ACCEPTED
05-19-00730-CV
FIFTH COURT OF APPEALS
DALLAS, TEXAS
10/4/2019 11:56 AM
LISA MATZ
CLERK

No. 05-19-00730-CV

In the Fifth Court of Appeals
Dallas, Texas

FILED IN
5th COURT OF APPEALS
DALLAS, TEXAS
10/04/2019 11:56:23 AM
LISA MATZ
Clerk

ZALE CORPORATION,

Appellant,

v.

BERKLEY INSURANCE COMPANY

and

STARR INDEMNITY & LIABILITY COMPANY,

Appellees.

On Appeal from the 14th Judicial District Court, Dallas County, Texas
Cause No. DC-17-09200

BRIEF OF APPELLANT,
ZALE CORPORATION

Roger Townsend
State Bar No. 20167600
rtownsend@cokinoslaw.com
COKINOS | YOUNG
Four Houston Center
1221 Lamar St., 16th Floor
Houston, Texas 77010
Telephone: 713-535-5564
Facsimile: 713-535-5533

ORAL ARGUMENT REQUESTED

Michael E. Farnell
Admitted *pro hac vice*
Gabriel J. Le Chevallier
Admitted *pro hac vice*
mfarnell@pfglaw.com
glechevallier@pfglaw.com
PARSONS, FARNELL & GREIN, LLP
1030 SW Morrison Street
Portland, Oregon 97205
Telephone: 503-222-1812
Facsimile: 503-274-7979

Patrick J. Wielinski
State Bar No. 21432450
pwielinski@cokinoslaw.com
Travis M. Brown
State Bar No. 24061890
tbrown@cokinoslaw.com
COKINOS | YOUNG
800 Crestview Tower
105 Decker Court
Irving, Texas 75062
Telephone: 817-635-3620
Facsimile: 817-635-3633

COUNSEL FOR APPELLANT,
ZALE CORPORATION

IDENTITY OF PARTIES AND COUNSEL

Pursuant to Rule 38.1(a) of the Texas Rules of Appellate Procedure, Appellant certifies that the following is a list of all parties to the trial courts judgment and their counsel:

Plaintiff/Appellant	Zale Corporation
Trial Counsel for Appellant	Patrick J. Wielinski State Bar No. 21432450 pwielinski@cokinoslaw.com Travis M. Brown State Bar No. 24061890 tbrown@cokinoslaw.com COKINOS | YOUNG 800 Crestview Tower 105 Decker Court Irving, Texas 75062 Telephone: 817-635-3620 Facsimile: 817-635-3633 Michael E. Farnell Admitted *pro hac vice* Gabriel J. Le Chevallier Admitted *pro hac vice* mfarnell@pfglaw.com glechevallier@pfglaw.com PARSONS, FARNELL & GREIN, LLP 1030 SW Morrison Street Portland, Oregon 97205 Telephone: 503-222-1812 Facsimile: 503-274-7979

Appellate Counsel for Appellant

Michael E. Farnell
Admitted *pro hac vice*
Gabriel J. Le Chevallier
Admitted *pro hac vice*
mfarnell@pfglaw.com
glechevallier@pfglaw.com
PARSONS, FARNELL & GREIN, LLP
1030 SW Morrison Street
Portland, Oregon 97205
Telephone: 503-222-1812
Facsimile: 503-274-7979

Roger Townsend
State Bar No. 20167600
rtownsend@cokinoslaw.com
COKINOS | YOUNG
Four Houston Center
1221 Lamar St., 16th Floor
Houston, Texas 77010
Telephone: 713-535-5564
Facsimile: 713-535-5533

Patrick J. Wielinski
State Bar No. 21432450
pwielinski@cokinoslaw.com
Travis M. Brown
State Bar No. 24061890
tbrown@cokinoslaw.com
COKINOS | YOUNG
800 Crestview Tower
105 Decker Court
Irving, Texas 75062
Telephone: 817-635-3620
Facsimile: 817-635-3633

Defendants/Appellees	Berkley Insurance Company and Starr Indemnity & Liability Company
Counsel for Appellee ***Berkley Insurance Company***	Howard L. Close State Bar No. 04406500 Natasha Taylor State Bar No. 24071117 WRIGHT CLOSE & BARGER, LLP One Riverway, Suite 2200 Houston, TX 77056 close@wrightclosebarger.com taylor@wrightclosebarger.com Jennifer Mathis Admitted *pro hac vice* TROUTMAN SANDERS LLP 580 California Street, Suite 1100 San Francisco, CA 97104 jennifer.mathis@troutman.com Brandon Almond Admitted *pro hac vice* TROUTMAN SANDERS LLP 401 9th Street, NW, Suite 1000 Washington, DC 20004 brandon.almond@troutman.com
Counsel for Appellee ***Starr Indemnity & Liability Co.***	Daisy Khambatta State Bar No. 24029654 KENNEDYS CMK LLP 3821 Juniper Trace, Suite 101 Austin, TX 78738 daisy.khambatta@kennedyslaw.com Matthew M. Ferguson Admitted *pro hac vice* William J. Brennan Admitted *pro hac vice* KENNEDYS CMK LLP 570 Lexington Avenue, 8th Floor New York, NY 10022 matthew.ferguson@kennedyslaw.com william.brennan@kennedyslaw.com

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

STATUTES

OTHER

STATEMENT OF THE CASE

Nature of the Case	This is a breach-of-contract and bad-faith case involving two excess, follow-form insurance policies issued to Plaintiff/Appellant Zale Corporation ("Zale") by Defendants/Appellees Berkley Insurance Company ("Berkley") and Starr Indemnity & Liability Company ("Starr" and together the "Insurers"). C.R. 21-41. Zale sued Berkley and Starr, alleging that they breached their respective insurance policies and breached their obligations of good faith and fair dealing. *Id.*
Trial Court	Hon. Eric Moyé, 14th Judicial District Court of Dallas County
Proceedings Below	The Insurers filed traditional and no-evidence motions for summary judgment, both of which the trial court granted. C.R. 16-17, 878, 880. This appeal followed.

STATEMENT REGARDING ORAL ARGUMENT

Zale requests oral argument. Argument is desirable because the exhibits are numerous, and argument will clarify the several fact issues precluding summary judgment.

ISSUES PRESENTED

1. The trial court erred in granting the Insurers' no-evidence motion for summary judgment.

    a. Zale produced competent evidence raising a fact issue on each particular element of the claims identified in the Insurers' no-evidence and traditional motions.

        i. Zale (as well as the Insurers) submitted competent evidence that the underlying settlement in *In re Zale Corporation Appraisal Litigation* resulted from a "Securities Action" "for a Wrongful Act occurring before" May 29, 2014.

        ii. Zale (as well as the Insurers) submitted competent evidence that *In re Zale Corporation Appraisal Litigation* and *In re Zale Corporation Stockholders Litigation* arose from the same "Wrongful Act" or "Interrelated Wrongful Acts" such that the two claims are deemed a single claim pursuant to the policies' related claims provision.

        iii. Zale submitted competent evidence that a portion of the underlying settlement was attributable to prejudgment interest on the appraisal petitioners' merger consideration and prospective cost of litigation, which are not subject to the policies' "Bump-Up Exclusion."

        iv. Zale submitted competent evidence that the Insurers' breached their obligation of good faith and fair dealing.

    b. The Insurers' grafting of a "wrongdoing" element onto the words "act," "error," and "omission", which define the term "Wrongful Act," is contrary to the Texas rules of policy interpretation; the ordinary and commonly understood meaning of those words apply.

    c. Delaware appraisal proceedings are claims "for a Wrongful Act" because they "necessarily" concern the alleged contravention of shareholders' right to receive fair value for their shares.

2. The trial court erred in granting the Insurers' traditional motion for summary judgment.

   a. The evidence submitted by Zale created genuine issues of material fact on the "Wrongful Act," related claims, and Bump-Up Exclusion issues.

   b. Texas public policy does not prohibit covering a settlement that reflected Zale's exposure for prejudgment interest on the appraisal petitioners' merger consideration, and there are genuine issues of material fact as to whether Zale earned any income on the merger consideration.

   c. There are genuine issues of material fact as to when the Insurers received notice of *In re Zale Corporation Appraisal Litigation.*

   d. The Insurers failed to present evidence in support of at least one essential element of their notice-of-claim and consent-to-settle affirmative defenses—that is, that they were prejudiced by Zale's alleged failure to comply with certain policy conditions.

STATEMENT OF FACTS

This insurance dispute arises out of Zale's agreement to merge with Signet Jewelers Limited ("Signet"), which was announced on February 19, 2014, approved by shareholders on May 29, 2014, and executed on the same day. C.R. 323.

The Insurance Policies

Zale is a retailer of fine jewelry in North America. To protect itself and its directors and officers from securities-related claims (among other claims), Zale paid premiums to obtain several layers of directors and officers insurance from the Insurers. For the period July 31, 2013 to July 31, 2014, Liberty Insurance Underwriters ("Liberty") issued a first-layer policy, which has $10 million in limits excess of any applicable retention. C.R. 122. Berkley issued a $5 million policy that is immediately excess of the Liberty policy. C.R. 191. Starr issued a $5 million policy that is immediately excess of the Berkley policy. C.R. 206. The Berkley policy and the Starr policy follow the terms and conditions of the Liberty policy (collectively, the "Policies"). C.R. 200, 208.

The Policies insure against "Securities Action Liability," and the Insurers specifically agreed to cover Zale for any "Loss which it shall become legally obligated to pay as a result of a Securities Action first made during the Policy Period or Discovery Period, if applicable, against the Insured Organization [i.e., Zale] for a Wrongful Act which takes place before or during the Policy Period." C.R. 176.

The Policies also contain a “Related Claims Provision” that states, “All Claims arising from the same Wrongful Act or Interrelated Wrongful Acts shall be deemed one Claim and subject to a single limit of liability.” C.R. 127.

The Policies define “Wrongful Act” to mean “any actual or alleged error, misstatement, misleading statement, act, omission, neglect, or breach of duty, actually or alleged[ly] committed or attempted by . . . the Insured Organization.” C.R. 140. They define “Interrelated Wrongful Acts” to mean “Wrongful Acts that have as a common nexus any fact, circumstance, situation, event, transaction, cause or series of causally connected facts, circumstances, situations, events, transactions, or causes.” C.R. 131.

The Policies define “Loss” to include:

> [S]ums which the Insured Person(s) or, with respect to Insuring Agreement 1.3, the Insured Organization are legally obligated to pay solely as a result of any Claim insured by the Policy, including Defense Costs, damages, judgments, settlement amounts, legal fees and costs awarded pursuant to judgments, (including pre and post judgment interest), punitive or exemplary damages, and the multiple portion of any multiplied damage award.

C.R. 183. The definition of “Loss” includes a “Bump-Up Exclusion” that provides,

> With respect to any Claim alleging that the price or consideration paid or proposed to be paid for the acquisition of any securities issued by or assets owned by any natural person or entity is inadequate, excessive, or improper, Loss shall not include the portion of any judgment or settlement relating to the amount by which such price or consideration was changed or modified as a result of such Claim; however, this exclusion will not apply to Defense Costs.

Id.

The definition of "Loss" also includes a "Public Policy Exclusion" that bars coverage for "matters uninsurable pursuant to any applicable law, including but not limited to damages or settlements which are in the nature of restitution, disgorgement or the return of ill-gotten gains." *Id.* Relatedly, the Policies contain an "Ill-Gotten Gains" exclusion, which bars coverage for "Loss"

> based upon, arising from, or in any way related to any Insured gaining any personal profit, remuneration or financial advantage to which they were not legally entitled, if upon a non-appealable final judgment or other final adjudication in the underlying action adverse to the Insured(s) establishes that such personal profit, remuneration or financial advantage.

C.R. 179.

Lastly, in connection with the merger, Zale acquired "Run-Off Endorsements" that extended the Policies' expiration dates to May 29, 2020, and required that the "Wrongful Act" occur before May 29, 2014 (the date of the merger, as discussed below). C.R. 189, 205, 218.

TIG's Proxy Battle Against the Zale-Signet Merger

On February 19, 2014, Zale and Signet announced the signing of a merger agreement under which Zale shareholders would receive $21 per share and Zale would merge with a subsidiary of Signet. C.R. 221.

After the announcement, one shareholder, TIG Advisors, LLC ("TIG"), led a proxy battle against the merger. On May 9, 2014, TIG urged shareholders to vote against the merger, contending that "shareholders are not being paid a fair value for the margin expansion opportunity they already own, much less a fair premium." C.R. 554. TIG alleged that "[s]ignificant issues of process and potential conflicts of interest seriously taint the sale process . . . ." C.R. 558. One of the members on the merger negotiation committee was Joshua Olshansky, an employee at Golden Gate Capital ("Golden Gate"), Zale's largest shareholder at the time of the merger. C.R. 296. TIG specifically alleged that (1) the "inclusion on the Negotiation Committee of Golden Gate's board representative created an inherent conflict of interest between a shareholder looking to sell its stake and a Board decision over the right course to maximize shareholder value," (2) "Bank of America's [Zale's banker in the merger] involvement with Signet, including a presentation detailing an acquisition of Zale (for $17-21 per share) made prior to Zale retaining BofA fundamentally 'taints' the entire sale process and its outcome," (3) the board relied on stale financial projections, and (4) there were conflicts of interest involving Zale's management. C.R. 561-562. TIG also alleged that "[r]ather than producing updated forward projections that would reflect a business already trending above previous forecasts, Management and the Board elected to simply update the projections for two quarters of actual results and created a lower alternative case to justify the deal price." C.R. 567. TIG declared that, in the event of the merger, it would "pursue an appraisal claim . . . to compel additional consideration for our interest." C.R. 559. Based on TIG's allegations, GAMCO Investors, Inc. ("GAMCO"), another investor, announced that it had begun the process to assert its appraisal rights. C.R. 593.

On May 23, 2014, TIG filed its definitive proxy statement in opposition to the merger. C.R. 285-300. TIG alleged that the $21-per-share merger consideration was "grossly unfair to current shareholders." C.R. 293. TIG claimed that (a) Zale used an inappropriate share price benchmark, (b) Zale used stale financial forecasts to evaluate the fairness of Signet's offer, (c) the merger was below the standalone value of Zale, (d) that there were several flaws in Bank of America Merrill Lynch's ("BAML") fairness analysis, and (e) Signet shareholders received all the value of potential synergies. C.R. 293-95.

In addition, TIG alleged that "the principal reason that the Merger consideration is inadequate and fails to provide full and fair value for the Shares is because the Company failed to undertake a competitive sale process to obtain the highest possible price for the Company and because the sale process was tainted by a number of conflicts of interest." C.R. 296. TIG reiterated its allegation that there was an "inherent conflict of interest" with Golden Gate. C.R. 297. TIG repeated that BAML "was conflicted and not in the best position to provide a 'fairness opinion' on the proposed Merger given its prior involvement with Signet." *Id.* TIG also alleged that "a full sales process was never conducted by Zale to solicit proposals from any other potential bidders." C.R. 298. Lastly, TIG complained that "Signet's stated interest in retaining Mr. Killion [then Zale's CEO] served to further deepen the level of conflicts replete throughout the [sales] process." *Id.*

The Stockholder Litigation

After the announcement of the merger, several Zale shareholders filed class action lawsuits against Zale and certain of its directors and officers. C.R. 594. These lawsuits were consolidated in *In re Zale Corporation Stockholders Litigation* (Del. Ch.) (the "Stockholder Litigation"). C.R. 301-02. There, the plaintiffs alleged that, among other things, Zale's directors and officers failed to maximize stockholder value, agreed to an inadequate merger price, agreed to deal terms that deterred higher bids, and issued misleading and incomplete proxy statements regarding the merger. C.R. 302. The plaintiffs also sought to enjoin the merger. *Id.*

On May 23, 2014, Vice Chancellor Parsons of the Delaware Court of Chancery denied the Stockholder Litigation plaintiffs' motion to enjoin the merger. In doing so, the court stated that it was "inclined to agree with plaintiffs that the Zale's [sic] board did not employ a particularly good—let alone ideal—sales process." C.R. 534. Nonetheless, the court ruled that, "to the extent the board might have breached their fiduciary duties, those breaches can be addressed sufficiently through remedies at law, ***such as appraisal*** or damages." C.R. 535 (emphasis added).

On May 29, 2014, a majority of Zale shareholders approved the merger. C.R. 323. After the merger, the Stockholder Litigation plaintiffs filed a Second Amended Complaint that quoted and adopted many of TIG's allegations of wrongful conduct from its proxy statements.[1] C.R. 594-602.

The Insurers do not dispute that the Stockholder Litigation was for and/or arose from a "Wrongful Act" under the Policies.

The Appraisal Litigation

After the merger, TIG, GAMCO (including its affiliates), and Merion Capital L.P. (including its affiliate) ("Merion Capital" and together the "Appraisal Petitioners") sued for appraisal under Section 262 of the Delaware General Corporation Law ("Section 262") in the Delaware Court of Chancery. Merion Capital sued on June 4, 2014; TIG sued on August 26, 2014; and GAMCO sued on September 24, 2014. C.R. 309, 317, 322. These suits were consolidated in *In re Zale Corporation Appraisal Litigation* (the "Appraisal Litigation"). C.R. 301. At the $21-per-share merger price, the Appraisal Petitioners held Zale stock worth

[1] Ultimately, the Stockholder Litigation defendants were successful in their efforts to dismiss the action. *See In re Zale Corp. Stockholders Litig.*, No. 9388-VCP, 2015 WL 5853693 (Del. Ch. Oct. 1, 2015), *amended on reargument*, No. 9388-VCP, 2015 WL 6551418 (Del. Ch. Oct. 29, 2015).

approximately $184 million. C.R. 1080. Vice Chancellor Parsons also presided over the Appraisal Litigation. C.R. 1196.

Under Delaware practice and procedure, a petition in an appraisal action need only allege that the petitioner (a) held shares of the acquired company, (b) demanded appraisal, (c) did not vote for the merger, and (d) filed suit within 120 days of the merger. C.R. 454. The Appraisal Petitioners alleged as much, prayed that the court determine the fair value of their Zale shares, and prayed for prejudgment interest and attorney fees. C.R. 306-34.

The Appraisal Petitioners and Zale Seek Discovery Relating to TIG's Allegations

Section 262 provides that the court must "take into account ***all relevant factors***" in determining the fair value of the stock. DEL. CODE tit. 8, § 262(h) (emphasis added). Under Delaware practice and procedure, allegations of a flawed merger process are relevant to the fair price determination. C.R. 543, 545, 551.

Because allegations of a flawed merger process are relevant to a fair price determination, the "scope of discovery in such an appraisal proceeding is difficult, if not impossible, to distinguish from the scope of discovery in a plenary fiduciary action challenging a merger or consolidation." C.R. 543, 545. The Appraisal Petitioners' counsels explained on the record in the deposition of Mr. Burman (Zale's former chairman and also a Stockholder Litigation defendant) that the alleged conflicts of interests were relevant to the Appraisal Litigation:

> All right. I can tell you that process matters in appraisal cases and conflicts also matter in appraisal cases. They aren't strictly related to fiduciary matters. So the integrity of the process by which a price is arrived at in a transaction is something that the Court absolutely will consider, and it's something we think needs to be explored here. So I don't intend on spending a bunch more time on this, but it's in the proxy. It's material. These are conflict issues that matter in the appraisal case, and they're factors that we believe that the Court is going to consider.

C.R. 945-46.

The Appraisal Petitioners sought to elicit discovery to support their allegations of a flawed merger process as set forth in TIG's proxy statements. The Appraisal Petitioners questioned Mr. Killion (Zale's former CEO and Stockholder Litigation defendant), Mr. Burman, and Mr. Dyer (Zale's former director and Stockholder Litigation defendant) regarding the participation of Golden Gate's representatives on the negotiating committee. C.R. 936-39, 944, 954-60. They questioned Mr. Burman, Mr. Killion, Mr. Dyer, Mr. Olshansky (Golden Gate's board representative and Stockholder Litigation defendant), and Mr. Haubenstricker (Zale's former CFO) regarding Zale's retention of BAML, BAML's prior involvement with Signet, BAML's failure to disclose that prior relationship to the board, and the board's alleged decision to go forward with the merger notwithstanding the alleged conflict and last-minute disclosure. C.R. 940-41, 945-46, 950-53, 963, 971-72. And the Appraisal Petitioners questioned Mr. Killion and Mr. Haubenstricker about the alternative projections relied upon by the board to support the fairness of the merger consideration. C.R. 941, 966-70. As Zale's defense counsel reported in a settlement presentation, "Plaintiffs focused on sale process issues (potential Golden Gate and BAML conflicts, no-shop, etc.)." C.R. 974. Zale's expert testified that TIG's allegations formed the basis of the claims in the Appraisal Litigation. C.R. 551.

In turn, Zale deposed TIG (and other Appraisal Petitioners) regarding these allegations. C.R. 982-88. The Appraisal Petitioners' representatives testified that it was wrongful for the board to rely on the "Alternative Case" projections and that the fair value of their shares was reflected in the board's previously approved "Business Case" projections. C.R. 986-88, 1002-03.

According to the Insurers' expert, the Appraisal Petitioners could, theoretically, have proved at trial that (a) the BAML fairness analysis improperly relied upon stale financial forecasts, (b) there were conflicts of interest with BAML, and (c) management's "Business Case" projections better forecasted the future value of Zale. C.R. 541-42.

The Settlement of the Appraisal Litigation

Zale's defense counsel and management made settlement presentations in May and July of 2015 to a board subcommittee overseeing the Appraisal Litigation ("Subcommittee"). C.R. 973, 1058. [redacted]

[redacted] Prejudgment interest was accruing on the merger consideration at 5.75%, compounded quarterly. C.R. 1068. At the time, Delaware law did not permit Zale to tender the merger consideration to the Appraisal Petitioners, and there was no mechanism to stop the accrual of interest. C.R. 461. [redacted]

[redacted]

[redacted]

On August 12, 2015, Zale and the Appraisal Petitioners entered into the settlement agreement (the "Agreement") under which Zale agreed to pay the settlement amount of $34.2 million (the "Settlement Amount"). C.R. 1163-98. [redacted] The Settlement occurred before the October 29, 2015 dismissal of the Stockholder Litigation.

[redacted]

[redacted]

The Insurers' Denials of Coverage

On April 14, 2015, Zale's broker provided notice of the Appraisal Litigation to the Insurers. C.R. 625. Berkley testified that the April 14, 2015 notice email was timely. C.R. 796. On June 11, 2015, Starr asked Zale's broker if Liberty had issued a coverage letter for the Appraisal Litigation. C.R. 802. Zale's broker responded that Liberty had not yet issued a coverage letter, but that he had asked Liberty "to issue a new coverage opinion addressing [the Appraisal Litigation] as a 'related claim' under the policy terms and conditions." *Id*. On June 25, 2015, Berkley asked Liberty about the status of the Appraisal Litigation and whether defense counsel had provided a budget. C.R. 788.

Having received no coverage position from its insurers regarding the Appraisal Litigation, let alone an acceptance of coverage, Zale did not seek the Insurers' consent to settle the Appraisal Litigation. On August 12, 2015, the same day that the Appraisal Litigation settled, Zale's broker sent defense cost invoices and additional documentation, including the petitions for appraisal, to the Insurers. C.R. 301-02. In that email, Zale's broker noted that

> These matters [the Appraisal Litigation], which we have previously advised all Zale's Insurers of, arise out of the same facts and

> circumstances as the ongoing Class Action lawsuit(s) [the Stockholder Litigation] filed against Zale and defendants who are Insured Persons under the Zale policies. Thus, these Appraisal Petitions have been reported as 'related claims' under all policy terms and conditions such that these related matters should be treated as one claim with a single retention applicable.

C.R. 302.

Without knowledge of the Settlement, Liberty denied coverage for the Appraisal Litigation on September 24, 2015. C.R. 365. Starr followed Liberty's denial on October 2, 2015. C.R. 368, 831. Although it had previously closed its Appraisal Litigation file without issuing a coverage position, Berkley did not deny coverage until August 23, 2016, after Zale's August 12, 2016 demand letter. C.R. 363, 798.

Moreover, the Insurers have testified that they would have denied coverage for the Appraisal Litigation no matter what. C.R. 801, 832. Berkley testified that it has never covered an appraisal action. C.R. 797, 801. Within seven minutes of receiving the petitions in the Appraisal Litigation, Berkley expressed its belief that there was no coverage. C.R. 797. Historically, the insurance industry has refused to cover appraisal actions, according to Zale's broker. C.R. 837.

The Trial Court Grants Summary Judgment for the Insurers

On April 5, 2019, the Insurers filed no-evidence and traditional motions for summary judgment. C.R. 16. The trial court granted the Insurers' motions in their entirety. C.R. 878, 880. This appeal followed.

SUMMARY OF THE ARGUMENT

The trial court erred in granting the Insurers' no-evidence and traditional motions for summary judgment.

In the no-evidence motion, the Insurers principally contended that there was no evidence that the Settlement resulted from a claim for a "Wrongful Act" (an "actual or alleged error, . . . act, [or] omission" by the insured). The Insurers also contended that there was no evidence that the Settlement was not subject to the Bump-Up Exclusion. Because, according to the Insurers, there was no evidence that could establish coverage for the Settlement, they also argued that there was no evidence that they acted in bad faith by denying coverage. The Insurers also raised these arguments in their traditional motion.

The Insurers argued in their traditional motion that coverage for the prejudgment interest portion of the Settlement Amount was excluded under Texas public policy. The Insurers also argued that Zale failed to comply with the Policies' notice-of-claim and consent-to-settle conditions.

The trial court should have denied the Insurers' motions for at least seven reasons.

First, Zale (as well as the Insurers) submitted competent evidence that the Appraisal Litigation was for an "actual or alleged" "act," "error," or "omission." This evidence includes, but is not limited to, TIG's proxy allegations, the underlying deposition questions and answers of Zale's directors and officers and the Appraisal Petitioners' representatives, and Zale's settlement analysis.

Second, the Insurers' attempt to graft a "wrongdoing" element onto the words "act," error," or "omission" is contrary to the Texas rules of policy interpretation. Rather, the ordinary and commonly understood meanings of those terms—as set forth in the dictionary—apply. Zale's agreement to merge for an allegedly unfair merger price is an "act," "error," or "omission," even if innocent conduct caused the allegedly unfair merger price.

Third, Delaware appraisal actions necessarily involve an "actual or alleged" "act," "error," or "omission" by the company. A Delaware appraisal action "necessarily" involves a breach of law or contravention of a right or duty because an appraisal action is, by its very nature, a claim that the merging company contravened the shareholders' right to receive fair value for their shares. Indeed, Delaware cases and commentators state that all manner of conduct can give rise to an appraisal action, including conduct that would rise to the level of a breach of fiduciary duty, as well as other types of sloth, incompetence, pressure, or collusion that courts have been hesitant to characterize as breaches of fiduciary duty.

Fourth, Zale (as well as the Insurers) submitted competent evidence that the Appraisal Litigation and Stockholder Litigation are one claim under the Related

Claims Provision. The evidence shows that both actions ***arise from*** the same allegations, conduct, and transaction.

Fifth, Zale (as well as the Insurers) submitted competent evidence that a portion of the Settlement Amount was for prejudgment interest on the merger consideration and prospective cost of litigation. Because neither of those items relate to the amount by which any share price was increased or decreased, the Bump-Up Exclusion cannot apply.

Sixth, it is not against Texas public policy to insure against a settlement reflecting an insured's exposure for prejudgment interest. Zale presented evidence that no income was earned on the Appraisal Petitioners' merger consideration. There can be no unjust enrichment where there is no enrichment. Moreover, Section 262 was amended in 2007 to remove the court's ability to consider the rate at which the corporation would have to pay to borrow money (the alleged restitutionary component). Even if prejudgment interest still had both a compensatory goal and a restitutionary goal, the Insurers failed to meet their burden of proving the application of the Public Policy Exclusion.

Seventh, the Insurers failed to meet all elements of their notice-of-claim and consent-to-settle affirmative defenses. Zale presented evidence that it notified the Insurers of the Appraisal Litigation on April 14, 2015—prior to both the August 12, 2015 Settlement and the expiration of the Policies. As such, the Insurers had the burden of proving that they were prejudiced by Zale's failure to comply with the policy conditions. The Insurers presented no evidence of prejudice.

STANDARD OF REVIEW

"To defeat a no-evidence motion, the non-movant must produce evidence raising a genuine issue of material fact as to the challenged elements. A genuine issue of material fact exists if the evidence rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 220 (Tex. 2017) (citations omitted).

The party moving for traditional summary judgment also has the burden of proving that there is no genuine issue of any material fact and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). To determine whether there is a genuine issue of material fact, the court reviews the evidence in the light most favorable to the party against whom judgment was rendered, crediting evidence favorable to that party if reasonable jurors could do so, and disregarding contrary evidence and inferences unless reasonable jurors could not do so. *Gonzalez v. Ramirez*, 463 S.W.3d 499, 503 (Tex. 2015) (per curiam). Evidence raises a genuine fact issue when it rises to a level that would enable reasonable and fair-minded jurors to differ in their conclusions in light of all the evidence. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007) (per curiam).

THE DUTY TO INDEMNIFY STANDARD

This dispute concerns the Insurers' duty to indemnify Zale for a portion of the Settlement. The duty to indemnify is separate and distinct from the duty to defend such that an insurer can have a duty to indemnify even where the underlying allegations do not give rise to the duty to defend. *D.R. Horton-Texas, Ltd. v. Markel Int'l Ins. Co., Ltd.*, 300 S.W.3d 740, 744 (Tex. 2009). While the duty to defend focuses on the pleaded allegations, the duty to indemnify focuses on the facts of the underlying case.

> The insurer's duty to indemnify depends on the facts proven and whether the damages caused by the actions or omissions proven are covered by the terms of the policy. Evidence is usually necessary in the coverage litigation to establish or refute an insurer's duty to indemnify. This is especially true when the underlying liability dispute is resolved before a trial on the merits and there was no opportunity to develop the evidence, as in this case.

Id. Like here, "where an indemnitee enters into a settlement with a third party, it may recover from the indemnitor only upon a showing that potential liability existed, and that the settlement was reasonable, prudent, and in good faith under the circumstances."[2] *Ins. Co. of N. Am. v. Aberdeen Ins. Servs., Inc.*, 253 F.3d 878, 888 (5th Cir. 2001); *Fireman's Fund Ins. Co. v. Commercial Standard Ins. Co.*, 490 S.W.2d 818, 824 (Tex. 1972), *overruled on other grounds by Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705 (Tex. 1987) (same); *Gulf, Colo. & Santa Fe Ry. Co. v.*

[2] Where, as here, an insurer has received notice and the opportunity to participate in the case, the insurer's denial of coverage precludes it from challenging the reasonableness of the settlement. *See Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660, 671 (Tex. 2008).

McBride, 322 S.W.2d 492 (Tex. 1958) (same). *See also Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 123 (Tex. 2010) (examining procedural posture to determine whether settlement of remaining claims fell within coverage).

Further, when an underlying lawsuit has settled, the duty to indemnify inquiry is a subjective one. As one commentator, who is frequently cited by the Supreme Court of Texas and this Court,[3] states:

> Following a settlement as to which the insurer denies coverage, the existence of coverage should depend on what claims were settled; that is, it should depend on why the money was paid. The actual merit of each of the plaintiff's claims against the insured is not directly relevant. The only question should be how the parties to the settlement viewed the relative merits of the plaintiff's claims at the time of the settlement and whether, if the insured settled without the carrier's approval, the settlement amount was reasonable.

2 ALLAN D. WINDT, INSURANCE CLAIMS AND DISPUTES § 6:31 (6th ed. 2013, Supp. 2019) (footnotes omitted).[4] *See also Am. Int'l Specialty Lines Ins. Co. v. Res-Care Inc.*, 529 F.3d 649, 657 (5th Cir. 2008) (holding that, in the allocation context, the "question is how the parties viewed the merits of the plaintiff's claims at the time of the settlement" (citing 1 ALLAN D. WINDT, INSURANCE CLAIMS AND DISPUTES § 6:31 (5th ed. 2008)).

[3] *E.g., Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 8 (Tex. 2007) (citing Windt); *Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 20 S.W.3d 692, 701 (Tex. 2000) (same); *State Farm Lloyds, Inc. v. Williams*, 791 S.W.2d 542, 550 (Tex. App.—Dallas 1990, writ denied) (same).

The Insurers' duty to indemnify is also defined by the terms of the Policies. *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305, 310 (Tex. 2006). Here, "Wrongful Act" is defined to include an "actual or alleged" "act," "error," or "omission"; consequently, the Insurers' duty to indemnify can also rest on *allegations* of an act, error, or omission, whether pleaded or not.

ARGUMENT

For the reasons that follow, the trial court erred in rendering judgment for the Insurers. This Court should reverse and remand.

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON WHETHER THE SETTLEMENT RESULTED FROM A SECURITIES CLAIM FOR AND/OR ARISING FROM A WRONGFUL ACT OR INTERRELATED WRONGFUL ACTS

The trial court incorrectly ignored evidence presented by Zale that the Settlement resulted from a claim for an "actual or alleged error, misstatement, misleading statement, act, omission, neglect, or breach of duty" occurring before May 29, 2014. The trial court also incorrectly ignored evidence that the Stockholder Litigation and Appraisal Litigation arose from the same "Wrongful Act" or "Interrelated Wrongful Acts" such that they are deemed to be a single claim under the Policies.

A. THE APPRAISAL PETITIONERS SOUGHT TO PROVE THAT AN ALLEGEDLY FLAWED MERGER PROCESS CAUSED THE MERGER CONSIDERATION TO BE GROSSLY UNFAIR

Zale presented evidence to the trial court that the Appraisal Litigation was for an "actual or alleged" "act," "error," or "omission." At minimum, Zale's February 2014 agreement to cash out its shareholders for an allegedly unfair amount is an "act," "error," "omission." Moreover, TIG's allegations that the $21-per-share merger consideration was "grossly unfair" and that the unfair merger consideration resulted from a flawed merger process are allegations of "acts," "errors," and/or "omissions." C.R. 293-95. Among other things, TIG alleged that (1) Golden Gate's board representative on the negotiating committee had a conflict of interest, (2) BAML had a conflict of interest, (3) Mr. Killion had a conflict of interest, and (4) the value of Zale shares should have been based on the "Business Case" projections—which were prepared in the ordinary course of business—as opposed to the "Alternative Case" projections—which allegedly were prepared by BAML and Zale's management to justify the merger. C.R. 293-95, 558-62.

Vice Chancellor Parsons tacitly approved TIG's subsequent pursuit of its allegations of a flawed merger process in an appraisal action. First, he noted that he was inclined to agree that the "board did not employ a particularly good—let alone ideal—sales process." C.R. 534. Second, he held that, "to the extent the board might have breached their fiduciary duties, those breaches can be addressed sufficiently through remedies at law, such as appraisal or damages." C.R. 535.

The parties' course of conduct in discovery in the Appraisal Litigation was consistent with TIG's allegations and Vice Chancellor Parsons's ruling. The Appraisal Petitioners sought discovery into the alleged conflict of interest of Golden Gate, the alleged conflict of interest of BAML, and the board's reliance on the "Alternative Case" projections. C.R. 936-39, 940-41, 944, 945-46, 950-53, 954-60, 963, 966-70, 971-72. When Zale sought to impede discovery into the alleged conflicts of interests, the Appraisal Petitioners stated on the record that the alleged conflicts were relevant to their claims. C.R. 945-46. In turn, Zale questioned the Appraisal Petitioners regarding these allegations. C.R. 982-88, 1002-03.

The parties' conduct was also in line with Delaware practice and procedure. Section 262 provides, "In determining such fair value, the Court shall take into account ***all relevant factors***." DEL. CODE tit. 8, § 262(h) (emphasis added). Delaware treatises acknowledge that

- "Because the Court's willingness to rely on the deal price turns, in part, on the quality of the sales process and the amount of information about the company available to the market, where the respondent company argues that the deal price is evidence of fair value, the stockholder petitioner's discovery will likely extend beyond financial information to thoroughly explore those issues. The scope of discovery in such an appraisal proceeding is difficult, if not impossible, to distinguish from the scope of discovery in a plenary fiduciary action challenging a merger or consolidation." C.R. 545.

- “Moreover, the Court of Chancery has held that evidence of unfairness or misconduct on the part of the corporation’s directors may be considered by the Court in assessing the credibility of the company’s valuation or contentions.” C.R. 546-47.
- “Where the Court does utilize traditional valuation methodologies, it prefers to rely on contemporaneously prepared management projections on the theory that management ordinarily has the best first-hand knowledge of a company’s operations.” C.R. 548.

Indeed, the Insurers’ expert testified that the Appraisal Petitioners could have proven at trial that there were conflicts of interest and that management should have relied on the “Business Case” projections. C.R. 541-42.

[redacted]

From this evidence a reasonable jury could conclude that the Appraisal Litigation was for an “actual or alleged” “act,” “error,” or “omission” by Zale. It was reversible error for the trial court to ignore this evidence when it granted the Insurers’ no-evidence and traditional motions for summary judgment.

B. THE INSURERS MISINTERPRET "ACT," "ERROR" AND "OMISSION;" THE ORDINARY AND COMMONLY UNDERSTOOD MEANING OF THOSE WORDS APPLY

The Insurers contend that the defined term "Wrongful Act" modifies the words in the definition itself, such that an "act," "error," or "omission" must involve "wrongdoing." C.R. 102. The Insurers are wrong.

As an initial matter, even if Texas law permitted the Insurers to rewrite the Policies to insert a wrongdoing element to the words that define "Wrongful Act," the evidence discussed above satisfies the Insurers' interpretation.

Moreover, the Insurers' interpretation of "act," "error," and "omission" is contrary to Texas law. The Texas rules of policy interpretation are well-established:

> First, we look at the language of the policy because we presume parties intend what the words of their contract say. We examine the entire agreement and seek to harmonize and give effect to all provisions so that none will be meaningless. The policy's terms are given their ordinary and generally-accepted meaning unless the policy shows the words were meant in a technical or different sense. Courts strive to honor the parties' agreement and not remake their contract by reading additional provisions into it.

Gilbert Texas Constr., L.P., 327 S.W.3d at 126 (internal citations omitted). "[W]hen terms are defined in an insurance policy, those definitions control." *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 823 (Tex. 1997). Under Texas law, the words used in the definition must be given their "ordinary and commonly understood" meaning. *Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 23 (Tex. 2008).

The ordinary and commonly understood meaning of "act" is "a thing done or being done." *Act*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabridged ed. 1993) [hereinafter "WEBSTER'S"]. "Error" is commonly understood to mean (a) "an act or condition of often ignorant or imprudent deviation from a code of behavior," (b) "an act involving an unintentional deviation from truth or accuracy," and (c) "an act that through ignorance, deficiency or accident departs from or fails to achieve what should be done." *Error*, WEBSTER'S. "Omission" means "the act of omitting whether by leaving out or by abstention from inserting or by failure to include or perform." *Omission*, WEBSTER'S. Other Texas courts have relied on the dictionary to determine that "act" commonly means "a thing done or being done; a deed or performance" and "omission" commonly means "apathy toward or neglect of duty; lack of action; something neglected or left alone." *See Nat'l Cas. Co. v. Commonwealth Lloyds Ins. Co.*, No. 07-97-0419-CV, 1999 WL 314832, at *5 (Tex. App.—Amarillo May 19, 1999, pet. denied) (consulting WEBSTER'S).[5]

[5] The Insurers do not clearly articulate what level of "wrongdoing" is required. It is notable that the dictionary defines "wrongdoing" to include "evil behavior or action; transgression of moral or civil law." *Wrongdoing*, WEBSTER'S. Presumably, the Insurers do not contend that this commonly understood meaning of "wrongdoing" applies such that the Policies only cover "evil" acts, errors, and omissions. This illustrates, however, the problem with the Insurers' position. How is a person, like a director or officer, supposed to understand what degree of "wrongdoing" is covered by the policy and what is not covered where the words that allegedly restrict the definition of "Wrongful Act" are not even used in that definition?

Courts have rejected insurer attempts to narrowly construe the defined term "Wrongful Act." In *Burks v. XL Specialty Insurance Co.*, the insurer argued that there was no allegation that the insured "acted wrongfully" and the "intent of [the insured was] not at issue" in the bankruptcy proceeding." 534 S.W.3d 458, 464 (Tex. App.—Houston [14th Dist.] 2015, no pet.), *judgment vacated, opinion not withdrawn*, 534 S.W.3d 470 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (supp. mem. op.) But the court held that "Wrongful Act" was "defined broadly," and "the plain language of the policy does not require scienter to establish a wrongful act." *Id.* Notably, the court held that the allegations of "receipt of money, stock, and other benefits, and the failure to give Superior Offshore something of reasonably equivalent value" raised a fact issue as to whether there was an allegation of a "Wrongful Act." *Id. See also Culbreath Isles Prop. Owners Ass'n, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 601 F. App'x 876, 878–79 (11th Cir. 2015) (noting that the policy's definition of "Wrongful Act" "was broadly drafted" to include "any error, misstatement, misleading statement, act, omission, neglect, or breach of duty committed or attempted, or allegedly committed or attempted, by the Insured Organization"); *Fid. Nat'l Prop. & Cas. Co. v. Boardwalk Condo. Ass'n, Inc.*, No. 3:07CV278/MCR/EMT, 2010 WL 1911159, at *6 (N.D. Fla. May 12, 2010) ("[T]he March 2007 letters reasonably support a claim of an actual or alleged error, misstatement, act or omission in Boardwalk's flood insurance payment request, ***regardless of the lack of any accusation of fault or bad intent***.") (emphasis added); *Crimson Exploration, Inc. v. Intermarket Mgmt., LLC*, 341 S.W.3d 432, 442 (Tex. App.—Houston [1st Dist.] 2010, no pet.) ("The plain language of the indemnity agreement does not require the showing of any 'improper' or 'unlawful' act or omission by Crimson in order for appellees to be entitled to indemnity.").

Indeed, one commentator noted that "wrongful act is defined broadly, and that [i]t would be hard to think of any act or omission by a director or officer, acting as such, which would not be covered by this definition." *Reliance Grp. Holdings, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 594 N.Y.S.2d 20, 23-24 (N.Y. App. Div. 1993) (quoting Joseph F. Johnston, Jr. *Corporate Indemnification and Liability Insurance for Directors & Officers*, 33 Bus. Law. 1993, 2017 (1978)).

Under several federal and state securities laws, directors, officers, and their companies can be held strictly liable for even innocent mistakes. *E.g.*, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983) ("If a plaintiff purchased a security issued pursuant to a registration statement, he need only show a material misstatement or omission to establish his *prima facie* case [under Section 11 of the Securities Act of 1933]. Liability against the issuer of a security is virtually absolute, even for innocent misstatements."). It should be no surprise that the Insurers broadly drafted their securities liability coverage to encompass the wide range of potential liability faced by directors, officers, and their companies.

For that reason, in *Solera Holdings, Inc. v. XL Specialty Ins. Co.*, 2019 WL 3453232, at *4-5, 213 A.3d 1249 (Del. Super. Ct. 2019)—which also concerned coverage for a Delaware appraisal action—the court rejected the insurers' attempt to imbue the term "violation" with "wrongdoing."[6] Similar to here, the insurers argued that "the Appraisal Action is not a claim for 'violation' of any federal, state, or local statute, regulation, rule, or common law regulating securities because a 'violation' of law must involve wrongdoing, and allegations of wrongdoing are not required in an appraisal action." *Id.* at *3. The court refused to rewrite the policies, holding that the common meaning of "violation" is not limited to wrongdoing and means, among other things, a breach of the law and the contravention of a right or duty. *Id.* at *5. The court explained that this made sense in the securities context because several laws regulating securities can be violated without any showing of wrongdoing or scienter. *Id.* at *5 n.33 (citing securities laws).

Under Zale's interpretation, at a minimum, the February 2014 agreement to merge at $21 per share was an "act." And the Appraisal Litigation was "for" that act. Even if more is needed, the "significant process issues" alleged by TIG are "acts," "errors," or "omissions" even under the Insurers' view of those terms. And there can be little question that each alleged conflict of interest qualifies as a "Wrongful

[6] In *Solera*, the insurers moved for interlocutory appeal, which Solera did not oppose. *Solera Holdings, Inc. v. XL Specialty Ins. Co.*, No. N18C-08-315 AML CCLD, 2019 WL 4733431, at *2 (Del. Super. Ct. Sept. 26, 2019). In turn, the trial court certified interlocutory appeal to the Delaware Supreme Court on September 26, 2019. *Id.* at *5. As of the date of this brief, the Delaware Supreme Court has not yet accepted or denied the request for interlocutory appeal.

Act" under any interpretation. A grant of summary judgment on this basis is reversible error.

C. The Insurers Misconstrue Delaware Appraisal Actions—Such Actions Necessarily Are For an "Act," "Error," or "Omission"

The Insurers also wrongly contend that a Delaware appraisal action can never be for or arise from an "act," "error," or "omission," when in fact the opposite is true.

As Vice Chancellor Parsons held in the Stockholder Litigation, an appraisal action can provide a damages remedy that can sufficiently address conduct giving rise to breaches of fiduciary duty. C.R. 535. The ruling in *Blueblade Capital Opportunities LLC v. Norcraft Companies, Inc.*, No. 11184-VCS, 2018 WL 3602940 (Del. Ch. July 27, 2018), illustrates how allegations of a flawed merger process can result in a higher fair-value determination in an appraisal action. There, the court ruled:

> [T]he evidence reveals significant flaws in the process leading to the Merger that undermine the reliability of the Merger Price as an indicator of Norcraft's fair value. There was no pre-signing market check; Norcraft and its advisors fixated on Fortune and never broadened their view to other potential merger partners. As the parties worked to negotiate the Merger agreement, Norcraft's lead negotiator was at least as focused on securing benefits for himself as he was on securing the best price available for Norcraft. And, while the Merger agreement provided for a thirty-five-day post-signing go-shop, that process was rendered ineffective as a price discovery tool by a clutch of deal-protection measures.
>
> . . . .

> Having concluded that flaws in the sales process leading to the Merger undermine the reliability of the Merger Price as an indicator of fair value, and that the evidence *sub judice* does not allow for principled reliance upon the efficient capital markets hypothesis, I have turned to a "traditional valuation methodology," a discounted cash flow ("DCF") analysis, to calculate the fair value of Norcraft as of the Merger date.[7]

Id. at *2. In short, the company's conduct caused the merger consideration to be too low, which resulted in a higher damages award under a traditional valuation methodology.

Moreover, an appraisal action can also involve misconduct that does not reach the threshold of a breach of fiduciary duty. In discussing the overlap and differences between breach of fiduciary duty class actions and appraisal actions, one commentator—who was cited by the Insurers below—explained that:

> To be sure, the questions in the two kinds of actions [fiduciary class actions and appraisal actions] are frequently related. Often, when stockholders do not get fair value for their shares, it will be because the board has breached its fiduciary duties. The strongest appraisal claims [should] also present strong fiduciary duty claims, and vice versa. But forcing both types of claims into the same analytical box is a self-evident mistake. Many types of managerial sloth, incompetence, pressure, or collusion that courts have been understandably hesitant to characterize as breaches of fiduciary duty can nonetheless lead to

[7] Under Delaware law, in a cash-out sale, the duty of the board of directors is the "maximization of the company's value at a sale for the stockholders' benefit" and the board members become "auctioneers charged with getting the best price for the stockholders at a sale of the company." *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986). As early as 2004, Delaware court began to rely on the merger price as the best evidence that the board negotiated and the shareholders received fair value where the sales process consisted of was "conducted fairly and openly," without any evidence of fiduciary conflict or motivation other than achieving the "highest price." *Union Ill. 1995 Inv. Ltd. P'ship v. Union Fin. Grp., Ltd.*, 847 A.2d 340, 357–59 (Del. Ch. 2004). The reliance on the merger price in the absence of a flawed merger process was firmly established in 2017. *See Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd*, 177 A.3d 1, 22 (Del. 2017).

> stockholders receiving well below fair value for their shares. In such situations, appraisal constitutes a useful middle course between holding directors personally liable (and potentially granting injunctions) and allowing unfair transactions to escape meaningful scrutiny.

In re Appraisal of Dell Inc., No. 9322-VCL, 2016 WL 3186538, at *27 (Del. Ch. May 31, 2016), *aff'd in part, rev'd in part sub nom. Dell, Inc.*, 177 A.3d 1 (Del. 2017) (quoting Charles Korsmo & Minor Myers, *Reforming Modern Appraisal Litigation*, 41 DEL. J. CORP. L. 279, 322 (2017) (internal punctuation omitted)).[8] *See also* Barry M. Wertheimer, *The Purpose of the Shareholders' Appraisal Remedy*, 65 TENN. L. REV. 661, 680 (1998) (purpose of appraisal statutes is "to protect minority shareholders from wrongful conduct"). Thus, even if the Zale conduct alleged by the Appraisal Petitioners could not support a breach of fiduciary duty claim, they still are "acts," "errors," and/or "omissions" under the Policies.

Delaware courts have rejected insurer arguments that appraisal actions are no-fault proceedings that involve no wrongdoing. Not only ***can*** appraisal action involve wrongdoing, the *Solera* court held that a Delaware appraisal action "necessarily" involves a breach of the law or contravention of a right or duty, stating,

> Under Delaware law, shareholders have the right to receive "fair value" for their shares when they are cashed out of their positions through certain types of mergers or consolidations. ***By its very nature, a demand for appraisal is an allegation that the company contravened that right by not paying shareholders the fair value to which they are entitled.*** This interpretation corresponds with the general

[8] See C.R. 857 (quoting *In re Appraisal of Dell, Inc.*, which in turn quoted *Reforming Modern Appraisal Litigation*).

> understanding that a "violation" is "the contravention of a right or duty" or a "breach of the law." Accordingly, the Appraisal Action is a claim against Solera for a violation of law and therefore is a Securities Claim under the Policy.

2019 WL 3453232, at *5 (emphasis added). Similarly, an agreement by a company to pay its shareholders an amount allegedly less than the fair value for their shares also is a "Wrongful Act."

Thus, the Insurers' reliance on introductory statements by the Appraisal Petitioners' counsel in the depositions of several Stockholder Litigation defendants that an appraisal action is a "no fault" proceeding is a red herring. It does not matter that directors and officers cannot be held personally liable in an appraisal action for any breaches of fiduciary duty because the company can be held liable for that very conduct. *See* C.R. 552 (testimony of retired Chief Justice Steele that "[w]hile there's no finding similar to a tort case itself in that there was fault, proximate cause, directly caused damages, the focus [in an appraisal action] is nevertheless on the fault of not constructing the process that the law requires to maximize share value"). Indeed, often the end result in appraisal litigation and breach of fiduciary duty litigation is the same. *Owen v. Cannon*, No. 8860-CB, 2015 WL 3819204, at *31 (Del. Ch. June 17, 2015) ("The fair price inquiry in a fiduciary duty claim is largely equivalent to the fair value determination in an appraisal proceeding, although the remedies may be different."); *ONTI, Inc. v. Integra Bank*, 751 A.2d 904 (Del. Ch. 1999) (holding that an appraisal award adequately compensated the petitioners for their unfair dealing claims). It also does not matter whether the conduct complained of in an appraisal action may not support a viable claim for breach of fiduciary duty because a petitioner can still obtain relief for lesser injurious conduct. *See In re Appraisal of Dell Inc.*, 2016 WL 3186538, at *27.

Lastly, the Insurers will argue that an appraisal action is not "for" a "Wrongful Act" because the court's fair value determination is essentially an accounting proceeding, often based on a discounted cash flow analysis or other traditional valuation methodology. The Insurers, however, conflate the result of an appraisal action (the damages calculation) with its cause. To paraphrase, the Policies cover "Loss ***as a result of*** a Securities Action for a Wrongful Act." For all the reasons set forth in this brief, the Appraisal Litigation qualifies as a "Securities Action" "for a Wrongful Act." How the damages are ultimately calculated is irrelevant and contrary to the terms of the Policies. Indeed, if the damage calculations were relevant to whether a claim is because of a "Wrongful Act," then many claims alleging unfair dealing would not qualify. *See In re Dole Food Co., Inc. Stockholder Litig.*, Nos. 8703-VCL, 9709-VCL, 2015 WL 5052214, at *46 (Del. Ch. Aug. 27, 2015) (using discounted cash flow analysis to calculate damages for breaches of duty of loyalty); *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816, 867 (Del. 2015) (affirming trial court's use of discounted cash flow analysis to calculate damages for breach of fiduciary duty).

Thus, the law and commentary concerning appraisal actions and the evidence in the record show that the trial court erred in rendering judgment for the Insurers.

D. The Stockholder Litigation and Appraisal Litigation Are One Covered Claim Because They Arose From the Same Wrongful Act or Interrelated Wrongful Acts

Even if the Insurers were correct that a Delaware appraisal action is not "for" a "Wrongful Act," the Appraisal Litigation is nonetheless covered because the Appraisal Litigation and the Stockholder Litigation arose from the same "Wrongful Act" or "Interrelated Wrongful Acts" under the Related Claims Provision, which states that "[a]ll Claims arising from the same Wrongful Act or Interrelated Wrongful Acts shall be deemed one Claim . . . ." C.R. 127.

The Insurers' decision to use the phrase "arising from" is significant because that phrase requires that there only be a "causal connection or relation" between the claims and the underlying acts, errors, and omissions. *Mid-Century Ins. Co. of Tex. v. Lindsey*, 997 S.W.2d 153, 156 (Tex. 1999); *Utica Nat'l Ins. Co. of Tex. v. Am. Indem. Co.*, 141 S.W.3d 198, 203 (Tex. 2004) ("arise out of" means "there is but for causation, though not necessarily direct or proximate causation").

Moreover, the effect of the Related Claims Provision is broad.

> Most often, insurers use it to exclude coverage for claims made during the policy period when those claims relate to claims made before the policy period began. But such a provision can also be used, as [the insured] seeks here, to have a claim that is made after the policy period deemed one made during the policy period, thus including coverage for a subsequent claim.

Burks, 534 S.W.3d at 464 (citations omitted). In fact, this Court recently held that the related claims provision can result in two claims being deemed a single claim such that an exception to an exclusion applied to both claims. *Prophet Equity LP v. Twin City Fire Ins. Co.*, No. 05-17-00927-CV, 2019 WL 3886651, at *8 (Tex. App.—Dallas Aug. 19, 2019, no pet. h.) ("Under these circumstances, one reasonable Policy reading is that it treats the entire arbitration rooted in Stelling's termination as a single Claim beginning with Stelling's initial demand letter. Because that reading is reasonable, that is how we construe the Policy on these facts."); *see also George K. Baum & Co. v. Twin City Fire Ins. Co.*, 760 F.3d 795 (8th Cir. 2014) (holding that related-claim provision resulted in subsequent claim being deemed to have been timely noticed during the policy period).

Here, Zale (as well as the Insurers) submitted evidence to the trial court from which a reasonable jury could have concluded that the Appraisal Litigation and Stockholder Litigation arose from the same "Wrongful Act" or "Interrelated Wrongful Acts." But for the February 2014 agreement to merge at $21 per share, the Stockholder Litigation and Appraisal Litigation would not have been initiated. If more causal connection is necessary, the Second Amended Complaint in the Stockholder Litigation provides all the evidence necessary. Not only did the Stockholder Litigation plaintiffs reiterate TIG's allegations of a flawed merger process, including conflicts of interest, the Stockholder Litigation plaintiffs *quoted*

TIG's proxy filings. C.R. 594-602. [redacted] It should, therefore, be no surprise that Zale's broker reported the claims to the Insurers as "related claims" and asked Liberty (as noted to Starr) to determine coverage on that basis. C.R. 302, 638. The trial court erred in rendering judgment in favor of the Insurers.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON WHETHER THE BUMP-UP EXCLUSION APPLIED

The Insurers also moved for no-evidence and traditional summary judgment on the Bump-Up Exclusion, claiming that the Settlement was for an increased share price and is thus subject to the exclusion.

As an initial matter, granting a "no evidence" motion for summary judgment on the basis of this exclusion is obvious error because a policy exclusion is in the nature of an affirmative defense, on which the insurer, not the insured, has the burden of proof. *For Kids Only Child Dev. Ctr., Inc. v. Philadelphia Indem. Ins. Co.*, 260 S.W.3d 652, 655 (Tex. App.—Dallas 2008, pet. denied) (citing *Crocker v. Am. Nat'l Gen. Ins. Co.*, 211 S.W.3d 928, 931 (Tex. App.—Dallas 2007, no pet.)) ("[I]f, as here, the insurer relies upon an exclusion to the policy, it bears the burden of proof to show the exclusion is applicable."). Although a plaintiff may move for no evidence summary judgment on the ground that there is no evidence of one or more essential elements of an affirmative defense, "a defendant must file a traditional motion for summary judgment if it wishes to establish each element of that defense as a matter of law." *Haver v. Coats*, 491 S.W.3d 877, 881-82 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

Regardless of whether an exclusion is technically an "affirmative defense," this reasoning applies with equal force here because the principle "follows from the plain language of Rule 166a(i), which provides that a no-evidence motion can only be used to establish the inapplicability of a 'defense on which *an adverse party* would have the burden of proof at trial.'" *Id.* at 881 (emphasis in original). A no-evidence motion for summary judgment was simply "not an appropriate procedural vehicle" for the Insurers to establish an issue on which they had the burden of proof at trial. *Id.* at 883. The trial court erred in granting a no-evidence motion on that basis.

As to the Insurers' traditional motion on the Bump-Up Exclusion, issues of fact preclude sustaining the trial court's ruling. Because the Appraisal Litigation was settled, Zale had the burden to put on evidence demonstrating that a "portion of the settlement was reasonably intended to concern claims covered by the policy." *Am. Int'l Specialty Lines Ins. Co.*, 529 F.3d at 657. This determination is based on Zale's subjective view of "the merits of the plaintiff's claims at the time of settlement." *Id.* Here, Zale does not seek coverage for the entire Settlement. Rather, it seeks coverage only for the portions of the Settlement reflecting Zale's exposure for (1) prejudgment interest on the Appraisal Petitioners' merger consideration, and (2) the prospective cost of litigation. C.R. 1079.

On those issues, Zale presented evidence from which a jury could conclude that a significant portion of the Settlement Amount reflected Zale's exposures for prejudgment interest on the merger consideration and prospective cost of litigation. [redacted]

The legal reasons behind this are clear. Prior to 2016, a defendant in an appraisal action could not tender the merger consideration to the appraisal petitioner and toll the accrual of prejudgment interest. *See Huff Fund Inv. P'ship v. CKx, Inc.*, No. 6844-VCG, 2014 WL 545958, at *3 (Del. Ch. Feb. 12, 2014) (rejecting the respondent's effort to prevent further accrual of interest by paying a portion of the fair value prior to final judgment). Thus, both as a general matter and in this case, the accrual of interest and the cost of litigation created significant leverage for petitioners because appraisal actions seldom proceed to trial before 18 months to two years following the commencement of the action. C.R. 460-61.

Here, there was evidence from which a reasonable jury could conclude that a portion of the Settlement reflected Zale's exposure for prejudgment interest on the merger consideration and prospective cost of litigation. This evidence includes:

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

This evidence should have precluded summary judgment against Zale.

Further, contrary to the Insurers' arguments below, prejudgment interest on the merger consideration and prospective cost of litigation is not subject to the Bump-Up Exclusion. The exclusion states,

> With respect to any Claim alleging that the price or consideration paid or proposed to be paid for the acquisition of any securities issued by or assets owned by any natural person or entity is inadequate, excessive, or improper, Loss shall not include ***the portion of any judgment or settlement relating to the amount by which such price or consideration was changed or modified*** as a result of such Claim; however this exclusion will not apply to Defense Costs.

C.R. 183 (emphasis added). Under Texas law, the exclusion must be "strictly construed" against the Insurers. *Evanston Ins. Co.*, 256 S.W.3d at 668.

Prejudgment interest on the merger consideration simply does not "relat[e] to the amount by which such price or consideration was changed or modified as a result of such claim." If the Delaware court had confirmed that the merger share price of $21 was the "fair value," then there would have been no change or modification in price and thus the Bump-Up Exclusion could not apply. [redacted]

Correspondingly, if there had been a fair value determination of $22 per share, then the Bump-Up Exclusion would only apply to the $1 increase and any prejudgment interest on that $1 increase, i.e. the interest "relating to" an increased share price. The exclusion would not apply to the prejudgment interest on the original merger consideration because it would not relate to the change in merger consideration. The Insurers knew how to draft broader versions of the Bump-Up Exclusion but chose not to include a more expansive exclusion. *See Genzyme Corp. v. Fed. Ins. Co.*, 622 F.3d 62, 72 (1st Cir. 2010) (excluding "that part of Loss, other than Defense Costs, which is based upon, arising from, or in consequence of the actual or proposed payment by any Insured Organization of allegedly inadequate or excessive consideration") (emphasis omitted). At best for the Insurers, both Zale and the Insurers' interpretations of the exclusion are reasonable, in which case it must be construed in Zale's favor.

In addition, the Bump-Up Exclusion expressly does not apply to defense costs. It follows that the decision to avoid prolonged litigation and instead use the anticipated cost of further litigation to help settle a claim also is not subject to the Bump-Up Exclusion. As one commentator has stated,

> What if a settlement were entered into solely in order to avoid the cost of continuing to defend against the plaintiff's claims? If the future defense costs would have been covered by the policy, then the settlement would be covered. The settlement money would have been paid by reason of something that was covered by the policy.

WINDT, *supra*, § 6:31. [redacted] C.R.

1068-70, 1095. The trial court erred in granting summary judgment for the Insurers.

III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON WHETHER TEXAS PUBLIC POLICY PRECLUDES COVERAGE FOR PREJUDGMENT INTEREST

The Insurers moved for traditional summary judgment on whether it is against Texas public policy to cover prejudgment interest under Section 262. They claimed that there is a "restitutionary" aspect to prejudgment interest because prior to a 2007 amendment, the court could consider the interest rate that the corporation would have to pay to borrow money when it determined the applicable prejudgment interest rate. The Insurers failed to meet their burden of proving this affirmative defense, and genuine issues of material fact should have precluded summary judgment.

"Texas's strong public policy favoring freedom of contract is firmly embedded in our jurisprudence. Absent compelling reasons, courts must respect and enforce the terms of a contract the parties have freely and voluntarily entered." *Philadelphia Indem. Ins. Co. v. White*, 490 S.W.3d 468, 471 (Tex. 2016); *Gotham Ins. Co. v. Warren E & P, Inc.*, 455 S.W.3d 558, 564 (Tex. 2014) ("[W]e will enforce the parties' bargain unless it contravenes some positive statute."); *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 655 (Tex. 2008). To overcome the strong Texas public policy favoring freedom of contract, the Insurers had the burden of proving that there is a strong public policy against insuring the portion of the Settlement that reflected Zale's exposure for prejudgment interest on the merger consideration.

Aside from the fact that the Insurers cited to no Texas public policy against insuring claims "in the nature of restitution, disgorgement or the return of ill-gotten gains,"[9] the Insurers also could not point to a single fact showing that the prejudgment interest was the return of an ill-gotten gain. [redacted] The Insurers have no factual basis for an assertion of unjust enrichment—there is zero evidence of any enrichment.

The Insurers' argument rests on a line of Delaware case law interpreting a portion of Section 262 that the Delaware legislature ***deleted*** in 2007. Before 2007, Section 262 permitted the court to determine what interest rate applied to an appraisal award. DEL. CODE tit. 8, § 262(h) (2006). The court was allowed to

[9] In *Nortex Oil & Gas Corp. v. Harbor Insurance Co.*, 456 S.W.2d 489, 493–94 (Tex. Civ. App.—Dallas 1970, no writ), the case cited by the Insurers, the words "public policy" were not even used. Rather, the court held that there was a difference between "property taken" and "property damaged." *Id.* According to *Burks*, "no Texas court has held that insuring a settlement of a claim seeking restitution or disgorgement is against public policy or otherwise generally 'uninsurable under the law' of Texas; nor has the Legislature enacted any legislation on point." 534 S.W.3d at 469. To the extent that there is a public policy against insuring restitution, disgorgement, or the return of ill-gotten gains, that public policy is coterminous with the Policies' Ill-Gotten Gains exclusion, which requires a final adjudication in the underlying action. *See Fed. Ins. Co. v. Cont'l Cas. Co.*, No. 2:05-CV-305, 2006 WL 3386625, at *23 (W.D. Pa. Nov. 22, 2006) ("Since the Personal Profit Exclusion will effectively prevent the Individual Defendants from receiving a windfall, any policy-related arguments to the effect that Counts VI and VIII state claims for matters uninsurable under Pennsylvania law are significantly weakened.").

consider "all relevant factors, including the rate of interest which the corporation would have had to pay to borrow money during the pendency of the proceeding." *Id.*

How the court actually determined the interest award varied widely. In some pre-amendment cases, the court applied the legal rate of interest that Delaware used in other circumstances. *See Neal v. Ala. By-Products Corp.*, No. 8282, 1990 WL 109243, at *21 (Del. Ch. Aug. 1, 1990) ("A more realistic and fair rate of interest, in my judgment, is the legal rate of interest in August 1985."). In other pre-amendment cases, interest was set by the court after examining (1) the rate at which a prudent investor could have invested the money, and (2) the surviving corporation's cost of borrowing. *E.g.*, *Lebman v. Nat'l Union Elec. Corp.*, 414 A.2d 824, 829 (Del. Ch. 1980). Some courts referred to the cost-of-borrowing component as being restitutionary.

> An award of interest serves two purposes. First, an award of interest recognizes that petitioners, by electing to pursue appraisal rather than accepting the amount offered in the merger, have been denied the use of the fair value of their shares. Second, an award of interest recognizes that the corporation has received a benefit from the use of the fair value of petitioners' shares during the pendency of the proceeding.

Grimes v. Vitalink Commc'ns Corp., No. 12334, 1997 WL 538676, at *9 (Del. Ch. Aug. 28, 1997) (citations omitted). How courts applied those two factors also varied widely. *E.g.*, *Chang's Holdings, S.A. v. Universal Chems. & Coatings*, No. 10856, 1994 WL 681091, at *2 (Del. Ch. Nov. 22, 1994) ("Although no set formula exists, in most circumstances the Court looks primarily to the prudent investor rate, but also considers the corporation's cost of borrowing."); *Kleinwort Benson Ltd. v. Silgan Corp.*, No. 11107, 1995 WL 376911, at *10 (Del. Ch. June 15, 1995) (equally weighing the two rates).

But in 2007, Section 262 was amended to set the interest rate at 5% above the federal discount rate, compounded quarterly. *See* 2007 Del. Laws Ch. 145 (H.B. 160); DEL. CODE tit. 8, § 262(h) (2007). In doing so, the Delaware legislature expressly eliminated a court's ability to consider the company's cost of borrowing. A "central policy choice in the amendment was that the default rate should be equal to the legal rate of interest that Delaware law employs in other circumstances." Charles K. Korsmo & Minor Myers, *Interest in Appraisal*, 42 J. CORP. L. 109, 120 (2016).

At best for the Insurers, Section 262 prejudgment interest has two purposes, to compensate the appraisal petitioners and to avoid an undeserved windfall on the company. Where, as here, the merger consideration is sitting in escrow and not earning any income, how is the purported restitutionary component being served? Not only did the Insurers fail to show that Zale somehow obtained an undeserved windfall when the merger consideration sat in escrow and did not earn any income, but the Insurers could not identify the portion of the prejudgment interest rate that served the compensatory interest versus the portion that served the alleged restitutionary interest. C.R. 540. The trial court's order cannot be affirmed under the Public Policy Exclusion.

IV. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON ZALE'S ALLEGED BREACH OF POLICY CONDITIONS

The Insurers moved for traditional summary judgment on the grounds that Zale violated policy conditions by allegedly providing late notice and not obtaining the Insurers' consent to settle. The Insurers provided no evidence of prejudice as a result of Zale's alleged breach of the policy conditions.

A. BEFORE THE SETTLEMENT, ZALE PROVIDED TIMELY NOTICE

On April 14, 2015, Zale's broker provided notice of the Appraisal Litigation to it excess carriers, including Berkley and Starr. C.R. 625. Berkley admitted that notice was timely. C.R. 796. ("Q. So did Berkley receive written notice of the appraisal litigation on April 15 [14], 2015? A. Yes. Q. Was that notice timely with respect to Berkley? A. I believe it was in the -- yes."). The Insurers certainly acted as if they had received notice, seeking limited information about the Appraisal Litigation. On June 11, 2015, Starr's adjuster asked if Liberty had issued a coverage letter for the Appraisal Litigation. C.R. 802. And on June 25, 2015, Berkley's adjuster asked Liberty about the status of the Appraisal Litigation and whether defense counsel had provided a budget. C.R. 788. These are not the actions of insurers that have not received notice. Any contention by the Insurers that they did not receive notice until later would only underscore the fact that there were genuine issues of material fact that should have precluded summary judgment.

B. THE INSURERS FAILED TO PROVE PREJUDICE RELATING TO ANY DEFECTIVE NOTICE OR LACK OF CONSENT TO SETTLE

Far from being consistent with the actions of an insurer that has not received notice, the Insurers' actions instead reflected the Insurers' predetermined position that a Delaware appraisal action is never covered under any circumstances. Thus, the Insurers cannot demonstrate that they were prejudiced by some allegedly defective notice—or failure to obtain consent for the Settlement—for a claim that they were always going to deny.

Even to the extent that the April 14, 2015 notice was defective, any defect is subject to the prejudice rule.

> When one party to a contract commits a material breach of that contract, the other party is discharged or excused from any obligation to perform. In determining the materiality of a breach, courts will consider, among other things, the extent to which the nonbreaching party will be deprived of the benefit that it could have reasonably anticipated from full performance. The less the non-breaching party is deprived of the expected benefit, the less material the breach.

Hernandez v. Gulf Grp. Lloyds, 875 S.W.2d 691, 692 (Tex. 1994). "In a claims-made policy, when an insured gives notice of a claim within the policy period or other specified reporting period, the insurer must show that the insured's noncompliance with the policy's 'as soon as practicable' notice provision prejudiced the insurer before it may deny coverage." *Prodigy Commc'ns Corp. v. Agric.*

Excess & Surplus Ins. Co., 288 S.W.3d 374, 382 (Tex. 2009). Where, as here, the insurer merely has a duty to indemnify, as opposed to a duty to defend, its onus to prove actual prejudice is daunting. *See Trustees of Univ. of Pa. v. Lexington Ins. Co.*, 815 F.2d 890, 898 (3d Cir. 1987) ("Unlike primary insurers, excess insurers have no right to control a lawsuit and thus have less need for early notice."). The Insurers did not attempt to present any evidence of prejudice from allegedly defective notice.

The Insurers also failed to demonstrate that they were prejudiced by Zale not obtaining their consent to settle the Appraisal Litigation. Under Texas law, the prejudice rule applies to consent-to-settle provisions, including the voluntary payment provision and no-action clauses. *See Hernandez*, 875 S.W.2d at 692; *Lennar Corp. v. Markel Am. Ins. Co.*, 413 S.W.3d 750, 756 (Tex. 2013).[10]

While the burden was on the Insurers to demonstrate prejudice, the record contains evidence that affirmatively negates the existence of prejudice. An insurer must demonstrate "a material change in position to establish prejudice." *Coastal Ref. & Mktg., Inc. v. U.S. Fid. & Guar. Co.*, 218 S.W.3d 279, 288 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). An insurer is not prejudiced when

[10] Below, the Insurers' attempted to argue that if a "notice of settlement" is not provided before the settlement, then prejudice can be presumed. In each of the Insurers' cases, however, the insured did not provide notice of the claim until after settlement. *See Maryland Cas. Co. v. Am. Home Assurance Co.*, 277 S.W.3d 107, 111 (Tex. App.—Houston [1st Dist.] 2009, pet. dism'd) (discussing the notice of claim provision). There is no requirement under the Policies or Texas law to provide "notice of settlement"—particularly where, as here, the Insurers had not accepted coverage and would have denied coverage in any event.

it "remains in the same position it would have occupied had the [insureds] complied" with the policy conditions. *Hernandez*, 875 S.W.2d at 694. If an insurer would have denied the claim irrespective of the timing of notice, the alleged failure to comply with the policy conditions deprived the insurer of nothing. As one court explained,

> Travelers' denial of coverage was not premised on late notice, but rather on its review of ACB's Complaint and its conclusion that the claims brought against Bay and FAE did not fall within the policy coverage. Thus, regardless of the timing of notice, Travelers would have denied coverage and was therefore not prejudiced by the timing of Plaintiffs' notice. Where, as here, the insurer would not have adjusted or defended the action regardless of the timing of notice there is no reason to require a forfeiture of coverage merely upon a technicality.

Bay Elec. Supply, Inc. v. Travelers Lloyds Ins. Co., 61 F. Supp. 2d 611, 620 (S.D. Tex. 1999); *E. Tex. Med. Ctr. Reg'l Healthcare Sys. v. Lexington Ins. Co.*, No. 6:04-CV-165, 2011 WL 773452, at *6 (E.D. Tex. Feb. 25, 2011) ("Following untimely notice, the insurer must link the lost opportunity to the harm it incurred. This requires proof that the insurer would have exercised the right lost."). "[M]ere[] speculative or potential prejudice" is insufficient. *Coastal Ref. & Mktg., Inc.*, 218 S.W.3d at 288.

The record shows that Starr would have denied coverage regardless of notice or any attempt by Zale to obtain consent because they ***did deny coverage*** on October 2, 2015, without knowledge of the Settlement. C.R. 368, 831. Similarly, Berkley testified that it has never covered an appraisal action. C.R. 797. And within seven minutes of receiving the petitions in the Appraisal Litigation, Berkley expressed its belief that there was no coverage. C.R. 797. In short, the Insurers could not identify any facts demonstrating any alleged change in position as a result of any failure by Zale to comply with the policy conditions. And the evidence shows they were going to deny coverage for the Appraisal Litigation no matter what.

The Court cannot affirm the trial court's decision as a result of any failure by Zale to comply with the policy conditions.

V. THERE WAS EVIDENCE THAT THE INSURERS VIOLATED THE TEXAS INSURANCE CODE

Finally, Zale presented evidence from which a jury could conclude that the Insurers violated the Texas Insurance Code and caused Zale to sustain damages in the form of policy benefits.

First, Zale incurred "actual damages" in the form of lost policy benefits. *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 495 (Tex. 2018).

Second, Zale presented evidence that the Insurers violated the Texas Insurance Code by, among other things, failing to perform a reasonable investigation. Under Texas law, the duty to indemnify is separate from and independent of an insurer's defense obligation. *D.R. Horton-Texas, Ltd.*, 300 S.W.3d at 743–44. As the duty to indemnify is based on the actual facts from the Appraisal Litigation and the parties' view of Zale's exposure, the Insurers had an obligation to make "a good-faith effort to objectively investigate" the bases of the

Settlement. *State Farm Fire & Cas. Co. v. Simmons*, 963 S.W.2d 42, 45 (Tex. 1998).

After receiving notice in April 2015, the Insurers never sought information concerning the actual facts of the Appraisal Litigation. And in response to Zale's August 12, 2016 demands that the Insurers pay for the Settlement, the Insurers failed to request any information concerning the actual facts of the Appraisal Litigation or the parties' view of Zale's exposure before denying coverage. C.R. 840, 845. To the contrary, Berkley relied solely on the appraisal petitions and the Liberty Policy in arriving at its coverage position. C.R. 637. And Starr relied solely on Liberty's denial letter. C.R. 667.

In reality, any "investigation" that the Insurers performed was a pretext because they prejudged coverage for the Appraisal Litigation, assuming that it is not covered as a matter of course. Berkley has never accepted coverage for an appraisal action, and knew within minutes of receiving the appraisal petitions that it would deny coverage. C.R. 797. Starr similarly assumed, without performing any investigation, that an appraisal action is not covered, regardless of the facts that could have been proved at trial. C.R. 667, 845.

Had the Insurers investigated the claims against their insured, they would have uncovered the facts identified by Zale herein. A jury could conclude that the

Insurers breached their good faith and statutory obligations, causing Zale to suffer damages.

PRAYER

The Court should reverse and remand. All costs incurred by virtue of this appeal should be taxed against the Insurers.

Respectfully submitted,

By: */s/ Roger Townsend*

Roger Townsend
State Bar No. 20167600
rtownsend@cokinoslaw.com
COKINOS | YOUNG
Four Houston Center
1221 Lamar St., 16th Floor
Houston, Texas 77010
Telephone: 713-535-5564
Facsimile: 713-535-5533

Patrick J. Wielinski
State Bar No. 21432450
pwielinski@cokinoslaw.com
Travis M. Brown
State Bar No. 24061890
tbrown@cokinoslaw.com
COKINOS | YOUNG
800 Crestview Tower
105 Decker Court
Irving, Texas 75062
Telephone: 817-635-3620
Facsimile: 817-635-3633

Michael E. Farnell
Admitted *pro hac vice*
Gabriel J. Le Chevallier
Admitted *pro hac vice*
mfarnell@pfglaw.com
glechevallier@pfglaw.com
PARSONS, FARNELL & GREIN, LLP
1030 SW Morrison Street
Portland, Oregon 97205
Telephone: 503-222-1812
Facsimile: 503-274-7979

Attorneys for Appellant,
Zale Corporation

CERTIFICATE OF COMPLIANCE

Based on a word count run in Microsoft Word 2010, this brief contains 13,486 words, excluding the portions of the brief exempt from the word count under Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ Travis M. Brown
Travis M. Brown

CERTIFICATE OF SERVICE

I certify that, on October 4, 2019, a copy of the foregoing was forwarded to all counsel of record by the Electronic Filing Service Provider and by e-mail, as follows:

Howard L. Close
Natasha Taylor
WRIGHT CLOSE & BARGER, LLP
One Riverway, Suite 2200
Houston, TX 77056
close@wrightclosebarger.com
taylor@wrightclosebarger.com

Jennifer Mathis
Admitted *pro hac vice*
TROUTMAN SANDERS LLP
580 California Street, Suite 1100
San Francisco, CA 97104
jennifer.mathis@troutman.com

Brandon Almond
Admitted *pro hac vice*
TROUTMAN SANDERS LLP
401 9th Street, NW, Suite 1000
Washington, DC 20004
brandon.almond@troutman.com

Counsel for Appellee
Berkley Insurance Company

Daisy Khambatta
KENNEDYS CMK LLP
3821 Juniper Trace, Suite 101
Austin, TX 78738
daisy.khambatta@kennedyscmk.com

Matthew M. Ferguson
Admitted *pro hac vice*
William J. Brennan
Admitted *pro hac vice*
KENNEDYS CMK LLP
570 Lexington Avenue, 8th Floor
New York, NY 10022
matthew.ferguson@kennedyslaw.com
william.brennan@kennedyslaw.com

Counsel for Appellee
Starr Indemnity & Liability Company

/s/ Travis M. Brown
Travis M. Brown