

ENTERED

March 02, 2026

Nathan Ochsner, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISIONBAILEY DORNEMANN, *et al.*,

Appellants,

VS.

REPUBLIC VANGUARD INSURANCE
COMPANY, *et al.*,

Appellees.

§
§
§
§
§
§
§
§
§
§

CIVIL ACTION NO. 4:24-CV-03997

ORDER AFFIRMING BANKRUPTCY COURT’S JUDGMENT

This bankruptcy appeal concerns insurance coverage disputes arising from two automobile personal-injury lawsuits against Debtor NPC International, Inc. (“NPC”). Now before the Court is Appellants’ Bailey Dornemann and Jacob Roe’s appeal of the Bankruptcy Court’s Order Granting Declaratory Relief to Republic-Vanguard Insurance Company (“Republic-Vanguard”) and James River Insurance Company (“James River”). Having considered the Parties’ briefing, evidence, and relevant law, the Court finds that the Bankruptcy Court’s decision should be AFFIRMED.

I. FACTUAL AND PROCEDURAL BACKGROUND

The relevant facts are largely undisputed. NPC is a large Pizza Hut franchisee headquartered in Kansas. (ROA 10124). Appellants were each injured in separate automobile accidents in Florida involving NPC employees in March and June 2018. *Id.* Roe sued NPC and the driver for negligence in Florida state court in 2019. (ROA 6750–6752). Dornemann sued NPC and the driver for negligence in Florida state court in 2024 (ROA 6742–6747) and eventually obtained a \$10,452,091.60 judgment in 2025 (D.E. 37-1).

NPC maintained a layered insurance program. During the relevant policy period of September 30, 2017, to September 30, 2018, NPC’s primary business auto policy was issued by

Republic-Vanguard and provided \$1 million per occurrence in coverage, subject to a \$1 million self-insured retention (“SIR”) per claim and an additional \$1 million “corridor” SIR per policy period (“Corridor SIR”). (Republic-Vanguard Policy, ROA 66–90). Under the Policy’s terms, Republic-Vanguard’s coverage obligations were triggered only after NPC made actual payment of both SIR layers:

A. Self-Insured Retention and Corridor Self-Insured Retention:

For each “accident”, you will pay all sums payable as damages, expenses, costs and benefits because of “bodily injury” or “property damage” to which this insurance applies, as well as any amounts payable as Supplementary Payments, up to the amount shown in the Schedule above as the Self-Insured Retention and “Corridor Self-Insured Retention”. Our obligation to pay damages, expenses, costs, or benefits because of “bodily injury” or “property damage” will apply only in excess of the Self-Insured Retention and “Corridor Self-Insured Retention” up to the applicable limit of insurance. We have no obligation under this policy unless there has been full compliance with the following provisions:

1. You have made actual payment of all damages, expenses, costs, and benefits because of “bodily injury” or “property damage” to which this insurance applies until you have made payment of the full amount of the Self-Insured Retention and “Corridor Self-Insured Retention”.
2. You will not reinsure the Self-Insured Retention and “Corridor Self-Insured Retention” without our knowledge and written consent.

(ROA 69–70).

The Policy also contained a bankruptcy clause providing that NPC’s insolvency would not alter Republic-Vanguard’s obligations:

We will have no obligation under any circumstances to assume or satisfy your obligation for the actual payment of damages, expenses, costs, and benefits, until the Self-Insured Retention and “Corridor Self-Insured Retention” have been exhausted. Our obligation to pay damages, expenses, costs, or benefits under this policy will not be affected, modified or changed in the event of your bankruptcy.

(ROA 70).

Above the Republic-Vanguard Policy sat a \$3 million commercial excess policy issued by James River, which applies only after the underlying insurance has been “exhausted by payments.” (James River Policy, ROA 215–245). The James River Policy follows form to all underlying insurance, including the Republic-Vanguard Policy. (ROA 217–222).¹

NPC also maintained a separate \$1 million primary auto policy issued by Allianz, which did not include an SIR (Allianz Policy, ROA 7088–7364), and a \$25 million commercial umbrella policy issued by Liberty Mutual (“Liberty”) (Liberty Policy, ROA 2167–2234).

NPC filed for Chapter 11 bankruptcy protection on July 1, 2020, in Case No. 20-33353. Roe and Dornemann filed proofs of claim in the bankruptcy case, which were ultimately treated as general unsecured claims in amounts corresponding to the SIR obligations. (ROA 412–441, 1111). The Bankruptcy Court confirmed NPC’s plan of reorganization in January 2021 (the “Plan”), impairing unsecured creditors and creating a General Unsecured Creditors Trust (“GUC Trust”) to handle distributions. (ROA 6871–7016). Roe and Dornemann both sought and were granted relief to lift the stay and to proceed to liquidate their claims through lawsuits against NPC and its employees. (ROA 4138–4139, 6239).

Two adversary proceedings followed in the Bankruptcy Court. In June 2022, Republic-Vanguard filed an adversary proceeding against Roe, NPC, and the GUC Trust (Adv. No. 22-03042), seeking declarations that: (1) Republic-Vanguard had no duty to defend NPC or the GUC Trust in the Roe lawsuit until there is “actual payment” of the SIR and Corridor SIR; (2) the Republic-Vanguard Policy does not afford NPC and/or the GUC Trust coverage absent satisfaction of the two retentions of \$1 million each; and (3) a claim liquidated and treated as a general

1. “[A] ‘following form’ insurance agreement is one that subjects the excess insurer to the ‘terms, conditions and exclusions’ of the underlying policy.” *Laster v. Am. Nat. Fire Ins. Co.*, 775 F. Supp. 985, 992 (N.D. Tex. 1991) (quoting *Home Ins. Co. v. Am. Home Prods. Corp.*, 902 F.2d 1111, 1113 (2nd Cir. 1990)).

unsecured claim under the Plan does not constitute actual payment of the retentions and does not satisfy the terms of the Republic-Vanguard Policy. (ROA 19–27).

On July 25, 2022, Republic-Vanguard filed an amended adversary complaint, adding Dornemann as a party and seeking the same relief as in its original complaint. (ROA 118–152). Dornemann filed a motion to dismiss pursuant to FED. R. CIV. P. 12(b)(1) and 12(b)(6), averring Republic-Vanguard’s Amended Complaint failed for: want of subject matter jurisdiction, the failure to state a claim on which relief could be granted, and the failure to join James River as an indispensable party. (ROA 198–245). The Bankruptcy Court (Judge Jones) dismissed Republic-Vanguard’s request for declarations (1) and (2) but left open whether the allowance of unsecured claims under the Plan could constitute “actual payment” of the SIRs. (ROA 279–280). The Bankruptcy Court also denied Dornemann’s request to join James River. (ROA 313). The Parties thereafter attempted mediation without success. (ROA 688–693).

In 2023, James River filed a separate adversary proceeding against Dornemann, Roe, Republic-Vanguard, NPC, and the GUC Trust (Adv. No. 23-03207), seeking declarations that: (1) James River has no duty to defend or indemnify NPC or the GUC Trust with respect to the claims made by Roe and/or Dornemann because NPC has not actually paid the SIRs and Republic-Vanguard has not exhausted its limit of insurance per accident; and (2) a mere filing of a Proof of Claim or its allowance as a general unsecured claim under the Plan does not constitute actual payment of the SIRs and does not satisfy the terms of the Primary Policy and Excess Policy. (ROA 10117–10128). In response, Dornemann moved to dismiss James River’s claims on the same grounds asserted against Republic-Vanguard. (ROA 10203–10223). Meanwhile, Roe moved to consolidate the Republic-Vanguard and James River adversary proceedings and to add Liberty and Allianz, all in a single adversary proceeding. (ROA 9218–9238). The Bankruptcy Court (Judge

Lopez) denied joinder but granted consolidation of the two adversary proceedings. (ROA 6209–6211). It did not rule on Dornemann’s motion to dismiss.

A consolidated trial was held after pretrial briefings, exhibits, witness lists, and demonstrative evidence were submitted. (ROA 9854–9979). On September 30, 2024, the Bankruptcy Court announced its judgment orally to the Parties. (ROA 9988–10035). That same day, the Bankruptcy Court entered final judgment granting declaratory relief in favor of both insurers as follows:

As to Republic-Vanguard Insurance Company:

1. A claim liquidated and treated as a general unsecured claim under the Plan is not actual payment of the self-insured retention in the Republic-Vanguard insurance policy with NPC.

As to James River Insurance Company:

1. The mere filing of a Proof of Claim or its allowance as a general unsecured claim under the Plan and Confirmation Order is not actual payment of the self-insured retentions and does not satisfy the terms of the Primary Policy and Excess Policy; and
2. James River has no duty to defend or indemnify NPC or the GUC Trust with respect to the Jacob Roe and Bailey Dornemann claims because NPC has not actually paid the self-insured retentions and Republic-Vanguard has not exhausted its limit of insurance per “accident.”

(ROA 9982–9983).

Roe and Dornemann timely appealed this final judgment on October 13, 2024. (ROA 10037–10041).

II. ISSUES ON APPEAL

Appellants present the issues on appeal as follows:

- 1) Whether the Bankruptcy Court abused its discretion in refusing to dismiss the Republic-Vanguard and James River adversary complaints under Rules 12(b)(1) and 12(b)(6);
- 2) Whether the Bankruptcy Court abused its discretion in denying joinder of Allianz and Liberty as required parties;

- 3) Whether the Bankruptcy Court erred in applying Texas law after concluding that there is no substantive difference between Kansas and Texas law for purposes of resolving the coverage disputes;
- 4) Whether the Bankruptcy Court erred in holding that the term “actual payment” in the SIR and Corridor SIR endorsements is unambiguous and requires cash payment by the insured;
- 5) Whether the Bankruptcy Court erred in holding that liquidation and treatment of Appellants’ tort claims as general unsecured claims under the Plan does not constitute “actual payment” of the SIRs; and
- 6) Whether, in light of the above, the Bankruptcy Court erred in concluding that (a) the Republic-Vanguard SIRs and limits were not exhausted, and therefore (b) James River has no duty to defend or indemnify NPC and/or the GUC Trust with respect to Appellants’ claims.

III. STANDARD OF REVIEW

On appeal of a bankruptcy court’s rulings, the district court reviews the bankruptcy court’s conclusions of law *de novo*, whereas it may disregard findings of fact only if they are clearly erroneous. *In re Perry*, 345 F.3d 303, 309 (5th Cir. 2003); FED. R. BANKR. P. 8013. The district court may affirm, modify or reverse a bankruptcy judge’s judgment or remand with instructions for further proceedings. FED. R. BANKR. P. 8013.

IV. DISCUSSION

A. Appeal Issue 1: Denial of Motions to Dismiss Under Rules 12(b)(1) and 12(b)(6)

The Court first considers whether the Bankruptcy Court abused its discretion in refusing to dismiss the adversary proceedings brought by Republic-Vanguard and James River for lack of subject matter jurisdiction and failure to state a claim. Appellants raise this issue jointly; however, because Roe never filed a motion to dismiss nor joined Dornemann’s motions, the appeal on this issue is limited to Dornemann. *See In re Texas Gen. Petroleum Corp.*, 52 F.3d 1330, 1337 (5th Cir. 1995).

1. Proceedings Below

Dornemann moved to dismiss Republic-Vanguard's declaratory judgment claims under Rules 12(b)(1) and 12(b)(6) in the initial adversary action. The Bankruptcy Court (Judge Jones) denied the motion under Rule 12(b)(1), explaining that it had "jurisdiction to resolve the interrelationship between the GUC Trust, the Reorganized Debtor and the claimants asserting claims against the GUC Trust as well as the policies that are applicable to the alleged injuries," including "the impact of the provision that deals with the allowance of a general unsecured claim as purported satisfaction and/or payment of any SIR that may exist under the applicable insurance policies." (ROA 310–311). The Bankruptcy Court likewise denied Dornemann's Rule 12(b)(6) motion to dismiss Republic-Vanguard's request for a declaration that liquidation of a claim and its treatment as a general unsecured claim under the Plan do not constitute actual payment of, or satisfy, the Policy's retention requirements. (ROA 279–280, 312). However, it granted the 12(b)(6) motion as to Republic-Vanguard's requests for declarations that it had no duty to defend NPC or the GUC Trust and that its Policy afforded no coverage unless and until the SIRs were actually paid. *Id.*

After James River filed its own adversary proceeding, Dornemann filed a nearly identical motion to dismiss James River's declaratory judgment claims under Rules 12(b)(1) and 12(b)(6). Although the Bankruptcy Court (Judge Lopez) did not expressly deny the motion, in orally delivering its decision after trial, the Bankruptcy Court concluded that: an actual controversy existed, it had authority to grant declaratory relief, and it would exercise its discretion to address each request. (ROA 9999).

2. Applicable Law

a. Declaratory Judgment Act

“The Declaratory Judgment Act (DJA), 28 U.S.C. § 2201(a), ‘is an enabling act, which confers discretion on the courts rather than an absolute right on a litigant.’” *Sherwin–Williams Co. v. Holmes County*, 343 F.3d 383, 389 (5th Cir. 2003) (quoting *Wilton v. Seven Falls Co.*, 515 U.S. 277, 287 (1995)). The DJA is procedural only and does not create a substantive cause of action; it merely provides a mechanism for early adjudication of disputes arising under other law. *Collin County v. Homeowners Ass’n for Values Essential to Neighborhoods*, 915 F.2d 167, 170 (5th Cir. 1990); *Lowe v. Ingalls Shipbuilding*, 723 F.2d 1173, 1179 (5th Cir. 1984) (citing *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950)). In deciding whether to entertain a declaratory judgment action, the court must determine: “(1) whether the declaratory action is justiciable; (2) whether the court has the authority to grant declaratory relief; and (3) whether to exercise its discretion to decide or dismiss the action.” *Sherwin–Williams*, 343 F.3d at 387 (citing *Orix Credit Alliance, Inc. v. Wolfe*, 212 F.3d 891, 895 (5th Cir. 2000)).

Justiciability is a threshold jurisdictional inquiry. A declaratory judgment action, like any other action, must be ripe to be justiciable, meaning that an “actual controversy” exists. *Orix*, 212 F.3d at 896. “[A]n actual controversy exists where ‘a substantial controversy of sufficient immediacy and reality exists between parties having legal interests.’” *Id.* (quoting *Middle South Energy, Inc. v. City of New Orleans*, 800 F.2d 488, 490 (5th Cir. 1986)). Although future contingencies may remain, declaratory relief may be appropriate where the likelihood of injury is sufficient to warrant judicial intervention. *RSUI Indem. Co. v. Enbridge (U.S.) Inc.*, 2008 WL 5158179, at *2 (S.D. Tex. Dec. 9, 2008); 10B *Fed. Prac. & Proc.* § 2757 (4th ed.). A case is ripe where the remaining issues are purely legal and further factual development is unnecessary. *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 833 F.2d 583, 587 (5th Cir. 1987).

b. Rule 12(b)(1)

An assertion that a declaratory judgment action is not justiciable challenges the court's subject-matter jurisdiction and is properly addressed under Rule 12(b)(1). *See Orix*, 212 F.3d at 895; FED. R. CIV. P. 12(b)(1). "Federal courts have limited jurisdiction, and therefore, the power to adjudicate claims only when jurisdiction is conferred by statute and the constitution." *Celestine v. TransWood, Inc.*, 467 F. App'x 317, 318 (5th Cir. 2012) (citing *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994)). A court properly dismisses a case for lack of subject-matter jurisdiction under Rule 12(b)(1) "when the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998) (quoting *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1187 (2d Cir. 1996)); *see* FED. R. CIV. P. 12(b)(1).

A party challenging jurisdiction under Rule 12(b)(1) may do so through a "facial attack" on the complaint, or through a "factual attack" relying on evidence outside the pleadings. *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir.), *cert. denied*, 449 U.S. 953 (1980). The former "requires the court merely to look and see if plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion." *Id.* If the movant pursues the latter, "no presumptive truthfulness attaches to the plaintiff's allegations." *Montez v. Dep't of Navy*, 392 F.3d 147, 149 (5th Cir. 2004). Instead, the court looks to whether the plaintiff has proven the existence of subject-matter jurisdiction by a preponderance of the evidence and can decide disputed issues of material fact in making this determination. *Superior MRI Servs., Inc. v. All. Healthcare Servs., Inc.*, 778 F.3d 502, 504 (5th Cir. 2015) (quoting *Irwin v. Veterans Admin.*, 874 F.2d 1092, 1096 (5th Cir. 1989), *aff'd sub nom., Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990)); *Montez*, 392 F.3d at 149. In sum, the court may determine lack of subject-matter jurisdiction on the basis of: (1) the complaint alone; (2) the

complaint supplemented by undisputed facts in the record; or (3) the complaint supplemented by undisputed facts plus the court’s resolution of disputed facts. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

c. Rule 12(b)(6)

The Rule 12(b)(6) standard also applies to declaratory judgment claims brought under the DJA. *Klein v. O’Neal, Inc.*, 2009 WL 3573849, at *2 (N.D. Tex. Oct. 30, 2009). “Rule 12(b)(6) authorizes the filing of motions to dismiss asserting, as a defense, a plaintiff’s ‘failure to state a claim upon which relief can be granted,’” and is read in conjunction with the federal pleading standard. *Inclusive Cmtys. Project, Inc. v. Lincoln Prop. Co.*, 920 F.3d 890, 899 (5th Cir. 2019) (quoting FED. R. CIV. P. 12(b)(6)); see *Ashcroft v. Iqbal*, 556 U.S. 662, 677–68 (2009); FED. R. CIV. P. 8(a)(2) (“A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief[.]”). “Thus, claims may be dismissed under Rule 12(b)(6) ‘on the basis of a dispositive issue of law,’” and also “if the complaint does not contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Inclusive Cmtys. Project*, 920 F.3d at 899 (quoting *Neitzke v. Williams*, 490 U.S. 319, 326 (1989); *Iqbal*, 556 U.S. at 678). The “plausibility” standard does not require detailed factual allegations, but a party’s “obligation to provide the ‘grounds’ of his ‘entitle[ment]’ to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.]” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations omitted); accord *Iqbal*, 556 U.S. at 678. To “show” that the pleader is entitled to relief, the well-pleaded facts of the complaint and any other matters properly considered² must allow the

2. “Generally, a court ruling on a 12(b)(6) motion may rely on the complaint, its proper attachments, ‘documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.’” *Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 763 (5th Cir. 2011) (quoting *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008)); see also *Lone Star Fund V (U.S.)*, *L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010) (court’s review on 12(b)(6) motion “is limited to the complaint, any documents attached to the complaint, and any documents attached to the motion to dismiss that are central to the claim and referenced by the complaint”).

court, drawing on its “judicial experience and common sense,” to infer “more than the mere possibility of misconduct.” *Iqbal*, 556 U.S. at 679.

3. Analysis

A declaratory judgment action involving an insurer, its insured, and a claimant in a pending liability suit presents an Article III “controversy,” but the availability of declaratory relief in diversity depends on whether such relief is permitted under applicable state law. *Klein*, 2009 WL 10656010 at *3 (citing *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 272–74 (1941); *Westport Ins. Corp. v. Atchley, Russell, Waldrop & Hlavinka, L.L.P.*, 267 F. Supp. 2d 601, 630 (E.D. Tex. 2003)). “In a prejudgment declaratory action regarding the duty of an insurer to indemnify, state law controls the federal court’s decision.” *Id.* (citing *Northfield Ins. Co. v. Loving Home Care, Inc.*, 363 F.3d 523, 537 (5th Cir. 2004)).

Dornemann argues that, under Kansas law, she was not a proper party to any declaratory judgment action concerning the duty to defend or indemnify because she was not an insured under the relevant policies, and she therefore lacked standing. Dornemann further argues that the Bankruptcy Court’s declaration that James River has no duty to indemnify NPC or the GUC Trust with respect to her claims was premature because, under Kansas law, the duty to indemnify cannot be decided absent a judgment or settlement. *See Bankwest v. Fidelity & Deposit Co. of Maryland*, 63 F.3d 974, 978 (10th Cir. 1995) (Under Kansas law, “the duty to indemnify is determined by the facts as they are established at trial or as they are finally determined by some other means (*e.g.*, summary judgment or settlement).”) (parenthetical in original); *Atchison, Topeka & Santa Fe Ry. Co. v. Stonewall*, 71 P.3d 1097, 1126 (Kan. 2003) (same).³

3. Although Dornemann’s motions to dismiss cited Kansas caselaw, her current insistence on the application of Kansas law to the issues of standing and ripeness was not presented to the Bankruptcy Court. To the contrary, both motions to dismiss contained nearly identical footnotes:

Appellees respond that Dornemann misstates the jurisdictional inquiry. Under the DJA, the relevant question is whether an “actual controversy” exists between adverse parties concerning coverage, not whether Dornemann is insured under the Policies. That requirement is satisfied because Dornemann has a concrete interest in the availability of insurance proceeds to satisfy her claim against NPC, creating a sufficiently adversarial relationship with the insurers. At the time Appellees filed their declaratory judgment actions, Dornemann had not yet filed a lawsuit; however, she had filed a proof of claim in excess of \$2 million, which would exceed all available retentions and potentially implicate both the Republic-Vanguard and James River policies. By the time the Bankruptcy Court issued its decision in October 2024, Dornemann had filed suit in Florida state court against NPC. Federal courts in the Southern District of Texas routinely allow declaratory judgment actions to determine rights and obligations under an insurance policy, even before the resolution of the insured’s underlying lawsuit. *E.g.*, *Darwin Select Ins. Co. v. Laminack, Pirtle & Martines, L.L.P.*, 2011 WL 2174970, at *2 (S.D. Tex. June 3, 2011) (“As a general rule, ‘an actual case or controversy exists before the resolution of an insured’s underlying suit concerning the insurer’s duty to defend,’” and “a court may decide that an insurance policy does not cover an event or claim before the underlying liability lawsuit has been resolved if the duty to defend and the duty to indemnify turn on the same principle and the court concludes as a matter of law there is no duty to defend under the Policy.”) (citing *Columbia Gas. Co. v. Georgia & Florida RailNet, Inc.*, 542 F.3d 106, 110 (5th Cir. 2008)); *Allstate Tex. Lloyd v. Lantz*, 2009 WL 499699, at *5 (S.D. Tex. Feb. 23, 2009) (“Courts have consistently approved of the use of § 2201

At this point, it is unclear what state law applies. . . . For purposes of this motion, Dornemann cites to Kansas law where the policies were issued. However, Florida law might apply as it is where Dornemann’s accident occurred. Texas law may also apply in this diversity case. For purposes of this motion, there appear to be no material differences between Kansas, Florida, and Texas law.

(ROA 10209 (emphasis added); *see also* ROA 203).

to declare the rights and obligations of parties to an insurance policy.”); *RSUI Indem. Co. v. Enbridge (U.S.) Inc.*, 2008 WL 5158179, at *2 (S.D. Tex. Dec. 9, 2008) (“It is well-established that a dispute regarding an insurer’s duty to defend or indemnify its insured for losses in a state court tort action by a third party presents an actual controversy with the meaning of the federal Declaratory Judgment Act, even if the tort action has not proceeded to judgment.”).

Appellees emphasize that judicial resolution is particularly warranted in the bankruptcy context because the existence of insurance proceeds may impact the ability of tort litigation to go forward. *See, e.g., Pak-Mor Mfg. Co. v. Royal Surplus Lines Ins. Co.*, 2005 WL 3487723 (W.D. Tex. Nov. 3, 2005) (deciding bankrupt insured’s declaratory judgment action in bankruptcy court seeking declaration that insurer was obligated to indemnify and provide coverage in pending tort lawsuit, despite insured’s inability to satisfy policy’s SIR); *Assoc. Elec. & Gas Ins. Servs., Ltd. v. Border Steel Rolling Mills, Inc.*, 2005 WL 3068787 (W.D. Tex. Sept. 27, 2005) (granting insurer’s request for declaration that it was not required to indemnify bankrupt insured until SIR had been exhausted, even though no judgment had been rendered against insured).

Here, the adversary proceedings below focused on the impact of the SIRs, assuming NPC had some obligation to pay. The arguments of all parties as to how the retentions would impact Republic-Vanguard’s and James River’s obligations, given NPC’s bankruptcy, were premised on the possibility that there could be a judgment in favor of Dornemann (or Roe) that would exceed the retentions. Those issues did not depend on the facts of any underlying tort litigation, the existence or amount of liability, or any trial-level determinations. Instead, the Bankruptcy Court assumed the existence of judgments against NPC and resolved purely legal issues of policy interpretation dispositive of both the duty to defend and the duty to indemnify. Dornemann’s argument that James River’s indemnity claims were unripe therefore fails under both Kansas and Texas law. *See Garrison v. State Farm Mut. Auto. Ins. Co.*, 907 P.2d 891, 893–94 (Kan. 1995)

(deciding declaratory judgment by auto insurers seeking coverage determination on agreed record before judgment or settlement, where “[t]he issue we consider does not hinge on any factual determination but rather on the interpretation of what the policy requires This is a legal question upon which our review is unlimited.”); *Nautilus Ins. Co. v. Country Oaks Apts. Ltd.*, 566 F.3d 452, 458 (5th Cir. 2009) (under Texas law, courts may decide duty to indemnify in advance of conclusion of underlying liability lawsuit where exclusion in insurance policy that precludes duty to defend would also preclude indemnity).

Even if the Court were to accept Dornemann’s assertion that the Bankruptcy Court’s declaration that James River had no duty to defend or indemnify NPC or the GUC Trust was premature absent a tort judgment, that premise is no longer true because Dornemann now holds a judgment against NPC. “Because ripeness is fundamentally an issue of timing, subsequent events can render a case ripe for adjudication even if it was not ripe at the time of filing.” *Council v. Washington*, 2025 WL 3461553, at *3 (M.D. Ala. Dec. 2, 2025). Appellate courts may decide a purely legal issue where, as here, subsequent events have cured any arguable ripeness defect. *Lower Colorado River Auth. v. Papalote Creek II, L.L.C.*, 858 F.3d 916, 926 (5th Cir. 2017); *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 833 F.2d 583, 586 n.2 (5th Cir. 1987) (citing 13A *Fed. Prac. & Proc.* § 3532.1 (2d ed.) (“Ripeness should be available on the basis of all the information available to the court. Intervening events that occur after decision in lower courts should be included.”)). Dornemann has identified no additional facts that could be developed on remand that would alter the Bankruptcy Court’s analysis, which turned solely on the language of the Republic-Vanguard and James River policies. Thus, the precise legal issues decided by the Bankruptcy Court are indisputably ripe for this Court’s review.

Finally, the Court finds that Appellees properly asserted declaratory judgment claims against Dornemann, who filed a proof of claim in NPC’s bankruptcy proceeding and later pursued

a tort action to liquidate those claims. *See Md. Cas.*, 312 U.S. at 273–74 (1941) (holding that an insurer’s declaratory judgment action disclaiming coverage and duty to defend in pending tort suit presented an “actual controversy” with both the insured and the injured claimant, who had a statutory right to proceed directly against insurer if the judgment went unsatisfied); *Am. Safety Cas. Ins. Co. v. Condor Assocs., Ltd.*, 129 F. App’x 540, 542 (11th Cir. 2005) (absent tort claimants were indispensable parties to insurer’s declaratory judgment action on the duty to defend and indemnify because proceeding without them would prejudice their interests despite their alignment with the insured in seeking coverage). Indeed, “the Fifth Circuit has held that an injured party, who is a plaintiff in state court litigation against an insured party, has a ‘real and substantial, though not immediate’ interest in a determination of whether an insurance company has a duty to indemnify the insured, and as such is a proper party to a declaratory judgment action,” and it “has continued to affirm its decision in [*Standard Accident Ins. Co. v. Meadows*, 125 F.2d 422 (5th Cir. 1942)] that an injured party who has sued an insured, but has yet to obtain a judgment in a state court action, is a proper party to a declaratory judgment action.” *Atl. Cas. Ins. Co. v. Ramirez*, 651 F. Supp. 2d 669, 674 (N.D. Tex. 2009) (citing *Dairyland Ins. Co. v. Makover*, 654 F.2d 1120 (5th Cir. 1981); *Central Surety & Ins. Corp. v. Norris*, 103 F.2d 116, 117 (5th Cir. 1939)).

Accordingly, the Court rejects Dornemann’s asserting that the Bankruptcy Court abused its discretion in denying her motions to dismiss.

B. Appeal Issue 2: Denial of Motion to Join Allianz and Liberty

The Court next considers whether the Bankruptcy Court abused its discretion in denying joinder of Allianz and Liberty as required parties. Appellants contend that joinder of all insurers is necessary to resolve the full coverage picture, avoid piecemeal litigation, and ensure an enforceable and efficient bankruptcy resolution. Specifically, Appellants argue that coverage for their claims cannot be fully or finally resolved without determining how the Allianz Policy

interacts with the Republic-Vanguard, James River, and Liberty policies, including whether Allianz constitutes underlying insurance and/or satisfies the Republic-Vanguard SIRs, triggering higher layers of coverage. Appellees respond that joinder was properly denied because the declaratory judgment action addressed only Republic-Vanguard and James River's coverage obligations under their own policies and could be resolved without Allianz or Liberty to afford complete relief or avoid inconsistent obligations.

1. Rules 12(b)(7) and 19

Rule 12(b)(7) allows dismissal for “failure to join a party under Rule 19.” FED. R. CIV. P. 12(b)(7). “Rule 19 provides for the joinder of all parties whose presence in a lawsuit is required for the fair and complete resolution of the dispute at issue.” *HS Res., Inc. v. Wingate*, 327 F.3d 432, 438 & n.7 (5th Cir. 2003) (citing *Pulitzer–Polster v. Pulitzer*, 784 F.2d 1305, 1308 (5th Cir. 1986) (“The federal rules seek to bring all persons that may have an interest in the subject of an action together in one forum so that the lawsuit can be fairly and completely disposed of. In accord with this goal, Rule 19 seeks to bring into a lawsuit all those persons who ought to be there by requiring joinder” (citations omitted)). Rule 19 also authorize the dismissal of litigation when it cannot fairly proceed in the absence of parties that cannot be joined. *Id.* at 438 & n.8 (citing FED. R. CIV. P. 19(b); *Pulitzer–Polster*, 784 F.2d at 1308).

An analysis under Rule 12(b)(7) involves two steps under Rule 19. First, the court considers under Rule 19(a) whether a person is required to be joined in the action. There are three types of “required” parties under Rule 19(a): (1) parties needed to give complete relief to the existing parties; (2) parties who claim interests that could be practically impaired or impeded if not joined; and (3) parties necessary to ensure that existing parties are not exposed to multiple or inconsistent obligations. *Lee v. Anthony Lawrence Collection, L.L.C.*, 47 F.4th 262, 265–66 (5th Cir. 2022) (citing FED. R. CIV. P. 19(a); *Moss v. Princip*, 913 F.3d 508, 514–15 (5th Cir. 2019)).

“If joinder is warranted, then the person will be brought into the lawsuit. But if such joinder would destroy the court’s jurisdiction, then the court must determine under Rule 19(b) whether to press forward without the person or to dismiss the litigation.” *HS Res.*, 327 F.3d at 439 & n.10 (citing *Pulitzer–Polster*, 784 F.2d at 1309). “Factors to consider under Rule 19(b) include: ‘(1) prejudice to an absent party or others in the lawsuit from a judgment; (2) whether the shaping of relief can lessen prejudice to absent parties; (3) whether adequate relief can be given without participation of the party; and (4) whether the plaintiff has another effective forum if the suit is dismissed.’” *Id.* at 439 & n. 11 (quoting *Cornhill Ins. PLC v. Valsamis, Inc.*, 106 F.3d 80, 84 (5th Cir. 1997) (citing FED. R. CIV. P. 19(b))). “The cases make it clear that the burden is on the party moving under Rule 12(b)(7) to show the nature of the unprotected interests of the absent individuals or organizations and the possibility of injury to them or that the parties before the court will be disadvantaged by their absence.” 5C Wright & Miller, *Fed. Prac. & Proc.* § 1359 (3d ed.).

2. Analysis

In this case, the Bankruptcy Court correctly determined that Allianz and Liberty are not required parties under Rule 19(a). This declaratory judgment action concerns only the interpretation of the Primary Policy issued by Republic-Vanguard and the Excess Policy issued by James River, and the Bankruptcy Court expressly limited its declaration to the rights and obligations of the parties before it.

Liberty is an umbrella insurer that provides coverage excess of Allianz or, alternatively, excess of Republic-Vanguard and James River. James River, by contrast, is a true excess insurer that follows form only to Republic-Vanguard, sits above NPC’s SIRs and Republic-Vanguard’s policy limits, and does not drop down. Republic-Vanguard and James River do not follow form to Allianz, and neither Allianz’s nor Liberty’s policy is incorporated into or governs the policies construed in this action. No party seeks interpretation of Allianz’s or Liberty’s policies, and their

coverage positions neither create nor negate obligations under the Republic-Vanguard or James River policies, including the disputed issue of whether NPC may satisfy required SIRs through an unsecured claim under the Bankruptcy Plan. The Bankruptcy Court correctly rejected Dornemann's contention that Allianz's payment of defense costs and indemnity satisfies the SIRs, finding that the Republic-Vanguard Policy unambiguously requires payment by NPC, not by a third-party insurer. (ROA 10011).

Because no interpretation of Allianz's or Liberty's policies is sought, proceeding in their absence does not expose any party to multiple or inconsistent obligations under Rule 19(a). Appellants' reliance on decisions requiring joinder where insurers' liabilities were interdependent or contingent is therefore misplaced. *See Rhone-Poulenc, Inc. v. Int'l Ins. Co.*, 877 F. Supp. 1170 (N.D. Ill. 1995); *Shell Oil Co. v. Aetna Cas. & Sur. Co.*, 158 F.R.D. 395 (N.D. Ill. 1994); *City of Littleton, Co. v. Commercial Union Assur. Cos.*, 133 F.R.D. 159 (D. Colo. 1990). Unlike those cases, Allianz's and Liberty's obligations to defend or indemnify NPC do not turn on this Court's interpretation of the Republic-Vanguard or James River policies, and the obligations of Republic-Vanguard and James River to NPC likewise do not turn on Allianz's or Liberty's policies. Appellants' assertion that this action will result in "piecemeal litigation" does not alter the Rule 19(a) analysis. *See Canal Ins. Co. v. Xmex Transp. LLC*, 2013 WL 5740223, at *3 (W.D. Tex. Oct. 22, 2013) ("Courts have held that complete relief can be afforded in numerous types of declaratory actions concerning coverage under insurance policies in which entities not party to the particular insurance contract at issue were not joined."); 7 *Fed. Prac. & Proc.* § 1619 (3d ed.) (in action involving multiple insurers, joinder of other insurers is not required if court can enter judgment on policy without adversely affecting their interests and grant complete relief among existing parties).

Nor would joinder serve any practical purpose at this stage. Allianz issued a primary policy with no SIR and has paid its full \$1 million policy limit toward Dornemann's \$10,452,091.60 tort

judgment. (D.E. 37-1). The Liberty Policy likewise has no SIR, does not follow form to James River or Republic-Vanguard, and has been pursued separately in Florida, where the tort judgment expressly retains jurisdiction over the dispute between Dornemann and Liberty. *See id.* Liberty has already paid more than \$3 million toward the judgment without conditioning payment on exhaustion of the Republic-Vanguard or James River policies or payment of any SIRs by NPC. *Id.*

Because the Court can accord complete relief among the existing parties without impairing the interests of absent insurers or risking inconsistent obligations, Allianz and Liberty are not required parties under Rule 19(a). Accordingly, the Bankruptcy Court properly denied the motion for joinder and did not reach the Rule 19(b) indispensability inquiry.

3. Joinder of Additional Party

Dornemann recently filed a Supplemental Brief raising, for the first time, the necessity of joining Pizza Hut driver Hali OBerry, who is jointly liable with NPC for the \$10,452,091.60 tort judgment. (D.E. 33-1). Dornemann argues the Bankruptcy Court's declaration that James River had no duty to indemnify NPC or the GUC Trust with respect to her claims cannot stand because OBerry was not before the Court. Appellees respond that any argument regarding OBerry's joinder is waived because Dornemann failed to raise the issue before trial. *See* FED. R. CIV. P. 12(b)(7), 12(h)(2), 12(h)(i). Appellees further argue that joinder is unnecessary because OBerry is not an insured under the Republic-Vanguard or James River policies, has never sought coverage under either policy, is not a bankruptcy creditor, and has no obligations under the retention endorsement. Even if she were an insured, NPC—not OBerry—would remain responsible for the retentions, so her presence would not affect whether: (1) a claim liquidated and treated as a general unsecured claim under the Plan satisfies the Republic-Vanguard Policy's SIRs, or (2) James River's obligations are triggered before exhaustion of the Republic-Vanguard Policy.

The Court finds no merit to Dornemann’s assertion that she “waived nothing” by failing to seek joinder of OBerry until after trial, judgment, and the close of appellate briefing. A Rule 12(b)(7) defense must be timely asserted, and although such a defense may be raised as late as trial, it must be heard and decided before trial unless the court orders otherwise. FED. R. CIV. P. 12(h)(2), 12(i). This rule is applicable in adversary proceedings. FED. R. BANKR. P. 7012. Although there was no tort judgment at the time, Dornemann had already sued NPC and OBerry before the consolidated trial in this case and knew that indemnity under the Republic-Vanguard and James River policies was squarely before the Bankruptcy Court. Dornemann cannot assert a forfeited Rule 12(b)(7) defense after an adverse judgment when she failed to raise the issue while it was properly before the Bankruptcy Court. Her failure to raise OBerry’s joinder until after trial, despite full awareness of the coverage issues being litigated, renders the argument untimely and therefore waived. *See, e.g., In Re Hankerson*, 133 B.R. 711, 713 n.1 (Bankr. E.D. Pa. 1991) (“[T]he failure of the Defendants to raise the defense that the Trustee is an indispensable party constitutes a waiver of this issue.”), *rev’d on other grounds, sub nom. Hankerson v. United States Dept. of Educ.*, 138 B.R. 473 (Bankr. E.D. Pa. 1992); *In re Parker*, 80 B.R. 729, 732–33 (Bankr. E.D. Pa. 1987) (“Bankruptcy Rule 7012(b) and Federal Rule of Civil Procedure 12(h)(2) require that such a defense must be made either in pleadings or at trial. Failure to raise it in either of those places, and not raising it until post-trial briefing, constitutes, in our view, a waiver of the indispensable party defense.”).

C. Appeal Issue 3: Choice of Law

The Court next considers whether the Bankruptcy Court erred in applying Texas law after concluding that there is no substantive difference between Kansas and Texas law for purposes of resolving the coverage disputes. Neither the Republic-Vanguard Policy nor the James River Policy contains a governing law section. Roe’s trial brief before the Bankruptcy Court initially stated that

“[t]he outcome of this dispute will not change whether the Court applies the law of either Kansas, Texas (forum), or Florida (location of accident).” (ROA 354). Roe now joins Dornemann’s position that Kansas law applies because the Policies were both issued in Kansas. Appellees maintain that the Court need not decide this issue because the states’ laws do not conflict on the relevant issues.

A federal court sitting in diversity applies the choice-of-law rules of the forum state. *Int’l Interests, L.P. v. Hardy*, 448 F.3d 303, 306 (5th Cir. 2006). Where the insured is not a resident or citizen of Texas, courts use the “most significant relationship” test. *See Maxus Exploration Co. v. Moran Brothers, Inc.*, 817 S.W.2d 50, 53 (Tex. 1991). If there is no conflict between the relevant states’ laws, no choice-of-law analysis is required, and the court may simply apply the law of the forum. *Nat’l Union Fire Ins. v. CNA Ins. Cos.*, 28 F.3d 29, 32, n.3 (5th Cir. 1994); *W.R. Grace & Co. v. Continental Cas. Co.*, 896 F.2d 865, 874 (5th Cir. 1990).

The Bankruptcy Court found that a choice-of-law analysis was unnecessary because the substantive laws of each state did not conflict, and the outcome would be the same under Texas and Kansas law. (ROA 9999). This Court agrees. Texas and Kansas both apply the same settled principles of insurance contract interpretation: (1) Insurance policies, like other contracts, are interpreted according to their plain meaning. *Puckett v. U.S. Fire Ins. Co.*, 678 S.W.2d 936, 938 (Tex. 1984); *Marshall v. Kansas Med. Mut. Ins.*, 73 P.3d 120, 130 (Kan. 2003). (2) Insurance policies must be read as a whole, giving effect to all provisions together. *Provident Life and Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003); *Am. Fam. Mut. Ins. Co. v. Wilkins*, 179 P.3d 1104, 1109 (Kan. 2008). (3) Courts must give insurance policies a practical and reasonable construction. *Plantation Pipe Line Co. v. Highlands Ins. Co.*, 444 S.W.3d 307, 311 (Tex. App.—Eastland 2014, no pet.); *Liggatt v. Emps. Mut. Cas. Co.*, 46 P.3d 1120, 1125 (Kan. 2002). (4) Insurance policies must be construed to give effect to the intention of the parties as

expressed in the contract. *R&P Enters. v. LaGuarta, Gavrel & Kirk, Inc.*, 596 S.W.2d 517, 518 (Tex. 1980); *Hall v. Shelter Mut. Ins. Co.*, 253 P.3d 377, 380 (Kan. App. 2011). (5) If a policy term is ambiguous, the ambiguity is construed against the insurer and in favor of the insured. *Providence Washington Ins. Co. v. Proffitt*, 239 S.W.2d 379, 381 (Tex. 1951); *Narron v. Cincinnati Ins. Co.*, 97 P.3d 1042, 1047 (Kan. 2004). (6) If the language is unambiguous, courts enforce it as written as a matter of law and do not engage in construction. *Texas Farmers Ins. Co. v. Gerdes*, 880 S.W.2d 215, 217–18 (Tex. App.—Ft. Worth 1994); *Sheldon v. KPERS*, 189 P.3d 554, 561 (Kan. App. 2008).

Appellants argue that Texas and Kansas law are substantively different because, under Kansas law, ambiguity is assessed based not on what the insurer intended the language to mean, but on what a “reasonably prudent insured” would understand the language to mean. *Assoc. Wholesale Grocers, Inc. v. Americold Corp.*, 934 P.2d 65, 78 (Kan. 1997); *Farm Bureau Mut. Ins. Co. v. Winters*, 806 P.2d 993, 996 (Kan. 1991). This is known as the “doctrine of reasonable expectations,” which Texas does not adopt. *Cf. Assoc. Wholesale Grocers*, 934 P.2d at 78; *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 140, n.8 (Tex. 1994). As the Bankruptcy Court correctly observed, however, Kansas courts have refused to apply this doctrine when an insurance contract is unambiguous. (ROA 10014 (citing *Liggatt*, 46 P.3d at 1127 (“Unless there is a finding that an insurance policy is ambiguous, the reasonable expectations doctrine does not permit the court to reform the unambiguous meaning of the contract.”))). “And here, the plain language [of the Republic-Vanguard Policy] is plain and unambiguous.” (ROA 10014). *See also id.* (finding the text of the James River Policy to be similarly clear and unambiguous); Part IV.D, *infra*. Accordingly, this distinction between Texas and Kansas law is immaterial and does not affect the outcome of this case.

D. Appeal Issue 4: Interpretation of “Actual Payment”

The Court next considers whether the Bankruptcy Court erred in holding that the term “actual payment” in the SIR and Corridor SIR endorsements is unambiguous and requires cash payment by the insured. Appellants contend that the phrase “actual payment” is ambiguous and that, if Republic-Vanguard intended to restrict the term to payment in cash, it could have stated so expressly. They argue that Republic-Vanguard’s failure to do so requires the provision to be construed in favor of coverage and against Republic-Vanguard and James River. Appellees counter that the term is unambiguous and that the Bankruptcy Court did not conclude that payment could be satisfied only in cash.

The relevant Policy language provides that Republic-Vanguard has no obligation until “You (NPC) have made *actual payment* of all damages, expenses, costs, and benefits because of ‘bodily injury’ or ‘property damage’ to which this insurance applies until you have made *payment of the full amount* of the Self-Insured Retention and ‘Corridor Self-Insured Retention’.” (ROA 69–70 (emphasis added)).

The Bankruptcy Court found this language to be “plain and unambiguous.” (ROA 10014). Because the Policy does not define the term “actual,” the Bankruptcy Court turned to Merriam-Webster to determine its plain meaning: “existing in fact or reality . . . and not false or apparent.” (ROA 10004–10005). The Court further explained, “The adjective, actual, modifies the noun, payment, so the payment must be, in fact, an actual payment of the full amount.” (ROA 10005). Contrary to Appellants’ assertion, the Bankruptcy Court did not hold that the payment had to be in cash. Instead, it explained that the Policy “does not specify the means of payment, so *actual payment could come in the form of cash or, for example, a deferred note under a chapter 11 plan*. But the requirement to actually pay the full amount is unambiguous.” *Id.* (emphasis added). *See*

also (ROA 10008 (citing *Pak-Mor*'s holding "that the form of an actual payment can vary, but that the requirement to pay the actual SIR when required under the policy, cannot change"))).

Courts across jurisdictions have repeatedly held that similar language requiring "actual payment" is not ambiguous and must be enforced according to its plain, ordinary meaning. *See, e.g., Pak-Mor Mfg. Co. v. Royal Surplus Lines Ins. Co.*, 2005 WL 3487723, at *2 (W.D. Tex. Nov. 3, 2005) (policy requiring that insured "make[] actual payment of the 'Retained Limit'" was "clear as daylight" and "totally unambiguous"); *Great American Ins. Co. v. Bally Total Fitness Holding Corp.*, 2010 WL 2542191, *5 (N.D. Ill. 2010) (excess policy language defining method of exhaustion as "actual payment by the 'insurers of the Underlying Policies'" was "not ambiguous regarding the manner in which the underlying insurance policies must be exhausted"); *Comerica Inc. v. Zurich Am. Ins. Co.*, 498 F. Supp. 2d 1019, 1021 (E.D. Mich. 2007) ("[T]he plain language of the excess policy . . . requires exhaustion of the primary insurance's liability limits by actual payment of losses by the primary insurer before the excess policy is triggered."); *Avalon Health Care, LLC v. Trustmark Ins. Co.*, 471 F. Supp. 2d 869, 872 (M.D. Tenn. 2007) (citing *Sizemore v. E.T. Barwick Indus., Inc.*, 465 S.W.2d 873, 231 (Tenn. 1971) (noting that "the word 'payment' has a well defined meaning in the law" and requires the delivery of money or its equivalent from the person from whom it is due to the person to whom it is due); *Religious Employees Assoc., Inc. v. Pilot Life Ins. Co.*, 746 F.2d 1478 (6th Cir. 1984) (upholding dismissal of action alleging breach of stop loss contract requiring reimbursement based upon "actual payment" of benefits because that term was not ambiguous)); *Forecast Homes, Inc. v. Steadfast Ins. Co.*, 181 Cal. App. 4th 1466, 1472 (2010) (policy language stating that "it is a condition precedent to our liability that you make actual payment of all damages and defense costs for each occurrence or offense, until you have paid self-insured retention amounts" was not ambiguous). *Cf. Chartis Specialty Ins. Co. v. Queen*

Anne HS, LLC, 867 F. Supp. 2d 1111, 1121 (W.D. Wash. 2012) (noting that contract “required ‘actual payment,’ a term whose ordinary meaning encompasses payment by note”).

This Court agrees with these decisions and with the Bankruptcy Court’s holding that the Policy’s requirement that NPC make “actual payment . . . of the full amount” of the SIR is unambiguous. The fact that the Policy fails to specify the precise means of payment does not create ambiguity.

E. Appeal Issue 5: Effect of Bankruptcy Treatment of Claims on SIR Exhaustion

The Court must next consider whether proofs of claim or bankruptcy plan treatment as unsecured claims satisfy the Republic-Vanguard Policy’s requirement that NPC make “actual payment . . . of the full amount” of the SIR and Corridor SIR. Appellants contend that allowance of the tort claims as general unsecured claims in the Chapter 11 case is the functional equivalent of payment of the SIRs. Republic-Vanguard and James River counter that the Republic-Vanguard Policy unambiguously requires payment in full as a condition precedent to coverage, which is not satisfied by a mere allowance of a claim.

The Court has not identified a Fifth Circuit decision squarely addressing the effect of bankruptcy on an SIR requirement; however, the Fifth Circuit, applying Texas law, has held that where an excess policy requires “actual payment” of the “full amount” or “all” underlying insurance, a settlement for less than the underlying limits does not trigger excess coverage. *Martin Res. Mgmt. Corp. v. AXIS Ins. Co.*, 803 F.3d 766, 769–70 (5th Cir. 2015) (“The AXIS policy requires ‘actual payment’ of ‘all applicable Underlying Insurance.’ . . . The word ‘all’ makes clear that, under the AXIS policy, a settlement does not exhaust the Zurich policy when it is for less than the limit of liability.”); *Citigroup Inc. v. Fed. Ins. Co.*, 649 F.3d 367, 372 (5th Cir. 2011) (applying Texas law and interpreting “full amount” to mean that a below-limits settlement does not trigger excess coverage). See also *Great Am. Ins. Co. v. Bally Total Fitness Holding Corp.*,

2010 WL 2542191, at *3 (N.D. Ill. 2010) (rejecting argument that below-limits settlements exhausted underlying coverage and holding that upper-layer policies were not triggered until the underlying carriers made “actual payment” of their full limits).

District and bankruptcy courts within the Fifth Circuit have applied those same principles in the bankruptcy context, consistently enforcing SIR provisions as written and holding that excess coverage is not triggered unless and until the insured actually exhausts the retention, notwithstanding the insured’s insolvency. *See, e.g., Mt. Hawley Ins. Co. v. Hampton*, 2023 WL 6725735, at *3 (S.D. Tex. Oct. 16, 2023) (insurer had no obligation under business auto insurance policy despite insured’s bankruptcy, where “[t]he plain language of the Policy Endorsements makes clear that the Policy limits are in excess of the sum of the two retention amounts, and that the Policy limits are not due unless and until the insured ‘first pays’ the damages amount”); *Assoc. Elec. & Gas Ins. Servs.*, 2005 WL 3068787 at *11 (because the insured was insolvent and could not satisfy its SIR, excess policy was not triggered and excess insurer had no obligation to pay any judgment); *In re TIC United Corp.*, 2005 WL 3047782, at *3 (N.D. Tex. Aug. 9, 2005) (despite bankruptcy, debtor trucking company was responsible for \$1 million SIR per accident before insurer would be required to make payments, and insurer was entitled to reimbursement for defense and indemnity costs within the SIR limits it fronted for the debtor); *In re Tailored Brands, Inc.*, 2021 WL 2021472, at *5 (Bankr. S.D. Tex. May 20, 2021) (because debtor was required to exhaust \$500,000 SIR before coverage attached, it was effectively uninsured for the first \$500,000 of loss in employment discrimination lawsuit); *In re CJ Holding Co.*, 2018 WL 3965225, at *2–*3 (Bankr. S.D. Tex. 2018) (debtor was required to pay \$5 million SIR before any proceeds of excess insurance policy were available). *See also Laster v. Am. Nat. Fire Ins. Co.*, 775 F. Supp. 985, 995 (N.D. Tex. 1991), *aff’d*, 966 F.2d 676 (5th Cir. 1992), (“Insolvency of the primary insurer does not

impose on the excess insurer an obligation to defend if it does not otherwise have such an obligation under the policy.”).

Like the Bankruptcy Court, this Court finds *Pak-Mor* particularly persuasive. There, the insurer argued that the policy required the insured to satisfy the full amount of the SIR from its own assets before any coverage obligation could arise, while the insured contended that the retention could be “exhausted” in bankruptcy through the allowance of unsecured claims and confirmation of a Chapter 11 plan. *Pak-Mor*, 2005 WL 3487723 at *6, n.43. The court rejected that argument, explaining that courts may not “judicially compel[] an insurer to pay . . . contrary to contractual obligations” or “hold [it] to promises [it] never made and never received payment for.” *Id.* at *3. The court made clear that, although Pak-Mor could pay the retained limit in any traditional form it chose—such as by cash, check, money order, credit card, or credible, non-dischargeable promissory note—the SIR could not be satisfied by less than the full \$100,000. *Id.* at *6–*7. The entire retained limit had to be paid, or credibly obligated to be paid, in full. *Id.*⁴

Citing *Pak-Mor*, one court has recognized that “[t]he effect of self-insured retention requirements like the one at issue here is that when an insured goes bankrupt, its creditors are out of luck because the insurer is relieved of its obligation to provide coverage due to the insured’s inability to pay the self-insured retention.” *Ruiz v. Power Home Solar, LLC*, 2025 WL 3777203, at *6 (E.D. Tenn. Feb. 14, 2025), *motion to certify appeal granted*, 2025 WL 3777204 (E.D. Tenn. Mar. 20, 2025). “Displeased with this result, several state legislatures have mandated that insurers insert ‘bankruptcy clauses’ into their policies designed to ‘negate the retained limit requirements in the bankruptcy context and thereby keep insurers on the hook when the insureds go bankrupt.’” *Id.* (quoting *Pak-Mor* at *20). But no such statute exists in Texas or Kansas. So while Appellants

4. The court further noted that “if Pak-Mor seeks to pay using a non-traditional method of payment, it might have to obtain the payee’s consent.” *Id.* at *6, n.49. However, “Pak-Mor does have to give \$100,000 in value,” and “the payment [must be] worth the full amount.” *Id.*

insist that “[i]t would affront Kansas public policy to enforce an SIR as an absolute condition precedent to coverage” in the bankruptcy context (D.E. 15 at 61), they “cannot create a direct link between the public policy of [Texas or Kansas] and requiring [Appellees] to provide coverage like courts applying the laws of other states have been able to do.” *See Ruiz*, 2025 WL 3777203 at *6 (citing *In re Vanderveer Estates Holding, LLC*, 328 B.R. 18, 24–25 (Bankr. E.D.N.Y. 2005) (Illinois statute requiring insurance policies to contain a bankruptcy clause implemented the public policy “that injured parties shall be compensated whether or not a bankrupt debtor pays its self-insured retention”); *In re Fed. Press Co.*, 104 B.R. 56, 63 (Bankr. N.D. Ind. 1989) (reaching the same conclusion applying Indiana statute)).

Appellants argue that, although no statute requires such a provision, the Republic–Vanguard Policy contains a “bankruptcy savings clause” that should be enforced. Appellants rely on a bankruptcy clause contained in the Policy’s Business Auto Coverage Form, which provides that “[b]ankruptcy or insolvency of the ‘insured’ or the ‘insured’s’ estate will not relieve us of any obligations under this Coverage Form.” (ROA 81). Republic-Vanguard acknowledges the clause but explains that it applies only to obligations arising under the Business Auto Coverage Form once coverage is triggered; because that coverage is excess of the applicable retentions governed by the SIR Endorsement, the clause preserves Republic-Vanguard’s obligations under the excess coverage but does not eliminate the requirement that the SIRs be satisfied before coverage begins. Moreover, the bankruptcy clause contained in the SIR Endorsement—which expressly modifies the Business Auto Coverage Form—does not state that bankruptcy relieves NPC of its obligation to satisfy the SIR, nor does it provide that Republic-Vanguard’s obligations arise in the absence of such satisfaction. To the contrary, the clause provides: “*We will have no obligation under any circumstances to assume or satisfy your obligation for the actual payment of damages, expenses, costs, and benefits, until the Self-Insured Retention and ‘Corridor Self-Insured Retention’ have*

been exhausted. Our obligation to pay damages, expenses, costs, or benefits under this policy *will not be affected, modified or changed in the event of your bankruptcy.*” (ROA 70 (emphasis added)). *See Pak-Mor*, 2005 WL 3487723 at *4–*5 (rejecting insured’s argument that the “policy’s bankruptcy clause negates the retained limit requirement in the bankruptcy context” where clause provided that “Bankruptcy, insolvency or any other inability of the insured or of the insured’s estate or any other insured to pay the ‘Retained Limit’ will not increase or otherwise change our obligations under this Coverage Part and our obligations shall continue to apply only in excess of the ‘Retained Limit’”).

The Court recognizes that other jurisdictions have held that “the failure of a bankrupt insured to fund a self-insured retention will not excuse the insurer’s performance under the insurance policy.” *In re FF Acquisition Corp.*, 2010 WL 1027405, at *1 (N.D. Miss. Bankr. Mar. 18, 2020) (collecting cases); *accord Sturgill v. Beach at Mason Ltd. P’ship*, 2015 WL 6163787, at *2 (S.D. Ohio Oct. 20, 2015) (collecting cases). However, like the Bankruptcy Court, this Court “respectfully disagrees with *Sturgill* because it involves a court creating a remedy that’s not expressly found under the law or the terms of the policy.” (ROA 10013). Moreover, *Sturgill* involved a bankruptcy clause providing that the insured’s bankruptcy would not *relieve* the insurer of its policy obligations, a provision materially different from the Policy at issue here. *See Sturgill*, 2015 WL 6163787 at *2. Other cases cited by Appellants likewise rest on state statutes or public-policy considerations not present in this case. *See Rosciti v. Ins. Co. of Pennsylvania*, 659 F.3d 92, 99 (1st Cir. 2011) (holding that enforcing SIR in light of insured’s bankruptcy would violate Rhode Island public policy, while noting that “[i]f, as in *Pak–Mor*, the language of the policy was the only factor controlling the outcome of this case, we would affirm the district court’s]” holding that insolvent insurer must exhaust SIR before coverage attached); *In re FF Acquisition Corp.*, 2010 WL 1027405 at *1 (relying on *Admiral Ins. Co. v. Grace Indus., Inc.*, 409 B.R. 275, 282

(E.D.N.Y. 2009) (“[B]ecause the bankruptcy clause must be given full force and effect as a matter of state insurance law . . . the policy’s SIR endorsement cannot be construed under any theory as precluding Grace from coverage if it cannot fund the SIR as contractually required.”)); *In re Keck, Mahin & Cate*, 241 B.R. 583, 597 (Bankr. N.D. Ill. 1999) (SIR obligations could be satisfied through bankruptcy plan treatment based on policy’s express bankruptcy clause and Illinois statute requiring insurers to remain liable notwithstanding insured’s insolvency).

Here, as in *Pak-Mor*, “this Court believes [Appellants] should get the compensation they deserve.” *See Pak-Mor*, 2005 WL 3487723 at *4. But “equity prevents it from forcing [Republic-Vanguard and James River] to pay [Appellants] in this instance.” *See id.* That does not mean, however, that Appellants are left without any remedy. Because NPC agreed to the allowance of a general unsecured claim, Appellants have the same relief as other holders of unliquidated or contingent claims through judicial liquidation of their claims. *See In re Tailored Brands*, 2021 WL 2021472 at *5.

E. Appeal Issue 6: Coverage Consequences for Republic-Vanguard and James River

Finally, the Court considers whether the Bankruptcy Court erred in concluding that: (1) the Republic-Vanguard SIRs and limits were not exhausted, and therefore (2) James River has no duty to defend or indemnify NPC and/or the GUC Trust with respect to Appellants’ claims.

1. Republic-Vanguard’s Obligations

NPC is subject to three separate retentions under the Republic-Vanguard Policy: a \$1 million SIR for the Roe claim, a \$1 million SIR for the Dornemann claim, and a \$1 million Corridor SIR for the 2017–2018 policy period. The Republic-Vanguard Policy attaches only after NPC makes “actual payment” of these amounts. The Bankruptcy Court held—and this Court agrees—that, in theory, NPC could satisfy its SIR obligation either through cash or through a credible, non-dischargeable deferred promissory note for the full amount of the SIRs. But that is not what the

Plan provides. Roe’s counsel acknowledged that any distribution on Appellants’ unsecured claims would be “pennies on the dollar . . . [i]t’s not 100 percent.” (ROA 9923). (*See also* ROA 9997–9998 (“The GUC trustee estimates that holders of allowed general unsecured claims will receive distributions of between zero to 2 percent of the value of their claims under the plan.”)). Dornemann’s counsel likewise conceded that NPC is “not going to give a promissory note.” (ROA 9940).

Just as a below-limits settlement does not constitute “actual payment” or payment of the “full amount” necessary to trigger excess coverage, the allowance of Appellants’ claims under the Bankruptcy Plan—payable at mere pennies on the dollar—cannot satisfy the Republic-Vanguard Policy’s unambiguous requirement that NPC make “actual payment . . . of the full amount” of the SIR and Corridor SIR. Unless and until NPC makes actual payment of the full amount of the SIRs, Republic-Vanguard has no obligations under the Policy.

2. James River’s Obligations

Appellants argue that the James River Policy does not condition coverage on payment of the SIRs and that the Bankruptcy Court ignored policy language imposing an indemnity obligation independent of the Republic-Vanguard Policy and associated SIRs. In support of this argument, Appellants rely on the following Maintenance Clause:

1) Maintenance of Underlying Insurance(s):

You (NPC) will maintain the “underlying insurance(s)” in full force and effect during the term of this policy, and to inform us within 30 days of any replacement or material change to that “underlying insurance(s)” by the same or any other company.

If you do not maintain the “underlying insurance(s)” in full force and effect or fail to meet all conditions, terms and warranties of such “underlying insurance(s)”, this policy will apply as if those policies were available and collectible.

Your failure to comply with the foregoing shall not invalidate this policy, but in the event of such failure, we shall be liable under this policy only to the extent that we would have been liable if you had complied.

For the purposes of this policy, if any “underlying insurance(s)” is not available or collectible because of:

- a. The bankruptcy or insolvency of the underlying insurer(s) providing such “underlying insurance(s)”; or
- b. The inability or failure for any other reason of such underlying insurer(s) to comply with any of the obligations of its policy;

then this policy shall apply (and amounts payable hereunder shall be determined) as if such “underlying insurance(s)” were available and collectible.

(ROA 220–221).

1. “[U]nderlying Insurance(s)” – means:

The policy or policies or self insurance listed in the Schedule of Underlying Insurance forming a part of this policy, any replacements or renewals thereof, provided that such replacement or renewal policy(ies) provide coverage equivalent to and afford limits of insurance equal to or greater than the policy(ies) being renewed or replaced.

a) Policies purchased or issued for newly acquired or newly formed organizations shall not be more restrictive than any of the policies included in the Schedule of Underlying Insurance.

b) The limits of the policies included in the Schedule of Underlying Insurance shall be deemed to be applicable regardless of

- I. Any defense which the underlying insurer may assert; or
- II. The insured’s failure to comply with any condition of any such policy; or
- III. The insolvency of the underlying insurer.

(ROA 220).

In construing the Maintenance Clause, the Bankruptcy Court correctly held that the James River Policy does not drop down or attach unless and until the underlying Republic-Vanguard Policy is exhausted in accordance with its terms. (ROA 10017–10019 (citing *Royal Surplus Lines Ins. Co. v. Delta Health Grp., Inc.*, 2006 WL 167565, at *4, *7 (N.D. Fla. Jan. 23, 2006), *aff’d*, 243 F. App’x 551 (11th Cir. 2007) (holding that identical maintenance clause precluded drop-down coverage where insured failed to satisfy conditions of underlying insurance and stating, “Per the explicit terms” of the maintenance clause, “the fact that [the insured] cannot pay the SIR is of no relevance with respect to [the excess insurer’s] duties”); *Jin Ming Chen v. Ins. Co. of the State*

of Penn., 163 N.E.3d 447, 451–53 (N.Y. 2020) (holding that maintenance clause and bankruptcy provisions prevented drop-down coverage where insured failed to maintain required underlying limits and that excess insurer’s obligations were unaffected by insured’s or underlying insurer’s inability to pay); *Textron, Inc. v. Century Indem. Co.*, 2005 WL 1791698, at *2, *5 (R.I. Super. Ct. July 27, 2005) (umbrella carrier’s liability did not drop down after insured permitted underlying coverage to lapse, where maintenance clause provided that, “[i]n the event of failure by the insured so to maintain [the underlying policy(ies)] or to meet all conditions and warranties subsequent to loss under such policy(ies), the insurance afforded by this policy shall apply in the same manner it would have applied had such policy(ies) been so maintained in force”).

The James River Policy expressly provides that, if NPC fails to maintain the underlying insurance or to satisfy its conditions, the excess coverage applies *as if the underlying insurance were available and collectible*, thereby treating the Republic-Vanguard Policy as existing and in force, notwithstanding any payment issues below it. NPC’s failure to fund the SIRs under the Republic-Vanguard Policy does not trigger or accelerate James River’s coverage obligations, and to interpret the Maintenance Clause to allow coverage despite such failure would reward NPC for breaching its obligations. *See Royal Surplus*, 2006 WL 167565 at *5. Nor does Republic-Vanguard’s lack of payment constitute a failure to comply with its policy obligations, as those obligations were never triggered in the absence of satisfaction of the SIRs. NPC’s bankruptcy does not alter this analysis because the underlying insurer—Republic-Vanguard—is not insolvent and has not failed to perform any obligation under its policy. Accordingly, the James River Policy remains excess to the Republic-Vanguard Policy, and James River owes no duty to defend or indemnify NPC or the GUC Trust with respect to Appellants’ claims until the Republic-Vanguard Policy is exhausted.

V. CONCLUSION

For the foregoing reasons, the Court hereby ORDERS that the decision of the Bankruptcy Court is AFFIRMED.

SO ORDERED March 2, 2026, at McAllen, Texas.

A handwritten signature in black ink, reading "Randy Crane", written over a horizontal line.

Randy Crane
Chief United States District Judge