NO. 05-23-00079-CV

IN THE COURT OF APPEALS
FOR THE FIFTH DISTRICT OF TEXAS

IN RE LYFT, INC.,

Relator

Original Proceeding from the County Court at Law No. 5,
Dallas County, Trial Court Cause No. CC-20-01321-E
Hon. Nicole Taylor, Presiding

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

Michelle Stratton (SBN 24085606)
Razvan Ungureanu (SBN 24085630)
SMYSER KAPLAN & VESELKA LLP
717 Texas Avenue, Suite 2800
Houston, Texas 77002
713-221-2300
713-221-2320 (fax)
mstratton@skv.com
razvan@skv.com

Counsel for Amici Curiae
Chamber of Commerce of the United States of America and American Property Casualty Insurance Association

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Rules

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It directly represents approximately 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases of concern to the nation's business community.

The American Property Casualty Insurance Association ("APCIA") is the primary national trade association for home, auto, and business insurers. For 150 years, APCIA has promoted and protected the viability of private competition for the benefit of consumers and insurers. APCIA's member companies represent nearly 50% of the U.S. property-casualty insurance market and write more than $25 billion in commercial insurance premiums in Texas. APCIA advocates for sound public policies in federal and state legislative and regulatory forums, and APCIA also files *amicus curiae* briefs in federal and state courts, on issues of importance to the insurance industry and marketplace.

This case significantly affects the interests of the Chamber's and APCIA's members. The trial court held that Relator Lyft, Inc.'s proprietary excess insurance

[1] No counsel for a party authored this brief in whole or in part, and no entity or person other than *amici curiae*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. *See* TEX. R. APP. P. 11.

policies are not confidential, permitting the plaintiffs who received Lyft's policies in discovery to disseminate the policies publicly. Like Lyft, many of the Chamber's members and thousands of other businesses operate in Texas, regularly engage in civil litigation in Texas, and have excess insurance policies that contain proprietary and trade-secret information. Many of APCIA's members issue those policies, which likewise contain the insurer's proprietary and trade-secret information. Both the Chamber's and APCIA's members thus have an interest in whether Texas courts protect the confidentiality of excess insurance policies produced in litigation.

INTRODUCTION AND BACKGROUND

The Court should grant Lyft's mandamus petition, not only because Lyft has no adequate appellate remedy if this Court does not correct the trial court's clear abuse of discretion, but also because the trial court's failure to maintain the confidentiality of Lyft's excess insurance policies will set a harmful precedent. Publicizing the proprietary and trade-secret contents of a business's excess insurance policies will cause competitive injury to both insureds and insurers. It will also invite increased litigation against insured businesses and insurers that would not have been filed but for knowledge of the business's insurance coverage. And it will make discovery of excess insurance policies within litigation more burdensome for all parties and the courts.

Like other businesses, Lyft keeps its excess insurance policies confidential because they are bespoke contracts containing proprietary information that gives Lyft a competitive advantage. Just as Texas cases instruct, Lyft produced the policies to the

plaintiffs in this case under an agreed protective order that allowed the plaintiffs to share them within this litigation and even to share them with attorneys in other, similar litigation against Lyft, so long as no one exposed the policies publicly.

But one plaintiff contended that Lyft's policies should be open to the public. He didn't counter Lyft's evidence that it guards the secrecy of the terms in its excess insurance policies because Lyft's risk-management strategy gives it a competitive edge. MR299–330. Rather, the plaintiff broadly declared that "[i]nsurance policies are not confidential, period, full stop." MR307. Nor did the plaintiff identify any legitimate interest *he* had in stripping the policies of protection; after all, he had full access to the policies as he pursued his claims. Rather, he contended that "other plaintiff's lawyers" should know "there's a lot more insurance than a million dollars … it is a huge tower." MR309–10.

The trial court summarily agreed with the plaintiff and ordered Lyft to produce its excess insurance policies in discovery with no confidentiality protections.

ARGUMENT[2]

I. Failing to protect the confidentiality of excess insurance policies produced in litigation will harm businesses across industry sectors.

The decision below doesn't merely affect Lyft, the rideshare industry, or even the broader "gig" economy (industries in which people earn income by providing on-demand work, services, or goods, often through an app or website). Left undisturbed,

[2] This brief adds all emphasis and omits internal quotation marks and citations in quoted materials unless otherwise indicated.

it will impact all sorts of "commercial and professional insureds," who "purchase excess [insurance] coverage as part of comprehensive risk management programs." Scott M. Seaman, *Excess Liability Insurance: Law and Litigation*, 32 Tort & Ins. L. J. 653, 653 (1997). The trial court's decision will also adversely affect the insurers who issue excess insurance policies.

A. Excess insurance is a common feature of business risk management.

An excess insurance policy "provides specific coverage above an underlying limit of primary insurance." Douglas R. Richmond, *Rights and Responsibilities of Excess Insurers*, 78 Denv. U. L. Rev. 29, 30 (2000). "An insured's liability insurance program generally includes a layer of primary insurance or self-insurance coverage followed by one or more layers of excess insurance." Seaman, *supra*, at 654–55. Excess insurance is designed "to protect the insured from catastrophic loss" that exceeds primary policy limits, and "[m]ost major corporate insureds now obtain multiple layers of excess insurance to cover losses potentially aggregating in the hundreds of millions of dollars." *Id.* at 656–57.

Businesses face that staggering amount of potential liability due in part to the litigation climate. In short, "civil litigation has become characterized by high jury verdicts, a 'deep pocket' mentality," and a "casino-like atmosphere." Seaman, *supra*, at 653–54; *see also* Richmond, *supra*, at 32 ("[M]any areas of tort litigation have become characterized by sizable jury verdicts and a lottery ticket mentality or atmosphere."). Indeed, eight-figure and nine-figure verdicts in Texas civil litigation are not

uncommon.[3] In these circumstances, excess insurance is a critical risk-management tool for numerous businesses in Texas.

B. Public exposure of excess insurance policies, which contain proprietary and trade-secret information of both insured businesses and their insurers, will cause competitive injury.

If Texas courts fail to maintain the confidentiality of excess insurance policies produced in litigation, thousands of businesses—both insureds and insurers—will face unwarranted and harmful public exposure of their proprietary information and trade secrets.

Excess insurance policies are highly customized to the insured's particular financial situation, business arrangements and risk tolerance. "[T]here are no standard or universally accepted forms for excess liability insurance contracts." Scott M. Seaman, *Excess Liability Insurance: Law and Litigation*, 32 Tort & Ins. L. J. 653, 659 (1997). Rather, "many excess contracts are manuscript contracts" that are custom designed for a particular insured and contain special "language or provisions supplied by the insured or its broker." *Id.* at 660; *see also* Ltr. of *Amicus Curiae* Uber Technologies, Inc. at 5 (explaining that excess insurance policies are "highly negotiated, bespoke, and specific to [the insured's] products and services").

Because excess insurance policies are bespoke, they are full of the insured and the insurer's proprietary information. For example, an excess policy's endorsements—

[3] *See, e.g.,* TEXAS LAWYER, *2021 Southwest Verdicts Hall of Fame*, https://images.law.com/media/texaslawyer/supplements/HOF_Southwest_2021/mobile/index.html (last visited Feb. 13, 2023).

typically authored by the insured business—identify additional insureds, i.e., the third parties with whom the insured business has confidential business relationships. With reverse engineering by a competent actuary, the policy's rates can reveal the insured business's historical claims and losses. And the policies likewise expose the particular premiums and other special contractual terms under which the insurer has agreed to coverage.

The contents of these unique, customized policies are not only proprietary; they are also trade secrets. Under Texas law, "*all* forms and types of information" that derive independent economic value from being confidential, that can provide economic value to third persons if disclosed, and that an owner reasonably tries to keep secret are trade secrets. TEX. CIV. PRAC. & REM. CODE § 134A.002(6). Both the structure and the specific terms of a business's excess insurance coverage are economically valuable to the insured business and its competitors because one way that businesses compete effectively in the marketplace is by managing risks better than their competitors do.[4] Public disclosure of a business's risk management strategies thus causes competitive injury. *See, e.g.*, *Fox News Network, LLC v. U.S. Dept. of Treasury*, 739 F. Supp. 2d 515, 571 (S.D.N.Y. 2010) (agreeing that information about business's risk-management strategies was proprietary, that public disclosure would "enhance competitors' ability to anticipate

[4] *See, e.g.*, Elahi Ehsan, *How Risk Management Can Turn into Competitive Advantage: Examples and Rationale* (2013), https://scholarworks.umb.edu/cgi/viewcontent.cgi?article=1028&context=msis_faculty_pubs (last visited Feb. 8, 2023); Steven Slezak, *Sound Risk Management Creates Competitive Advantage* (2014), https://globalriskinsights.com/2014/01/sound-risk-management-creates-competitive-advantage/ (last visited Feb. 8, 2023).

or predict" business's strategies and "unfairly improve their capacity to compete," and that information was properly withheld from Freedom-of-Information-Act production to news organization). Similarly, the unique, confidential terms of an excess insurance policy are economically valuable to the insurer and its competitors in the insurance industry, who compete for the business of insureds.

The proposition that excess insurance policies contain proprietary risk-management information that provides a competitive advantage is not even truly disputed in this case. Lyft presented evidence that it guards the confidentiality of its policy terms because Lyft's risk-management strategy gives it a competitive edge; the plaintiff seeking to publish Lyft's policies offered no evidence to the contrary. MR299–330. Rather, the plaintiff boldly and incorrectly declared that there is "no legal authority in the state of Texas that says that an insurance policy is confidential." MR310. But before this case, this Court, its sister Texas courts of appeals, and courts outside of Texas readily recognized that insurance policies may contain proprietary business information entitled to protection. *See* Lyft Mandamus Pet. 25–27 and 28 n.16 (citing ten cases). In contrast, the decision below effectively holds that insurance policies are *not* entitled to protection from public disclosure, *even when* there is uncontroverted evidence that their contents are proprietary and trade secrets. That is a harmful outlier this Court should correct.

C. Public exposure of excess insurance policies invites lawsuits against insured businesses and insurers.

The trial court's failure to protect Lyft's excess insurance policies from public disclosure was a clear abuse of discretion, not only because the policies contain proprietary and trade-secret information, but also because the plaintiff articulated no countervailing interest that could justify opening Lyft's policies to the public.

The plaintiff urged the trial court to strip Lyft's policies of confidentiality so that other plaintiffs' lawyers would know how much insurance coverage Lyft has. MR309–10. But given that the protective order already authorized the plaintiffs to share Lyft's policies with other lawyers *presently* in litigation against Lyft, the plaintiff's intent is clear: he wants to publicly broadcast the coverage amount and terms of Lyft's excess insurance policies to invite *new* lawsuits against Lyft (or leverage that threat to increase the settlement value of his own case).

Encouraging new litigation and high damages claims against a business and its insurers because of the depth of excess insurance coverage is not good policy. Even if it were, it is not a policy that outweighs "the importance of protecting trade secrets through protective orders," which the Texas Supreme Court has recognized for some 80 years. *Garcia v. Peeples*, 734 S.W.2d 343, 346 (Tex. 1987). This Court should not permit the business harms that will result from the decision below.

II. Failing to protect the confidentiality of excess insurance policies will make their discovery more burdensome for parties and courts.

The trial court's refusal to protect excess insurance policies from public disclosure does not merely threaten irreparable harm to insured businesses and their insurers, though that is reason enough for mandamus to issue. The decision below will also make discovery within litigation more costly and time-consuming, to the detriment of all parties, the courts, and the taxpaying public.

Because "the ultimate purpose of discovery is to seek the truth" and an "adversarial approach to discovery" frustrates that goal, Texas courts have long prioritized making discovery less adversarial and more cooperative. *Garcia*, 734 S.W.2d at 347. To that end, "[a]greed protective orders and confidentiality agreements matter." *In re Ford Motor Co.*, 211 S.W.3d 295, 301 (Tex. 2006). Here, Lyft voluntarily and promptly produced its highly sensitive excess insurance policies to the plaintiffs because an agreed protective order was in place to guard their confidentiality.

The trial court's decision to remove that protection thwarts Texas's policy of cooperative discovery. The Texas Supreme Court has warned that "if parties are unable to trust" that courts will enforce agreed protective orders, litigation will be "far more contentious and far more expensive." *Id.* Indeed, without assurance that the proprietary and trade-secret information in their excess insurance policies will be treated confidentially under agreed protective orders, businesses and insurers will not produce their policies in Texas litigation without a fight. That's especially true in the Internet age, when the recipient of electronically-produced discovery can broadcast it to the

world in a moment. *See* Ltr. of *Amicus Curiae* Uber Technologies, Inc. at 3 ("with the advent of the Internet, massive amounts of discovery can now be shared, broadly and instantaneously, with the click of a button"). Absent this Court's correction, expensive and time-consuming discovery disputes are the inevitable result of the trial court's abuse of discretion.

CONCLUSION

The Court should grant Lyft's petition for writ of mandamus.

Respectfully submitted,

/s/ Michelle S. Stratton

Michelle S. Stratton (SBN 24085606)
Razvan Ungureanu (SBN 24085630)
SMYSER KAPLAN & VESELKA LLP
717 Texas Avenue, Suite 2800
Houston, Texas 77002
713-221-2300
713-221-2320 (fax)
mstratton@skv.com
razvan@skv.com

Counsel for Amici Curiae
Chamber of Commerce of the United States of America and American Property Casualty Insurance Association

CERTIFICATE OF COMPLIANCE

This brief complies with Texas Rules of Appellate Procedure 9.4(e) and 9.4(i)(2)(B) because it contains 2,266 words and was prepared by Microsoft Word in 14-point Garamond font for text and 12-point Garamond font for footnotes.

/s/ Michelle S. Stratton
Michelle S. Stratton

CERTIFICATE OF SERVICE

On March 3, 2023, I served this amicus brief via the court's electronic filing system or e-mail on all counsel of record and on respondent, as listed below:

Jessica Z. Barger
Bradley W. Snead
Cristina De La Cruz
Wright Close & Barger, LLP
One Riverway, Suite 2200
Houston, Texas 77056
barger@wrightclosebarger.com
snead@wrightclosebarger.com
delacruz@wrightclosebarger.com

Joelle G. Nelson
Jacqulyn P. Jandrucko
Lewis Brisbois Bisgard & Smith, LLP
24 Greenway Plaza, Suite 1400
Houston, Texas 77046
joelle.nelson@lewisbrisbois.com
jacqulyn.jandrucko@lewisbrisbois.com

Counsel for Relator Lyft, Inc.

Carl L. Evans, Jr.
McCathern, PLLC
Regency Plaza
3710 Rawlins Street, Suite 1600
Dallas, Texas 75219
cevans@mccathernlaw.com

Counsel for Real Parties in Interest Chloe Marion Baker and Travis Barrett Barker

Alexander D. Good
Lindow Stephens Schultz, LLP
One Riverwalk Place
700 N. St. Mary's Street, Suite 1700
San Antonio, Texas 78205
agood@LSSLAW.com

Counsel for Real Parties in Interest Carlos Hevia Rego and Kieber Manuel Gonzalez Ortiz

Charla G. Aldous
Brent R. Walker
Caleb M. Miller
Eleanor O. Aldous
Adlous\Walker LLP
4311 Oak Lawn Ave., Suite 150
Dallas, Texas 75219
caldous@aldouslaw.com
bwalker@aldouslaw.com
cmiller@aldouslaw.com
ealdous@aldouslaw.com

Counsel for Real Party in Interest Grant Dakota Allen

Hon. Nicole Taylor
County Court at Law Number 5
Dallas County Civil Courthouse
600 Commerce Street, 5th Floor
Dallas, Texas 75202
tiara.jones@dallascounty.org
brianna.brown@dallascounty.org

Respondent

/s/ Michelle S. Stratton
Michelle S. Stratton

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Deborah Hardy on behalf of Michelle Stratton
Bar No. 24085606
dhardy@skv.com
Envelope ID: 73323915
Status as of 3/3/2023 1:41 PM CST

Associated Case Party: Lyft, Inc.

Name	BarNumber	Email	TimestampSubmitted	Status
Joelle G.Nelson		joelle.nelson@lewisbrisbois.com	3/3/2023 1:31:16 PM	SENT
Jacqulyn P.Jandrucko		jacqulyn.jandrucko@lewisbrisbois.com	3/3/2023 1:31:16 PM	SENT
Jessica Z.Barger		barger@wrightclosebarger.com	3/3/2023 1:31:16 PM	SENT
Bradley W.Snead		snead@wrightclosebarger.com	3/3/2023 1:31:16 PM	SENT
Christina De La Cruz		delacruz@wrightclosebarger.com	3/3/2023 1:31:16 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Elizabeth Davila		edavila@aldouslaw.com	3/3/2023 1:31:16 PM	SENT
Ellen Lessem		elessem@aldouslaw.com	3/3/2023 1:31:16 PM	SENT
Marie R.Yeates		myeates@velaw.com	3/3/2023 1:31:16 PM	SENT
Michelle Stratton		mstratton@skv.com	3/3/2023 1:31:16 PM	SENT
Rhonda Acrey		racrey@velaw.com	3/3/2023 1:31:16 PM	SENT
Sha'Huni Norman		snorman@aldouslaw.com	3/3/2023 1:31:16 PM	SENT
Support Center 30		c30hou@velaw.com	3/3/2023 1:31:16 PM	SENT
Benjamin Moss		benmoss@velaw.com	3/3/2023 1:31:16 PM	SENT
Deb Hardy		dhardy@skv.com	3/3/2023 1:31:16 PM	SENT
Charla G.Aldous		caldous@aldouslaw.com	3/3/2023 1:31:16 PM	SENT
Brent R.Walker		bwalker@aldouslaw.com	3/3/2023 1:31:16 PM	SENT
Caleb M.Miller		cmiller@aldouslaw.com	3/3/2023 1:31:16 PM	SENT
Eleanor O.Aldous		ealdous@aldouslaw.com	3/3/2023 1:31:16 PM	SENT
Alexander D.Good		agood@lsslaw.com	3/3/2023 1:31:16 PM	SENT

Associated Case Party: ChloeMarionBarker

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Deborah Hardy on behalf of Michelle Stratton
Bar No. 24085606
dhardy@skv.com
Envelope ID: 73323915
Status as of 3/3/2023 1:41 PM CST

Associated Case Party: ChloeMarionBarker

Name	BarNumber	Email	TimestampSubmitted	Status
Carl L.Evans, Jr.		cevans@mccathernlaw.com	3/3/2023 1:31:16 PM	SENT
Aaron Dekle		adekle@mccathernlaw.com	3/3/2023 1:31:16 PM	SENT