TexasBarCLE

16th Annual Advanced Insurance Law Course

LIVE • San Antonio • June 6-7, 2019

Thursday 7 hours including 1.25 ethics

8:00 **Registration**
Coffee & Pastries Provided

8:50 **Welcoming Remarks**
Course Directors
Stephen A. Melendi, *Dallas*
Juan "Trey" Mendez III, *Brownsville*

9:00 **1** **Supreme Court Update** *.75 hr*
Hon. Debra Lehrmann, *Austin*

9:45 **2** **Duty to Indemnify: When to File a Declaratory Judgment** *.5 hr*
Neel Lane, *San Antonio*

10:15 **Networking Break**

10:30 **3** **Professional Liability Policies** *.5 hr*
Natalie DuBose, *Dallas*

11:00 **4** **Coverage B Developments** *.75 hr*
Alicia G. Curran, *Dallas*

11:45 **Insurance Law Section Annual Meeting and Legends Presentation**

12:15 **Break - Lunch Provided**

12:30 **5** **Luncheon Presentation: Judges Panel - What to Do and Not to Do in the Courtroom** *1 hr (.25 ethics)*
Moderator
Robert M. "Randy" Roach, Jr., *Houston*
Panelists
Hon. Jeffrey S. Boyd, *Austin*
Hon. Tracy Christopher, *Houston*
Hon. Rose Guerra Reyna, *Edinburg*
Hon. Ravi K. Sandill, *Houston*

1:30 **Break**

1:45 **6** **Construction Insurance Update** *.75 hr*
Matt Rigney, *Dallas*
Lee Shidlofsky, *Austin*

2:30 **7** **Everyday Strategies for Avoiding Professional Misconduct** *.75 hr ethics*
Scott Rothenberg, *Bellaire*

3:15 **8** **Insurance Coverage for Rideshare & Autonomous Vehicles** *.5 hr*
Catherine L. Hanna, *Austin*

3:45 **Break**

4:00 **9** **Extra-Contractual Claims After Menchaca** *.75 hr (.25 ethics)*
Richard Daly, *Houston*
Robert E. Valdez, *San Antonio*

4:45 **10** **Hot Issues in Storm Claims: Harvey and Beyond** *.75 hr*
William J. Chriss, J.D., Ph.D., *Corpus Christi*
Christene Wood, *Houston*

5:30 **Adjourn**

Friday 5 hours including 1 ethics

8:00 **Coffee & Pastries Provided**

8:25 **Announcements**

8:30 **11** **Legislative Update** *.5 hr*
Randy Cashiola, *Beaumont*

9:00 **12** **ALI Restatement: The Law of Liability Insurance** *.75 hr*
Christina Culver, *Houston*
Beverly Godbey, *Dallas*

9:45 **13** **542A Update** *.5 hr*
Jennifer W. Johnson, *Dallas*

10:15 **Networking Break**

10:30 **14** **Choice of Law** *.5 hr*
Jose "Joey" Gonzalez, Jr., *San Antonio*

11:00 **15** **Soriano & Settlement Strategies After OGA Charters** *.75 hr*
Wayne Pickering, *Houston*

11:45 **Break - Lunch Provided**

12:00 **16** **Luncheon Presentation: Resilience Training - Performance and Interpersonal Management Skills for a Better Practice...and a Better Life** *.75 hr ethics*
Hon. Roy L. Moore, *Houston*
Mark T. Murray, *Houston*

12:45 **Break**

1:00 **17** **Coverage of Punitive Damages** *.5 hr*
Stacy Thompson, *Dallas*

1:30 **18** **Myths and Misconceptions About Insurance Coverage** *.75 hr (.25 ethics)*
Beth D. Bradley, *Dallas*
Vincent E. Morgan, *Houston*

2:15 **Adjourn**

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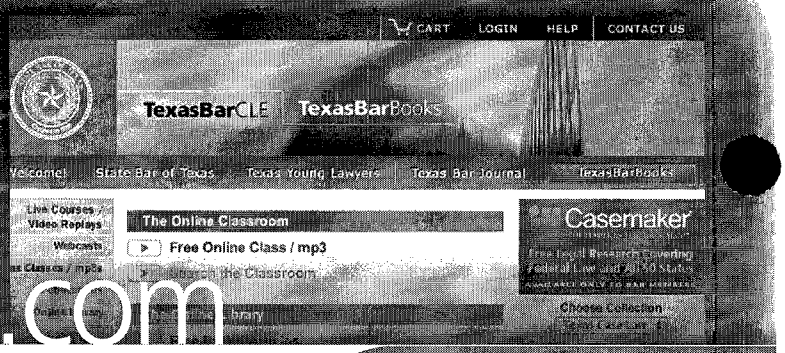

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THE TEXAS LAWYER'S CREED

A Mandate for Professionalism

Promulgated by The Supreme Court of Texas and the Court of Criminal Appeals November 7, 1989.

I am a lawyer; I am entrusted by the People of Texas to preserve and improve our legal system. I am licensed by the Supreme Court of Texas. I must therefore abide by the Texas Disciplinary Rules of Professional Conduct, but I know that Professionalism requires more than merely avoiding the violation of laws and rules. I am committed to this Creed for no other reason than it is right.

I. OUR LEGAL SYSTEM

A lawyer owes to the administration of justice personal dignity, integrity, and independence. A lawyer should always adhere to the highest principles of professionalism.

1. I am passionately proud of my profession. Therefore, "My word is my bond."
2. I am responsible to assure that all persons have access to competent representation regardless of wealth or position in life.
3. I commit myself to an adequate and effective pro bono program.
4. I am obligated to educate my clients, the public, and other lawyers regarding the spirit and letter of this Creed.
5. I will always be conscious of my duty to the judicial system.

II. LAWYER TO CLIENT

A lawyer owes to a client allegiance, learning, skill, and industry. A lawyer shall employ all appropriate means to protect and advance the client's legitimate rights, claims, and objectives. A lawyer shall not be deterred by any real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by mere self-interest.

1. I will advise my client of the contents of this Creed when undertaking representation.
2. I will endeavor to achieve my client's lawful objectives in legal transactions and in litigation as quickly and economically as possible.
3. I will be loyal and committed to my client's lawful objectives, but I will not permit that loyalty and commitment to interfere with my duty to provide objective and independent advice.
4. I will advise my client that civility and courtesy are expected and are not a sign of weakness.
5. I will advise my client of proper and expected behavior.
6. I will treat adverse parties and witnesses with fairness and due consideration. A client has no right to demand that I abuse anyone or indulge in any offensive conduct.
7. I will advise my client that we will not pursue conduct which is intended primarily to harass or drain the financial resources of the opposing party.
8. I will advise my client that we will not pursue tactics which are intended primarily for delay.
9. I will advise my client that we will not pursue any course of action which is without merit.
10. I will advise my client that I reserve the right to determine whether to grant accommodations to opposing counsel in all matters that do not adversely affect my client's lawful objectives. A client has no right to instruct me to refuse reasonable requests made by other counsel.
11. I will advise my client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes.

III. LAWYER TO LAWYER

A lawyer owes to opposing counsel, in the conduct of legal transactions and the pursuit of litigation, courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings. Ill feelings between clients shall not influence a lawyer's conduct, attitude, or demeanor toward opposing counsel. A lawyer shall not engage in unprofessional conduct in retaliation against other unprofessional conduct.

1. I will be courteous, civil, and prompt in oral and written communications.
2. I will not quarrel over matters of form or style, but I will concentrate on matters of substance.
3. I will identify for other counsel or parties all changes I have made in documents submitted for review.
4. I will attempt to prepare documents which correctly reflect the agreement of the parties. I will not include provisions which have not been agreed upon or omit provisions which are necessary to reflect the agreement of the parties.
5. I will notify opposing counsel, and, if appropriate, the Court or other persons, as soon as practicable, when hearings, depositions, meetings, conferences or closings are cancelled.
6. I will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided legitimate objectives of my client will not be adversely affected.
7. I will not serve motions or pleadings in any manner that unfairly limits another party's opportunity to respond.
8. I will attempt to resolve by agreement my objections to matters contained in pleadings and discovery requests and responses.
9. I can disagree without being disagreeable. I recognize that effective representation does not require antagonistic or obnoxious behavior. I will neither encourage nor knowingly permit my client or anyone under my control to do anything which would be unethical or improper if done by me.
10. I will not, without good cause, attribute bad motives or unethical conduct to opposing counsel nor bring the profession into disrepute by unfounded accusations of impropriety. I will avoid disparaging personal remarks or acrimony towards opposing counsel, parties and witnesses. I will not be

11. influenced by any ill feeling between clients. I will abstain from any allusion to personal peculiarities or idiosyncrasies of opposing counsel.
12. I will not take advantage, by causing any default or dismissal to be rendered, when I know the identity of an opposing counsel, without first inquiring about that counsel's intention to proceed.
13. I will promptly submit orders to the Court. I will deliver copies to opposing counsel before or contemporaneously with submission to the court. I will promptly approve the form of orders which accurately reflect the substance of the rulings of the Court.
14. I will not attempt to gain an unfair advantage by sending the Court or its staff correspondence or copies of correspondence.
15. I will not arbitrarily schedule a deposition, Court appearance, or hearing until a good faith effort has been made to schedule it by agreement.
16. I will readily stipulate to undisputed facts in order to avoid needless costs or inconvenience for any party.
17. I will refrain from excessive and abusive discovery.
18. I will comply with all reasonable discovery requests. I will not resist discovery requests which are not objectionable. I will not make objections nor give instructions to a witness for the purpose of delaying or obstructing the discovery process. I will encourage witnesses to respond to all deposition questions which are reasonably understandable. I will neither encourage nor permit my witness to quibble about words where their meaning is reasonably clear.
19. I will not seek Court intervention to obtain discovery which is clearly improper and not discoverable.
20. I will not seek sanctions or disqualification unless it is necessary for protection of my client's lawful objectives or is fully justified by the circumstances.

IV. LAWYER AND JUDGE

Lawyers and judges owe each other respect, diligence, candor, punctuality, and protection against unjust and improper criticism and attack. Lawyers and judges are equally responsible to protect the dignity and independence of the Court and the profession.

1. I will always recognize that the position of judge is the symbol of both the judicial system and administration of justice. I will refrain from conduct that degrades this symbol.
2. I will conduct myself in court in a professional manner and demonstrate my respect for the Court and the law.
3. I will treat counsel, opposing parties, witnesses, the Court, and members of the Court staff with courtesy and civility and will not manifest by words or conduct bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation.
4. I will be punctual.
5. I will not engage in any conduct which offends the dignity and decorum of proceedings.
6. I will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities to gain an advantage.
7. I will respect the rulings of the Court.
8. I will give the issues in controversy deliberate, impartial and studied analysis and consideration.
9. I will be considerate of the time constraints and pressures imposed upon the Court, Court staff and counsel in efforts to administer justice and resolve disputes.

Order of the Supreme Court of Texas and the Court of Criminal Appeals

The conduct of a lawyer should be characterized at all times by honesty, candor, and fairness. In fulfilling his or her primary duty to a client, a lawyer must be ever mindful of the profession's broader duty to the legal system.

The Supreme Court of Texas and the Court of Criminal Appeals are committed to eliminating a practice in our State by a minority of lawyers of abusive tactics which have surfaced in many parts of our country. We believe such tactics are a disservice to our citizens, harmful to clients, and demeaning to our profession.

The abusive tactics range from lack of civility to outright hostility and obstructionism. Such behavior does not serve justice but tends to delay and often deny justice. The lawyers who use abusive tactics, instead of being part of the solution, have become part of the problem.

The desire for respect and confidence by lawyers from the public should provide the members of our profession with the necessary incentive to attain the highest degree of ethical and professional conduct. These rules are primarily aspirational. Compliance with the rules depends primarily upon understanding and voluntary compliance, secondarily upon reenforcement by peer pressure and public opinion, and finally when necessary by enforcement by the courts through their inherent powers and rules already in existence.

These standards are not a set of rules that lawyers can use and abuse to incite ancillary litigation or arguments over whether or not they have been observed.

We must always be mindful that the practice of law is a profession. As members of a learned art we pursue a common calling in the spirit of public service. We have a proud tradition. Throughout the history of our nation, the members of our citizenry have looked to the ranks of our profession for leadership and guidance. Let us now as a profession each rededicate ourselves to practice law so we can restore public confidence in our profession, faithfully serve our clients, and fulfill our responsibility to the legal system.

The Supreme Court of Texas and the Court of Criminal Appeals hereby promulgate and adopt **"The Texas Lawyer's Creed -- A Mandate for Professionalism"** described above.

In Chambers, this 7th day of November, 1989.

The Supreme Court of Texas

Thomas R. Phillips, Chief Justice
Franklin S. Spears, Justice
C. L. Ray, Justice
Raul A. Gonzalez, Justice
Oscar H. Mauzy, Justice
Eugene A. Cook, Justice
Jack Hightower, Justice
Nathan L. Hecht, Justice
Lloyd A. Doggett, Justice

The Court of Criminal Appeals

Michael J. McCormick, Presiding Judge
W. C. Davis, Judge
Sam Houston Clinton, Judge
Marvin O. Teague, Judge
Chuck Miller, Judge
Charles F. (Chuck) Campbell, Judge
Bill White, Judge
M. P. Duncan, III, Judge
David A. Berchelmann, Jr., Judge

TEXAS PARALEGAL'S CREED

I work with, and under the supervision of, a lawyer who is entrusted by the People of Texas to preserve and improve our legal system. I realize that unethical or improper behavior on my part may result in disciplinary action against my supervising attorney. As a Paralegal, I must abide by the Texas Disciplinary Rules of Professional Conduct, but I know that Professionalism requires more than merely avoiding the violation of laws and rules. I am committed to this Creed for no other reason than it is right.

I. OUR LEGAL SYSTEM

A Paralegal owes to the administration of justice personal dignity, integrity, and independence. A Paralegal should always adhere to the highest principles of Professionalism.

1. I am passionately proud of my profession. Therefore, "My word is my bond."

2. I will work with my supervising attorney to educate clients, the public, and other lawyers and Paralegals regarding the spirit and letter of this Creed.

3. I will always be conscious of my duty to the judicial system.

II. PARALEGAL TO CLIENT

A Paralegal owes to the supervising attorney and the client allegiance, learning, skill, and industry. A Paralegal shall not be deterred by any real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by self interest.

1. With, and under the direction of, my supervising attorney, I will endeavor to achieve the client's lawful objectives in legal transactions and litigation as quickly and economically as possible.

2. I will be loyal and committed to the client's lawful objectives, but I will not permit that loyalty and commitment to interfere with my ability to be objective.

3. I will inform the client that civility and courtesy are expected and not a sign of weakness.

4. I will inform the client of proper and expected behavior.

5. I will treat adverse parties and witnesses with fairness and due consideration. A client has no right to demand that I abuse anyone or indulge in any offensive conduct.

6. I will inform the client that my supervising attorney and I will not pursue conduct which is intended primarily to harass or drain the financial resources of the opposing party.

7. I will inform the client that my supervising attorney and I will not pursue tactics which are intended primarily for delay.

III. PARALEGAL TO OPPOSING LAWYER

A Paralegal owes to opposing counsel and their staff, in the conduct of legal transactions and pursuit of litigation, courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings. Ill feelings between clients shall not influence a Paralegal's conduct, attitude, or demeanor toward opposing counsel or their staff. A Paralegal shall not engage in unprofessional conduct in retaliation against other unprofessional conduct.

1. I will be courteous, civil, and prompt in oral and written communications.

2. I will identify for other counsel and parties all changes made by my supervising attorney in documents submitted for review.

3. I will attempt to prepare drafts for my supervising attorney's review which correctly reflect the agreement of the parties and not arbitrarily include provisions which have not been agreed upon or omit provisions necessary to reflect the agreement of the parties.

4. I will notify opposing counsel, and, if appropriate, the Court, Court staff, or other persons, as soon as practicable, when hearings, depositions, meetings, conferences, or closings are canceled.

5. I can relay a disagreement without being disagreeable. I realize that effective representation by my supervising attorney does not require antagonistic or obnoxious behavior. I will not encourage or knowingly permit the client to do anything which would be unethical or improper if done by me or my supervising attorney.

6. I will not, without good cause, attribute bad motives or unethical conduct to opposing counsel, nor bring the profession into disrepute by unfounded accusations of impropriety. I will avoid disparaging personal remarks or acrimony toward opposing counsel, opposing counsel's staff, parties, and witnesses. I will not be influenced by ill feelings between clients. I will abstain from any allusion to personal peculiarities or idiosyncrasies of opposing counsel or other Paralegals.

7. I will not attempt to gain an unfair advantage by sending the Court or its staff correspondence or copies of correspondence.

8. I will assist my supervising attorney in complying with all reasonable discovery requests. I will not encourage the client to quibble about words where their meaning is reasonably clear.

IV. PARALEGAL AND JUDGE

Paralegals owe judges and the Court respect, diligence, candor, and punctuality. Paralegals share in the responsibility to protect the dignity and independence of the Court and the profession.

1. I will always recognize that the position of judge is the symbol of both the judicial system and administration of justice. I will refrain from conduct that degrades this symbol.

2. I will conduct myself in Court in a professional manner, and demonstrate my respect for the Court and the law.

3. I will treat counsel, opposing parties, the Court, and members of the Court staff with courtesy and civility.

4. I will be punctual and will assist my supervising attorney in being punctual.

5. I will not engage in any conduct which offends the dignity and decorum of proceedings.

Order of the Supreme Court of Texas and the Court of Criminal Appeals

Misc. Docket No. 99-9012

Standards For Appellate Conduct

At the request of the Council of the Appellate Practice and Advocacy Section of the State Bar and the Board of Directors of the State Bar of Texas, and based upon their submissions to our courts, the Supreme Court of Texas and the Court of Criminal Appeals hereby adopt and promulgate the attached Standards of Appellate Conduct. Nothing in these standards alters existing standards of conduct under the Texas Disciplinary Rules of Professional Conduct, the Texas Rules of Disciplinary Procedure, or the Code of Judicial Conduct.

In Chambers, this 1st day of February, 1999.

Standards for Appellate Conduct

Lawyers are an indispensable part of the pursuit of justice. They are officers of courts charged with safeguarding, interpreting, and applying the law through which justice is achieved. Appellate courts rely on counsel to present opposing views of how the law should be applied to facts established in other proceedings. The appellate lawyer's role is to present the law controlling the disposition of a case in a manner that clearly reveals the legal issues raised by the record while persuading the court that an interpretation or application favored by the lawyer's clients is in the best interest of the administration of equal justice under law.

The duties lawyers owe to the justice system, other officers of the court, and lawyers' clients are generally well-defined and understood by the appellate bar. Problems that arise when duties conflict can be resolved through understanding the nature and extent of a lawyer's respective duties, avoiding the tendency to emphasize a particular duty at the expense of others, and detached common sense. To that end, the following standards of conduct for appellate lawyers are set forth by reference to the duties owed by every appellate practitioner.

Use of these standards for appellate conduct as a basis for motions for sanctions, civil liability or litigation would be contrary to their intended purpose and shall not be permitted. Nothing in these standards alters existing standards of conduct under the Texas Disciplinary Rules of Professional Conduct, the Texas Rules of Disciplinary Procedure or the Code of Judicial Conduct.

Lawyers' Duties to Clients

A lawyer owes to a client allegiance, learning, skill, and industry. A lawyer shall employ all appropriate means to protect and advance the client's legitimate rights, claims, and objectives. A lawyer shall not be deterred by a real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by mere self-interest. The lawyer's duty to a client does not militate against the concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of harm on the appellate process, the courts, and the law itself.

1. Counsel will advise their clients of the contents of these Standards of Conduct when undertaking representation.

2. Counsel will explain the fee agreement and cost expectation to their clients. Counsel will then endeavor to achieve the client's lawful appellate objectives as quickly, efficiently, and economically as possible.

3. Counsel will maintain sympathetic detachment, recognizing that lawyers should not become so closely associated with clients that the lawyer's objective judgment is impaired.

4. Counsel will be faithful to their clients' lawful objectives, while mindful of their concurrent duties to the legal system and the public good.

5. Counsel will explain the appellate process to their clients. Counsel will advise clients of the range of potential outcomes, likely costs, timetables, effect of the judgment pending appeal, and the availability of alternative dispute resolution.

6. Counsel will not foster clients' unrealistic expectations.

7. Negative opinions of the court or opposing counsel shall not be expressed unless relevant to a client's decision process.

8. Counsel will keep clients informed and involved in decisions and will promptly respond to inquiries.

9. Counsel will advise their clients of proper behavior, including that civility and courtesy are expected.

10. Counsel will advise their clients that counsel reserves the right to grant accommodations to opposing counsel in matters that do not adversely affect the client's lawful objectives. A client has no right to instruct a lawyer to refuse reasonable requests made by other counsel.

11. A client has no right to demand that counsel abuse anyone or engage in any offensive conduct.

12. Counsel will advise clients that an appeal should only be pursued in a good faith belief that the trial court has committed error or that there is a reasonable basis for the extension, modification, or reversal of existing law, or that an appeal is otherwise warranted.

13. Counsel will advise clients that they will not take frivolous positions in an appellate court, explaining the penalties associated therewith. Appointed appellate counsel in criminal cases shall be deemed to have complied with this standard of conduct if they comply with the requirements imposed on appointed counsel by courts and statutes.

Lawyers' Duties to the Court

As professionals and advocates, counsel assist the Court in the administration of justice at the appellate level. Through briefs and oral submissions, counsel provide a fair and accurate understanding of the facts and law applicable to their case. Counsel also serve the Court by respecting and maintaining the dignity and integrity of the appellate process.

1. An appellate remedy should not be pursued unless counsel believes in good faith that error has been committed, that there is a reasonable basis for the extension, modification, or reversal of existing law, or that an appeal is otherwise warranted.

2. An appellate remedy should not be pursued primarily for purposes of delay or harassment.

3. Counsel should not misrepresent, mischaracterize, misquote, or miscite the factual record or legal authorities.

4. Counsel will advise the Court of controlling legal authorities, including those adverse to their position, and should not cite authority that has been reversed, overruled, or restricted without informing the court of those limitations.

5. Counsel will present the Court with a thoughtful, organized, and clearly written brief.

6. Counsel will not submit reply briefs on issues previously briefed in order to obtain the last word.

7. Counsel will conduct themselves before the Court in a professional manner, respecting the decorum and integrity of the judicial process.

8. Counsel will be civil and respectful in all communications with the judges and staff.

9. Counsel will be prepared and punctual for all Court appearances, and will be prepared to assist the Court in understanding the record, controlling authority, and the effect of the court's decision.

10. Counsel will not permit a client's or their own ill feelings toward the opposing party, opposing counsel, trial judges or members of the appellate court to influence their conduct or demeanor in dealings with the judges, staff, other counsel, and parties.

Lawyers' Duties to Lawyers

Lawyers bear a responsibility to conduct themselves with dignity towards and respect for each other, for the sake of maintaining the effectiveness and credibility of the system they serve. The duty that lawyers owe their clients and the system can be most effectively carried out when lawyers treat each other honorably.

1. Counsel will treat each other and all parties with respect.

2. Counsel will not unreasonably withhold consent to a reasonable request for cooperation or scheduling accommodation by opposing counsel.

3. Counsel will not request an extension of time solely for the purpose of unjustified delay.

4. Counsel will be punctual in communications with opposing counsel.

5. Counsel will not make personal attacks on opposing counsel or parties.

6. Counsel will not attribute bad motives or improper conduct to other counsel without good cause, or make unfounded accusations of impropriety.

7. Counsel will not lightly seek court sanctions.

8. Counsel will adhere to oral or written promises and agreements with other counsel.

9. Counsel will neither ascribe to another counsel or party a position that counsel or the party has not taken, nor seek to create an unjustified inference based on counsel's statements or conduct.

10. Counsel will not attempt to obtain an improper advantage by manipulation of margins and type size in a manner to avoid court rules regarding page limits.

11. Counsel will not serve briefs or other communications in a manner or at a time that unfairly limits another party's opportunity to respond.

The Court's Relationship with Counsel

Unprofessionalism can exist only to the extent it is tolerated by the court. Because courts grant the right to practice law, they control the manner in which the practice is conducted. The right to practice requires counsel to conduct themselves in a manner compatible with the role of the appellate courts in administering justice. Likewise, no one more surely sets the tone and the pattern for the conduct of appellate lawyers than appellate judges. Judges must practice civility in order to foster professionalism in those appearing before them.

1. Inappropriate conduct will not be rewarded, while exemplary conduct will be appreciated.

2. The court will take special care not to reward departures from the record.

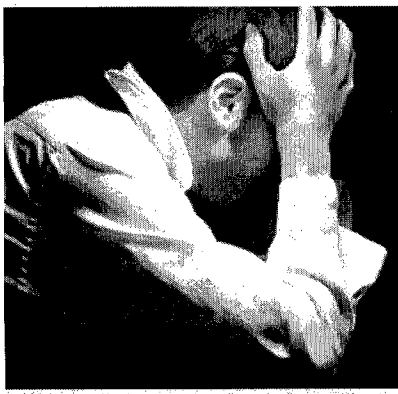
3. The court will be courteous, respectful, and civil to counsel.

4. The court will not disparage the professionalism or integrity of counsel based upon the conduct or reputation of counsel's client or co-counsel.

5. The court will endeavor to avoid the injustice that can result from delay after submission of a case.

6. The court will abide by the same standards of professionalism that it expects of counsel in its treatment of the facts, the law, and the arguments.

7. Members of the court will demonstrate respect for other judges and courts.



depression

Lawyers are at high risk for depression.

If you think you or someone you know may be depressed, please don't try to handle it alone.

The clinically depressed lawyer:

- **has little or no energy.**
- **sometimes misses deadlines.**
- **knows phone calls have to be returned but feels too enervated to do so.**
- **may spend hours at the office behind a closed door staring out the window.**
- **easily becomes angry or irritated.**
- **feels overwhelmed and immobilized by indecisiveness.**
- **has diminished ability to concentrate, analyze and synthesize information.**
- **isolates socially and professionally.**
- **is confused by an inability to "snap out of it," feels "weak," and berates self.**
- **tries to feel better by using alcohol, sedatives, stimulants or other substances, including food.**
- **fantasizes about some kind of escape, has fleeting thoughts of suicide.**

For more information, contact the Texas Lawyers' Assistance Program:

1-800-343-TLAP or 1-512-427-1453.

All communications with TLAP are confidential by law.

This information is provided through the collaboration of the State Bar of Texas Task Force on Lawyer Mental Health and the Texas Lawyers' Assistance Program.

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28%
of lawyers face **DEPRESSION**

19%
of lawyers experience **ANXIETY**

11%
of lawyers have experienced **SUICIDAL THOUGHTS**

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Diminished ability to remember, think clearly, concentrate, or make decisions

Thoughts or expressions of death or suicide

Using alcohol or drugs to bolster performance

Using alcohol/substances on the job, during the day, before appointments, meetings, deposition or court appearances

Failing to show for appointments, meetings, depositions, court appearances; failing to return phone calls

Declining quality and quantity of work product

Avoiding law partners, staff, colleagues, clients, friends, and family

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Or, call the TLAP Judges' Line at 1-800-219-6474

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TLAP helpline for LAWYERS: 1-800-343-8527 (TLAP)

TLAP helpline for JUDGES: 1-800-219-6474

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TEXAS LAWYERS' ASSISTANCE PROGRAM

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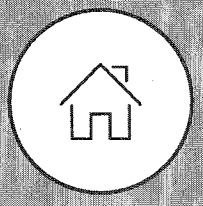

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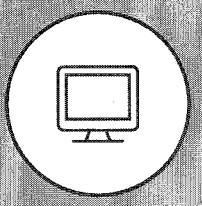

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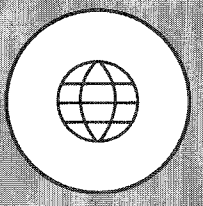

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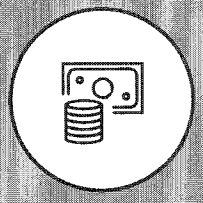
Make your plans for anything and anywhere, from a much-needed vacation to a quick business trip.



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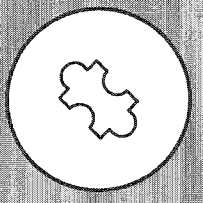

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Tagging a business page is easy. Begin your post and type @ and then start typing TexasBarCLE. A list of related people and business pages for you to choose from should appear and you will then select our page from the group.

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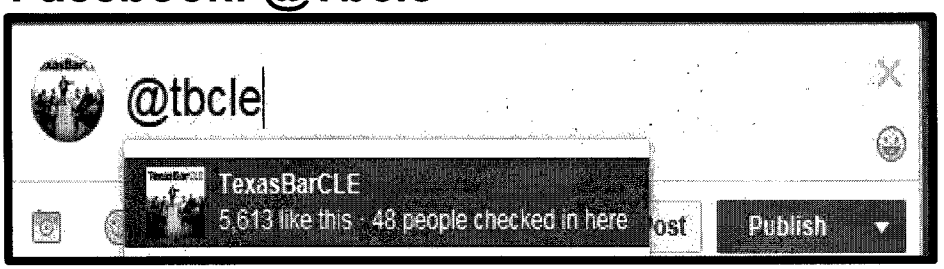

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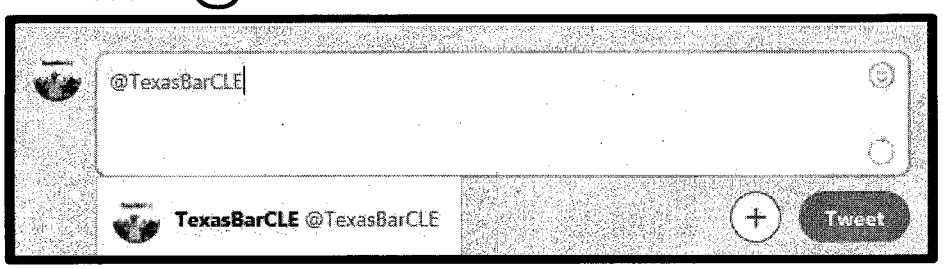

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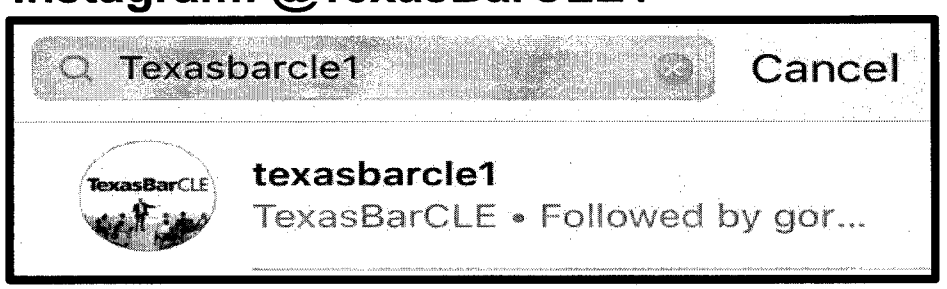

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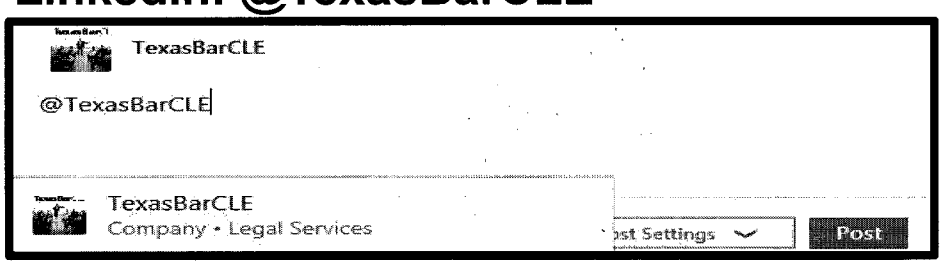

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TEN TIPS FOR LAWYERS DEALING WITH STRESS, MENTAL HEALTH, AND SUBSTANCE USE ISSUES

Prepared by:
CHRIS RITTER, J.D., *Austin*
Staff Attorney for Texas Lawyers' Assistance Program (TLAP)
www.texasbar.com\tlap
800-343-TLAP(8527)
512-427-1453

State Bar of Texas
BONUS MATERIALS

TABLE OF CONTENTS

TEN TIPS FOR LAWYERS DEALING WITH STRESS, MENTAL HEALTH, AND SUBSTANCE USE ISSUES

ABSTRACT

Being a lawyer in Texas is not easy. This paper provides some basic information and tools to help lawyers understand and address the serious stress, mental health and substance use issues which so many attorneys face.

I. INTRODUCTION.

For those practicing law in Texas, it may be no surprise that lawyers suffer very high rates of mental health and substance use disorders. Lawyers are handed their clients' worst problems and are expected to solve them. They are supposed to be perfect or their reputations dwindle. If they make a mistake, it can be career changing or devastating to a client's life. There is little time to smell the roses, and when that opportunity comes, it is hard if not impossible to stop thinking about the fires which need putting out at the office. It is a tremendous understatement to say that the life of a lawyer can be very stressful and difficult.

For decades, researchers have looked at the strenuous lifestyle and bad habits of lawyers. They have found extraordinary differences between the mental health and substance use of attorneys compared to normal people.

A recent law review article noted that attorneys have the highest rate of depression of any occupational group in the United States.[1] Another study showed that attorneys suffer depression 3.6 times as often as the general population.[2]

With regard to alcohol use, researchers have understood since a major study in 1990 that attorneys have much higher than usual rates of problem drinking and mental health issues.[3] Now, the details of the extent of the legal world's woes are revealed in two new major studies regarding the degree to which attorneys and law students suffer from such mental health and substance use disorders.

With regard to attorneys, in 2016 the American Bar Association Commission on Lawyer Assistance Programs and the Hazelden Betty Ford Foundation released a groundbreaking study of almost 13,000 employed attorneys which showed that 21% of attorneys screened positive for problematic drinking, defined as "hazardous, harmful, and potentially alcohol-dependent drinking" (some have referred to these people in the past as "alcoholics"), 28% suffer from depression, and 19% suffer from clinical anxiety.[4] Perhaps even more disturbing, 36% reported drinking alcohol in a quantity and frequency that would indicate "hazardous drinking or possible alcohol abuse or dependence," 46% felt they suffered depression in the past, and 61% reported concerns about anxiety.[5]

As a reference to how these numbers stack up to the norm, about 6% of adults over 26 years of age suffer from problematic drinking[6] (versus 21% of lawyers), and only 15% of doctors reported drinking alcohol in a quantity and frequency that would indicate hazardous drinking or possible alcohol abuse or dependence (versus 36% of lawyers).[7]

Likewise, a 2015 law school wellness study of nearly 4,000 participating law students at 15 law schools across the country showed similar results. In the study, 42% of respondents indicated that in the past year they had thought they needed help for emotional or mental health problems. Furthermore, 25% answered two or more of four questions that comprise the CAGE assessment, indicating as many as one-quarter of the law students should be considered for further screening for alcohol use disorder. The study also showed that 43% of law students reported binge drinking in the past 2 weeks and 25% reported marijuana use in the past year.[8]

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[1] *See Lawrence S. Krieger and Kennon M. Sheldon, What Makes Lawyers Happy? Transcending the Anecdotes with Data from 6200 Lawyers . 83 GEO. WASH. U. L. REV. 554 (2015), also published as FSU College of Law, Public Law Research Paper No. 667(2014); see also Rosa Flores & Rose Marie Arce, Why are lawyers killing themselves?, CNN (Jan. 20, 2014, 2:42 PM),* http://www.cnn.com/2014/01/19/us/lawyer-suicides/.

[2] *See William Eaton et al., Occupations and the Prevalence of Major Depressive Disorder, 32 J. OCCUPATIONAL MED. 1079, 1085 tbl. 3 (1990).*

[3] *See Justin J. Anker, Ph.D., Attorneys and Substance Abuse, Butler Center for Research(Hazelden 2014)(available at* http://www.hazelden.org/web/public/document/bcrup_attorneyssubstanceabuse.pdf)

[4] *See* Patrick Krill, Ryan Johnson, and Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, Journal of Addiction Medicine, Feb. 2016, Vol. 10, Issue 1, pp. 46-52, http://journals.lww.com/journaladdictionmedicine/Fulltext/2016/02000/The_Prevalence_of_Substance_Use_and_Other_Mental.8.asp

[5] *Id.*

[6] *Behavioral Health Trends in the United States: Results from the 2015 National Survey on Drug Use and Health, U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, September 2015,* http://www.samhsa.gov/data/sites/default/files/NSDUH-FRR1-2014/NSDUH-FRR1-2014.pdf

[7] *Id.*

[8] *See* Jerome M. Organ, David B. Jaffe, and Katherine M. Bender, *Helping Law Students Get the Help They Need: An Analysis of Data Regarding Law Students' Reluctance to Seek Help and Policy Recommendations for a Variety of Stakeholders,* The Bar Examiner, Dec. 2015, Vol. 4, Issue 4,

Additionally, 14% reported using prescription drugs in the past year without a prescription, 27% reported having an eating disorder, and 21% percent reported that they had considered suicide.[9]

One law school study found that before law school, only 8% reported alcohol problems. By the third year of law school, 24% reported a concern about having a drinking problem.[10] Moreover, a 2014 Yale Law School study sent shockwaves across academia when it reported 70% of its law students had symptoms of depression.[11]

Regarding suicide, lawyers have consistently been at or near the top the list of all professionals in suicide rates.[12] They have been found to be twice as likely as the average person to commit suicide.[13]

Obviously, these are major problems. No one wants to be troubled by thinking about these issues, but they demand real attention. This paper is an effort to provide some basic information and tools to help attorneys and others in contact the legal community understand and address the unique and substantial stress, mental health and substance use issues from which so many attorneys suffer.

II. DEFINING THE ISSUES.

While there are a large number of hardships faced by attorneys practicing law across the State of Texas, the following are some of the most common and most serious:

A. Anxiety Disorders.

Disorders relating to anxiety range from a general Panic Attack (which is Panic Disorder with or without Agoraphobia[14]) to specific phobias such as Social Anxiety Disorder (SAD), Obsessive-Compulsive Disorder (OCD), Posttraumatic Stress Disorder (PTSD), Acute Stress Disorder (ASD), Generalized Anxiety Disorder (GAD), Substance-Induced Anxiety Disorder, anxiety due to a medical condition, and anxiety disorder not otherwise specified.

Generalized Anxiety Disorder is prevalent in the legal community, although most lawyers would argue that its symptoms sound like what one experiences every day when practicing law:

1. Excessive anxiety and worry (apprehensive expectation) which occurs more days than not for at least six months about a number of events or activities (such as work or school performance);
2. The person finds it difficult to control the worry;
3. The anxiety and worry are associated with three (or more) of the following six symptoms present for more days than not for the past 6 months:
    a. restlessness or feeling keyed up or on edge;
    b. being easily fatigued;
    c. difficulty concentration or mind going blank;
    d. irritability;
    e. muscle tension;
    f. sleep disturbance (difficulty falling or staying asleep or restless unsatisfying sleep);
4. The focus of anxiety or worry is not about another disorder (panic, social phobia, OCD, PTSD, etc);
5. The anxiety, worry or physical symptoms cause clinically significant distress or impairment in social, occupation or other important areas of functioning; and
6. The disturbance is not due to the direct physiological effects of a substance (drug of abuse, medication, etc.) or a general medical condition and does not exclusively occur during a mood disorder or psychotic disorder.[15]

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http://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia_files%2FBar-Examiner%2Fissues%2F2015-December%2FBE-Dec2015-HelpingLawStudents.pdf

[9] *Id.*

[10] *See* G.A. Benjamin, E.J. Darling, and B. Sales, *The Prevalence Of Depression, Alcohol Abuse, And Cocaine Abuse Among United States Lawyers,* International Journal of Law and Psychiatry, 1990, Vol. 13, pp. 233-246.

[11] *See* Yale Law School Mental Health Alliance, *Falling Through the Cracks: A Report on Mental Health at Yale Law School*, December 2014, http://www.scribd.com/doc/252727812/Falling-Through-the-Cracks

[12] According to a 1991 Johns Hopkins University study of depression in 105 professions, lawyers ranked number one in the incidence of depression. *See William Eaton et al., Occupations and the Prevalence of Major Depressive Disorder,* 32 JOURNAL OF OCCUPATIONAL MEDICINE 11, Page 1079(1990).

[13] A 1992 OSHA report found that male lawyers in the US are two times more likely to commit suicide than men in the general population. *See http://www.lawpeopleblog.com/2008/09/the-depression-demon-coming-out-of-the-legal-closet/*.

[14] This is a type of anxiety disorder in which you fear and often avoid places or situations that might cause you to panic and make you feel trapped, helpless or embarrassed.

[15] *See* www.depression-screening.org for self-assessment screening tests for anxiety disorders.

B. Substance Use Disorders and Process Addictions.

Approximately 21% of the lawyers in the United States are affected by alcohol and other substance use disorders compared with about 6% of the general public in the same age group.[16] The substances used to excess include: alcohol, amphetamines, methamphetamine, caffeine, club drugs, cocaine, crack cocaine, hallucinogens, heroin, marijuana, myriad prescription drugs, nicotine, sedatives, steroids and a combination of all of the above (polysubstance abuse/dependency).

Substance use disorders span a wide variety of problems arising from substance use. The following are the 11 different criteria for diagnosing a substance use disorder under the recently established DSM-5[17]:

1. Taking the substance in larger amounts or for longer than meant to;
2. Wanting to cut down or stop using the substance but not managing to;
3. Spending a lot of time getting, using, or recovering from use of the substance;
4. Cravings and urges to use the substance;
5. Not managing to do what should be done at work, home or school, because of substance use
6. Continuing to use, even when it causes problems in relationships;
7. Giving up important social, occupational or recreational activities because of substance use;
8. Using substances again and again, even when it puts one in danger;
9. Continuing to use, even when known that there is a physical or psychological problem that could have been caused or made worse by the substance;
10. Needing more of the substance to get the effect wanted (tolerance); and/or
11. Development of withdrawal symptoms, which can be relieved by taking more of the substance.

The DSM-5 further provides a measure for determining the severity of a substance use disorder as follows:

MILD: Two or three symptoms indicate a mild substance use disorder

MODERATE: four or five symptoms indicate a moderate substance use disorder, and

SEVERE: six or more symptoms indicate a severe substance use disorder. Clinicians can also add "in early remission," "in sustained remission," "on maintenance therapy," and "in a controlled environment."[18]

Though they are not all classified as substance use disorders, TLAP also works in increasing numbers with lawyers who also experience process addictions (compulsive or mood altering behavior related to a process such as sexual activity, pornography – primarily online, gambling, gaming, exercise, working, eating, shopping, etc.). The DSM-5 does now recognize Gambling Disorder as a behavioral addiction.

C. Depressive Disorders.

Texas lawyers often present with symptoms of depressive disorders, including Major Depression, Persistent Depressive Disorder (formerly referred to as Dysthymic Depression), Compassion Fatigue, and Depression Not Otherwise Specified.

1. Major Depressive Disorder:

A major depressive episode is a period characterized by the symptoms of major depressive disorder when five or more of the following are present during the same two-week period:

a. depressed mood most of the day, nearly every day, as indicated by subjective report or observation made by others;
b. markedly diminished interest or pleasure in all or most activities most of the day, nearly every day;
c. significant weight gain or loss (when not dieting) or decrease or increase in appetite nearly every day;
d. insomnia or hypersomnia nearly every day;
e. psychomotor agitation or retardation nearly every day;

[16] *See* Patrick Krill, Ryan Johnson, and Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, Journal of Addiction Medicine, Feb. 2016, Vol. 10, Issue 1, pp. 46-52, http://journals.lww.com/journaladdictionmedicine/Fulltext/2016/02000/The_Prevalence_of_Substance_Use_and_Other_Mental.8.asp ; *see also G.A.H. Darling et al., The prevalence of depression, alcohol abuse, and cocaine abuse among United States lawyers,* 13 INTERNATIONAL JOURNAL OF LAW AND PSYCHIATRY 233-246 (1990).

[17] The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, abbreviated as DSM-5, is the 2013 update to the American Psychiatric Association's (APA) classification and diagnostic tool. In the United States, the DSM serves as a universal authority for psychiatric diagnosis. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. text rev. 2013) (hereinafter "DSM-5").

[18] *Id. See also* http://www.alcoholscreening.org/ for an alcohol use disorder self-assessment test.

f. fatigue or loss of energy nearly every day;
g. feelings of worthlessness or excessive or inappropriate guilt nearly every day;
h. diminished ability to think or concentrate, or indecisiveness, nearly every day; and/or
i. recurrent thoughts of death, recurrent suicidal ideation without a plan, suicide attempt or a specific plan for completing suicide.[19]

2. Persistent Depressive Disorder:

This is a disorder involving a depressed mood that occurs for most of the day, for more days than not, for at least 2 years with the presence of at least two of the following six symptoms:

a. poor appetite or overeating;
b. insomnia or hypersomnia;
c. low energy or fatigue;
d. low self-esteem;
e. poor concentration or difficulty making decision; and/or
f. feelings of hopelessness.

Additionally, for Persistent Depressive Disorder to be diagnosed, the person must not have been without the symptoms above for more than two months at a time during the 2-year period of the disturbance and must not have experienced a major depressive episode, manic episode or hypomanic episode in that time.

Finally, the disturbance must not occur exclusively during the course of a chronic psychotic disorder, must not be due to substance use or another medical condition, and must cause clinically significant distress or impairment in social, occupational or other important areas of functioning.[20]

3. Compassion Fatigue and Burnout.

Compassion fatigue has been defined as "a combination of physical, emotional, and spiritual depletion associated with caring for persons in significant emotional pain and physical distress."[21] Its components are the presence of Secondary Traumatic Stress (STS) in combination with a condition commonly referred to by lawyers as "Burnout":

a. Secondary Traumatic Stress.

Secondary Traumatic Stress is the presence of traumatic symptoms caused by indirect exposure to the traumatic material. The following are characteristics of this kind of trauma:

(1). Symptoms are similar to Post Traumatic Stress Disorder except the information about the trauma is acquired indirectly from communicating with the person who personally experienced the traumatic event.
(2). The traumatic event is persistently re-experienced in one or more of the following ways: recurrent and intrusive distressing recollections, dreams, acting or feeling as if the event is reoccurring.
(3). Persistent avoidance of the stimuli associated with the trauma (the client, the case, the deposition, specific facts, etc.) and numbing of general responsiveness develops.
(4). Persistent symptoms of increased arousal such as difficulty falling or staying asleep, irritability or outbursts of anger, difficulty concentrating, hyper vigilance, or exaggerated startle response.

b. Burnout.

Burnout is the term used by many lawyers to describe the psychological syndrome of emotional exhaustion, depersonalization and reduced personal accomplishment. Burnout symptoms include:

> increased negative arousal, dread, difficulty separating personal and professional life, inability to say "no," increased frustration, irritability, depersonalization of clients and situations, diminished enjoyment of work, diminished desire or capacity for intimacy with family and friends, diminished capacity to listen and communicate, subtle manipulation of clients to avoid them or painful material, diminished effectiveness, loss of confidence, increased desire to escape or flee, isolation.

If you are concerned about suffering from Compassion Fatigue, you may be interested in taking the self-assessment test at http://www.compassionfatigue.org/pages/cfassessment.html.

D. Suicide.

There is no need to define suicide, but because it is such a serious matter and so prevalent among lawyers, it deserves further discussion.

A recent study by the Air Force (2010) found that suicide prevention training included in all military training reduced the mean suicide rate within the

[19] *See* www.depression-screening.org for a self-assessment screening test for depression.
[20] *See* DSM-5.
[21] Barbara Lombardo & Carol Eyre, *Compassion Fatigue: A Nurse's Primer*, 16 THE ONLINE JOURNAL OF ISSUES IN NURSING 1 (2011).

population studied by an unprecedented 21%.[22] In light of this recognition of the major impact training and education can have on suicide, it is appropriate that TLAP has made it a priority since 1987 to inform lawyers about this issue. If you want to know how to carry on a conversation about suicide, how and when to get a client, friend or colleague to professional help, or how to handle a suicide emergency, explore the resources on TLAP's website at www.texasbar.com/TLAP.[23]

III. TEN HELPFUL TIPS FOR LAWYERS DEALING WITH STRESS, MENTAL HEALTH, OR SUBSTANCE USE ISSUES.

When dealing with the spectrum of problems faced by Texas attorneys, there is no single solution which will take care of everything, but many tools are useful for both mental health and substance abuse issues. The following are ten practical tools which any affected attorney should consider using for prevention or to help solve a problem:

1. Take Action!

Whether a lawyer is living in the darkness of depression or lost in a routine of substance abuse, there is a solution but it depends on *action*. Taking action requires courage. By expressing the need for help to someone, the process to peace begins. TLAP is available for any lawyer to confidentially share a desire to change the way he or she is living and to assist the person in getting the help needed.[24] Once an attorney is able to take even the smallest action toward solving their problem, life gets better quickly.

a. Get Professional Help.

Lawyers are slow to utilize professional assistance, perhaps due to fear of what people might think, how it might affect their practice, or being ashamed of not being able to figure it out alone. It has been said that people cannot think their way out of bad thinking. Of all people, lawyers know that using a professional who specializes in solving a particular problem is wise.

If what you are doing is not working and you would like to confidentially get professional help but do not already know a suited professional, TLAP can help guide you to licensed professionals who are a good fit for you and who are experienced in working with lawyers.

b. Take The Steps Which Are Suggested.

Having discovered and accepted the fact that a problem exists, it is important to accept help from people who have experience in solving that problem. Once a plan is made, it is important to accept and follow the steps suggested for getting better. Professionals and doctors may prescribe certain actions to address your problem and which may bring about major changes in the way you function and feel. Likewise, there are many 12 Step programs[25] which provide guidance for recovery from a variety of problems and which suggest specific actions which bring about change in the way a person thinks and lives so as to overcome the "problem."

c. Get proactive.

Know that this profession can wear you out. So, get an annual physical. Take a vacation (or "stay-cation"). Develop a team of experts for yourself: peer support, primary care physician, therapist and psychiatrist. Act now, do not wait to address your burnout, sense of dread, lingering grief, daily fear, or excessive substance use intended to numb all of the above.

d. Call TLAP.

The only way to ensure that the situation changes for you is to take action. It may be hard to figure out what action to take. If you are wondering what to do, TLAP's experienced and professional staff is available by phone 24/7 to answer your questions about substance abuse, mental health and wellness issues. Your calls will be to attorneys with resources and helpful ideas to better your life. You can call TLAP at any time at 1-800-343-TLAP(8527). By statute, all communications are confidential pursuant to the Texas Health and Safety Code Chapter 467. TLAP services include confidential support, referrals, peer assistance, customized CLE and education, mandated monitoring, and volunteer opportunities. Without proper intervention and

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[22] *See* Eric D. Caine, *Suicide Prevention Is A Winnable Battle*, 100 *AMERICAN JOURNAL OF PUBLIC HEALTH* S1 (2012).

[23] If you or anyone you know is in need, the National Suicide Prevention Hotline is available 24/7 at 1(800)273-8255(TALK).

[24] TLAP is afforded confidentiality of communications through the Texas Health and Safety Code Chapter 467.

[25] The following are some of the many 12 Step Programs: AA - Alcoholics Anonymous; ACA - Adult Children of Alcoholics; Al-Anon/Alateen, for friends and families of alcoholics; CA - Cocaine Anonymous; Co-Anon, for friends and family of addicts; CoDA - Co-Dependents Anonymous, for people working to end patterns of dysfunctional relationships and develop functional and healthy relationships; DA - Debtors Anonymous; EA - Emotions Anonymous, for recovery from mental and emotional illness; FA - Food Addicts in Recovery Anonymous; FAA - Food Addicts Anonymous; GA - Gamblers Anonymous; Gam-Anon/Gam-A-Teen, for friends and family members of problem gamblers; MA - Marijuana Anonymous; NA - Narcotics Anonymous; NicA - Nicotine Anonymous; OA - Overeaters Anonymous; OLGA - Online Gamers Anonymous; PA - Pills Anonymous, for recovery from prescription pill addiction; SA - Smokers Anonymous; SAA - Sex Addicts Anonymous; and WA - Workaholics Anonymous.

treatment, substance abuse and mental illness are both chronic health conditions that worsen over time. Please call and find out how TLAP can help.

2. Set Boundaries.

Boundaries are important for a person practicing self-care. Personal or professional boundaries are the physical, emotional and mental limits, guidelines or rules that you create to help identify your responsibilities and actions in a given situation and allow you take care of yourself. They also help identify actions and behaviors that you find unacceptable. They are essential ingredients for a healthy self and a healthy law practice. In essence, they help define relationships between you and everyone else.

How does one establish healthy boundaries? Know that you have a right to personal and professional boundaries. Set clear and decisive limits and let people know what you expect and when they have crossed the line, acted inappropriately or disrespected you. Likewise, do not be afraid to ask for what you want, what you need and what actions to take if your wishes are not respected. Recognize that other's needs and feelings and demands are not more important than your own. Putting yourself last is not always the best – if you are worn out physically and mentally from putting everyone else first, you destroy your health and deprive others of your active engagement in their lives. Practice saying no and yes when appropriate and remain true to your personal and professional limits. Do not let others make the decisions for you. Healthy boundaries allow you to respect your strengths, your abilities and your individuality as well as those of others. [26]

3. Connect with Others.

Connecting with others who know first-hand what you are going through can help reduce the fear and hopelessness that is often connected to mental health and substance use disorders. A growing body of research shows that the need to connect socially with others is as basic as our need for food, water and shelter. [27] Fortunately, there are support groups available for lawyers. TLAP and the Texas Lawyers Concerned for Lawyers[28] programs have joined together to offer and support lawyer self-help and support groups around the state. Groups are active around the state in major cities and other areas (Austin, Beaumont, Corpus Christi, Dallas, El Paso, Ft. Worth, Houston, Lubbock, Rio Grande Valley, and San Antonio). These groups operate to support lawyers dealing with a variety of concerns, primarily stress, anxiety, substance use, addictions, and depression. A list of active groups and local contacts is available at www.texasbar.com/TLAP.

Additionally, TLAP's resources include a dedicated and passionate group of hundreds of volunteers who can connect with a lawyer suffering from a mental health or substance use issue. These volunteers are lawyers, judges and law students who are committed to providing peer assistance to their colleagues and who have experienced their own challenges, demonstrated recovery, and are interested in helping others in the same way they were helped. TLAP volunteers uniquely know how important confidentiality is to the lawyer in crisis and are trained to help in a variety of ways: providing one-on-one peer support and assistance, sharing resources for professional help, introducing others to the local support groups and other lawyers in recovery, speaking and making presentations and a host of other activities.

4. Practice Acceptance.

Acceptance is a big, meaningful word which encompasses a variety of important tools for a person seeking a positive life change. First, being able to honestly accept the place where you are at present is an important step in making a change. Until a person is able to accept that the future is not here yet and that the past is gone, he or she cannot be present to focus on what is within grasp that day.

Furthermore, accepting that something is wrong is a step many lawyers resist. Perfectionism and pride play a role in learning to be a good lawyer, but the effects of those can be limiting on a person who needs to get honest about a difficulty.[29] Acceptance of the fact that you have an issue for which help is needed is a major part of solving the problem.

5. Learn to Relax.

For attorneys, relaxing can seem almost impossible. The mind is an instrument, but sometimes

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[26] *This section includes information originally included in a paper written by* Ann D. Foster, JD, LPC-Intern entitled *Practicing Law and Wellness: Modern Strategies for the Lawyer Dealing with Anxiety, Addiction and Depression, which is available online at www.texasbar.com/AM/Template.cfm?Section=Wellness1&Template=/CM/ContentDisplay.cfm&ContentID=15158, and is included herein with her permission.*

[27] *See* MATTHEW LIEBERMAN, *SOCIAL: WHY OUR BRAINS ARE WIRED TO CONNECT* (Crown Publishers 2013).

[28] Texas Lawyers Concerned for Lawyers (TLCL), a volunteer organization associated with the State Bar of Texas Lawyers' Assistance Program (TLAP), helps those in the legal profession who are experiencing difficulties because of alcohol and/or substance abuse, depression, anxiety and other mental health issues.

[29] *See Brené Brown's Ted Talk on "The price of invulnerability":* https://www.youtube.com/watch?v=_UoMXF73j0c&list=PLvzC42i6_rJJkyzWp1hyqUytxBBvNKgI6. *Dr. Brown is a research professor at the University of Houston Graduate College of Social Work where she has spent many years studying courage, shame and authenticity.*

it seems that the instrument has become the master. Breathing exercises, meditation, and mindfulness [30] practices have been very effective for attorneys who need to relax, or "quiet the mind." Much has been written to express how impactful these tools can be to bring about peace in the life of an attorney.[31]

There are countless variations of breathing exercises and resources to learn how to build control of your thoughts and worries.[32] TLAP's website includes links to several of these wellness resources at www.texasbar.com/TLAP.

Suggestion: Calendar what you want to do. Wishing and wanting to change are important ingredients for change but action is important. If there is something that you want to do, what would be the first thing to accomplish to move toward that goal? Calendar it. First things really do come first. Try it!

Finally, in order to relax, cultivate interests unrelated to the practice of law. This will provide you with opportunities to take a well-deserved break from your work, and, quite frankly, helps to make you a far more emotionally well-developed and interesting person. You will also meet a host of new friends and contacts who will help give some additional perspective about your life and your choices.

6. Practice Positive Thinking.

There is a growing body of research showing the powerful positive effects of positive thinking and positive psychology.[33] The goal of this movement is to help people change negative styles of thinking as a way to change how they feel.

Suggestion: Make a Gratitude List. One way to practice positive thinking is to focus your attention on what is right in your life. This is a proven and effective way to escape the sometimes overwhelming thoughts of all of the things that may seem to be wrong. Become conscious of your gratitude. Studies have shown that taking the time to make a list of things for which you are grateful can result in significant improvement in the way you feel and the amount of happiness you experience.[34] Try making a list of three to five things for which you are grateful each morning for a week and see what happens.

7. Help Others.

Service work sounds like just one more thing to add to the list of things you do not have time for, but this is something helpful for you, so consider really making time to do. Obviously, until you secure your oxygen mask, you should not attempt to rescue others, but lawyers have been found to gain "intense satisfaction" from doing service work, [35] and studies show it helps improve mental health and happiness.[36]

For example, a researcher named Dr. Martin Seligman highlighted this theory in an experiment called "Philanthropy versus Fun," Seligman divided up his psychology students into two groups. The first partook in pleasurable past times such as eating delicious food and going to the movies. The second group participated in philanthropic activities, volunteering in feeding the homeless or assisting the physically handicapped. What Seligman found was that the satisfaction and happiness that resulted from volunteering was far more lasting than the fleeting reward of food or entertainment.[37] Even if you feel that it is being done for your own selfish gain, try it anyway and before long you will experience a heightened sense of peace, joy and satisfaction in life. *Service Work Suggestions:* Try to do something kind for someone at least once a week. Try something small. If

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[30] *See* Rhonda V. Magee, *Making the Case for Mindfulness and the Law*, 86 NW Lawyer 3 at p. 18 (2014)(available online at: http://nwlawyer.wsba.org/nwlawyer/april_may_2014/?pg=20#pg20).

[31] *See e.g.*, STEVEN KEEVA, TRANSFORMING PRACTICES: FINDING JOY AND SATISFACTION IN THE LEGAL LIFE (1999); Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Clients*, 7 HARV. NEGOT. L. REV. 1 (2002); Rhonda V. Magee, *Educating Lawyers to Meditate?*, 79 UMKC L. REV. 535 (2010).

[32] Guided breathing exercises and meditations: http://marc.ucla.edu/body.cfm?id=22; Meditate at your desk: https://www.youtube.com/watch?v=nQjMJpQyj8E&feature=youtu.be;

[33] *See* http://www.ppc.sas.upenn.edu/publications.htm

[34] *See* Steven Toepfer, *Letters of Gratitude: Improving Well-Bring through Expressive Writing,* J. OF WRITING RES. 1(3) (2009).

[35] *See Lawrence S. Krieger and Kennon M. Sheldon, What Makes Lawyers Happy? Transcending the Anecdotes with Data from 6200 Lawyers . GEO. WASH. U. L. REV. 83 (2015 Forthcoming), FSU College of Law, Public Law Research Paper No. 667(2014) (citing* Bruno Frey & Alois Stutzer, HAPPINESS AND ECONOMICS: HOW THE ECONOMY AND INSTITUTIONS AFFECT HUMAN WELL-BEING at 105 (2002)).

[36] *See also* the following video of *Dr. Charles Raison, the Assistant Professor of the Department of Psychiatry and the Director of the Mind/Body Program at Emory University, in which Dr. Raison talks about happiness and what causes it:* http://www.youtube.com/watch?v=0orvsH07zeg

[37] *See* Karen Salmansohn, THE BOUNCE BACK BOOK (Workman Publ'g 2008), partially available online at http://www.psychologytoday.com/blog/bouncing-back/201003/the-world-taking-it-outta-you-seligman-study-shows-how-you-can-cheer-givin. *See also* Martin E. P. Seligman, Authentic Happiness (Simon & Schuster 2002).

you have the time, volunteer your time to help another. Do not make the activity about you – it should be about giving to others. Whatever measure you take, large or small, remember that it will not only help others, but it will also serve to build your self-esteem, help put your life in perspective, and help to develop and maintain a vital connection with the community in which you live. [38]

8. Live in the Present.

This cliché phrase may be one of the most under-appreciated tools for the legal profession of any listed here. As lawyers, this sounds like a joke. Deadlines loom. Trials approach. How can this work?

Try it. Consider during your day the things which you are able to do that day. Live it "only for today." If nothing can be done about something on your mind in the day you are in, return your focus to the things you can do that day. If you are not happy with your circumstance, what incremental thing can you do today about it? Nothing? Then move on and enjoy your today. As one attorney put it, "Be where your feet are." The Serenity Prayer is something which can serve as a means to practice this "one day at a time" method: "God, grant me the serenity to accept the things I cannot change, The courage to change the things I can, And the wisdom to know the difference."

9. Expand your Spirituality or Consciousness.

Whatever the variety, research has shown that expanding this area of life makes a major impact of the wellbeing of people, and particularly lawyers. [39] Spirituality has many definitions, but at its core spirituality brings context to our lives and the struggles within them. For many lawyers dealing with the legal world and its many issues, expanding the spiritual life is invaluable. Other lawyers who do not prefer religion or traditional spiritual practices often find great benefit to expanding their consciousness by means of an expansion of an involvement in natural, philosophical, or other pursuits which bring about the contemplation of the reality of existence.

10. Keep it Real.

Recovering from a mental health or substance abuse problem requires honesty. If you begin to feel like you should be better than you are, but you are embarrassed to let others down by admitting your true condition, you are doing yourself a major disservice. Commit to "keeping it real." Be honest with someone about how you are doing so that you do not lose touch with those who can help.

One way to develop or ensure honesty with ourselves is to do an inventory. We all know that any business that fails to take inventory is bound to fail. People are no different. Assessing your life by taking an inventory or snapshot of your daily life can give you an idea of where you are and -- of equal importance -- where you want to go. Small corrections in allocation of time today will help prevent an out-of-balance life tomorrow.

Here is an exercise to help with this type of inventory: Draw a circle and divide the circle into wedges representing the time spent on your daily activities. Are you happy with the allocation of time and energy? Are there areas where you spend the majority of your time and you wish you'd spend less? Are there areas where you devote minimal or no time but wish you did? There is no right or wrong allocation. After all, it is your life and your responsibility. If your inventory highlights areas of concern, what can you do to change them? Or, better said, what would your perfect day's circle look like? Would there be enough time for all-important life activities: work, family, self, exercise, friends, hobbies, spiritual practices, meditation, fun, sex and sleep? What's really important to you? [40]

IV. HELP AND HOPE: TLAP -- A SAFE PLACE TO GET HELP

Why TLAP?

As you know, practicing law can be an awesome adventure, a wonderful walk, a paralyzing fear factory, a sea of depressing doldrums, or all of the above in the same week, depending on your circumstances, lifestyle and perspective. Research shows that perspective and mental wellbeing are paramount to lawyer happiness.[41] Mark Twain once said, "There has been much tragedy

[38] Ann D. Foster, JD, LPC-Intern entitled *Practicing Law and Wellness: Modern Strategies for the Lawyer Dealing with Anxiety, Addiction and Depression, which is available online at* www.texasbar.com/AM/Template.cfm?Section=Wellness1&Template=/CM/ContentDisplay.cfm&ContentID=15158.

[39] See Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Clients*, 7 HARV. NEGOT. L. REV. 1 (2002).

[40] Ann D. Foster, JD, LPC-Intern entitled *Practicing Law and Wellness: Modern Strategies for the Lawyer Dealing with Anxiety, Addiction and Depression, which is available online at* www.texasbar.com/AM/Template.cfm?Section=Wellness1&Template=/CM/ContentDisplay.cfm&ContentID=15158, *portions included herein with her permission.*

[41] *See Lawrence S. Krieger and Kennon M. Sheldon, What Makes Lawyers Happy? Transcending the Anecdotes with Data from 6200 Lawyers . 83 GEO. WASH. U. L. REV. 554 (2015).*

in my life; at least half of it actually happened." This sort of disconnection between perspective and reality is common for attorneys. The Texas Lawyers Assistance Program (TLAP) is a powerful tool for lawyers, law students, and judges to restore or keep wellness to have a hopeful and happy life practicing law.

Background.

TLAP began in 1989 as a program directed toward helping attorneys suffering from alcoholism. While that role remains important for TLAP (attorneys have twice the rate of alcoholism as the general population), the mission is now much broader.

Currently, approximately half of all assistance provided by TLAP is directed toward attorneys suffering from anxiety, depression, or burnout. Additionally, TLAP helps lawyers, law students, and judges suffering problems such as prescription and other drug use, cognitive impairment, eating disorders, gambling addictions, codependency, and many other serious issues. These problems[42] are very treatable, and TLAP's staff of experienced attorneys can connect a person-in-need to a variety of life-changing resources.

TLAP is a Safe Place to Get Help.

It is essential to emphasize and repeat this for those who may be worried: TLAP is a safe place to get help. It is confidential and its staff can be trusted. TLAP's confidentiality was established under Section 476 of the Texas Health & Safety Code. Under this statute, all communications by any person with the program (including staff, committee members, and volunteers), and all records received or maintained by the program, are strictly protected from disclosure. TLAP doesn't report lawyers to discipline!

Call TLAP to Get a Colleague Help.

While the majority of calls to TLAP are self-referrals, other referrals come from partners, associates, office staff, judges, court personnel, clients, family members, and friends. TLAP is respectful and discreet in its efforts to help impaired lawyers who are referred, and TLAP *never* discloses the identity of a caller trying to get help for an attorney of concern.

Furthermore, calling TLAP about a fellow lawyer in need is a friendly way to help an attorney with a problem without getting that attorney into disciplinary trouble. Texas Health & Safety Code Section 467.005(b) states that "[a] person who is required by law to report an impaired professional to a licensing or disciplinary authority satisfies that requirement if the person reports the professional to an approved peer assistance program." Further, Section 467.008 provides that any person who "in good faith reports information or takes action in connection with a peer assistance program is immune from civil liability for reporting the information or taking the action." *Id.*

What TLAP Offers.

Once a lawyer, law student, or judge is connected to TLAP, the resources which can be provided directly to that person include:

- direct peer support from TLAP staff attorneys;
- self-help information;
- connection to a trained peer support attorney who has overcome the particular problem at hand and who has signed a confidentiality agreement;
- information about attorney-only support groups such as LCL (Lawyers Concerned for Lawyers – weekly meetings for alcohol, drug, depression, and other issues) and monthly Wellness Groups (professional speakers on various wellness topics in a lecture format) which take place in major cities across the state;
- referrals to lawyer-friendly and experienced therapists, medical professionals, and treatment centers; and
- assistance with financial resources needed to get help, such as the Sheeran-Crowley Memorial Trust which is available to help attorneys in financial need with the costs of mental health or substance abuse care.

In addition to helping attorneys by self-referrals or third-party referrals, TLAP staff attorneys bring presentations to groups and organizations across the state to educate attorneys, judges, and law students about a variety of topics, including anxiety, burnout, depression, suicide prevention, alcohol and drug abuse, handling the declining lawyer, tips for general wellness, and more. In fact, TLAP will customize a CLE presentation for your local bar association.

Finally, TLAP provides an abundance of information about wellness on its website. The site offers online articles, stories, blogs, podcasts, and videos regarding wellness, mental health, depression, alcohol and drugs, cognitive impairments, grief, anger and many other issues. Check the site out for yourself at www.texasbar.com/TLAP.

V. FINANCIAL HELP: THE SHEERAN-CROWLEY MEMORIAL TRUST

It is funny how society assumes lawyers are all rich. A 2014 CNN report indicated that, while law school debt averaged $141,000, the average starting

[42] *See* www.texasbar.com/TLAP for resources for most of these problems.

U.S. income for attorneys was $62,000.[43] Considering the financial strain many lawyers face and the significant impairment of an attorney struggling with a mental health or substance use problem, you might see how plenty of lawyers cannot afford to get help.

For this reason, in 1995, a small group of generous Texas lawyers created The Patrick D. Sheeran & Michael J. Crowley Memorial Trust. These lawyers knew that about 20% of members of the bar suffer from alcohol or drug problems and that about the same percentage suffer from mental health issues such as depression, anxiety, and burnout. They also knew that, if untreated, these problems would eventually devastate a lawyer's practice and life. With proper treatment and care, however, many of these lawyers can be restored to an outstanding law practice and a healthy life.

The Trust provides financial assistance to Texas lawyers, law students, and judges who need and want professional help for substance abuse, depression and other mental health issues. To be approved, the applicant must be receiving services from TLAP and must demonstrate a genuine financial need.

Once an individual's application for assistance is approved by the Trustees, grants are made payable directly to the care provider(s). To help protect the corpus of the Trust and to give applicants a significant stake in their own recovery, all applicants are asked to make a moral commitment to repay the grant. Beneficiaries can receive up to $2,000 for outpatient counseling, medical care, and medication, $3,000 for intensive outpatient treatment and medication, and $8,000 for inpatient treatment.

The Trust is the only one of its kind in Texas that serves both substance abuse and mental health needs. It has been funded contributions from lawyers and organizations, including the State Bar of Texas, the Texas Center for Legal Ethics, and the Texas Bar College. The Trust is administered by TLAP staff and controlled by a volunteer Board of Trustees who are also members of Texas Lawyers Concerned for Lawyers, Inc., a non-profit corporation that works closely with TLAP.

If you need assistance, or if you would like to help other attorneys in need by contributing to this trust, please contact TLAP at 1-800-343-TLAP (8527)! Also, for more information about the trust or about how to make contributions, see the form attached in the appendix or click here: Sheeran-Crowley Memorial Trust Web Page.

VI. CONCLUSION: TAKE ACTION, CALL TLAP!

A call to TLAP will connect you to a staff attorney around the clock. A recent study indicated that the number one reason law students in need of help would not seek it was the fear of bad professional consequences (63% indicated this fear) such as losing a job, not being able to take the bar, etc.[44] There is **no** *professional* consequence for calling TLAP, but there will be a *personal* consequence for failing to do so if you need help!

Lawyers suffering from mental health and substance use disorders must take action to get better. As Mahatma Gandhi (a lawyer in his younger years) said, "The future depends on what you do today." If you or a lawyer, law student, or judge you know needs help, TLAP is available to provide guidance and support at 1(800)343-TLAP(8527).

[43] *See Ben Brody, Go to Law School. Rack Up Debt. Make $62,000. CNN (July 15, 2014),* http://money.cnn.com/2014/07/15/pf/jobs/lawyer-salaries/ .

[44] *See* 2014 ABA/Dave Nee Survey of Law Student Well-Being (co-piloted by David Jaffe and Jerry Organ and funded by the ABA Enterprise Fund and the Dave Nee Foundation).

APPENDIX 1:

MORE ABOUT THE SHEERAN – CROWLEY MEMORIAL TRUST AND DONATION FORM

The Patrick D. Sheeran & Michael J. Crowley Memorial Trust

Trustees: Mike G. Lee, Dallas; Dicky Grigg, Austin; Bob Nebb, Lubbock

In 1995, a small group of Texas lawyers created The Patrick D. Sheeran & Michael J. Crowley Memorial Trust. They were compelled to do so by the grim knowledge that approximately 15-20% of Texas lawyers suffered from mental illnesses such as substance abuse and depression and that these illnesses, if left untreated, directly impacted a lawyer's practice in myriad negative ways. They also knew that, with proper treatment and mental health care, a lawyer could be restored to a productive life and the ethical practice of law.

The Trust is specifically designed to provide financial assistance to Texas attorneys who need and want treatment for substance abuse, depression and other mental health issues. It serves those whose illnesses have impacted their financial situation and reduced their ability to pay or maintain insurance for necessary mental health care.

All applicants must be receiving services from the Texas Lawyers' Assistance Program and must demonstrate financial need. Once an individual's application for assistance is approved by the Trustees, grants are made payable only to the treatment or provider, after services have been rendered. To help protect the corpus of the Trust and to give applicants a significant stake in their own recovery, all applicants are asked to make a moral commitment to repay the grant. No applicant may be allowed additional grants unless previous grants have been repaid.

The Trust is the only one of its kind in Texas that serves both substance abuse and mental health needs and is currently funded solely by contributions from lawyers. Since 2000, the Trust has raised just over $68,000. Since 2006, the Trust has granted an average of $10,000 per year to lawyers in need of mental health services who could not otherwise afford them, but the need is much greater.

Mental health care is expensive: a psychiatrist charges an average of $300 per hour and a master's level psychotherapist charges $100 per hour. A three month supply of medication to treat depression may cost up to $300. A typical out-patient eight week substance abuse treatment costs $5000, and in-patient substance abuse treatment for one month starts around $12,000. The good news is that lawyers who follow a recommended course of treatment usually respond well and often return to practice relatively quickly. Your generous donation could provide a month of therapy; a three month supply of medication; an out-patient course of treatment; a one month course of in-patient treatment or even more. There are no administrative fees or costs, and volunteer Trustees serve pro bono, to insure that all contributions provide truly valuable and much needed assistance.

In 2010, *The Texas Bar Journal* published the story of a lawyer who received funds from the Trust. Success speaks more eloquently than any fundraiser's plea:

> "Approximately two years ago I found myself in a deep dark place from which I could see no hope for the future. The Sheeran Crowley Trust provided that hope.... I decided that rehab was appropriate for my situation. The next hurdle was financial.... I was totally surprised that there was some financial assistance available to help with the cost of treatment. I never expected financial assistance via a trust specifically set up to help lawyers like me.... Without the Sheeran Crowley Trust I don't know where I would be today. They provided the financial backing to get me the help that I needed. I learned the rest was up to me. I've remained sober since my release from rehab and I have my law practice back. It's been almost two years now. Thank God for TLAP. Thank God for the Sheeran Crowley Trust."

The Trust is named in honor of the first Director of the State Bar of Texas' Lawyers' Assistance Program, Patrick D. Sheeran, and Michael J. Crowley, one of the founders of TLAP, who, during their lives, helped many

attorneys to achieve recovery from alcohol, drugs, depression and other mental health issues. The Trust is supported by the Texas Lawyers' Assistance Program and administered by a volunteer Board of Trustees who are also members of Texas Lawyers Concerned for Lawyers, Inc., a non-profit corporation that works closely with TLAP.

The Trust needs your help through your tax deductible contributions. For more information, please contact Bree Buchanan at 800-343-8527 or simply send a check made payable to the Trust, along with a copy of the accompanying form to: The Sheeran-Crowley Trust, c/o Bree Buchanan, P. O. Box 12487, Austin, Texas 78711.

Yes, I want to make a difference! Please accept my donation to

The Patrick D. Sheeran & Michael J. Crowley Memorial Trust.

_____ $100 _____ $5000

_____ $300 _____ $12,000

_____ $1000 _____ Other

☐ I prefer to remain anonymous.

☐ This gift is in memory / honor of: _____.

☐ I have remembered the Trust in my will.

☐ I have purchased a life insurance policy naming The Patrick D. Sheeran & Michael J. Crowley Memorial Trust as beneficiary.

The Patrick D. Sheeran & Michael J. Crowley Memorial Trust is a 501(c)(3) charitable organization.

Thank you for your generous contribution!

APPENDIX 2: ADDITIONAL RESOURCES

Anxiety and Stress

Edmund Bournes & Lorna Garano, COPING WITH ANXIETY – 10 SIMPLE WAYS TO RELIEVE ANXIETY, FEAR AND WORRY (New Harbinger Publications 2003).

Nancy Byerly Jones, *The Dangerous Link Between Chronic Office Chaos, Stress, Depression, and Substance Abuse,* American Bar Association: GPSOLO 18(5) (2001).

Michael P. Leiter & Christina Maslach, BANISHING BURNOUT (John Wiley & Sons 2011).

Howard Lesnick et al., *Lawyers and Doctors Face the Perils of Practice*, 16 The Hastings Center Report 1, Page 46 (1986).

Andrew Levin et al., *The Effect of Attorneys' Work With Trauma-Exposed Clients on PTSD Symptoms, Depression, and Functional Impairment: A Cross-Lagged Longitudinal Study*, 36 Law and Human Behavior 6 (2012).

Andrew Levin et al., *Secondary Traumatic Stress in Attorneys and Their Administrative Support Staff Working With Trauma-Exposed Clients*, The Journal of Nervous and Mental Disease, 199(12), Page 946 (2011).

Donald C. Murray and Johnette M. Royer, *The cost of justice: a desk manual on vicarious trauma-- vicarious traumatization: The corrosive consequences of law practice for criminal justice and family law practitioners*, Canadian Bar Association (2014) (available online at http://www.lpac.ca/main/main/vicarious_trauma.aspx).

Rebecca M. Nerison, *Lawyers--Anger and Anxiety: Dealing with the Stresses of the Legal Profession*, American Bar Association (2010).

Oregon Attorney Assistance Program, *A Traumatic Toll on Lawyers and Judges*, In Sight for Oregon Lawyers and Judges, 80 (2011).

Robert M. Sapolsky, WHY ZEBRAS DON'T GET ULCERS-- AN UPDATED GUIDE TO STRESS, STRESS-RELATED DISEASES AND COPING (Macmillan 2004).

Marc Schenker, Eaton, Muzza, Green, Rochelle & Samuels, *Steven Self-Reported Stress and Reproductive Health of Female Lawyers*, 39 Journal of Occupational and Environmental Medicine 6, Page 556 (1997).

Depression

G. Andrew H. Benjamin et al., *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 INT'L J. L. & PSYCHIATRY 233 (1990).

Jim Benzoni, *Depression: The Soul Speaks*, 72 THE IOWA LAWYER Vol. 6 (2012).

Matthew Dammeyer and Narina Nunez, *Anxiety and Depression Among Law Students: Current Knowledge and Future Directions*, 23 L. & HUMAN BEHAVIOR 55 (1999).

William Eaton et al., *Occupations and the Prevalence of Major Depressive Disorder*, 32 J. OCCUPATIONAL MED. 1079 (1990).

Todd Goren & Bethany Smith, *Depression As A Mitigating Factor In Lawyer Discipline*, 14 GEORGETOWN JOURNAL OF LEGAL ETHICS 4 (2001).

Rosa Flores & Rose Marie Arce, *Why Are Lawyers Killing Themselves?*, CNN (Jan. 20, 2014, 2:42 PM), online at http://www.cnn.com/2014/01/19/us/lawyer-suicides/.

John Hagan and Fiona Kay, Fiona, *Even Lawyers Get the Blues: Gender, Depression, and Job Satisfaction in Legal Practice,* 41 LAW & SOCIETY REVIEW 1, PAGE 51(March 2007).

Stephen S. Iliardi, Ph.D., THE DEPRESSION CURE: THE 6-STEP PROGRAM TO BEAT DEPRESSION WITHOUT DRUGS (ReadHowYouWant.com 2010).

Nancy Byerly Jones, *The Dangerous Link Between Chronic Office Chaos, Stress, Depression, and Substance Abuse,* American Bar Association: GPSOLO 18(5) (2001).

Howard Lesnick et al., *Lawyers and Doctors Face the Perils of Practice*, 16 The Hastings Center Report 1, Page 46 (1986).

Andrew Levin et al., *The Effect of Attorneys' Work With Trauma-Exposed Clients on PTSD Symptoms, Depression, and Functional Impairment: A Cross-Lagged Longitudinal Study*, 36 Law and Human Behavior 6 (2012).

Rebecca M. Nerison, Is Law Hazardous to Your Health? The Depressing Nature of the Law, NEV. 22 B. LEADER 14 (1998).

Page Thead Pulliam, *Lawyer Depression: Taking a Closer Look at First-Time Ethics Offenders,* 32 THE JOURNAL OF THE LEGAL PROFESSION 289 (2008).

Martin E. Seligman et al., *Why Lawyers are Unhappy*, 22 Cardozo Law Review 33 (2001).

State Bar of Montana, *Special Issue on Lawyers, Depression, and Suicide*, 37 MONTANA LAWYER 8 (2012).

Debra Cassens Weiss, Perfectionism, *'Psychic Battering' Among Reasons for Lawyer Depression*, ABA J.(Feb. 18, 2009, 9:40 AM), http://www.abajournal.com/news/article/perfectionism_psychic_battering_among_reasons_for_lawyer_depression/ ("[T]he likelihood of depression is 3.6 times higher for lawyers than other employed people.").

J. Mark G. Williams et al., THE MINDFUL WAY THROUGH DEPRESSION (Guilford Press 2012).

Mental Health

A.B.A., *The Report Of At The Breaking Point: A National Conference On Emerging Crisis In The Quality Of Lawyers' Health And Lives—Its Impact On Law Firms And Client Services* (1991).

Connie J.A. Beck ET AL., LAWYER DISTRESS: ALCOHOL-RELATED PROBLEMS AND OTHER PSYCHOLOGICAL CONCERNS AMONG A SAMPLE OF PRACTICING LAWYERS, 10 J. L. & HEALTH 1 (1995).

G. Andrew H. Benjamin et al., *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 INT'L J. L. & PSYCHIATRY 233 (1990).

Eric D. Caine, *Suicide Prevention Is A Winnable Battle*, 100 AMERICAN JOURNAL OF PUBLIC HEALTH S1 (2012).

Rosa Flores & Rose Marie Arce, *Why Are Lawyers Killing Themselves?*, CNN (Jan. 20, 2014, 2:42 PM), online at http://www.cnn.com/2014/01/19/us/lawyer-suicides/.

John Hagan and Fiona Kay, Fiona, *Even Lawyers Get the Blues: Gender, Depression, and Job Satisfaction in Legal Practice,* 41 LAW & SOCIETY REVIEW 1, PAGE 51(March 2007).

John P. Heinz et al., *Lawyers and Their Discontents: Findings from a Survey of the Chicago Bar*, 74 IND. L.J. 735 (1999).

Nancy Byerly Jones, *The Dangerous Link Between Chronic Office Chaos, Stress, Depression, and Substance Abuse,* American Bar Association: GPSOLO 18(5) (2001).

Howard Lesnick et al., *Lawyers and Doctors Face the Perils of Practice*, 16 The Hastings Center Report 1, Page 46 (1986).

Andrew Levin et al., *The Effect of Attorneys' Work With Trauma-Exposed Clients on PTSD Symptoms, Depression, and Functional Impairment: A Cross-Lagged Longitudinal Study*, 36 Law and Human Behavior 6 (2012).

Rebecca M. Nerison, Is Law Hazardous to Your Health? The Depressing Nature of the Law, NEV. 22 B. LEADER 14 (1998).

Sacha Pfeiffer, *Law And A Disorder: As Profession Changes, Support Group Sees More Attorneys Seeking Mental Health Help*, The Boston Globe (June 27, 2007).

Todd David Peterson & Elizabeth Waters Peterson, *Stemming the Tide of Law Student Depression: What Law Schools Need to Learn from the Science of Positive Psychology*, 9 YALE J. HEALTH POL'Y, L. & ETHICS 357 (2009).

Robert M. Sapolsky, WHY ZEBRAS DON'T GET ULCERS-- AN UPDATED GUIDE TO STRESS, STRESS-RELATED DISEASES AND COPING (Macmillan 2004).

Patrick J. Schiltz, *On being a happy, healthy, and ethical member of an unhappy, unhealthy, and unethical profession*, 52 VANDERBILT LAW REVIEW 4, Page 869 (1999), available online at http://www.vallexfund.com/download/Being_Happy_Healthy_Ethical_Member.pdf.

Martin E. Seligman et al., *Why Lawyers are Unhappy*, 22 Cardozo Law Review 33 (2001).

Debra Cassens Weiss, Perfectionism, *'Psychic Battering' Among Reasons for Lawyer Depression*, ABA J.(Feb. 18, 2009, 9:40 AM), http://www.abajournal.com/news/article/perfectionism_psychic_battering_among_reasons_for_lawyer_depression/ ("[T]he likelihood of depression is 3.6 times higher for lawyers than other employed people.").

Law School Mental Health and Substance Abuse

G. Andrew Benjamin et al., *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, 1986 AM. B. FOUND. RES. J. 225 (1986).

Matthew Dammeyer and Narina Nunez, *Anxiety and Depression Among Law Students: Current Knowledge and Future Directions*, 23 L. & HUMAN BEHAVIOR 55 (1999).

B.A. Glesner, *Fear and Loathing in the Law Schools*, 23 CONN. L. REV. 627 (1991).

Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. LEGAL EDUC. 75 (2002).

Lawrence S. Krieger, *Human Nature as a New Guiding Philosophy for Legal Education and the Profession*, 47 WASHBURN L. J. 247 (2008).

Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112 (2002).

Todd David Peterson & Elizabeth Waters Peterson, *Stemming the Tide of Law Student Depression: What Law Schools Need to Learn from the Science of Positive Psychology*, 9 YALE J. HEALTH POL'Y, L. & ETHICS 357 (2009).

Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers and their Clients*, 7 HARVARD NEGOTIATION LAW REVIEW 1 (2002).

Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 BEHAV. SCI. & L. 261 (2004).

Lawyer Happiness and Wellness

Herbert Benson, M.D. & Miriam Z. Klipper, THE RELAXATION RESPONSE (HarperCollins 2009).

Mihaly Csikszentmihalyi, FLOW – THE PSYCHOLOGY OF OPTIMAL EXPERIENCE - STEPS TOWARD ENHANCING THE QUALITY OF LIFE (1990).

Susan Daicoff, LAWYER, KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY STRENGTHS AND WEAKNESSES (American Psychological Association 2004).

Martha Davis, Ph.D., et al., THE RELAXATION & STRESS REDUCTION WORKBOOK (New Harbinger 1995).

Bhante Gunaratana & Henepola Gunaratana, MINDFULNESS IN PLAIN ENGLISH (Wisdom Publications Inc 2011).

Thich Nhat Hanh, THE MIRACLE OF MINDFULNESS (Beacon Press 1996).

Peter H. Huang & Rick Swedloff, *Authentic Happiness & Meaning at Law Firms*, 58 SYRACUSE L. REV. 335 (2007-2008).

Lynn D. Johnson, Ph.D., ENJOY LIFE! HEALING WITH HAPPINESS: HOW TO HARNESS POSITIVE MOODS TO RAISE YOU ENERGY, EFFECTIVENESS, AND JOY (HEAD ACRE PRESS 2008).

George W. Kaufman, THE LAWYER'S GUIDE TO BALANCING LIFE AND WORK (Am. Bar 2006).

Lawrence S. Krieger and Kennon M. Sheldon, *What Makes Lawyers Happy? Transcending the Anecdotes with Data from 6200 Lawyers,* GEO. WASH. U. L. REV. 83 (2015 Forthcoming), FSU College of Law, Public Law Research Paper No. 667(2014).

Nancy Levit & Douglas O. Linder, THE HAPPY LAWYER, MAKING A GOOD LIFE IN THE LAW 3-7 (Oxford University Press 2010).

Michael Long et al., *Lawyers at Midlife: Laying the Groundwork for the Road Ahead – A Personal & Financial Retirement Planner for Lawyers* (Niche Press 2009).

Sonja Lyubomirsky, THE HOW OF HAPPINESS (Penguin 2008).

John Monahan & Jeffrey Swanson, *Lawyers at Mid-Career: a 20-Year Longitudinal Study of Job and Life Satisfaction*, 6 J. EMPIRICAL LEGAL STUD. 451, 452-55, 470 (2009)

Jerome M. Organ, What Do We Know About the Satisfaction/Dissatisfaction of Lawyers? A Meta-Analysis of Research on Lawyer Satisfaction and Well-Being, 8 U. ST. THOMAS L.J. 225 (2011).

James W. Pennebaker, OPENING UP: THE HEALING POWER OF EXPRESSING EMOTIONS (Guilford Press 2012).

Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers and their Clients*, 7 HARVARD NEGOTIATION LAW REVIEW 1 (2002).

Karen Salmansohn, THE BOUNCE BACK BOOK (Workman Publ'g 2008).

Patrick J. Schiltz, *On being a happy, healthy, and ethical member of an unhappy, unhealthy, and unethical profession*, 52 VANDERBILT LAW REVIEW 4, Page 869 (1999), available online at http://www.vallexfund.com/download/Being_Happy_Healthy_Ethical_Member.pdf.

Martin E. Seligman, *Authentic Happiness* (Simon & Schuster 2002).

J. Mark G. Williams et al., THE MINDFUL WAY THROUGH DEPRESSION (Guilford Press 2012).

Substance Abuse

Rick Allan, *Alcoholism, Drug Abuse and Lawyers: Are We Ready to Address the Denial?* CREIGHTON LAW REVIEW, 31(1) (1997).

Connie J.A. Beck ET AL., LAWYER DISTRESS: ALCOHOL-RELATED PROBLEMS AND OTHER PSYCHOLOGICAL CONCERNS AMONG A SAMPLE OF PRACTICING LAWYERS, 10 J. L. & HEALTH 1 (1995).

G. Andrew H. Benjamin et al., *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 INT'L J. L. & PSYCHIATRY 233 (1990).

G. Andrew Benjamin et al., *Comprehensive Lawyer Assistance Programs, Justification and Model*, 16 LAW & PSYCHOLOGY REVIEW 113 (1992).

Michael Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is it Time for a New Approach?* 61 TEMPLE LAW REVIEW 1409 (1988).

Eric Drogin, *Alcoholism in the Legal Profession: Psychological and Legal Perspectives and Interventions*, LAW & PSYCHOLOGY REVIEW Vol. 15(1991).

Timothy Edward & Gregory Van Rybroek, ADDICTION AND ATTORNEYS: CONFRONTING THE DENIAL, 80 WISCONSIN LAWYER 8 (2007).

Mary Greiner, *Demystifying 12-Step Programs*. American Bar Association: GPSOLO, 18(5), available online at http://www.njlap.org/AboutAlcoholDrugAbuse/Demystifying12StepPrograms/tabid/69/Default.aspx.

Cindy McAlpin, *Bumps in the Road III: Out of the Shadows Women and Addiction,* American Bar Association: GPSOLO, 23(8) (2006).

Elsie Shore, *Relationships Between Drinking and Type of Practice among U.S. Female and Male Attorneys,* 141 JOURNAL OF SOCIAL PSYCHOLOGY 5, Page 650 (2001).

J.E. Stockwell, *Lawyers Assistance: Identifying Alcoholism*, 60 LA. B.J. 57, 57 (2012) (citing alcoholism and substance abuse numbers as doubled within the legal community).

Suicide Prevention

M. M. Dammeyer and N. Nunez, N., *Anxiety And Depression Among Law Students: Current Knowledge And Future Directions,* 23 Law and Human Behavior 55-73 (1999).

http://www.daveneefoundation.org/ (contains many suicide prevention resources for lawyers and law students).

B. Gibson, *How Law Students Can Cope: A Student's View,* 60 Journal of Legal Education 140-146 (2010).

D.H. Granello, *The Process Of Suicide Risk Assessment: Twelve Core Principles*, 88 Journal of Counseling and Development 363-370 (2010).

http://www.lawlifeline.org/ (outstanding resources for the legal profession on wellness and suicide prevention)

Bodell Ribeiro, Hagan Hames, and T.T. Joiner, *An Empirically Based Approach To The Assessment And Management Of Suicidal Behavior*, 23 Journal of Psychotherapy Integration 207-221 (2013).

http://www.suicidepreventionlifeline.org/ (click here for Suicide Prevention Toolkit).

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16TH ANNUAL
ADVANCED INSURANCE LAW

Course Directors:
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Tollefson Bradley Mitchell & Melendi, LLP

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Mendez Law Firm

8265

June 2019

16TH ANNUAL
ADVANCED INSURANCE LAW

Preface

The State Bar of Texas sponsored a two-day seminar entitled "16th Annual Advanced Insurance Law" in San Antonio on June 6-7, 2019. This book was prepared for that program.

The State Bar would like to express its sincere appreciation for the fine efforts of the planning committee, and especially to the Course Directors, Stephen A. Melendi and Juan "Trey" Mendez III.

The greatest thanks and recognition, however, go to the authors and lecturers for their unselfish devotion of time and effort over the past several months to this worthwhile program.

Hedy R. Bower, Director
TexasBarCLE
State Bar of Texas

The authors who prepared the articles appearing in this book were carefully selected for their knowledge and experience in the subject area under review. They prepared their articles a short time prior to the program, and their manuscripts were, upon arrival at the State Bar, sent to the printer without being edited for content. The intent of this process is to provide readers with the most up-to-date information available.

Obviously, neither the State Bar nor the authors can warrant that the material will continue to be accurate, nor do they warrant it to be completely free of errors when published. Readers should verify statements before relying on them.

The articles in this book reflect the viewpoints of their authors and do not necessarily express the opinions of the State Bar of Texas, its Sections, or Committees.

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Mr. Melendi's practice focuses on insurance coverage analysis and disputes. He has represented parties to insurance disputes involving interpretation of liability, property, errors and omissions, commercial auto, trucking, and excess policies, as well as in disputes regarding an insurer's duty of good faith and fair dealing and duties throughout the State of Texas at the trial court level and on appeal.

Stephen is rated "AV Pre-eminent" by Martindale-Hubbell, and is a Member of the College of the State Bar of Texas. He was named a "Texas Super Lawyer" as published in *Texas Monthly* Magazine in 2013, 2014, 2015, and 2016; and was named a "Texas Rising Star" as published in *Texas Monthly* Magazine in 2007 - 2013.

Education

Stephen graduated *cum laude* from Southern Methodist University School of Law. While in law school, he was an articles editor for the International Law Review Association and is a member of *Phi Delta Phi*. Mr. Melendi also served as Judicial Extern for the late Chief Judge Jerry Buchmeyer of the United States District Court for the Northern District of Texas. Prior to attending law school Stephen graduated from Texas A & M University with a B.S. in political science.

Admissions

Mr. Melendi is admitted to practice law before all state courts in Texas, all United States District Courts in Texas, Arkansas and Oklahoma, as well as the United States Courts of Appeal for the Fifth, Seventh, Eighth and Eleventh Circuits.

Memberships

State Bar of Texas
American Bar Association
Dallas Bar Association
College of the State Bar of Texas
Texas Aggie Bar Association
Defense Research Institute
Claims & Litigation Management Alliance (CLM) –
- Greater Dallas Chapter Secretary
- Insurance Bad Faith Committee

Activities

Council Member, Council of the Insurance Law Section of the State Bar of Texas,
- 2014-present

Dallas Bar Association Tort and Insurance Practice Section,
- Director – 2014 – present
- Secretary – 2016
- Vice-Chair - 2017

Member of the Planning Committee for the Annual Insurance Law Institute, co-sponsored by the University of Texas School of Law 2009- 2016 (Co-Chair 2014 - 2016)

Claims & Litigation Management Alliance (CLM) –
- Greater Dallas Chapter Secretary – 2016-Present

Recent Speeches and Papers Presented at Accredited Continuing Education Seminars and Published Articles

The Primary Excess Relationships, Or the Cause and Effect of Helicopter Carriers
State Bar of Texas, Twelfth Annual Advanced Insurance Law Course, San Antonio, Texas, 2015

Gilbert/Ewing – Contractual Liability Coverage
State Bar of Texas, Ninth Annual Advanced Insurance Law Course, Dallas, Texas, 2012

Auto Coverage under General Liability Policies,
Presented at the 16th Annual Insurance Law Institute, University of Texas School of Law, 2011

Other Insurance: One, Two, Three ... Not "It!"
Presented at the 15th Annual Insurance Law Institute, University of Texas School of Law, 2010

The Application of Pollution Exclusions in Texas
Presented at the 14th Annual Insurance Law Institute, University of Texas School of Law, 2009

Representative Reported Cases:

Colony Natl. Ins. Co. v. United Fire & Cas. Co., __ Fed.Appx. __ 2017 WL 436042 (5th Cir. 2017)

Quibodeaux v. Nautilus Ins. Co., 655 Fed.Appx. 984 (5th Cir. 2016)

Colony Ins. Co. v. Chesapeake Energy Corp., ___ F.Supp.3d ___ 2016 WL 5416517 (W.D.Okla. September 28, 2016)

Colony Ins. Co. v. Price, 622 Fed.Appx. 311 (5th Cir. 2015)(per curiam)

Morrison v. Fettig, et al., 630 Fed.Appx. 307 (5th Cir. 2015)(per curiam)

Nautilus Ins. Co. v. Texas State Sec. and Patrol, 2010 WL 3239157 (W.D.Tex. June 18, 2010)

Colony Nat. Ins. Co. v. Specialty Trailer Leasing, Inc., 620 F.Supp. 786 (N.D.Tex. 2009)

James River Ins. Co. v. Affordable Hous. of Kingsville II, Ltd., 2012 WL 1551529 (S.D.Tex. Apr.27, 2012)

Continental Cas. Co. v. Consolidated Graphics, Inc., 646 F.3d 210 (5th Cir. 2011)

National Fire Ins. Of Hartford v. C. Hodges & Associates, PLLC, 825 F.Supp.2d 792 (W.D.Tex 2011)

Nautilus Ins. Co. v. Villalta, 558 Fed.Appx. 404 (5th Cir. 2014)(Mem.Op)

Nautilus Ins. Co. v. Steinberg, 316 S.W.3d 752 (Tex.App. – Dallas 2010, pet denied)

Transport International Pool, Inc. v. Continental Ins. Co., 166 S.W.3d 781 (Tex.App. – Fort Worth 2005, no pet.)

Nautilus Ins. Co. v. Country Oaks Apartments Ltd., 566 F.3d 452 (5th Cir. 2009)

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Nat'l Fire Ins. Co. v. Entertainment Specialty Ins. Services, Inc., 485 F.Supp.2d 737 (N.D.Tex. 2007)

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Richmond Condominiums v. Skipworth Commercial Plumbing, Inc., 245 S.W.3d 646, (Tex.App.-Fort Worth 2008, pet. denied)

Am. S. Ins. Co. v. Buckley, 748 F.Supp.2d 610 (E.D.Tex.2010)

Personal

Mr. Melendi was born, and resides, in Dallas, Texas, and is a fourth generation Dallasite.
Mr. Melendi is an Eagle Scout.

COURSE DIRECTOR

Juan "Trey" Mendez III was born and raised in Brownsville, Texas. He graduated from the University of Texas School of Law in 2005 and returned to his hometown to practice. After a small stint at a two-person law office, he joined a larger firm and became a partner in about two years. Five years later, he opened his own law firm in Brownsville, The Mendez Law Firm, which focuses on Civil Litigation. Trey proudly represents home and business owners in first party insurance litigation throughout Texas and has tried several cases against insurance companies in the last couple of years.

Besides being a lawyer, his passion for historical preservation and restoration resulted in his appointment as the chairman of the Historic Preservation and Design Review Board for the City of Brownsville. He also co-founded the Brownsville Preservation Society, Inc. a non-profit corporation that preserves and protects Brownsville's historical architecture. He is currently serving his second six-year term as an elected member of the Texas Southmost College Board of Trustees.

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SUPREME COURT OF TEXAS UPDATE
(EDITED EXCERPT)
JUNE 1, 2018 – DECEMBER 31, 2018

HON. DEBRA H. LEHRMANN, *Austin*
Justice, Supreme Court of Texas

State Bar of Texas
16TH ANNUAL
ADVANCED INSURANCE LAW
June 6-7, 2019
San Antonio

CHAPTER 1

Special thanks to all the staff attorneys and Law Clerks at the Supreme Court of Texas for their substantial contributions.

Debra H. Lehrmann
Justice, Supreme Court of Texas

Justice Debra Lehrmann has served on the Supreme Court of Texas since 2010, having been elected to the Court twice following her gubernatorial appointment. She serves as the Court's liaison to the Board of Disciplinary Appeals, the Commission for Lawyer Discipline, the Texas Association for Court Administration, the State Bar Family Law Section, the State Bar Family Law Council, and the Texas Attorney–Mediator Coalition.

With a total of over 30 years' judicial experience, she was a trial judge in Tarrant County for 23 years prior to her appellate service. She has served the Bar in leadership capacities on both a state and national level.

She currently serves as the inaugural chair of the State Bar of Texas Child Protection Law Section and is a prior chair of the Family Law Section of the ABA. She is a commissioner on the Uniform Law Commission and served as chair of the drafting committee on the Uniform Nonparental Child Custody and Visitation Act. As a member of the American Law Institute, she serves on the drafting committee of the Restatement of Children and the Law.

A member of Phi Beta Kappa, she received her undergraduate degree with high honors from The University of Texas, her law degree from U.T. Law, and her LL.M. from Duke.

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SUPREME COURT OF TEXAS UPDATE

Phil Johnson
Justice
Supreme Court of Texas

I. SCOPE OF THIS ARTICLE

This article surveys cases that were decided by the Supreme Court of Texas from January 1, 2018 through December 31, 2018. Petitions granted but not yet decided are also included.

II. ARBITRATION

A. Enforcement of Arbitration Agreement

1. RSL Funding, LLC v. Newsome, S.W.3d , 62 Tex. Sup. Ct. J. 253 (Tex. Dec. 21, 2018) [16-0998].

At issue in this case was whether a court may determine the arbitrability of claims in a bill of review despite an agreement assigning arbitrability to the arbitrator. Rickey Newsome assigned his right to receive structured-settlement payments to RSL Funding, LLC and RSL Special-IV, LP in exchange for a lump-sum payment. The parties signed a contract that included a mandatory arbitration agreement that also delegated to the arbitrator the question of whether a dispute was arbitrable. A district court approved the transfer as required by the Structured Settlement Protection Act but also ordered RSL to pay a penalty if it did not promptly pay Newsome. After a dispute emerged over payment, RSL and Newsome agreed to modify the court order to remove the penalty. The court entered the modified judgment nunc pro tunc after its plenary power in the case had lapsed. Newsome then brought a bill of review asking the court to void the nunc pro tunc approval order or, in the alternative, void both approval orders. RSL moved to compel arbitration. The trial court refused to compel arbitration. The court of appeals affirmed the trial court's order denying arbitration on interlocutory appeal. The Supreme Court reversed and remanded.

The Court held neither the bill-of-review context nor the Structured Settlement Protection Act prohibited enforcement of the arbitration agreement for the arbitrator to at least determine arbitrability. Under both Texas and federal law, courts must enforce arbitration agreements, including agreements to have the arbitrator decide which disputes are arbitrable. In this case, the court was therefore obligated to compel arbitration once it determined an arbitration agreement existed because the parties agreed to have the arbitrator, not the court, decide which disputes were arbitrable. While the Structured Settlement Protection Act requires a court to approve structured-settlement-payment transfers and a bill of review may only be heard by the trial court that issued the earlier judgment, neither are incompatible with arbitration of related disputes such that a court could disregard parties' agreement to have an arbitrator determine the disputes' arbitrability. The Court also held that the separability of the agreement to arbitrate meant the arbitrator should decide the enforceability of the contract containing the agreement. Because Newsome did not put the formation of the contract in question nor challenge the enforceability of the arbitration clause specifically, the trial court had no choice but to send the case to arbitration. The Court accordingly reversed and remanded to the trial court with instructions to grant the motion to compel arbitration.

III. DAMAGES

A. Settlement Credits

1. Sky View at Las Palmas, LLC v. Martinez, 555 S.W.3d 101 (Tex. June 1, 2018) [17-0140].

At issue in this case was whether the trial court erred in denying the defendants, Sky View at Las Palmas, LLC and its shareholders, settlement credits for the four settlements the plaintiff entered into with the other defendants in the lawsuit. In order to fund a planned development in Hidalgo County, Sky View obtained a $1,275,000 promissory note from Romano Geronimo Martinez Mendez (Martinez),

secured by a lien on the property. Sky View's two shareholders, Ilan Israely and Abraham Gottlieb, each personally guaranteed the note. After Sky View defaulted, Martinez sued Sky View, Israely, and Gottlieb for breach of contract and fraud. Over years of litigation, Martinez added four additional defendants to his lawsuit: (1) his prior counsel who had represented him during the loan transaction, (2) the title company that employed an allegedly negligent escrow officer, (3) the title company that underwrote the title insurance policy, and (4) the counsel that Martinez had retained at the beginning of the lawsuit. Martinez alleged various causes of action against each of these additional defendants, including claims for negligence, fraud, breach of contract, and legal malpractice. The jury returned a verdict against Sky View, Israely, and Gottlieb for the full value Martinez claimed was due on the note plus interest—$2,655,832.72. Prior to trial, Martinez settled with three of the later added defendants, and he settled with the fourth after the jury returned its verdict but before the trial court entered its final judgment. Together, the four settlement agreements totaled $2,300,000. Sky View and Israely argued that they were entitled to settlement credits under the one-satisfaction rule for the amounts paid to Martinez by the settling defendants. The trial court refused to award any credits, and the court of appeals affirmed.

The Supreme Court reviewed the common law surrounding the one-satisfaction rule, emphasizing that whether a nonsettling defendant is entitled to settlement credits depends not on the causes of actions the plaintiff asserts, but on whether the plaintiff has suffered a single, indivisible injury. The Court concluded that Martinez complained of a single, indivisible injury against each defendant—nonpayment of the $1,275,000 million note—merely varying his causes of action and allegations according to each defendant's alleged role in causing Martinez to suffer the claimed damages. Thus, because the defendants offered evidence of the settlement amounts and Martinez failed to show that awarding him the full jury's award would not amount to a double recovery, the trial court should have applied the requested settlement credits. The Court also held that application of the one-satisfaction rule is not limited to tort cases or cases involving joint and several liability. The Court reversed the court of appeals' judgment and remanded the case to that court for calculation of the reduced judgment with appropriate interest.

IV. EVIDENCE

A. Unfair Prejudice

1. JBS Carriers, Inc. v. Washington, 564 S.W.3d 830 (Tex. Dec. 21, 2018) [17-0151].

At issue in this wrongful death case was (1) whether the trial court abused its discretion in excluding evidence of the decedent's mental disorder and drug and alcohol use, and (2) whether an employer could be held directly liable for the death based on a negligent training theory. Mary L. Turner was crossing a street away from a crosswalk when a turning eighteen-wheeler tractor trailer ran over her. Her children brought this wrongful death and survival action against the driver, James Lundry, and his employer, JBS Carriers, Inc. JBS and Lundry sought to introduce evidence showing that Turner had mental health issues and that she ingested drugs and alcohol before her death. The proffered evidence included an autopsy, Turner's prior medical records, and testimony from an expert medical witness. The trial court excluded the evidence under Texas Rule of Evidence 403, finding the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. The jury found Lundry, JBS, and Turner negligent, attributing 50% of the responsibility to Lundry, 30% to JBS, and 20% to Turner. The jury also awarded damages. JBS and Lundry appealed, challenging the trial court's exclusion of evidence. JBS also challenged the evidence regarding its direct liability. The court of appeals affirmed, and JBS and Lundry appealed.

The Supreme Court first addressed the exclusion of evidence. The Court noted that evidence of a party's use of impairing substances is admissible if (1) the evidence raises a question about why the party acted as he or she did in connection with the occurrence and (2) if it is relevant to the party conforming or failing to conform to an appropriate standard of care. A mental health issue in a negligence case is also relevant when other evidence supports a finding that the mental impairment contributed to the party's allegedly negligent actions. Here, because

the excluded evidence was related to Turner's vigilance, judgment, and reactions in walking into the road when and where she did, and under circumstances where she had an unrestricted view of a large truck moving toward her, the evidence should not have been excluded. The Court also found that the exclusion of the evidence was harmful because it was crucial to the key issue of whether Turner's decision to walk into the street met the standard of reasonable care and no other evidence was presented showing that Turner walked into the street because she was impaired.

JBS also challenged its direct liability. It argued that a direct negligence claim may not be submitted as to a corporate employer if that employer has already conceded that it will be vicariously liable for any negligence found against its employee. The Court did not reach that issue, however, finding instead that there was no evidence to support the family's claim that JBS negligently trained Lundry regarding a blind spot in the eighteen-wheeler because there was no evidence that even if Lundry had received such training, the occurrence would not have happened. The Court reversed the court of appeals judgment, entered a take nothing judgment against JBS, and remanded the claims against Lundry for a new trial.

V. GOVERNMENTAL IMMUNITY

A. Contract Claims

1. Wasson Interests, Ltd. v. City of Jacksonville, 559 S.W.3d 142 (Tex. Oct. 5, 2018) [17-0198].

At issue in this case was whether a city enjoyed immunity from suit for a breach-of-contract claim arising from its termination of a lakefront lease and the application of the governmental-proprietary dichotomy to a breach of contract claim. The dichotomy provides that a municipality enjoys immunity from suit when exercising a governmental function but not when exercising a proprietary function. The City of Jacksonville leases lakefront lots surrounding Lake Jacksonville. Wasson Interests, Ltd., was one of those lessees. The City terminated Wasson's lease after alleged violations of the lease agreement. Wasson filed suit for, among other things, breach of contract. The trial granted summary judgment for the City, and the court of appeals affirmed, reasoning that the governmental-proprietary dichotomy does not extend to breach of contract claims against a municipality. The Supreme Court reversed, holding that the dichotomy extends to the contract claims, but remanded to the court of appeals to address whether the City entered into the lease in its proprietary or governmental capacity. On remand the court of appeals held that the City's actions that formed the basis of the suit were part of several governmental functions. Wasson again appealed to the Supreme Court, arguing that the City did not enjoy immunity from suit because it entered into the lease in its proprietary capacity.

The Court held that, when applying the governmental-proprietary dichotomy to a breach-of-contract claim, courts must focus on the city's actions in entering the contract, not the city's actions giving rise to suit. The Court then articulated a four-factor test derived from the Tort Claims Act to determine whether the City's actions in entering into the lease agreement were proprietary or governmental: whether (1) the City's act of entering into the leases was mandatory or discretionary, (2) the leases were intended to primarily benefit the general public or the City's inhabitants, (3) the City was acting on the State's or its own behalf when it entered the leases, and (4) the City's act of entering into the leases was sufficiently related to a governmental function to render the act governmental even if otherwise it would have been proprietary. Applying those factors, the Court held that the City was operating in its proprietary capacity because the City's decision to lease its lakefront property was discretionary, the lease primarily benefitted the City's inhabitants, the City was not acting as a branch of the State, and the lease of lakefront property was not sufficiently related to an enumerated governmental function. The Court reversed and remanded to the court of appeals for that court to consider the City's other grounds for summary judgment.

VI. INSURANCE

A. Insurance Code Liability

1. State Farm Lloyds v. Fuentes, 549 S.W.3d 585 (Tex. June 8, 2018) [16-0369].

This case involves an insurance coverage dispute. Hurricane Ike damaged the Fuenteses' home in 2008. The Fuenteses filed a claim with

their insurer, State Farm, for exterior and interior damage. State Farm paid for the exterior damage, but an adjuster concluded the hurricane did not cause the interior damage. The Fuenteses sued State Farm for breach of contract, breach of the duty of good faith and fair dealing, fraud, and Insurance Code violations. A jury awarded the Fuenteses breach of contract damages and damages for violations of the Insurance Code. State Farm sought judgment notwithstanding the verdict, arguing the jury's finding that the Fuenteses breached the insurance contract first excused State Farm from performing under the policy. The trial court disregarded two of the jury's findings and rendered judgment for the Fuenteses.

The court of appeals affirmed, concluding that State Farm waived its argument that the trial court improperly disregarded the jury's findings because its briefing addressed only the Fuenteses' breach of contract claim without separately challenging the jury's findings on Insurance Code violations. The court also rejected State Farm's argument that the trial court improperly prohibited State Farm from presenting evidence and submitting a jury question on its excessive-demand defense.

The Supreme Court affirmed in part and reversed in part. As to State Farm's argument that the trial court improperly disregarded the jury's findings, the Court passed no judgment on the court of appeals' briefing-waiver analysis but concluded the issue should be remanded to the court of appeals for reconsideration in light of 14-0721; *USAA Texas Lloyds Co. v. Menchaca*, decided while the petition in this case was pending before the Court. But the Court found no fault with the court of appeals' determination that State Farm did not establish that the exclusion of evidence on State Farm's excessive-demand defense resulted in rendition of an improper judgment, assuming the defense is available at all when an insured makes an excessive demand on its insurer.

VII. INTENTIONAL TORTS

A. Fraud

1. Anderson v. Durant, 550 S.W.3d 605 (Tex. June 22, 2018) [16-0842].

This fraudulent-inducement and defamation case presents two issues: (1) whether the jury's failure to find the parties agreed to specific contract terms precluded an award of benefit-of-the-bargain damages for fraudulent inducement where the terms of the parties' agreement were disputed but its existence was not, and (2) whether legally sufficient evidence supported the general and special damages awarded for defamation.

After working at Jerry Durant Auto Group for a decade, Andrew Anderson's employment was terminated amid allegations he had accepted illegal kickbacks. After struggling to find comparable work, Anderson sued Durant and others for defamation. Anderson also sued Durant for breach of contract and fraudulent inducement, alleging Durant reneged on an oral promise to convey an ownership interest in the business. The terms, but not the existence, of the agreement were vigorously disputed. Anderson claimed the offer was firm and included a 10% interest in two dealerships plus associated real estate interests while Durant maintained the offer was contingent and limited to a 10% interest in only one of the dealerships but not the real estate. Answering fraudulent-inducement and contract questions, the jury found Durant defrauded Anderson but did not find Durant agreed to convey ownership interests in both the dealerships and their underlying real estate. The jury awarded Anderson $383,150 in fraud damages based on a 10% ownership interest in both dealerships and $0 fraud damages for the value of a 10% interest in any real property. Finding the defendants defamed Anderson, the jury awarded him $2.2 million in past and future defamation damages. The trial court rendered judgment on the jury's verdict, but the court of appeals reversed and rendered a take-nothing judgment, holding (1) Anderson could not recover benefit-of-the-bargain damages on his fraudulent-inducement claim absent a separate and independent finding the parties entered into an enforceable contract on specific terms, and (2) no evidence supported an award of defamation damages.

The Supreme Court affirmed in part, reversed in part, and remanded to the court of appeals to consider unaddressed issues. As to the fraudulent-inducement claim, the Court held (1) the fraud-liability question incorporated the required elements of a contract; (2) the record included disputed, but legally sufficient, evidence of an enforceable promise to provide Anderson a 10% ownership interest in the two dealerships; (3) no findings rendered that contractual exchange unenforceable; and (4) the jury's failure to find an agreement that included both business and land interests did not conflict with the jury's fraud findings, which only awarded damages based on an unfulfilled promise to convey business interests. Considering the evidence and the jury submissions, the jury's fraud-in-the-inducement finding and award of benefit-of-the-bargain damages did not require a separate and independent finding that an enforceable agreement existed as to only the business interests. Regarding the defamation claim, the Court held some evidence supported an award for loss of reputation and mental anguish in the past, but no evidence supported awards of future damages or lost-income damages related to the kickback allegations.

VIII. JURISDICTION

A. Personal Jurisdiction

1. Old Republic Nat'l Title Ins. Co. v. Bell, 549 S.W.3d 550 (Tex. June 1, 2018) [17-0245].

This dispute over personal jurisdiction arose from a series of money transfers between a Texas resident and a Louisiana resident in connection with the sale of Texas property. Lisa Bell, a Texas resident, sold a house to Chita Chandrasekaran and transferred the proceeds to Robin Goldsmith, a Louisiana resident. After the sale of the house, the United States government informed Chandrasekaran that it had a lien on the property and demanded payment. Old Republic National Title Insurance Company, the company that insured title for the sale of the property, paid the federal government $202,573.88 in exchange for the release of the lien, and then sued both Bell and Goldsmith under the Texas Uniform Fraudulent Transfers Act. Goldsmith filed a special appearance, objecting to the court's jurisdiction over her. The trial court granted Goldsmith's motion and the court of appeals affirmed, holding that Goldsmith's contacts with Texas were too attenuated to constitute purposeful availment. Old Republic appealed to the Supreme Court.

The sole issue before the Supreme Court was whether Goldsmith's contacts with Texas were sufficient to confer specific jurisdiction over her as to Old Republic's fraudulent transfer claim. Old Republic alleged that Goldsmith's contacts included numerous phone calls with a Texas resident, at least eighty-one money transfers to a Texas bank account, a lien held by Goldsmith on three vehicles in Texas, and the receipt of proceeds derived from the sale of Texas real property. The test for establishing purposeful availment has three factors: (1) only the defendant's contacts with the forum are relevant; (2) the contacts must be purposeful rather than random, fortuitous, or attenuated; and (3) the defendant must seek some benefit, advantage, or profit by availing itself of the jurisdiction. Analyzing each of the alleged contacts, the Court reasoned that no evidence showed that Goldsmith sought a benefit, advantage, or profit from her alleged contacts with Texas. The Court added that specific jurisdiction does not turn on where a defendant "directed a tort" but is instead dependent on the defendant's contacts themselves. Thus, the Court held that Goldsmith's contacts did not meet the test for establishing purposeful availment and were therefore insufficient to establish jurisdiction over her. The Court affirmed the court of appeals' judgment.

IX. MEDICAL LIABILITY

A. Emergency Care

1. Tex. Health Presbyterian Hosp. of Denton v. D.A., S.W.3d , 62 Tex. Sup. Ct. J. 280 (Tex. Dec. 21, 2018) [17-0256].

At issue in this case was whether Texas Civil Practice and Remedies Code section 74.153, which requires a heightened standard of proof for health care liability claims involving the provision of emergency medical care, applied to care provided in an obstetrical unit when the patient was not first evaluated or treated in a hospital emergency department.

A mother checked into Texas Health Presbyterian Hospital of Denton for an elective

induction of labor the next day. During the delivery the next day, the baby's shoulder became stuck on the mother's pelvis. The baby suffered injuries when the doctor dislodged the shoulder. Mother and father, individually and as baby's next friends (collectively, the family), sued the hospital, the doctor, and the doctor's practice group (collectively, the hospital), alleging that the maneuvers used to dislodge the baby's shoulder were negligent. At trial, the hospital invoked section 74.153, arguing that because the claims arose from the provision of emergency medical care, the family must prove willful and wanton negligence, not mere ordinary negligence. In response, the family argued that section 74.153 did not apply because mother was not first evaluated in the hospital's emergency department. The trial court agreed with the hospital and concluded that section 74.153 applies to emergency medical care performed in an obstetrical unit without the patient having first been evaluated or treated in a hospital emergency room. The court of appeals reversed and remanded, concluding section 74.153 does not apply to emergency medical care performed in an obstetrical unit without the patient having first been evaluated or treated in a hospital emergency room.

The Supreme Court reversed the court of appeals' judgment. The Court first considered the statutory text and context. Willful and wanton negligence is required when the claim arises from the provision of emergency medical care "in a hospital . . . or in a surgical suite immediately following the evaluation or treatment of a patient in a hospital emergency department." The statute's repeated use and placement of the prepositional phrase "in a," and the repeated references to treatment provided "in a hospital emergency department," led the Court to conclude that the family's proposed construction was not reasonable. Further, the phrase "immediately following" modified the reference to care provided in a surgical suite, but not the references to care provided in a hospital emergency department or obstetrical unit.

Although the family urged the court to consider various extrinsic construction aids, the Court declined to do so because the Court does not rely on extrinsic aids to construe unambiguous statutory language. The Court concluded that section 74.153 requires claimants to prove willful and wanton negligence when their claims arise out of the provision of emergency medical care in a hospital obstetrics unit, regardless of whether that care is provided immediately following an evaluation or treatment in the hospital's emergency department. The Court reinstated the trial court's partial summary judgment, and remanded the case to the trial court for further proceedings.

X. MUNICIPAL LAW

A. State Law Preemption

1. City of Laredo v. Laredo Merchs. Ass'n, 550 S.W.3d 586 (Tex. June 22, 2018) [16-0748].

At issue in this case was whether a local anti-litter ordinance was preempted by the Texas Solid Waste Disposal Act. The Laredo Merchants Association sued the City of Laredo, seeking to forestall the enforcement of an ordinance prohibiting merchants from providing or selling single use bags to customers. The trial court granted the City's motion for summary judgment and denied the Merchants' motion for summary judgment. The court of appeals reversed. The Supreme Court affirmed and remanded the case to the trial court to consider the Merchants' claims for attorney fees and costs.

Because Laredo is a home-rule municipality, it has authority to enact regulations unless the regulation is inconsistent with the Texas Constitution or Texas state laws. However, the Texas Solid Waste Act expressly precludes local governments from prohibiting or restricting the sale or use of a container or package if the restraint is for solid waste management purposes and the manner of regulation is not authorized by state law. The City enacted the ordinance to control the generation of solid waste, which the Court concluded was a solid waste management purpose. The Court reasoned that single-use bags fell under the statutory terms "container" and "package" based on statutory context and the plain meanings of the words. The Court held that the Texas Solid Waste Disposal Act authorizes regulation only when municipalities are expressly told what manner of regulation is permissible. As such, the City's ordinance was expressly

preempted by the Texas Solid Waste Disposal Act.

Justice Guzman, joined by Justice Lehrmann, concurred. The concurrence agreed with the Court's opinion but highlighted the adverse impact of plastic waste and expressed concern over the lack of uniform regulation on the topic.

XI. PROCEDURE—PRETRIAL

A. Responsible Third Party Designation

1. In re Dawson, 550 S.W.3d 625 (Tex. June 22, 2018) [17-0122].

The issue in this case was whether the relator, Melissa Dawson, presented adequate grounds for mandamus relief when the trial court permitted the defendant, Two for Freedom, LLC, (Freedom) to designate a time-barred responsible third party despite Freedom's failure to provide Dawson with timely notice of its intent to do so. Dawson sued Freedom after a television at its restaurant fell from the wall, striking Dawson and injuring her. In response to her requests for disclosures, interrogatories, and requests for production, Freedom indicated that all parties were correctly named, there were no other potential parties, and it would supplement its disclosures with the information regarding persons who may be designated as a responsible third party. But in an answer to an interrogatory, it indicated that an individual named Michael Graciano installed the television. Two weeks after limitations ran, Freedom filed a motion for leave to designate Graciano as a responsible third party, noting that he installed the television "in his individual capacity as an independent contractor." The trial court granted leave. After the court of appeals denied Dawson's request for mandamus relief, she sought a writ of mandamus from the Supreme Court.

The Court held that the trial court abused its discretion by granting Freedom leave to designate a time-barred responsible third party because Freedom did not satisfy the prerequisite discovery obligations and that Dawson lacked an adequate remedy by appeal. In order to designate a responsible third party after the statute of limitations on a plaintiff's claims has expired, the defendant must have timely disclosed that the third party may be so designated. Freedom merely indicated that it would supplement its response pertaining to potential responsible third parties. Yet, it never timely notified Dawson of whom it intended to designate. Furthermore, Dawson lacked an adequate remedy by appeal. Mandamus relief is often afforded when the very act of proceeding to trial would defeat a substantive right. Dawson sought to protect her right to not have to try her case against a time-barred responsible third party from whom she could not recover. Accordingly, the Court conditionally granted a writ of mandamus without hearing oral arguments.

B. Summary Judgment

1. Seim v. Allstate Tex. Lloyds, 551 S.W.3d 161 (Tex. June 29, 2018) [17-0488].

At issue in this case was whether complaints pertaining to unverified or unauthenticated summary judgment evidence are subject to the general rules of error preservation. Richard and Linda Seim sued Allstate Texas Lloyds and its adjuster, Lisa Scott, regarding an insurance policy claim arising from property damage that their home sustained during an August 2013 storm. Allstate moved for summary judgment on both traditional and no-evidence grounds. In response, the Seims filed a response that referenced two unverified expert reports and a purported affidavit. Allstate objected to defects in the summary judgment evidence, including that the Seims' expert merely attested to the accuracy of the facts within the document, rather than within the two expert reports and that the document lacked a notary's signature. The trial court granted judgment for Allstate without specifying the grounds or ruling on Allstate's evidentiary complaints. The Seims appealed to the court of appeals, which concluded the Seims' expert reports constituted incompetent evidence due to the lack of verification or authentication. And due to the defects with the affidavit, the Court held that the record contained no sworn evidence supporting the Seims' claims.

The Supreme Court held that Allstate was required to preserve its objections to the Seims' summary judgment proof by both objecting and obtaining an express ruling on its objections. Although a trial court's implicit ruling may be sufficient for purposes of error preservation, it is not sufficient when nothing in the record serves as a clearly implied ruling. Due to the lack of a clear

implicit ruling in the record, Allstate could only raise the issue on appeal if its objections pertained to purely substantive defects with the summary judgment evidence. However, when an affidavit presents formal defects, those flaws must be objected to and ruled on by the trial court to preserve error. The Court held the affidavit presented a formal defect and thus the issue was not preserved. The Court reversed and remanded to the court of appeals for consideration of Allstate's remaining issues.

XII. STATUTE OF LIMITATIONS

A. Discovery Rule

1. Carl M. Archer Trust No. 3 v. Tregellas, 566 S.W.3d 281 (Tex. Nov. 16, 2018) [17-0093, 17-0094].

At issue in this case was when the statute of limitations begins to run on a claim for a breach of a right of first refusal—at the time of the sale in breach or at the time the rightholder discovers the breach? In other words, does the discovery rule, a common law doctrine that tolls the statute of limitations until the injured party discovers the injury, apply to such a claim?

The Carl M. Archer Trust No. 3 held a publicly recorded right of first refusal to purchase the mineral interests under a tract of land. However, Ronald and Donnita Tregellas purchased the mineral interests from the then-owners without any party to the sale notifying the Trust. The Trust thus did not have an opportunity to exercise its right of first refusal. Just over four years after the Tregellases' purchase, a potential oil and gas lessee notified the Trust that the mineral interest had been sold. The Trust filed suit to enforce its right of first refusal the next day, May 5, 2011. The trial court decided in the Trust's favor because the Trust neither knew nor should have known of the sale. But the court of appeals reversed, holding that the limitations period began to run at the time of the sale to the Tregellases and thus expired before the Trust filed its action. The court of appeals also severed and remanded the matter of attorney's fees.

The Supreme Court reversed the court of appeals' judgment in part regarding the right of first refulsal and reversed the court of appeals' judgment regarding attorney's fees. The Court agreed with numerous courts of appeals (including the court below) holding that a cause of action for breach of a right of first refusal generally accrues when the property subject to the right is transferred in violation of the right. In so doing, the Court rejected the Trust's argument that a cause of action accrues only upon a suit for specific performance of the right. However, the Court held that a grantor's conveyance of property in breach of a right of first refusal, where the rightholder is given no notice of the grantor's intent to sell or of the purchase offer, is inherently undiscoverable and that the discovery rule applies to defer accrual of the holder's cause of action until the holder knew or should have known of the injury. Because the Trustees did not know of their injury, nor in the exercise of reasonable diligence should they have known until May 4, 2011, they sued well within four years of the date the cause of action accrued, and the statute of limitations did not bar their claim. Accordingly, the Court also reinstated the trial court's award of attorney's fees.

XIII. UNIFORM COMMERCIAL CODE

A. Bank Transactions

1. Compass Bank v. Calleja-Ahedo, S.W.3d , 62 Tex. Sup. Ct. J. 260 (Tex. Dec. 21, 2018) [17-0065].

This case concerned liability for losses when an imposter takes funds from a customer's bank account. Fancisco Calleja-Ahedo had a money market account with Compass Bank. He lived in Mexico and instructed the Bank to send statements to his brother at an address in Texas. The brother would not open the statements but Calleja would sometimes review them. In June 2012, an imposter instructed the bank to change the address where the statements were sent. The imposter ordered checks and wrote a large check on the account in July 2012. The check depleted most of the account. Small withdrawals and charges then eventually drained the account until it had a negative balance. Calleja claimed he did not learn of the improper charges until January 2014. He sued the bank for the lost funds. The trial court granted summary judgment for the Bank, finding that the claims were barred because Calleja waited too long to notify the Bank of the fraudulent activity. The court of appeals reversed and rendered judgment for Calleja.

The Supreme Court reversed the court of appeals' judgment. The Court held that under section 4-406 of the Uniform Commercial Code, TEX. CIV. PRAC. & REM. CODE § 4.406, Calleja's claims against the Bank were barred. Under section 4.406(f), a statute of repose, claims are barred without regard to care or lack of care if a customer does not report the loss to the bank within one year after the bank statement is made available to the customer. The Court held that the statements were "made available" to Calleja even if they were mailed to the imposter, because the evidence showed that Calleja could have picked up copies of his statements at any branch, he could have called a 1-800 number given in each statement to obtain copies, and he could have obtained the statements online by setting up online banking for free. Most of Calleja's losses related to losses within one year of the time the statements were made available. As to a few smaller transactions occurring within one year before the relevant statements were made available, the Court held that these claims were barred by section 4.406(d)(2), which provides that the customer must notify the bank within 30 days of unauthorized withdrawals by the same wrongdoer. This subsection applies if the banks paid the unauthorized amounts in good faith and the Court held there was no evidence the Bank failed to act in good faith. The Court remanded the case to the court of appeals for it to consider issues it did not reach.

XIV. WORKERS' COMPENSATION

A. Subrogation

1. Wausau Underwriters Ins. Co. v. Wedel, 557 S.W.3d 554 (Tex. June 8, 2018) [17-0462].

In this case the Supreme Court construed a subrogation waiver promulgated by the Texas Department of Insurance (TDI) to waive a workers' compensation carrier's right to recover either directly from a liable third party or indirectly from an injured employee's recovery from the third party. After James Wedel was injured at work, workers' compensation carrier Wausau Underwriters Insurance Company paid benefits to him. Wedel sued Western Refining, the owner of the facility where he was injured. When Wedel and Western Refining entered into settlement negotiations, Wausau asserted subrogation rights against it for past and future medical expenses and indemnity payments. Wedel joined Wausau as a third-party defendant. Wedel moved for summary judgment declaring that Wausau had waived its right to recover any proceeds from the lawsuit based on a provision in the workers' compensation policy: "Waiver of Our Right to Recover from Others Endorsement," which provided that the carrier would not enforce its right to recover "against the person or organization named in the Schedule," which included Western Refining. The trial court granted judgment for Wedel and the court of appeals affirmed.

The Supreme Court affirmed the court of appeals' judgment, rejecting Wausau's argument that the waiver foreclosed only Wausau's right to pursue reimbursement directly from Western Refining but not Wedel. Noting that it must look to TDI's intent when construing an agency-promulgated endorsement, the Court observed that the form had not substantively changed despite over twenty years of unanimous case law interpreting it as the employee argued. The Court further acknowledged TDI administrative orders that interpreted the waiver to preclude recovery from either the third party or the injured employee. The Court concluded those interpretations were consistent with the waiver's plain language, which can be fairly read to apply to both a direct recovery from a third party or an indirect recovery from proceeds the third party pays to an injured employee. Under either scenario, the Court reasoned, the reimbursement the carrier receives flows from the third party named in the waiver. The Court rejected an argument that the Labor Code necessarily creates separate and distinct rights to subrogation and reimbursement that must inform its reading of the contract. The Court further explained that the carrier's interpretation of the waiver undermines the rationale for having such a waiver in the first place because a potential recovery from the employee's settlement proceeds would effectively drive up the cost for the third party to settle the lawsuit to the same amount as if there had been no waiver at all.

Justice Johnson, joined by Justice Boyd, dissented and agreed with Wausau that the Texas Labor Code creates separate rights to subrogation

and reimbursement and that the waiver spoke only to the carrier's subrogation right to recover directly from a liable third party. Arguing that the waiver was obtained by the employer only because it was required by Western Refining, the dissent maintained that the waiver does not reference or waive the carrier's right to reimbursement if an injured employee recovers from a third party.

Index

DECLARATORY JUDGMENT AS A REMEDY: WHEN YOU CAN AND WHEN YOU CAN'T

Presented by:
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Levinger, PC

State Bar of Texas
16TH ANNUAL
ADVANCED INSURANCE LAW
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San Antonio

CHAPTER 2

This article was originally presented at the 35th Annual Litigation Update Institute in San Antonio on January 17, 2019.

Thanks

As with most CLE papers, this paper stands on the shoulders of previous papers drafted by selfless volunteer lawyers who gave their time to enhance continuing legal education. We are particularly indebted to the following article, from which we borrowed shamelessly:

- The Honorable Christine Butts, Judge, Harris County Probate Court No. 4, *When Is a Declaratory Judgment Proper?*, 12th Annual Conference on Fiduciary Litigation (2017).

Neel Lane

Partner
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Neel Lane

Biography

Mr. Lane's practice principally consists of representing insurers in coverage litigation, class action suits, reinsurance arbitrations and other disputes. He is known for his knowledge and appreciation of the client's business operations and interests, and for formulating strategies that best serve those interests.

Mr. Lane has also handled a wide range of commercial litigation disputes. He has conducted more than 30 jury trials, bench trials and arbitrations and has argued before numerous state and federal appellate courts.

Mr. Lane has also handled numerous matters on a pro bono basis, including cases involving death penalty habeas corpus petitions and lawsuits challenging state restrictions on same-sex marriage.

Additionally, he has testified before the legislature in support of needle exchange legislation and restrictions on payday lending practices that impact the working poor.

Education

JD, University of Texas School of Law, 1988
BA, Columbia University, 1984

Admissions

New York State Bar

Texas State Bar

Representative experience

Mr. Lane has represented a diverse body of clients in engagements that include:

Representation of Insurers in D&O Coverage Disputes

- representing underwriters of D&O and PI policies in numerous suits brought in state and federal courts based on coverage disputes related to the failure of Stanford Financial Group. In one notable case brought in federal court in Houston, underwriters obtained a finding that indicted directors and officers had engaged in acts of money laundering, triggering a policy exclusion. Numerous other cases remain pending
- representing underwriters of a D&O policy issued to bank directors in declaratory judgment action brought in federal court in Atlanta, Georgia

- representing underwriters of excess policy issued to an energy company in connection with a dispute over coverage for an SEC enforcement action and bankruptcy adversary proceeding pending in federal court in Dallas, Texas
- representing underwriters in Delaware Chancery Court in connection with a Side A-only D&O Policy issued to a major corporation
- representing underwriters in Delaware Superior Court in connection with a D&O Policy issued to a national real estate operating company
- representing underwriters of D&O policies in numerous disputes resolved prior to litigation

Reinsurance Arbitrations

- representing ceding companies in arbitration proceedings over coverage of claims submitted under variable annuity death benefit reinsurance treaty. One matter remains pending
- representing a ceding company in an arbitration proceeding over application of cap on premium rates set forth in variable annuity death benefit reinsurance treaty
- representing ceding companies in an arbitration proceeding over cession of impaired life claims under automatic reinsurance treaties
- representing a ceding company in an arbitration proceeding over payment of life insurance claims arising from the World Trade Center attack on September 11, 2001
- representing a ceding company in an arbitration proceeding over application of pollution exclusion to ceded property claims
- representing a reinsurer in an arbitration proceeding relating to a block of long-term care policies

Representation of Life Insurers and Affiliated Broker-Dealers in State and Federal Court

- representing defendants in a class action suit brought in federal court in Oklahoma City, Oklahoma asserting federal securities claims based on alleged failure to disclose incentive compensation programs for registered representatives in connection with the sale of variable life policies and mutual fund shares. The district court granted motions to dismiss and for summary judgment disposing of all of plaintiffs' claims. The Tenth Circuit affirmed
- representing defendants in a class action suit brought in state court in Hartford, Connecticut asserting state law claims based on alleged unsuitable sale of variable annuities for use in qualified plans. After removal to federal court, plaintiffs' claims were dismissed in their entirety under SLUSA. The Second Circuit's decision affirming the district court's order (Lander v. Hartford Life) remains the leading case on SLUSA preemption involving sale of hybrid insurance products representing defendants in a class action suit brought in federal court in Texarkana, Texas asserting securities violations for the alleged unsuitable sale of variable annuities for use in qualified plans. After the close of class discovery, the district court denied plaintiff's motion for class certification. Plaintiffs did not appeal
- representing defendants in a pre-SLUSA class action suit brought in state court in San Diego, California alleging state law remedies based on alleged unsuitable sale of variable annuities for use in a large qualified plan for county employees. The court granted plaintiffs' motion for class certification on a narrow question. The court granted judgment in favor of the defendant after a five-week trial. Plaintiffs did not appeal
- representing defendants in a pre-SLUSA class action suit brought in state court in Los Angeles, California alleging state law remedies based on alleged unsuitable sale of variable annuities for use in a large qualified plan for municipal employees. The court denied plaintiff's motion for class certification, and the case thereafter was dismissed
- representing defendants in a class actions brought in state court in St. Clair and Madison Counties, Illinois asserting state law contract and negligence claims based on defendants' allegedly permitting market timing in subaccounts offered within variable annuities. After removal and transfer of venue in the cases, the district court dismissed plaintiffs' claims. The Fourth Circuit affirmed and the U.S. Supreme Court denied certiorari
- representing defendants in a class action suit brought in state court in Tucson, Arizona asserting state law and federal claims based on alleged omissions and misrepresentations relating to the sale of variable annuities for use in qualified plans. After removal to federal court, and the close of discovery, the court struck plaintiffs' expert witness, vacated an order granting class certification, and granted summary judgment in favor of defendants. The Ninth Circuit affirmed
- representing defendant in a multiple-plaintiff suit brought in state court in Marin County, California asserting numerous state law tort and statutory claims based on alleged negligence in sponsoring financial education seminars by financial advisors who allegedly made unsuitable investment recommendations to seminar participants
- representing defendants in a class action suit brought in state court in Phoenix, Arizona asserting federal claims based on alleged omissions and misrepresentations relating to the sale of variable annuities for use in qualified plans. After defendants won a motion to transfer venue to the Southern District of Texas, the district court granted defendants' motion to dismiss. The case is currently on appeal to the Fifth Circuit

- representing defendants in class action suit brought in federal court in Atlanta, Georgia asserting federal securities claims based on alleged unsuitable sale of variable annuities for use in qualified plans. After taking the case over from a firm that lost a motion to dismiss, we obtained dismissal of the case prior to certification. The Eleventh Circuit affirmed
- representing defendants in class action suit brought in federal court in Oakland, California asserting federal securities claims based on alleged unsuitable sale of variable annuities for use in qualified plans. After defendants won dismissal of two plaintiffs and transfer of venue to the Middle District of Florida, the district court granted defendants' motion to dismiss the remaining plaintiffs' claims
- representing defendants in class action suit brought in state court in Charleston, West Virginia, alleging defendant committed fraud and misrepresentation in connection with the sale of fixed annuities within a government-sponsored qualified plan. The case remains pending.
- representing respondent in an arbitration involving a dispute over alleged breach of a marketing agreement relating to the sale of insurance products in qualified plans
- representing broker-dealer affiliate in an arbitration arising from a dispute over fees alleged to be due under a technology licensing agreement

Representation of Property & Casualty Insurers in State and Federal Court

- representing defendants in a class action suit brought in state court in Norman, Oklahoma alleging bad faith and breach of contract based upon failure to pay general contractor's overhead and profit on homeowners' claims. After the defendants obtained dismissal of all but one defendant entity on procedural grounds, the case settled
- representing defendants in a class action suit brought in state court in Beaumont, Texas alleging insurer wrongfully withheld depreciation in paying homeowner insurance claims. Case was settled on an individual basis after court failed to certify class
- representing defendants in a class action suit brought in state court in Austin, Texas alleging defendants wrongfully refused to pay for OEM parts in connection with repairs made under auto insurance policies
- representing defendants in numerous suits brought in Texas state courts alleging the insurer had wrongfully denied claims in bad faith. Many of these cases were tried to a jury
- representing defendant in a suit brought in federal court in Minneapolis, Minnesota alleging insurer wrongfully denied payment of claims under employer-sponsored health plan. The district court granted defendant's motion to dismiss. The plaintiff dismissed its appeal of the order

Rankings and recognitions

- Finalist, Attorney of the Year, *Texas Lawyer*, 2015
- Outstanding Lawyer, *San Antonio Business Journal*, 2015
- Empire State Counsel, New York State Bar Association, 2015
- The Best Lawyers in America, 2009 - 2016, 2018 - 2019
- Texas Super Lawyers, Insurance Coverage, *Thomson Reuters*, 2014 - 2018

Publications

- Author, "The Arbitration Trap," *Insurance Journal*, Nov. 5, 2012

Memberships and activities

Mr. Lane is involved in community, civic and charitable activities that include current and previous membership on the boards of:

- Episcopal Relief and Development
- Texas Appleseed
- Good Samaritan Community Services
- Texas Law Review Association

Mr. Lane is also a member of The William S. Sessions American Inn of Court.

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BIOGRAPHY

Joe Greenhill is an associate in the firm's Appellate and Litigation sections. Prior to joining Kelly Hart & Hallman LLP, Mr. Greenhill served as a law clerk to the Honorable John Devine and the Honorable David Medina of the Texas Supreme Court.

EXPERIENCE AND HIGHLIGHTS

- *Anderson v. Durant*, 550 S.W.3d 605 (Tex. 2018)
- *N. Am. Tubular Servs., LLC v. BOPCO, L.P.*, No. 02-17-00352-CV, 2018 WL 4140635, at *1 (Tex. App.—Fort Worth Aug. 30, 2018, no pet. h.) (mem. op.).
- *In re Happy State Bank*, No. 02-17-00453-CV, 2018 WL 1918217, at *1 (Tex. App.—Fort Worth Apr. 23, 2018, orig. proceeding) (mem. op.).
- *City of Bedford v. Apartment Ass'n of Tarrant Cty., Inc.*, No. 02-16-00356-CV, 2017 WL 3429143, at *1 (Tex. App.—Fort Worth Aug. 10, 2017, pet. denied) (mem. op.).
- *Enter. Prods. Partners, L.P. v. Energy Transfer Partners, L.P.*, No. 05-14-01383-CV, 2017 WL 3033312 (Tex. App.—Dallas July 18, 2017, pet. pending)
- *Kinsel v. Lindsey*, No. 15-0403, 2017 WL 2324392 (Tex. May 26, 2017)
- *CBIF Ltd. P'ship v. TGI Friday's Inc.*, No. 05-15-00157-CV, 2017 WL 1455407 (Tex. App.—Dallas Apr. 21, 2017, pet. denied) (mem. op.)
- *Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580 (Tex. 2016)
- *In re Lipsky*, 460 S.W.3d 579 (Tex. 2015) (orig. proceeding)
- *Conglomerate Gas II, L.P. v Gibb*, No. 02-14-00119-CV, 2015 WL 6081919 (Tex. App.—Fort Worth Oct. 15, 2015, pet. denied)
- *Walsh v. Woundkair Concepts, Inc.*, No. 02-14-00395-CV, 2015 WL 1544004, at *1 (Tex. App.—Fort Worth Apr. 2, 2015, pet. denied) (mem. op.)
- *Cactus Well Serv., Inc. v. Energico Prod., Inc.*, No. 02-13-00186-CV, 2014 WL 6493231 (Tex. App.-Fort Worth Nov. 20, 2014), opinion supplemented on denial of reh'g, No. 02-13-00186-CV, 2015 WL 293840 (Tex. App.—Fort Worth Jan. 22, 2015, pet. denied)
- *Jackson Walker, LLP v. Kinsel*, No. 07-13-00130-CV, 2014 WL 720889 (Tex. App.—Amarillo Feb. 14, 2014, pet. granted) (mem. op.).
- *1707 New York Ave., LLC v. City of Arlington*, No. 02-14-00259-CV, 2015 WL 6457569, at *1 (Tex. App.—Fort Worth Oct. 22, 2015, no pet.) (mem. op.)

- *Daven Corp. v. Tarh E & P Holdings, L.P.*, 441 S.W.3d 770, 772 (Tex. App.—San Antonio 2014, pet. denied)

AFFILIATIONS AND HONORS

AFFILIATIONS

- Texas Bar Foundation, Fellow
- Tarrant County Bar Association, Appellate Section, Chair
- Eldon B. Mahon Inn of Court
- Texas Supreme Court Historical Society
- The WARM Place, Board Member

HONORS

- Texas Super Lawyers Rising Star, Thomson Reuters, 2018
- Top Attorney in Appellate Law, *360 West* magazine, 2018
- Top Attorney, *Fort Worth, Texas* magazine, 2017-2018
- Top Attorney in less than five years in practice in Appellate Law, *360 West* magazine, 2017
- Top Attorney under five years in practice, *Fort Worth, Texas* magazine, 2013-2016

EDUCATION

- Charleston School of Law, J.D., *magna cum laude*, 2012
    - *Charleston Law Review*, Associate Editor in Chief, 2011-2012; Member, 2010-2011
- Texas Tech University, B.A., *summa cum laude*, 2006

ADMISSIONS

- State Bar of Texas, 2013
- U.S. Court of Appeals, Fifth Circuit

SPEECHES & PUBLICATIONS

- Joe R. Greenhill, *From the Playground to Cyberspace: The Evolution of Cyberbullying*, 5 CHARLESTON L. REV. 707 (2011).

LEVINGER

JEFFREY S. LEVINGER
Board Certified Civil Appellate Law
Texas Board of Legal Specialization

CURRICULUM VITAE OF JEFFREY S. LEVINGER

EDUCATION

Dartmouth College (B.A., 1979) Magna cum laude; Phi Beta Kappa
University of Virginia (J.D., 1982) Editorial Board, Virginia Law Review (1980-1982); Order of the Coif

JUDICIAL CLERKSHIP

Law Clerk to the Honorable Patrick E. Higginbotham, United States Court of Appeals for the Fifth Circuit (1982-1983)

PROFESSIONAL EXPERIENCE

Owner, Levinger PC (2011–present)
Partner, Hankinson Levinger LLP (2008–2011)
Partner, Carrington, Coleman, Sloman & Blumenthal, L.L.P. (1990–2008)
Associate, Carrington, Coleman, Sloman & Blumenthal, L.L.P. (1983-1989)

BOARD CERTIFICATION

Board Certified in Civil Appellate Law by the Texas Board of Legal Specialization (1989-present)
Nationally Certified in Appellate Law by the American Institute of Appellate Practice (2013)

PROFESSIONAL ACTIVITIES AND RECOGNITION

Member, American Law Institute (2000-present)
Master, Wm. "Mac" Taylor American Inn of Court (1997-present)
Board of Governors, Fifth Circuit Federal Bar Association (2014-present)
Fellow, Litigation Counsel of America (2010-present)
Fellow, Texas Bar Foundation (1998-present) and Dallas Bar Foundation (2001-present)
Member, State Bar of Texas Pattern Jury Charge Oversight Committee (2018-present)
Chairman, State Bar of Texas Committee on Pattern Jury Charges: Malpractice, Premises & Products (2009-2017)
Chairman, State Bar of Texas Appellate Section (2013-2014)
Council member, State Bar of Texas Appellate Section (2005-2008)
Chairman, Civil Appellate Law Advisory Commission for the Texas Board of Legal Specialization (2005)
Chairman, Dallas Bar Association Appellate Law Section (2007)
Named in *Best Lawyers in America* in appellate law and commercial litigation (2008-present)
Named multiple times by *Texas Monthly* as one of Texas's top 100 attorneys
Named multiple times by *D Magazine* as one of the "Best Lawyers in Dallas" in appellate law
Named by *Benchmark Appellate Litigation* as a "Fifth Circuit Litigation Star" (2012-present)
Named by *Chambers USA* as one of Texas's top appellate attorneys (2010-2012)

SELECTED PUBLICATIONS AND PRESENTATIONS

Equitable Relief at Trial and on Appeal (co-author and presenter with Lara Hollingsworth), presented at the 28th Annual UT Conference on State and Federal Appeals (June 2018)

Farmers and Ranchers Should be Friends: How Trial and Appellate Lawyers Can and Should Work Together (co-presenter with Todd Clement), presented at the 31st Annual State Bar of Texas Course on Advanced Civil Appellate Practice (September 2017)

Legal Malpractice and Breach of Fiduciary Duty (co-author with Michael Endy), presented At the 27th Annual UT Conference on State and Federal Appeals (June 2017)

Arguing "Significance to the Jurisprudence of the State": Ten Ways to Get Supreme Court Review, and Ten Ways to Avoid It (co-author with Carl Cecere), presented at the State Bar of Texas course on Practice Before the Texas Supreme Court (May 2015)

Update of Federal Courts and Federal Rules of Civil Procedure, panel discussion presented at the State Bar of Texas Advanced Civil Trial Law Course (August 2014)

Summary Judgments: How to Prepare Them, How to Defend Them, and How to Hold Onto Them on Appeal (co-author and presenter with Judge Ken Molberg), presented at the 36th Annual State Bar of Texas Advanced Civil Trial Course (July, August, October 2013)

The Charge and Appellate Issues (co-author and presenter with John Gsanger), presented at the Fifth Annual State Bar of Texas course on Damages in Civil Litigation (March 2013)

Creative Use of Special Exceptions/Summary Judgments (co-author and presenter with Judge Ken Molberg), presented at the 35th Annual State Bar of Texas Advanced Civil Trial Course (July, August, October 2012)

The Court's Charge and the Implications of Casteel (co-author and presenter), presented at the 4th Annual State Bar of Texas course on Damages in Civil Litigation (February 2012)

Texas Supreme Court Update, presented at the 2010 Annual Judicial Education Conference (September 2010)

Changes in Pattern Jury Charges, presented at the 24th Annual State Bar of Texas Advanced Civil Appellate Practice Course (September 2010)

The Court's Charge and the Implications of Casteel, presented at the State Bar of Texas course on Evaluating, Negotiating, Proving and Collecting Damages and Attorneys' Fees (February 2009)

Pro Bono Initiatives, presented at the 22nd Annual State Bar of Texas Advanced Civil Appellate Practice Court (September 2008)

War Stories: A View From the Litigation Trenches, panel discussion, presented at the 17th Annual Dallas Bar Association Bench Bar Conference (September 2008)

Effective Courtroom Written and Oral Communications, panel discussion, presented at the 17th Annual Dallas Bar Association Bench Bar Conference (September 2008)

How to Not Screw Up Your Case for Appeal, presented at the State Bar of Texas Advanced Personal Injury Law Course (July, August 2008)

Perfecting the Appeal and Securing the Record, presented at the 21st Annual Advanced Civil Appellate Practice Course (September 2007)

Creative Interpretations of State Farm v. Campbell, presented at the 15th Annual Conference on State and Federal Appeals (June 2005)

Pondering Punitives: Issues Arising at Trial and on Appeal, presented at the 18th Annual State Bar of Texas Advanced Civil Appellate Practice Course (September 2004)

Jury Charge Under HB4 (co-author), presented at the State Bar of Texas Advanced Civil Trial Course (August 2004)

PJC Volume 3 (co-author and co-presenter), presented at the State Bar of Texas Advanced Personal Injury Law Course (July, August 2004)

What in the World Does the Charge Look Like After House Bill 4?, presented at the State Bar of Texas course on Real Damages after HB 4 (January, February 2004)

Selected Topics in Appealing Actual and Punitive Damages, presented at the 17th Annual State Bar of Texas Advanced Civil Appellate Practice Court (September 2003)

Pondering Punitives: Issues Arising at Trial and on Appeal, presented at the State Bar of Texas Advanced Personal Injury Law Course (June, July, August 2003)

FRAP Amendments and TRAPs in the FRAPs, presented at the 13th Annual Conference on State and Federal Appeals (June 2003)

Business Litigation panel discussion, presented at the 16th Annual State Bar of Texas Advanced Civil Appellate Practice Course (September 2002)

Co-Author, *Fifth Circuit Trial Practice Guide* (1998)

TABLE OF CONTENTS

DECLARATORY JUDGMENT AS A REMEDY: WHEN YOU CAN AND WHEN YOU CAN'T

I. INTRODUCTION.

It seems as if most litigation these days contains a request from one party or the other (or both) for the trial court to make some form of declaration. Sometimes these declarations are the primary thrust of a suit; other times, the requested declarations are tacked on to the end of a petition (or counterclaim) and merely duplicate the parties' other claims.

Why this trend? There are really two primary benefits to pursuing a declaratory judgment action. First, attorney's fees may be awarded to the parties, irrespective of who prevails. Second, when a declaratory judgment arrives on the scene, it raises the stakes in the litigation and threatens to eat away at the possible spoils, occasionally prompting parties to consider settlement.

Since litigants often avoid directly paying the freight for the prosecution of declaratory judgment actions, such actions provide an attractive mechanism by which to bring a dispute to the attention of the court. Sometimes, like a wolf in huntsman's clothing, claims for affirmative relief, like breach of fiduciary duty, are improperly cloaked as declaratory judgment actions. This paper will explore common ways in which declaratory judgments are correctly used and examples of how declaratory judgments are sometimes misused.

II. PURPOSE OF THE TEXAS UNIFORM DECLARATORY JUDGMENT ACT.

A. Remedial, Not Coercive Relief.

The stated purpose of the Texas Uniform Declaratory Judgments Act ("TDJA" or the "Act") is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." Tex. Civ. Prac. & Rem. Code § 37.002(b). The statute expressly provides that it is "remedial" and "is to be liberally construed." *Id.* The basic purpose of the remedy is to provide parties with an early adjudication of rights before they have suffered irreparable damage. *Harkins v. Crews*, 907 S.W.2d 51, 56 (Tex. App.—San Antonio 1995, writ denied). The TDJA is intended as a speedy and effective remedy for settling disputes before substantial damages are incurred and was enacted to provide a remedy that is simpler and less harsh than coercive relief, if it appears that a declaration might terminate the potential controversy. *Town of Annetta South v. Seadrift Development, L.P.*, 446 S.W.3d 823 (Tex. Civ. App.—Fort Worth 2014, pet. denied).

Declaratory judgment actions in the United States are defined by a statutory framework first developed by the National Conference of Commissioners on Uniform State Laws in 1922 and designed to expand the role and authority of courts in settling disputes.

> The Declaratory Judgment aims at abolishing the rule which limits the work of the courts to a decision which enforces a claim or assesses damage or determines punishment. The Declaratory Judgment allows parties who are uncertain as to their rights and duties, to ask for a final ruling from the court as to the legal effect of an act before they have progressed with it to the point where any one has been injured.

Uniform Declaratory Judgments Act, National Conference of Commissioners on Uniform State Laws, San Francisco, August 2-8, 1922.

B. Subject Matter of Relief Under the TDJA.

A person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder. Tex. Civ. Prac. & Rem. Code § 37.004(a) (Vernon 2008). The statute goes on to state that a "contract may be construed either before or after there has been a breach." *Id.*

C. Courts Have Broad Discretion.

A trial court has discretion to enter a declaratory judgment so long as it will serve a useful purpose or will terminate a controversy between the parties. *Bonham State Bank v. Beadle*, 907 S.W.2d 465 (Tex. 1995). *See also United Interests, Inc. v. Brewington, Inc.*, 729 S.W.2d 897, 905 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.). Though trial courts have discretion with regard to entering declaratory judgments, courts are obligated to declare the rights of parties when such judgment will terminate the uncertainty or controversy giving rise to the lawsuit. *Public Util. Comm'n v. City of Austin*, 728 S.W.2d 907, 910 (Tex. App.—Austin 1987, writ ref'd n.r.e.). But the TDJA does not invite every party to seek construction of an instrument; rather, to be entitled to relief under such Act, a party must show that litigation is imminent unless the contractual obligations of the party can be judicially clarified. *Paulsen v. Texas Equal Access to Justice Found.*, 23 S.W.3d 42 (Tex. App.—Austin 1999, no pet.).

III. ATTORNEY'S FEES UNDER THE TDJA.

A. An Award of Attorney's Fees Is Discretionary.

A court, "[i]n any proceeding under [chapter 37], may award costs and reasonable and necessary attorney's fees as are equitable and just." Tex. Civ. Prac. & Rem. Code § 37.009. Thus, unlike chapter 38, a court is not required to award fees to anyone, regardless of whether the party seeking fees wins at trial: "The trial court may award attorney's fees to the prevailing party, may decline to award attorney's fees to either party, or may award attorney's fees to the non-prevailing party, regardless of which party sought declaratory judgment." *Brookshire Katy Drainage Dist. v. Lily Gardens, LLC*, 333 S.W.3d 301, 313 (Tex. App.—Houston [1st Dist.] 2010, pet. denied); *Teal Trading & Dev., LP v. Champee Springs Ranches Prop. Owners Ass'n*, 534 S.W.3d 558, 596 (Tex. App.—San Antonio 2017, pet. filed) ("a trial court may award fees even to a non-prevailing party as long as they are equitable and just"). And whatever the court rules is reviewed on appeal for an abuse of discretion. *Brookshire Katy*, 333 S.W.3d at 313.

B. Limitations on Discretion.

Although courts enjoy broad discretion with regard to the award of attorney's fees in declaratory judgment actions, there are limitations to the court's discretion. The fees must be: (1) reasonable; (2) necessary; (3) equitable; and (4) just.

1. Reasonable.

TDJA fees, like all requests for fees, must be reasonable. In evaluating whether or not attorney's fees are reasonable, courts consider the following factors:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

El Apple I, Ltd. v. Olivas, 370 S.W.3d 757, 761 (Tex. 2012).

2. Necessary.

The fees also must be necessary. Although it seems unusual for an attorney to seek payment for unnecessary services—and it is rare for courts to find fees unnecessary—it is not impossible. *Goodyear Dunlop Tires N. Am., Ltd. v. Gamez*, although not a declaratory judgment action, represents an instance where the court of appeals found fees to be unnecessary. There, defendant Goodyear appealed a portion of the trial court's judgment awarding $400,000 in fees to six guardians ad litem.

This products liability case arose when a high occupancy van rolled over in Arizona with sixteen migrant farm workers on board. Six of the passengers died as a result. Six guardians ad litem were appointed to represent a total of twenty-two minor plaintiffs, with five guardians ad litem being appointed within one month of trial. Shortly before trial, the minor plaintiffs arrived at a settlement, but Goodyear objected to the requested fee of the guardians ad litem on the grounds that such fees were excessive. Over the objections of Goodyear, the trial court entered a final judgment approving the settlement, dismissing all claims against Goodyear, and awarding total fees of almost $400,000 to the guardians ad litem. *See Goodyear Dunlop Tires N. Am., Ltd. v. Gamez*, 151 S.W.3d 574 (Tex. App.—San Antonio 2004, no pet.).

Generally, guardians ad litem must represent the best interests of their client while also serving as an officer of the court. "The ad litem is required to participate in the case to the extent necessary to adequately protect the interests of his ward." *Id.* at 580. What is more, the role of the guardian ad litem ends when the conflict giving rise to such appointment ends; and work performed outside the scope of his duties or after the conflict has been resolved will not be compensated. *See Brownsville-Valley Regional Medical Center v. Gamez*, 894 S.W.2d 753, 755 (Tex. 1995). The trial court, however, shall award the guardian ad litem a reasonable fee to be taxed as costs of court and the appropriateness of such fee is determined by factors set out in Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct, including among other considerations, the time and labor required and the novelty or difficulty of the legal questions involved. Additionally, the appellate court will not set aside an award of guardian ad litem fees without a showing of abuse of discretion. *Goodyear* 151 S.W.3d at 580

Goodyear complained that, among other things, the guardians ad litem charged for activities outside the scope of their appointment when they prepared for, attended, and reviewed depositions not relevant to the minors to whom the guardians ad litem owed a duty. In

addition, the guardians ad litem reviewed liability-related pleadings, discovery motions, and deposition notices.

The court of appeals ultimately found that the guardians ad litem acted beyond the scope of appointment when they attended or reviewed every deposition, motion, and pleading without regard to its relevance to the minor child to whom they owed a duty. As a consequence, the court determined that the bulk of the fees requested were for unnecessary services. *See id.* at 584.

> Practice tip: While the question of whether TDJA fees are equitable and just is a legal question for the court, whether those fees are reasonable and necessary raises a question of fact. *See Kinsel v. Lindsey*, 526 S.W.3d 411, 427 (Tex. 2017); *Bocquet v. Herring*, 972 S.W.2d 19, 20 (Tex. 1998). Thus, when seeking fees under the TDJA, be sure to submit a question asking the jury to find the amount of fees that are reasonable and necessary. Otherwise, you risk waiving the right to recover those fees. *See, e.g.*, *Fuqua v. Oncor Elec. Delivery Co.*, 315 S.W.3d 552, 559-60 (Tex. App.—Eastland 2010, pet. denied) (party waived fees under the TDJA when it failed to submit jury question regarding the reasonableness and necessity of those fees); *Univ. of Tex. at Austin v. Ables*, 914 S.W.2d 712, 717 (Tex. App.—Austin 1996, no writ) (same); *Howell v. Homecraft Land Dev., Inc.*, 749 S.W.2d 103, 113 (Tex. App.—Dallas 1987, writ denied) (per curiam) (same).

3. Equitable and Just.

Although a fact finder finds the amount of fees that are reasonable and necessary, the judge must take the analysis one step further and find a party's fees to be equitable and just in order for a party to be awarded TDJA attorney's fees. "Unreasonable fees cannot be awarded, even if the court believe[s] them just, but the court may conclude that it is not equitable or just to award even reasonable and necessary fees." *Bocquet*, 972 S.W.2d at 21; *see Anglo-Dutch Petroleum Int'l, Inc. v. Greenberg Peden, P.C.*, 522 S.W.3d 471, 497 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (fee award to attorney not equitable and just when he sought fees based on a position the Supreme Court had rejected).

In determining whether fees are equitable and just, the judge must consider equitable principles and fairness. "Whether it is equitable and just to award less than the fees found by a jury is not a fact question because the determination is not susceptible to direct proof but is rather a matter of fairness in light of all the circumstances." *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999). Though some courts have reversed awards for attorney's fees as not equitable and just when reversing a declaratory judgment upon which such fees are based, whether the party seeking attorney's fees prevailed in his claim is only one of several factors to consider when analyzing whether fees are equitable and just. *See Carpenter v. Carpenter*, No. 02–10–00243–CV, 2011 WL 5118802, at 8 (Tex. App.—Fort Worth 2011, pet. denied) (mem. op.).

The court is tasked to use its discretion to determine whether an award of fees is equitable and just, based upon all the circumstances of the case, not just evidence presented by the party seeking the award. For example, the court may consider the history of the case, the value at stake in the litigation, and the merits of a party's position.

C. The TDJA Cannot Be Used as a "Vehicle to Obtain Otherwise Impermissible" Fees—the "Mirror Image" Rule.

Although declaratory relief under the TDJA may be proper in a particular case, and although courts may award fees in "any proceeding" under the TDJA, a party may not use the TDJA as a "vehicle to obtain otherwise impermissible attorney's fees." *MBM Fin. Corp. v. Woodlands Operating Co.*, 292 S.W.3d 660, 669 (Tex. 2009). Thus, when a party has a claim for which fees are unavailable, in addition to a claim for declaratory relief, the declaratory relief claim must do "more than merely duplicate the issues" being litigated by the claims for which fees are unavailable; if it does not, fees are unrecoverable.[1] *Id.* at 670; *see also Etan Indus., Inc. v. Lehmann*, 359 S.W.3d 620, 624 (Tex. 2011) (per curiam) (fees unrecoverable under the TDJA when the declarations "add nothing to what would be implicit or express in a final judgment for the other remedies sought in the same action"); *CBIF Ltd. P'ship v. TGI Friday's Inc.*, No. 05-15-00157-CV, 2017 WL 1455407, at *12 (Tex. App.—Dallas Apr. 21, 2017, pet. denied) (the *MBM* rule "bars the recovery of attorney's fees for TDJA claims that merely duplicate other affirmative claims for which fees are unrecoverable"). Otherwise, "attorney's fees would be available for all parties in all cases," which would have the effect of "repeal[ing] not only the American Rule but also the limits imposed on fee awards in other statutes." *MBM Fin.*, 292 S.W.3d at 669 (Tex. 2009).

This limit also prohibits a defendant from recovering TDJA fees when it "styles its defenses to a pending claim as a separate declaratory-judgment action

[1] Some courts call this limitation of fees the "mirror-image" rule. *Washington Square Fin., LLC v. RSL Funding, LLC*, 418 S.W.3d 761, 775 (Tex. App.—Houston [14th Dist.] 2013, pet. denied).

...." *Washington Square*, 418 S.W.3d at 775. To recover fees, the TDJA claim must have "greater ramifications" than the plaintiff's claim. *Id.*

But when a plaintiff brings a claim for declaratory relief, this rule does not prevent a trial court from awarding attorney's fees to a defendant that asks the court to make a corresponding contrary declaration. *See, e.g., Save Our Springs Alliance, Inc. v. Lazy Nine Mun. Util. Dist. ex rel. Bd. of Directors*, 198 S.W.3d 300, 318 (Tex. App.—Texarkana 2006, pet. denied) ("Once a plaintiff claims relief under the Declaratory Judgments Act, the mirror-image rule does not prohibit the trial court from awarding attorney's fees even if the defendant's counterclaim for declaratory relief only duplicates the claims already raised."); *Elder v. Bro,* 809 S.W.2d 799, 801 (Tex. App.—Houston [14th Dist.] 1991, writ denied) ("In a suit where the plaintiff seeks a declaratory judgment, a counterclaim for declaratory relief is available to settle the dispute which was brought in the original action."); *Hawkins v. Tex. Oil & Gas Corp.*, 724 S.W.2d 878, 891 (Tex. App.-Waco 1987, writ ref'd n.r.e.) (rejecting the position "that only one party in a suit can receive attorney's fees in connection with a declaratory judgment and that is the party who first requests it"). This is because the TDJA authorizes the trial court to determine that it is equitable and just to award attorney's fees to *either* party, so a defendant that raises a mirror-image counterclaim in response to the plaintiff's declaratory-judgment claim cannot be said to have raised the counterclaim solely to pave the way for an award of otherwise-impermissible attorney's fees. *See Save Our Springs Alliance, Inc.*, 198 S.W.3d at 318.

D. Segregation of fees.

Parties generally couple declaratory judgment claims with other claims like breach of fiduciary duty, fraud, or breach of contract. When a party is pursuing both claims for which attorney's fees are recoverable and claims for which such fees are not recoverable, the general rule is that fees must be segregated. *See Stewart Title Guar. Co. v. Aiello*, 941 S.W.2d 68, 73 (Tex. 1997). This is true of TDJA fee claims as well. *See Jackson Walker, LLP v. Kinsel*, 518 S.W.3d 1, 27-28 (Tex. App.—Amarillo 2015), *aff'd and remanded sub nom. Kinsel v. Lindsey*, 526 S.W.3d 411 (Tex. 2017) (holding fees were recoverable under TDJA but reversing remanding fee award so plaintiff could segregate TDJA fees from fees it incurred prosecuting claims for which fees were not recoverable). The exception to this rule is if the fees incurred pursuing the TDJA claim are "so intertwined" with the fees incurred pursuing the other, non-recoverable claims that the fees need not be segregated. *Id.*

IV. COMMON USES OF THE TDJA.

A. Non-Liability Under a Contract.

Because the TDJA's "purpose is to settle and afford relief from uncertainty and insecurity" and because it may be utilized "before or after there has been a breach" of contract, the TDJA is often used a tool for a party to get a declaration of "non-liability" under a contract. Tex. Civ. Prac. & Rem. Code §§ 37.002(b), .004(b); *MBM Fin.*, 292 S.W.3d at 667-68 ("declarations of non-liability under a contract have been among the most common suits filed under the Act"). Thus, a party fearing that its contractual counterpart is going to sue for breach may preemptively bring a suit for a declaration that it has not breached, or that the contract at issue is unenforceable.

In *MBM Fin.*, the Supreme Court observed that "declarations of non-liability under a contract have been among the most common suits filed under the Act," and include:

- suits by insurers to declare non-liability under a duty-to-defend clause,
- suits by employees to declare non-liability under a covenant not to compete, and
- suits by a party to declare non-liability for higher or additional payments.

292 S.W.3d at 668 (citing cases).

In *Fleet Oil & Gas, Ltd v. EOG Resources, Inc.*, No. 10-11-00289-CV, for example, the plaintiff essentially obtained a declaration that it did not breach the parties contract. 2014 WL 2159537, at *7 (Tex. App.—Waco May 22, 2014, pet. denied) (mem. op.) (declaration that EOG "diligently prosecuted drilling" was simply a declaration "that EOG did not breach the Agreement by failing to diligently prosecute the completion and sale of gas from the Initial Wells"). And in *CBIF*, the plaintiff obtained a declaration that the covenant not to compete at issue—which the defendant later claimed the plaintiff had breached—was unenforceable. 2017 WL 1455407, at *6, *8.

But whether a party may recover TDJA fees for such a claim is an open question. Because, as previously discussed, the TDJA cannot be used a vehicle to recover otherwise impermissible fees, TDJA fees may be unavailable when the TDJA claim for non-liability merely duplicates the breach of contract claim from the other party. *Etan Indus.*, 359 S.W.3d at 624 (to recover fees under the TDJA, the declaratory judgment claim must do more "than merely duplicate the issues litigated" via the contract claims); *see, e.g., CBIF*, 2017 WL 1455407, at *14 (reversing TDJA fee award where the claim merely duplicated and was resolved by defendant's breach claim); *Fleet*, 2014 WL 2159537, at *7 (reversing TDJA fee award when the requested

declaration "merely duplicate[d]" the breach-of-contract counterclaim).

That said, some courts have permitted fees when the TDJA claim duplicates a breach claim but the TDJA claim was filed *before* the breach claim. *Handwerker Hren Legal Search, Inc. v. Recruiting Partners GP, Inc.*, No. 03-13-00239-CV, 2015 WL 4999054, at *5 (Tex. App.— Austin Aug. 19, 2015, pet. denied) (mem. op.) ("[W]hen a plaintiff initiates a declaratory-judgment action when no dispute is pending before the court, a counterclaim on the same issues does not prevent the award of attorney's fees."); *Brush v. Reata Oil & Gas Corp.*, 984 S.W.2d 720, 722 (Tex. App.—Waco 1998, pet. denied). *But see Fleet*, 2014 WL 2159537, at *3, 7 (party who initiated suit for non-liability declaration could not recover TDJA fees when the requested declaration mirrored later-filed breach-of-contract counterclaim); *Shank, Irwin, Conant & Williamson v. Durant, Mankoff, Davis, Wolens & Francis*, 748 S.W.2d 494, 500 n.4 (Tex. App.—Dallas 1988, no writ) (declining to remand case for consideration of plaintiff's TDJA attorney's fees because "once [the defendant] filed its action on the contract," the plaintiff's "request for declaratory judgment of non-liability became moot"); *Brush v. Reata Oil & Gas Corp.*, 984 S.W.2d 720, 731 (Tex. App.—Waco 1998, pet. denied) (Vance, J., dissenting) (arguing that the recovery of fees for a first-filed TDJA claim that mirrors a later breach of contract claim should not be determined by who files first).

B. Counterclaim Seeking Affirmative Relief.

TDJA claims filed as counterclaims are proper only when the counterclaim has greater ramifications beyond the original suit. For example, if the counterclaim includes a claim for affirmative relief, use of the TDJA is appropriate. *See BHP Petroleum Co. v. Millard*, 800 S.W.2d 838, 841 (Tex. 1990). In *BHP Petroleum*, a natural gas producer, BHP Petroleum, sued for breach of the "take or pay" obligations under its contract with a purchaser. The purchaser counterclaimed seeking a declaratory judgment and stated in its pleading that, "an actual controversy exists between [purchaser] and BHP regarding: (a) the interpretation of certain provisions of the contract; (b) the respective rights and obligations resulting therefrom; and (c) the claims BHP has asserted or may assert against [purchaser] related to the contract." *Id.* at 840.

BHP filed a motion for nonsuit and the judge granted the nonsuit but realigned the parties with the purchaser as plaintiff and BHP as defendant. BHP argued that the purchaser's counterclaim failed to plead a claim for affirmative relief and that the counterclaim was nothing more than a response to BHP's original petition. The purchaser responded asserting that its counterclaim is a "pending claim for affirmative relief" that may not be dismissed. The appeals court agreed.

In its analysis, the court of appeals focused on the scope of the purchaser's claims for relief, stating "[to] qualify as a claim for affirmative relief, a defensive pleading must allege that the defendant has a cause of action, independent of the plaintiff's claim, on which he could recover benefits, compensation, or relief, even though the plaintiff may abandon his cause of action or fail to establish it." *Id.* at 841. The court went on to reason that in certain instances a defensive declaratory judgment may present issues beyond those raised by the plaintiff. *Id.*

In the instant case, the purchaser went beyond seeking a declaratory judgment regarding the "take or pay" obligation under the contract (as set out in BHP's original petition). The purchaser sought the court's declaration that "events have occurred which constitute force majeure, as the parties agreed to define the term, or other causes not reasonably within the control of [purchaser] and its customers, which have affected and will continue for the foreseeable future to affect [purchaser's] takes of natural gas under the contract." *Id.* The court determined that the purchaser's declaratory judgment was "more than a mere denial of BHP's causes of action," as the purchaser's declaratory judgment action pursued claims which had "greater ramifications" than BHP's original suit. *Id.* at 842.

C. Rival Claims to the Same Property.

Though matters akin to trespass to try title suits may be brought as declaratory judgment actions, the courts must analyze the issues in the same manner as a trespass to try title suit. *See Coker v. Geisendorff*, 370 S.W.3d 8, 12-13 (Tex. App.—Texarkana 2012, no pet.). In 2007, the Texas Legislature added an exception to the rule that a trespass to try title claim is the exclusive method for adjudicating disputed claims to the title of real property. *Id.* at 14. "Notwithstanding [the trespass to try title statute], a person [interested under a deed, will, written contract, or other writings constituting a contract] may obtain a determination under this chapter when the sole issue concerning title to real property is the determination of the proper boundary line." Tex. Civ. Prac. & Rem. Code § 37.004(c). Historically, suits concerning rival claims to the same property have not been treated as a boundary dispute unless that dispute was between adjoining landowners and the question could be resolved by defining a boundary line. *See Corker*, 370 S.W.3d at 12.

In contrast, if a dispute over land involves claims to property wholly inside the boundaries of a rival's parcel, such dispute must be resolved using traditional claims of trespass to try title. *Id.* Further, when the substantive rights of the parties over ownership of real property is at stake, the dispute is governed by trespass to try title. *See Kennesaw Life & Accident Inc. Co.*, 694 S.W.2d 115, 117-18 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

D. Claims Relating to Easements.

The court in *Roberson v. City of Austin*, 157 S.W.3d 130 (Tex. App.—Austin 2005, pet. denied) instructs that actions involving easements are properly brought as declaratory judgment actions. In *Roberson*, Roberson, a landowner, sued the City of Austin and Jester Development Corporation ("JDC") after Roberson noticed problems with his deck supports and cracks in concrete flatwork caused by the settling of a sewer line not revealed to him when he originally purchased his home in 1983. In 1979, JDC began developing in what would become Roberson's subdivision. The sewer easement was not included in the original plat approved by the City of Austin, but the city was later granted an easement for the placement of sewer lines. The city never recorded the easement in the county records. When Roberson purchased his home in the subdivision from the builder, the purchase documents failed to reveal the presence of the sewer easement.

Roberson filed suit against the city in 1998 under the TDJA seeking, among other relief, a declaration that the easement was invalid and an injunction preventing the city from holding up the removal of the sewer line. After a jury trial, the jury determined that Roberson was entitled to $31,000 in damages and reasonable attorney's fees totaling $111,227. The trial court awarded only the damages and reasoned that the claim should have been brought as a trespass to try title action. As a consequence, Roberson was not entitled to attorney's fees.

On appeal, Roberson argued that the trial court abused its discretion by holding that the TDJA was an inappropriate vehicle by which to bring his claim and by failing to award attorney's fees. The appeals court agreed with Roberson holding that Roberson could properly bring his claims regarding the easement under the TDJA and to "do otherwise would render the TDJA's language concerning its use in determining the validity of deeds meaningless." *Id.* at 137. In arriving at this conclusion, the court of appeals made three related arguments.

First, the court pointed to the Texas Supreme Court's decision in *Martin v. Amerman*, 133 S.W.3d 262 (Tex. 2004), where the court explained that trespass to try title suits are typically used to clear problems in chains of title or to recover possession of land unlawfully withheld and for boundary disputes that inherently involve title to and possession of property. In contrast, easements are nonpossessory in nature and simply authorize the holder of such easement use of the property for a particular purpose.

Second, though some courts have allowed easement disputes to advance as trespass to try title actions, the remedy of trespass to try title has not generally been applied to nonpossessory property interests such as easements. *See Roberson*, 157 S.W.3d at 136 (citing *T-Vestco Litt-Vada v. Lu-Cal One Oil Co.*, 651 S.W.2d 284 (Tex. App.—Austin 1983, writ ref'd n.r.e.), which held that a royalty interest is a nonpossessory interest insufficient to support possessory remedies such as trespass to try title).

Third, many other easement cases have been decided as claims pursuant to the TDJA. *See id.* (citing *Holmstrom v. Lee*, 26 S.W.3d 526 (Tex. App.—Austin 2000, no pet.), which affirmed a trial court's declaratory judgment that plaintiffs had easement appurtenant to use water and septic lines). Further, the appeals court noted that the TDJA is to be liberally construed and the plain language of the statute makes it clear that it is to be used to determine the validity of deeds. *See id.*

E. Determination Regarding Insurer's Obligation to the Insured.

Insurers who have denied the claim of an insured may properly bring a declaratory judgment action to settle whether it owes coverage to an insured, as the insured might likely sue as a result of the denial of such insured's claim. *Transportation Ins. Co. v. WH Cleaners, Inc.*, 372 S.W.3d 223, 230-32 (Tex. App.—Dallas 2012, no pet.).

F. Determination Regarding Indemnitor's Obligation to the Indemnitee.

Parties to an indemnification contract may use the TDJA to determine whether or not indemnification is owed. *See N. Am. Tubular Servs., LLC v. BOPCO, L.P.*, No. 02-17-00352-CV, 2018 WL 4140635 (Tex. App.—Fort Worth Aug. 30, 2018, no pet.) (mem. op.). In *BOPCO*, an oil-field operator was sued for negligence in New Mexico in connection with the death of one of its contractor's employees. The operator sued the contractor in Texas, seeking a declaration that the contractor was required to indemnify it in the New Mexico suit. The trial court granted summary judgment for the contractor and entered the requested declarations. The court of appeals affirmed.

G. Will Contests.

When competing wills exist, framing a will contest as a declaratory judgment action expands the number of pockets from which to recover attorney's fees. In most will contests, the estate of the decedent foots the bill for the contest provided the parties pursued their actions in good faith and with just cause. *See* Tex. Est. Code § 352.052. As attorney's fees escalate, so does the probability of a pyrrhic victory, where the victor must pay the attorney's fees of the vanquished, significantly depleting the assets of the estate.

Consequently, if a will proponent believes he holds a competitive advantage or have the upper hand, seeking a determination as to the validity of the proponent's will and contesting the opponent's will might properly be brought as a declaratory judgment action, thereby

enabling the will proponent to possibly recover reasonable attorney's fees from his adversaries, individually, if equitable and just.

The statutory authority for this lies in section 37.004(a), which permits "[a] person interested under a deed, will, written contract, or other writings constituting a contract ... [to] have determined any question of construction or validity arising under the instrument ...." Tex. Civ. Prac. & Rem. Code § 37.004(a). But if heirs at law wish to contest a will submitted for probate, and have no competing will to offer up for probate, framing the contest as a declaratory judgment action may be viewed as improper, as the contest may be a mere denial of the will proponent's claim and fail to seek affirmative relief.

In *Lipsey v. Lipsey*, for example, the court held that the validity of an entire will may not be questioned through a declaratory judgment proceeding. 660 S.W.2d 149 (Tex. App.—Waco 1983, no writ). There, a widow filed an application to probate her deceased husband's will and the decedent's son filed a will contest arguing that the decedent lacked capacity or was unduly influenced at the time the will was executed. The widow withdrew her application to probate the will and the court non-suited the application without prejudice. The son appealed the non-suit, arguing that the widow did not have the right to discontinue the entire proceeding, as the son sought affirmative relief in the form of a declaration that the will was invalid. The court of appeals disagreed, holding that the son's will contest did not constitute a counterclaim for affirmative relief and that the widow was entitled to have the entire proceeding dismissed.[2] *See id.* at 150.

Another argument used to avoid framing a will contest as a declaratory judgment action involves a claim that the Estates Code provides a statutory framework for proving up a will. Allowing the "declaratory judgment mechanism to determine the validity of [a] claim that a valid will exists would impermissibly subvert the statutory scheme and time limitations established by the Probate Code." *Howard Hughes Med. Inst. v. Lummis*, 596 S.W.2d 171, 173 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.). In *Howard Hughes*, less than ten days after the death of Hughes on April 5, 1976, the aunt of Hughes, Annette Lummis, was appointed the temporary co-administrator of the estate of Hughes. Almost a year later, Howard Hughes Medical Institute ("HHMI") entered an appearance in the Harris County probate action and reported that it had filed for probate an alleged lost will of Howard Hughes in a Nevada district court. Lummis responded with a motion seeking a declaratory judgment that the alleged will claimed by HHMI was not the valid last will and testament of Howard Hughes. The motion was granted by way of summary judgment.

The court of appeals reversed the trial court's holding that such lost will was invalid, explaining that "the declaratory judgment was an impermissible advisory opinion before joining of issue in a will contest, and before the expiration of the time allowed by law for the filing for probate of a valid last will and testament meeting all the requirements of the Probate Code." *Id.*

Howard Hughes has little applicability with respect to the run of the mill will contest for two reasons. First, the purported lost will was not even before the probate court at the time the probate court deemed it invalid. Second, the declaration sought a determination before a will contest had been instituted; thus, the opinion of the trial court was necessarily advisory and impermissible. *See Harkins v. Crews*, 907 S.W.2d 51 (Tex. App.—San Antonio 1995, writ denied) (supporting the use of declaratory judgments in will contests as permissible and furthering the public policy of promoting judicial economy).

The foregoing decisions rejecting the use of the TDJA to invalidate a will in a will contest almost always lack relevance with respect to the typical contest involving competing wills. The cases that find the use of the TDJA to be improper in a will contest can be distinguished for the following reasons: 1) as in *Lipsey* and *Hughes*, the declaratory judgment involved a will that was not before the court and any opinion regarding the will's validity would have been impermissible as an advisory opinion; 2) as in *Hughes*, no contest to the will had been initiated; and 3) the case involved a district court's authority to invalidate a will properly admitted to probate.

Even if the proponent of a will fails to invoke the TDJA in contesting another will, such proponent is entitled to seek reimbursement of attorney's fees expended in advocating for such will's probate irrespective of such proponent's success and so long as such proponent acted in good faith and with just cause. *See* Tex. Estates Code § 352.052; *see also Huff v. Huff*, 124 S.W.2d 327 (Tex. 1939).

Nevertheless, if a contestant is not advocating for the probate of another will, but rather seeks to have a will declared invalid so that the decedent's estate passes

[2] In analyzing the *Lipsey* case, the court of appeals in *Harkins v. Crews*, 907 S.W.2d 51 (Tex. App.—San Antonio 1995, writ denied) rightly pointed out that the body of the opinion in *Lipsey* does not address the use of a declaratory judgment action with respect to the validity of a will being offered for probate. Rather, the only mention of the declaratory judgment is within a footnote to the opinion. Moreover, once the widow withdrew her application to probate her deceased husband's will, such will was no longer before the court. Thus, like the *Howard Hughes* case discussed below, any opinion offered by a court with respect to a will not before such court is an advisory opinion.

by intestacy, in the event the contestant fails in such pursuit, the contestant is not entitled to attorney's fees. *Estate of Huff*, 15 S.W.3d 301 (Tex. App.—Texarkana 2000, no writ).

Query whether an award of attorney's fees out of the estate to heirs at law who unsuccessfully challenge the validity of a will pursuant to the TDJA would stand. Would heirs at law even be allowed to contest an application to probate a will via the TDJA without seeking any other affirmative relief? Maybe not.

V. INAPPROPRIATE USES OF THE TDJA.

A. Case Does Not Involve an Actual Controversy.

Declaratory judgment actions are appropriate only if a justiciable controversy exists as to rights and status of parties and the controversy will be resolved by the declaration sought. *Bonham State Bank v. Beadle*, 907 S.W.2d 465 (Tex. 1995). A declaratory judgment is not appropriate where a plaintiff has a mature and enforceable right that results in a judgment or decree such that the declaration would add nothing to the judgment. *Tucker v. Graham*, 878 S.W.2d 681, 683 (Tex. App.—Eastland 1994, no writ). But a cause of action does not need to be fully ripe to constitute a justiciable controversy. Rather, the action must be ripe enough for judicial review and consideration must be given as to the hardship suffered by a party in the event a court declines to rule on the matter. *Juliff Gardens v. TCEQ*, 131 S.W.3d 271 (Tex. App.—Austin 2004, no pet.). Further, a request for declaratory judgment is moot if the claim presents no live controversy. *See Tex. A & M Univ.-Kingsville v. Yarbrough*, 347 S.W.3d 289, 290 (Tex. 2011).

Though the Texas Supreme Court has ruled that a request for declaratory judgment is moot when the claim fails to present a live controversy, a court of appeals tested the limits of what represents a live controversy in *In re Estate of Gibbons*, 451 S.W.3d 115 (Tex. App.—Houston [14th Dist.], pet. denied). In *Gibbons*, before the decedent's death, she signed three wills and at least two sets of beneficiary designations on life insurance policies. Around the time the decedent entered a hospital for a surgical procedure to remove a brain tumor, the decedent called a friend who was also an attorney and the decedent executed estate planning documents prepared by the attorney naming the attorney as a beneficiary on two life insurance policies and as independent executor under her will. Shortly before her death, the decedent retained another attorney, signed a new will, and changed the beneficiary designations on the life insurance policies, naming her estate as the beneficiary.

After the decedent's death, decedent's former attorney and friend attempted to probate the will signed around the time of the decedent's surgery. The decedent's surviving spouse then sought the admission of the most recent will to probate along with a declaration from the court that the most recent beneficiary designations on the life insurance policies were valid and that the decedent's estate was the beneficiary of such policies, as opposed to the decedent's former attorney and friend. The surviving spouse also sought reasonable and necessary attorney's fees pursuant to the TDJA. A will contest ensued. Ultimately, the decedent's friend and former attorney non-suited all claims. The case nonetheless proceeded to trial and the surviving spouse obtained a judgment from the trial court which, among other things, granted the declaratory relief related to the beneficiary designations on the life insurance policies in favor of the surviving spouse and awarded attorney's fees to be paid by the decedent's friend and former attorney.

On appeal, the decedent's friend and former attorney argued that the trial court should not have granted declaratory relief or awarded attorney's fees to be paid by her to the surviving spouse since she non-suited her entire cause of action. As a consequence, the friend and former attorney of the decedent argued no live controversy existed regarding who was entitled to the life insurance proceeds. The court of appeals disagreed, holding that the contestant's nonsuit of any claims asserted by her does not prejudice the surviving spouse's right to pursue his pending claims for declaratory relief and award of attorney's fees against such contestant. *See Gibbons* at 120 (citing *City of Dallas v. Albert*, 354 S.W.3d 368 (Tex. 2011) and Tex. R. Civ. P 162).

> Practice Tip: Before nonsuiting claims where a declaratory judgment action is involved, try to obtain an agreement from the opposing party that they will not seek their attorney's fees against your client.

B. Cases to Alter Rights or Remedies.

A declaratory judgment cannot be used as an affirmative ground of recovery to revise or alter rights or legal remedies. *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 164 (Tex. 1993). Nor can it be used as a mechanism to confer additional substantive rights upon parties. *Lane v. Baxter Healthcare Corp.*, 905 S.W.2d 39, 41 (Tex. App.—Houston [1st Dist.] 1995, no writ).

In *Emmco Ins. Co. v. Burrows*, the plaintiff purchased a truck financed through Associates Discount Corporation. 419 S.W.2d 665 (Tex. Civ. App.—Tyler 1967, no writ). The plaintiff insured the truck with Emmco. The truck was later involved in an accident, resulting in damages equal to $12,300. The plaintiff filed suit against the insurance company, Emmco, to recuperate his damages; he also filed a declaratory judgment action against the finance company contending that the monthly installment payments due on the note should be suspended until the matter with Emmco was resolved. The plaintiff asserted that

Emmco and the finance company were acting "in consort" in handling his claim. The trial court awarded the declaratory relief sought by the plaintiff and the defendants appealed.

On appeal, the defendants argued that declaratory relief was not available to rewrite a contract between the parties. The appeals court agreed, recognizing that declaratory relief is available to declare existing rights, status, or other legal relations. As applied to contracts, in a declaratory judgment action, the court may only interpret a contract, not modify its terms.

In addition, declaratory relief is not appropriate when the only issue is one of fact. Here, the contract was not in dispute, as both the plaintiff and the finance company recognized payments were due pursuant to the terms of the contract. At issue was whether the finance company acted in consort with Emmco, so as to warrant the suspension of monthly payments due by the plaintiff. *See Emmco*, 419 S.W.2d at 671.

C. Declarations of Non-Liability in Tort Actions.

As discussed above, parties may use the TDJA to obtain a declaration of non-liability under a contract. But parties may not use it to obtain a declaration of non-liability in a tort action. *MBM Fin.*, 292 S.W.3d at 668; *Feldman v. KPMG LLP*, 438 S.W.3d 678, 682 (Tex. App.—Houston [1st Dist.] 2014, no pet.) ("Texas courts should decline to exercise jurisdiction in a case seeking a declaration of non-liability in a tort suit because to do so deprives the potential plaintiff of the right to determine where and when to file suit.").

D. Choice of Law Provisions Prevent Use of TDJA.

Valid choice of law provisions within a contract govern the contract's interpretation and award of attorney's fees. *Exxon Corp. v. Burglin*, 4 F.3d 1294 (5th Cir. 1993). In *Exxon*, Exxon served as the general partner of a partnership that owned interests in oil and gas leases. Exxon offered to purchase the interests of the limited partners. As part of the offer, the limited partners were given the option to "select a mutually acceptable consultant to make an independent assessment of Exxon's offer" and the cost associated with such consultant would be shared among the limited partners and Exxon. The limited partners agreed to sell their interests to Exxon and declined to exercise the option to obtain an independent assessment of Exxon's offer.

When the oil and gas interests proved much more valuable than the limited partners had anticipated, they sued Exxon in Alaska alleging misrepresentation, fraud, and breach of fiduciary duty. In response, Exxon brought a declaratory judgment action in Texas to determine its duties under the partnership agreement. The case was removed to federal court. Ultimately, the district court granted Exxon's motion for summary judgment holding that Exxon had no duty to disclose information it considered confidential. The court also awarded attorney's fees to Exxon.

In reviewing the district court's decision, the Fifth Circuit Court of Appeals affirmed the finding that Exxon had no duty to disclose information it considered confidential. But the court vacated the award of attorney's fees. The court found that the choice of law agreed upon in the partnership agreement should control not only the interpretation of the contract but also the award of attorney's fees. Bringing a suit under the TDJA did not change that result, as the TDJA "is merely a procedural device and does not confer any substantive benefits." *Id.* at 1301.

E. In Administrative Proceedings When the Agency Is Acting Within Its Statutory Powers.

Provided that an agency is acting within its statutory powers, intervention in an administrative proceeding using the TDJA is not permitted. *Beacon Nat'l Inc. Co. v. Montemayor*, 86 S.W.3d 260 (Tex. App.—Austin 2002, no pet.). Since the Department of Insurance had the exclusive authority to enforce rules relating to a preferred provider organization (PPO), aggrieved physicians who were terminated from such PPO were not entitled to construction of contract rights pursuant to the TDJA. *Tex. Medical Ass'n v. Aetna Life Ins. Co.*, 80 F.3d 153 (5th Cir. 1996).

F. Counterclaim Is a Mere Denial of the Plaintiff's Claim.

Generally speaking, declaratory judgment actions should not be used to settle disputes already pending before a court. When a declaratory judgment is sought, either as a counterclaim or in a separate suit, if the declaratory judgment would have "greater ramifications" as compared to the original suit, it may be allowed; otherwise, it will not be allowed. *See Howell v. Mauzy*, 899 S.W.2d 690 (Tex. App.—Austin 1994, writ denied).

The case of *Howell v. Mauzy* involved two candidates for the Texas Supreme Court. In 1986, after contested primaries, both Howell and Mauzy won the nominations of their respective parties. Shortly before the general election, Howell filed suit against Mauzy and his wife contending that they violated campaign contribution and expenditure reporting requirements. In response, Mauzy counterclaimed seeking a declaratory judgment that his campaign finance reports complied with relevant provisions of the Election Code.

Howell argued that Mauzy was not entitled to a declaratory judgment because he requested no relief beyond what could be obtained through resolution of Howell's pending action. In addition, Howell suggested that Mauzy's counterclaim was merely a contrivance to obtain attorney's fees and inhibit non-suit. Over Howell's objections, the trial court rendered a

declaratory judgment finding that Mauzy's campaign finance reports were in compliance.

The court of appeals agreed with Howell and held that declaratory judgment actions are not available to settle disputes pending before the court. *Id.* at 706. In addition, the court reasoned that a counterclaim including only affirmative defenses to the plaintiff's claims and which "exists solely to pave the way to an award of attorney's fees" is improper. *Id.* Though use of declaratory judgments is improper in such cases, the use of the TDJA is proper if the counterclaim seeks affirmative relief and alleges a cause of action independent of plaintiff's claim so that the defendant could enjoy a recovery of "benefits, compensation, or relief, even if the plaintiff were to abandon or fail to establish his cause of action." *Id.* Accordingly, the court of appeals disagreed with the trial court's granting of declaratory judgment and reversed such judgment.

> Practice Tip: Before filing a declaratory judgment action as a defensive pleading, consider whether the claims advanced by such action could survive a non-suit by the plaintiff; and if the claims advanced by the defensive declaratory judgment action fail to stand alone, it is likely an improper use of the TDJA.

G. To Interpret Judgments.

The TDJA may not be used to seek interpretation of a court's judgment. *Cohen v. Cohen*, 632 S.W.2d 172-73 (Tex. App.—Waco 1982, no writ). The *Cohen* case involved a declaratory judgment action instituted for the purpose of rendering a provision in a divorce decree void. The Cohens divorced in 1975. The plaintiff did not appeal the judgment of divorce. Six years later, Mr. Cohen filed his declaratory judgment action asking the court to invalidate a provision requiring him to pay 10% interest annually on amounts due Ms. Cohen per the decree of divorce because at the time the judgment was entered, Texas law provided that all judgments would bear interest at 6%. He argued that such award was a deprivation of property without due process of law under the Texas and the United States Constitutions.

Thereafter, Mrs. Cohen filed a plea in abatement, which the trial court sustained and dismissed the declaratory judgment claims. The court of appeals affirmed the trial court's judgment, holding that the "utilization of a declaratory judgment action is a collateral attack on the prior judgment and cannot be used for the purpose of asking a trial court to interpret a prior judgment entered by that or any other court." *Id.* at 173.

H. Some Actions Unique to Real Estate.

1. Lis Pendens.

Declaratory relief and accompanying attorney's fees are not available for lis pendens actions, as a lis pendens is not a deed, will, or writing constituting a contract. *Jordan v. Hagler*, 179 S.W.3d 217 (Tex. App.—Fort Worth 2005, no pet.). *Jordan* involved a contractor, Jordan, who became disgruntled with his homeowner clients, the Haglers. Jordan supplied materials and performed services for the Haglers' homestead including mold remediation and reconstruction work.

Jordan's business relationship with the Haglers soured and he filed liens on the homestead property. The liens were ultimately found to be invalid, so Jordan filed a lis pendens against the property. The Haglers moved to cancel the lis pendens via a declaratory judgment action and sought sanctions and attorney's fees. The trial court invalided the lis pendens and awarded attorney's fees to the Haglers. Jordan appealed.

The court of appeals reversed the trial court's award of attorney's fees to the Haglers, holding that a lis pendens is not a "deed, will, written contract, or other writing constituting a contract" and such writings designated by section 37.004 are the only instruments for which declaratory relief is available. *See id.* at 222.

2. Possessory Rights to Real Estate.

Property Code section 22.001, not the TDJA, governs disputes regarding title or possessory rights to real property. *Ramsey v. Grizzle*, 313 S.W.3d 498 (Tex. App.—Texarkana 2010, no pet.). *See* Sections IV(C)-(D), *supra*, for more discussion regarding when use of the TDJA versus a suit to try title is appropriate in settling disputes involving real property.

VI. IMMUNITY AND THE TDJA.

Under the doctrine of governmental immunity, cities are generally immune from suit unless the Legislature waives that immunity. The TDJA allows a party whose "rights, status, or other legal relations are affected by a ... municipal ordinance" to "have determined any question of construction or validity arising under the ... ordinance" and to "obtain a declaration of rights, status, or other legal relations thereunder." Tex. Civ. Prac. & Rem. Code § 37.004(a). The TDJA thus provides a limited governmental-immunity waiver for declaratory-judgment claims against municipalities. *City of New Braunfels v. Carowest Land, Ltd.*, 432 S.W.3d 501, 530 (Tex. App.—Austin 2014, no pet.). Immunity is waived when a party seeks a declaration that an ordinance or statute is invalid. *See City of Bedford v. Apartment Ass'n of Tarrant Cty., Inc.*, No. 02-16-00356-CV, 2017 WL 3429143, at *3 (Tex. App.—Fort Worth Aug. 10, 2017, pet. denied) (immunity waived for suit challenging seeking declaration that local ordinance was void); *City*

of Dallas v. E. Vill. Ass'n, 480 S.W.3d 37, 46 (Tex. App.—Dallas 2015, pet. denied) (same).

Practice tip: When seeking a declaration that an ordinance is invalid, make sure to join the city. *See* Tex. Civ. Prac. & Rem. Code § 37.006(b) (in seeking a declaration that an ordinance is invalid, the "municipality must be made a party"); *Town of Flower Mound v. Rembert Enters., Inc.*, 369 S.W.3d 465, 474 (Tex. App.—Fort Worth 2012, pet. denied) ("Immunity from suit is waived if a party joins a governmental entity and seeks a declaration that an ordinance or statute is invalid, based on either constitutional or nonconstitutional grounds.").

UNDERSTANDING PROFESSIONAL LIABILITY POLICIES

NATALIE DUBOSE, *Dallas*
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State Bar of Texas
16TH ANNUAL
ADVANCED INSURANCE LAW
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CHAPTER 3

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- Judicial Extern to the Honorable Barbara M.G. Lynn, United States District Court for the Northern District of Texas, August-December 2010

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Natalie DuBose is an insurance-recovery professional who has successfully represented a number of Fortune 500 companies and smaller organizations on all types of insurance matters, including directors and officers, commercial general liability, property, errors and omissions, builders risk, and cyber. Having worked for years in the automotive and construction industry before joining Haynes and Boone, Natalie has developed a business-oriented approach to insurance recovery and a unique understanding of her clients' goals. Natalie recognizes the need to minimize cost while maximizing results and actively consults with clients on cost-effective solutions to manage risk and maximize insurance recovery.

Natalie has consistently shown a track record of success in representing corporate policyholders in coverage disputes in state and federal courts, arbitration, mediation, and appeals. Recently, in a coverage dispute in federal court, Natalie was able to successfully strike a key insurance expert who is nationally recognized and regularly cited in court opinions.

Clients also routinely rely on Natalie's counsel in negotiating directors and officers coverage, analyzing the insurance ramifications of corporate transactions and national product roll-outs, and presenting claims to insurers.

Apart from her client work, Natalie enjoys giving back to the community through organizations such as Soldier's Angels and regularly accepts cases through the Dallas Volunteer Attorney Program and Genesis Women's Shelter. She is currently a board member for the Dallas Bar Association Tort and Insurance Practice Section and is an active member of Park Cities Presbyterian Church.

Professional Recognition

- Recognized in *The Best Lawyers in America*, Woodward/White, Inc., Insurance Law, 2019

Professional and Community Activities

- Co-Chair, ABA Women-In-Insurance Conference 2018
- Board Member, Young Risk Professionals
- Board Member, Dallas Bar Association Tort and Insurance Practice Section, 2016-present
- Associate, Patrick E. Higginbotham Inn of Court, 2015-2016

Selected Client Representations

- Effectively prosecuting bad faith claims and Texas Insurance Code violations related to alleged claims mishandling in arbitration for construction clients.
- Successfully arguing against and defeating summary judgment in federal court in an action involving deceptive trade practices and fraudulent inducement.
- Conducting deposition of plaintiff as defense counsel for tort claim.
- Advising clients on the handling of large insurance claims after natural disasters.
- Counseling international client on the insurance and warranty implications of national product roll-outs.
- Counseling clients on the insurance implications of proposed settlement agreements.
- Advising clients on professional liability litigation and the coverage provided by their insurance policies.

Selected Publications and Speeches

- "An Update On Texas Insurance Code Chapter 542A," panelist, Dallas Bar Association's Corporate Counsel CLEs, Dallas, TX, April 2, 2019.
- "When the Cloud Bursts, Will There Be Coverage For Your Dependent Business Interruption Loss?," article editor, ABA Women in Litigation Conference, November 2017.
- "Sink or Swim: Critical Insurance Issues for Property & Asset Managers," panelist, CLE seminar, October 31, 2017.
- "Managing a Weather Related Crisis: Before, During and After," panelist, Texas Insurance Academy CLE, September 7, 2017.
- "Maximizing Business Insurance Recovery Following a Natural Disaster," author, Dallas Bar Association, June 2016.
- "Responding to Reservation of Rights Letters: The Why, When, and How," panelist, Texas Insurance Academy CLE, May 5, 2016.
- "Conflicts of Interest: The Often Ignored Elephant in the Room in Construction Defect Litigation and Law Firm Conflicts," panelist, Pulte Legal Summit CLE, November 18, 2015.
- Insurance Mock Trial Presenter, 52nd Academy of International and American Law, Center for American and Internal Law (CAIL), June 2015.
- "Fracking - There's Coverage For That," guest author, *Law360*, June 28, 2013.
- "The Corporate Representative Deposition: Differences in State and Federal Courts," co-author, 26th Annual Advanced Evidence & Discovery Court, Texas Bar CLE, 2013.
- "Policyholder Approach to Discovery Disputes," co-author, *Property Litigator's Handbook: Second Edition*, 2013.

- "Builder's Risk Insurance Issues," co-author, *Insurance in the Construction Industry CLE*, May 9, 2013.
- *Flightcrew Member Duty and Rest Requirements: Does the Proposed Legislation Put to Rest the Concern over Pilot Fatigue*, 76 J. Air L. & Comm. 253 (2011).
- *Twombly and Parallel Conduct - How the Sixth Circuit Grounded In re Travel Agent Commission Antitrust Litigation*, 76 J. Air L. & Comm. 111 (2011).

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UNDERSTANDING PROFESSIONAL LIABILITY POLICIES

Professional liability insurance, often referred to as errors and omissions (E&O insurance) is a special type of insurance that protects the company against claims that a professional service provided by the insured caused a third-party to suffer harm based on the company's mistakes (errors) or the company's failure to perform a service (omissions). E&O insurance is essential for any professional services business, but many do not understand this valuable tool. This article aims to guide the reader through the particular provisions which are often the subject of controversy and help avoid problematic policy language.

I. THE INSURING CLAUSE: THE HEART OF THE POLICY

In every policy, the "insuring clause" or "insuring agreement" is the heart of the policy. It sets forth the insurer's agreement about coverage. Thus, understanding the insuring clause is the key to understanding when and under what situations coverage is triggered. An example clause may read as follows:

> "The Insurer shall pay on behalf of the **Insured**, all sums in excess of the deductible that the **Insured** is legally obligated to pay as **Damages** because of a **Claim** first made against the **Insured** during the **Policy Period**, provided that:
>
> (a) the "Claim" arises out of an actual or alleged negligent act, error or omission with respect to the rendering of or failure to render **Professional Services** by the **Insured;** and
> (b) the act, error or omission took place on or after the **Retroactive Date**"

Each of the bolded terms are defined in the policy, and those definitions will often be the key to unlocking coverage. Thus, each of these will be addressed in turn.

II. THE IMPORTANT DISTINCTION BETWEEN "CLAIMS-MADE" POLICIES AND "OCCURRENCE" POLICIES

E&O policies are generally "claims-made" policies, and it is therefore important to understand the distinction between this type of policy and an "occurrence" policy.

- **Occurrence-based policy**

  This type of policy is triggered if the occurrence, accident, or event takes place within the policy period, regardless of when the claim is made.

- **Claims-made policy**

  This type of policy is triggered if the "claim" is made within the policy period, regardless of when the occurrence, accident, or event took place.

Under an E&O policy (which is a claims-made policy), the claim against the insured must be made ***during the policy period***. While the act, error or omission giving rise to the claim need not be committed during the policy period under most policies, many E&O policies provide a "retroactive date," which is the earliest date a act can take place and be covered under the E&O policy. It is therefore important for the policyholder to understand whether the E&O policy has a retroactive date and how early that date is. This is discussed further below.

There are also variations of the "claims-made" policy form. The more restrictive form is called a "claims-made and reported" policy form. Insureds should avoid this type of form if possible. Under this form, not only does the claim have to be made during the policy period, but it also must be reported by the insured to the insurer during the policy period. The more policyholder-friendly form does not require that the insured report the claim during the policy period. Instead, it simply requires that the reporting take place "as soon as practicable" or similar language.

III. WHAT IS A "CLAIM" AND HOW BROADLY IS IT DEFINED UNDER THE E&O POLICY?

Since E&O policies are "claims-made" policies and since the "claim" must be made within the policy period, it is therefore critical for the policyholder to understand how the policy defines the term "claim."

A good working example of the definition of "claim" in an E&O policy is "a written demand for monetary damages or a civil adjudicatory or arbitration proceeding for monetary damages, against an insured for a wrongful act, including any appeal thereof, brought by or on behalf of or for the benefit of any client."

It goes without saying that the broader the definition of the term "claim," the broader the coverage that is afforded by the policy. Policyholders should therefore seek the broadest possible definition of the

term "claim." Here are some terms that will broaden coverage under the definition of "claim":

- Written demands for monetary, nonmonetary and injunctive relief
- Civil proceedings for monetary, nonmonetary and injunctive relief
- Arbitration proceedings

As a practical matter, if the definition of "claim" is broadened (as is desirable), then professional policyholders must be diligent to report those "claims" to their insurers once they are made. While most professional policyholders would consider civil litigation to be a "claim," many professional policyholders may not understand that a written demand for damages is also a "claim," which requires timely reporting to the E&O insurer.

IV. WHAT IS CONSIDERED A "PROFESSIONAL SERVICE"?

"Professional services" defines the nature and scope of the professional's duties. The definition of "professional services" in the E&O policy is often tailored to a specific industry. For example, a definition of "professional services" in a contractor's E&O policy might be defined as "those services that the Insured is legally qualified to perform for others in their capacity as an architect, engineer, landscape architect, land surveyor or planner, construction manager, or interior designer/space planner."

The issue of whether the claim arises out of conduct that is a "professional service" is arguably one of the most litigated issues under E&O policies. Texas state courts and federal courts applying Texas law have concluded that professional services include only "those services for which professional training is a prerequisite to performance." *Shamoun & Norman, LLP v. Ironshore Indem., Inc.*, 56 F. Supp. 3d 840, 845 (N.D. Tex. 2014). Not all acts associated with the profession are "professional services." Only those acts "which use the inherent skills typified by the profession" are considered professional services. *Shamoun & Norman, LLP*, 56 F. Supp. 3d 840, 845 (N.D. Tex. 2014). In other words, ordinary tasks, even when performed by a professional, are not "professional services" if they can be done by a person lacking in training and expertise. *See id.* (finding billing and fee-setting practices are not a professional service).

Courts typically agree that when determining whether a particular act is a "professional service," courts must consider the act itself, not the title or character of the insured actor. *Gregg & Valby, L.L.P. v. Great Am. Ins. Co.*, 316 F. Supp. 2d 505, 513 (S.D. Tex. 2003).

Insureds (and their counsel) should be weary of court opinions which define "professional service" for purposes of coverage under a E&O policy versus an exclusion in a commercial general liability policy, because under Texas law, exclusions are to be interpreted narrowly against the insurer, and coverage is to be interpreted broadly. Thus, the same or similar conduct may be found by one court to be excluded under a commercial general liability policy's professional services exclusion, but another court would find that same or similar act to be covered under an E&O policy's insuring clause.

V. WHAT IS A "RETROACTIVE DATE" AND WHY IS IT IMPORTANT?

E&O policies are typically subject to a "prior acts" or retroactive date, meaning that the act, error or omission which triggers a "claim" must take place on or after a specified date in the policy—the retroactive date. For example, a January 1, 2019 retractive date in a policy with a January 1, 2019 to January 1, 2020 policy period would bar coverage for claims resulting from wrongful acts that took place prior to January 1, 2019, even if claims made are made against the insured during the policy period.

Retroactive dates are designed to eliminate an insurer's responsibility for those incidents known to insured that have the potential to give rise to claims in the future and for claims that arise from events which are remote in time. Thus, it is important for the insured to try to negotiate the furthest "retroactive date" available in order to maximize coverage and also to ensure that the retroactive date not change when moving the policy to a new insurer.

VI. DEFENSE PROVISIONS OF THE E&O POLICY

Here are some of the typical characteristics of a E&O policy with respect to the provision of a defense to the insured:

A. Duty to Defend

Similar to traditional commercial general liability policies, the typical E&O policy obligates the insurer to defend the insured in connection with potentially covered litigation. The duty to defend is much broader than a duty to indemnify. As such, while a policy may exclude coverage for indemnity (a settlement or judgment), a lawsuit or other "claim" may still contain allegations that will trigger the insurer's duty to defend. Under Texas' eight-corners rule, the insurer must defend its insured if, after comparing the allegations in the four corners of the underlying pleading and the four corners of the insurance policy, the allegations potentially state a claim covered under the policy. *St. Paul Fire & Marine Ins. Co. v. Green Tree Fin. Corp.*-Texas, 249 F.3d 389, 391 (5th Cir.

2001). Because the cost of defending a professional liability suit can be substantial, a defense provided by the insurer is invaluable.

B. Defense Costs Are Included Within the Policy Limit

Under most E&O policies, every dollar incurred in defense of the litigation is a dollar that reduces the policy limit or, said another way, the defense costs are within the policy limits. This makes the policy a "wasting asset" policy. Accordingly, insureds must factor the often-considerable defense costs which arise from professional liability defense into their determination of whether they have enough coverage limits.

VII. SETTLEMENT RIGHTS AND OBLIGATIONS

Under most E&O policies, an insured cannot settle a claim without first obtaining the written consent of the insurer. Indeed, an insured which settles without its insurer's consent may be precluded from recovering under the policy. *See, e.g., Charter Roofing Co., Inc. v. Tri-State Ins. Co.*, 841 S.W.2d 903, 907 (Tex. App. – Houston [14th Dist.] 1992, writ denied). *Cf. Insurance Co. of N. Am. v. McCarthy Brothers, Inc.*, 123 F.Supp. 2d 373, 379 (S.D. Tex. 2000) (imposing a prejudice requirement before an insurer will be relieved of its obligations under a liability policy based on the insured's violation of a no voluntary assumption of liability clause). A typical clause in a E&O policy may provide as follows:

> ***The insureds shall not admit or assume any liability, enter into any settlement agreement, stipulate to any judgment, or incur any defense costs without the prior written consent of the insurer. Only those settlements, stipulated judgments and defense costs which have been consented to by the insurer shall be recoverable as loss under the terms of this policy.***

This clause gives the insurer tremendous power over settlement decisions. With this ultimate "veto" power, insurers can avoid making settlement payments urged by its insured. However, the policyholder can defuse this power by insisting that the policy have the following clause:

> ***The insurer's consent shall not be unreasonably withheld.***

This additional clause will arm the policyholder with a potent weapon against a recalcitrant insurer. If, for example, a settlement opportunity is presented to the insured and the settlement offer is reasonable, the insurer's failure to consent to pay the settlement may give the insured a colorable breach of contract claim against the insurer.

While the insured must obtain the insurer's consent to settle, the insurer will often reserve to itself the right to make any settlement it deems expedient subject to the insured's written consent. Furthermore, the policy will often include an additional clause which provides that if the insured withholds consent to such a settlement, the insurer's liability will not exceed the amount for which the insurer could have settled as proposed by the insurer. This clause is often referred to as a "hammer" clause because of the power it gives the insurer to force settlement. The corporate policyholder should seek to have the "hammer" clause removed from the policy. Alternatively, the policyholder should seek to modify the language so that it applies only when the insured "unreasonably" withholds consent to such a settlement.

VIII. WHAT AN E&O POLICY DOESN'T COVER--"CONDUCT" EXCLUSIONS

While the particular language may vary from form to form, most, if not all, E&O policies contain exclusions barring coverage for certain "conduct" by the professional. Generally, they include the following:

- Dishonest acts or omissions
- Fraudulent acts or omissions
- Criminal acts or omissions
- Malicious acts or omissions

Of course, it is not uncommon for plaintiffs to allege that a professional was engaged in such "bad conduct." Therefore, it is critical that the policyholder purchase a E&O policy containing the following features with respect to these types of exclusions, if possible:

- Language requiring the fraudulent conduct to be intentional or deliberate.
- "Final adjudication in the underlying claim" language: Before coverage can be barred based on these "conduct" exclusions, there must be a determination by a "final adjudication" that the professional committed such "bad conduct," ideally in the underlying proceeding for which the insured is seeking coverage (as opposed to a separate proceeding which could be commenced by the insurer).
- "No imputation" language: No conduct of any individual insured will be imputed to any other insured with respect to these exclusions.

IX. THE INSURED'S KEY RESPONSIBILITIES: NOTIFICATION AND COOPERATION

The key responsibilities of the insured under an E&O policy include notification to the insurer and cooperation.

A. Reporting the Claim

Under an E&O policy, it is critical to report the "claim" to the insurer. A failure to timely report a claim to a claims-made E&O insurer may result in a loss of coverage. Generally speaking, under Texas law, however, an insurer must establish that it has been prejudiced by the late notice. *Prodigy Comms. Corp. v. Agric. Excess & Surplus Ins. Co.*, 288 S.W.3d 374 (Tex. 2009). Policies differ with respect to when the claim should be reported. Some of the variations include the following:

- Claims must be reported within the policy period (this is often referred to as a "claims-made and reported" policy and is the least preferred type of reporting clause)
- Claims must be reported "as soon as practicable"
- Claims must be reported "as soon as practicable" but in all events within XX days (usually 30 to 60)
- Claims must be reported "as soon as practicable" and in all events within the policy period plus 30 days (this one along with just "as soon as practicable" are the preferred clauses)

As discussed above, the insured must be careful to understand how the term "claim" is defined under the policy and report all "claims" to the insured.

In *Prodigy Comms. Corp. v. Agric. Excess & Surplus Ins. Co.*, the Court analyzed a claims-made policy that required the insured give notice of a claim "as soon as practicable . . ., but in no event later than ninety (90) days after the expiration of the Policy Period or Discovery Period." 288 S.W.3d at 374. The Court ultimately held that an insurer must show prejudice before it can deny coverage "when an insured gives notice of a claim within the policy period or other specified reporting period" but fails to comply with the policy's "as soon as practicable" notice provision. *Id.* at 382.

The Court held the same way in *Fin. Industries v. XL Specialty Ins.*, 285 S.W.3d 877, 879 (Tex. 2009) finding "that an insurer must show prejudice to deny payment on a claims-made policy, when the denial is based upon the insured's breach of the policy's prompt-notice provision, but the notice is given within the policy's coverage period."

B. Reporting of Circumstances That May Give Rise to a Claim

Many E&O policies contain a notice provision, which allows the insured to provide notice to the insurer of circumstances that have not yet ripened into a claim. Here is an example:

> ***If during the Policy Period the Company or the insureds shall become aware of any circumstances which may reasonably be expected to give rise to a claim be made against the insureds and shall give written notice to the insurer of the circumstances and the reasons for anticipating such a claim, with full particulars as to dates and persons involved, then any claim which is subsequently made against the insureds and reported to the insurer alleging, arising out of, based upon or attributable to such circumstances for alleging any Wrongful Act which is the same as or related to any Wrongful Act alleged or contained in such circumstances, shall be considered made at the time such notice of such circumstances was given.***

The obvious benefit of this clause is that it can convert the "claims-made" feature of the E&O policy to a quasi "occurrence-based" policy. Assuming the insured complies with the provision, it can afford coverage to claims that are made after the policy lapses. Policyholders should know, however, that if this reporting clause is triggered, no subsequent E&O policy will likely cover the reported circumstance.

"COVERAGE B DEVELOPMENTS"

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CHAPTER 4

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Alicia leads a legal team focusing on the representation of insurers and the defense of their insureds. Her emphasis on early development of factual issues, innovative case positioning, problem resolution, and timely information assists her clients in obtaining positive case results. Now concentrating her practice in the areas of bad faith insurance litigation, insurance coverage, and agent and broker malpractice, she also has prior experience and continues to receive litigation assignments involving professional liability, defamation, business disputes, construction defect, premises liability, and general tort matters.

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"COVERAGE B DEVELOPMENTS"

I. INTRODUCTION

Part B in a CGL policy, which provides coverage for "personal and advertising injury," has different triggering conditions, and often different policy limits, from part A, which provides coverage for "bodily injury" or "property damage." Part B often functions as a gap filler when there is no "bodily injury," "property damage," or "occurrence." In recent Texas state and federal opinions, common sense definitions are attributed to the relevant terms and then strictly applied. In recent published Texas case law, courts have rarely found coverage exits under Part B.

Two recent part B developments are particularly noteworthy. *First*, the Fifth Circuit recently held that the "offense c." coverage requires physical possession of or presence at the property in question. *Second*, there is a general consensus by courts outside of Texas that part B does not apply to data breaches. Given this trend, entities desiring data breach coverage should purchase specialized policies. It will be interesting to see whether Texas courts ultimately follow the trend and hold part B does not apply to data breaches.

II. PART B CGL COVERAGE—THE BASICS

Standard CGL policies contain three coverage parts: A, B and C. Generally speaking, Part A covers liability for "bodily injury" or "property damage" caused by an "occurrence" (*i.e.*, an accident).[1] Like Part A, Part B also offers both defense and indemnity coverages. However, Part B coverage is theoretically broader, and often functions as a gap filler when Part A coverage is not available.[2] Insurers and practitioners alike often first review Part A to determine whether coverage is triggered, before reviewing Part B.

In particular, Part B covers liability for "personal and advertising injury" arising out of the insured's business. "Personal" injury and "advertising" injury were contained in separate policy provisions and defined separately until 1997.[3] As a result, courts and commentators tended to analyze such injuries separately.

Standard CGL forms today, however, define "personal and advertising injury" to mean:

> injury, including consequential 'bodily injury', arising out of one or more of the following offenses:
>
> a. False arrest, detention or imprisonment;
> b. Malicious prosecution;
> c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
> d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
> e. Oral or written publication, in any manner, of material that violates a person's right of privacy;
> f. The use of another's advertising idea in your 'advertisement'; or
> g. Infringing upon another's copyright, trade dress or slogan in your 'advertisement'.

Under the CGL policy language, a. through g. are referred to as "offenses." Although current iterations of the CGL policy do not separately define "advertising injury" and "personal injury," it is still helpful to discuss the various offenses in terms of these two categories. Accordingly, we do so briefly here.

Advertising injuries are understood to arise from offenses d. through g.[4] committed in the course of advertising goods, products, or services.[5] Traditionally, Texas courts have required such advertising to be widespread and aimed at a large public audience.[6] However, at least one commentator, citing a handful of Texas cases, has determined that "a growing minority interprets advertising as including any activity that promotes an insured's business or product, whether widespread activities or merely one-on-one personal solicitations."[7] The breadth of a court's interpretation of the term "advertisement" is often determined by whether the term is used in the insuring agreement or an exclusion, with the insuring term interpreted broadly, and the exclusionary term interpreted narrowly.[8] In any

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[1] The terms "bodily injury," "property damage," and "occurrence" are typically defined terms within a CGL policy.

[2] *See* 2 LAW OF LIABILITY INSURANCE §§ 1.08 & 9.06 (2018); *North Am. Bldg. Maint., Inc. v. Fireman's Fund Ins. Co.*, 137 Cal. App. 4th 627, 40 Cal. Rptr. 3d 468, 472 n.4 (2006).

[3] 2 LAW OF LIABILITY INSURANCE §§ 1.08 & 9.06.

[4] *See* "Advertising injury", 9A COUCH ON INS. § 129:9 (collecting cases).

[5] *Id.* (collecting cases).

[6] *See e.g., Finger Furniture Co., Inc. v. Travelers Indem. Co. of Conn.*, 2002 WL 32113755, at *9 (S.D. Tex. 2002); *Continental Cas. Co. v. Consolidated Graphics, Inc.*, 646 F.3d 210, 214-17 (5th Cir. 2011) (interpreting Texas law).

[7] COUCH, *supra*, n.4 (collecting cases, including *Consolidated Graphics, Inc.*, *supra*, n.6).

[8] *See Berman v. General Acc. Ins. Co. of Am.*, 671 N.Y.S.2d 619, 623 (N.Y. Sup. Ct. 1998); *Amway Distributors Benefits*

event, there must be a causal connection between the offense and the injury.[9]

Personal injuries are the remaining, non-"advertising" related offenses listed in the "personal and advertising injury" definition.[10] They are understood to arise from offenses a. through e.[11] Courts have held that it is the *offense* at issue that triggers coverage, not the resulting *injury*.[12] This becomes significant when reviewing whether the policy period requirement is satisfied, as a CGL policy will "provide personal injury coverage for an offense committed during the term of the policy even if the injury occurs after the subject policy expires."[13]

Part B coverage is very different from Part A. Unlike Part A, there is no need for "bodily injury," "property damage," or an "occurrence." Part B coverage provisions generally contain their own discreet sets of exclusions and are not affected by Part A exclusions. Furthermore, CGL policies typically do not subject Part B to an each "occurrence" limit, instead providing a separate personal and advertising injury limit.[14] Therefore, Part B coverage limits may still be available, even when a policy's per "occurrence" limit has been exhausted.

To summarize, Part B often provides gap-filler coverage when Part A is unavailable. Its triggering conditions, and often its policy limits, are different as well.

III. PART B COVERAGE IN TEXAS

A. Texas State Case Law

Texas state courts have weighed in sparingly with regard to Part B. However, there are three notable Texas state court cases providing meaningful guidance on this aspect of CGL coverage:

- *PAJ, Inc. v. Hanover Insurance Company*: In 2008, the Texas Supreme Court held that an insurer may not enforce the CGL notice requirements for purposes of Part B, unless the insurer establishes resulting prejudice.[15]
- *Robert Trotter Gift Fund for Tomas v. Trinity Universal Insurance Company*: In 2007, the Austin Court of Appeals discussed offense c. (invasion of the right to private occupancy), and held offense c. is not triggered when easement beneficiaries are not satisfied with the scope of the easement rights they were given.[16]
- *McClain v. State Farm Fire and Casualty Company*: In 2017, the Fort Worth Court of Appeals held that offense c. (here, wrongful eviction by owner, landlord or lessor) did not apply to harassing behavior by a creditor in a foreclosure action, before the creditor actually held title to the real property in question and, thus, before it was an owner, landlord or lessor.[17]

In sum, Part B Texas state court case law is somewhat scarce, tends to focus on offense c., and turns on a literal interpretation of the terms at issue.

B. Texas Federal Case Law

Federal case law is not as scarce. A careful evaluation of all relevant published cases over the last four years shows some general patterns:

First, there are no particular part B offenses that predominate. There are cases evaluating part B coverage

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Ass'n v. Federal Ins. Co., 990 F. Supp. 936, 945 (W.D. Mich. 1997); *U.S. Fid. & Guar. Co. v. Star Tech., Inc.*, 935 F. Supp. 1110, 1115 (D. Or. 1996); *N.H. Ins. Co. v. Foxfire, Inc.*, 820 F. Supp. 489, 494 (N.D. Cal. 1993); *Playboy Enter., Inc. v. St. Paul Fire & Marine Ins. Co.*, 769 F.2d 425, 428 (7th Cir. 1985).

[9] *Sentry Ins. v. R.J. Weber Co., Inc.*, 2 F.3d 554, 557 (5th Cir. 1993); *see also State Farm Fire and Cas. Co. v. Steinberg*, 393 F.3d 1226, 1231 (11th Cir. 2004); *Advance Watch Co., Ltd. v. Kemper Nat. Ins. Co.*, 99 F.3d 795, 807 (6th Cir. 1996); *Simply Fresh Fruit, Inc. v. Continental Ins. Co.*, 94 F.3d 1219, 1222 (9th Cir. 1996), as amended, (Aug. 16, 1996).

[10] "Personal injury", 9A COUCH ON INS. § 129:8 (citing *Schiff v. Federal Ins. Co.*, 779 F. Supp. 17, 21 (S.D. N.Y. 1991), *aff'd*, 990 F.2d 622 (2d Cir. 1993)).

[11] *See e.g., Nat'l Union Fire Ins. Co. of Pittsburgh, PA. v. Alticor, Inc.*, 2005 WL 2206461, at *4 (W.D. Mich. 2005); *AMCO Ins. Co. v. Tri-Spur Inv. Co.*, 101 P.3d 226, 229 (Idaho 2004); *Woo v. Fireman's Fund Ins. Co.*, 128 Wash. App. 95, 114 P.3d 681, 684 (Div. 1 2005), rev'd in part on other grounds, 164 P.3d 454 (Wash. 2007); *Liberty Mut. Ins. Co. v. OSI Industries, Inc.*, 831 N.E.2d 192, 199 (Ind. Ct. App. 2005); *Southgate Recreation & Park Dist. v. California Assn. for Park & Recreation Ins.*, 106 Cal. App. 4th 293, 298–99, 130 Cal. Rptr. 2d 728, 731 (3d Dist. 2003).

[12] *See, e.g., Block v. Golden Eagle Ins. Corp.*, 121 Cal. App. 4th 186, 200, 17 Cal. Rptr. 13, 25 (2d Dist. 2004); *Atlantic Mutual Ins. Co. v. J. Lamb, Inc.*, 100 Cal. App. 4th 1017, 1032-33, 123 Cal. Rptr. 2d 256, 267 (2d Dist. 2002); *State Bancorp, Inc. v. U.S. Fidelity and Guar. Ins. Co.*, 199 W. Va. 99, 483 S.E.2d 228, 237 (1997).

[13] COUCH, *supra*, n.10 (citing *Mid-Continent Cas. Co. v. Kipp Flores Architects, L.L.C.*, 602 Fed. Appx. 985 (5th Cir. 2015)).

[14] 1 LAW OF LIABILITY INSURANCE § 1.08 (2018) (citing *Century Sur. Co. v. Seductions, LLC*, 609 F. Supp. 2d 1273, 1281 (S.D. Fla. 2009)).

[15] 243 S.W.3d 630, 636 (Tex. 2008).

[16] 2007 WL 2682247, at *7 (Tex. App.—Austin Sept. 13, 2007, pet. denied).

[17] 2017 WL 817152, at *4 (Tex. App.—Fort Worth Mar. 2, 2017, no pet.).

in the context of offenses a.,[18] c.,[19] d.,[20] f.[21] and g.[22] Going back further in time reveals Texas federal case law discussing offenses b.[23] and e.[24] as well.

Second, Part B coverage is limited. Of the eight relevant Texas federal cases published in the last four years, seven resulted in findings of no coverage.[25] The eighth appears to be an outlier, not just in outcome, but also in methodology.[26]

Third, and relatedly, recent Texas federal courts have freely applied built-in part B CGL exclusions to preclude coverage, and particularly the "knowing violation of rights of another" exclusion.[27]

Fourth, and finally, recent federal decisions demonstrate a very practical approach in defining relevant Part B terms. Since many of the relevant terms are not defined, courts revert to their plain meanings, and often their dictionary definitions.[28] At least in Texas, there is not a long history and tradition of case law defining the meaning and contours of undefined Part B terms. Thus, there is little judicial basis for departing from the terms' ordinary meanings. Recent Texas federal opinions, except perhaps one,[29] appear to rigorously apply and enforce the plain meaning of relevant terms.

In sum, there is very little Texas state Part B case law, but more Texas federal law. No Part B offenses predominate in recent federal opinions. Courts in both systems rigorously apply the plain meaning of the terms at play.

IV. RECENT SIGNIFICANT DEVELOPMENTS

A. Offense c. Requires Physical Possession or Presence on the Property in Question

As noted, "personal and advertising injury" is defined in offense c. to include injury arising out of "[t]he [1] wrongful eviction from, [2] wrongful entry into, or [3] invasion of the right of private occupancy of a room, dwelling or premises *that a person occupies*, committed by or on behalf of its owner, landlord or lessor . . . ."[30] The meaning of the term "occupies" is important because it is part of the larger phrase, "a room, dwelling or premises that a person occupies," that modifies each of the three alternative scenarios that might trigger offense c. Put simply, failure to satisfy "occupies" eliminates offense c. from consideration.

Texas state courts have not decided whether "occupies" means physical possession or presence, or whether it also includes the mere right to possess where there is no possession. In October 2018, however, the Fifth Circuit in *2200 West Alabama, Inc. v. Western World Insurance Company* held that for purposes of offense c., "occupy" is not ambiguous and requires physical possession or presence, as opposed to the mere right to occupy.[31]

In *2200 West Alabama, Inc.*, the insured effectively leased a property to a new restaurant tenant.[32] The restaurant had a right to possess the property, but the insured backed out of the lease before the restaurant actually took possession.[33] The restaurant sued the insured, which then sought coverage under its CGL Policy's Part B, offense c. coverage. The insurer denied

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[18] *Century Sur. Co. v. Deari*, 2017 WL 5642578, at *6 (N.D. Tex. Jan. 4, 2017), *aff'd sub nom.*, *Century Sur. Co. v. Seidel*, 893 F.3d 328 (5th Cir. 2018), *cert. denied*, 2019 WL 111206 (U.S. Mar. 18, 2019).

[19] *2200 W. Alabama, Inc. v. W. World Ins. Co.*, 751 Fed. Appx. 501, 507 (5th Cir. 2018).

[20] *Landmark Am. Ins. Co. v. Blue Bay Constr.*, 2017 WL 6886101, at *5 (S.D. Tex. Mar. 15, 2017).

[21] *Laney Chiropractic & Sports Therapy, P.A. v. Nationwide Mut. Ins. Co.*, 866 F.3d 254, 258 (5th Cir. 2017); *Shanze Enterprises, Inc. v. Am. Cas. Co. of Reading, PA*, 150 F. Supp. 3d 771, 775 (N.D. Tex. 2015).

[22] *Laney Chiropractic*, 866 F.3d at 258.

[23] *Martin's Herend Imports Inc. v. Twin City Fire Ins. Co.*, 2000 WL 33795043, at *2 (S.D. Tex. Mar. 31, 2000).

[24] *Hartford Acc. & Indem. Ins. Co. v. Capella Group, Inc.*, 2009 WL 4931469, at *5 (N.D. Tex. Dec. 21, 2009).

[25] *See 2200 W. Alabama, Inc. v. W. World Ins. Co.*, 751 Fed. Appx. 501, 507 (5th Cir. 2018); *Laney Chiropractic*, 866 F.3d at 258; *AIG Specialty Ins. Co. v. Stoller Enterprises, Inc.*, 2017 WL 541533, at *9 (S.D. Tex. Feb. 7, 2017); *Deari*, 2017 WL 5642578, at *5; *Awards Depot, LLC v. Scottsdale Ins. Co.*, 2016 WL 1162187, at *2 (S.D. Tex. Mar. 23, 2016); *Shanze Enterprises, Inc.*, 150 F. Supp. 3d at 779; *Chartis Specialty Ins. Co. v. JSW Steel (USA), Inc.*, 2015 WL 4378366, at *3 (S.D. Tex. July 8, 2015).

[26] *See Landmark Am.*, 2017 WL 6886101, at *7 (rejecting the "unauthorized use of another's name or product" exclusion by reading in purpose not found in this exclusion's language, and citing an Ohio case in the process).

[27] *See AIG Specialty*, 2017 WL 541533, at *9 (applying "material published prior to policy period" exclusion); *Deari*, 2017 WL 5642578, at *5 (applying "knowing violation of the rights of another" exclusion); *Awards Depot, LLC*, 2016 WL 1162187, at *2 (applying "knowing violation of the rights of another" exclusion); *Shanze Enterprises, Inc.*, 150 F. Supp. 3d at 786 (applying "infringement of copyright, patent, trademark or trade secret" exclusion); *Chartis Specialty*, 2015 WL 4378366, at *3 (applying "knowing violation of rights of another" exclusion).

[28] *See 2200 W. Alabama, Inc.*, 751 Fed. Appx. at 506; *Laney Chiropractic*, 866 F.3d at 263; *AIG Specialty*, 2017 WL 541533, at *7; *Deari*, 2017 WL 5642578, at *6; *Chartis Specialty*, 2015 WL 4378366, at *3

[29] *See Landmark Am.*, 2017 WL 6886101, at *6.

[30] Emphasis added.

[31] *2200 W. Alabama, Inc.*, 751 Fed. Appx. at 507.

[32] *Id.* at 502-03.

[33] *Id.*

the claim because the restaurant never actually possessed the property. Aggrieved, the insured filed a declaratory judgment action, arguing that "occupies" includes the *right* to occupy, even if there is no physical possession. The federal district court agreed,[34] but the Fifth Circuit did not, reversing for at least four reasons.

First, the term "occupies" was not defined in the policy,[35] so the Fifth Circuit derived and applied a series of definitions from the Tenth Edition of Black's Law Dictionary, the majority of which require physical possession or presence.[36] Importantly, the Court held that the Tenth Edition, not the Sixth Edition, applied because the Tenth Edition was published more closely in time to the policy period at issue.[37]

Second, the Fifth Circuit identified two Texas cases which held that the term "occupy" is unambiguous, although those cases were not in the context of Part B, offense c. coverage.[38] Although the insured cited North Carolina and California cases holding "occupy" is ambiguous, the Fifth Circuit dismissed that argument, citing Texas Supreme Court precedent for the proposition that "an insurance policy is not ambiguous merely because the courts differ over its interpretation."[39]

Third, the Fifth Circuit held that requiring physical possession or presence is the only way to give meaning to all the terms contained within offense c.[40] If the phrase "that a person occupies" only requires the right to possess, the phrase become superfluous because the right to possess is already contained within the prior phrase, "invasion of the *right of private occupancy* of a room, dwelling or premises."[41]

Fourth, the Fifth Circuit found it important that offense c. uses the term occupy in its present tense (*i.e.*, "occupies").[42] In so doing, the Court cited the Texas Supreme Court case *Guardian Life Insurance Company of America v. Scott*, which discussed the verb "to have" and found that its present tense variation "has" means to have possession or control.[43]

In sum, based on *2200 West Alabama, Inc.*, offense c. can only be satisfied with physical present or possession, as opposed to mere right to occupancy, at least in Texas federal courts and the Fifth Circuit applying Texas law.

B. Data Breaches

Another emerging issue in recent years is Part B data breach coverage. We cannot locate any published Texas cases discussing this issue. Nevertheless, case law from other jurisdictions, as well as new exclusions—particularly since 2014—have narrowed any Part B data breach coverage to the point where a prudent entity wishing to have data breach coverage should purchase a cybersecurity-specific policy.

Because there are no "advertisements" involved in data breaches, part B coverage turns on whether or not there is a "personal injury" arising from an enumerated offense (*i.e.*, a through e.). Case law focuses on offense e.—"[o]ral or written *publication*, in any manner, of material that violates a person's right of privacy."[44] At the center of this discussion is whether or not there has been a "publication."[45]

The exact contours of the term "publication" differ by jurisdiction.[46] However, the most important question is whether the information was "published" when it was hacked by a third party and then released by the *hacker*, and not by the *insured*. In 2014, the New York Supreme Court of New York County held there is no "publication" for purposes of Part B unless the *insured* discloses the information.[47] Following this opinion, "the general consensus seems to be that CGL policies

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[34] *2200 W. Alabama, Inc. v. W. World Ins. Co.*, 2017 WL 4049272, at *1 (S.D. Tex. Sept. 13, 2017), *vacated and remanded*, 751 F. App'x 501 (5th Cir. 2018).

[35] *2200 W. Alabama*, 751 Fed. Appx. at 506.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 505-06 (citing *Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462, 467 (Tex. 1998); *Liberty Mut. Fire Ins. Co. v. Lexington Ins. Co.*, 446 S.W.3d 835, 846 (Tex. App.—San Antonio 2014, no pet.)).

[39] *2200 W. Alabama, Inc.*, 751 Fed. Appx. at 505 (citing *U.S. Metals, Inc. v. Liberty Mut. Grp., Inc.*, 490 S.W.3d 20, 24 (Tex. 2015)).

[40] *2200 W. Alabama, Inc.*, 751 Fed. Appx. at 507.

[41] *Id.* (emphasis added).

[42] *Id.*

[43] *Id.* at 506-07.

[44] *See* Nathan L. Colvin & Timothy C. Dougherty, *Trends for Potential Insurance Coverage for Losses Arising from A Data Breach*, 44 N. KY. L. REV. 29, 30 (2017) (emphasis added).

[45] *Id.* ("In the data breach context, the focus of the courts has been on the manner of publication.").

[46] Compare *Travelers Indem. of Am. v. Portal Healthcare Solutions*, 35 F. Supp. 3d 765, 771 (E.D. Va. 2014) (finding publication when insured uploaded private information to the internet where information was accessible to the public, but there was no evidence public accessed the information), with *Recall Total Info Mgmt. v. Fed. Ins. Co.*, 317 Conn. 46, 50-51 (Conn. 2015), *aff'ing* 147 Conn. App. 450 (Conn. App. Ct. 2014) (finding *no* publication where employee information accidentally fell out of van, but there was no direct evidence the public accessed information).

[47] *See, e.g., Zurich Am. Ins. Co. v. Sony Corp. of Am.*, Index No. 651982-2011, transcript of proceedings rec'd Mar. 3, 2014 (N.Y. Supp. Ct., Feb.21, 2014) (no written opinion); *see also* Nathan L. Colvin & Timothy C. Dougherty, *Trends for Potential Insurance Coverage for Losses Arising from a Data Breach*, 44 N. KY. L. REV. 29, 32 (2017) (discussing decision).

provide little to no coverage for liabilities resulting from data breaches."[48]

Moreover, observing increased data breach exposure in 2013 and 2014, the Insurance Services Office ("ISO") drafted three new CGL exclusions, each of which have the practical effect of excluding Part B data breach liability.[49] They are the following:

- CG 21 06 05 14 (Exclusion – Access Or Disclosure Of Confidential Or Personal Information And Data-Related Liability – With Bodily Injury Exception): Excludes coverage under Parts A and B "for injury or damage arising out of any access to or disclosure of any person's or organization's confidential or personal information, including patents, trade secrets, processing methods, customer lists, financial information, credit card information, health information or any other type of nonpublic information."
- CG 21 07 05 14 (Exclusion – Access Or Disclosure Of Confidential Or Personal Information And Data-Related Liability – Limited Bodily Injury Exception Not Included): Excludes coverage under Parts A and B in very similar manner to endorsement CG 21 06 05 14, but does not include the bodily injury exception found in that endorsement.
- CG 21 08 05 14 (Exclusion – Access Or Disclosure Of Confidential Or Personal Information): Excludes coverage under Part B only for "'personal and advertising injury' arising out of any access to or disclosure of confidential or personal information."[50]

These endorsements were made available for use on June 16, 2014.[51] Furthermore, in 2013, ISO began generating forms that simply eliminate offense e. ("[o]ral or written publication, in any manner, of material that violates a person's right of privacy") from the definition of "personal and advertising injury."[52]

In light of recent case law and ISO policy modifications, the relevance of Part B coverage to data breaches is greatly diminished, and will continue to diminish as the 2013 and 2014 ISO policy changes are increasingly embraced. Therefore, at least one commentator has indicated that "[p]rovisions such as these, as well as the general inapplicability of traditional CGL coverage to data breaches, has demonstrated a need to transfer risk from traditional lines to a more specific product tailored to cyber policies."[53]

V. CONCLUSION

In summary, Part B coverage has different triggering conditions, and often different policy limits, from Part A. On occasion, Part B may function as a gap filler when there is no "bodily injury," "property damage" or "occurrence." In recent Texas state and federal opinions, the courts strictly apply common sense definitions to the relevant terms. In recent published Texas case law, courts have rarely found coverage exits under Part B.

Two recent part B developments are worth mentioning. First, the Fifth Circuit recently held that offense c. requires physical possession of or presence at the property in question. Second, there is a general consensus by courts outside of Texas that part B does not apply to data breaches. Given this, entities desiring data breach coverage should purchase specialized policies to ensure coverage for data breaches.

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[48] Kristen Heald, *Note & Comment: Why the Insurance Industry Cannot Protect Against Health Care Data Breaches*, 19 J. HEALTH CARE L. & POL'Y 271, 280 (2017).

[49] *See ISO Comments on CGL Endorsements for Data Breach Liability Exclusions*, Insurance Journal, https://www.insurancejournal.com/news/east/2014/07/18/332655.htm (last visited March 21, 2019).

[50] *See ISO Comments on CGL Endorsements for Data Breach Liability Exclusions*, INSURANCE JOURNAL (Jul. 18, 2014), available at: https://www.insurancejournal.com/news/east/2014/07/18/332655.htm (last visited Apr. 10, 2019).

[51] *Id.*

[52] *Id.*

[53] Kristen Heald, *Note & Comment: Why the Insurance Industry Cannot Protect Against Health Care Data Breaches*, 19 J. HEALTH CARE L. & POL'Y 271, 280 (2017).

JUDGE-CENTRIC ARGUMENT IN COVERAGE CASES ON KEY LEGAL RULINGS: WHAT TO DO AND NOT TO DO IN THE COURTROOM

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Robert M. (Randy) Roach, Jr. is the founding partner of Roach Newton LLP, a Texas litigation and appellate boutique, with offices in Houston, Austin, and Beaumont. Randy's almost 40 years of practice have focused on a unique combination of high-profile appeals, major insurance litigation, and being the legal ruling specialist at trial for Fortune 500 companies and top trial lawyers. He has served as state, regional, and national counsel for several major corporations regarding complex legal issues and insurance coverage disputes. Since 1993, Randy has served as a mediator and arbitrator, primarily in coverage cases and appeals.

For the past 30 years, Randy has been an adjunct professor of law in appellate advocacy and has taught it at both the University of Texas School of Law and the University of Houston Law Center. His class focuses on teaching his judge-focused and law-driven methods for identifying, developing and presenting winning legal arguments, at any point in the life cycle of dispute resolution. The class allows Randy to teach advanced substantive law on insurance, fraud, fiduciary duties, punitives, and oil and gas. He has made over 200 CLE presentations on the same topics.

Reflecting his unique fusion of appellate and trial practices, Randy is a Fellow in the invitation-only American Academy of Appellate Lawyers, and is also a member of the American Board of Trial Advocates. He is board certified in Civil Appellate Law and Personal Injury Trial Law by the Texas Board of Legal Specialization. He has been named a Texas Super Lawyer and one of the top 100 lawyers in the Houston region. He has been listed in Best Lawyers in America for Insurance Law and Appellate Practice and in Chambers USA Leading Lawyers for Business-Insurance. He is also listed as "Go-To" lawyer for Insurance Coverage Disputes on LinkedIn. He is a sustaining member of PLAC and a member of the Insurance Information Council. He is a past chair of three bar organizations: the State Bar of Texas' Appellate Section, the Houston Bar Appellate Section, and the Council of Chairs of the State Bar of Texas.

Born in Westchester New York, he attended elementary school in Chicago and secondary school in Houston. Randy received his undergraduate B.A. degree *magna cum laude* from Georgetown University in Washington, D.C. and received his J.D. from the University of Texas School of Law, where he was on the Texas Law Review and won the Hildebrand Moot Court Championship. Prior to law school, Randy worked as a writer and researcher for the U. S. Senate Nutrition Committee and the U. S. Supreme Court.

BOYD

Justice Jeff Boyd joined the Texas Supreme Court on December 3, 2012, after being appointed by Governor Rick Perry. Justice Boyd was elected to his first full term on the Court in 2014.

After graduating from both Round Rock High School and Abilene Christian University, Justice Boyd served for five years as a minister with the Brentwood Oaks Church of Christ in Austin before heading to Pepperdine University School of Law as an academic scholarship recipient.

After obtaining his law degree, Jeff completed a one-year judicial clerkship for the Honorable Thomas M. Reavley, Judge of the United States Fifth Circuit Court of Appeals. He then joined the Austin office of Thompson & Knight as a first-year associate in 1992. Over the next eight years, his practice focused primarily on civil litigation, defending against product liability, professional liability, personal injury, and business tort claims. Jeff was elected as a partner at Thompson & Knight upon his first year of eligibility in 1998.

In 2000, former Attorney General (now United States Senator) John Cornyn appointed Jeff as Texas' Deputy Attorney General for Civil Litigation.

In December 2002, when General Cornyn became Senator Cornyn and Greg Abbott became Attorney General, Jeff agreed to remain with the AG's office through the transition, which included the 2003 Legislative Session and the resolution of several significant cases. In August 2003, he completed his commitment to the State and returned to the Austin office of Thompson & Knight as a Senior Partner.

In January 2011, Jeff returned to public service when Governor Rick Perry named him General Counsel for the Governor's office. In August 2011, Governor Perry named Jeff as Chief of Staff, making him responsible for all operations of the Governor's office. Jeff held this position until he joined the Texas Supreme Court.

Jeff has long been involved in leadership roles with Austin-area charitable organizations, including the Board of Directors of Brentwood Christian School, the Board of Directors of Goodwill Industries of Central Texas, the Board of Directors of Volunteer Legal Services of Central Texas, as President of the Robert W. Calvert American Inn of Court, and on the Board of Directors of the Freedom of Information Foundation of Texas. He was a co-founder of the Barbara Jordan American Inn of Court and continues to serve as its Counselor.

Jeff is a member of the State Bar of Texas and its Litigation and Administrative Law Sections. He has been admitted to practice before all Texas State courts, as well as the United States Courts of Appeals for the D.C. Circuit; the United States Court of Appeals for the Fifth Circuit; and the United States District Courts of the Western, Eastern, Southern, and Northern Districts of Texas.

Jeff and his wife, Jackie married in February 1986. Their twin daughters, Hanna and Abbie, both graduated from Brentwood Christian School and Abilene Christian University. Their son Carter, who also graduated from Brentwood Christian, obtained his degree from Savannah College of Art and Design in Georgia.

Justice Boyd is a judicial conservative who understands that a judge's role in our constitutional system is to interpret and apply the law and not to create it or make policy decisions that belong to the Legislature. He is committed to faithfully upholding our state and federal Constitutions and the laws.

Tracy Christopher
Justice, 14th Court of Appeals
301 Fannin
Houston, TX 77002
(713) 274-2819

Professional Experience:

2009 to present Justice, 14th Court of Appeals Harris County, TX
Member of a nine member intermediate court of appeals with jurisdiction over civil and criminal appeals in a ten county area.

1995 - 2009 Judge, 295th Civil District Court Harris County, TX
Judge, General Civil Docket.
Region 2, Rule 11 judge, Baycol cases.
Regions 4 & 5, Rule 11 judge, Oil and Gas tax cases.
Statewide Rule 13 judge, silica cases.

1986-1994 Susman Godfrey Houston, TX
Prepared and tried commercial lawsuits for the plaintiff and the defense. Briefed and argued cases before the Texas appellate courts.

1981-1986 Vinson & Elkins Houston, TX
Prepared and tried personal injury lawsuits primarily for the defense. Briefed and argued cases before the Fifth Circuit.

Education:

1978-1981 University of Texas School of Law Austin, TX
J.D. with honors

1974-1978 University of Notre Dame South Bend, IN
B.A. in Economics, with honors

Awards, Certifications and Committees:

2013 Texas Bar Foundation Outstanding Jurist Award
2001 Trial Judge of the Year, Texas Association of Civil Trial and Appellate Specialists
2013 Appellate Judge of the Year, Texas Association of Civil Trial and Appellate Specialists
Board Certified in Civil Trial Law by the Texas Board of Legal Specialization
Board Certified in Personal Injury Trial Law by the Texas Board of Legal Specialization
Supreme Court Advisory Committee 2003-2020
Pattern Jury Charge Committee 2004-2021, Chair of Oversight 2007-2015
Houston Bar Life Fellow and Texas Bar Fellow
College of the State Bar

JUDGE ROSE G. REYNA
206TH DISTRICT COURT
HIDALGO COUNTY COURTHOUSE
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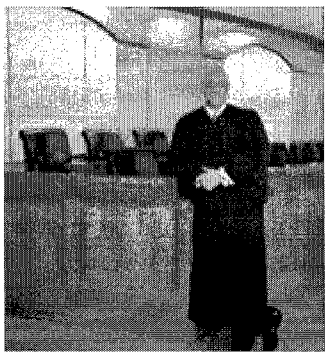
BACKGROUND, EDUCATION AND PRACTICE

Judge Rose Guerra Reyna was born and raised in McAllen, Texas. She received her BA from Pan American University in 1981 and her J.D. from the University of Texas School of Law in 1983. Judge Rose G. Reyna was sworn in as Judge of the 206th Judicial District Court of Hidalgo County, Texas on January 1, 1999 and has been on the bench ever since. Prior to becoming judge, she practiced law for over fifteen years. In her practice, she represented clients in civil matters at the trial court level in state and federal courts, and at the appellate level before the Thirteenth Court of Appeals and the Texas Supreme Court. Besides hearing her regular docket in a court of general jurisdiction, she is also the Re-Entry Court Judge, the Pre-Trial Judge for hailstorm cases filed in Hidalgo County District Courts and was also designated as an MDL Judge in five separate MDL cases. Judge Reyna has also been very involved in professional organizations and committees. She is a graduate of the Judicial College of the State of Texas and was a member of the Board of the College of the State Bar of Texas. She also sat on the Litigation Council of the State Bar of Texas and the Criminal Justice Council of the State Bar of Texas. Judge Reyna also sat on the Board of the Texas Women Lawyers. She has also been appointed to various state assignments to improve the legal system. More notably, she was appointed by Supreme Court Chief Justice Wallace Jefferson to the Judicial Advisory Council in 2007 where she continues to sit. Judge Reyna has also been appointed to the Supreme Court Task Force on Jury Administration, the Court Administration Task Force, and the Texas Center for the Judiciary Finance Committee. She is also currently serving on the Board of Trustees of the Texas Bar Foundation. She continually involves herself in trying to improve our legal system. Judge Reyna has been a course director as well as a frequent speaker at continuing legal education programs sponsored by various law schools, the State Bar of Texas and local bar associations. Judge Reyna has been involved in various non-profit organizations and community organizations and has received various recognitions and awards over the years including Outstanding Women of America, Notable Woman of Texas, Notable Valley Hispanic-UTPA and AVANCE Mother of the Year. She was awarded the 2010 Texas Center Professionalism Award by the Hidalgo County Bar Association and the Texas Center for Legal Ethics. Judge Reyna was also awarded the 2017 Lifetime Achievement Award from the Hidalgo County Bar Association.



R.K. Sandill
127th District Court
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Ravi "R. K." Sandill is a state district judge presiding over a civil docket in the 127th District Court in Harris County, having first been elected in 2008. Judge Sandill was the first South Asian District Court Judge ever elected in Texas and the first South Asian elected countywide in Harris County (3rd most populous county in the United States). Last year, Judge Sandill ran for the Texas Supreme Court. He was the first South Asian to run statewide in Texas.

Last year, Judge Sandill was the first judge in the country to issue a standing Order allowing for those adopting or having a child to get a trial continuance.

Ravi has received the Indian Cultural Center's Award for Legal Service. In 2012, he received the Asia Houston Network's Leadership Award. In 2014, he received the Indo-American Chamber of Commerce of Greater Houston's Pioneer in Public Service Award. It was the first time the Chamber had awarded such an award. In March 2015, Judge Sandill was awarded the University of Houston Law Center's Public Service Award. In that same year, Judge Sandill was named one of 20 Extraordinary Minorities in Texas Law. This honor is given once every 5 years. Last week, the Indo-American Coalition of Texas recognized Judge Sandill, when he was given their Trailblazer Award.

Among his many civic activities, Ravi has been a member of the Board of Trustees of the Leukemia & Lymphoma Society, Gulf Coast Chapter, as well as serving on its advisory board; he has served as a speaker and mentor with the Indian Cultural Center's Youth Leadership Development Program; and served as inaugural gala keynote speaker for the Indian American Cancer Network. Judge Sandill serves as an advisory board member of iEducateUSA. He is a fellow of Leadership Houston and is a senior fellow and sits on the Board of Trustees for the American Leadership Forum. Judge Sandill also sits on the University of Houston Law Center's Alumni Association Board. Since May 2013, Judge Sandill has convened a regular breakfast to discuss issues regarding the Houston area. The breakfast series brings together members in various industries in our city.

Judge Sandill is a member of the Houston Bar Association, for which he has served as a biannual speaker at meetings of the Litigation Section and the Employment Section. In 2011-2012, he was co-chair of the Bone Marrow Match Committee. In 2012-2013, he co-chaired the Minority Opportunities in the Profession Committee, for which he received the President's Award for

Outstanding Service. Judge Sandill co-chaired the Continuing Legal Education Committee for the Houston Bar Association. Judge Sandill has been a member of the Garland R. Walker Inn of Court since 2004 and served on its Executive Board from 2009 to 2019. In the spring of 2016, Judge Sandill began teaching as a trial advocacy adjunct at the University of Houston Law Center.

Judge Sandill has ventured into all aspects of legal and civic life. As a cancer survivor, father, husband, and elected official, he wears many hats. He has taken every opportunity to effect all his communities in a positive way. From volunteering in public schools, to assisting cancer advocacy organizations, Judge Sandill takes his position as a pioneer very seriously.

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Judge-Centric Argument

A. Introduction

The overwhelming majority of questions and issues in an insurance coverage case are decided by judges, not juries. In fact, the overwhelming majority of coverage cases handled by this author in almost 40 years of experience were never seen at all by a jury.

It is no overstatement to say that advocacy to judges on contested legal issues is the single most important part of insurance coverage advocacy.

This author has been a student of how Judges decide contested legal issue for over 40 years. Beyond practicing as a coverage litigator since 1983, this author has conducted three statewide surveys of all state appellate court judges, conducted many dozens of informal interviews of state and federal judges, taught judge-focused advocacy with trial and appellate judges for 30 years, and moderated over 20 CLE panels with judges on advocacy topics.

The result of that study - of how best present arguments that help Judges decide legitimately contested issues - is reflected in this paper.

1) Judge–centric focus of coverage advocates.

It is the author's personal prejudice, albeit shared by many top advocates, that the focus of any attorney's advocacy approach to judges should be based primarily on the needs and concerns of his or her audience, the judges. Although it is true that the attorney can only account for his or her own conduct and performance in argument before judges, the more important aspect of the argument is the decision that will ultimately come from the court. Accordingly, the focus of this paper will be how the lawyer can best help judges do their job.

This judge-centric approach is shared by many very skilled appellate attorneys who regularly practice before appellate courts. In the past, many of these attorneys have generously submitted to interviews by this author concerning their various approaches to appellate argument, both in preparation and in performance. Their views are strikingly similar and may reasonably be said to constitute a consensus concerning how argument should be approached. This paper will attempt to identify those areas of agreement, but it will also identify some areas where different lawyers pursue their shared goals differently. Were it not for their candor and generous contributions, the views expressed herein would not be done so with nearly as much confidence. To all the justices and all the attorneys who have so generously contributed their thoughts, I am deeply indebted and thankful.

2) Structure of this paper.

This paper divides argument into three separate sections. The first section concerns the goals of argument. It addresses the general and specific goals for argument that are the objectives or the targets at which the advocate aims. The second topic is preparation. Preparation is divided into substantive preparation and performance preparation. The third and final topic is presentation. Presentation can be divided into the substance of the presentation and presentation skills.

B. The Goals of Argument Before Judges.

The general and specific goals of argument will largely dictate the focus of argument preparation and presentation. By understanding the goals to be accomplished, the advocate can better prepare for argument. The better the argument preparation, the better the argument presentation. The following are some of the primary goals articulated by accomplished advocates before appellate judges.

1) Helping the judges to the greatest possible extent.

The ultimate goal of argument should be to help the Court do its job. The Court's job is to write opinions on important issues of jurisprudence.

The goal of helping the Court do its job can also be understood in comparison to the opposite approach–one that focuses on the advocate instead of the Court. Law students engaged in moot court are understandably more focused on how their presentation is going to be judged than on how the case should be decided. In the real world, however, where it is the decision that matters and not the advocate's performance, the court-oriented approach is the better approach.

2) Proper framing of the issue.

The ability to frame an issue can be instrumental in determining the outcome of that issue. There are literally dozens of ways that an issue could be framed, each with its own intended or unintended emphases. Picking the right angle on the issue gives an advocate

the power to point the discussion in a particular direction. There are few considerations in argument more important than how the advocate frames the issue.

From the judge's perspective, the proper framing of the issue would join the issue as it is addressed by both sides. Because the ultimate job of the judge is to decide between two competing views on how the Court should state and interpret the law, the best way to frame the issue would be to encompass both sides' competing approaches in a unified statement of the issue.

To help the judges do their job, the issue should be framed in as pointed and in as incisive a way as possible. General statements of the issue, by definition, do not penetrate to the level of the specific decisional ruling. By framing the issue with respect to the narrowest ultimate point of decision, the advocate moves the Court immediately to the issue in the case, avoids wasting time on developing the issue, and helps the Court spend the maximum amount of time on exploring the pros and cons of each side's proposed decisional rule of law.

3) Propose and defend the proper decisional rule of law.

The basis of the Court's ultimate decision and opinion will be the Court's decisional rulings of law. Focusing on the rule of law the advocate wants the Court to hold in its opinion helps the Court to more easily decide the issue in the case. In contrast, if the Court does not understand what holding is being requested, the Court, at best, will have to spend considerable time trying to understand the advocate's position. By making the proposed holding of law crystal clear at the outset, an advocate quickly progresses to the most fruitful topic of discussion – the reasons for and against the proposed decisional rule of law.

4) Make the best use of the first ninety seconds.

The first ninety seconds of the advocate's argument may be the only opportunity that the advocate has to frame the issue, focus on the proposed decisional rule of law, and provoke judge into analyzing the case along the initial lines suggested by counsel. Because the Court may listen to the first ninety seconds and then ask questions that take the attorney in a different direction, the first ninety seconds present the best opportunity to engage the Court along the advocate's own preferred angle on the issue. If the Court believes the advocate is offering a truly valuable insight into the issue at hand and into the choice the Court must make, then the advocate may earn additional time from the judge to develop that particular framing of the issue.

Condensing the argument into one sentence, and then stating that sentence at the very beginning of the argument has many advantages. It focuses the judge on the precise angle on the legal issue that the advocate wants the judge to consider. It may intrigue the judge enough to allow the advocate to expand and elaborate on his or her approach to the issue. It communicates a level of insight and preparation on the part of the advocate that may lead to sharply focused questions at the heart of the issue as the advocate has just framed it. By focusing on the heart of the issue at the outset, precious time is saved, and the ball is advanced into the reasons for the competing decisional rulings of law being proposed by the opposing sides.

5) Focus on the jurisprudential issues.

Another goal of argument should be to focus on the jurisprudential issue. Straying away from that jurisprudential issue probably wastes time and distracts the Court's attention from the arguments and points that can make the difference in the Court's ultimate decision. Focusing on how the jurisprudence would be more coherent with the advocate's proposed decisional rule of law, and why the opponent's proposed ruling is not coherent with the surrounding fabric of Texas or federal jurisprudence, can give the Court an important basis to rule in the advocate's favor. Some of the most persuasive arguments focus on the fairness and justness of a proposed holding, and in particular on the fairness or appropriateness of the result that would come from applying that holding to the facts of other cases that may later come up for review.

6) Manage the precious time effectively.

Most courts give both sides a limited amount of time to argue. The advocate's task must be to develop a strategy for argument that will manage that precious amount of time as effectively as possible. Because there literally is no time to waste during argument, the

advocate must ruthlessly edit prepared remarks into the most concise and incisive remarks possible. Complex thought must be simplified. Long sentences must be turned into short sentences. Unnecessary thoughts and phrases must be discarded. Time management must be one of the advocate's overriding concerns.

7) Identify the 6 to 10 key points in support of the proposed legal ruling.

While there may be countless points that could be offered in support of the advocate's proposed holding, one goal for the oral advocate should be to identify the 6 to 10 most persuasive points. Because time is limited, and because the justices' questions deserve attention more than the advocate's own prepared remarks, a real premium should be placed on identifying the most persuasive points. One universally experienced post argument thought is, "I wasn't able to make all the points I really wanted to make." Identifying the most persuasive points is the first step toward finding a way to actually makes many of those points as possible during argument.

8) Extend the argument beyond the written briefs.

The court obviously is not interested in a regurgitation of the information contained in the written briefs. Because the Court expects the parties to join the issue and discuss the advantages and disadvantages to the jurisprudence of adopting one holding as opposed to the other, the goal of argument should be to make the argument start where the briefs end. To do this, the advocate will not only have to join the issue, but will have to synthesize the clash of respective positions into an argument concerning the decisive point on which the choice between decisional rulings will ultimately turn.

9) Provoke questions and issues with answers to questions.

When judges are prepared and ask tough questions of both sides is the opportunity to make points needs to be developed from the opportunity to answer particular questions. Some of the advocate's statements can be calculated to provoke questions from the Court that would elicit the opportunity to give particular answers. Those answers can, in turn, provoke additional questions in order to give answers that make additional points that the advocate believes will further develop the argument.

10) To be persuasive, be comprehensible.

In order to persuade, the advocate will have to be understood. To be understood, given the shortness of time and the complexity of the issues, clarity and conciseness in oral expression is key. Two methods of preparation help an advocate be comprehensible. First, in order to formulate an answer that can be expressed with the appropriate level of economy and clarity, the advocate will need to have anticipated the question in advance. Second, it helps to rehearse the argument before an audience. If colleagues or even family members listen to the argument and do not understand it, the advocate probably will not be all that comprehensible or persuasive to appellate justices.

11) Protect and enhance your credibility.

The argument should be devised so that credibility is maintained at all times, and enhanced if possible. Beyond candor, concessions concerning the limitations of the facts or the existing case law should be made strategically. Statements concerning the record and the law must be completely accurate.

12) Be the master of the record and the law.

The advocate should have mastered the body of relevant law to the point where he or she is the state's most knowledgeable expert on that area of law at the time of argument. The advocate should be prepared to discuss the facts and opinions of any particular case that might be raised by the opponent or the Court. Similarly, if there are questions concerning what is contained in the record, the advocate should have anticipated the question to the point where the record page cites can be offered. Also, it requires a mastery of the record to be able to truthfully to say that there is nothing else in the record beyond X and Y.

C. Preparation for Argument

Keeping in mind the above listed goals, the essential foundation for the argument is the advocate's preparation. Based on the author's survey on preparation for argument, virtually all advocates focus on the following basics of preparation.

1) Basics.

The first step in preparation is to gather all the

briefs, all of the record, and all cases that were used in the briefing process. The advocate first re-reads those briefs. Most practitioners always read chronologically from the first brief to the last, although some always reverse the process and begin with the petitioner's reply brief. Six to twelve of the key cases are then read in order to establish the background of these most important cases. An abstract of the record is then reviewed. Additional excerpts may be culled based on what the advocate anticipates will be the object of questions or otherwise be important in argument.

Even though the briefs contain many arguments, most experienced practitioners will only focus on two or three issues that they believe are most important to the Court. On these key issues, the advocate tries to identify all the questions that could be raised by the justices during argument. All possible answers are identified, and then those possible answers are ranked and ordered from the most persuasive to least persuasive in descending order. The advocate will consult with colleagues to discuss the argument and to help anticipate potential questions and to evaluate the potential answers. Normally, no more than two answers will be given to a particular question during arguments. The advocate then creates an outline of the argument.

Once this process is complete, the next step is to practice. Some advocates practice privately; others practice in front of someone else. Advocates generally adhere to the motto that practice makes perfect. The advocate streamlines and polishes the argument to the greatest extent possible.

2) The importance of preparation.

Over-preparation is the rule. Advocates approach the process from the viewpoint of, "I have to master everything." The common experience is one of total immersion in the law and the record. Also, most advocates redevelop their thinking concerning their argument based on their preparation. Most advocates make significant and material changes between briefing and the argument.

The fact that an advocate's understanding of the issue develops after the brief is completed, but before argument, may be attributable to the oral advocates focus on addressing the concerns of the Court. Focusing on the justices' likely concerns and questions makes advocates more sensitive to the vulnerability of their position as expressed in the brief. Determining what points would have to be conceded in order to maintain their credibility and coherence makes advocates think more deeply about the core truth of their position.

The focus on self-criticism during argument preparation is furthered by obtaining input from colleagues in informal moot court sessions. Receiving pointed criticisms from colleagues about the weaknesses of certain positions and areas of concern not previously appreciated by the advocate often generates additional insight into how to better articulate a position and how to better justify it.

3) Developing a flexible approach to answering the judge's questions.

Anticipating the judge's questions must be tempered with flexibility. The good oral advocate will go where the Court wants to take the advocate. Advocates who resist directly answering the judge's concerns risk alienating the Court and missing the opportunity to persuade. The need to build in a significant amount of flexibility to address the Court's concerns during argument suggests that an advocate should not prepare a particular script or try to adhere to one particular logical flow of the argument.

4) Question and answer modules.

Preparing questions and answers in discrete modules is one means of building flexibility into an argument outline. Instead of constructing an outline that has a long logical flow, particular questions and points may be developed discretely. This modular approach to answering the Court's concerns necessarily requires that the advocate consider alternative transitions from point to point, instead of just following one particular flow of points.

5) Sowing questions in the mind of the judges.

If the focus of preparation is on the judges instead of on the advocate, it requires a fair amount of skill for the advocate to steer the Court. Some advocates call this skill being provocative; others call it sowing questions in the mind of the judges. Preparing answers to anticipated questions that raise other potential questions may indirectly steer the Court. The judges

may or may not take the opportunity to follow a provocative statement with a particular question. When that happens, however, the judges and counsel have connected in a very meaningful way.

6) Focusing on the jurisprudential consequences that flow from a proposed rule of law.

Analyzing the jurisprudential consequences that result from a particular decisional rule of law is one of the most important tasks in preparing for argument. Articulating a rule of law raises a number of natural questions. How is the proposed rule going to change law? How will it be consistent with the law? How will it be applicable to another set of facts? Is the rule consistent with what other states are doing? Is the law in other respects consistent with the proposed decisional rule? Good lawyers prepare for argument by analyzing both sides' respective proposed decisional rules and by anticipating these questions.

7) Framing the issue for the judges.

One of the most important things any advocate can do in an attempt to steer the Court is to frame the issue. If an issue is framed one way, it may have a great deal more persuasive impact than framing it another way. A well framed issue will focus on the primary decisional point. Each side has a rule they want the Court to adopt. The key to framing the issue is to both identify where the parties disagree and to explain to the judges why they disagree. Ultimately, it is the "why" of the disagreement that becomes the most important issue to the judges in deciding the case.

The primary decisional point is the point that, if won, will decide that case. By focusing on the primary decisional point, the advocate can create a shortcut around some of the issues raised by opposing counsel and some of the issues that are more peripheral to the case.

8) Identify the weak points that can be conceded.

After identifying the primary decisional point, the advocate should identify the weak and peripheral issues that distract the Court from the core of the case. Some attorneys describe this process as limiting the battlefield to as small an area as possible. When missiles come in from the other side that are not aimed at the advocate's battlefield, and are outside of it, the advocate chooses not to defend against those attacks. Missiles that do come into the battlefield, however, will be vigorously contested. Preparing an argument with a keen eye toward abandoning weak issues and focusing on the core of the case furthers the goals of utilizing the limited time to the best possible advantage.

9) Practice and rehearsal.

Whether the focus is on answering questions or in preparing remarks, practice and rehearsal are key to argument preparation. Most advocates will spend a great deal of time alone, speaking their argument. Some argue in front of a mirror, and others argue to a video camera. Developing an easy connection between the brain and the tongue is an important part of these rehearsals. Sentences or phrases that have been uttered countless times before the actual argument presentation are far less likely to make the advocate tongue tied. These rehearsals make the advocate more comfortable and confident when they actually appear before the court.

10) Deciding on visual aids.

The process of thinking through the pros and cons of a visual aid also will help sharpen the focus in preparation for argument. If visual aids of any kind are going to be used, almost all lawyers and judges reject the use of posters or enlargements and prefer handouts. Many advocates prefer not to use any visual aid at all. They believe visual aids of any size can distract from the advocate's presentation and result in disengaged observers.

11) Focusing on the principal cases.

Although all advocates are concerned about mastering the principal cases that are likely to be discussed during argument, advocates differ on how they approach this task. Some advocates will master every case cited in all of the briefs, by memorizing the facts, the holdings, and the reasons for the holdings. Other advocates will focus just on a few key cases,

choosing not to waste their time on cases that are not likely to be discussed during argument.

D. Presentation of Argument

After all of the preparation is completed and the time for argument finally arrives, the actual presentation of the argument requires focus and flexibility. The keys to persuading the judge during your presentation are considered below.

1) Use the first ninety seconds to engage the judge and to make your most important point before the judges begin asking questions.

The first ninety seconds of the argument is the most important opportunity to frame the issue and steer the court. This is the time to place the argument in the best possible light for winning. Reducing the argument to a one sentence description will normally permit the advocate to at least state his or her position at the very beginning of the argument.

The author has previously studied how appellate advocates use their first ninety seconds and cataloged the different approaches that advocates employ to utilize that time. There are basically five groups of approaches that advocates employ for their first ninety seconds. Those approaches are: law oriented, fact oriented, methodology oriented, context oriented, and attack oriented. Each of these approaches has variations, and they are briefly summarized below.

There are several different varieties of the law oriented approach. The first is the "here is legal issue" approach. This approach uses the first 90 seconds to frame the issue and may explain how the opponent has incorrectly framed the issue. The second variety focuses on identifying and applying the controlling case law. The third variety appeals to core precedent or legal doctrines. The final law oriented type of approach focuses on the correct jurisprudence for the Court to follow or the jurisprudential effect of the Court's possible rulings.

The fact oriented approach to the first ninety seconds may involve the advocate going straight to a key fact that is dispositive of the case. A second type of fact oriented approach uses the first 90 seconds to describe the facts of the case generally, but briefly.

The third approach to the first 90 seconds is the resolution oriented approach. The first variety says, "I have the simple solution to this mess that the other side has created." The second variety presents a test that the advocate suggests that the Court use to resolve this case and similar future cases.

The fourth approach to the first 90 seconds is the context oriented approach. One variety of this approach offers a road map of the advocate's argument. A second variety attempts to summarize the advocate's argument for the Court. A third identifies the issue over which the parties are clashing and attempts to explain why they are clashing.

The fifth category of approach is the attack approach. In one version of this approach, the advocate attacks the court of appeals' judgment and reasoning. Another version of the attack oriented approach attacks the opponent's credibility.

On some occasions, none of these approaches are utilized because the judges ask questions before the advocate has a chance to say anything. In each of these circumstances, the Court's first question irrevocably changes the first 90 seconds of the argument.

2) Embrace the judge's questions and make your case out of answers to those questions.

The key component of the judge-centric approach to argument is to embrace the Court's questions as the most important part of argument. These questions certainly deserve primacy because they reflect the particular objects of the Court's concern. Unlike the preparation phase, where the advocate attempts to anticipate the judges' possible concerns, during the argument the advocate focuses on the Court's questions, which are the concrete expressions of their actual concern. Thorough preparation will allow the advocate to better understand the judge's stated question and possible unstated subtext. Drawing upon the advocate's preparation, the advocate offers the very best and most concise answer first. If permitted, a

second concise point may be offered in answer to the question.

3) Concede what you must.

Frequently, the judges will ask questions to see if the advocate is going to concede the perceived weaknesses of their argument or whether they will simply fight on every issue. The smart advocate will concede limitations or weaknesses of the argument and immediately follow by identifying the related core concept that is not part of the concession that they will vigorously defend.

4) Don't talk over the judge's questions.

The advocate should stop immediately if and when the judge begins to interrupt the speaker to ask another question. Consistent with the judge-centric focus, whatever the advocate is saying is of far less value that the Court's questions. This has the added benefit of signaling to the Court that the advocate appreciates the judge's questions and values those questions and the opportunities they present to inform and to persuade.

5) Don't miss the softball questions.

One difference between good and not so good advocates is whether they recognize "softballs" – questions that are favorable to the advocate and permit them to make a key point to the rest of the Court. These softballs must be recognized and hit out of the park. Softball questions are often intended to be a means by which one justice communicates with another justice, using the advocate as foil. The unprepared advocate may mistake softballs as an attack on the advocate's position. The resulting argument on an issue that was otherwise favorable to the advocate could be one of the worst possible moments for any oral advocate.

6) Use an answer to one question to transition to another key point.

Draw upon your preparation to make the best use of the opportunity to answer questions and to transition from your answer to another important point. The initial answer cannot be given short shrift, but should instead fully answer the judge's question in one or two sentences. A transition sentence connecting the answer to the next point will probably be appreciated by the Court.

7) Focus on the justness of your position.

To bolster the jurisprudential argument, the good advocate will apply the proposed holding or reasoning to the facts of future, hypothetical cases and then demonstrate that the result of applying the advocate's proposed rule is far more just and jurisprudentially coherent than applying the opponent's rule. This furthers the goal of focusing on the jurisprudential issue which is at the heart of the Court's concern.

E. Conclusion

The goals, preparation, and presentation of the argument should all be of a piece. The opportunity to argue controlling legal issues before judge and to affect Texas jurisprudence is truly one of the great professional experiences for any appellate advocate. With any luck, helping judges to do their job will also pay dividends to the advocate and the advocate's client.

AN UPDATE ON RECENT INSURANCE COVERAGE DECISIONS AND THEIR IMPACT ON THE CONSTRUCTION INDUSTRY

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CHAPTER 6

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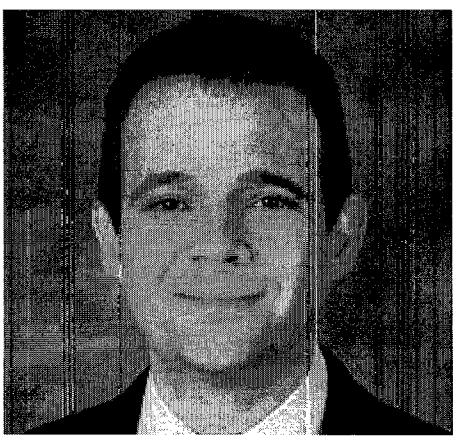

Matt Rigney joined the firm in 2015 after working for five years as a trial attorney in Dallas and Austin, where he represented clients dying from cancer caused by industrial toxins.

Matt graduated in 2010 from Southern Methodist University Dedman School of Law. In law school, he was heavily involved with SMU's Association for Public Interest Law and was a member of the Phi Delta Phi international legal honor society. Matt also interned for the Honorable Jorge A. Solis of the United States District Court for the Northern District of Texas and the American Civil Liberties Union of Texas. Matt earned a B.S. in Journalism from Texas A&M University in 2005.

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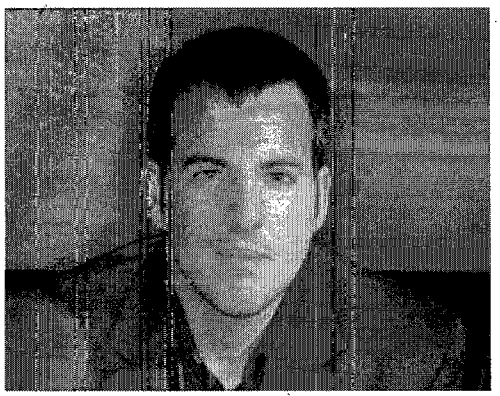

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Lee Shidlofsky is a founding member of Shidlofsky Law Firm PLLC where he heads up the Insurance Law Practice Group. The Insurance Law Practice Group represents corporate policyholders that are in disputes with their insurance companies, provides advice to plaintiffs in complex litigation on how to best maximize an insurance recovery, and provides risk-management consultation in connection with contractual risk transfer issues. The Insurance Law Practice Group has handled a wide variety of first-party and third-party insurance claims (e.g., D&O, E&O, "personal and advertising injury liability," construction defect, commercial property, business interruption, pollution, and commercial auto) in state and federal courts at both the trial and appellate court levels. Shidlofsky Law Firm PLLC is ranked as a Top Insurance Coverage Firm by Chambers USA and Best Lawyers of America®.

In addition to his practice as an insurance coverage lawyer, Lee mediates multi-party construction defect cases as well as insurance coverage matters.

Lee is a Past Chair of the Insurance Law Section and formerly held a council position with the Construction Law Section of the State Bar of Texas. He formerly served as the Insurance Liaison to the Construction Law Section. Lee is the author of numerous articles and seminar papers and is a frequent speaker at continuing legal education seminars across the country.

In 2019, Chambers ranked Lee as a Star Individual for Insurance Coverage. He also has been named a "Super Lawyer" by Texas Monthly Magazine since 2004, including a ranking as a Top 50 attorney in the Central and West Texas Region since 2007 and a Top 100 attorney statewide for 2012, 2013, 2016, 2017 and 2018. He is ranked as a top insurance coverage and construction lawyer by Best Lawyers in America® (including 2012, 2015 and 2018 Lawyer of the Year for Insurance Coverage–Austin and 2013 and 2016 Lawyer of the Year for Construction–Austin); Chambers USA and Who's Who Legal. In 2015, Lee was inducted as a Fellow to the American College of Construction Lawyers. Lee was named a Top Notch Lawyer for Insurance Law by Texas Lawyer and was a finalist for Go-To Lawyer in 2012.

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AN UPDATE ON RECENT INSURANCE COVERAGE DECISIONS AND THEIR IMPACT ON THE CONSTRUCTION INDUSTRY

I. *GREAT AMERICAN INSURANCE CO. V. HAMEL*, 525 S.W.3D 655 (TEX. 2017)

In *Great American Insurance Co. v. Hamel*, 525 S.W.3d 655 (Tex. 2017), the Supreme Court of Texas addressed what constitutes a "fully adversarial trial" under the *Gandy* rule. *Id.* (citing *State Farm Fire & Casualty Co. v. Gandy*, 925 S.W.2d 696, 714 (Tex. 1996)). The Court held that a reviewing court must focus on the insured's incentives to contest liability at the time of trial, as opposed to an evaluation of trial strategies and tactics.

A. Background Facts

The Hamels sued their builder, Terry Mitchell Builder's Inc. (the "Builder"), for water damage allegedly caused by an improperly installed Exterior Insulation and Finish System ("EIFS"). Great American provided liability insurance to the Builder for five years. The fourth and fifth years contained an Exterior Stucco exclusion. Based on the fact that damage was discovered during the fifth year, Great American denied a defense for the Hamels' claim.

Before trial, the Hamels essentially agreed not to enforce any judgment against Terry Mitchell individually or against any "personal tools of the trade and [his] truck"—which were essentially all of the company's assets. Before a bench trial, the Builder stipulated to certain facts that supported Hamels' claims and Mr. Mitchell testified consistent with those stipulations at trial. The Hamels offered evidence to support their claims, but the Builder did not call any witnesses or raise any objections to the Hamels' evidence. In lieu of closing argument, the Court accepted the Hamels' attorney's suggestion that the parties submit findings of fact and conclusions of law. However, only the Hamels submitted proposed findings. The trial court adopted the Hamels' uncontested findings and awarded the Hamels damages for repair costs, loss of market value, and mental anguish. Builder then assigned most of its rights against Great American to the Hamels.

Subsequently, the Hamels sued Great American to recover the amounts they were awarded against the Builder. The Hamels went to a bench trial on a breach-of-contract claim. The underlying record and the stipulations were admitted at trial and the court entered judgment for the Hamels. On appeal, Great American argued that *Gandy* precluded enforcement of the underlying judgment against the Builder because the judgment was rendered without a "fully adversarial trial." *Id.* at 662 (citing *Gandy*, 925 S.W.2d at 714). The El Paso Court of Appeals affirmed, holding the underlying judgment was the result of a fully adversarial trial and that the Builder's assignment of its claims against Great American to the Hamels was valid. *Id.* (citing *Great Am. Ins. Co. v. Hamel*, 444 S.W.3d 780 (Tex. App.—El Paso 2014, pet. granted)).

B. *Gandy's* "Fully Adversarial Trial" Requirement

Initially, the Supreme Court reiterated *Gandy*'s two-pronged conclusion that:

> [A] defendant's assignment of his claims against his insurer to a plaintiff is invalid if (1) it is made prior to an adjudication of plaintiff's claim against defendant in a fully adversarial trial, (2) defendant's insurer has tendered a defense, and (3) either (a) defendant's insurer has accepted coverage, or (b) defendant's insurer has made a good faith effort to adjudicate coverage issues prior to the adjudication of plaintiff's claim.

Gandy, 925 S.W.2d at 714. The *Gandy* Court independently concluded: "In no event . . . is a judgment for plaintiff against defendant, rendered without a fully adversarial trial, binding on defendant's insurer or admissible as evidence of damages in an action against defendant's insurer by plaintiff as defendant's assignee." *Id.*

Great American conceded the validity of the Builder's assignment to the Hamels under *Gandy*. Further, the Court confirmed that the assignment was valid because: a) the Builder assigned its claims after, not before, a trial and judgment; b) unlike the insurer in *Gandy*, Great American breached its duty to defend; and c) Great American neither accepted coverage nor made a good-faith effort to adjudicate coverage before the Hamels' claims against the Builder were resolved. *Hamel*, 525 S.W.3d at 664.

Nevertheless, Great American argued that, independent of the assignment's validity and despite its failure to defend, *Gandy* precluded enforcement of the judgment against Great American solely because it was "rendered without a fully adversarial trial." *Id.*

Referring to *Employers Casualty Co. v. Block*, 744 S.W.2d 940, 943 (Tex. 1988), the Supreme Court had previously indicated that, in light of its failure to defend, an insurer "was barred from collaterally attacking the agreed judgment by litigating the reasonableness of the damages recited therein." *Id.* Further, in *Evanston Insurance Co. v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660, 671 (Tex. 2008), the Court applied *Block* when an insurer breached its duty to defend, avoiding *Gandy*'s "fully adversarial trial" rule because "*Gandy*'s key factual predicate [was] missing" in that the insured had not assigned its claims but had sued the insurer

directly. *Id.* The *Hamel* Court noted that *Gandy*'s "fully adversarial trial" requirement had shifted focus away from an insurer's failure to defend and "toward whether the underlying judgment accurately reflects the plaintiff's damages and thus the insured's covered loss." *Id.*

C. What Constitutes a "Fully Adversarial Trial"?

The Court rejected the Court of Appeals' approach to "retroactively evaluate and thus second-guess trial strategies and tactics" because it "often produces an inaccurate and unreliable result." *Id.* at 666. Accordingly, the Court announced a new rule:

> Today we clarify that the controlling factor is whether, at the time of the underlying trial or settlement, the insured bore an actual risk of liability for the damages awarded or agreed upon, or had some other meaningful incentive to ensure that the judgment or settlement accurately reflects the plaintiff's damages and thus the defendant–insured's covered liability loss.

Id. Based on that standard, the Court held that the underlying trial was not fully adversarial because "the parties' pretrial agreement eliminated any meaningful incentive the Builder had to contest the judgment" because the Builder "no longer has a financial stake in the outcome and thus likely has no interest in either avoiding liability altogether or minimizing the amount of damages." *Id.* at 667. The lack of an incentive rendered the underlying suit "a mere formality—a pass-through trial aimed not at obtaining a judgment reflective of the Hamels' loss, but instead at obtaining a potentially inflated judgment to enforce against Great American." *Id.*

The Hamels argued that, in the event that the Court found there was a lack of adversity during the underlying liability trial, the problem was cured during the Insurance Trial. The Court noted that, although "we will not hold an insurer to a judgment that was not the result of an adversarial proceeding, we will not preclude the parties from properly litigating the underlying liability issues in a subsequent coverage suit." *Id.* at 669. The Court recognized that "relitigation of underlying liability and damages issues is not a perfect solution, but it is necessitated by the circumstances." *Id.* Specifically, the Court stated:

> [U]nder the approach we adopt today, the insurer will have the opportunity to challenge its insured's underlying liability and the resulting damages, the abandoned insured is protected, and the burden on the plaintiff is fair. And of course, the insurer has every incentive to assert a strong defense during the Insurance Trial.

Id. The Court ultimately found that, although certain aspects of the Hamels' damages were discussed during the Insurance Trial, the scope of the Insurance Trial was not sufficiently broad to cure the problem with the lack of adversity. Accordingly, the Court remanded the case to the trial court "in the interest of justice." *Id.* at 670.

D. Commentary

In *Hamel*, the Supreme Court of Texas reiterated the "fully adversarial trial" requirement in *Gandy*. However, it shifted the focus from second-guessing trial tactics and strategies to whether the insured had a financial incentive. This raises the question of whether an insured that is otherwise judgment proof can ever have a financial incentive to challenge a plaintiff once its insurance carrier has denied it a defense. Although an insurance carrier cannot avoid liability altogether when it improperly denies a defense and the underlying case is not the result of a fully adversarial trial, the insurer can challenge the issues not addressed in the underlying case during a subsequent coverage action, as was required in *Hamel*. As *Hamel* represents a shift in focus, its full contours will be developed through other cases in the years to come. As of the writing of this paper, there only have been two opinions that address the contours of the *Hamel* decision. *See CBX Resources, LLC v. Ace Am. Ins. Co.*, 320 F. Supp.3d 853 (W.D. Tex 2018) (finding that insured did not have meaningful incentive to ensure that CBX's default judgment accurately reflected its damages and thus holding that the underlying judgment was not the result of a fully adversarial proceeding); *Landmark Am. Ins. Co. v. Eagle Supply & Manufacturing L.P.*, 530 S.W.3d 761 (Tex. App. —Eastland 2017 no pet.) (holding that the settlement agreement at issue removed any meaningful incentive for the insured to oppose the claimant's property damage claim at the time each subsequent judgment was entered).

II. *MT. HAWLEY INSURANCE CO. V. SLAY ENGINEERING*, 335 F. SUPP. 3D 874 (W.D. TEX. 2018).

In *Mt. Hawley Insurance Co. v. Slay Engineering*, 335 F. Supp. 3d 874 (W.D. Tex. 2018), the United States District Court for the Western District of Texas found various exclusions did not apply to allegations against a general contractor for breach of contract and negligence. Most notably, the court rejected the application of a "breach of contract" exclusion with respect to the insurer's duty to defend.

A. Background Facts

Slay Engineering/Texas Multi-Chem/Huser Construction ("Huser") had a commercial general liability policy from Mt. Hawley Insurance Company. Huser contracted with the City of Jourdanton to design and construct a municipal sports complex. The project consisted of four little league baseball fields, a softball field, parking lots and a new swimming pool. Huser subcontracted with Cody Pools, Inc. to design and build the swimming pool. Huser also subcontracted with Q-Haul, Inc. for earth work, grading and storm drainage work at the site.

After substantial completion of the project, a Huser employee noticed cracks in the pool and parking lot paving. Cody Pool began repair work, but the problem was not cured. The City later notified Huser of several alleged deficiencies involving the swimming pool structure, asphalt paving, concrete flatwork and curbing, and overall drainage. When the City was not happy with the repair proposal, it sued Huser for breach of contract and negligence.

Huser provided notice to Mt. Hawley of the lawsuit against it, but Mt. Hawley denied coverage based on certain exclusions. Mt. Hawley then filed suit, seeking a judgment that it had no duty to defend or indemnify Huser. Mt. Hawley relied on the "damage to your work" exclusion, which precludes coverage for "property damage to your work arising out of it or any part of it and included in the products-completed operations hazard." *Id.* at 881. The exclusion includes an exception, however, "if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor." *Id.* The policy included a separate endorsement that excluded coverage arising directly or indirectly out of a breach of "express or implied contract, breach of express or implied warranty or fraud or misrepresentation regarding the formation, terms or performance of a contract." *Id.*

B. "Breach of contract" Exclusion Only Applies When the Breach is a "But For" Cause of Property Damage

The parties both moved for summary judgment, and Mt. Hawley argued the "breach of contract" exclusion applied because "but for the Contract, there would be no cause of action to bring against Huser." *Id.* at 884. The court rejected that argument, finding that Mt. Hawley conflated Huser's causation of "property damage" with Huser's ultimate liability for economic losses. Specifically, the court found:

> Merely because Huser may ultimately be liable for certain of the City's economic losses under a breach of contract theory does not mean that all of the alleged property damage was causally attributable to Huser's alleged breach of its contract with the City.

Id. at 885. The Court found that the "directly or indirectly" and "arising out of" language in the exclusion required Mt. Hawley to demonstrate that Huser's breach of the contract was a "but for" cause of the alleged property damage. "The fact that all claims contained in the underlying suit have some relation to Huser's contract with the City or that Huser has been sued for breach of contract are not enough to trigger the Breach of Contract exclusion." *Id.* Although the underlying petition alleged certain acts that indicated the breach of contract caused the "property damage," for Mt. Hawley to prevail, the facts alleged in the underlying suit would have to demonstrate that there were *no other* independent, covered (non-excluded) "but for" causes of the alleged property damage. *Id.*

The Court then noted that the underlying suit alleged that "work performed by [Huser], its subcontractors and suppliers, was defective." *Id.* at 886. Therefore, the underlying suit alleged that entities other than Huser were responsible for the allegedly defective work and the resulting damage. Accordingly, the allegations left open the possibility that the property damage may have occurred "even in the absence of" a breach of contract or implied duty by Huser. *Id.* at 886 (citing *Utica Nat'l Ins. Co. of Tex. v. Am. Indem. Co.*, 141 S.W.3d 198, 203 (Tex. 2004) (concluding that the insurer had duty to defend when injury or damage "could" have occurred even absent the excluded conduct)).

C. "Breach of Contract" Exclusion Does Not Override the Subcontractor Exception to the "Damage to Your Work" Exclusion

Mt. Hawley argued the subcontractor exception to the "damage to your work" exclusion was irrelevant because it was overridden by the endorsement containing the "breach of contract" exclusion. *Id.* But the court noted that a natural reading of the "breach of contract" exclusion was that "it pertains to [the insured's] liability for repairing its own deficient work or to specific contractual obligations that [the insured] has assumed." *Id.* at 887 (citing *Mt. Hawley Ins. Co. v. Aguilar*, No. SACV 07-00969, 2008 WL 11342656, at *3 (C.D. Cal. Feb. 29, 2008)). It is "not natural to read it to encompass all work incidentally related to the project regardless of the party that performed the work or the capacity in which it did so." *Id.* The court rejected the sweeping interpretation asserted by Mt. Hawley and instead found that the policy should be interpreted such that the subcontractor exception to the "damage to your work" exclusion still had meaning. *Id.* Therefore, Mt. Hawley had a duty to defend. Having found a duty to defend, Mt. Hawley's motion on the duty to indemnify was also denied because it was premature to determine whether it had such a duty. *Id* at 888–89.

D. Commentary

The interesting aspect of *Slay Engineering* is the court's finding that the breach of contract exclusion does not override the subcontractor exception in the "damage to your work" exclusion. Often courts will find that endorsements trump the base policy language. Moreover, each exclusion is supposed to be read individually even if the result is that the application of one or more exclusions results in an overlap. Nonetheless, *Slay Engineering*, does provide support for insureds that are seeking a duty to defend on claims arising from an alleged breach of a construction contract where the work was performed by a subcontractor. The *Slay Engineering* case presents a split in the district courts as a different court applied the breach of contract exclusion to negate any and all coverage for claims against a general contractor. *See Scottsdale Ins. Co. v. Mt. Hawley Ins. Co.*, Civ. A. No. M-10-58, 2011 WL 9169946 (S.D. Tex June 15, 2011), *aff'd*, 488 F. App'x 859 (5th Cir. 2012) (not designated for publication). In light of the split in the district courts on this issue, it is likely this matter will be appealed to the Fifth Circuit Court of Appeals; however, currently it is pending on a motion for reconsideration filed by Mt. Hawley.

III. *MT. HAWLEY INSURANCE CO. V. HUSER CONSTRUCTION CO., INC.*, NO. CV H-18-0787, 2019 WL 1255756 (S.D. TEX. MAR. 19, 2019)

Just five months after *Slay Engineering*, the Southern District of Texas took its own look at the "breach of contract" exclusion found in Mt. Hawley's insurance policy, finding that the exclusion did apply to negate coverage for an underlying construction defect case against Mt. Hawley's insured. *See Mt. Hawley Ins. Co. v. Huser Constr. Co., Inc.*, No. CV H-18-0787, 2019 WL 1255756, at *1 (S.D. Tex. Mar. 19, 2019). In doing so, the court did not mention the holding in *Slay Engineering*.

A. Background Facts

Huser Construction Company served as the general contractor for the construction of the Eagle Heights Pleasanton ("EHP") apartment complex. 2019 WL 1255756, at *2. When EHP sued Huser over alleged construction defects related to the HVAC system, Mt. Hawley, which issued a CGL policy to Huser, declined a defense. *Id.* at *3–4. Mt. Hawley filed a declaratory judgment action in the Southern District of Texas, asserting it had no duty to defend or indemnify Huser, and Huser filed counterclaims for breach of contract and violations of Chapters 541 and 542 of the Texas Insurance Code. *Id.*

B. The Fight for Coverage

The Mt. Hawley policy included a "breach of contract" exclusion endorsement, which replaced the usual exclusion b. *Id.* at *2. The endorsement excluded coverage for property damage "arising directly or indirectly out of . . . breach of [an] express or implied contract," as well as breach of warranties, fraud related to the contract, or defamation arising from the contractual relationship. *Id.*

The court held that the "breach of contract" exclusion negated Mr. Hawley's duty to defend because the underlying lawsuit alleged that Huser "breached its contract, or, in the alternative has negligently supervised and staffed the project in question all proximately causing damages or producing damages . . . ." *Id.* at *7.[1] Even though EHP also sued the HVAC contractor, the court found that Huser was the "but for" cause of the damage. *Id.* Therefore, the claim fell within the scope of the "breach of contract" exclusion in that it "arose out of" Huser's breach of the EHP contract. The court rejected an argument that the breach of contract exclusion renders the policy illusory. *Id.* at *7. The court also held that, because all the underlying claims arose out of Huser's breach of the EHP contract, Mt. Hawley also had no duty to indemnify Huser.

With respect to Huser's Insurance Code counterclaims, the court found in favor of Mt. Hawley. *Id.* at *8–*9. The court held that Huser did not suffer any independent injury and that, because Mt. Hawley had no duty to defend, it did not violate Chapter 542. *Id.* at *8.

C. Commentary

Despite the fact that the court in the Western District addressed this same issue in *Slay Engineering*, the Southern District made no mention of that case in reaching its conclusion that no coverage existed. Notably, the distinction between the two appears to be the priority of contract interpretation principles. Namely, the court in *Slay Engineering* focused on interpreting the insurance contract such that all provisions had meaning, but the court in *Huser Construction* focused on interpreting the policy so that an endorsement is read as overriding the basic policy terms. The clock on the insured's appellate deadline in *Huser Construction* is running, and the insured is expected to file an appeal to the U.S. Court of Appeals for the Fifth Circuit in light of the split in authority between the district courts. If that occurs, the court in *Slay Engineering* may hold its own opinion until the Fifth Circuit resolves the dispute.

[1] The Huser-EHP contract required Huser to adequately supervise and staff the project.

IV. *SATTERFIELD & PONTIKES CONSTRUCTION, INC. V. UNITED STATES FIRE INSURANCE CO.*, 898 F.3D 574 (5TH CIR. 2018)

In *Satterfield & Pontikes Construction, Inc. v United States Fire Insurance Co.*, 898 F.3d 574 (5th Cir. 2018), the United States Court of Appeals for the Fifth Circuit examined an excess insurance provider's refusal to cover damages incurred by an insured general contractor after it was terminated from a construction project.

A. Background Facts

Satterfield & Pontikes Construction, Inc. ("S&P") was hired as general contractor for a courthouse project in Zapata County, Texas. S&P purchased two layers of insurance to cover potential liabilities: a commercial general liability insurance policy and an excess insurance policy. The excess insurance policy issued by United States Fire Insurance Company ("U.S. Fire") only applied when the first layer was exhausted. Further, the court noted that the U.S. Fire policy was not all-inclusive – it barred coverage for fungi, mold or bacteria and also did not cover attorney's fees or other legal costs.[2] S&P also required its subcontractors to purchase insurance and execute indemnity agreements to cover damages they caused to the project.

Following problems with construction of the project, Zapata County terminated S&P and filed suit to recover the costs it incurred to complete and correct S&P's work. An arbitration panel awarded Zapata County over $8 million in damages, fees, and costs. S&P included its subcontractors in the arbitration and was able to recover approximately $4.5 million of the award through settlement agreements with its subcontractors and two third parties. The settlement agreements released S&P's claims against those parties but did not specifically allocate the proceeds to the damages or liabilities they covered. S&P also obtained just over $3 million from its primary commercial general liability insurance carriers.

S&P sought to obtain coverage for the balance of the award from U.S. Fire. U.S. Fire refused to pay any amount, arguing its policy was not implicated because the first layer of insurance had not been completely exhausted. U.S Fire further argued that not all of the damages awarded in the arbitration were covered under its policy (*e.g.*, mold, attorneys' fees, and prejudgment interest), and the costs that might have been covered were subject to the subcontractor settlements. As a result, U.S. Fire claimed that there was no shortfall in the arbitration award for it to pay.

The district court granted summary judgment to U.S. Fire, holding that "S&P cannot unilaterally allocate all of its settlement proceeds to uncovered losses in order to manufacture a covered loss." *Id.* at 578. Relying on *RSR Corp. v. International Insurance Co.*, 612 F.3d 851 (5th Cir. 2010), a case not cited by the parties, the district court placed the burden on S&P to demonstrate that the settlement proceeds could be properly allocated to the non-covered portions of the excess policy and held that S&P failed to satisfy that burden. *Id.*

B. Settlement Payments from Subcontractors Was "Other Insurance" Under the Terms of the Excess Policy

The Fifth Circuit first examined whether the settlement payments from the subcontractors qualified as "Other Insurance" under the excess policy such that U.S. Fire could consider the payments in determining whether its policy was implicated. The court explained that the U.S. Fire policy defined "Underlying Insurance" as S&P's commercial general liability insurance and defined "Other Insurance" as "any type of Self-Insurance or other mechanism by which an Insured arranges for funding of legal liability for which this policy also provides coverage." *Id.* at 579. The court found that the plain language of the "Other Insurance" definition supported affirming the trial court's summary judgment order. In particular, the court found that the indemnity agreement in the subcontractor contracts:

> [F]alls under the plain language of the "Other Insurance" provision of U.S. Fire's policy—which is very broad—because it is a "mechanism by which an Insured arranges for funding of legal liabilities for which [U.S. Fire's] policy also provides coverage." And, under the reasoning of *RSR*, settlement proceeds resulting from an indemnity agreement also count as "Other Insurance."

Id. at 580 (citing *RSR Corp..*, 612 F.3d 851 (finding that settlement agreements with thirty-six comprehensive general liability insurers was "other insurance" to environmental policies and that the settlement amounts should be applied to offset covered losses)).

C. The Insured Bore the Burden of Allocating the Settlement Payments between Covered and Non-Covered Losses

The court then turned to the district court's decision regarding placing the burden on the insured to allocate the settlement proceeds between covered and non-covered losses. The district court explained that, under

[2] In a footnote, the court cites to *In re Nalle Plastics Family Ltd. P'ship*, 406 S.W.3d 168, 172-73 (Tex. 2013) for the proposition that in Texas attorney's fees and court costs awarded pursuant Chapter 38.001 of the Civil Practice and Remedies Cod are not damages and thus are not covered.

Texas law, the insured generally bears the burden of identifying the portion of a loss that was produced by a covered condition. *Id.* at 581 (citing *Comsys Info. Tech. Servs., Inc. v. Twin City Fire Ins. Co.*, 130 S.W.3d 181, 198 (Tex. App.—Houston [14th Dist.] 2003, pet. denied)).

The Fifth Circuit looked to the Supreme Court of Texas's opinion in *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917 (Tex. 1998), to determine where Texas courts would place the burden. In *Ellender*, an independent contractor died from benzene exposure. The contractor's family sued multiple parties and reached settlement agreements with all but Mobil. When the jury returned a verdict in favor of the family, the Supreme Court of Texas was asked to address how the settlements impacted the jury verdict. The *S&P* court described the Supreme Court's analysis as follows:

> The linchpin of that court's reasoning was its concern that a litigant who is not party to the settlement had "almost no ability to prove which part of the settlement amount represented actual damages. Nonsettling parties should not be penalized for events over which they have no control." The Texas Supreme Court ultimately concluded that "[t]he better rule is to require a settling party to tender to the trial court, before judgment, a settlement agreement allocating between actual and punitive damages as a condition precedent to limiting dollar-for-dollar settlement credits to settlement amounts representing actual damages." Thus, where a settling party failed to allocate its settlement, the nonsettling party was entitled to a credit equaling the entire settlement amount.

Id. at 582 (citing *Ellender*, 968 S.W.2d at 928) (internal citations omitted).

The Court therefore held that S&P had the burden to show that the subcontractor settlement proceeds were properly allocated to either covered or non-covered damages. *Id.* at 583. Because S&P failed to timely raise a fact issue regarding the allocation of the settlement proceeds, the Fifth Circuit affirmed summary judgment in favor of U.S. Fire.

D. Commentary

In *Satterfield & Pontikes*, the court found that settlement payments from subcontractors should be allocated between covered and non-covered losses for purposes of determining the amount owed by an insurance carrier. Moreover, the court placed the burden on the insured to allocate the settlement and noted that the settlements did not contain an allocation. However, that begs the question of if the settlement agreement did contain such an allocation, would that allocation have been upheld. This certainly created an incentive to include an allocation in any settlement agreement that attributes the vast majority of the settlement proceeds to what would otherwise be covered losses.

V. *BALFOUR BEATTY CONSTRUCTION LLC V. LIBERTY MUTUAL INSURANCE CO.*, 366 F. SUPP.3D 836 (S.D. TEX. DEC. 2018)

In *Balfour Beatty Construction LLC v. Liberty Mutual Insurance Co.*, 366 F.Supp.3d 836 (S.D. Tex. Dec. 28, 2018), the United States District Court for the Southern District of Texas examined a "defects, errors and omissions" exclusion, which barred coverage for a claim regarding damage to windows during a construction project, and whether an exception for resulting damage applied to reinstate coverage.

A. Background Facts

Balfour Beatty Construction LLC was the general contractor for the Energy Center 5 construction project. Milestone Metals Inc. was a subcontractor hired to perform certain welding work. While performing welding work near the 18th floor of Energy Center 5, welding slag from its work fell down the side of the building and damaged the glass on windows below requiring replacement. Milestone had not installed the windows.

The project developer obtained builder's risk insurance coverage for the project from Liberty Mutual. Once the damage was discovered, a claim was submitted to Liberty Mutual, who denied coverage based on a "defects, errors, and omissions" exclusion, which precluded coverage for "loss or damage ... caused by, or resulting from an act ... relating to ... construction, materials, or workmanship ... or ... installation[.] But if an act, defect, error, or omission as described above results in a covered peril, 'we' do cover the loss or damage caused by that covered peril." *Id.* at *2. Balfour and Milestone then sued Liberty Mutual, asserting claims for breach of contract and violations of Chapters 541 and 542 of the Texas Insurance Code.

B. Application of the "Defects, Errors and Omissions" Exclusion

The court first examined whether the "defects, errors and omissions" exclusion applied to the insureds' claim. The court noted that the claim was for damage caused by an act relating to construction and, therefore, fell within plain, unambiguous language of exclusion. The insureds argued that the exclusion only applies to claims based on defects or damage to the insureds' own work. *Id.* at *5. However, the court rejected that argument, noting that while "parties can and do limit the exclusion to defects in the insureds own work when that is their intent, [t]he parties here simply did not draft their contract that way." *Id.* Because the language of the

exclusion was clear, the court "is duty bound to enforce it as written." *Id.* at *6.

Balfour and Milestone also argued that wind (a covered cause of loss) contributed to the loss. *Id.* However, the court referred to the following quote from the Supreme Court of Texas regarding concurrent causation:

> Texas courts and the Fifth Circuit applying Texas law have recognized a distinction between cases involving "separate and independent" causation and "concurrent" causation when both covered ... and excluded events cause a plaintiff's injuries. In cases involving separate and independent causation, the covered event and the excluded event each independently cause the plaintiff's injury, and the insurer must provide coverage despite the exclusion. In cases involving concurrent causation, the excluded and covered events combine to cause the plaintiff's injuries. Because the two causes cannot be separated, the exclusion is triggered.

Id. (citing *Utica Nat'l Ins. Co. of Tex. v. Am. Indem. Co.*, 141 S.W.3d 198, 204 (Tex. 2004) (internal citations omitted)). Because the wind alone could not have independently caused the slag damage to the windows, the court concluded that wind was not a "separate and independent" cause of the loss. *Id.* Accordingly, because the wind was at best a concurrent cause, the exclusion still applied. *Id.*

C. The "Ensuing Loss" Exception Does Not Apply

Balfour and Milestone argued that, even if the "defects, errors and omissions" exclusion barred coverage for their claim, the following exception effectively reinstated coverage: "But if an act, defect, error, or omission as described above results in a covered peril, 'we' do cover the loss or damage caused by that covered peril." *Id.* at *7.

The judge rejected the insureds' position, finding that allowing the exception to reinstate coverage would "swallow" the exclusion. *Id.* In particular, the court found:

> There is only one instance of loss or damage in this case: the damage to the windows. The language of the exception, however, suggests that there needs to be at least two loss events. Parsing the exclusion, we find: 'But if an act, defect, error, or omission as described above'—that is, an excluded peril—'*results* in a covered peril,' then the loss or damage caused by the covered peril is covered. The language, then, calls for (1) an excluded peril that (2) 'results in' a covered peril. Since a peril cannot be simultaneously excluded and covered, the clause must be referring to two separate perils, one excluded and one covered. The Court finds that the 'results in' language is not ambiguous and is capable of being given a definite meaning, although the Court acknowledges that there is a recent decision, albeit vacated pursuant to an agreed motion of the parties, reaching the contrary conclusion.

Id. (citing *Nay Co. v. Navigators Specialty Ins. Co.*, No. 3:16-CV-02675-N, 2018 WL 4026346, at *4 (N.D. Tex. June 12, 2018) (finding a nearly identical exception ambiguous "[b]ecause the phrase 'results in' is susceptible to more than one interpretation")) (emphasis added by court).

The insureds further argued that Liberty Mutual's interpretation of the exception would render coverage under the policy illusory for many of the risks that are typically covered under a builder's risk policy. *Id.* at *8. The Court recognized that the insureds' contention had some support in *Nay* because in that case the ensuing loss exception was found to reinstate coverage for two reasons: 1) because "result in" was found to be ambiguous allowing the insured's interpretation as long as it was reasonable; and 2) because the policy's protections would be "largely illusory" under the insurer's interpretation. *Id.* (discussing *Nay*, 2018 WL 4026346, at *5).

Although the court understood the *Nay* court's reasoning, it found that the result could not be reconciled with the Fifth Circuit's opinions that an unambiguous policy be enforced as written. Further, because the policy still provided coverage for certain risks (*e.g.*, acts of nature or Acts of God), the policy was not illusory. *Id.* Accordingly, the court found that Liberty Mutual did not breach the contract in denying coverage and granted summary judgment for Liberty Mutual.

D. Commentary

The *Balfour Beatty* case provides a fairly straightforward analysis of a faulty workmanship exclusion and ensuing loss provision. Even so, it presents a cautionary tale as not all "faulty workmanship" exclusions are created equal. The one here was written on the AAIS policy form and eliminates virtually any damage to property caused by construction errors. There are much narrower exclusions available in the insurance market. Additionally, the courts application of the concurrent cause doctrine is noteworthy. The court reinforced the distinction between losses resulting from "separate and independent" causes and concurrent causes. When two causes are separate and independent, then the loss is covered if one of the causes is covered (despite the presences of an excluded loss). However, when two

causes of a loss are concurrent and one is excluded, the loss falls within the exclusion.

VI. *GREYSTONE FAMILY BUILDERS, INC. V. GEMINI INSURANCE CO.*, NO. 17-921, 2018 WL 1579477 (S.D. TEX. APR. 2, 2018)

In *Greystone Family Builders, Inc. v. Gemini Insurance Co.*, No. 17-921, 2018 WL 1579477 (S.D. Tex. Apr. 2, 2018), the United States District Court for the Southern District of Texas adopted a magistrate judge's recommendation that an insurer's motion for summary judgment be denied because an underlying counterclaim filed against the insured contractor alleged an occurrence for which coverage under the policy is provided.

A. Background Facts

Greystone Multi-Family Builders Inc. entered into a contract with TPG (Post Oak) Acquisition LLC to perform services as a general contractor for a construction project. After Greystone purportedly did not fully perform its obligations under the contract, TPG terminated the contract and hired Allied Realty Advisors to complete the job. Greystone then filed suit against TPG and Allied. TPG filed a counterclaim against the contractor, alleging that Greystone breached the construction contract. When Greystone submitted the counterclaim to Gemini, the insurer denied a duty to defend or indemnify because the policy did not respond to property damage that occurred while Greystone was performing operations or for damage caused by mold. *Id.* at *1. When Greystone resubmitted its request, Gemini denied coverage on the basis that Greystone never completed its work and the damage occurred in the course of Greystone's operations. *Id.* Greystone then sued Gemini for its attorneys' fees and a declaration judgment stating that Gemini had a duty to defend. Gemini cross-moved for summary judgment.

The magistrate judge issued a memorandum and recommendation ("M&R"), finding that the underlying allegations constitutes an occurrence for which coverage should be provided. Gemini objected to the M&R, and Greystone filed a motion for clarification as to whether Gemini's motion was denied in full.

B. Was there an "Occurrence"?

Gemini argued there was no "occurrence" because Greystone's actions were not an accident. *Id.* at *2. The magistrate judge considered the Supreme Court of Texas's decision in *Lamar Homes, Inc. v. Mid–Continent Casualty Co.*, 242 S.W.3d 1, 4–5, 7 (Tex. 2007), which contained virtually identical language, to find:

> '[A] claim does not involve an accident or occurrence when either direct allegations purport that the insured intended the injury ... or circumstances confirm that the resulting damage was the natural and expected result of the insured's actions, that is, was highly probable whether the insured was negligent or not.'

Id. The magistrate judge found no allegations in the underlying complaint that Greystone intended its work to cause the damage or that the damage was the natural and expected result of Greystone's actions. *Id.* Gemini's main argument that there was no "occurrence" was that the counterclaim alleged that "Greystone hid costs so that it could continue to collect its contractor's fees, paid subcontractors up front so that it could collect higher contractor's fees resulting in lower incentive for them to complete their work, and withheld information from TPG, all of which Gemini contends resulted in predictably poor workmanship." *Id.*

The District Court found that, although at first glance the allegations in the counterclaim could lead one to conclude that the alleged damages were the result of Greystone's mismanagement, a closer inspection of the entire counterclaim revealed that many of the alleged damages were not predictable (*e.g.*, the framing subcontractor allegedly failed to construct frames with the required amount of studs; Greystone installed power conduits under the building's garage and these were later lost or destroyed when concrete was poured over them; the masonry subcontractor installed the trash-chute walls without leaving access to install the trash chutes, which required retrofitting of the doors; Greystone builders "forgot to install" pipe; and the emergency exit door was installed backwards). *Id.* at *3. As a result, the District Court found that the magistrate judge had correctly determined that some of the allegations in the counterclaim fell within the definition of "occurrence."

C. "Loss of Use" and "Property Damage"

Gemini agreed that there was some property damage to the project, but it objected to the magistrate judge's conclusion that the counterclaim alleged "property damage" in the form of "loss of use." *Id.* In particular, Gemini argued that the counterclaim only alleged increased construction costs due to delay in the completion of the project but did not allege any actual loss of rents. *Id.* at *4. The policy defined "property damage" as follows:

> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
> b. Loss of use of tangible property that is not physically injured. All such loss of

> use shall be deemed to occur at the time of the 'occurrence' that caused it.

Id. Based on this definition, the District Court agreed with the magistrate judge that the counterclaim contained some allegation of actual physical damage. Further, the District also agreed that the end goal of the construction project was to use the property as an apartment complex and charge rent; therefore, the delay in construction caused a "loss of use" within the definition of "property damage."

D. The Policy's Exclusions Did Not Preclude a Duty to Defend

The District Court addressed whether any of four exclusions barred coverage for the allegations against Greystone.[3]

1. Exclusion j.(5)

Exclusion j.(5) bars coverage for "property damage" to "that particular part of real property on which you . . . are performing operations, if the 'property damage' arises out of those operations." The District Court noted that this exclusion only applies to "property damage that occurred during the performance of construction operations." *Id.* at *4 (citing *Mid-Continent Cas. Co. v. JHP Dev., Inc.*, 557 F.3d 207, 213 (5th Cir. 2009)). The court noted that there were no clear allegations as to when the damage actually occurred. Further, some of the alleged damage (*e.g.*, plumbing elements being cracked because the floor of the structure began to sag, water leaks due to improperly installed roofing systems, and leaks due to plaster and masonry being installed improperly) could have occurred after Greystone and its subcontractors were no longer working on the project. *Id.*

Gemini also requested that it be allowed to conduct limited discovery to ascertain when the property damage took place. The District Court addressed Texas case law recognizing the possibility that a narrow exception to the eight-corners rule may exist, but only if: (1) it is impossible to determine whether coverage is potentially implicated; and (2) the extrinsic evidence goes solely to a fundamental issue of coverage that does not overlap with the merits of or engage the truth or falsity of any facts alleged in the underlying case. *Id.* at *6 (citing *Allstate Cty. Mut. Ins. Co. v. Wootton*, 494 S.W.3d 825, 835–36 (Tex. App.—Houston [14th Dist.] 2016, pet. denied); *Liberty Mut. Ins. Co. v. Graham*, 473 F.3d 596, 601 (5th Cir. 2006) (discussing *GuideOne Ins. Co. v Fielder Rd. Baptist Church*, 197 S.W.3d 305, 308 (Tex. 2006)); *Northfield Insurance Co. v. Loving Home Care, Inc.*, 363 F.3d 523 (5th Cir. 2004)). Because the court found that allowing discovery would overlap with the merits of the allegations in the underlying complaint, the narrow exception to the eight-corners rule did not apply.

Based on the above, the District Court agreed with the magistrate judge that exclusion j.(5) did not allow Gemini to avoid its duty to defend.

2. Exclusion j.(6)

Exclusion j.(6) bars coverage for "property damage" to "that particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." The exclusion does not apply to property damage included in the products-completed operations hazard (*i.e.*, when all of the work called for in the contract is complete). The District Court noted that the exclusion bars coverage only for property damage to parts of a property that were themselves the subject of defective work by the insured. The District Court agreed with the magistrate judge that exclusion j.(6) did not apply to the extent the counterclaim alleged damage to parts of the property that were the subject of only non-defective work by the insured and were damaged as a result of defective work on other parts of the property.

In the M&R, the magistrate judge found that the counterclaim alleged that some of Greystone's work that was non-defective was damaged by defective work. *Greystone Family Builders, Inc. v. Gemini Insurance Co.*, No. 17-921, 2018 WL 3080890 (S.D. Tex. Feb. 26, 2018). For example, the counterclaim alleged that, because of defective structural work, "the floor of the structure began to sag and critical plumbing elements were damaged." *Id.* at *11. The counterclaim also alleged that the roof was installed defectively, which caused water leaks on the property. *Id.* The allegations also established that not all of Greystone's work was completed because the contract was never completed. *Id.* Therefore, the products-completed operations hazard was not implicated. Accordingly, exclusion j.(6) did not operate to bar the insurer's duty to defend.

E. "Fungus or Spore" Exclusion.

The District Court agreed with the magistrate judge that the policy's fungus or spore exclusion precluded coverage for some of the allegations in the counterclaim. 2018 WL 1579477 at *7. However, the court noted that the exclusion did not preclude coverage for all of the allegations; therefore, it did not preclude Gemini's obligation to provide Greystone with a defense. *Id.*

F. Commentary

The decision in *Greystone* is not necessarily monumental, as it effectively reiterates now long-

[3] Because Gemini did not attempt to actually establish that exclusion m.—the "impaired property" exclusion—applied, that exclusion is not addressed herein.

standing Texas law on the application of standard construction-defect related exclusions like exclusions j.(5) and j.(6). Moreover, it reinforces the fact that, unless an insurer can assert a complete defense to coverage, a complete defense is owed to the insured. Going forward, and in that same vein, should the matter not otherwise be settled, any ultimate ruling by the District Court may be important in addressing the extent to which an insured can recover defense costs in regard to defense of an underlying lawsuit that includes affirmative claims that are not otherwise covered by the insured's policy.

VII. *TRAVELERS LLOYDS INSURANCE CO. V. CRUZ CONTRACTING OF TEXAS, LLC*, NO. 16-759, 2017 WL 5202891 (W.D. TEX. SEPT. 7, 2017)

Travelers Lloyds Insurance Co. v. Cruz Contracting of Texas, LLC, No. 16-759, 2017 WL 5202891 (W.D. Tex. Sept. 7, 2017) is one of the few cases interpreting the Supreme Court of Texas' opinion in *U.S. Metals, Inc. v. Liberty Mutual Group., Inc.*, 490 S.W.3d 20, 29 (Tex. 2015) and finding the that costs to access defective work can constitute "property damage" under the CGL policy.

A. Background Facts

D&D Contractors, Inc. ("D&D") entered into a subcontract with Cruz Contracting, LLC ("Cruz") for Cruz to perform certain utility work in connection with a residential development project in Boerne, Texas. During the construction project, Cruz had commercial general liability coverage with Travelers.

According to D&D, because of defective work performed by Cruz, D&D filed suit against Cruz. Cruz's faulty work on the Project required D&D to tear out and replace much, if not all, of Cruz's work on the sewer and water systems. *Id.* at *2. According to D&D, "[i]n order to replace the sewer system, D&D crews were required to excavate through the existing completed (with the exception of asphalt) roadways [that it] had previously and carefully constructed and passed all required testing with the City of Boerne." *Id.* The problems with the sewer system also caused damage to many items installed by others on the Project. *Id.* Cruz's faulty installation of the water system also required D&D to tear out and re-complete various roadways, curbs, and parkways. *Id.*

When D&D obtained a jury award in excess of $1 million, D&D and Cruz sought to have Travelers satisfy the judgment. Travelers filed a declaratory judgment action against D&D and Cruz, seeking a declaration that the judgment awarded against Cruz was not covered. Travelers filed summary judgment on the grounds that: (1) Travelers' policies do not cover the damages associated with the restoration, repair, or replacement of any of Cruz's defective work; (2) damage to property intentionally caused to access Cruz's defective work is not an "occurrence"; and (3) Travelers' policies do not cover attorneys' fees awarded under Chapter 38 of the Texas Civil Practice and Remedies Code. *Id.*

In response to Travelers' Motion, D&D and Cruz argued that they were not seeking coverage to repair Cruz's defective work, but rather were seeking coverage for the cost to access that defective work in order to repair damage to other parties' work on the project. *Id.* D&D and Cruz argued that such property damage independently qualified for coverage under the CGL policies. *Id.*

B. Was there "Property Damage"?

D&D and Cruz argued that the cost to replace roadways, curbs, and sidewalks that D&D had built above Cruz's defective work and the adjoining utility work done by other subcontractors was tangible property that, although not physically disturbed by Cruz's defective work, was rendered useless and constituted property damage under the CGL Policies. *Id.* at *5.

Citing to *U.S. Metals, Inc. v. Liberty Mut. Group, Inc.*, 490 S.W.3d 20, 29 (Tex. 2015), and *Lennar Corp. v. Markel Insurance American Insurance Co.*, 13 S.W.3d 750, 757 (Tex. 2013), the court noted that the Supreme Court of Texas had determined that repair costs and other damages to access faulty equipment installed by an insured was "property damage" under nearly identical CGL policy language. *Cruz*, 2017 WL 5202891 at *5. Accordingly, the Court found that D&D experienced "property damage" sufficient to implicate coverage.

C. Was There an "Occurrence"?

Travelers argued that D&D's "property damage" was not caused by an "occurrence" because there was no "accident." Rather, the damage was a result of D&D's intentional activities to repair Cruz's defective work. *Id.* The Court found that Travelers' argument was misplaced because the relevant inquiry was not whether D&D's repair activities were intentional, but rather whether the damage resulting from Cruz's negligence was "unexpected and unintended, and therefore accidental." *Id.* (citing *Hartford Cas. Co. v. Cruse*, 938 F.2d 601, 605 (5th Cir. 1991)). The court noted that the Fifth Circuit "has held that defective performance or faulty workmanship by the insured that injures the property of a third party is 'accidental' under this definition." *Id.* at *6 (citing *Federated Mut. Ins. Co. v. Grapevine Excavation, Inc.*, 197 F.3d 720, 725 & nn. 20, 23 (5th Cir. 1999); *Cruse*, 938 F.2d at 604–05; *First Tex. Homes, Inc. v. Mid-Continent Cas. Co.*, No. 3-00-CV-1048-BD, 2001 WL 238112, at *2–3 (N.D. Tex. Mar. 7, 2001)). Further, "an occurrence takes place where the resulting injury or damage was unexpected and unintended, regardless of whether the

policyholder's acts were intentional." *Id.* (quoting *Cruse*, 938 F.3d at 605). Accordingly, since the property damage at issue occurred with the failed testing of the utility systems, the court found that such damage was unexpected and unintended and, therefore, constituted an "occurrence" under the policies. *Id.*

Travelers also argued that any such "occurrence" did not take place during its policy periods but occurred sometime after Cruz had finished its work on the project. *Id.* The court rejected this argument based on the Supreme Court of Texas's holding in *Don's Building Supply, Inc. v. OneBeacon Insurance Co.*, 267 S.W.3d 20, 30 (Tex. 2008), that "[o]ccurred means when *damage* occurred, not when *discovery* occurred." 2017 WL 5202891, at *6 (emphasis in original). Because the underlying petition alleged damage occurring during the policy period, there was sufficient evidence that the property damage at issue was an "occurrence" to avoid summary judgment.

D. Application of Policy Exclusions

Having agreed that the requirements of the insuring agreement had been met, the court addressed whether the policy exclusions for "damage to property" and "impaired property" barred coverage for the damage resulting from Cruz's defective work.

1. "Damage to Property" Exclusions

Exclusion j.(5) applies to "property damage to ... [t]hat particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the 'property damage' arises out of those operations." The court noted that Texas courts have determined that "the use of the present tense indicates that the exclusion applies to circumstances where the contractor or subcontractors are currently working on the project." *Id.* at *7 (quoting *CU Lloyd's of Tex. v. Main St. Homes, Inc.*, 79 S.W.3d 687, 696 (Tex. App.—Austin 2002, no pet.); *see also Mid-Continent Cas. Co. v. JHP Dev., Inc.*, 557 F.3d 207 (5th Cir. 2009)). Because the underlying petition did not allege that Cruz currently was working on the project, the court found that exclusion j.(5) did not apply.

Exclusion j.(6) provides that there is no coverage for "property damage to ... [t]hat particular part of any property that must be restored, repaired or replaced because 'your work' was incorrectly performed on it." However, the exclusion does not apply to "property damage" included in the "products-completed operations hazard." The court noted that the Fifth Circuit has held that:

> the plain language of the exclusion "bars coverage only for property damage to parts of a property that were themselves the subject of defective work by the insured; the exclusion does not bar coverage for damage to parts of a property that were the subject of only nondefective work by the insured and were damaged as a result of defective work by the insured on other parts of the property."

Id. (citing *JHP Dev., Inc.*, 557 F.3d at 215). Because D&D and Cruz were not claiming coverage for the cost to repair Cruz's work itself, the court concluded that exclusion j.(6) did not bar coverage for the damages being claimed.

2. "Impaired Property" Exclusion

The "impaired property" exclusion bars coverage for claims arising out of damages to impaired property – property that can be "restored to use by the ... repair, replacement, adjustment or removal" of the defective utilities. *Id.* at *8. The court found that for the exclusion to apply, the electric utility lines, roads, curbs and parkways that were damaged as a result of Cruz's work would need to be capable of being fully restored by repairing Cruz's work. *Id.* In other words, the damage would be entirely repaired by simply fixing Cruz's work. However, the court noted that nothing in the court's record or in the underlying pleadings demonstrated that such a solution would actually repair the damage caused to the electric utility lines, roads, curbs and parkways. Accordingly, the damage being claimed was not to "impaired property" to which the exclusion applied.

E. Attorneys' Fees

The judgment in the underlying case awarded over $300,000 in attorneys' fees to D&D. Travelers argued that attorneys' fees are not "damages" that are covered by CGL policies. *Id.* at *9. D&D and Cruz argued that the word "damages" is undefined in the policies and that it should be given its normal meaning and should not be precluded from coverage. *Id.* Citing the Supreme Court of Texas's opinions in *In re Nalle Plastics Family Ltd. Partnership*, 406 S.W.3d 168 (Tex. 2013) (finding that "compensatory damages" do not include attorneys' fees in the context of superseding a judgment), and *In re Corral-Lerma*, 451 S.W.3d 385 (Tex. 2015) (per curiam) ("while attorney's fees for the prosecution or defense of a claim may be compensatory in that they help make a claimant whole, they are not, and have never been, damages"), the court found that summary judgment should be granted to Travelers.

F. Commentary

In *Cruz*, following the Supreme Court of Texas's decision in *U.S. Metals*, the court found that the costs to access an insured's defective work could constitute independent "property damage" sufficient to trigger coverage under a commercial general liability policy. Further, the court found that allegations of damage to

property other than to the defective work itself was sufficient to avoid the application of the "damage to property" and "impaired property" exclusions. Interestingly, the court applied a duty to defend standard—*i.e.*, the court looked to only the pleadings and the terms of the insurance policy—when evaluating the extent to which the carrier owed a duty to indemnify. Applying this standard, the court ultimately found that the *pleadings* were sufficient to overcome summary judgment despite the fact that the duty to indemnify is inherently an issue of fact. The case settled prior to an appeal to the Fifth Circuit. As such, this will not be the last word on the scope and application of *U.S. Metals* for "rip and tear" coverage.

VIII. *LYDA SWINERTON BUILDERS, INC. V. OKLAHOMA SURETY CO.*, 903 F.3D 435 (5TH CIR. 2018)

Following the Supreme Court of Texas's opinion in *USAA Texas Lloyds Co. v. Menchaca*, 545 S.W.3d 479 (2018), the Fifth Circuit, in *Lyda Swinerton Builders, Inc. v. Oklahoma Surety Co.*, 903 F.3d 435 (5th Cir. Aug. 29, 2018), recently addressed an insurer's duty to defend and the damages an insured may recover when the duty is breached.

A. Background Facts

Lyda Swinerton Builders was hired as the general contractor to build a ten-story office building in College Station, Texas. Swinerton engaged A.D. Willis Company as a subcontractor for roofing, ornamental metal, metal wall panels, and rough carpentry. As a requirement under the subcontract, Willis obtained a commercial general liability policy from Oklahoma Surety Company ("OSC") in which Willis was identified as a "ROOFING CONTRACTOR" and Swinerton was named an additional insured "but only with respect to liability directly attributable to performance of 'your [*i.e.*, Willis'] work.'" *Id.* at 441.

After the office building owner assigned its interest in the contract with Swinerton to Adam Development Properties ("ADP"), ADP sued Swinerton for breach of contract, alleging, among other things, that Swinerton failed to meet the contractual deadline for substantial completion, provided work with material deficiencies and consistently failed to comply with various contractual obligations (*e.g.*, adequately supervise its subcontractors, provide skilled workers and suitable materials, protect the property from exposure to the elements). *Id.* at 442. Swinerton filed a third-party petition against Willis and others. When ADP amended its petition, it referred to Willis as a third-party defendant (without mentioning it was a subcontractor).

Swinerton requested a defense from OSC based on its status as an additional insured under Willis' policy, which OSC denied. Swinerton also requested a defense from other insurers (some of whom issued policies directly to Swinerton), who similarly denied the request. One of the insurers that denied Swinerton's request filed a declaratory judgment action in a federal district court, naming ADP, Swinerton and another party as defendants. Swinerton filed a third-party complaint in that action, seeking damages and relief against OSC and the other insurers for breach of contract based on their failure to defend in the state court suit, violation of the Texas Insurance Code and violation of the Prompt Payment of Claims Act.

All claims eventually settled with the exception of those between Swinerton and OSC. The District Court ultimately found OSC had a duty to defend Swinerton, that the duty was breached and that Swinerton was entitled to damages. The District Court awarded approximately $650,000 for the breach of the duty to defend and violation of the Prompt Payment of Claims Act, statutory penalty of 18% interest, and reasonable attorneys' fees and costs. *Id.* at 444.

B. Did OSC Owe a Duty to Defend?

Addressing OSC's duty to defend, the court analyzed the duty in three parts: (1) whether Swinerton was a named insured under the OSC policy; (2) whether a duty to defend arose under the eight-corners rule; and (3) whether the anti-stacking rule applied.

The court noted that the policy obligated OSC to defend Willis and any additional insured against suits covering property damage covered by the policy provided that Willis "agreed by written 'insured contract' to designate" Swinerton as an additional insured. *Id.* at 445. Despite the fact that Swinerton never countersigned the subcontract, the court found that the subcontract between Swinerton and Willis qualified as an "insured contract" because even with certain modifications to the subcontract's indemnity agreement, the subcontract still provided that Willis agreed to "unconditionally indemnify" Swinerton "to the fullest extent permitted by law." *Id.* at 446. The court also held that a party may qualify as an additional insured even if the underlying insured contract is not enforceable. *See id.*

Under the eight-corners rule, Texas courts look to the facts alleged within the four corners of the petition (or complaint) in the underlying lawsuit, "measure them against the language within the four corners of the insurance policy, and determine if the facts alleged present a matter that could *potentially* be covered by the insurance policy." *Id.* (citing *Ewing Constr. Co. v. Amerisure Ins. Co.*, 420 S.W.3d 30, 33 (Tex. 2014)) (emphasis added by court). The court found that the allegations in the underlying petition were sufficient to implicate OSC's duty to defend. Specifically, the court found that, based on the factual allegations of material deficiencies in the work resulting from actions by contractors and deficiencies in the building's roof, the

petition sufficiently alleged damage caused by Willis even though Willis was not specifically named in the petition.

The court then turned to *American Physicians Insurance Exchange v. Garcia*, 876 S.W.2d 842 (Tex. 1994), in which the Supreme Court of Texas adopted an "anti-stacking rule" that prohibits an insured from stacking the coverage limits of multiple, consecutive policies when "a single claim involving indivisible injury" extends across several distinct policy periods. *Id.* at 449 (quoting *Garcia*, 879 S.W.2d at 853-55). OSC argued that, because Swinerton obtained a complete defense from another insurer, to allow it to recover from OSC as well would undermine the anti-stacking rule. *Id.* Because *Garcia* was an indemnity case, the court questioned whether the anti-stacking rule even applied in the duty to defend context. *Id.* The court then found that, even if the rule did apply to duty to defend cases, it would not apply to Swinerton's claim. In particular, the court noted that OSC had not presented any evidence that Swinerton obtained a complete defense from the other carrier before requesting a defense from OSC. *Id.* To allow OSC to avoid its obligation to defend because Swinerton was able to obtain a defense elsewhere, after OSC shirked its legal duty, would "incentivize wrongful denials of requests of defense and would shift defense costs onto insurers who undertake their duty to defend in good faith." *Id.*

Based on the above, the Fifth Circuit affirmed the District Court's finding that there was a duty to defend.

C. Did OSC Violate Chapter 541 of the Texas Insurance Code?

Swinerton claimed OSC violated the Texas Insurance Code by knowingly misrepresenting the policy coverage to avoid its duty to defend. *Id.* at 451. The District Court found that Swinerton provided no evidence that it suffered an independent injury apart from the denial of policy benefits and, therefore, ruled in favor of OSC. *Id.* While the case was on appeal, the Supreme Court of Texas issued its opinion in *USAA Texas Lloyds v. Menchaca.*

The *Menchaca* court distilled several rules regarding the relationship between contractual and extra-contractual claims—including the "entitled-to-benefits rule" and the "independent injury rule." *Id.* (citing *Menchaca*, 545 S.W.3d at 489). The "entitled-to-benefits" rule provides that "an insured who establishes a right to receive benefits under an insurance policy can recover those benefits as 'actual damages' under the [Insurance Code] if the insurer's statutory violation causes the loss of the benefits." *Id.* (citing *Menchaca*, 545 S.W.3d at 495). The "independent injury" rule has two aspects:

> The first is that, if an insurer's statutory violation causes an injury independent of the insured's right to recover policy benefits, the insured may recover damages for that injury even if the policy does not entitle the insured to receive benefits. ... The second aspect of the independent-injury rule is that an insurer's statutory violation does not permit the insured to recover any damages beyond policy benefits unless the violation causes an injury that is independent from the loss of the benefits.

Id. (citing *Menchaca*, 545 S.W.3d at 499–500).

The court noted that, because the "entitled-to-benefits" rule allows an insured to recover policy benefits as "actual damages" and an insured can recover treble damages in the event an insurer knowingly committed the act complained of, an insured can recover three times the amount of policy benefits. *Id.* at 453. Because Swinerton was entitled to a defense from OSC as a benefit of the OSC policy, if Swinerton could establish, on remand, that the misrepresentation caused the loss of the benefit, Swinerton can recover the defense costs it incurred as actual damages plus treble damages upon a finding that the statutory violation was made knowingly. *Id.*

D. Swinerton's Damages

OSC also appealed the district court's award of defense costs to Swinerton. The Fifth Circuit found no error because those defense costs were damages produced by OSC's breach of its duty to defend. *Id.* at 453–54. For damages under the prompt payment statute, because of the remand of Swinerton's claims under Chapter 541 of the Insurance Code, the Fifth Circuit noted that, if Swinerton prevails and elects to recover defense costs as actual damages rather than breach-of-contract damages, it will be entitled to recover penalties under the prompt payment act through the time of the judgment in the remanded action. *Id.* at 455–56.

E. Commentary

The Fifth Circuits decision in *Swinerton* reinforces how broadly the duty to defend applies in Texas. In fact, the court started with the notion that the eight-corners rule is "very favorable to insureds."

The *Swinerton* decision is most notable, however, for its discussion of Chapter 541 and its application of the Supreme Court of Texas's analysis in *USAA Texas Lloyds v. Menchaca.* In particular, the application of *Menchaca*—a first-party property insurance case—to a third-party liability case is noteworthy. In doing so, for the first time under Texas law, the court found that Swinerton was entitled to recover the attorneys' fees it incurred to defend itself in the underlying litigation and statutory penalties but also that it may be entitled to *treble* damages in the event it can show—on remand—

that OSC knowingly misrepresented the coverage under its policy in order to avoid the duty to defend.

Recently, in *Braden v. Allstate Vehicle & Property Insurance Co.*, No. 18-592, 2019 WL 201942 (N.D.Tex. Jan 15, 2019), the Northern District of Texas cited *Swinerton* for the proposition that the "independent injury" rule does not restrict the damages an insured can recover under the "entitled-to-benefits" rule; rather the "independent-injury" rule restricts the recovery of *other* damages that flow from a denial of policy benefits. For example, an insured is not entitled to recover damages for emotional distress caused by a denial of benefits because "the entitled-to-benefits doctrine does not provide for the recovery of such damages and . . . the second aspect of the independent-injury rule precludes such recovery." *Swinerton*, 903 F.3d at 452. Simply put, *Swinerton* already is being applied by other courts and will be oft-cited in the near future—or at least until the Supreme Court of Texas gets an opportunity to address the applicability of Chapter 541 to a liability insurance policy.

IX. *MID-CONTINENT CASUALTY CO. V. PETROLEUM SOLUTIONS, INC.*, 917 F.3D 352 (5TH CIR. 2019)

"This insurance coverage case raises various legal issues suitable for a law school examination." That is the first sentence of *Mid-Continent Casualty Co. v. Petroleum Solutions, Inc.*, No. CV 4:09-0422, 2016 WL 5539895, at *1 (S.D. Tex. Sept. 29, 2016), *amended,* CV 4:09-0422, 2016 WL 7491858 (S.D. Tex. Dec. 30, 2016), *aff'd*, 917 F.3d 352 (5th Cir. 2019), an opinion spanning more than ninety pages and, having been affirmed on appeal, will have a significant impact on (1) how the duty to cooperate applies in the context of general liability coverage in Texas and (2) whether there is general liability coverage for a claimant's attorneys' fees as "damages because of . . . 'property damage.'"

A. Background Facts

The facts in this case span nearly two decades and include a jury trial in the underlying liability lawsuit, an appeal to the Corpus Christi Court of Appeals, an appeal to the Supreme Court of Texas, a hearing in the trial court on remand, and a coverage dispute in the Southern District of Texas, lasting more than eight years. The background facts here are taken almost verbatim from the district court's Amended Memorandum and Order issued September 29, 2016. 2016 WL 5539895 at *2.

In 1997, Bill Head ("Head") contracted with Petroleum Solutions, Inc. ("PSI") to construct and install an underground fuel storage system at his Silver Spur Truck Stop ("Silver Spur") in Pharr, Texas. PSI purchased a component part for the fuel tank from Titeflex Commercial Products ("Titeflex"). In October 2001, Head discovered that 20,000 gallons of diesel fuel had seeped into the soil under the truck stop. Head attributed the damage to a leak in the fuel storage system and contacted PSI. PSI notified Mid-Continent Casualty Company ("Mid-Continent") of the fuel spill, believing any resulting liability would be covered by the commercial general liability policy Mid-Continent issued to PSI (the "Policy"). *Id.*

In 2002, Mid-Continent retained counsel to represent PSI in any potential litigation arising out of the fuel leak. PSI and Mid-Continent believed that a flex connector manufactured by Titeflex in the fuel tank was faulty. Counsel submitted the flex connector to an expert for testing. The expert inspected the flex connector but found no visual, conclusive evidence that the part was defective. The expert stored the flex connector in W.H. Laboratories' storage facility, which was torn down in 2006, causing the part to be lost. *Id.* at *3.

On February 13, 2006, more than four years after the leak was discovered, Head filed suit against PSI (the "State Court Litigation"). Head alleged claims for Breach of Warranty of Fitness, Breach of Implied Warranty of Good and Workmanlike Services, and Negligence. Head alleged that PSI had contended that the fuel leak was caused by a faulty flex connector, but the Original Petition alleged more broadly that PSI was at fault because it sold and installed the fuel storage tank, including the flex connectors and the leak detection system. Mid-Continent assumed PSI's defense under a reservation of rights. *Id.*

On October 5, 2006, PSI filed a third-party action against Titeflex, in which it alleged that Titeflex was responsible for the failure of the fuel storage system and, therefore, PSI was "entitled to contribution and/or indemnity" from Titeflex (the "Affirmative Claim") under the Texas Products Liability Act, specifically, § 82.002 of the Texas Civil Practice and Remedies Code ("Section 82.002"). Several months later, on January 30, 2007, Head filed a First Amended Original Petition, which added a strict products liability claim against Titeflex. *Id.*

During discovery in the State Court Litigation, on January 4, 2008, Titeflex moved for a spoliation instruction against PSI for PSI's failure to produce the flex connector. On March 7, 2008, Head non-suited his claims against Titeflex without prejudice and shortly thereafter filed an amended petition that alleged claims only against PSI. *Id.*

In the first half of 2008, PSI and Mid-Continent debated whether to dismiss PSI's Affirmative Claim against Titeflex. Mid-Continent had retained trial counsel to represent PSI in the trial court and appellate counsel to prepare for the possibility of an appeal. Appellate counsel also offered legal advice during the trial court proceedings. After Head non-suited his claims against Titeflex without prejudice, trial counsel advised that PSI similarly should dismiss its Affirmative Claim without prejudice to simplify the State Court Litigation because Titeflex was "vigorously defending

itself," and the defense was undercutting PSI's position with regard to Head. *Id.* at *4.

On May 19, 2008, Titeflex filed a counterclaim against PSI (the "Titeflex Counterclaim") requesting indemnification of "costs of court, reasonable expenses, and attorney's fees arising subsequent to the entry of [Head's] Notice of Non-Suit [on March 7, 2008] which were expended in defense of this action and in prosecution of this demand for indemnity." PSI's trial counsel relayed to Mid-Continent and PSI that Titeflex offered to dismiss its Counterclaim if PSI dismissed its Affirmative Claim. As a result, on August 12, 2008, PSI dismissed its Affirmative Claim without prejudice. On August 13, 2008, Titeflex explained that it only would dismiss its Counterclaim if PSI would agree to mutual dismissal of their claims *with* prejudice (the "Settlement Offer"). Titeflex gave PSI two days, until August 15, 2008, to accept the Settlement Offer. *Id.*

PSI's trial counsel advised Mid-Continent and PSI that PSI's dismissal of its claims against Titeflex likely disposed of the Titeflex Counterclaim because it was merely a reformulation of Titeflex's Answer to PSI's Affirmative Claim. Nevertheless, Titeflex maintained that its Counterclaim remained valid despite PSI's dismissal. PSI's trial counsel, as well as Mid-Continent personnel, urged PSI to accept the Settlement Offer. PSI decided to reject the Settlement Offer because PSI wanted to retain the option to pursue an indemnity action against Titeflex, if necessary, in light of Mid-Continent's reservation of rights regarding the defense of PSI against Head's claims. *Id.*

On September 15, 2008, a month after Titeflex's Settlement Offer had expired, Titeflex amended its counterclaim. As amended, the Titeflex Counterclaim asserted a Section 82.002 claim, which requested "all past and future costs of court, reasonable expenses, and reasonable and necessary attorney's fees which were expended in defense of this action and in prosecution of this demand for indemnity." *Id.* at *5

The State Court Litigation proceeded to trial on Head's and Titeflex's respective claims against PSI. The judge instructed the jury that PSI had "destroyed, lost, or failed to produce . . . material evidence" and that the jury could presume that this evidence was unfavorable to PSI. The jury returned verdicts in favor of Head and Titeflex. Head was awarded $1,131,321.26 in damages and prejudgment interest and $91,500.00 in attorney's fees against PSI. The jury awarded Titeflex $382,334.00 in attorneys' fees, $68,519.12 in expenses, $12,393.35 in costs, and post-judgment interest at 5% from the day of the judgment until its satisfaction (the "Titeflex Judgment"). *Id.*

PSI appealed the judgment in favor of Head, contending that the trial judge's spoliation sanctions were in error. PSI also appealed the Titeflex Judgment on the ground that Titeflex could not satisfy the requirements of Section 82.002, the statute pursuant to which it sought indemnification from PSI. The Corpus Christi Court of Appeals affirmed, and PSI petitioned for review by the Supreme Court of Texas. The Court issued an opinion on July 11, 2014 but substituted a new opinion on reconsideration on December 19, 2014. The Court reversed the judgment in favor of Head, holding the trial court's spoliation instruction was error, and remanded for retrial on Head's claims. At the same time, the Court rejected PSI's challenges to the Titeflex Judgment, finding that the erroneous spoliation instruction did not affect the verdict in favor of Titeflex. Accordingly, the Court affirmed the Titeflex Judgment. In June of 2016, on remand, the trial court entered summary judgment for PSI on Head's claims. *Id.*

Over the course of the State Court Litigation, Mid-Continent sent six reservation of rights letters to PSI—the fifth and sixth of which are relevant in the coverage case. The fifth letter, which was sent on August 26, 2008, did not address the Titeflex Counterclaim specifically, but stated that "Mid-Continent reserves its right to decline any duty to PSI, including, but not limited to, PSI's failure to cooperate in our investigation and defense of this claim/suit." In the sixth letter, sent on September 19, 2008, Mid-Continent explained that its coverage position in the fifth letter applied to the Titeflex Counterclaim. Noting that Titeflex sought indemnification only of attorney's fees, costs of court, and reasonable expenses, Mid-Continent reserved the right in the sixth letter to disclaim coverage because these items "may not constitute damages because of 'property damage' or 'bodily injury' caused by an 'occurrence' as defined by the Mid-Continent Policy." *Id.* at *6.

After the Supreme Court of Texas affirmed the Titeflex Judgment in its July 11, 2014 opinion, Mid-Continent denied coverage for the Titeflex Counterclaim on July 30, 2014. In the denial letter, Mid-Continent took the position that PSI's rejection of the Settlement Offer constituted a failure of cooperation that permitted Mid-Continent to deny coverage. Mid-Continent further cited "Exclusion q" of the Policy, which excludes losses "caused intentionally by or at the direction of the insured." *Id.*

On February 12, 2009, Mid-Continent filed a declaratory judgment action in the United States District Court for the Southern District of Texas seeking declaratory relief that the judgment against PSI in the State Court Litigation was not covered under the Policy. *Id.* Mid-Continent sought a declaratory judgment that the Titeflex Judgment is not covered by the Policy on the grounds that (1) the language of the Policy does not support a finding of coverage, (2) Exclusion q applies to the Titeflex Judgment, and (3) PSI breached its duty to cooperate with Mid-Continent when PSI rejected the Settlement Offer. PSI counterclaimed on the grounds that Mid-Continent's denial of coverage constituted (1) a breach of contract and (2) a breach of Chapter 541 of

the Texas Insurance Code. PSI and Mid-Continent filed cross-motions for summary judgment. *Id.* The case was ultimately tried to a jury, which found that PSI had complied with the cooperation clause with respect to the Titeflex Settlement Offer and that Mid-Continent had nonetheless waived its right to enforce the cooperation clause.

B. The Duty to Cooperate Encompassed PSI's Decision Whether to Settle Its Affirmative Claim and Was a Fact Issue for the Jury

Mid-Continent complained that PSI failed to satisfy its contractual duty to cooperate by refusing to acquiesce to Mid-Continent's request to agree to the Settlement Offer and dismiss its Affirmative Claim with prejudice. PSI, on the other hand, argued that the dismissal of the Affirmative Claim would have been a bad bargain considering the legal advice of trial counsel and appellate counsel and the fact that Mid-Continent had issued a reservation of rights, potentially leaving Titeflex as the only source of indemnification for Head's claim. Moreover, PSI argued that the application of the duty to cooperate to an insured's affirmative claim would be an "unprecedented expansion of the duty." *Id.* at *14.

The duty to cooperate is contractual and states in pertinent part that the insured must "[c]ooperate with [the insurer] in the investigation or settlement of the claim or defense or defense against the 'suit'[.]" "Claim" means a request for relief against the insured. "'Suit' means a civil proceeding in which damages because of 'bodily injury', 'property damage' or 'personal and advertising injury' to which [the] insurance applies are alleged." Accordingly, the court stated that "[b]ecause 'suit is defined to include the entire 'civil proceeding,' the assertion of, or retention of a right to assert, a right of action by PSI in response to a claim against it is part of 'defense against' a 'suit' under the Policy." *Id.* In doing so, the court rejected PSI's textual argument that the term "settlement of *the* claim" in the cooperation clause limited its scope to purely defensive actions. Instead, the court stated that the whole clause must be read in light of the broad definition of "suit," which includes the entire "civil proceeding." As the Affirmative Claim was an item of value that could be used "as a part of a 'settlement of the claim,'" the court held that the cooperation clause applied to PSI's rejection of the Settlement Offer. *Id.* at *14-*15.

Having decided the cooperation clause applied, the court then held that neither party carried its burden to show the absence of a genuine issue of material fact "regarding the reasonableness of PSI's rejection of the Settlement Offer." *Id.* at *16. The court found that the record contained support for both PSI's and Mid-Continent's positions. As such, the court denied both parties' motions for summary judgment on the cooperation clause. The court, however, did find as a matter of law that, if a jury finds PSI acted unreasonably, Mid-Continent was prejudiced by PSI's rejection of the Settlement Offer because PSI "deprived Mid-Continent of the opportunity to avoid liability entirely." *Id.* at *19.

C. Coverage for an Attorneys' Fee Award under the Insuring Agreement

The scope of commercial general liability coverage for bodily injury and property damage is established by the Policy's "Insuring Agreement" at section I.A.(1)(a):

> We [Mid-Continent] will pay those sums that the insured [PSI] becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies.

To carry its burden with respect to coverage on summary judgment, PSI had to show that there was no genuine issue of material fact that (1) there was "'property damage' to which this insurance applies" and (2) the Titeflex Judgment was awarded as "damages because of" that property damage." The court found that the damage to Head's property resulting from the 20,000 gallons of leaked diesel established "property damage." *Id.* at *21–*26.

With regard to whether there were "damages because of property damage," the court had a mixed answer based on its analysis of the components of the Titeflex Judgment. The court first looked at what constitutes damages, distinguishing between compensatory and non-compensatory damages as explained in *In re Nalle Plastics Family Limited Partnership*, 406 S.W.3d 168, 171 (Tex. 2013). The court held that Titeflex's Section 82.002(a) award constituted damages because they were compensation. In contrast, Titeflex's Section 82.002(g) award for costs incurred in prosecuting its indemnification claim against PSI were non-compensatory because 82.002(g) is a "fee-shifting provision for successful claims against a product manufacturer" and, as such, are not damages "because of property damage" under the Policy. *Id.* at *26–*37.

D. The Fifth Circuit's Opinion.

The Fifth Circuit issued its opinion on February 26, 2019. *See Mid-Continent Cas. Co. v. Petroleum Sols., Inc.*, 917 F.3d 352 (5th Cir. 2019). It is, fortunately, not ninety pages, but it did not settle the attorneys' fees issue and provided limited analysis on the cooperation clause.

The Fifth Circuit first addressed the cooperation clause issue, suggesting that the cooperation clause *does not* apply to an affirmative claim. *Id.* at 356–57. The court was not swayed by the argument that the cooperation clause applies to an affirmative third-party

claim, noting that "the direction of the last in this area is against" Mid-Continent's "novel and dubious concept." *Id.* at 356. However, the court's treatment of this issue was limited because the jury found in favor of PSI at trial, meaning that a full legal analysis was not necessary. *Id.* at 357. The court did hold that the jury instruction—which provided that "PSI complied with the Cooperation Clause if PSI's conduct was reasonable and justified under all the circumstances that existed"—was proper, given that the insured's duties under a cooperation clause are tied to a reasonableness standard. *Id.* at 357 (citing *Am. Nat'l Cty. Mut. Ins. Co. v. Medina*, No. 05-16-01062-CV, 2018 WL 4037357, at *3 (Tex. App.—Dallas Aug. 22, 2018, no pet.) (mem. op.); *Frazier v. Glens Falls Indem. Co.*, 278 S.W.2d 388, 391–92 (Tex. Civ. App.—Fort Worth 1955, writ ref'd n.r.e.)).

Because the court held that providing the cooperation-clause jury instruction was not an abuse of discretion, the court did not reach Mid-Continent's waiver argument; however, it did note that "sending an insured generic reservation of rights letters such as the ones sent here likely is insufficient." 971 F.3d at 356 n.2.

Finally, the court did not rule one way or the other as to whether attorneys' fees are "damages" under the insuring agreement; rather, it held that the attorneys' fees were covered under a separate professional liability endorsement, which broadened coverage to include bodily injury, property damage, or "money damages," defined as a "monetary judgment, award, or settlement." 817 F.3d at 358-59. So, the attorney fee issue will perhaps live for another day.

E. Commentary

Ultimately, following the Fifth Circuit's opinion, two interesting issues remain. The first is the impact of the court's comment that "generic" reservation of rights may be insufficient to reserve rights. That is an issue that is being litigated across the country with courts adopting differing views as to what constitutes a valid reservation of rights. The second issue is the "attorney fee" issue and, in particular, whether attorneys' fees awarded pursuant to CPRC 38.001 are "damages" because of "property damage" in an otherwise covered claim. The Supreme Court of Texas perhaps gave a hint as to how the issue would come out when it recently held that "'attorney's fees are generally not damages, even if compensatory.'" *See Andarko Petroleum Corp. v. Houston Cas. Co.*, 2019 WL 321921 (Tex. Jan. 25, 2019). A motion for rehearing has been filed and the opinion is not yet final.

X. HONORABLE MENTION:

A. The "Extrinsic Evidence" Exception to the "Eight Corners" Rule: *Evanston Insurance Co. v. Kinsale Insurance Co.*, No. 17-327, 2018 WL 4103031 (S.D. Tex. July 12, 2018)

VCC, LLC filed suit against Pharr-San Juan-Alamo Independent School District ("PSJA") for nonpayment. PSJA then filed a counterclaim against VCC, alleging defective work by VCC and its subcontractors. In turn, VCC filed cross-claims and a third-party petition against its subcontractors—including NM Contracting, LLC ("NM"). Both Evanston and Kinsale initially provided a defense to NM against the claims by VCC.

According to VCC's crossclaim, one of the construction projects began in 2011 and ended in 2012, and the other began in 2009 and ended in 2011. The complaint, however, was silent as to when the property damage occurred. Eventually, one of the carriers (Kinsale) withdrew its defense and denied that it owed any defense obligation because the damage arose before its coverage existed. Kinsale relied on a "prior injury or damage" exclusion in its policy to deny coverage. Evanston then brought suit, seeking a declaration that Kinsale did owe a duty to defend and to recover Kinsale's share of the defense costs.

At issue was whether the court was required to determine whether Kinsale owed a duty to defend by only looking at the allegations in VCC's crossclaim or whether the allegations in PSJA's counterclaim regarding when property damage occurred could be considered. The court noted the following:

> Texas courts have recognized "a very narrow exception" to the eight-corners rule that permits the "use of extrinsic evidence only when relevant to an independent and discrete coverage issue, not touching on the merits of the underlying third-party claim." This exception applies "when it is initially impossible to discern whether coverage is potentially implicated and when the extrinsic evidence goes solely to a fundamental issue of coverage which does not overlap with the merits of or engage the truth or falsity of any facts alleged in the underlying case."

Id. at *10 (citing *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305, 308–09 (Tex. 2006)). The court discussed why the PJSA counterclaim fell within the extrinsic evidence exception as follows:

> [T]he Court also agrees with Defendant that this is a situation in which the extrinsic evidence exception applies. The alleged date of construction goes solely to a fundamental issue of coverage and does not implicate the

> merits or depend on the truth of the facts alleged. [Evanston] argues that the extrinsic evidence exception would not apply because the Court may not consider a complaint as evidence of the truth of an assertion since the facts asserted in pleadings do not constitute evidence. However, the Court is not referring to the PSJA Counterclaim as evidence of the truth of the dates of construction, but rather as evidence of what allegations were made in the PSJA Counterclaim regarding the dates of construction. Thus, the pleading itself is the evidence, and would fall within the extrinsic evidence exception.

Id. at *11 (citing *Weingarten Realty Mgmt. Co. v. Liberty Mut. Fire Ins. Co.*, 343 S.W.3d 859, 862–64 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (discussing the application of the exception)). Based on the allegations at issue, the court concluded that PSJA alleged damage that occurred prior to the inception of the Kinsale policy and, therefore, Kinsale had no duty to defend.

B. Application of a "Cross-Suits" Exclusion: *Certain Underwriters at Lloyd's of London v. Sterling Custom Homes, Inc.*, 705 F. App'x 259 (5th Cir. 2017) (not designated for publication).

Sterling Custom Homes, Inc. was the general contractor on a residential construction project that subcontracted with Silvestre Espinoza's painting company. The subcontract required Espinoza to obtain commercial general liability insurance and name Sterling as an additional insured. Espinoza purchased coverage from Lloyds, and the policy contained an additional insured endorsement that extended blanket additional insurance coverage to other entities "as per written contract." *Id.* at 261.

When a fire damaged the construction project, Sterling's builder's risk insurers paid for the loss and then brought a subrogation action in Sterling's name against Espinoza. The Lloyd's Syndicate filed a declaratory judgment action in federal court, seeking a declaration that the policy's cross-claim exclusion applied and no duty to defend existed because one insured under the policy brought suit against another insured, triggering the exclusion.

The *Sterling* court found that the exclusion was enforceable as written. *Id.* at 264. The court then turned to whether Sterling was an additional insured when it sued Espinoza. The court noted that the policy's additional insured endorsement added specific entities as additional insureds "but only with respect to liability arising out of your [*i.e.*, Espinoza's] ongoing operations performed for that insured." *Id.* at 265. Thus, the court found that the additional insured endorsement made Sterling an additional insured only with respect to Sterling's liability arising out of Espinoza's ongoing operations for Sterling. *Id.* The court explained its conclusion as follows:

> The plain language of the additional insured endorsement comports with our interpretation, and we conclude our interpretation most likely reflects the parties' true intentions. For example, our interpretation recognizes the likelihood that Espinoza, the policy's purchaser, intended to buy from the Syndicate a commercial general liability policy that provided him coverage for claims made against him by his general contractors. Similarly, nothing in the plain language of the subcontracting agreement obligating Espinoza to name Sterling Homes as an additional insured suggests the parties intended for Espinoza to lose insurance coverage in the event Sterling Homes needed to sue him.

Id. Because Sterling was not an additional insured with respect to the subrogation action at issue, the Fifth Circuit found that the district court had erred when finding that the cross-suits exclusion barred coverage. *Id.*

C. Allegations of "Property Damage": *Scottsdale Insurance Co. v. Mid-Continent Casualty Co.*, No. 17-191, 2018 WL 5733179 (W.D. Tex. July 5, 2018).

Scottsdale provided liability insurance coverage to Templar Development, Inc. from 2009-2016 and provided Templar with a defense when suit was filed against it by a condominium association for alleged construction deficiencies. Mid-Continent provided coverage to Templar from 2004-2006 and it refused to provide a defense to Templar for the condominium association's claim. Scottsdale filed suit against Mid-Continent in federal court, seeking a declaration that Mid-Continent owed a duty to defend and for contribution.

The underlying complaint generally alleged deficiencies in the "construction of the Project's roofs, exterior cladding, concrete flatwork, windows, doors, parking areas, exterior stairways, grading and drainage." *Id.* at *4. As a result, the condo association claimed "damages including, but not limited to, property damage, diminution in value, repair costs, mitigation costs, loss of use of all or portions of the Project, attorney's fees, litigation costs, and other damages." *Id.*

Initially, the court examined whether the allegations alleged "property damage." Mid-Continent argued that the allegations were conclusory in nature and, therefore, insufficient to invoke coverage. *Id.* at *5 (citing *PPI Tech. Servs., L.P. v. Liberty Mut. Ins. Co.*,

515 F. App'x 310, 314 (5th Cir. 2013) (not designated for publication) (holding no coverage existed because the underlying complaint "did not contain factual allegations of property damage" because "the underlying complaints contain no factual allegations of actual damage to or loss of tangible property. The allegations in the underlying lawsuits are either for economic damages, and thus not covered, or are legal conclusions, rather than factual allegations as required."). Conversely, Scottsdale relied on *Lexington Insurance Co. v. National Oilwell NOV, Inc.*, 355 S.W.3d 205 (Tex. App.—Houston [1st Dist.] 2011, no pet.), which imposed a duty to defend based on "scantily pleaded allegations." *Scottsdale*, 2018 WL 5733179 at *5. Ultimately, the court found that the underlying allegations were no less descriptive than those in *National Oilwell* and, therefore, were sufficient to allege "property damage." *Id.* at *6.

The court then examined whether the policy's exclusions for damage to Templar's work barred coverage. Based on the broad allegations in the underlying petition, the court found that damage to property outside Templar's work potentially had been alleged. *Id.* at *7. Accordingly, the exclusions did not apply. Similarly, the "impaired property" exclusion did not preclude a duty to defend because the court found that the underlying petition potentially alleged damages to aspects of the project outside the scope of Templar's work, and no allegations existed that those aspects "incorporated" Templar's work such that they became "impaired property."

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BACKGROUND, EDUCATION AND PRACTICE

Scott Rothenberg is a sole practitioner trial and appellate attorney from Houston, Texas. He has twice served as Director of the State Bar of Texas, and served as chair of the State Bar of Texas Appellate Section, chair of the Houston Bar Association Appellate Section, co-chair of the Houston Bar Association Juvenile Consequences Partnership Committee, Member of the State Bar of Texas Board of Directors Executive Committee, Small Section Representative to the State Bar Board of Directors, a multi-term appointee to the State Bar of Texas Continuing Legal Education Committee, a multi-year member of the State Bar of Texas Appellate Section Council, a multi-year member of the Houston Bar Association Appellate Section Council, and a Sustaining Life Fellow of the Texas Bar Foundation.

Scott earned his B.A. in Political Science from the State University of New York at Albany in 1982 and his J.D. from the University of Houston College of Law in 1986. To pay for law school, Scott drove a taxicab during the day and parked cars at Astroworld (now a really big patch of grass south of IH-610 and Kirby Drive) at night. He also served as a certified tester of new Nintendo games prior to their release to the public.

Scott has been board certified in civil appellate law for over a quarter-century since December of 1992. Scott has been designated a Texas Appellate Super Lawyer (© 2018 Super Lawyers®, part of Thomson Reuters) several times, most recently from 2009 through the present.

In 2012, Scott received the State Bar of Texas Continuing Legal Education Department's Standing Ovation Award for his lifetime contributions to continuing legal education in the State of Texas. In 1999, Scott received the State Bar of Texas President's Award in Appreciation for Outstanding Contributions through Distinguished Service to the Lawyers of Texas. In 1994, Scott was honored by the College of the State Bar of Texas for writing the Outstanding Continuing Legal Education Article of the Year, "Advanced Legal Research - 15 Tips and 20 TRAPs."

Despite authoring and/or presenting well-over 100 continuing legal education articles and presentations, Scott's proudest accomplishment is the loving relationship that he has with Lisa, his wife and life partner of 31 years, and his four sons– Daniel, a proteomics scientist for Neon Therapeutics in Cambridge, Mass., and a PhD graduate from the David H. Koch Institute for Integrative Cancer Research at the Massachusetts Institute of Technology; Jared, a mathematics teacher and assistant baseball coach at James E. Taylor High School in Katy, Texas; Benjamin, a Marketing Program Manager for Buzz Points, Inc., in Austin, Texas; and Jacob, a freshman at Cedar Valley College in Lancaster, Texas, and a right handed pitcher on the Cedar Valley Suns men's baseball team.

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INTRODUCTION - EVERYDAY STRATEGIES FOR AVOIDING PROFESSIONAL MALPRACTICE

Lawyers are busier than ever. Courts issue opinions and orders multiple times per week. We are expected to keep up with procedural law, the substantive law that controls disposition of our clients' legal matters, and the law controlling our ethical duties to our clients. Those ethical duties are spelled out in numerous different ways. Court opinions construing attorney fiduciary duties, professional negligence, fraud and the like provide some of that guidance. The Texas Disciplinary Rules of Professional Conduct, the ethical opinions that construe them, and restatements, cases, statutes, and rules from other jurisdictions all form part of the kaleidoscope of information that we must process in order to assure that we meet the ethical obligations that we owe to our clients and to the legal system as a whole.

This paper is an effort to help Texas attorneys stay current with new ethics information that has become available over the past month or months, or year or years, as the case may be. It is a good start to assisting the average practitioner in meeting his or her ethical obligations to his or her clients, and to the legal system as a whole. With that, let's explore 50 everyday strategies that lawyers can use to avoid professional misconduct.

1. DO NOT GIVE DISPOSITIVE WEIGHT TO AN AMERICAN BAR ASSOCIATION ETHICS OPINION THAT IS RIGHT ON POINT.

Meador, In re:, 968 S.W.2d 346, 349, fn. 1 (Tex. 1998) (orig. proceeding):

> This ten-person standing committee of the American Bar Association is charged with "interpreting the professional standards of the Association and recommending appropriate amendments and clarifications...." ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT viii (ABA Center for Professional Responsibility, 3d ed.1996). It issues advisory opinions on ethics questions of general interest submitted by attorneys. *See id.*; *see also* Klein, Legal Malpractice, Professional Discipline, and Representation of the Indigent Defendant, 61 TEMP. L. REV. 1171, 1179 n. 54 (1988). While the Committee's opinions are often cited as persuasive authority by state disciplinary bodies, the opinions do not bind those bodies. *See, e.g.*, ABA INFORMAL OP. 1420 (1978) ("Enforcement of legal ethics and disciplinary procedures are local matters securely within the jurisdictional prerogative of each state and the District of Columbia."); Hellman, When "Ethics Rules" Don't Mean What They Say: The Implications of Strained ABA Ethics Opinions, 10 GEO. J. LEGAL ETHICS 317, 326 (1997) ("ABA opinions are binding upon no one. ABA opinions represent the views of a small committee of a private association, and they construe that private association's Model Rules and Model Code. The power to determine whether and to what extent either of these model documents will be put into force in any state is exercised by a state authority, most commonly the state's highest court." (notes omitted)).

2. DO NOT GIVE DISPOSITIVE WEIGHT TO A TEXAS FORMAL ETHICS OPINION THAT IS RIGHT ON POINT.

"Such opinions are concerned with matters of attorney discipline and are advisory rather than binding." *Sidley Austin Brown & Wood, LLP, v. J.A. Green Devel. Corp.*, 327 S.W.3d 859, 866 (Tex. App.– Dallas 2010, no pet.) (*citing Labidi v. Sydow*, 287 S.W.3d 922, 929 (Tex.App.– Houston [14th Dist.] 2009, orig. proceeding)).

3. DO NOT COMPLETELY DISREGARD ABA OR TEXAS FORMAL ETHICS OPINIONS.

Some Texas appellate courts have found that while these opinions are advisory, and not binding, they are persuasive enough to form the basis of appellate opinions:

> In 2001, the Texas Center for Legal Ethics and Professionalism was asked to address whether "a lawyer, who is the newly elected district attorney, [is] prohibited from prosecuting a former client in a new criminal proceeding." Tex. Comm. on Prof'l Ethics, Op. 538. While opinions of the Texas Ethics Commission are advisory, rather than binding, authority, Opinion 538 directly addresses the issues now before this Court and we find great logic in its reasoning.

In re Goodman, 210 S.W.3d 805, 812 (Tex. App.– Texarkana 2006) (orig. proceeding). *See also Royston, Rayzor, Vickery & Williams, LLP v. Lopez*,

467 S.W.3d 494, 503 (Tex. 2015) ("Opinions of the Professional Ethics Committee carry less weight than do the Disciplinary Rules as to legal obligations of attorneys, but they are nevertheless advisory as to those obligations.").

4. DO NOT CONTACT A PROSPECTIVE EXPERT SOLELY FOR THE PURPOSES OF DISQUALIFYING HIM OR HER. - EO 676 - 8/18

The Texas Disciplinary Rules of Professional Conduct prohibit a lawyer from retaining an expert or disclosing confidential information to a prospective expert when the lawyer has no substantial purpose other than to attempt to disqualify or otherwise prevent the expert from being used by, including testifying on behalf of, an opposing party.

5. DO NOT RENEGOTIATE YOUR FEE IN THE MIDDLE OF THE REPRESENTATION UNLESS YOU FEEL CONFIDENT YOU CAN PROVE THAT THE NEW AGREEMENT IS FAIR TO THE CLIENT UNDER ALL OF THE CIRCUMSTANCES. EO 679 - 9/18

A lawyer may renegotiate his fixed, flat fee for representing a client in a litigation matter after the litigation is underway if modification of the fee agreement is fair under the circumstances. The burden of proving fairness is the lawyer's and will depend upon factors such as the length of the lawyer-client relationship, whether the reason for the renegotiation could have been anticipated at the outset of the representation, and the client's level of sophistication. Before seeking to renegotiate a fixed fee, the lawyer should be mindful of the risks that the lawyer voluntarily assumed when proposing or agreeing to that fee—including the possibility that the fixed fee might not be adequate to compensate the lawyer when compared to other fee arrangements.

6. BE CERTAIN TO UNDERSTAND THE CONFIDENTIALITY RISKS IN THE TECHNOLOGY THAT YOU USE TO MAINTAIN AND STORE CLIENT COMMUNICATIONS. EO 680 - 9/18

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer may use a cloud-based electronic data storage system or cloud-based software document preparation system to store client confidential information or prepare legal documents. However, lawyers must remain alert to the possibility of data breaches, unauthorized access, or disclosure of client confidential information and undertake reasonable precautions in using those cloud-based systems. Keep in mind that as of February 26, 2019, Texas attorneys have an affirmative duty to understand the risks and benefits of technology used or available in the practice of law. *See* TDRCP, Rule 1.01, Comment 8 (new language highlighted in yellow): "Because of the vital role of lawyers in the legal process, each lawyer should strive to become and remain proficient and competent in the practice of law, including the benefits and risks associated with relevant technology. To maintain the requisite knowledge and skill of a competent practitioner, a lawyer should engage in continuing study and education.").

7. MAKE SURE YOU KNOW HOW TO DISTRIBUTE CLIENT PROPERTY WHEN A THIRD-PARTY HAS A SUPERSEDING INTEREST IN THAT PROPERTY. EO 681 - 9/18

Under the Texas Disciplinary Rules of Professional Conduct, if a lawyer is aware that a third-party claimant has an interest in client funds in the lawyer's possession, the lawyer must pay the funds to the third party unless the claim is disputed by the client, in which case the lawyer must withhold the disputed portion from both the client and the third party until the dispute is resolved or the lawyer has interpleaded the disputed funds. For purposes of Rule 1.14 of the Texas Disciplinary Rules of Professional Conduct, a third-party claimant has an "interest" in client funds held by a lawyer only when the third party has a matured legal or equitable interest in those particular funds. A matured legal or equitable interest in particular client funds can be based on:

a. A statutory lien,
b. A judgment that adjudicates ownership or disposition of the funds in question,
c. A court order regarding the funds in question,
d. A written assignment conveying an interest in the funds in question,
e. A right of subrogation regarding the funds in question, or
f. A signed letter of protection or similar agreement formed to aid the lawyer in obtaining the funds in question, which promises payment upon collection.

If a lawyer is obligated under Rule 1.14 to withhold client funds from the client due to the claim of a third party who has a matured legal or equitable interest in the funds, the lawyer's obligation to the third party survives and is unaffected by the client's termination of the lawyer-client relationship.

8. JUST BECAUSE NO RULE, ETHICS OPINION, CASE, DISCIPLINARY RULE OR OTHER AUTHORITY PROHIBITS IT DOESN'T MEAN YOU CAN'T BE SANCTIONED FOR DOING IT.

"Brewer contends the trial court abused its discretion by sanctioning him because the use of a pretrial survey is not a "bad faith" abuse of the judicial process since "[t]here is no rule, ethics opinion, case, disciplinary rule, or other authority that prohibits the type of survey conducted in this case." He posits that because the use of surveys is not specifically prohibited, such surveys can be ethically administered, and their use is common, or at least generally accepted, rendering the trial court's imposition of sanctions ipso facto an abuse of discretion.

Brewer contends that the absence of express authority directly prohibiting this conduct operates as implied permission to conduct such surveys. This is a logical fallacy. Such an argument fails to account for the inherent power of the trial court to oversee the trial of a cause of action or the interplay of the rules of professional conduct and ethics on unforeseen efforts to impact the outcome of a trial or to influence a witness. In that regard, Texas appellate courts have consistently held that a trial court has the inherent power to sanction litigants and attorneys whose abusive conduct affects a core function of the judiciary and this power exists regardless of whether the conduct is specifically proscribed by rule or statute. *Davis v. Rupe*, 307 S.W.3d 528, 530 (Tex. App.—Dallas 2010, no pet.) (decision reached on appeal of a different cause number in *Ritchie v. Rupe*, 339 S.W.3d 275 (Tex. App.—Dallas 2011), *rev'd on other grounds*, 443 S.W.3d 856 (Tex. 2014))."

> *Brewer v. Lennox Hearth Prods.*, LLC, 546 S.W.3d 866, 876 (Tex. App.—Amarillo 2018, pet. filed).

9. DO NOT THREATEN TO FILE A GRIEVANCE OR CRIMINAL CHARGES. PERIOD.

Wait a minute, Rothenberg. Texas Disciplinary Rule 4.04(b)(1) says that I cannot threaten to file a grievance or threaten to file criminal charges "solely to gain an advantage in a civil matter." So if I have a legitimate reason for threatening these actions OTHER THAN to gain an advantage in a civil matter, that should not be a violation of the disciplinary rules. Right?

In theory, that is correct. However, in practice, it can end up with a finding that you committed professional misconduct. A recent Texas appellate opinion illustrates why. The following facts are set forth in the court of appeals' memorandum opinion in *Yetiv v. Commission for Lawyer Discipline*, No. 14-17-00666-CV (Tex. App.– Houston [14th Dist.] March 14, 2019, no pet. hist.). Yetiv sent Wilkin an email threatening to file a grievance if Wilkin did not withdraw an allegation and apologize in open court. Wilkin filed a grievance as a result of that threat. At the conclusion of the trial on the grievance matter, the trial court found that Yetiv violated TDRPC 4.04(b)(1) and ordered a four month fully probated suspension.

On appeal, Yetiv pointed to evidence other than gaining an advantage in a civil matter that resulted in him threatening to file a grievance. The court of appeals, citing *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 434 (Tex. 1986), noted that "[i]ntent is a fact question uniquely within the realm of the trier of fact because it so depends upon the credibility of the witnesses and the weight to be given their testimony." Opinion at 12. The court of appeals affirmed the finding of professional misconduct against Yetiv because "[t]he trial court could have disbelieved Yetiv's self-serving testimony and statements in the email concerning his motive for threatening a disciplinary charge against Wilkin." Opinion at 13.

The moral of this story is not to threaten to file a grievance or criminal charges, even if YOU think there is a valid reason for doing so other than to gain an advantage in a civil matter. It doesn't matter what your motives are. It matters what the finder of fact (grievance panel or trial court) finds to have been your motives. And if the finder of fact rules against you, given the deference afforded to fact finders by appellate courts on matters of subjective intent, it is highly unlikely that a finding of professional misconduct will be overturned on appeal.

10. DO NOT DISCLOSE CONFIDENTIAL CLIENT INFORMATION IN SOCIAL MEDIA WITHOUT CLIENT CONSENT.

Ethics Opinion 673 - August 2018 - EO 673 may end up being one of the most useful ethics opinions ever issued in the State of Texas. The Texas Disciplinary Rules of Professional Conduct were enacted in 1989. The internet was opened to commercial traffic in 1990. Business use of e-mail became common in the mid-1990's. Facebook was launched in 2004. Thus, the disciplinary rules that control the professional obligations of Texas attorneys predate both the internet and social media.

So how is an attorney in 2019 to know how to balance his or her obligations to zealously and professionally represent clients versus clients' entitlement to attorney-client confidentiality? Ethics Opinion 673 – which was published just last month – addresses many of the most common issues facing Texas attorneys with respect to social media.

EO 673 frames the issue thusly:

It is common for lawyers to have informal lawyer-to-lawyer consultations touching on client-related issues. Informal consultations may occur in a variety of situations, such as when a lawyer poses questions to a speaker at a CLE seminar, when a lawyer seeks advice from members of an online discussion group, or when a lawyer solicits the insight of a trusted mentor. Informal consultations allow lawyers to test their knowledge, exchange ideas, and broaden their understanding of the law, with the realistic goal of benefitting their clients. Nevertheless, lawyers who engage in informal lawyer-to-lawyer consultation regarding issues arising in particular client matters must be careful not to violate their professional obligations under the Texas Disciplinary Rules of Professional Conduct.

The professional obligation most clearly implicated by informal consultation is the inquiring lawyer's duty of confidentiality. In general, Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct prohibits a lawyer from knowingly revealing confidential information of a client unless permitted or required by the provisions of that Rule.

Not every lawyer-to-lawyer consultation involves the revelation of confidential information. For example, confidential information is not revealed merely by asking general questions about a particular statute, rule or legal procedure. A general or abstract inquiry that does not identify the client and does not disclose information relating to the representation does not implicate Rule 1.05 and does not require client consent.

In some cases, however, the inquiring lawyer may consider it necessary to provide a certain amount of factual context in order to frame the issue and obtain useful feedback. Providing factual context will implicate Rule 1.05 if doing so reveals "information relating to a client or furnished by the client . . . acquired by the lawyer during the course of or by reason of the representation of the client." Such information is confidential under Rule 1.05, and a lawyer may not knowingly reveal it unless permitted or required by a provision in that Rule.

It is the opinion of the Committee that Rules 1.05(d)(1) and (2) allow a lawyer to reveal a limited amount of unprivileged confidential information to lawyers outside the inquiring lawyer's law firm, without the client's express consent, when the inquiring lawyer reasonably believes that the revelation will further the representation by obtaining the responding lawyers' experience or expertise for the benefit of the client, and when it is not reasonably foreseeable that revelation will prejudice the client.

In determining the amount and type of permissible disclosure, a lawyer should be guided by the following considerations.

(1) An inquiring lawyer may reveal unprivileged confidential information only to the extent the lawyer believes necessary for effective consultation for the client's benefit regarding the issue in question. Revealing unprivileged confidential information, however, should not be greater than the lawyer believes necessary to accomplish the intended purpose. Accordingly, the inquiring lawyer should not reveal any unprivileged confidential information if it is possible to conduct an effective consultation without doing so.

(2) To the extent the lawyer believes it is necessary to reveal some unprivileged confidential information to conduct an effective lawyer-to-lawyer consultation for the client's benefit, the inquiring lawyer should employ a hypothetical that does not identify the client. In most instances the use of an inquiry presented in purely hypothetical terms, which does not disclose the identity of the client or information identifiable to the client, will not violate Rule 1.05. However, if under the circumstances a responding lawyer might match the hypothetical facts to a specific person or entity, or if there is an apparent risk that disclosure of the information in hypothetical form could harm, prejudice or embarrass the client, the discussion of hypothetical facts without the client's consent may violate Rule 1.05. The lawyer should evaluate the risk of prejudice to the client by assuming that the inquiry might be disclosed to counsel for an adverse party or to the public.

(3) An inquiring lawyer should never disclose privileged confidential information specific to an identifiable client, or information that foreseeably might prejudice the client, without the client's express consent. To the extent the exceptions in Rules 1.05(d)(1) and (2) apply, those exceptions allow only the limited disclosure of unprivileged confidential information. When the inquiring lawyer determines that consultation requires disclosure of privileged confidential information, or unprivileged confidential information that foreseeably might prejudice the client if disclosed, the lawyer must ensure that the client is made aware of the potential consequences of the disclosure and consents to the consultation despite those risks, including the risk of a privilege waiver.

(4) If the client has expressly instructed the lawyer not to reveal confidential information, the lawyer may not do so even if the exceptions set forth in Rules 1.05(d)(1) and (2) would otherwise apply. See Rule 1.05, Comments 6 and 7.

(5) An inquiring lawyer who intends to reveal unprivileged confidential information to a responding lawyer may wish to consider seeking the agreement of the responding lawyer to maintain the confidentiality of any such information. Absent such an agreement a responding lawyer with no expectation of an attorney-client engagement has no obligation to maintain the confidentiality of the information. When it is not reasonably feasible to secure an agreement regarding confidentiality (as may be the case with posts on an online discussion forum), or if for any other reason the inquiring lawyer does not secure such an agreement, the inquiring lawyer should take the lack of a confidentiality commitment into consideration when determining whether and to what extent disclosure is in the client's best interest.

A responding lawyer does not enter into an attorney-client relationship with the inquiring lawyer's client merely by virtue of an informal consultation of the type described in this opinion. Absent an agreement to the contrary, a responding lawyer has no duties of care, loyalty or confidentiality to the inquiring lawyer's client. Nevertheless, responding lawyers must consider their professional obligations to their own clients. Responding lawyers must take care not to reveal confidential information of their own clients in responding to a request for advice or guidance. Responding lawyers should take reasonable steps to insure that consultation with an inquiring lawyer on a given subject will not adversely affect a present or former client in the subject of the present or former representation.

The above discussion applies only to consultations between an inquiring lawyer and another lawyer who is not in the inquiring lawyer's law firm or formally associated as co-counsel on the client's matter. A lawyer may reveal confidential client information to other lawyers in the lawyer's law firm or to the client's representatives (including other lawyers retained by the client in the same matter), except when otherwise instructed by the client. Rule 1.05(c)(3).

Finally, the above discussion pertains only to informal lawyer-to-lawyer consultations for the principal purpose of benefiting a client in the subject of the representation. Additional exceptions to Rule 1.05 may apply to consultations for other purposes. For example, pursuant to Rule 1.05(c)(4) "[a] lawyer may reveal confidential information" in a consultation with a private ethics lawyer or in a call to the State Bar of Texas Ethics Helpline "[w]hen the lawyer has reason to believe it is necessary to do so in order to comply with ... a Texas Disciplinary Rules [sic] of Professional Conduct ...."

The Texas Disciplinary Rules of Professional Conduct do not categorically prohibit informal lawyer-to-lawyer consultation for the benefit of a client, whether the consultation occurs in an online discussion group, an in-person meeting, or otherwise. However, inquiring lawyers must honor their duty of confidentiality under the Texas Disciplinary Rules of Professional Conduct.

If possible, the inquiring lawyer should limit such consultation to general or abstract inquiries that do not disclose confidential

information relating to the representation. If it is not reasonably possible to address the issues in question using a general or abstract inquiry, a lawyer may reveal a limited amount unprivileged client information in a lawyer-to-lawyer consultation, without the client's express consent, when and to the extent that the inquiring lawyer reasonably believes that the revelation will benefit the inquiring lawyer's client in the subject of the representation. The inquiring lawyer should do so using a hypothetical that does not identify the client. If under the circumstances a responding lawyer might match the hypothetical facts to a specific person or entity, or if it is reasonably foreseeable that the disclosure of the information will harm, prejudice or embarrass the client, the discussion of hypothetical facts without the client's consent may violate the Texas Disciplinary Rules of Professional Conduct.

An inquiring lawyer may not reveal confidential information protected by the lawyer-client privilege without the client's express, informed consent. An inquiring lawyer may not reveal unprivileged confidential information for the benefit of the client if the client has expressly instructed the lawyer not to do so. In deciding whether and to what extent disclosure of unprivileged client information would be in the client's best interest, the inquiring lawyer should take into account whether the responding lawyer has agreed to maintain the confidentiality of the consultation.

The responding lawyer must take reasonable steps to avoid providing information that could impair any obligations to the responding lawyer's clients.

11. DO NOT RESPOND TO CLIENTS' ADVERSE COMMENTS ON THE INTERNET USING CONFIDENTIAL INFORMATION. EO 662 - 8/16.

Under the Texas Disciplinary Rules of Professional Conduct, a Texas lawyer may not publish a response to a former client's negative review on the internet if the response reveals any confidential information, *i.e.*, information protected by the lawyer-client privilege, or otherwise relating to a client or furnished by the client, or acquired by the lawyer during the course of or by reason of the representation of the client. The lawyer may post a proportional and restrained response that does not reveal any confidential information or otherwise violate the Texas Disciplinary Rules of Professional Conduct.

12. SCRUB ELECTRONIC DOCUMENTS TO PREVENT TRANSMISSION OF CONFIDENTIAL METADATA. EO 665 - 12/16.

The Texas Disciplinary Rules of Professional Conduct require lawyers to take reasonable measures to avoid the transmission of confidential information embedded in electronic documents, including the employment of reasonably available technical means to remove such metadata before sending such documents to persons other than the lawyer's client. Whether a lawyer has taken reasonable measures to avoid the disclosure of confidential information in metadata will depend on the factual circumstances.

13. DO NOT CONDUCT OR DIRECT SOMEONE ELSE TO CONDUCT AN ANONYMOUS INVESTIGATION TO DETERMINE JURISDICTIONAL INFORMATION. EO 671 - 3/18.

Under the Texas Disciplinary Rules of Professional Conduct, Texas lawyers, and their agents, may not anonymously contact an anonymous online individual in order to obtain jurisdictional or identifying information sufficient for obtaining a deposition pursuant to Rule 202 of the Texas Rules of Civil Procedure.

14. DO NOT COMMUNICATE WITH POTENTIAL WITNESSES WHO COULD TURN INTO CLIENTS WITHOUT COMPLYING WITH RULES REGARDING LAWYER ADVERTISING. EO 672 - 3/18.

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer's written, electronic or digital communication with a nonclient that purports to seek information may be treated as a written solicitation subject to the provisions of Rule 7.05(b) if statements in the letter are made with the intent to seek professional employment. When none of the exceptions under Rule 7.05(f) apply, communications for the purpose of obtaining professional employment must comply with the provisions of Rule 7.05(d).

15. TURN OVER THE ORIGINAL OF A FORMER CLIENTS' FILE UPON REQUEST. EO 657 - 5/16.

In general, the documents, papers and other information received from a client or received or generated in the course of representing the client, including work product and notes, are the property of the client. When a lawyer receives a request for those materials from a former client, the lawyer must make

those materials available for delivery to the former client, except as prohibited by statute, court order or the lawyer's duties to third parties or the client, or unless the lawyer is permitted by law to retain those documents and can do so without prejudicing the interests of the client in the subject matter of the representation.

16. DO NOT CHARGE A FORMER CLIENT FOR COPYING OF THE FORMER CLIENT'S FILE. DO NOT PROVIDE ONLY A COPY. EO 657 - 5/16.

A lawyer must make the client's file available for transfer to the client or a designated representative at the lawyer's office. The lawyer may require the client to pay any delivery or shipping expenses associated with delivering the file to the former client at a location other than the lawyer's office. If the lawyer deems it necessary to retain a copy of the file, that expense will be borne by the lawyer in the absence of an agreement otherwise.

17. CONVERT THE FILE TO A FORMAT REASONABLY ACCESSIBLE TO THE ORDINARY CLIENT AT THE ATTORNEY'S COST. EO 657 - 5/16.

The lawyer may provide the client's file in the form in which it is maintained, or convert some or all of it to paper or to a reasonably accessible electronic format for delivery to the client. However, if some of the information in the file is maintained in a special format that is not reasonably accessible to the ordinary client, the lawyer must bear the cost of converting the information to a reasonably accessible format, or print the information in a format that can be read by the client. If the client's file contains material that has unique or significant value in the form originally acquired by the lawyer, such material should be returned to the client in its original form.

18. DO NOT ENTER INTO AN AGREEMENT RESTRICTING THE LAWYER'S ABILITY TO REPRESENT CLIENTS UPON SEPARATION. EO 656 - 5/16.

Question Presented - Under the Texas Disciplinary Rules of Professional Conduct may a lawyer, as a part of becoming a member of a law firm, enter into an agreement with the law firm that provides that the lawyer is restricted or prohibited from providing legal services to clients of the law firm after the lawyer's work with the law firm ends?

Committee's Answer - The proposed agreed limitation on the lawyer's law practice after the relationship terminates is contrary to the provision of Rule 5.06(a), which prohibits "a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement . . . ." *See* Opinion 590 (December 2009). Because the introductory language of Rule 5.06 provides that "[a] lawyer shall not participate in offering or making" an agreement prohibited by paragraph (a) of the Rule, both the law firm lawyers involved in offering or making the agreement and the lawyer proposing to enter into the agreement will be in violation of Rule 5.06(a) if the proposed agreement includes a restriction limiting the lawyer's law practice after the termination of the relationship between the lawyer and the law firm. Under the Texas Disciplinary Rules of Professional Conduct, a lawyer and a law firm may not enter into an agreement for the lawyer to serve as a member of the law firm if the agreement provides that the lawyer is restricted or prohibited from providing legal services to clients of the law firm after the lawyer's work with the law firm ends.

19. DO NOT PROVIDE FREE STUFF IN ORDER TO GET PROSPECTIVE CLIENTS "IN THE DOOR." EO 654 - 3/16.

Question Presented - Under the Texas Disciplinary Rules of Professional Conduct, may a lawyer encourage members of the public to visit her law office by offering to provide free information such as warrant checks and bail bond information that may be of interest to the public?

Committee's Answer - A lawyer does not violate the Texas Disciplinary Rules of Professional Conduct by offering and giving free information about bail bonds and warrants to the public who visit the lawyer's office in response to the lawyer's offer to provide such free information. Under the Texas Disciplinary Rules of Professional Conduct, in doing so, the lawyer must honor such offers and take reasonable steps to ensure that any non-lawyer assistant who also offers and provides such information complies with the lawyer's professional obligations.

Rothenberg Addendum Answer - TDRCP 7.03(c) prohibits lawyers from paying, giving or advancing "anything of value" to a prospective client or any other person "in order to solicit professional employment." Does this mean that the no-cost professional advice or information provided by the attorney has no value? If so, why provide it in the first place? Follow this ethics opinion at your own risk!

20. DO NOT COMMUNICATE WITH A REPRESENTED PARTY DIRECTLY WHEN THE LAWYER IS A PRO SE LITIGANT. EO 653 - 1/16.

Question Presented - May a lawyer who is a party in a legal matter but who does not represent any other

party in the matter communicate concerning the matter directly with a represented adverse party without the consent of the adverse party's lawyer?

Committee's Answer - Under the Texas Disciplinary Rules of Professional Conduct, a lawyer who is a party in a legal matter but who does not represent any other party in the matter may communicate concerning the matter directly with a represented adverse party without the consent of the adverse party's lawyer. However, a lawyer will violate the Texas Disciplinary Rules if the lawyer's communication with the adverse party involves dishonesty, fraud, deceit or misrepresentation.

Rothenberg Addendum Answer - Caveat causidicus (Lawyer beware!).

21. DO NOT USE A COLLECTION AGENCY TO COLLECT PAST DUE ATTORNEY'S FEES WITHOUT DOTTING THE I's AND CROSSING THE T's OR REPORT A NONPAYING OR SLOW PAYING CLIENT TO A CREDIT BUREAU. EO 652 - 1/16.

Questions Presented -

A. May a lawyer use a collection agency to collect past due attorney's fees without violating the Texas Disciplinary Rules of Professional Conduct?

Committee's Answer - A lawyer may use a collection agency to collect past due fees owed by a client without violating the Texas Disciplinary Rules of Professional Conduct if the following conditions are met: (1) the lawyer is no longer handling the client's matter, (2) the fee is not unconscionable, (3) the lawyer has attempted other reasonable means of collection short of using a collection agency, (4) the lawyer retains control over the collection process, and (5) the lawyer reveals to the collection agency only the minimum amount of client information necessary to collect the debt.

B. May a lawyer report nonpaying clients to a credit bureau without violating the Texas Disciplinary Rules of Professional Conduct?

Committee's Answer - Under the Texas Disciplinary Rules of Professional Conduct, a lawyer may not, directly or indirectly, report a delinquent client to a credit bureau as this is not necessary to the collection of the debt, the effect is punitive, and it unjustifiably risks the unauthorized disclosure of confidential client information.

22. TREAT PROSPECTIVE CLIENT INFORMATION CONFIDENTIALLY IF YOUR WEB SITE DOES NOT WARN THAT THE INFO PROVIDED WILL NOT BE TREATED CONFIDENTIALLY. EO 651 - 11/15.

Question Presented - If a law firm's web site does not contain a warning notice concerning the absence of confidentiality with respect to information transmitted by prospective clients who use an email link provided on the law firm's web site, are the law firm and its lawyers required to treat the information received in such transmissions as confidential and not available for use against the person transmitting the information?

Committee's Answer - If a web site solicits email communications from potential clients and does not contain an effective warning notice concerning the absence of confidentiality with respect to information transmitted to a law firm or one of its lawyers by prospective clients who use an email link provided on the law firm's web site, the law firm's lawyers may be required to treat the information received in such emails from prospective clients as confidential and therefore not available for use against the person transmitting the information. Such limitations on the disclosure and use of confidential information received in emails from prospective clients may result in a conflict of interest for the law firm and its lawyers that would have to be addressed appropriately under the Texas Disciplinary Rules.

23. DO NOT PARTICIPATE IN THE DRAFTING OF A SHAM AFFIDAVIT.

A sham affidavit is one that contains sworn testimony that is directly contradicted by other sworn testimony by the same witness in the same case (usually oral deposition).

Is an attorney ethically prohibited from participating in the drafting, filing or usage of a sham affidavit? At least one court of appeals says, "yes."

If a party provides inconsistent or conflicting summary judgment proof, that party has created a fact issue for the trier of fact to resolve. As the Supreme Court has stated, [i]f the motion involves the credibility of affiants or deponents, or the weight of the showings or a mere ground of inference, the motion should not be granted. It can be argued that this approach allows an unscrupulous party to file summary judgment affidavits solely for the purpose of creating

> "sham" fact issues. However, we must rely on attorneys as officers of the court to honor their duty of candor toward the court. An attorney's failure to observe this duty constitutes professional misconduct for which sanctions may be imposed.

Wallace v. AmTrust Ins. Co. of Kansas, Inc., No. 10-14-00209-CV, 2016 WL 3136875, at *7 (Tex. App.– Waco June 2, 2016, no pet.) (*citing Thompson v. City of Corsicana Housing Authority*, 57 S.W.3d 547, 556–58 (Tex.App.–Waco 2001, no pet.) (*citing* TEX.R. DISCIPLINARY P. 1.06(Q)(1), reprinted in TEX. GOV.CODE ANN., tit. 2, subtit. G app. A–1 (Vernon 1998))).

24. DO NOT CHARGE A CLIENT FOR THE TIME IT TAKES TO WITHDRAW FROM REPRESENTATION OF THE CLIENT.

In *Lee v. Daniels & Daniels*, 264 S.W.3d 273, 280-82 (Tex. App.– San Antonio 2008, pet. denied), the San Antonio Court of Appeals held that a fee agreement requiring the client to "pay for all time spent, costs and expenses incident to withdrawal as attorney of record to include, but not limited to, airfare, mileage, motel, and lodging," was unconscionable at the time it was formed. In doing so, the court made the following observations:

> Unconscionability has no single legal definition and must be determined on a case by case basis in light of a variety of factors. *See Southwestern Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 498 (Tex. 1991) (Gonzalez, J., concurring). "When interpreting and enforcing attorney-client fee agreements, it is 'not enough to simply say that a contract is a contract. There are ethical considerations overlaying the contractual relationship.' " *Hoover Slovacek*, 206 S.W.3d at 560 (*quoting López v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 868 (Tex. 2000) (Gonzales, J., concurring and dissenting)). Paramount among those ethical considerations is the fiduciary obligation mandated by the professional nature of the attorney-client relationship. *See id.* at 561 (attorneys have a special responsibility to maintain the highest standards of conduct and fair dealing); *see also Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964) (attorney-client relationship is highly fiduciary in nature); *Dow Chemical Co. v. Benton*, 163 Tex. 477, 357 S.W.2d 565, 567 (1962) (attorneys are members of an ancient profession with unique privileges and corresponding responsibilities).
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> . . . .
>
> Implicitly, if not explicitly, the Disciplinary Rules demand that a reasonable legal fee be charged only for legal services. *See id.* 1.04(b)(1) ("... and the skill requisite to perform the legal service properly"); 1.04(b)(3) ("... the fee customarily charged in the locality for similar legal services "); 1.04(b)(7) ("... the experience, reputation, and ability of the lawyer or lawyers performing the services "); 1.04(b)(8) ("... or uncertainty of collection before the legal services have been rendered"). Legal services are services performed or rendered on behalf of a client. *See Crain v. The Unauthorized Practice of Law Comm.*, 11 S.W.3d 328, 333 (Tex.App.–Houston [1st Dist.] 1999, pet. denied) (noting practice of law embraces action taken for clients); *Brown v. Unauthorized Practice of Law Comm.*, 742 S.W.2d 34, 41 (Tex.App.–Dallas 1987, writ denied) (same); TEX.R. EVID. 503(a)(1) (defining client as one who is rendered legal services); see generally BLACK'S LAW DICTIONARY 1399 (8th ed.2004) (defining service as act of doing something useful for another person).
>
> Turning to the one sentence withdrawal provision at issue here, it broadly mandates that Cummings pay Daniels's hourly rate for "all time spent" incident to withdrawal, regardless of whether or not legal services were rendered on behalf of Cummings. Indeed, Daniels sought reimbursement for all time spent in his efforts to terminate his attorney-client relationship with Cummings including time spent adversarial to his own client. None of that time was spent engaged in "legal services" performed or rendered on behalf of Cummings, his client. *See Crain*, 11 S.W.3d at 333; *Brown*, 742 S.W.2d at 41. Instead, Daniels spent that time engaged in services performed for his own benefit. *See Scolaro v. State ex rel. Jones*, 1 S.W.3d 749, 756 (Tex.App.–Amarillo 1999, no pet.) (services rendered for one's own interest are not considered to be the practice of law by the State Bar of Texas). No lawyer could form a reasonable belief that time spent adversarial to the client and in pursuit of the lawyer's own interests is the rendering of

"legal services" for the client. Thus, no lawyer could form a reasonable belief that fees incident to such time spent were reasonable. Therefore, we hold the particular withdrawal provision at issue here, which because of its broad nature allows the recovery of such fees, is unconscionable and contravenes Texas public policy as a matter of law. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.04(a) ("[a] fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable").

We recognize our holding may impose a burden on a withdrawing attorney with legitimate reasons to terminate the attorney-client relationship. Frankly, however, our ethical and fiduciary obligations require no less. It is simply one of the costs that must be borne by a professional who operates under the mantle of a fiduciary duty. As a professional, an attorney's relationship to his client is not to be guided by "the morals of the marketplace." *Hoover Slovacek*, 206 S.W.3d at 561. Otherwise, we relegate our profession to an ordinary business relationship. *See Bohatch v. Butler & Binion,* 977 S.W.2d 543, 560 (Tex. 1998) (Spector, J., dissenting) ("[a]s attorneys, we bear responsibilities to our clients and the bar itself that transcend ordinary business relationships").

25. DO NOT RETAIN THE GENERAL RIGHT TO CONTROL THE REPRESENTATION ON BEHALF OF THE CLIENT.

Some attorneys tell a client what he or she will do for the client and the manner in which the attorney will proceed. And in the vast percentage of situations when the client approves or agrees, that does not become an issue. But what about when the attorney insists that he or she knows what is in the best interest of the client and insists upon that course of action over the client's (or prospective client's) wishes? Texas Disciplinary Rule of Professional Conduct 1.02(a)(1) states that with certain enumerated exceptions, a lawyer ***shall*** abide by a client's decisions "concerning the objectives and general methods of representation." Thus, an attorney should never include in a written representation agreement any right of control for the attorney over the wishes of the client with respect to the objectives and general methods of the representation. Remember, it is the client's legal matter, not yours.

26. DO NOT RETAIN THE RIGHT TO CONTROL WHETHER OR NOT A CASE WILL SETTLE AND UPON WHAT TERMS.

Texas Disciplinary Rule of Professional Conduct 1.02(a)(2) expressly states that an attorney ***shall*** abide by a client's decisions with respect to whether or not to accept an offer of settlement of a matter, except in very limited circumstances rarely seen. Therefore, your appellate representation agreements should not contain any provision that grants the attorney authority to accept or reject settlement offers without client input into the decision making process. If the attorney and the client disagree over whether to accept or reject a settlement offer, in most circumstances, the client's decision should prevail.

27. DO NOT ACCEPT A CONTINGENT FEE IN A CRIMINAL REPRESENTATION.

While attorneys practicing in the energy sectors are not likely to be involved in criminal cases, remember that Texas attorneys should never enter into a contingent fee agreement with a criminal defendant. Tex. Disc. R. Prof. Cond. 1.04(e) ("A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case."). Also remember that contempt matters are quasi-criminal in nature. "Contempt proceedings in Texas have been characterized as quasi-criminal proceedings which should conform as nearly as practicable to those in criminal cases." *Ex parte Johnson*, 654 S.W.2d 415, 420 (Tex. 1983). Thus, while no authority is directly on point, the careful practitioner will avoid contingent fee arrangements in contempt proceedings.

28. DO NOT ENTER INTO AN ORAL CONTINGENT FEE AGREEMENT.

Section 82.065(a) of the Texas Government Code Annotated states: "A contingent fee contract for legal services must be in writing and signed by the attorney and client."

29. WHAT IF I DO ENTER INTO AN "ORAL CONTINGENT FEE CONTRACT"?

From the legal ethics standpoint, an oral contingent fee contract could potentially constitute a violation of "any other laws of this state relating to the professional conduct of lawyers and to the practice of law," sufficient to trigger a violation of Tex. Disc. R. Prof. Cond. 8.04(a)(12).

30. IN MOST CASES, DO NOT ATTEMPT TO RECOVER ATTORNEY'S FEES UNDER QUANTUM MERUIT FOR AN "ORAL CONTINGENT FEE CONTRACT."

Section 82.065(a) of the Texas Government Code states: "A contingent fee contract for legal services must be in writing and signed by the attorney and client." So can you recover under quantum meruit for an "oral contingent fee contract"?

Section 82.065(c) of the Texas Government Code states:

> (c) Any attorney who was paid or owed fees or expenses under a contract that is voided under this section may recover fees and expenses based on a quantum meruit theory if the client does not prove that the attorney committed barratry or had actual knowledge, before undertaking the representation, that the contract was procured as a result of barratry by another person. To recover fees or expenses under this subsection, the attorney must have reported the misconduct as required by the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas, unless:
>
> (1) another person has already reported the misconduct; or
> (2) the attorney reasonably believed that reporting the misconduct would substantially prejudice the client's interests.

Thus, to recover attorney's fees under quantum meruit arising out of an oral contingent fee contract, an attorney would have to report himself or herself to the Commission for Lawyer Discipline for charging an oral contingent fee, unless someone else has already reported him or her, or the attorney reasonably believed that reporting the misconduct would substantially prejudice the client's interests.

Let's say that you're willing to jump through all those hoops. Are you entitled to recover the oral contingent fee as a percentage of the recovery obtained by the client? No. "When an attorney attempts to support a quantum-meruit claim with a bare contingent-fee percentage and no supporting evidence of the value of services rendered, courts deem the claimed contingent-fee agreement "no evidence" of the reasonable value of the services performed." *Hill v. Shamoun & Norman, LLP*, 544 S.W.3d 724, 736-37 (Tex. 2018).

31. DO NOT ATTEMPT TO RECOVER ATTORNEY'S FEES AS A "PIECE OF THE CLIENT'S ACTION" WITHOUT DOTTING THE I's AND CROSSING THE T's.

For years, legal commentators have extolled the virtues of "alternative billing arrangements" that do not rely solely– or sometimes at all– upon the billable hour. In this context, attorneys sometimes wish to "take a piece of the client's action," in return for the rendition of professional legal services. However, when this is the case, the Texas Disciplinary Rules of Professional Conduct require certain safeguards for the client (or potential new client).

Rule 1.08(a)(1) expressly states that a lawyer "shall not" enter into a business transaction with a client unless the transaction and terms are "fair and reasonable to the client and are fully disclosed in a manner which can be reasonably understood by the client." Even if this is done, the client must be "given a reasonable opportunity to seek the advice of independent counsel in the transaction." Tex. Disc. R. Prof. Cond. 1.08(a)(2). Finally, even after all of that, the client must consent in writing to the lawyer's involvement in the business transaction. Tex. Disc. R. Prof. Cond. 1.08(a)(3).

32. DO NOT ACCEPT COMPENSATION FROM A THIRD-PARTY OTHER THAN A CLIENT, FOR REPRESENTATION OF THE CLIENT, WITHOUT DOTTING THE I's AND CROSSING THE T's.

Attorneys are rightly concerned about being compensated for the professional legal services that we render. Sometimes, payment for the representation of a client comes from a family member, a trusted friend, or an insurance company pursuant to a policy of liability insurance. When this occurs, attorneys must be careful to follow the requirements set forth in Tex. Disc. R. Prof. Cond. 1.08(e). That rule requires client consent for the third-party payment. Tex. Disc. R. Prof. Cond. 1.08(e)(1). It also requires that "there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship." Tex. Disc. R. Prof. Cond. 1.08(e)(2). Finally, client confidences must be protected, even from the third-party that is paying the client's legal bills. Tex. Disc. R. Prof. Cond. 1.08(e)(3).

33. DO NOT ATTEMPT TO PROSPECTIVELY LIMIT YOUR LIABILITY FOR PROFESSIONAL NEGLIGENCE, IN WRITING OR OTHERWISE.

Texas Disciplinary Rule of Professional Conduct 1.08(g) prohibits attorneys from making "an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client

is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith."

The only circumstance in which an exception to Rule 1.08(g) has been recognized to apply is the "customary qualification and limitations in legal opinions and memoranda." Official Comment 6 to Tex. Disc. R. Prof. Cond. 1.08.

34. DO NOT EXERCISE A UNILATERAL RIGHT TO CONVERT A FIXED-FEE OR HOURLY FEE AGREEMENT TO A CONTINGENT FEE AGREEMENT AFTER THE COMMENCEMENT OF THE REPRESENTATION.

Wythe II Corp. v. Stone, 342 S.W.3d 96 (Tex. App.– Beaumont, 2011, pet. denied), *cert. denied*, 132 S.Ct. 1150 (2012). Facts: Wythe owned apartments that were damaged by Hurricane Rita. Attorney Stone represented Wythe in an insurance claim against property insurer, XL Lloyds. Stone obtained payments of $2,775,000 for Wythe from XL Lloyds even though the insurance policy in question had limits of $1,625,000.

A fee dispute arose between Wythe and Stone. Stone intervened in the insurance lawsuit and withdrew from representing Wythe. Wythe counterclaimed against Stone for fraud and breach of fiduciary duty. The insurer paid the settlement insurance proceeds into the registry of the court.

Wythe contended that the representation agreement was unenforceable as a matter of law because it contained a provision allowing the attorney to unilaterally convert the hourly rate in the representation agreement to a percentage contingency fee "at any time during the representation."

Wythe also attacked a provision of the representation agreement that allowed the attorney to recover the full contingency fee upon withdrawal from representation of Wythe, regardless of whether the withdrawal was for good cause or not.

The court of appeals rejected Stone's unilateral right to convert the Representation Agreement from hourly to contingent at any stage of the proceedings:

> A contingent-fee contract is permissible in Texas in part because the potential for a greater fee compensates the attorney for assuming the risk that the attorney will receive no fee if the case is lost, while the client is largely protected from incurring a net financial loss in the event of an unfavorable outcome. *Hoover*, 206 S.W.3d at 561 (*citing Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997)). If the attorney could earn a reasonable fee on an hourly basis until recovery is assured and the work complete, but later exercise a unilateral option to collect a percentage of the client's recovery, the fee would no longer be "contingent" on anything—in effect, the client could be required to pay regardless of recovery. Shifting the risk of non-recovery to the client through the unilateral option provision would undermine one significant justification for the higher compensation sometimes received under a contingent-fee contract. *Id.* Simply stated, when an attorney bears no risk of going unpaid, risk of non-recovery is not a factor in assessing the reasonableness of the fee.

Wythe II Corp. v. Stone, 342 S.W.3d 96, 103 (Tex. App.– Beaumont, 2011, pet. denied), *cert. denied*, 132 S.Ct. 1150 (2012). Under the particular facts unique to this case, the court of appeals deemed the fee agreement to be contingent at its inception because it had to be approved by a bankruptcy court as a contingent fee after Wythe filed for bankruptcy.

35. HAVE A WRITTEN REPRESENTATION AGREEMENT SIGNED BY THE ATTORNEY AND THE CLIENT AND INITIALED ON ALL PAGES BY BOTH THE ATTORNEY AND THE CLIENT.

In *Wythe II*, discussed above, the client argued that the attorney defrauded him by presenting the client only with the signature page of the agreement, and not the entire agreement. *Wythe II Corp. v. Stone*, 342 S.W.3d 96, 105-06 (Tex. App.– Beaumont, 2011, pet. denied), *cert. denied*, 132 S.Ct. 1150 (2012). This allegation is reason enough for attorneys to require their prospective clients to sign each page of the Appellate Representation Agreement, and not just the last page.

36. DO NOT ACCEPT AN ASSIGNMENT OF A PORTION OF ANOTHER ATTORNEY'S CONTINGENT FEE AGREEMENT WITH A CLIENT WITHOUT INDEPENDENTLY DETERMINING THAT THE OTHER ATTORNEY COMPLIED WITH TDRPC 1.04 IN ALL RESPECTS.

If a trial attorney has a representation based upon a contingent fee agreement, and you agree to accept an assignment of a portion of that fee for appellate representation, never fail to make certain that the original fee agreement complies with Texas Disciplinary Rule of Professional Conduct 1.04(f):

(f) A division or arrangement for division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is:

(i) in proportion to the professional services performed by each lawyer; or
(ii) made between lawyers who assume joint responsibility for the representation; and

(2) the client consents in writing to the terms of the arrangement prior to the time of the association or referral proposed, including:

(i) the identity of all lawyers or law firms who will participate in the fee-sharing agreement, and
(ii) whether fees will be divided based on the proportion of services performed or by lawyers agreeing to assume joint responsibility for the representation, and
(iii) the share of the fee that each lawyer or law firm will receive or, if the division is based on the proportion of services performed, the basis on which the division will be made; and

(3) the aggregate fee does not violate paragraph (a).

If, for some inexplicable reason, you fail to make certain that the above-quoted provisions are complied with, you still may have the right to seek quantum meruit recovery plus the recovery of reasonable and necessary expenses actually incurred on behalf of the client. Tex. Disc. R. Prof. Cond. 1.04(g). Regardless of the availability of this remedy, the far better practice is to make certain that the referral arrangement conforms in all respects with Tex. Disc. R. Prof. Cond. 1.04(f).

37. OBTAIN A GUARDIAN AD LITEM TO PROTECT THE CLIENT'S INTERESTS IF YOU HAVE REASON TO BELIEVE THAT A POTENTIAL NEW CLIENT LACKS LEGAL COMPETENCE TO ENTER INTO THE REPRESENTATION AGREEMENT.

Client walks in the door seeking legal representation. Within minutes, he agrees to your full hourly rate of $1,200 per hour, signs your written Representation Agreement without any questions or changes, and his $100,000.00 electronic transfer into your client trust fund account clears in a matter of minutes. He is also wearing a three-cornered tinfoil hat and mentions that Guardians of the Galaxy are trying to extradite him to the planet Jupiter as you are visiting with him.

> "A lawyer shall take reasonable action to secure the appointment of a guardian or other legal representative for, or seek other protective orders with respect to, a client whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client."

Tex. Disc. R. Prof. Cond. 1.02(g).

38. DO NOT CHARGE A NON-REFUNDABLE RETAINER WITHOUT BEING CERTAIN YOU UNDERSTAND *CLUCK V. COMM'N FOR LAWYER DISCIPLINE*, 214 S.W.3D 736, 739–40 (TEX. APP.– AUSTIN 2007, NO PET.).

> We first address the trial court's finding that Cluck violated rule 1.14(a) by failing to hold the $20,000 paid by Smith in a trust account. See Tex. Disciplinary R. Prof'l Conduct 1.14(a) ("A lawyer shall hold funds ... belonging in whole or in part to clients .... in a separate account, designated as a 'trust' or 'escrow' account...."). Cluck argues that the fee paid by Smith was a nonrefundable retainer that was earned at the time it was received and that he was not obligated to hold the funds in a trust account because they did not belong in whole or in part to Smith. The Commission argues that, despite the contractual language, the fee was neither nonrefundable nor a retainer but was instead an advance fee that should have been held in a trust account.
>
> An opinion by the Texas Committee on Professional Ethics discusses the difference between a retainer and an advance fee. *See*

Tex. Comm. on Prof'l Ethics, Op. 431, 49 Tex. B.J. 1084 (1986). The opinion explains that a true retainer "is not a payment for services. It is an advance fee to secure a lawyer's services, and remunerate him for loss of the opportunity to accept other employment." *Id.* The opinion goes on to state that "[i]f the lawyer can substantiate that other employment will probably be lost by obligating himself to represent the client, then the retainer fee should be deemed earned at the moment it is received." *Id.* If a fee is not paid to secure the lawyer's availability and to compensate him for lost opportunities, then it is a prepayment for services and not a true retainer. *Id.*

"A fee is not earned simply because it is designated as non-refundable. If the (true) retainer is not excessive, it will be deemed earned at the time it is received, and may be deposited in the attorney's account." *Id.* However, money that constitutes the prepayment of a fee belongs to the client until the services are rendered and must be held in a trust account. Tex. Disciplinary R. Prof'l Conduct 1.14 cmt. 2. We are convinced that no genuine issue of material fact exists regarding whether the fees charged by Cluck were true retainers and, thus, whether Cluck was obligated to hold the funds in a trust account. First, the contract for legal services does not state that the $15,000 payment compensated Cluck for his availability or lost opportunities; instead, it states that Cluck's hourly fee will be billed against it. Second, the $5,000 additional payment requested by Cluck in 2002 makes clear that the $15,000 paid in 2001 did not constitute a true retainer; as the trial court noted in its judgment, "if the first $15,000 secured [Cluck]'s availability, it follows that he should not charge another 'retainer' to resume work on the divorce. He was already 'retained' for the purposes of representing Smith in the matter." Finally, Cluck concedes in his brief that the fees did not represent a true retainer. However, he argues that he did not violate any disciplinary rules by depositing the money in his operating account because the contract states that the fees are nonrefundable. We disagree. "A fee is not earned simply because it is designated as non-refundable." Tex. Comm. on Prof'l Ethics, Op. 431, 49 Tex. B.J. 1084 (1986). Advance fee payments must be held in a trust account until they are earned. Tex. Disciplinary R. Prof'l Conduct 1.14 cmt. 2 (providing that trust account must be utilized "[w]hen a lawyer receives from a client monies that constitute a prepayment of a fee and that belongs to the client until the services are rendered" and that "[a]fter advising the client that the service has been rendered and the fee earned, and in the absence of a dispute, the lawyer may withdraw the fund from the separate account"); Tex. Comm. on Prof'l Ethics, Op. 431, 49 Tex. B.J. 1084 (1986); *see also* Tex. Disciplinary R. Prof'l Conduct 1.15(d) ("Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as ... refunding any advance payments of fee that has not been earned."). Cluck violated rule 1.14(a) because he deposited an advance fee payment, which belonged, at least in part, to Smith, directly into his operating account.

Cluck v. Comm'n for Lawyer Discipline, 214 S.W.3d 736, 739–40 (Tex. App.– Austin 2007, no pet.).

39. MAKE CERTAIN YOUR REPRESENTATION AGREEMENT CONTAINS A SPECIFIC DESCRIPTION OF THE PROFESSIONAL LEGAL SERVICES THAT YOU AND/OR YOUR FIRM WILL PROVIDE, AND THOSE THAT YOU AND/OR YOUR LAW FIRM WILL NOT PROVIDE.

* **A specific description of the professional services to be performed.** This is not as simple as it sounds. Will you become counsel of record in the trial court, or only enter an appearance in the court of appeals? If you appear in the trial court, will it be as attorney-in-charge or additional counsel? If on appeal, will your representation terminate upon the issuance of an appellate opinion, or will it include a motion for rehearing or response thereto? If the representation is in the court of appeals, will it automatically extend to the Supreme Court of Texas, or the United States Supreme Court, or terminate at the conclusion of the intermediate appellate court proceedings? If you assist in the trial court, will you be responsible for

the entire representation (along with lead trial counsel) or only be responsible for preservation of error issues and drafting of dispositive motions, briefs and responses? Clear answers to these questions could save you from an unwarranted grievance or malpractice claim later on.

* **Express discussion of specific professional legal services that will not be performed.** If one or more of the parties files for bankruptcy, will your representation extend into the bankruptcy court? If tax issues, or probate and estate issues arise, do you intend to become involved in the prospective client's representation of those? Just as important as a description of the professional legal services that you intend to provide is a description of the professional legal services that you do not intend to provide.

40. INCLUDE IN YOUR REPRESENTATION AGREEMENT A VERY DETAILED EXPLANATION OF HOW THE ATTORNEY'S FEE WILL BE CALCULATED.

* **The manner of calculation of the attorney's fee.** Many attorneys are satisfied when a Representation Agreement contains the attorney's hourly rate. Some attorneys even include different hourly rates for senior partners, junior partners, senior associates, junior associates and paralegals. However, many attorneys fail to include other important information that could form the basis of an unwarranted grievance, malpractice or breach of fiduciary duty claim. Will time entries be rounded either up or down, or be actual time worked? Will the time spent in local travel or longer distance travel be billed or unbilled? If billed, will it be billed at full rate, half-rate or otherwise? Does the attorney bill portal-to-portal including both travel and waiting time (at courthouses, for instance)? Which attorneys will be primarily responsible for work on the file, and at what hourly billing rate? Addressing these matters up front could avoid substantial aggravation for the attorney and the client alike later on.

41. ADDRESS FREQUENCY OF BILLING IN YOUR WRITTEN REPRESENTATION AGREEMENT, AND COMPLY WITH THE FREQUENCY SET FORTH IN THE WRITTEN REPRESENTATION AGREEMENT.

* **Frequency of billing.** This should be addressed in the representation agreement, and the attorney should bill as often as required by the representation agreement. Otherwise, the client may seek to argue that he or she "did not know what was going on with the case," and if he or she had known how expensive the representation was becoming, action may have been taken to reduce or eliminate future bills.

42. ADDRESS FREQUENCY OF CLIENT COMMUNICATIONS IN YOUR WRITTEN REPRESENTATION AGREEMENT AND COMPLY WITH THE AGREEMENT AS WRITTEN.

* **Frequency of attorney information updates.** I have had clients who did not want to hear from me after the Representation Agreement was signed until we received a decision from the appellate court. I have had other clients who wanted to receive copies of all documents, pleadings, motions, briefs and communications as they occurred. By addressing frequency of updates in the representation agreement, you can avoid misunderstandings later on, or claims that the attorney "failed to keep me informed regarding the status of the representation."

43. ADDRESS IN THE WRITTEN REPRESENTATION AGREEMENT THE SPECIFIC EXPENSES THAT WILL BE CHARGED BY YOU OR YOUR FIRM, AND THE RATES FOR EACH.

* **The specific expenses that will be charged, and the rates for each.** Once again, establishing this in writing will tend to cut down on complaints after the client receives the invoice.

44. INCLUDE THE STATUTE-MANDATED INFORMATION THAT MUST BE PROVIDED TO EACH CLIENT WITH RESPECT TO THE AVAILABILITY OF THE GRIEVANCE PROCESS.

* **Information required by the State Bar of Texas regarding availability of the grievance process.** Tex. Gov't Code § 81.079(b). I put this language right in the representation agreement so that there is no credible allegation that I failed to provide it. "The State Bar of Texas investigates and prosecutes professional misconduct committed by Texas attorneys. Although not every complaint against or dispute with a lawyer involves professional misconduct, the State Bar Office of General Counsel will provide you with information about how to file a complaint. For more information, please call 1-800-932-1900. This is a toll-free phone call."

45. INCLUDE IN YOUR WRITTEN REPRESENTATION AGREEMENT THE SPECIFIC IDENTITY OF THE CLIENT.

* **The specific identity of the client.** This is particularly important where entities are involved, and where a third-party may be paying for the representation of the actual client. Stating whether the entity or a particular individual or individuals are the client can avoid a potential disqualification later on. The same is true with nested entities such as parent and subsidiary corporations.

46. INCLUDE IN YOUR WRITTEN REPRESENTATION AGREEMENT THE IDENTITY OF WHICH PERSONS ARE ENTITLED TO RECEIVE CONFIDENTIAL COMMUNICATIONS, AND IN WHAT MANNER.

* The specific identity of all those entitled to receive attorney-client communications and the manner of receipt of those communications.

47. INCLUDE IN YOUR WRITTEN REPRESENTATION AGREEMENT THE MANNER IN WHICH IT CAN BE TERMINATED BY THE ATTORNEY AND BY THE CLIENT "FOR GOOD CAUSE," THE MANNER OF CALCULATING THE ATTORNEY'S FEE IF THE AGREEMENT IS TERMINATED "FOR GOOD CAUSE," AND IF IT IS NOT TERMINATED "FOR GOOD CAUSE."

The following excerpts from the Supreme Court of Texas' opinion in *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 561-65 (Tex. 2006), are so important that they should be committed to memory by Texas attorneys:

> In Texas, if an attorney hired on a contingent-fee basis is discharged without cause before the representation is completed, the attorney may seek compensation in quantum meruit or in a suit to enforce the contract by collecting the fee from any damages the client subsequently recovers. *Mandell & Wright v. Thomas*, 441 S.W.2d 841, 847 (Tex.1969) (*citing Myers v. Crockett*, 14 Tex. 257 (1855)). Both remedies are subject to the prohibition against charging or collecting an unconscionable fee. Tex. Disciplinary R. Prof'l Conduct 1.04(a), reprinted in Tex. Gov't Code, tit. 2, subtit. G app. A (Tex. State Bar R. art., § 9).6 Whether a particular fee amount or contingency percentage charged by the attorney is unconscionable under all relevant circumstances of the representation is an issue for the factfinder. *See, e.g., Curtis v. Comm'n for Lawyer Discipline*, 20 S.W.3d 227, 233 (Tex.App.-Houston [14th Dist.] 2000, no pet.) (concluding that the evidence was sufficient to support a finding that a contingent fee equaling 70–100% of the client's recovery was unconscionable). On the other hand, whether a contract, including a fee agreement between attorney and client, is contrary to public policy and unconscionable at the time it is formed is a question of law. *See, e.g.*, Tex. Bus. & Com.Code § 2.302 (courts may refuse to enforce contracts determined to be unconscionable as a matter of law); *Ski River Dev., Inc. v. McCalla*, 167 S.W.3d 121, 136 (Tex.App.-Waco 2005, pet. denied) ("The ultimate question of unconscionability of a contract is one of law, to be decided by the court."); *Pony Express Courier Corp. v. Morris*, 921 S.W.2d 817, 821 (Tex.App.-San

Antonio 1996, no writ) (distinguishing procedural and substantive aspects of unconscionability).

Hoover's termination fee provision purported to contract around the *Mandell* remedies in three ways. First, it made no distinction between discharges occurring with or without cause. Second, it assessed the attorney's fee as a percentage of the present value of the client's claim at the time of discharge, discarding the quantum meruit and contingent fee measurements. Finally, it required Walton to pay Hoover the percentage fee immediately at the time of discharge.

In allowing the discharged lawyer to collect the contingent fee from any damages the client recovers, *Mandell* complies with the principle that a contingent-fee lawyer "is entitled to receive the specified fee only when and to the extent the client receives payment." Restatement (Third) of the Law Governing Lawyers § 35(2) (2000). Hoover's termination fee, however, sought immediate payment of the firm's contingent interest without regard for when and whether Walton eventually prevailed. Public policy strongly favors a client's freedom to employ a lawyer of his choosing and, except in some instances where counsel is appointed, to discharge the lawyer during the representation for any reason or no reason at all. *See Martin v. Camp*, 219 N.Y. 170, 114 N.E. 46, 48 (1916) (describing this policy as a "firmly established rule which springs from the personal and confidential nature" of the attorney-client relationship); *see also Whiteside v. Griffis & Griffis, P. C.*, 902 S.W.2d 739, 746 (Tex.App.-Austin 1995, writ denied) (noting that the policy supporting a client's freedom to select his attorney precludes the application of commercial standards to agreements that restrict the practice of law); Tex. Disciplinary R. Prof'l Conduct 1.15 cmt. 4 ("A client has the power to discharge a lawyer at any time, with or without cause...."). Nonetheless, we recognize the valid competing interests of an attorney who, like any other professional, expects timely compensation for work performed and results obtained. Thus, attorneys are entitled to protection from clients who would abuse the contingent fee arrangement and avoid duties owed under contract. Striving to respect both interests, *Mandell* provides remedies to the contingent-fee lawyer who is fired without cause. Hoover's termination fee provision, however, in requiring immediate payment of the firm's contingent interest, exceeded Mandell and forced the client to liquidate 28.66% of his claim as a penalty for discharging the lawyer. Because this feature imposes an undue burden on the client's ability to change counsel, Hoover's termination fee provision violates public policy and is unconscionable as a matter of law.

Notwithstanding its immediate-payment requirement, several additional considerations lead us to conclude that Hoover's termination fee provision is unenforceable. In *Levine v. Bayne, Snell & Krause, Ltd.*, we refused to construe a contingent fee contract as entitling the attorney to compensation exceeding the client's actual recovery. 40 S.W.3d 92, 95 (Tex.2001). In that case, the clients purchased a home containing foundation defects, and stopped making mortgage payments when the defects were discovered. *Id.* at 93. They agreed to pay their lawyer one-third of "any amount received by settlement or recovery." *Id.* A jury awarded the clients $243,644 in damages, but offset the award against the balance due on their mortgage, resulting in a net recovery of $81,793. *Id.* The lawyer sued to collect $155,866, a fee equaling one-third of the gross recovery plus pre- and post-judgment interest and expenses. *Id.* In refusing to interpret "any amount received" as permitting collection of a contingent fee exceeding the client's net recovery, we emphasized that the lawyer is entitled to receive the contingent fee " 'only when and to the extent the client receives payment.' " *Id.* at 94 (quoting Restatement (Third) of the Law Governing Lawyers § 35). A reasonable client does not expect that a lawyer engaged on a contingent-fee basis will charge a fee equaling or, as in this case, exceeding 100% of the recovery. In *Levine*, we noted that " '[l]awyers almost always possess the more sophisticated understanding of fee arrangements. It is therefore appropriate to place the balance of the burden of fair dealing and the allotment of risk in the hands of the lawyer in regard to fee arrangements

with clients.' " *Id.* at 95 (*quoting In re Myers*, 663 N.E.2d 771, 774–75 (Ind.1996)). We believe Hoover's termination fee provision is unreasonably susceptible to overreaching, exploiting the attorney's superior information, and damaging the trust that is vital to the attorney-client relationship.

The Disciplinary Rules provide that a contingent fee is permitted only where, quite sensibly, the fee is "contingent on the outcome of the matter for which the service is rendered." Tex. Disciplinary R. Prof'l Conduct 1.04(d). Hoover's termination fee, if not impliedly prohibited by Rule 1.04(d), is directly forbidden by Rule 1.08(h), which states that "[a] lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for the client, except that the lawyer may ... contract in a civil case with a client for a contingent fee that is permissible under Rule 1.04." *Id.* 1.08(h)(2). Thus, even if Hoover's termination fee provision is viewed as transforming a traditional contingent fee into a fixed fee, it nonetheless impermissibly grants the lawyer a proprietary interest in the client's claim by entitling him to a percentage of the claim's value without regard to the ultimate results obtained.

Examining the risk-sharing attributes of the parties' contract reveals that Hoover's termination fee provision weighs too heavily in favor of the attorney at the client's expense. Specifically, it shifted to Walton the risks that accompany both hourly fee and contingent fee agreements while withholding their corresponding benefits. In obligating Walton to pay a 28.66% contingent fee for any recovery obtained by Parrott, the fee caused Walton to bear the risk that Parrott would easily settle his claims without earning the fee. But Walton also bore the risk inherent in an hourly fee agreement because, if he discharged Hoover, he was obligated to pay a 28.66% fee regardless of whether he eventually prevailed. This "heads lawyer wins, tails client loses" provision altered *Mandell* almost entirely to the client's detriment. Indeed, the only scenario in which Hoover's termination fee provision would benefit Walton is if he expected the value of his claim to significantly increase after discharging Hoover. In that case, Walton could limit Hoover's fee to 28.66% of a relatively low value, and avoid paying 28.66% of a much larger recovery eventually obtained with new counsel. Thus, it is conceivable that a client viewing the events in hindsight could find that the arrangement worked out to his benefit. At the time of contracting, however, the client has no reason to desire such a provision because the winning scenario is not only unlikely, but also entirely arbitrary in relation to its timing and occurrence. Moreover, to the extent the client believes the value of his claim will increase as a result of employing new counsel, a rational client would forego the representation altogether rather than agree to the provision. In sum, the benefits of Hoover's termination fee provision are enjoyed almost exclusively by the attorney.

Hoover's termination fee provision is also antagonistic to many policies supporting the use of contingent fees in civil cases. Most troubling is its creation of an incentive for the lawyer to be discharged soon after he or she can establish the present value of the client's claim with sufficient certainty. Whereas the contingent fee encourages efficiency and diligent efforts to obtain the best results possible, Hoover's termination fee provision encourages the lawyer to escape the contingency as soon as practicable, and take on other cases, thereby avoiding the demands and consequences of trials and appeals. Moreover, the provision encourages litigation of a subset of claims that would not be pursued under traditional contingent fee agreements. Finally, Hoover's termination fee provision creates problems relating to valuation and administration, but not in the manner articulated by the court of appeals. The court of appeals viewed the parties' contract as empowering Parrott alone to determine the value of Walton's claims at the time of discharge, concluding that "[a]n agreement that leaves the damages to be paid upon termination by one party wholly within the unfettered discretion of the other party is so one-sided as to be substantively unconscionable." 149 S.W.3d at 846 (citations omitted). We disagree, because nothing in their fee agreement indicates that Parrott retained such discretion. On the contrary, the contract is silent with respect to valuation. Nevertheless, its silence in that respect exposes an additional defect—the

contract fails to explain how the present value of the claims will be measured. It does not describe how the nature and severity of the client's injuries will be characterized, nor does it state whether any other factors, such as venue, availability and quality of witnesses, the defendant's wealth and the strength of its counsel, and the reprehensibility of the defendant's conduct will apply to the calculation. Lawyers have a duty, at the outset of the representation, to "inform a client of the basis or rate of the fee" and "the contract's implications for the client." *Levine*, 40 S.W.3d at 96 (citing Restatement (Third) of the Law Governing Lawyers §§ 38(1), 18). We have stated that "to impose the obligation of clarifying attorney-client contracts upon the attorney 'is entirely reasonable, both because of [the attorney's] greater knowledge and experience with respect to fee arrangements and because of the trust [the] client has placed in [the attorney].' " *Levine*, 40 S.W.3d at 95 (*quoting Cardenas v. Ramsey County*, 322 N.W.2d 191, 194 (Minn.1982)) (alterations in original). For these reasons, the "failure of the lawyer to give at the outset a clear and accurate explanation of how a fee was to be calculated" weighs in favor of a conclusion that the fee may be unconscionable. Tex. Disciplinary R. Prof'l Conduct 1.04 cmt. 8. And while experts can calculate the present value of a claim at the time of discharge, this extra time, expense, and uncertainty can be avoided under hourly billing and the traditional contingent fee, even in cases in which a discharged attorney seeks compensation from a disgruntled client.

Our conclusion that Hoover's termination fee provision is unconscionable does not render the parties' entire fee agreement unenforceable. *See* Restatement (Second) of Contracts § 208 (1981) ("If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result."); *Williams v. Williams*, 569 S.W.2d 867, 871 (Tex. 1978) (explaining that an illegal provision generally may be severed if it does not constitute the essential purpose of the agreement); *In re Kasschau*, 11 S.W.3d 305, 313 (Tex.App.-Houston [14th Dist.] 1999, no pet.) (concluding that an unenforceable provision may be severed if the parties would have entered into the contract without it). Walton paid Hoover its contingent fee for settlements that Parrott negotiated with Texaco and El Paso Natural Gas, and Walton does not contend that this portion of the agreement is unconscionable. On the contrary, in his brief to the court of appeals, Walton argued in the alternative that Hoover was limited to recovering 28.66% of the $900,000 settlement reached in the Bass litigation and requested rendition of judgment in that amount. Severing the termination fee provision, the remainder of the fee agreement is enforceable. Thus, if Hoover were discharged without cause, it would be entitled to either its contingent fee or compensation in quantum meruit. *Mandell*, 441 S.W.2d at 847.

48. ADDRESS IN YOUR WRITTEN REPRESENTATION AGREEMENT THE TIME AND MANNER OF DISPOSITION OF THE CLIENT'S FILE AT THE CONCLUSION OF THE REPRESENTATION.

* Disposition of the client's file at the conclusion of the representation.

49. ADDRESS IN YOUR WRITTEN REPRESENTATION AGREEMENT THE SPECIFIC MANNER OF DISPUTE RESOLUTION TO BE UTILIZED BY THE ATTORNEY AND THE CLIENT.

The manner of dispute resolution in the event of a dispute between the attorney and the client (choice of law, jurisdiction, venue, particular court, arbitration, mediation, jury waiver, specified arbitrator or mediator, etc.). If arbitration is chosen, which disputes will or will not be included in the arbitration, which act (TAA or FAA) will apply, under what rules will the arbitration proceed, and what measure of trial court or appellate review will apply to the arbitration award.

50. EXPRESSLY STATE THE MANNER OF COMMUNICATIONS WITH CLIENT, AND THE ETHICAL, SECURITY, AND CONFIDENTIALITY ISSUES SURROUNDING THEM.

* Manner client is to receive communications (email address, fax, fax

only with permission, mail, mail only to certain address, etc.), and informed disclosure by the attorney of the security risks and relative benefits of each. *See* Texas Ethics Opinion 648 (April 2015).

51. OBTAIN THE CLIENT'S PERMISSION TO PERFORM A BACKGROUND CHECK OF THE CLIENT.

* Authorization to perform background check on client including banking, financial, judicial, litigation, and criminal records.
* Authorization to speak with client's prior legal counsel (if appropriate).

52. DISCLOSE IN WRITING THE RISK OF VARIOUS RULE, STATUTE AND COMMON LAW BASES OF SANCTIONS POTENTIALLY APPLICABLE TO YOUR REPRESENTATION OF THE CLIENT.

* Disclosures of the risk of various rules based, statute based, and common law sanctions inherent in the type of legal representation sought. Tex. R. Civ. P. 91a, Texas Rule of Appellate Procedure 45, Texas Rule of Civil Procedure 215, Texas Rule of Civil Procedure 13, Federal Rule of Civil Procedure 11, Texas Civil Practice & Remedies Code Chapters 9, and 10, inherent power of the courts, Texas Citizens Participation Act, medical malpractice dismissal for failure to provide proper expert report, among others.

53. INCLUDE A MERGER CLAUSE AND A NO-RELIANCE CLAUSE IN YOUR WRITTEN REPRESENTATION AGREEMENT, IF FACTUALLY APPROPRIATE.

* Merger clause and no-reliance clause. It is almost always the case that formation of a written legal representation agreement is preceded by a period of communications, negotiations and discussions between the attorney and the prospective client. Years after those negotiations, it is possible for one or both of the parties to those oral negotiations to mis-remember what was actually said. When those "mis-remembrances" form the basis of a claim of fraud in the inducement or breach of fiduciary duty, that becomes a serious problem. One way to help avoid that situation is to include a clause that neither the attorney nor the client relied upon any oral or written communication or representation by the other leading up to the formation of the written representation agreement. The clause could further state that the only promises, representations, or statements of fact or opinion by the attorney or the client that are binding on the parties to the legal representation agreement are those that are expressly stated in the legal representation agreement itself. In drafting this language for your written and signed representation agreement, consider the following opinion from the Supreme Court of Texas:

We have held that a merger clause, standing alone, does not prevent a party from suing for fraudulent inducement. Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am., 341 S.W.3d 323, 327 (Tex. 2011). And similarly, a clause that merely recites that the parties have not made any representations other than those contained within the written contract is not effective to bar a fraudulent-inducement claim. Id. at 334. But a clause that clearly and unequivocally expresses the party's intent to disclaim reliance on the specific misrepresentations at issue can preclude a fraudulent-inducement claim. See Forest Oil Corp. v. McAllen, 268 S.W.3d 51, 60–61 (Tex. 2008); see also Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 179 (Tex. 1997). Not every such disclaimer is effective, and courts "must always examine the contract itself and the totality of the surrounding circumstances when determining if a waiver-of-reliance provision is binding." Forest Oil, 268 S.W.3d at 60. Specifically, courts must consider such factors as whether:

(1) the terms of the contract were negotiated, rather than boilerplate, and during negotiations the parties specifically discussed the issue

which has become the topic of the subsequent dispute;
(2) the complaining party was represented by counsel;
(3) the parties dealt with each other at arm's length;
(4) the parties were knowledgeable in business matters; and
(5) the release language was clear.

Italian Cowboy, 341 S.W.3d at 337 n.8; see also Forest Oil, 268 S.W.3d at 60.

When "sophisticated parties represented by counsel disclaim reliance on representations about a specific matter in dispute, such a disclaimer may be binding, conclusively negating the element of reliance in a suit for fraudulent inducement." Italian Cowboy, 341 S.W.3d at 332 (citing Schlumberger, 959 S.W.2d at 179).

Int'l Bus. Machs. v. Lufkin Industries, LLC, ___ S.W.3d ___, No. 17-0666, at 7-8 (Tex. Mar. 15, 2019).

54. INCLUDE "ANTI-CONTRACT OF ADHESION" LANGUAGE TO YOUR AGREEMENT, WHERE FACTUALLY APPROPRIATE.

* Anti-contract of adhesion language. Whenever appropriate, include a prominent clause setting forth the fact that the legal representation agreement was the product of back and forth negotiation between the parties, and was not presented by one party to the other as a "take it or leave it" proposition.

55. ATTACH A COPY OF OR A LINK TO THE APPLICABLE DISCIPLINARY STANDARDS TO YOUR WRITTEN REPRESENTATION AGREEMENT AND EXPRESSLY INCORPORATE ITS TERMS INTO YOUR REPRESENTATION OF THE CLIENT.

* A copy of, or link to, the Texas Lawyer's Creed, the Disciplinary Rules, and the Texas Standards for Appellate Conduct (if you intend to handle any appeals arising out of the trial court representation). Include either a link to, or copy of the Texas Lawyer's Creed, the Texas Disciplinary Rules of Professional Conduct, and the Texas Standards for Appellate Conduct in the representation agreement. State in the representation agreement the client's express understanding that these three sets of rules and guidelines are expressly incorporated into the representation agreement as if set forth at length, and your representation of the client will be guided by them wherever applicable.

56. ENCOURAGE YOUR NEW CLIENT TO HAVE YOUR PROPOSED FORM OF REPRESENTATION AGREEMENT REVIEWED BY COUNSEL OF THE CLIENT'S OWN CHOOSING, AT THE CLIENT'S OWN COST, TO ENSURE THAT YOU ARE BOTH SATISFIED THAT THE INDIVIDUAL TERMS OF THE AGREEMENT, AND THE AGREEMENT AS A WHOLE, ARE FAIR TO BOTH THE ATTORNEY AND THE CLIENT.

Bonus Material - Why you should have a comprehensive representation agreement.

Your written representation agreement should be a document that clearly defines the rights, responsibilities and expectations of you– the legal services provider– and your potential new client. By the time the ink is dry on the parties' signatures, both attorney and client should know what is expected of them, and what they can expect to receive in return, for entering into the representation agreement. If this paper were written in or before the mid-1980's, this paragraph would both begin and end this paper. It was not. This paper is written in the mid-two thousand teens. As Bob Dylan warned us half a century ago, the times (and a small, but very dangerous percentage of our clients), they are a changin'.

It is a scene that repeats itself over and over again throughout the years. New Client shows up in your office asking you to draft legal documents or to handle some complex energy-related litigation. After a discussion of the facts surrounding the potential representation, the client's expectations, the anticipated costs of the representation, your background, experience and ability, and your firm's resources and reputation, New Client agrees to hire you to represent him, her, or it. You or your legal assistant pull up your firm's existing form of representation agreement from the firm's administrative database. The form agreement was originally created while Texaco v. Pennzoil was still pending in the First Court of Appeals. The firm's managing partner works under the theory that "if it was good enough to use then, it is good enough to use now." Or if you or your firm are like a small percentage of firms, the representation

agreement has actually been tweaked a few times after the turn of the century (the 2000's, not the 1900's) to reflect new developments in attorney-client, attorney ethics, and legal malpractice law. How do I know this? Because I have been asked to consult with lawyers and law firms about the representation agreements that they use. In the course of doing so, I have found many to be woefully inadequate.

Why do I say woefully inadequate? Back in the early 1980's, the typical species of bee found in the United States was fairly docile, would only attack when it was itself attacked, and usually only as a last resort at self-preservation. Its main interest in life was to fly from flower to flower, collect pollen and convert it to honey back at the hive. They were dependable, productive, hard-working, diligent and rarely aggressive.

In the mid-1980's, a new breed of bee– often referred to as killer bees– began to spread throughout North America. Killer bees react aggressively to disturbances as much as ten times faster than traditional honey bees. They have been known to chase humans for a quarter of a mile or more. To-date, killer bees have killed thousands, with their victims sometimes receiving vastly more stings than from their traditional counterparts. The aggressiveness of killer bees is not solely directed at humans. They frequently attack and kill horses and other livestock, as well as domestic pets.

Imagine that you are hiking through a state park. You come upon a tree laden with several bee hives. Knowing what you've read about killer bees, are you going to automatically assume that the bees flying nearby are gentle, docile traditional honey bees? Will you assume that they mean you no harm and walk as close to the hives and bees as possible? Or will you seek to manage the risk that this is a hive full of angry, aggressive, killer bees and take steps to protect yourself from the potential risk that results therefrom?

The prudent hiker will obviously seek to protect himself or herself from unnecessary risk. Doing so minimizes the risk of injury or death in case the hives turn out to be full of angry killer bees.

What do bees have to do with legal clients? Simply this. The overwhelming majority of potential clients who pass through your doors are comparable to traditional honey bees. They are honest, decent, thoughtful, considerate, responsible, truthful individuals or companies who come to you seeking help in resolving a legal problem. However, like the American bee population, over the past three or so decades, the pool of potential legal clients has been invaded by a new, aggressive and highly dangerous form of client. Representing a small percentage of overall clients, this type of client is seemingly willing to say anything, or to do anything, whether truthful or not, in order to achieve a legal objective, win a case, or walk away with a pre-determined sum of money. And in doing so, they care not whether that sum of money comes from the opposing party in litigation, your firm's reserve account or your firm's malpractice insurance policy. This type of client considers the threat or actual filing of a grievance, or a lawsuit alleging legal malpractice, or an equitable fee forfeiture proceeding to be a first strike weapon of choice providing the client necessary leverage over the attorney, law firm, and their professional liability insurance carrier, regardless of the appropriateness of doing so under the facts and circumstances presented.

Just as you can no longer assume that your encounter with bee hives or bee swarms in the forest will end safely, you can no longer assume that potential clients are unwilling to cause serious and unwarranted risk to your firm's solvency, insurance coverage, continued ability to practice law, and reputation in the legal community, simply to achieve their predetermined litigation objectives. How can you best protect yourself, your firm, your reputation, and your solvency from the small but dangerous percentage of new breed aggressive clients in the legal marketplace? Your first line of defense is a thoughtful, well-crafted written representation agreement.

Why do many attorneys and firms fail when it comes to drafting effective representation agreements that adequately protect both the attorney and the client? I submit that there are two factors at play.

First, it is the shoemaker's children who go shoeless. We are so busy drafting effective legal documents for our clients, we sometimes fail to take the time and effort to draft effective legal documents for ourselves.

Second, attorneys sometimes fail to draft effective representation agreements because we use an incorrect paradigm. Typically, the attorney (or firm) will come from the perspective of "we need the agreement to state the rights and responsibilities of both the firm and New Client." In the mid-1980's and before, that would have been sufficient. But with the advent of the new, dangerous, aggressive form of potential client who sometimes appears in the legal marketplace, it is not enough.

One of the most potentially dangerous allegations stated in grievances, legal malpractice lawsuits, and fee forfeiture proceedings is, "I would not have gone forward with the representation if the lawyer had disclosed X." Why is this allegation so potentially dangerous? Simply put, if a client wishes to falsely allege that an attorney failed to inform him or her about something at the beginning of the representation, ***and there is no documentation that the information at issue was provided to the client***, the matter becomes a

disputed issue of fact. Disputed issues of fact sometimes mean the difference between receiving a take-nothing summary judgment in a legal malpractice lawsuit or not, or receiving a summary "no just cause" finding in a grievance proceeding or not. Just as important, legal malpractice carriers who seek to manage and avoid risk, sometimes settle otherwise meritless legal malpractice lawsuits simply because of the presence of a disputed issue of material fact.

The best way for an attorney or firm to prove that a factual matter was properly and timely disclosed is the placement of the disclosure in a well-written, fair, comprehensive written representation agreement, where the client initials or signs each page and signs the last page of the agreement.

Why is it prudent to write representation agreements with a focus on the very small percentage of potential clients who are willing to do or say anything in order to win their case? The very same disclosures that are made for the attorney to protect himself or herself against the (hopefully) less than 1% of "bad clients" will be of great assistance to educate and inform the vast majority of "good clients" who are willing to abide by the applicable rules of litigation, appeals, ethics, and civilized society. Thus, writing thoughtful, comprehensive, legal representation agreements is good policy for lawyers, good clients and not-so-good clients, alike.

INSURANCE COVERAGE FOR RIDESHARE & AUTONOMOUS VEHICLES

CATHERINE L. HANNA, *Austin*
Hanna & Plaut, LLP

State Bar of Texas
16TH ANNUAL
ADVANCED INSURANCE LAW
June 6-7, 2019
San Antonio

CHAPTER 8

Catherine Hanna's practice focuses on representation of clients in appellate matters as well as direct representation of insurance carriers in connection with coverage and first-party bad faith actions. Catherine has represented insurance carriers for over 25 years and has extensive experience in coverage and bad faith litigation and appeals involving all types of policies.

Catherine received her law degree from Stanford Law School and her undergraduate degree from Texas Tech University. Catherine is admitted to practice in Texas and California state and federal courts. Catherine is active in state and local bar association activities and is a regular contributor and speaker at continuing legal education events. Catherine currently serves as an elected member of the Council of the State Bar of Texas Insurance Law Section.

Catherine is an avid reader and currently serves as the Chair of the City of Austin's Library Commission and encourages every visitor to Austin to visit the recently opened new Central Branch of the Austin Public Library. Catherine has two grown children and lives in Austin with one husband, one mother, and three small dogs.

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- John McAfee

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- Tina Brown

I. BLURRED LINES: INSURANCE FOR PERSONAL AND COMMERCIAL ACTIVITIES.

Historically, insurance policies sold in the United States could not contain more than one line of insurance. Gary L. Johnson, *The Practical Art: On the Archaeology and Architecture of Liability Insurance Contracts*, 78 Def. Couns. J. 143, 149-150 (2011). As state legislatures allowed insurance companies to sell multi-line policies, insurance carriers categorized their lines of business into two major groupings: "personal lines" and "commercial lines." *Id.* Personal lines policies generally exclude coverage for activities seen as "business risks." For example, homeowner's policies typically contain a "business pursuits exclusion" and personal automobile policies exclude coverage when the covered auto is being used to carry persons or property for a fee. This is often referred to as the "livery exclusion."

The gig, or sharing, economy, which involves individuals marketing their own time and assets directly to other individuals, challenges the traditional dichotomy between personal and commercial activities and the insurance assumptions that go along with them. The underwriter who priced and sold a personal automobile insurance policy to a suburban commuter likely did not factor in the increased exposure that occurs when that suburbanite drives passengers for a fee in a crowded entertainment district on Friday and Saturday night. This is not a completely new challenge. In the homeowner's insurance context, in-home day care arrangements can present challenging coverage questions, with courts struggling to distinguish between casual babysitting arrangements and "full-time, for-profits, state-regulated residential child care business." *Contrast State Farm Fire & Cas. Co. v. Vaughan*, 968 S.W.2d 931, 932 (Tex. 1998) (no coverage for damages resulting from child who died as a result of the negligence of the day care operator) with *State Farm Fire & Cas. Co. v. Reed,* 873 S.W.2d 698 (Tex.1993) (holding that the death of a toddler who climbed through a fence surrounding his home day care and drowned in a swimming pool was not excluded because his death "was caused by an activity that was ordinarily incidental to non-business pursuits.") In his dissent in *Reed*, Chief Justice Philips highlighted the sometimes murky nature of this distinction. While noting that "it is not the responsibility of the four million other Texans who have homeowners' policies to subsidize the business risks of the homeowner who initiates an at-home enterprise subject to certain risks without purchasing appropriate coverage," he recognized that other child-care activities for profit, such as part-time babysitting would not fall into the same category. 873 S.W.2d at 794 and n. 4.

Likewise, long before companies like Uber arrived to further complicate matters, personal automobile carriers had to distinguish between business and personal pursuits. This issue comes up in cases involving delivery drivers, where employees often use their personal automobiles to make deliveries. In *Dhillon v. General Accident Insurance Company*, 789 S.W.2d 293 (Tex. App – Houston [14th Dist.] 1990, no writ) a pizza delivery driver was returning to Domino's after delivering a pizza when he was rear-ended by an uninsured motorist. Dhillon's personal insurance carrier denied his UM/UIM claim, citing the exclusion for "carrying persons or property for a fee." Summary judgment was granted and Dhillon appealed. The Houston Court of Appeals initially reversed the trial court's grant of summary judgment for the carrier because there was no summary judgment proof to show that Dhillon was carrying property for a fee. 789 S.W.2d at 294. However, the court forecast its ultimate decision, opining that on the return trip after delivery, the driver would be in possession of the proceeds from the sale of the pizza and those proceeds would constitute "property,' within the meaning of the exclusion. *Id.* When the case returned after remand, when the court was presumably more satisfied with the evidentiary record, the court rejected Dhillon's argument that the livery exclusion was ambiguous and held unequivocally that the claim was excluded. *Dhillon v. General Accident Insurance Company*, 1991 WL 51470 (Tex. App – Houston [14th Dist.] 1991, writ denied). The driver "was being paid to use his car to deliver pizzas. This is clearly excluded under the policy." *Id.*

One significant factor in the Houston court's reasoning in *Dhillon* was that the delivery driver was being paid a salary. Dhillon was being paid for the entire trip so question of what part of the trip he was on was not relevant. Other courts, applying the exclusion to situations that do not involve salaried drivers, have determined application of the exclusion by whether the passenger or good transported was in the vehicle at the

time of the accident. In *Fort Worth Lloyds Insurance Company v. Lane*, 189 S.W.2d 78 (Tex. Civ. App. – Dallas 1945, no writ), the insured's son, Harlan had used her car with permission to carry three passengers from Dallas to Little Rock, charging each passenger $10. On the way home from Little Rock, after dropping off his passengers, young Harlan failed to negotiate a turn and crashed the car, causing a whopping $354 of damage. Fort Worth Lloyds denied Lane's claim, citing the exclusion for carrying passengers for a fee, but the court disagreed, holding that the exclusion only applied while the passengers were actually being carried and not otherwise. In fact, Texas courts have consistently determined that this exclusion applies "if [the] insured vehicle has been held out to the general public for carrying passengers, and at the time of the accident was actually so used." *Canal Ins. Co. v. Gensco, Inc.*, 404 S.W.2d 908 (Tex. App. – San Antonio 1966, no writ)(emphasis added).

II. TROUBLE AHEAD: THE UBER PROBLEM.

The group of businesses known as Transportation Network Companies ("TNCs") began with the founding of Uber in San Francisco in 2008. It was originally founded as a way to hail black car services using a smart phone but later allowed drivers to use their own cars to transport passengers. Uber began service in 2011 and Uber's biggest competitor, Lyft, began operations in 2012. TNCs connect customers with nearby drivers through a smartphone app which is downloaded by both drivers and customers. Customers request a ride and local drivers using the app can accept the request. After the ride is complete, the app charges the fare to the customer's credit card automatically. TNCs profit by taking a percentage of the fares and leaving the remainder to the drivers.

The Uber story took a tragic turn in 2013 when 6-year old Sofia Liu died after she, her younger brother, and their mother were hit by a car in a San Francisco cross-walk on New Year's Eve. Dan Levine, *Uber Settles Wrongful Death Lawsuit in San Francisco*, Reuters, July 14, 2015 (http://www.reuters.com/article/us-uber-tech-crash-settlement-idUSKCN0PO2OW20150715) At the time of the crash, the driver was logged on to the UberX smartphone app and was available to provide rides but he did not have a passenger in the car. Uber initially took the position that it was not responsible for the accident because the driver was not carrying an Uber passenger at the time. The case ultimately settled for a confidential amount, but it raised questions regarding the liability of Uber as well as the insurance issues and gaps.

After the Liu tragedy, there was significant political pressure on the TNCs to make sure liability insurance coverage was available to their drivers. This pressure resulted in a legislative solution in many states. Uber wisely participated in crafting this solution and most states, including Texas, have adopted legislation based on a model compromise bill developed by insurers, insurance industry trade groups, and TNCs themselves. See Mark R. Goodman, *Insurance for the Sharing Economy*, 26 Westlaw Journal Insurance Coverage 1 (2015).

The Texas Legislature adopted House Bill 1733, which became effective Jan. 1, 2016 and is codified in Chapter 1954 of the Texas Insurance Code. The new legislation ensured that insurance would be available even if not provided by the driver's personal automobile insurer. It also addressed the question of what insurance coverage is available during the time the driver is logged on to the TNC's digital network, but does not yet have a passenger. This period is generally known as Period 1 and accidents occurring during this time period would very likely be excluded under the driver's personal automobile policy. The new law requires that the TNC driver or the TNC on the driver's behalf maintain primary automobile insurance with bodily injury limits of $50,000 per person, $100,000 per accident, and $25,000 in property damage coverage. Tex. Ins. Code Section 1954.052. In addition, the TNC or the TNC driver is required to maintain insurance to cover the time which begins "at the time a driver accepts a ride requested by a rider through a digital network controlled by a transportation network company" and ends when "the last requesting rider departs from the driver's personal vehicle." TEX. INS. CODE § 1954.053. The insurance limits required for this period, known as the "prearranged ride" period are significantly higher than the limits required for the period between prearranged rides. Carriers are required to maintain coverage with a total aggregate limit of liability of $1 million for death, bodily injury, and property damage for each incident. *Id.* For both periods, the statute requires that the TNC or driver provide uninsured/underinsured motorist (UM/UIM) and personal injury protection ("PIP") coverage when required by statute. *Id.* In other words, just as with personal automobile insurance, in order for a carrier to not provide UM/UIM or PIP coverage, it must obtain a written rejection of the coverage. See TEX. INS. CODE §§ 1952.01 (UM/UIM) and 1952.152 (PIP). The statute does not require that the TNC or driver maintain insurance to cover property damage to the driver's vehicle. In all cases, the liability coverage required is not contingent on a driver's personal automobile insurer initially denying a claim. TEX. INS. CODE § 1954.055 And if the insurance maintained by a TNC driver has lapsed or does not provide the required coverage, "the transportation network company shall provide the coverage required by this subchapter beginning with the first dollar of a claim against the driver." TEX. INS. CODE § 1954.055.

The statute allows personal automobile insurance carriers to exclude coverage for both periods, when the driver is logged on and when the driver is in the

"prearranged ride" period. TEX. INS. CODE § 1954.151. It also specifically provides that personal automobile carriers with the authorized exclusions do not have a duty to defend or indemnify a claim "arising from an event subject to the exclusion." TEX. INS. CODE § 1954.153. Presumably foreseeing some of the fact questions that might arise from the two-period distinction, the statute requires a TNC or insurer providing coverage to assist each insurer involved in the claim by providing the following information to "directly interested persons" and an insurer of the TNC driver:

> (1) the precise times that a driver logged on and off of the transportation network company's digital network in the 12-hour period immediately preceding and the 12-hour period immediately following the accident; and
> (2) a clear description of the coverage, exclusions, and limits provided under an automobile insurance policy maintained under Subchapter B.

TEX. INS. CODE § 1954.154.

In spite of the fact that the statute allows personal automobile insurers to escape coverage, some have seen an opportunity to provide specific policies or riders for TNC situations. For example, GEICO advertises a hybrid policy that includes coverage for personal use, as well as "the added level of protection for ridesharing; all for a competitive price." (https:www.geico–.com/information/aboutinsurance/rideharing/faq/)

III. THE ROAD AHEAD – COVERAGE QUESTIONS ON THE HORIZON.

Although TNCs continue to face litigation and regulatory issues, the model legislation adopted by Texas and other states should provide useful clarification to insurance professionals. There are questions remaining, however. Texas insurance carriers must determine whether their standard livery or "carrying passengers for a fee" exclusion in their automobile policy is sufficient or whether they should add endorsements tracking the specific exclusionary language contained in the statute. When personal automobile insurance carriers do provide coverage, how will their "Other Insurance" clauses interact with the TNC policy? Does the requirement to provide "clear information" regarding insurance coverage to "directly interested persons" open the door to third-party misrepresentation claims?

Some drivers have complained that Uber misrepresents the scope of insurance coverage, including the fact that the Uber policy will not cover the driver's own bodily injuries or property damage under any circumstance. Jennie Davis, *Drive At Your Own Risk: Uber Violates Unfair Competition Laws By Misleading UberX Drivers About Their Insurance Coverage*, 56 B. C. L. REV. 1097, 1103 (2015); see also Randy Wallace, *Accident Leaves Houston Uber Driver with Regrets,* MY FOX HOUSTON (Jan. 4, 2015, 10:30 PM), http://www.myfoxhouston.com/story/27656550/accident-leaves-houston-uber-driver-with-regrets, *archived at* http://perma.cc/ 8KDM-7XS6 (reporting that a Houston UberX driver who caused a collision was unable to get compensation for his own injuries through Uber's insurance.)

Finally, is it possible to manipulate the "periods" in order to maximize (or minimize) available insurance coverage? A recent case from Washington state demonstrates the potential issues. In *Trofimovich v. Progressive Direct Ins. Co.*, 2017 WL 3424980 (W.D. Wash. Aug. 8, 2017), a Lyft driver whose claim was initially denied by his personal automobile insurer sued for bad faith. When Trofimovich first reported the accident he stated "I was working and I was driving for, uh, what's it called, Lift [sic]." He confirmed that he had a passenger in the car at the time of the accident. 2017 WL 3424980, *1. The following day, however, Trofimovich told Progressive that he was doing the passenger a favor and that he had clocked out of Lyft an hour before he drove her home. *Id.* at *2. Although Progressive ultimately accepted the claim and provided coverage to Trofimovich, it initially denied coverage based on the fact that he was driving for Lyft. *Id.* Trofimovich submitted ride history on the day of the accident showing an 11:26 a.m. ride as his latest. *Id.* at *3, n.2 However, it also appears that Trofimovich told Progressive he had passengers after his noon lunch break:

> "I had like one or two passengers, and then I was meeting a friend for lunch and then I had ... to pick up some stuff at the store, and on the way back I picked them up."

Id.

From a subpoena to Lyft, Progressive obtained further records showing that Trofimovich logged onto Lyft at 1:51 p.m., off at 2:18 p.m., and back on again at 2:42 p.m. *Id.* The court dismissed the case, finding that Progressive's initial denial of the claim was reasonable and rejecting Trofimovich's suggestion that Progressive had a duty to inquire whether his passenger was a paying customer. *Id.* at *3. In this case the court noted that the confusion created by the evidence and Trofimovich's "App on. App off" history, was to Progressive's benefit. *Id.* at *3, n.2. Insurance carriers can expect that will not always be the case and adjusters should be carefully trained in how to investigate claims involving these new technologies.

Meanwhile, we should all prepare for the issues presented by the driverless cars on the horizon.

IV. SELF-DRIVING VEHICLES – THE END OF THE ROAD FOR TRADITIONAL INSURANCE?

According to a recent article in Bloomberg, "Self-driving cars might kill auto insurance as we know it," reasoning that without humans to cause accidents, most of the risk is removed. See Tullis, Paul. "Self-Driving Cars Might Kill Auto Insurance as We Know It." Bloomberg.com. Feb. 19, 2019. (https://www.bloomberg.com/news/articles/2019-02-19/autonomous-vehicles-may-one-day-kill-car-insurance-as-we-know-it) Until that happens, however, "drivers" of driverless vehicles are encountering sky high premiums – the result of not enough data and extremely expensive autonomous equipment. *Id.* While traditional "car-wreck" litigation might decline, products liability specialists may be seeing an increase in lawsuits, bringing with it the inevitable coverage fights.

In March 2018, Walter Huang died when his Model X vehicle which was being driven with the Autopilot feature engaged slammed into a concrete hightly barrier on U.S. 101 in Mountain View, California. According to a complaint filed against Tesla by Huang's family, the vehicle's semi-automated system misread lane lines on the road, didn't detect the concrete median and didn't' brake, but accelerated into the barrier. See *Huang v. Tesla, The State of California, and Does 1 through 100*, Cause No. 19CV346663, filed in the Superior Court of the State of California in and for the County of Santa Clara. (https://www.scribd.com/document/408295025/Huang-v-Tesla-State-of-Calif-20190430) Tesla has argued that Huang was at fault, suggesting that the crash resulted from an "inattentive driver." See Noyes, Dan, "Wrongful death lawsuit filed in deadly, fiery Tesla crash in Mountain View," abc7news.com, April 30, 2019. A National Transportation Safety Board report found that Huang had been given two visual alerts and one auditory alert to place his hands on the steering wheel, but those alerts came more than 15 minutes before the crash. Autoblog.com. Consumer group lobbies Tesla to fix fatal flaws in Autopilot. June 8, 2018.(https://www.autoblog.com/2018/06/08/tesla-flaws-autopilot-fatal-crash/) The NTSB previously blamed Tesla for a 2016 fatal crash in Florida, concluding that "Tesla allowed the driver to use the [Autopilot] system outside of the environment for which it was designed and the system gave far too much leeway to the driver to divert his attention." *Id.*

Meanwhile, the Wall Street Journal recently reported that Tesla is creating its own branded insurance program, hoping to offer a lower cost product to consumers, though Chief Executive Elon Musk said buyers would have "to agree to not drive the car in a crazy way." See Scism, Leslie, "Tesla Plans to Sell Owners Cheaper Car Insurance," Wall Street Journal, May 7, 2019. (https://www.wsj.com/articles/tesla-plans-to-sell-owners-cheaper-car-insurance-11557221400) That'll be the day!

EXTRA-CONTRACTUAL CLAIMS AFTER *MENCHACA*

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16TH ANNUAL
ADVANCED INSURANCE LAW
June 6-7, 2019
San Antonio

CHAPTER 9

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Mr. Valdez is a trial lawyer, licensed in both Texas and New Mexico, who has a particular expertise in the litigation of catastrophic cases. He is board certified by the Texas Board of Legal Specialization in Personal Injury Trial Law. He has extensive experience in the trial of personal injury, commercial, and insurance coverage cases that include defending legal and medical malpractice, product liability, premises and construction liability, as well as commercial disputes and insurance coverage litigation.

By virtue of his extensive trial experience, Mr. Valdez is often called upon to provide mediation services in catastrophic cases as well as insurance coverage disputes. He has also provided testimony as an expert witness in numerous professional liability and insurance coverage cases.

Having over 30 years of experience in the practice of civil trial law, Mr. Valdez has been recognized by his peers, the legal profession, and the insurance industry as an outstanding and distinguished advocate. He has received the following recognitions and distinctions:

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Mr. Valdez is a frequent lecturer and author for the State Bar of Texas and the State Bar of New Mexico in various legal education programs. His papers and lectures include topics involving legal malpractice and professional ethics (defending lawyers and judges in administrative grievances), insurance coverage matters, trucking litigation, premises liability litigation, and product liability.

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CHAPTER 9.1

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EXTRA-CONTRACTUAL CLAIMS AFTER *MENCHACA*[1]

I. INTRODUCTION

The Texas Supreme Court issued its second opinion in *USAA v. Menchaca*,[2] approximately one year ago. It represents the court's attempt to clarify the law regarding the interaction between contract and extra-contractual damages that may arise in the context of insurance litigation. While not an exhaustive treatment of the state and federal case law examining and applying *Menchaca*, I will attempt here to present the reader with a fair summary of such cases.

II. BACKGROUND

USAA v. Menchaca was a property damage case. It involved Menchaca's suit for covered losses under a homeowner's policy that she allegedly sustained in a wind / hail storm. A jury verdict returned apparently conflicting responses to questions submitted:

In the contract question, the jury answered that USAA did not breach its contract of insurance with Menchaca; however, in the question submitting an extra-contractual theory of recovery, the jury answered that USAA did violate the Texas Insurance Code.

The issue then put squarely before the Supreme Court: may an insured recover extra-contractual damages against an insurer without a finding that the insurer breached the contract of insurance? The answer, as I mentioned in a previous paper is, "Perhaps."[3]

Succinctly put, the court explained that an insured may recover extra-contractual damages without a predicate finding of a breach of contract when the insured establishes: 1) an entitlement to contract benefits, or 2) an independent injury that is separate and apart from contract benefits.[4] The first part of the court's opinion is an explanation of its rules concerning the evidence necessary to establish entitlement to benefits and the rules concerning the establishment of an independent injury.[5] The court announced five rules in this regard and the courts construing *Menchaca* have provided their respective constructions of those rules and their application to particular facts situations.

III. THE FIVE RULES

Rule No. 1 (The General Rule): An insured cannot recover policy benefits for an insurer's statutory violation if the insured does not have a right to those benefits under the policy.

Rule No. 2 (Entitled-to-Benefits Rule): An insured who establishes a right to receive benefits under an insurance policy can recover those benefits as "actual damages" under the statute if the insurer's statutory violation causes the loss of the benefits.

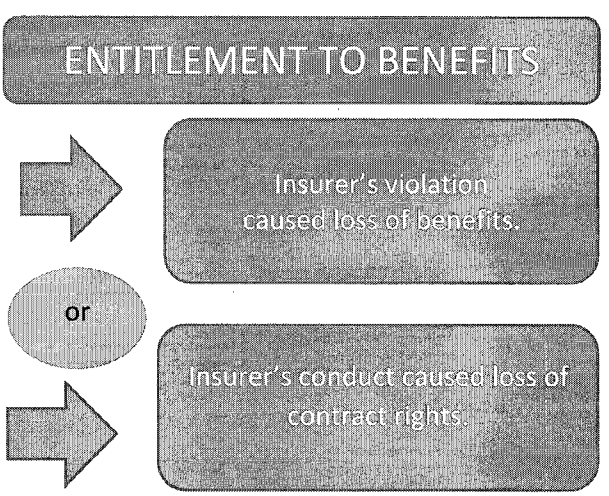
Rule No. 3 (The Benefits-Lost Rule): An insured can recover benefits as actual damages under the Insurance Code even if the insured has no right to those benefits under the policy, if the insurer's conduct caused the insured to lose that contractual right.

Rule No. 4 (The Independent-Injury Rule): There can be no claim for bad faith when an insurer has promptly denied a claim that is in fact not covered; however, in denying the claim, the insurer may commit some act, so extreme, that would cause injury independent of the policy claim.

Rule No. 5 (The No-Recovery Rule): An insured cannot recover *any* damages based on an insurer's statutory violation unless the insured establishes a right to receive policy benefits under the policy or an injury independent of a right to benefits.

The five rules can be condensed:

An insured may recover damages under an insurance policy when he establishes an entitlement to those benefits or an independent injury:



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[1] I thank my colleague and appellate attorney, Joseph E. Cuellar, as well as Clay Robison, 3L Baylor University School of Law, for their significant contributions to this article.

[2] *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479 (Tex. 2018).

[3] For a more detailed analysis of *Menchaca*, please see my paper, "*Menchaca* II and Bifurcation of Trial Issues" presented at the Advanced Civil Trial Course (State Bar of Texas 2018).

[4] *USAA Tex. Lloyds Co. v. Menchaca, supra* at 488.

[5] *See id.* at 488-99.

In addition to property damage / wind and hail cases, several cases reviewed in this paper arise out of uninsured / underinsured (UM / UIM) motorist law. I cite to these opinions since they give some insight into how the lower appellate courts treat arguments for an expansive reading of *Menchaca*. This is the backdrop against which we now review lower court cases that have interpreted the *Menchaca* rules.

IV. APPRAISAL AND MENCHACA

The essence of the battle is this: ***Is there a cause of action for extra-contractual damages after an insurer timely pays an appraisal award in a property damage case?*** According to the courts of appeal and most of the lower federal courts that have decided the issue, the answer is, "No." This issue, however, now has been argued before the Supreme Court. There is no opinion as of the submission date of this article.

We begin this analysis with the two opinions from the courts of appeal that have decided the issue and note that these cases have been briefed and argued before the Supreme Court—but no opinion has been forthcoming to date.

A. *Ortiz v. State Farm Lloyds*

In *Ortiz v. State Farm Lloyds*, the San Antonio Court of Appeals held that the insurer's prompt payment of an appraisal award precluded the recovery of extra-contractual damages.[6] This was another wind / hail storm case. Following Ortiz's claim for property damage, State Farm Lloyds' adjuster inspected the property and determined that covered losses (some $700) fell under the insured's deductible and advised Ortiz it would make no payment under the policy. After a second inspection, State Farm Lloyds found some additional damage, but the covered losses still did not exceed the deductible.

Ortiz then filed suit alleging both contractual and extra-contractual claims. Approximately five months after the lawsuit was filed, State Farm Lloyds invoked appraisal and the lawsuit was abated pending that process. The appraisal award issued in the case was $9,447.52. Fifteen days later, State Farm Lloyds paid Ortiz $4,243.93, representing the actual cash value of the covered losses minus the deductible and recoverable depreciation (recoverable after repairs made).

Following payment of the award, the trial court granted the insurer's motion for summary judgment that argued that the timely payment of the appraisal award estopped Ortiz from making a breach of contract claim and likewise precluded his extra-contractual claims. The court of appeals affirmed.[7]

Citing its previous opinion in *Garcia v. State Farm Lloyds*, the court noted, "Texas law clearly holds the discrepancy between the initial estimate and the appraisal award cannot be used as evidence of breach of contract."[8]

First, the court dealt with the insured's common law bad faith claims. Relying on its precedent in *Garcia v. State Farm Lloyds*, the court noted that evidence showing only a "bona fide dispute" about the insurer's liability on the contract claim does not rise to the level of bad faith.[9] In order to defeat a summary judgment on a common law bad faith claim post appraisal, the court held that the insured "had the burden to raise a genuine issue of material fact that the insurer failed to timely investigate the claim or the insurer committed some act, so extreme, that it would cause injury independent of the policy claim."[10] Second, the court held that in evaluating the statutory bad faith claims (under the Insurance Code and the DTPA) when the common law claims fail, the statutory bad faith claims based on the same conduct fail as well.[11]

The court then considered the effect of *Menchaca* on post-appraisal payment cases. It noted that Ortiz did not identify which of *Menchaca's* five rules supported his proposition that he could recover for a statutory bad faith claim without a corresponding breach of contract claim. The court then proceeded to review all of the five rules in light of the payment of the appraisal award. It noted that only the second and third of *Menchaca* rules applied in this situation (i.e., where the insurer's statutory violation caused the loss of benefits or the loss of the insured's contractual right to benefits). The court held:

> Here, however, the payment of the appraisal award satisfied [Ortiz's] right to receive

[6] *Ortiz v. State Farm Lloyds*, 2017 WL 5162315 (Tex. App.—San Antonio 2017, pet. granted).

[7] *Ortiz v. State Farm Lloyds, supra.*

[8] *See Ortiz v. State Farm Lloyds, supra, citing, Garcia v. State Farm Lloyds,* 514 S.W.3d 257, 273 (Tex. App.—San Antonio 2016, pet. denied).

[9] *See Ortiz v. State Farm Lloyds, supra, citing, Garcia v. State Farm Lloyds,* 514 S.W.3d 257, 276 (Tex. App.—San Antonio 2016, pet. denied).

[10] *See id., citing, Garcia v. State Farm Lloyds,* 514 S.W.3d at 279 (Tex. App.—San Antonio 2016, pet. denied).

[11] *See id., citing, Garcia v. State Farm Lloyds,* 514 S.W.3d at 279 (Tex. App.—San Antonio 2016, pet. denied).

> benefits under [his policy] and therefore, there is no 'loss of benefits' or 'loss of a contractual right to policy benefits.'[12]

Therefore, nothing in *Menchaca* caused the San Antonio court to reverse the trial court ruling granting summary judgment to the insurer dismissing contractual and extra-contractual claims following its timely payment of an appraisal award.[13]

B. *Barbara Technologies v. State Farm Lloyds*

The second case of note is *Barbara Technologies v. State Farm Lloyds*.[14] In this case, the San Antonio Court of Appeals held that the invocation of appraisal precluded recovery for alleged violations of the Texas Prompt Payment Act. [15]

This is another wind and hail case. Following the insured's report of wind and hail damage, State Farm Lloyds inspected the property, but found that any covered losses were under the deductible and therefore paid no benefits under the policy. State Farm Lloyds' came to the same conclusion following its re-inspection of the property. Barbara Technologies filed suit, alleging, among other things, that State Farm Lloyds violated the Texas Insurance Code § 542.058 and § 542.060 (West 2009 & West sup.2016)(Texas Prompt Payment of Claims Act) when it failed to pay damages with interest and attorney's fees for delay of payment of the claim for longer than 60 days.[16]

Approximately six months after Barbara Technologies filed suit, State Farm Lloyds invoked appraisal under the policy. Approximately six months after that, the appraisal panel completed its appraisal and issued an award settling the loss at $195,345.63. State Farm Lloyds then tendered payment of the award minus depreciation and deductible. Barbara Technologies accepted the payment and amended its petition to delete all claims except those stated under the Prompt Payment Act.[17]

Barbara Technologies position in the court of appeals was as follows:

> State Farm is strictly liable for interest and attorneys' fees under chapter 542 because it did not pay the claim within sixty (60) days after it received notice of the loss.

The San Antonio Court of Appeals rejected this contention, and again relied upon its precedent in *Garcia v. State Farm Lloyds*, 514 S.W.3d 257 (Tex. App.—San Antonio 2016, pet. denied). The court held that a plaintiff cannot sustain a claim under the Prompt Payment Act when it is undisputed that the insurer had paid the appraisal award.[18]

C. Federal Cases

1. Timely Payment of Appraisal Award Estops Breach of Contract Claims and Negates Extra-contractual Claims for Common Law and Statutory Bad Faith

A number of lower federal courts have held that the timely payment of an appraisal award forecloses an insured's suit for extra-contractual damages.

Gonzales v. Allstate Vehicle and Property Ins. Co., a case arising out of the Southern District of Texas, involved the insured's prosecution of extra-contractual causes of action following Allstate's payment of an appraisal award. The court granted Allstate's motion for summary judgment noting:

> The court is of the opinion, and the plaintiff agrees, that the appraisal agreement and award establish the amount owed to the plaintiff under the policy. The plaintiff has not challenged the appraisal. Instead, she agreed to the award of $23,822.72. Therefore, the plaintiff's claim for breach of contract does not survive the defendant's motion for summary judgment.

See Gonzales v. Allstate Vehicle and Property Ins. Co., 2019 WL 699137 at *1 (S.D. Tex. 2019), *citing*, *inter alia, Quibodeaux v. Nautilus*, 655 Fed. Appx. 984, 986-87 (5th Cir. 2016).

The court also noted that there were no facts to support a bad faith claim: no evidence of prejudice, or that the insurer acted in bad faith that resulted in damages beyond the actual or contracted loss. Citing *Menchaca*, the court stated,

> Specifically, the plaintiff has not asserted or proffered evidence that policy benefits were wrongfully withheld, that any alleged statutory violations resulted in or caused the plaintiff to lose any benefit under her policy or that she was entitled to recover losses or damages independently of the actual policy benefits.

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[12] *Ortiz v. State Farm Lloyds*, supra at *3 (Tex. App.—San Antonio 2017, pet. granted).

[13] *See id.; see also Wellington Ins. Co. v. Banuelos,* 2018 WL 626534 (Tex. App.—San Antonio 2018, pet. filed).

[14] 566 S.W.3d 294 (Tex. App.—San Antonio 2017, pet. granted).

[15] *See id.* at 294.

[16] *See id.*

[17] *See id.* at 296.

[18] *See id.* at 296.

See Gonzales v. Allstate Vehicle and Property Ins. Co., 2019 WL 699137 at *1 (S.D. Tex. 2019), *citing USAA Tex. Lloyds v. Menchaca*, 545 S.W.3d 479 (Tex. 2018).[19]

To the same effect is *United Neurology, P.A. v. Hartford Lloyd's Ins. Co.*, 101 F.Supp.3d 584 (S.D. Tex.) *aff'd*, 624 Fed. Appx. 225(5th Cir. 2015). The court explained the elements necessary to estop a breach of contract claim:

1. the existence and enforceability of an appraisal award;
2. the timely payment of the award by the insurer; and
3. the acceptance of the award by the insured;

See id. at 598. The court enforced an appraisal award, rejecting the insured's arguments that the award improperly made causation determinations. In enforcing the award, the court held that the timely payment negated common law and statutory claims for bad faith:

> Because Hartford's compliance with the Policy by payment of the appraisal award nullified United Neurology's contract claim, the foundation for its whole case, it also nullified United Neurology's extra-contractual claims, including the common law bad faith and fair dealing

United Neurology, P.A. v. Hartford Lloyd's Ins. Co., 101 F. Supp. 3d 584, 608 (S.D. Tex.), *aff'd*, 624 F. App'x 225 (5th Cir. 2015).

In *Cano v. State Farm Lloyds*, 276 F.Supp.3d 620 (N.D. Tex. 2017), the Northern District of Texas provided a detailed analysis of whether contractual and extra-contractual claims survive the timely payment of an appraisal award. The conclusion: they do not.

Like the other cases discussed in this review, this wind and hail case involved State Farm Lloyds' assessment, following its inspection of the insured property that covered losses, minus deductible and depreciation, amounted to a relatively small amount, in this case, some $1,300. State Farm Lloyds invoked appraisal and the resulting award established the amount of the loss at $ (9,040.37 (actual cash value). The insurer tendered payment of $6,725.11 (the ACV minus the deductible and depreciation). Defendant moved for summary judgment on the contractual and extra-contractual claims following the payment of the award. The insured argued that the breach of contract claim survived since it arises from the insurer's failure to include all covered damages in its estimate and payment, and for its specific denial of coverage for damages that were covered by the policy.[20]

The court held that the fact that the appraisal award is greater than the initial estimate of payment may not be used as evidence of breach of contract.[21] Regarding the assertion of common law and statutory bad faith claims, the court evaluated the claims in light of *Menchaca* and found no violations:

> It is undisputed that Plaintiffs had a right to receive benefits under the insurance policy, as Defendants conceded this point and paid the appraisal award. Recovery of extra-contractual damages that exceed policy benefits requires that the statutory violation or bad faith cause an injury that is independent from the loss of benefits. Hurst, 523 S.W.3d at 848 (citing *Menchaca*, —— S.W.3d at —— – ——, 2017 WL 1311752, at *11–12). Although *USAA Texas Lloyds Co. v. Menchaca* is not a case involving payment of an appraisal award, the Texas Supreme Court used it to "provide clarity regarding the relationship between claims for an insurance policy breach and Insurance Code violations." *Menchaca*, —— S.W.3d at ——, 2017 WL 1311752, at *3. In *Menchaca*, the court stated that "a successful independent-injury claim would be rare, and we in fact have yet to encounter one." *Id.* at ——, 2017 WL 1311752, at *12 (citing *Mid–Continent Cas. Co. v. Eland Energy, Inc.*, 709 F.3d 515, 521 (5th Cir. 2013)). The *Menchaca* court, however, recognized that "[t]his is likely because the Insurance Code offers procedural protections against misconduct likely to lead to an improper denial of benefits and little else." *Id.* "The *[Menchaca]* court acknowledged that it has further limited the natural range of injury by insisting that an 'independent injury' may not 'flow' or 'stem' from denial of policy benefits." Hurst, 523 S.W.3d at 848 (citing *Menchaca*, —— S.W.3d at ——, 2017 WL 1311752, at *12) (emphasis added).

[19] In *Quibodeaux v. Nautilus Ins. Co.*, the Fifth Circuit held that without a finding that the insured breached the contract of insurance, statutory and common law bad faith claims fail: "Quibodeaux cannot show a breach of contract, so he cannot establish the predicate to bring a bad faith claim. Nor does he argue that an exception to the rule applies. *See Republic Ins. Co. v. Stoker*, 903 S.W.2d 338, 341 (Tex. 1995)(summarizing exceptions). So these claims fail." *See Quibodeaux v. Nautilus Ins. Co.*, 655 F. App'x 984, 987 (5th Cir. 2016).

[20] *See Cano v. State Farm Lloyds*, 276 F.Supp.3d at 623.

[21] *See id.* at 626.

Cano v. State Farm Lloyds, 276 F.Supp.3d at 627. The court also noted, "Plaintiffs have not alleged, or even raised a genuine dispute of material fact, that any independent damages exist. The only 'extreme act' Plaintiffs reference is that 'Defendants' conduct during the investigation of the loss was extremely unreasonable and egregious.' *Cano v. State Farm Lloyds*, 276 F. Supp. 3d 620, 628 (N.D. Tex. 2017).

Likewise, it rejected the insured's contention that the payment of the award nonetheless preserved the ability to sue for violations of the Texas Prompt Payment Act. The argument (the very argument set forth in the Texas Supreme Court in *Barbara Technology*) was:

> Plaintiffs argue under that they are entitled to damages under the [Prompt Payment Act] for Defendants' delay in payment between the initial payments and the payment of the appraisal award.

The court's succinct response:

> Plaintiffs' [Prompt Payment Claim] fails as a matter of law because "[a] plaintiff may not seek Chapter 542 damages for any delay in payment between an initial payment and the insurer's timely payment of an appraisal award." *Quibodeaux v. Nautilus Ins. Co.*, 655 Fed. App'x. 984, 988 (5th Cir. 2016); *see also In re Slavonic Mut. Fire Ins. Ass'n*, 308 S.W.3d 556, 563 (Tex. App.–Houston [14th Dist.] 2010, orig. proceeding).

Cano v. State Farm Lloyds, 276 F. Supp. 3d 620, 628-29 (N.D. Tex. 2017).

2. The Fifth Circuit and Menchaca's Independent Injury Rule

In *Aldous v. Darwin National Assurance Company*, 889 F.3d 798 (5th Cir. 2018)(on rehearing), the Fifth Circuit stated that *Menchaca* "repudiated" the independent injury rule. Some context is necessary to understand that the court's actual holding may be correct, even if its terse statement concerning the repudiation of the independent injury rule is not.

Relevant here, *Aldous* involved a law firm's claim against its professional liability carrier for the latter's failure to pay fully expenses incurred in the successful defense of a malpractice claim.[22] In its original opinion, the Fifth Circuit, citing *Parkans International LLC v. Zurich Ins. Co.*, 299 F.3d 514 (5th Cir. 2002), held as follows:

> There can be no recovery for extra-contractual damages for mishandling claims unless the complained of actions or omissions caused injury independent of those that would have resulted from a wrongful denial of policy benefits.

See Aldous, 851 F.3d at 485. In other words, the court held, following *Parkans*, that policy benefits were not recoverable damages under the insurance code.

The troublesome language from *Parkans* was:

> "Moreover, the jury essentially found no tort injuries independent of the contract damages. There can be no recovery for extra-contractual damages for mishandling claims unless the complained of actions or omissions caused independent injury of those that would have resulted from a wrongful denial of policy benefits."

Parkans, 299 F.3d at 519. Essentially, *Parkans* required an independent injury for any action under the insurance code to be viable. But of note, the first issue decided in *Parkans* was whether the insured's claim was covered under the policy: it was not. *Id.* at 516–17.

On rehearing in *Aldous*, the Fifth Circuit stated the following:

> *Menchaca* repudiated the independent-injury rule, clarifying instead that "an insured who establishes a right to receive benefits under an insurance policy can recover those benefits as 'actual damages' under the statute if the insurer's statutory violation causes the loss of benefits." *Id.* Put simply, *Parkans's* categorical bar does not hold up in the face of *Menchaca*.

Aldous v. Darwin Nat'l Assurance Co., 889 F.3d 798, 799 (5th Cir. 2018).

Both *Parkans* and *Aldous* can be harmonized with *Menchaca* by going back to the text of *Menchaca*:

First, *Menchaca* does not repudiate the "independent injury rule". Rule 4 (the independent-injury rule listed in *Menchaca*) accurately states that in the absence of an insured's proof of entitlement to policy benefits, the insured may nonetheless recover damages for a statutory violation if the insured proves damages independent of contract benefits.[23]

[22] *See Aldous v. Darwin National Assurance Co.*, 851 F.3d 473 (5th Cir. 2017), opinion withdrawn on rehearing, 889 F.3d 798 (5th Cir. 2018)(on rehearing).

[23] *See Menchaca at* 499.

Menchaca allows for recovery statutory benefits if:

(a) the insured proves entitlement to benefits; or
(b) the insured proves that he has suffered an injury separate and independent of any claim for contract benefits.

So *Parkans* was correct insofar as it did not allow the insured to recover statutory damages when the underlying claim was not covered—and thus no lost policy benefits—and there was no evidence of an independent injury. But it was wrong to suggest a categorical bar on recovery of lost policy benefits under the insurance code. And so in turn *Aldous* was correct, as far as it goes, in stating that an insured who establishes a right to receive benefits under a policy can recover those benefits as actual damages under the statute if the insurer's statutory violation causes the loss of benefits. However, the opinion is misread if one believes that there is no "independent-injury rule" under *Menchaca*. Rather, the independent-injury rule is a last escape hatch for an insured to obtain damges under the insurance code if the insured is not entitled to policy benefits.

V. UNINSURED / UNDERINSURED MOTORIST INSURANCE AND *MENCHACA*

A. In re State Farm Mutual Automobile Ins. Co.

The San Antonio Court of Appeals dealt with an insured's argument that *Menchaca* "changed the evidentiary landscape" in uninsured / underinsured motorist cases by freeing insureds from having to prove a breach of contract before pursuing damages for extra-contractual violations."[24] *In re State Farm Mutual Automobile Ins. Co.* involved the insurer's demand that the insured's case for contract benefits under the UM / UIM policy be severed and abated from the insured's case for extra-contractual damages. As in many of these cases, the insured had not secured a judgment against the underlying tortfeasor (or against the insurer) establishing "legal entitlement" to benefits under the policy.[25] The trial court severed the contract and extra-contractual cases, but refused to abate the extra-contractual case.

In granting the insurer's petition for writ of mandamus, the San Antonio Court, through Chief Justice Sandee Marion, engaged in a thoughtful analysis of the insured's argument that *Menchaca* somehow dispensed with the "legal entitlement" rule articulated in *Brainard*. While it agreed with the proposition that the breach of contract cause of action is distinct from the extra-contractual cause of action, the court explained that this did not nullify *Brainard* or precedents limiting discovery on extra-contractual issues during the pendency of the contract case.[26]

B. Weber v. Progressive Cty. Mut. Ins. Co.

Recently, the Texas Supreme Court has passed on an insured's attempt to establish extra-contractual liability on a UM /UIM insurer without evidence of a binding settlement against the carrier or judgment against the tortfeasor in the underlying auto accident case. In *Weber v. Progressive County Mutual Ins. Co.*,[27] the insured settled her claim against the tortfeasor in the underlying auto case for the liability policy limit of $30,000. Claiming that she had over $150,000 in medical expenses, she then made a demand on her UIM insurer for $100,007, the entire UIM policy limits. The insurer offered $30,000.

Although she did not obtain a judgment against the tortfeasor establishing negligence, causation, and damages, the insured sued the UIM insurer for breach of contract and violations of the Texas Insurance Code as well as the Texas Deceptive Trade Practices Act. The trial court granted the insurer's special exceptions and allowed the insured an opportunity to amend her petition. She refused and the court dismissed her petition.[28]

On appeal, the insured argued for an exception to the Texas Supreme Court's holding requiring evidence of a judgment against the tortfeasor in the underlying auto case:

> Citing authority from other jurisdictions, Weber argues that under the exhaustion doctrine, a UIM claimant can show that he or she is legally entitled to UIM bodily injury benefits by . . . settlement or judgment exhausting the policy limits of all liability policies.

Weber v. Progressive Cty. Mut. Ins. Co., *supra* at *3 (Tex. App.--Dallas 2018, pet. denied).

The court of appeals rejected the so-called "exhaustion doctrine" and reaffirmed the vitality of the Supreme Court's holding in *Brainard v. Trinity Universal Insurance Co.*, 206 S.W.3d 809 (Tex. 2006):

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[24] *See In re State Farm Mutual Automobile Ins. Co.*, 553 S.W.3d 557, 560 (Tex. App.—San Antonio 2018)(orig. proceeding).

[25] *See id., citing*, Tex. Ins. Code Ann. § 1952.101(a)(West 2009)(insurance protections extend to those "legally entitled to recover" damages); and *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.809, 818 (Tex. 2006)(explaining that insurers' contractual obligation to pay benefits does not arise until liability and damages are determined).

[26] *See In re State Farm Mutual Automobile Ins. Co., supra* at 563.

[27] 2018 WL 564001 (Tex. App.—Dallas 2018, pet. denied).

[28] *See id.*

> The Supreme Court then concluded that the insured had failed to present a contract claim where the insured had not obtained a judgment against underinsured motorist prior to suing insurer for UIM benefits. . . A 'UIM insurer is under no contractual duty to pay benefits until the insured obtains a judgment establishing the liability and underinsured status of the other motorist.'. . . '[N]either a settlement with nor an admission of liability from the underinsured motorist establishes UIM coverage, because a jury could find that the underinsured motorist was not at fault or award damages that do not exceed the [underinsured motorist's] liability insurance.'

Weber v. Progressive Cty. Mut. Ins. Co., 8 WL 564001, at *2 (Tex. App.—Dallas 2018, pet. denied)(internal citations omitted).

VI. THE JURY CHARGE AND *MENCHACA*

The second major section of the *Menchaca* opinion dealt with the procedural aspects of the case: specifically the submission of a case in which the plaintiff-insured seeks to recover contract damages for an insurer's statutory violation.[29] In reversing and remanding the case for a new trial, the Supreme Court provided the bench and bar with guidance on the submission of cases involving breach of contract and extra-contractual causes of action to the jury. First, recall that the court was divided on the procedural effect of the jury's answers to the questions submitted: Three of the justices believed that the finding of no breach of contract foreclosed extra-contractual liability. Three justices believed that USAA waived any right to complain about any conflict in responses to the contract and extra-contractual question. The chief justice believed that there was an irreconcilably fatal conflict in the jury's answers. The result: a concurrence for remanding the case.[30]

We must carefully consider the following guidance provided by the court:

- To avoid an conflict between responses to questions regarding a breach of contract claim and a statutory-violation claim—ensure that the jury answers the entitlement-to-benefits question only; or
- Ask the jury first whether the insured was entitled to receive benefits under the policy and then condition the remaining questions on an affirmative answer to the first question; or
- Instruct the jury that, because the plaintiff-insured seeks only to recover benefits under the policy, defendant-insurer did not fail to comply with the policy and the plaintiff-insured incurred no damages as a result of any statutory violation unless the plaintiff-insured was entitled to benefits under the policy.

USAA Texas Lloyds Co. v. Menchaca, supra at 503.

A. *State Farm Lloyds v. Fuentes*

The only Texas Supreme Court case to consider these rules in light of *Menchaca* is *State Farm Lloyds v. Fuentes*.[31] This was a Hurricane Ike case. The Fuenteses filed a claim for property damage to the interior and exterior of his home. State Farm paid for the exterior damage, but concluded that the hurricane did not cause interior damage. The Fuenteses sued for breach of contract as well as common law and statutory bad faith. The jury found that both parties breached the insurance contract—but that Fuenteses breached first. The jury also found that State Farm committed fraud and breached the common law duty of good faith and fair dealing as well as the Texas Insurance Code.[32] The jury awarded $18,818.39 for State Farms' breach of contract and $18,818.39 for each of the Fuenteses' extra-contractual claims.[33]

The trial court disregard two of the jury's findings about the Fuenteses' breach of contract and rendered judgment for them awarding them $18,818.39 for amounts owed under the insurance policy, $27,000 for mental anguish damages, $7,527 in statutory penalties, and over $300,000 in attorneys' fees.[34] That is, the trial court allowed jury findings that State Farm breached contractual and extra-contractual duties to stand and then awarded damages for those breaches by disregarding the jury's findings that the Fuenteses breached the contract first.

State Farm argued in the Supreme Court that the jury's findings about the Fuenteses' breach of contract precluded State Farm's liability "contractual or otherwise" (an opinion, you will recall, that was shared by at least three justices of the Supreme Court in *Menchaca*). The Texas Supreme Court, citing the confusion surrounding the circumstances under which

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[29] *See USAA Texas Lloyds Co. v. Menchaca, supra* at 484-85.

[30] *See USAA Texas Lloyds v. Menchaca, supra* at 484-485.

[31] 549 S.W.3d 585 (Tex. 2018) (per curiam). While the court also discussed the "excessive demand doctrine," which generally holds that a creditor who makes an excessive demand upon a debtor is not entitled to attorney's fees for subsequent litigation required to recover the debt, that issue can be the subject of a separate paper! *See id.* at 588.

[32] *See id.* at 585.

[33] *See id.* at 585.

[34] *See id.* at 585.

an insured may recover policy benefits based on the insurer's violation of the Texas Insurance Code even though the jury failed to find that the insurer failed to comply with its obligations under the policy, remanded the case to the court of appeals for reconsideration in light of *Menchaca.*[35]

There is no indication yet what the court of appeals has done on remand; however, the take-away here is that one is well advised to consider the guidance provided by the *Menchaca* court when crafting jury questions involving contract and extra-contractual violations.

VII. ETHICAL CONSIDERATIONS

Insurance cases involve many of the same issues confronted by lawyers who try other types of civil cases. While not peculiar to cases dealing with *Menchaca* issues, I offer the following, based on my experience defending attorney grievance and malpractice issues, for your consideration in accepting and trying insurance cases involving wind & hail as well as uninsured motorist cases.

Conflicts of Interest

From the plaintiff's perspective, troublesome issues arise in accepting or "signing up" cases from referring attorneys or from public adjusters. With regard to referring sources, be it public adjusters or attorneys, remember that we are subject to very specific rules of conduct:

- The Texas Rules of Professional Conduct. Rule 1.06 prohibits representation in which there is a present or potential conflict of interest.[36]
- The rules also provide very strict provisions regarding the referral of cases among lawyers—note here particularly that the client must consent prior to the time of the association of additional counsel (with the identification of such counsel) and such consent must be confirmed in writing.[37]
- Note that the DTPA specifically prohibits a public adjuster from soliciting employment for an attorney or entering into a contract with an insured for the primary purpose of referring the insured to an attorney without the intent to actually perform the services customarily provided by a licensed public insurance adjuster.[38]
- Also, recall the prohibition against splitting a fee with an non-lawyer.[39]

From the defense perspective, conflicts of interest likewise may be present. Many times an adjuster for the insured is sued along with the carrier for violations of the Texas Insurance Code. The proscriptions of Rule

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[35] *See id.* at 587.

[36] The rule provides, in pertinent part:

In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

(1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or(2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client ***or to a third person or by the lawyer's or law firm's own interests.***

Tex. Disciplinary Rules Prof'l Conduct R. 1.06(b), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A(West 2019)(Tex. State Bar R. art. X, § 9).

[37] This rule provides, in pertinent part:

(f) A division or arrangement for division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is:

(i) in proportion to the professional services performed by each lawyer; or

(ii) made between lawyers who assume joint responsibility for the representation; and

(2) the client consents in writing to the terms of the arrangement **prior to the time of the association** or referral proposed, including:

(i) **the identity of all lawyers** or law firms who will participate in the fee-sharing agreement, and

(ii) whether fees will be divided based on the proportion of services performed or by lawyers agreeing to assume joint responsibility for the representation, and

(iii) **the share of the fee** that each lawyer or law firm will receive or, if the division is based on the proportion of services performed, the basis on which the division will be made; and

(3) the aggregate fee does not violate paragraph (a).

(g) Every agreement that allows a lawyer or law firm to associate other counsel in the representation of a person, or to refer the person to other counsel for such representation, and that results in such an association with or referral to a different law firm or a lawyer in such a different firm, **shall be confirmed** by an arrangement conforming to paragraph (f). Consent by a client or a prospective client without knowledge of the information specified in subparagraph (f)(2) does not constitute a confirmation within the meaning of this rule. No attorney shall collect or seek to collect fees or expenses in connection with any such agreement that is not confirmed in that way, except for:

(1) the reasonable value of legal services provided to that person; and

(2) the reasonable and necessary expenses actually incurred on behalf of that person.

Tex. Disciplinary Rule Prof'l Conduct R. 1.04(f).

[38] *See* TEX. BUS. & COM. CODE § 17.46.

[39] *See* Tex. Disciplinary Rule Prof'l Conduct R. 5.04.

1.06 apply to defense attorneys as well. Understand that there may be present or potential conflicts in representing both the adjuster and the insured:

- Are there allegations of negligent training or supervision of the adjuster that set up a conflict?
- Is the adjuster an employee of the insurer or an independent contractor?
- Should the insurer assume liability for the adjuster under §542A.006 of the Texas Insurance Code?[40]
- In the context of UM / UIM litigation, recall that any defense attorney hired to represent the carrier in the UM / UIM litigation should not also represent the tortfeasor in the underlying auto accident case.[41]

These are all matters that must be evaluated at the inceptions of the representation. The failure to do so may jeopardized the defense lawyer's ability to represent either party in the litigation.

VIII. CONCLUSION

The bulk of the courts that have applied *Menchaca* to date have not expanded its holdings. In the wind and hail property damage cases, the courts have held that *Menchaca* does not allow for the prosecution of a bad faith case following an insurer's timely payment of an appraisal award. Important cases addressing this very issue presently are pending in the Texas Supreme Court.

In the UM / UIM cases, the courts have resisted attempts to utilize *Menchaca* to undermine *Brainard's* holding that a judgment is required to demonstrate "legal entitlement" to benefits under a UM /UIM policy.

The guidance provided by the Supreme Court concerning the manner in which these breach of contract / bad faith cases are submitted is something the trial practitioner should consider carefully.

I do hope that this brief review will be of benefit to you in your insurance practice.

[40] *See* Tex. Ins. Code Ann. § 542A.006.

[41] *See* *Perez v. Kleinert*, 211 S.W.3d 468, 474-76 (Tex. App.—Corpus Christi 2006, no pet.), *citing*, *Allstate Ins. Co. v. Hunt*, 469 S.W.2d 151, 153 (Tex. 1971).

EXTRA-CONTRACTUAL CLAIMS AFTER *MENCHACA*

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16TH ANNUAL
ADVANCED INSURANCE LAW
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CHAPTER 9.2

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EXTRA-CONTRACTUAL CLAIMS AFTER *MENCHACA*

I. THE ROAD TO *MENCHACA*

When the Texas Supreme Court decided *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479 (Tex. 2018),[1] insurance companies and insureds alike were hopeful that the opinion would settle for once and for all a debate that had been ongoing for more than twenty years. Carriers had consistently argued that breach of contract or an "independent injury" is a prerequisite to bad faith liability, while policyholders had steadfastly contended that an insured need not recover for breach of contract or demonstrate an independent injury in order to succeed on a bad faith cause of action so long as the insured's claim was covered by the policy.

A. *Stoker*: General Rule and Two Exceptions

Both sides' arguments were grounded in a line of cases beginning with *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338, 341 (Tex. 1995).

Stoker was a car wreck case involving the Stokers' vehicle, another vehicle, and an unidentified vehicle that dropped a load of furniture on the highway. *See id.* at 339. The Stokers filed a claim under their uninsured/underinsured motorist coverage and Republic denied it because it concluded that Mrs. Stoker was at fault. *See id.* The Stokers sued Republic[2] for breach of contract, breach of the common law duty of bad faith and fair dealing, and statutory bad faith. *See id.*

The Stokers argued that Republic's stated reason for denying the claim – Mrs. Stoker's fault in the accident – was invalid. *See id.* Republic moved for summary judgment, raising for the first time a policy provision that predicated uninsured/underinsured motorist coverage on physical contact between the insured's vehicle and the unidentified vehicle. *See id.* The lack of coverage under the policy, Republic argued, meant that the Stokers could not maintain breach of contract or bad faith claims against Republic. *See id.*

The trial court granted summary judgment on the Stokers' contract claim but submitted the bad faith causes of action to the jury. *See id.* The jury found in favor of the Stokers on their common law and statutory bad faith claims and the trial court entered judgment on the verdict. *See id.* The court of appeals affirmed. *See id.* at 339-40.

Because the Stokers did not appeal the summary judgment on their breach of contract claim, the sole issue before the Supreme Court as to Republic was whether Republic was liable to the Stokers for denying their claim for an invalid reason – Mrs. Stoker's fault in the accident[3] – when there was a valid reason – lack of coverage – that Republic did not assert at the time of denial. *See id.* at 340.

The Court began its analysis by reciting the bad faith standard, noting that "[a]n insurer has a duty to deal fairly and in good faith with its insured in the processing and payment of claims," *id.* (citing *Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987)), and identifying the elements of a claim for breach of the duty of good faith and fair dealing as (1) "absence of a reasonable basis for denying or delaying payment of benefits under the policy;" and (2) a showing that "the carrier knew or should have known that there was not a reasonable basis for denying the claim or delaying payment of the claim," *id.* (citing *Aranda v. Insurance Co. of N. Am.*, 748 S.W.2d 210, 213 (Tex. 1988)).

The Court distinguished its holding in *Viles v. Security Nat'l Ins. Co.*, 788 S.W.2d 566 (Tex. 1990), upon which the court of appeals had relied in affirming the trial court. *See Stoker*, 903 S.W.2d at 340. The situation in *Viles*, the Court said, was different. *See id.* In that case, the insurer denied the claim before the insureds filed a proof of loss and before their time to do so had expired because it found the damage to the insured property was preexisting. *See id.* (citing *Viles*, 788 S.W.2d at 566-67). At trial, the evidence at trial established that the insured's claim was, in fact, covered, but the insurer still maintained its denial was proper because of the insureds' failure to submit a proof of loss. *See id.* (citing *Viles*, 788 S.W.2d at 567 n.2). The Court found in *Viles* that because the carrier denied the claim before the proof of loss was due, the failure to file a proof of loss could not have been a basis for denial of the claim. *See id.* (citing *Viles*, 788 S.W.2d at 567-68). Emphasizing that the reasonableness of the denial must be judged by the facts before the insurer at the time the claim was denied, the Court pointed out that even though Republic may have relied on a different, maybe invalid, reason for denying coverage, the facts demonstrating lack of coverage were in existence at the time the denial was made. *See id.* The question, the Court said, was "whether, based upon the facts existing at the time of the denial, a reasonable insurer would have

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[1] The Court initially issued a judgment and opinion in *Menchaca* on April 7, 2017. *See Menchaca*, 545 S.W.3d at 484. Almost exactly one year later, on rehearing, the Court withdrew its judgment and opinion and issued a new one. *See id.*

[2] The Stokers also sued the third-party adjuster hired by Republic to investigate the claim. *See Stoker*, 903 S.W.2d at 338. The Stokers' claims against the third-party adjuster are not discussed herein.

[3] The Court noted that the issue of whether Mrs. Stoker was actually at fault had not been determined by a jury and assumed, for purposes of its opinion, that Republic's assessment of fault was incorrect. *See Stoker*, 903 S.W.2d at 340.

denied the claim." *See id.* (citing *Aranda*, 748 S.W.2d at 213).

The Court turned to the Stokers' argument that because a breach of contract claim is independent from a bad faith claim, an insured may recover for a bad faith denial even if the claim is not covered. *See id.* Despite accepting the premise of the argument – that the two claims are independent of one another – the Court rejected the Stokers' conclusion. *See id.* at 340-41 (citing *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 17 (Tex. 1994)). Because Republic made the right decision, even if it was for the wrong reason, Republic could not be liable for bad faith. *See id.* at 341.

Next, the Court articulated the general rule and two exceptions/caveats for which the *Stoker* opinion would become oft-cited. *See id.* First, the Court said that "[a]s a general rule there can be no claim for bad faith when an insurer has promptly denied a claim that is in fact not covered." *Id.* (citations omitted). But, it continued, it did not "exclude . . . the possibility that in denying the claim, the insurer may commit some act, so extreme, that would cause injury independent of the policy claim." *Id.* (citing *Aranda*, 748 S.W.2d at 214). And, the Court cautioned that it should not "be understood as retreating from the established principles regarding the duty of an insurer to timely investigate its insureds' claims." *Id.*

Because the circumstances of the case implicated neither the independent injury rule nor the failure to investigate exception, the Court applied the general rule to the Stokers' claim, concluding that the claim failed because the Stokers could not demonstrate the absence of a reasonable basis for denying the claim. *See id.* The Court reversed the judgment of the court of appeals and rendered judgment in Republic's favor.[4] *See id.*

B. Courts' and Carriers' Expanded View of *Stoker*

After the Court decided *Stoker*, some courts – and insurance companies in litigation – cited the case not for its fairly straightforward holding that an insured cannot generally recover for bad faith when the claim is not covered, but for the broader, wholesale propositions that extra-contractual claims are *always* dependent on a breach of the insurance contract and/or that the *Stoker* rule applies even when the claim is *covered* unless one of the two exceptions applies. *See, e.g., United Neurology, P.A. v. Hartford Lloyd's Ins. Co.*, 101 F. Supp. 3d 584, 616 (S.D. Tex. 2015) (citing *Stoker* after stating that "there must be a breach of contract for an insured to prove a bad faith claim" in post-appraisal case where insurer did not dispute that there was covered damage to insured property); *Garcia v. Lloyds*, 514 S.W.3d 257, 276 (Tex. App.—San Antonio 2016, pet. denied) (discussing the *Stoker* rule in case involving post-appraisal summary judgment where coverage was not in dispute). Neither *Stoker* nor the Court's subsequent decisions supports this reading of the Court's *Stoker* holding.

C. *Stoker's* Progeny: The Supreme Court Never Alters Holding

Between the time it decided *Stoker* and the time it decided *Menchaca*, the Texas Supreme Court cited *Stoker* thirteen times. Not a single one of the Court's post-*Stoker*, pre-*Menchaca* opinions altered the key holding in *Stoker*: that subject to two exceptions, an insurer generally has no bad faith liability where the claim is not covered. In fact, in at least one case, the Court indicated that its holding in *Stoker* was even more limited than it appeared on its face. *See Liberty Nat'l Fire Ins. Co. v. Akin*, 927 S.W.2d 627, 630 (Tex. 1996).

Decided the year after *Stoker*, *Akin* was the first case in which the Court engaged in meaningful discussion of its *Stoker* holding. It involved a homeowner's claim that Liberty denied outright for lack of coverage. *See id.* at 628. The insured sued for breach of contract, common law bad faith, and statutory bad faith. *See id.* Liberty moved to sever and abate the contract claim from the extra-contractual causes of action. *See id.* The trial court denied the motion and Liberty filed a petition for writ of mandamus. *See id.* When the court of appeals denied the petition, Liberty sought mandamus relief in the Supreme Court. *See id.*

Liberty argued, among other things, that in light of the Court's holding in *Stoker*, the trial court should have required the insured to obtain a finding of liability for breach of contract before proceeding with her bad faith claims. *See id.* at 629. In addressing this argument, the Court discussed its holding in *Stoker*, pointing out the independence of coverage and bad faith claims and citing *Stoker* for the proposition that in most circumstances, an insured cannot prevail under a bad faith theory without showing breach of contract. *See id.* (citing *Stoker*, 903 S.W.2d at 341; *Moriel*, 879 S.W.2d at 17).

The Court held, however, that the trial court did not abuse its discretion when it declined to sever and abate the bad faith claims. *See id.* at 630. The Court reasoned, in pertinent part, that *Stoker* did not hold that a finding for the insurer on the coverage issue bars all bad faith claims. *See id.* (citing *Stoker*, 903 S.W.2d at 342). Rather, it merely held that failure to prevail on coverage precludes recovery based on bad faith *denial* of a claim.

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[4] Two justices concurred in the judgment but did not join in the majority's opinion. *See id.* at 341-45. The concurrence expressed concern that the Court's opinion chipped away at the duty of good faith, opining that the evidence in the case supported the jury's finding that Republic acted in bad faith by failing to properly investigate the Stokers' claim. *See id.* at 342-43. But, because record did not contain evidence of damages caused by the improper investigation, the concurring justices joined in the judgment. *See id.* at 345.

See id. (citing *Stoker*, 903 S.W.2d at 342); *see also In re Tex. Workers' Comp. Ins. Fund*, 997 S.W.2d 247, 247 n.2 (Tex. 1999) (characterizing *Stoker* in a parenthetical as standing for the proposition that an "insured must show a right to benefits as a predicate to a bad faith claim for denial of those benefits"). Because the insured had not limited her bad faith allegations to bad faith denial of her claim, Liberty's argument lacked merit. *See id.*

In sum, *Akin* told us two things. First, it reiterated that the *Stoker* rule applies in the context of claims that are *not covered*. Second, and perhaps more importantly, it told us that the *Stoker* rule was limited to bad faith *denial* of a claim and was not to be interpreted as a bar to recovery for other acts by an insurer that amount to bad faith at common law or by statute.

In 1999, the Court decided *Provident Am. Ins. Co. v. Castaneda*, 988 S.W.2d 189 (Tex. 1999). The plaintiff in *Castaneda*, *see id.* at 191, sued Provident American for statutory bad faith following the denial of her claim for benefits under a health insurance policy. The jury found in the plaintiff's favor, and the court of appeals affirmed (except as to an interest penalty). *See id.* at 192. The Supreme Court found that there was no evidence to support the jury's finding that Provident American wrongfully denied the claim. *See id.* at 198. In its analysis of the remaining jury findings, the Court reiterated the *Stoker* rule and exceptions thereto, discussing them in the context of Castaneda's non-covered claim. *See id.* at 198-99.

This discussion is particularly instructive in understanding the purpose and proper application of the independent injury rule. The Court applied *Stoker* to dispose of Castaneda's extra-contractual claims because she could not show injury independent of the loss of policy benefits – *which she was not entitled to recover under the policy* – resulting from an extreme act or faulty investigation. *See id.* at 197-99. If she was not entitled to recover policy benefits because they were not covered, she was not entitled to recover them some other way; in order to recover damages, she would have to show some independent injury. *See id.* The Court highlighted the fact that the *Stoker* rule prevents an insured from "back-dooring" its way to recovering policy benefits via extra-contractual claims when the insurer was not obligated to pay them under the policy because the claim was not covered. *See id.* at 197-99.

Although it did not cite *Stoker*, the Court's holding in the 2010 case, *State Farm Lloyds v. Page*, 315 S.W.3d 525, 532 (Tex. 2010), is markedly illustrative of the limitations of the *Stoker* rule. In that case, the Court found that the policy at issue covered mold damage to the contents of Page's home but did not cover mold damage to the dwelling. *See id.* at 530-31. Having made these findings, the Court turned to the viability of the extra-contractual claims. *See id.* at 532. Unsurprisingly, the Court reiterated its prior holdings, stating: "When the issue of coverage is resolved in the insurer's favor, extra-contractual claims do not survive. There can be no liability under . . . the Insurance Code if there is no coverage under the policy. Similarly, to the extent the policy affords coverage, extra-contractual claims remain viable." *Id.* (emphasis added). Consistent with these well-settled principles, the Court held:

> [T]o the extent Page's extra-contractual claims are based on State Farm's denial of coverage for mold damage to her dwelling, they cannot survive. To the extent Page's extra-contractual claims are based upon denial of her claim for mold damage to the contents of her home, we remand them to the trial court for further proceedings.

Id.

The bottom line is that the Court's characterization of the *Stoker* rule and its exceptions as applying only in the context of claims that are not covered was unwavering from the time it decided *Stoker* through its 2018 *Menchaca* opinion, which is discussed in detail below. *See JAW The Pointe, LLC v. Lexington Ins. Co.*, 460 S.W.3d 597, 602, 610 (Tex. 2015) ("we agree with the court of appeals that the policy . . . excluded coverage for JAW's losses, and JAW therefore cannot recover against Lexington on its statutory bad faith claims"); *Chrysler Ins. Co. v. Greenspoint Dodge of Houston, Inc.*, 297 S.W.3d 248, 253 (Tex. 2009) (articulating the *Stoker* rule in the context of a claim that was not covered); *Progressive County Mut. Ins. Co. v. Boyd*, 177 S.W.3d 919, 922 (Tex. 2005) (per curiam) (holding that insured's bad faith claims were "negated by the determination in the breach of contract claim that there was no coverage" and recognizing that the Court had "left open the possibility that an insurer's denial of a claim it was not obliged to pay might nevertheless be in bad faith if its conduct was extreme and produced damages unrelated to and independent of the policy claim"); *American Motorists Ins. Co. v. Fodge*, 63 S.W.3d 801, 804 (Tex. 2001) ("In *Republic Insurance Co. v. Stoker,* we did not exclude the possibility that an insurer's denial of a claim it was not obliged to pay might nevertheless be in bad faith if its conduct were 'extreme' and produced damages unrelated to and independent of the policy claim.").

II. *MENCHACA*: SUPREME COURT SETS OUT TO CLARIFY THE INTERPLAY BETWEEN CONTRACT CLAIMS AND EXTRA-CONTRACTUAL CLAIMS

In 2014, the Corpus Christi Court of Appeals decided *USAA Tex. Lloyd's Co. v. Menchaca*, No. 13-13-00046-CV, 2014 WL 3804602 (Tex. App.—Corpus Christi July 31, 2014), *rev'd*, 545 S.W.3d 479 (Tex. 2018). Three years later, in April 2017, the Texas

Supreme Court issued an opinion. *See Menchaca*, 545 S.W.3d at 484. In April 2018, on rehearing, the Court withdrew its judgment and opinion and issued a new one. *See id.*

Menchaca was a first party insurance dispute. *See id.* at 485. USAA's adjusters found covered damage to Menchaca's property following Hurricane Ike but did not issue payment because they found that the repair cost was under deductible. *See id.* At trial, the jury answered "No" to the breach of contract question but answered "Yes" to the question whether USAA violated the Insurance Code by failing to pay her claim without conducting a reasonable investigation and awarded Menchaca damages of $11,350, representing the difference between the amount it should have paid Menchaca for her Ike damages and the amount it actually paid. *See id.* at 485-86. The trial court disregarded the jury's answer to the breach of contract question and entered judgment in Menchaca's favor based on the jury's answers to the statutory bad faith liability and damages questions. *See id.* at 486.

A. Court of Appeals

USAA appealed to the Corpus Christi Court of Appeals. *See generally Menchaca*, 2014 WL 3804602. USAA, relying on *Page*, argued that because the jury found USAA had not breached the insurance contract, Menchaca's extra-contractual claims must fail as a matter of law. *See id.* at *5. USAA contended that the jury's finding of no breach was tantamount to a finding that the policy did not cover Menchaca's property damage. *See id.* The court disagreed for two reasons. *See id.*

First, the court pointed out that the extra-contractual claims at issue in *Page* were limited to claims under the predecessor statute to Subchapter B of Chapter 542 of the Texas Insurance Code (commonly referred to as the Prompt Payment of Claims Act). *See id.*; *Page*, 315 S.W.3d at 532 & n.3. Of course, the court observed, prompt payment claims "are naturally precluded when there is a finding of no coverage – after all, it would be absurd to allow a plaintiff to recover damages on the basis that the insurer failed to promptly pay a claim if the claim was not covered by the policy in the first place." *See Menchaca*, 2014 WL 3804602, at *5. On the other hand, the court said, Section 541.060 of the Insurance Code deals with unfair settlement practices including reasonable investigations. *See id.*; TEX. INS. CODE § 541.060. Nothing in the *insurance contract* required the insurance company (1) to conduct a reasonable investigation before denying a claim; or (2) "to cover all damages that would be identified by a reasonable investigation." *Menchaca*, 2014 WL 3804602, at *5. Consequently, the court held, "section 541.060 thus imposes a duty on an insurer, above and beyond the duties established by the insurance policy itself, to conduct a reasonable investigation prior to denying a claim. It follows that USAA could have fully complied with the contract even if it failed to reasonably investigate Menchaca's claim." *Id.* at *5 (emphasis added).

Second, the court rejected USAA's argument because even assuming *arguendo* that USAA was correct that a claim for unfair settlement practices is barred when there is a finding of no coverage, the jury's finding of no breach of contract could have been based on something other than coverage. *See id.* at *6. So, it was never "established" that the policy did not cover Menchaca's damages. *See id.*

For those reasons, the Court found *Page* distinguishable and concluded that "Menchaca's extra-contractual claims were not barred as a result of the jury's finding that USAA did not fail to comply with the policy." *Id.*

USAA also argued in the court of appeals that the trial court erred in disregarding the jury's finding of no breach of contract. *See id.* The court likewise rejected this argument, finding in pertinent part that the jury's finding of no breach of contract and its finding of bad faith "did not compel the rendition of different judgments." *Id.* at *7.

The *Menchaca* court also addressed USAA's argument that an insured may not recover extra-contractual damages unless the acts or omissions complained of caused some injury independent of the injury resulting from a wrongful denial of policy benefits. *See id.* at *8 (citations omitted). The court pointed out that an allegation of failure to perform a reasonable investigation is not a claim for breach of contract; rather, it is based on a statutory tort duty. *See id.* (citations omitted). Citing *Stoker* and *Akin*, the court recognized the "general rule" that "in most circumstances, an insured may not prevail on a bad faith claim without first showing that the insurer breached the contract." *Id.*

USAA had cited several cases "where an insured's extra-contractual claims were barred as a matter of law because there was no evidence of damages other than wrongfully withheld policy benefits." *Id.* (citations omitted). But the court found these cases "distinguishable." *Id.* Most of them, the court observed, involved situations where the claim was not covered, citing the cases and their holdings. *See id.* (citations omitted).

The court specifically addressed *United Servs. Auto. Ass'n v. Gordon*, 103 S.W.3d 436 (Tex. App.—San Antonio 2002, no pet.). In that case, the jury found that the defendant breached the policy and violated the insurance code, awarding identical amounts of damage under both the contractual and extra-contractual theories. *See Gordon*, 103 S.W.3d at 442. The Texas Supreme Court reversed the award of extra-contractual damages, holding that USAA could not be liable for them because the plaintiffs did not prove damages

separate and apart from those stemming from denial of the claim. *See id.* But that case, the *Menchaca* court said, was different; the jury had already found breach of contract and awarded damages. *See Menchaca*, 2014 WL 3804602, at *8. An award of extra-contractual damages absent any evidence of damages beyond policy benefits would have constituted an impermissible double recovery under the one satisfaction rule. *See id.* (citing *Gordon*, 103 S.W.3d at 442; *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 390 (Tex. 2000)).

Next, the court discussed *Castaneda*, which USAA had also cited. *See Menchaca*, 2014 WL 3804602, at *8. Noting its citation of the general rule in *Stoker*, the court distinguished it, pointing out that in *Castaneda*, it was "established" that the policy did not cover the claimed damages. *See id.* (citing *Stoker*, 903 S.W.2d at 339). The court reiterated that in *Menchaca*, it was not "established" that the claim was not covered; the jury could have found that USAA complied with the policy based on for reasons other than lack of coverage. *See id.* Importantly, USAA did not deny coverage in *Menchaca*; it had stipulated to it. *See id.*

Under the "unique circumstances" of *Menchaca*, USAA did not breach the policy, but policy benefits were the correct measure of damages caused by its violation of the insurance code. *See id.* at *9 (citations omitted). Section 541 provides that a plaintiff may recover actual damages for a violation of that subchapter, and unfair refusal to pay an insured's claim causes damages as a matter of law in at least the amount of the wrongfully withheld policy benefits. *See id.* (citing TEX. INS. CODE § 541.152(a); *Vail v. Texas Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129, 136 (Tex. 1988)).

After discussing and rejecting USAA's independent injury rule argument, the court concluded its analysis as follows:

> USAA has not directed us to any cases, nor can we find any, involving a situation such as this one where (1) the insurer complied with the policy, but (2) nonetheless violated the insurance code, and (3) the insurer *would have been* contractually obligated to pay policy benefits had the insurer complied with the insurance code.

Id. at *9.

B. Supreme Court

1. Five Rules

On appeal to the Texas Supreme Court, USAA again relied on *Castaneda*, citing its holding that a carrier's failure to investigate is not a basis for obtaining policy benefits. *See Menchaca*, 545 S.W.3d at 487. By contrast, Menchaca argued that the jury's findings that USAA violated the Insurance Code and that the violation resulted in a loss of policy benefits supported the award. *See id.* She relied primarily on *Vail*, wherein the Court said that the unfair refusal to pay a claim "causes damages as a matter of law in at least the amount of the policy benefits wrongfully withheld." *See id.* at 487 (citing *Vail*, 754 S.W.2d at 136). Menchaca argued that she could recover policy benefits as damages resulting from the insurer's statutory violation because she only had to show that the policy "covered" those losses, not that the carrier breached the contract. *See id.* at 486-87. In other words, the parties' arguments in *Menchaca* parroted those that insurance companies and policyholders made for years prior to *Menchaca*: Insurers contended that an insured cannot recover for bad faith absent a breach of contract or independent injury, while policyholders argued that the general rule announced in *Stoker* and its exceptions only applied when the claim was not covered by the policy.

The Supreme Court readily acknowledged that there had been confusion over this area of the law and, in particular, over a perceived conflict between *Castaneda* and *Vail*. *See id.* The Court recognized that much of the confusion in these two positions stems from the Court's historic use of the terms "breach" and "coverage" interchangeably. *See id.* at 494; *compare Akin*, 927 S.W.2d at 629 ("...in most circumstances, an insured may not prevail on a bad faith claim without first showing that the insurer breached the contract"), *with Stoker*, 903 S.W.2d at 341 ("As general rule there can be no claim for bad faith when an insurer has promptly denied a claim that is in fact not covered").

In *Menchaca*, the Court set out to harmonize the strands of case law on this issue by articulating rules that explain the relationship between a claim for breach of an insurance policy and a claim for statutory bad faith and emphasizing that the nexus between the two was and always has been on whether the insured has a "right to benefits" under the policy. *See Menchaca*, 545 S.W.3d at 484, 490-503. Indeed, the Supreme Court explicitly acknowledged the distinction between breach and coverage, emphasizing that "what matters for purposes of causation under the statute is whether the insured was entitled to receive benefits under the policy," *i.e.*, whether the loss at issue was *covered*. *Id.* at 494.

a. General Rule

"The general rule is that an insured cannot recover policy benefits for an insurer's statutory violation if the insured does not have a right to those benefits under the policy." *Id.* at 490. This, the first rule set forth in *Menchaca*, is a rule of simple logic: if the policyholder was never entitled to policy benefits, *i.e.*, the claim was not covered, the insurer's statutory violation cannot, as a general matter, "cause damages in the form of policy benefits that the insured has no right to receive under the

policy." *Id.* at 493. Indeed, this was the exact situation in *Stoker*.

In discussing this first rule, the *Menchaca* Court explained that failure to show breach of contract is not dispositive of a policyholder's extra-contractual claims: "While an insured cannot recover policy benefits for a statutory violation unless the jury finds that the insured had a right to the benefits under the policy, *the insured does not* also *have to prevail on a separate breach-of-contract claim based on the insurer's failure to pay those benefits*." *Menchaca*, 545 S.W.3d at 494 (emphasis added). In other words, what the insured must demonstrate is ***coverage***, not a breach of contract.

b. Entitled-to-Benefits Rule

The second rule the Court articulated – directly from its precedent – is that "an insured who establishes a right to receive benefits under an insurance policy can recover those benefits as 'actual damages' under the statute if the insurer's statutory violation causes the loss of the benefits." *Id.* at 495. This, a corollary to the general rule, is exactly what the Court recognized in *Vail*. *See id.*

The insureds in *Vail* sued their insurer for bad faith *only* and not for breach of contract. *See id.* (citing *Vail*, 754 S.W.2d at 130). The jury found that Farm Bureau violated the bad faith statute and committed common law bad faith, awarding policy limits, treble damages, attorneys' fees, and prejudgment interest. *See id.* The insurer argued that the insureds could not recover under a bad faith theory because policy benefits could only be breach of contract damages and not bad faith damages. *See id.* (citing *Vail*, 754 S.W.2d at 136). The Court said:

> We rejected that argument and held that "an insurer's unfair refusal to pay the insured's claim causes damages as a matter of law in at least the amount of the policy benefits wrongfully withheld." We explained that the insureds "suffered a *loss* ... for which they were entitled to make a claim under the insurance policy," and that loss was "transformed into a legal *damage*" when the insurer "wrongfully denied the claim." . . . "That damage," we held, "is, at minimum, the amount of policy proceeds wrongfully withheld by" the insurer. Because the Insurance Code provides that the statutory remedies are cumulative of other remedies, we concluded that the insureds could elect to recover the benefits under the statute even though they also could have asserted a breach-of-contract claim.

Id. (internal citations omitted).

The Court emphasized in *Menchaca* that *Vail* is still good law, distinguishing it from *Castaneda* because in *Vail*, there was no dispute about whether the loss was ***covered*** while in *Castaneda*, there was no allegation or finding of ***coverage***. *See id.* at 496-97. The Court concluded this portion of the *Menchaca* opinion as follows:

> In short, *Stoker* and *Castañeda* stand for the general rule that an insured cannot recover policy benefits as damages for an insurer's extra-contractual violation if the policy does not provide the insured a right to those benefits. *Vail* announced a corollary rule: an insured who establishes a right to benefits under the policy can recover those benefits as actual damages resulting from a statutory violation. We clarify and affirm both of these rules today.

Id. at 497.

c. Benefits-Lost Rule

The third rule announced in *Menchaca* is that "an insured can recover benefits as actual damages under the Insurance Code even if the insured has no right to those benefits under the policy, *if the insurer's conduct caused the insured to lose than contractual right*." *Id.* The Court said that it has recognized this principle in three basic contexts. *See id.* at 497-98.

First, the Court explained, it has recognized that an insurer violates the Insurance Code when it represents to the insured that the policy provides coverage that it does not provide and the insured is adversely affected or injured by its reliance on the insurer's misrepresentation. *See id.* at 497 (citing *Royal Globe Ins. Co. v. Bar Consultants, Inc.*, 577 S.W.2d 688, 694 (Tex. 1979)). Even though the policy does not afford the insured a *contractual* right to receive benefits, the misrepresentation resulting in the loss of benefits causes damages in the amount of benefits the insured reasonable believed it was entitled to receive. *See id.* at 497-98 (citing *Royal Globe*, 577 S.W.2d at 694). The Court cited a case where an insured recovered full coverage under a health policy because the insured relied on an agent's representation that the policy offered full coverage for preexisting conditions when it did not. *See id.* (citing *Kennedy v. Sale*, 689 S.W.2d 890, 891-92 (Tex. 1985)).

The second context in which the benefits-lost rule might come into play, the Court explained, involves claims based on waiver or estoppel. *See id.* at 498. While it is true that waiver and estoppel cannot be used to rewrite a policy to provide coverage it did not originally provide, if the insurer violates the Insurance Code and the statutory violations prejudice the insured, the insurer may be estopped from denying the claim that would be payable had the risk been covered. *See id.* (citing *Ulico*

Cas. Co. v. Allied Pilots Ass'n, 262 S.W.3d 773, 775 (Tex. 2008)).

Finally, the Court said that the benefits-lost rule might apply when the insurer's violations caused the policy not to cover losses that it would have otherwise covered. *See id.* at 498. The Court used *JAW The Pointe* as an example. *See id.* That case, the Court explained, was a Hurricane Ike case involving a policy that covered 300 otherwise unrelated apartment complexes with a limit of $25 million per occurrence. *See id.* (citing *JAW The Pointe*, 460 S.W.3d at 602). When JAW The Pointe disputed the denial of coverage as to some of the losses and filed suit, Lexington continued paying claims filed by other covered properties until it exhausted the $25 million per occurrence limit. *See id.* (citing *JAW The Pointe*, 460 S.W.3d at 601). The Court ultimately found in that case that JAW The Pointe's loss was not covered by the policy even before Lexington paid limits. *See id.* at 499 (citing *JAW The Pointe*, 460 S.W.3d at 610). But, it acknowledged that if Lexington's statutory bad faith had caused JAW The Pointe to lose its contractual right to benefits under the policy, *i.e.*, if the loss *had* been covered by the policy, JAW The Pointe could have recovered policy benefits under a bad faith theory. *See id.* (citing *JAW The Pointe*, 460 S.W.3d at 610). "Put simply," the Court concluded, "an insurer that commits a statutory violation that eliminates or reduces its contractual obligations cannot then avail itself of the general rule." *Id.*

d. Independent Injury Rule

The fourth rule announced in *Menchaca* affirmed what insureds had argued is the law since *Stoker*: that the independent injury rule is merely an exception to the general rule that there can be no bad faith liability where there is no right to benefits, *i.e.*, where the claim is not covered. *See id.* at 499-500. The Court said: "[I]f an insurer's statutory violation causes an injury independent of the insured's right to recover policy benefits, the insured may recover damages for that injury ***even if the policy does not entitle the insured to receive benefits***." *Id.* at 499 (emphasis added). This exception recognizes that because an insurer's extra-contractual liability is indeed "distinct" from its liability under an insurance policy, even if the claim is not covered, the insurer may still be liable for damages if it "commit[s] some act, so extreme, that would cause injury independent of the policy claim." *Id.*

The court then explained two aspects of the independent injury rule. *See id.* First, the rule only entitles the policyholder to extra-contractual damages if those damages are "truly independent of the insured's right to receive policy benefits." *Id.* Second, the independent injury rule does not permit the insured to recover "any damages beyond policy benefits ***unless*** the violation causes an injury that is independent from the loss of the benefits." *Id.* (emphasis added). The Court acknowledged that it has yet to encounter such a case but did not foreclose the possibility that one could arise. *See id.* at 500.

In other words, an independent injury is a prerequisite to statutory bad faith liability ***only*** where the claim is ***not covered*** but the insurer nonetheless committed some act that injured the insured.

e. No-Recovery Rule

The fifth and final rule announced in *Menchaca* "is simply the natural corollary to the first four rules: An insured cannot recover *any* damages based on an insurer's statutory violation unless the insured establishes a right to receive benefits under the policy or an injury independent of a right to benefits." *Id.* at 500 (citations omitted).

2. How to Submit a Claim for Policy Benefits to a Jury

Following its articulation of the five rules, the Court undertook – in response to USAA's request for "guidance" – a discussion of how parties should submit claims for policy benefits.[5]

The Court cautioned that it could provide only limited guidance because each case is different but observed that the question whether an insurer breached the policy is not necessarily dependent on whether it paid the proper amount of benefits. *See id.* at 502. An insurer may fail to comply with the insurance contract even though it pays the proper amount of benefits, and likewise it may comply with the insurance contract even if it fails to pay the proper amount of benefits. *See id.* at 502.

Nonetheless, the Court noted that for statutory violation claims, the Pattern Jury Charge Committee recommends a question asking whether the insurer engaged in an unfair or deceptive act or practice that caused damages to the insured, along with an instruction that defines unfair or deceptive act or practice. *See id.* at 502. Then, the Court said, a second question is required – conditional on the first – that asks the jury to determine the amount of damages caused by the unfair or deceptive act or practice. *See id.* The Court said that it generally agrees with the PJC Committee's recommendations, but noted that its holdings in *Menchaca* "clarified" that to establish causation as damages on a statutory bad faith claim, the jury must find that the violation caused the insured to lose benefits she was otherwise entitled to receive under the policy. *See id.* at 503. "A proper jury

[5] Neither this discussion nor any discussion of how such claims should be charged appeared in the Court's original *Menchaca* opinion.

submission must include an appropriate question or instruction to establish that element." *Id.*

The Court then recognized, as USAA pointed out, that submitting both breach of contract and statutory violation claims in the same jury charge creates the risk of conflicting answers. The Court observed,

> If the jury's answers to questions on one liability theory establish that the insured was not entitled to any policy benefits or was paid all policy benefits to which she was entitled, an answer on the other liability theory that the insured was entitled to benefits would create an irreconcilable and even fatal conflict.

Id. (citing *Arvizu v. Estate of Puckett*, 364 S.W.3d 273, 276 (Tex. 2012)). To avoid such a conflict, the Court said, a trial court should ensure that the jury only answers the entitled-to-benefits question once. *See id.* Although it offered some examples of how the trial court might have charged the jury in Menchaca's case, the Court stopped short of making a definitive pronouncement, opting to leave it to the parties and the trial judge to decide how best to submit Menchaca's claims to the jury on remand. *See id.*

3. Application of the Rules to Menchaca's Claims Against USAA

Next, the Court engaged in a lengthy analysis of Menchaca's claims vis-à-vis the governing rules. *See id.* at 503-21.

The Court began its analysis with an acknowledgment that the parties had disputed the effect of the jury's answers to the questions in the verdict form since the verdict was returned. *See id.* at 504. The Court said:

> Relying on the jury's answer to Question 1, USAA has contended that Menchaca cannot recover any policy benefits for a statutory violation because she did not prevail on her breach-of-contract claim. Meanwhile, Menchaca has consistently argued that she can recover the award of policy benefits even though she did not prevail on her breach-of-contract claim because the jury found in answer to Questions 2 and 3 that USAA violated the statute and the violation caused Menchaca to incur damages in the form of policy benefits that USAA "should have paid" to Menchaca.

Id. The Court said that USAA's argument overlooked the fact that an insured need not prevail on a breach of contract claim in order to recover policy benefits for statutory bad faith. *See id.* The Court reiterated that Menchaca could prevail if she established a statutory violation that resulted in her loss of benefits to which she was entitled under the Policy. *See id.* It pointed out that Menchaca contended that she obtained those findings through Questions 2 and 3. "But if USAA 'should have paid' policy benefits to Menchaca and did not, then the jury's answers to Questions 2 and 3 conflicted with the jury's answer to Question 1 because USAA necessarily failed to comply with the policy." *Id.*

The trial court, the Supreme Court observed, noted this conflict before dismissing the jury, but both parties took the position that there was no conflict. *See id.* The parties maintained their positions in this regard. *See id.* Ultimately, the Court recounted, the trial court disregarded the jury's answer to Question 1 and entered judgment for Menchaca based on the jury's answers to Questions 2 and 3. *See id.*

All eight participating members of the Court[6] unanimously agreed that this was error. *See id.* But the Court went further. The Court expounded in great detail on the procedural and error preservation aspects of its opinion. *See generally id.* The Court followed its pronouncement that the trial court erred in disregarding the answer to Question 1 by noting that a majority of the Court concluded that the answer to Question 1 created an irreconcilable and fatal conflict with the answers to Questions 2 and 3 and that a plurality concluded that a judgment based on a conflict does not constitute fundamental error and therefore must be preserved by objection before the Court discharges the jury. *See id.* at 504-05. Because the error was not preserved in Menchaca's case, the Court said, it could not reverse the trial court's judgment on that ground. However, the Court continued, "in light of the parties' obvious confusion regarding our precedent and the clarifications we provide today, the plurality agrees that we should reverse the judgment and remand for a new trial in the interest of justice." *Id.* at 505.

The Court rejected USAA's argument that its finding that the trial court should not have disregarded the answer to Question 1 mandated a take-nothing judgment. *See id.* at 506. In so arguing, the Court said, USAA was ignoring the jury's answers to Questions 2 and 3, in which the jury found that USAA's statutory violation caused Menchaca damages representing the difference between what USAA should have paid her for her Hurricane Ike damages and what it actually paid. *See id.* This finding, the Court said, "necessarily constitute[d] a finding that Menchaca was entitled to

[6] Justice Johnson did not participate. *See Menchaca*, 545 S.W.3d at 485.

receive those benefits under the policy." *Id.* The bottom line was that "Menchaca obtained two conflicting findings: one, in Question 1, that she did not have the right to receive policy benefits, and two, in Question 3, that she *did* have the right to policy benefits." *Id.* at 507. The Court "therefore conclude[d] that the jury's answer to Question 3 necessarily constitute[d] a finding that Menchaca was entitled to receive those benefits under the policy." *Id.*

4. "Where Do We Go From Here?"

Having decided that the jury's answers to Questions 2 and 3 amounted to a finding that Menchaca was entitled to policy benefits, the Court essentially turned to the question: "where do we go from here?" *See id.* at 509.

a. Fatal Conflict

The Court observed that a trial court is tasked with reconciling conflicting jury findings if reasonably possible, but unequivocally stated that in Menchaca's case, "the findings are irreconcilable." *See id.* The findings being, on the one hand, the jury's "No" answer to the breach of contract question and, on the other hand, its "Yes" answer to the statutory violation question.

The Court pronounced that when, as in Menchaca's case, "an irreconcilable conflict involves one jury answer that would require judgment in favor of the plaintiff and another that would require a judgment in favor of the defendant, the conflict is fatal." *Id.* (citing *Little Rock Furniture Mfg. Co. v. Dunn*, 222 S.W.2d 985, 991 (Tex. 1949)).

> Here, both questions address the decisive issue—whether USAA failed to pay benefits Menchaca was entitled to under the policy. Without Questions 2 and 3, the jury's answer to Question 1 would require a judgment in USAA's favor. But without Question 1, the jury's answers to Questions 2 and 3 would require a judgment in Menchaca's favor. We thus conclude that the answers created a fatal conflict.

Id. at 509-10. But this was not the end of the Court's inquiry. *See id.* at 510.

b. Fundamental Error

The Court moved to the next step in its "where do we go from here?" analysis. Recognizing that a trial court should not enter judgment based on a verdict that contains a fatal conflict until the conflict is resolved, the Court pondered whether it could even consider the trial court's error given that neither party objected to the conflict. *See id.*

Citing the general rule that an appellate court may not consider an error that was not properly raised in the absence of a recognized exception, the Court considered application of the fundamental-error doctrine. *See id.* at 510-15. The doctrine is an exception to the preservation-of-error requirement that allows the trial court to review error that was not properly raised in the trial court or assigned on appeal. *See id.* at 510. After a discussion of the evolution of the doctrine as it relates to fatal conflict in jury answers, the Court concluded that the fatal conflict in Menchaca's case did not constitute fundamental error and, therefore, the Court could not consider it unless it was properly preserved.

c. Error Preservation

This brought the Court to the logical next query: how and when does a party preserve error based on fatal conflict? *See id.* at 515. After summarizing the relevant authority, the Court said that "to preserve error based on fatally conflicting jury answers, parties must raise that objection before the trial court discharges the jury." *Id.* at 518.

Noting that neither USAA nor Menchaca objected prior to the jury's discharge, the Court considered the effect of the failure to preserve. *See id.* at 519-20. USAA argued that even if the jury's answers conflicted, it was Menchaca's burden to object and she waived error by failing to do so before the trial court discharged the jury. *See id.* at 519. The Court disagreed, noting that Menchaca had all she needed to recover on her statutory claim and that USAA was the party who must rely on the conflicting answer to Question 1 to keep Menchaca from recovering under Questions 2 and 3. *See id.* Therefore, "[a]s the party who must rely on the conflicting answer to avoid the effect of answers that establish liability, USAA bore the burden to object." *Id.* Because it didn't, the Court was "left with a judgment based on fatally conflicting jury answers, but since neither party preserved that error, [the Court could not] consider the conflict as a basis for reversing the trial court's judgment." *Id.* at 520.

d. Remand in the Interest of Justice

The final step in the Court's "where do we go from here?" analysis concerned remand in the interest of justice. *See id.* at 520-21. The Court acknowledged that despite the fatal conflict in the jury answers, it could render judgment for Menchaca based on the jury's verdict because USAA failed to preserve the conflict. Or, the Court noted, it could reverse and remand the case for new trial in the interest of justice. *See id.* (citing TEX. R. APP. P. 60.3); *see also* TEX. R. APP. P. 43.3 ("When reversing a trial court's judgment, the court must render the judgment that the trial court should have rendered, except when . . . the interests of justice require a remand for another trial."). The Court said:

> Such a remand is particularly appropriate when it appears that one or more parties

> "proceeded under the wrong legal theory," especially when "the applicable law has . . . evolved between the time of trial and the disposition of the appeal." In light of the parties' obvious and understandable confusion over our relevant precedent and the effect of that confusion on their arguments in this case, as well as our clarification of the requirements to preserve error based on conflicting jury answers, we conclude that a remand is necessary here in the interest of justice.

Id. at 521 (internal citations omitted). Importantly, the Court also observed that after the jury rendered its verdict, the parties *both* took the position that there was no conflict, and neither they nor the trial court had the benefit of the guidance the Court provided regarding the preservation of error based on fatal conflict. *See id.* at 521.

Accordingly, the Court reversed the court of appeals' judgment and remanded the case to the trial court for a new trial in the interest of justice. *See id.*

III. THE AFTERMATH OF *MENCHACA*

In the two years since the first *Menchaca* opinion issued, a number of Texas state and federal courts have had occasion to consider, interpret, and apply the rules the Court announced in the context of extra-contractual damages. The results are anything but uniform, and they raise more questions than answers.

A. Is the Independent Injury Rule Alive and Well?

One federal court in the Southern District of Texas made the astute observation last fall that "[t]he independent injury rule is a complex doctrine, as the decision in *Menchaca* attests." *CVR Energy, Inc. v. American Zurich Ins. Co.*, No. 4:17-cv-1284, 2018 WL 6622226, at *5 (S.D. Tex. Nov. 27, 2018), *report and rec. adopted*, 2018 WL 6617829 (Dec. 18, 2018) (citing *Menchaca*, 545 S.W.3d at 499-500). The court further noted, parenthetically, the Fifth Circuit's observation "that the Fifth Circuit had itself misconstrued Texas law on the topic." *Id.* (citing *Lyda Swinerton Builders, Inc. v. Oklahoma Surety Co.*, 903 F.3d 435, 451-53 (5th Cir. 2018)).

This parenthetical notation referred to the Fifth Circuit's opinion in *Lyda Swinerton Builders*. In that case, after several partial summary judgment rulings and a bench trial on one remaining claim, the district court entered a final judgment that largely favored the insured but denied its claim for extra-contractual damages under Chapter 541. *See Lyda Swinerton Builders*, 903 F.3d at 440, 450. LSB had claimed in the district court that the insurer violated Chapter 541 by misrepresenting coverage in order to avoid providing LSB a defense in a suit brought against it by a third party, causing LSB to incur defense costs as extra-contractual damages. *See id.* at 451. The district court concluded that Fifth Circuit case law required LSB to establish an injury independent of the denial of policy benefits in order to prevail on its Chapter 541 claim. *See id.*

The Fifth Circuit laid out the case law upon which the district court had relied. *See id.* Specifically, the court cited a prior opinion wherein the court said "[t]here can be no recovery for extra-contractual damages for mishandling claims unless the complained of actions or omissions caused injury independent of those that would have resulted from a wrongful denial of policy benefits." *Id.* (citing *Parkans Int'l LLC v. Zurich Ins. Co.*, 299 F.3d 514, 519 (5th Cir. 2002)) (internal quotation marks omitted). But, the court said, *Parkans* had involved a non-covered claim. *See id.* (citing *Parkans*, 299 F.3d at 517-18). The court also noted that in another case, it had relied on *Parkans* in expressly rejecting a policyholder's argument that it was not required to prove an independent injury because denial of insurance proceeds was sufficient to enable the insured to recover on its extra-contractual claims. *See id.* (quoting *Great Am. Ins. Co. v. AFS/IBEX Fin. Servs., Inc.*, 612 F.3d 800, 808 n.1 (5th Cir. 2010)). Unlike *Parkans*, *Castaneda*, and *Stoker*, the court observed, the insured in *Great American* had established coverage under the policy. *See id.* The *Great American* holding, the court said, conflicted with *Vail*. *See id.* (citing *In re Deepwater Horizon*, 807 F.3d 689, 698 (5th Cir. 2015).

While the case was on appeal, *Menchaca* was decided, compelling reexamination of the court's reasoning in *Great American*. *See id.* at 451. After reciting the entitled-to-benefit and independent injury rules, the court affirmed that the independent injury rule does *not* restrict the damages an insured may recover under the entitled-to-benefits rule. *See id.* Rather it limits the recovery of *other* damages that flow from denial of policy benefits. *See id.* Under *Menchaca*, the court said, if LSB could show that the carrier's misrepresentation about coverage caused LSB to be deprived of a defense (a policy benefit), LSB could recover defense costs as damages under Chapter 541 and treble them if it could prove that the misrepresentation was made knowingly. *See id.* at 453.

Although the court did not cite it, the Fifth Circuit had recognized the significance of *Menchaca* as it pertains to the independent injury rule several months prior to its decision in *Lyda Swinerton Builders*:

> [In *Menchaca*,] the Court cleared up some lingering confusion created by its past caselaw. Relevant here, *Menchaca* repudiated the independent-injury rule, clarifying instead that "an insured who establishes a right to receive benefits under an insurance policy can recover those benefits as 'actual damages' under the statute if the insurer's statutory

> violation causes the loss of benefits. . . . Put simply, *Parkans*'s categorical bar does not hold up in the face of *Menchaca*."

Aldous v. Darwin Nat'l Assurance Co., 889 F.3d 798, 799 (5th Cir. 2018) (quoting *Menchaca*, 545 S.W.3d at 495); *cf. Certain Underwriters at Lloyd's of London v. Lowen Valley View, LLC*, 892 F.3d 167, 171 (5th Cir. 2018) (applying independent injury rule, citing *Menchaca*, because insured did not demonstrate that its claim was covered by the policy); *see also Lopez v. Allstate Tex. Lloyds*, No. 4:17-cv-00152-O-BP, 2018 WL 2773381, at *4-5 (N.D. Tex. May 23, 2018), *report and rec. adopted*, 2018 WL 2765409 (June 8, 2018) (acknowledging repudiation of independent injury rule but finding no issue of material fact as to extra-contractual claims).

A court in the Northern District cited *Aldous* in rejecting an insurer's argument that the insureds' extra-contractual claims must fail because the insureds had not submitted proof of damages beyond a loss of policy benefits. *See 2223 Lombardy Warehouse, LLC v. Mount Vernon Fire Ins. Co.*, No. 3:17-CV-2795-D, 2019 WL 1583558, at *8 (N.D. Tex. Apr. 12, 2019). The insurer in *2223 Lombardy Warehouse*, a first-party storm damage case, had relied on the independent injury rule embraced by *Parkans*. *See id.* at *8. The court observed that the relevant language in *Parkans* was abrogated by *Menchaca* insofar as *Menchaca* held that "an insured who establishes a right to receive benefits under an insurance policy can recover those benefits as 'actual damages' under the statute if the insurer's statutory violation causes the loss of the benefits." *Id.* (internal quotation marks and citations omitted). Because the court had determined that a fact issue existed with regard to whether the damage to the insured property was covered under the policy, the (abrogated) independent injury rule did not apply and summary judgment on the extra-contractual claims was not proper. *See id.*; *see also Mt. Hawley Ins. Co. v. Slay Eng'g*, 335 F. Supp. 3d 874, 889 (W.D. Tex. 2018) (denying summary judgment on extra-contractual claims in light of fact issue on coverage); *Loncar v. Progressive County Mut. Ins. Co.*, 553 S.W.3d 586, 595 & n.5 (Tex. App.—Dallas 2018, no pet.) (citing *Menchaca* in granting summary judgment on extra-contractual causes of action because insured's claim was not covered and plaintiffs had not alleged any independent injury). The Dallas Court of Appeals took a similar view in *Allen v. State Farm Lloyds*, No. 05-16-00108-CV, 2017 WL 3275912, at *13 (Tex. App.—Dallas Aug. 1, 2017, pet. denied) ("In light of the holding in *Menchaca* that no independent injury must be shown for failure to conduct a reasonable investigation when the insured has shown he was entitled to benefits under the policy, and in light of our holding that the Allens raised a fact issue about whether they were entitled to benefits under the policy, we conclude the trial court erred by directing a verdict on this statutory claim.").

Other courts, however, have held that the independent injury not only survived *Menchaca*, but that *Menchaca* reaffirmed it. *See, e.g., Turner v. Peerless Indem. Ins. Co.*, No. 07-17-00279-CV, 2018 WL 2709489, at *4 (Tex. App.—Amarillo June 5, 2018, no pet.) The Amarillo Court of Appeals' interpretation of *Menchaca*, for example, is 180 degrees from that of the Fifth Circuit and the district court in *2223 Lombardy Warehouse*: "The independent injury rule is alive and well, as reiterated by the Texas Supreme Court in its recent *Menchaca* opinion . . . ." *Id.* at *4; *see also, e.g., Old Am. Ins. Co. v. Lincoln Factoring*, ___ S.W.3d ___, 2018 WL 5832111, at *5 (Tex. App.—Fort Worth 2018, no pet.), *reh'g denied* (applying independent injury rule even though insured's claim was covered); *State Farm Lloyds v. Webb*, No. 09-15-00408-CV, 2017 1739763, at *9-10 (Tex. App.—Beaumont May 4, 2017, pet. denied) (reversing judgment on jury verdict in insured's favor on extra-contractual claims even though plaintiff also prevailed on contract claim, holding that under *Menchaca*, insured was required to show independent injury).

B. Post-Appraisal Cases

The majority of cases that cite the Supreme Court's opinion in *Menchaca* are post-appraisal cases, meaning cases where the insurer (or, occasionally, the insured) invoked appraisal, the panel issued an award, the insurer paid the award, and the insurer moved for summary judgment. In these cases, both parties typically rely on *Menchaca* and argue that it supports their position.

The insurer argues that its timely payment of the appraisal award and the insured's acceptance of the payment estops the insured from using the difference between the amount of the appraisal award and the amount of the initial adjustment as evidence of breach of contract. The insurer then makes the derivative argument, often citing *Menchaca* and frequently relying on *Stoker* and its progeny as well, that in the absence of a breach of contract or an independent injury, the insured cannot maintain any extra-contractual claims.

In response, the insured will attack the estoppel defense if appropriate (usually contesting the timeliness of the carrier's payment of the appraisal award), arguing that if the contract claim survives summary judgment, the carrier's argument necessarily fails. But even if the contract claim does not survive, the insured contends, *Menchaca* confirmed what insureds have argued since *Stoker* was decided: that it is *coverage*, not *breach* that determines the viability of the extra-contractual claims. Because appraisal is, by its very nature, a dispute about the amount of covered loss, a claim that resulted in a paid appraisal award was necessarily "covered" such that *Menchaca* does not preclude bad faith claims.

Stated another way, insureds argue that all they need to show in order to maintain extra-contractual claims is entitlement to benefits under the policy, not entitlement to *additional* benefits over and above what has already been paid in the appraisal process. Policyholders have enjoyed some success in defeating post-appraisal motions for summary judgment in state district courts. But the intermediate courts of appeal and federal district courts have been largely non-receptive, albeit for varying reasons, to insureds' post-appraisal arguments.

Some courts have simply continued to hold fast to the independent injury rule in post-appraisal cases where they find payment of the award was timely, despite *Menchaca*'s seemingly clear pronouncement that the rule only applies in the context of claims that are not covered. *See, e.g.*, *Gonzales v. Allstate Vehicle & Prop. Ins. Co.*, No. 6:18-CV-26, 2019 WL 699137, at *1 (S.D. Tex. Feb. 19, 2019); *Durham v. Allstate Vehicle & Prop. Ins. Co.*, No. H-17-1752, 2019 WL 764581, at *4 (S.D. Tex. Feb. 4, 2019);[7] *Meisenheimer v. Safeco Ins. Co. of Ind.*, No. 3:17-CV-2153-M, 2018 WL 3869573, at *3 (N.D. Tex. Aug. 15, 2018); *Kezar v. State Farm Lloyds*, No. 1:17-CV-389-RP, 2018 WL 2271380, at *4 (W.D. Tex. May 17, 2018); *Jimenez v. Liberty Ins. Corp.*, No. H-16-1866, 2017 WL 6368663, at *5 (S.D. Tex. Nov. 9, 2017); *Hinojos v. State Farm Lloyds*, ___ S.W.3d ___, 2019 WL 257883, at *5 (Tex. App.—El Paso Jan. 18, 2019, pet. filed);[8] *Biasatti v. GuideOne Nat'l Ins. Co.*, 560 S.W.3d 739, 743 (Tex. App.—Amarillo 2018, pet. filed);[9] *Abdalla v. Farmers Ins. Exch.*, No. 07-17-00020-CV, 2018 WL 2220269m at *3-4 (Tex. App.—Amarillo 2018, no pet.); *Floyd Circle Partners, LLC v. Republic Lloyds*, No. 05-16-00224-CV, 2017 WL 3124469, at *9 (Tex. App.—Dallas July 24, 2017, pet. denied); *Hurst v. National Sec. Fire & Cas. Co.*, 523 S.W.3d 840, 848 (Tex. App.—Houston [14th Dist.] 2017, pet. filed);[10] *but see Bagley v. Allstate Fire & Cas. Ins. Co.*, No. 2:18-CV-56-D-BR, 2019 WL 635681, at *4-5 (N.D. Tex. Jan. 22, 2019), *report and rec. adopted*, 2019 WL 634067 (Feb. 14, 2019) (noting that *Menchaca* does not address the viability of extra-contractual claims where the insurer timely pays appraisal award but stating that the issue was not ripe because the court recognized a timeliness issue with regard to insurer's payment of award).

Others have simply rejected *Menchaca* outright because it did not involve an appraisal, finding that nothing in *Menchaca* changed the existing approach to extra-contractual claims in the post-appraisal context whereunder the failure of the contract claim likewise defeats extra-contractual claims. *See, e.g.*, *Byrd v. Liberty Ins. Corp.*, No. 5:17-CV-209, 2018 WL 7021591, at *5-7 (S.D. Tex. Nov. 29, 2018), *report and rec. adopted*, 2019 WL 184096 (Jan. 14, 2019); *Dean v. State Farm Lloyds*, No. 5:16-CV-1321-DAE, 2018 WL 6430534, at *9-10 (W.D. Tex. Nov. 20, 2018); *Marchbanks v. Liberty Ins. Co.*, 558 S.W.3d 308, 316 (Tex. App.—Houston [14th Dist.], pet. filed);[11] *see also Debesingh v. Geovera Specialty Ins. Co.*, No. 4:18-cv-02316, 2018 WL 4810629, at *3 & n.22 (stating, in order abating case pending appraisal, that the insurer's full payment of an appraisal award will generally dispose of all claims and implying that this is still the case after *Menchaca*); *see also Ortiz v. State Farm Lloyds*, 568 S.W.3d 156, 159 (Tex. App.—San Antonio 2017, pet. granted)[12] ("We note, however, *Menchaca* is not a case involving the payment of an appraisal award.").

Some courts have reasoned that in order to recover on an extra-contractual theory, the insured must establish that it is entitled to benefits *in addition to* what has already been paid and not just merely that the claim was covered (or show an independent injury). *See, e.g.*, *Zhu v. First Community Ins. Co.*, 543 S.W.3d 428, 437-38 (Tex. App.—Houston [14th Dist.] 2018, pet. filed);[13] *see also Braden v. Allstate Vehicle & Prop. Ins. Co.*, No. 4:18-cv-00592-O, 2019 WL 201942, at *5 (N.D. Tex. Jan. 15, 2019) (acknowledging repudiation of independent injury rule and acknowledging that insured established a right to benefits under the policy, but granting summary judgment on extra-contractual claims because insured was paid those benefits under the appraisal award).[14]

C. Breach of Contract as Prerequisite to Bad Faith

At least two federal district courts have rejected, post-*Menchaca*, the notion that breach of contract is a prerequisite to bad faith liability. In *Jones v. Allstate Tex. Lloyds*, No. 4;17-CV-0199-ALM-CAN, 2017 WL 1019162, at *2 (E.D. Tex. Aug. 22, 2017), the court cited *Vail* and the original *Menchaca* opinion in denying a motion to sever and abate, reasoning that Jones had alleged Chapter 541 and DTPA violations "which may survive an adverse ruling on Plaintiff's contractual

[7] The case is currently being briefed on appeal to the Fifth Circuit.

[8] The insured filed a petition for review on April 4, 2019.

[9] The petition for review has been briefed since February 2019 and remains pending.

[10] The petition for review has been briefed since January 2019 and remains pending.

[11] The petition for review has been briefed since January 2019 and remains pending.

[12] The Texas Supreme Court heard oral argument on February 20, 2019, and the petition remains pending.

[13] The petition for review has been briefed since August 2018 and remains pending.

[14] The case is currently being briefed on appeal to the Fifth Circuit.

claims." And, in a memorandum and order denying an insurer's motion to sever and abate extra-contractual claims in a Hurricane Harvey first-party case, Judge Atlas said in a footnote: "The Court does not agree with Metropolitan's premise that a breach of the insurance contract in issue is an absolute prerequisite for a statutory bad faith claim." *Donald v. Metropolitan Lloyds Ins. Co.*, No. 4:18-02410, 2019 WL 783024, at *2 n.3 (S.D. Tex. Feb. 21, 2019).

D. *Barbara Technologies* and *Ortiz*

Although lawyers on both sides of the first-party docket are equally confident in their respective interpretations of *Menchaca*, as it turns out, the Court's opinion did not provide the clarity or settle the debate that first-party insurance lawyers and their clients hoped it would. As a result, several cases cited above are currently in the petition for review stage before the Texas Supreme Court or on appeal to the Fifth Circuit.

The continued uncertainty is especially prevalent, however, in the post-appraisal context given both the volume of cases that are going to appraisal and the fact that *Menchaca* did not speak to how its rules apply in that context. The Court is expected to offer some insight soon.

On February 20, 2019, the Court heard oral argument in two post-appraisal cases that implicate questions regarding the effect of appraisal on an insured's extra-contractual claims. *See Ortiz*, 568 S.W.3d 156; *Barbara Techs. Corp. v. State Farm Lloyds*, 566 S.W.3d 294 (Tex. App.—San Antonio, pet. granted). In both cases, the carriers invoked appraisal and paid the awards, both of which were significantly higher than the payments to the insured after the initial adjustments. *See Ortiz*, 568 S.W.3d at 157-58; *Barbara Techs.*, 566 S.W.3d at 295-96.

Although it is certainly impossible to predict the outcome of the two cases, the questioning at oral argument suggested that a number of the Justices are uneasy about foreclosing an insured's bad faith remedies simply because the carrier invokes appraisal. It also suggested that at least some of the Court subscribes to the policyholder interpretation of *Menchaca* as tying extra-contractual damage to *coverage* and/or *entitlement to benefits* as opposed to *breach*. However, the Court also questioned counsel about the independent injury rule, which policyholders would argue does not apply if the claim that went to appraisal was covered. Argument also addressed the Prompt Payment of Claims Act and it seems likely that if and how the Act applies in the post-appraisal context will be among the issues the Court addresses when it decides *Ortiz* and *Barbara Technologies*.

HOT ISSUES IN STORM CLAIMS: HARVEY AND BEYOND

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CHAPTER 10

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"Chief Justice Jack Pope of Texas," (book chapter) in *Common Law Judge: Selected Writings of Chief Justice Jack Pope of Texas* (Austin: Texas Sup.Ct. Hist. Soc., 2014) 322-354.
The Noble Lawyer (Austin: Texas Bar Books, 2011).
"Commentary on the Texas Disciplinary Rules of Professional Conduct Governing the Duties between Lawyer and Client," (with John F. Sutton, Jr.) in *Texas Lawyers' Professional Ethics*, 4th ed. (State Bar of Texas, 2007).
"Personhood and the Right to Privacy in Texas" *South Texas Law Review 48, no. 3* (Spring 2007): 575-611.
"Coverage for Ensuing Water Damage under Texas Property Insurance Policies." *South Texas Law Review* 46, no. 4 (Summer 2005): 1247-1281.

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Publications and Seminars

- *Moon v. State*, 410 S.W.3d 366 (Tex.App.—Houston [1st Dist.] 2013, affirmed 451 S.W.3d 28 (Tex. Crim. App. 2014).
- *Lundstrom v. United Services Auto. Ass'n-CIC*, 192 S.W.3d 78 (Tex.App.—Houston [14th Dist.] 2006, pet. denied).
- April 22, 2016, keynote speaker at the 29th Annual Juvenile Law Conference at Wyndham Riverwalk in San Antonio, Texas. Christene presented with Jack Carnegie, Appellate Counsel for Cameron Moon, on the topic of "The State of Texas v. Cameron Moon: Ethical Issues in Assessing Whether Youth Should be Certified", which discussed the background and legal significance of the landmark decision on the juvenile certification process in Texas.

Community Activities

Past Co-Chair Houston Bar Association's Juvenile Consequences Committee

Foster Mom for CAMO Rescue and K-9 Angels Rescue

Former mentor to detained youth for Crossroads

HURRICANE HARVEY AND INSURANCE LAW: TRAPS AND FOIBLES

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CHAPTER 10.1

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HURRICANE HARVEY AND INSURANCE LAW: TRAPS AND FOIBLES[1]

By William J. Chriss[2]

While it is sometimes said that an insurance company cannot "create coverage" by waiver or estoppel, this statement is not without its exceptions.[3] In addition, "conditions" of the policy, as opposed to coverage provisions, are certainly waivable and in fact are often waived.[4]

I. CONDITIONS

There are several "conditions" of the insurance policy which insurance companies can and do waive often. In general, a "condition" is any provision of the policy requiring an act to be performed by the insured as a prerequisite to payment or coverage under the policy. Most property policies have a separate section called "conditions," containing several numbered sections which, as conditions, are matters that can be waived by the insurance company, or that the company can be estopped to assert. While insurance carriers often argue that it is the policyholder's burden to show compliance with conditions precedent in the policy in order to recover,[5] there is substantial authority that failure of a condition does not *bar* recovery but only requires abatement until the condition is satisfied.[6] In addition, substantial compliance is usually all that is required in connection with conditions precedent of a policy.[7] Discussion of specific conditions that are commonly encountered follows. A recent exposition and analysis of this area of the law can be found in the Fifth Circuit's opinion in *Cox Operating Co. v. Surplus Lines Ins. Co.*[8]

A. Notice of Loss

1. Requirement of Notice

Many policies provide that in case of loss, the insured should give prompt written notice of the facts relating to the claim. Note that there is usually no requirement to "make a claim" but only to give "notice of facts." Some policies do not even require that the notice be in writing. Most often the notice is called in to the agent by the insured, and the agent submits an appropriate ACORD form[9] to the carrier in writing, on behalf of the insured. As with any other condition, this requirement can be waived by any action by the carrier inconsistent with relying upon the notice.[10] This could include acknowledging the claim in writing without requesting further written notice, beginning an investigation, or making payment.[11] Again, acceptance of late, written notice by the insurer or any conduct by the insurer inconsistent with an intention to rely on such notice to avoid liability accomplishes a waiver.[12] By analogy to cases involving the condition requiring a proof of loss, many actions by the insurer will waive any requirement of prompt written notice or else create an estoppel where the insurer cannot rely upon such failure to avoid the claim. Such acts include either recognizing partial liability on the claim or denying liability on the

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[1] The 2103-14 version of this Insurance Update portion of this article appeared in Volume 66 of *The Advocate*, a publication of the State Bar of Texas. The similar parts of the current article add analysis of important decisions rendered in the past four years and appears in substance as "Insurance Law Update: Traps and Foibles, Including *Stowers*" 37 CORP. COUNS. REV. 65 (2018). Other materials have been added specifically relating to hurricane claims.

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[3] Gen. Life & Accident Ins. Co. v. Lightfoot, 737 S.W.2d 953, 957 (Tex. App.—El Paso 1987, writ denied). For exceptions, see USAA Tex. Lloyds Co. v. Menchaca, No. 14-0721, 2018 WL 1866041, *13 (Tex. 2018) (citing Ulico Cas. Co. v. Allied Pilots Ass'n, 262 S.W.3d 773, 775 (Tex. 2008)). *See also* Texas Cnty. Mut. Ins. Co. v. Wilkinson, 601 S.W.2d 520, 523 (Tex.Civ.App.—Austin 1980, writ ref'd n.r.e.).

[4] Republic Ins. Co. v. Silverton Elevators, Inc., 493 S.W.2d 748, 754 (Tex. 1973); Nielson v. Allstate Ins. Co., 784 S.W.2d 735, 737 (Tex. App.—Houston [14th Dist.] 1990, no writ); Aetna Cas. & Sur. Co. v. Clark, 427 S.W.2d 649, 658 (Tex. Civ. App.—Dallas 1968, no writ).

[5] Grimm v. Grimm, 864 S.W.2d 160, 161 (Tex. App.—Houston [14th Dist.] 1993, no writ).

[6] *See* State Farm Gen. Ins. Co. v. Lawlis, 773 S.W.2d 948, 949 (Tex. App.—Beaumont 1989, no writ) (per curiam) (citing Humphrey v. Nat'l Fire Ins. Co., 231 S.W. 750 (Tex. 1921)).

[7] Home Ins. Co. v. Greene, 443 S.W.2d 326, 330-31 (Tex. Civ. App.—Texarkana 1969), *aff'd*, 453 S.W.2d 470 (Tex. 1970); Home Ins. Co. v. Scott, 152 S.W.2d 413, 414 (Tex. Civ. App.—El Paso 1941, writ dism'd); Century Ins. Co. v. Hogan, 135 S.W.2d 224, 228 (Tex. Civ. App.—Austin 1939, no writ).

[8] 795 F.3d 496 (5th Cir. 2015).

[9] "ACORD" is an acronym for "Association for Operations Research and Development." This association is a non-profit developer of standards for the insurance industry and publishes forms for many insurance needs.

[10] *E.g.*, *Aetna Cas. & Sur. Co. v. Clark*, 427 S.W.2d at 658 n.3.

[11] Nat'l Sur. Corp. v. Wells, 287 F.2d 102 (5th Cir. 1961).

[12] Sparks v. Aetna Life & Cas. Co., 554 S.W.2d 228, 230 (Tex. Civ. App.—Dallas 1977, no writ); Hanover Ins. Co. of N.Y. v. Hagler, 532 S.W.2d 136, 138 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.).

claim on grounds other than the failure to provide notice.[13]

For this reason, it is almost never a good idea for an insured to sign a non-waiver agreement or to fail to object to a unilateral reservation of rights letter.[14]

2. Late Notice

Carriers will sometimes defend on the basis that the insured did not promptly notify the carrier of the loss. There are several responses available to the insured in such circumstances. First, there are excuses for failing to give notice sooner. For example, if it is not reasonably possible to provide notice substantially sooner than it is given, such as when an insured excusably lacks knowledge that any claim needs to be made, such excuse will generally explain and avoid any defense of late notice.[15] Where no specific time is given in the policy for giving notice or filing proofs of loss, a reasonable time is assumed.[16] This invokes the standard of ordinary prudence.[17] "As soon as practical" or "immediately" requires only that notice be given within a reasonable time in light of all the circumstances.[18] Lack of knowledge by an insured that will excuse notice or proof of loss can include mental incapacity.[19] It may also include legal minority.[20] Although an insured is not automatically excused by ignorance of the notice requirements of the policy or an inability to read, lack of education in business matters may be considered in determining whether he acted reasonably under all of the surrounding circumstances.[21]

Authorities are not uniform regarding the effect of an insured's ignorance or lack of understanding as to how his insurance coverage relates to any occurrence or manifestation. Texas courts have held that an insured's ignorance of the existence of a policy, unmixed with his own negligence, will constitute an excuse,[22] but federal courts have held that an insured's failure to know he had coverage for a particular type of claim did not constitute a valid excuse for failure to give notice as to such claim.[23] On the other hand, an insured cannot be required to give notice of an accident or forward notice of a claim before he knows of the existence of the policy and the fact that he is covered thereby.[24] The best exposition of the categories of excuse available to an insured is found in *Employers Casualty Co. v. Scott Electric Co.*[25] That court held that there are four general categories of excuse for failure to give prompt notice to an insurance carrier: (1) the insured's lack of knowledge of the accident (or occurrence); (2) the insured's belief that the accident or occurrence was trivial and no claim could be made; (3) the insured's belief that he was not covered; and (4) the insured's illness or incapacity.[26]

The most common situation is where an insured notices damage to his dwelling but either believes the damage to be trivial (not exceeding the deductible) or not to be caused by a peril covered under his insurance policy. For example, an insured might note some mold or mildew on the surface of a wall and not discover for a long period of time that there is a covered peril inside the wall which has produced substantial contamination that will be expensive to remove. Two recent cases by implication lend support to the notion that the duty to give notice does not arise in such situations until such time as a reportable and significant loss arguably caused by a covered peril has been discovered. In *State Farm Fire & Casualty Co. v. Rodriguez*,[27] an insured noticed some wall cracks that might be symptomatic of foundation movement, but did not make a claim until noticing a foundation crack that the court held was the first indication of actual covered foundation damage.[28] In *State Farm Lloyds v. Nicolau*,[29] the Supreme Court gave a long factual chronology of the Nicolaus's

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[13] *See* cases cited *infra* Section I.B. Proof of Loss, notes 74 to 88, inclusive.

[14] *See* King v. Commercial Union Ins. Co. of N.Y., 306 F. Supp. 9 (N.D. Tex. 1969).

[15] *See* Williams v. Travelers Ins. Co., 220 F. Supp. 411 (W.D. Tex. 1963).

[16] Lewis v. Conn. Gen. Life Ins. Co., 94 S.W.2d 499, 501 (Tex. Civ. App.—Beaumont 1936, writ ref'd).

[17] State Farm Cnty. Mut. Ins. Co. of Texas v. Plunk, 491 S.W.2d 728, 731 (Tex. Civ. App.—Dallas 1973, no writ).

[18] Cont'l Savings Ass'n v. United States Fid. & Guar. Co., 762 F.2d 1239, 1243 (5th Cir. 1985), *amended in part on reh'g*, 768 F.2d 89.

[19] Proctor v. Southland Life Ins. Co., 522 S.W.2d 261, 265 (Tex. Civ. App.—Fort Worth 1975, writ ref'd n.r.e.).

[20] Dairyland Cnty. Mut. Ins. Co. v. Roman, 486 S.W.2d 847, 853 (Tex. Civ. App.—San Antonio 1972), *aff'd*, 498 S.W.2d 154 (Tex. 1973).

[21] *State Farm Cnty. Mut. Ins. Co. of Texas v. Plunk*, 491 S.W.2d at 731.

[22] Whitehead v. Nat'l Cas. Co., 273 S.W.2d 678, 680 (Tex. Civ. App.—Fort Worth 1954, writ ref'd).

[23] McPherson v. St. Paul Fire & Marine Ins. Co., 350 F.2d 563, 567 (5th Cir. 1965).

[24] Nat'l Sur. Corp. v. Wells, 287 F.2d 102, 108 (5th Cir. 1961); Mead v. Johnson Grp., Inc., 615 S.W.2d 685, 689 (Tex. 1981); Jack v. State, 694 S.W.2d 391, 397 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

[25] 513 S.W.2d 642 (Tex. Civ. App.—Corpus Christi 1974, no writ).

[26] *Id.* at 646.

[27] 88 S.W.3d 313, 317-18 (Tex. App.—San Antonio 2002, pet. denied), *abrogated by* Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co., 267 S.W.3d 20 (Tex. 2008).

[28] *Id.* at 317.

[29] 951 S.W.2d 444 (Tex. 1997).

foundation problems.[30] Over several years, repeated attempts were made to either investigate or repair foundation damage to the Nicolaus's dwelling from soil movement.[31] There was no evidence that the Nicolaus had any sophistication in such matters.[32] Ultimately, the experts they consulted began to believe that there might be a plumbing leak under the foundation which would cause such repeated movement.[33] Plumbing testing was promptly accomplished to investigate that hypothesis, and once the plumbing testing revealed a leak that would account for the foundation movement, the Nicolaus then reported their claim, several years after having first discovered the initial foundation movement without knowing it might be caused by a covered peril (a plumbing leak).[34] The Supreme Court cited this long factual history without any criticism of the Nicolaus and with apparent understanding of why they reported the claim when they did.[35]

3. Late Notice Defense

Even in the event that the policyholder cannot show substantial compliance, excuse, waiver, or estoppel as to a claim by the insurance company of late notice, the coverage inquiry continues. In order to avoid payment under the policy for late notice, the insurance company must demonstrate a material breach of a policy condition.[36] In fact, under general contract law, failure of one party to an agreement to perform a condition will not excuse the other party's performance of the contract, unless the breach of contract thereby committed is material.[37] The use of this doctrine of materiality of breach to determine whether an insurance company can avoid payment under a policy for failure of an insured to perform a condition of the policy is expressly authorized by the Supreme Court's decision in *Hernandez v. Gulf Group Lloyds*.[38] It is clear from that decision and others that the primary inquiry in determining whether the failure of an insured to perform any condition (not only the condition requiring prompt notice) excuses nonpayment by the insurer is whether such failure to perform prejudices the insurer such that it "will be deprived of the benefit that it could have reasonably anticipated from full performance."[39] The less the insurance company is deprived of the expected benefit of prompt notice, the less material the breach. Other factors to be considered include (1) the extent to which the insurance carrier can be adequately compensated for the part of the benefit of which it will be deprived, (2) the extent to which the insured will suffer forfeiture, (3) the likelihood that the insured will cure his failures, and (4) the extent to which the behavior of the insured comports with standards of good faith and fair dealing.[40] This is obviously a fact-based inquiry. There is no hard and fast rule in connection with materiality that has been established, and in most instances, this will be an issue for the jury.[41]

This doctrine was amplified by the Supreme Court in *PAJ, Inc. v. The Hanover Insurance Co.*[42] In that case, the court held that an insured's failure to timely notify its insurer of a claim or suit does not defeat coverage under the advertising injury (Coverage B) part of an occurrence-based commercial general liability policy if the insurer was not prejudiced by the delay.[43]

PAJ, Inc. had a CGL policy with Hanover that covered, among other things, injury arising out of copyright infringement, which "advertising injury" was defined to include.[44] The policy required PAJ to notify Hanover of any claim or suit brought against it "as soon as practicable."[45] "In 1998, Yurman Designs, Inc. demanded that PAJ cease marketing a particular jewelry line" and ultimately sued PAJ for copyright infringement.[46] PAJ failed to notify Hanover of the suit until "four to six months after litigation commenced."[47]

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[30] *Id.* at 446-48.

[31] *Id.*

[32] *Id.* at 451.

[33] *Id.* at 446-48.

[34] *Id.*

[35] *Id.*

[36] *See* Hernandez v. Gulf Grp. Lloyds, 875 S.W.2d 691, 693 (Tex. 1994).

[37] *See* RESTATEMENT OF CONTRACTS §§ 274, 397 (1932); *see also* Ferrell v. Sec'y of Def., 662 F.2d 1179 (5th Cir. 1981). Insurance policies are contracts and as such are subject to rules applicable to contracts generally. Barnett v. Aetna Life Ins. Co., 723 S.W.2d 663 (Tex. 1987).

[38] 875 S.W.2d 691, 693 (Tex. 1994).

[39] *Id.* at 692-93.

[40] *Id.*; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 241 (1981).

[41] Bell v. United States Fid. & Guar. Co., 853 S.W.2d 187, 191 (Tex. App.—Corpus Christi, 1993, no writ); Members Ins. Co. v. Branscum, 803 S.W.2d 462, 464, 465 (Tex. App.—Dallas, 1991, no writ).

[42] PAJ, Inc. v. Hanover Ins. Co., 243 S.W.3d 630 (Tex. 2008) ("We hold, as we did in *Hernandez v. Gulf Group Lloyds*, that an immaterial breach does not deprive the insurer of the benefit of the bargain and thus cannot relieve the insurer of the contractual coverage obligation.").

[43] *Id.* at 631-32.

[44] *Id.*

[45] *Id.*

[46] *Id.* at 631.

[47] *Id.* ("Initially unaware that the CGL policy covered the dispute, PAJ did not notify Hanover of the suit until four to six months after litigation commenced.").

PAJ filed a declaratory judgment action against Hanover.[48]

The parties stipulated in the declaratory judgment action that PAJ failed to notify Hanover as soon as practicable and that Hanover was not prejudiced by the lack of notice.[49] Both sides moved for summary judgment.[50] "The trial court granted Hanover's motion . . . holding that Hanover was not required to demonstrate prejudice to avoid coverage under the policy."[51] The court of appeals affirmed.[52]

On appeal to the Texas Supreme Court, Hanover contended that the provision was a condition precedent, the failure of which defeated coverage regardless of whether Hanover was prejudiced.[53] PAJ argued that the provision was a covenant, the breach of which would excuse Hanover's performance only if the breach were material.[54] PAJ also argued that, even if the requirement were specifically couched in "condition precedent" language, Texas law nonetheless would require an insurer to demonstrate prejudice before it could avoid coverage on this basis alone.[55] The court "agree[d] with PAJ that only a material breach of the timely notice provision will excuse Hanover's performance under the policy."[56]

The court reasoned that "'when a condition would impose an absurd or impossible result, the agreement will be interpreted as creating a covenant rather than a condition.'"[57] The court concluded that a denial of coverage without a showing of prejudice would be such a result, imposing "draconian consequences for even *de minimis* deviations from the duties the policy places on the insureds."[58] In reaching its conclusion, the court also noted that the timely notice provision "was not an essential part of the bargained-for exchange under PAJ's occurrence-based policy."[59] Distinguishing such a policy from a claims-made policy, the court recognized that, with respect to occurrence-based policies, a notice requirement "'is subsidiary to the event that triggers coverage.'"[60]

4. Texas Insurance Code Annotated Sections 542.055-.60

Sections 542.055-.059 establish time deadlines for responding to claims.[61] If insurance companies violate these deadlines, under Section 542.060 statutory damages of 18 percent per annum from the date of the violation are payable on the claim, together with attorney's fees.[62] To trigger the applicability of these penalties and deadlines, the insured must give written notice, even if oral notice would have been sufficient under the doctrines of excuse or waiver discussed above.[63] The statutory damages section of the statute, Section 542.060, was amended in 2017 to lower the rate of statutory damages from 18 percent per annum to 10 percent per annum on claims made on or after September 1, 2017.

5. Pleading and Proof

The plaintiff should always plead in the original petition that all notices and proofs of loss or claim have been timely and properly given, sufficient to invoke coverage under the policy and the requirements of the Texas Insurance Code. Once such a pleading has been made, the insured enjoys a conclusive presumption of such facts, and no further proof is required unless the insurance company denies such pleading "specifically and with particularity" *and under oath*.[64] Rule 93 requires such a pleading to be verified by affidavit based upon personal knowledge.[65] Verifications must be "positive and unequivocal."[66] Pleadings and denials that do not meet these stringent requirements should be stricken as nullities.[67] Global allegations that plaintiffs "fail to provide proper notice" are not sufficient.[68] They

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[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.* at 631-32.

[52] *Id.* at 632.

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.* at 636 (quoting Criswell v. European Crossroads Shopping Ctr., Ltd., 792 S.W.2d 945, 948 (Tex. 1990)).

[58] *Id.*

[59] *Id.*

[60] *Id.* (quoting Matador Petroleum Corp. v. St. Paul Surplus Lines Ins. Co., 174 F.3d 653, 658 (5th Cir. 1999)).

[61] TEX. INS. CODE ANN. §§ 542.055-.059.

[62] *Id.* § 542.060.

[63] *Id.* § 542.055.

[64] *See* Tex. R. Civ. P. 93.

[65] *See* Schultz v. Houston, 551 S.W.2d 494, 496 (Tex. Civ. App.—Houston [14th Dist.] 1977, no pet.).

[66] Golub v. Nelson, 441 S.W.2d 220, 221 (Tex. Civ. App.—Houston [14th Dist.] 1969); *see* Day Cruises Mar., LLC v. Christus Spohn Health Sys., 267 S.W.3d 42, 54-55 (Tex. App.—Corpus Christi 2008, pet. denied).

[67] Brown Found. Repair & Consulting, Inc. v. Friendly Chevrolet Co., 715 S.W.2d 115 (Tex. App.—Dallas 1986, writ ref'd n.r.e.); Davis v. Young Californian Shoes, Inc., 612 S.W.2d 703, 704 (Tex. App.—Dallas 1981, no writ).

[68] *See* Austin Bldg. Co. v. Nat'l Union Fire Ins. Co., 403 S.W.2d 499, 506 (Tex. Civ. App.—Dallas 1966, writ ref'd n.r.e.).

must be both specific *and* made under oath based upon personal knowledge.[69]

6. But Exception: Vacancy Clauses

The Supreme Court recently muddied this area of the law in the case of *Greene v. Farmers Insurance Exchange*.[70] Even though prior caselaw, including *PAJ v. Hanover*,[71] seemed to require a showing of prejudice to the carrier from an insured's violation of a condition, the court here ruled that such analysis did not apply to the vacancy clause of a property policy.[72] Even though that provision was listed under the "Conditions" section of the policy, the court impliedly held it was not a condition but part of the insuring agreement, just like the effective dates of the policy.[73]

B. Proof of Loss

1. Policy Requirements

The standardized "Homeowners B" or "HOB" policy required that proof of loss be given within 91 days of the insurance company's request on a standard form supplied by the company.[74] However, if such a sworn proof of loss is not requested within 15 days after receiving written notice from the insured of the claim, such requirement is waived.[75] Many homeowners and commercial property policies have similar provisions.[76] This waiver almost always occurs.

Although some provisions require the proof of loss to be filed by the insured on a standard form supplied by the insurance company, many do not, and this is probably a mere formal requirement in any event, as it is settled law that substantial compliance with a proof of loss provision on a timely basis will suffice.[77] Where the insurance company furnishes no forms, the insured is free to use any form he wishes.[78]

In addition, while the proof of loss must be sworn, it only needs state the insured's "best knowledge and belief" as to certain facts including the time and cause of loss as best can be determined; the interest of the insured and all others in the property, including all liens on the property; other insurance which might cover the loss; and the actual cash value of each item of property and the amount of loss as alleged to each.[79] If the insured elects to make a claim for full replacement cost coverage (as opposed to actual cash value, which is full replacement cost minus depreciation), the proof of loss should also state the replacement cost of the dwelling or other building and the full cost of repair or replacement of the loss without deduction for depreciation.[80] It is usually a simple matter to state the insured's best knowledge and belief, since most insureds do not have much information about the loss in the initial stages of the claim (the first 91 days). Besides, recall that substantial compliance will usually suffice. However, proof of loss requirements in cases involving federally subsidized flood insurance are much less forgiving. While such flood insurance is provided by a private insurer, it is provided in the form of a Standard Flood Insurance Policy ("SFIP"). While the policy is purchased from a private insurer, the insurance is provided through the National Flood Insurance Program ("NFIP"), which is administered by the Federal Emergency Management Agency ("FEMA") under the National Flood Insurance Act. The terms of SFIP policies are dictated by FEMA. [See 44 C.F.R. §§ 61.4(b), 61.13(d)]. Payments on SFIP claims come ultimately from the federal treasury. *Gowland v. Aetna*, 143 F.3d 951, 955 (5th Cir. 1998). The carrier is therefore essentially a fiscal agent of the United States. [See 42 U.S.C. §§ 4071(a)(1), 4081(a)].[81]

Since the terms of one's flood policy are dictated by FEMA, they can be checked on the FEMA website, and because FEMA regulates essentially everything NFIP insurers do, one may conveniently find summaries of those regulations and policyholder claim rights on the FEMA website. This is also why flood insurers cannot be sued in state court or be sued for violating state insurance laws. They can only be sued in federal court,

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[69] *See id.* at 506; Wade and Sons, Inc. v. Am. Standard, Inc., 127 S.W.3d 814, 825-26 (Tex. App.—San Antonio 2003, pet. denied).

[70] 446 S.W.3d 761 (Tex. 2014).

[71] PAJ, Inc. v. Hanover Ins. Co., 243 S.W.3d 630 (Tex. 2008).

[72] *Greene*, 446 S.W.3d at 767-78, 772.

[73] *See id.* at 769.

[74] *See id.* at 766; Texas Department of Insurance, Homeowners Tenant Form B (Jan. 1, 2002), https://www.texasfairplan.org/wp-content/uploads/2017/01/OLD_Texas-Homeowners-Tenant-Policy-Form-B-HO-BT-Effective-01_01_2002.pdf [hereinafter "Texas HOB Policy"].

[75] Texas HOB Policy, *supra* note 74; Norris v. Combined Am. Ins. Co., 429 S.W.2d 654, 655 (Tex. Civ. App.—Tyler 1968, no writ).

[76] *See, e.g.*, ISO Form CP-01-42-03-12, p. 2 of 3.

[77] Turrill v. Life Ins. Co. of N. Am., 753 F.2d 1322, 1326 (5th Cir. 1985); First Nat'l Bank of Bowie v. Fid. & Cas. Co. of N.Y., 634 F.2d 1000, 1005 (5th Cir. 1981); Rogers v. Aetna Cas. & Sur. Co., 601 F.2d 840, 844 (5th Cir. 1979); Henry v. Aetna Cas. & Sur. Co., 633 S.W.2d 583, 584 (Tex. App.—Texarkana, 1982, writ ref'd n.r.e.).

[78] Proctor v. Southland Life Ins. Co., 522 S.W.2d 261, 264 (Tex. Civ. App.—Fort Worth 1975, writ ref'd n.r.e.).

[79] Ambrose v. United States, 106 Fed.Cl. 152, 153 n.2 (2012).

[80] Commonwealth Lloyd's Ins. Co. v. Thomas, 678 S.W.2d 278, 291 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.).

[81] See *Wright v. Allstate Ins. Co.*, 415 F.3d 384, 386 (5th Cir. 2005).

no matter how small the dispute. Under federal law and regulation, NFIP insurers can essentially do as they please and the only right to redress is to appeal their determinations to FEMA or sue them in local federal court.

More specifically, the cases have held that because they operate essentially as fiscal agents of the federal government, NFIP flood insurers cannot waive or be estopped to assert conditions or defenses in the policy, even if they have expressly told the insured otherwise.[82]

2. Excuse, Waiver, and Estoppel

The same excuses that can be utilized in connection with the notice requirement of the policy are available in connection with proof of loss. Likewise, the same categories of acts that will waive an insurer's right to insist upon prompt written notice will also waive a requirement of proof of loss. In addition, there are several specific acts that an insurance company can commit which will accomplish a waiver and estoppel as to the requirement to file proof of loss. The simplest is one often provided in the policy, which is to fail to request the same on an insurer-provided form within 15 days of receiving written notice of loss, or within some other specified period.[83] Other acts include denying the claim before proof of loss is due, which waives the proof-of-loss requirement as a matter of law;[84] there are also some cases that seem to indicate that such a denial after the 91-day period may constitute waiver if not expressly based upon the insured's failure to file proof of loss;[85] an admission of partial liability on a claim or attempts to settle or pay after the 91-day period also accomplishes a waiver;[86] and demanding an appraisal also accomplishes such a waiver.[87] A little-known statute that is not cited in the cases dealing with the sufficiency of proofs of loss and waivers of proofs of loss is Section 705.003 of the Texas Insurance Code (the so-called "anti-technicalities statute").[88] This statute provides,

> (a) An insurance policy provision that states that a misrepresentation, including a false statement, made in a proof of loss or death makes the policy void or voidable:
>
> (1) has no effect; and
> (2) is not a defense in a suit brought on the policy.
>
> (b) Subsection (a) does not apply if it is shown at trial that the misrepresentation:
>
> (1) was fraudulently made;
> (2) misrepresented a fact material to the question of the insurer's liability under the policy; and
> (3) misled the insurer and caused the insurer to waive or lose a valid defense to the policy.

C. Performance of Repairs to Obtain Full Replacement Cost

Many property policies provide for payment of the actual cash value of the loss, until such time as the property has been repaired.[89] Once the property has been repaired, the insured may be paid any difference between the actual cash value of the loss and full replacement cost. However, the provision of the policy requiring actual repair before full recovery is normally a *condition*, and hence is subject to the same rules of insurance and contract law as the other conditions mentioned above, i.e., it can be waived, the insurance company can be estopped to assert it, it may be substantially complied with, etc.[90]

Some terms should be defined here. "Full replacement cost" is obviously the cost to repair or replace with like kind and quality the damaged property. "Actual cash value" is generally defined as full replacement or repair cost minus applicable depreciation or betterment. In other words, if I have a roof designed to last 20 years, and it is destroyed in the 19th year of its useful life, the full replacement cost would be the cost to repair with a new roof (that has another 20 years of life expectancy). The actual cash value would be such cost of repair minus the amount the

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[82] Id. at 387-389.

[83] *See Norris*, 429 S.W.2d at 655.

[84] Viles v. Sec. Nat'l Ins. Co., 788 S.W.2d 566, 567-68 (Tex. 1990); Angelo State Univ. v. Int'l Ins. Co. of N.Y., 491 S.W.2d 700, 701 (Tex. Civ. App.—Austin 1973, no writ).

[85] *See* Austin Bldg. Co. v. Nat'l Union & Fire Ins. Co., 403 S.W.2d 499, 506 (Tex. Civ. App.—Dallas 1966, writ ref'd n.r.e.), *on appeal after remand*, 422 S.W.2d 763 (Tex. Civ. App.—Dallas), *aff'd*, 432 S.W.2d 697 (Tex. 1968); Hazlitt v. Provident Life & Accident Ins. Co., 212 S.W.2d 1012, 1013 (Tex. Civ. App.—San Antonio 1948), *aff'd*, 216 S.W.2d 805 (Tex. 1949); Am. Cas. & Life Ins. Co. v. McCuistion, 202 S.W.2d 474, 478 (Tex. Civ. App.—Fort Worth 1947, writ ref'd n.r.e.); Serv. Mut. Ins. Co. of Texas v. Territo, 147 S.W.2d 846, 849 (Tex. Civ. App.—Waco 1941, no writ).

[86] United States Fid. & Guar. Co. v. Bimco Iron & Metal Corp., 464 S.W.2d 353, 357 (Tex. 1971).

[87] Alamo Cas. Co. v. Trafton, 231 S.W.2d 474, 476 (Tex. Civ. App.—San Antonio 1950, writ dism'd).

[88] TEX. INS. CODE ANN. § 705.003.

[89] *E.g.*, State Farm Fire & Cas. Co. v. Griffin, 888 S.W.2d 150, 152 (Tex. App.—Houston [1st Dist.] 1994, no writ).

[90] *See Norris*, 429 S.W.2d at 655; State Farm Lloyds v. Hanson, 500 S.W.3d 84, 96 (Tex. App.—Houston [14th Dist.] 2016, pet. denied), *reh'g overruled* (Aug. 16, 2016).

roof has depreciated over the last 19 years, i.e., the extent to which the roof will be "bettered" by replacement with a new roof. The insurance policy recognizes this definition in the provisions relating to full replacement cost coverage as being "without deduction for depreciation," by differentiating it from actual cash value (ACV).[91] Texas cases have recognized this same definition.[92]

Other courts have defined actual cash value as the market value reduction caused to the damaged property. For example, see *Guaranty County Mutual Insurance Co. v. Williams*.[93]

There are cases holding that such a condition specifically can be waived, in particular, by failing to plead it.[94] Hence, any of the acts normally held to constitute a waiver by the insurance company of any condition (denial of a claim, etc.) will support a waiver of the condition that the insured be required actually to replace the property before the full amount (including depreciation) is tendered. In the event the insured is concerned that such waiver cannot be established, it appears that proof of actual cash value may be made by reference to either a reduction in market value or replacement cost minus depreciation. Additionally, the insured can argue that it would be judicially inefficient and superfluous to require that the insured first file suit over the actual cash value owed on a claim that has been essentially denied, and then wait to file suit again for the replacement cost. This argument is by analogy to those cases in contract law that do not require that a plaintiff sue each time a specific amount of money becomes owed once it becomes clear that the defendant refuses to perform the agreement. There is an old line of cases holding that any partial loss should be determined by reference to repair costs, rather than actual cash value, although these cases appear to be interpreting language in old form policies that has now been changed. For example, see *Lerman v. Implement Dealers Mutual Insurance Co.*,[95] *Gulf Insurance Co. v. Carroll*,[96] and *Farmers Mutual Protective Ass'n of Texas v. Cmerek*.[97] Likewise, where actual cash value is a difficult method of proof and thus impracticable to determine, cost of repair or replacement within a reasonable time after loss are proper factors to be considered in determining the amount of the loss to be paid to the insured.[98]

D. Appraisal

Another technicality that insurance companies sometimes raise in order to delay or defeat an insured's suit for policy proceeds is to claim that the suit should be abated until such time as an appraisal can be had. Traditionally, this technique was seldom efficacious. First, appraisal is not a legitimate means to resolve disputes regarding coverage of the loss or any portion thereof. Rather, its function is limited completely to disputes over unit cost and other pricing issues once coverage, scope, and the amount and type of repairs have been agreed upon by the insured and the insurer.[99] In addition, it has long been the law in Texas that the right to demand an appraisal can be waived by the insurance company under a number of situations including refusal to appraise, denial of the claim, delaying resolution of the claim, failure to timely demand appraisal, acts inconsistent with an intention to appraise, appointment of a prejudiced appraiser, or any improper conduct during appraisal.[100] The cases on waiving appraisal are useful and instructive because, by analogy, one should argue that other conditions may be waived in the same way.

In the event that an appraisal is actually appropriate between an insured and an insurance company, there are several rules regarding the appraisal process. First, each party must appoint, at its own expense, a competent and disinterested appraiser.[101] These appraisers then meet to determine the identity of a third person to act as a neutral umpire of any disputes between them.[102] If they cannot agree on an umpire, then either side can obtain the appointment of an umpire from any district judge in the

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[91] *See Norris*, 429 S.W.2d at 655; Harold H. Reader III, *Modern Day Actual Cash Value: Is It What the Insurers Intended?*, 22 TORT & INS. L.J. 282, 283–84 (1987).

[92] Farmers Mut. Protective Ass'n of Texas v. Cmerek, 404 S.W.2d 599, 600 (Tex. Civ. App.—Austin 1966, no writ); Gulf Ins. Co. v. Carroll, 330 S.W.2d 229, 233 (Tex. Civ. App.—Waco 1959, no writ); Manhattan Fire & Marine Ins. Co. v. Melton, 329 S.W.2d 338, 341, 344-45 (Tex. Civ. App.—Texarkana 1959, writ ref'd n.r.e.).

[93] 732 S.W.2d 57, 60 (Tex. App.—Amarillo 1987).

[94] Zaitchick v. Am. Motorists Ins. Co., 554 F. Supp. 209 (S.D.N.Y. 1982); Columbia Mut. Ins. Co. v. Sanford, 920 S.W.2d 28 (Ark. App. 1996); Pollock v. Fire Ins. Exchange, 423 N.W.2d 234 (Mich. App. 1988); Bailey v. Farmers Union Coop. Ins. Co. of Neb., 498 N.W.2d 591 (Neb. App. 1992).

[95] 382 S.W.2d 285, 287-88 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.).

[96] 330 S.W.2d 227, 230 (Tex. Civ. App.—Waco 1959, no writ).

[97] 404 S.W.2d 599, 600 (Tex. Civ. App.—Austin 1966, no writ).

[98] *See* Manhattan Fire & Marine Ins. v. Melton, 329 S.W.2d 338, 344 (Tex. Civ. App.—Texarkana 1959, writ ref'd n.r.e.).

[99] Wells v. Am. States Preferred Ins. Co., 919 S.W.2d 679, 683-84 (Tex. App.—Dallas 1996, writ denied).

[100] *See Gulf Ins. Co. v. Carroll*, 330 S.W.2d at 232-33; Am. Cent. Ins. Co. v. Terry, 26 S.W.2d 162, 166 (Tex. Comm'n App. 1930, holding approved).

[101] *Terry*, 26 S.W.2d at 163; Int'l Servs. Ins. Co. v. Brodie, 337 S.W.2d 414, 417 (Tex. Civ. App.—Fort Worth 1960, writ ref'd n.r.e.).

[102] *See Terry*, 26 S.W.2d at 163; *Brodie*, 337 S.W.2d at 417.

county where the insured property is located. Any award signed by two members of the appraisal team is ostensibly binding.[103]

The Texas Supreme Court's decision in *State Farm Lloyds v. Johnson*[104] changed the law of appraisal in this state. Until *Johnson*, Texas courts held that an appraisal only determined *the amount* of a loss, not causation or coverage. For example, if an insured made a claim for hail damage, an appraisal was useless because the appraisal, under then-existing law, could not decide coverage, i.e., what damage was covered under the relevant policy and what damage was not. Under decades of decisions culminating in 1989 in *Wells v. American States Preferred Insurance Co.,*[105] appraisal's function was effectively limited to disputes over unit cost and other pricing issues once coverage and the scope and the type of repairs were all agreed upon by the insured and the insurer. However, in *Johnson*, Justice Brister noted that valuing every partial loss inevitably requires *some* consideration of causation, e.g., did the wind injure three roof shingles or all of them, and he ruled that the injunction in previous cases against deciding coverage had been overblown.[106] Now, appraisal can decide causation, scope, and virtually everything other than coverage under the policy. *Johnson* has been used by some courts to radically expand the function of appraisal at the expense of the court system, although this seems to go beyond the precise holding in *Johnson*.[107]

Johnson and its progeny also changed the law of waiver as regards appraisal, which could, like other conditions of the policy, such as formal proofs of loss, be waived by the insurer's claims handling. The 1930 Commission of Appeals (holding approved) case of *American Central Insurance Co. v. Terry*,[108] among several others, catalogued the plethora of situations where insurers almost always waived any right to appraise, including refusal to appraise, denial of the claim, delaying the claim, failure to timely demand appraisal, acts inconsistent with an intention to appraise, appointment of a prejudiced appraiser, or any improper conduct during appraisal. However, the Texas Supreme Court's 2011 follow-up appraisal decision, *In re Universal Underwriters of Texas Insurance Co.*,[109] announced an additional requirement for proving waiver where there has been delay invoking appraisal: evidence of prejudice to the resisting party from the delay.[110] The problem with this, as the Court itself noted, is that "it is difficult to see how prejudice could ever be shown."[111] Thus, there are now reported cases where carriers have been allowed to invoke appraisal even months after the claim has been refused or deferred and the policyholder has hired an attorney and filed suit.[112] And carriers are now arguing in several courts that a policyholder cannot sue for breach of contract or bad faith, no matter how bad or dilatory the carrier's conduct, as long as it eventually demands appraisal and timely pays the appraisers' ultimate award.[113] Carriers see appraisal as the ultimate "get out of jail free" card. It remains to be seen how the Texas Supreme Court will view that argument, and there are more recent decisions of courts of appeals *that have found waiver*. See, e.g., *Southland Lloyds Ins. Co. v. Cantu*, 399 S.W.3d 558, 578 (Tex. App. – San Antonio 2011, pet. denied) (Insurer waived appraisal by never responding to letter from the insured expressly invoking the appraisal process and then waiting until sixteen months after Plaintiff sued before filing motion to compel appraisal, which was almost two and one-half years after the insured's letter invoking the appraisal process); and *In re Allstate Vehicle & Prop. Ins. Co.*, No. 02-17-00319-CV, 2018 Tex. App. LEXIS 3146, at *1-2 (Tex. App. – Fort Worth May 3, 2018, orig. proceeding) (to be published) (Insurer waived appraisal by requesting new inspections and time to name additional experts, and by telling the trial court it was ready for trial despite lack of satisfaction of the appraisal clause condition precedent).

E. Recoverable Damages: *USAA Texas Lloyds Co. v. Menchaca*

In its 2017 opinion in *USAA Texas Lloyds Co. v. Menchaca*,[114] the Texas Supreme Court clarified the damages recoverable in a suit for extra-contractual insurance liability under the common law doctrine of bad faith or Chapter 541 of the Texas Insurance Code.[115] Associate Justice Jeff Boyd summarized the opinion as follows:

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[103] *Terry*, 26 S.W.2d at 163; *see also* State Farm Lloyds v. Johnson, 290 S.W.3d 886, 895 (Tex. 2009).

[104] 290 S.W.3d 886, 895 (Tex. 2009).

[105] 919 S.W.2d 679, 683-84 (Tex. App.—Dallas 1996, writ denied).

[106] *Johnson*, 290 S.W.3d at 891, 893.

[107] See, e.g., *Breshears v. State Farm Lloyds*, 155 S.W.3d 340 (Tex. App. – Corpus Christi 2004, no pet.)

[108] 26 S.W.2d 162, 166 (Tex. Comm'n App. 1930, holding approved).

[109] 345 S.W.3d 404 (Tex. 2011).

[110] *Id.* at 411.

[111] *Id.* at 412.

[112] *E.g.*, *In re* Ooida Risk Retention Grp., Inc. 475 S.W.3d 905, 909 (Tex. App.—Fort Worth 2015, no pet.).

[113] *Id.* at 913-14.

[114] Case No. 14-0721 (Tex. April 7, 2017, rehearing granted), http://www.txcourts.gov/media/1437878/140721.pdf, *withdrawn and superseded by* 61 Tex. Sup. Ct. J. 743, 2018 WL 1866041 (Tex. April 13, 2018)

[115] *Id.* at 6-9.

> Today we endeavor to fulfill that duty in this case involving an insured's claims against her insurance company. The primary issue is whether the insured can recover policy benefits based on jury findings that the insurer violated the Texas Insurance Code and that the violation resulted in the insured's loss of benefits the insurer "should have paid" under the policy, even though the jury also failed to find that the insurer failed to comply with its obligations under the policy. Unfortunately, our precedent in this area has led to substantial confusion among other courts, and that confusion has permeated this case. In resolving this appeal, we seek to clarify our precedent by announcing five rules that address the relationship between contract claims under an insurance policy and tort claims under the Insurance Code.[116]

In summary, the five rules are:

> [1.] First, as a general rule, an insured cannot recover policy benefits as damages for an insurer's statutory violation if the policy does not provide the insured a right to receive those benefits.
> [2.] Second, an insured who establishes a right to receive benefits under the insurance policy can recover those benefits as actual damages under the Insurance Code if the insurer's statutory violation causes the loss of the benefits.
> [3.] Third, even if the insured cannot establish a present contractual right to policy benefits, the insured can recover benefits as actual damages under the Insurance Code if the insurer's statutory violation caused the insured to lose that contractual right.
> [4.] Fourth, if an insurer's statutory violation causes an injury independent of the loss of policy benefits, the insured may recover damages for that injury even if the policy does not grant the insured a right to benefits.
> [5.] And fifth, an insured cannot recover any damages based on an insurer's statutory violation if the insured had no right to receive benefits under the policy and sustained no injury independent of a right to benefits.[117]

Menchaca reconciled variant interpretations of a number of Supreme Court cases never overruled, including *Vail v. Texas Farm Bureau Mutual Insurance Co.*,[118] in which the court held that an insurer's "unfair refusal to pay the insured's claim causes damages as a matter of law in at least the amount of the policy benefits wrongfully withheld,"[119] and *Republic Insurance Co. v. Stoker*,[120] in which the court stated that as "a general rule there can be no claim for bad faith when an insurer has promptly denied a claim that is in fact not covered."[121] The *Menchaca* court, citing *Liberty National Fire Insurance Co. v. Akin*,[122] resolved any apparent conflict, stating that "a more accurate statement of the rule we announced in *Stoker* is that 'there can be no claim for bad faith [denial of an insured's claim for policy benefits] when an insurer has promptly denied a claim that is in fact not covered.'"[123]

Menchaca was lauded by commentators as providing welcome clarification of the relationship between the holdings of these prior cases as differently interpreted by policyholder lawyers and carriers' counsel,[124] but the insurance industry and U.S. Chamber of Commerce filed amicus briefs supporting USAA's motion for rehearing.[125] USAA's motion for rehearing was granted December 15, 2017, and the court withdrew its initial opinion and issued a new one on rehearing on April 13, 2018.[126] However, the new opinion left the "*Menchaca* Five Rules" intact, only providing additional clarification and examples of how they operate, as well as dealing with the procedural disposition of the case (it was remanded for a new trial).[127]

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[116] *Id.* at 2.

[117] *Id.* at 9-10 (reformatted for convenience in reading).

[118] 754 S.W.2d 129 (Tex. 1988).

[119] *Id.* at 136.

[120] 903 S.W.2d 338, 341 (Tex. 1995).

[121] *Id.* at 341.

[122] 927 S.W.2d 627, 629 (Tex. 1996).

[123] *Menchaca, supra* note 114, at 11.

[124] *E.g.*, Laura Grabouski, *Are Policy Proceeds Actual Damages For Violations of the Insurance Code? The Texas Supreme Court in Menchaca Says: "Yes—If Claim Is Covered."* 15 J. TEX INS. L. 9 (2017).

[125] Brief of Amicus Curiae Insurance Council of Texas, USAA Texas Lloyds Co. v. Menchaca, 2017 WL 1311752, at *1 (Tex. 2017) (No. 14-0721), 2016 WL 7637206; Amicus Curiae Brief of the Chamber of Commerce of the United States of America in Support of Petitioner, USAA Texas Lloyds Co. v. Menchaca, 2017 WL 1311752, at *1 (Tex. 2017) (No. 14-0721), 2016 WL 695607.

[126] USAA Texas Lloyds Co. v Menchaca, No. 14-0721, 2018 WL 1866041 (Tex. April 13, 2018).

[127] *Id.* at *1 (reaffirming the five rules), *3-16 (restating the five rules and providing clarification and examples), *17-30 (disposing of the appeal).

F. Flood Insurance

The practitioner should beware government subsidized flood insurance because this insurance is among the worst and least forgiving in the context of any failure to abide by technical policy requirements. Thus, the rules set forth here must be examined on a case-by-case basis with respect to flood policies. For a grim discussion of how unforgiving these policies are, see *Wright v. Allstate Ins. Co.*, 415 F.3d 384 (5th Cir. 2005).

Dr. Wright had a home that was flooded. He had a standard flood insurance policy that covered his Houston home, and what happened to Dr. Wright is really very characteristic of what happens to people in connection with proofs of loss and the ordinary course of life. His home was insured for flood with Allstate. His home was damaged by flood and he was provided a proof of loss form. He retained an adjuster to help him in connection with his fairly significant loss. Rather than signing the proof of loss form that was provided to him by the Allstate adjuster, he eventually submitted his own proof of loss form to Allstate listing "to be determined" in the spaces for cost of repairs, depreciation, cash value, and then amount of loss. This is very common. What commonly will happen is that the insurance company will attempt to negotiate or start adjusting the loss and propose an amount of loss to the insured. They will then send the insured a proof of loss on a regular ACORD or company form that will have the amounts filled in. Often, the insured disagrees with the proposed adjustment and submits his or her own proof of loss. Especially if it is early in the claims process or the insured has not completed its own investigation (which the insured is under no obligation to do in the first place), it's very common to reflect an amount of loss claimed of "undetermined at this time" or "subject to investigation" or "at least $10,000," etc. The reason for that is the policy requirement that these proofs of loss be sworn. Thus, filing an "amount yet to be determined" proof of loss may satisfy the requirement of *timely* filing a proof of loss without forcing the insured to swear to a completely hypothetical, incomplete, or incorrect amount of loss. For example, while virtually all policies purport to require the proof of loss to be sworn, most require only that it state the insured's "best knowledge and belief" as to certain facts including: the time and cause of loss as best can be determined, the amount of loss as alleged to each, etc. It is usually a simple matter to state the insured's best knowledge and belief, since most insureds do not have much information about the loss in the initial stages of the claim during which the proof of loss is due.

Similarly, Dr. Wright tried to submit an "amount to be determined" proof of loss within the time period provided by the policy. The truth being that he was a doctor and not a contractor, engineer, or architect, he couldn't swear to what the amount of his loss was yet, for which reason he hired an expert (public adjuster). Allstate, to their credit, wrote back to Dr. Wright's public adjuster and said, "we are accepting this proof in compliance with the policy conditions concerning the filing of the proof of loss," and that's normally what a private insuror will do because they to some extent understand the quandary that an insured faces in having to swear to an amount of loss within like 60 or 90 days of a house being blown away or being severely damaged by a hurricane.

What happened afterwards is also typical. Dr. Wright's adjuster tried to negotiate a larger amount than Allstate wanted to pay, and someone at a higher level within the company chose to deny the claim on the basis that the deadline for filing a proof of loss had passed because the one filed by the doctor, while timely and previously accepted by Allstate, did not state the amount claimed and the amount of the damage.

Litigation ensued and the Fifth Circuit held that there is no such thing as waiver or equitable estoppel in connection with claims against the federal treasury. In fact, the statement that you find in these cases that is often repeated is "when dealing with the government a man must square round corners," and so when it comes to dealing with federal flood insurance, the bottom line is you're probably just out of luck. Because if you make any mistake, no matter how technical, if you make any omission, no matter how invited by the insurance company, or approved or agreed to by them, if it gets kicked up to another level or if somebody knows this "square the round corner rule," you're going to get the shaft.

Fortunately for insureds, this is not the case with most forms of insurance, which are not subsidized by the federal treasury. Here, instead, the doctrines of waiver, estoppel, and excuse have broad application to insurance policy conditions.

G. Concurrent Cause; Burdens of Proof

Hurricane claims sometimes involve competing allegations of what caused the damage. Whenever there's a hurricane, there will often be situations where the flood insurance company says the loss was caused by windstorm or rain, and the regular insurance company says it was caused by flood. Hurricane claims, by their nature, often implicate the insurance doctrine of concurrent causation, yet this doctrine is often misapplied and misunderstood.

1. Lead-in Clauses

First of all, with respect to flood and surface water, there is a problem that's caused by what are called lead-in clauses. *Valley Forge Insurance Company v. Hicks Thomas & Lilienstern* is a December 16, 2004 opinion of the Houston 1st District Court of Appeals that discusses this question of lead-in clauses. A lead-in

clause is the clause that "leads in" to the list of exclusions in a policy, and what many of those clauses say is "we will not pay for loss or damage caused directly or indirectly by any of the following...," and more importantly, "such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." The *Valley Forge* case approves the use of lead-in clauses so that – for example, if you have a policy that says "we exclude flood whether or not it's combined with any other cause of loss covered or not in concurring to cause your problem," – what that means is if your house is damaged sort of one percent by flood or your building is damaged one percent by flood and ninety-nine percent by windstorm, the insurance company is going deny coverage.

2. Concurrent Cause Doctrine

There is a statute in the state of Texas that was passed in 1991. It was formerly Article 21.58 of the Texas Insurance Code and is now codified as Section 554.001 and 002 of the Insurance Code, and it's titled "Burden of Proof and Pleading." It provides in relevant part that:

> "In a suit to recover under any insurance or health maintenance organization contract, the insurer or health maintenance organization has the burden of proof as to any avoidance or affirmative defense that the Texas Rules of Civil Procedure require to be affirmatively pleaded, *and language of exclusion in the contract or an exception to coverage claimed by the insurer constitutes an avoidance or an affirmative defense* (emphasis added)."

This statute was a precise legislative action to address the Texas judiciary's prior attempts to deal with the concurrent cause- burden of proof issue as it arose in property insurance contexts. The common law history of this doctrine is intertwined with the hurricane history of Texas.

In 1961 Hurricane Carla struck the Texas coast, and there were two important court of appeals cases that were thereby generated, *Fire Insurance Exchange v. Paulson*[128] and *Berglund v. Hardware Dealers Mutual Fire Insurance Company*.[129] They're within a few pages of one another in the Southwestern Reporter because they were decided one day apart, one by the San Antonio court and one by the Houston court, and there is a split of authority between them. In the *Berglund* case, the policyholder gets blown away, completely destroyed. The windstorm insurance company didn't pay and question for decision was: was the total loss caused by flood, or was it caused by windstorm, and how are you going to prove it because the house is gone. In the other case, *Paulson*, there was not complete destruction, but the same proof problem still arose in that the property was insured by both a flood policy and a windstorm policy and so who has the burden of allocating the loss cause by each peril by evidence?

The position of the plaintiff in both cases was that each had an "all risk" policy, as most homeowner's policies still are, and under an all risk policy, all the insured need do is prove that the loss comes within the purview of the policy in the sense that it happened during the policy period and it occurred to covered property. So the plaintiffs pled: "My house was destroyed (or suffered loss in Paulson's case) by a hurricane on September 11, 1961, and my windstorm policy was in effect at that time." The plaintiffs claimed that if the insurance company wanted to come forward and plead in avoidance or defense some exclusion in the policy like that some or all of the damages are caused by flood, then that's an affirmative defense, and when defendants raise affirmative defenses, they have the burden of proof on the issues thereby raised.

One court accepted this argument and placed the burden of proof upon the insurer to allocate between the concurrent causes. The other held it to be the plaintiff's burden. Because the courts of appeals split on this precise issue both cases were heard by the Texas Supreme Court, which decided the two cases on the same day, June 23, 1965. In *Hardware Dealers v. Berglund*[130] and *Paulson v. Fire Insurance Exchange*[131], with Justice Norvell writing the opinion in both cases. Justice Norvell based his opinions on the 1890 case of *Pelican Insurance Company v. Troy,*[132] in which he found the convenient dictum that "a party suing upon an insurance policy has the burden of proving that the insurance policy covered the loss." From this he took the precarious leap of reasoning that it was therefore the insured's burden to prove that the loss was not excluded. Thus, based on an inapposite 1890 precedent, the Supreme Court held in 1965 as a result of Hurricane Carla, that Mr. Paulson and Mr. Berglund had the burden of proof on concurrent cause, and particularly in the Paulson case, where the house was completely destroyed, there's little way to fulfill it. The case was over. Insurance company didn't have to pay anything.

These two 1965 cases represent the initial adoption of a doctrine of "concurrent causation" by Texas courts epitomized by this flood/wind dichotomy. The initial iteration of that doctrine was that *where two perils, one*

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[128] 381 S.W.2d 199

[129] 381 S.W.2d 631

[130] 383 S.W.2d 309

[131] 393 S.W.2d 316.

[132] 13 S.W. 980 (Tex. 1890)

insured and one excluded, combined to cause a loss, it was the insured's burden to prove the extent to which the excluded peril caused damage and the extent to which the insured peril caused damage. To reach this result, Justice Norvell had to circumvent or distinguish Rule of Civil Procedure 94 passed by the legislature in 1941, 51 years after his 1890 white-horse *Pelican v. Troy* case. Rule 94 still requires that any matter of avoidance, exclusion, or defense raised by an insurer with respect to an insurance policy must be affirmatively pleaded as an affirmative defense. However, Justice Norvell disposes of that obstacle by saying that Rule 94 only places the burden of *pleading* on the insurer– not the burden of proof, rather a weak argument, frankly. Nonetheless, Norvell's holding that in a "concurrent cause" case, the plaintiff must be the one who bears the burden of separating out what was caused by flood and what caused by wind was reiterated in 1971 in *Travelers Indemnity Company v. McKillip.*[133] The court simply lifted the language about concurrent causation out of the *Berglund* and *Paulson* opinions and merely repeated it in *McKillip* to once again deny the policyholder a recovery on the basis that there were two concurrent causes, one excluded and one covered, that combined to cause his loss, and he could not prove the allocation of damage between them.

There matters rested until the 1990's and the case of *Lyons v. Millers Casualty Company of Texas.*[134] The Court of Appeals' 1990 opinion merely cites *Berglund*, even skipping over *McKillip*, again for this proposition that it's the plaintiff's burden to separate out the excluded cause from the concurrent cause. The case reached the Supreme Court in 1993,[135] and is most well-known for its holding on the proof required in order to establish a bad faith claim, but it also has in it once again – it doesn't cite *Berglund*, it cites the other 1963 case *Paulson*- but it has in it once again the same rule that: when insured and excluded cause is combined a cause of loss, cause a loss, it is the plaintiff's burden to separate them out. As a result, the 1993 Supreme Court opinion in *Miller's Mutual v. Lyons* is often still cited without comment or explanation as yet another iteration of the "concurrent cause-burden of proof" rule.

Now, this creates substantial confusion in the lower courts because while Miller's appears to support the notion that the plaintiff bears the burden of proof on concurrent cause, it really does not. Here's why: the Court of Appeals decision in *Millers Casualty v. Lyons* was dated September of 1990. Article 21.58 of the Insurance Code was added by the legislature in 1991, quite probably in response to the Court of Appeals decision just six months earlier in this *Millers Mutual v. Lyons* case, and certainly in response to the *Berglund/Paulson/McKillip* rule on burden of proof. However, the passage of that statute, which overrules the *Berglund/Paulson/McKillip* rule by legislative mandate, was not relevant to the law of that case in *Miller's Mutual.* This results in a 1993 Texas Supreme Court opinion in the case that ignores the contrary rule in Article 21.58 of the Insurance Code because it didn't apply, since the *Miller's Mutual* case was tried in the 1980's. Because of this chronological anomaly, many practitioners and courts are still today simply unaware that the legislature had already abolished the very rule on concurrent causation announced and repeated in *Miller's Mutual* years *before the opinion was even handed down.*

In fact the first and only published case which actually construes Article 21.58 is *Telepak v. USAA*[136]. Now this case is interesting and important because what happens in the *Telepak* case is different from the prior concurrent cause cases. It's not a situation where you have one peril covered under the policy and one peril excluded and somebody has got to separate out what caused what. *Telepak* is a case where the plaintiff's damage was all excluded. It was all excluded by the "settling and foundation movement" exclusion of the policy. But there was an *exception* to that exclusion for any amount of the excluded damage that was *also* caused by plumbing leaks. And what the court says in *Telepak* is to acknowledge that Article 21.58 had been passed by the legislature, and that the court is bound to follow it, and that it requires that USAA (the insurer, not the policyholder) to plead *and prove* how much of the damage claimed was caused by settling and cracking because that's excluded, and thus the basis of an affirmative defense. Now, USAA did that in *Telepak* because all the damage claimed was caused by settling and cracking. The question in *Telepak* was: who has the burden to plead and prove *an exception* to that exclusion that would bring all or part of the loss back within coverage. The *Telepak* court held that in that situation (where the insurer has already satisfied its burden of proof on the excluded peril), the burden of allocation shifts back to the policyholder to prove the extent of the exception to the exclusion. The rationale was that 21.58 only required insurers to bear the burden of proving the application of their exclusions, not the burden of *negating exceptions to those exclusions.* This is the same rule applied with respect to other "affirmative defense/exceptions to such defenses situations." For example, the defendant must prove the facts surrounding the running of a statute of limitations because it is an affirmative defense to liability.

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[133] 469 S.W.2d 160

[134] 798 S.W.2d 339 (Tex.Civ.App.-_____ 1990, aff'd 866 SW 2d 597)

[135] *Lyons v. Millers Casualty* 866 S.W.2d 597 (Tex. 1993).

[136] 887 SW 2d 506 (Tex.App.-San Antonio 1997, no writ.).

However, if the defendant shoulders that burden and the plaintiff wants to claim in exception or avoidance some tolling statute, fraudulent concealment, etc., the burden of proving that exception is the plaintiff's.

Clearly, this is a different situation than the hurricane cases where no exception to an exclusion is alleged, but rather a combination of an excluded peril and a peril covered separate from and without regard to any exception to the exclusions. It is one thing to say that the defendant still has the burden on the affirmative defense but if there's a specific exception to that affirmative defense, the plaintiff must prove it. It is not inconsistent to say, as Article 21.58 does, that if you have an all risk policy and one of those risks that's clearly covered – not as an exception to exclusions, but is just covered – and it's combined with an excluded cause of loss, the defendant must still prove the existence and extent of its exclusion as an affirmative defense. And yet, this distinction is often missed in lower Texas to this day. What sometimes happens is that courts, both trial courts and appellate courts are picking up the dicta that originated in 1890 and that has been made obsolete by both the 1941 adoption of the Rules of Civil Procedure and more particularly by the 1991 adoption of Article 21.58 and they're continuing to hold or say, without reflection, that based on *Lyons v. Millers Mutual* and its predecessors, concurrent cause means the plaintiff has the burden to allocate the damage between covered and excluded causes. This is simply false, and it results from insurance lawyers either ignorantly or intentionally misleading lower courts about two things: 1) the established fact that *Miller's Mutual* and its predecessors on the question of burden of proof were overruled by Article 21.58; and 2) the applicability of Article 21.58 and the inapplicability of *Telepak* where no exception to an exclusion is in issue.

Article 21.58 of the Insurance Code makes it quite clear that it is the defendant's burden to prove the extent of the contribution of an excluded peril to a loss when dealing with an all risk policy rather than an exception to that exclusion. For example, in an all-risk policy there is no "rain" exception to the flood exclusion. Rather, the way the coverage works is that the policy is generally going to be an all-risk policy and wind-driven rain is one of those perils that is not excluded and that therefore falls within the all-risk provision. In some policies it may even be a primarily and specifically defined covered cause of loss. In either event, the insurer must pay for wind/rain/hurricane damage unless excluded, and the exclusion customarily relied upon is the one for flood.

And therefore, the original argument that was made by Mr. Paulson in that Hurricane Carla case in 1965 has been vindicated by legislative action with the passage of Article 21.58 twenty-six years later. Mr. Paulson was right. He was just ahead of his time. Article 21.58 is still the law as recodified in 2003 at which time the only change made was to add HMO's to make sure that they have the same burden as other insurers. The situation now with respect to any of these hurricane claims is that any homeowner should be able to say – just as Mr. Paulson unsuccessfully did in 1965- "Your Honor, it's the defendant's burden to establish the extent of any exclusion or defense in response to my general claim of coverage. I have an all risk policy. My home was damaged by windstorm, windstorm is not excluded, and the loss occurred during the term of the policy. And unless the defendant comes forward with some other evidence, I win." At that point, the defendant has to affirmatively plead the exclusion for flood and say, "Well, Your Honor, that's all well and good, but we've got this excluded peril and we've got some evidence that there was some flooding going on in that building and therefore we're going to plead this affirmative defense that some or all of the loss was excluded under the policy because it was caused by flood."

Here is where evidentiary rules like those concerning burdens of proof are so crucial: Whoever loses that case is probably going to be the party who has the burden of proving (or allocating) *how much* of the damage was caused by flood and how much of the damage was caused by windstorm. Under Texas statute, the party that has the responsibility to prove that, in addition to pleading it, is *the insurer.*

TEXAS STORM CLAIMS POST CHAPTER 542A AND POST *MENCHACA*: THE INDEPENDENT INJURY RULE AND FACTS OF THE PARTICULAR CLAIM STILL MATTER IN DEFENDING SAME

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CHAPTER 10.2

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TEXAS STORM CLAIMS POST CHAPTER 542A AND POST *MENCHACA*: THE INDEPENDENT INJURY RULE AND FACTS OF THE PARTICULAR CLAIM STILL MATTER IN DEFENDING SAME.

New rules and requirements in reporting a storm damage claim were enacted with the goals of decreasing mass litigation and streamling cases filed. The statute was written to require actual notice of the dispute up front, allow a re-inspection to resolve the matter, and also allow an insurer to elect responsibility for adjusters to avail themselves of federal court jurisdiction if available. Almost two years since the enactment of Section 542A of the Texas Insurance Code, we are seeing efforts to circumvent the intended effects of the statute.

For instance, plaintiffs' counsel skirt being tied to the damages claimed in notice letters by simply claiming that "new" damages were discovered after issuance of the demand or that the alleged "delays" caused the damages to worsen. Also, carriers seeking federal court diversity by accepting liability for adjusters' alleged statutory violations in claims handling may be thwarted simply on the timing of the election.

Cases examining storm claims post *Menchaca*[1] and post Section 542A demonstrate, however, that it is imperative to carefully evaluate each case on its facts because the independent injury rule and appraisal's ability to end disputes appear to be unscathed by *Menchaca.* To evaluate these claims, careful analysis should be placed on: 1) the notice of loss and whether it was timely; 2) the sufficiency of the demand notice letter for compliance with § 542A and making a timely election of responsibility for the adjuster(s) involved in the claim; 3) concurrent causation and the fortuity doctrine; 4) whether the insured has an insurable interest or whether the interest has been improperly assigned or transferred; 5) whether the demand seeks damages barred by limitations; 6) whether to invoke appraisal; 7) whether the cosmetic roof damage endorsement is an issue in the claim; and 8) whether to make a Rule 167 Offer of Settlement.

This paper discusses recent cases addressing several of these points but is not written as an exhaustive discussion of same.

I. POST *MENCHACA,* THE INDEPENDENT INJURY RULE IS STILL IN EFFECT.

Since the Texas Supreme Court's opinion in *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479 (Tex. 2018) "clarified" the rules on recovering statutory damages, confusion persists over whether an insured may recover an amount for a new roof (contractual damages) via an award for alleged extra-contractual violations. Despite the arguments from both sides, it seems to be that the independent injury rule is alive and well as post *Menchaca* cases in both state and federal courts continue to apply it.

A. Houston First Court of Appeals Upheld the Independent Injury Rule.

For instance, in *Wall v. State Farm Lloyds,* __ S.W.3d __, 2018 WL 6843781 (Tex. App.—Houston [1st Dist.] 2018, no pet. h.),[2] the Houston First Court of Appeals considered a *Menchaca*-type verdict in that the jury found no breach of contract but awarded damages for alleged insurance code violations. The trial court entered judgment for State Farm and the Walls appealed arguing that the case should be remanded for new trial. The Court of Appeals affirmed judgment for State Farm, noting that the homeowners could have claimed the alleged violations caused either independent injury or lost benefits owed under the policy. The Walls, however, did not obtain a jury finding on either. The charge included a damages question based on whether State Farm breached the policy. When the jury found it did not, the insurance code damages failed.

The Walls argued that they established, as a matter of law, that the jury's answer to the breach of contract question should have been "yes" because the evidence showed State Farm paid on the policy but did so late and that a late payment does not cure the breach. The Court noted that the charge question defined the failure to comply with the policy as "fail[ure] to pay for the damages" which the Walls conceded that State Farm did. There was no inclusion of any definition of paying late in the charge and the Walls did not object.

As to the Insurance Code violations, the issue on appeal was "whether an insured can recover policy benefits as 'actual damages'" where there is no contractual breach found. The Court noted that the "no" answer to the contractual breach question did not, by itself, defeat the insurance code claim but that the jury's answers to the insurance code questions did not support judgment for the Walls. The charge asked "What sum of money, if any, if paid now in cash, would fairly and

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[1] *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479 (Tex. 2018). See http://coveragereporter.com/wp-content/uploads/2018/05/Menchaca-April-2018-Opinion-w-o-dissents-or-concurrences.pdf.

[2] Available for viewing at https://scholar.google.com/scholar_case?case=14336557407632594092&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

reasonably compensate Charles and Cecelia Wall for their damages, if any, that were caused by such unfair or deceptive act or practice?" The question included only one category of damages—the actual cash value at the time of loss for the damaged property. Nothing limited the damages to those that would be available under the policy and the jury was never asked to determine if the damages it awarded were available under the policy.

The Court found the distinction to be critical from the *Menchaca* conflict. The Walls asserted damages to the fence and garage that State Farm argued were not covered due to exclusions. The Court found the damages awarded for the code violations were damages that were not available under the policy.

B. The Court of Appeals in El Paso Found Appraisal to Be Dispositive Where No Independent Injury Was Alleged.

Next, in *Hinojos v. State Farm Lloyds*, No. 08-16-00121-CV, in the El Paso Court of Appeals,[3] the insured appealed from a summary judgment granted for State Farm and Raul Pulido. The insured argued there was a fact issue on whether the appraisal award was timely paid and whether State Farm proved the insured accepted the payment, he was entitled to extra-contractual damages because his recovery did not depend on his entitlement to damages under the contractual claim, and he was entitled to Chapter 542 damages because State Farm did not prove it paid the insured the award inside the sixty-day statutory timeframe.

In the initial adjustment, State Farm found hail damages to the home which were below the policy's deductible. The Insured hired a public adjuster who requested a re-inspection. After re-inspection, State Farm found and estimated interior damages and additional damages to the shingles but denied those damages were due to wind and hail. State Farm paid for the interior damages less the deductible and depreciation. The Insured sued and State Farm invoked appraisal. The appraisal award was $38,269.95 replacement cost and $26,259.86 ACV. State Farm paid the ACV amount but sent the check to the wrong address. State Farm learned of the error at a status conference and re-issued the check with a mortgagee which was no longer correct. The Insured's counsel returned the check to State Farm who had moved for summary judgment based on payment of the appraisal award and lack of any independent injury.

The Insured argued that he refused to accept the appraisal award but apparently did not raise the issue before the trial court and therefore waived that issue on appeal. The Court noted that, even had it not been waived, rejecting payment of the appraisal award will not defeat an appraisal award and the carrier's payment estops a contractual breach claim.

The Court also rejected the Insured's argument that the errors in issuing the payment raised fact issues as to whether it was timely paid. The Court found that the Insured failed to raise that point in the breach of contract section in his response to State Farm's summary judgment motion and thus failed to present an issue to be considered on appeal as a ground for reversal.

As to the extra-contractual claims, the Insured attempted to distinguish *Menchaca* by arguing that *Menchaca* only precludes such claims where there is no covered loss. The Court rejected the argument and found that an insured can recover damages above an appraisal award only where a statutory violation or act of bad faith caused an independent injury. The injury must be both independent and extreme. The Insured did not make any such allegation or raise any issue of fact, and summary judgment was proper.

Finally, the Court rejected the Insured's assertions that fact issues existed on whether the appraisal award was paid in compliance with Chapter 542 and found that State Farm made a reasonable payment within the statutory sixty-day limit.

C. The United States Fifth Circuit Court of Appeals Uses the Independent Injury Rule to Invalidate Plaintiff's Claims Based on a Dispute Seemingly Simply Over the Rejection of Plaintiff's Proffered Damage Estimate.

The Fifth Circuit has also weighed in on post-*Menchaca* recovery of extra-contractual claims in *Moore v. Allstate Texas Lloyds*, 2018 WL 3492818 (5th Cir. 2018).[4] In *Moore*, the Fifth Circuit affirmed the trial court's summary judgment for Allstate. Allstate inspected the home three times, finding no damage, again finding no damage, and then finding a "laundry list of perils, which Allstate would not cover under the claim." Allstate filed a motion to dismiss which the trial court granted finding that the Insured failed to explain what happened, the extent of damages reportedly incurred, what Allstate did or did not do that made its inspections inadequate, or why Allstate's actions were untimely. The Court found that the Insured simply complained that "he did not get paid as much as he thinks he should have been paid," but he failed to allege any facts that there was a contractual breach. The Court further affirmed the trial court's dismissal of the extra-contractual claims and noted that conclusory allegations

[3] Available at https://law.justia.com/cases/texas/eighth-court-of-appeals/2019/08-16-00121-cv.html.

[4] Available at https://law.justia.com/cases/federal/appellate-courts/ca5/17-10904/17-10904-2018-07-19.html.

and a regurgitation of the Insurance Code do not suffice to state a viable cause of action.

The Fifth Circuit affirmed and noted that simply referencing the Insured's estimate with an allegation that Allstate refused to pay it is not sufficient to state a breach of contract claim. Simply because Allstate's assessment did not match the Insured's estimate "gives little insight into how Allstate breached its contractual duty to investigate Moore's damages." Dismissal of the contractual claim was proper.

As to the extra-contractual claims, the Fifth Circuit found that the Insured's reliance on the independent injury rule failed to show the alleged damages were truly independent of the right to receive policy benefits. The independent injury rule does not apply if the claims are predicated on the loss being covered or if the damages stem from the policy benefits denial.

These cases tend to support the Insurer's position that the independent injury rule is still applicable and effective at barring alleged extra-contractual claims when the alleged damages are simply assertions that "my estimate is more than your estimate." Before getting to the charge stage of litigation, however, it is important to not view all cases as cookie cutter or presume them to be the same. The cases may involve the same type of peril but the facts and circumstances of each will differ and those differences may support various defenses for the insurer.

II. NOTICE OF LOSS-WHEN DID THE LOSS OCCUR AND WHEN DID THE INSURED REPORT IT?

When a claim is reported soon after a significant weather event, notice is typically not an issue. When the claim is first reported by a contractor, public adjuster, or attorney, however, the timing of the notice may raise defenses for the insurer which should be addressed in a reservation of rights letter to the insured. Insureds should be asked whether they had any prior claims and, if so, about prior repairs during an investigation.

Also, an insurer may want to search for possible storms preceding the reported loss as there are often instances of public adjusters blanketing a much larger area than that impacted by a passing storm. We have seen instances where public adjusters and roofers tell the homeowner or business owner that they have storm damage and then pull weather data and pick a date for which to assign the purported damage. It is not uncommon for that weather data to include a number of weather events prior to or subsequent to the reported loss date. Weather reports should be routinely obtained to verify a storm event *capable of causing the claimed damages* actually occurred on the reported loss date or even in the applicable policy period.

When either the weather data shows multiple potential loss dates or a delay in reporting the claim, the insurer should reserve its rights to deny the claim based on failure to timely report the loss when it begins its claim investigation.

A. Late Notice of the Claim

Most policies typically include a list of duties with which an Insured must comply when making a claim, including a requirement to promptly report the loss. Failing to timely report a loss may prejudice the insurer's investigation in a number of ways such as: (1) by depriving it of the opportunity to fairly investigate the cause, nature, and extent of the loss closer in time to when it allegedly occurred; and (2) by increasing the cost to repair the damage. Insureds typically argue that the nature of the loss was such that it was not immediately discoverable and/or that they reported the loss reasonably promptly after they learned about the damage.

Texas courts tend to apply a notice-prejudice rule when analyzing notice provisions in occurrence-based insurance policies. *See PAJ, Inc. v. Hanover Ins. Co.*, 243 S.W.3d 630, 634–35 (Tex. 2008);[5] *see also Ridglea Estate Condo. Ass'n v. Lexington Ins. Co.*, 415 F.3d 474, 479–80 (5th Cir. 2005). The prejudice requirement means the insured's late notice of a claim alone is not enough to support an insurer's defense that the insured breached the policy's notice requirement. The insurer must also show that it was prejudiced by the Insured's failure to timely report. *See Ridglea*, 415 F.3d at 479–80.

B. Whether Notice Is "Late" May Be a Legal Determination

Where the policy does not define "prompt," Texas courts "construe the term as meaning that notice must be given *within a reasonable time* after the occurrence." *Id.* at 479 (quoting *Stonewall Ins. Co. v. Modern Expl., Inc.*, 757 S.W.2d 432, 435 (Tex. App.—Dallas 1988, no writ)). The Texas Supreme Court has defined property damage as "occurring" when actual physical damage to the property occurs. *See Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 23–30 (Tex. 2008). Whether the loss was reported reasonably promptly after a loss was found to be a matter of law in a number of cases involving hail claims. *Alaniz v. Sirius Int'l Ins. Corp.*, 626 Fed.Appx. 73, 76 (5th Cir. 2015).

Other courts found time periods to be not reasonable as a matter of law. *Hamilton Properties v.*

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[5] *See* https://caselaw.findlaw.com/tx-supreme-court/1469658.html.

American Ins. Co., 653 Fed. Appx. 437 (5th Cir. 2016);[6] *Montemayor v. State Farm Lloyds*, 2016 WL 4921553, at *2–3 (S.D. Tex. Apr. 7, 2016) (finding two-year delay unreasonable as a matter of law); *Herrera v. State Farm Lloyds*, 2016 WL 1076911, at *3 (S.D. Tex. Mar. 18, 2016); *Galvan v. Great Lakes Reinsurance PLC*, 2015 WL 12552009, at *2–3 (S.D. Tex. Apr. 15, 2015).

C. Notice of the Event, Not Discovery of Damage Controls.

As Judge Boyle in the Northern District of Texas recently noted, "Texas law requires prompt notice 'within a reasonable time after the *occurrence*,' not within a reasonable time of discovery of the damage." *Certain Underwriters at Lloyd's, London v. Lowen Valley View, L.L.C.,* 2017 WL 3115142 (N.D. Tex. 2017) (citing *Ridglea*, 415 F.3d at 479)).[7] The delay in *Lowen Valley* was 30 months from the storm event. The Court rejected the Insured's arguments that it was not reasonable to expect an insured to report a loss it could not have reasonably discovered relying on assertions that there were no leaks from the hail storm, there were no routine inspections of the roofs because they could only be accessed by a crane or lift, and the Insured was not aware of the severity of the hail event. Further, no guests reported hail damage to their vehicles and no hotel employees reported any damage or water leaks. The Court rejected the Insured's excuses and found the 30-month delay in reporting was not prompt as a matter of law.

D. Prejudice

The *Lowen Valley* opinion notes ways in which an insurer may establish it was prejudiced by the Insured's late notice. There, the Court noted Underwriters' evidence, including the adjuster's affidavit showing how his inspection was impacted such as his inability to document the condition of the roofs until more than two years after the alleged date of loss or to determine how the roofs had been impacted by other weather events or non-covered perils such as wear and tear in the intervening time period.

Additionally, Underwriters argued that the Insured's late notice prejudiced Underwriters because the cost to repair the damage to the Property increased significantly during the thirty-month delay. Underwriters' witness used Xactimate to show that the estimate would have been $47,802.67 less had the claim been immediately reported after the loss so that he could have used June 2012 pricing data rather than January 2015 pricing data.

The Court noted that "an insurer must offer 'more than the mere fact that it cannot employ its normal procedures in investigating and evaluating the claim.'" *Id.* (citing *Trumble Steel Erectors, Inc. v. Moss*, 304 Fed.Appx. 236, 244 (5th Cir. 2008) (per curiam)). Though the existence of prejudice is generally a fact question, the Court may decide the issue on summary judgment "if the undisputed facts establish prejudice sufficient to relieve an insurer of its obligations." *Id.* (citing *St. Paul Guardian Ins. Co. v. Centrum G.S. Ltd.*, 383 F. Supp. 2d 891, 902 (N.D. Tex. 2003)).

The Court rejected the Insured's argument that the insurer was able to prepare an estimate so, therefore, it was able to complete a full investigation and was not prejudiced by the late notice. Further, the Court was persuaded by the evidence of the increase in pricing between the loss date and date of reporting by $47,802.67. The Insured also argued that Underwriters could not show prejudice because they had no evidence that the condition of the roofs changed between the time of the loss and the reporting date and therefore could not show an increase in the repair cost. The Court rejected that contention.

III. NOTICE OF DISPUTE (DEMAND) UNDER § 542A

In addition to whether the notice of the claim was made timely, it is also important to evaluate whether the insured complied with Section 542A of the Insurance Code when making a demand for damages or filing suit over same in connection with a storm damage claim.

A. The Initial Demand Must Allow for Abatement of a Lawsuit.

The Fourteenth Court of Appeals in Houston granted a writ of mandamus where a trial court denied abatement due to insufficient notice under § 542A in *In re Allstate Indemnity Co.*, 2018 WL 3580644 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding) (mem. Op.).[8] There, the trial court denied Allstate's plea in abatement and awarded the Insureds $2,500 in attorneys' fees as a sanction against Allstate for filing a frivolous plea.

The Cabreras sued Allstate in connection with their Hurricane Harvey claim and Allstate answered with a plea in abatement based on the Cabreras' failure to serve pre-suit notice. The Cabreras argued they provided adequate notice and sought fees and sanctions for

[6]https://law.justia.com/cases/federal/appellate-courts/ca5/15-10382/15-10382-2016-04-14.html

[7]https://law.justia.com/cases/federal/appellate-courts/ca5/17-10914/17-10914-2018-06-07.html

[8] Available at https://law.justia.com/cases/texas/fourteenth-court-of-appeals/2018/14-18-00362-cv.html.

having to respond to the plea. The Court granted mandamus and found that the Cabreras' letter and e-mails failed to comply with § 542A of the Insurance Code.

B. Attorneys' Fees May Not Always Be Barred Despite a Statutorily-Deficient Demand Letter Under § 542a.

Recently, a federal court in the Western District of Texas, San Antonio Division, addressed the statutory notice requirements and attorneys' fees and interest in *Agredano v. State Farm Lloyds,* 2018 WL 3579484 (W.D. Tex. 2018).[9] There, the Plaintiffs won at trial on their contractual and extra-contractual claims but there was an issue of whether they were entitled to attorneys' fees and statutory interest. Judge Royce Lamberth ruled for the Plaintiffs.

The Court found that Chapter 38 of the CPRC applies to an individual or corporation and noted Plaintiffs could not recover attorneys' fees under this statute as State Farm Lloyds is neither an individual nor corporation. The Court also found that the Plaintiffs could not recover attorneys' fees under Chapter 542 of the Insurance Code because Judge Ezra had dismissed all claims other than the breach of contract claim. The Court then allowed attorneys' fees to the Plaintiffs under FRCP 54 which allows the granting of relief to which a party is entitled even if the party has not demanded that relief in its pleadings.

The Court further rejected State Farm's argument that attorneys' fees were barred because the Plaintiffs did not serve a sufficient notice letter as required by § 542A. The Court found that "notice of a claim" was made when the public adjuster served a letter of representation that included an estimate of claimed damages. The PA's letter was sufficient to "apprise the insurer of the facts relating to the claim."

The statute was used to decrease a jury award for an insured in *Pham v. State Farm Lloyds,* 2018 WL 5260659 (Tex. App.—Amarillo 2018, no pet. h.).[10] In *Pham,* the Insured made a claim for hail damage to her restaurant. State Farm made payments for same but Pham contended the payments were insufficient "to cover all the damage incurred." The jury awarded $15,000 in damages for State Farm's alleged breach of contract. The award was significantly less than a previous settlement offer, so Pham was obligated to pay State Farm's litigation costs which were offset against Pham's recovery.

On a side note, the Court upheld summary judgment on the extra-contractual claims where Pham argued that evidence of an independent injury was unnecessary because she sought policy benefits which State Farm owed but did not pay. The Court noted that State Farm conducted further investigations and found additional covered damage from same which could imply that its initial investigation may have been deficient. To find bad faith, however, there has to be a showing of unreasonableness. A mistake may be just a mistake and mere mistakes do not mean there was an act in bad faith. There must be a finding of actual awareness by the insurer that it knows the claim is covered and the amount is owing but it still denied or delayed payment.

In *J.P. Columbus Warehousing, Inc. v. United Fire & Cas. Co.*, 2019 WL 453378 (S.D. Tex. 2019), a federal magistrate recommended that the plaintiff be barred from recovering its attorneys' fees under § 542A. There, it was undisputed that the Plaintiff failed to send a pre-suit notice but Plaintiff pleaded the impracticability exception. United Fire argued that the Plaintiff retained a public adjuster long before the expiration of the two-year statute of limitations expiration date.

The Court found the issue of whether it is impracticable to comply with the notice requirement based on when an attorney is hired to be an issue of first impression. The Court reasoned that allowing a Plaintiff a pass based on the timing of hiring an attorney could encourage claimants to delay hiring an attorney until the eve of the expiration of limitations and defeat the purpose of the notice requirements. United Fire proved it was entitled to notice and Plaintiff did not comply and its claims for attorneys' fees were barred.

IV. IMPROPER JOINDER-DISMISSAL OF ADJUSTER AND ELECTION OF RESPONSIBILITY UNDER §542A.

Texas Insurance Code § 542A.006 allows an insurer to accept liability for its adjusters' acts (or alleged acts) and immediately dismiss them from an action. The theory is that removing the adjusters would allow insurers with diversity jurisdiction to remove and maintain an action in federal court. The statute, however, has not resulted in a guaranteed federal court venue preference as initially thought.

In June 2018, a Houston federal court found that the mandatory dismissal of an adjuster under the statute violated the "voluntary-involuntary rule" and did not support removal. *See Massey v. Allstate Vehicle & Prop. Ins. Co.*, No. CV H-18-1144, 2018 WL 3017431 (S.D.

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[9]https://law.justia.com/cases/federal/district-courts/texas/txwdce/5:2015cv01067/785513/121/

[10]https://law.justia.com/cases/texas/seventh-court-of-appeals/2018/07-17-00366-cv.html

Tex. June 18, 2018) (slip op.).[11] In *Massey,* a Hurricane Harvey claim was at issue in a lawsuit filed in state court against Allstate and several adjusters. Allstate answered the lawsuit and then served an election of responsibility for the adjusters' acts, if any, and moved for their dismissal. Once dismissed, Allstate removed the case to federal court. Plaintiffs, both lawyers, argued that the voluntary-involuntary rule applied and warranted remand.

The rule provides that "an action nonremovable when commenced may become removable thereafter only by the voluntary act of the plaintiff." An exception to that rule is where a claim against a non-diverse or in-state defendant is dismissed on account of fraudulent joinder. Allstate conceded that the adjusters were not fraudulently joined. Because the statute required dismissal of the adjusters after Allstate's election of legal responsibility, their dismissal was involuntary and remand was granted.

This case would tend to support a recommendation that insurers elect responsibility for their adjusters upon receipt of a demand or notice letter or possibly as soon as it becomes apparent that the claim may head to litigation. One carrier did just that and the approach worked in its favor in a remand challenge.

Notably, Acadia Insurance Company accepted responsibility for its adjuster immediately upon receipt of a demand. *See Electro Grafix Corp. v. Acadia Ins. Co.*, 2018 WL 3865416 (W.D. Tex. Aug. 14, 2018) (slip op.).[12] Acadia accepted responsibility for the adjuster's alleged acts before suit was filed. Once suit was filed in state court, Acadia removed it and asserted the adjuster was improperly joined as there could be no recovery against him, individually. The Plaintiff moved to remand contending that the adjuster was not fraudulently joined. The Court analyzed the matter via a Rule 12(b)(6) analysis of improper joinder and looked to the pleadings to determine whether there was any reasonable basis on which the Court may predict that the plaintiff may be able to recover against the adjuster.

The Court noted that any claim against the adjuster would be dismissed under § 542A.006(c) and, therefore, there was no reasonable basis to predict that Plaintiff would recover against him. Acadia, the Court found, met its burden of showing improper joinder and denied the Plaintiff's motion to remand.

Of further note in *Acadia*, the Plaintiff unsuccessfully argued that the Court was limited to the pleadings in its remand analysis and the 542A acceptance was pre-suit and outside the pleadings. The Court noted it had discretion to pierce the pleadings in evaluating an improper joinder claim.

Interestingly, a Western District Court denied remand in a factually similar situation to that in *Massey* in *Flores v. Allstate Veh. & Prop. Ins. Co.*, 2018 WL 5695553 (W.D. Tex. Oct. 31, 2018) (slip op.). In *Flores,* Allstate accepted responsibility for the adjuster and the state court dismissed the adjuster. Two days later (and still within 30 days after being served), Allstate removed the case to federal court but did not cite improper joinder in its grounds therefor. While similar to *Massey*, a key difference between the two matters was that Allstate removed the *Flores* case within thirty days of dismissal of the in-state defendant. *Massey* took longer than thirty days to dismiss the in-state defendants which led Allstate to argue that the case became removable after their dismissal.

Recently, in *River of Life Assembly of God v. Church Mutual Ins. Co.*, 2019 WL 1468933 (W.D. Tex. 2019), the Court granted remand despite the insurer's election of responsibility compelling dismissal of the non-diverse adjuster. The Court had previously found that dismissal of an adjuster meant he was improperly joined but, in *River of Life,* the same court was "now persuaded" that joinder is not improper where the insurer elects responsibility for the adjuster after the adjuster is joined, even if the plaintiff can no longer recover against the adjuster. The simple naming of the adjuster in the lawsuit was considered to be joinder by the court.

Going a step further to kick an insurance dispute from its docket, a Houston federal court recently granted remand after finding plausible claims for relief against an adjuster in *Murray v. Allstate Veh. & Prop. Ins. Co.,* 2018 WL 5634949 (S.D. Tex. Oct. 30, 2018) (slip op.). In *Murray,* the plaintiff did not move to remand the action. The Court reviewed jurisdiction, *sua sponte,* and performed an improper joinder analysis. Finding the complaint to track the language of the Insurance Code and DTPA, the Court also found that the specific acts of the adjuster were sufficient to state a plausible cause of action against the non-diverse defendant and destroyed diversity jurisdiction.

In short, it appears that diversity jurisdiction will depend a bit on the proclivity of the court in which a removed action lands just as it did before enactment of § 542A. If the goal is to avail itself of the federal court's jurisdiction, an insurer with diversity jurisdiction should accept responsibility for its adjusters and agents as soon as it becomes aware of a dispute as to the cause and scope of a claim.

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[11]https://law.justia.com/cases/federal/district-courts/texas/txsdce/4:2018cv01144/1496534/19/

[12]https://www.casemine.com/judgement/us/5b84d4498b09d31062a039c7

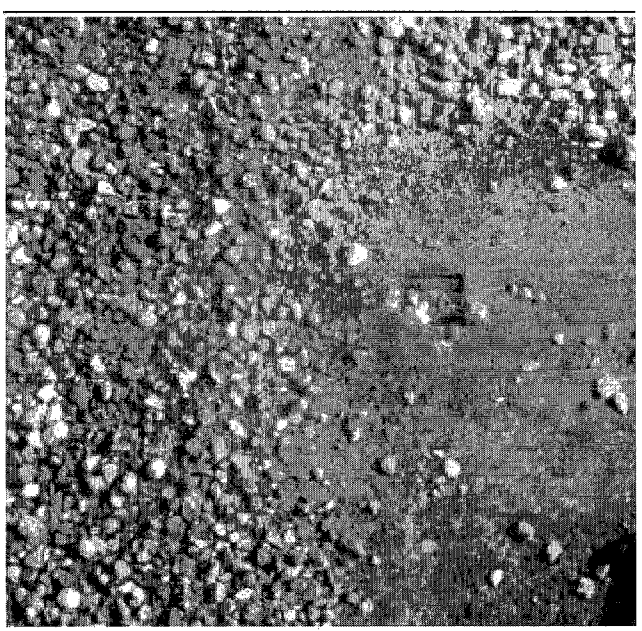
V. CONCURRENT CAUSATION AND SEGREGATION OF DAMAGES AND FORTUITY DOCTRINE

Whether the property damage claim is made under a commercial or residential policy, it is important to determine whether the policy has an anti-concurrent causation clause and to evaluate whether there are any non-covered causes of loss or a history of pre-existing damages or other similar losses when assessing liability exposure.

An easy place to start is Google street view. By searching the address of the property, oftentimes, it is possible to see evidence that damages asserted by the Insured existed months or years prior to the alleged loss date. Underwriting inspections of the subject property are also important and the inspection may have revealed existing damages at the inception of the policy or may state the property is in good condition with no history of roof damages or leaks.

Where weather data confirms a history of prior storms and/or the Google search shows pre-existing damages, the anti-concurrent causation clause in a policy may be a significant defense because the Texas Supreme Court held it to bar coverage for damages if such damage is caused by a combination of covered and uncovered perils. *Jaw The Pointe, L.L.C. v. Lexington Ins. Co.*, 460 S.W.3d 597, 607-608 (Tex. 2015).[13]

In some cases, simply looking at the photos should alert you to a possible concurrent causation or fortuity doctrine defense. For instance, where the gravel ballast has been worn away for years on a roof, a subsequent claim for wind-blown debris cuts and tears would arguably be excluded under the anti-concurrent causation clause.



While relying on the policy's clause to support a denial is the evidentiary burden of the insurer, the initial burden of proving a covered loss and segregating the amount of damages between covered and non-covered perils belongs to the insured.

Again, the *Certain Underwriters at Lloyd's, London v. Lowen Valley* case addresses concurrent causation. *Certain Underwriters at Lloyd's of London v. Lowen Valley View, L.L.C.*, 892 F.3d 167 (5th Cir. June 6, 2018). There, the Fifth Circuit Court of Appeals affirmed the trial court's granting of summary judgment to Certain Underwriters at Lloyd's of London in a case where a hotel could not prove roof hail damage resulted during the relevant policy period. Lowen Valley owned and operated a hotel in Irving, Texas and obtained a policy with Underwriters for one year, from June 2, 2012 to June 2, 2013. One-and-one-half years after the policy expired, an employee noticed the roof shingles looked bad and called a roofing contractor who found significant hail damage. Based on a weather report which showed *nine* hail events at the hotel's location between 2006 and 2014, the owner reported the date of loss as June 13, 2012, a date within the policy period. Lloyd's hired an engineer who opined the following in four consecutive reports: (1) the most recent hailstorm with hailstones large enough to cause the observed damage was on June 13, 2012; (2) the damage observed most likely occurred on June 13, 2012; (3) it was unlikely that hail only fell at that location one time; and finally, (4) he never intended to suggest June 13, 2012 was a known date or the only date that hail damage occurred at the property and there were additional dates with weather conducive to hail prior to June 2012.

Underwriters filed for declaratory judgment. Lowen Valley counterclaimed and added claims for breach of contract and insurance code violations. The District Court granted summary judgment to Underwriters, in part because it found Lowen Valley failed to meet its burden of evidence which would allow the jury to segregate covered losses from non-covered losses, and in part due to late notice. On appeal, Lowen Valley argued that Underwriters' adjuster stated the roof was totaled by hail on the date of loss. However, the adjuster's full report and deposition testimony suggested the adjuster had not questioned the insured's reported date of loss because his job was only to determine whether there was hail damage and the cost to repair it. Lowen Valley also argued that the engineer's "most likely" language provided a fact issue. However, as the engineer had disclaimed the language and there was undisputed

[13] https://law.justia.com/cases/texas/supreme-court/2015/13-0711.html

evidence of severe hail events outside the coverage period, the Court agreed with the District Court that the record lacked reliable evidence which would permit a jury to determine which of the storms – "alone or in combination" – damaged the hotel.

The Fort Worth Court of Appeals also recently addressed the doctrine of concurrent causation in *Seim v. Allstate Texas Lloyds*, No. 02-16-00050-CV, 2018 WL 5832106 (mem. op). In *Seim,* the Court of Appeals had previously affirmed the trial court's summary judgment in Allstate's favor but the Texas Supreme Court reversed and remanded for a determination of whether summary judgment could be affirmed on other grounds.

The homeowners made a claim for interior water damage from an August 2013 storm. Allstate denied the claim because there was no evidence of an opening in the roof caused by wind or hail as required by the policy. The Court found the homeowners' expert's opinions conclusory and insufficient to create a question of fact as to whether the damage resulted from the August 2013 storm or other causes. However, the Court further found in the alternative that, to the extent the expert's reports raised a fact issue as to whether the claimed damage resulted from the August 2013 storm combined with prior storms and other causes, it would trigger the doctrine of concurrent causation.

Citing *Lowen Valley*, the Court found the homeowners had failed to produce any evidence segregating the damage attributable solely to the August 2013 storm from damage caused by prior storms and other causes, such as thermal cracking. The homeowners argued that circumstantial evidence can suffice instead of expert allocation of damages, citing *Lyons v. Millers Cas. Ins. Co.*, 866 S.W.2d 597, 601 (Tex. 1993). However, the Court distinguished *Lyons*, in which the homeowners and a neighbor testified there was no preexisting damage. Instead, the Court found there was "no evidence that the Seims' roof was visibly damaged after the August 2013 storm in a way that it was not before," and that Ms. Seims' statement that there were "new leaks" did not establish new damage. In the absence of evidence segregating the Seims' damage, the Court held summary judgment proper.

Further, determining whether the loss may be barred or limited by concurrent causation may also come into play in evaluating claims for alleged violations of Chapter 542 of the Insurance Code or the Prompt Payment statute. To establish a right to recover the Chapter 542 penalty, the insured must show (1) a claim was made under an insurance policy, (2) **the insurer is liable for the claim**, and (3) the insurer failed to follow one or more sections of the prompt payment statute with respect to the claim. *See Allstate Ins. Co. v. Bonner,* 51 S.W.3d 289, 291 (Tex.2001); *Marchbanks v. Liberty Ins. Corp.*, 2018 WL 4016931 (Tex. App.—Houston [14th Dist.] 2018, no pet. h.) (citing *United Nat. Ins. Co. v. AMJ Investments, LLC*, 447 S.W.3d 1, 13 (Tex. App.—Houston [14th Dist.] 2014, pet. dism'd).

VI. APPRAISAL

Since Chapter 542A was enacted, many insurers and insureds still utilize appraisal to determine the amount of loss in dispute. Insureds tend to use it in jurisdictions favorable to the plaintiffs' bar as umpire lists may contain former mediators or former judges who either split the baby as if the process is a mediation or sometimes adopt the plaintiff's estimate. Carriers may choose to invoke appraisal and move to end a dispute or litigation by payment of the award. Plaintiffs' counsel continue to argue that payment of an appraisal award does not end the litigation after *Menchaca*. The majority of opinions to examine such assertion, however, continue to find that the timely payment of an appraisal award ends the dispute.

A. Timely Payment of an Appraisal Award Estops Alleged Contractual Claims.

For instance, in *Garcia v. Liberty Mut. Ins. Co.*, 2019 WL 1383011 (S.D. Tex. 2019), Liberty Mutual invoked appraisal after being sued in a residential wind/hail case. The award was around $30,000 and Liberty Mutual paid the ACV portion, around ten days later, and advised the Insured how to collect the withheld depreciation. Liberty Mutual then moved for summary judgment. The Plaintiffs argued that the payment was untimely because the policy stated the carrier would pay within five business days of notifying the Insured it would pay all or part of a claim. Interestingly, the Court found that the loss-payment provision does not apply to appraisal awards. The Court also rejected Plaintiffs' argument that the award was not "paid" because depreciation was withheld and noted that the payment was in compliance with the policy's terms.

The Court further rejected Plaintiffs' arguments that *Menchaca* allowed for the further litigation of extra-contractual allegations despite payment of the appraisal award. The Court noted that the independent injury rule is still effective and operated here to warrant dismissal of the claims.

Similarly, a Northern District federal court granted summary judgment for the insurer after payment of an appraisal award in *Braden v. Allstate Veh. & Prop. Ins. Co.,* 2019 WL 201942 (N.D. Tex. 2019). In *Braden*, Allstate's first inspection found storm damages to the residence to be below the policy's deductible. Over a year later, Allstate received a statutory notice letter and re-inspected the property. After the second inspection,

Allstate estimated $8,619.77 in damages and sent a letter to the Plaintiff advising of its findings.

Four days later, the Insured filed suit against Allstate. Allstate removed the lawsuit to federal court and invoked appraisal. The two appraisers agreed to an award that was around $900 more than Allstate's prior payment. Allstate paid the award. Plaintiff opposed Allstate's subsequent summary judgment motion and argued that Allstate did not show that Plaintiff accepted the payment. The Court noted that Allstate did not have to show that Plaintiff negotiated the payment.

As for the alleged extra-contractual claims, the Court noted that the independent injury rule did not restrict the damages an insured can recover but it, instead, limits recovery of other damages that stem from a mere denial of policy benefits. Plaintiff had a right to policy benefits which it received when the insurer paid the appraisal award. Plaintiff did not plead any statutory violation causing Plaintiff to lose any benefits and failed to show any bad faith on the insurer's part.

B. *Menchaca* Has Not Supported Extra-Contractual Recovery After Timely Payment of an Appraisal Award.

In *Losciale v. State Farm Lloyds*, 2017 WL 3008642 (S.D. Tex. 2017),[14] Judge Nancy Atlas granted summary judgment for State Farm after it timely paid an appraisal award and discounted Plaintiff's argument that *Menchaca* "overruled" previous law on the effect of paying an appraisal award. *Id.* at *2. Plaintiff apparently did not identify which of the five *Menchaca* rules it believed supported the alleged Insurance Code claims against State Farm and the Court found that none applied to the case. *Id.* at *3. The Court found summary judgment for State Farm to be warranted because the payment of the appraisal award satisfied Plaintiff's "right to receive benefits under the Policy" so there was no "loss of benefits." *Id.* Also, there was no evidence of an independent tort that did not flow or stem from the original denial of benefits.

C. Refusing to Accept the Appraisal Award Payment Will Does Not Defeat the Insurer's Summary Judgment Motion.

After Hurricane Ike, a number of plaintiffs' counsel refused to accept the appraisal award payment and opposed summary judgment on those grounds. The Fourteenth Court of Appeals recently found that practice insufficient to defeat summary judgment and reversed and rendered a jury verdict in favor of National Security on that point in *National Security Fire & Cas. Co. v. Hurst,* 523 S.W.3d 840 (Tex. App.—Houston [14th Dist.] 2017, pet. filed).[15] In *Hurst,* National Security paid Hurst $3,524.56 for property damages. Hurst cashed the check and did not make any repairs to his property with the money. He, instead, filed suit against National Security, Action Claim Service, Inc. and Aaron Timmins, and his counsel invoked appraisal.

The Parties' appraisers could not agree on an umpire and the MDL Court appointed one who subsequently issued an award of $7,166.36. National Security paid the difference between the award and the prior payment. Hurst did not move to set aside the award or return the check. A jury trial resulted in a verdict for Hurst with an award of $3,651.80 in contractual damages. The jury also found that National Security and the two adjusters named, individually, committed unfair or deceptive acts and awarded another $41,396.71 for Insurance Code violations. The jury found that Action and Timmins, but not National Security, knowingly engaged in such conduct and awarded another $12,500 against Action and $12,500 against Timmins in damages. The jury also awarded Plaintiff $25,000 in damages for National Security's alleged bad faith.

The trial court entered judgment awarding Plaintiff $55,993.60 from National, $22,731.22 from Action, $22,731.22 from Timmins, 18% penalty interest, court costs, $75,000 in attorneys' fees through trial, and $35,000 for attorney's fees conditioned on an appeal. National Security appealed and argued that case law is clear that the timely payment of an appraisal award estops a contractual claim. Plaintiff argued that his refusal to accept the award negated the estoppel of his contractual claim. Both sides argued *Barry v. Allstate Tex. Lloyds*, 2015 WL 1470429 (S.D. Tex. 2015) applied, which the Court found to be instructive.

The Court noted that in *Barry,* the insurer instructed the insured to hold the appraisal award payment in trust until a release was signed. The Court noted that the *Barry* Court did not find that conditioning the payment of the award upon execution of the release constituted a breach of contract or rendered the award payment deficient so as to allow the breach of contract case to proceed. The *Barry* Court also did not hold that the release barred the extra-contractual claims even though *Barry* accepted payment. Here, Hurst never objected to the release but did not accept the payment after he initiated the appraisal process. National Security paid the full amount of the award due so there was no contractual claim on which Hurst should have recovered. *Id.* at 847.

As to the extra-contractual claims, the *Hurst* Court found that Hurst received the contractual benefits to which he was entitled under the policy and he failed to

[14] https://casetext.com/case/losciale-v-state-farm-lloyds

[15] https://casetext.com/case/natl-sec-fire-cas-co-v-hurst-1

allege any act so extreme as to cause independent injury. *Id.* at 848-49.

VII. INSURABLE INTEREST AND ANTI-ASSIGNMENT CLAUSES

Anti-assignment clauses sometimes come into play in claims or litigation in which an assignee, such as a subsequent purchaser of the insured property, pursues claims or litigation for property damages under a policy to which it is a stranger. Often times, the transfer of the property is unknown to the insurer and only discovered once the matter is in litigation. Typically, an insurer may defend against the litigation by showing the new owner of the property has no standing to sue under the policy as Texas enforces the anti-assignment clause.

Texas courts have consistently enforced anti-assignment clauses in insurance policies. *See Texas Farmers Ins. Co. v. Gerdes,* 880 S.W.2d 215, 218 (Tex. App.—Fort Worth 1994, writ denied); *Texas Pacific Indem. Co. v. Atlantic Richfield Co.,* 846 S.W.2d 580, 585 (Tex. App. –Houston [14th Dist.] 1993, no writ). Under Texas law, an anti-assignment clause also bars post-loss assignments. *See Hutter,* 34 Fed. Appx. 963, 2002 WL 663778, *1 (rejecting the post-loss assignment argument); *Conoco,* 819 F.2d at 123-24 (barring post-loss assignment under insurance policy's anti-assignment clause); *Gerdes,* 880 S.W.2d at 218 (barring post-loss assignment under insurance policy's anti-assignment clause). A policy's anti-assignment clause "prohibits the assignment of all rights and duties stemming from the Policy, including the right to post-loss proceeds, absent the consent of [Insurer]." *Certain Underwriters at Lloyd's v. PV Housing Group LP,* 2012 WL 10688348 (S.D. Tex. 2012) (not designated for publication). *See also Dr. Michael Hoffman & Associates ex rel. Dallas Medical Holdings, Ltd. v. St. Paul Guardian Ins. Co.*, 2005 WL 1950848 (Tex. App.—Dallas 2005, no pet.) (Texas law barred assignee from pursuing the insurance claims where an insured had assigned its claims a year after the loss occurred and the policy had an anti-assignment clause.).

For the most part anti-assignment clauses are unambiguous and enforceable. *See, e.g., Texas Farmers Ins. Co. v. Gerdes*, 880 S.W.2d 215, 218 (Tex. App. – Fort Worth 1994, writ denied); *Keller Foundations, Inc. v. Wausau Underwriters Ins. Co.,* 626 F.3d 871, 874 (5th Cir. 2010) (anti-assignment clauses are valid and enforceable even for post-loss assignments). The purported assignee has no standing to sue for breach of contract where an assignment is made without the insurer's consent. *Conoco, Inc. v. Republic Ins. Co.*, 819 F.2d 120, 124 (5th Cir. 1987); *Dallas County Hosp. Dist. v. Pioneer Casualty Co.*, 402 S.W.2d 287, 288 (Tex. Civ. App. - Fort Worth 1966, writ ref'd n.r.e.). An insurer does not have to show prejudice in enforcing anti-assignment clauses, even when the assignment is made after a loss. *International Interests, LP v. Mt. Hawley Ins. Co.*, 2014 WL 4537784, at *5 (S.D. Tex. Sept. 11, 2014); *Nautilus Ins. Co. v. Concierge Care Nursing Centers, Inc.*, 804 F. Supp. 2d 557, 559 (S.D. Tex. 2011).

Whether a party has an insurable interest is a question of law. *Jones v. Tex. Pac. Indem. Co.*, 853 S.W.2d 791, 793 (Tex. App.—Dallas 1993, no writ). To recover under the policy, an assignee would have the same evidentiary burden as an insured—the burden to prove it has an insurable interest. *Monarch Fire Ins. Co. v. Redmon*, 109 S.W.2d 177, 178 (Tex.Civ.App.-Dallas 1937, no writ history).

Courts must enforce anti-assignment clauses in the absence of a successful attack on that clause. *In re Hughes*, 513 S.W.3d 28, 32 (Tex. App.—San Antonio 2016, pet. denied). Anti-assignment clauses are enforceable unless rendered ineffective by an applicable statute, estoppel, waiver or some other aspect of contract law. *Chul Ju Choi v. Century Surety Co.*, 2010 WL 3825405 (S.D. Tex. 2010). If an anti-assignment clause is enforceable, any purported assignment in violation of the clause is invalid and the assignee may not rely on the assignment document to proceed directly on the contract.

Courts have not invalidated the anti-assignment clause for assignments made after a loss. For example, in *Paramount Disaster Recovery, Inc. v. Axis Surplus Ins. Co.*, 2011 WL 3875357 (S.D. Tex. 2011) (not designated for publication), the insurer issued a policy to a realty management company. After Hurricane Ike damaged a covered property, Paramount sued Axis in its capacity as the management company's assignee. The policy had an anti-assignment provision. The *Paramount* Court found that the non-assignment clause was enforceable for post-loss assignments and that it precluded the assignment of the management company's rights to the assignee without the insurer's written consent. *Id.*

A. Anti-Assignment Clauses May Be Waived.

One way an assignee may challenge an insurer's objection to its pursuit of proceeds under a policy is to argue waiver by the insurer. A waiver occurs when a party either intentionally relinquishes a known right or engages in intentional conduct inconsistent with claiming that right. To establish waiver, the insured or assignee must demonstrate prejudice. *In re Universal Underwriters of Texas Ins. Co.*, 345 S.W.3d 404, 412 (Tex. 2011).

A Houston appellate court recently found that the insurer waived its right to enforce its anti-assignment clause in *Safeco Insurance Co. v. Clear Vision Windshield Repair, LLC*, 564 S.W.3d 913 (Tex. App.—

Houston [14th Dist.] 2018, pet. granted). Clear Vision performed chip repairs in automobile windshields. Safeco's insureds assigned their rights to Clear Vision to pay for the windshield repairs. Safeco paid for three of the invoices and denied a fourth because it did not include sales tax. Also, Safeco did not reject the invoice based on the anti-assignment clause and did not raise the clause issue until litigation. Other facts supporting waiver developed at trial were that Clear Vision had previously billed Safeco for over 2,000 windshield repairs and Safeco paid 85% of those. In the 15% denied, Safeco had not cited the anti-assignment clause.

B. Circumventing the Anti-assignment Clause by Assigning Rights in the Litigation

Texas law recognizes a distinction between a contracting party's ability to assign rights under a contract containing an anti-assignment provision, and that party's ability to assign a cause of action arising from a breach of that contract. Anti-assignment clauses are enforceable unless rendered ineffective by a statute. *Safeco*, 564 S.W.3d at 919; *Certain Underwriters at Lloyd's v. PV Housing Group LP*, 2012 WL 10688348 (S.D. Tex. 2012).

A clever attempt to circumvent this established law involved a situation where a property owner alleged it sold its right in interest in a lawsuit under Section 12.014(a) of the Texas Property Code which states:

> (a) A judgment or part of a judgment of a court of record or an interest in a cause of action on which suit has been filed may be sold, regardless of whether the judgment or cause of action is assignable in law or equity, if the transfer is in writing.

Tex. Prop. Code. § 12.014(a). The case settled without the issue being addressed by the trial court or appellate court.

One of the only courts to address this situation was Judge Hoyt in the Southern District in *Choi v. Century Surety Co.*, 2010 WL 3825405 (S.D. Tex. 2010). In *Choi*, the Court noted that the Property Code provision allows the insured to sell her judgment creditor interest to a third party but does not allow plaintiff to transfer her rights under the policy to plaintiffs.

At issue was a contract dispute involving a shooting at a karaoke bar insured under Century's liability policy. Plaintiffs sued the insured and obtained a judgment against the insured and the shooter. Century denied coverage after the suit concluded because it alleged that no "occurrence" of bodily injury occurred. The insured assigned her rights against the defendant (shooter) to the plaintiffs who then sued Century for breach of contract. Century asserted that the plaintiffs had no standing under the contract to assert any contractual claims. The plaintiffs argued that Section 12.014(a) of the Property Code rendered the anti-assignment provision void. The Court disagreed and rendered judgment for Century.

VIII. OVERHEAD AND PROFIT

Another issue often debated in a dispute between the insured and insurer over cost of repair is whether overhead and profit is owed and the reasonable rate for same. The San Antonio Court of Appeals considered the "O&P" issue in two cases recently. *In re Acceptance Indem. Ins. Co.*, --- S.W.3d ---, 2018 WL 4608261 (Sep. 26, 2018) and *In re Acceptance Indem. Ins. Co.*, --- S.W.3d ---, 2018 WL 4610902 (Sep. 26, 2018). The two *Acceptance* cases involved wind/hail lawsuits by owners of apartment complexes against Acceptance where the insured complained that Acceptance's damage estimates did not include O&P and sales tax.

The insured signed proofs of loss for undisputed payments but reserved the right to further seek O&P and sales tax. Acceptance invoked appraisal in response to pre-suit demand letters. The insured objected to appraisal alleging it was inappropriate. The trial court denied Acceptance's motion to compel appraisal and abatement of the lawsuits and Acceptance petitioned for mandamus.

In the mandamus proceeding, the insured argued against appraisal via several grounds. First, it argued that Acceptance waived the right to appraisal by delaying a decision on the claim. The Court applied the rationale of the Texas Supreme Court in *In re Universal Underwriters*, 345 S.W.3d 404 (Tex. 2011) and found there was no evidence of an impasse or delay after an impasse. The pre-suit demand letter is not evidence of impasse because its purpose is to encourage settlement and it implies further negotiation.

Second, the insured argued that a dispute involving O&P and tax is not proper for appraisal because it is not a dispute as to the amount of loss but is a legal or coverage issue. Acceptance agreed that some amount is due and the question of how much inherently makes the dispute about "amount of loss." Third, the insured argued that Acceptance breached the policy by not paying O&P and tax and that the breach negated any duty to further comply with the policy, including appraisal. The Court disagreed noting the appraisal process is to resolve the dispute between the parties.

Finally, the insured argued that the appraisal clause is illusory because the insurer could still deny the claim, meaning that it only had to pay an award it liked. The Court again disagreed and noted that both sides in an appraisal have the right to reject the award and litigate coverage. The Court granted mandamus and ordered that the action be abated until the appraisal

process was complete despite the *Universal Underwriters* opinion expressly stating that an abatement denial is not subject to mandamus and proceedings can go forward during an appraisal process.

IX. LIMITATIONS

In *Sideman v. Farmers Group, Inc.*, 2018 WL 4361160 (5th Cir. 2018) (mem. op.),[16] the Fifth Circuit Court of Appeals held that limitations barred the insureds' extra-contractual claims stemming from an alleged deceptive issuance of a homeowner's policy offer. The Court concluded that the discovery rule did not toll limitations which ran from the time the insureds received the offer, not years later after the home experienced property damage. The issue was a policy issuance with a cosmetic damage roof endorsement that excluded roof damages other than puncture damages which affected the roof's function. The offer was sent to the insured with an advisory to review and contact the signatory agent with questions but did not include a copy of the policy with the endorsement.

The insureds purchased the policy and did not have a claim until three years later when an April 2016 hailstorm caused damage to their metal roof. Farmers denied their claim based on the cosmetic damage endorsement excluding mere marring. The insureds sued and alleged the summary comparison with the policy's offer was misleading and other allegations of deception with the sale of the policy.

Limitations run in a Chapter 541 claim two years from the date the unfair method of competition or unfair or deceptive act or practice occurred or the date the person discovered or, by the exercise of reasonable diligence, should have discovered the act or practice.[17] Here, the insureds' complaint was based on the policy offer which was received in June 2013. They filed suit in January 2017 and those claims were barred unless saved by the discovery rule. The Court found the discovery rule did not toll limitations and affirmed dismissal of their claims. Dispositive facts considered by the Court included that the insureds could have exercised reasonable diligence to discover the policy's absence and allegedly misleading language. The offer told them to review the full policy and they never contacted anyone to ask for a copy of it.

X. COSMETIC DAMAGE TO ROOF EXCLUSION ENDORSEMENT

With the number of wind and hail claims there have been some challenges to the insurer's reliance on policy endorsements excluding cosmetic damages to roofs. As noted above in the *Sideman v. Farmers Group, Inc.* case, limitations run from the date the policy with the endorsement is issued as to any alleged misrepresentation allegations.

A Western District court found a fact issue existed as to whether hail dents to a metal roof was "cosmetic" in *Dragoo v. Allstate Vehicle and Prop. Ins. Co.*, 2018 WL 1536639 (W.D. Tex. 2018). In *Dragoo,* the insureds claimed hail damage to their metal roof which Allstate denied based on a cosmetic damage to metal roofs endorsement. Allstate's endorsement read:

> Cosmetic damage caused by hail to the surface of a metal roof, including but not limited to, indentations, dents, distortions, scratches, or marks, that change the appearance of the surface of the metal roof.
>
> This exclusion applies to all of the components of the surface of a metal roof, including but not limited to, panels, shingles, flashing, caps, vents, drip edges, finials, eave and gable trim and snow guards, coatings and other finishing materials.
>
> We will not apply this exclusion to sudden and accidental direct physical damage to the surface of a metal roof caused by hail that result in water leaking through the surfaces of a metal roof.

Id. at *2. The Parties agreed the metal roof was not leaking but disagreed as to whether the damage was purely cosmetic as plaintiff alleged it was still "functional damage." Plaintiff's expert opined that the dents not only changed the surface of the metal roof (cosmetic), but that it also affected the roof's proper function (not cosmetic). The Court found the dispute to be a fact issue and granted summary judgment that the endorsement bars cosmetic damage but denied summary judgment on whether the damage to Dragoo's property was cosmetic.

In *Hahn v. United Fire & Casualty Co.*, 2017 WL 1289024, *11-12 (W.D. Tex. 2017), the Court considered a dispute over a cosmetic damages exclusion and found a fact issue as to the contractual claim but granted summary judgment on the alleged extra-contractual claims because the insurer had a reasonable basis for denying the claim. *Id.* at *11.

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[16]https://law.justia.com/cases/federal/appellate-courts/ca5/17-51106/17-51106-2018-09-12.html

[17]Tex. Ins. Code § 541.162, available at https://texas.public.law/statutes/tex._ins._code_section_541.162

XI. LIMITING DAMAGE AWARDS VIA A TRCP 167 SETTLEMENT OFFER

The Corpus Christi Court of Appeals recently denied State Farm Lloyd's request to limit a Plaintiff's recovery based on its TRCP 167 settlement offer. In *Lloyds v. Vega*, 2018 WL 1773304 (Tex. App.—Corpus Christi-Edinburg 2018, pet. granted), the Court rejected State Farm's argument that its Rule 167 offer of $11,000 precluded Plaintiff's recovery where the jury awarded plaintiff $2,100 on the contractual claim. The Court reasoned that the total award was $21,986.47 with treble damages and such amount was greater than 80% of State Farm's offer.

The same appellate court, however, affirmed a $0 verdict based on State Farm's pre-trial Rule 167 offer. In *Salinas v. State Farm Lloyds*, No. 13-18-00129-CV (Tex. App.—Corpus Christi, April 11, 2019, no pet. history), Plaintiffs sued State Farm in Hidalgo County in connection with the April 2012 hailstorm. Around three months after suit was filed, State Farm made an offer of settlement of $25,900 which expired without response from Plaintiffs.

In a June 2017 trial, the jury awarded around $38,163.87 to Plaintiffs, comprised of $10,500 for breach of contract, $10,500 for an unconscionable violation of the DTPA, $9,066.82 in pre-judgment interest, $10,500 for attorneys' fees, and $8,097.05 for taxable costs. State Farm filed a motion to modify the judgment based on its offer of settlement.

The hearing was reset approximately five times and Plaintiffs' counsel was unavailable on the final setting. The court allowed attendance by telephone but the court was not available when Plaintiffs' counsel called in. The court was to call Plaintiffs' counsel later but, instead, Plaintiffs' counsel learned from State Farm's counsel that afternoon that the court heard the motion that morning. The court signed a modified judgment which reduced Plaintiffs' award to $0 and found that contractual damages of $10,500 were the same as the extra-contractual damages, one of which was barred by the one satisfaction rule. After applying the deductible, the contractual damages were reduced to $8,934.00.

Further, the court noted that Plaintiffs' attorneys' fees were $3,150 prior to expiration of State Farm's settlement offer. After applying 18% penalty interest, and recoverable attorneys' fees, the amount of the jury award would be $15,534.45 which was less than State Farm's offer of settlement. State Farm was entitled to its costs under the statute which offset all damages awarded to Plaintiffs.

Plaintiffs' sole point of error raised was that the hearing on the motion to modify was held *ex parte*. The Court of Appeals determined that the *ex parte* hearing was error but found it to be harmless and affirmed the judgment in favor of State Farm.

XII. CONCLUSION

In sum, while the new statute continues to make its way through the Courts for interpretation, it has not stopped mass storm claims or litigation. *Menchaca* has neither killed nor strengthened the independent injury rule. Storm claims must still be evaluated on each individual set of facts and circumstances and particular policy language. Concurrent causation and the independent injury rule must be thoroughly examined, pleaded, and factually supported where applicable.

2019 TEXAS LEGISLATIVE UPDATE – SIGNIFICANT INSURANCE LEGISLATION

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CHAPTER 11

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Fluor Enters. v. Conex Int'l Corp., 273 S.W.3d 426 (Tex. App.–Beaumont 2008, pet. den'd);
Simplified Dev. Corp. v. Garfield, 2008 Tex. App. LEXIS 1127 (Tex. App.-Houston [14th Dist. 2008, pet. denied);
Brown v. Miguez, 2007 Tex.App.LEXIS 7980, (Tex. App.–Beaumont October 4, 2007, pet. den'd);
Biscamp v. Entergy Gulf States, Inc., 202 S.W.3d 414 (Tex. App.–Beaumont 2006, no pet.);
Pugh v. Conn's Appliances, Inc., 2004 Tex.App.LEXIS 2443 (Tex. App.–Beaumont March 18, 2004, pet. den'd).

Presentation and paper

Advanced Consumer and Commercial Law Course 2010, "Insurance Law from the Consumer's Perspective" (presentation); *IS IT NOW CAVEAT EMPTOR FOR CONSUMERS AND THEIR INSURANCE POLICIES* (paper)

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AUTOMOBILE INSURANCE				
Bill Number	**Author**	**Statute Amended**	**Summary**	**Last Action (as of 5/22/19)**
HB 259	Thompson, Ed(R)	§1952, Subchapter H Insurance Code	Relating to named driver insurance policies; policies must insure named driver when operating an unowned vehicle; and named driver exclusion must be in writing and signed	Sent to the Governor on 5/21/19
HB 2601	Lucio III, Eddie(D)	§1952.0545 (b), (c), (c-1) Insurance Code	Relating to named driver policy disclosure requirements; requiring notice that policy only provides coverage to named driver(s)	House Committee report sent to Calendars on 4/30/19
HB 4278	Vo, Hubert(D)	§601.124 Insurance Code	Relating to regulation of self-insurance for financial responsibility for operating a motor vehicle; requires bond of $10,000 and for claim payments holds self-insurer to same laws as insurers	Introduced and referred to committee on House Insurance on 3/25/19
HB 2679	Craddick, Tom(R)	§545.428 Transportation Code	Relating to damage to certain state transportation infrastructure resulting from certain motor vehicle accidents	House left pending in committee on 4/3/19
HB 799	Landgraf, Brooks(R)	§§621.207 (c); 621.504 Transportation Code	Relating to liability for certain damage caused by vehicles exceeding maximum height limitations; strict liability imposed and is a Class C misdemeanor	Sent to the Governor on 5/14/19
HB 1548	Springer, Drew(R)	In Transportation Code, Subchapters A & B of Chapter 663 are redesignated under Chapter 551A	Relating to the operation of golf carts, neighborhood electric vehicles, and off-highway vehicles	Placed on local and uncontested calendar on 5/22/19
HB 1348	Clardy, Travis(R)	§§1952.300-302 Insurance Code	Relating to insurance practices with respect to repair of motor vehicles; requires use of parts meeting manufacturer's standard and prohibits certain tactics in selection of repair facilities	Placed on General State Calendar on 5/9/19
HB 649	Krause, Matt(R)	§542, Subchapter C-2 Insurance Code	Relating to mandatory disclosure by liability insurers and policyholders to third-party claimants of applicable liability insurance	House left pending in committee on 4/2/19
HB 1739	Geren, Charlie(R)	§§1951.1061 - 1063 Insurance Code	Relating to recovery under UM/UIM insurance coverage; no legal determination necessary to bring UM/UIM claim for failure to settle, and attorney fees recoverable under TCPRC §38.002	Senate received from the House on 5/9/19

AUTOMOBILE INSURANCE CONTINUED				
Bill Number	**Author**	**Statute Amended**	**Summary**	**Last Action (as of 5/22/19)**
HB 2112	Thompson, Ed(R)	§501.091 (4-a) & (15) Transportation Code	Relating to defining when flood vehicles are deemed nonrepairable; defining "flood vehicle" as having water above doorsill or in the passenger, trunk or engine compartment	Placed on local and uncontested calendar on 5/22/19
HB 2371	Johnson, Julie (F)(D)	§1952.159 (a) & (c) Insurance Code	Relating to liability carrier's right of offset for PIP paid to guest/passenger; no such offset unless liability carrier pays full limits	Introduced and referred to committee on House Insurance on 3/6/19
HB 2372	Johnson, Julie (F)(D)	§1952.152 (b) Insurance Code	Relating to making PIP coverage mandatory after 1/1/2020	Introduced and referred to committee on House Insurance on 3/6/19
HB 2373	Johnson, Julie (F)(D)	§1952.153 Insurance Code	Relating to raising mandatory minimum PIP coverage from $2,500 to $5,000 mandatory after 1/1/2020	Introduced and referred to committee on House Insurance on 3/6/19
HB 2374	Johnson, Julie (F)(D)	§1955 Insurance Code	Relating to settlement of an automobile claim; a release is voidable if entered into within 45 days of the accrual of the cause of action and challenged within the first anniversary of the release	House Committee report sent to Calendars on 5/3/19
HB 2468	Zedler, Bill(R)	§1951.005 Insurance Code	Relating to proof of United States citizenship for the issuance or renewal of a personal automobile insurance policy	Introduced and referred to committee on House Insurance on 3/11/19
HB 3420	Lambert, Stan(R)	§1952.060 Insurance Code	Relating to mandatory coverage for temporary substitute vehicles under a person automobile insurance policy	Senate passage as amended report on 5/21/19
SB 1439	Zaffirini, Judith(D)	§2301.265 (a) & (b-1) Insurance Code	Relating to a requirement for the declarations page of personal automobile insurance policy to disclose potential variables in deductible	Introduced and referred to committee on Senate Business and Commerce on 3/14/19
SB 1797	Zaffirini, Judith(D)	§544.003 (b-1) Insurance Code	Relating to the prohibition on gender or marital discrimination in personal automobile insurance	Introduced and referred to committee on Senate Business and Commerce on 3/18/19

PROPERTY INSURANCE				
Bill	**Author**	**Statute Amended**	**Summary**	**Last Action (as of 5/22/19)**
HB 1900 & Companion SB 1036	Bonnen, Greg(R)	§2210.207 (c) - (d) Insurance Code	Relating to allow appraisal in replacement cost disputes in Texas Windstorm Insurance Association policies	Senate Amendments Analysis distributed on 5/21/19
SB 615 & Companion HB 1510	Buckingham	§2210.002 (b) Insurance Code	Relating to the operations and functions of the Texas Windstorm Insurance Association and the sunset review date for and programs administered by the association; authorizing a fee	Reported Enrolled on 5/21/19
HB 2686	Lucio III, Eddie(D)	§2210.573 (d-1) & (e-1) Insurance Code	Relating to a dispute relating to a denial of coverage by the Texas Windstorm Insurance Association	House failed to pass to engrossment on 5/2/19
HB 3074 & 3076	King, Ken(R)	§2210.001 Insurance Code	Relating to expansion of coverage by the Texas Windstorm Insurance Association for tornadoes and wildfires	Introduced and referred to committee on Insurance on 3/13/19
HB 1897	Bonnen, Greg(R)	§2211.003 (c) and §§2211.004 - 005 Insurance Code	Relating to optional arbitration, with discounted premium, for claims arising under FAIR Plan Association policies	House returned to committee on 5/6/19
SB 2443	Taylor, Larry(R)	§2210.001 Insurance Code	Relating to abolition of the FAIR Plan Association and merging Texas Windstorm Insurance Association	Introduced and referred to committee on Senate Business and Commerce 3/21/19
HB 1411 & Companion SB 590	Lucio III, Eddie(D)	§§551.051 - 551.054 (a) Insurance Code	Relating to extension of law on cancellation and nonrenewal of liability policies to commercial property policies	House laid on the table subject to call on 5/3/19
HB 1940 & Companion SB 2444	Lucio III, Eddie(D)	§981.004 (e) Insurance Code	Relating to eligibility of surplus lines insurers to provide windstorm and hail coverage	Reported Enrolled on 5/21/19

PROPERTY INSURANCE CONTINUED				
Bill	**Author**	**Statute Amended**	**Summary**	**Last Action (as of 5/22/19)**
HB 3108	Murphy, Jim(R)	§551.104 (g) Insurance Code	Relating to the cancellation of certain homeowners insurance policies; can cancel if in effect less than 60 days only with written consent of homeowner	Introduced and referred to committee on House Insurance on 3/13/19
HB 4557	Davis, Yvonne(D)	§2002.103 Insurance Code	Relating to a disclosure of coverage for water damage in connection with a residential property insurance policy	House left pending in committee on 4/23/19
SB 807	Johnson, Nathan (F)(D)	§82.111 (b-1) & (b-2) Property Code	Relating to condominium association's requirement to provide annual summary of material terms of property insurance coverage	Introduced and referred to committee on Senate Business and Commerce on 3/1/19

FLOOD INSURANCE				
Bill Number	**Author**	**Statute Amended**	**Summary**	**Last Action (as of 5/22/19)**
SB 442 & Companions HB 283 and HB 1382	Hancock, Kelly(R)	§2002.103 Insurance Code	Relating to mandatory disclosure that flood coverage not included in residential property insurance policy	Sent to the Governor on 5/17/19
SB 796	Alvarado, Carol (F)(D)	§2002.103 Insurance Code	Relating to mandatory disclosure that flood coverage not included under a residential property insurance policy issued in area susceptible to flooding	Introduced and referred to committee on Senate Business and Commerce on 3/1/19
HB 1942	Lucio III, Eddie(D)	§2002.053 Insurance Code	Relating to mandatory disclosure that flood coverage not included under a commercial or residential property insurance policy	Introduced and referred to committee on House Insurance on 3/5/19
HB 993	Coleman, Garnet(D)	§92.0132 Property Code	Relating to mandatory notice to a prospective residential tenant regarding a dwelling that is located in a floodplain or that has been damaged by flooding	Introduced and referred to committee on Senate Business & Commerce on 5/15/19
SB 339 & Companion HB 3815	Huffman, Joan(R)	§5.008(b) Property Code	Relating to a seller's required disclosure notice for a residential property regarding floodplains, flood pools, or reservoirs	Placed on Local, Consent, and Res. Calendar on 5/22/19
SB 1220 & Companions HB 3815 and HB 3839	Bettencourt, Paul(R)	§212.004 (b) & (f) Local Property Code	Relating to requiring surveyor certification of property located in floodplains, flood pools, or reservoirs to be provided by sellers of real property and on subdivision plats	Introduced and referred to committee on Senate Business and Commerce on 3/7/19
HB 1306	Frullo, John(R)	§981.004 (e) Insurance Code	Relating to the provision of flood coverage under policies issued by surplus lines insurers; surplus lines insurers exempted in such cases from showing no comparable standard insurance	Reported Enrolled on 5/21/19

PREMIUM RATE SETTING				
Bill Number	**Author**	**Statute Amended**	**Summary**	**Last Action (as of 5/22/19)**
HB 668	King, Ken(R)	§2251.053 Insurance Code	Relating to prohibition of using loss and expense experience in a disaster area to set rates outside of the disaster area	Introduced and referred to committee on House Insurance on 2/21/19
HB 3073	King, Ken(R)	Joint interim study	Relating to a joint interim study regarding the spreading of risk and costs related to certain natural disasters across the state by property and casualty insurance companies	House left pending in committee on 4/1/19

DISASTER CONTRACTORS				
Bill Number	**Author**	**Statute Amended**	**Summary**	**Last Action (as of 5/22/19)**
HB 2102 & Companion SB 1169	Capriglione, Giovanni(R)	§707 Insurance Code	Relating to prohibition of "rebating" deductibles and making it a Class A misdemeanor	Placed on local and uncontested calendar on 5/22/19
HB 2103	Capriglione, Giovanni(R)	§130.302 Education Code	Relating to prohibition of all contractors -- not just roofing contractors -- acting as public insurance adjusters	Placed on local and uncontested calendar on 5/22/19
HB 1152	Bernal	§17.45 (17) Business Code	Relating to the deceptive trade practice of charging exorbitant or excessive prices for necessities during a declared disaster	Placed on local and uncontested calendar on 5/22/19
SB 1643	Miles, Borris(D)	§17.46 (b) Business and Commerce Code	Relating to the deceptive trade practice of charging exorbitant or excessive prices for necessities during a declared disaster	Introduced and referred to committee on State Affairs on 3/14/19
HB 3151 & Companion HB 3156	Capriglione, Giovanni(R)	Title 8, Chapter 1306 Occupations Code	Relating to regulation of reroofing contractors; establishes Board, licensing and contract language requirements	Introduced and referred to committee on Business and Industry on 3/13/19
HB 4467	Thierry	Title 8, Chapter 1306 Occupations Code	Relating to regulation of roofing contractors; establishes Board, licensing and prohibition to act as public adjusters	Introduced and referred to committee on Business and Industry on 3/26/19
SB 985 & Companion HB 2856	Kolkhorst, Lois(R)	§58.001 (1) & (2) Business and Commerce Code	Relating to restrictions under disaster remediation contracts, creating a criminal (felony) offense to require advance payment without escrowing the payment	Senate Committee report printed and distributed on 4/30/19

PUBLIC ADJUSTERS				
Bill Number	**Author**	**Statute Amended**	**Summary**	**Last Action (as of5/22/19)**
HB 2659	Paul, Dennis(R)	§4102.162 Insurance Code	Relating to prohibition of use of company names by public insurance adjusters if name is different than name on license and is not a valid assumed name	Not again placed on intent calendar on 5/22/19
LIFE INSURANCE				
Bill Number	**Author**	**Statute Amended**	**Summary**	**Last Action (as of 5/22/19)**
HB 207	Craddick, Tom(R)	§1101, Subchapter E Insurance Code	Relating to disclosures and notices required for certain life insurance policies for adverse impact of non-guaranteed charges and interest rate changes	Senate Amendments Analysis distributed on 5/21/19
HB 2378 & Companion SB 2436	Raymond, Richard(D)	§1101, Subchapter E Insurance Code	Relating to mandatory disclosure to a funeral director of a beneficiary under a life insurance policy	House Committee report sent to Calendars on 5/8/19
HB 2104	Frullo, John(R)	§1101.014 Insurance Code	Relating to a limitation on life insurance proceeds for terroristic acts; limits recovery to premiums paid	Introduced and referred to committee on Senate Business and Commerce on 5/7/19

HEALTH INSURANCE				
Bill Number	**Author**	**Statute Amended**	**Summary**	**Last Action (as of 5/22/19)**
HB 1273	Zedler, Bill(R)	§1217 Insurance Code	Relating to prohibition of denial of payment for preauthorized health care services	Introduced and referred to committee on Senate Business and Commerce on 5/6/19
HB 2408 & Companion SB 1741	Johnson, Julie (F)(D)	§§1356.005 - 1361.003 Insurance Code	Relating to preauthorization by certain health benefit plan issuers of certain benefits	House Committee report sent to Calendars on 4/11/19
HB 3041	Turner, Chris(D)	§1222 Insurance Code	Relating to the mandatory provision for allowing renewal of a preauthorization for a medical or health care service prior to the preauthorization expiring	Placed on intent calendar on 5/22/19
HB 1278	White, James(R)	§254.001(5) Health and Safety Code	Relating to adding outpatient acute care clinics to definition of "freestanding emergency medical care facilities"	House Committee report sent to Calendars on 4/18/19
HB 1941 & Companion SB 866	Phelan, Dade(R)	§17.464 Business & Commerce Code	Relating to unconscionable prices charged by emergency care facilities	Placed on intent calendar on 5/22/19
HB 3064	Johnson, Julie (F)(D)	§1203, Subchapter C Insurance Code	Relating to prohibition of requirement that claimant first make claim against third-party liability insurance before claiming against health care policy	House Committee report sent to Calendars on 4/30/19
SB 2407 & Companion HB 2507	Menendez, Jose(D)	§1201.104 (a) Insurance Code	Relating to the regulation of short-term limited duration health insurance policies	Introduced and referred to committee on Senate Business and Commerce on 3/21/19
HB 2362& Companion SB 2378	Moody, Price, Canales	§74.153 Civil Practice and Remedies Code	Relating to the standard of proof in health care liability claims involving emergency medical care	Placed on intent calendar on 5/22/19

MISCELLANEOUS				
Bill Number	**Author**	**Statute Amended**	**Summary**	**Last Action (as of 5/22/19)**
HB 1648	Lucio III, Eddie(D)	§981.101 (d) Insurance Code	Relating to arbitration provisions in surplus lines insurance policies	Placed on General State Calendar on 5/9/19
HB 4065	Reynolds, Ron(D)	§92.3516 Property Code	Relating to mandatory tenant liability insurance for property damage	Introduced and referred to committee on Senate Business and Industry on 3/21/19
HB 4277	Davis, Yvonne(D)	§2003, Subchapter E Government Code	Relating to the establishment of the consumer complaint review panel by the State Office of Administrative Hearings to conduct appeals of denial of claims by TDI	House left pending in committee on 4/23/19
HB 4321	Davis, Yvonne(D)	§33.008 Insurance Code	Relating to certain conflicts of interest of the commissioner of insurance and employees of the Texas Department of Insurance; prohibition of gifts to TDI employees	No action taken in committee on 4/8/19
HB 4322	Davis, Yvonne(D)	§33.008 Insurance Code	Relating to prohibited employment of former commissioners of insurance and employees of TDI by insurers and agents for two years from date of separation	No action taken in committee on 4/8/19
SB 569 & Companion HB 4259	Huffman, Joan(R)	§42.042 (d-1) & (g) Human Resources Code	Relating to mandatory liability insurance for owners of single-family residences in the amount of $300,000	Passed to 3rd reading on 5/21/19
HB 2730 & Companion SB 2162	Leach	§27.001(2), (6) and (7) Civil Practice and Remedies Code	Relating to civil actions involving the exercise of certain constitutional rights	Sent to Governor on 5/21/19
HB 2929 & Companion SB 1159	Leach	§55.0015 (b) and (d) Property Code	Relating to hospital liens	Not again placed on intent calendar on 5/22/19
HB 3300	Murr	§30.021 Civil Practice and Remedies Code	Relating to an award of costs and attorney's fees in a motion to dismiss for certain actions that have no basis in law or fact	Reported Enrolled on 5/21/19

ATTORNEY'S FEES				
Bill Number	**Author**	**Statute Amended**	**Summary**	**Last Action (as of 5/22/19)**
SB 471	Hughes	§38.001, *et seq.* Civil Practice and Remedies Code	Relating to recovery of attorney's fees against entities other than individuals and corporations	Referred to State Affairs on 2/14/19
HB 370	Cain	§38.001, *et seq.* Civil Practice and Remedies Code	Relating to recovery of attorney's fees against entities other than individuals and corporations	Introduced and referred to committee on House Judiciary and Civil Jurisprudence on 2/19/19
HB 790	Davis, Sarah(R)	§38.001, *et seq.* Civil Practice and Remedies Code	Relating to recovery of attorney's fees against entities other than individuals and corporations	Senate Received from the House on 4/26/19
HB 2533	Meyer	§38.001, *et seq.* Civil Practice and Remedies Code	Relating to recovery of attorney's fees against entities other than individuals and corporations	Introduced and referred to committee on House Judiciary and Civil Jurisprudence on 3/11/19
HB 2437	Murr	§38.001, *et seq.* Civil Practice and Remedies Code	Relating to recovery of attorney's fees against entities other than individuals and corporations	House Committee report sent to Calendars on 4/30/19
HB 4223	Davis, Yvonne(D)	§154, Subchapter E Civil Practice and Remedies Code	Relating to the resolution of any contract dispute through a contractual appraisal process; allows prevailing party to recover attorney's fees and costs	House Committee report sent to Calendars on 5/6/19
HB 2826 & Companion SB 28	Bonnen, Greg(R)	§2254.101 (2-a & 2-b) Government Code	Relating to procurement of a contingent fee contract for legal services by a state agency or political subdivision	Reported Enrolled on 5/21/19
HB 3308 & Companion SB 1623	Smithee, John(R)	§501.204 (a) Insurance Code	Relating to nonprofit legal services corporations deemed not to be engaged in the business of insurance while being allowed to provide legal services to insurers	Committee report sent to Calendars on 4/25/19

EVIDENCE/TRIAL				
Bill Number	**Author**	**Statute Amended**	**Summary**	**Last Action (as of 5/22/19)**
HB 1554	Smithee, John(R)	§2301.058 Insurance Code	Relating to the English language controlling in any dispute over language of personal automobile or residential property insurance policy	Sent to the Governor on 5/14/19
HB 1555	Smithee, John(R)	§2301.057 Insurance Code	Relating to extraneous materials such as summaries as inadmissible evidence of coverage representations	Sent to the Governor on 5/14/19
HB 3832 & Companion SB 1215	Smith	§41.0105 Civil Practice and Remedies Code	Relating to recovery of medical or health care expenses in civil actions	Introduced and referred to committee on Judiciary and Civil Jurisprudence on 3/19/19
HB 1185 & Companion SB 737	Cyrier	§114.003 Civil Practice and Remedies Code	Relating to adjudication of claims arising from certain written contracts with state agencies	Senate left pending in committee on 5/17/19
HB 1737	Holland, Justin (R)	§16.008 (a), (a-1), (a-2) & (c) Civil Practice and Remedies Code	Relating to the statutes of limitation and repose for certain claims involving the construction or repair of an improvement to real property or equipment attached to real property	House Committee report sent to Calendars on 5/1/19
SB 1928 & Companion HB 2440	Fallon	§150.001 (1-a), (1-b) & (1-c) Civil Practice and Remedies Code	Relating to adding the requirement of a certificate of merit in claims for contribution, indemnity and third-party claims against certain licensed or registered professionals	House passage as amended reported on 5/15/19
HB 3365	Paul	§79.003 Civil Practice and Remedies Code	Relating to creation of immunity from liability of volunteer health care providers and health care institutions for care, assistance, or advice provided in relation to a disaster	Signed in the Senate on 5/21/19
SB 752 & Companion HB 1353	Huffman, Joan(R)	§79.0031 Civil Practice and Remedies Code	Relating to creation of immunity from liability of volunteer health care providers and health care institutions for care, assistance, or advice provided in relation to a disaster	Effective on 9/1/19
HB 3771	Oliverson, Tom(R)	§142.009 (b) & (c) Property Code	Relating to the resolution by court of which companies can provide structured settlement annuity contracts	Placed on local and uncontested calendar on 5/22/19

EVIDENCE/TRIAL CONTINUED				
Bill Number	**Author**	**Statute Amended**	**Summary**	**Last Action (as of 5/22/19)**
HB 1693 & Companion SB 1465	Smithee	§18.001 Civil Practice and Remedies Code (b), (d), (e) and (f)	Relating to affidavits concerning cost and necessity of services	Reported Enrolled on 5/21/19
HB 2757	Leach	§5.001 Civil Practice and Remedies Code	Relating to the rule of decision in a court of this state	Senate Amendments Analysis distributed on 5/21/19
SB 2342 & Companion HB 3336	Creighton	§22.004(h) Government Code	Relating to the jurisdiction of, and practices and procedures in civil cases before, justice courts, county courts, statutory county courts and district courts	House passage as amended reported on 5/19/19

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United Servs. Auto. Ass'n v. Hayes, 507 S.W.3d 263 (Tex.App.—Houston [1st Dist.] 2016, pet. granted, judgm't vacated w.r.m.);
Fluor Enters. v. Conex Int'l Corp., 273 S.W.3d 426 (Tex. App.–Beaumont 2008, pet. den'd);
Simplified Dev. Corp. v. Garfield, 2008 Tex. App. LEXIS 1127 (Tex. App.-Houston [14th Dist. 2008, pet. denied);
Brown v. Miguez, 2007 Tex.App.LEXIS 7980, (Tex. App.–Beaumont October 4, 2007, pet. den'd);
Biscamp v. Entergy Gulf States, Inc., 202 S.W.3d 414 (Tex. App.–Beaumont 2006, no pet.);
Pugh v. Conn's Appliances, Inc., 2004 Tex.App.LEXIS 2443 (Tex. App.–Beaumont March 18, 2004, pet. den'd).

Presentation and paper

Advanced Consumer and Commercial Law Course 2010, "Insurance Law from the Consumer's Perspective" (presentation); *IS IT NOW CAVEAT EMPTOR FOR CONSUMERS AND THEIR INSURANCE POLICIES* (paper)

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AUTOMOBILE INSURANCE				
Bill Number	**Author**	**Statute Amended**	**Summary**	**Last Action (as of 6/6/19)**
HB 259	Thompson, Ed(R)	§1952, Subchapter H Insurance Code	Relating to named driver insurance policies; policies must insure named driver when operating an unowned vehicle; and named driver exclusion must be in writing and signed	Effective on 9/1/19
HB 2601	Lucio III, Eddie(D)	§1952.0545 (b), (c), (c-1) Insurance Code	Relating to named driver policy disclosure requirements; requiring notice that policy only provides coverage to named driver(s)	House Committee report sent to Calendars on 4/30/19
HB 4278	Vo, Hubert(D)	§601.124 Insurance Code	Relating to regulation of self-insurance for financial responsibility for operating a motor vehicle; requires bond of $10,000 and for claim payments holds self-insurer to same laws as insurers	Introduced and referred to committee on House Insurance on 3/25/19
HB 2679	Craddick, Tom(R)	§545.428 Transportation Code	Relating to damage to certain state transportation infrastructure resulting from certain motor vehicle accidents	House left pending in committee on 4/3/19
HB 799	Landgraf, Brooks(R)	§§621.207 (c); 621.504 Transportation Code	Relating to liability for certain damage caused by vehicles exceeding maximum height limitations; strict liability imposed and is a Class C misdemeanor	Effective on 9/1/19
HB 1548	Springer, Drew(R)	In Transportation Code, Subchapters A & B of Chapter 663 are redesignated under Chapter 551A	Relating to the operation of golf carts, neighborhood electric vehicles, and off-highway vehicles	Sent to the Governor on 5/29/19
HB 1348	Clardy, Travis(R)	§§1952.300-302 Insurance Code	Relating to insurance practices with respect to repair of motor vehicles; requires use of parts meeting manufacturer's standard and prohibits certain tactics in selection of repair facilities	Placed on General State Calendar on 5/9/19
HB 649	Krause, Matt(R)	§542, Subchapter C-2 Insurance Code	Relating to mandatory disclosure by liability insurers and policyholders to third-party claimants of applicable liability insurance	House left pending in committee on 4/2/19
HB 1739	Geren, Charlie(R)	§§1951.1061 - 1063 Insurance Code	Relating to recovery under UM/UIM insurance coverage; no legal determination necessary to bring UM/UIM claim for failure to settle, and attorney fees recoverable under TCPRC §38.002	Senate received from the House on 5/9/19

AUTOMOBILE INSURANCE CONTINUED				
Bill Number	**Author**	**Statute Amended**	**Summary**	**Last Action (as of 6/6/19)**
HB 2112	Thompson, Ed(R)	§501.091 (4-a) & (15) Transportation Code	Relating to defining when flood vehicles are deemed nonrepairable; defining "flood vehicle" as having water above doorsill or in the passenger, trunk or engine compartment	Sent to the Governor on 5/29/19
HB 2371	Johnson, Julie (F)(D)	§1952.159 (a) & (c) Insurance Code	Relating to liability carrier's right of offset for PIP paid to guest/passenger; no such offset unless liability carrier pays full limits	Introduced and referred to committee on House Insurance on 3/6/19
HB 2372	Johnson, Julie (F)(D)	§1952.152 (b) Insurance Code	Relating to making PIP coverage mandatory after 1/1/2020	Introduced and referred to committee on House Insurance on 3/6/19
HB 2373	Johnson, Julie (F)(D)	§1952.153 Insurance Code	Relating to raising mandatory minimum PIP coverage from $2,500 to $5,000 mandatory after 1/1/2020	Introduced and referred to committee on House Insurance on 3/6/19
HB 2374	Johnson, Julie (F)(D)	§1955 Insurance Code	Relating to settlement of an automobile claim; a release is voidable if entered into within 45 days of the accrual of the cause of action and challenged within the first anniversary of the release	House Committee report sent to Calendars on 5/3/19
HB 2468	Zedler, Bill(R)	§1951.005 Insurance Code	Relating to proof of United States citizenship for the issuance or renewal of a personal automobile insurance policy	Introduced and referred to committee on House Insurance on 3/11/19
HB 3420	Lambert, Stan(R)	§1952.060 Insurance Code	Relating to mandatory coverage for temporary substitute vehicles under a person automobile insurance policy	Sent to Governor on 5/29/19
SB 1439	Zaffirini, Judith(D)	§2301.265 (a) & (b-1) Insurance Code	Relating to a requirement for the declarations page of personal automobile insurance policy to disclose potential variables in deductible	Introduced and referred to committee on Senate Business and Commerce on 3/14/19
SB 1797	Zaffirini, Judith(D)	§544.003 (b-1) Insurance Code	Relating to the prohibition on gender or marital discrimination in personal automobile insurance	Introduced and referred to committee on Senate Business and Commerce on 3/18/19

PROPERTY INSURANCE				
Bill	**Author**	**Statute Amended**	**Summary**	**Last Action (as of 6/6/19)**
HB 1900 & Companion SB 1036	Bonnen, Greg(R)	§2210.207 (c) - (d) Insurance Code	Relating to allow appraisal in replacement cost disputes in Texas Windstorm Insurance Association policies	Sent to the Governor on 5/28/19
SB 615 & Companion HB 1510	Buckingham	§2210.002 (b) Insurance Code	Relating to the operations and functions of the Texas Windstorm Insurance Association and the sunset review date for and programs administered by the association; authorizing a fee	Sent to the Governor on 5/25/19
HB 2686	Lucio III, Eddie(D)	§2210.573 (d-1) & (e-1) Insurance Code	Relating to a dispute relating to a denial of coverage by the Texas Windstorm Insurance Association	House failed to pass to engrossment on 5/2/19
HB 3074 & 3076	King, Ken(R)	§2210.001 Insurance Code	Relating to expansion of coverage by the Texas Windstorm Insurance Association for tornadoes and wildfires	Introduced and referred to committee on Insurance on 3/13/19
HB 1897	Bonnen, Greg(R)	§2211.003 (c) and §§2211.004 - 005 Insurance Code	Relating to optional arbitration, with discounted premium, for claims arising under FAIR Plan Association policies	House returned to committee on 5/6/19
SB 2443	Taylor, Larry(R)	§2210.001 Insurance Code	Relating to abolition of the FAIR Plan Association and merging Texas Windstorm Insurance Association	Introduced and referred to committee on Senate Business and Commerce 3/21/19
HB 1411 & Companion SB 590	Lucio III, Eddie(D)	§§551.051 - 551.054 (a) Insurance Code	Relating to extension of law on cancellation and nonrenewal of liability policies to commercial property policies	House laid on the table subject to call on 5/3/19
HB 1940 & Companion SB 2444	Lucio III, Eddie(D)	§981.004 (e) Insurance Code	Relating to eligibility of surplus lines insurers to provide windstorm and hail coverage	Sent to the Governor on 5/24/19

PROPERTY INSURANCE CONTINUED				
Bill	**Author**	**Statute Amended**	**Summary**	**Last Action (as of 6/6/19)**
HB 3108	Murphy, Jim(R)	§551.104 (g) Insurance Code	Relating to the cancellation of certain homeowners insurance policies; can cancel if in effect less than 60 days only with written consent of homeowner	Introduced and referred to committee on House Insurance on 3/13/19
HB 4557	Davis, Yvonne(D)	§2002.103 Insurance Code	Relating to a disclosure of coverage for water damage in connection with a residential property insurance policy	House left pending in committee on 4/23/19
SB 807	Johnson, Nathan (F)(D)	§82.111 (b-1) & (b-2) Property Code	Relating to condominium association's requirement to provide annual summary of material terms of property insurance coverage	Introduced and referred to committee on Senate Business and Commerce on 3/1/19

FLOOD INSURANCE				
Bill Number	**Author**	**Statute Amended**	**Summary**	**Last Action (as of 6/6/19)**
SB 442 & Companions HB 283 and HB 1382	Hancock, Kelly(R)	§2002.103 Insurance Code	Relating to mandatory disclosure that flood coverage not included in residential property insurance policy	Effective on 9/1/19
SB 796	Alvarado, Carol (F)(D)	§2002.103 Insurance Code	Relating to mandatory disclosure that flood coverage not included under a residential property insurance policy issued in area susceptible to flooding	Introduced and referred to committee on Senate Business and Commerce on 3/1/19
HB 1942	Lucio III, Eddie(D)	§2002.053 Insurance Code	Relating to mandatory disclosure that flood coverage not included under a commercial or residential property insurance policy	Introduced and referred to committee on House Insurance on 3/5/19
HB 993	Coleman, Garnet(D)	§92.0132 Property Code	Relating to mandatory notice to a prospective residential tenant regarding a dwelling that is located in a floodplain or that has been damaged by flooding	Introduced and referred to committee on Senate Business & Commerce on 5/15/19
SB 339 & Companion HB 3815	Huffman, Joan(R)	§5.008(b) Property Code	Relating to a seller's required disclosure notice for a residential property regarding floodplains, flood pools, or reservoirs	Sent to the Governor on 5/25/19
SB 1220 & Companions HB 3815 and HB 3839	Bettencourt, Paul(R)	§212.004 (b) & (f) Local Property Code	Relating to requiring surveyor certification of property located in floodplains, flood pools, or reservoirs to be provided by sellers of real property and on subdivision plats	Introduced and referred to committee on Senate Business and Commerce on 3/7/19
HB 1306	Frullo, John(R)	§981.004 (e) Insurance Code	Relating to the provision of flood coverage under policies issued by surplus lines insurers; surplus lines insurers exempted in such cases from showing no comparable standard insurance	Sent to the Governor on 5/24/19

PREMIUM RATE SETTING				
Bill Number	**Author**	**Statute Amended**	**Summary**	**Last Action (as of 6/6/19)**
HB 668	King, Ken(R)	§2251.053 Insurance Code	Relating to prohibition of using loss and expense experience in a disaster area to set rates outside of the disaster area	Introduced and referred to committee on House Insurance on 2/21/19
HB 3073	King, Ken(R)	Joint interim study	Relating to a joint interim study regarding the spreading of risk and costs related to certain natural disasters across the state by property and casualty insurance companies	House left pending in committee on 4/1/19

DISASTER CONTRACTORS				
Bill Number	**Author**	**Statute Amended**	**Summary**	**Last Action (as of 6/6/19)**
HB 2102 & Companion SB 1169	Capriglione, Giovanni(R)	§707 Insurance Code	Relating to prohibition of "rebating" deductibles and making it a Class A misdemeanor	Sent to the Governor on 5/29/19
HB 2103	Capriglione, Giovanni(R)	§130.302 Education Code	Relating to prohibition of all contractors -- not just roofing contractors -- acting as public insurance adjusters	Sent to the Governor on 5/29/19
HB 1152	Bernal	§17.45 (17) Business Code	Relating to the deceptive trade practice of charging exorbitant or excessive prices for necessities during a declared disaster	Sent to the Governor on 5/26/19
SB 1643	Miles, Borris(D)	§17.46 (b) Business and Commerce Code	Relating to the deceptive trade practice of charging exorbitant or excessive prices for necessities during a declared disaster	Introduced and referred to committee on State Affairs on 3/14/19
HB 3151 & Companion HB 3156	Capriglione, Giovanni(R)	Title 8, Chapter 1306 Occupations Code	Relating to regulation of reroofing contractors; establishes Board, licensing and contract language requirements	Introduced and referred to committee on Business and Industry on 3/13/19
HB 4467	Thierry	Title 8, Chapter 1306 Occupations Code	Relating to regulation of roofing contractors; establishes Board, licensing and prohibition to act as public adjusters	Introduced and referred to committee on Business and Industry on 3/26/19
SB 985 & Companion HB 2856	Kolkhorst, Lois(R)	§58.001 (1) & (2) Business and Commerce Code	Relating to restrictions under disaster remediation contracts, creating a criminal (felony) offense to require advance payment without escrowing the payment	Senate Committee report printed and distributed on 4/30/19

PUBLIC ADJUSTERS				
Bill Number	**Author**	**Statute Amended**	**Summary**	**Last Action (as of 6/6/19)**
HB 2659	Paul, Dennis(R)	§4102.162 Insurance Code	Relating to prohibition of use of company names by public insurance adjusters if name is different than name on license and is not a valid assumed name	Sent to the Governor on 5/26/19
LIFE INSURANCE				
Bill Number	**Author**	**Statute Amended**	**Summary**	**Last Action (as of 6/6/19)**
HB 207	Craddick, Tom(R)	§1101, Subchapter E Insurance Code	Relating to disclosures and notices required for certain life insurance policies for adverse impact of non-guaranteed charges and interest rate changes	Sent to the Governor on 5/29/19
HB 2378 & Companion SB 2436	Raymond, Richard(D)	§1101, Subchapter E Insurance Code	Relating to mandatory disclosure to a funeral director of a beneficiary under a life insurance policy	House Committee report sent to Calendars on 5/8/19
HB 2104	Frullo, John(R)	§1101.014 Insurance Code	Relating to a limitation on life insurance proceeds for terroristic acts; limits recovery to premiums paid	Introduced and referred to committee on Senate Business and Commerce on 5/7/19

HEALTH INSURANCE				
Bill Number	**Author**	**Statute Amended**	**Summary**	**Last Action (as of 6/6/19)**
HB 1273	Zedler, Bill(R)	§1217 Insurance Code	Relating to prohibition of denial of payment for preauthorized health care services	Introduced and referred to committee on Senate Business and Commerce on 5/6/19
HB 2408 & Companion SB 1741	Johnson, Julie (F)(D)	§§1356.005 - 1361.003 Insurance Code	Relating to preauthorization by certain health benefit plan issuers of certain benefits	House Committee report sent to Calendars on 4/11/19
HB 3041	Turner, Chris(D)	§1222 Insurance Code	Relating to the mandatory provision for allowing renewal of a preauthorization for a medical or health care service prior to the preauthorization expiring	Sent to the Governor on 5/25/19
HB 1278	White, James(R)	§254.001(5) Health and Safety Code	Relating to adding outpatient acute care clinics to definition of "freestanding emergency medical care facilities"	House Committee report sent to Calendars on 4/18/19
HB 1941 & Companion SB 866	Phelan, Dade(R)	§17.464 Business & Commerce Code	Relating to unconscionable prices charged by emergency care facilities	Sent to the Governor on 5/29/19
HB 3064	Johnson, Julie (F)(D)	§1203, Subchapter C Insurance Code	Relating to prohibition of requirement that claimant first make claim against third-party liability insurance before claiming against health care policy	House Committee report sent to Calendars on 4/30/19
SB 2407 & Companion HB 2507	Menendez, Jose(D)	§1201.104 (a) Insurance Code	Relating to the regulation of short-term limited duration health insurance policies	Introduced and referred to committee on Senate Business and Commerce on 3/21/19
HB 2362& Companion SB 2378	Moody, Price, Canales	§74.153 Civil Practice and Remedies Code	Relating to the standard of proof in health care liability claims involving emergency medical care	Sent to the Governor on 5/26/19

MISCELLANEOUS				
Bill Number	**Author**	**Statute Amended**	**Summary**	**Last Action (as of 6/6/19)**
HB 1648	Lucio III, Eddie(D)	§981.101 (d) Insurance Code	Relating to arbitration provisions in surplus lines insurance policies	Placed on General State Calendar on 5/9/19
HB 4065	Reynolds, Ron(D)	§92.3516 Property Code	Relating to mandatory tenant liability insurance for property damage	Introduced and referred to committee on Senate Business and Industry on 3/21/19
HB 4277	Davis, Yvonne(D)	§2003, Subchapter E Government Code	Relating to the establishment of the consumer complaint review panel by the State Office of Administrative Hearings to conduct appeals of denial of claims by TDI	House left pending in committee on 4/23/19
HB 4321	Davis, Yvonne(D)	§33.008 Insurance Code	Relating to certain conflicts of interest of the commissioner of insurance and employees of the Texas Department of Insurance; prohibition of gifts to TDI employees	No action taken in committee on 4/8/19
HB 4322	Davis, Yvonne(D)	§33.008 Insurance Code	Relating to prohibited employment of former commissioners of insurance and employees of TDI by insurers and agents for two years from date of separation	No action taken in committee on 4/8/19
SB 569 & Companion HB 4259	Huffman, Joan(R)	§42.042 (d-1) & (g) Human Resources Code	Relating to mandatory liability insurance for owners of single-family residences in the amount of $300,000	Sent to the Governor on 5/25/19
HB 2730 & Companion SB 2162	Leach	§27.001(2), (6) and (7) Civil Practice and Remedies Code	Relating to civil actions involving the exercise of certain constitutional rights	Effective on 9/1/19
HB 2929 & Companion SB 1159	Leach	§55.0015 (b) and (d) Property Code	Relating to hospital liens	Sent to the Governor on 5/26/19
HB 3300	Murr	§30.021 Civil Practice and Remedies Code	Relating to an award of costs and attorney's fees in a motion to dismiss for certain actions that have no basis in law or fact	Sent to the Governor on 5/24/19

ATTORNEY'S FEES				
Bill Number	**Author**	**Statute Amended**	**Summary**	**Last Action (as of 6/6/19)**
SB 471	Hughes	§38.001, *et seq.* Civil Practice and Remedies Code	Relating to recovery of attorney's fees against entities other than individuals and corporations	Referred to State Affairs on 2/14/19
HB 370	Cain	§38.001, *et seq.* Civil Practice and Remedies Code	Relating to recovery of attorney's fees against entities other than individuals and corporations	Introduced and referred to committee on House Judiciary and Civil Jurisprudence on 2/19/19
HB 790	Davis, Sarah(R)	§38.001, *et seq.* Civil Practice and Remedies Code	Relating to recovery of attorney's fees against entities other than individuals and corporations	Senate Received from the House on 4/26/19
HB 2533	Meyer	§38.001, *et seq.* Civil Practice and Remedies Code	Relating to recovery of attorney's fees against entities other than individuals and corporations	Introduced and referred to committee on House Judiciary and Civil Jurisprudence on 3/11/19
HB 2437	Murr	§38.001, *et seq.* Civil Practice and Remedies Code	Relating to recovery of attorney's fees against entities other than individuals and corporations	House Committee report sent to Calendars on 4/30/19
HB 4223	Davis, Yvonne(D)	§154, Subchapter E Civil Practice and Remedies Code	Relating to the resolution of any contract dispute through a contractual appraisal process; allows prevailing party to recover attorney's fees and costs	House Committee report sent to Calendars on 5/6/19
HB 2826 & Companion SB 28	Bonnen, Greg(R)	§2254.101 (2-a & 2-b) Government Code	Relating to procurement of a contingent fee contract for legal services by a state agency or political subdivision	Sent to the Governor on 5/24/19
HB 3308 & Companion SB 1623	Smithee, John(R)	§501.204 (a) Insurance Code	Relating to nonprofit legal services corporations deemed not to be engaged in the business of insurance while being allowed to provide legal services to insurers	Committee report sent to Calendars on 4/25/19

EVIDENCE/TRIAL				
Bill Number	**Author**	**Statute Amended**	**Summary**	**Last Action (as of 6/6/19)**
HB 1554	Smithee, John(R)	§2301.058 Insurance Code	Relating to the English language controlling in any dispute over language of personal automobile or residential property insurance policy	Effective Immediately on 5/24/19
HB 1555	Smithee, John(R)	§2301.057 Insurance Code	Relating to extraneous materials such as summaries as inadmissible evidence of coverage representations	Effective Immediately on 5/23/19
HB 3832 & Companion SB 1215	Smith	§41.0105 Civil Practice and Remedies Code	Relating to recovery of medical or health care expenses in civil actions	Introduced and referred to committee on Judiciary and Civil Jurisprudence on 3/19/19
HB 1185 & Companion SB 737	Cyrier	§114.003 Civil Practice and Remedies Code	Relating to adjudication of claims arising from certain written contracts with state agencies	Senate left pending in committee on 5/17/19
HB 1737	Holland, Justin (R)	§16.008 (a), (a-1), (a-2) & (c) Civil Practice and Remedies Code	Relating to the statutes of limitation and repose for certain claims involving the construction or repair of an improvement to real property or equipment attached to real property	House Committee report sent to Calendars on 5/1/19
SB 1928 & Companion HB 2440	Fallon	§150.001 (1-a), (1-b) & (1-c) Civil Practice and Remedies Code	Relating to adding the requirement of a certificate of merit in claims for contribution, indemnity and third-party claims against certain licensed or registered professionals	Sent to the Governor on 5/25/19
HB 3365	Paul	§79.003 Civil Practice and Remedies Code	Relating to creation of immunity from liability of volunteer health care providers and health care institutions for care, assistance, or advice provided in relation to a disaster	Effective Immediately on 6/2/19
SB 752 & Companion HB 1353	Huffman, Joan(R)	§79.0031 Civil Practice and Remedies Code	Relating to creation of immunity from liability of volunteer health care providers and health care institutions for care, assistance, or advice provided in relation to a disaster	Effective on 9/1/19
HB 3771	Oliverson, Tom(R)	§142.009 (b) & (c) Property Code	Relating to the resolution by court of which companies can provide structured settlement annuity contracts	Sent to the Governor on 5/26/19

EVIDENCE/TR CONTINUED				
Bill Number	**Author**	**Statute Amended**	**Summary**	**Last Action (as of 6/6/19)**
HB 1693 & Companion SB 1465	Smithee	§18.001 Civil Practice and Remedies Code (b), (d), (e) and (f)	Relating to affidavits concerning cost and necessity of services	Sent to the Governor on 5/24/19
HB 2757	Leach	§5.001 Civil Practice and Remedies Code	Relating to the rule of decision in a court of this state	Sent to the Governor on 5/28/19
SB 2342 & Companion HB 3336	Creighton	§22.004(h) Government Code	Relating to the jurisdiction of, and practices and procedures in civil cases before, justice courts, county courts, statutory county courts and district courts	Sent to the Governor on 5/28/19

ALI RESTATEMENT:
THE LAW OF LIABILITY INSURANCE

CHRISTINA A. CULVER, *Houston*
Thompson, Coe, Cousins & Irons, LLP

BEVERLY B. GODBEY, *Dallas*
Amy Stewart, PC

State Bar of Texas
16TH ANNUAL
ADVANCED INSURANCE LAW
June 6-7, 2019
San Antonio

CHAPTER 12

Christy Culver gratefully acknowledges the contribution of Cy Haralson and Alexa Gould, attorneys with Thompson Coe. Beverly Godbey gratefully acknowledges the contributions of Katie L. Glenn, of counsel to Amy Stewart, PC.

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Overview

Christy's practice focuses on complex, multi-party insurance coverage litigation, including bad faith litigation, and direct action coverage litigation in Louisiana, involving general liability, environmental pollution, commercial property coverage, construction defects, product defects, professional liability, errors and omissions coverage, and supplemental accident only coverage. Christy is licensed in Texas and Louisiana.

Representative Experience

- Obtained dismissal of Chinese Drywall product defect suit in Louisiana based upon Peremptory Exception of Peremption.
- Obtained summary judgment in favor of insurer on multiple environmental property claims and bodily injury claims in the Western District of Louisiana.
- Guiding coverage and bad faith disputes through each phase of resolution, including pre-litigation coverage analysis, strategic discovery, motion practice, alternative dispute resolution, and trial strategy.
- Obtained favorable opinion, in construction defect case, by the Fourth Circuit Court of Appeal of Louisiana reversing trial court's judgment granting motion for new trial and reinstating an order of dismissal on the grounds of abandonment. Cambrie Celeste, LLC v. F.I.N.S. Construction, LLC, et al., 2018 WL 4623355, --- So.3d ---, 2018-0459 (La. App. 4 Cir. 9/26/18), writ denied, 2019 WL 277703 (Mem), ---So.3d ---, 2018-1863 (La. 1/14/19).
- Obtained partial summary judgment, in the United States District Court for the Southern District of Texas, dismissing claim against insurer for pre-tender defense costs, and third-party's claim for breach of the insurance policy because the third-party lacked standing.

Professional & Community Activity

- Claims & Litigation Management Alliance ("CLM") – Greater Houston Chapter
- Allstate Staff Counsel for Street Law Program

- Garland R. Walker American Inn of Court – Member
- American Bar Association – Section of Litigation, Insurance Coverage Litigation
- State Bar of Texas – Insurance Law Section and Animal Law Section
- Texas Exes Life Member
- Houston Bar Association - Animal Law Section

Speeches & Presentations

- *Reserving Right and Denying Coverage, 2017 Insurance & Tort Law Update (October 2017)*
- *Animal Liability Claims, 2016 PLRB Claims Conference & Insurance Services Expo*
- *After the Storm – Property Coverage and Business Interruption Update, 8th Annual Texas Insurance and Tort Law Update 2015*
- *ABA WIN Conference 2018 – A Roadmap for Young Coverage Litigators*
- *ABA Coverage Journal – Recent Opinions on the Burden to Allocate Settlement Funds (to be published in winter issue)*

Professional Recognition

- *Texas Super Lawyers* - 2019 Texas Rising Star

Practices

- Insurance Litigation & Coverage

Industries

- Insurance

Education

- South Texas College of Law
- The University of Texas at Austin

Bar Admissions

- Texas, 2011
- Louisiana, 2015
- United States District Court Northern, Southern, Western and Eastern Districts of Texas
- Eastern and Western Districts of Louisiana
- Middle District of Louisiana

News

03.04.19	Thirteen Thompson Coe Attorneys Nominated Texas "Super Lawyers - Rising Stars"
09.01.17	Thompson Coe Announces Eleven New Partners
03.27.15	Thompson Coe Partners with Allstate Staff Counsel for Street Law Program

Publications

01.17.18	The Burden to Allocate Settlement Funds
11.20.17	Hurricane Harvey's Aftermath: Anticipated Coverage Issues Following Natural Disasters
08.29.14	Potential Conflicts in the Tripartite Relationship: The Use of Billing Guidelines and the Right to Independent Counsel

Events

04.09.15	8th Annual Insurance and Tort Law Update

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insurance coverage advocates

BEVERLY B. GODBEY

Principal

Beverly Godbey knows the power of asking nicely.

When a client's insurance claim is denied, Beverly leverages her decades of coverage experience to draft a concise, well-researched letter aimed at persuading the insurer to change its decision. If that doesn't achieve the desired result, then Beverly continues to speak softly, and she brings a big stick to the courtroom.

With 30 years as a trial and lawyer and nearly 50 cases tried to verdict, she knows how to face adversity with grace. Her unparalleled understanding of the complexities of insurance coverage, combined with her calm, professional demeanor, makes her a formidable opponent and a powerful advocate for her clients.

In addition to navigating coverage disputes, Beverly provides critical insights for policyholders in all types of insurance coverage matters, including policy reviews and comparisons. In addition to her insurance work, Beverly has represented corporate clients in complex commercial litigation, personal injury claims, products liability actions, trade secret cases, and professional malpractice claims, among others.

She is admitted to practice before state courts in Texas and Georgia, as well as the U.S. District Courts for the Northern, Southern, Eastern and Western Districts of Texas; U.S. District Court for the Northern District of Georgia; and U.S. Courts of Appeals for the Fifth, Eighth and Eleventh Circuits.

Based on her work for clients in insurance coverage litigation and commercial litigation, she has been named by her peers to *D Magazine*'s list of the Best Lawyers in Dallas, *The Best Lawyers in America*, and the annual listing of *Texas Super Lawyers*.

Beverly is also committed to providing pro bono legal services through The Human Rights Initiative and The Senior Source. For her pro bono work, she received the Fellows Justinian Award from the Dallas Bar Foundation in 2017.

She earned her law degree at Tulane University School of Law and her undergraduate degree, *magna cum laude*, at Southern Methodist University.

PRACTICE AREAS

- Insurance coverage litigation
- Bad faith litigation
- Commercial litigation
- Policy interpretation & analysis
- Insurance review & planning advice
- Mediation | Insurance coverage
- Mediation | Bad faith
- Advice | Insurance disputes
- Arbitration | Insurance coverage and commercial litigation

REPRESENTATIVE CASES

- Recovered policy aggregate limit for two different employee theft claims in the same policy year
- Negotiated insurance terms in construction contracts, leases, and other commercial contracts
- Achieved defense verdict in two-week products liability trial in state district court
- Obtained reimbursement of defense costs in numerous cases in which the insurer initially denied any duty to defend
- Negotiated settlement of property damage claim with homeowner's insurer
- Negotiated enhanced coverage for publicly traded clients in directors and officers, employment practices liability, fiduciary liability, crime, and commercial general liability policies
- Won summary judgment in federal court on duty to defend and violations of the Texas Insurance Code
- Named as an expert witness on coverage and bad faith issues for insurance companies and policyholders
- Panel member of arbitrators for the American Arbitration Association

PUBLICATIONS | PRESENTATIONS

- Feb | Mar 2018 — "Your Brain on Ethics :: How that Thing Between Your Ears Can Lead You Astray" presentation at the Justice James A. Barker Guide to Ethics and Professionalism in Texas, Texas Center for Legal Ethics, Austin, Texas (February) and Dallas, Texas (March)
- June 2017 — "Professional Liability Insurance :: Errors and Omissions to Avoid" presentation at *State Bar of Texas, Advanced Insurance Law Course 2017*, San Antonio, Texas
- December 2016 — "Proactive Approaches to Ethics and Professionalism" presentation for newly licensed Texas lawyers package, *Justice James A. Baker Guide to Ethics and Professionalism in Texas*, a 4-hour online CLE available through the Texas Center for Legal Ethics
- August 2015 — "Insurance Coverage for Drones" article in *Headnotes*, a publication of the Dallas Bar Association
- January 2015 — "Transfer of Risk and Insurance Requirements in Business Contracts" presentation for American Law Institute Continuing Legal Education
- January 2015 — "Drafting Risk Transfer and Insurance Provisions in Business Contracts :: Strategies for Mitigating Risk" presentation for American Law Institute Continuing Legal Education
- June 2014 — "Common Pitfalls of Certificates of Insurance" webinar presentation for Lorman Education Services
- November 2013 — "Misrepresentations in an Insurance Application" article in *Headnotes*
- April 2012 — "Case Law Update" presentation at the *State Bar of Texas, Advanced Insurance Law Course 2012*, Dallas, Texas
- April 2011 — "Insurance – What Your Management Team Needs to Know" presentation at the 33rd Annual Corporate Counsel Institute, Dallas and Houston, Texas
- April 2011 — "ERISA – A Primer for Coverage Lawyers" presentation at the *State Bar of Texas, Advanced Insurance Law Course 2011*, Dallas, Texas

HONORS | ACHIEVEMENTS

- Rated AV® Preeminent™ 5.0 out of 5 (Peer Review Rating) by Martindale-Hubbell® [AV® Preeminent™ and BV® Distinguished™ are certification marks of Reed Elsevier Properties Inc., used in accordance with the Martindale-Hubbell® certification procedures, standards, and policies]
- Selected by her peers for inclusion in The Best Lawyers in America® (2015 – 2019) listing in the field of insurance law and commercial litigation
- Named one of the Best Lawyers in Dallas: Insurance Law (2011 – 2018) by D Magazine
- Selected to the Texas Super Lawyers® (2005 – 2007, 2011– 2013, 2018) list; Super Lawyers® is a rating service of outstanding attorneys who have attained a high degree of peer recognition and professional achievement
- Recipient of the Fellows Justinian Award presented by the Dallas Bar Foundation (2017)

- Presented with Presidential Citations by the State Bar of Texas (2012, 2013)
- Presented with the Larry Schoenbrun Jurisprudence Award by the Anti-Defamation League (2011)
- Named one of the Best Women Lawyers in Dallas (2010) by D Magazine
- Presented with the Rainmaker Award by the Equal Access to Justice Foundation (2004)

PROFESSIONAL | COMMUNITY INVOLVEMENT

- State Bar of Texas, Member
  Past Chair of the Board
  Former Co-Chair, Nominations and Elections Committee
  Past Director, District 6, Place 2
- Texas Supreme Court Task Force on the Texas Bar Exam, Member
- Texas Equal Access to Justice Commission, Former Member
- American Law Institute, Member
  Advisor on Principles of the Law of Liability Insurance
- Dallas Bar Association, Former President
- Dallas Association of Young Lawyers, Former President
- American Arbitration Association
  Arbitrator (2015 – present)
- Texas Bar Foundation, Life Fellow
- Dallas Bar Foundation, Life Fellow
- Dallas Association of Young Lawyers Foundation, Founding Fellow
- Texas Center for Legal Ethics, Board of Trustees
- Texas Association of Defense Counsel and the Defense Research Institute, Member
- International Association of Defense Counsel, Member
- Campaign for Equal Access to Justice, Former Chair
- Lakehill Preparatory School Board of Directors, Advisory Director
- The Senior Source, Director
- Crossroads Community Services, Director
- Dallas Museum of Art, Member
- First United Methodist Church in Dallas, Member
  Church Council, Former Chair
  Staff Parish Relations Committee, Former Chair
- Junior League of Dallas, Sustainer
- Attorneys Serving the Community, Former Chair

EMPLOYMENT

Prior to joining Amy Stewart Law, Beverly was a Partner and Co-Chair of the Litigation Section at Gardere Wynne Sewell LLP in Dallas from 1986 to 2018.

EDUCATION

- J.D., Tulane School of Law, 1982
- B.S., Southern Methodist University, 1979, *magna cum laude*
  Phi Beta Kappa Society

BAR | COURT ADMISSIONS

- State Bar of Texas
- State Bar of Georgia
- Dallas Bar Association
- American Bar Association
- U.S. Court of Appeals for the Fifth, Eighth, and Eleventh Circuits
- U.S. District Court of the Northern, Southern, Eastern, and Western Districts of Texas
- U.S. District Court of the Northern District of Georgia

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ALI RESTATEMENT: THE LAW OF LIABILITY INSURANCE

I. INTRODUCTION

The ALI Restatement of the Law of Liability Insurance began as a Principles project in 2010. After two tentative drafts were approved by the membership in 2013 and 2014, the ALI Council determined that the project was better suited to the format of a restatement and approved its conversion to a restatement in 2014. The Council and membership thereafter debated and approved various sections of the Restatement, culminating in a final vote on the entire Restatement in May of 2018, subject to the discussion at the meeting and the usual editorial prerogative. The Revised Proposed Final Draft No. 2, dated September 7, 2018, is available on the ALI website.

Because the Restatement covers so much ground and so many different aspects of the law of liability insurance, the authors decided to select several representative sections to discuss in more detail, with a brief analysis of whether Texas follows the ALI recommendation, or declines to follow it.

According to the Revised Style Manual approved by the ALI Council in January of 2015, a Restatement focuses on the common law, assuming "the perspective of a common-law court, attentive to and respectful of precedent, but not bound by precedent that is inappropriate or inconsistent with the law as a whole." The Restatement reporters were directed to consider four elements in drafting the restatement: (1) the nature of the majority rule; (2) new trends in the law; (3) what rule leads to more coherence in the law; and (4) the relative desirability of competing rules, using social science and empirical guidelines. As the ALI notes, "if a Restatement declines to follow the majority rule, it should say so explicitly and explain why."

Some sections of the Restatement follow Texas law and some don't. Similarly, the reporters have incorporated some majority rules and some minority rules. The authors hope that this brief sampling of the many sides of the Restatement will provoke thoughtful consideration and energetic discussion among Texas coverage lawyers regarding the law of liability insurance.

II. SAMPLE ALI SECTIONS

§ 3. The Plain-Meaning Rule

(1) If an insurance policy term has a plain meaning when applied to the facts of the claim at issue, the term is interpreted according to that meaning.

(2) The plain meaning of an insurance policy term is the single meaning to which the language of the term is reasonably susceptible when applied to facts of the claim at issue in the context of the entire insurance policy.

(3) If a term does not have a plain meaning as defined in subsection (2), that term is ambiguous and is interpreted as specified in § 4.

The common law supports two main approaches to the interpretation of insurance contracts: the contextual approach and the plain-meaning approach. ALI adopted the plain-meaning approach because the majority of jurisdictions follow this approach for insurance contracts. The ALI cites to the following Texas case to support the plain-meaning approach: *Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462, 464 (Tex. 1998) ("If a written contract is so worded that it can be given a definite or certain legal meaning, then it is not ambiguous. Parol evidence is not admissible for the purpose of creating an ambiguity.").

Texas agrees with the ALI's adoption of the plain-meaning rule in accordance with § 3.

The Texas Supreme Court recently confirmed the long-held principle that "every contract should be interpreted as a whole and in accordance with the plain meaning of its terms." *Great Am. Ins. Co. v. Primo*, 512 S.W.3d 890, 892–93 (Tex. 2017) (citing *Nat'l Union Fire Ins. Co. v. Crocker*, 246 S.W.3d 603, 606 (Tex. 2008); *see also Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 23 (Tex. 2008)). When reviewing policy language, Texas courts ensure that no provision is rendered meaningless. *Gilbert Tex. Const., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 126 (Tex. 2010).

As outlined by the Texas Supreme Court in *Great Am. Ins. Co. v. Primo*, 512 S.W.3d 890, 893 (Tex. 2017):

> The goal of contract interpretation is to ascertain the parties' true intent as expressed by the plain language they used. *See Gilbert*, 327 S.W.3d at 126 (explaining that "we look at the language of the policy because we presume parties intend what the words of their contract say"); *Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995) (per curiam) ("The primary concern of a court in construing a written contract is to ascertain the true intent of the parties as expressed in the instrument."). "Plain meaning" is a watchword for contract interpretation because word choice evinces intent. A contract's plain language controls, not "what one side or the other alleges they intended to say but did not." *Gilbert*, 327 S.W.3d at 127; *see also Crocker*, 246 S.W.3d at 606. And we assign terms their ordinary and

generally accepted meaning unless the contract directs otherwise. *Crocker*, 246 S.W.3d at 606; *Gilbert*, 327 S.W.3d at 126.

The plain-meaning rule outlined in § 3 necessarily is read in conjunction with § 4 below.

§ 4. Ambiguous Terms

(1) An insurance policy term is ambiguous if there is more than one meaning to which the language of the term is reasonably susceptible when applied to the facts of the claim at issue in the context of the entire insurance policy.

(2) When an insurance policy term is ambiguous as defined in subsection (1), the term is interpreted against the party that supplied the term, unless that party persuades the court that a reasonable person in the policyholder's position would not give the term that interpretation.

Texas generally agrees with the ALI's approach to ambiguous terms in accordance with § 4.[1] However, the rule of *contra proferentem* tends to be more of a rule of last resort in Texas.

If the language lends itself to a clear and definite legal meaning, the contract is not ambiguous and will be construed as a matter of law. *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex. 2003). An ambiguity does not arise merely because a party offers an alternative conflicting interpretation, but only when the contract is actually "susceptible to two or more reasonable interpretations." *Id.* "The fact that the parties may disagree about the policy's meaning does not create an ambiguity." *State Farm Lloyds v. Page*, 315 S.W.3d 525, 527 (Tex. 2010).

If a contract is susceptible to more than one reasonable meaning, it is ambiguous. *Evergreen Nat. Indem. Co. v. Tan It All, Inc.*, 111 S.W.3d 669, 676 (Tex. App.—Austin 2003, no pet.) (citing *Grain Dealers Mut. Ins. Co. v. McKee*, 943 S.W.2d 455, 458 (Tex.1997); *Kelley–Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462, 464 (Tex. 1998)).

The doctrine of *contra proferentem* is a device of last resort employed by Texas courts when construing ambiguous contractual provisions. *AT & T Corp. v. Rylander*, 2 S.W.3d 546, 560 (Tex. App.—Austin 1999, pet. denied); *GTE Mobilnet Ltd. P'ship. v. Telecell Cellular*, 955 S.W.2d 286, 291 (Tex. App.—Houston [1st Dist.] 1997, writ denied); *Smith v. Davis*, 453 S.W.2d 340, 344–45 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.) (declining to apply doctrine in face of contractual ambiguity); *see also Forest Oil Corp. v. Strata Energy*, 929 F.2d 1039, 1043–44 (5th Cir. 1991) ("a contract generally is construed against its drafter only as a last resort under Texas law—i.e., after the application of ordinary rules of construction leave a reasonable doubt as to its interpretation"). *Contra proferentem* is essentially a tie-breaking device used to prevent arbitrary decisions when all other methods of interpretation and construction prove unsatisfactory. *Evergreen Nat. Indem. Co. v. Tan It All, Inc.*, 111 S.W.3d 669, 676–77 (Tex. App.—Austin 2003, no pet.).

In the insurance context, *contra proferentem* operates so that ambiguous policy provisions are construed against the insurer and in favor of coverage. *See Grain Dealers Mut. Ins. Co. v. McKee*, 943 S.W.2d 455, 458 (Tex. 1997); *Kelley–Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462, 464 (Tex. 1998); *see also State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430, 433 (Tex. 1995) (explaining that only if insurance policy remains ambiguous after courts apply canons of interpretation should policy's language be construed against insurer in manner that favors coverage). If the policy interpretation offered by the insured of an ambiguous provision is reasonable, it will be adopted even if the insurer's interpretation is objectively more sensible, *National Union Fire Ins. Co. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex.1991); *Ramsay v. Maryland Am. Gen. Ins. Co.*, 533 S.W.2d 344, 349 (Tex. 1976), "as long as that [the insured's] construction is not unreasonable." *Balandran v. Safeco Ins. Co. of Am.*, 972 S.W.2d 738, 741 (Tex. 1998). *See State Farm Fire & Cas. Co. v. Vaughan*, 968 S.W.2d 931, 933 (Tex.1998).

§ 12. Liability of Insurer for Conduct of Defense

(1) If an insurer undertakes to select counsel to defend a legal action against the insured and fails to take reasonable care in so doing, the insurer is subject to liability for the harm caused by any subsequent negligent act or omission of the selected counsel that is within the scope of the risk that made the selection of counsel unreasonable.

(2) An insurer is subject to liability for the harm caused by the negligent act or omission of counsel provided by the insurer to defend a legal action when the insurer directs the conduct of the counsel

[1] The ALI cites to the following case construing Texas law: *Taylor v. Lloyd's Underwriters*, No. 90-1403, 1994 WL 118303, at *15, *24 (E.D. La. Mar. 24, 1994) (applying Texas law) (construing an ambiguous policy exclusion against Lloyd's Underwriters and in favor of insured/coverage because the insurer drafted the CGL policy and could have made the relevant provision unambiguously exclude punitive damages from coverage).

with respect to the negligent act or omission in a manner that overrides the duty of the counsel to exercise independent professional judgment.

Texas disagrees with the ALI's adoption of the rule that the insurance company can be vicariously liable for the acts of defense counsel it retains to defend the insured. *See State Farm Mut. Auto. Ins. Co. v. Traver*, 980 S.W.2d 625, 627 (Tex. 1998) ("A defense attorney, as an independent contractor, has discretion regarding the day-to-day details of conducting the defense, and is not subject to the client's control regarding those details.").

In *State Farm Mut. Auto. Ins. Co. v. Traver*, 980 S.W.2d 625 (Tex. 1998), the Texas Supreme Court held that an insurer is not vicariously liable for the malpractice of an independent counsel selected by the insurer to defend the insured. The court held that independent counsel appointed by an insurer owes unqualified loyalty to the insured and must at all times protect the interests of the insured if those interests would be compromised by the insurer's instructions. *See Taylor v. Allstate Ins. Co.*, 356 S.W.3d 92 (Tex. App.—Houston [1st Dist.] 2011, rehearing overruled (May 19, 2011), review denied (Dec 16, 2011)); *Gulf Ins. Co. v. Jones*, No. CIV.A. 300CV0330L, 2003 WL 22208551, at *4 (N.D. Tex. Sept. 24, 2003), aff'd, 143 F. App'x 583 (5th Cir. 2005). Surprisingly, since *Traver*, there has been little other case law in Texas regarding this issue.

§ 13. Conditions Under Which the Insurer Must Defend

(1) An insurer that has issued an insurance policy that includes a duty to defend must defend any legal action brought against an insured that is based in whole or in part on any allegations that, if proved, would be covered by the policy, without regard to the merits of those allegations.

(2) For the purpose of determining whether an insurer must defend, the legal action is deemed to be based on:

(a) Any allegation contained in the complaint or comparable document stating the legal action; and

(b) Any additional allegation known to the insurer, not contained in the complaint or comparable document stating the legal action, that a reasonable insurer would regard as an actual or potential basis for all or part of the action.

(3) An insurer that has the duty to defend under subsections (1) and (2) must defend until its duty to defend is terminated under § 18 by declaratory judgment or otherwise, unless facts not at issue in the legal action for which coverage is sought and as to which there is no genuine dispute establish that:

(a) The defendant in the action is not an insured under the insurance policy pursuant to which the duty to defend is asserted;

(b) The vehicle or other property involved in the accident is not covered property under a liability insurance policy pursuant to which the duty to defend is asserted and the defendant is not otherwise entitled to a defense;

(c) The claim was reported late under a claims-made-and-reported policy such that the insurer's performance is excused under the rule stated in § 35(2);

(d) The action is subject to a prior-and-pending-litigation exclusion or a related-claim exclusion in a claims-made policy;

(e) There is no duty to defend because the insurance policy has been properly cancelled; or

(f) There is no duty to defend under a similar, narrowly defined exception to the complaint-allegation rule recognized by the courts in the applicable jurisdiction.

Texas law aligns with ALI § 13 in that the duty to defend is determined under the "eight corners" rule. *See Zurich Am. Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487, 491 (Tex. 2008); *GuideOne Elite Ins. Co. v. Fielder Road Baptist Church*, 197 S.W.3d 305, 308 (Tex. 2006). However, Texas law is not as permissive with respect to the use of extrinsic evidence to establish and/or defeat the duty to defend.

Eight Corners

In Texas, "if the petition does not state facts sufficient to bring the case clearly within or outside the insured's coverage, the insurer is obligated to defend if *potentially* there is a claim under the complaint within the coverage of the insured's policy." *Gen. Star Indem. Co. v. Gulf Coast Marine Assocs.*, 252 S.W.3d 450, 454 (Tex. App.—Houston [14th Dist.] 2008, pet. denied). Where the petition does not state facts sufficient to bring the case clearly within or outside the insured's coverage, the insurer is obligated to defend if

there is potentially a covered claim. As the Texas Supreme Court has stated:

> [I]n case of doubt as to whether or not the allegations of a complaint against the insured state a cause of action within the coverage of a liability policy sufficient to compel an insurer to defend the action, such doubt will be resolved in the insured's favor.

Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Merchants Fast Motor Lines, Inc., 939 S.W.2d 139, 141 (Tex. 1997) (citations omitted); *see also King v. Dallas Fire Ins. Co.*, 85 S.W.3d 185, 187 (Tex. 2002) ("[W]e resolve all doubts regarding the duty to defend in favor of the duty."); *Nautilus Ins. Co. v. Country Oaks Apts., Ltd.*, 566 F.3d 452, 455 (5th Cir. 2009) ("all reasonable inferences must be drawn in the insured's favor"); *Gomez v. Allstate Tex. Lloyds Ins. Co.*, 241 S.W.3d 196, 204 (Tex. App.—Fort Worth 2007, no pet.) (drawing inferences in the insured's favor to find a duty to defend).

Extrinsic Evidence

In *GuideOne Elite Ins. Co. v. Fielder Road Baptist Church*, 197 S.W.3d 305, 308 (Tex. 2006), the Texas Supreme Court limited the use of extrinsic evidence to two situations: (1) when the petition alleges facts that are insufficient to determine if there is a duty to defend; and (2) where the extrinsic evidence sought to be used relates only to coverage issues and not to the liability of the insured. In *GuideOne*, the underlying plaintiffs alleged the dates of employment of the youth minister at the church. From that allegation, the Texas Supreme Court held that the facts pleaded were sufficient to determine the duty to defend. The court expressly rejected the use of extrinsic evidence where the evidence is relevant not only to the coverage issue, but also to the issues of the insured's liability in the underlying lawsuit. *See also Northfield Ins. Co. v. Loving Home Care, Inc.*, 363 F.3d 523, 535 (5th Cir. 2004) (affirming district court's strict application of the eight corners rule and refusing to read extrinsic facts into the pleadings).

In *Avalos v. Loya Ins. Co.*, 2018 WL 3551260, at *4 (Tex. App.—San Antonio July 25, 2018), Texas Supreme Court made it clear that if the extrinsic evidence directly contradicts the allegations in the underlying petition, then it will not be considered when determining whether an insurance provider has a duty to defend. *Id.* (citing *Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, 279 S.W.3d 650, 655 (Tex. 2009); *GuideOne Elite Ins.*, 197 S.W.3d at 310).

Texas federal courts may be more likely to allow the use of extrinsic evidence when examining the duty to defend. The Fifth Circuit has suggested that extrinsic evidence may more likely be admissible when an "explicit policy coverage exclusion clause[ ]" is at issue. *Lib. Mut. Ins. Co. v. Graham*, 473 F.3d 596, 603 (5th Cir. 2006); *see Star–Tex Res., LLC V. Granite State Ins. Co.*, No. A-12-CV-326 ML, 2013 WL 12076485, at *6 (W.D. Tex. Apr. 24, 2013), aff'd sub nom. *Star-Tex Res., L.L.C. v. Granite State Ins. Co.*, 553 F. App'x 366 (5th Cir. 2014) (citing *Ooida Risk Ret. Group Inc. v. Williams*, 579 F.3d 469, 476 (5th Cir. 2009) (considering extrinsic evidence of deceased's role as tandem truck driver where coverage depended on applicability of Fellow Employee exclusion); *W. Heritage Ins. Co. v. River Entm't*, 998 F.2d 311, 314 (5th Cir. 1993) (allowing evidence showing cause of underlying defendant's "impairment" was intoxication, which triggered policy's Liquor Liability exclusion); *Int'l Serv. Ins. Co. v. Boll*, 392 S.W.2d 158, 160–61 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.) (accepting undisputed extrinsic evidence that underlying car accident occurred while son of insured was driving which triggered an exclusion to coverage).

Neither the Texas state courts nor the federal courts have adopted or follow the hard-and-fast extrinsic evidence rules espoused by the ALI. The Texas rules on the use and purpose of extrinsic evidence to determine the duty to defend are significantly more fluid and flexible.

§ 22. Defense-Cost-Indemnification Policies

(1) A defense-cost-indemnification policy is an insurance policy in which the insurer agrees to pay the costs of defense of a covered legal action and does not undertake the duty to defend. Typically, such policies also cover settlements and judgments.

(2) When a defense-cost-indemnification policy obligates an insurer to pay the costs of defense on an ongoing basis:

(a) The scope of the insurer's defense-cost obligation is determined using the rules governing the duty to defend stated in § 13, § 18, and § 20;

(b) To preserve the right to contest coverage for a legal action, the insurer must follow the reservation-of-rights procedure stated in § 15; and

(c) An insurer that breaches this defense-cost obligation loses the right to associate in the defense of the action under § 23 and the right to exercise any control in the settlement of the action.

(3) When a defense-cost-indemnification policy does not obligate an insurer to pay the costs of defense of a covered legal action on an ongoing basis, the insurer's obligation to pay defense costs is determined based on all the facts and circumstances, unless otherwise provided in the policy.

The Texas Supreme Court has not spoken on the issue of whether to apply the eight corners rule to a defense-cost-indemnification policy. *See Oceans Healthcare, L.L.C., v. Illinois Union Insurance Co.*, No. 4:18-CV-00175, 2019 WL 1437955, at *8 (E.D. Tex. Mar. 30, 2019) (declining to adopt the eight corners rule in a duty to advance defense costs matter because the parties chose to allow, by contract, the use of extrinsic evidence to determine the defense obligation).

Here is the relevant excerpt from *Oceans Healthcare*: "IUIC argues that the plain language of the Policy charges it with no affirmative duty to defend claims; rather, only obligates it pay for the defense costs in defending a claim. Oceans concedes that the Policy does not contain a standard duty to defend clause."

Oceans, however, argues that IUIC's duty to advance defense costs is akin to a duty to defend and should be subject to the automatic trigger and eight-corners rule. Oceans relies on three cases it contends stands for the proposition that the eight-corners rule applies to the duty to pay defense—even where the insurer has no duty to defend. *See Julio & Sons Co. v. Travelers Cas. and Sur. Co. of Am.*, 591 F.Supp.2d 651 (S.D. N.Y. 2008) (applying the eight-corners rule to a duty to pay defense cost reasoning that there was no material difference between an unconditional duty to advance payment cost and a duty to defend); *Basic Energy Servs., Inc. v. Liberty Mut. Ins. Co.*, 655 F.Supp.2d 666 (W.D. Tex. 2009) (vacated following settlement) (applying the eight-corners rule to a duty to reimburse defense costs reasoning that "this reimbursement of defense costs obligation is most analogous to a duty to defend, even when the duty to defend is explicitly disclaimed"); *Pendergest-Holt v. Certain Underwriters at Lloyd's of London*, 681 F.Supp.2d 816 (S.D. Tex. 2010), modified on appeal by *Pendergest-Holt v. Certain Underwriter's at Lloyd's of London*, 600 F.3d 562, 574 (5th Cir. 2010). Oceans is correct in its analysis of the lower court's decision in *Pendergest-Holt*. On appeal, however, the Fifth Circuit modified the lower court's decision by explicitly addressing and declining to apply the eight-corners rule in a context outside of an insurer's duty to defend. *See Pendergest-Holt*, 600 F.3d at 574.

The lower court in *Pendergest-Holt* applied the eight-corners rule in to a duty to advance costs reasoning that "in the absence of Texas court decisions explicitly refusing to apply the eight corners rule in cases such as this one—in which no duty to defend exists but in which there is a duty to advance defense costs—and with no explicit direction from Texas courts to apply a different standard, the logic employed by the *Julio & Sons and Basic Energy* courts is persuasive." *Pendergest-Holt v. Certain Underwriters at Lloyd's of London*, 681 F.Supp.2d 816, 828 (S.D. Tex. 2010). The Fifth Circuit modified the lower court's decision and explicitly reserved the application of the eight-corners rule in any context other than a duty to defend until the Texas Supreme Court established that such was possible. The Fifth Circuit explained:

> The Texas Supreme Court has spoken of the eight corners rule only in the context of duty-to-defend cases, and no Texas state court has applied the rule to a case, like the present one, involving a duty to advance defense costs. Whatever the Texas Supreme Court might do to resolve the issue in a future case, however, we need not venture a guess in this one: the D&O Policy's terms plainly state that the underwriters must advance defense costs "until it is determined that the alleged act or alleged acts did in fact occur" and, in so doing, require recourse to something more than mere allegations. The terms contemplate the use of extrinsic evidence in making the determination. Thus, we need not and hence do not pause to decide whether the eight corners rule applies to the duty to advance costs as a general matter....

Pendergest-Holt, 600 F.3d at 574 (internal citations omitted). Although the Fifth Circuit did not foreclose the applicability of the eight corners rule to cases involving a duty to advance defense costs, the Court found it prudent to echo this reluctance and await guidance from the Texas Supreme Court.

Despite the cautionary language, the Fifth Circuit nevertheless held that even if the eight corners rule did apply, the parties displaced it because the insurance policy anticipated the use of extrinsic evidence to determine coverage. *Id.* at 574 (explaining that "[t]exas prefers freedom of contract and honors the well-worn prerogatives of parties to override judge-made doctrines—like the eight corners rule—by contracting around them.... Assuming but not deciding the eight corners rule would have applied, the parties chose—in plain language—to displace it and to provide for the use of extrinsic evidence."). *Oceans Healthcare, L.L.C.*, 2019 WL 1437955, at *8–9.

Another recent Texas federal court case is *Texas Trailer Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, No. 3:15-CV-2453-B, 2016 WL 1047088, at *4 (N.D. Tex. Mar. 16, 2016), where the court examined an insurer's duty to reimburse defense costs. The Northern

District of Texas said, in examining the *Basic Energy Services* case, that "[t]he lesson of these cases is that the Court should not blindly apply the eight corners rule, but should instead consult the parties' contract to determine what evidence is relevant." In the coverage suit, both parties filed motions for summary judgment without submitting evidence other than the underlying complaint and the policy, relying on the eight-corners rule. The trial court, however, disagreed and denied both motions. The court held the eight-corners rule was not "an immutable rule of law," but "merely a means of enforcing a contractual bargain" concerning defense of lawsuits against the insured. *Id.* at *3.

Under the terms of the policy (which apportioned costs based on the outcome), the amount of defense costs payable by the insurer could not be determined until the "actual facts" were determined in the underlying lawsuit. Consequently, the court held extrinsic evidence was required. It therefore granted both parties leave to refile their motions, attaching evidence of the underlying case to support their positions.

§ 24. The Insurer's Duty to Make Reasonable Settlement Decisions

(1) When an insurer has the authority to settle a legal action brought against the insured, or the insurer's prior consent is required for any settlement by the insured to be payable by the insurer, and there is a potential for a judgment in excess of the applicable policy limit, the insurer has a duty to the insured to make reasonable settlement decisions.

(2) A reasonable settlement decision is one that would be made by a reasonable insurer that bears the sole financial responsibility for the full amount of the potential judgment.

(3) An insurer's duty to make reasonable settlement decisions includes the duty to make its policy limits available to the insured for the settlement of a covered legal action that exceeds those policy limits if a reasonable insurer would do so in the circumstances.

While § 24 embraces some aspects of Texas' *Stowers* doctrine, it is not identical to *Stowers*, and arguably not as broad. For example, in Texas, there is no general duty to engage in settlement discussions unless an insurer who does not have a duty to defend assumes control over the settlement process. *See, e.g., Rocor International, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 77 S.W.3d 253, 262 (Tex. 2002), ("[A]n insurer's settlement duty is not activated until a settlement demand within policy limits is made, and the terms of the demand are such that an ordinarily prudent insurer would accept it.").

Instead, the courts have fashioned multi-pronged tests for the application of *Stowers*. In *OneBeacon Insurance Company v. T. Wade Welch & Associates*, 841 F.3d 669 (5th Cir. 2016), the court outlined four distinct requirements for "activating" the *Stowers* duty to settle:

> The *Stowers* duty is activated by a settlement demand when "three prerequisites are met: (1) the claim against the insured is within the scope of coverage, (2) the demand is within the policy limits, and (3) the terms of the demand are such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment." *Am. Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 849 (Tex. 1994). The demand must also offer to release fully the insured in exchange for a sum equal to or less than the policy limits. *Id.* at 848–49.

The Texas Supreme Court noted in *Garcia* that there is no general duty on an insurer "to make or solicit settlement proposals." *Garcia*, 876 S.W.2d at 849. However, in the context of *Stowers*, the duty to make reasonable settlement decisions can arise if all of the *Stowers* prongs are present.

§ 26. The Effect of Multiple Claimants on the Duty to Make Reasonable Settlement Decisions

(1) If multiple legal actions that would count toward a single policy limit are brought against an insured, the insurer has a duty to the insured to make a good-faith effort to settle the actions in a manner that minimizes the insured's overall exposure.

(2) The insurer may, but need not, satisfy this duty by interpleading the policy limits to the court, naming all known claimants, and, if the insurer has a duty to defend or a duty to pay defense costs on an ongoing basis, continuing to defend or pay the defense costs of its insured until:

(a) Settlement of the legal actions;
(b) Final adjudication of the actions; or
(c) Adjudication that the insurer does not have a duty to defend or to pay the defense costs of the actions.

Application of the *Stowers* Doctrine becomes more complicated when multiple claimants are involved.

Under Texas law, it is well settled that an insurer may "favor a claim by one claimant over a claim by another claimant in pursuit of this [*Stowers*] duty." *Travelers Indem. Co. v. Citgo Petroleum Corp.*, 166 F.3d 761, 764 (5th Cir. 1999). Thus, an insurer "faced with a settlement demand arising out of multiple claims and inadequate proceeds . . . may enter into a reasonable settlement with one of the several claimants even though such settlement exhausts or diminishes the proceeds available to satisfy other claims . . . . Such an approach . . . promotes settlement of lawsuits and encourages claimants to make their claims promptly." *Tex. Farmers Ins. Co. v. Soriano*, 881 S.W.2d 312, 314-15 (Tex. 1994).

The Restatement, however, adopts an "overall exposure" test and supports interpleading of the proceeds. Thus, Texas law and the Restatement diverge on the effect of multiple claimants. Texas courts have also held that a valid *Stowers* demand requires that an insurer settle on behalf of one of several insureds when doing so exhausts policy limits, heaving other insureds exposed. *Citgo Petroleum Corp.*, 166 F.3d at 768. The rationale behind this holding is to prevent the insurer from settling on behalf of one insured and being forced to choose between either continuing to defend non-settling co-insureds beyond policy limits or facing liability for disparate treatment of the non-settling co-insureds:

> A settlement offer given to only one insured that would exhaust coverage under the liability limit of the policy creates a dilemma for the insurer. An insurer should not be precluded from accepting a reasonable settlement offer for fewer than all insureds. By accepting the offer the insurer would avoid being subjected to liability exceeding the policy limits due to its rejection of a reasonable offer. Further, any settlement would benefit all insureds by decreasing the total amount of liability in the underlying suit.

Pride Transp. v. Cont'l Cas. Co., 804 F.Supp.2d 520, 526 (N.D. Tex. 2011) (applying Texas law) (quoting *Millers Mut. Ins. Ass'n of Ill. v. Shell Oil Co.*, 959 S.W.2d 864, 870 (Mo. Ct. App. 1997)).

§ 27. Damages for Breach of the Duty to Make Reasonable Settlement Decisions

(1) An insurer that breaches the duty to make reasonable settlement decisions is subject to liability for any foreseeable harm caused by the breach, including the full amount of damages assessed against the insured in the underlying legal action, without regard to the policy limits. (2) When an insurer has breached the duty to make reasonable settlement decisions, the insured may settle the action without the insurer's consent and without violating the duty to cooperate or other restrictions on the insured's settlement rights contained in the policy if:

* * *

(d) The settlement agreed to by the insured is one that a reasonable person who bears the sole financial responsibility for the full amount of the potential covered judgment would make.

An interesting difference between Texas law and the Restatement is how sections 24 and 27 of the Restatement combine to fundamentally alter an insurers' ability to control the defense of its insured and evaluate settlement options. In Texas, an insurer faced with a valid *Stowers* demand has two options. It can accept the offer, or it can decline the offer, continue the defense, and risk being liable for an excess verdict. Either way the insured is protected.

§ 24 sets out the Restatement's version of Texas' *Stowers* duty to settle, or make reasonable settlement decisions, defining a "reasonable settlement decision [a]s one that would be made by a reasonable insurer that bears the sole financial responsibility for the full amount of the potential judgment." § 27 then provides that if an insurer does not make a reasonable settlement decision, the insured can settle the claim.

In short, under the Restatement, if a "*Stowers*-consistent" settlement is offered or even available to solicit, the insurer loses the right under Texas law to determine whether it would prefer to agree to the settlement or continue defending and bear the risk for an excess verdict.

§ 44. Implied-in-Law Terms and Restrictions

(1) A term that is required by law to be included in a liability insurance policy is so included by operation of law notwithstanding its absence in the written policy.

(2) A liability-insurance-policy term is unenforceable if;

(a) legislation prohibits enforcement, or

(b) the interest in its enforcement is clearly outweighed in the

circumstances by a public policy against enforcement.

Texas law and the Restatement both follow general contract-law rules when interpreting policies. The Restatement, however, adds more requirements to the analysis.

Texas courts construe insurance policies as they would contracts. *In re Deepwater Horizon*, 470 S.W.3d 452 (Tex. 2015). As such, a court may imply terms that are reasonably implied through the aid of factual circumstances. *1320/1390 Don Haskins, Ltd. v. Xerox Commercial Sols., LLC*, 2018 WL 2126911, at *6 (Tex. App.—El Paso May 9, 2018, pet. denied). Texas also follows the Restatement (Second) of Contracts, which states that "terms may be supplied by factual implication, and in recurring situations the law often supplies a term in the absence of agreement to the contrary." Restatement (Second) of Contracts § 33cmt. a. For example, in a case where a provision in a contract required a builder to "furnish . . . insurance", but did not identify the type of insurance required, the builder's existing policy provided the missing terms for the required insurance coverage and "the contract was sufficiently definite for the parties to understand their obligations." *Fischer v. CTMI, L.L.C.*, 479 S.W.3d 231, 239–40 (Tex. 2016) (quoting *ATOFINA Petrochemicals, Inc. v. Cont'l Cas. Co.*, 185 S.W.3d 440, 443 (Tex. 2005)).

In addition to the use of factual circumstances to imply terms, Texas also favors the use of "implied-in-law" terms and restrictions. In *Johnson*, the Texas Supreme Court refused to enforce a policy term that conflicted with an existing statute. *National County Mutual Fire Insurance Company v. Johnson*, 879 S.W.2d 1, 2 (Tex. 1993). The Restatement notes that the Court in *Johnson* held that an auto liability insurance policy's household exclusion was void because it conflicted with a statute whose purpose was to ensure that all claims for losses arising out of all vehicles' operation were covered by insurance. *Id.*

According to the comments, the Restatement follows general contract-law rules regarding implied-in-law terms and restrictions. Sources such as statutes, regulations, and the common law may lead to an implied-in-law liability term or restriction. While Texas law already enforces implied-in-law terms from statutes, the Restatement would broaden the practice by requiring that policies also include terms from regulations and common law.

Further, Texas law and the proposed Restatement both restrict the enforcement of insurance policies if the policies are contrary to public policy. *See Id.* (concluding that family members' exclusions are invalid because they are against public policy). The Restatement relies on the Restatement (Second) of Contracts. Under section 178, the factors to be considered in weighing the interest in the enforcement of a term are:

> (a) the parties' justified expectations, (b) any forfeiture that would result if enforcement were denied, and (c) any special public interest in the enforcement of the particular term. The factors to be considered in weighing a public policy against enforcement of a term are: (a) the strength of that policy as manifested by legislation or judicial decisions, (b) the likelihood that a refusal to enforce the term will further that policy, (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and (d) the directness of the connection between that misconduct and the term.
>
> Restatement (Second) of Contracts § 178.
>
> Texas courts also follow section 178 when determining whether a contract provision is unenforceable on public policy grounds. *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 663 (Tex. 2008). The proposed Restatement would just ensure that section 178 factors are followed with respect to all liability-insurance policies that might conflict with public policy.

§ 49. Liability for Insurance Bad Faith

An insurer is subject to liability to the insured for insurance bad faith when it fails to perform under a liability insurance policy:

(a) Without a reasonable basis for its conduct; and

(b) With knowledge of its obligation to perform or in reckless disregard of whether it had an obligation to perform.

The Restatement and Texas law employ similar bad faith standards. However, the common law and statutory schemes for bad faith claims in Texas are more specific and well defined than under the Restatement.

Texas courts and the Texas Legislature have extensively addressed the availability of extracontractual claims. In that regard, Texas does not recognize a common law tort of bad faith premised on third-party insurance, except in the limited situation in which an insurer fails to settle third-party claims against its insured (*i.e.*, a so-called *Stowers* claim). *See Maryland Ins. Co. v. Head Indus. Coatings & Servs., Inc.*, 938 S.W.2d 27, 28-29 (Tex. 1996).

Instead, the Texas Legislature has set out a comprehensive and detailed extracontractual liability scheme applicable to third-party claims. Statutory bad faith claims are broken down into violations of the Texas Insurance Code Chapter 541, violations of the Texas Deceptive Trade Practices – Consumer Protection Act,[2] and violations of the Texas Prompt Payment of Claims Statute. *See* Tex. Bus. & Comm. Code § 17.41, *et seq;* Tex. Ins. Code Ch. 542.

Extra-contractual claims under Chapter 541 are tort claims—requiring a negligence-type standard—that revolve around whether the insurer's actions were reasonable under the circumstances. Section 541.060 contains a "laundry list" of actions by an insurer that may give rise to a claim under the statute.

A breach of Chapter 541 can result in trebled damages. Trebled damages equate to three times the economic damages; it does not equate to economic damages plus three times economic damages. Thus, if a jury awards a plaintiff $100,000 in economic damages (not including mental anguish damages) and awards additional damages the total award will be $300,000; it will not be $400,000 or [$100,000 + ($100,000 x 3)]. See Tex. Ins. Code §§541.151, 152; *see also Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430, 441 (Tex. 2012). Additionally, prejudgment interest should not be included in the amount trebled. Rather, it should be added after the additional damages are added to the economic damages. *Aetna Cas. & Surety Co. v. Garza*, 906 S.W.2d 543, 556 (Tex. App.—San Antonio 1995, writ denied).

An insured can also recover mental anguish damages by establishing that the defendant acted "knowingly." The Texas Supreme Court has clarified that a knowing violation of the Insurance Code occurs where the offending party has "actual awareness" of the deception. *St. Paul Surplus Lines Ins. Co. v. Dal-Worth Tank Co.*, 974 S.W.2d 51, 53-54 (Tex. 1998). The *St. Paul* court explained:

> "Actual awareness" does not mean merely that a person knows what he is doing; rather it means that a person knows that what he is doing is false, deceptive, or unfair. In other words, a person must think to himself at some point, "Yes, I know this is false, deceptive or unfair to him, but I'm going to do it anyway."

Id.; *see also Allison v. Fire Ins. Exch.*, 98 S.W.3d 227, 256 (Tex. App.—Austin 2002, pet. vac'd w.r.m.).

The Prompt Payment of Claims Statute sets out rules for timing of communications and payments of first-party claims. Tex. Ins. Code Ch. 542. In the liability policy context, the Texas Supreme Court has interpreted this to mean that claims concerning indemnity for third-party claims are not covered by the statute, but claims for the insured's defense are included. *See Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 16 (Tex. 2007). Section 542.055 concerns acknowledgement of the claim, and Section 542.056 sets forth the deadline to accept or reject the claim. Under section 542.058, if an insurer fails to make payment on a valid claim within the specified deadlines, then it is liable for the penalties set forth in section 542.060.

Accordingly, an insurer who does not pay a valid claim within the specified statutory period is subject to an 18 percent interest penalty. Currently, there is no good faith exception to this rule, as several courts have stated that an insurer who wrongfully denies a claim should not be in a better position than one who delays, but ultimately pays, the claim. *See, e.g., Higginbotham v. State Farm Mut. Auto. Ins. Co.*, 103 F.3d 456 (5th Cir. 1997) (applying Texas law); *Teate v. Mutual Life Ins. Co. of N.Y.*, 965 F. Supp. 891 (E.D. Tex. 1997) (applying Texas law); *Oram v. State Farm Lloyds*, 977 S.W.2d 163 (Tex. App.—Austin 1998, no pet.). The 18 percent per annum penalty is simple interest and is not compounded. *See Primrose Operating Co. v. Nat'l Amer. Ins. Co.*, No. Civ. A. 5:02-CV-101-C, 2003 WL 21662829, at *3 (N.D. Tex. July 15, 2003), *rev'd in part,* 382 F.3d 546 (5th Cir. 2004) (applying Texas law). Further, because the penalty is punitive in nature, prejudgment interest is not assessed on it. *Id.*

III. CONCLUSION

Notably, Texas House Concurrent Resolution 58, introduced on April 4, 2018, asks the 86th Legislature of the State of Texas to condemn the ALI's 2018 Restatement of the Law of Liability Insurance and discourage courts from relying on the Restatement as an authoritative reference regarding established rules and principles of law. H.C.R. 58 is currently pending in committee. The authors encourage Texas coverage lawyers to download and read all sections of the Restatement and participate fully in legislative discussion.

TEXAS INSURANCE CODE 542A IN PRACTICE – AN UPDATE

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CHAPTER 13

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- *How to Navigate Insurance Claims,* TAPS Annual Seminar, CLE October 2017
- *An Update on Life Insurance,* Tort & Insurance Practice Section of the DBA, CLE February 2018
- Moderator, Insurance 101, Advanced Insurance Law Seminar, CLE June 2018
- *Texas Insurance Code 542A*, Tort & Insurance Practice Section of the DBA, CLE April 2019
- *Texas Insurance Code 542A In Practice – An Update,* Advanced Insurance Law Seminar, CLE June 2019

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TEXAS INSURANCE CODE 542A IN PRACTICE – AN UPDATE

I. INTRODUCTION

A. The Language of 542A

Section 542A of the Texas Insurance Code became effective on September 1, 2017 and provides the notice requirements to be provided to an insurer prior to the bringing of a claim related to certain property damage. *See Tex. Ins. Code* § 542A.003(a).

Section 542A.003 of the Texas Insurance Code provides that "not later than the 61st day before the date a claimant files an action to which this chapter applies in which the claimant seeks damages from any person, the claimant must give written notice to the person in accordance with this section as a prerequisite to filing the action." *Tex. Ins. Code* § 542A.003. The notice must include "(1) a statement of the acts or omissions giving rise to the claim; (2) the specific amount alleged to be owed by the insurer on the claim for damage to or loss of covered property; and (3) the amount of reasonable and necessary attorney's fees incurred by the claimant, calculated by multiplying the number of hours actually worked by the claimant's attorney, as of the date the notice is given and as reflected in contemporaneously kept time records, by an hourly rate that is customary for similar legal services." *Tex. Ins. Code.* § 542A.003. If an attorney provides notice on behalf of an insurance claimant, the written notice must include "a statement that a copy of the notice was provided to the claimant." *Id.* § 542A.003(b). "The court shall abate the action if the court finds that the person filing the plea in abatement: . . . did not, for any reason, receive a presuit notice complying with Section 542A.003." *Id.* § 542A.005(b)(1).

Section 542A.005 allows a defendant to file a plea in abatement "not later than the 30th day after the date the [defendant] files an original answer in the court in which the action is pending . . ." *Tex. Ins. Code* § 542A.005(a)(1). "The party seeking abatement has the burden of proof to establish the allegations in its motion." *In re Vanblarcum*, No. 13-15-00056-CV, 2015 WL 1869415, at *1 (Tex. App.—Corpus Christi, Apr. 22, 2015, pet. denied) (mem. op.) (citing cases); *Southern Cty. Mut. Ins. Co. v. Ochoa*, 19 S.W.3d 452, 468–69 (Tex. App.—Corpus Christi 2000, no pet.) (citing *Flowers v. Steelcraft Corp.*, 406 S.W.2d 199, 199 (Tex. 1966)). If the person seeking abatement did not receive presuit notice as required by section 542A.003, "[t]he court shall abate the action . . ." *Id.* at § 542A.005(b)(1). "Abatement is automatic and without court order if the defendant verifies the plea in abatement," alleges failure to comply with section 542A.003, "and the plaintiff does not controvert the verified plea [by filing an affidavit] before the 11th day after the plea in abatement is filed." *Rodriguez v. Metropolitan Lloyds Ins. Co. of Texas*, 2015 WL 12699855, at *4 (N.D. Tex. July 27, 2015) (citing *Tex. Ins. Code* § 541.155(c)) (quotations omitted); *Tex. Ins. Code* § 542A.005(c). In either case, an abatement continues until "the 60th day after the date notice" is provided. *Tex. Ins. Code* § 542A.005(e)(1).

Section 542A.003 provides an exception to this notice requirement, as follows:

> (d) A presuit notice under Subsection (a) is not required if giving notice is impracticable because:
>
> (1) the claimant has a reasonable basis for believing there is insufficient time to give the presuit notice before the limitations period will expire; or
> (2) the action is asserted as a counterclaim.

Tex. Ins. Code Ann. § 542A.003(d) (West 2017). Regarding attorneys' fees:

> If a defendant in an action to which this chapter applies pleads and proves that the defendant was entitled to but was not given a presuit notice stating the specific amount alleged to be owed by the insurer under Section 542A.003(b)(2) at least 61 days before the date the action was filed by the claimant, the court may not award to the claimant any attorney's fees incurred after the date the defendant files the pleading with the court. A pleading under this subsection must be filed not later than the 30th day after the date the defendant files an original answer in the court in which the action is pending.

Tex. Ins. Code § 542A.007(d).

Regarding the option to elect to assume legal responsibility for the acts and omissions of an adjuster, section 542A.006 of the Texas Insurance Code provides:

> (a) . . . in an action to which this chapter applies, an insurer that is a party to the action may elect to accept whatever liability an agent might have to the claimant for the agent's acts or omissions related to the claim by providing written notice to the claimant.
> (b) If an insurer makes an election . . . before a claimant files an action . . . no cause of action exists against the agent related to the claimant's claim, and, if the claimant

> files an action against the agent, the court shall dismiss that action with prejudice.
>
> (c) If a claimant files an action . . . against an agent and the insurer thereafter makes an election . . . the court shall dismiss the action against the agent with prejudice.
>
> . . .
>
> (e) An insurer's election under Subsection (a) is ineffective to obtain the dismissal of an action against an agent if the insurer's election is conditioned in a way that will result in the insurer avoiding liability for any claim-related damage caused to the claimant by the agent's acts or omissions.

Tex. Ins. Code § 542A.006(a)-(c), (e).

B. The Purposes of 542A

The 60-day notice requirement is to "discourage litigation and encourage settlements of consumer complaints," *Hines v. Hash*, 843 S.W.2d 464, 469 (Tex. 1992) (quoting *John Walter Homes, Inc. v. Valencia*, 690 S.W.2d 239, 242 (Tex. 1985)), by allowing the defendant-insurer a right and opportunity to make a settlement offer. *See Tex. Ins. Code* § 541.156; *In Re Behr*, 2006 WL 468001, at *2 (Tex. App.—San Antonio Mar. 1 2006) (without presuit notice, a defendant "is denied his right to limit his damage exposure through an offer of settlement as contemplated by sections 541.156–.159 of the Insurance Code"). If a plaintiff does not comply with the notice requirement, "abatement of the action for the statutory notice period is more consistent with the purpose of notice than dismissal." *Id.* The Texas Supreme Court has held that "if a plaintiff files an action for damages . . . without first giving the required notice, and a defendant timely requests an abatement, the trial court must abate the proceedings for 60 days." *Hines*, 843 S.W.2d at 469.

Another purpose of section 542A.003(c) is to aid in the calculation of recoverable attorneys' fees. *Tex. Ins. Code* § 542A.007(d) (noting that "the court may not award . . . the claimant any attorney's fees incurred after the date the defendant files the pleading with the court," if defendant fails to provide required notice).

II. RECENT 542A CASES

A. *Perrett v. Allstate Ins. Co.*, Civil Action No. 4:18-cv-01386, 2018 WL 2864132 (S.D. Tex. June 11, 2018) – Sufficiency of the Presuit Notice Letter

Perrett is a first-party insurance dispute arising from Houston's Hurricane Harvey, which flooded the city and beyond in August 2017. Jose Luis Perrett sued Allstate Insurance Company in Texas state court, alleging violations of the Texas Deceptive Trade Practices Consumer Protection Act, Tex. Bus. & Comm. Code §§ 17.46 (b), 17.50(a); the Texas Insurance Code, Tex. Ins. Code §§ 541.060, 542.003; breach of the duty of good faith; and breach of contract. Allstate timely removed to federal court.

On October 10, 2017, Perrett's counsel sent Allstate a notice letter alleging that Allstate violated the Texas Insurance Code and the Texas Deceptive Trade Practices Act. Allstate moved to abate under section 542A.003 of the Texas Insurance Code. Allstate argues that Perrett's notice did not include "a statement of the acts or omissions giving rise to the claims and the amount of reasonable and necessary attorney's fees incurred by the claimant" or a statement that a copy of the notice was provided to the claimant. Perrett responded that the notice satisfied section 542A.003(a)'s requirements. Since Perrett sent Allstate the notice letter over 60 days ago, the issue is whether that letter satisfied the statutory requirements.

The Court in *Perrett* noted that notice letters with specific factual allegations supporting the causes of action, or at least enough information to imply those facts, satisfy the notice requirement. *See Lewis v. Nationwide Prop. & Cas. Ins. Co.*, 2011 WL 845952, at *5 (S.D. Tex. Mar. 8, 2011); *Richardson v. Foster & Sear, L.L.P.*, 257 S.W.3d 782 (Tex. App. – Fort Worth 2008); *Williams v. Hills Fitness Ctr., Inc.*, 705 S.W.2d 189, 191–92 (Tex. App.—Texarkana 1985, writ ref'd n.r.e.) (four-paragraph notice letter satisfied the notice requirement, even though the allegations were general and the specific facts supporting cause of action were implied).

Allstate argues that Perrett's notice letter did not provide "a statement of the acts or omissions giving rise to the claims." The letter contains several paragraphs detailing how Allstate allegedly breached the insurance contract and the duty of good faith by conducting an inadequate examination of the damage and by failing to pay the claims. It also specifies the provisions of the Texas Insurance Code and the Deceptive Trade Practices Act Allstate allegedly violated. In addition to setting out the damages sought, the letter included appraisal reports for how those damages were calculated. The Court in *Perrett* held that the letter sufficiently states the acts or omissions giving rise to the claims because Allstate has a basis from which to imply the facts. *Perrett*, 2018 WL 2864132, at *2 (referencing *Rodriguez v. Allstate Tex. Lloyd's*, 2011 WL 689580, at *3 (S.D. Tex. Feb. 17, 2011) ("The notice letter in this case contains scant factual information about the cause of action. But it does identify the damages sought—$180,000 in economic damages, $30,000 in mental anguish damages, and $84,000 in expenses and attorneys' fees.")).

Allstate also argues that the letter did not include the amount of reasonable and necessary attorney's fees incurred by the claimant. The Court in *Perrett* noted that

although the Texas Insurance Code requires that attorney's fees be "calculated by multiplying the number of hours actually worked by the claimant's attorney, as of the date the notice is given and as reflected in contemporaneously kept time records, by an hourly rate that is customary for similar legal services," Tex. *Ins. Code* section 542A.002(b)(3), it *does not* require that those calculations be included in the presuit notice. *Perrett*, 2018 WL 2864132, at *2. Because the attorney's fees were sufficiently included in Perrett's letter, he has also met this requirement. *Perrett*, 2018 WL 2864132, at *2.

The Court in *Perrett* held that although the notice letter satisfies the requirements in section 542A.002(b), it does not satisfy section 542A.003(c)'s requirement that "[i]f an attorney or other representative gives the notice required under this section on behalf of a claimant, the attorney or representative shall: (1) provide a copy of the notice to the claimant; and (2) include in the notice a statement that a copy of the notice was provided to the claimant." *Perrett*, 2018 WL 2864132, at *2 (citing *Carrizales v. State Farm Lloyds*, 2018 WL 1697584, at *2, 4 (N.D. Tex. Apr. 6, 2018) (the requirement that the notice include a statement that the claimant had a copy of the notice is part of section 542A.003's requirements). Perrett's response to the motion to abate does not dispute or respond to Allstate's argument that the notice letter did not contain a statement that the letter was provided to Perrett. In a January 2018 email to Allstate, Perrett's counsel stated: "I'm in receipt on the response and informed the clients. We'll proceed with a suit at this time." The Court in *Perrett* found that neither the email nor the presuit notice letter satisfy the requirement because neither states that a copy of the presuit notice was provided to Perrett. *Perrett*, 2018 WL 2864132, at *2. Because the letter does not satisfy this requirement, the Court held that the case is abated until 60 days after Allstate receives proper written notice and issued a date in which that notice letter must be provided. *Id.* at *2-3.

1. *Perrett* in Practice

The 542A notice letter at issue in *Perrett* is attached hereto as Appendix A.

B. *Carrizales v. State Farm Lloyds,* Civil Action No. 3:18-CV-0086-L, 2018 WL 1697584 (N.D. Tex. April 6, 2018) – Sufficiency of the Presuit Notice Letter

Carrizales arises out of a dispute over an insurance claim. Gregorio Carrizales is the owner of an insurance policy issued by State Farm Lloyds and State Farm Lloyds, Inc. On or around May 25, 2015, his home in Garland, Texas, sustained damages resulting from a storm, and he initiated an insurance claim under the policy on November 24, 2015.

On January 26, 2016, Plaintiff's counsel sent a letter of representation to Defendants requesting various information relating to the claim. On March 15, 2016, he sent a demand letter asserting that the claim had been properly submitted, but Defendants "failed to pay for the damages; failed to properly account for all of the damages; and properly estimate the value of such damages." *Carrizales,* 2018 WL 1697584, at *1. The letter stated that there was no reason to delay payment of the claim, and "withholding payment of undisputed benefits owed to [Plaintiff] even after receipt of this demand in an effort to effectuate a settlement is a clear violation of the contract." *Id.* Counsel estimated total damages in the amount of $29,806.64. *Id.* The letter further stated that its purpose was to resolve Plaintiff's claim, but if Defendants failed to respond to the letter with an acceptable settlement offer, counsel would recommend filing suit against Defendants. *Id.*

On December 6, 2017, Plaintiff filed his original petition against Defendants for breach of contract, breach of the duty of good faith and fair dealing, violations of the Texas Insurance Code, and violations of the Texas Deceptive Trade Practices Act (DTPA). Defendants removed the action to federal court based on diversity jurisdiction and filed a verified motion to abate asserting that the case should be abated until Plaintiff provides proper notice as required under the Texas Insurance Code. Plaintiff did not respond to the motion. *Id.*

After reciting the elements of 542A and its purpose, the Court in *Carrizales* noted that the Fifth Circuit does not appear to have considered whether sections 542A.003, 542A.005, or their predecessors are substantive or procedural laws, and whether they should be applied in federal court. *Carrizales,* 2018 WL 1697584, at *2. However, several federal district courts have applied prior versions of sections 542A.003 and 542A.005 in response to motions or pleas to abate without discussion of their applicability in federal court. *See Landing Council v. Fed. Ins. Co.*, No. 4:15-1902, 2015 WL 13685337, at *4 (S.D. Tex. Oct. 14, 2015) (finding that the action should be abated for 60 days under section 541.155(d) where plaintiff failed to provide proper notice); *Rodriguez*, 2015 WL 12699855, at *5 (abating case where the plaintiff failed to provide proper presuit notice); *Shaw v. Zurich Am. Ins. Co.*, No. 2:12-CV-00797-JRG, 2013 WL 12147665, at *1 (E.D. Tex. Mar. 19, 2013) (granting plea in abatement under section 541.155 for failure of notice); *San Marcos Willow Springs, Ltd. v. United States Fire Ins. Co.*, No. A-08-CA-216-LY, 2008 WL 11334013, at *1 (W.D. Tex. May 30, 2008) (finding that an action was automatically abated under section 541.155).

Although the Fifth Circuit has not considered whether sections 542A.003, 542A.005, or their predecessors, are procedural or substantive, and whether

they apply in federal court, it has considered a similar notice and abatement requirement in the context of a medical malpractice case. *See Baber v. Edman*, 719 F.2d 122, 123 (5th Cir. 1983). The Fifth Circuit has also applied the DTPA's nearly identical notice requirement without considering its applicability in federal court and determined that abatement is the proper remedy for failure to provide notice. *See Oppenheimer v. Prudential Sec. Inc.*, 94 F.3d 189, 194 (5th Cir. 1996) (citing *Hines v. Hash*, 843 S.W.2d 464, 469 (Tex. 1992)) (determining that the district court erred when it dismissed, rather than abated, the plaintiff's DTPA claims for insufficient notice); *Int'l Nickel Co., Inc. v. Trammel Crow Distrib. Corp.*, 803 F.2d 150, 156 (5th Cir. 1986) (determining that the plaintiff failed to provide notice as required under the DTPA, and that "the proper remedy is not dismissal of the DTPA claims but abatement of the suit until the notice requirement is satisfied.").

The purpose of the similar notice and abatement requirements of sections 542A.003 and 542A.005 is also to encourage settlement of disputes without litigation. *See Potts*, 2018 WL 1046626, at *7 (citing cases); *Ross v. Nationwide Ins. Co. of America*, 2011 WL 11201, at *1 n.1 (S.D. Tex. Jan. 3, 2011) (citing *Cleo Bustamante Enters., Inc. v. Lumbermens Mut. Cas. Co.*, 2005 WL 1586994, at *1 (W.D. Tex. June 30, 2005)). "[I]t would frustrate the purposes of the statute" for Plaintiff to fail to provide proper presuit notice to Defendants. *Baber v. Edman,* 719 F.2d 122, 123 (5th Cir. 1983). For this reason, the notice statute for actions brought under the Texas Insurance Code likewise presents a procedural requirement that "is so intertwined with Texas's substantive policy" that "federal courts sitting in diversity must enforce its requirements." *See id.* The procedural requirement that an action under the code be abated for lack of proper notice "is no less substantive than the requirement that notice be given." *Redmond,* 492 F. Supp. 2d at 578 (citing cases); *see Tex. Ins. Code* § 542A.005. Accordingly,
although sections 542A.003 and 542A.005 present procedural requirements, the Court in *Carrizales* noted that their relationship to Texas' substantive policy for claims brought under the Texas Insurance Code requires that they be applied in federal court. *Carrizales,* 2018 WL 1697584, at *4.

Defendants filed their motion to abate within 30 days of filing their answer, the motion was verified, and alleged that Plaintiff did not provide proper presuit notice as required under section 542A.003. *Id.* Plaintiff did not controvert the motion by filing an affidavit "before the 11th day after the date" Defendants filed their motion. *See Tex. Ins. Code* § 542A.005(c). Accordingly, the *Carrizales* action was automatically abated under the Texas Insurance Code on February 17, 2018, 11 days after Defendants filed their verified motion, and will remain in abatement until "the 60th day after the date" proper presuit notice is provided. *See id.* at §§ 542A.005(a), (e)(1); *San Marcos Willow Springs, Ltd.*, 2008 WL 11334013, at *1 (action automatically abated where the defendant's motion was "verified, allege[d] that [d]efendant did not receive the require[d] notice, and was not controverted by an affidavit from [the p]laintiff filed within eleven days of the motion to abate."); *see also Villarreal v. Scottsdale Ins. Co.*, No. B:12-152, 2012 WL 13048213, at *1 (S.D. Tex. Dec. 10, 2012) (recognizing that the case was previously abated automatically in state court where the defendant filed a verified plea in abatement alleging failure to provide notice, and the plea was not challenged by the plaintiffs); *Grimes & Assoc., Consulting Eng'r, LP v. Nautilus Ins. Co.*, No. 5:10-CV-134-C, 2010 WL 11565406, at *1 (N.D. Tex. Dec. 22, 2010) (considering a motion to re-open a case that was automatically abated by that court after the plaintiff failed to respond to the defendants' verified plea of abatement).

1. *Carrizales* in Practice

The 542A notice letters at issue in *Carrizales* are collectively attached hereto as Appendix B.

C. *Davis v. Allstate Fire & Casualty Ins. Co.,* Civil Action No. 4:18-CV-00075, 2018 WL 3207433 (E.D. Tex. June 29, 2018) – Sufficiency of the Presuit Notice Letter

Davis concerns a dispute over homeowners' insurance benefits, brought under diversity jurisdiction, arising out of a first party insurance dispute over benefits under a residential insurance policy issued by Defendant to Plaintiff for alleged storm damage to Plaintiff's home on September 17, 2016.

On April 17, 2017, Plaintiff's law firm sent a letter to Defendant with the intent of providing presuit notice as required under Texas law. On November 14, 2017, Plaintiff filed suit against Defendant in the 191st District Court, Dallas County, Texas and on January 12, 2018, Defendant removed the case to the Northern District of Texas. Thereafter, Defendant filed a Verified Motion to Abate Pursuant to Texas Insurance Code Section 542A, to which Plaintiff did not respond. On January 29, 2018, the Northern District of Texas, on its own motion, transferred the case to the Eastern District of Texas. On May 8, 2018, Defendant again filed a Verified Motion to Abate Pursuant to Texas Insurance Code Section 542A. Plaintiff filed a verified response on May 9, 2018.

The Court in *Davis* noted that despite the Fifth Circuit's silence on the applicability of section 542A's particular notice provision in federal court, the Fifth Circuit has strictly applied similar notice provisions required by Texas law. *See Oppenheimer v. Prudential Sec. Inc.*, 94 F.3d 189, 194 (5th Cir. 1996) (enforcing

notice provision in the DTPA)); *Int'l Nickel Co., Inc. v. Trammel Crow Distrib. Corp.*, 803 F.2d 150, 156 (5th Cir. 1986) (enforcing notice provision in the DTPA); *Baber v. Edman*, 719 F.2d 122, 123 (5th Cir. 1983) (enforcing notice provision for medical malpractice suits). The Fifth Circuit holds that "the[se] notice statute[s] [are] . . . so intertwined with Texas' substantive policy . . . that, to give that policy full effect, federal courts sitting in diversity must enforce [their] requirements." *Baber*, 719 F.2d at 123. The notice provision in section 542A shares the same settlement encouragement and litigation-curbing purposes as those notice provisions found applicable by the Fifth Circuit. *See Carrizales v. State Farm Lloyds*, 2018 WL 1697584, at *2 (N.D. Tex. Apr. 6, 2018).

Following the Fifth Circuit, district courts in Texas have also consistently applied similar insurance related notice provisions that exist throughout Texas law. *See, e.g., Rodriguez v. Metro. Lloyds Ins. Co. of Tex.*, No. 5:15-CV-143-C, 2015 WL 12699855, at *3 (N.D. Tex. July 27, 2015) ("[t]he notice requirement[s] [are] intended to give a defendant insurer a right and opportunity to make a settlement offer"); *Nichols v. Nationwide Prop. & Cas. Ins. Co.*, No. CIV. A. H-10-0824, 2010 WL 1576694, at *3 (S.D. Tex. Apr. 20, 2010). Only one district in this circuit has found the notice requirements inapplicable to federal courts. *See Gaytan v. Underwriters at Lloyd's*, No. DR-15-CV-017-AM-VRG, 2015 WL 13134990, at *1 (W.D. Tex. June 3, 2015). Departing from prior precedent, the Western District of Texas found the notice requirement in the DTPA entirely procedural and thus, not binding on federal courts. *See id. But see, e.g., Cleo Bustamante Enterprises, Inc. v. Lumbermens Mut. Cas. Co.*, No. CIV.A.SA-05-CA0433XR, 2005 WL 1586994, at *1 (W.D. Tex. June 30, 2005) (abating suit for failure to comply with DTPA notice requirement). However, the Court in *Davis* agreed with the majority of district courts in Texas and enforces similar notice provisions required by Texas law. *See, e.g., Flores v. Allstate Ins. Co.*, No. 1:13-CV-613, 2013 WL 12155745, at *2 (E.D. Tex. Nov. 6, 2013) (abating suit for failure to comply with DTPA notice requirement); *Shaw v. Zurich Am. Ins. Co.*, No. 2:12-CV-00797-JRG, 2013 WL 12147665, at *1 (E.D. Tex. Mar. 19, 2013) (abating suit for failure to comply with DTPA notice requirement).

Furthermore, district courts that have recently analyzed the notice provision in section 542A have found that federal courts should apply it strictly. *See Perrett v. Allstate Ins. Co.*, No. 4:18-CV-01386, 2018 WL 2864132, at *3 (S.D. Tex. June 11, 2018); *Carrizales*, 2018 WL 1697584, at *1. Thus, the Court in *Davis* was of the opinion that, although providing sufficient notice is a procedural process, federal courts should apply the notice provision in section 542A because its purpose is intertwined with Texas' substantive policy. *Davis,* 2018 WL 3207433, at *3.

In *Davis*, neither party challenged the applicability of the notice provision in section 542A in federal court. *Davis,* 2018 WL 3207433, at *3. Rather, the issue in *Davis* was whether Plaintiff's pre-suit notice satisfied the requirements of section 542A.003. The Court inspected the notice letter and found that the notice contains all the elements required by section 542A.003(b). *Id.* The notice contains "a statement of the acts or omissions giving rise to the claim." *Id.*; *Tex. Ins. Code. Ann.* § 542A.003(b)(1). "Notice letters with specific factual allegations supporting the causes of action, or at least enough information to imply those facts, satisfy the notice requirement." *Perrett,* 2018 WL 2864132, at *2. Thus, while the description of the acts or omissions is brief, it is sufficient to satisfy the statutory requirement. *Davis,* 2018 WL 3207433, at *3. The letter also contains both the amounts sought for actual damages, "$108,334.26," and for attorney's fees, "$5,000," thus, satisfying the remaining requirements of section 542A.003(b). *Id.*

However, the *Davis* Court noted that section 542A.003(c) requires Plaintiff's pre-suit notice to "include . . . a statement that a copy of the notice was provided to the claimant" and Plaintiff's pre-suit notice does not contain such a statement. Therefore, *Davis* found Plaintiff's pre-suit notice fails, as a matter of law, to satisfy the statutory notice requirement. *Davis,* 2018 WL 3207433, at *3 (citing *Perrett,* 2018 WL 2864132, at *2). The *Davis* action was abated until 60 days after the date Plaintiff provides Defendant with proper pre-suit notice as required under section 542A.003.

D. *In re Allstate Indemnity Co.*, 2018 WL 3580644 (Tex. App. – Houston [14th Dist.] July 26, 2018) – Sufficiency of the Presuit Notice Letter

This case involves a dispute over the amount Allstate paid for Holt and Cabrera's claim for damage to their condominium resulting from Hurricane Harvey. On December 12, 2017, Holt and Cabrera filed suit against Allstate for breach of contract, fraud, violations of the DTPA, and violations of Chapter 541 of the Texas Insurance Code. Allstate filed an answer and a verified plea in abatement. Allstate argued in its plea in abatement that Holt and Cabrera did not provide written presuit notice in accordance with the Texas Insurance Code. Holt and Cabrera filed a response, on February 12, 2018, asserting that they had provided presuit notice, and also requesting attorney's fees as sanctions for having to respond to Allstate's plea, which they argued was frivolous. The trial court denied Allstate's plea in abatement and awarded Holt and Cabrera $2,500 in attorney's fees as a sanction against Allstate for filing a plea without merit. The order advised that the trial court would strike Allstate's answer and a judgment of liability would be entered in favor of Holt and Cabrera

if Allstate did not pay the attorney's fees within fifteen days of the order. Allstate paid the attorney's fees.

The Court in *In re Allstate* began by noting that when a claimant fails to give a statutory notice that is a prerequisite to filing suit and the trial court denies the defendant's timely request for abatement, the defendant is entitled to seek review of the court's denial by mandamus. *In re Cypress Tex. Lloyds*, 437 S.W.3d 1, 5 (Tex. App.—Corpus Christi 2011, orig. proceeding). When a trial court abuses its discretion by denying a plea in abatement, the relator does not have an adequate remedy by appeal. *See In re Liberty Mut. Fire Ins. Co.*, No. 14-09-00876-CV, 2010 WL 1655492, at *6 (Tex. App.—Houston [14th Dist.] Apr. 27, 2010, orig. proceeding) (mem. op.).

Holt and Cabrera argue they provided sufficient presuit notice in a letter dated September 28, 2017, and two emails dated November 1, 2017 and December 4, 2017. *In re Allstate Indemnity Co.,* 2018 WL 3580644, at *2. The Court held that review of the letter and emails reflects that Holt and Cabrera's notice *does not comply* with section 542A.003 and therefore, the trial court abused its discretion by denying Allstate's plea in abatement. *Id.* Moreover, when a trial court abuses its discretion by denying a plea in abatement, the relator does not have an adequate remedy by appeal. *See Liberty Mut. Fire Ins. Co.*, 2010 WL 1655492, at *6. The Court also concluded that Allstate does not have an adequate remedy by appeal. *In re Allstate Indemnity Co.,* 2018 WL 3580644, at *2. Because the trial court abused its discretion by denying Allstate's plea in abatement, the Court held that the trial court's award of attorney's fees was insupportable. *Id.* at *3.

E. *Massey v. Allstate Vehicle & Property Ins. Co.,* Civil Action H–18–1144, 2018 WL 3017431 (S.D. Tex. June 18, 2018) – Election of Adjuster Liability and Complete Diversity

Massey is an insurance case regarding the Masseys' home suffering storm damage during Hurricane Harvey. On December 15, 2017, the Masseys sued Allstate and four insurance adjusters in the 333rd Judicial District Court of Harris County, Texas, for: (1) breach of contract; (2) breach of the duty of good faith and fair dealing; (3) fraud; (4) conspiracy; (5) negligent hiring, training, supervision, and retention; (6) violations of the Texas Insurance Code; and (7) violations of the DTPA. Allstate received service of the petition on December 26, 2017 and filed its answer on January 19, 2018. On March 20, Allstate filed an election of legal responsibility ("Election") under Texas Insurance Code section 542A.006 for the adjusters. Under section 542A.006, when an insurer is a party to an action, it "may elect to accept whatever liability an agent might have to the claimant for the agent's acts or omissions related to the claim by providing written notice to the claimant." *Tex. Ins. Code Ann.* § 542A.006. If this election is made after a lawsuit has been filed, then "the court shall dismiss that action with prejudice." *Id.* In relevant part, an "agent" is defined to include an "adjuster who performs any act on behalf of an insurer." *Id.* § 542A.001(1). On April 2, the Masseys filed an amended petition acknowledging that Allstate filed the Election. That same day, the state court dismissed the four adjusters pursuant to section 542A.006. Then, on April 11, Allstate removed the case. The Masseys then moved for remand. It is undisputed that without the adjusters, complete diversity exists. The only inquiry is whether removal was proper.

Allstate argues that it was error to apply the voluntary-involuntary rule in this case. The voluntary-involuntary rule states that "an action nonremovable when commenced may become removable thereafter only by the voluntary act of the plaintiff." *Crockett v. R.J. Reynolds Tobacco Co.*, 436 F.3d 529, 532 (5th Cir. 2006) (quoting *Weems v. Louis Dreyfus Corp.*, 380 F.2d 545, 547 (5th Cir. 1967)). Courts recognize an exception to the rule "where a claim against a nondiverse or in-state defendant is dismissed on account of fraudulent joinder." *Id.* This fraudulent joinder exception is "designed to prevent plaintiffs from blocking removal by joining non-diverse and/or in-state defendants who should not be parties." *Id.* at 533. In *Crockett*, the Fifth Circuit applied this fraudulent joinder exception to defendants who are "improperly, though not fraudulently, joined." *Id.*

In *Crockett*, the state court severed plaintiff Crockett's claims against two sets of defendants because the claims against each set had "totally different" burdens of proof. *Crockett*, 436 F.3d at 533. Though the severance order was not a voluntary act by the plaintiff, the Fifth Circuit held that the voluntary-involuntary rule did not apply. *Id.* Allstate, in *Massey*, argues that *Crockett* did not apply the voluntary-involuntary rule because the severance order was a non-merits based order. *Massey,* 2018 WL 3017431, at *2. However, *Crockett* applied the fraudulent joinder exception to improper joinder. *See Crockett*, 436 F.3d at 533. The court held that "[t]o the extent the severance decision was tantamount to a finding of improper joinder, we agree with that finding." *Id.* The court then stated:

> The fraudulent joinder exception to the voluntary-involuntary rule is designed to prevent plaintiffs from blocking removal by joining nondiverse and/or in-state defendants who should not be parties. That salutary purpose is also served by recognizing an exception to the voluntary-involuntary rule where defendants are improperly, though not fraudulently, joined.

Id. Crockett did not hold that only merits-based dismissals are subject to the voluntary-involuntary rule. Instead, *Crockett* held that the severance order was "tantamount to a finding of improper joinder," and improper joinder is an exception to the rule. *Id.*

The Fifth Circuit further illustrated this point in *Morgan v. Chase Home Finance, LLC. See* 306 F. App'x 49, 53 (5th Cir. 2008) (reaffirming that the exception to the voluntary-involuntary rule applies when the plaintiff fraudulently or improperly joined the non-diverse defendant, not when the state court order is non-merits based). Thus, the inquiry for the court is not whether the state court dismissal was on the merits, but whether the dismissal is "tantamount to a finding of" fraudulent/improper joinder. *See Crockett*, 436 F.3d at 533.

In *Massey*, Allstate admits that the Masseys did not improperly or fraudulently join the adjusters and the Court agreed. *Massey,* 2018 WL 3017431, at *3. As Allstate admits, the Masseys asserted viable claims against the adjusters. *Id.* Further, unlike in *Crockett*, *Massey* does not involve a severance order of dissimilar claims. *Id.*; *see Crockett,* 436 F.3d at 533. The Court in *Massey* found that because the state court's dismissal of the adjusters is not tantamount to a finding of improper or fraudulent joinder, *Crockett* does not apply; and because non-merits based dismissals are not an exception to the voluntary-involuntary rule, the rule applies. *Massey,* 2018 WL 3017431, at *3. Allstate could not remove the case based on the state court's dismissal of the adjusters as that dismissal was involuntary to the Masseys. *Id.*; *see also Weems*, 380 F.2d at 547.

Allstate also argued that the Masseys' first amended petition created independent grounds for removal based on improper joinder. *Massey,* 2018 WL 3017431, at *4. On the same day that the state court issued its order dismissing the adjusters, the Masseys filed an amended petition acknowledging that Allstate made the Election. However, the Masseys did not amend the petition to remove the claims against the adjusters. Thus, Allstate argues that the Masseys improperly joined the adjusters by asserting non-viable claims against them after the Election was made. The Court in *Massey* disagreed – because the Masseys filed their first amended petition on the same day the court entered the order dismissing the insurance adjuster defendants, the court will not assume that the amended petition was a reassertion of dismissed claims. *Id.* Remand was granted.

F. *Flores v. Allstate Vehicle & Property Ins. Co.*, Civil Action No. SA-18-CV-742-XR, 2018 WL 5695553 (W.D. Tex. Oct. 31, 2018) – Election of Adjuster Liability and Complete Diversity

On May 22, 2018, Plaintiffs Fermin Flores and Mary Flores filed this action in Texas state court against Defendants Allstate Vehicle and Property Insurance Company and insurance adjuster Mark Godwin. Plaintiffs' original petition alleges claims related to an insurance dispute. Allstate was served on June 18, 2018.

On July 2, 2018, Allstate moved to elect legal responsibility for Mark Godwin as authorized by section 542A.006 of the Texas Insurance Code, which allows "an insurer that is a party to the action [to] elect to accept whatever liability an agent might have to the claimant for the agent's acts or omissions related to the claim by providing written notice to the claimant" and further provides that, if the insurer makes such an election, "the court shall dismiss the action against the agent with prejudice." *Tex. Ins. Code* § 542A.006(a), (c). The state district judge signed an order dismissing Godwin from the lawsuit. *Flores*, 2018 WL 5695553, at *1.

On July 18, 2018, Defendant Allstate removed the case to this Court, invoking diversity jurisdiction. Allstate's Notice of Removal notes that Godwin was dismissed with prejudice on July 16, and then stated, "As required by 28 U.S.C. § 1446(b)(3), Allstate files this notice of removal within thirty (30) days following receipt by Defendant of the initial pleadings." However, section 1446(b)(3) applies when the case stated by the initial pleading is not removable, and allows removal if the notice of removal is filed "within 30 days after receipt by the defendant of . . . other paper from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b)(3). The Notice of Removal further states that removal is proper "because this Court has original diversity jurisdiction under 28 U.S.C. § 1332 and the action is one that may be removed by Defendant pursuant to 28 U.S.C. § 1441(b)(3)." There is no section 1441(b)(3), and Allstate presumably meant section 1446(b)(3). Thus, it appears that the Notice of Removal is relying on the state court's dismissal order as "other paper" upon which the case became removable. The Notice of Removal does not assert that Godwin was improperly joined, presumably because Godwin had already been dismissed from the action. *Flores*, 2018 WL 5695553, at *1.

On July 27, 2018, Plaintiffs timely moved to remand, arguing that removal was improper because diversity jurisdiction was created by the unilateral acts of the Defendants, and thus the voluntary-involuntary rule precludes removal. In response, Allstate argues that Godwin was improperly joined. Plaintiffs reply that Allstate has waived an improper joinder basis for removal by failing to include it in the Notice of Removal, and that in any event improper joinder does not apply. Plaintiffs contend that this case was not removable when filed because complete diversity did not exist (Godwin and Plaintiffs are Texas citizens), and the state court's dismissal of Godwin was not a

voluntary act by Plaintiffs, rendering the voluntary-involuntary rule applicable. Plaintiffs argue that the dismissal is similar to a defendant obtaining a directed verdict, which indisputably invokes the voluntary-involuntary rule. Plaintiffs further contend that an assertion of improper joinder would be untimely because it was not raised in the Notice of Removal within thirty days of service of the petition. Plaintiffs assert that an improper joinder argument would also fail on the merits because Plaintiffs had viable claims against Godwin and intended to pursue them. *Flores*, 2018 WL 5695553, at *2.

In response, Allstate invoked the doctrine of improper joinder as a basis for removal, arguing that it is an exception to the voluntary-involuntary rule and noting that it timely filed its notice of removal within thirty days following service of the initial petition. Allstate argues that the fact that Plaintiffs had not given Godwin the required pre-suit notice meant that the state court lacked jurisdiction over the claims against him and indicates that he was only joined to defeat jurisdiction. *Flores*, 2018 WL 5695553, at *2.

The Court in *Flores* notes that courts have long recognized an exception to the voluntary-involuntary rule where a claim against a nondiverse or in-state defendant is dismissed on account of improper joinder. *Crockett*, 436 F.3d at 532. The improper joinder exception to the voluntary-involuntary rule is designed to prevent plaintiffs from blocking removal by joining non-diverse and/or in-state defendants who should not be parties. *Id.* Improper joinder may be established in two ways: (1) actual fraud in the pleading of jurisdictional facts; or (2) inability of the plaintiff to establish a cause of action against the non-diverse party in state court. *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 572 (5th Cir. 2004). Typically, the allegedly improperly joined defendant is still a party at the time of removal, and the federal district court conducts an inquiry into whether the plaintiff has the possibility of establishing a cause of action against the non-diverse party. In *Flores*, however, the allegedly improperly joined defendant was dismissed by the state court prior to removal, and thus Plaintiffs argue that the case is more like situations in which the state court has involuntarily dismissed a defendant before removal, which typically invokes the voluntary-involuntary rule. *Flores*, 2018 WL 5695553, at *2.

The Court in *Flores* held that although the dismissal was involuntary, it is not appealable, and thus does not implicate the underlying concerns of the voluntary-involuntary rule identified in *Weems*. *Flores*, 2018 WL 5695553, at *2. Specifically, Texas Insurance Code section 542.006(a) provides that, if a claimant files an action to which the chapter applies against an agent, and the insurer thereafter makes an election under subsection (a) to accept whatever liability the agent might have to the claimant for the agent's acts or omissions related to the claim, the court *shall* dismiss the action against the agent with prejudice. *Tex. Ins. Code* § 542A.006(c). More importantly, an insurer may not revoke, and a court may not nullify, an insurer's election. *Id.* § 542A.006(f). Thus, dismissal of the agent is not only required, it is final and non-appealable. *Flores*, 2018 WL 5695553, at *2.

But even if the Notice of Removal was insufficient because of the failure to specifically cite improper joinder, "[a]n imperfect or defective allegation of jurisdiction" "may be amended . . . to set forth more specifically the jurisdictional grounds for removal which were imperfectly stated in the original petition [for removal]." *Wormley*, 863 F.Supp. at 385. Defective allegations of jurisdiction in a notice of removal, though possibly not sufficient to confer jurisdiction if not amended, are sufficient to confer jurisdiction on the federal courts to permit the curing of the defect by amendment, even outside the thirty-day period. *Id.; see also Firemen's Ins. Co. of Newark, J.J. v. Robbins Coal Col*, 288 F.2d 349 (5th Cir. 1961) (citing 28 U.S.C. § 1653). A removing defendant may not add completely new bases for removal, but it may state previously articulated grounds more fully. *Fed. Prac. & Proc.* § 3733. Thus, to cure any potential deficiency, the Court permitted Allstate to file an Amended Notice of Removal that specifically asserts that Godwin was improperly joined to support its assertion of diversity jurisdiction.

Addressing the merits of Allstate's position, the Court concluded that the improper joinder exception to the voluntary-involuntary rule for state court dismissals applies in this case. *Flores*, 2018 WL 5695553, at *4. The Court in *Flores* agreed with the district court in *Massey* that the inquiry for the court is whether the dismissal by the state court is tantamount to a finding of fraudulent/improper joinder, and under *Crockett*, an additional inquiry must be whether the district court would agree with that conclusion. *Id.* However, in *Massey*, Allstate *admitted* that the plaintiffs did not improperly join the adjusters, and the district court agreed with that conclusion. In *Flores*, in contrast, Allstate does not concede that Godwin was not improperly joined, and Allstate timely removed this action within 30 days of receipt of the initial pleading. *Id.* Thus, the Court found that Godwin was improperly joined either because improper joinder was ascertainable from the initial pleadings and Allstate timely removed or because the state court's dismissal order was tantamount to a finding of improper joinder. *Flores*, 2018 WL 5695553, at *5. The Texas Legislature's enactment of section 542A.006 essentially rendered Plaintiffs unable (not merely unlikely) to succeed on their claims against Godwin. In addition, where such a dismissal occurs before removal, it is not appealable, and thus does not implicate the efficiency concerns of the voluntary-involuntary rule. *Id.* Thus, the

Court in *Flores* found removal was proper and the motion to remand was denied. *Id.*

The Court in *Flores* emphasized that it based its decision on the fact that (1) it has previously found that a dismissal under section 542A.006 is appropriately viewed as a dismissal for improper joinder and thus the state court's dismissal order is tantamount to a dismissal for improper joinder, (2) such a dismissal order in the state court is final and unappealable, and (3) Allstate timely removed regardless of whether the 30-day clock began to run from the receipt of initial pleadings or the state court's dismissal order. *Id.*

G. *Stephens v. Safeco Ins. Co.*, Civil Action No. 4:18-cv-00595, 2019 WL 109395 (E.D. Tex. Jan. 4, 2019) - Election of Adjuster Liability and Complete Diversity

Safeco issued Stephens a property insurance policy (the "Policy") to insure Stephens' property located in Richardson, Collin County, Texas (the "Property"), against hail and windstorm damage. On or about March 24, 2016, a hailstorm and/or windstorm struck Collin County, Texas. Stephens alleges that the Property sustained extensive damage to the roof and interior, prompting her to submit a claim to Safeco. Stephens requested that pursuant to the Policy, Safeco cover the costs to replace the roof, repair the Property's interior, and perform any necessary repairs. *Stephens,* 2019 WL 109395, at *1.

Safeco assigned Baker as the individual adjuster on the claim. According to Stephens, on or about April 8, 2016, Baker inspected the Property and determined that the composition roof required a full replacement and that minor repairs needed to be made to the flat portion of the roof instead of a full replacement. Stephens further alleges that even though the flat roofing portion needed to be immediately replaced, Baker insisted that minor repairs be made before a full replacement. Safeco approved payment on the claim, and, pursuant Baker's instruction, Stephens used the funds designated for the composition roof replacement and interior damage to repair the flat roofing. Stephens alleges that the repairs were insufficient and the Property required further attention. Stephens contends Baker was improperly trained and conducted a substandard inspection that failed to accurately account for all of the Property's damages. Stephens further argues that Safeco failed to thoroughly review Baker's assessment and to properly supervise his work, which led to the approval of an inadequate adjustment and a wrongful partial denial of Stephens' claim. *Stephens,* 2019 WL 109395, at *1.

On July 27, 2018, Stephens sued Safeco and Baker in the 429th District Court in Collin County, Texas, alleging multiple violations of the of the Texas Insurance Code, breach of contract, and breach of the duty of good faith and fair dealing. On August 17, 2018, Safeco provided Stephens with formal notice of its election under Texas Insurance Code section 542A.006 to accept legal responsibility and liability for Baker. On August 20, 2018, Safeco removed the case to the United States District Court for the Eastern District of Texas and contemporaneously filed a motion to dismiss Baker from the suit arguing that the adjuster is improperly joined. Stephens and Baker are citizens of the State of Texas, and Safeco is organized under the laws of the State of Indiana with its principal place of business in Boston, Massachusetts. On September 27, 2018, Stephens filed the present motion to remand arguing that the voluntary-involuntary rule bars the action's removal. *Stephens,* 2019 WL 109395, at *2.

The central issue in *Stephens* was whether an action non-removable when commenced due to the lack of complete diversity among the parties, becomes removable based *solely* on a diverse insurer's election to accept complete liability of a nondiverse adjuster. It is undisputed that Baker's impending dismissal creates complete diversity; the only issue is whether the action also becomes removable. Safeco argues that Baker's dismissal establishes diversity jurisdiction thus deeming the action removable. Stephens responds that the voluntary-involuntary rule bars removal *solely* because neither Safeco's elections nor Baker's dismissal were her own voluntary acts. Safeco maintains that the voluntary-involuntary rule is inapplicable because Baker was improperly joined based on Stephens' inability to recover against the adjuster. *Stephens,* 2019 WL 109395, at *3.

The *Stephens* Court found that Safeco's election and Baker's dismissal are undoubtedly involuntary acts of Stephens. *Stephens,* 2019 WL 109395, at *4. Section 542A.006 confers Safeco, as an insurer, unabridged discretion in deciding whether to elect to accept legal liability of Baker, its agent/adjuster. *Tex. Ins. Code Ann.* § 542A.006. Safeco's decision is not contingent on and does not anticipate Stephens' assent. Section 542A.006 provides no indication that Stephens may decline Safeco's election, and requires that a court dismiss Baker *if an election is made. Id.* This entire process is done without Stephens' agreement, contrary to her wishes, and is therefore involuntary. *Stephens,* 2019 WL 109395, at *4. This finding, however, did not end the Court's inquiry because Safeco argued that Baker was improperly joined which is a recognized exception to the voluntary-involuntary rule.

Improper Joinder

Courts have long excluded plaintiffs who improperly join non-diverse defendants from the protections of the voluntary-involuntary rule. *See Crockett v. R.J. Reynolds Tobacco Co.*, 436 F.3d 529, 532 (5th Cir. 2006) (citing *Insinga v. LaBella*, 845 F.2d 249, 254 (11th Cir. 1988)). The Fifth Circuit has held that "the fraudulent joinder exception to the

voluntary-involuntary rule is designed to prevent plaintiffs from blocking removal by joining nondiverse and/or in-state defendants who should not be parties." *Crockett*, 436 F.3d at 533. As to not limit this exception exclusively to defendants who were fraudulently joined - which suggests scienter - the Fifth Circuit further explained that the "salutary purpose is also served by recognizing an exception to the voluntary-involuntary rule where defendants are improperly, though not fraudulently, joined." *Id.* To summarize, the principle behind the improper joinder exception is straightforward: a plaintiff may not argue that removal is barred because a non-diverse defendant's dismissal was involuntary when the non-diverse defendant should have never been party to the action to begin with. If a court determines that a non-diverse defendant who is preventing removal is improperly joined, that defendant is dismissed without prejudice for lack of subject matter jurisdiction and the court will allow removal if complete diversity otherwise exists. *See Int'l Energy Ventures Mgmt., L.L.C. v. United Energy Grp., Ltd.*, 818 F.3d 193, 200 (5th Cir. 2016) ("[T]he dismissal of a nondiverse party over whom the court does not have jurisdiction must be a dismissal without prejudice in every instance.").

"Improper joinder may be established in two ways: (1) actual fraud in the pleading of jurisdictional facts; or (2) inability of the plaintiff to establish a cause of action against the non-diverse party in state court." *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 572 (5th Cir. 2004). In *Stephens*, Safeco argued the latter. Safeco can carry its heavy burden of showing that Stephens is unable to establish a cause of action against Baker by demonstrating that Stephens has "no possibility of recovery . . . which stated differently *means that there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant.*" *Travis v. Irby*, 326 F.3d 644, 647 (5th Cir. 2003) (emphasis in original). Safeco, however, does not challenge Baker's joinder. *Stephens,* 2019 WL 109395, at *4. Rather, Safeco only contends that because section 542A.006 mandates that Baker be dismissed from the action, there is no reasonable basis to predict that Stephens might be able to recover against him, and thus Baker is, by definition, improperly joined. The Court found that this conclusion wholly disregards the joinder itself and, instead, proposes that the Court adopt a blanket "no possibility of recovery" rule as dispositive to an improper joinder analysis. *Stephens,* 2019 WL 109395, at *4. This also contradicts binding Fifth Circuit precedent that has rejected similar propositions and emphasized that the focal point of an improper joinder analysis is the joinder. *See Smallwood,* 385 F.3d at 573 (holding that "[s]ince the purpose of the improper joinder inquiry is to determine whether or not the in-state defendant was properly joined, the focus of the inquiry must be on the joinder . . ."). The Court, therefore, declined to accept Safeco's interpretation. *Stephens,* 2019 WL 109395, at *4.

Allowing Safeco, or any insurer, to remove the action pursuant to an election that, though could have been made pre-suit, is made only after action commences in state court, gives an insurer–defendant the discretion as to where the case will be litigated. *Stephens,* 2019 WL 109395, at *5. For example, defendants may choose to elect pre-suit, which guarantees that the suit will be removable when filed. Defendants may choose to elect after the suit is filed and decide whether to stay in state court or remove to federal court. Defendants may choose to not elect and nevertheless remove the case arguing that a non-diverse defendant was improperly joined on grounds independent of section 542A.006. *Id.* Though courts have continued to recognize a defendant's right to remove a case to federal court, that right may not improperly deprive a plaintiff of her fundamental right to choose the forum to litigate her case. *Id.*

Other courts that have considered this narrow issue under similar facts reveal a split in rulings with a Southern District of Texas court finding no improper joinder and remanding the case, and, conversely, a court in the Western District of Texas allowing the removal under similar arguments set forth by Safeco. *Compare Massey v. Allstate Vehicle & Property Ins. Co.*, No. H-18-1144, 2018 WL 3017431, at *4 (S.D. Tex. June 18, 2018) *with Flores v. Allstate Vehicle & Property Ins. Co.*, No. SA-18-CV-742-XR, 2018 WL 5695553, at *1 (W.D. Tex. Oct. 31, 2018); *Electro Grafix Corp. v. Acadia Ins. Co.*, No. SA-18-CA-589-XR, 2018 WL 3865416, at *3–*4 (W.D. Tex. Aug. 14, 2018). The Court in *Stephens* agreed with *Electro Grafix* in so much as it propositions that if a diverse defendant–insurer makes the election *before* the insured files suit in state court, then a dismissal under section 542A.006 is tantamount to a finding of improper joinder if a plaintiff–insured attempts to add the non-diverse adjuster to an action. *Stephens,* 2019 WL 109395, at *7. This is because the Texas Insurance Code forecloses on any ability to recover against an adjuster if an insurer makes an election. Therefore, if the election is made pre-suit, an adjuster subsequently joined is joined when state law mandates that there can be no viable claims against him. *Id.* If, however, the election is made after an insured commences action, a diverse defendant–insurer cannot rely solely on the fact that the insured is now prohibited from recovering against the non-diverse adjuster. *Id.* An election made after suit commences does not challenge the joinder of the non-diverse adjuster and, as a result, has no bearing on whether a plaintiff–insured asserted viable claims against the non-diverse adjuster when joining him to the action. Simply put, if an insurer elects to accept full responsibility of an agent/adjuster *after* the insured commences action in state court, the insurer must prove

that the non-diverse adjuster is improperly joined for reasons independent of the election made under Section 542A.006 of the Texas Insurance Code. *Id.* The motion to remand was granted.

H. *Yan Qing Jiang v. Travelers Home and Marine Ins. Co.*, Civil Action No. 1:18-cv-758-RP, 2018 WL 6201954 (W.D. Tex. Nov. 28, 2018) – Acceptance of Adjuster Liability and Improper Joinder

Jiang filed this action in the 345th Judicial District Court of Travis County, Texas, on July 17, 2018. Jiang alleges that her home was damaged in a storm and that Travelers (the insurer) and Pustka (the adjuster) failed to properly handle her insurance claim. Out of those allegations, Jiang asserts various claims against Defendants for violations of Texas law. Defendants removed the case on the basis of diversity jurisdiction. In their notice of removal, Defendants assert that Travelers is diverse from Jiang and argue that Pustka - who is not - was improperly joined. Defendants also ask the Court to dismiss Jiang's claims against Pustka under Texas Insurance Code section 542A.006.

Travelers argues that Pustka is improperly joined because Travelers elected responsibility under Texas Insurance Code section 542A.006(a). The Texas Insurance Code allows an insurer that is a party to a civil action to accept whatever liability an agent might have to the claimant for the agent's acts or omissions related to the claim by providing written notice to the claimant. *Tex. Ins. Code* § 542A.006(a). If the insurer elects to accept responsibility for the agent, a court must dismiss the action against the agent with prejudice. *Id.* § 542A.006(c). In its response to Jiang's motion to remand, Travelers provides written notice to Jiang that it elects to accept responsibility for her claims against Pustka. *Jiang*, 1018 WL 621954, at *2. The Court dismissed all of Jiang's claims against Pustka relating to Jiang's insurance claim. *Tex. Ins. Code* § 542A.006(c). The motion to remand was denied. *Jiang*, 1018 WL 621954, at *2.

I. *Electro Grafix Corp. v. Acadia Ins. Co.*, Civil Action No. SA-18-CA-589-XR, 2018 WL 3865416 (W.D. Tex. Aug. 14, 2018) – Acceptance of Adjuster Liability, Improper Joinder and Diversity

On April 20, 2018, Plaintiff filed its Original Petition in the 285th Judicial District Court of Bexar County, Texas, asserting claims for fraud, breach of contract, noncompliance with the Texas Insurance Code, breach of the duty of good faith and fair dealing, and violations of the DTPA against Defendants. Defendant Acadia Insurance Company ("Acadia") removed the case to the Western District of Texas, alleging that the Court has jurisdiction pursuant to 28 U.S.C. § 1332.

The facts are as follows. Plaintiff owns real property located at 2438 Freedom Drive, San Antonio, Texas 78217 (the "Property") that was covered by an insurance policy provided by Acadia, which covered potential hail damage. Plaintiff alleges that on April 12, 2016, a hail storm damaged the roof of the Property and Plaintiff hired a roofing contractor to get an estimate on the extent of damage and cost of repair. The contractor allegedly determined a hail incident occurred and the Property's roof was damaged. Plaintiff filed a claim with Acadia on April 22, 2016, and Plaintiff alleges that after Acadia's agents inspected the roof, "it was understood by Plaintiff that Acadia determined indication of hail damage to the roof existed." Plaintiff claims that Acadia, however, "falsely reported that such damage did not exceed the policy deductible and stated [Acadia] was closing its file." *Electro Grafix*, 2018 WL 3865416, at * 1.

Plaintiff alleges that on March 27, 2017, Acadia was again notified that a contractor inspected the roof and was of the opinion that it had sustained hail damage. *Id.* After Plaintiff requested Acadia to re-inspect the damage, Acadia allegedly hired a professional engineer who concluded there was no visible hail damage to the roof. Plaintiff alleges that following a second examination, the engineer found at least one hail strike that indicated potential hail damage. *Id.* Thereafter, Acadia allegedly "took the position there was some damage, but the roof could be repaired and the incident was not covered by the Acadia Policy." *Id.* Plaintiff alleges that after an October 19, 2017 inspection of the roof, Acadia again denied the claim because "core samples of the roof were negative for damage, Plaintiff had not provided additional samples, and [Acadia] falsely claimed the damage to the roof was 'wear and tear.'" *Id.*

Plaintiff also alleged that, at a later date, Acadia "attempted to obtain an inappropriate settlement" with Plaintiff over the incident. *Id.* Defendant Odermatt allegedly arrived at the Property and "attempted to obtain a release from Plaintiff's general manager, Manuel Ramos, who lacked the authority to act." Plaintiff alleges Odermatt made "certain misrepresentations" in an attempt to obtain an inappropriate settlement and release. Plaintiff further alleges that Odermatt "misrepresented the extent of the damages to the building, the facts related to the claim, and the amount of the loss and tried to convince Ramos that Ramos had authority to make a settlement on behalf of Plaintiff in an effort to obtain an inappropriate release." *Id.*

Plaintiff alleges that Acadia failed to adequately compensate it under the terms of the insurance policy. Plaintiff alleges that Odermatt was "apparently not an employee" of Acadia's, "but was acting on [Acadia's] behalf as an agent at the time of his actionable conduct." Plaintiff states that Acadia "has not

accepted responsibility for the conduct of Odermatt, and thus he is being sued in his individual capacity." Plaintiff brings claims against Acadia for fraud, breach of contract, noncompliance with the Texas Insurance Code, breach of the duty of good faith and fair dealing, and violations of the DTPA. Plaintiff brings a claim against Odermatt for noncompliance with the Texas Insurance Code. *Electro Grafix*, 2018 WL 3865416, at *2.

Odermatt filed his motion to dismiss, arguing that Plaintiff failed to state a valid claim against him under the Texas Insurance Code. On July 3, 2018, Plaintiff filed its motion to remand, arguing that Odermatt is not improperly joined.

In its notice of removal, Acadia states that on May 17, 2018, before Odermatt was served with Plaintiff's lawsuit, Acadia provided written notice that it accepted "whatever liability Odermatt might have to [Plaintiff] for Odermatt's acts or omissions related to this claim." *Electro Grafix*, 2018 WL 3865416, at *3. Acadia argues that Plaintiff has no valid claim against Odermatt under the Texas Insurance Code. But under the Texas Insurance Code, "[i]f a claimant files an action to which this chapter applies against an agent and the insurer thereafter makes an election under Subsection (a) with respect to the agent, the court shall dismiss the action against the agent with prejudice." *Tex. Ins. Code Ann.* § 542A.006(c); *Id.* § 542A.006(a) ("[A]n insurer that is a party to the action may elect to accept whatever liability an agent might have to the claimant for the agent's acts or omissions related to the claim by providing written notice to the claimant").

The Plaintiff in *Electro Grafix* argued that the Court should not consider Acadia's written notice indicating that it elected to accept whatever liability Odermatt might have because such written notice is "information beyond the four corners of the State Court pleadings" and should not be considered in a Rule 12(b)(6)-type analysis. *Electro Grafix*, 2018 WL 3865416, at *3. But the Court in *Electro Grafix* found that it is not so limited when determining if a party is improperly joined. *Id.* First, the Court should look "at the allegations of the complaint to determine whether the complaint states a claim under state law against the in-state defendant." *Smallwood v. Illinois Cent. R. Co.*, 385 F.3d 568, 573 (5th Cir. 2004). If a plaintiff survives a Rule 12(b)(6) challenge, ordinarily there is no improper joinder. But there are cases "in which a plaintiff has stated a claim, but has misstated or omitted discrete facts that would determine the propriety of joinder." *Id.* In such a case, a court "may, in its discretion, pierce the pleadings and conduct a summary inquiry." *Id.*

Although a court may pierce the pleadings, it should do so with restraint, so as to not necessitate substantial hearings or extensive discovery because such steps risk moving the court "beyond jurisdiction and into a resolution of the merits." *Id.* at 573-74. In *Electro Grafix,* however, the Court did not find such a risk to be present. *Electro Grafix*, 2018 WL 3865416, at *4. In his petition, Plaintiff acknowledged that Acadia accepted the responsibility of Christopher Lee Michels, another adjuster, but makes no similar acknowledgment as to Acadia accepting responsibility for Odermatt. Defendants have shown that Acadia provided Plaintiff with written notice of its election to accept whatever liability Odermatt might have in this case. *Electro Grafix*, 2018 WL 3865416, at *4. When an insurer elects to accept liability for an agent and notifies the claimant, the court "shall dismiss" the claimant's action against the agent. *Tex. Ins. Code. Ann.* § 542A.006(c). The *Electro Grafix* Court thus held that Defendants have shown that any potential claim against Odermatt would be dismissed under the Texas Insurance Code. *Electro Grafix*, 2018 WL 3865416, at *4. Further, the Court found that Plaintiff's argument that Acadia has failed to show that Odermatt is an "agent" lacks merit. *Id.* Plaintiff's own allegation that "Odermatt . . . was acting on [Acadia's] behalf as an agent at the time of his actionable conduct" contradicts such an argument. *Id.* Given that any claim that Plaintiff makes against Odermatt will be dismissed under section 542A.006(c), the Court found that Acadia met its burden to show that there is no reasonable basis to predict that Plaintiff might be able to recover against Defendant Odermatt, Odermatt is improperly joined, and the Court lacks subject-matter jurisdiction over the claims against him. *Electro Grafix*, 2018 WL 3865416, at *4. Plaintiff's motion to remand was denied.

1. Electro *Grafix* in Practice

The letter in response to Plaintiff's 542A notice letter at issue in *Electro Grafix* - in which Acadia accepted responsibility for its adjuster - is attached hereto as Appendix C.

J. *River of Life Assembly of God v. Church Mutual Ins. Co. and Jim Turner Harris,* Civil Action No. 1:19-CV-49-RP, 2019 WL 1468933 (W.D. Tex. April 3, 2019) – Acceptance of Adjuster Liability, Improper Joinder and Diversity

This is a lawsuit about insurance coverage for storm damage to a church. Unhappy with how its claim was handled, River of Life sued its insurance company, Church Mutual, and the adjuster who handled the claim, Harris, in state court. Church Mutual is diverse from River of Life; Harris is not. Church Mutual elected responsibility for Harris and removed to the Western District of Texas. Church Mutual's election requires this Court to dismiss all of River of Life's claims against Harris, Tex. Ins. Code § 542A.006(c), which would result in complete diversity. *River of Life*, 2019 WL 1468933, at *1. The question before the Court is

whether to remand the case or to keep it because Harris was improperly joined.

The Court in *River of Life* explained that "the improper joinder doctrine constitutes a narrow exception to the rule of complete diversity." *Cuevas v. BAC Home Loans Servicing, LP*, 648 F.3d 242, 249 (5th Cir. 2011). To establish improper joinder, the removing party has the burden to demonstrate either: "(1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the non-diverse party in state court." *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 573 (5th Cir. 2004). Only the doctrine's second prong is before the Court.

Under the second prong of the improper joinder doctrine, a defendant must establish "that there is no possibility of recovery by the plaintiff against an in-state defendant," which stated differently means "that there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant." *Smallwood*, 385 F.3d at 573. A court evaluates the reasonable basis of recovery under state law by "conduct[ing] a Rule 12(b)(6)-type analysis" or "pierc[ing] the pleadings and conduct[ing] a summary inquiry." *Id.*; *see also Int'l Energy Ventures Mgmt., L.L.C. v. United Energy Grp., Ltd.*, 818 F.3d 193, 207 (5th Cir. 2016) (stating that a court may use either analysis, but it must use one and only one). The Court in *River of Life* found a 12(b)(6) analysis appropriate.

In conducting a 12(b)(6)-type analysis, federal pleading standards apply. *Int'l Energy Ventures*, 818 F.3d at 207. Accordingly, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The party seeking removal "bears the burden of establishing that federal jurisdiction exists and that removal was proper." *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002). The removal statute must "be strictly construed, and any doubt about the propriety of removal must be resolved in favor of remand." *Gasch v. Hartford Accident & Indem. Co.*, 491 F.3d 278, 281–82 (5th Cir. 2007).

Church Mutual makes two arguments against remand: (1) Harris was improperly joined because Church Mutual elected responsibility for him, and (2) he was improperly joined because River of Life's boilerplate pleadings against him fail to state a claim for relief. *River of Life*, 2019 WL 1468933, at *2.

The Court in *River of Life* reiterated the applicable sections of 542A - as of September 2017, the Texas Insurance Code allows an insurer that to accept whatever civil liability an agent might have to a claimant for the agent's conduct related to the claim by providing written notice to the claimant. *Tex. Ins. Code* § 542A.006(a). If the insurer elects to accept responsibility for the agent, a court must dismiss all claims against the agent with prejudice. *Id.* § 542A.006(c). After River of Life sued Church Mutual in October 2018, Church Mutual elected responsibility for Harris and removed the case. *River of Life*, 2019 WL 1468933, at *2. The Court was therefore required to dismiss with prejudice River of Life's claims against Harris relating to River of Life's insurance claim - which in this case would be all of River of Life's claims against Harris. *Tex. Ins. Code* § 542A.006(c).

Because of this, Church Mutual believed that Harris is improperly joined, as River of Life is unable to recover against him. *River of Life*, 2019 WL 1468933, at *2. The Court in *River of Life* noted that several district court decisions in this circuit have reached that conclusion, including the Western District of Texas. *See Yan Qing Jiang v. Travelers Home & Marine Ins. Co.*, 1:18-CV-758-RP, 2018 WL 6201954, at *2 (W.D. Tex. Nov. 28, 2018) (Pitman, J.); *Flores v. Allstate Vehicle & Prop. Ins. Co.*, SA-18-CV-742-XR, 2018 WL 5695553, at *5 (W.D. Tex. Oct. 31, 2018); *Electro Grafix, Corp. v. Acadia Ins. Co.*, SA-18-CA-589-XR, 2018 WL 3865416, at *4 (W.D. Tex. Aug. 14, 2018). Others have concluded that when an insurer elects responsibility for the adjuster after the adjuster is joined, joinder is not improper even if the plaintiff can no longer recover against the adjuster. *Stephens v. Safeco Ins. Co. of Indiana*, 4:18-CV-00595, 2019 WL 109395, at *7 (E.D. Tex. Jan. 4, 2019). The Court in *River of Life* was persuaded that the latter approach is the proper application of federal law. *River of Life*, 2019 WL 1468933, at *2.

River of Life filed this action in state court on October 25, 2018. *Id.* Church Mutual did not elect responsibility for Harris until January 3, 2019. *Id.* Church Mutual's argument that its election renders Harris improperly joined requires the Court to consider whether an action that is not removable when commenced because of incomplete diversity later becomes removable based on a diverse insurer's election of responsibility for the non-diverse adjuster. *Id.*

River of Life argued that the voluntary-involuntary rule applies, but the Court disagreed. *Id.* at *3. That rule provides that "a case nonremovable on the initial pleadings could become removable only pursuant to a voluntary act of the plaintiff." *Weems v. Louis Dreyfus Corp.*, 380 F.2d 545, 547 (5th Cir. 1967). And while it is true that Church Mutual's election was not a voluntary act by River of Life, improper joinder is an exception to the voluntary-involuntary rule. *Crockett v. R.J. Reynolds Tobacco Co.*, 436 F.3d 529, 532–33 (5th Cir. 2006). The question remains whether Harris was improperly joined.

The Court in *River of Life* stated that Church Mutual's argument that Harris is improperly joined based solely on its section 542A.006 election misunderstands the doctrine of improper joinder, which is fundamentally about joinder. *See Smallwood*, 385 F.3d at 573 ("Since the purpose of the improper joinder

inquiry is to determine whether or not the in-state defendant was properly joined, the focus of the inquiry must be on the joinder, not the merits of the plaintiff's case."). The possibility-of-recovery inquiry is a means to discerning whether the joinder of a nondiverse defendant was improper, not an end in itself. *See id.* ("A claim of improper joinder by definition is directed toward the joinder of the in-state party, a simple but easily obscured concept. The party seeking removal bears a heavy burden of proving that the joinder of the in-state party was improper."). The focus must remain on whether the nondiverse party was properly joined when joined. *See Stephens*, 2019 WL 109395, at *5 ("The Court's inquiry as to whether [the adjuster] was improperly joined is contingent on [the adjuster's] joinder being challenged and not merely whether [the plaintiff] is unable to recover against him . . . It does not follow that a non-diverse defendant that is initially properly joined may become initially improperly joined. Again, the focus must be on the joinder.").

This approach - focusing on whether a plaintiff could recover against a nondiverse defendant at the time of joinder - is consistent with the Fifth Circuit's improper joinder doctrine. *River of Life*, 2019 WL 1468933, at *3. In *Smallwood*, for example, the court considered whether a nondiverse defendant was improperly joined when the plaintiff could not recover against that defendant for the same reason that it could not recover against a diverse defendant. 385 F.3d. at 574. The court decided that in such cases, there "is no improper joinder; there is only a lawsuit lacking merit." *Id.* The court emphasized that the removing party has the burden not merely to demonstrate that the claims against the nondiverse defendant lack merit, but "that sham defendants were added to defeat jurisdiction." *Id.* at 575. As the *Stephens* court observed, if the impossibility of recovery were all that mattered, "the *Smallwood* Court would have reached the opposite conclusion." *Stephens*, 2019 WL 109395, at *5. Like the *Smallwood* court, the Court in *River of Life* found that it must focus on the joinder of nondiverse defendants and not solely on the possibility of recovery against those defendants. *River of Life,* 2019 WL 1468933, at *3.

Taking that approach here, the Court in *River of Life* could not deny remand based on Church Mutual's section 542A.006 election alone. *Id.* River of Life joined Harris as a defendant when it named him in its original petition in October 2018. *Id.* Church Mutual did not elect responsibility for Harris for more than another two months. *Id.* Church Mutual's election of responsibility therefore did not render Harris' *joinder* improper, because it did not preclude recovery against Harris until months after his joinder. *Id.* If Harris is improperly joined, it must be for a reason that predated his joinder. *Id.* Because at least a reasonable basis existed that River of Life might be able to recover against Harris at the time of his joinder, the Court found he was properly joined even though Church Mutual has now elected responsibility. *Id* at *4. The parties therefore lack complete diversity, and the Court thus lacks subject matter jurisdiction over this action. *Id.* The Court remanded the action to state court. *Id.*

K. *J.P. Columbus Warehousing, Inc. v. United Fire & Casualty Co.,* Civil Action No. 5:18-cv-00100, 2019 WL 453378 (S.D. Tex. Jan. 14, 2019) – Reasonable Basis for Not Providing Presuit Notice

Plaintiff J.P. Columbus Warehousing, Inc. sued Defendant United Fire and Casualty Co. for failing to pay two separate insurance claims for property damage resulting from two different storms. Plaintiff asserts causes of action against Defendant for breach of contract, violations of Chapters 541 and 542 of the Texas Insurance Code, and breach of the common law duty of good faith and fair dealing.

Plaintiff asserts that three of its properties were damaged during a first storm on March 18, 2016 (First Storm), and again during a second storm fourteen months later on May 21, 2017 (Second Storm). On both dates, the properties were insured by an insurance policy issued by Defendant. Plaintiff filed separate insurance claims with Defendant following each incident. On July 5, 2016, Defendant sent Plaintiff a letter denying the insurance claim related to the First Storm. Then, on September 9, 2017, Defendant sent a letter denying the insurance claim for the Second Storm.

The Court in *J.P. Columbus* reiterated that Plaintiffs' causes of action accrued on the date coverage under the Policy was denied as to each of the two separate insurance claims. *See Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 828–29 (Tex. 1990) (breach of contract and bad faith claims accrue on date of denial); *Provident Life & Acc. Ins. Co. v. Knott*, 128 S.W.3d 211, 221 (Tex. 2003) (a claim brought under the DTPA or Texas Insurance Code "based on denial of insurance coverage accrues on the date that the insurer denies coverage"). The statute of limitations under Texas law for claims under the Texas Insurance Code and claims for bad faith is two years from the date they accrue. *Id.* The statute of limitations for breach of contract is four years. *Stine v. Stewart*, 80 S.W.3d 586, 592 (Tex. 2002) (citing *Tex. Civ. Prac. & Rem. Code* § 16.051).

On July 5, 2016, Plaintiff received a letter from Defendant denying the insurance claim for the First Storm, and on September 9, 2017 Plaintiff received the letter denying its claim for the Second Storm. Therefore, relevant to this discussion, the earliest date on which the statute of limitations would have expired on one of Plaintiff's claims related to the First Storm was July 4, 2018. *J.P. Columbus,* 2019 WL 453378, at *2.

The Court in *J.P. Columbus* stated that to prevail on a motion under Texas Insurance Code section 542A.007(d) to deny or limit an award of attorneys' fees to a plaintiff, a defendant must "plead and prove" that it was entitled to but was not given pre-suit notice at least sixty-one days before the date the action was filed as required by section 542A.003. *Tex. Ins. Code Ann.* § 542A.007(d) (West 2017). However, section 542A.003(d)(1) provides that a pre-suit notice is *not* required if giving notice is impracticable because the plaintiff has a reasonable basis for believing there is insufficient time to give the pre-suit notice before the limitations period will expire. *Tex. Ins. Code Ann.* § 542A.003(d)(1) (West 2017).

The Court noted that it is undisputed Plaintiff failed to send a pre-suit notice. *J.P. Columbus,* 2019 WL 453378, at *3. But Plaintiff has pleaded the impracticability exception in its state court Original Petition, stating, "Providing § 542A.003 notice is impracticable because the two-year anniversary of denial will occur before the expiration of 61 days. Insufficient time exists to give the 61-day pre-suit notice." *Id.* Plaintiff argued that it had a reasonable basis for believing there was insufficient time to give the pre-suit notice before the statute of limitations expired, and thus that giving pre-suit notice was impracticable, because Plaintiff hired an attorney sixty-three days before the two-year anniversary of Defendant's denial of the first insurance claim, on July 5, 2016. *Id.*

Defendant countered that the question of impracticability under section 542A.007(d)(1) should not be determined solely by the fact that Plaintiff waited to retain counsel until shortly before the expiration of the statute of limitations, with no further explanation by Plaintiff. *Id.* Plaintiff, Defendant points out, had retained a public adjuster who communicated with Defendant long before the two-year statute of limitations expiration date. *Id.*

Initially, the Court in *J.P. Warehousing* noted that Plaintiff's argument that the pre-suit notice exception of section 542.003(d)(1), regarding reasonable belief that there was insufficient time to give notice prior to the expiration of a statute of limitations, applies only to Plaintiff's claims relating to the First Storm and is not applicable to the Second Storm claims. *Id.* Plaintiff made separate insurance claims for damage arising from the two different storms which occurred over a year apart; and in fact, Defendant denied the claim for the First Storm's damage on July 5, 2016, long before the Second Storm even occurred. *Id.* Plaintiff's claims relating to the Second Storm are separate and independent from Plaintiff's First Storm claims. There was no legal requirement that Plaintiff file suit on the First and Second Storm claims together. *Id.* Plaintiff could have filed suit on the First Storm claims and then, separately, at Plaintiff's convenience, sent pre-suit notice as to the Second Storm claims; there was no impending expiration of the statute of limitations as to the Second Storm claims to compel Plaintiff to bring suit on his Second Storm claims together with those arising from the First Storm. Accordingly, this Court found that the pre-suit notice exception of section 542A.003(d)(1) does not apply to Plaintiff's claims relating to the Second Storm. *J.P. Columbus,* 2019 WL 453378, at *4. Defendant has proven that, as to Plaintiff's claims relating to the Second Storm, it was entitled to but was not given a pre-suit notice at least sixty-one days before the date Plaintiff filed this action and thus Defendants' motion to deny attorneys' fees was granted. *Id.*; *Tex. Ins. Code Ann.* § 542A.007(d) (West 2017).

As to Plaintiff's claims relating to the First Storm, Plaintiff's argument for the applicability of the pre-suit notice exception of 542A.003(d)(1) is premised solely on the fact that Plaintiff retained the attorney who filed this action approximately sixty-three days prior to the expiration of the two-year statute of limitations applicable to some of the claims arising from Defendant's denial of the insurance claim. Plaintiff offers no other argument or evidence as to why pre-suit notice could not be given to Defendant prior to filing suit. *J.P. Columbus,* 2019 WL 453378, at *4. Thus, the Court had to decide whether the timing of Plaintiff's hiring an attorney, by itself, supports Plaintiff's "reasonable basis for believing there is insufficient time to give the pre-suit notice before the limitations period will expire." *Tex. Ins. Code Ann.* § 542A.007(d) (2017).

The Court in *J.P. Columbus* noted that although this is an issue of first impression, there are at least two other Texas statutes containing similar pre-suit notice requirements and impracticability exceptions for impending expiration of the statute of limitations, including a section of Chapter 541 of the Texas Insurance Code. Both Texas Business & Commerce Code section 17.505 and Texas Insurance Code section 541.154 provide a process for filing a plea in abatement if adequate pre-suit notice is not provided, similar to section 542A.005 of the Texas Insurance Code. *J.P. Columbus,* 2019 WL 453378, at *4.

Conversely, neither the DTPA nor Chapter 541 of the Texas Insurance Code contains a provision limiting attorneys' fees in the event a claimant fails to comply with the respective pre-suit notice requirements. Regardless, there is scant case law referring to the timing of retaining legal counsel in relation to the impracticability of providing pre-suit notice under either section 17.505 or section 541.154. *J.P. Columbus,* 2019 WL 453378, at *5. Yet Chapter 542A appears to anticipate and provide for the possibility that section 542A.003's pre-suit notice may be sent on behalf of a claimant by a representative other than an attorney. Section 542A.003(c) states:

> If an attorney *or other representative* gives the notice required under this section on behalf of a claimant, the attorney *or representative* shall:
>
> (1) provide a copy of the notice to the claimant; and
> (2) include in the notice a statement that a copy of the notice was provided to the claimant.

Tex. Ins. Code Ann. § 542A.003(c) (West 2017) (emphasis supplied). Based on this express language of the statute, the Court in *J.P. Warehousing* noted that the Texas legislature anticipated that the pre-suit notice could be sent by a representative of a claimant other than an attorney. *J.P. Columbus,* 2019 WL 453378, at *6. Therefore, it would not be consistent with the language of section 542A.003 to conclude that sending pre-suit notice was impracticable due to a reasonable belief that there was insufficient time to send the notice based solely on the fact that Plaintiff did not hire an attorney until sixty-three days prior to the expiration of the statute of limitations, as presented in this case. *Id.* Furthermore, establishing a rule that section 542A.003(d)(1)'s presuit notice exception applies whenever a claimant postpones hiring an attorney until the eve of the expiration of the statute of limitations, without further explanation or justification, could encourage claimants to do just that, defeating the purpose of the presuit notice requirements. *Id.* "The purpose of the sixty-day notice obligation under [Sections 17.505 and 541.154] is to "'discourage litigation and encourage settlements of consumer complaints.'" *Hines v. Hash*, 843 S.W.2d 463, 469 (Tex. 1985) (quoting *John Walter Homes, Inc. v. Valencia*, 690 S.W.2d 239, 242 (Tex. 1985)).

Section 542A.007(d) places the burden on Defendant to plead and prove that it was entitled to receive presuit notice as to the Plaintiff's claims related to the First Storm. *J.P. Columbus,* 2019 WL 453378, at *6. The relevant facts in *J.P. Columbus* were undisputed. Plaintiff retained a licensed public adjuster, through execution of a written contract, on November 9, 2017. Plaintiff's public adjuster sent a "Letter of Representation" to Defendant on March 26, 2018. Plaintiff hired an attorney on May 3, 2018. The statute of limitations as to some of Plaintiff's claims arising from the First Storm expired on July 4, 2018. Although Plaintiff's counsel was retained sixty-three days prior to the expiration of the statute of limitations, Plaintiff retained a public adjuster, licensed by the State of Texas, more than seven months prior to the expiration of the statute of limitations. That licensed insurance professional, as a representative of Plaintiff, communicated with Defendant well outside of the sixty-one-day notice period of section 542A.003. *J.P. Columbus,* 2019 WL 453378, at *6. Plaintiff offered no explanation for why it waited approximately twenty-two months after Defendant denied its insurance claim for the First Storm before it hired an attorney. Under these facts, this Court felt it unnecessary to decide whether Plaintiff's counsel himself could have reasonably believed he could not send the pre-suit notice prior to filing suit. *J.P. Columbus,* 2019 WL 453378, at *6. The Court found that the pre-suit notice exception of section 542A.003(d)(1) did not apply to Plaintiff's claims relating to the First Storm and attorneys' fees should not be awarded to Plaintiff. *Id.* at *7.

L. *Eller v. United Property Casualty & Ins. Co.*, Civil Action No. 2:18-cv-199, 2018 WL 3817999 (S.D. Tex. Aug. 10, 2018) – Rejection of 542A Demand Letter, Invocation of Appraisal and Abatement Request

Eller owns property that was damaged in Hurricane Harvey on or about August 25, 2017. Defendant (UPC) issued the policy of insurance that covered the hurricane damage. By letter, UPC provided Eller with its estimate of the covered loss. Contending that the loss was far greater than the amount UPC set out, Eller made a pre-suit demand under Texas Insurance Code chapter 542A by letter of February 1, 2018. On February 22, 2018, UPC rejected Plaintiff's demand and made a demand for an appraisal, naming its appraiser and asking Eller to name his appraiser. Eller did not respond with the naming of his appraiser until his letter of June 14, 2018. On the same date, he filed an action in the 36th Judicial District Court of San Patricio County, Texas, seeking contractual and extra-contractual damages under theories including breach of contract, violation of the prompt payment of claims statute, and for bad faith. UPC removed the case to the Southern District of Texas. *Eller*, 2018 WL 3817999, at *1.

The policy at issue in *Eller* contains an appraisal condition that is intended to be satisfied prior to filing a legal action. *Id.* Like any contractual terms, the Court in *Eller* noted that such appraisal provisions are generally enforceable, absent fraud, accident, or mistake. *State Farm Lloyds v. Johnson*, 290 S.W.3d 886, 894-95 (Tex. 2009). While it is anticipated that the appraisal will be completed prior to filing suit, the Court in *Eller* held that nothing in UPC's motion supports a need for abatement while the appraisal process takes place. *Eller*, 2018 WL 3817999, at *1. Neither is there any estimate of how much time is necessary or where the appraisers are in the process. *Id.*

Eller opposed abatement because it does not serve judicial efficiency, is discretionary, and was not pled as a condition precedent. He also argued that the amount of damage to the property is only one aspect of this case and he should be permitted to proceed with discovery on his extra-contractual, bad faith claims. *Id.*

The *Eller* Court noted that courts are to enforce appraisal clauses but need not abate a case while the appraisal process proceeds. *In re Pub. Serv. Mut. Ins. Co.*, No. 03-13-00003-CV, 2013 WL 692441, at *7 (Tex. App.— Austin Feb. 21, 2013) (orig. proceeding) (mandamus denied); *see also*, *In re Allstate Cty. Mut. Ins. Co.*, 85 S.W.3d 193, 196 (Tex. 2002). More specifically, "this case need not be held hostage while the parties engage in the appraisal process." *Tran v. Am. Econ. Ins. Co.*, No. CIV.A. H-10-0016, 2010 WL 2680616, at *3 (S.D. Tex. July 2, 2010).

The Court in Eller found that UPC has already received the benefit of a 60-day pre-suit notice period under chapter 542A of the Texas Insurance Code and because UPC has cited no evidence that prejudice will result from allowing the case to proceed simultaneously with the completion of the appraisal process, the Court found no compelling reason to abate the case. *Eller*, 2018 WL 3817999, at *1.

1. *Eller* in Practice

The letter in response to Plaintiff's 542A notice letter at issue in *Eller* is attached hereto as Appendix D.

Djiba & Riepen
700 Lavaca, Ste. 1400, Austin, TX 78701
Telephone: (512) 621-7833
Facsimile: (512) 621-7832
email: malick@akeelahlg.com

FOR SETTLEMENT PURPOSES ONLY

Date: October 10, 2017
To: Allstate Insurance Company
P.O. Box 660636
Dallas, TX 75266-0598

Via email/US Mail RRR:
Via email/US Mail RRR:

Our client:	Jose Luis Perret
Policy No.:	000838735763
Claim No.:	0472476928
Property:	13826 Cold Spring St., Humble, Texas 77396
Date of loss:	August 27, 2017

DEMAND FOR RELIEF UNDER THE TEXAS DECEPTIVE TRADE PRACTICES-CONSUMER PROTECTION ACT AND THE TEXAS INSURANCE CODE

To Whom it May Concern:

This firm has been retained by Jose Luis Perret in connection with the handling and prosecution of respective claims against American Security Insurance Company as under the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA) and under the Texas Insurance Code, section 541.

Our client, is a "consumer" within the definition as set forth in the DTPA because our client purchased a policy of insurance from Allstate Insurance Company. It was represented to our client that this policy of insurance was in full force and effect for the policy period, and that any and all claims made by the insured would be handled in a manner consistent with the guidelines set forth in the Texas Insurance Code. In addition, our client is also "persons" under the Texas Insurance Code with standing to bring claims under the Texas Insurance Code.

As you know, our client, your insured, has made a claim under the policy of insurance sold to it by Allstate Insurance Company. Your company has conducted an inadequate examination of the damage from the

PHONE (512) 621-7833 FAX (512) 621-7832 EMAIL malick@akeelahlg.com

APPENDIX A

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August 27, 2017 hail/wind event and the claims made by your insured. To date, the handling of the claims for hail/wind damage, have resulted in significant problems for our client.

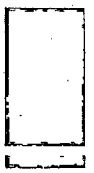
DTPA

The DTPA violations of Allstate Insurance Company include but not limited to:

- Causing confusion or misunderstanding as to the course, sponsorship, approval, or certification of goods or services;
- Representing that an agreement confers or involves rights, remedies, or obligations, which it does not have or involve, or which are prohibited by law;
- Failure to disclose information concerning goods or services which was known at the time of transaction if such failure to.
- disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed;
- Misrepresenting to a claimant a material fact or policy provision relating to coverage at issue;
- Failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim with respect to which the insurers' liability has become reasonably clear;
- Failing to attempt, in good faith, to effectuate a prompt, fair, and equitable settlement under one portion of a policy of a claim with respect to which the insurers' liability has become reasonably clear in order to influence the claimant to settle an additional claim under another portion of the coverage, provided that this prohibition does not apply if payment under one portion of the coverage constitutes evidence of liability under another portion of the policy;
- Failing to provide promptly to a policyholder a reasonable explanation of the basis in the policy, in relation to the facts or applicable law, for the insurer's denial of a claim or for the offer of a compromise settlement of a claim;
- Failing with a reasonable time to affirm or deny coverage of a claim to a policyholder and/or submit a reservation of rights to a policyholder;

Jose Luis Perret - DTPA Notice

APPENDIX A



3

- Refusing, failing, or unreasonably delaying an offer of settlement under applicable first party coverage on the basis that other coverage may be available or that third parties are responsible for the damages suffered, except as may be specifically provided in the policy;
- Undertaking to enforce a full and final release of a claim from a policyholder when only a partial payment has been made, provided that this prohibition does not apply to a compromise settlement of a doubtful or disputed claim;
- Refusing to pay a claim without conducting a reasonable investigation with respect to the claim;
- Making an untrue statement of material fact;
- Failing to state a material fact that is necessary to make other statements made not misleading, considering the circumstances under which the statements were made;
- Making a statement in such manner as to mislead a reasonably prudent person to a false conclusion of a material fact;
- Making a material misstatement of law, or
- Failing to disclose any matter required by law to be disclosed, including a failure to make disclosure in accordance with another provision of the Texas Insurance Code.

American Security Insurance Company's actions are in violation of the DTPA and constitute producing causes of damage to our client.

Because of the nature of the claims and the circumstances surrounding the losses in question, Allstate Insurance Company's decision to deny the claims even though it is reasonably clear the claims are covered constitutes "knowing" violations of the DTPA and the Texas Insurance Code sufficient to allow the imposition of treble damages. Moreover, Allstate Insurance Company's "knowing" violations of the Texas Insurance Code and the DTPA have caused and continue to cause significant mental anguish to my client.

Furthermore, because of Allstate Insurance Company's violations of the DTPA and the Texas Insurance Code, our client is entitled to recover attorney's fees.

Texas Insurance Code Violations

Allstate Insurance Company and its representatives have violated the Texas Insurance Code in the following manner including, but are not limited to:

Jose Luis Perret - DTPA Notice

APPENDIX A

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- Refusing to pay a claim without conducting a reasonable investigation with respect to the claim;
- Making an untrue statement of material fact;
- Failing to state a material fact that is necessary to make other statements made not misleading, considering the circumstances under which the statements were made;
- Making a statement in such manner as to mislead a reasonably prudent person to a false conclusion of a material fact;
- Making a material misstatement of law, or
- Failing to disclose any matter required by law to be disclosed, including a failure to make disclosure in accordance with another provision of the Texas Insurance Code.

Breach of Duty of Good Faith and Fair Dealing: Bad Faith

In addition, Allstate Insurance Company violated the duty of good faith and fair dealing by refusing to pay the claims in question even though Allstate Insurance Company knew or should have known that it was reasonably clear the claims were covered. American Security Insurance Company's breach of its duty of good faith and fair dealing has proximately caused injury and damage to our client.

Breach of Contract

Moreover, by failing to pay benefits under the policy of insurance, Allstate Insurance Company breached the contract of insurance that existed between your company and our client. As a result, our client is entitled to recover actual damages, consequential damages and attorney's fees pursuant to §38.001 of the Texas Civil Practice & Remedies Code because of your breach of contract.

As a result, please allow this correspondence to constitute notice under the Texas Deceptive Trade Practices Act and under the Texas Insurance Code of the claim, against you and your representatives. Please allow this correspondence to serve as notice pursuant to Chapter 38.001 of the Texas Civil Practice & Remedies Code.

The damages suffered by our client to date include:

Economic Damages: $73,054.88
10% Interest: $1,217.58

Jose Luis Perret - DTPA Notice

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Attorney's Fees: **$2,105.00**

Because of the nature of the claims and the circumstances surrounding the losses in question, Allstate Insurance Company's actions could constitute "knowing" violations of the DTPA and the Texas Insurance Code sufficient to allow the imposition of treble damages up to 3 times economic damages.

Please let this letter serve as my client's demand for **$73,377.46**

Sincerely,

DJIBA & RIEPEN

By: */s/ Malick Djiba*
MALICK DJIBA, Esq.

Enclosures: Damage Estimate and Images

Jose Luis Perret - DTPA Notice

APPENDIX A

JOSE GAMEZ
Public Insurance Adjusters
License #203092
708 Mozella Street STE. E
Pharr, TX 78577
Office: (956) 854-4124
Fax: (956) 453-0191
Cell: (956) 330-2163
Email: McallenAdjusting@gmail.com

Perrett, L. Jorge
PROJECT DETAILS

Customer Name	**Jorge L. Perrett**
Primary Address	**13826 Cold Spring** **Houston, TX 77396**
Property Address	**13826 Cold Spring** **Houston, TX 77396**
Date of Loss :	**8/25/2017**
Sales Tax Rate :	**8.25%**

Estimator: Jose Gamez

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Perrett, L. Jorge
REPORT DETAIL

Roof

Item	Qty	Description	Unit Cost	Total
1	1.00 EA	Roof & wall tarping	$153.75	$153.75
2	2.00 EA	Satellite dish (Includeing re-align)	$92.01	$184.02
3	19.03 SQ	Remove composition shingles - 3 tab (removal labor only)	$47.82	$910.01
4	5.16 SQ	Remove 30 year laminated shingles (removal labor only)	$47.82	$246.75
5	2,539.95 SF	Remove & replace roof sheathing - 5% added for waste	$1.96	$4,978.31
6	202.00 LF	Replace drip edge	$1.72	$347.44
7	24.19 SQ	Replace roofing felt	$16.29	$394.05
8	202.00 LF	Replace starter shingle	$1.31	$264.62
9	20.93 SQ	Replace composition shingles - 3 tab (without felt)	$160.73	$3,364.08
10	5.70 SQ	Replace 30 year laminated shingles - (without felt)	$223.00	$1,271.10
11	80.00 LF	Remove and replace valley metal	$4.28	$342.40
12	4.00 EA	Remove & replace pipe jack	$19.74	$78.96
13	2.00 EA	Replace star vent	$66.25	$132.50
14	3.00 EA	Remove & replace roof vent (turtle)	$71.30	$213.90
15	30.00 LF	Remove and replace metal flashing	$4.96	$148.80
16	40.00 HR	Added cost for safety Monitor (as per OSHA)	$58.24	$2,329.60
17	25.00 EA	Added cost for fall protection harness and lanyard per day (as per OSHA)	$27.90	$697.50
18	1.00 EA	Dumpster	$598.23	$598.23
Totals - Roof				$16,656.02

Exterior

Item	Qty	Description	Unit Cost	Total
19	1.00 EA	Pressure washing - fascia & soffit area	$265.00	$265.00
20	1.00 EA	Minimum charge for fascia repair	$375.00	$375.00
21	202.00 LF	Prime exterior fascia	$0.66	$133.32
22	202.00 LF	Paint exterior fascia	$1.21	$244.42
23	1.00 EA	Tree Removal	$500.00	$500.00
Totals - Exterior				$1,517.74

APPENDIX A

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Perrett, L. Jorge
REPORT DETAIL

Kitchen

8' 7 L x 14' 2 W x 8' 1 H

Square Footage of Floor	121.58 ft²
Square Footage of Ceiling	121.58 ft²
Square Footage of Walls	367.64 ft²
Square Footage of Walls & Ceiling	489.22 ft²
Square footage of Walls, Floor & Ceiling	610.80 ft²
Linear footage of Floor Perimeter	45.50 ft
Linear footage of Ceiling Perimeter	45.50 ft
Linear footage of Floor & Ceiling Perimeter	91.00 ft

Item	*Qty*	*Description*	*Unit Cost*	*Total*
24	1.00 EA	Move and cover room contents	$35.59	$35.59
25	1.00 EA	Remove & reinstall electric range	$83.40	$83.40
26	1.00 EA	Remove & reinstall refrigerator	$78.80	$78.80
27	1.00 EA	Drywall ceiling patch	$168.60	$168.60
28	1.00 EA	Spot insulation - wall/ceiling	$107.73	$107.73
29	121.58 SF	Skim Ceiling	$0.96	$116.72
30	121.58 SF	Texture drywall ceiling	$0.69	$83.89
31	121.58 SF	Prime Ceiling	$0.40	$48.63
32	121.58 SF	Paint ceiling	$0.68	$82.67
33	1.00 EA	Drywall wall patch	$159.38	$159.38
34	367.64 SF	Skim Wall	$0.85	$312.49
35	367.64 SF	Texture walls	$0.70	$257.35
36	367.64 SF	Prime walls	$0.45	$165.44
37	367.64 SF	Paint walls	$0.73	$268.38
38	136.50 LF	Mask & prep for paint	$0.81	$110.57
39	45.50 LF	Paint crown molding	$1.45	$65.97
40	32.82 LF	Remove baseboard	$0.92	$30.19
41	121.58 SF	Remove & replace wood flooring	$15.24	$1,852.86
42	32.82 SF	Replace baseboard	$5.78	$189.70
43	45.50 LF	Seal / prime baseboard	$0.83	$37.76
44	45.50 LF	Paint baseboard	$0.98	$44.59
45	121.58 SF	Clean floor after construction work	$0.60	$72.94

Totals - Kitchen $4,373.65

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Perrett, L. Jorge
REPORT DETAIL

Living Room

19' 0 L x 13' 2 W x 8' 1 H

Square Footage of Floor	250.23 ft²
Square Footage of Ceiling	250.23 ft²
Square Footage of Walls	519.87 ft²
Square Footage of Walls & Ceiling	770.10 ft²
Square footage of Walls, Floor & Ceiling	1,020.33 ft²
Linear footage of Floor Perimeter	64.34 ft
Linear footage of Ceiling Perimeter	64.34 ft
Linear footage of Floor & Ceiling Perimeter	128.68 ft

Item	*Qty*	*Description*	*Unit Cost*	*Total*
46	1.00 EA	Move and cover room contents	$35.59	$35.59
47	1.00 EA	Drywall ceiling patch	$168.60	$168.60
48	1.00 EA	Spot Insulation - wall/ceiling	$107.73	$107.73
49	250.23 SF	Skim Ceiling	$0.96	$240.22
50	250.23 SF	Texture drywall ceiling	$0.69	$172.66
51	250.23 SF	Prime Ceiling	$0.40	$100.09
52	250.23 SF	Paint ceiling	$0.68	$170.15
53	519.87 SF	Skim Wall	$0.85	$441.89
54	519.87 SF	Prime walls	$0.45	$233.94
55	519.87 SF	Paint walls	$0.73	$379.50
56	193.02 LF	Mask & prep for paint	$0.81	$156.34
57	64.34 LF	Paint crown molding	$1.45	$93.29
58	250.23 SF	Clean floor after construction work	$0.60	$150.14
Totals - Living Room				$2,450.14

Middle Room

15' 8 L x 10' 7 W x 8' 1 H

Square Footage of Floor	165.79 ft²
Square Footage of Ceiling	165.79 ft²
Square Footage of Walls	424.20 ft²
Square Footage of Walls & Ceiling	589.99 ft²
Square footage of Walls, Floor & Ceiling	755.78 ft²
Linear footage of Floor Perimeter	52.50 ft
Linear footage of Ceiling Perimeter	52.50 ft
Linear footage of Floor & Ceiling Perimeter	105.00 ft

Item	*Qty*	*Description*	*Unit Cost*	*Total*

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Perrett, L. Jorge
REPORT DETAIL

Middle Room - continued

Item	Qty	Description	Unit Cost	Total
59	1.00 EA	Move and cover room contents	$35.59	$35.59
60	1.00 EA	Drywall ceiling patch	$168.60	$168.60
61	1.00 EA	Spot insulation - wall/ceiling	$107.73	$107.73
62	165.79 SF	Skim Ceiling	$0.96	$159.16
63	165.79 SF	Texture drywall ceiling	$0.69	$114.39
64	165.79 SF	Prime Ceiling	$0.40	$66.31
65	165.79 SF	Paint ceiling	$0.68	$112.74
66	1.00 EA	Drywall wall patch	$159.38	$159.38
67	424.20 SF	Skim Wall	$0.85	$360.57
68	424.20 SF	Texture walls	$0.70	$296.94
69	424.20 SF	Prime walls	$0.45	$190.89
70	424.20 SF	Paint walls	$0.73	$309.67
71	157.50 LF	Mask & prep for paint	$0.81	$127.58
72	52.50 LF	Paint crown molding	$1.45	$76.12
73	32.82 LF	Remove baseboard	$0.92	$30.19
74	165.79 SF	Remove & replace wood flooring	$15.24	$2,526.62
75	32.82 SF	Replace baseboard	$5.78	$189.70
76	52.50 LF	Seal / prime baseboard	$0.83	$43.57
77	52.50 LF	Paint baseboard	$0.98	$51.45
78	165.79 SF	Clean floor after construction work	$0.60	$99.47
Totals - Middle Room				$5,226.67

Hall Main Entrance

8' 0 L x 3' 1 W x 8' 1 H

Square Footage of Floor	24.64 ft²
Square Footage of Ceiling	24.64 ft²
Square Footage of Walls	179.05 ft²
Square Footage of Walls & Ceiling	203.69 ft²
Square footage of Walls, Floor & Ceiling	228.33 ft²
Linear footage of Floor Perimeter	22.16 ft
Linear footage of Ceiling Perimeter	22.16 ft
Linear footage of Floor & Ceiling Perimeter	44.32 ft

Item	Qty	Description	Unit Cost	Total

JOSE GAMEZ
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Perrett, L. Jorge
REPORT DETAIL

Hall Main Entrance - continued

Item	Qty	Description	Unit Cost	Total
79	1.00 EA	Drywall ceiling patch	$168.60	$168.60
80	1.00 EA	Spot Insulation - wall/ceiling	$107.73	$107.73
81	24.64 SF	Skim Ceiling	$0.96	$23.65
82	24.64 SF	Texture drywall ceiling	$0.69	$17.00
83	24.64 SF	Prime Ceiling	$0.40	$9.86
84	24.64 SF	Paint ceiling	$0.68	$16.75
85	1.00 EA	Drywall wall patch	$159.38	$159.38
86	179.05 SF	Skim Wall	$0.85	$152.20
87	179.05 SF	Texture walls	$0.70	$125.34
88	179.05 SF	Prime walls	$0.45	$80.58
89	179.05 SF	Paint walls	$0.73	$130.71
90	66.48 LF	Mask & prep for paint	$0.81	$53.85
91	22.16 LF	Paint crown molding	$1.45	$32.13
92	32.82 LF	Remove baseboard	$0.92	$30.19
93	24.64 SF	Remove & replace wood flooring	$15.24	$375.51
94	32.82 SF	Replace baseboard	$5.78	$189.70
95	22.16 LF	Seal / prime baseboard	$0.83	$18.39
96	22.16 LF	Paint baseboard	$0.98	$21.72
97	24.64 SF	Clean floor after construction work	$0.60	$14.79

Totals - Hall Main Entrance $1,728.08

Left Front Corner Room

15' 7 L x 10' 0 W x 8' 1 H

Square Footage of Floor	155.80 ft²
Square Footage of Ceiling	155.80 ft²
Square Footage of Walls	413.37 ft²
Square Footage of Walls & Ceiling	569.17 ft²
Square footage of Walls, Floor & Ceiling	724.97 ft²
Linear footage of Floor Perimeter	51.16 ft
Linear footage of Ceiling Perimeter	51.16 ft
Linear footage of Floor & Ceiling Perimeter	102.32 ft

Item	Qty	Description	Unit Cost	Total

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Perrett, L. Jorge
REPORT DETAIL

Left Front Corner Room - continued

Item	Qty	Description	Unit Cost	Total
98	1.00 EA	Move and cover room contents	$35.59	$35.59
99	1.00 EA	Drywall ceiling patch	$168.60	$168.60
100	1.00 EA	Spot Insulation - wall/ceiling	$107.73	$107.73
101	155.80 SF	Skim Ceiling	$0.96	$149.57
102	155.80 SF	Texture drywall ceiling	$0.69	$107.50
103	155.80 SF	Prime Ceiling	$0.40	$62.32
104	155.80 SF	Paint ceiling	$0.68	$105.94
105	1.00 EA	Drywall wall patch	$159.38	$159.38
106	413.37 SF	Skim Wall	$0.85	$351.37
107	413.37 SF	Texture walls	$0.70	$289.37
108	413.37 SF	Prime walls	$0.45	$186.02
109	413.37 SF	Paint walls	$0.73	$301.77
110	153.48 LF	Mask & prep for paint	$0.81	$124.32
111	51.16 LF	Paint crown molding	$1.45	$74.18
112	32.82 LF	Remove baseboard	$0.92	$30.19
113	155.80 SF	Remove & replace wood flooring	$15.24	$2,374.40
114	32.82 SF	Replace baseboard	$5.78	$189.70
115	51.16 LF	Seal / prime baseboard	$0.83	$42.46
116	51.16 LF	Paint baseboard	$0.98	$50.14
117	155.80 SF	Clean floor after construction work	$0.60	$93.48
Totals - Left Front Corner Room				$5,004.03

Bathroom

5' 0 L x 12' 0 W x 8' 1 H

Square Footage of Floor	60.00 ft²
Square Footage of Ceiling	60.00 ft²
Square Footage of Walls	274.72 ft²
Square Footage of Walls & Ceiling	334.72 ft²
Square footage of Walls, Floor & Ceiling	394.72 ft²
Linear footage of Floor Perimeter	34.00 ft
Linear footage of Ceiling Perimeter	34.00 ft
Linear footage of Floor & Ceiling Perimeter	68.00 ft

Item	Qty	Description	Unit Cost	Total

APPENDIX A

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Perrett, L. Jorge
REPORT DETAIL

Bathroom - continued

Item	Qty	Description	Unit Cost	Total
118	1.00 EA	Move and cover room contents	$35.59	$35.59
119	1.00 EA	Remove & reinstall toilet	$127.31	$127.31
120	1.00 EA	Drywall ceiling patch	$168.60	$168.60
121	1.00 EA	Spot insulation - wall/ceiling	$107.73	$107.73
122	60.00 SF	Skim Ceiling	$0.96	$57.60
123	60.00 SF	Texture drywall ceiling	$0.69	$41.40
124	60.00 SF	Prime Ceiling	$0.40	$24.00
125	60.00 SF	Paint ceiling	$0.68	$40.80
126	1.00 EA	Drywall wall patch	$159.38	$159.38
127	274.72 SF	Skim Wall	$0.85	$233.51
128	274.72 SF	Texture walls	$0.70	$192.30
129	274.72 SF	Prime walls	$0.45	$123.63
130	274.72 SF	Paint walls	$0.73	$200.55
131	102.00 LF	Mask & prep for paint	$0.81	$82.62
132	34.00 LF	Paint crown molding	$1.45	$49.30
133	34.00 LF	Seal / prime baseboard	$0.83	$28.22
134	34.00 LF	Paint baseboard	$0.98	$33.32
135	60.00 SF	Clean floor after construction work	$0.60	$36.00

Totals - Bathroom $1,741.86

Middle Back Room

10' 0 L x 10' 0 W x 8' 1 H

Square Footage of Floor	100.00 ft²
Square Footage of Ceiling	100.00 ft²
Square Footage of Walls	323.20 ft²
Square Footage of Walls & Ceiling	423.20 ft²
Square footage of Walls, Floor & Ceiling	523.20 ft²
Linear footage of Floor Perimeter	40.00 ft
Linear footage of Ceiling Perimeter	40.00 ft
Linear footage of Floor & Ceiling Perimeter	80.00 ft

Item	Qty	Description	Unit Cost	Total
136	1.00 EA	Move and cover room contents	$35.59	$35.59

APPENDIX A

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Perrett, L. Jorge
REPORT DETAIL

Middle Back Room - continued

Item	Qty	Description	Unit Cost	Total
137	1.00 EA	Drywall ceiling patch	$168.60	$168.60
138	1.00 EA	Spot Insulation - wall/ceiling	$107.73	$107.73
139	100.00 SF	Skim Ceiling	$0.96	$96.00
140	100.00 SF	Texture drywall ceiling	$0.69	$69.00
141	100.00 SF	Prime Ceiling	$0.40	$40.00
142	100.00 SF	Paint ceiling	$0.68	$68.00
143	1.00 EA	Drywall wall patch	$159.38	$159.38
144	323.20 SF	Skim Wall	$0.85	$274.72
145	323.20 SF	Texture walls	$0.70	$226.24
146	323.20 SF	Prime walls	$0.45	$145.44
147	323.20 SF	Paint walls	$0.73	$235.94
148	120.00 LF	Mask & prep for paint	$0.81	$97.20
149	40.00 LF	Paint crown molding	$1.45	$58.00
150	32.82 LF	Remove baseboard	$0.92	$30.19
151	100.00 SF	Remove & replace wood flooring	$15.24	$1,524.00
152	32.82 SF	Replace baseboard	$5.78	$189.70
153	40.00 LF	Seal / prime baseboard	$0.83	$33.20
154	40.00 LF	Paint baseboard	$0.98	$39.20
155	100.00 SF	Clean floor after construction work	$0.60	$60.00

Totals - Middle Back Room $3,658.13

Master Bedroom

16' 9 L x 10' 9 W x 8' 1 H

Offset : Master Bedroom - 1 15' 4 L x 9' 6 W x 8' 1 H

Square Footage of Floor	325.70 ft²
Square Footage of Ceiling	325.70 ft²
Square Footage of Walls	845.65 ft²
Square Footage of Walls & Ceiling	1,171.35 ft²
Square footage of Walls, Floor & Ceiling	1,497.05 ft²
Linear footage of Floor Perimeter	104.66 ft
Linear footage of Ceiling Perimeter	104.66 ft
Linear footage of Floor & Ceiling Perimeter	209.32 ft

Item	Qty	Description	Unit Cost	Total

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Perrett, L. Jorge
REPORT DETAIL

Master Bedroom - continued

Item	Qty	Description	Unit Cost	Total
156	1.00 EA	Move and cover room contents	$35.59	$35.59
157	1.00 EA	Drywall ceiling patch	$168.60	$168.60
158	1.00 EA	Spot insulation - wall/ceiling	$107.73	$107.73
159	325.70 SF	Skim Ceiling	$0.96	$312.67
160	325.70 SF	Texture drywall ceiling	$0.69	$224.73
161	325.70 SF	Prime Ceiling	$0.40	$130.28
162	325.70 SF	Paint ceiling	$0.68	$221.47
163	1.00 EA	Drywall wall patch	$159.38	$159.38
164	845.65 SF	Skim Wall	$0.85	$718.81
165	845.65 SF	Texture walls	$0.70	$591.95
166	845.65 SF	Prime walls	$0.45	$380.55
167	845.65 SF	Paint walls	$0.73	$617.33
168	313.98 LF	Mask & prep for paint	$0.81	$254.33
169	104.66 LF	Paint crown molding	$1.45	$151.76
170	32.82 LF	Remove baseboard	$0.92	$30.19
171	325.70 SF	Remove & replace wood flooring	$15.24	$4,963.63
172	32.82 SF	Replace baseboard	$5.78	$189.70
173	104.66 LF	Seal / prime baseboard	$0.83	$86.87
174	104.66 LF	Paint baseboard	$0.98	$102.57
175	325.70 SF	Clean floor after construction work	$0.60	$195.42
Totals - Master Bedroom				$9,643.56

Closet

4' 4 L x 12' 9 W x 8' 1 H

Square Footage of Floor	55.21 ft²
Square Footage of Ceiling	55.21 ft²
Square Footage of Walls	276.01 ft²
Square Footage of Walls & Ceiling	331.22 ft²
Square footage of Walls, Floor & Ceiling	386.43 ft²
Linear footage of Floor Perimeter	34.16 ft
Linear footage of Ceiling Perimeter	34.16 ft
Linear footage of Floor & Ceiling Perimeter	68.32 ft

Item	Qty	Description	Unit Cost	Total

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Perrett, L. Jorge
REPORT DETAIL

Closet - continued

Item	Qty	Description	Unit Cost	Total
176	1.00 EA	Move and cover room contents	$35.59	$35.59
177	1.00 EA	Drywall ceiling patch	$168.60	$168.60
178	1.00 EA	Spot insulation - wall/ceiling	$107.73	$107.73
179	55.21 SF	Skim Ceiling	$0.96	$53.00
180	55.21 SF	Texture drywall ceiling	$0.69	$38.09
181	55.21 SF	Prime Ceiling	$0.40	$22.09
182	55.21 SF	Paint ceiling	$0.68	$37.54
183	1.00 EA	Drywall wall patch	$159.38	$159.38
184	276.01 SF	Skim Wall	$0.85	$234.61
185	276.01 SF	Texture walls	$0.70	$193.20
186	276.01 SF	Prime walls	$0.45	$124.20
187	276.01 SF	Paint walls	$0.73	$201.49
188	102.48 LF	Mask & prep for paint	$0.81	$83.01
189	34.16 LF	Paint crown molding	$1.45	$49.53
190	32.82 LF	Remove baseboard	$0.92	$30.19
191	55.21 SF	Remove & replace wood flooring	$15.24	$841.36
192	32.82 SF	Replace baseboard	$5.78	$189.70
193	34.16 LF	Seal / prime baseboard	$0.83	$28.35
194	34.16 LF	Paint baseboard	$0.98	$33.48
195	55.21 SF	Clean floor after construction work	$0.60	$33.13
Totals - Closet				$2,664.27

General

Item	Qty	Description	Unit Cost	Total
196	606.00 LF	Mask & prep for paint - fascia	$0.79	$478.74
197	1.50 MO	Job-site storage container - 20' long - per month	$376.02	$564.03
198	14.00 DA	Portable toilet (temporary Toilet	$101.24	$1,417.36
199	1.00 EA	Added cost for taxes, insurance, permits & fees	$190.00	$190.00
200	15.00 HR	Added cost for job site supervision	$48.56	$728.40
201	1.00 EA	Added cost for haul debris - trailer load (includes dump fee)	$429.32	$429.32

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Perrett, L. Jorge
REPORT DETAIL

General - continued

Item	*Qty*	*Description*	*Unit Cost*	*Total*
Totals - General				$3,807.85

APPENDIX A

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Perrett, L. Jorge
REPORT SUMMARY

	Total
Roof	$16,656.02
Exterior	$1,517.74
Kitchen	$4,373.65
Living Room	$2,450.14
Middle Room	$5,226.67
Hall Main Entrance	$1,728.08
Left Front Corner Room	$5,004.03
Bathroom	$1,741.86
Middle Back Room	$3,658.13
Master Bedroom	$9,643.56
Closet	$2,664.27
General	$3,807.85
Total All Rooms	$58,472.00
Sales Tax @ 8.25% on Materials	$2,303.76
Sub-Total	$60,775.76
Overhead @ 10% on $58,472.00	$5,847.20
Profit @ 10% on $64,319.20	$6,431.92
Total Amount	**$73,054.88**

APPENDIX A

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Perrett, L. Jorge
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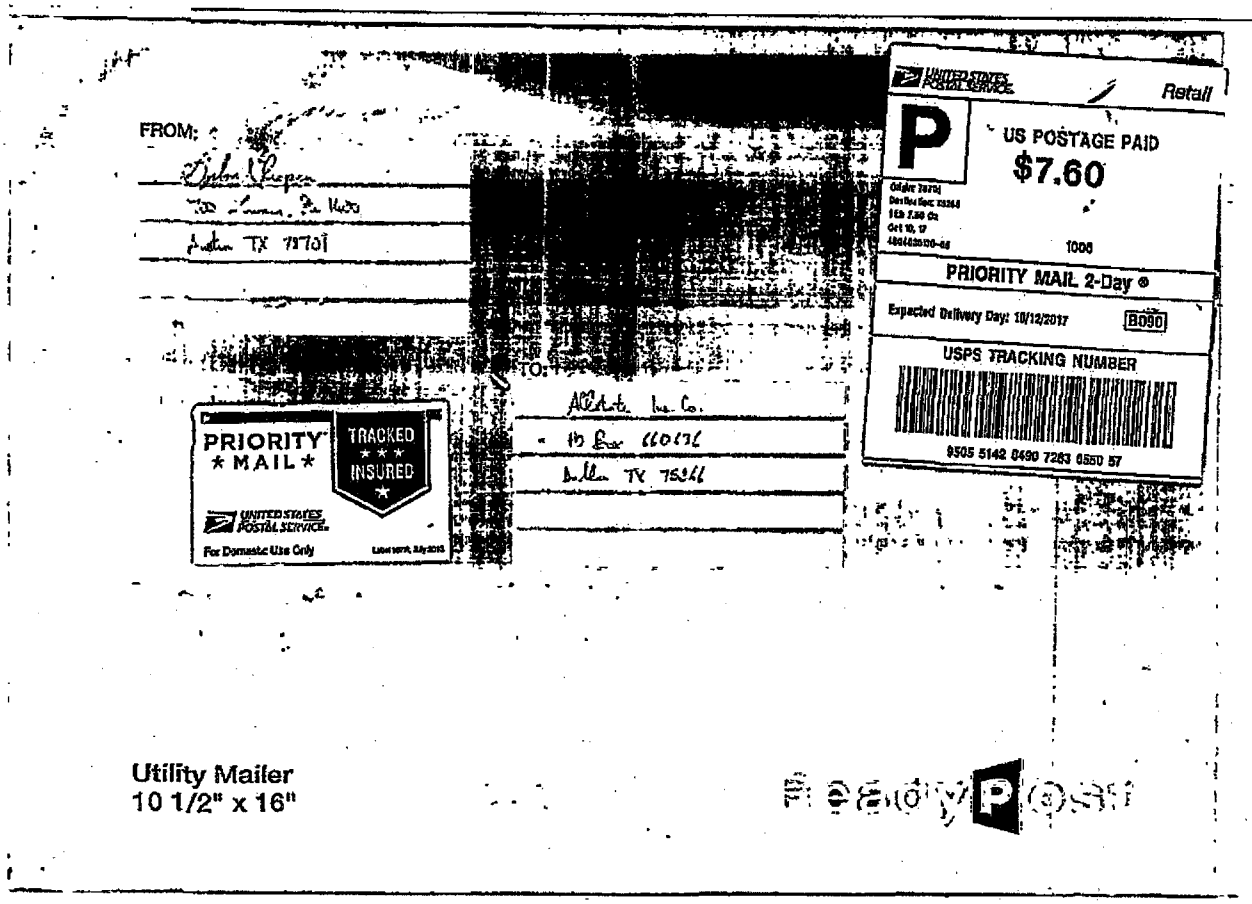
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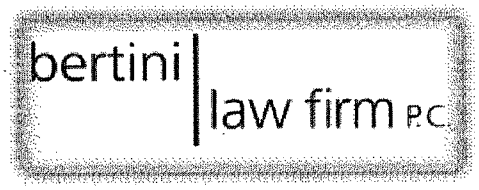
Penny Post

APPENDIX A



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3102 Maple Ave. Suite 400
Dallas, Texas 75201
(Office by appointment only)

March 15, 2016

Re: Policy No. 43BZV4509; Claim No. 43769M657
DOL May 25, 2015
Our client(s): Gregorio Carrizales
Address: 5109 Stagecoach Lane Garland, TX

State Farm
Via Email & Facsimile

Dear Statefarm:

Our firm has been retained to represent the above referenced client with respect to a claim against their carrier. Please direct all correspondence to our **Galveston** address listed above.

On date referenced above our client's property was severely damaged as a result of a storm that hit the Dallas/Fort Worth area. All payments on the policy were current, and the policy was in force on the dates of the loss. Although the claim was submitted in proper form and within the time specified in the insurance policy, the carrier has failed to pay for the damages, failed to properly account for all of the damages, and properly estimate the value of such damages.

There is no reason to delay payment of that portion of the claim that has become reasonably clear is due. In addition, withholding payment of undisputed benefits owed to our client even after receipt of this demand in an effort to effectuate a settlement is a clear violation of the contract, the Prompt Payment statutes, and the Texas Deceptive Trade Practices Act.

As a result of mishandling of this claim, our client has been forced to live each day with the knowledge that short of legal action, their claim for damages will not be compensated.

It is our contention that your insurance company's conduct violates the prompt payment statutes, Tex. Ins. Code Sec. 542.057, and Sec. 542.058, and is a breach of this insurance policy.

542.056(a) Notice of Acceptance or Rejection of Claim: Except as provided by Subsection (b) or (d), an insurer shall notify a claimant in writing of the acceptance or rejection of a claim not later than the 15th business day after the date that insurer receives all items, statements, and forms required by the insurer to secure a final proof of loss. (d) If an insurer is unable to accept or reject the claim within the period specified by subsection (a) or (b), the insurer, within the same period, shall notify the claimant of the reasons the insurer needs additional time.

542.057(a) Payment of Claim: Except as otherwise provided in this section, if an insurer will pay a claim or part of a claim, the insurer shall pay the claim not later than the fifth business day after the date notice is made.

542.058(a) Delay in Payment of Claim: Except as otherwise provided, if an insurer, after receiving all items, statements, and forms reasonably requested and required under the period specified by other applicable statutes or, if other statutes do not specify a period, for more than 60 days, the insurer shall pay damages and other items as provided by section 542.060.

Furthermore, your company's conduct constitutes unfair and deceptive acts or practices in the business of insurance in violation of Chapter 541 of the Texas Insurance Code, Specifically, Tex. Ins. Code Sec. 541.060(a) (1) - (4)(A)(B), and 541.061.

541.060(a) Unfair Settlement Practices: It is an unfair method of competition or an unfair or deceptive act or practice in the business of insurance to engage in the following unfair settlement practices with respect to a claim by an insured or beneficiary:

(1) misrepresenting to a claimant a material fact or policy provision relating to coverage at issue;

(2) failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of: (A) a claim with respect to which the insurer's liability has become reasonably clear; or (B) a claim under one portion of a policy with respect to which the insurer's liability has become reasonably clear to influence the claimant to settle another claim under another portion of the coverage unless payment under one portion of the coverage constitutes evidence of liability under another portion;

(3) failing to promptly provide to a policyholder a reasonable explanation of the basis in the policy, in relation to the facts or applicable law, for the insurer's denial of a claim or offer of a compromise settlement of a claim;

(4) failing within a reasonable time to: (A) affirm or deny coverage of a claim to a policyholder; or (B) submit a reservation of rights to a policyholder;

(5) refusing, failing, or unreasonably delaying a settlement offer under applicable first-party coverage on the basis that other coverage may be available or that third parties are responsible for the damages suffered, except as may be specifically provided in the policy;

(6) refusing to pay a claim without conducting a reasonable investigation with respect to the claim;

Based upon the information now available to us, and for purposes of this notice letter, we estimate that our client's damages are as follows:

Economic losses:	$15,470.81
Expenses/Costs:	$1000
Interest:	$3,016.80 (accruing daily)
Attorney's fees:	$10,319.03 (based on contractual agreement with client)
Total:	$29,806.64

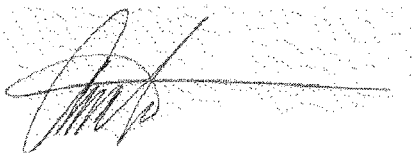
Of course, we reserve the right to adjust these amounts to conform to the information and additional evidence that will be available to us.

Our client has incurred reasonable and necessary attorney's fees in the pursuit of the claim stated in this letter. The amount of fees incurred as of the date of this letter is indicated above. Under the contract of employment we have with our client, our firm has been assigned an interest in this claim.

The purpose of this letter is to encourage you to resolve our client's claim in a fair and equitable manner without the need for further legal action. In the event you fail to respond to this letter with an offer of settlement that is acceptable to our client, we will have no alternative but to recommend to our client that they file litigation against your company. The lawsuit has filed under Chapter 541 and 542 of the Texas Insurance Code, among other authorities. In that lawsuit, rather than seeking only the amount of money we have ask of your insurance company at this time, we will seek to recover the full measure of our client's damages, expenses and attorney's fees as allowed by law. Additionally, as you may know, in this lawsuit, if the jury finds your company "knowingly" violated Chapter 541, our client may recover additional damages in an amount up to three times the amount of actual damages.

If your company is interested in resolving this matter without the necessity of further litigation, please contact me within sixty days of your receipt of this letter. I look forward to resolving this matter with you as soon as possible

Gratefully Yours,



Christopher D. Bertini

WILSON ELSER
WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

May 17, 2018

Jennifer Martin
(214) 698-8045 (direct)
Jennifer.Martin@wilsonelser.com

By Email: *jayers@ayersfirm.com*
Jonathan P. Ayers
Ayers Plaza
4205 Gateway Drive, Suite 100
Colleyville, Texas 76034

Re: **Insured: Electro Grafix, Inc. d/b/a Aetna Sign Group**
Claim #: 10101859
Policy No.: PK 0004120212 ("Policy")
Date of Loss: April 12, 2016
Our File No: 09356.00390

Counsel:

Pursuant to Chapter 542A of the Texas Insurance Code, Acadia Insurance Company hereby provides written notice of its election to accept whatever liability Marlin Odermatt might have to Electro Grafix, Inc. d/b/a Aetna Sign Group for Odermatt's acts or omissions related to claim number 10101859.

Best regards,

/s/ Jennifer G. Martin
Jennifer G. Martin

APPENDIX C

James. H. Hunter, Jr., Partner
Jim.hunter@roystonlaw.com

Esteban Delgadillo, Associate
esteban.delgadillo@roystonlaw.com
Internet: www.roystonlaw.com

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February 22, 2018

Via Fax: 800.380.5053 & E-Mail: rdaly@dalyblack.com
Richard D. Daly
Daly & Black, P.C.
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Houston, TX 77098
Tel: 713.655.1405
Fax: 713.655.1587

Re: Insured: Mark & Leslie Eller
Claim #: 2017TX025921
Policy #: UTH03451510142
Our File: 62567

Dear Mr. Daly:

The undersigned represents **United Property And Casualty Insurance Company ("UPC")** in this matter. UPC is in receipt of your February 1, 2018 letter pursuant to Section 542A of the Texas Insurance Code. After a careful review of the facts and circumstances of the claim investigation and the result, UPC must respectfully reject your demand of "$114,930.17 (less any amounts paid and any applicable deductible), plus interest."

Furthermore, UPC acknowledges that the parties have reached an impasse and takes this opportunity to invoke appraisal. UPC hereby designates Russell Yalowsky as our appraiser. Our appraiser's contact information is as follows:

Russell Yalowsky
Tel: 727-220-2444
hurricaneruss@gmail.com

UPC has timely and properly invoked the appraisal process in accordance with the below-referenced terms and conditions of the Insurance policy. **UPC therefore requests that you comply with the terms of the Policy by choosing a competent appraiser within 20 days of your receipt of this written request.** Please have your chosen appraiser contact us or UPC's designated appraiser (see above) as soon as possible so that the process may commence, and be completed, expeditiously. In this regard, you are reminded that no action can be brought against UPC until the appraisal process is completed (see policy terms noted below).

APPENDIX D

In your client's policy with UPC, the appraisal provision states as follows.

SECTION I – CONDITIONS

F. Appraisal

If you and we fail to agree on the amount of loss, either may demand an appraisal of the loss. In this event, each party will choose a competent and impartial appraiser within 20 days after receiving a written request from the other. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a court of record in the state where the "residence premises" is located. The appraisers will separately set the amount of loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon will be the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will set the amount of loss.

Each party will:

1. Pay its own appraiser; and
2. Bear the other expenses of the appraisal and umpire equally.

No suit involving the amount of loss or damage under Section I of the policy can be brought unless an appraisal has been completed.

UPC reserves its right to deny coverage for damages that may increase or worsen by failure to mitigate those damages from further loss.

No act or conduct of UPC, its agents, adjusters, employees or representatives, and nothing in this correspondence is intended to nor shall it be deemed a waiver of or estoppel to UPC's legal and/or contractual right in this matter or of the enforceability of relevant provisions, conditions and obligations set forth in the above-named policy. UPC also reserves its rights regarding any defenses to coverage to which it may now or hereafter be legally entitled. Notices, determinations or reservations not recited in this letter are not waived by UPC, but are reserved for all purposes.

We look forward to receiving the name and contact details of the appraiser you select.

Very truly yours,

ROYSTON, RAYZOR, VICKERY & WILLIAMS, L.L.P.

By: */S/ Esteban Delgadillo*
James H. Hunter, Jr.
Esteban Delgadillo

62567:10334118

APPENDIX D

CHOICE OF LAW:
DECISIONS TO MAKE IN A CASE WITH LIMITED INSURANCE
[A GENERAL OVERVIEW]

JOSE G. "JOEY" GONZALEZ, JR., *San Antonio*
Watts Guerra, LLP

Co-author:
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Watts Guerra, LLP

State Bar of Texas
16TH ANNUAL
ADVANCED INSURANCE LAW
June 6-7, 2019
San Antonio

CHAPTER 14

BIO/RESUME
(Jose G. "Joey" Gonzalez, Jr.)

Joey attended the United States Military Academy at West Point and is a graduate of the United States Army Northern Warfare Training School (Fort Greely, Alaska). He was Honorably Discharged from the United States Army in 1991 and also received the National Defense Service Medal. Joey attended St. Mary's School of Law where he served as Chair of the St. Mary's School of Law Board of Advocates and was an Associate Editor of the St. Mary's Law Journal. While in law school, Joey served as a Judicial Intern for Texas Supreme Court Justice Nathan Hecht. Upon graduating from law school, Joey served as a briefing attorney and law clerk for the Honorable Filemon B. Vela, United States District Judge for the Southern District of Texas in the Brownsville and McAllen Divisions.

Joey has been practicing civil trial law for over twenty (20) years and is Board Certified in Personal Injury Trial Law by the Texas Board of Legal Specialization. In addition to his law-firm duties, Joey has also volunteered hundreds of hours with the State Bar of Texas and local bar associations. For example, he was appointed by the Texas Supreme Court to serve on its Grievance Oversight Committee (2008-2016). Joey also served on the State Bar of Texas Grievance Committee District 12-B in the Rio Grande Valley where he served as a member, panel chair, and chair (2003-2008). Joey served as member, Treasurer, Vice-President, President, and Past-President of the Hidalgo County Bar Association and Hidalgo County Bar Foundation (2002-2012). He also served as President of the St. Mary's School of Law Alumni Board-Rio Grande Valley Chapter (2008-2012). In 2018, Joey was appointed by State Bar of Texas President-Elect Joe Longley to serve on the Task Force of Fiscal Responsibility committee.

Joey was selected as a Super Lawyer-Rising Star by "Texas Monthly" (2007-2011), a Top Latino Lawyer in the Country by "Latinos Leaders Magazine" in 2018, Best San Antonio Lawyer by "San Antonio Scene Magazine" in 2018, and a Top 100 Civil Plaintiff Trial Lawyer in Texas by "The National Trial Lawyers Top 100 Magazine" in 2018. He was also selected as a Charter Member of the Distinguished Justice Advocates for 2018 (Top 1% of Attorneys in America). Further, Joey has been admitted to practice in numerous cases via pro hac vice in New York, Florida, New Mexico, Nevada, Louisiana, Georgia, Utah, California, and Arizona.

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CHOICE OF LAW: DECISIONS TO MAKE IN A CASE WITH LIMITED INSURANCE [A GENERAL OVERVIEW]

I. INTRODUCTION

A potential client walks through your door. He explains to you that he was broadsided by a commercial vehicle. The client informs you that he sustained injuries to his low back. To date, he has treated conservatively: (physical therapy, chiropractic care, analgesics, and pain management). Notwithstanding, he continued with severe pain to his low back. Ultimately, his primary physician referred him to an orthopedic surgeon for consultation.

You do some preliminary research and determine that the potential defendant company has policy limits of only $500,000. No excess or umbrella coverage is available. As a prudent attorney evaluating a case with injuries such as this, two important questions must be answered first. Given that the target defendant only has $500,000 in insurance coverage: (1) Can I get there on liability; and (2) Do the damages in this case justify hiring experts that can assist me in resolving the case.

The purpose of this paper is to discuss, from a general standpoint and practical perspective, how to maximize recovery for your client in a personal injury case with minimal available insurance. Of course, every case is different and each case calls for different strategies. However, the end goal should always be to maximize the amount of recoverable damages for your client. The strategy outlined below is merely a suggestion. Although it has consistently worked for me, it is not a recommendation and may not work for everyone. As mentioned, every case is different.

II. FACTORS TO CONSIDER

Many times, you win or lose your case based on your Exhibit "A". Although it sounds obvious, the importance of interviewing your client from the outset is critical. Your client's credibility holds the remarkable power to make or break a case. It is never too early to start thinking about how a jury will see your client at trial (good, bad, or somewhere in between). Get the who, what, when, where, and how answered. Do not ignore the opportunity to learn of any potential hurdles that may arise. It is better to learn of the hurdles now rather than on the eve of trial (after thousands of dollars in expenses have been incurred). Some of the hurdles that should be fully explored during the client interview are:

- pre-existing injuries;
- criminal record;
- driving record (DPS abstract);
- prior or subsequent accidents;
- employment related issues;
- gaps in treatment dates; and
- client attitude.

Determining whether a client has any pre-existing injuries can be as easy as asking the client questions about prior injuries in the interview. In our hypothetical, if the potential client reveals that he had been in a prior crash and had a confirmed herniated disc in the lumbar spine, it is imperative to order those records since most clients won't know the exact level (and even if they do, it is best to confirm with the medical records). At best, the medical records show that the level complained of in the prior crash is a different level than in the subject crash. At worse, you have an aggravation of a pre-existing injury. Still a good case, but not great. Determine if the client was asymptomatic at the time of the subject crash. Also, determine the extent of medical treatment in the prior crash, if any.

In every case, I obtain my client's criminal record (assuming they tell me that they have been arrested before). It is important to get in front of this issue early. Was it a crime of moral turpitude? Was it a DWI? Was it a felony? Make sure and verify what the client tells you (rather than just relying on the client's interpretation of the crime). In a "he said-she said" case, the client's criminal record could become an issue.

Equally as important is obtaining my client's driving record. This is easily done by requesting the records from Texas Department of Public Safety. A certified abstract from DPS captures the potential client's entire driving history from traffic citations to crashes. You want to make sure that you know of every crash or traffic citation that the client has received. Don't simply rely on the "I think I've gotten 2 tickets in my entire life" line. We hear it all the time. Make sure and confirm.

Explore whether your client has been involved in any subsequent accidents and whether there have been any gaps in treatment. Both of these issues can cause future "causation" issues in your case. For example, if the hypothetical client mentioned above had waited 3 months to go to the doctor, a defense attorney will most probably argue that a reasonable person would not wait that long to seek medical attention and therefore, the crash did not cause the injuries. This is especially true when there is an intervening subsequent crash that occurred after the subject crash but before your client went to the doctor.

Talk to the potential client about his employment. This is important not just to determine whether he may have a lost wage and loss of earning capacity claim, but to determine whether he was a problem employee or had

a history of being fired. The last thing you need is a former employer to come in and testify that your client was fired because he was a habitual liar, was caught stealing, or was using narcotics/alcohol on the job. Of course, you have the choice of not making a claim for lost wages and loss of earning capacity, thus eliminating the potential problem above. However, determine whether this element of damage is in play early in the case. This will save you the cost of ordering employment records, IRS records, and hiring an economist.

One of the most important factors that I consider when taking a case is client attitude. We all have encountered "problem clients". For the most part, they can be dealt with. However, there is that one client that you know will be a problem before, during and after a case settles. Use your gut feeling and go with it. If a potential client comes in saying "well, the other attorney I spoke to before you says I can get X amount of dollars" or "this isn't about the money, its about the principle" or "I don't have time for lawsuits, I want my case done quickly", be extremely wary and cautious before deciding to take the case. Meet with the client multiple times to get a feel of what you will be dealing with for the next twelve months.

After my initial evaluation referenced above, I decide to take the case. What now?

III. CASE INVESTIGATION

When investigating the case before filing a lawsuit, I obtain a copy of the crash report, determine all of the potential defendants, visit the scene of the crash, determine the extent of my client's injuries, and send a preservation of evidence letter to the trucking company.

A. Obtain a Copy of the Crash Report

The crash report is an important tool in your investigation. Obtain it first thing. It will help fact check the client's narrative. A typical crash report will provide you with the names of the parties, owners of the vehicles, a description of and date of the crash, the time of the crash, the weather conditions, location, speed limits, and contributing factors that the investigating officer believes led to the crash, among other important information.

B. Determine All Potential Defendants

Determining all of the potential defendants is important from both an insurance coverage and venue standpoint. While the client may have the name of the individual driver, they most likely will not know the identity of the tractor company and/or trailer company. At a minimum, determine the owner of the tractor and the owner of the trailer (assuming it is not the same company). This information will provide you with potential venue options.

C. Visit Crash Scene

Depending on the severity and timing of the crash, you will also want to visit the crash site. I do this in every case. In contested liability cases, visiting and documenting the scene is crucial. Knowing the scene, as the parties in the crash saw it, will give you a better perspective. Look for obstructions or other things that may have contributed to the crash so that you can frame arguments around potential defenses that may arise in your case. In addition, look for the "silent witness" (surveillance cameras). In this day and age, most businesses have exterior surveillance cameras. Look for them and subpoena the tapes if you believe that the silent witness may have captured the crash on video.

D. Determine the Extent of Your Client's Injuries

You will want to understand your client's damages in order to formulate a plan and prevent yourself from outspending the value of the case. It is critical that you first order the MRI results from the radiologist and the MRI films themselves (so that you can forward to an expert should you hire one). Furthermore, as referenced above, you should speak with your client to ask what their plan is for future treatment.

Do they want to continue with conservative treatment or are they considering surgery? From this point forward, you should implement your game plan on how to maximize the damages in your case.

E. Send a Preservation Letter Immediately

As soon as you have made the decision to take the case, you need to preserve all evidence associated with the subject crash immediately. This includes placing the defendant vehicle out of service, preserving the Electronic Control Modules ("ECM") and/ or the Electronic Data Recorders ("EDR"). Finally, you should ensure that driver logs and other federally mandated documents are secured.

Many times, the defendant company or the vehicle owner will want to repair the vehicle as soon as possible so they can continue with their business. That is understandable. However, it is imperative that you send a preservation letter requesting the vehicle be placed "out of service." Not only will this prevent the defendant from repairing the vehicle, it also prevents anyone from operating the vehicle.

In one case that I recently handled, the defendant failed to place the vehicle out of service and placed it back on the road. A few days later, the driver was involved in a "near collision" that required him to brake hard. As a result, ALL the EDR/ECM data that had been recorded regarding the crash was erased.

The ECM/EDR download is a crucial piece of evidence. If the module was not damaged during the impact, you should be able to access specific data from the crash. These modules typically record the seatbelt

status, airbag deployment, speeds, RPMs, throttle, and braking (among other items) in the seconds leading up to impact. Securing this data is crucial.

Finally, you should also request that all federally mandated driver logs and other regulated documents be preserved. This will give you a general understanding of the hours driven by the defendant driver, his stops throughout the day, and any maintenance or inspection records. Typically, all of these items can be requested and consolidated into one preservation of evidence letter to defense counsel. In the event that the Defendant gets rid of an item requested in the letter, you have protected your client and may seek a spoliation instruction down the road.

Please note, this is not an all-inclusive list. For the sake of being brief, the authors have intentionally left out steps regarding pleadings, written discovery, depositions, and mediation.

IV. FORMULATE YOUR GAME PLAN

A. Past and Future Medical Expenses

The first element of damage that I normally address is my client's past and future medical expenses. To do so, I have the client provide me with a comprehensive list of all medical providers relating to the subject incident. It is critical to order all the medical records and then cross -reference the records to ensure that you haven't missed any provider or medical facility. Once I have an exhaustive list of medical providers, I then order all the medical billing. Obtaining all of my client's medical billing will provide me with a comprehensive overview of my client's past medical expenses. This is crucial because at some point down the road I will need to prove-up my client's past medical treatment and billing.

The next thing I will need to do is prove that the medical treatment was necessary and that the charges were reasonable. As you know, you can do this by having an expert testify as to the necessity of the medical treatment and the reasonableness of the medical costs associated with the treatment. I like having a specialist do this, (in this case an orthopedic surgeon). Jurors like to hear from specialists (surgeons) who can explain medical terms in detail and who can walk them through complex medical procedures and surgeries.

Most importantly, if the specialist (surgeon in this case) believes that a future surgery or surgeries may become necessary, it is critical to memorialize this in a report that includes an itemized cost projection for the future surgery (e.g., surgeon costs, assistant surgeon costs, hospital admit and facility costs, anesthesiologist costs, post-surgery physical therapy costs, among other surgery related costs.) You can also provide proof that the medical costs were reasonable and necessary by filing affidavits under TCPRC §18.001. In serious injury cases, I do both (i.e., file the affidavits and have an expert testify via deposition or live at trial.)

Regarding future medical expenses, I sometimes hire a certified life care planner who can quantify the medical needs and services that my client will require in the future. A Life Care Plan is a comprehensive report that describes the medical condition and ongoing medical care requirements of an individual with chronic or permanent health care needs. The typical life care plan includes a general overview and comprehensive summary of the client's past medical treatment, client interview/examination findings, projected life expectancy, diagnostic conclusions, and importantly, the future medical cost projections for the client's medical needs. The cost projections normally incorporate costs associated with physician care, diagnostics, medication, rehabilitation, equipment/supplies, attendant nursing care, and acute care.

As you know, however, expert testimony is not required when proving up future medical costs. However, in proving up future medical costs, Plaintiff must show that there is a reasonable probability that the expenses resulting from the injury will be necessary in the future.[1] This burden requires a Plaintiff to provide evidence of (1) a reasonable probability the Plaintiff will incur future medical expenses, and (2) the reasonably probable amount of the future medical expenses.[2]

I never take a chance in cases where I have significant damages and a client who will definitely require significant medical attention/care in the future. Expert testimony is always preferable in establishing this particular element of damage.

B. Past and Future Loss of Earning Capacity

Regarding the past loss of earning capacity claim, you must look at what the client's capacity to earn was at the time of the subject incident and to what extent the subject incident impaired that capacity. I typically collect all of my client's tax filings for at least three (3) years prior to the subject incident. This allows the economist (assuming I hire one) to have an adequate overview of my client's earning capacity pre-incident. An economist will consider the client's life expectancy, work life expectancy, earnings growth, employee benefits, personal consumption, taxes, and discount rates when calculating the client's economic loss. In

[1] *Saeco Elec. & Util., Ltd. v. Gonzales*, 392 S.W.3d 803, 808 (Tex. App.—San Antonio 2012, pet. granted)

[2] *Finley v. P.G.*, 428 S.W.3d 229, 233 (Tex. App.—Houston [1st Dist.] 2014, no pet.)

order to accurately determine this figure, the economist will normally reduce the expected future income to its current or present value. Regarding future loss of earning capacity, you may consider hiring a vocational rehabilitation expert (or someone in a similar field) to testify regarding the client's current and future impairment (specifically, how the client's capacity to earn has been diminished at the present time and into the future). It is important to note that there is a difference between loss of earnings (lost wages) and loss of earning capacity. Loss of earnings (lost wages) is the Plaintiff's loss of actual income due to the accident[3] whereas loss of earning capacity is the Plaintiff's diminished ability to earn a living.[4] The proper measure of damages is loss of earning capacity, not loss of earnings.[5]

C. Past and Future Physical Impairment

In cases where physical impairment is at issue, I may hire a vocational rehabilitation expert. The vocational rehabilitation expert will evaluate my client's vocational potential and employability by interviewing him, reviewing his medical and employment records, and administering vocational testing. The vocational rehabilitation expert will then provide an appraisal as to my client's ability to work in the competitive labor market, given his medical condition. The vocational rehabilitation expert will determine my client's employability and the extent of my client's physical impairment as it relates to employment. The expert will also provide opinions regarding my client's current handicaps that could prevent him from finding part-time or full-time employment. From a lay-person standpoint, it is important to establish at least four to five activities that the client could perform before the subject incident, but can no longer perform now (or can perform now, but on a limited basis). Have the client convey specific hobbies and activities that he can no longer perform, or at best, can only perform in a limited basis (e.g., fishing, hunting, playing softball, yard work, exercising, etc).

D. Past and Future Physical Pain and Mental Anguish

It is undisputed that the client sustained physical injuries in the hypothetical case above. As such, mental anguish can be inferred. Simply showing (through the client's own testimony and post-injury photos) that he suffered a serious bodily injury suffices to prove this element. Notwithstanding, I like to use the client's family members and close friends to convey to a jury how his life has changed and/or has been materially altered. Convey how often the client thinks about his injuries during the day. Convey how the client can actually feel his injuries all day. Convey how angry and frustrated the client gets during the day (at work with coworkers, at home with his family, and at social settings with friends). Importantly, convey that the client will never have any type of normal quality of life that will allow him to enjoy his day like he could before the crash.

E. Liability Experts to Consider Hiring

Liability experts can, and most likely will, be the largest expense of the lawsuit.

1. Accident Reconstruction

A good accident reconstructionist can be irreplaceable, but they can also be extremely costly. An accident reconstruction expert will typically go to the scene, inspect the vehicles, and use technology to create 3-D images of what occurred. If hiring an accident reconstructionist creates a math problem, consider cost-effective alternatives. For instance, there is now drone technology that can be used to take photographs and video of the accident site. This technology can show and record the timing of stop lights, two way stops versus four way stops, or any other pattern you wish to show the jury. Stills from google maps may also be a useful tool to show the relevant images of the scene. This concept is true of vehicle inspections as well. If you were able to preserve and inspect the vehicle, images will show where the impact was made. As mentioned above, the data download will also show the speed the defendant driver was traveling in the moments leading up to the impact and the exact moment he applied his brakes (among other important information).

2. FMCSR

Although a Federal Motor Carrier Safety Regulations expert is not always needed, it is always important to consider whether such an expert would be beneficial to your case. The FMCSR offers volumes of safety rules that are written for drivers of commercial vehicles to follow while operating commercial vehicles. If you have a clear-cut liability case (i.e. – rear end collision), you probably don't need to consider an FMCSR expert. If you have a contested liability case, consider hiring an FMCSR expert to evaluate the defendant trucking company's safety ratings, any violations of federal and state regulations in the past (log book violations, hours of service violations, etc),

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[3] *Koko Motel, Inc. v. Mayo*, 91 S.W.3d 41, 51 (Tex. App.—Amarillo 2002, pet. denied)

[4] *Big Bird Tree Serv. v. Gallegos*, 365 S.W.3d 173, 178 (Tex. App.—Dallas 2012, pet. denied)

[5] Dallas Ry. & Terminal Co. v. Guthrie, 210 S.W.2d 550, 552 (Tex. 1948)

company safety policies and procedures (which includes implementation and enforcement of same), among other issues.

V. CONCLUSION

Initial case evaluation when you have a client with significant injuries and a target defendant with limited insurance is crucial. Take the time to fully evaluate liability and damages. Meet with the client in person and get a feel of what you will be dealing with should you decide to take the case. Determine which liability and damages experts you need for your case, if any. Most importantly, determine the costs for such experts and whether you can prosecute the case without some or all of them. Sometimes that is possible. Sometimes not.

The end goal should always be to maximize the amount of recoverable damages for your client. Although there are different views on how to maximize damages in personal injury cases, I have provided a very general outline and strategy that has worked for me in the past. Some cases may incorporate all, some, or none of the experts that I mentioned above. Every case is different.

SORIANO AND THE *STOWERS* DOCTRINE AFTER *OGA CHARTERS*

WAYNE PICKERING, *Houston*
Martin, Disiere, Jefferson & Wisdom, LLP

State Bar of Texas
16TH ANNUAL
ADVANCED INSURANCE LAW
June 6-7, 2019
San Antonio

CHAPTER 15

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EDUCATION

B.S. in Business, Eastern Illinois University (1978)
J.D., University of Houston Law Center (1989)

PROFESSIONAL EXPERIENCE

Mr. Pickering's legal experience includes many years of experience at both the trial and appellate level in numerous facets of insurance litigation, including coverage issues, bad faith and extra-contractual claims, as well as litigating professional liability claims against insurance agents, brokers and claims adjusters. He also has authored or co-authored various articles and has edited treatises in the field of insurance law. He is a member of the Defense Research Institute and the Texas Association of Defense Counsel.

PROFESSIONAL PUBLICATIONS AND SEMINARS

Eliminating Frivolous Lawsuits Against Agents: Recent Changes to The Texas Insurance Code Regarding Hail and Windstorm Claims. Published in the Fall 2017 issue of the *Houston Insurance News*, discussing significant 2017 legislation which amended the Texas Insurance Code regarding lawsuits arising out of insurance claims for hail or windstorm damage.

Reducing Insurers' Bad Faith Litigation Exposure in Reasonable Settlement Offers. Member of a three-person panel for continuing education presentation sponsored by The Knowledge Group to discuss strategies to avoid or defend litigation relating to handling of insurance claims (March 2017).

Cornell's Texas Annotated Insurance Code. Contributing editor and author for chapters pertaining to agents' and brokers' liability (2008, 2010, 2012, 2014 editions).

Texas Surplus Lines Regulations – Recent Legislation. Continuing education seminar presentation to Independent Insurance Agents of Houston (2014).

Lessons Learned from Hurricane Ike. Paper and continuing education presentation to client and industry groups discussing the firm's accumulated experience from years of representing insurers, agents and adjusters in "bad faith" litigation arising out of insurance claims submitted for hurricane property damage (May 2013 and November 2015).

Texas Surplus Lines Insurance – Avoiding Unauthorized Insurance. Paper and continuing education presentation to client and industry groups regarding developments in Texas surplus lines insurance law (May 2012, November 2012).

Overview of Insurance Agents' and Brokers' Errors & Omissions Liability. Co-author of paper discussing the various duties and obligations owed by an insurance agent or broker under Texas law. (Originally published in 1997, and republished and updated in 2006, 2008 & 2012.)

Don't Take 'No' For An Answer: A Discussion of Recent Cases From the Supreme Court of Texas Affecting Your Rights As A Policyholder. Author of paper and presentation delivered to the International Association of Drilling Contractors (IADC) regarding an insured's coverage rights and obligations once litigation ensues or is threatened (October 2008).

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SORIANO AND THE *STOWERS* DOCTRINE AFTER *OGA CHARTERS*

I. INTRODUCTION

The year 2019 marks the twenty-fifth anniversary of the Supreme Court's opinion in the landmark insurance case of *Texas Farmers Ins. Co. v. Soriano*, 881 S.W.2d 312 (Tex. 1994). As a refresher for those who may not regularly face *Soriano* issues, that case addressed an insurer's obligations – and rights – in a situation where the insurer is presented with settlement demands from multiple claimants, but the aggregate of those claims exceeds the coverage limits of the applicable policy.

To summarize the Supreme Court's holding in *Soriano,* when an insurer is "faced with a settlement demand arising out of multiple claims and inadequate proceeds, an insurer may enter into a reasonable settlement with one of the several claimants *even though such settlement exhausts or diminishes the proceeds available to satisfy other claims*. ... Such an approach, we believe, promotes settlement of lawsuits and encourages claimants to make their claims promptly." *Texas Farmers Ins. Co. v. Soriano*, 881 S.W.2d at 315 (emphasis added).

In the twenty-five years since the Court issued its opinion in *Soriano*, I have found no case where a court has voided or set aside a settlement under the *Soriano* doctrine because the court found the settlement to be unreasonable. That remains true today.

However, the Fifth Circuit's recent bankruptcy opinion in the case of *In re OGA Charters, LLC*, 901 F.3d 599 (5th Cir. 2018), has shown that even settlements made in good faith under *Soriano* may still be subject to a collateral attack, in the right situation. The *OGA Charters* case presented the classic *Soriano* settlement quandary: an insurer facing multiple *Stowers* demands but insufficient coverage limits to settle all of those claims. The Court held that the apparent insufficiency of the policy limits gave the debtor [OGA Charters] an equitable interest in having the proceeds applied to satisfy as many claims as possible, which was enough to bring policy proceeds into the "property of the estate." While the Fifth Circuit did not address the question as to whether the settlements were reasonable, the Court did illustrate, in football parlance, how to make an "end run" around *Soriano* in an appropriate case.

The *OGA Charters* case arose out of a tragic accident near Laredo where a bus carrying several elderly passengers to a casino overturned and killed or seriously injured a large number of them. OGA Charters was insured by New York Marine & General Insurance Company for $5,000,000 under a commercial vehicle liability policy. After having been presented with multiple *Stowers* demands for the entire $5,000,000, the insurer developed a strategy in which it ultimately reached settlements with a large number of the claimants, but not all of them. Those settlements exhausted the policy limits.

Before any of those settlements were finalized and funded, however, the non-settling claimants retained highly competent bankruptcy counsel, who filed a petition in the bankruptcy court in McAllen to place OGA Charters into involuntary Chapter 7 bankruptcy. The bankruptcy court entered an injunction prohibiting the insurer from funding the settlements until the court could consider the unresolved question in the Fifth Circuit of whether the proceeds of a liability insurance policy constituted property of the bankruptcy estate.

Ultimately, the bankruptcy court and the Fifth Circuit found in the *OGA Charters* factual scenario that the proceeds of the liability policy were indeed property of the bankruptcy estate. The settlements were set aside, and New York Marine tendered the entire $5,000,000 into the registry of the court for the bankruptcy trustee to administer in resolving all of the claims arising out of the bus accident.

This paper and today's presentation will discuss in greater depth the details of the *OGA Charters* case, the *Stowers* and *Soriano* issues that the insurer had to consider in addressing the settlement demands in *OGA Charters*, the settlement strategy that was employed by the insurer to arrive at what ordinarily would have likely been seen as reasonable settlements, and the bankruptcy strategy employed by the non-settling claimants to claim a piece of the settlement pie despite the seeming exhaustion of the policy proceeds.

Before exploring the results and the impact of the *OGA Charters* case, however, a review of the *Stowers* doctrine and an understanding of the *Soriano* doctrine is necessary.

II. THE *STOWERS* DOCTRINE

The *Stowers* doctrine arises out of the landmark case of *G.A. Stowers Furniture Co. v. American Indem. Co.,* 15 S.W.2d 544, 547 (Tex. Comm'n App. 1929, holding approved). The *Stowers* case, as developed through subsequent judicial interpretations, has given us what has become a bedrock principle of Texas insurance law.

An insurer's *Stowers* duty is activated by a settlement demand where three prerequisites are met: (1) the claim against the insured is within the scope of coverage, (2) there is a demand within policy limits, and (3) the terms of the demand are such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment. *American Physicians Ins. Exchange v. Garcia,* 876 S.W.2d 842, 848 (Tex.1994).

Simply put, the *Stowers* doctrine requires that an insurer act as a reasonably or ordinarily prudent insurer

in considering settlement demands for covered claims that fall within the insurer's policy limits. An insurer must "exercise 'that degree of care and diligence which an ordinarily prudent person would exercise in the management of his own business' in responding to settlement demands within policy limits." *American Physicians Ins. Exchange v. Garcia,* 876 S.W.2d at 848.

Because of this duty, an insurer may be liable to its insured for a judgment in excess of its policy limits if the insurer negligently failed to settle a claim within policy limits where an ordinarily prudent insurer would have done so. *Stowers,* 15 S.W.2d at 547–48.

In the *OGA Charters* case, the insurer was presented with multiple *Stowers* settlement demands for the entire policy limits. At the outset, OGA Charters' insurer was thus faced with the responsibility of fulfilling its *Stowers* duties to OGA Charters, even though its policy limits were insufficient to satisfy all the demands.

III. THE *SORIANO* DOCTRINE

Before the Supreme Court of Texas issued its opinion in *Texas Farmers Ins. Co. v. Soriano*, 881 S.W.2d 312 (Tex. 1994), an insurer operated at its own peril when it settled some claims, and not others, when presented with multiple claims and inadequate insurance limits to fully satisfy them all. Before *Soriano*, insurers had to walk an uncertain tightrope. Insurers had to decide which settlement demands to accept in cases involving multiple claimants and insufficient policy limits to satisfy all demands, while still fulfilling their *Stowers* duties to their insureds. The *Soriano* case therefore provided some much-needed clarity in the law and some protection to insurers that previously had been punished for settling certain claims where its insured's liability was reasonably clear, but not settling others.

A. Factual Scenario

Richard Soriano crashed head-on into an oncoming car driven by Carlos Medina in which he and his family were riding. Mr. Medina suffered serious, injuries including broken ribs, a broken jaw, broken feet, and severe head lacerations. His wife of thirty years was killed. The Medinas' two children, ages 11 and 12, were injured in the accident as well. The Medinas' son sustained three broken teeth, and their twelve-year-old daughter suffered a broken collar bone and facial cuts resulting in permanent scars. Adolfo Lopez, a teenage passenger riding with Richard Soriano, was also killed.

Soriano was charged with involuntary manslaughter, driving while under the influence of alcohol, driving at an unsafe speed, and passing with insufficient clearance. Soriano had only minimum insurance coverage through his parents' policy with Texas Farmers Insurance Group, which provided for limits of $10,000 per person and $20,000 per occurrence. Farmers offered the full policy limits of $20,000 to the Medinas, but the Medinas rejected this offer because they wished to investigate Soriano's personal assets.

Both the Medinas and Alonzo and Rafaela Lopez, the parents of Adolfo Lopez, then sued Richard Soriano, and the cases were consolidated for trial. Shortly before trial, Farmers settled the Lopez wrongful death claim for $5,000 and offered the remaining $15,000 to the Medinas. The Medinas rejected this offer, but then demanded $20,000 (the original policy limits they had previously rejected).

The Medinas' personal injury and wrongful death claims against Soriano went to trial, and the jury found Soriano negligent. The trial court rendered judgment and awarded the Medinas damages of $172,187 plus interest. In exchange for a covenant not to execute on the judgment and an agreement to drop the criminal charges, Soriano then assigned his rights against Farmers to the Medinas. The Medinas then sued Farmers in Soriano's name for negligence, gross negligence, and breach of the duty of good faith and fair dealing for failure to settle the Medinas' claims before trial.

The jury found that Farmers was negligent and grossly negligent in the handling of the Medinas' claims and that Farmers breached a duty of good faith and fair dealing to Soriano by failing to settle the Medinas' claims. The trial court rendered judgment awarding Soriano (and by assignment the Medinas) $520,577.24 in actual damages and prejudgment interest and $5 million in exemplary damages.

B. The Court of Appeals Opinion in *Soriano*

Although the Supreme Court ultimately overturned the judgment of the San Antonio Court of Appeals, it is worthwhile to review the Court of Appeals' opinion as an illustration of the "damned if you do, damned if you don't" perils that an insurer faced before *Soriano* when trying to settle with multiple claimants with insufficient limits to satisfy them all. Remember, Farmers had initially offered the entire $20,000 policy limits to the Medinas, and they rejected them. Despite its efforts to resolve the Medina claims, Farmers was sued for its failure to have preserved the entire policy limits once the Medinas decided they wanted to accept the original offer.

Soriano asserted that, in opting to settle the Lopez claim for $5,000, Farmers had acted in bad faith by reducing the amount of insurance available to resolve the Medinas' claims. Soriano argued that the Lopez settlement had subjected him to liability for an excess judgment on the more serious Medina claims. He further argued that when faced with multiple claims and inadequate proceeds, an insurer must weigh the seriousness of the respective claims and attempt to settle

those claims within policy limits that pose the greatest threat of liability for excess judgments.

Farmers countered that it had *no* duty, in essence, to "triage" the claims and determine which claims would result in the greatest liability in considering settlement. The insurer argued that it was not negligent and had not acted in bad faith toward its insured because the Lopez settlement was reasonable under the circumstances. *Soriano* at 314. After all, the insurer had settled a wrongful death claim for $5,000.

The San Antonio Court of Appeals affirmed the trial court's judgment against Farmers in *Texas Farmers Ins. Co. v. Soriano*, 844 S.W.2d 808 (Tex. App. 1992), *writ granted* (Nov. 24, 1993), *rev'd*, 881 S.W.2d 312 (Tex. 1994). The Court of Appeals held there was some evidence that the Lopez settlement was unreasonable, negligent, and made in bad faith by settling one claim for a portion of policy limits that left insufficient coverage to settle more substantial claims against Soriano.

C. The Supreme Court Opinion

The case was then appealed to the Supreme Court of Texas, where the Court concluded "there is no evidence that Farmers was negligent or that Farmers breached a duty of good faith and fair dealing. We therefore reverse and render judgment that Soriano take nothing." *Texas Farmers Ins. Co. v. Soriano*, 881 S.W.2d 312, 314 (Tex. 1994).

Prior to the Supreme Court's opinion in *Soriano*, it was unclear whether an insurer indeed had a duty under Texas law to "triage" the various claims and to attempt to settle what were deemed to be the most serious claims. Although that issue arguably remains open – and dependent upon the facts of the individual case – the Court's opinion in *Soriano* therefore brought some clarity to an issue that is frequently faced by insurers where there are multiple claims arising out of a covered occurrence and the settlement demands in the aggregate exceed the total coverage available under its policy.

The Supreme Court began its analysis with a discussion of an insurer's obligations to its insured under the *Stowers* doctrine as set forth in *G.A. Stowers Furniture Co. v. American Indem. Co.,* 15 S.W.2d 544, 547 (Tex.Comm'n App.1929, holding approved). The Court had recently discussed in detail an insurer's *Stowers* duties in *American Physicians Ins. Exchange v. Garcia,* 876 S.W.2d 842, 848 (Tex.1994), holding that insurers must "exercise 'that degree of care and diligence which an ordinarily prudent person would exercise in the management of his own business' in responding to settlement demands within policy limits. Through this *Stowers* duty, insurers may be liable for negligently failing to settle within policy limits claims made against their insureds. *Stowers,* 15 S.W.2d at 547–48."

The Court in *Soriano* went on to note that an insurer's "*Stowers* duty is not activated by a settlement demand unless three prerequisites are met: (1) the claim against the insured is within the scope of coverage, (2) there is a demand within policy limits, and (3) the terms of the demand are such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment. *American Physicians,* 876 S.W.2d at 848–49. A demand above policy limits, no matter how reasonable, does not trigger the *Stowers* duty to settle. *Id."*

Applying the principles of the *Stowers* doctrine to the factual scenario in *Soriano*, the Supreme Court reasoned that when Farmers was presented with Lopez' settlement demand of $5,000 to settle a wrongful death claim, Farmers was required under *Stowers* to exercise reasonable care in responding to that demand:

> Had Farmers opted not to settle the Lopez wrongful death claim but, in the face of that demand, to renew its offer of the original face amount of the policy to settle the Medinas' claims instead, Farmers would surely face questions about liability under *Stowers* for failing to settle the Lopez wrongful death claim. To be sure, in settling the Lopez claim, Farmers necessarily reduced the amount of insurance available to satisfy the Medinas' claims, but Farmers also reduced Soriano's liability exposure. We conclude that when faced with a settlement demand arising out of multiple claims and inadequate proceeds, an insurer may enter into a reasonable settlement with one of the several claimants even though such settlement exhausts or diminishes the proceeds available to satisfy other claims. Such an approach, we believe, promotes settlement of lawsuits and encourages claimants to make their claims promptly.

Texas Farmers Ins. Co. v. Soriano, 881 S.W.2d at 315.

The Court then addressed – and rejected – the argument that the Lopez settlement was itself unreasonable. The Court noted it was undisputed that the Lopez claim, a wrongful death claim alleging negligence and gross negligence, had merit. *Id.* The Court also rejected Soriano's argument that the Lopez settlement was unreasonable when viewed in comparison to the allegedly more serious Medina claims, thus rejecting the notion that an insurer must triage the competing claims and settle the more serious claims first:

> The fact that the Medinas' claims may be more serious is not evidence that the Lopez claim was unreasonable. To be unreasonable,

> Soriano must show that a reasonably prudent insurer would not have settled the Lopez claim when considering solely the merits of the Lopez claim and the potential liability of its insured on the claim. This standard is nothing more than what is required of an insurer under *Stowers*. We conclude that there is no evidence that Farmers' decision to settle the Lopez wrongful death claim for $5,000 was unreasonable. *Id.*

IV. THE *OGA CHARTERS* BUS ACCIDENT

A. Details of the Accident

The *OGA Charters* case arose out of a tragic single-vehicle accident near Laredo where a bus carrying several elderly passengers to a casino overturned on a slick road during a storm. Nine of the passengers were killed and approximately forty more were seriously injured.

B. Multiple Claims and Lawsuits Filed By Multiple Attorneys

OGA Charters was insured by New York Marine & General Insurance Company ("New York Marine") for $5,000,000 under a commercial vehicle liability policy. Literally within two days following the accident, two multi-plaintiff lawsuits had been filed in Hidalgo County, and additional suits soon followed. OGA Charters immediately provided notice of these claims to New York Marine and requested coverage and a defense.

As one would expect, a number of settlement demands under the *Stowers* doctrine were made at the time or shortly after these suits were filed. Within just a few days of the accident, New York Marine had received two separate *Stowers* letters demanding the entire $5,000,000 limits. Additional demands for the policy limits soon followed. By the time that New York Marine opened a settlement dialog with counsel for the various claimants who either had filed suit or made settlement demands, sixteen different plaintiffs' firms were involved and had made settlement demands in varying amounts, but many of which were for the entire policy limits.

V. SETTLEMENT STRATEGY: WALKING THE *STOWERS*/*SORIANO* TIGHTROPE

Having been presented with multiple *Stowers* demands for its entire $5,000,000, New York Marine was presented with a quandary not at all unfamiliar to insurers in Texas: how to satisfy its *Stowers* duties to its insured when it clearly lacked inadequate limits to accept all of the demands, even if they were reasonable demands? Given the tragic facts of the case and the venues in which the personal injury and death cases were likely to be tried, many of the claims easily could have been valued at or near $5,000,000 for settlement purposes.

As a result, New York Marine looked to Texas counsel for advice in responding to these demands in light of the inadequate policy limits to satisfy them all. Ultimately, New York Marine developed what it believed to be a prudent settlement strategy that relied on the protections afforded to an insurer under the *Soriano* doctrine to reach what it hoped would ultimately be perceived as reasonable settlements with a large number of the claimants. Those settlements exhausted the policy limits, but some claims were left unresolved. Those "loose ends" proved to be significant in *OGA Charters*, as it was the non-settling claimants who instituted the involuntary bankruptcy proceedings against OGA Charters.

Because the Fifth Circuit's opinion in the author's view unfortunately and unfairly states that New York Marine, OGA Charters, and the settling claimants "quickly" entered into settlements, it is important to understand the lengths to which the insurer went to attempt to settle *all* of the claims arising out of the bus accident. Only when that strategy, as discussed below, failed because of a lack of cooperation from all of the *claimants* did New York Marine entertain settlement discussions with individual claimants.

A. "Settlement in the Sunshine"

One of the take-aways from *Soriano* and its progeny is that if an insurer is going to enter into settlements of fewer than all claims which reduce the insurance limits available to settle other claims, those settlements must be "reasonable." Having been presented with multiple policy-limits demands within just a few days of the accident, New York Marine obviously had very little information to assess what the reasonable settlement value of any of the individual claims might be.

Added to that was the fact that little case law has provided any guidance from the Texas courts as to what would constitute a "reasonable" versus an "unreasonable" settlement under the *Soriano* doctrine. As a result, New York Marine was rightfully hesitant to enter into hasty settlements that might later be second-guessed as to their reasonableness.

With its ultimate goal being to reach reasonable settlements to protect its insured from as much liability as possible, New York Marine developed and employed a strategy by which it laid its cards on the table (1) to make all claimants *immediately* aware that there were inadequate insurance limits to accept all of the *Stowers* demands, and (2) to make a proposal to reach a settlement of all of the claims, even though that meant no one claimant would receive the entire $5,000,000.

B. Correspondence With All Known Claimants

1. Immediate Notice That the Insurer Had

Insufficient Limits to Satisfy All Demands

As a first step in its settlement strategy, New York Marine's first act was to send a letter to all of the plaintiffs' firms representing the known claimants to globally acknowledge the receipt of the multiple settlement demands for the entire $5,000,000 and to advise that New York Marine obviously could not satisfy all of the demands. The pertinent portions of this first global communication read as follows:

> This will confirm that the Company issued a commercial automobile liability policy, No. AU201600009025, for the coverage period February 23, 2016 – February 23, 2017. We acknowledge that the Accident falls within the coverage period of the Policy. This letter will also confirm that the Policy provides a total of $5,000,000 in liability coverage for those sums that our Insured, OGA, legally must pay as damages because of bodily injury or property damage to which the Policy applies, subject to the various insuring terms and conditions in the Policy.
>
> ***
>
> This letter will also serve to acknowledge receipt of the petitions in [*the lawsuits that have been filed at that point*] and related settlement demands received on behalf of certain claimants. Based on the representations that have been made in the pleadings and demand letters received to date, it is alleged that there are at least nine (9) fatalities and more than forty (40) serious injuries that occurred as a result of the Accident.
>
> ***
>
> Please be assured that the Company acknowledges this indeed was a serious accident, as evidenced by the apparent number of fatalities and serious injuries described in your pleadings and demand letters. Unfortunately, in light of the number of fatalities and apparent serious injuries, and given the current settlement demands that have been made, the $5,000,000 policy limits would not appear to be adequate to satisfy all of the claims or demands of which we are presently aware. In addition, it would appear likely that there are other claims for wrongful death and serious bodily injury that have not yet been presented.

Because so many of the triggering *Stowers* demands were received within just a few days after the accident, and because records obtained from OGA Charters indicated that there were a number of additional passengers on the bus who had not yet made claims, New York Marine also elected to send a letter to those *potential* claimants. The pertinent portions of that letter read as follows:

> Information provided to us by OGA Charters indicates that you may have been a passenger on the bus at the time of the Accident. Therefore, the purposes of this letter are:
>
> (1) to advise you that in light of the number of fatalities and apparently serious injuries arising out of the Accident, OGA Charters' insurance limits may not be adequate to satisfy all such claims; and
> (2) to encourage you to provide immediate notice of any claim you may intend to make for injuries related to the Accident, as we work toward trying to resolve as many claims as possible given the limited amount of insurance and the number of claims.
>
> At the time of the Accident, New York Marine ... insured OGA Charters under Policy AU201600009025 ("the Policy"). The Policy provides Five Million Dollars ($5,000,000) in liability coverage. This is the total amount of coverage under the Policy, regardless of the number of potential insureds or the number of persons with claims as a result of the accident in question.

New York Marine further advised these potential claimants that there had been at least six known lawsuits filed as of the date of the letter, and that it had been made aware of numerous additional personal injury, wrongful death, and survival claims which had not yet become lawsuits. The carrier further advised:

> In our estimation, the claims arising out of the Accident that have been made or that will be made, will, in all probability, exceed the available insurance proceeds if all of the cases and claims ultimately proceed to trial.
>
> As a result, it is the Insurance Company's goal to try to resolve all of the claims within the limits available under the Policy, if possible. Because of the potentially inadequate limits,

> however, the Insurance Company may not be able to settle all claims within the Policy's limits. The Insurance Company thus may have to settle some, but not all of the claims. To attempt to resolve as many claims as possible, we have proposed a joint mediation of all known claimants' interests as soon as possible. Some of the claimants' attorneys already have responded favorably about a joint mediation. No agreement on mediation has yet been reached, however, and no mediation date is presently set.
>
> On behalf of the Insurance Company, if you believe you sustained any injuries as a result of the Accident, I therefore want to encourage you to take the necessary steps to provide notice of your claim as soon as possible. If you advise us that you have a claim, we will add you (or your attorney, if applicable) to our mailing list for future communications relating to the Insurance Company's attempts to resolve the claims.

2. Requesting Additional Information To Evaluate the Claims

In order to fulfill its *Stowers* duties to OGA Charters, New York Marine as part of its initial round of communications with the known claimants also requested additional information about each of the claims to allow it to assess whether a "reasonably prudent insurer" would accept any of the particular demands. The insurer requested the following:

> ... [T]he Company desires to reasonably resolve as many claims as possible in light of the amount of insurance that is available. In that regard, while we acknowledge that you all believe your clients' injuries and related claims are all serious, we would request additional, specific information from each of you regarding your clients' particular claims. We are requesting the information outlined below in order that we may further investigate and reasonably evaluate the various claims in order to resolve as many as possible given the apparently inadequate limits.

With respect to the claims involving fatalities, New York Marine requested information pertaining to any survival damages and wrongful death damages, such as:

- evidence of funeral expenses or other final expenses;
- evidence of any medical expenses incurred by the decedents;
- any medical or forensic reports that provide information as to the time of death and actual cause of the decedents' deaths;
- any witness statements to document whether any of the decedents initially survived the crash, in order to support survival claims for pain, suffering, and mental anguish by the decedents themselves;
- if any of the decedents were providing support or services to anyone claiming wrongful death damages, information regarding any pecuniary losses incurred by those claimants relating to the injury or death of their family member; and
- any expenses incurred by any of the claimants for psychological or medical treatment that they had received relating to the loss of their family member.

For those claims seeking to recover damages for personal injuries, New York Marine requested all available information pertaining to the nature of the claimants' injuries and the medical expenses incurred in the course of such treatment, as well as documentation to support any claims for loss of earnings or loss of earning capacity. New York Marine stressed that this information was essential for it to understand the nature of each of the personal-injury claims in order to evaluate them properly.

Although the *Soriano* doctrine does not expressly impose on insurers an obligation to "triage" competing claims, as long as any settlements are objectively reasonable, New York Marine nonetheless advised the claimants that the requested information was necessary to allow it to evaluate the claims to assess the reasonableness of the settlement demands. The carrier's rationale was that for a settlement to be "reasonable" in order to pass scrutiny under *Soriano*, it could not simply enter into arbitrary settlements without conducting a reasonable investigation. By way of example, and in order to demonstrate that it was acting reasonably in assessing the settlement demands, New York Marine added, "*we would likely evaluate differently a claim involving only a broken arm versus an injury involving paralysis or permanent impairment or disability that might have a significant future life-care component.*"

New York Marine received additional information from a number of the claimants in response to this first round of communications with the claimants and their counsel. However, a number of known claimants and/or their counsel did not respond to the initial letter. As a result, a few days after the first letter but still within the specified period to time to respond to the *Stowers* demands that had been received, New York Marine sent a second letter renewing its request for the information described above.

C. Propose a Global Settlement Approach Via a Group Mediation

Having received enough information to reasonably conclude that at least some of the *Stowers* demands were demands that a reasonably prudent insurer should probably accept if its policy limits were adequate, New York Marine as part of its second letter to all known claimants and potential claimants suggested that the parties agree to suspend the deadlines to accept the various *Stowers* demands and agree to a global mediation of all claims:

> In furtherance of our stated goal to resolve as many of the claims as possible given the limitations on the available insurance, we would also ask that you all consider the possibility of an early, joint mediation. We believe a meaningful settlement discussion could best occur in the context of a joint mediation whereby of all of the claimants and their counsel are present. Because of the number of claimants, getting all the parties together in a group mediation would seem to be the most effective way to address everyone's claims and to be sure that all parties are protected if a settlement can be reached. Please advise as to your thoughts on attempting to resolve the competing claims in this manner.
>
> Nothing in this letter is or should be considered a rejection or a counter to any of the previously referenced settlement demands which some of you have made to date. You should each consider this a request to extend the deadlines of each demand referenced above by 30 days in order to allow more time for us to obtain additional documentation and information regarding everyone involved in the accident. It is our goal to resolve as many of the most serious claims as we can with the limited policy benefits available.
>
> To reiterate, nothing herein should be construed as a rejection of any demand made to date. We wish to extend the deadlines of all outstanding demands by 30 days to enable us to fully evaluate all of the available damage evidence and information and, hopefully, to have a mediation/settlement conference with all counsel for all parties within that 30-day window. If one or more of you refuse our request for a reasonable extension of time in which to respond to your previously mentioned settlement demands, if one or more of you refuse to provide the additional requested damage documents and information requested by us, or if one or more of you decline our request to have a settlement conference/ mediation in the next few weeks, then please be advised that we will have no choice but to assess the incomplete information we have received thus far in the inadequate amount of time which some of you have given us, and we will make decisions to the best of our ability with a full understanding of the protections given by the Texas Supreme Court in this precise circumstance involving multiple claimants and inadequate policy limits.[1]

In conjunction with this letter, New York Marine routed a proposed agreement under Rule 11 of the Texas Rules of Civil Procedure to abate the various demands and agree to a global mediation of all claims. A material term of this proposal was that *all claimants had to agree* to stand down on their *Stowers* demands and agree to mediation, in return for OGA Charters' agreement not to enter into any settlements that would erode the policy limits prior to that mediation. The essential terms of the proposed Rule 11 agreement were:

- On behalf of the clients whom we [i.e., the plaintiffs' attorneys] currently represent, and on behalf of any additional clients that any of us may begin to represent prior to July 29, 2016, we agree to a group mediation of all claims for personal injury, wrongful death, or survival damages arising out of the single-vehicle rollover accident involving a motor coach operated by OGA Charters, LLC, and which occurred on May 14, 2016.
- The mediation shall occur as soon as reasonably practical, but no later than July 29, 2016.
- If all counsel who have made a settlement demand as of the date of this letter agree to a group mediation under the terms set forth in this letter, New York Marine and General Insurance Company, the liability insurer for OGA Charters, LLC, shall make no settlement payments prior to the mediation that would erode the $5,000,000 liability limits available under policy no. AU201600009025, which provides a total of $5,000,000 in liability coverage for the policy period February 23, 2016 – February 23, 2017 ("the Policy").

[1] This last sentence was an indication by New York Marine to counsel for the various claimants that the insurer would entertain the idea of settlements with fewer than all of the claimants under the *Soriano* doctrine.

- Any party who presently has made a settlement demand with a stated expiration date shall extend the deadline for a response until the earlier of 6:00 p.m. on the mediation date or 6:00 p.m. on Friday, July 29, 2016.
- If any party elects to make a settlement demand subsequent to the date of this letter, the deadline to respond to such demand will be no later than the earlier of 6:00 p.m. on the mediation date or 6:00 p.m. on Friday, July 29, 2016.
- This agreement shall take effect only if all counsel who have made a settlement demand that expires on or before June 30, 2016, agree to the terms of this agreement. At this time, such settlement demands have been made by [*two groups of claimants who had made Stowers demands that were set to expire imminently*]. This agreement shall not be effective unless these attorneys also enter into this agreement.
- If you are agreeable to the terms of this proposed agreement, please signify your agreement by printing your name, and by signing and dating this letter where indicated below and returning an executed copy to me not later than noon Central time on Friday, June 24, 2016. If we have not heard from you by that time, we will interpret a lack of a response to mean that you are opposed to the proposed agreement, and we will proceed to evaluate the claims based on the information that has been provided to us.

D. Consideration of Settlement of Individual Claims

Some of the claimants responded favorably to this proposal and agreed to abate their *Stowers* demands and proceed to a group mediation. However, not all claimants agreed to this proposal. New York Marine, through defense counsel for OGA Charters, again contacted all claimants and their counsel to advise that the proposal for a group mediation had not been accepted and that the insurer therefore would begin to entertain individual settlement demands.

E. Settlements Reached With Certain Claimants, But Not All

OGA Charters and New York Marine thereafter entered into settlement discussions with some of the claimants who were willing to back off of their demands for the full policy limits and to make more reasonable demands. As settlements were reached, New York Marine advised the remaining claimants that some settlements had been reached and that the policy limits had been partially eroded by those settlements. New York Marine again offered the prospect of a joint mediation of the remaining claims, in an effort to get all of the remaining claims settled.

As a result of those communications, additional claimants came forward and negotiated settlements that ultimately exhausted the policy limits. New York Marine resolved five of the death cases and several of the personal injury cases with the $5,000,000 limits. A number of the claimants, including a group represented by counsel who had made one of the initial *Stowers* demands, never engaged in settlement discussions at all. Once settlement agreements had been reached with the various settling claimants, defense counsel advised the known remaining parties that the limits had been exhausted.

At this point, defense counsel began executing settlement agreements and obtaining payment instructions for the settlements that had been reached. Those settlements were never funded or finalized, however, as the case came to a grinding halt with the filing of a bankruptcy petition that placed OGA Charters into involuntary Chapter 7 bankruptcy.

VI. THE BANKRUPTCY PROCEEDINGS

The non-settling claimants retained highly competent bankruptcy counsel out of Corpus Christi to institute a Chapter 7 proceeding in the bankruptcy court in McAllen. The non-settling claimants argued that OGA Charters had become insolvent as a result of the large number of injury and death claims and inadequate assets (including insurance) to satisfy those claims. These claimants further argued that the proceeds of the New York Marine $5,000,000 policy were property of the bankruptcy estate. They contended that this justified an order from the bankruptcy court setting aside the unfunded settlements and taking possession of the insurance proceeds to make an equitable distribution among all claimants.

A. Injunction Against Funding The Settlements

To preserve the policy proceeds, the non-settling claimants first had to obtain an injunction to prevent OGA Charters and New York Marine from funding and finalizing the settlements. The bankruptcy court in McAllen entered such an injunction and then instructed the parties to submit briefing on the controlling issue of whether the insurance proceeds were the property of the bankruptcy estate.

B. Insurance Proceeds: Property of the Bankruptcy Estate?

Before the *OGA Charters* case, the rule in the Fifth Circuit seemed fairly clear: if the proceeds of the policy were not payable to the debtor/insured, the proceeds were not property of the estate. Because the proceeds of a liability policy are payable to third parties and not the insured, the general rule in the Fifth Circuit had been that the *proceeds* of a liability policy were not property of the bankruptcy estate. See, e.g., *Louisiana World Exposition, Inc. v. Federal Insurance Co.* (*In re*

Louisiana World Exposition, Inc.), 832 F.2d 1391 (5th Cir.1987), and *Houston v. Edgeworth* (*In re Edgeworth*), 993 F.2d 51 (5th Cir.1993).

In *Louisiana World Exposition,* a corporate debtor purchased liability insurance for its individual directors and officers. *Id.* at 1398. The policies covered the directors' personal liability and legal expenses incurred by reason of their positions with the corporation. *Id.* The Fifth Circuit noted that the directors and officers were the only named insureds and that the policy did not cover the liability exposure of the debtor corporation at all. *Id.* at 1399–1400. As a result, the court held that the liability proceeds were not property of the estate. In doing so, the court distinguished between ownership of insurance *policies* and insurance *proceeds*. *Id.* at 1399–1401 ("The question is not who owns the policies, but who owns the proceeds.").

The Fifth Circuit again addressed the issue in *Houston v. Edgeworth* (*In re Edgeworth*), 993 F.2d 51 (5th Cir.1993). In that case, a doctor filed for Chapter 7 protection shortly after a woman died under his care. *Id.* at 53. After the doctor received a discharge, the decedent's daughter sought approval of the bankruptcy court to file a claim against the doctor's malpractice policy. *Id.* The court held that the daughter could pursue the malpractice insurer because the insurer was not protected by the doctor's discharge, and *the proceeds of the policy were not property of his estate*. *Id.* (emphasis added). The court explained its reasoning as follows:

> The overriding question when determining whether insurance proceeds are property of the estate is whether the debtor would have a right to receive and keep those proceeds when the insurer paid on a claim. When a payment by the insurer cannot inure to the debtor's pecuniary benefit, then that payment should neither enhance nor decrease the bankruptcy estate. In other words, when the debtor has no legally cognizable claim to the insurance proceeds, those proceeds are not property of the estate.

Id. at 55–56 (footnotes omitted). Hence, the court provided what many insurance practitioners believed was a bright-line rule that the liability *policy* itself was property of the Chapter 7 estate but the *proceeds* of the policy were not.

However, the Fifth Circuit panel in *Edgeworth* added an important caveat to its holding, which upon close reading clearly left open the possibility that in the right factual scenario, such as where the policy limits were insufficient to cover all competing claims to the liability proceeds, the proceeds might be viewed as property of the bankruptcy estate:

> [The doctor] has asserted no claim at all to the proceeds of his medical malpractice liability policy, and they could not be made available for distribution to the creditors other than victims of medical malpractice and their relatives. *Moreover, no secondary impact has been alleged upon* [the doctor's] *bankruptcy estate, which might have occurred if, for instance, the policy limit was insufficient to cover appellants' claims or competing claims to proceeds. Consequently, in this case* the insurance proceeds were not part of the estate.

Id. at 56 (emphasis added). For purposes of this presentation, the author will hereafter refer to this part of the Court's *Edgeworth* holding as the "*Edgeworth* exception."

C. The *Edgeworth* "Exception"

Before OGA Charters, there was little case law in the Fifth Circuit discussing or interpreting the "*Edgeworth* exception." Furthermore, no court applying Texas law and interpreting *Soriano* had addressed the situation where the insured, having exhausted its policy limits in settlements, was then subjected to bankruptcy proceedings. As discussed below, the *OGA Charters* case therefore presented the ideal factual scenario to determine whether the exception contemplated in *Edgeworth* would justify setting aside the settlements.

D. Bankruptcy Court's Determination

Following the injunction and the appointment of a Chapter 7 trustee, the parties filed cross-motions for summary judgment that briefed the issue of whether the proceeds of the New York Marine policy in this particular instance were or should be viewed property of the bankruptcy estate under 11 U.S.C. § 541(a) pursuant to the "*Edgeworth* exception." The settling claimants argued that the policy proceeds were not property of the estate and that they should have been allowed to recover the full $5 million in settlements despite OGA's pending bankruptcy proceedings. Conversely, the non-settling claimants contended that the proceeds should be subjected to the bankruptcy court's process of equitable distribution amongst all claimant's creditors.

The bankruptcy court granted summary judgment in favor of the Trustee and non-settling claimants and held that the proceeds of the New York Marine policy were property of the bankruptcy estate. The settling claimants then sought direct appeal to the Fifth Circuit, and the bankruptcy court certified the following question under 28 U.S.C. § 158(d)(2):

> Are proceeds of a debtor-owned liability insurance policy property of the debtor's bankruptcy estate when: (1) the policy covers

> the debtor's liability to third parties; (2) the debtor cannot make a legally cognizable claim against the policy; and (3) the claims by third parties exceed the coverage limits of the policy[?]

E. The Fifth Circuit's Opinion

Thus, the issue squarely presented to the Fifth Circuit in *this* case was whether, under the *Edgeworth* framework, liability policy proceeds are property of the bankruptcy estate when the policy limits are insufficient to cover a multitude of tort claims. The settling claimants argued on appeal that no such fact-specific exception should exist in this case and, if it did, it would contravene both the bankruptcy code and state law under *Soriano*.

At the outset of its analysis, the Fifth Circuit noted that while a debtor's liability insurance *policies* are generally held to be property of the estate, the Court's prior treatment of the insurance *proceeds* has had a complicated history, citing *Sosebee v. Steadfast Ins. Co.*, 701 F.3d 1012, 1023 (5th Cir.2012), *In re Louisiana World Exposition, Inc.*, 832 F.2d 1391 (5th Cir.1987), and *In re Edgeworth*, 993 F.2d 51 (5th Cir.1993).

In *OGA Charters*, the Court emphasized that the framework laid out in *Edgeworth* for the characterization of the liability policy proceeds remains applicable in the Fifth Circuit. *In re OGA Charters*, 901 F.3d at 603, citing *Sosebee*, 701 F.3d at 1023–24 (applying *Edgeworth* to determine whether proceeds of a liability insurance policy were property of the estate); *see also Kipp Flores Architects, L.L.C. v. Mid-Continent Cas. Co.*, 852 F.3d 405, 413 n.11 (5th Cir.2017).

The Court began its analysis by emphasizing that "the inquiry remains, as it has always been, a fact-specific one." *OGA Charters*, 901 F.3d at 603, citing *Edgeworth*, 993 F.2d at 56; and *In re Sfuzzi, Inc.*, 191 B.R. 664, 668 (Bankr. N.D. Tex. 1996) ("[T]he question of whether the *proceeds* are property of the estate must be analyzed in light of the facts of each case."). Thus, the issue in the *OGA Charters* case was whether, under the *Edgeworth* framework, the liability policy proceeds are property of the estate when the policy limit is insufficient to cover a multitude of tort claims.

The Court noted in its previous decisions that it had been careful to leave open the possibility that liability proceeds are property of the estate in cases like this one. *OGA Charters*, 901 F.3d at 604, citing *Edgeworth*, 993 F.2d at 56 (pointing out "no secondary impact has been alleged upon [the] estate, which might have occurred if, for instance, *the policy limit was insufficient to cover appellants' claims or competing claims to proceeds*") (emphasis added); *Vitek*, 51 F.3d at 535 (explaining that we had not yet "grappled" with all of the issues on the proceeds "continuum"); *see Sosebee*, 701 F.3d at 1023 (acknowledging that "in the limited instance of a mass tort action where hundreds or thousands of claims against the debtor's insurer might exhaust insurance proceeds and thus threaten the debtor's estate over and above limits of liability insurance policies[,] [courts have] held the *proceeds* of liability insurance policies *are* property of the bankruptcy estate") (emphasis in original) (citing *MacArthur Co. v. Johns–Manville Corp.*, 837 F.2d 89, 92 (2d Cir.1988); *Edgeworth*, 993 F.2d at 56 n.21). The Court therefore made official what it noted its cases had long contemplated:

> In the "limited circumstances," as here, where a siege of tort claimants threaten the debtor's estate over and above the policy limits, we classify the proceeds as property of the estate. Here, over $400 million in related claims threaten the debtor's estate over and above the $5 million policy limit, giving rise to an equitable interest of the debtor in having the proceeds applied to satisfy as much of those claims as possible. *Sosebee*, 701 F.3d at 1023; *see, e.g.*, *Johns–Manville Corp.*, 837 F.2d at 92–93; *In re Taylor Agency, Inc.*, 281 B.R. 354, 362–63 (Bankr. S.D. Ala. 2001) (holding proceeds were property of the estate when unlikely to satisfy all claims). To be sure, this interest does not bestow upon the debtor a right to pocket the proceeds.

VII. VIABILITY OF *SORIANO* AFTER *OGA CHARTERS*

Generally speaking, the *Soriano* doctrine would seem to remain viable in all but those unusual circumstances that were present in the OGA Charters case. Clearly, the Fifth Circuit did not disapprove of *Soriano* or criticize it. In fact, the Court seemed to give rather short shrift to the insurance arguments. In the single paragraph of the opinion addressing *Soriano*, the Court noted that its holding did not constitute a "collateral attack" on state law (*Soriano*), as the settling claimants had argued. In addressing that argument, the Court wrote that

> [U]nder Texas law, insurers do not incur independent liability solely by reason of entering into reasonable settlements that exhaust or diminish the proceeds available to satisfy other claims. *See Tex. Farmers Ins. Co. v. Soriano*, 881 S.W.2d 312, 315 (Tex. 1994). However, categorizing the proceeds as property of the estate does not involve any sort of determination regarding the negligent-settlement liability of an insurer or the lack thereof. Further, we make no determination as to the validity, enforceability, or propriety of the purported

> settlements. In fact, the bankruptcy court explicitly left "a determination ... on potential encumbrances of Policy Proceeds ... for another day."

From a practical standpoint, most cases involving *Soriano* issues will not justify expending the money to retain bankruptcy counsel to see a proceeding through bankruptcy. Hence, the vast majority of cases involving settlements with fewer than all claimants which exhaust the policy proceeds will not be impacted. In all but the most exceptional cases, it would seem that the insurer's goal and motivation will remain unchanged: to sufficiently investigate the various claims, to be able to enter into *reasonable* settlements as the facts warrant, even if some claims are unresolved.

A couple of issues remain unaddressed, however. The non-settling claimants in *OGA Charters* acted promptly in petitioning the bankruptcy court to place the insured into involuntary Chapter 7 bankruptcy. As a result of their diligence in acting promptly, none of the settlements had been funded at the time they filed the involuntary bankruptcy petition. Whether a different result might have followed had the settlements been funded is not clear. Given the breadth of the Court's holding in *OGA Charters*, its seems doubtful that the status of the funding of settlements would be a significant consideration.

Another issue that is not addressed in *OGA Charters* is the situation where there are claims of which the insurer (or the insured) is not aware. In *OGA Charters*, the feeding frenzy that led to New York Marine receiving numerous settlement demands led to the insurer fortunately being aware of all potential claims before it began entering into settlement negotiations. It is unclear whether a claimant who did not promptly come forward could successfully assert the same equitable arguments that the non-settling claimants asserted in *OGA Charters* to undo what the insurer and the diligent claimants thought was a finalized settlement and a done deal.

Given the realities that settling claimants in a majority of cases require funding in a relatively short period of time, this is a factor that may ultimately have to be addressed in the bankruptcy arena. The promptness with which a settlement is funded therefore should be considered any time that an insurer is settling claims that exhaust the policy proceeds.

RESILIENCE TRAINING: PERFORMANCE AND INTERPERSONAL MANAGEMENT SKILLS FOR A BETTER PRACTICE...AND A BETTER LIFE

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CHAPTER 16

This paper was originally presented at the 7th Annual Firearms Law: What Every Texas Lawyer Needs to Know

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SPEECHES AND PAPERS:

Innovations: Breaking Boundaries in Custody Litigation
"Different Strokes for Different Folks," February 2017

Advanced Family Law Conference
"Direct/Cross of a Tracing Expert," August 2016

Advanced Family Law Conference
"Getting it in and Keeping it Out," August 2016

National Business Institute
"What Family Court Judges Want You to Know," October 2015

Houston Volunteer Lawyers, Family Law Seminar, October 2015
Judge's Panel Discussion

Houston Bar Association, Family Law Section
"Valuation of Retirement and Other Property Valuation," March 2015

Family Law Technology 360: Everything You Need to Know for Your 21st Century Practice
"What Judges Think Is (and Isn't) Persuasive With the Use of Technology in the Courtroom," December 2014

Texas Lawyer CLE Breakfast
"How to Make Your Case in Family Court," June 2014

HVL Family Law Seminar
"How to Make a Judge Happy," May 2014

37th Annual Marriage Dissolution Institute
"Default Judgment Practices," April 2014

28th Annual Family Law Conference
"A Conversation with the Judges: The Ideal Lawyer," March 2014

Advanced Family Law Drafting Course
"Enforcement and Contempt Essentials," December 2013

39th Annual Advanced Family Law Course
"Enforcement – Mock Trial," August 2013

36th Annual Marriage Dissolution Institute
"How to Take a Default Judgment and Hold It," April 2013

27th Annual Family Law Conference
"Moving Away? Residency Restrictions," March 2013

Houston Bar Association, Family Law Section
"Tax Returns, Decoded," February 2013

HBA Enforcement – A Mock Trial Presentation
"Property Enforcement," November 2012

Texas Military Forces Joint Legal Workshop
"A View from the Bench," September 2012

38th Annual Advanced Family Law Course
"The Texas Story: Implicit Bias and Disproportionality," August 2012

HBA Conference on ADR
"What's New in Family Law Mediation," May 2012

35th Annual Marriage Dissolution Institute
"Marriage Dissolution 101 – Judges Panel," April 2012

HBA Family Law Institute
"Reimbursement," April 2012

HBA Essentials of Family Law Evidence
"Expert Witnesses: Pitfalls and Warnings," November 2011

National Business Institute
"What Family Court Judges Want You to Know," November 2011

Annual Civil Judicial CLE
"Family Law and Domestic Violence," August 2011

25th Annual Family Law Conference
"Fine Tuning Your Case for Court," April 2011

2011 HBA Continuing Legal Education
"Meet the New Judges," April 2011

Texas Center for the Judiciary
"Beyond the Bench," Team Leader, April 2010

South Texas College of Law Family Law Conference
"Enforcement: Nuts & Bolts," March 2010

National Institute for Trial Advocacy
"Trial Skills for Juvenile and Family Courts," February 2010

25th Annual Conference – Texas Association of Domestic Relations Offices
"View from the Bench on Modification of Child Support," November 2009

HBA Ad Litem/Amicus Boot Camp, September 2009
"Q&A: Ask the Experts"
"Perspectives from the Bench and in Mediation"

Advanced Family Law Course
"Changes in SAPCR Issues and Trends for the Future, August 2009

South Texas College of Law Family Law Conference
"Fine Tuning Your Case for the Judge," March 2009

South Texas College of Law Grandparent and Kinship Care Seminar
"The Practical Approach to and Mechanics of Pursuing Conservatorship," November 2008

South Texas College of Law Family Law Conference
"Forms, Checklists and What to Bring at Entry," March 2008

University of Texas – The Definitive Short Court on Parent-Child Relationships
"Presenting Your Temporary Order to the Court," November 2007

National Institute for Trial Advocacy
"Trial Skills for Juvenile and Family Courts," November 2007

South Texas College of Law Family Law Conference
"Getting Information from Your Client and Presenting It to the Court," February 2007

2006 HBA Family Law Institute
"Prosecuting & Defending the Child Support Enforcement Case," March 2006

South Texas College of Law Family Law Conference
"Parenting Plans and Parenting Coordinators," February 2006

2004 HBA Family Law Institute
"Child Support: They Owe It, Now Go and Get it," April 2004

Burta Rhoads Raborn Family Law Inn of Court
"Uniform Parentage Act," October 2003

South Texas College of Law Family Law Conference
"The Initial Interview: Forms and Checklists," February 2002

South Texas College of Law Family Law Conference
"Winning Strategies and Tactics for Temporary Hearings: Property, Support, Custody and Extraordinary Relief," February 2001

3rd Annual Family Law Institute – South Texas College of Law
"Advocacy with Time Constraints or "I have a ten hour hearing and the Judge has one hour," March, 2000

South Texas College of Law Family Law Conference
"Checklists and Forms You've Got to Have, including a Discussion of How to Keep your Clients Informed as to Court Requirements and Ongoing Ethical Obligations," February 2000

9th Annual South Texas College of Law Family Law Conference
"Unusually Obtained Evidence," February 1999

7th Annual South Texas College of Law Family Law Conference
"Recognizing Reimbursement When You See It," April 1997

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Mark is a past president of the Houston Trial Lawyers Association, an organization committed to the rights of people who must seek redress in law. Mark is a Life Fellow in the Texas Bar Foundation, the largest charitable-funded bar foundation in the country. He is a member of the American Bar Association, the State Bar of Texas and the Houston Bar Association. Mark also taught as an Adjunct Professor at South Texas College of Law for more than twenty years. He served as the 2011 President of the South Texas Alumni Association, and is a frequent CLE lecturer and contributor. He has served on the Board of Directors for South Texas College of Law while President of the Alumni Association. Mr. Murray has been recognized by Klein Independent School District on its Alumni Hall of Honor Wall. He received the 2014 South Texas College of Law Alumni Impact Award and was further honored with the establishment of a scholarship in his name.

Born in Colorado, Mark was raised and educated in Texas, where he received his B.A. from Baylor University and his J.D. from South Texas College of Law. Mark's advocacy skills in law school earned his admission to the esteemed Order of the Barristers. After graduating law school, Mark joined the firm of Tucker, Hendryx and Gascoyne, litigating cases for those who had been sued. Mark began working for injured individuals five years later when he joined the firm of Abraham, Watkins, Nichols, Sorrels, Matthews & Friend. Mark joined John W. Stevenson, Jr. in 2005 and continues his practice today as a partner at Stevenson & Murray.

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Personal Injury Trial Law, Texas Board of Legal Specialization, 1996

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RESILIENCE TRAINING: PERFORMANCE AND INTERPERSONAL MANAGEMENT SKILLS FOR A BETTER PRACTICE...AND A BETTER LIFE

I. OUR SEARCH FOR HAPPINESS AND BALANCE

Do you ever look at really happy people and wonder what they have that you don't have?

You see that colleague who comes in whistling to work each morning, and wonder why his world is different from other's? And despite all your hard work, your significant other always complains that you never spend enough time with the family. How does 'the whistler" balance all those demands?

What is the key to being successful and happy? Many psychologists call it Resilience and Mental Balance.

> "Resilience is that ineffable quality that allows some people to be knocked down by life and come back stronger than ever. Rather than letting failure overcome them and drain their resolve, they find a way to rise from the ashes".[1]

> "Mental Balance - the healthy psychological state of someone with good judgment; it is someone that encompasses Mental Soundness-the healthy psychological state of someone with good judgment and Mental Health- the psychological state of someone who is functioning at a satisfactory level of emotional and behavioral adjustment."[2]

How do busy lawyers incorporate these principles into their busy lives, staying health, positive, and effective? It's all about knowing yourself, your profession, and finding your own productive balance.

II. TEN TIPS FOR LAWYERS DEALING WITH STRESS, MENTAL HEALTH, AND SUBSTANCE USE ISSUES

> "For those practicing law in Texas, it may be no surprise that lawyers suffer very high rates of mental health and substance use disorders. Lawyer are handed their clients' worst problems and are expected to solve them. For decades, researchers have looked at the strenuous lifestyle and bad habits of lawyers. A recent law review article noted that attorneys have the highest rate of depression of any occupational group in the United States.[3]"

Some of the most common and serious issues found in attorneys across the state of Texas are:

- Anxiety Disorders
- Substance Use Disorders and Process Addictions
- Depressive Disorders
  - Major Depressive Disorders
  - Persistent Depressive Disorders
- Compassion Fatigue and Burnout
  - Secondary Traumatic Stress
  - Burnout
  - Suicide

Practicing of law is difficult, demanding, and exhausting. Engaging in an adversarial practice (like trial work) is particularly taxing on our continuing capacity for empathy, and a constant challenge to self-esteem, as we suffer through difficult arguments and unexpected losses.

To remain mentally healthy and productive, we must have strategies to surmount those regular obstacles.

When dealing with the spectrum of problems faced by Texas attorneys, there is no single solution which will take care of everything.[4]" The top ten tips to helps attorneys combat some of these issues are:

1. Take action! If you, or an attorney you care about, need help, don't put it off.

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[1] https://www.psychologytoday.com/basics/resilience

[2] https://www.thefreedictionary.com/mental+balance

[3] https://www.texasbar.com/AM/Template.cfm?Section=Wellness1&Template=/CM/ContentDisplay.cfm&ContentID=30326

[4] https://www.texasbar.com/AM/Template.cfm?Section=Wellness1&Template=/CM/ContentDisplay.cfm&ContentID=30326

a. Get professional help
b. Take the steps which are suggested
c. Get proactive
d. Call Texas Lawyers Assistance Program. https://www.tlaphelps.org/

2. Set boundaries – while client contact and updates are important, don't be a prisoner of the digital world
3. Connect with others – isolation is often a precursor to trouble. Collaborate and socialize
4. Practice acceptance – few of us mortals can control the fates, or traffic. Always pick your battles.
5. Learn to relax – this is often the most difficult task for those of us who stay in motion constantly.
6. Practice positive thinking – negative "self talk" often precedes depression.
7. Help others – the benefits of helping others to your own mental health cannot be underestimated
8. Live in the present – finish today's task list as part of today's world, and value your own time
9. Expand your spirituality or consciousness – whether it's religion, meditation or self-care, do it!
10. Keep it real - don't overestimate your skills in lieu of preparation, and always value those around you

III. BENEFITS OF RESILIENCE AND BALANCE

"Psychologists have identified some of the factors that make someone resilient, among them a positive attitude, optimism, the ability to regulate emotions, and the ability to see failure as a form of helpful feedback. Even after misfortune, resilient people are blessed with such an outlook that they are able to change course and soldier on."[5]

"Living in balance means knowing what's important to you in your life, and maintaining as best you can, an equilibrium of attention between each of those priorities".[6]

IV. TRAITS OF THE HAPPIEST ATTORNEYS

Some of the most common traits that you will find in successful and happy attorneys are:

A. They are active in their community and state bar.
B. They are likeable and friendly.
C. They have high energy and go the extra mile.
D. They have confidence and inspire confidence in others.
E. They have emotional intelligence.
F. They take responsibility.
G. They take pride in advocating for their clients.
H. They have a desire to give back and pay it forward.
I. They are continuous learners.
J. They are prepared.
K. They know how to deal with stress.
L. They respond quickly and don't put things on the back burner.
M. They look at, and think about, the small details.
N. They have a purpose and goals.
O. They have spiritual and emotional fulfillment.
P. They are grateful.
Q. They are willing to work hard.
R. They are willing to admit when they are wrong.
S. They know how to manage and delegate.
T. They have a sense of humor and an ability to laugh at themselves.

Of course, that doesn't mean that every successful person has every one of these traits, but it does provide a laundry list for you to do an internal evaluation about what might be missing in your own life and what might be blocking your progress to your own goals and fulfillment.

According to a recent study[7]:

- **Only half** of lawyers are very satisfied or satisfied with their work.
- Lawyers are the most frequently depressed occupational group in the US.
- Lawyers' rank 5th in incidence of suicide by occupation.
- Chronic stress can trigger the onset of clinical depression.
- Depression and anxiety is cited by 26% of all lawyers who seek counseling.

It is these issues that have now sparked a national debate on the topic and a move to try to increase the resilience

[5] https://www.psychologytoday.com/basics/resilience

[6] http://www.mindforlife.org/live-in-balance/

[7] http://www.daveneefoundation.org/scholarship/lawyers-and-depression/

and balance in the lives of our lawyers. Gone are the days of any stigma to this topic. We need to take responsibility of our happiness and success and the happiness and success of our colleagues!

V. LESSONS FROM THE MILITARY

In 2008, the U.S. Army recognized the correlation between military troops suffering from low mental health status and certain ongoing disorders. These soldiers were found to most commonly have PTSD, substance use disorders and more. In an incredibly insightful move, they began to do research on how to treat and seek ways to proactively prevent these issues. Historically, the military has not been known for its open-minded or feel-good beliefs, but in a move that we should find instructive, they created a program to cultivate a culture of resilience in their troops and improve leadership.

The Army had to overcome years of ingrained resistance to anything that might be too "emotional". Asking for help in the past was seen a sign of weakness, and now they are faced with the idea of training their soldiers to ask for the one thing they resisted for so long: help --which is now seen as a strength of character! The newfound prevalence of mental issues in the military through the Master Resilience Training (MRT) program has now allowed an open conversation for those who suffered in silence to no longer feel alone and for those who may one day battle one of more of these issues to know how and when to seek help.

The Army's MRT program consisted of 6 core competencies.[8]

1. Self-awareness
2. Self-regulation
3. Optimism
4. Mental Agility
5. Strength of Character
6. Connection

The Army has recently reported that this program is having positive results and they will continue with it despite funding issues. They have seen a turn-around in attitude from those who once were skeptical and have attended and implemented these core ideas into their lives.[9]

No, attorneys aren't soldiers, but you can't deny if you have ever tried a big case, it feels like you have been to war! Some of the skills that the Army teaches their soldiers can also be applied to anyone who faces difficult situations each day.

For more information on the Army's MRT program, please visit: https://www.army.mil/readyandresilient/

VI. SKILLS TO DEVELOP FOR SUCCESS

Start with your mental attitude: One of the most beneficial things you can do for yourself is to control your thoughts and not let your imagination take you on a cycle of "what's the worst thing that can happen" scenario. This is not a new disease. The tendency to worry about worst case scenaria was named *"Praemeditacio Malorum"* by Seneca the Younger 2,000 years ago. He recognized it then as an impediment to progress. Recently on the hit T.V. show "This is Us", Randall Pearson, one of the main characters on the show, and his wife Beth, played a little game when they were having a stressful moment in their lives where they would say aloud the things that they were afraid could happen. Their scenarios built from both of their girls ending up as pole dancers to them being murdered in their beds by their daughters. Later Randall plays this game with his TV brother Kevin when they are looking for their sister (the bride) on her wedding day. Randall says "What if we never find her and we have to tell Toby (the groom) that the wedding is off and he is so shocked that he has a heart attack and dies". Kevin looks at him with shocked eyes and says "Jesus Randall!" This semi-comedic scene illustrates how a problem can turn into a stressful overload and becomes unconducive to solving your problems or situation.

From time to time, almost everyone wakes up at 3:00 a.m. thinking about events that happened during the day, or wakes up angry at your or someone else's actions. Have the problems or issues plagued you so that you couldn't get enough sleep? Well, here are a few strategies that might help you out.

1. Right Spotting or Looking For the Good Stuff

This skill goes by many names, but the idea is to focus on the positive. Grab a notebook or legal pad and put it by your bed. At night before retiring spend a couple of minutes writing down at least **3 good things that happened to you that day** and reflect on them and how it made you feel.

For example - your list might include:

(1.) When I went to the kitchen this morning my spouse had made pancakes for breakfast and already had the kids dressed and at the curb waiting for the school bus.

[8] https://positivepsychologyprogram.com/wp-content/uploads/2017/07/Master-Resilience-Training-Presentation.pdf

[9] http://www.mccoy.army.mil/vnewspaper/newspaper/realmccoy/02242012/MRT.htm

(2.) After all the cloudy weather this week, it was finally sunny today and I got in a good walk at lunch.

(3.) The Judge accepted my request for a change of venue and now my client really has a good chance of winning.

Nothing **but positive** things can go in this notebook that you write in before bedtime! Research[10] indicates that this exercise has proven to:

- Increase happiness
- Decrease depression
- Increase moments of positive emotion, such as gratitude
- Improve psychological capacities, such as hope and optimism
- Improve health and physical function

What could it hurt? Give it a shot!

2. Emotional Intelligence

The way we act is often controlled by our emotions and this can lead to dangerous situations. You might have represented a client or two because they acted in a situation before they thought it through, leading to the claim against them which you're now handling. You however, are smarter than that!

Some law schools have courses in communication and emotional intelligence. If you were one of the lucky ones that had training in this area then you probably already have some of these skills. For those who didn't have training in this area, it can be very beneficial training for your success.

> "Emotional intelligence is the ability to identify and manage your own emotions and the emotions of others. It is generally said to include three skills: emotional awareness; the ability to harness emotions and apply them to tasks like thinking and problem solving; and the ability to manage emotions, which includes regulating your own emotions and cheering up or calming down other people."[11]

People are more productive when their thoughts are flexible, accurate, and thorough. Being an attorney is challenging enough without a full awareness of your thoughts and emotions. You must have the ability to understand other people, empathize with their situations, and work in harmony with them.

There are five steps to emotional intelligence.[12]

1. Self-awareness - the ability to recognize your own emotions.
2. Self-regulation – self-control, management of impulses, being flexible.
3. Motivation - setting personal goals, commitment, optimism, and action.
4. Empathy - understanding and recognizing the needs and feelings of others.
5. Social skills - sending a clear message, negotiating and resolving disagreements, relationships and cooperation.

Everyone at one time has said to themselves "Did I really do that?" or "Did I really say that"? Yes, you probably did. Life is a learning experience and you have to forgive yourself, learn from your mistakes, and move forward with better intentions the next time around. One important life lesson to remember is that you can do 29 great positive things in the month, but people will most likely remember the 1 other day of the month when you lost your temper or made a comment you regret. Quickly those other 29 positive acts dim in comparison.

There is a skill taught in resilience classes called the S.T.O.P. technique that is also covered in the book A Mindfulness-Based Stress Reduction Workbook.[13]

> The S.T.O.P Technique stands for:
>
> **S**top. Be still, put it down, and quit what you are doing.
>
> **T**ake several deep breaths and focus on your breathing.
>
> **O**bserve what is going on in your body. The tension or other sensations.
>
> **P**lan and **P**roceed. Take a moment to consider your next course of action and the consequences thereof.

To learn more about emotional intelligence or work on your skills there are several really good articles on the

[10] Gander, F., Proyer, R.T. Ruch, W. , & Wyss, T. (2013) Journal of Happiness Studies, 14(4), 1241-1259.

[11] https://www.psychologytoday.com/us/basics/emotional-intelligence

[12] https://psychcentral.com/lib/what-is-emotional-intelligence-eq/

[13] https://www.amazon.com/Mindfulness-Based-Reduction-Workbook-Harbinger-Self-Help/dp/1572247088

web, or you can check out this book by Travis Bradberry and Jean Greaves, Emotional Intelligence 2.0.[14]

3. Time Management

Attorneys today can be amazing in the number of things they can pack into their busy schedules. They can be equally amazing for the number of things they don't get to in a timely manner.

Does it surprise anyone that the most common complaint against lawyers in the United States is: "My lawyer won't return my calls or emails" in a timely manner. To run a truly success office it is extremely important to master time management and law office management skills.

The number one advice that can be given for time management organization is to learn how to say "No". It is very tempting to try to be everything to everyone and work on all your cases, attend every ball game, do some pro bono work, chair your favorite committee, be the best spouse/significant other, and parent. In reality accepting too many different commitments can cause you to only perform at an average or below average level and not allow you to operate at your full potential. You have to set some priorities and these priorities will change from week to week and year to year. This year you might have time to chair the committee, and next year you might have time to take on 10 new clients, but probably not all in the same year. This month you might have an anniversary or other big event and you might have to bite the bullet and refer that new client to an associate or another firm to keep your life in order and operate at your A game to all the involved parties. It is a delicate balance.

A few tips to help you manage your time include:

1. **A good calendar**. Whether you are high tech and use the latest APP or you prefer a big chief tablet and number two pencil, you need to remember to write it down!
   a. Microsoft Outlook has a calendar function that is quick and easy to use.
   b. There is an APP called **Days Counter**[15] that is great for scheduling big events or cases and allows you to schedule in important dates like your spouse's and kids birthdays.
   c. **COZI**[16] is a great APP that allows several users at the same time. So if you want your assistant to have access to your calendar or your kids or your spouse, this is a fantastic organizational tool. Your whole family or office can coordinate your calendars.
   d. There are several professional electronic organizers just for lawyers, like the one from Lexis Nexis.[17]
   e. And for those of you who prefer paper and pen, there is the Planner Pad[18] or any week at a glance calendars.
2. **Look at your calendar daily!** It does no good to write it down if you never look at it!
3. **A clutter- free office**. Clean it up, file it away and keep it that way!
4. **Keep clean records** of your billable hours. And record your time daily. If you need a reminder, always look at your own outgoing emails for evidence of what you worked on and who you communicated with in the process.
   a. PC Law [19] can help you streamline your practice.
   b. CLIO[20] is a time tracking and billing software system.
   c. Law Pay[21] is a quick and easy billing system that lets you customize.

---

[14] https://www.amazon.com/s/?ie=UTF8&keywords=emotional+intelligence&tag=mh0b-20&index=stripbooks&hvadid=77721781951918&hvqmt=e&hvbmt=be&hvdev=c&ref=pd_sl_84v5r6tsqw_e

[15] https://play.google.com/store/apps/details?id=com.arkadiusz.dayscounter

[16] http://www.cozi.com/

[17] http://www.lexisnexis.com/business-of-law/solutions/practice-management/schedule-all-appointments-with-electronic-calendaring

[18] https://plannerpads.com/?SID=88262meestknar40b0f5d9uh64

[19] https://www.lexisnexis.com/business-of-law/products/practice-management/pclaw

[20] https://www.clio.com/billing-tracking/?sem_account_id=7189143421&sem_campaign_id=1345187478&sem_ad_group_id=56434404698&sem_device_type=c&sem_keyword=%2Blawyer%20%2Bbilling%20%2Bsoftware&sem_matchtype=b&sem_ad_id=267057259863&sem_network=g&sem_target_id=kwd-295817365439&sem_feed_item_id&utm_source=google&utm_medium=cpc&utm_term=%2Blawyer%20%2Bbilling%20%2Bsoftware_b&sem_location_id=9060225&sem_placement&sem_placement_category&utm_campaign=TS%3ATX%3ANBR%3ATX%3ASV%3AX%3AStateBar&gclid=Cj0KCQjwre_XBRDVARIsAPf7zZhD9tq26gnNJMUm3ejArW7Slt_-es_EWxtYnQCHHISg53zK17lk6D0aAm7kEALw_wcB

[21] https://lawpay.com/

5. **Stay on time**. Don't let that consult that should take one hour run into two. Get a system in place like a timer that goes off on your smartphone or an assistant who buzzes in at the end of the allotted time.
6. **Priority lists.** What are your top 10 items to do each day or week? Write it down and try to stay focused. Emergencies always pop up and throw us off track, but if you are working ahead, you won't be left in the dust when it happens to you.
7. **A back-up person**. There should be someone in your life or office that can tend to business when you are down and out. Whether you are locked up in an important trial or surfing in Hawaii, don't let your business suffer.

    a. Use an out of office message on your email.
    b. Let clients know in advance that you are out of the office for the week and will not be returning calls until you return. Don't wait for people to become angry before you let them know what is going on.
    c. Assign someone to return calls and emails in your absence
    d. Have a **number for emergencies** that someone in your office can reach you on. Yup, even on vacation. It's better to deal with it and move on than come back to an empty office and no clients.
    e. Leave some wiggle room. Try not to schedule out every single minute of your day. Leave some time for the unexpected. Everyone needs some buffer space.

4. Law Office Management

1. In 1995 the State Bar of Texas put into place a Law Practice Management Program. There is a website available at http://texaslawpracticemanagement.com/ that provides how-to brochures, free resources, publications, and available vendors.
2. The Texas Young Lawyers Association has a website that has a program called the Ten-Minute Mentor that includes a very large selection of law office management topics. http://www.tenminutementor.com/
3. TexasBarCLE has thousands of articles on their website in the online classroom on law office management. https://www.texasbarcle.com/CLE/LPDirectory.asp?lCategoryID=3

No excuses! The information is out there for you to be successful!

VII. ACHIEVING WORK/ LIFE BALANCE

1. Relationship Management

Remember who is important in your life and treat them like they are important. Even on your busiest days, take time for a kind word, a hug, or more. Communication is a big factor in the success of your personal relationships.

a. Keep your calendar open and available to your family so they know in advance what days will be hectic and what days are free. Even better, notify your significant others of upcoming major events as soon as possible.
b. Try to keep your commitments that you promise to your significant others. Some lawyers do this by having a "bright line" between office and home, and not bringing office work home to invade that boundary.
c. Don't be defensive. Accept the fact that sometimes everyone messes up and apologize.
d. Make sure you calendar all those special dates like birthdays and anniversaries. Amazon is a life-saver for getting gifts out on time. 1-800 flowers is always good in a pinch. And for you female lawyers out there make a note of this link - www.mancrates.com.
e. A great new customizable gift site is https://knackshops.com/. A good gift can soothe a lot of ruffled feathers!
f. Pick your battles. Try not to get into argument over small petty things. Everyone has their own unique way of doing things. Save your arguments for the big stuff.
g. Fight fair. Get your temper under control before broaching issues. Talk in a calm manner and be specific about your wants, needs, likes, and dislikes.
h. Don't bring up past resolved issues. Get over it and move on. We are all adults here and stuff happens. Leave it in the past where it belongs.

2. Find Your Purpose

Psychologists have known for decades that people who have goals and purpose in life are much happier than those who don't.[22] It boils down to what you want to do with your time that is important to you.

[22] https://greatergood.berkeley.edu/article/item/how_to_find_your_purpose_in_life

Finding your purpose in life means getting to know yourself.

a. What do you love to do?
b. What are you good at? Or what are you ok at and want to be good at?
c. What are your personal values?
d. How would you like to be remembered? What will your obituary say?
e. What are your priorities?
f. Is there something big you want to change?
g. **Passion and Action = a purposeful life.** What's your passion and what action will you take?

Here are a few examples of what some peoples' purpose in life looks like.[23]

> "I want to be a spokesman for wildlife issues and help people connect their daily actions to saving the wildlife on this planet."
> "... grow nutritious, organic food that helps people grow and thrive and have vibrant health."
>
> "...create an online voice for autism to educate parents, teachers and patients about the latest developments and coping strategies."
>
> ".... working to reduce teen suicides caused by bullying and a lack of self-worth. I want to help teenagers discover that being different is OK and create hope when they feel their life is crashing down around them and nobody will understand what they are going through."
>
> "... make people feel beautiful by cutting and styling their hair in a way that expresses who they are and where they are going in life."
>
> ".....help online business owners be fully booked by using my web design and SEO skills to make sure customers and clients can find them online."
>
> ".....document and archive my family history so that family members in the future will know where they came from and have pictures, stories, and mementos of those that have passed before them."

3. Financial Stability and Responsibility

Few lawyers are trained to carefully create a budget which incorporates their financial needs and the income that requires, broken down on yearly, monthly, weekly and work-day needs. Doing that gives the practicing lawyer a daily financial microcosm, which can alleviate stress and promote better business sense. Yet, most lawyers simply say, "I just need to make as much money as I can, and that will have to do." It is a backwards way of engineering your life.

As you will see below, there are definite steps to financial security. But be advised, don't indulge what the rest of world might think of you, as presciently described in the following passages:

> "The rest of the world thinks that you are a rich lawyer, whether you are rich or poor. The rest of the world thinks that you have more money than they do, whether you do or don't. The rest of the world is quite willing to separate you (the perceived rich lawyer) from your money. If you are not careful, they will. It has not happened to me often, but when it has happened it has been painful."
>
> "*I was once involved in a very large case that involved twenty-six insurers in London. I spent two and a half weeks taking depositions in London. If you want to know what expensive is find out what a British court reporter charges you. Wait 'til you get the bill from the conference center for the time you spent watching witnesses evade your questions. As a cherry on top of the sundae, on the first or second day of my two and half week sojourn, a wonderfully nice British lady asked if I would like some cookies. Naively, I sure "sure". Magically a tray of cookies arrived, and we had them every morning from then on. Then I got the bill; it seems we ate over a thousand dollars' worth of cookies in two and a half weeks. I could have bought three packages of Chips Ahoy and Oreos for about $20. When I went back to London for the second round of meetings we did it without the cookies.*"[24]

Get Thee To A Financial Advisor!

Start planning your retirement early on. Know what you need to live on. The State Bar of Texas member

[23] http://www.manifestyourpotential.com/self_discovery/5_discover_life_purpose/statement_examples_of_life_purpose.htm

[24] Harry Herzog, Law Firm Financials, March 7, 2018 page 7.

benefits and services has several discounts and resources to help you plan[25].

Know The Appropriate Elements Of Lawyer Budgeting:

Translating expenses and income needs into a daily practice.

First, you will need to know how to set your hourly rates and look at them often to make sure you are charging appropriately.

1. What is reasonable & necessary for you?
2. What is a client willing to pay?

You cannot charge less than you need to support yourself (and often your family) given all resources available to you. But, you can't charge more than a fair/reasonable rate in your community for your area of practice.[26]"

a. Step One: What is charged in my community?

   1. Ask attorneys in your practice area
   2. Ask the judges in your area

b. Step Two: How do I figure out my personal budget?

   1. Annual Goal
   2. Daily Goal (based upon 48 weeks per year = 20 billing days per month)

   The best formula I have found is the 4-HOUR Per Day Rule: A lawyer who is correctly priced in his/her community should be able to survive on billing and collecting 4 hours per day.

c. How do I calculate the 4 hour per day method?

FORMULA

Add - All personal expenses, plus Law office expenses. Let's assume $12,000 after taxes for your current personal lifestyle and your law office overhead is $10,000 a month.

Total:

$ 12,000 personal expenses + $10,000 law office expenses = $ (22,000 a month gross)

(this assumes you are including 30% for social security, Medicare, and taxes in your monthly needs)

20 billing days x 4 = 80 hrs. a month

$22,000 ÷ 80 hrs.

$275.00 HOURLY RATE

So, you can see with that calculation that your law office will succeed with the 4-Hour Method if:

- Your hourly rate is within the accepted rate for your community; and
- You monitor/check each day to make sure you are confident you can bill and COLLECT for 4 hours.

d. Billing and Collecting: The "Lifeblood" of Your Practice

   1. Record time diligently
   2. Send bills out on time
   3. Give clients payment options
   4. Incentivize them to pay
   5. Follow up on unpaid items

e. Using a Trust Account
   What belongs in an IOLTA (Trust) account?[27]

   1. Client funds which have not been earned by you.
   2. Client funds being held in escrow for an event or contract or Costs

What doesn't belong in there?

1. Your Money! When you earn it, take it out and transfer to your operating account.
2. Non-refundable retainers, absent agreement to contrary (non-refundables are similar to Flat Fee)

[25]https://www.texasbar.com/AM/Template.cfm?Section=Member_Benefits&Template=/memberbenefits/sections/financial.cfm

[26] Claude Ducloux, What I Wish I'd Known When I Started My Practice, February 2018, pages 10-13

[27]https://www.texasbar.com/Content/NavigationMenu/ForLawyers/ResourceGuides1/TrustAccounts/default.htm

4. Physical Wellness

Are you engaged in the process of physical wellness?[28]

- Do I know important health numbers, like my cholesterol, weight, blood pressure, and blood sugar levels?
- Do I get annual physical exams?
- Do I avoid using tobacco products?
- Do I get sufficient amount of sleep?
- Do I have an established exercise routine?

If you answered "No" to any of the questions, it may indicate an area where you need to improve the state of your physical wellness.

Physical wellness will improve the quality and length of your life. It elevates your mental capacity and regular exercise can help reduce stress, tension, and depression. No one is telling you to train for the Olympics! Start off slow and build your endurance. One of the worst things that you can do it to go out and pretend to be an iron man for 4 hours in a day and be so sore you don't want to exercise again for a month.

Check out this great article from WebMD on starting a program - **Fitness 101 - Start Low and Go Slow**[29].

If you are already exercising and in pretty good shape, challenge yourself! Recently two Houston attorneys have stretched their athletic limits at ages 53 and 61. The first has been in training this year to take part in the 2018 Escape from Alcatraz Triathlon.

> *"Triathletes will hit the water at 7:30 a.m. to embark on a challenging 1.5-mile swim from Alcatraz Island to the shoreline of Marina Green, an 18-mile twisting bike ride through the Presidio, and an 8-mile trail run out to Baker Beach and up the infamous 400-plus step Sand Ladder. To finish the race, triathletes will follow a path back under the Golden Gate Bridge, pass Crissy Field, and finish on the grass at Marina Green."*[30]

The second attorney has been in training to make it to the Texas State Amateur Tennis Competition. To make it to that level, you must qualify at several local level competitions. At his first tournament of the season he was defeated in the second round after 3.5 hours on the court by a man half his age, but he hasn't given up. He was back in another tournament recently playing a young man who was so fast on the court he wasn't sure he wasn't 'part-jackrabbit.'

Both of these men have never looked or felt better! You can do it too. It doesn't have to be a triathlon or tournament, **just move and make it a good habit.**

5. Connection

Whether you are an introvert or an extrovert you need contact with other people. You need connections in your life to feel grounded and well. Humans are wired to need social interaction, and not just any social interaction; you need to connect with your people!

Your people are other attorneys who do what you do. They know the same type of problems and cases that you see on a daily basis. They have the same struggles with staff and office management. They have the same relationship issues that you do and they have probably tried something that you haven't.

So, how do you connect with these people? Join state and local bar organizations[31]. Join practice specific organizations like SBOT sections[32]. And then get out there and go to the lunches and the dinners and the CLE's and talk to your neighbor. Exchange business cards or bump your smartphones. As an added bonus of networking and connecting, the ABA says that 80% of clients come from trusted sources such as fellow attorneys.

Claude Ducloux, an Austin lawyer (and co-author in this article) who has been heavily involved in bar work reports that he is often asked, "Does any of your bar work actually result in business?" He routinely responds, "Absolutely. My connections with hundreds of attorneys throughout Texas have resulted in more referrals than I can count." So, make those connections. They work.

VIII. CONCLUSION

The military says "Be all you can be"!

Nike says "Just do it"!

L'Oréal says "Because You're Worth It"

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[28] https://wellness.ucr.edu/physical_wellness.html

[29] https://www.webmd.com/fitness-exercise/features/fitness-beginners-guide#1

[30] http://www.escapealcatraztri.com/news/2018/elite-field-of-professional-triathletes-set-to-compete-in-2018-escape-from-alcatraz-triathlon

[31] https://www.texasbar.com/AM/Template.cfm?Section=Local_Bar_Services

[32] https://www.texasbar.com/AM/Template.cfm?Section=Find_Sections_and_Divisions&Template=/CM/HTMLDisplay.cfm&ContentID=39932

> Winston Churchill said "Some people dream of success while others wake up and work hard at it."

There is a reason that there are no company mottos that tell you to go out and have a sucky day. There is a reason that you tell someone to "Be Careful" instead of "Don't have a wreck".

Humans subconsciously listen to the message and hear the main words as in this example, "careful" and "wreck". Humans are driven through their unconscious mind, which is incapable of absorbing the negative "don't". For example: Hold your coffee is absorbed in the unconscious mind, don't drop your coffee, don't spill your coffee, and don't burn yourself on hot coffee is incapable of reaching the unconscious mind[33].

You are in control of your own life and it is much too short to be unhappy. However, you can't sit around and wait for happiness to find you. **You have to find happiness.** You have to have balance and resilience. Make room for those activities which make you happy and satisfy your soul.

> "If you want to change your life for the better, start changing your 'don'ts' and 'cant's' into positive thoughts so that you're unconscious mind is dwelling on success instead of failure"[34].

Care about you. Work on you.

[33] http://www.sacredphysicality.com/cant-not-do-it

[34] http://www.sacredphysicality.com/cant-not-do-it

RESOURCES

Texas Lawyers Assistance Program
https://www.texasbar.com/AM/Template.cfm?Section=Texas_Lawyers_Assistance_Program1&ContentID=37221&Template=/CM/HTMLDisplay.cfm

Texas Bar Members Benefits
https://www.texasbar.com/AM/Template.cfm?Section=Member_Benefits&Template=/memberbenefits/home.cfm

Bar Resource Portal
https://www.texasbar.com/AM/Template.cfm?Section=Resources_for_Tough_Times&Template=/CM/HTMLDisplay.cfm&ContentID=39480

Law Practice Management
http://texaslawpracticemanagement.com/

Toll-Free Ethics Helpline for Lawyers (800) 532-3947, 8am - 5pm CT, Monday through Friday

Ten Minute Mentor
http://www.texasbarcle.com/CLE/tyla/home.asp

Tech Resources
https://www.texasbar.com/AM/Template.cfm?Section=Technology_Resources

COVERAGE OF PUNITIVE DAMAGES IN TEXAS

STACY THOMPSON, *Dallas*
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State Bar of Texas
16TH ANNUAL
ADVANCED INSURANCE LAW
June 6-7, 2019
San Antonio

CHAPTER 17

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Education

Bachelor of Science, Health Education, Texas A&M University, College Station, TX, 2000
Master of Public Health, University of Texas Health Science Center, Houston, 2002
Juris Doctor, South Texas College of Law, Houston, TX, 2004

Practice Areas

Appeals
Insurance Bad Faith
Insurance Class Action
Insurance Coverage
Insurance Defense Litigation
Premises Liability

Court Admissions

Texas, 2004
New Mexico, 2015
Colorado, 2016
U.S. District Court for the Eastern, Northern, Western and Southern Districts of Texas, 2010 & 2014
U.S. Court of Appeals for the Fifth Circuit, 2014
U.S. District Court of Colorado, 2016
U.S. District Court of New Mexico, 2016

Presentations

Key Issues in Uninsured/Underinsured Motorist Coverage in Texas, Insurance Law Section of the State Bar of Texas, Advanced Law Seminar, June 2018
UM/UIM Coverage After Brainard, February 2015
Sideshows in Claims and Litigation, October 2015 & February 2019
Old and New Revisited – *Stowers*, Reservations of Rights and other Burning Topics, February 2017

Professional Affiliations

Dallas Bar Association
Insurance Law Section of the State Bar of Texas
Litigation Section of the State Bar of Texas
Appellate Law Section of the State Bar of Texas

PERRY LAW P.C.

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COVERAGE OF PUNITIVE DAMAGES IN TEXAS

I. INTRODUCTION

The terms punitive and exemplary damages tend to either strike fear or excitement in the minds of attorneys litigating automobile personal injury cases. For those litigating in a world where the entire purpose of the case is to make the victim whole, exemplary damages represent the civil justice system's attempt to rebalance the scales of justice. However, righting the scales of justice has a different meaning to everyone and presents a unique challenge to both Plaintiff and Defense counsel. This paper is intended to address the general process required to recover punitive damages in automobile personal injury cases in Texas. It will also address the current decisions determining whether punitive damages are recoverable from the automobile insurance policy which typically provides the only method of substantial recovery.

The origin of punitive damages, called exemplary, punitory, or vindictive damages or "smart money," has been traced to Biblical times. Dewey J. Consoulin, *Is an Award of Punitive Damages Covered under an Automobile or Comprehensive Liability Policy*, 22 Sw L.J. 433 (1968) *citing Exodus* 21:37 ("When a man steals an ox or a sheep, and slaughters or sells it, he shall restore five oxen for the one ox and four sheep for the one sheep.") Punitive damages appeared in the English law by the eighteenth century and were recognized generally in the United States by the end of the nineteenth century. *Id.* Punitive damages arose in common law as a supplementary sanction in exceptional cases where compensatory damages do not provide sufficient levels of deterrence and retribution. Jason Taliadoros, *The Roots of Punitive Damages at Common Law: A Longer History*, 64 Clev. St. L. Rev. 251 (2016). Punitive damages are damages "over and above those necessary to compensate the plaintiff" and are "awarded for three main reasons: (1) to punish the defendant and provide retribution, (2) to act as a deterrent to the defendant and others minded to behave in a similar way, and (3) to demonstrate the court's disapproval of such conduct." *Id.*

II. THE PURPOSE OF A PUNITIVE DAMAGE AWARD UNDER TEXAS LAW

Typically, a civil Plaintiff is entitled to recover money damages which will sufficiently compensate them for their injuries. *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 552 (Tex. 1985). However, throughout Texas legal history, punitive damages have served an altogether different purpose. *Id.* at 555; *Smith v. Sherwood*, 2 Tex. 460, 463–64 (1847). In one of its first opinions addressing punitive damages, the Texas Supreme Court recognized the attenuated connection between criminal law and tort damages:

> Such indifference is morally criminal, and if it leads to actual injury may well be regarded as criminal in law. A mere act of omission or non-feasance, to be punishable by exemplary damages, should reach the border-line of a quasi-criminal act of commission or malfeasance.

Southern Cotton Press & Mfg. Co. v. Bradley, 52 Tex. 587, 600–601 (1880) (citations omitted).

In 1994, the Texas Supreme Court reiterated the purpose of punitive damages. *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 17 (Tex. 1994). In *Moriel*, an employer covered by workers compensation insurance had a punitive damages award entered against it and sought clarification of the gross negligence standard. *Id.* at 12, 14. The Court held that the purpose of punitive damages was not only to punish a party for "outrageous, malicious, or otherwise morally culpable conduct," but also to deter others from repeating the same or similar acts in the future. *Id.* at 16-17; *see also Lunsford v. Morris*, 746 S.W.2d 471, 471–72 (Tex. 1988).

The Court also emphasized the "exceptional" nature of punitive damages by limiting their recovery to circumstances where it was established that the defendant knew of an extreme risk of serious injury but consciously disregarded it. *Moriel*, 879 S.W.2d at 18–19, 22. The Court reasoned a plaintiff must "'establish' the defendant's actual conscious indifference, rather than raise the mere belief that conscious indifference might be attributable to a hypothetical reasonable defendant." *Id.* at 20.

The court emphasized that the public policy of Texas is to ensure that a defendant who deserves to be punished "in fact receive[s] an appropriate level of punishment, while at the same time preventing punishment that is excessive or otherwise erroneous." *Id.* at 17. In order to ensure the punishment was appropriate, the Court held that "evidence of a defendant's net worth is relevant in determining the proper amount of punitive damages" and that "the amount of punitive damages necessary to punish and deter wrongful conduct depends on the financial strength of the defendant." *Id.* at 29.

In 1998, the Texas Supreme Court took the opportunity to expand on *Moriel* after the Texas Legislature's enactment of Chapter 41 and provided a more detailed statement of the kinds of evidence that are relevant to the issue of the amount of punitive damages to be awarded. *Owens–Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 40–41 (Tex. 1998). Specifically, the Court went beyond the net worth consideration addressed in *Moriel* and held that when a Defendant attempted to mitigate punitive damages,

evidence about the profitability of a defendant's misconduct as well as punitive damages previously paid for the same conduct was relevant and admissible. *Id.* The Court reasoned such evidence was admissible because it better informed the fact finder of the amount of punitive damages necessary to fairly punish a party and deter the conduct in question. *Id.* at 41. In *Malone*, the Court expressly recognized the reality that many Defendants had insurance coverage and expressly held that insurance coverage was not admissible to mitigate punitive damages because it was irrelevant and unduly prejudicial. *Id.*, *citing Rojas v. Vuocolo*, 142 Tex. 152, 177 S.W.2d 962, 964 (1944).

III. STANDARD FOR RECOVERY OF PUNITIVE DAMAGES

Under the common law, the state of mind required to obtain an award of punitive damages was not entirely clear. Some decisions looked for "malice," while others looked for "intent" or evidence of "ill will" while using an inconsistent definition of gross negligence. However, most of the confusion regarding obtaining an award of punitive damages was alleviated when Chapter 41 of the Texas Civil Practice and Remedies Code was enacted in 1995. Section 41.003(a) allows for the recovery of exemplary damages only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from a unanimous finding of:

(1) fraud;
(2) malice; or
(3) gross negligence.

TEX. CIV. PRAC. & REM. CODE ANN. §41.003.

Fraud is defined as "fraud other than constructive fraud." TEX. CIV. PRAC. & REM. CODE ANN. §41.001(6). Malice is defined as "a specific intent by the defendant to cause substantial injury or harm to the claimant." TEX. CIV. PRAC. & REM. CODE ANN. §41.001(7). Gross Negligence is defined, "as an act or omission:

(A) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
(B) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others."

TEX. CIV. PRAC. & REM. CODE ANN. §41.001(11).

Proof of ordinary negligence, bad faith or deceptive trade practices will not suffice to support an award of exemplary damages. TEX. CIV. PRAC. & REM. CODE ANN. 41.003(b); *Moriel*, 879 S.W.2d at 18–19. In order to recover exemplary damages, the Texas Legislature also required a unanimous jury finding in regard to a finding of liability as well as the amount of exemplary damages. TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(d). The coupling of a unanimous verdict with the clear and convincing evidence standard makes the recovery exemplary damages in personal injury cases in Texas difficult.

IV. PLEADING PUNITIVE DAMAGES

In addition to the general "fair notice" standard of Rule 47, Rule 56 clearly states that "[w]hen items of special damage are claimed, they shall be specifically stated." TEX. R. CIV. P. 56. Thus, any party seeking to recover exemplary damages must include a request for punitive damages that is "supported by express allegations." *Marin v. IESI TX Corp.*, 317 S.W.3d 314, 332 (Tex. App.—Houston [1st Dist.] 2010, pet. denied). Moreover, if Plaintiff is seeking to avoid the cap on punitive damages by proving the defendant intentionally or knowingly engaged in felonious conduct under criminal statutes listed in Texas Civil Practice and Remedies Code 41.008(c), the plaintiff must plead the alleged exception to the cap. *Id.* at 331.

In contrast, Defendants are not required to plead the affirmative defense that a punitive damages cap applies. In *Zorrilla*, the Texas Supreme Court determined that the punitive damages cap does not require proof of any additional fact to establish its applicability and there is no defense to it. *Zorrilla v. Aypco Construction II, LLC*, 469 S.W.3d 143, 157 (Tex. 2015). Specifically, the Court stated, "[b]ecause the statutory cap on exemplary damages automatically applies and its scope is delineated by statute, there is little concern that plaintiffs will be genuinely surprised by its application in any given case. ...Section 41.008, in and of itself, provides sufficient notice of the types of claims that are excluded from the cap, allowing plaintiffs to structure their cases to avoid the cap when desired and possible." *Id.*

However, Defendant's should take note that the holding in *Zorrilla* is limited to the statutory cap issue and other affirmative defenses must still be pled. For instance, ordinarily, the unconstitutionality of a statute is an affirmative defense that must be pled. *Knoll v. Neblett*, 966 S.W.2d 622, 639 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). Therefore, if a Defendant believes it may need to argue the constitutionality of a punitive damages award on appeal, the affirmative defense should be pled.

V. CONDUCTING DISCOVERY ON PUNITIVE DAMAGES

Chapter 41 requires a fact finder to take a defendant's net worth into account in its assessment of punitive damages. As a result, a Defendant's net worth is relevant and subject to discovery in an action in which

the plaintiff seeks to recover exemplary damages. TEX. CIV. PRAC. & REM. CODE ANN. § 41.011(a)(6); *see also Lunsford v. Morris*, 746 S.W.2d at 471–473. "Net worth means the total assets of a person minus the total liabilities of the person on a date determined appropriate by the trial court." TEX. CIV. PRAC. & REM. CODE ANN. 41.001(7-a). The theory is that a defendant's ability to pay bears directly on the question of whether the punishment being addressed is adequate and whether it will serve its purpose of deterring others from repeating the same conduct. *Lunsford*, 746 S.W.2d at 473. Prior to 2015, despite its size, Defendant's had little choice but to respond to discovery regarding their net worth regardless of the validity or potential success of Plaintiff's claim.

In 2015, the Texas Legislature adopted Section 41.0115 of the TEXAS CIVIL PRACTICE AND REMEDIES CODE which placed a hurdle in front of any Plaintiff seeking to discover evidence of the net worth of a defendant. Section 41.0115(a) provides:

> On the motion of a party and after notice and a hearing, a trial court may authorize discovery of evidence of a defendant's net worth if the court finds in a written order that the claimant has demonstrated a substantial likelihood of success on the merits of a claim for exemplary damages.

TEX CIV. PRAC. & REM. CODE § 41.0115(a) (2015).

Under Section 41.0115, a plaintiff must demonstrate a substantial likelihood of success on the merits of a claim to the Court and obtain a ruling from the Court that net worth discovery is appropriate. *Id.* In determining whether a substantial likelihood of success exists, the Court may consider evidence in the form of an affidavit or a response to discovery supporting or opposing the discovery of net worth. *Id.* If the decision granting or denying net worth discovery is challenged, the reviewing court may consider only the evidence submitted by the parties to the trial court. TEX. CIV. PRAC. & REM. CODE § 41.0115(c). Notably, if the trial court authorizes discovery, the court's order may only authorize use of the least burdensome method available to obtain the net worth evidence. TEX. CIV. PRAC. & REM. CODE § 41.0115(b). Lastly, the statute presumes that when the net worth hearing is requested, the Plaintiff is conceding that discovery has progressed to the point that a no evidence summary judgment is at least appropriate. TEX. CIV. PRAC. & REM. CODE § 41.0115(d).

VI. BIFURCATING THE TRIAL

In *Moriel*, the Texas Supreme Court recognized that evidence of a defendant's net worth, which is generally relevant only to the amount of punitive damages, has a "very real potential for prejudicing the jury's determination of other disputed issues in a tort case" by "highlighting the relative wealth of a defendant." *Moriel*, 879 S.W.2d at 30. In an effort to avoid this prejudice to defendants, the court concluded that, upon request, a trial court should bifurcate the determination of the amount of punitive damages from the remaining issues. *Id.* The Texas Legislature codified the Court's holding the following year. TEX. CIV. PRAC. & REM. CODE ANN. § 41.009.

Section 41.009 provides that on motion by a defendant, the court must bifurcate the question concerning the amount of exemplary damages in a jury trial from the questions of liability, actual damages, and the predicate for exemplary damages. TEX. CIV. PRAC. & REM. CODE Ann. § 41.009(a)(b). Notably, a Court has no obligation to bifurcate the trial at the Plaintiff's request and has no discretion to bifurcate the trial if requested by Defendant.

In the first phase of a bifurcated trial, the trier of fact shall determine liability for compensatory and exemplary damages and the amount of compensatory damages. If liability for exemplary damages is established during the first phase, the second phase determines the amount of exemplary damages to be awarded. TEX. CIV. PRAC. & REM. CODE Ann. § 41.009(b). "The same jury that hears the liability phase of a case must also hear the punitive damages phase." *In re Bradle*, 83 S.W.3d 923, 926 (Tex. App.— Austin 2002, orig. proceeding).

It is generally thought Defendants prefer a bifurcated trial, however, in practice, that is not always so. *See generally* J. Stephen Barrick, *Moriel and the Exemplary Damages Act: Texas Tag-Team Overhauls Punitive Damages*, 32 HOUS L. REV. 1059, 1083-86 (1995) (discussing potential effects of bifurcation). While determining liability and the amount of compensatory damages in the first phase of a bifurcated trial, juries are not told that they have an additional opportunity to award additional damages. Therefore, if the jury is particularly enraged by a Defendant's conduct, it may increase the award of actual damages, not realizing it will get another chance.

Schindler Elevator Corp. v. Anderson illustrates how a Plaintiff can use a Defendant's request for bifurcation to its own advantage. 78 S.W.3d 392 (Tex. App.—Houston [14th Dist.] 2001, pet. granted, judgm't vacated w.r.m.). In *Schindler*, the jury returned a verdict of $16.97 million in damages (consisting largely of noneconomic damages) for a child's injury in an escalator accident. *Id.* at 398, 410–14. In the second phase, the jury awarded an additional $100,000 in punitive damages. *Id.* at 400. The Houston Court of Appeals affirmed the award, however in dissenting from the court's denial of rehearing *en banc*, Chief Justice Brister observed that "[w]hat happened in this case is quite clear – the jury included punitive damages in the guise of compensatory damages." *Id.* at 417 (Brister, J., dissenting).

As a result, before a Defendant requests a bifurcated trial, it should research other cases in the jurisdiction and develop a strategy which will minimize the potential risks associated with a jury being given two opportunities to award damages.

VII. WHAT MUST BE PROVEN TO RECOVER PUNITIVE DAMAGES IN TEXAS

Presuming a Plaintiff can overcome the hurdles of pleading a case for punitive damages properly and obtaining discovery of the net worth of Defendant, the Plaintiff still has to prove liability for exemplary damages and the amount of exemplary damages by clear and convincing evidence. TEX. CIV. PRAC. & REM. CODE ANN. §41.003(a). Punitive damages must be proven by "clear and convincing evidence" not the normal "preponderance of the evidence" standard for negligence. Clear and convincing evidence "means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(2).

To prove a claim of gross negligence, a plaintiff must prove, by clear and convincing evidence, an act or omission:

- which when viewed objectively from the standpoint of the defendant at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
- of which the defendant has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(11).

Evidence of ordinary negligence is not sufficient to satisfy either the subjective or objective prong of gross negligence. TEX. CIV. PRAC. & REM. C. § 41.003(b); *Gen. Motors Corp. v. Sanchez*, 997 S.W.2d 584, 595 (Tex. 1999). "[A] party cannot be liable for gross negligence when it actually and subjectively believes that circumstances pose no risk to the injured party, even if [it is] wrong." *Perez v. Arredondo*, 452 S.W.3d 847, 854 (Tex. App.—San Antonio 2014, no pet.).

The objective, "extreme degree of risk" component requires an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow. *Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 326 (Tex. 1993). "'Extreme risk' is not a remote possibility or even a high probability of minor harm, but rather the likelihood of the plaintiff's serious injury." *U-Haul Int'l, Inc. v. Waldrip*, 380 S.W.3d 118, 137 (Tex. 2012). Statistical evidence of the probability of serious injury is not necessary to establish the objective component of gross negligence. *Goodyear Tire & Rubber Co,* 538 S.W.3d at 645.

In other words, to establish the first element, a plaintiff must prove "the act or omission must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others. *Moriel*, 879 S.W.2d at 23; *Columbia Med. Ctr. of Las Colinas v. Hogue*, 271 S.W.3d 238, 259 (Tex. 2008); *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 923 (Tex. 1998) (Mobil's conduct in "not monitoring contract workers for benzene exposure, not warning them of the dangers of such exposure, and not providing them with protective gear" -- "involved an extreme degree of risk to those workers."); *Lee Lewis Construction, Inc. v. Harrison*, 70 S.W.3d 778 (Tex. 2001) (contractor's failure to provide an effective fall-protection system to window installers on tall building posed obvious risks of falls).

To establish the second element, Plaintiff must establish the defendant knew about the peril, but its acts or omission demonstrated that it simply did not care. *Boerjan v. Rodriguez*, 436 S.W.3d 307, 311 (Tex. 2014). Determining whether an act or omission involves peril requires "an examination of the events and circumstances from the viewpoint of the defendant at the time the events occurred, without viewing the matter in hindsight." *Rayner v. Dillon,* 501 S.W.3d 143, 148 (Tex. App.—Texarkana 2016). "[A]wareness of an extreme risk does not require proof that the defendant anticipated the precise manner in which the injury would occur to identify to whom the injury would befall." *U-Haul*, 380 S.W.3d at 139. In examining proof of this second, subjective element "courts focus on the defendant's state of mind, examining whether the defendant knew about the peril caused by his conduct but acted in a way that demonstrates he did not care about the consequences to others." *Reeder v. Wood Cty. Energy, LLC*, 395 S.W.3d 789, 796 (Tex. 2013). Gross negligence can never be the result of "momentary thoughtlessness, inadvertence, or error of judgment" because of the conscious indifference requirement. *Wal-Mart Stores, Inc. v. Alexander,* 868 S.W.2d 322, 326 (Tex. 1993). There must be something "in the nature of a continued or persistent course of action." *Rogers v. Blake,* 240 S.W.2d 1001, 1004 (Tex. 1951).

VIII. FACTORS CONSIDERED IN AWARDING PUNITIVE DAMAGES

The general rule in Texas is that an award of actual damages is necessary to support an award of exemplary damages. TEX. CIV. PRAC. & REM. CODE ANN. § 41.004(a); *Travelers Indem. Co. of Ill. v. Fuller*, 892 S.W.2d 848, 851-852 (Tex. 1995). Moreover, a judgment for punitive damages must be supported by a judgment for actual damages "arising from the tort on which the punitive damages award is based." *Sterling Trust Co. v. Adderley,* 119 S.W.3d 312, 323 (Tex.App.—Fort Worth 2003) (rev'd on other grounds

by *Sterling Trust Co. v. Adderley*, 168 S.W.3d 835 (Tex.2005)) ("We are not aware of any authority, and appellees cite none, giving a plaintiff the right to pick and choose an actual damage award under one theory and a punitive damage award under an alternative theory. Rather, the plaintiff is entitled to judgment on the single theory under which he recovered the greatest relief.").

Actual damages, also known as compensatory damages, are awarded when Plaintiff establishes quantifiable injuries such as medical bills and lost wages, property damages, and/or mental anguish resultiung from Defendant's conduct. TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(12). Punitive damages cannot be awarded if no actual damages, or nominal damages, are awarded. TEX. CIV. PRAC. & REM. CODE ANN. § 41.004(a). Equitable relief is also generally insufficient to support an award of exemplary damages under the statute. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.002(a) (stating that the Act "applies to any action in which a claimant seeks damages relating to a cause of action.").

A fact-finder decides whether to award exemplary damages and how much to award. TEX. CIV. PRAC. & REM. CODE Ann. § 41.010(b). In making its determination it must consider the statutory purpose of exemplary damages – to punish the defendant. *See* TEX. CIV. PRAC. & REM. CODE Ann. § 41.001(5). In reaching a decision on the amount of exemplary damages, the Texas Legislature has provided a list of factors a jury shall consider, and therefore Plaintiff must present evidence of, in determining the amount of exemplary damages it awards. Texas Civil Practice and Remedies Code Section 41.011(a) provides that, "in determining the amount of exemplary damages, the trier of fact shall consider evidence, if any, relating to:

(1) the nature of the wrong;
(2) the character of the conduct involved;
(3) the degree of culpability of the wrongdoer;
(4) the situation and sensibilities of the parties concerned;
(5) the extent to which such conduct offends a public sense of justice and propriety; and
(6) the net worth of the defendant."

TEX. CIV. PRAC. & REM. CODE ANN. §41.011(a); *see also Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981). There are few decisions detailing the evidence which can be used (or cannot be used) to establish the factors. As a result, Courts are left with little guidance in determining whether particular evidence should be admitted or excluded in cases involving punitive damages.

IX. PUNITIVE DAMAGE CAPS

The Texas Legislature has placed statutory caps on the amount of exemplary damages that can be awarded in a personal injury case. TEX. CIV. PRAC. & REM. CODE ANN. § 41.010(b). An award of exemplary damages against a defendant may not exceed an amount equal to the greater of:

(1) (A) two times the amount of economic damages; plus
(B) an amount equal to any noneconomic damages found by the jury, not to exceed $750,000;

or

(2) $200,000.

(c) This section does not apply to a cause of action against a defendant from whom a plaintiff seeks recovery of exemplary damages based on conduct described as a felony.[1]

TEX. CIV. PRAC. & REM. CODE ANN. § 41.008.

In order to determine whether the cap applies, the Court must know the amount of economic damages, therefore section 41.008 (a) requires the jury assess the amount of economic damages separately from the amount of other compensatory damages. TEX. CIV. PRAC. & REM. CODE ANN. § 41.008(a). As used in the cap formula, "economic damages" means compensatory damages intended to compensate a claimant for actual economic or pecuniary loss; the term does not include exemplary damages or noneconomic damages. TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(4); *see also Goodyear Tire & Rubber Co. v. Rogers*, 538 S.W.3d 637, 652 (Tex. App.—Dallas 2017). The Supreme Court has held that "damages for pecuniary harm do require proof of pecuniary loss for either harm to property, harm to earning capacity, or the creation of liabilities." *Waste Mgmt. of Tex., Inc. v. Tex. Disposal Sys. Landfill, Inc.*, 434 S.W.3d 142, 153 (Tex. 2014). In contrast, noneconomic damages are "damages awarded for the purpose of compensating a claimant for physical

[1] To "bust" the cap, a plaintiff must obtain a jury finding that the defendant violated one of the criminal code provisions listed in Texas Civil Practice and Remedies Code § 41.008(c) and that the violation was committed knowingly or intentionally. *Signal Peak Enters. of Tex., Inc. Bettina Invs., Inc.*, 138 S.W.3d 915, 927 (Tex. App.—Dallas 2004, pet. stricken). Section 41.008(c) provides that the caps on exemplary damages do not apply to a cause of action against a defendant from whom a plaintiff seeks recovery of exemplary damages based on conduct described as a felony in various sections of the Penal Code, and the conduct was committed knowingly or intentionally. TEX. CIV. PRAC. & REM. CODE ANN. § 41.008(c). The legislature specifically identified 17 separate Penal Code sections that will bust the cap on exemplary damages. TEX. CIV. PRAC. & REM. CODE ANN. § 41.008(c)(1)-(17).

pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, injury to reputation, and all other nonpecuniary losses of any kind other than exemplary damages." TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(12).

X. INSURANCE COVERAGE FOR EXEMPLARY DAMAGES

The majority of states that have considered whether public policy prohibits insurance coverage of exemplary damages for gross negligence, either by legislation or under the common law, have decided that it does not. Prior to 2008, neither the Texas Supreme Court nor the Texas Legislature had pointedly addressed the insurability of exemplary damages resulting from acts of gross negligence. Generally, Texas courts held that punitive damages were excluded from coverage as a matter of public policy based on the *Northwestern National Cas. Co. v. McNulty* decision decided by the Fifth Circuit in 1962. *National Cas. Co. v. McNulty,* 307 F.2d 432 (5th Cir. 1962). The court reasoned that allowing a wrongdoer "to insure himself against punishment" would result in "a freedom of misconduct inconsistent with the establishment of sanctions against such conduct." *Id.* at 440. In short, allowing someone to obtain insurance coverage for damages designed to punish and deter bad behavior would undermine their very purpose and merely shift the burden to its insurance company. *Id.* This logic persisted in Texas jurisprudence until 2008 when the Texas Supreme Court issued its holding in *Fairfield Insurance Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653 (Tex. 2008).

A. *Fairfield v. Stephens Martin*

In 2008, the United States Court of Appeals for the Fifth Circuit certified a question to the Texas Supreme Court: "Does Texas public policy prohibit a liability insurance provider from indemnifying an award for punitive damages imposed on its insured because of gross negligence?" *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 381 F.3d 435, 437 (5th Cir. 2004). In response, the Texas Supreme Court set out a two-part test to determine whether Texas public policy prohibited coverage under the insurance policy at issue while offering "some considerations" for use in other cases. *Fairfield Insurance Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 669-670 (Tex. 2008).

In *Fairfield*, Roy Edward Bennett was employed by Stephens Martin Paving as a brooming machine operator. *Id.* at 654. Bennett died after being rolled over by a brooming machine. *Id.* Fairfield insured Stephens Martin under a workers' compensation and employer's liability insurance policy. *Id.* Fairfield paid workers' compensation benefits to the Bennett family in accordance with Texas workers compensation law. *Id.* A year later, the family sued Stephens Martin for gross negligence seeking the recovery of exemplary damages only. *Id.* at 654-655.[2]

Fairfield sued Stephens Martin Paving and Bennett's family in federal district court, seeking a declaratory judgment that Fairfield owed no duty to defend or indemnify Stephens Martin Paving in the suit for exemplary damages. *Fairfield Ins. Co. v. Stephens Martin Paving, L.P.*, 2003 WL 22005877, at *1-*2 (N.D. Tex. Aug. 25, 2003). The federal district court held exemplary damages were covered by the Fairfield Policy and that Texas public policy allowed insurance coverage of those damages. *Id.* at *10. Fairfield appealed to the Fifth Circuit, which certified the question of whether exemplary damages for gross negligence are insurable to the Supreme Court of Texas. *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 381 F.3d 435 (5th Cir. 2004).

In responding to the question, the Texas Supreme Court set out a two-step process: 1) determine whether the plain language of the policy covers the exemplary damages sought in the underlying suit against the insured; and 2) if the policy affords coverage, determine whether public policy allows or prohibits coverage under the circumstances of the underlying suit. *Fairfield Ins. Co.,* 246 S.W.3d at 669-670.

Although the Court briefly addressed the policy language at issue, due to the nature of the certified question, it presumed the policy language covered the exemplary damages sought and limited its analysis to the second prong of the analysis. *Id.* at 656. In answering the second prong, the Court determined that if insurance policies pay exemplary damages, the defendant is allowed to escape his punishment. *Id.* at 678. As a result, the insurance company would ultimately be forced to spread the cost amongst the insurance purchasing public, thwarting the very purpose of punitive damages. *Id.* at 686. The Court acknowledged that situations exist, such as drunk driving, where the purposes of punishment and deterrence outweigh the normally strong public policy of permitting the right to contract. *Id.* at 663-664. However, in other instances, such as protecting an innocent employer from the unknown gross negligence of a single employee, permitting coverage would support the purpose of exemplary damages. *Id.* at 670. Therefore, any analysis under the public policy prong will be dependent on the individual facts of each case and the effect of the decision on society as a whole.

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[2] Generally, the Texas Labor Code protects an employer who purchases workers' compensation insurance from an employee's common law claims for injuries incurred during the course and scope of employment. TEX. LAB. CODE § 408.001. Therefore, the family was barred by statute from recovering any additional actual damages. However, the Labor Code does not prohibit recovery of exemplary damages if the employee's death is a result of gross negligence by the employer. *Id.* § 408.001(b)-(c).

Ultimately, the Court determined that the public policy of Texas did not prohibit insurance coverage of exemplary damages for gross negligence in the workers' compensation context. *Id.* at 670. While the Court's holding is limited to the workers' compensation context, the Court believed its analysis would "offer some considerations applicable to the analysis in other cases." *Id.*

B. *Farmers Texas County Mutual Ins. Co. v. Zuniga*

Since *Fairfield*, the legal community has subscribed to the logic that absent policy language excluding punitive damages, they are covered under the liability coverage of a personal and/or commercial auto policy. However, some recent cases have called this logic into question.

In *Farmers Texas County Mut. Ins. Co. v. Zuniga*, 548 S.W.3d 646 (Tex. App—San Antonio 2017), the San Antonio Court of Appeals held that a personal auto policy that covered "damages for bodily injury" did not, on its face, cover punitive damages. In *Zuniga*, Jennifer Zuniga sued Christopher Medina to recover damages she sustained when the vehicle Medina was driving hit her from behind as she was walking. *Id.* at 648-649. A jury found Medina negligent and grossly negligent and awarded Zuniga $93,244.91 in actual damages and $75,000.00 in punitive damages. *Id.* at 649. Medina's insurer, Farmers, refused to pay the punitive damages award and Zuniga obtained an assignment from Medina. *Id.*

Farmers filed suit against Medina and Zuniga seeking a declaration that the punitive damages were not covered by the policy or, alternatively, if the punitive damages were covered by the policy, Texas public policy prohibited coverage for the punitive damages. *Id.* The San Antonio Court of Appeals issued an opinion and judgment on the appeal on September 13, 2017. *Id.* Shortly thereafter, both sides filed Motions for Rehearing. The Court denied both motions but withdrew its September 2017 opinion and substituted it with a new opinion in an attempt to clarify the reasoning behind its decision. *Id.* at 648.

Citing *Manriquez v. Mid-Century*, Zuniga argued punitive damages were covered by the policy as a matter of law. *Id.* at 654, *citing Manriquez v. Mid–Century Ins. Co. of Tex.*, 779 S.W.2d 482, 483 (Tex. App.—El Paso 1989, writ denied), *disapproved of in part on other grounds by Trinity Universal Ins. Co. v. Cowan,* 945 S.W.2d 819 (Tex. 1997). However, the court drew a distinction between the policy language in the *Manriquez* policy versus the Farmer's policy. The policy in *Manriquez* covered "all sums which the insured shall become legally obligated to pay as damages because of... bodily injury." *Id.* However, the Farmer's Policy which insured Mr. Medina, only covered "damages for bodily injury." *Id.*

Following the two-step analysis announced in *Fairfield,* the Court determined that the policy had one reasonable interpretation: "a promise to pay a sum of money as compensation for the bodily injuries sustained by an injured person." *Id.* The Court acquiesced that the "all sums" insuring agreement may be broad enough on its face to include punitive damages, however the phrase "damages for bodily injury," standing alone, did not include punitive damages, and nothing in the Farmers policy created coverage for damages aimed at deterrence. *Id.* The Court concluded the "policy's promise to pay damages for bodily injury was Farmers' commitment to pay a sum of money as compensation in exchange as the equivalent of the physical damage to the injured person's body" and did not encompass punitive damages, which are intended to punish. *Id.* at 653.

Ultimately, the Court held it could not render judgment because cross summary judgments had not been filed in the trial court, therefore it remanded the case to the trial court. *Id.* at 655. Following the guidance provided by the Court of Appeals, the trial court granted Farmers' summary judgment on October 18, 2018. *Zuniga v. Farmers Texas County Mut. Ins. Co.*, No. 2014-CI11445 (73rd Dist. Ct. Bexar County, Tex. Oct 18, 2018).

Counsel for Zuniga filed a Notice of Appeal on December 4, 2018 and on March 7, 2019, filed Appellant's Brief arguing that since the Policy at issue was not one of the Texas personal auto policies approved to specifically exclude exemplary damages, the Court of Appeals decision was incorrect. Brief of Appellant, 7, *Zuniga v. Farmers Texas County Mut. Ins. Co.*, No. 04-8-00889-CV (Tex. App.—San Antonio, March 7, 2019). Zuniga also argued that the opinion contradicts the Texas Supreme Court's holding in *Stephens Martin* and presented a public policy argument that the "average insured would assume the term damages would include all damages except those intentionally caused," and that despite the opportunity to make clear no punitive damages were covered under the Policy, Farmers chose not to, therefore the contract of insurance requires indemnification. *Id.* at 7-8, 10. As of the time of submission, Appellee's brief has not been filed.

C. *Frederking v. Cincinnati Ins. Co.*

Six months later after the San Antonio Court of Appeals determined the Farmer's policy did not cover punitive damages, United States District Judge Xavier Rodriguez in the Western District of Texas held the plain language of a commercial insurance policy did not cover a punitive damages award. *Frederking v. Cincinnati Ins. Co.*, No. SA–17–CV–651–XR, 2018 WL 1514095 (W.D. Tex. Mar. 27, 2018), reconsideration denied sub nom. *Frederking v. Cincinnati Ins. Co., Inc.*, No. SA–17–CV–651–XR, 2018 WL 2471455 (W.D. Tex. May 31, 2018).

Richard Frederking alleged he was injured when his vehicle was struck by an intoxicated driver, Sanchez. *Id.* at *1. Sanchez was allegedly operating a motor vehicle owned by his employer, Advantage Plumbing Services ("Advantage"), at the time of the collision. *Id.* Advantage was the named insured under a Business Automobile Coverage insurance policy issued by Cincinnati that was in full force and effect at the time of the collision. *Id.*

Plaintiff filed suit against both Sanchez and Advantage alleging claims for negligence, gross negligence, *respondeat superior*, and negligent entrustment. Brief of Appellee at 5, *Frederking v. Cincinnati Insurance Company*, No. 18-0536 (5th Cir. 2018). Cincinnati defended Sanchez and Advantage in the Underlying Lawsuit under a reservation of rights. *Id.* at 6. The trial court found that Sanchez was not in the course and scope of his employment for Advantage at the time of the collision and dismissed the *respondeat superior* claim on partial summary judgment. *Id.* at 5. At trial, the jury considered claims of negligence and gross negligence against Sanchez and a claim of negligent entrustment against Advantage. *Id.* at 5-6. The jury found that Sanchez was negligent and that Advantage was negligent under the theory of negligent entrustment. *Id.* The jury also found that Sanchez was grossly negligent. *Id.* Notably, there was no jury finding that Sanchez intended the injury or that his actions constituted an intentional tort. *Frederking,* 2018 WL 2471455 at *6. Plaintiff was awarded $137,025.00 in compensatory damages and interest, jointly and severally, against Sanchez and Advantage. *Id.* at *1. In addition, the jury awarded $350,000 in exemplary damages against Sanchez, which was reduced to $207,550.00 by Texas' statutory cap on exemplary damage awards. Brief of Appellee, *Frederking,* No. 18-0536 at 6 (5th Cir. 2018).

Cincinnati paid the compensatory damages award in exchange for Plaintiff releasing Advantage from the judgment against it. *Frederking*, 2018 WL 1514095 at *2. Plaintiff refused to release Sanchez from the punitive damages portion resulting from the finding of gross negligence and filed a declaratory judgment lawsuit against Cincinnati seeking a declaration that Cincinnati had a duty under the Policy to pay Frederking, a judgment creditor, for the exemplary damages awarded against Sanchez in the underlying suit. Brief of Appellee, *Frederking,* No. 18-0536 at 6 (5th Cir. 2018). Cincinnati subsequently removed the case to federal court. *Id.* Both Cincinnati and Frederking filed cross-motions for summary judgment. *Id* at 6-7.

Cincinnati moved for summary judgment on three independent, dispositive grounds. *Id.* First, the express terms of the Policy did not afford coverage on a finding of gross negligence because Sanchez's conduct did not constitute accidental conduct as required to trigger coverage. *Id.* Second, Cincinnati argued exemplary damages are not insurable as a matter of Texas public policy because Sanchez alone is responsible for the punitive burdens of his grossly negligent acts. *Id.* Lastly, Cincinnati urged Sanchez was not entitled to coverage because he did not have express or implied permission to use the Advantage vehicle as required for Sanchez to be an "insured" under Policy. *Id.* Not surprisingly, Frederking contended the opposite was true on each of the three grounds. *Id.*

The Court reviewed the relevant language of the Cincinnati policy and held under the plain language of the policy, Cincinnati was only required to indemnify an insured for an "accident" or "occurrence." *Frederking*, 2018 WL 1514095 at *5–6. "An accident is generally understood to be a fortuitous, unexpected, and unintended event." *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 8 (Tex. 2007). The Court held that since the jury concluded that Sanchez acted with gross negligence, it found Sanchez had "actual, subjective awareness of the risk involved, but nevertheless proceed[ed] with conscious indifference to the rights, safety, or welfare of others." *Frederking*, 2018 WL 1514095 at at *6, *citing* TEX. CIV. PRAC. & REM. CODE § 41.001(11). Relying in part on Texas Supreme Court precedent, the Court determined Sanchez's collision with Plaintiff and the resulting injuries were the natural and expected consequence of an intoxicated driver operating a vehicle and the collision and injuries were "highly probable." *Id.* at *6, *citing Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 820 (Tex. 1997). Since the jury found Sanchez had actual, subjective awareness of the risk involved, the Court determined the collision was not an accident and the punitive damages were not covered under the terms of the Cincinnati policy. *Id.* at *8.

While conceding that other cases with differing facts reached the opposite result, the Court determined that Sanchez's conduct was not an "accident" under the terms of the policy because it required actual, subjective awareness of the risks involved. *Id.* The Court specifically noted that Sanchez's conduct was not an "accident" under the policy because Plaintiff was unable to show that had the deliberate act—the act of driving while intoxicated—been performed correctly, the result would have been different. *Id.* at *6; *see also Bishop v. USAA Texas Lloyd's Co.*, 2016 WL 423564, at *2 (Tex. App. Feb. 4, 2016) ("[A] deliberate act, performed negligently, is an accident if the effect is not the intended or expected result; that is, the result would have been different had the deliberate act been performed correctly.")

An appeal is also pending in the Fifth Circuit in *Frederking* at this time. *Frederking v. Cincinnati Ins. Co.,* No. 18-50536 (5th Cir. 2018). On appeal, each side argued the jury's findings were based on different conduct. Frederking argued the conduct giving rise to Plaintiff's injuries was Sanchez's failure to yield the right of way which was unintentional and therefore constituted an "accident" under the terms of

Cincinnati's policy. Reply Brief of Appellant, 1, *Frederking v. Cincinnati Insurance Company*, No. 18-0536 (5th Cir. 2018). Cincinnati argued Sanchez's failure to yield the right of way was mere negligence and only occurred because he was driving while intoxicated which constituted gross negligence and is a deliberate act. Brief of Appellee, *Frederking,* No. 18-0536 at 18 (5th Cir. 2018). Oral argument was heard in early April 2019.

XI. CONCLUSION REGARDING COVERAGE OF PUNITIVE DAMAGES

Zuniga and *Frederking* have opened the door for personal and commercial insurers to challenge punitive damage awards at least in counties served by the San Antonio Court of Appeals and the Western District of Texas. No other courts have published decisions indicating how far the effects of these decisions will reach. It is possible other Courts of Appeals will reach different conclusions since neither case addressed the public policy prong of the test set out in *Stephens Martin*, instead relying solely on the policy language. If different Courts of Appeals reach different conclusions it is more likely the Texas Supreme Court will provide a definitive analysis at some point in the future.

Depending on the outcomes of the appeals in *Zuniga* and *Frederking*, insurance companies will be faced with evaluating facts that could include gross negligence or guessing whether Plaintiff will pursue a gross negligence claim in light of the coverage issues that may result. Either way, insurance companies are left with the virtually impossible task of evaluating a claim when coverage on a portion of the claim could be nullified. Likewise, Plaintiffs have little choice but to pursue punitive damage awards in appropriate cases or risk a potential malpractice claims from their client.

The decisions should also lead to strategic considerations by Plaintiff and Defense counsel. Plaintiff's counsel can no longer assume punitive damages will be covered by an insurance policy and will need to be prepared for a battle over coverage after obtaining a punitive damages award. However, certain strategies could minimize the impact of these decisions. For instance, instead of pursuing punitive damages, Plaintiff's counsel could use the potential punitive facts to build up the portions of their damages model which are clearly covered by insurance policies, such as past and future medical expenses or pain and suffering and take advantage of a bifurcated trial request. Defense counsel defending insureds would then be placed in the difficult position of minimizing the punitive conduct and risking a larger damage award in other categories covered by the Policy (which may exceed policy limits) or exposing its client to potential personal liability through a gross negligence finding and punitive damages award.

Moreover, the implications of the decisions to insureds themselves could be devastating. If a jury finds a Defendant was grossly negligent and awards a Plaintiff punitive damages, the Defendant's insurance company may decline to pay the punitive damages. A Plaintiff is then left with the option of suing the insurance company (like in *Frederking*) or seeking the punitive damages from the Defendant(s) themselves.

Will we see first party cases where a Defendant sues his insurer for failing to pay a punitive damage award? Will Defendants sue their insurer for failing to include punitive damages in their evaluations in response to *Stowers* demands? What issues arise when an insurance company uses captive counsel to represent an insured, but does not cover the exemplary damage claims? Will insurance companies seek to change the language of the liability coverage to expressly exclude punitive damages? Only time will tell.

MYTHS, MISTAKES, AND MISCONCEPTIONS: THE SEQUEL

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CHAPTER 18

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MYTHS, MISTAKES, AND MISCONCEPTIONS: THE SEQUEL

There are many rules about the interpretation of insurance policies and the duties and obligations of insurers and insureds. Some are creations of common law and the law of contracts, some are statutory, some are rules of policy construction, and some are just myths. This paper attempts to address some of the common myths and misconceptions that are often embraced by insurers, policyholders, and their counsel.[1]

I. THE SCOPE OF COVERAGE: PART I

A. Covered Conduct and the Duty to Defend

General liability policies cover, in part, damages for bodily injury and property damage based on an "occurrence." The definition of "occurrence" has changed over time, but is currently defined in the ISO form as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." There is often confusion about what allegations state an "occurrence" and will trigger a defense.

While Texas employs a complaint allegation rule, it is the facts alleged, not the theories or causes of action, that will determine if a defense is owed. *National Union Fire Ins. Co. v. Merchants Fast Motor Lines*, 939 S.W.2d 139, 141 (Tex. 1997).

1. Negligence Is Not Always an Occurrence

The word "negligence," if used to describe otherwise intentional conduct, will not automatically result in a defense obligation. Nor will pleading there is an "occurrence." For instance, a "negligent" assault, which results in exactly the injury that is expected to result from the conduct, is still not an "occurrence" and will not give rise to a defense obligation.

In *Farmers Tex. County Mut. Ins. Co. v. Griffin,* 955 S.W.2d 81 (Tex. 1997), the Texas Supreme Court held that there was no duty to defend (or indemnify) a drive-by shooting, despite an allegation of negligence. In *Tex. Farm Bureau Undw'rs v. Graham,* a wrongful death suit was brought after a homeowner shot and killed a "would-be" burglar. 450 S.W.3d 919 (Tex. App. – Texarkana 2014, pet. denied). The Court rejected an argument that an allegation that the family had no way of knowing why the homeowner pulled the trigger, and an alternative negligence cause of action, were insufficient to create a duty to defend. *See also Bishop v. USAA Tex. Lloyd's Co.*, 2016 Tex. App. LEXIS 1149 (Tex. App. – Beaumont, Feb. 4, 2016, no pet.) (sexual assault was not occurrence, even if injury was unintended); *and cf. Tarrant County Ice Sports, Inc. v. Equitable General Life Ins. Co.*, 662 S.W.2d 129 (Tex. App. – Fort Worth 1983, writ ref'd n.r.e.) (fight that broke out at hockey game was not "accident," under definition that excluded assault, despite allegation of negligence).

Negligent trespass or conversion are also unlikely to state an "occurrence." *Essex Ins. Co. v. Lampasas Golf Ass'n*, 1998 U.S. App. LEXIS 39785 (5th Cir., August 10, 1998). If the result is the expected result of intentional activity, a mistaken belief as to right is usually not enough to create an "occurrence." *Argonaut Southwest Ins. Co. v. Maupin*, 500 S.W.2d 633 (Tex. 1973).

2. Intentional Conduct May Be an Occurrence

In *Trinity Univ. Ins. Co. v. Cowan*, the Court also rejected an argument that no intentional act could be an occurrence. 945 S.W.2d 819, 828 (Tex. 1997). The Court offered the example of intentionally firing a gun, intending to shoot what appeared to be a deer but was actually a person. *Id.* Instead, the inquiry is whether the damages are expected or intended—whether they "ordinarily follow" from the conduct. *See also Nat'l Union Fire Ins. of Pittsburgh v. Puget Plastics Corp.*, 735 F. Supp. 2d 650 (S.D. Tex. August 25, 2010), *aff'd*, 454 Fed. Appx. 291 (5th Cir. 2011).

3. Breach of Contract May Be Covered

In *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007), the Texas Supreme Court rejected the argument that an "occurrence" could not include a breach of contract. The Court was addressing certified questions from the Fifth Circuit that included the following:

> When a homebuyer sues his general contractor for construction defects and alleges only damage to or loss of use of the home itself, do such allegations allege an "accident" or "occurrence" sufficient to trigger the duty to defend or indemnify under a CGL policy?

Applying a fact-based inquiry, the Court reasoned:

> The proper inquiry is whether an "occurrence" has caused "property damage," not whether the ultimate remedy for that claim lies in contract or in tort. An "occurrence" depends on the fortuitous nature of the event, that is, whether the damage was expected or intended from the standpoint of the insured. *King v. Dallas Fire Ins. Co.,* 85 S.W.3d 185, 191-92 (Tex. 2002). "Property damage" consists of physical injury to tangible property and

[1] The authors are both opinionated, but they are reasonable and have done their best to present an objective analysis. To the extent opinions are expressed, they are the authors' alone and they rarely agree, at least as to these issues.

> includes the loss of use of tangible property. Thus, we agree with the Fifth Circuit that "claims for damage caused by an insured's defective performance or faulty workmanship" may constitute an "occurrence" when "property damage" results from the "unexpected, unforeseen or undesigned happening or consequence" of the insured's negligent behavior. *Federated Mut. Ins. Co.*, 197 F.3d at 725.

Id. at 16.

In *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, the Court held that exclusion b., which applies to liability assumed under contract, did not preclude coverage for breach of contract.

Despite these cases, there is still a misconception that breach of contract is "just not covered."

Coverage B is decidedly different. While based on offenses, not an "occurrence," the exclusion for breach of contract is broader, and applies to any "'personal and advertising injury' arising out of a breach of contract, except an implied contract to use another's advertising idea in your "advertisement". "Arising out of" is construed broadly, so even an otherwise covered offense may be excluded if it arises out of a contractual relationship. *Sport Supply Group, Inc. v. Columbia Cas. Co.*, 335 F.3d 453 (5th Cir. 2003).

4. Knowing Is Not the Same as Intentional or Willful

Under Coverage A, DTPA violations may also be covered, or not, depending on whether the alleged conduct is an occurrence. If there is an occurrence, the additional allegation of a knowing violation does not necessarily defeat coverage, in its entirety or for the potential enhanced damages, as even a knowing violation can be an occurrence—depending on the facts. *Nat'l Union Fire Ins. Co. v. Puget Plastics Corp.*, 450 F. Supp. 2d 682 (S.D. Tex. 2006); *Stumph v. Dallas Fire Ins. Co.*, 34 S.W.3d 722 (Tex. App. – Dallas 2000, no pet.).

Under the personal and advertising injury coverage, there is an exclusion for a knowing violation of rights of another:

> "Personal and advertising injury" caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury".

Coverage B applies to many intellectual property torts, that may have an intent component, but it will not always equate to a knowing violation.

In *Graper v. Mid-Continent Cas. Co.*, 756 F. 3d 388 (5th Cir. 2014), the court evaluated whether an allegation of a willful violation of the Copyright Act gave rise to a right to independent counsel. The court reasoned, in part, that "willful," as used in the Act, included both knowing and reckless conduct, so even a determination of a willful violation was not determinative of coverage. *Id.* at 394.

5. Coverage for Indemnity Obligations Generally Depends on the Enforceability of the Indemnity Provision

The exception to exclusion b. affords coverage for liability assumed under certain "insured contracts." An insured contract includes one under which the named insured assumes the tort liabilities of another. While the policy defines the scope of coverage, whether a contract assumes the tort liability of another is usually an issue that will be litigated and resolved in the liability case, and is not a pure coverage issue.

II. THE SCOPE OF COVERAGE: PART II

A. Triggers, Limits and Exhaustion

1. Stacking Does Not Mean Every Policy, Every Limit

When an occurrence spans more than one policy period, the insured is entitled to pick the year with the highest limits, or broadest coverage, but the limit is still a single limit, not the cumulative limits of all triggered policies. *Amer. Phys. Ins. Exch. v. Garcia*, 876 S.W.2d 842 (Tex. 1994). In *Garcia*, evaluating a professional liability policy that spanned multiple policy periods, the court held:

> If a single occurrence triggers more than one policy, covering different policy periods, then different limits may have applied at different times. In such a case, the insured's indemnity limit should be whatever limit applied at the single point in time during the coverage periods of the triggered policies when the insured's limit was highest. The insured is generally in the best position to identify the policy or policies that would maximize coverage. Once the applicable limit is identified, all insurers whose policies are triggered must allocate funding of the indemnity limit among themselves according to their subrogation rights.

Id. at 855. This principle was reiterated in *Lennar Corp. v. Markel Am. Ins. Co.*, 413 S.W.3d 750, 758-59 (Tex. 2013), when an excess insurer was held liable for the entire remaining amount of a loss, not a pro rata share or other allocation, as long as some damage occurred during its policy period.

As a corollary, a "Stowers" demand for all limits of all policies over multiple years will likely be ineffective. *Garcia, supra.*

2. An Excess Policy Can Be Triggered Before All Primary Policies Exhaust

While neither case dealt with the secondary allocation, based on the reasoning of *Lennar* and *Garcia*, if an insured can select the year with the highest limit, it can also "spike," and require all insurers in the vertical tower for that year to exhaust. While *Garcia* provides that the triggered insurers may then allocate among themselves, it does not suggest they can wait, and defer their own obligation to the insured by seeking allocation.

3. Time on the Risk Is a Compromise

Where more than one consecutive policy is triggered, insurers have to decide how to allocate defense and indemnity. While *Don's Building* mandates that only injury or damage during the policy period is covered, that is not usually how cases are tried, or settled. Insurers often discuss time on the risk, and often treat it as a mandate. *Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20 (Tex. 2008). But there is nothing in the policy, or the law, that requires allocation by time on the risk. It may be a convenient method of compromise, but that is all it is. *Garcia* held that, once an insurer was selected, it could seek allocation with other insurers based upon its rights of subrogation. 876 S.W.2d at 855. *Lennar* rejected an argument that an insurer was limited to its pro rata share; in the absence of other available coverage, the insurer owes the entire indemnity amount. 413 S.W.3d at 759.

4. It Is Possible to Trigger More Than One Claims-Made Policy

Many in the insurance field assume that in a series of claims-made policies, only one year can be triggered. This is not accurate, as sometimes extended reporting periods extend not only the reporting period, but also the policy's coverage. Here is an example:

> An Extended Reporting Period is automatically provided without additional premium charge. If the **Insurer** or the **Named Insured** terminates or refuses to renew this policy, the **Named Insured** shall have an extension of the coverage provided by this policy with respect to any **Claim** first made against any **Insured** during the period of thirty (30) days after the end of the **Policy Period** and reported to the Insurer pursuant to the provisions of this policy, but only with respect to any **Wrongful Act** committed or alleged to be committed prior to the effective date of such termination or nonrenewal and subsequent to the **Continuity Date**, if any.

III. COVERAGE ISSUES AND THE DUTY TO DEFEND

A. If There Is No Duty to Defend, There Can Still Be a Duty to Indemnify

The Texas Supreme Court has resolved that the complaint allegation rule is not a one-way street. *D.R. Horton-Texas, Ltd. v. Markel Int'l Ins. Co.*, 300 S.W.3d 740 (Tex. 2009) (no duty to defend general contractor as additional insured where there was no allegation of the insured subcontractor's work). If the allegations are not covered, then extrinsic evidence will not create a defense obligation. And, if the same facts that preclude defense preclude indemnity, there is no duty to indemnify. *Farmers Tex. Cty. Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 84 (Tex. 1997). But, the absence of a duty to defend does not always mean there is no duty to indemnify. Although the duty to defend is usually broader than the duty to indemnify, sometimes it's not. *Id.* The duty to indemnify is based on actual facts, so evidence extrinsic to the allegations can make a difference. As a practical matter, this requires an insurer to decide whether to provide a defense—without a legal obligation to do so—because of a potential indemnity obligation.

B. A Reservation of Rights Is Not Always Effective

A reservation of rights letter, if properly written, timely given and supported by the law and the policy, preserves the insurer's coverage defenses. The letter should, however, adequately explain the coverage issues and potential defenses. Too much, or too little, detail may lead to a claim of waiver or estoppel. A letter that is generic, or no more than a "general warning" may be insufficient. *Mid-Continent Cas. Co. v. Petroleum Sols., Inc.*, 917 F. 3d 352, 356 n. 2 (5th Cir. 2019). In other words, think Goldilocks.

C. Defense Counsel Can, and Should, Read the Reservation of Rights

This is not a rule of law, but is still a good practice. When there is a reservation of rights, defense counsel is operating under an acknowledgement that a potential conflict exists. Unless he or she has some appreciation for that conflict, they cannot determine if or when the conflict requires them to withdraw, providing information to the insurer to the detriment of their client, the insured.

IV. RULES, OR JUST RULES OF CONSTRUCTIONS

In *Gilbert*, the Court reiterated the general rules of policy construction:

> The principles courts use when interpreting an insurance policy are well established. Those principles include construing the policy according to general rules of contract

> construction to ascertain the parties' intent. *Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 23 (Tex. 2008); *Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462, 464 (Tex. 1998). First, we look at the language of the policy because we presume parties intend what the words of their contract say. See *Don's Bldg. Supply*, 267 S.W.3d at 23. We examine the entire agreement and seek to harmonize and give effect to all provisions so that none will be meaningless. See *MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 652 (Tex. 1999). The policy's terms are given their ordinary and generally-accepted meaning unless the policy shows the words were meant in a technical or different sense. *Don's Bldg. Supply*, 267 S.W.3d at 23; *see also Sec. Mut. Cas. Co. v. Johnson,* 584 S.W.2d 703, 704 (Tex. 1979). Courts strive to honor the parties' agreement and not remake their contract by reading additional provisions into it. *See Nat'l Union Fire Ins. Co. of Pittsburg, PA v. Crocker*, 246 S.W.3d 603, 606 (Tex. 2008).

327 S.W.3d at 126.

Some "rules," however, are provided in policy language. In these instances, an insurer can circumvent the rule by changing the policy language. *See, e.g., Don's Bldg. Supply, Inc. v. One Beacon Ins. Co.,* 267 S.W. 3d 20, 29-30 (Tex. 2008).

The Texas Supreme Court adopted an injury-in-fact trigger. It also noted that injury-in-fact might require a difficult retrospective analysis, but that the Court was required "to honor the parties' chosen language." *Id.* The Court then invited change: "Finally, we stress that we do not attempt to fashion a universally applicable "rule" for determining when an insurer's duty to defend a claim is triggered under an insurance policy, as such determinations should be driven by the contract language – language that obviously may vary from policy to policy."

A. Illusory Coverage Is a Rule of Construction

Illusory coverage, while it sounds like a carte blanche argument, is most commonly used as a rule of construction: a court will adopt a construction that does *not* render coverage illusory.

B. Ambiguity Only Gives Rise to Coverage If One Reasonable Interpretation Is Covered

Policy language is ambiguous if it is subject to more than one reasonable interpretation. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995). A mere disagreement is not enough. *Am. Int'l Specialty Lines Ins. Co. v. Rentech Steel LLC,* 620 F.3d 558, 562 5th Cir. 2010); *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154 (Tex. 2003).

Even where two or more reasonable interpretations render the language ambiguous, the ambiguity only creates a basis to construe the language in favor of the insured if one of the reasonable interpretations supports coverage. *General Agents Ins. Co. v. Arredondo*, 52 S.W.3d 762 (Tex. App. – San Antonio 2001, pet. denied).

C. What About the Complaint Allegation Rule?

Texas employs a complaint allegation, or eight corners rule, to determine if an insurer owes a duty to defend. That precept is well known. But, is it a rule based on policy construction or a rule of law or just a legal conundrum.

Older general liability policies included an obligation to defend, even if the allegations were groundless, false or fraudulent. That language was deleted and is now rarely seen. Courts, however, continue to apply the concept, often without acknowledging the change in policy language.

Courts have noted that the duty to defend is contractual, and can therefore presumably be modified by contract, but have also noted that such modifications are rare, and there is little precedent for an alternative to the complaint allegation rule. *Guideone Specialty Mut. Ins. Co. v. Missionary Church of Disciples of Jesus Christ*, 687 F.3d 676 (5th Cir. 2012).

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