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SUPREME COURT OF TEXAS
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NO. 23-0447

IN THE

SUPREME COURT OF TEXAS

TEXAS WINDSTORM INSURANCE ASSOCIATION,

Petitioner,

v.

STEPHEN PRUSKI,

Respondent.

On Petition for Review from the Thirteenth District Court of Appeals

Corpus Christi - Edinburg, Texas

Cause No. 13-21-00167-CV

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF PETITIONER TEXAS WINDSTORM INSURANCE ASSOCIATION

Jeffrey Raizner
State Bar No. 00784806

RAIZNER SLANIA LLP
2402 Dunlavy Street
Houston, Texas 77006
Telephone: (713) 554-9099
Facsimile: (713) 554-9098
efile@raiznerlaw.com

Table of Contents

Index of Authorities

Cases

Statutes

Other Authorities

Treatises

Statement of Interest of United Policyholders

Effectuating the purpose of insurance and interpreting insurance contracts, laws, and regulations requires special judicial handling. United Policyholders ("UP") respectfully seeks to assist this Court in fulfilling this important role. UP is a non-profit, tax-exempt, charitable organization founded in 1991 that provides valuable information and assistance to the public concerning insurers' duties and policyholders' rights. UP monitors legal developments in the insurance marketplace and serves as a voice for policyholders in legislative and regulatory forums. UP helps preserve the integrity of the insurance system by educating consumers and advocating for fairness in policy sales and claim handling. Grants, donations, and volunteers support the organization's work. UP does not accept funding from insurance companies.

UP assists Texas residents and businesses through three programs: *Roadmap to Recovery*™ (disaster recovery and claim help), *Roadmap to Preparedness* (disaster preparedness through insurance education), and *Advocacy and Action* (judicial, regulatory and legislative engagements to uphold the reasonable expectations of insureds). UP hosts a library of

informational publications and videos related to personal and commercial insurance products, coverage, and the claims process at www.uphelp.org. UP has provided resource libraries and educational programs for Texas policyholders following local disasters such as Hurricane Harvey, the Memorial Day Flood of 2015, and the 2011 Central Texas Wildfires.

UP communicates with the Texas Department of Insurance on a regular basis at the tri-annual meetings of the National Association of Insurance Commissioners where UP's Executive Director Amy Bach, Esq. serves as an official consumer representative. United Policyholders also works with the Texas Office of Public Insurance Counsel on consumer initiatives.

In furtherance of its mission, UP cautiously chooses cases and only appears as *amicus curiae* in courts nationwide to advance the policyholder's perspective on insurance cases likely to have widespread impact. Information and arguments in United Policyholders' briefs have been cited by the US Supreme Court, as well as by numerous state and

federal appellate courts.[1] United Policyholders has also weighed in on important insurance issues affecting homeowners and businesses in matters adjudicated before this Court, Texas appellate courts, and the United States Court of Appeals for the Fifth Circuit.[2]

UP seeks to fulfill the "classic role of *amicus curiae* by assisting in a case of the general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration." *Miller-Wohl Co., Inc. v. Commissioner of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). As commentators have stressed, an *amicus curiae* is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." *R. Stern, E. Greggman & S. Shapiro, Supreme Court Practice*, 570-71 (1986) (quoting *Ennis, Effective*

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[1] *See, e.g. Humana, Inc. v. Forsyth,* No. 97-303, 525 U.S. 299, 119 S.Ct. 710, 142 L.Ed.2d 753 (1999).

[2] *See, e.g. Hinojos v. State Farm Lloyds,* 619 S.W.3d 651 (Tex. 2021); *In re State Farm Lloyds,* 520 S.W.3d 595 (Tex. 2017); *US Metals, Inc. v. Liberty Mut. Ins. Co.,* 490 S.W.3d 20 (Tex. 2016); *In re Universal Underwriters of Tex. Ins. Co.,* 345 S.W.3d 404 (Tex. 2011); *Gilbert Texas Constr., L.P. v. Underwriters at Lloyd's London,* 327 S.W.3d 118 (Tex. 2010); *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Crocker,* 246 S.W.3d 603 (Tex. 2008); *Excess Underwriters at Lloyds, London v. Franks Casing Crew & Rental Tools, Inc.,* 246 S.W.3d 42 (Tex. 2008); *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653 (Tex. 2008); *Pendergest-Holt v. Certain Underwriters at Lloyds of London,* 600 F.3d 562 (5th Cir. 2010); *Citigroup Inc. v. Fed. Ins. Co.,* 649 F.3d 367 (5th Cir. 2011); *Advanced Env. Recycling Tech. Inc. v. Am. Int'l Specialty Lines Ins. Co.,* 399 F. App'x 869 (5th Cir. 2010); *Motiva Enters., LLC v. St. Paul Fire & Marine Ins. Co.,* 445 F.3d 381 (5th Cir. 2006).

Amicus Briefs, 33 Cath. U.L. Rev. 603, 608 (1984)). UP's interest and concern in the present case is rooted in its mission to preserve the integrity of the insurance system and to represent the broad interests of policyholders. UP seeks to assist this Court in helping preserve the rights of both policyholders and the Texas Windstorm Insurance Association ("TWIA") by preserving the finality of judgments and providing clarity in a unique area of Texas insurance law.

In this case the stakes could not be clearer, the decision of the Thirteenth Court of Appeals has the potential to upend thousands of insurance claims resolved by Texas courts since 2011. The impact of such a decision poses a real and present danger to the interests of Texas policyholders and to the stability and integrity of the Texas insurance system. While the Gulf Coast fortunately avoided a major storm this year, the risk of disrupting the ability of hundreds of thousands of TWIA policyholders to contest partially denied claims in Texas courts following a windstorm in 2024 cannot be understated with the uncertainty and chaos created by this decision.

Disclosure Pursuant to TRAP 11(c)

Pursuant to Rule 11(c) of the Texas Rules of Appellate Procedure, UP is not being paid, nor will it be paid, any fee to prepare this brief.

Introduction

The Texas Catastrophe Property Insurance Association was created by the Texas Legislature in 1971 after Hurricane Celia. In 1993, it was renamed Texas Windstorm Insurance Association (TWIA). TWIA acts as an insurer of last resort providing residential windstorm and hail coverage along the seacoast territory of Texas. Tex. Ins. Code § 2210.001. Every insurer that is engaged in the authorized business of property insurance in Texas is required by law to participate in TWIA. *Id*. at §§ 2210.006(a), 2210.051. Members are required to participate in insuring losses and contributing to the operating expenses of TWIA proportionally to their net direct premiums compared to the aggregate of all members from the prior calendar year. *Id*. at § 2210.052(a). The actual policies issued by TWIA are strictly regulated and their terms, rates, and liability limits are largely governed by statute. *Id*. at §§ 2210.201 – 2210.506. For the 2023 hurricane season TWIA has access to $4.5 billion dollars in funds backed by TWIA revenues, the Catastrophe Reserve Trust Fund, six different types and classes of securities and assessments, and additional funding in the form of reinsurance necessary to equal at least

a once-in-a-century hurricane season.[3]

In 2011, the Texas Legislature amended the provisions of the Texas Insurance Code governing TWIA Claims to include, among others, Section 2210.575(e) which presents the issue before the court today: whether Section 2210.575(e) renders a decision made by a Texas District Court judge not appointed by the MDL panel void. UP urges the court to issue an opinion consistent with petitioner TWIA's brief on the merits that it should not.[4] Not only was the Court's reasoning flawed, but the decision would have the practical impact of undermining and upending thousands of decisions made by Texas district court judges not appointed by the MDL panel since 2011. Such a decision would be incorrect legally, and it would damage the stability of the entire Texas insurance system that millions of Texans rely upon.

The case before this Court originates in a dispute concerning a condominium owned by Stephen Pruski and damaged by Hurricane Harvey in August 2017. *Pruski v. Tex. Windstorm Ins. Ass'n,* 667 S.W.3d

[3] 2023 TWIA Annual Report, Texas Windstorm Insurance Association, "2023 Hurricane Season Funding," at p. 39–40.

[4] Significantly, this is a rare instance where the relief sought by UP in its *amicus* is adverse to an individual policyholder. This underscores the broader negative implications of the decision to Texas policyholders as a whole.

460, 461 (Tex. App.–Corpus Christ-Edinburg 2023, pet. filed). Following a partial denial of his claim, Pruski notified TWIA of his intent to sue and subsequently filed suit seeking recovery for damages in the 117th District Court of Nueces County, Texas. *Id.* Pruski then filed a motion for traditional summary judgment. *Id.* The 117th District Court denied Pruski's motion. *Id.* at 462. Thereafter, Pruski filed a motion for recusal which questioned the trial court judge's impartiality. *Id.* As part of his motion for recusal, Pruski cited Section 2210.575(e) of the Texas Insurance Code. *Id.* The responsible regional administrative judge assigned a judge to consider Pruski's motion and the motion was denied. *Id.*

On March 10, 2021, TWIA filed its own motion for traditional summary judgment arguing that the damages sought were not recoverable under the TWIA policy as a matter of law. *Id.* TWIA's motion for traditional summary judgment was granted, and Pruski filed an appeal with the Thirteenth Court of Appeals. *Id.*

The Thirteenth Court issued its opinion on February 23, 2023. *See generally, Pruski,* 667 S.W.3d 460. The Court held that the trial court judge lacked authority to preside over Pruski's case because the judge

was "never appointed by the Judicial Panel on Multidistrict Litigation (MDL Panel) in accordance with § 2210.575(e) of the insurance code." *Id.*

Argument

Contrary to the Thirteenth Court of Appeal's opinion, the underlying judgment in this case is not void. The plain meaning of Section 22010.575(e) does not limit the jurisdiction of a Texas district court in an action brought against TWIA, cannot void a district court judgment, and is subject to principles of waiver established by this Court. Beyond the plain text, consideration of other factors used by this Court strongly weighs against any finding that the statute is jurisdictional.

Any defect in the procedure outlined in the statute cannot, on its own, render an underlying judgement void because it is subject to principles of implied waiver. Pruski's conduct in the underlying litigation amounted to waiver and the district court did not abuse its discretion in denying Pruski's motion for recusal.

1. Texas Insurance Code Section 2210.575(e) Is Not Jurisdictional.

Section 2210.575(e) of the Texas Insurance Code reads in its entirety:

> If the claimant is not satisfied after completion of alternative dispute resolution, or if alternative dispute resolution is not completed before the expiration of the 60-day period described by Subsection (d) or any extension under that subsection, the

> claimant may bring an action against the association in a district court in the county in which the loss that is the subject of the coverage denial occurred. An action brought under this subsection shall be presided over by a judge appointed by the judicial panel on multidistrict litigation designated under Section 74.161, Government Code. A judge appointed under this section must be an active judge, as defined by Section 74.041, Government Code, who is a resident of the county in which the loss that is the basis of the disputed denied coverage occurred or of a first tier coastal county or a second tier coastal county adjacent to the county in which that loss occurred.

Tex. Ins. Code § 2210.575(e). However, the matter before the Court turns entirely on the sentence: "[a]n action brought under this subsection shall be presided over by a judge appointed by the judicial panel on multidistrict litigation designated under Section 74.161, Government Code." *Id.*

Notably, the Thirteenth Court of Appeals used the terms "judicial authority" and "jurisdiction" interchangeably in its opinion. *See Pruski,* 667 S.W.3d at 465–67. Yet, in its reasoning, the Court cited authority from this Court that explicitly addressed jurisdiction. *See id.* at 466 (citing *S.C. v. M.B.,* 650 S.W.3d 428, 436 (Tex. 2022) on a statute's effect on a court's jurisdiction); *id*. at 467 (citing *In re D.S.*, 602 S.W.3d 504, 512 (Tex. 2020) that a judgment is void when a court lacks jurisdiction); *id*. (citing *Dubai Petroleum*

Co. v. Kazi, 12 S.W.3d 71, 74–75 (Tex. 2000) on subject matter jurisdiction). As a result, this brief will address the issue before the Court as concerning the subject matter jurisdiction of the district court for the sake of consistency with the lower court's opinion case and ease of analysis.[5]

The question before the Court is one "of statutory construction, which is a legal one" for this Court to review de novo. *Energen Res. Corp. v. Wallace,* 642 S.W.3d 502, 509 (Tex. 2022). The goal of statutory interpretation "is to effectuate the Legislature's expressed intent." *In re Allen,* 366 S.W.3d 696, 703 (Tex. 2012).

The starting point for determining the Legislature's intent is the plain meaning of the statute's language "'without resort to rules of construction or extrinsic aids.'" *Energen Res. Corp.,* 642 S.W.3d at 502 (citing *Crosstex Energy Servs., L.P. v. Pro Plus, Inc.,* 430 S.W.3d 384, 389–90 (Tex. 2014). "Only truly extraordinary circumstances showing unmistakable legislative intent should

[5] This brief takes no position on whether the terms are fully interchangeable in all cases. *See* Williams, Ryan C. (2022) "Jurisdiction as Power," University of Chicago Law Review: Vol. 89: Iss. 7, Article 2. Available at: https://chicagounbound.uchicago.edu/uclrev/vol89/iss7/2 (offering a discussion over the concept of a court's jurisdiction and power or authority as being interchangeable).

divert us from enforcing the statute as written." *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 867 (Tex. 1999). This is especially important because there is a "modern trend against exposing final judgments to attack on subject matter jurisdiction by treating statutory prerequisites as jurisdictional." *Id.* (citing *Kazi,* 12 S.W.3d at 76).

This Court set forth several factors that may be considered to determine "whether the Legislature intended a jurisdictional bar" as the Thirteenth Court of Appeals found. *Crosstex,* 430 S.W.3d at 392. In addition to the paramount concern of the "plain meaning of the statute," this Court also reasoned the Court may consider "'the presence or absence of specific consequences for noncompliance'; [] the purpose of the statute; and [] 'the consequences that result from each possible interpretation.'" *Id.* (citing *City of DeSoto v. White,* 288 S.W.3d 389, 395 (Tex. 2009)). All four factors indicate the Legislature did not intend a jurisdictional bar.

a. The Plain Text of Section 2210.575(e) Indicates it is Not Jurisdictional.

In the present case it is uniquely important for this Court to determine the plain, ordinary meaning of the statute because of this Court's precedent that "clear legislative intent" is necessary to classify a provision as jurisdictional. *Crosstex Energy Servs.,* 430 S.W.3d at 391 (Tex. 2014) (citing *City of DeSoto v. White,* 288 S.W.3d 389, 393 (Tex. 2009); *Kazi,* 12 S.W.3d at 76). "The plain meaning of the text is the best expression of legislative intent unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results." *Molinet v. Kimbrell*, 356 S.W.3d 407, 411 (Tex. 2011) (citing *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625-26 (Tex. 2008). Plain meaning in statutory interpretation is indistinguishable from ordinary meaning unless the term is defined differently by the statute. *See TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011) (reasoning statutory terms are given their ordinary meaning).

The Thirteenth Court of Appeals only briefly engaged with the plain meaning of the text. *See Pruski,* 667 S.W.3d at 464 – 65. Certainly, as pointed out by the Thirteenth Court of Appeals, the

legislature's use of the word "shall" in the statute indicates a "mandatory prescription." *Id.* at 465. However, it does not follow that a mandatory prescription is a jurisdictional bar. *See Crosstex Energy Servs.,* 430 S.W.3d at 392 (citing *In re Dept. of Family & Protective Servs.,* 273 S.W.3d 637, 642 (Tex. 2009)); *Kazi,* 12 S.W.3d at 76–77; *Helena Chem. Co. v. Wilkins,* 47 S.W.3d 486, 494 (Tex. 2001); *White,* 288 S.W.3d at 398. The Thirteenth Court of Appeals did not properly consider the plain text of the statute in light of these precedents and resultingly its analysis of the plain text is incorrect.

The plain meaning of the statute in this case does not require this Court to parse words or derive meanings. The statute in question simply does not use words which explicitly indicate jurisdiction or otherwise implicate the question of jurisdiction. "The text of the statute itself does not indicate that failure [to fulfill statutory requirements] is jurisdictional." *Crosstex Energy Servs.,* 430 S.W.3d at 392. Unlike in *Crosstex* where this Court addressed a statute that "mandates dismissal as a remedy for non-compliance," there is no suggestion of a jurisdictional bar and

certainly not "the requisite level of clarity to establish the statute as jurisdictional." *Id.* (citing Tex. Civ. Prac. & Rem Code § 150.002(e)).

As two preeminent authorities on statutory interpretation wrote on the subject of plain meaning, "[t]he principle that a matter not covered is not covered is so obvious that it seems absurd to recite it." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 93 (Thompson/West, 1st ed. 2012). "The search for what the legislature 'would have wanted' is invariably either a deception or a delusion." *Id.* at 95. In short, the plain text of Section 2210.575(e) of the Texas Insurance Code contains no words that create a jurisdictional bar. *Cf.* Tex. Ins. Code § 2210.575(e). This is plainly true where the legislature has shown that it is more than capable of using simple, plain language to indicate when statutory prerequisites amount to a jurisdictional bar. *See e.g.,* Tex. Gov't. Code § 311.034 ("Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a government entity.")

The most important aspect of statutory interpretation, the plain language of the statute, does not indicate that Section 2210.575(e) renders the underlying action void for lack of jurisdiction due to the judge of a trial court not being appointed by the MDL panel. Without the requisite clarity from the legislature necessary to establish a jurisdictional bar, the significant lack of plain language to that effect alone should be dispositive of the issue.

b. All of The Other Factors Used by This Court Indicate Section 2210.575(e) is Not Jurisdictional.

The other three factors laid out by this Court in *Crosstex* also establish that Section 2210.575(e) is a statutory requirement that is not a jurisdictional bar leading to a void judgment. *Crosstex Energy Servs.,* 430 S.W.3 at 392–93.

i. There is an Absence of Consequences for Noncompliance.

The analysis of the second factor enumerated by this Court in *Crosstex* bears a striking resemblance to the textual analysis above. The second factor is "'the presence or absence of specific consequences for noncompliance." *See Crosstex Energy Servs.,* 430 S.W.3d at 392. Section 2210.575(e) does not delineate *any* consequences for noncompliance that

are present in other statutes. Unlike in Section 311.034 of the Texas Government Code, there is no explicit language to suggest that when a non-MDL judge presides over an action against TWIA the consequence is a lack of jurisdiction. *Compare* Tex. Gov't Code § 311.034 (enumerating "jurisdictional requirements") and Tex. Ins. Code § 2210.575 (containing no use of the word jurisdictional or its derivatives). Similarly, unlike in Section 150.002(e) of the Texas Civil Practice and Remedies Code, there is no mandatory dismissal of a claim that fails to comply with any of the requirements of Section 2210.575 in an action against TWIA. *Compare* Tex. Civ. Prac. & Rem. Code § 150.002(e) (directing a failure to comply with that section "shall result in dismissal of the complaint") with Tex. Ins. Code § 2210.575 (containing no language directing dismissal either mandatory or permissive). "So, we must assume the Legislature did not intend that a dismissal be the consequence for noncompliance." *City of Desoto v. White,* 288 S.W.3d 389, 396 (Tex. 2009).

If dismissal is not a consequence, then the requirement cannot be jurisdictional because a court that lacks jurisdiction over the claim "must dismiss it." *Heckman v. Williamson Cnty.,* 369 S.W.3d 137, 151 (Tex. 2012). In this case there is no consequence at all. This does not render

the statute superfluous. Mandatory, non-jurisdictional statutory requirements grant important rights to the parties. However, as demonstrated by the case law above, they do so without limiting the court's jurisdiction over the case if the party waives or otherwise fails to exercise that right. *Cf. Helena Chem. Co.,* 47 S.W.3d at 496; *Crosstex Energy Servs.,* 430 S.W.3d at 395–96; *Kazi,* 12 S.W.3d at 76–77; *White,* 288 S.W.3d at 393.

ii. There is No Declared Purpose for Section 2210.575 and the Legislative Record Does Not Point to a Jurisdictional Bar.

The third factor to be considered is "the purpose of the statute." *Crosstex Energy Servs.,* 430 S.W.3d at 392 (citing *White,* 288 S.W.3d at 395; *Helena Chem.,* 47 S.W.3d at 495). As discussed above, the clearest indication of the Legislature's intent is the plain meaning of the statute. In this case, that is the only indication of the purpose of the statute.

The Thirteenth Court of Appeals attempted to find the purpose of the statute through examination of remarks in the Legislative record. *See Pruski,* 667 S.W.3d at 465–66. However, *Crosstex* makes clear that the purpose of the statute is determined by a declaration of purpose within the enacted code. *See Crosstex Energy Servs.,* 430 S.W.3d at 392

("Because the Legislature did not declare the statute's purpose, the third factor provides little assistance.") There is no declared purpose contained in Section 2210.575 on "Disputes Concerning Denied Coverage" nor in the entirety of Subchapter L-1 on "Claims: Settlement and Dispute Resolution." *See* Tex. Ins. Code §§ 2210.571–2210.582 (containing no statements of purpose by the Legislature).

For its part, the MDL Panel recognized in *In re Tex. Windstorm Ins. Ass'n Harvey Litig.*, 2020 Tex. LEXIS 658 (Tex. MDL July 10, 2020) that "In 2011, the 82nd Legislature amended *the* ***process*** *for bringing claims* against TWIA for the denial of coverage." *Id.* * 2 (emphasis added).[6] When the MDL panel addressed the requirement for the first time, they too found that the legislature had intended for it to be a procedural requirement that did not implicate jurisdiction. *Id.*

To the extent that the Legislative debate record is reliable or even permissible evidence of the statute's purpose, the Thirteenth Court of Appeals concluded that the section was enacted to "ensur[e] more uniformity in claims resolutions" through the use of an MDL panel judge.

[6] As of July 10, 2020, *nine years* after the promulgation of House Bill 3, the Panel "ha[d] never been called upon to apply Section 2210.575(e)" in that process to assign a presiding judge. *Id.* at * 4.

Pruski, 667 S.W.3d at 466. However, the Thirteenth Court of Appeal's subsequent conclusion that "it stands to reason that the legislature intended to limit judicial authority in TWIA Act suits" is contrary to this Court's precedent. *Id.* This Court held in *Crosstex* that the legislature may pass statutory requirements that are *not* jurisdictional or otherwise impose limits on judicial authority. *See Crosstex Energy Servs.,* 430 S.W.3d at 392–3 ("*It does not follow* that because the Legislature created this procedural bar, it also wanted to create a basis for attacking the judgment in perpetuity." (emphasis added)) Even considering the legislative record as indicative of the statute's purpose to promote efficiency, ensuring more uniformity in handling claims against TWIA does not require a jurisdictional limitation on Texas district courts.

iii. The Consequences of Finding Section 2210.575(e) Jurisdictional Render that Interpretation Absurd.

"The fourth factor–consideration of the implications of alternative interpretations–strongly suggests the requirement is non-jurisdictional." *Crosstex Energy Servs.,* 430 S.W.3d at 392.

The consequences of requiring every insured to seek the appointment of a presiding judge from the MDL before proceeding with

a lawsuit on a partially denied TWIA claim are far reaching. Under this rationale, any case adjudicated by a court of general jurisdiction without first seeking a MDL appointment "could have the judgment set aside at any time [by either party] . . . returning the parties to square one." *Crosstex Energy Servs.,* 430 S.W.3d at 392–93. "[A] judgment will never be considered final if the court lacked subject-matter jurisdiction." *Kazi,* 12 S.W.3d at 76.

A Lexis search revealed that Texas District Courts have heard over 3,850 cases involving TWIA since Section 2210.575's effective date of September 28, 2011 through November 1, 2023 (presumably more have been or will be filed during the pendency of this petition for review). During that time the Multidistrict Litigation Panel of Texas has transferred only *a single block* of 242 cases comprising related to Hurricane Harvey. *See generally, In re Tex. Windstorm Ins. Ass'n Harvey Litig.,* MDL No. 19-0472, 2020 Tex. LEXIS 658 (Tex. July 10, 2020). Conservatively, that leaves more than 3,600 cases open to perpetual collateral attack on jurisdictional grounds if the reasoning of the Thirteenth Court of Appeals is affirmed or their ruling is otherwise allowed to remain in place.

As this Court noted over 20 years ago, "'the modern direction of policy is to reduce the vulnerability of final judgments to attack on the ground that the tribunal lacked subject matter jurisdiction.'" *Kazi,* 12 S.W.3d at 76 (citing RESTATEMENT (SECOND) JUDGMENTS § 11 cmt. e, at 113 (1982). As TWIA correctly points out, every order and judgment, save the one block of cases transferred, entered since 2011 involving TWIA would be invalidated because none of the judges were appointed by the MDL Panel. Moreover, any appellate decisions since 2011 which had provided clarity on the scope and causes of action which could be brought against TWIA would be rendered moot. Thus, the consequences for finding Section 2210.575(e) jurisdictional and rendering a judgment void that did not fully comply with the subsection are severe. This interpretation, held by the Thirteenth Court of Appeals, renders a jurisdictional reading of Section 2210.575(e) an absurdity and further weighs in favor of finding the section "a mandatory, but non-jurisdictional" requirement. *Cf. Crosstex,* 430 S.W.3d at 392.

All four factors which the Court may use to determine whether a statute is jurisdictional weigh against such a finding and in favor of determining that Section 2210.575(e) is a mandatory but non-

jurisdictional requirement that is and cannot render the underlying judgment from the trial court in this case void.

It should also be noted that the Thirteenth Court of Appeals, along with its sister courts, has previously understood that the 2011 changes to Chapter 2210 of the Insurance Code added "restrictions on policyholders' remedies *and specific* ***procedural*** *requirements*." *Tex. Windstorm Ins. Ass'n v. Boys & Girls Club of the Coastal Bend, Inc*., No. 13-19-00429-CV, 2020 Tex. App. LEXIS 7845, * 6 (Tex. App.—Corpus Christi-Edinburg Sept. 24, 2020, pet. denied) (emphasis added, quoting *Tex. Windstorm Ins. Ass'n v. Jones*, 512 S.W.3d 545, 549 (Tex. App.—Houston [1st Dist.] 2016, no pet.)). Those *procedural* requirements include deadlines for the insured to give notice of intent to bring an action and deadlines for the association to require the insured to submit to dispute resolution and for the same to be completed, following which "the claimant may bring an action against [TWIA] in a district court in the county in which the loss that is the subject of the coverage denial occurred." *Id.* at ** 8-9 (citing Tex. Ins. Code §§ 2210.575(b), (e)).

In holding that Section 2210.575(e) merely imposes a mandatory statutory requirement affecting *procedural* rights of parties in actions

brought against TWIA, this Court will clarify and enforce the prior understandings of the Thirteenth Court of Appeals, its sister courts, and the MDL panel.

2. Section 2210.575(e) Is Subject to Waiver.

Because the lower court found the question was jurisdictional, it did not reach the waiver argument raised by TWIA. *See Pruski,* 667 S.W.3d at 462, 464 ("TWIA urges this Court to conclude that however mandatory the language in § 2210.575(e) appears, it is still susceptible to waiver principles and not otherwise restrictive of a trial court's authority to preside over a § 2210.575 suit.").

Rather than simply remand this case to the Thirteenth Court of Appeals, this Court should provide guidance on waiver principles clearly present in this record of this petition. Otherwise, over 3,600 cases will remain susceptible to collateral attack on the grounds that Section 2210.575(e) arguments were not waived by the parties and needlessly complicate pending TWIA Act disputes that have already been filed. As demonstrated below, the analysis necessary to establish waiver in this

case is straightforward and the Court's opinion on the matter is necessary for the final resolution of the petition before the Court.[7]

This Court has offered clear guidance on when a party has waived mandatory, non-jurisdictional statutory requirements. *Crosstex Energy Servs.,* 430 S.W.3d at 391, 393–95. "Waiver is primarily a function of intent." *Crosstex Energy Servs.,* 430 S.W.3d at 393 (citing *Jernigan v. Langley,* 111 S.W.3d 153, 156 (Tex. 2003)). Waiver may be found when a party's conduct clearly demonstrated such an intent through the surrounding facts and circumstances. *Id.* Substantial invocation of the litigation process may amount to waiver of mandatory statutory provisions under the totality-of-the-circumstances. *Id.* 394. Waiver principles apply equally to pro se litigants because "pro se litigants are not exempt from the rules of procedure." *Pena v. McDowell,* 201 S.W.3d 665, 667 (Tex. 2006) (citing *Wheeler v. Green,* 157 S.W.3d 439, 444 (Tex. 2005); *Mansfield State Bank v. Cohn,* 573 S.W.2d 181, 184–85 (Tex. 1978)).

[7] The Thirteenth Court of Appeals offered two citations to waiver principles in its opinion, *See Pruski,* 667 S.W.3d at 464 (citing *Perryman v. Spartan Tex. Six Capital Partners, Ltd.,* 546 S.W.3d 110, 131–32 (Tex. 2018) and *Tex. Dept. of Pub. Safety v. Scanio,* 159 S.W.3d 712, 714 (Tex. App. – Corpus Christi-Edinburg 2004, pet. denied)).

The standard of review for a trial court's finding of waiver is abuse of discretion. *In re Nationwide Ins. Co. of Am.,* 494 S.W.3d 708, 719 (Tex. 2016). "Under a proper abuse-of-discretion review, waiver is a question of law for the court, but we must defer to a trial court's fact findings that are supported by the evidence." *Ford Motor Co. v. Castillo,* 279 S.W.3d 656, 661 (Tex. 2009). "A trial court abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." *Id.* (citing *Joe v. Two Thirty Nine Joint Venture,* 145 S.W.3d 150, 161 (Tex. 2004).

The Thirteenth Court of Appeals noted that Pruski "served TWIA with a timely notice of intent to sue and subsequently filed suit." *Pruski,* 667 S.W.3d at 461. Pruski then filed a traditional summary judgment motion. *Id.* at 462. Only after Pruski's traditional summary judgment motion was denied did Pruski file any motion questioning the trial court judge's ability and/or authority to rule on the case. *Id.* At that point a "judge assigned by the regional administrative judge to consider [Pruski's] motion denied the motion." *Id.* (citing Tex. R. Civ. P. 18a(g)). At no point in the record did Pruski move for the appointment of a judge by the MDL panel.

Under an abuse-of-discretion review and the totality of the circumstances, the trial court did not err in denying Pruski's motion.

First, the Thirteen Court of Appeals' decision appears to take a deferential review of Pruski's motion based on his *pro se* status. *See Pruski,* 667 S.W.3d 460, 462, fn.2 (noting Pruski's citation to Section 2210.575(e) of the Texas Insurance Code and footnoting TWIA's "acknowledging" the "'[r]eal substance of Pruski's motion....'") This deference is contrary to the long-established precedents of this Court that *pro se* litigants are equally bound by the rules of procedure and established case law as represented parties.

Second, the trial court, under an abuse of discretion review, conceivably made a reasonable finding that Pruski substantially invoked the litigation process by complying with pre-suit notice, filing a lawsuit, and then, after the assignment of a non-MDL appointed judge, filing a motion for traditional summary judgment. *See Pruski,* 667 S.W.3d at 461–62.

Under the totality of the circumstances with deference to the trial court's discretion, the denial of the motion was not "so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." *Cf.*

Castillo, 279 S.W.3d at 661. Pruski waived his right to object to a non-MDL judge presiding over the case by his substantial invocation of litigation.

Prayer

United Policyholders respectfully requests that this Court grant the relief requested by Petitioner, Texas Windstorm Insurance Association, reverse the judgment of the Thirteenth Court of Appeals, affirm the judgment of the 117th District Court, and remand for entry of judgment consistent with its opinion.

/s/ Jefreyf Raizner
Jeffrey Raizner
State Bar No. 00784806

RAIZNER SLANIA LLP
2402 Dunlavy Street
Houston, Texas 77006
Telephone: (713) 554-9099
Facsimile: (713) 554-9098

efile@raiznerlaw.com

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/s/ Jeffrey Raizner
Jeffrey Raizner

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I certify that on November 17, 2023 a true and correct copy of this brief was served on the following counsel by electronic case filing or e-mail:

J. STEPHEN BARRICK
sbarrick@hicks-thomas.com

JAMES. R. OLD. JR.
jold@hicks-thomas.com

HICKS THOMAS LLP
700 Louisiana Street, Suite 2300
Houston, Texas 77002
Tel. No. (713) 547-9100
Fax. No. (713) 547-9150

Counsel for Petitioner Texas Windstorm Insurance Association

STEPHEN PRUSKI
8546 Broadway, Suite 110
Houston, Texas 78217

Respondent, Pro Se

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Jeffrey Raizner on behalf of Jeffrey Raizner
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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
James Stephen Barrick	796168	sbarrick@hicks-thomas.com	11/17/2023 9:46:14 AM	SENT
James Old	15242500	jold@hicks-thomas.com	11/17/2023 9:46:14 AM	SENT
Theresa Madden		tmadden@hicks-thomas.com	11/17/2023 9:46:14 AM	SENT
Jean Magdaleno		jmagdaleno@hicks-thomas.com	11/17/2023 9:46:14 AM	SENT
Amanda Guerrero		aguerrero@hicks-thomas.com	11/17/2023 9:46:14 AM	SENT
Stephen Pruski		stevepruski@sbcglobal.net	11/17/2023 9:46:14 AM	SENT
Jay Gross		jgross@hicks-thomas.com	11/17/2023 9:46:14 AM	SENT
Jeffrey L. Raizner		jraizner@raiznerlaw.com	11/17/2023 9:46:14 AM	SENT

Associated Case Party: Texas Windstorm Insurance Association

Name	BarNumber	Email	TimestampSubmitted	Status
Jennifer Baker		jbaker@hicks-thomas.com	11/17/2023 9:46:14 AM	SENT