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Insurance Law

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*H. Michelle Caldwell**

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THIS Article discusses the significant insurance cases applying Texas law during this Survey period.

I. BAD FAITH

A. ASSIGNMENT OF CLAIMS

In *State Farm Fire & Casualty Co. v. Gandy*,¹ Gandy sued her stepfather, Pearce, for sexually abusing her over several years when she was a child. Gandy also sued her mother for allowing the abuse to take place. State Farm insured Gandy's mother under a homeowner's policy in effect during part of the time period when the abuse took place. Pearce retained Andrews, the attorney who was representing him in a divorce action filed by Gandy's mother and in the criminal case arising out of his alleged abuse of Gandy, to represent him in Gandy's civil action. Gandy's mother's divorce attorney actually notified State Farm of Gandy's lawsuit against Pearce.

State Farm agreed to defend both Pearce and Gandy's mother under a reservation of rights, but allowed each to select independent counsel at State Farm's expense. Andrews, however, never submitted any bills to State Farm or requested any payment of his fees. Apparently, Andrews did not charge Pearce for representing him in Gandy's civil suit, but only charged him for the divorce and criminal proceedings. Pearce subsequently fired Andrews and retained attorney Pattison to represent him in Gandy's civil suit. Although aware of State Farm's letter agreeing to pay Andrews' fees, neither Pattison nor Pearce contacted State Farm.

Following hearings on two motions for sanctions filed against Pearce for failing to properly respond to discovery, Gandy's attorney extended a settlement offer to attorney Pattison to settle with Pearce. Under the proposal, Pearce assigned Gandy all of his claims against State Farm and

1. 925 S.W.2d 696 (Tex. 1996).

agreed to a judgment. Gandy covenanted not to collect the judgment from Pearce's personal assets. Following settlement discussions, an agreed judgment, including actual and punitive damages, was entered against Pearce. One week before the judgment was entered, a State Farm adjuster contacted Andrews to inquire about the status of the case, only to learn that Andrews had withdrawn and that Pattison was now representing Pearce. When the adjuster called Pattison, the attorney responded that he had not yet had time to review the file and would call him back. In fact, the paperwork on the settlement had already been executed. State Farm first learned of the judgment almost a month after it was entered. State Farm immediately contacted Pattison and asked him to attempt to have the judgment set aside, offering to continue to defend Pearce under reservation of rights if the judgment were set aside. Pattison refused, and Gandy subsequently sued State Farm and Andrews.

The trial court granted summary judgment for State Farm, holding that it had neither a duty to defend nor indemnify Pearce in Gandy's lawsuit. However, the trial court ruled that even though State Farm had no duty to defend Pearce, because it had voluntarily assumed his defense, it was under a duty to do so in a non-negligent manner. Reasoning that Andrews was State Farm's agent in connection with Pearce's defense, and relying on evidence that Andrews' negligent representation of Pearce caused the entry of an excessive judgment against him, the trial court entered a judgment against State Farm for actual damages and attorneys' fees. Simply put, if State Farm had properly defended Pearce, the resulting judgment would have been substantially less than the judgment agreed to by the parties. The court of appeals affirmed,² agreeing that although State Farm was not legally obligated to defend Pearce, it was obliged to use ordinary care in the undertaking once it assumed the defense.³ The court of appeals noted that there was some evidence that the judgment harmed Pearce's reputation, credit, and ability to conduct his business.

The Texas Supreme Court reversed the court of appeals, noting that the settlement between Gandy and Pearce suffered from the same flaws that in the past led the court to invalidate assignments of causes of action in other contexts.⁴ Specifically, the court held that Pearce's assignment to Gandy violated public policy and, therefore, conveyed nothing to her.⁵ Because Gandy had no rights against State Farm except as Pearce's assignee, the court ruled that she could not recover anything from State Farm.⁶ In support of its holding, the court reasoned that (1) the settlement did not end the litigation, but rather prolonged it; (2) Pearce's settlement with Gandy greatly distorted the litigation, forcing Gandy to take vastly different positions with respect to her damages in order to maxi-

2. 880 S.W.2d 129 (Tex. App.—Texarkana 1994), *rev'd*, 925 S.W.2d 696 (Tex. 1996).

3. *Id.* at 136.

4. *Gandy*, 925 S.W.2d at 705.

5. *Id.*

6. *Id.* at 711-12.

mize her position to obtain a judgment against a solvent defendant; and (3) Pearce's settlement with Gandy forced Pearce to take differing positions with respect to whether or not he ever sexually abused Gandy.⁷

Based on public policy considerations, the court held that an insured's assignment of claims against his insurer is invalid if (1) the assignment is made prior to an adjudication of the plaintiff's claims against the defendant in a fully adversarial trial; (2) the defendant's insurer has tendered a defense; and (3) the defendant's insurer has either (a) accepted coverage, or (b) made a good faith effort to adjudicate the coverage issues prior to the adjudication of the plaintiff's claim.⁸ However, the court expressly declined to address whether an assignment is also invalid if one or more of these elements is lacking.⁹ In any event, the court stated that a judgment for plaintiff against an insured, rendered without a fully adversarial trial, is not binding on the carrier or admissible as evidence of damages in an action against the carrier by plaintiff as the insured's assignee.¹⁰ The court declared that its holding applied to any pending case in which complaint of the assignment was preserved and to all assignments executed after the date of the decision.¹¹

Without question, the *Gandy* decision alters the manner in which "sweetheart deals" were formerly transacted in the state of Texas. Both carriers and their insureds should be more inclined to file declaratory judgment actions to determine the duty to defend and the duty to indemnify. Courts and carriers, however, should be vigilant of assignments resulting from trials which purport to be "adversarial proceedings."¹²

B. REPRESENTATION OF COVERAGE TO INSURED

In *St. Paul Surplus Lines Insurance Co. v. Dal-Worth Tank Co.*,¹³ Dal-Worth Tank manufactured and sold tanker trucks for transportation of liquid propane gas. After Mission Butane, one of Dal-Worth's customers, suffered three rollovers of Dal-Worth tankers, Mission's insurer notified Dal-Worth of its intent to pursue a subrogation claim against Dal-Worth and requested that Dal-Worth notify its carrier of a possible design defect claim. Dal-Worth forwarded the notice and a subsequent DTPA demand to St. Paul, its products liability carrier. From there, everything went awry. After Dal-Worth was served with the suit papers, they were forwarded to Dal-Worth's insurance agent but apparently were never received by St. Paul. The St. Paul adjuster assigned to the file repeatedly

7. *Id.* at 711-13.

8. *Id.* at 714.

9. *Id.*

10. *Id.*

11. *Id.* at 720.

12. See *American Eagle Ins. Co. v. Nettleton*, 932 S.W.2d 169, 171 & n.3 (Tex. App.—El Paso 1996, writ denied) (after executing assignment and covenant not to execute with plaintiff, defendant insureds called no witnesses and offered no evidence in support of their defense at "trial").

13. 917 S.W.2d 29 (Tex. App.—Amarillo 1995, no writ).

failed to follow up on indications that Mission's carrier had filed suit against Dal-Worth. Almost seven months after Dal-Worth was served, Mission took a default judgment against Dal-Worth for nearly \$800,000 plus attorneys fees. Notice of the default judgment was sent to Dal-Worth, but went unheeded. Later, purely by accident, Mission's subrogation suit was discovered by an attorney sent by St. Paul's adjuster to the courthouse on another matter concerning Dal-Worth. Although the St. Paul adjuster discussed having the default judgment set aside, no action was taken. Instead, St. Paul sent the file to coverage counsel to determine if the claims in the default judgment were covered by the St. Paul policies. Although the St. Paul adjuster later told Dal-Worth of the default judgment, she failed to inform him that St. Paul now questioned coverage in the matter and that St. Paul had not hired any attorney to defend Dal-Worth's interests in the default judgment. Even after receiving counsel's coverage opinion, St. Paul waited a week before denying coverage to Dal-Worth. Although St. Paul later provided a "courtesy" defense to Dal-Worth in a related personal injury case, St. Paul refused to post a supersedeas bond to prevent execution on the writ from the default judgment on Dal-Worth's property. As a result, Dal-Worth was forced to file for bankruptcy and later ceased operations completely.

Among other findings at trial, the jury found that St. Paul breached its duty of good faith and fair dealing to Dal-Worth. In holding that sufficient evidence supported the jury's finding, the Amarillo Court of Appeals cited St. Paul's denial of coverage four months after the default judgment was taken and its agents' conduct which led Dal-Worth to believe that its interests were being represented in the interim.¹⁴ The court also flatly rejected St. Paul's advice-of-counsel defense to the charge that it wrongfully denied Dal-Worth's defense.¹⁵ St. Paul's claim that the claims made in the default judgment were the basis for its denial of coverage was also handily rejected by the court, which noted that the identical claims were made in a DTPA demand letter sent to Dal-Worth and received by St. Paul months before suit was filed by Mission. The evidence, the court held, "was sufficient for the jury to believe that St. Paul lulled Dal-Worth into believing it was handling the matter, and to find that its later denial of coverage was a breach of its duty of good faith and fair dealing."¹⁶ In light of the *Gandy* decision, however, decisions such as this one will likely be rare in the future.

14. *Id.* at 55-56.

15. *Id.* at 56 (citing *Nueces Trust Co. v. White*, 564 S.W.2d 798, 806 (Tex. Civ. App.—Corpus Christi 1978, no writ) as authority that advice of counsel alone does not establish good faith, but rather it is only to be considered a circumstance tending to show good faith).

16. *Id.* at 56 (citing *HOW Ins. Co. v. Patriot Fin. Servs. of Tex., Inc.*, 786 S.W.2d 533, 541 (Tex. App.—Austin 1990, writ denied), *rev'd on other grounds*, *Hines v. Hash*, 843 S.W.2d 464 (Tex. 1992)).

C. THIRD-PARTY CLAIMS

In a per curiam opinion, the Texas Supreme Court ruled that an insurer does not owe its insured a duty of good faith and fair dealing to investigate and defend claims by third parties against its insured. In *Maryland Insurance Co. v. Head Industrial Coatings & Services, Inc.*,¹⁷ Head Industrial contracted to do work for Texas Utilities (TU), agreeing to indemnify TU for any injury claims arising out of the work and to purchase contractual liability insurance for its indemnification obligation. Through its agent, Gans and Smith, Head purchased a general liability policy from Maryland. Head specifically instructed the agent to include contractual liability coverage, but the agent apparently committed a clerical error and the policy issued did not include the proper endorsement to create such coverage.

Nelson, a Head employee, sued Head and TU for injuries he sustained while working on TU's premises. After TU demanded indemnification from Head, Maryland determined that TU's claim for indemnity was not covered under the policy. Upon receiving a reservation of rights letter from Maryland, Head contacted its agent, who assured Head that the TU claim was covered. However, the agent later discovered his error in failing to secure the appropriate coverage, and unsuccessfully attempted to contact Maryland. Later, Maryland denied coverage to Head for TU's indemnification claim.

In the underlying trial, Nelson recovered a judgment against TU, and TU recovered a judgment on its indemnity cross-claim against Head. A suit for wrongful denial of its claim by Head against Maryland and its agent was in progress at the time the underlying judgments were rendered. Subsequently, Head settled with Nelson and TU, who assigned to Head their causes of action against Maryland and agreed not to execute on the underlying judgments. Head's insurance agent also guaranteed settlement funds to Head in exchange for Head's hold harmless agreement. Head dropped the agent from the case, but Maryland brought the agent back into the suit as a third-party defendant. At trial, in light of the agent's testimony about his clerical error, Maryland admitted that Head's claim was covered, and offered to pay the policy benefits. The jury determined that Maryland violated the Insurance Code by engaging in unfair or deceptive acts, but had not acted knowingly. The jury also found that the agent neither breached any fiduciary duty owed to Maryland nor breached its agency contract with Maryland.

At the case's initial stop on appeal,¹⁸ the Texarkana Court of Appeals held that a breach of the duty of good faith and fair dealing under a liability insurance policy can constitute an unfair or deceptive act or practice subjecting the carrier to liability under article 21.21 of the Texas Insur-

17. 938 S.W.2d 27 (Tex. 1996).

18. *Maryland Ins. Co. v. Head Indus. Coatings & Servs., Inc.*, 906 S.W.2d 218 (Tex. App.—Texarkana 1995), *rev'd*, 938 S.W.2d 27 (Tex. 1996).

ance Code.¹⁹ The court held that there was sufficient evidence that Maryland breached its duty of good faith and fair dealing based upon the acts of its agent. Noting that a carrier is liable to the insured for acts of agents which breach a duty of good faith and fair dealing,²⁰ the court of appeals held that the agent's failure to acknowledge his clerical error was "tantamount to misrepresentation, because he was aware that coverage was being denied because of his failure to correct his error."²¹ The agent's acts were attributable to Maryland and as such, were sufficient evidence that Maryland breached its duty of good faith and fair dealing to Head. The court of appeals also found that a knowing misrepresentation by an agent meets the requirements for knowing misrepresentation in the DTPA and Insurance Code.²² Because the agent was Maryland's local recording agent,²³ Maryland was charged with a knowing violation of the Insurance Code based on the agent's failure to disclose the policy error. Under the court's analysis, the knowledge of the agent is the knowledge of the company itself, and the agent's knowledge is imputed to the principal.

When the case reached the Texas Supreme Court, the court flatly rejected a bad faith cause of action in third-party insurance cases. The court expressly held that there is only one tort duty in the third-party context: the *Stowers*²⁴ duty to settle within policy limits.²⁵ The court held that *Stowers*, along with the insured's contractual rights, provides full protection against a carrier's refusal to defend or mishandling of a third-party claim.²⁶ The court's decision clearly limits an insured's common law claims for failure to settle a claim being defended by a carrier under a liability policy to a negligence standard.

D. INSURED AS THIRD-PARTY CLAIMANT

In *Rumley v. Allstate Indemnity Co.*,²⁷ Mrs. Rumley made a claim under her Allstate policy after she was injured in a one-vehicle accident while her husband was driving. Although Allstate paid personal injury

19. TEX. INS. CODE ANN. art. 21.21 (Vernon 1981 & Supp. 1996).

20. *Maryland Ins. Co.*, 906 S.W.2d at 227 (citing *Natividad v. Alexis, Inc.*, 875 S.W.2d 695 (Tex. 1994)).

21. *Id.* at 227.

22. *Id.* (citing *Underwriters Life Ins. Co. v. Cobb*, 746 S.W.2d 810 (Tex. App.—Corpus Christi 1988, no writ); *Celtic Life Ins. Co. v. Coats*, 885 S.W.2d 96 (Tex. 1994)).

23. A local recording agent is vested with authority coextensive with the insurer for writing insurance policies. *Head*, 906 S.W.2d at 229 (citing *Blakely v. American Employers' Ins. Co.*, 424 F.2d 728 (5th Cir. 1970); *American Nat'l Life Ins. Co. v. Montgomery*, 640 S.W.2d 346 (Tex. App.—Beaumont 1982, writ ref'd n.r.e.)). "A local recording agent has the authority to speak and act for the company and to transact all insurance business which that company is authorized to transact under its permit from the state." *Id.* (citing *Home Ins. Co. v. Roberts*, 129 Tex. 178, 100 S.W.2d 91 (1937)).

24. *See Stowers Furniture Co. v. American Indem. Co.*, 15 S.W.2d 544 (Tex. Comm'n App. 1929, holding approved).

25. *Head*, 938 S.W.2d at 28 (citing *Texas Farmers Ins. Co. v. Soriano*, 881 S.W.2d 312, 317 (Tex. 1994)).

26. *Id.* at 28-29.

27. 924 S.W.2d 448 (Tex. App.—Beaumont 1996, no writ).

protection benefits to Mrs. Rumley, the carrier denied her claim under the liability portion of the policy because of the family member exclusion.²⁸ Mrs. Rumley later sued Allstate and its adjuster for breach of the duty of good faith and fair dealing, Texas Insurance Code²⁹ violations, and DTPA³⁰ violations. The trial court granted Allstate's motion for summary judgment on the grounds that (1) Mrs. Rumley's claim was a third party claim for which the defendants owed no duty of good faith and fair dealing, (2) there was a reasonable basis for denying the claim since the validity of the family member exclusion was unsettled at the time of Allstate's adjustment of the claim, and (3) there was no special relationship or contractual privity between Allstate's adjuster and Mrs. Rumley. The Beaumont Court of Appeals acknowledged that the heart of the issue was whether a duty of good faith and fair dealing could arise where the claimant is a named insured on the policy on which the liability claim is made against another named insured. Even though Mrs. Rumley had a contractual relationship with Allstate, the court noted that the duty to act in good faith does not arise in every situation where there is a contractual relationship between the claimant and the carrier.³¹ Despite the fact that Mrs. Rumley had "relationships" with both her husband and Allstate when she asserted a liability claim against her husband, the court held that Mrs. Rumley became a legal antagonist to both her husband and Allstate.³² Based on this context, the court rejected Mrs. Rumley's assertion that she relied upon Allstate's good faith in handling her claim.³³

E. SEVERANCE AND ABATEMENT

The fundamental advantages of severing and abating "bad faith" claims from a claim for breach of contract—at least from the insurance carrier's standpoint—are the limitation of discovery to the contract claim and the avoidance of exposing all of the carrier's files. Avoiding discovery on the "bad faith" claims may be particularly desirable where resolution of the contract claim in the carrier's favor may render the "bad faith" claims moot. As a result, the issue of severance of bad faith claims was widely

28. The family member exclusion to the liability portion of a personal automobile policy in Texas typically excludes coverage for the insured "or any family member for bodily injury to [the insured] or any family member." *Rumley*, 924 S.W.2d at 448. During the time Allstate handled Mrs. Rumley's claim, the Texas Supreme Court was considering the validity of the family member exclusion in the case of *National County Mut. Fire Ins. Co. v. Johnson*, 829 S.W.2d 322 (Tex. App.—Austin 1992), *aff'd*, 879 S.W.2d 1 (Tex. 1993). The court subsequently invalidated the family member exclusion. *National County Mut. Fire Ins. Co. v. Johnson*, 879 S.W.2d 1 (Tex. 1993).

29. TEX. INS. CODE ANN. art. 21.21, §§ 3, 4(2), 16(a) (Vernon 1981 & Supp. 1996).

30. TEX. BUS. & COM. CODE ANN. ch. 17 (Vernon 1987 & Supp. 1996).

31. *Rumley*, 924 S.W.2d at 449 (citing *Caserotti v. State Farm Ins. Co.*, 791 S.W.2d 561 (Tex. App.—Dallas 1990, writ denied)).

32. *Id.* at 450.

33. *Id.*

litigated during the survey period.³⁴

In *Liberty National Fire Insurance Co. v. Akin*,³⁵ the Texas Supreme Court confronted the issue of whether a trial court abused its discretion when it denied a carrier's motion to sever and abate bad faith claims from a breach of contract claim. The lawsuit underlying the original proceeding arose out of claims by Brodrick against her homeowner's insurance carrier, Liberty, concerning foundation problems in her home resulting from water damage. After dispatching an adjuster and an engineer to investigate the damage, Liberty denied the claim. Brodrick subsequently filed suit against Liberty for breach of contract, violations of the Texas Insurance Code and the DTPA, and breach of the duty of good faith and fair dealing. Liberty moved to sever and abate Brodrick's bad faith claims on the grounds that certain evidence pertaining to Liberty's investigation, while admissible on the bad faith claims, would be inadmissible on the contract claim. After the trial court denied the motions, Liberty filed an original proceeding in the court of appeals. When the appellate court denied relief, Liberty sought mandamus relief from the Texas Supreme Court.

Noting that severance of claims rests within the sound discretion of the trial court, the supreme court held that the trial court did not abuse its discretion in denying Liberty's motions. Specifically, the supreme court found that Brodrick's claims were largely interwoven, that most of the evidence introduced would be admissible on both claims, and that any prejudicial effect resulting from a trial of the two claims simultaneously could be reasonably ameliorated by appropriate limiting instructions to the jury.³⁶

The supreme court did recognize, however, that severance may be necessary in situations where the carrier has made a settlement offer on a disputed contract claim. Liberty only made an offer on the undisputed portion of the contract claim. As such, the supreme court concluded that "[i]n the absence of a settlement offer on the entire contract claim, or other compelling circumstances, severance is not required."³⁷ Importantly, the supreme court only held that the trial court did not abuse its discretion in failing to grant the carrier's motions.³⁸ In other words, even

34. See, e.g., *Texas Farmers Ins. Co. v. Cooper*, 916 S.W.2d 698, 703 (Tex. App.—El Paso 1996, no writ) (holding that contractual claims must be tried separately from extracontractual claims in order to avoid prejudice, but declining to expand the holding beyond actual trial to include all pretrial proceedings and discovery); *Texas Farmers Ins. Co. v. Stem*, 927 S.W.2d 76, 81 (Tex. App.—Waco 1996, no writ) (directing the trial court to sever and abate all proceedings on bad faith claims pending resolution of the breach of contract claim).

35. 927 S.W.2d 627 (Tex. 1996).

36. *Id.* at 630.

37. *Id.* (citing *Allstate Ins. Co. v. Hunter*, 865 S.W.2d 189, 194 (Tex. App.—Corpus Christi 1993, orig. proceeding); *Progressive County Mut. Ins. Co. v. Parks*, 856 S.W.2d 776, 777 (Tex. App.—El Paso 1993, orig. proceeding)).

38. *Id.*

in the absence of a settlement offer, a trial court still maintains discretion to grant a carrier's motion to sever and abate if it so desires.

II. STOWERS DUTY

A. EFFECT OF SUPERSEDEAS BOND

The dispute in *Ecotech International, Inc. v. Griggs & Harrison*,³⁹ arose out of a wrongful death action against Ecotech. Two of Ecotech's insurance carriers, Mt. Hawley and American Capacity, retained the law firm of Griggs and Harrison to defend the company. Apparently, during the course of the underlying litigation, Mt. Hawley received offers to settle for the \$500,000 policy limits⁴⁰ but failed to pass this information to the insured. After a verdict substantially in excess of the available policy limits was entered, Ecotech sued the carriers and the defense firm for DTPA violations, article 21.21 violations, breach of contract, breach of express and implied warranties, negligence, breach of the common law duty of good faith and fair dealing, fraud and violation of the *Stowers* doctrine.⁴¹

On appeal, the San Antonio Court of Appeals rejected the initial contentions of the law firm and the carriers that the *Stowers* doctrine encompassed a majority of Ecotech's claims and that a violation of the *Stowers* duty cannot co-exist with Insurance Code or DTPA violations. The defendants also creatively argued that the filing of a supersedeas bond in the underlying case after the entry of judgment actually negated the element of damages from Ecotech's *Stowers* claim since (theoretically) the supersedeas bond protected Ecotech from any exposure to the excess judgment. The court declined to adopt this view. First, a period of over six months elapsed between the entry of judgment in the underlying proceedings and the filing of the supersedeas bond, leaving Ecotech exposed to joint and several liability for a judgment in excess of \$2.2 million. Additionally, the terms of the bond itself only served to extend Ecotech's exposure to joint and several liability for the entire amount of the judgment with interest. The carriers, on the other hand, were only required to indemnify Ecotech for the percentage of its liability. While acknowledging that the attorneys and their law firms were not subject to *Stowers* liability, the court of appeals held that summary judgment for the defendants was inappropriate because neither the law firm nor the carriers had attempted to disprove the other causes of action against them.

39. 928 S.W.2d 644 (Tex. App.—San Antonio 1996, writ denied).

40. Ecotech learned after the entry of judgment that it was only entitled to indemnity of \$200,000 because the \$500,000 policy limits were reduced according to the policy terms by the costs of defense in the underlying litigation. *Id.* at 648.

41. Under the doctrine outlined in *Stowers Furniture Co., v. American Indem. Co.*, 15 S.W.2d 544 (Tex. Comm'n. App. 1929, holding approved), an insured may recover from his insurance carrier the entire amount of a judgment in excess of policy limits rendered against him, if prior to judgment, the insurer negligently failed to accept a settlement offer within the liability limits of the policy. A carrier is "held to that degree of care and diligence which an ordinary prudent person would exercise in the management of his own business." *Id.* at 547.

B. DEMAND FOR MULTIPLE LIMITS

In *Traver v. State Farm Mutual Automobile Insurance Co.*,⁴² Davidson and Klause were involved in a car accident. Jordan, a passenger in Klause's car, made claims against Davidson and Klause, who were both insured by State Farm. Ultimately, State Farm offered to settle Jordan's claims for the full limit of Davidson's liability coverage and the full limits of Klause's liability and uninsured/underinsured motorist (UM/UIM) coverages. Jordan's attorney rejected this offer, but continued to demand the "policy limits from both insureds including uninsured motorist coverage."⁴³ At trial, the jury found Davidson solely responsible for the accident and awarded Jordan \$375,000 in damages. Traver, the executor of Davidson's estate, sued State Farm for (1) breaching its duty to defend Davidson in the underlying litigation; (2) its negligence in handling Jordan's case against Davidson; (3) breaching the duty of good faith and fair dealing; (4) violating the DTPA,⁴⁴ and (5) violating article 21.21.⁴⁵ State Farm obtained a summary judgment from the trial court.

After determining that a cause of action for breach of the *Stowers* duty survives the death of the insured,⁴⁶ the Fort Worth Court of Appeals analyzed the case under the requirements of *American Physicians Insurance Exchange v. Garcia*.⁴⁷ The court noted that clearly State Farm's offer of Davidson's entire policy liability limits was on the table during the entirety of the Jordan litigation. Under the terms of Davidson's State Farm policy, Jordan was never entitled to make a claim for Davidson's UM/UIM coverage; thus Jordan's demand for Davidson's UM/UIM policy limits was a settlement offer that was neither within the scope of coverage nor within the policy limits of Davidson's policy. The court held that the exclusion of the *Stowers* cause of action affected the viability of other causes of action, including State Farm's alleged failure to settle, breach of

42. 930 S.W.2d 862 (Tex. App.—Fort Worth 1996, writ granted).

43. *Id.* at 865.

44. TEX. BUS. & COM. CODE ANN. ch. 17 (Vernon 1987 & Supp. 1996).

45. TEX. INS. CODE ANN. art. 21.21 (Vernon 1981 & Supp. 1996).

46. In the absence of a statute, "the test most commonly used to determine survivability is whether or not the cause of action may be assigned." *Traver*, 930 S.W.2d at 867 (citing *Harding v. State Nat'l Bank*, 387 S.W.2d 768, 769 (Tex. Civ. App.—El Paso 1965, no writ)). An insured's right to sue for failure to settle is subject to assignment. *Charles v. Tamez*, 878 S.W.2d 201, 208 (Tex. App.—Corpus Christi 1994, writ denied); *Garcia v. American Physicians Ins. Exch.*, 812 S.W.2d 25, 33-34 (Tex. App.—San Antonio 1991), *rev'd on other grounds*, 876 S.W.2d 842 (Tex. 1994). "Because an insured's cause of action based upon *Stowers* can be assigned, it can also survive the death of the insured." *Traver*, 930 S.W.2d at 867.

47. 876 S.W.2d 842 (Tex. 1994). To impose a *Stowers* duty on a carrier when there is a single claim, a settlement demand must propose to release the insured fully in exchange for a stated sum of money. *Id.* at 848-49. The *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. *Id.* at 849. A demand above policy limits, no matter how reasonable, does not trigger the *Stowers* duty to settle. *Id.*

the duty to defend, and violations of the Insurance Code and DTPA.⁴⁸

III. GENERAL LIABILITY

A. TRIGGER OF COVERAGE

The Second Circuit applied Texas law to a convoluted coverage case involving excess liability coverage for asbestos-related personal injury and property damage claims in *Stonewall Insurance Co. v. Asbestos Claims Management Corp.*⁴⁹ National Gypsum Company (NGC) and a number of its liability insurers sought declaratory relief to clarify the extent to which NGC was entitled to indemnification for claims arising from NGC's manufacture of asbestos products. Because the insurance policies were triggered by injury or damage that occurs during the policy period, the court centered its focus on when the asbestos-related bodily injury or property damage occurred.

With respect to bodily injury claims, the Second Circuit held that the occurrence-based policies could be triggered throughout a gradual disease process where injury-in-fact can be shown by a preponderance of the evidence to be occurring at each point in that process.⁵⁰ The court also held that NGC was correctly allocated the pro rata share of liability attributable to those periods during which NGC was uninsured, but the "proration-to-the-insured" approach was modified so as not to apply to injuries occurring after 1985, when asbestos insurance was unavailable.⁵¹ The Second Circuit affirmed the trial court's finding that NGC did not expect or intend the bodily injuries caused by its products, rejecting the carriers' argument that even if NGC did not actually expect or intend the injuries, no coverage should be afforded if the evidence established that NGC "should have" expected the harm.⁵²

With respect to the property damage claims, the court found that the costs of removing and replacing asbestos products from buildings were properly considered "property damage."⁵³ NGC could not establish by a preponderance of the evidence that property damage was occurring continuously or at any given point following installation of NGC's building

48. *Traver*, 930 S.W.2d at 868 (citing *Garcia*, 876 S.W.2d at 846-47 & nn. 8 & 10 ("Breach of the *Stowers* duty does not constitute a violation of article 21.21 or the DTPA.")). *But see Ecotech Int'l*, 928 S.W.2d at 649 (citing *Garcia*, 876 S.W.2d at 847 n.11.) ("Contrary to the insurers' contention, in some circumstances there can exist a violation of article 21.21 and the DTPA in addition to a *Stowers* violation.").

49. 73 F.3d 1178 (2d Cir. 1995).

50. *Id.* at 1197. The court cited *National Standard Ins. Co. v. Continental Ins. Co.*, No. CA-3-81-1015-D, 1984 WL 23448 (N.D. Tex. Apr. 9, 1984) and *Dayton Indep. Sch. Dist. v. National Gypsum Co.*, 682 F.Supp. 1403 (E.D. Tex. 1988) for support in "confidently predict[ing] that Texas. . . will permit triggering throughout the period between exposure and date of claim or death in all cases in which the evidence persuades the trier of fact that successive injuries are recurring." *Stonewall*, 73 F.3d at 1197.

51. *Id.* at 1204.

52. *Id.* at 1205.

53. *Id.* at 1208-09.

materials.⁵⁴ The court also rejected NGC's position that all of the asbestos-in-building claims arose out of a single occurrence, i.e., NGC's decision to manufacture and sell asbestos-containing building materials.⁵⁵ Instead, the court held that each installation of NGC's products constituted a separate occurrence, requiring the application of another deductible.⁵⁶

B. OCCURRENCE

In a significant affirmation of its previous holding in *Columbia Mutual Insurance Co. v. Fiesta Mart, Inc.*,⁵⁷ the Fifth Circuit determined in *New York Life Insurance Co. v. Travelers Insurance Co.*⁵⁸ that an agent's intent is imputed to its principal for purposes of ascertaining whether an "occurrence" is alleged under a commercial general liability policy. In *New York Life*, Hernandez alleged that Herrera, a New York Life agent, defrauded her in connection with the sale of a life insurance policy. Hernandez alleged that Herrera and New York Life (NYL) jointly engaged in fraudulent and misleading conduct, as NYL negligently failed to follow its own underwriting guidelines, failed to formulate adequate rules and policies, and negligently hired and supervised Herrera. Travelers refused to defend and indemnify NYL in the Hernandez lawsuit. The jury in the state court suit subsequently returned a verdict against NYL. NYL then settled with Hernandez for an amount in excess of the aggregate limit of the Travelers policies.

NYL instituted a lawsuit against Travelers for breach of the insurance policies. The parties submitted cross-motions for summary judgment limited to the issue of whether Travelers breached its duty to defend NYL. The district court granted summary judgment for Travelers. On appeal, the Fifth Circuit agreed that the case was directly controlled by *Fiesta Mart*. In *Fiesta Mart*, the Fifth Circuit held that, although the complaint alleged negligent and unknowing acts by the insured, the insured's liability was related to and interdependent to the agent's fraud and, therefore, the carrier had no duty to indemnify the insured for the underlying judgment. The Fifth Circuit rejected NYL's attempts to characterize the "occurrence" as exposure to its *own* negligent and unknowing acts, finding that NYL's liability was clearly related to and interdependent on Herrera's fraud.⁵⁹ Additionally, NYL argued that *Fiesta Mart* was not binding on the Fifth Circuit because it is directly contrary to a later Fifth Circuit opinion, *Western Heritage Insurance v. Magic Years Learning Centers & Child Care, Inc.*⁶⁰ The Fifth Circuit acknowledged the inconsistent position on this issue taken in *Fiesta Mart* and *Magic Years*, but noted that

54. *Id.* at 1210.

55. *Id.* at 1213-14.

56. *Id.* at 1214.

57. 987 F.2d 1124 (5th Cir. 1993).

58. 92 F.3d 336 (5th Cir. 1996).

59. *Id.* at 339.

60. 45 F.3d 85 (5th Cir. 1995).

it was bound to follow the earlier opinion in *Fiesta Mart*.⁶¹

The *New York Life* decision may foreclose certain actions against employers or principals where plaintiffs allege remote acts of negligence on the part of the employers or principals in order to trigger coverage for the intentional acts of their employees or agents. Under simple principles of agency, an agent's intentional acts appear to be imputed to the principal, thereby precluding a duty to defend.

C. EXPECTED OR INTENDED INJURY EXCLUSION

In *Merchants Fast Motor Lines, Inc. v. National Union Fire Insurance Co.*,⁶² National Union filed a declaratory judgment action on its duty to defend its insureds, three Merchants entities, and their driver, Hart, under two insurance policies issued by National Union. National Union contended that it had no duty to defend the Merchants entities or Hart in a wrongful death lawsuit of a van's passenger who was shot by Hart while Hart was allegedly driving a Merchants truck. The suit alleged Hart was negligent in handling a firearm and that Merchants was negligent in hiring Hart and in failing to provide proper supervision of its driver. Merchants sought coverage under a commercial general liability policy and a truckers liability policy, both issued by National Union.

National Union acknowledged that it had a duty to defend Merchants in the underlying suit under the CGL. National Union filed a declaratory action seeking a determination of its remaining duties to defend Merchants under the truckers policy and to defend Hart under both policies. The trial court entered summary judgment in favor of National Union. On appeal, National Union contended that it owed no duty to defend either Hart or Merchants under the truckers policy⁶³ because the injuries suffered by Gonzales did not result from the "ownership, maintenance or use" of the vehicle operated by Hart. The underlying petition alleged that Hart negligently discharged the gun while operating a Merchants truck. National Union argued that a causal connection must exist between the use of the automobile and the accident, and that the discharge of the firearm was not causally connected to the operation of the truck. The court of appeals, however, reasoned that if Merchants' driver was authorized to carry a weapon for protection when operating the truck, and if the driver negligently discharged the weapon while operating that truck, then any damages resulting from the discharge arguably

61. 92 F.3d at 340 n.4 (citing *Smith v. Penrod Drilling Corp.*, 960 F.2d 456, 459 n.2 (5th Cir. 1992) ("That portion of *Magic Years* was an alternative holding and failed to acknowledge, let alone discuss, *Fiesta Mart*. Although we acknowledge the inconsistency in our caselaw, we are bound to follow the earlier decision.")). This note by the Fifth Circuit appears to seriously question the precedential value of *Magic Years*.

62. 919 S.W.2d 903 (Tex. App.—Eastland 1996), *rev'd*, 939 S.W.2d 139 (Tex. 1997).

63. The insuring agreement of the truckers policy provided: "We will pay all sums an insured legally must pay as damages because of bodily injury or property damage to which this insurance applies, caused by an accident and resulting from the ownership, maintenance or use of a covered auto." *Merchants*, 919 S.W.2d at 905.

arise out of the operation of that truck.⁶⁴ Therefore, the court of appeals determined that summary judgment for National Union was inappropriate and additional facts were needed to determine whether the negligent discharge of the firearm was causally connected to the operation of the truck.⁶⁵

The supreme court, acknowledging that the underlying petition alleged "use of a covered auto," dismissed the court of appeals' finding that a causal connection existed between the use of the auto and Gonzalez's injuries.⁶⁶ The court held that "the mere fact that an automobile is the situs of the accident is not enough to establish the necessary nexus between the use and the accident to warrant the conclusion that the accident resulted from such use."⁶⁷ The court found that because the facts alleged in the pleadings did not suggest even a remote causal connection between the truck's operation and Gonzalez's injuries, the pleadings did not create that degree of doubt which compels resolution of the issue for the insured.⁶⁸ In light of the holding that the pleadings did not allege that Gonzalez's injuries resulted from the use of a covered auto, the court declined to address whether the negligent hiring and supervision claims against merchants triggered coverage under the truckers policy.⁶⁹

The decision in *Bituminous Casualty Corp. v. Vacuum Tanks, Inc.*,⁷⁰ was a long time in the making. Beginning in 1982, Vacuum Tanks was embroiled in a environmental legal tangle stemming from contaminated waste sites. Vacuum Tanks sought coverage primarily for legal expenses under liability policies issued by Bituminous from 1959-1965; however, Vacuum Tanks also sought a defense from Bituminous for three suits for property damage. Due to the age of the policies, the parties spent several years trying to determine the contents of the lost policies.⁷¹ The Fifth Circuit determined that under Texas law, pollution cleanup costs incurred by a government in responding to the dumping of hazardous wastes on property, and imposed on an insured under CERCLA,⁷² are covered under the standard comprehensive general liability policy language insur-

64. *Id.* at 906.

65. *Id.*

66. *Merchant*, 1997 WL at 71253, *2-3.

67. *Id.* at *2 (citing 7 AM. JUR. 2D *Automobile Insurance* § 194, at 704 (1980)).

68. *Id.* at *3.

69. *Id.* National Union also argued before the Eastland Court of Appeals that it had no duty to defend Hart under the CGL policy because Hart was acting outside the course and scope of his employment at the time of the shooting. The court of appeals, however, rejected this argument in favor of the underlying petition's direct allegation that Hart was Merchants' employee and that Hart "negligently discharged a firearm" while operating a Merchants truck, holding that National Union had a duty to defend Hart under the terms of the CGL policy. *Merchants*, 919 S.W.2d at 907. On appeal to the supreme court, National Union dropped its complaints under the CGL policy.

70. 75 F.3d 1048 (5th Cir. 1996).

71. See *Bituminous Casualty Corp. v. Vacuum Tanks, Inc.*, 975 F.2d at 1130 (5th Cir. 1992).

72. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 § 107(a), 42 U.S.C. § 9607(a) (1994).

ing clause⁷³ for amounts the insured is legally obligated to pay as damages because of "injury to or destruction of property." The court specifically declined to classify such cleanup costs as economic injuries. The court further determined that because the underlying lawsuits did not allege that the insured intended or expected the injury or damage, the suits alleged a covered "accident," notwithstanding Bituminous' contention that Vacuum Tanks' transportation of the hazardous material was intentional. The distinguishing factor in this case was that *migration* of the contaminants was the cause of the damages to property adjacent to the waste site.⁷⁴ Accordingly, the court held that Bituminous was obligated to defend Vacuum Tanks in the underlying suits for property damage.

D. EMPLOYEE BODILY INJURY EXCLUSION

In *Assicurazioni Generali v. Pipe Line Valve Specialties Co.*,⁷⁵ the court held that even though the leasing contract specifically provided that the employee leasing company remained the employer for all purposes, the contract is not controlling when it is merely a "sham." The court noted that Pipeline Valves (the insured on the policy involved) fired all of its employees, entered into an employee leasing arrangement, and then "re-hired" via the leasing contract all of its former employees, causing no disruption to its operations. The leasing company was simply in the business of leasing employees and did not in any capacity work in the oil field pipe valve business. Therefore, when a leased employee sustained an on-the-job injury while working for Pipeline in the course of its normal business operations, Pipeline was not entitled to coverage under its CGL policy.⁷⁶ By determining that the injured employee was effectively the "borrowed servant" of the insured, both the insured and the leasing company were deemed to be co-employers of the injured man.⁷⁷

E. POLLUTION EXCLUSION

1. Limited Pollution Exclusion

In *SnyderGeneral Corp. v. Century Indemnity Co.*,⁷⁸ SnyderGeneral operated a manufacturing plant from April 1982 to July 1988 where it used and stored an industrial degreaser solvent, trichloroethane (TCA). A plant manager noticed a dramatic loss of TCA from one of the tanks

73. The specimen policy which the trial court adopted covered "all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease . . . sustained by any person and caused by accident." *Vacuum Tanks*, 75 F.3d at 1052. The policy also covered "all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident." *Id.*

74. *Id.* at 1054-55.

75. 935 F. Supp. 879 (S.D. Tex. 1996).

76. *Id.* at 887.

77. *Id.* at 886.

78. 907 F. Supp. 991 (N.D. Tex. 1995).

on November 18, 1983. SnyderGeneral employees observed several leaks on the side of the tank, saw rust surrounding the holes, and concluded that the leaks were caused by corrosion. It was later discovered that the groundwater at the facility was contaminated with TCA. SnyderGeneral regularly pumped groundwater from wells for use during its manufacturing process. Over a number of years, SnyderGeneral incurred environmental cleanup costs that it contended were the result of the 1983 TCA discharge. SnyderGeneral, which was not sued in connection with the cleanup of its facility, notified Century of its claim for coverage of the cleanup expenses.

In the resulting lawsuit, Century moved for summary judgment based on three provisions of its policy: (1) the limited pollution exclusion; (2) the "care, custody or control" exclusion; and (3) the term "damages" in the insuring agreement.⁷⁹ In connection with construing an exception to the pollution exclusion, the court was called upon to decide whether the TCA discharge for which SnyderGeneral sought coverage was "sudden and accidental" and whether that phrase also included a temporal component. The court concluded that the phrase "sudden and accidental" does have a temporal component, and rejected the argument that "sudden and accidental" was synonymous with "unforeseen."⁸⁰

Then, in connection with its analysis of the meaning of the temporal element of "sudden," the court concluded that "sudden" "can mean an instantaneous or abrupt event, or an unexpected incident of limited (although longer than instantaneous) duration."⁸¹ The court then determined what aspect of a discharge must be "sudden." After a detailed analysis of case law from Texas and other jurisdictions, the court concluded that there are two aspects of a pollution discharge that, if "sudden," are not excluded from coverage by the pollution exclusion. The first aspect

is the period of time that commences with the release of a contaminant and terminates with the cessation of the flow. In the case of a leak, this period represents the time . . . when waste first escapes from its container and ends when the flow ceases. Under [the court's view], the duration of the leak determines the suddenness of the discharge.⁸²

The second aspect is the cause of the discharge.⁸³ According to the court, the requirement of an accidental discharge means the policyholder cannot intentionally discharge pollution. Because intent requires evidence of an insured's pre-discharge conduct, the court looks to the cause of the discharge. The court concluded that the phrase "sudden and accidental" modified the term "discharge" and that if the "accidental" prong naturally refers to the cause of the discharge, the "sudden" prong can be read

79. *Id.* at 995.

80. *Id.* at 997.

81. *Id.* at 1000.

82. *Id.* at 1001.

83. *Id.*

the same way.⁸⁴ Under this view, the duration or nature of the cause of the discharge must qualify as "sudden." These interpretations are consistent with carriers' intent to limit pollution coverage to events that satisfy a temporal requirement. Because SnyderGeneral presented evidence that the TCA leak occurred within a 24-hour period, the court concluded that a genuine issue of material fact existed as to whether the TCA leak was of a limited duration.⁸⁵ Accordingly, the court refused to grant Century's motion for summary judgment on the basis of the pollution exclusion.

Next, the court analyzed the policy exclusion that precluded coverage for "'property used by the insured' or 'property in the care, custody or control of the insured or as to which the insured is for any purpose exercising physical control.'"⁸⁶ The court concluded that Texas law requires that the property in question be property that is totally and physically manipulated by the insured.⁸⁷ Concluding that SnyderGeneral did not physically manipulate the entire pool of groundwater beneath the site, but only controlled the groundwater that it actually pumped out and used, the court held that SnyderGeneral's use of a portion of the groundwater did not constitute use or control of all of the groundwater.⁸⁸ Accordingly, the court rejected Century's contention that the "care, custody or control" exclusion barred SnyderGeneral's claim.⁸⁹

Finally, the court addressed the issue of whether the word "damages" in the policy's basic insuring agreement included equitable relief such as environmental cleanup costs. Relying on cases decided under Texas law that distinguish between legal and equitable relief in other insurance contexts, as well as on cases characterizing environmental cleanup costs as equitable relief, the court concluded that the recovery sought by SnyderGeneral for the environmental cleanup expenses did not qualify as "damages" under the policy and granted Century's motion for summary judgment.⁹⁰

Mustang Tractor & Equipment Co. v. Liberty Mutual Insurance Co.,⁹¹ involved the construction of the "sudden and accidental" exception to a pollution exclusion. Mustang settled a lawsuit with Olin by agreeing to pay \$600,000 toward environmental cleanup costs assessed by the Texas Water Commission. After settling with Olin, Mustang sued its primary insurer, Liberty Mutual, and its excess carriers, including First State. Mustang sought to recover under its CGL policies the money it expended in the Olin settlement and the cost of defending several other lawsuits.

84. *Id.* at 1002.

85. *Id.*

86. *Id.* at 1002-03.

87. *Id.* at 1003 (citing *Hartford Cas. Co. v. Cruse*, 938 F.2d 601 (5th Cir. 1991)).

88. *Id.*

89. *Id.*

90. *Id.* at 1005.

91. 76 F.3d 89 (5th Cir. 1996).

In the underlying lawsuit, Olin alleged that after Mustang assumed control of the property, it demolished the structures on the property, extracted the concrete foundations, removed tanks, stripped vegetation, dug pits and trenches, installed underground tanks and pipes, bulldozed mounds of dirt, paved some areas, and constructed new buildings. Olin contended that these activities caused pollution to enter the ground. The trial court granted the insurers' motion for summary judgment in the coverage lawsuit and Mustang appealed.

Mustang argued on appeal that the "sudden and accidental" exception to the pollution exclusion was ambiguous and that the word "sudden" could mean either "unexpected" or "something that occurs quickly, rapidly or abruptly." According to Mustang, extrinsic evidence was admissible to resolve the ambiguity. Conversely, the carriers argued that "sudden" is commonly understood to mean quickly or rapidly, that the word is not ambiguous, and that extrinsic evidence is inadmissible.

Relying in part on the dictionary definition of "sudden,"⁹² the Fifth Circuit construed the pollution exclusion to bar coverage for releases of pollutants that are not quick or rapid as well as accidental.⁹³ Noting that Texas courts generally agree that "accidental" describes an unforeseen or unexpected event,⁹⁴ the court concluded that giving "sudden" the same meaning as "accidental" would violate the requirement that each word in a policy provision be given effect.⁹⁵ Thus, under Texas rules of construction, the Fifth Circuit reasoned that "sudden" must be read to include a temporal element. Because there was only one reasonable interpretation of the word as it was used in the policy provision, the word was not ambiguous and Mustang was not entitled to offer extrinsic evidence to support its definition of the word "sudden."⁹⁶

In *SnyderGeneral Corp. v. Great American Insurance Co.*,⁹⁷ a manufacturing plant owned and operated by a predecessor of SnyderGeneral used trichloroethylene to clean coils it produced, as well as to wash the floor and other activities. Any TCE spilled was collected by a drain system in the plant and emptied into dry wells located on the plant property. After several years, the groundwater was discovered to be contaminated and a government-ordered clean-up ensued. SnyderGeneral sought indemnification from its liability carriers for the \$7 million in costs, settlements and legal fees which it incurred as a result of the contamination. The carriers denied coverage based on the limited pollution exclusion found in the

92. *Id.* at 91-92 (citing *Webster's Third New International Dictionary* 2284 (1981) (listing as two of its alternative definitions "happening without previous notice or with very brief notice: coming or occurring unexpectedly: not foreseen or prepared for" and "characterized by swift action")).

93. *Id.* at 93.

94. *Id.* at 92 (citing *Republic Nat'l Life Ins. Co. v. Heyward*, 536 S.W.2d 549, 554 (Tex. 1976)).

95. *Id.*

96. *Id.*

97. 928 F. Supp. 674 (N.D. Tex. 1996).

policies.⁹⁸

Subsequent to determining that Texas law applied to the contract, the court addressed the issue of whether the facts of the case fell within the "sudden and accidental" exception to the limited pollution exclusion. Applying the general rules of contract construction, the court concluded that the limited pollution exclusion bars coverage for discharges that are not abrupt as well as unexpected or unintentional.⁹⁹

2. Absolute Pollution Exclusion

In *Bituminous Casualty Corp. v. Kenworthy Oil Co.*,¹⁰⁰ Kenworthy Oil was named as a defendant in litigation which alleged that the defendants conducted oil and gas recovery operations in a manner which resulted in the corruption of the underlying aquifer by residual pollutants. The underlying lawsuit pled causes of action for negligence, trespass, nuisance, intentional infliction of emotional distress, strict liability, fraud, and breach of covenants within oil and gas leases or easements. Kenworthy sought defense and indemnity from Bituminous, which was Kenworthy's CGL carrier from 1990 to 1995. Bituminous filed a declaratory judgment action and sought a summary judgment.

In its decision, the court adopted the "same nucleus of facts" test enunciated in *Northbrook Indemnity Insurance Co. v. Water District Management Co.*¹⁰¹ The court noted that when the "factual allegations are distilled to their essence, it is clear that plaintiff seeks recovery of damages for past and future pollution of the underlying aquifer."¹⁰² Based on the repetitious language in the underlying petition which only suggested pollution as the cause of the plaintiff's damages, the court held that the

98. The limited pollution exclusion stated:

This policy shall not apply . . . to liability arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Id. at 676-77.

99. *Id.* at 680 (citing in support *Snyder General Corp. v. Century Indem. Co.*, 907 F. Supp. 991 (N.D. Tex. 1995); *American States Ins. Co. v. Hanson Indus.*, 873 F. Supp. 17 (S.D. Tex. 1995); *Meridian Oil Prod., Inc. v. Hartford Accident & Indem. Co.*, No. G-91-167 (S.D. Tex., Mar. 4, 1993), *aff'd*, 27 F.3d 150 (5th Cir. 1994); *In re Texas Eastern Transmission Corp. PCB Contamination Ins. Coverage Litig.*, 870 F. Supp. 1293, 1349 (E.D. Pa. 1992) (applying Texas law), *aff'd on other grounds*, 15 F.3d 1249 (3d Cir.), *cert. denied*, 115 S. Ct. 291, 130 L.Ed.2d 206 (1994); *National Standard Ins. Co. v. Continental Ins. Co.*, No. CA-3-81-1015-D (N.D. Tex., Oct. 4, 1983)).

100. 912 F. Supp. 238 (W.D. Tex.), *aff'd*, 105 F.3d 656 (5th Cir. 1996).

101. *Id.* at 241 (citing *Northbrook*, 892 F. Supp. 170 (S.D. Tex. 1995));

[T]he fact that the underlying petitions allege various theories of liability, including negligence, does not change the nature of the precluded event. Because all of the underlying plaintiffs' alleged injuries arise out of the discharge, dispersal, release, or escape of pollutants, the absolute pollution exclusion operates to bar recovery of all of the . . . plaintiffs' claims.

Northbrook, 892 F. Supp. at 175.

102. *Kenworthy Oil*, 912 F. Supp. at 241.

absolute pollution exclusion applied to the claim.¹⁰³ The court also found that the petition failed to state an "occurrence" because the damages to the plaintiff's property were the natural and probable consequences of oil and gas production activities.¹⁰⁴ Finally, the court rejected Kenworthy's contention that the allegations of "trespass" fell within the "personal injury" coverage of the policies.¹⁰⁵

F. DESIGNATED PREMISES ENDORSEMENT

Cigna Lloyds Insurance Co. v. Kamins,¹⁰⁶ involved the duties of three carriers to defend and indemnify their insured in connection with an underlying automobile accident. Ray died as a result of injuries he received when his vehicle collided with a taxicab driven by Palmer. Ray's beneficiaries sued Kamins and others to recover damages resulting from Ray's death. The underlying plaintiffs maintained that Yellow Cab owned and operated the cab driven by Palmer. The underlying petition contained allegations of negligent acts and omissions attributable to Kamins, individually and d/b/a Yellow Cab, including allegations of negligent failure to investigate Palmer's background and negligent hiring. Kamins requested that various insurers defend him. The trial court granted summary judgment in favor of all of the insurers except Cigna Lloyds, Kamins' CGL carrier.

The Cigna Lloyds policy contained a designated premises endorsement.¹⁰⁷ The schedule to the designated premises described various business locations. Upon examining the petition in the underlying suit, however, the court determined that it mentioned neither any covered premises nor Kamins' relationship to them. Further, the petition failed to allege a relationship between any of the premises and the accident. Thus, the court concluded that no coverage was provided by the commercial general liability policy and rendered judgment in favor of Cigna Lloyds.¹⁰⁸

The court also addressed whether another Cigna company had a duty to defend Kamins under its excess policy. The court determined that there was no underlying or primary insurance policy issued to Kamins that covered the Ray accident or that triggered the protection of the ex-

103. *Id.* Courts appear to interpret the absolute pollution exclusion rather meticulously to the facts of a case. See, e.g., *Mid-Continent Casualty Co. v. Bermea*, No. V-95-097 (S.D. Tex. Aug. 6, 1995) (absolute pollution exclusion excluded coverage for claimant's alleged injuries sustained from drinking chemical-tainted water at insured's chemical storage plant).

104. *Id.* (citing *Meridian Oil Prod., Inc. v. Hartford Accident & Indem. Co.*, 27 F.3d 150, 152 (5th Cir. 1994) ("[C]overage does not exist for inevitable results which predictably and necessarily emanate from deliberate actions.")).

105. *Id.* at 241-42.

106. 924 S.W.2d 206 (Tex. App.—Eastland 1996, no writ).

107. A designated premises endorsement typically restricts the coverage of the insuring agreement to damages arising out of "[t]he ownership, maintenance or use of the premises shown in the Schedule and operations necessary or incidental to those premises . . ." *Id.* at 209.

108. *Id.*

cess policy. Noting that there were no obligations imposed upon the primary carriers listed in the schedule of underlying coverage in the excess policy, the court concluded that no obligations under the excess policy were triggered.¹⁰⁹

G. LIQUOR LIABILITY EXCLUSION

In *Paradigm Insurance Co. v. Texas Richmond Corp. d/b/a The Men's Club of Houston*,¹¹⁰ Paradigm sought a declaration that it had no duty to defend The Men's Club in an action by Butler, in which she alleged that she was a passenger in an automobile which was struck by a car driven by Moraczewski, a patron of the club. Butler alleged that The Men's Club allowed Moraczewski to leave the club intoxicated, thereby rendering it liable for the injuries she sustained as a result of the accident. Butler alleged that the club and its agents were negligent and grossly negligent in several respects, including failing to hire a competent valet parking service and failing to supervise the operations adequately.

Paradigm moved for summary judgment on the ground that Butler's damages were excluded from coverage by the liquor liability exclusion.¹¹¹ The club filed a cross motion for summary judgment on the ground that Paradigm had a duty to defend. The trial court found that Paradigm had a duty to defend and granted the club's motion for summary judgment.

On appeal, the court of appeals held that Paradigm had no duty to defend the club because Butler's lawsuit asserted only causes of action that fell within the liquor liability exclusion. Rejecting the Men's Club's attempt to distinguish other Texas authority construing the exclusion, the court of appeals held that Butler's allegation that The Men's Club failed to hire and select a competent valet parking service was not dependent upon its causing or contributing to the intoxication of any person.¹¹² The court further held that even though the service provided by the valet company was entirely independent of the club's business of selling and serving alcohol, Butler's claims of negligent hiring and supervision "actually stems from the failure of the parking attendant to monitor the intoxication of patrons who had consumed alcohol at the club."¹¹³

109. *Id.* at 210.

110. No. 14-95-00747-CV, 1997 WL 33944 (Tex. App.—Houston [14th Dist.] Jan. 30, 1997, no writ).

111. The policy excluded coverage for:

c. "Bodily injury" or "property damage" for which any insured may be held liable by reason of:

- (1) Causing or contributing to the intoxication of any person;
- (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
- (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

Id. at *1.

112. *Id.* at *4-5.

113. *Id.* at *6.

Accordingly, the court reversed the summary judgment for the club was appropriate and rendered judgment in favor of Paradigm.

H. EXCESS/UMBRELLA COVERAGE

In *St. Paul Mercury Insurance Co. v. Lexington Insurance Co.*,¹¹⁴ four insurance carriers contributed to the settlement of a severe personal injury case, each reserving its right to seek a judicial determination of its contribution obligation to the settlement. In the underlying case, an employee of a subsidiary of Sanifill was injured in the course and scope of his employment. Sanifill was covered by four policies: (1) a \$500,00 primary hull protection/indemnity policy issued by Centennial, (2) a \$4.5 million excess policy by St. Paul, Centennial's excess carrier, (3) a \$1 million primary workers compensation and employer's liability policy with Landmark, and (4) a \$5 million excess policy issued by Lexington, Landmark's excess carrier. Each of the primary carriers tendered their respective limits to the employee's \$4.8 million settlement, while St. Paul paid almost \$1.8 million and Lexington paid \$1.6 million. In the subsequent declaratory action, the trial court held that the primary carriers were obligated to contribute their entire policy limits and that the excess carriers were obligated to make a pro rata contribution on the remainder based on the amount of coverage provided by each excess policy.

On appeal, the Fifth Circuit noted that there are three types of "other insurance" clauses: pro rata, excess, and escape.¹¹⁵ The "other insurance" clause in Centennial's primary policy was an escape clause,¹¹⁶ which St. Paul's excess policy incorporated. Landmark's primary policy contained a pro rata "other insurance" clause.¹¹⁷ Lexington's policy contained an excess "other insurance" clause.¹¹⁸ The court held that because the "other insurance" clauses of the two primary policies conflicted, liability would be prorated between the policies.¹¹⁹ Effectively, however, the court's decision had no impact on the primary carriers since the settlement exceeded the limits of the primary policies. The court also found that the conflict between the "other insurance" clauses in the excess poli-

114. 78 F.3d 202 (5th Cir. 1996).

115. *Id.* at 206.

116. Centennial's policy contained an "other insurance" escape clause which provided that "where the Assured is, irrespective of this insurance, covered or protected against any loss or claim which would otherwise have been paid by the Assurer, under this policy, there shall be no contribution by the Assurer on the basis of double insurance or otherwise." *Id.* St. Paul's excess policy adopted the Centennial escape clause through its form-following provisions. *Id.*

117. Landmark's pro rata "other insurance" clause provided that Landmark "will not pay more than [its] share of damages and costs covered by this insurance and other insurance or self-insurance. Subject to any limits of liability that apply, all shares will be equal until the loss is paid." *Id.* at 207.

118. The Lexington excess "other insurance" clause stated, "[i]f other valid and collectible insurance with any other insurer is available to the Insured covering a loss also covered hereunder, this insurance shall be excess of, and shall not contribute with such other insurance." *Id.*

119. *Id.* at 210 (citing *Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch.*, 444 S.W.2d 583 (Tex. 1969)).

cies mandated that the excess insurance be prorated as well.¹²⁰ Finally, the court rejected Landmark and Lexington's argument that because Centennial and St. Paul had not reserved their rights on the "other insurance" escape clause as to the insured Centennial and St. Paul were estopped from asserting the "other insurance" escape clause against the other carriers.¹²¹

The impact of insurer instability was exhibited in *Taylor Service Co. v. Texas Property and Casualty Insurance Guaranty Association*.¹²² Taylor Service purchased two liability policies from COMCO Insurance Company, one a primary automobile policy and the other an excess policy. Taylor Service subsequently became liable for \$250,000 as the result of an automobile accident. At the time Taylor Service sought indemnity on the COMCO policies, the carrier was insolvent and the Guaranty Association was handling all claims under the Insurance Code.¹²³ Because the Insurance Code prohibits the Guaranty Association from paying more than \$100,000 for a claim written by an insolvent insurer,¹²⁴ it paid Taylor Service the \$100,000 statutory limit under the primary automobile policy. The Guaranty Association declined, however, to pay any sum under the excess policy. Taylor Service brought suit to recover the remaining \$100,000 under the excess policy.

On appeal, the court found that the trial court had correctly denied Taylor Service's claim. The court cited a provision of the excess policy requiring the insured to maintain the underlying insurance, and that the insured's failure to do so will not enlarge the carrier's liability under the excess policy. The provision specifically noted that if the insured was unable to recover from the primary carrier because of its insolvency, then "the coverage afforded by this policy shall apply in excess of the applicable limit of insurance specified in the schedule of 'underlying insurance.'"¹²⁵ The court interpreted this provision as meaning that the insolvency of the underlying insurer did not enlarge coverage under the excess policy. Coverage under the excess policy, held the court, "did not 'drop down' to encompass [the insured's] loss over and above the \$100,000 actually paid" under the primary policy.¹²⁶ In other words, the excess policy was not triggered until the \$1,000,000 limit of the underlying policy had been paid.

120. *Id.*

121. *Id.* at 207-08.

122. 918 S.W.2d 89 (Tex. App.—Austin 1996, no writ).

123. TEX. INS. CODE ANN. art. 21.28-C (Vernon Supp. 1996).

124. *Id.* § 5(8).

125. *Taylor Service*, 918 S.W.2d at 90.

126. *Id.*

IV. PROPERTY

A. WATER-RELATED FOUNDATION DAMAGE

In *Burditt v. West American Insurance Co.*,¹²⁷ the Burditts sought coverage for a shift in their home's foundation and structural damage to their home caused by a leak in an interior pipe behind their bathroom wall. West American issued a homeowner's policy¹²⁸ to the Burditts and paid for the repair of water damage immediately surrounding the pipe, but denied coverage for cracking in the foundation, walls and ceiling. The court found that the house suffered foundation damage, which was an excluded peril. The Burditts argued, however, that deterioration of the pipe, also an excluded peril, caused water damage to the foundation, thus fitting within the exception to the exclusionary clause. Essentially, the Burditts argued that the policy covered water damage caused by deterioration regardless of the foundation damage exclusion.

The court held that the exclusion was ambiguous because it sets out causal relationships among different, frequently interrelated types of damages.¹²⁹ Under those circumstances, the court held that an insured "need only demonstrate a reasonable interpretation of the clause favoring coverage" and that the Burditts' arguments strongly supported a reasonable interpretation for coverage of the water damage caused by the pipe's deterioration.¹³⁰ The court held that West American's interpretation of the exclusion "would make the exception for water damage almost meaningless because it would not include the excluded perils of rust, wet rot and mold, regardless of their natural association with water damage."¹³¹ As a result, the court reversed the district court's grant of summary judgment in favor of West American and remanded the case for determination of contested issues of material fact.¹³²

B. APPRAISAL PROVISION

Wells v. American States Preferred Insurance Co.,¹³³ involved the issue of whether appraisers, acting under the appraisal provision¹³⁴ of a Texas

127. 86 F.3d 475 (5th Cir. 1996).

128. The policy covered all risk of physical loss not excluded by Section IIB, which read in part as follows:

This policy does not insure against . . .

Loss by termites or other insects; deterioration; smoke from agricultural smudging or industrial operations; wet or dry rot; mold; mechanical breakdown; settling, shrinkage, or expansion in foundations, walls, floors or ceilings; this Exclusion, however, shall not apply to loss by fire, smoke, (Except as specifically excluded above), explosion, landslide, total or partial collapse, water damage, and glass breakage, caused by perils excluded in this paragraph.

Id. at 476.

129. *Id.* at 477.

130. *Id.*

131. *Id.*

132. *Id.* at 477-78.

133. 919 S.W.2d 679 (Tex. App.—Dallas 1996, writ denied).

134. The appraisal provision in the American States policy read:

homeowners' policy, are authorized and empowered to determine what caused or did not cause the loss claimed. The Wells purchased an insurance policy from American States insuring their dwelling against foundation and structural damage due to foundation movement caused by leaks in the plumbing system. The Wells made a claim on the policy for foundation and structural damage caused by a plumbing leak. American States denied the claim, demanded an appraisal and then sued to require an appraisal. The Wells counterclaimed on the policy and other causes of action. The trial court abated the counterclaim until an appraisal was done.

Two appraisers and an umpire determined that the resulting damage to the dwelling due to foundation movement was \$22,875. However, one appraiser and the umpire also determined that the plumbing leak caused no loss. Based on the latter determination, the trial court entered a take nothing summary judgment against the Wells. The Wells appealed that decision on the grounds that the appraisal section of the policy, as a matter of law, did not authorize the appraisers and umpire to determine that the plumbing leak did not cause the loss to the Wells property. The court agreed with the Wells and held that the appraisal section of the homeowners policy does not authorize and empower appraisers to determine what caused or did not cause a claimed loss.¹³⁵ Relying upon holdings from other jurisdictions, the court concluded that the majority rule is that appraisers have no power or authority to determine questions of causation, coverage or liability. The court reasoned that the majority rule was consistent with Texas courts' discussion of the effect of an appraisal award, which estops one party from contesting the issue of damages in a suit on the insurance contract, leaving only the question of liability for the court.

7. Appraisal. If you and we fail to agree on the actual cash value, amount of loss or the cost of repair or replacement, either can make a written demand for appraisal. Each will then select a competent, independent appraiser and notify the other of the appraiser's identity within 20 days of receipt of the written demand. 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 district court of a judicial district where the loss occurred. The two appraisers will then set the amount of loss, stating separately the actual cash value and loss to each item. If you or we request they do so, the appraiser [sic] will also set:

- a. the full replacement cost of the dwelling.
- b. the full replacement cost of any other building upon which loss is claimed.
- c. the full cost of repair or replacement of loss to such building, without deduction for depreciation.

If the appraisers fail to agree, they will submit their differences to the umpire. An itemized decision agreed to by any two of these three and filed with us will set the amount of the loss. Such award shall be binding on you and us.

Each party will pay its own appraiser and bear the other expenses of the appraisal and umpire equally.

Id. at 681.

135. *Id.* at 683.

Returning to the language of the appraisal clause, the court held that the appraisal clause concerned only a dispute over the amount of money involved in a claim.¹³⁶ The court noted that the appraisal clause makes no provision for a "causation dispute" or a "liability dispute."¹³⁷ The court held that the appraisal section of the Texas Homeowners policy established an appraisal procedure to determine the dollar amount of the insured's loss only, and that it does not authorize or empower the appraisal panel created thereunder to determine what caused or did not cause the loss.¹³⁸ As a result, the court held that the one appraiser and the umpire exceeded their authority when they determined that the plumbing leak did not cause the Wells' loss.

C. TOTAL LOSS DETERMINATION

In *State Farm Fire & Casualty Co. v. Mower*,¹³⁹ the Texas Supreme Court considered whether there was evidence that a home was so damaged that it qualified as a "total loss" under Texas law. The Mowers' home burned, leaving the foundation and a portion of the garage. The Mowers demanded payment for a total loss under their \$175,000 State Farm property policy. After two estimates were made for the reconstruction of the house, State Farm offered the Mowers \$90,000. Both of the estimates obtained by State Farm expressly stated that the garage and slab foundation would be used in the reconstruction of the home. The Mowers rejected State Farm's offer and demanded \$104,000, the balance of the mortgage.¹⁴⁰

The supreme court held that a claim could not constitute a "total loss" if a remnant of the structure is reasonably adapted for use as a basis upon which to restore the building to its pre-fire condition.¹⁴¹ Because there was uncontroverted evidence that the foundation and the garage could be used in rebuilding the home, the home was not a total loss, and the maximum award to which the Mowers were entitled was \$90,000.¹⁴²

D. AUTOMOBILE EXCLUSION

In *American Stone Diamond, Inc. v. Lloyds of London*,¹⁴³ Wasson, a jeweler, was the victim of a substantial diamond theft as he ended his business day of calling on small jewelry retailers in the Houston area. As Wasson paid for gasoline for his rented car, thieves broke into the trunk

136. *Id.* at 685.

137. *Id.*

138. *Id.*

139. 917 S.W.2d 2 (Tex. 1995).

140. Interestingly, the mortgagee, also an insured under the policy, informed the Mowers that it would accept State Farm's offer if they did not. *Id.* at 3.

141. *Id.* at 4.

142. *Id.*

143. 934 F. Supp. 839 (S.D. Tex. 1996); *see also* *Tivoli Corp. v. Jewelers Mut. Ins. Co.*, No. 04-95-00135-CV (Tex. App.—San Antonio, Aug. 14, 1996, writ requested), for facts and a holding that are virtually identical to the *American Stone Diamond* case.

of the car and vanished with almost \$270,000 worth of jewelry. Lloyds of London denied Wasson's claim under a property policy covering the inventory based on an automobile exclusion.¹⁴⁴ The automobile exclusion contained an exception for instances in which the insured, its agent or a person whose sole duty is to attend the vehicle is actually in or upon the vehicle. American Stone Diamond, the insured, filed suit against Lloyds for breach of contract, breach of the covenant of good faith and fair dealing, fraud, constructive fraud and breach of fiduciary obligations. Lloyds moved for summary judgment on the breach of contract claim, and the insured responded, asserting (1) that the "in or upon the vehicle" language of the policy should include "normal, essential daily activities such as buying gasoline for a car;" (2) that the exclusion was ambiguous with regard to coverage for such activities; and (3) that even if unambiguous, the exclusion was unconscionable when applied to the facts of this case.¹⁴⁵

The district court cited a litany of cases from other jurisdictions in rejecting the insured's assertions that the exclusion excepted "normal, essential daily activities" or was ambiguous.¹⁴⁶ The court noted that the use of the term "actually" in the phrase "actually in or upon" the vehicle plainly expressed the intent of the exclusion.¹⁴⁷ American Stone Diamond's unconscionability claim was also handily rejected by the court due to the court's perception that the insured was a sophisticated insur-

144. The automobile exclusion to the policy read:

This Insurance insures against all risks of loss or damage to the above described property arising from [sic] any cause whatsoever
EXCEPT:

* * *

(I) Loss or damage to property insured hereunder while in or upon any automobile, motor-cycle or any other vehicles unless, at the time of loss or damage occurs, there is actually in or upon such vehicle, the Assured, or a permanent employee of the Assured, or a person whose sole duty it is to attend the vehicle.

American Stone Diamond, 934 F. Supp at 841.

145. *Id.*

146. *Id.* at 843 (citing *Williams v. Fallaize Ins. Agency, Inc.*, 220 Ga. App. 411, 469 S.E.2d 752 (1996) (exclusion applicable where insured was in store 25 feet away from vehicle at time of theft); *JPM Associates, Inc. v. St. Paul Fire & Marine Ins. Co.*, 109 Md. App. 343, 674 A.2d 562 (1996) (exclusion applicable where insured was inside service station paying for gasoline at time of theft); *Wideband Jewelry Corp. v. Sun Ins. Co. of N.Y.*, 210 A.D.2d 220, 619 N.Y.S.2d 339 (1994) (exclusion applicable where insured's employee was six feet from vehicle at time of theft); *Jerome I. Silverman, Inc. v. Lloyd's Underwriters*, 422 F. Supp. 89 (S.D.N.Y. 1976) (exclusion applicable where insured was temporarily away from vehicle at time of theft); *Revesz v. Excess Ins. Co.*, 30 Cal. App. 3d 125, 106 Cal. Rptr. 166 (1973) (exclusion applicable where insured was getting directions a few feet from vehicle at time of theft); *Royce Furs, Inc. v. Home Ins. Co.*, 30 A.D.2d 238, 291 N.Y.S.2d 529 (1968) (exclusion applicable where insured was registering inside hotel for a few minutes while vehicle was six to ten feet outside hotel at time of theft); *American Charm Corp. v. St. Paul Fire & Marine Ins. Co.*, 56 Misc. 2d 574, 289 N.Y.S.2d 383 (1968) (exclusion applicable where insured was in his home with vehicle locked in adjacent garage at time of theft); *Phil G. Ruvelson, Inc. v. St. Paul Fire & Marine Ins. Co.*, 235 Minn. 243, 50 N.W.2d 629 (1951) (exclusion applicable where insured was away from vehicle for a few minutes to use bathroom and drink cup of coffee at time of theft).

147. *Id.* at 843.

ance purchaser who was aware that the policy's risk of loss was transferred back to the insured under certain circumstances.¹⁴⁸

V. AUTOMOBILE

A. CONSENT TO SETTLEMENT EXCLUSION

Simpson v. GEICO General Insurance Co.,¹⁴⁹ involved the interpretation of the "consent to settlement" exclusion and the "right-to-recover-payment" clause in a Texas personal automobile policy in the context of an insured who settled with a non-motorist tortfeasor without first obtaining the insurer's consent. Simpson was involved in an accident with an underinsured motorist. In addition to the underinsured motorist, Simpson sued several companies for negligent manufacture and maintenance of barricades at a construction area near the accident site. GEICO subsequently denied Simpson's claim for underinsured motorist benefits after he failed to obtain GEICO's consent to a settlement with the defendant companies. After Simpson sued GEICO for breach of contract, the carrier moved for summary judgment on the basis that Simpson failed to comply with the "consent to settlement" exclusion, the "right-to-recover-payment" clause, and the recoupment clause within the Texas Insurance Code. The trial court granted the summary judgment without specifically stating the reasons for its decision. On appeal, the insured argued that the trial court erred in granting summary judgment because he had complied with the terms and conditions of the insurance policy.

In a case of first impression in Texas, the Houston appellate court addressed the issue of whether the "consent to settlement" exclusion applied to settlements with non-motorist tortfeasors. After reviewing an opinion from the Supreme Court of Kansas,¹⁵⁰ the court noted that the exclusion is limited to settlements that jeopardize the ability of the insurer to recover from the tortfeasor causing the insured to provided uninsured/underinsured motorist coverage, the allegedly at-fault motorist.¹⁵¹ Because settlement with a non-motorist tortfeasor does not impede the rights of the insurer to recover from the uninsured or underinsured motorist, the court held that the "consent to settlement" exclusion did not apply to settlement with non-motorist tortfeasors.¹⁵² Similarly, the court found that the statutory subrogation or recoupment clause,¹⁵³ which is designed for the protection of injured parties against uninsured motorists, does not address other joint tortfeasors. As such, the court held that the statutory recoupment clause applies only to the uninsured or underinsured motorists, not other non-motorist joint tortfeasors.¹⁵⁴ Finally, the

148. *Id.* at 844-47.

149. 907 S.W.2d 942 (Tex.App.—Houston [1st Dist.] 1995, no writ).

150. *Bartee v. R.T.C. Transp., Inc.*, 781 P.2d 1084 (Kan. 1989).

151. *Simpson*, 907 S.W.2d at 946 (citing *Bartee*, 781 P.2d at 1099).

152. *Id.*

153. TEX. INS. CODE ANN. art. 5.06-1, § 6 (Vernon Supp. 1995).

154. *Simpson*, 907 S.W.2d at 947.

court rejected GEICO's contention Simpson violated the "right-to-recover payment" clause because the provision applies only if the carrier makes a payment under the policy. Because GEICO had made no payments under the policy, the court held that the clause was inapplicable.¹⁵⁵

B. PERSONAL INJURY PROTECTION

In *Schulz v. State Farm Mutual Automobile Insurance Co.*,¹⁵⁶ Fulk, Schulz's son, and a friend were driving Schulz's husband's truck when they gave Johnson a ride. Later, Johnson shot and killed Fulk and his friend as they stood outside the truck. Schulz sued State Farm to recover personal injury protection (PIP)¹⁵⁷ and auto death indemnity (ADI)¹⁵⁸ coverage. State Farm moved for summary judgment on the grounds that (1) because there was no collision or automobile accident between the insured truck and any other vehicle as contemplated by the policy, (2) because Fulk was not "occupying" the insured vehicle when he was killed, and (3) because there was no causal relationship between the insured vehicle and the incident giving rise to the injuries, Schulz was not entitled to any benefits under the policy.¹⁵⁹ Schulz argued that her son was "occupying" the vehicle at the time he was killed because: (1) "his status as an 'occupant' continued even though he was shot outside the vehicle;" (2) "he was in relatively close proximity to the vehicle for purposes related to the vehicle;" and (3) "his exit from the vehicle was not voluntary, but rather a result of force."¹⁶⁰ The trial court granted summary judgment in favor of State Farm.

The Houston Court of Appeals acknowledged that while the policy's PIP provision limited recovery to covered persons whose injuries resulted from a "motor vehicle accident," the pertinent Insurance Code provision did not include "motor vehicle accident" as a limiting term in the Code's

155. *Id.* at 949.

156. 930 S.W.2d 872 (Tex. App.—Houston [1st Dist.] 1996, no writ).

157. The policy's PIP provisions read:

[W]e will pay Personal Injury Protection benefits because of bodily injury resulting from a motor vehicle accident, and sustained by a "covered person."

"Covered person" as used in this part means:

1. You or any family member:
 - a. while occupying; or
 - b. when struck by a motor vehicle designed for use mainly on public roads or a trailer of any type.

"Occupying" means in, upon, getting in, on, out or off.

Id. at 875.

158. The relevant provision of the ADI coverage portion of the policy stated:
We will pay the principal sum stated in the Schedule in the event of the death of the *person* which shall result directly and independently of all other causes from bodily injury caused by accident and sustained by the insured while *occupying*, or through being struck by, an auto . . .

Id. at 875-76 (emphasis added).

159. *Id.* at 874.

160. *Id.* Schulz contended in her petition that her son was killed when Johnson attempted to hijack the truck. *Id.* at 873.

definition of PIP coverage.¹⁶¹ Noting that this issue recently arose in another case,¹⁶² the court reiterated its position that, based upon legal and public policy reasons, "the term 'the accident' means the motor vehicle accident for which the legislature created automobile liability insurance; it does not include all accidents that happen to occur in a motor vehicle."¹⁶³ The court also found that Schulz failed to produce competent summary judgment evidence to support her claim that Fulk was "occupying" the vehicle at the time he was shot, and denied her claim for ADI benefits on that ground.¹⁶⁴

C. UNINSURED/UNDERINSURED MOTORIST

In *Sidelnik v. American States Insurance Co.*,¹⁶⁵ the Austin Court of Appeals addressed the issue of whether the Texas Insurance Code mandates that umbrella policies include UM/UIM coverage. Sidelnik was killed in an automobile accident involving Ayala, an uninsured motorist. The Sidelniks were covered under an automobile liability insurance policy which provided UM/UIM coverage and an umbrella policy, issued by American States, which provided \$1 million in coverage. American States argued that the umbrella policy did not provide any UM/UIM coverage that would inure to the Sidelniks' benefit. On cross-motions for summary judgment filed in a declaratory action, the trial court ruled in favor of American States.

On appeal, the Sidelniks argued that the umbrella policy was ambiguous, and that it should be construed to cover the at-fault driver, Ayala, as an insured party. After reciting Texas' well-established rules of construction of insurance policies, the court held that the policy was unambiguous and covered only the named insured or drivers who operate a vehicle with permission of the named insured; therefore, Ayala did not qualify as a covered person under the umbrella policy.¹⁶⁶

Alternatively, the Sidelniks argued that the UM/UIM statute¹⁶⁷ mandated that the umbrella policy in question include UM/UIM coverage. After reviewing decisions from other jurisdictions, the court held that umbrella policies serve a different purpose from that served by automo-

161. *Id.* at 875 (citing TEX. INS. CODE ANN. art. 5.06-3(b) (Vernon 1981) which provides:

"Personal injury protection" consists of provisions of a motor vehicle liability policy which provide for payment to the named insured in the motor vehicle liability policy and members of the insured's household, any authorized operator or passenger of the named insured's motor vehicle including a guest occupant, up to an amount of \$2,500 for each such person for payment of all reasonable expenses arising from the accident. . . .

(emphasis added)).

162. See *Le v. Farmers Tex. County Mut. Ins. Co.*, 936 S.W.2d 317 (Tex. App.—Houston [1st Dist.] 1996, no writ).

163. *Schulz*, 930 S.W.2d at 875 (citing *Le*, 936 S.W.2d at 324).

164. *Id.* at 876.

165. 914 S.W.2d 689 (Tex. App.—Austin 1996, writ denied).

166. *Id.* at 694.

167. TEX. INS. CODE ANN. art. 5.06-1 (Vernon 1996).

bile policies, and that the mere fact that an umbrella policy provided excess coverage for liability did not convert it into an "automobile liability insurance" policy within the meaning of article 5.06-1.¹⁶⁸ Accordingly, the court concluded that the UM/UIM statute does not require umbrella policies to carry UM/UIM coverage.¹⁶⁹

In *White v. State Farm Mutual Automobile Insurance Co.*,¹⁷⁰ the court analyzed the construction of the term "covered person" within the UM/UIM coverage portion of a personal automobile policy. White contended that she and McLaughlin had been common-law husband and wife since 1986. They allegedly separated in 1989, and with the exception of one week during 1989, ceased cohabitation at that time. In 1993, McLaughlin was killed in an accident involving a drunk driver. White asserted a claim under a personal automobile policy she purchased from State Farm. State Farm denied White's claim on the basis that McLaughlin did not qualify as a "covered person," defined in the policy to include "family members" and any person occupying White's automobile.¹⁷¹

White filed suit in state court, and State Farm removed the action to a federal court. State Farm filed a motion for partial summary judgment on White's contractual claims contending that McLaughlin did not qualify as a "covered person" under the terms of White's policy. Specifically, in its motion for partial summary judgment, State Farm argued that "(1) White and McLaughlin were not married at the time of McLaughlin's death; (2) White's claim of common-law marriage is barred by the statute of limitations for proving informal marriages under [the Texas Family Code], and (3) White's claim is barred by quasi estoppel."¹⁷² Reviewing the applicable case law on common-law marriages, the court noted that once a common-law marriage exists, it may only terminate by death, divorce or annulment.¹⁷³ Furthermore, the mere passage of time and ceasing of cohabitation will not serve as grounds for termination.¹⁷⁴ Accordingly, the court held that the existence of the common-law marriage between White and McLaughlin was an issue of fact, and that the motion should be denied on that issue.

The court agreed with State Farm with respect to its claim that the statute of limitations for proving informal marriages under the Texas Family Code had expired, but nevertheless found that the provision within the Texas Family Code containing the applicable statute of limita-

168. *Sidelnik*, 914 S.W.2d at 694.

169. *Id.*

170. 907 F. Supp. 1012 (E.D. Tex. 1995).

171. *Id.* at 1015. Further, the term "family member" is defined to include "any person who is both a resident of the insured's household and is related to the insured by blood, marriage or adoption. A spouse who is not a resident of the insured's household 'during a period of separation in contemplation of divorce' is also covered as a 'family member'" under the policy.

172. *Id.* at 1016.

173. *Id.*

174. *Id.*

tions¹⁷⁵ was “unconstitutional as a violation of the Equal Protection clause of the United States Constitution.”¹⁷⁶ Therefore, the court denied State Farm’s motion for partial summary judgment on the ground that the statute of limitations provision had expired.

Finally, State Farm argued that White was barred from asserting that she was common-law married to McLaughlin by operation of the doctrine of quasi estoppel.¹⁷⁷ Specifically, State Farm contended that White represented to the agent at the time she purchased the policy that she was unmarried, and that her premiums were calculated on that basis. Therefore, State Farm argued that White could not now argue that she was married, and thus benefit from the misrepresentation. The court found that a fact issue existed as to any representations by White and State Farm’s agent; therefore, State Farm’s motion for summary judgment on that issue was also denied.¹⁷⁸

The court in *Valentine v. Safeco Lloyds Insurance Co.*¹⁷⁹ rejected an insured’s attempt to collect under her UM/UIM coverage for her employment-related injuries. Valentine was injured when she fell off the back bumper of her employer-owned truck while loading it. She alleged that her injuries resulted from her employer’s negligence in failing to properly repair the bumper. Valentine recovered \$30,000 in worker’s compensation benefits, and then sued her employer’s automobile carrier, Liberty Mutual, and her own UM/UIM carrier, Safeco. The trial court granted summary judgment for both insurers.

Safeco argued that Valentine’s employer was not a “negligent, financially irresponsible motorist.”¹⁸⁰ Valentine, however, claimed that she was entitled to the UM/UIM benefits since she was unable to collect under her employer’s auto policy.¹⁸¹ Maintaining that the sum she received in her worker’s compensation settlement was inadequate to cover her actual damages, Valentine asserted that her employer should be treated as underinsured. Citing the majority rule in other jurisdictions, the court declined to label the employer underinsured.¹⁸² The court noted that under workers compensation law,¹⁸³ Valentine was not “le-

175. TEX. FAM. CODE ANN. §1.91(b) (Vernon Supp. 1995).

176. *White*, 907 F. Supp. at 1019.

177. “The quasi estoppel doctrine prevents a party from asserting a position to the disadvantage of another and then asserting a right which is inconsistent with the previous position.” *Id.* at 1019 (citing *Stimpson v. Plano Indep. Sch. Dist.*, 743 S.W.2d 944, 946 (Tex. App.—Dallas 1987, writ denied)).

178. *Id.* at 1019.

179. 928 S.W.2d 639 (Tex. App.—Houston [1st Dist.] 1996, no writ).

180. *Id.* at 642, n.3 (citing *Francis v. International Serv. Ins. Co.*, 546 S.W.2d 57, 61 (Tex. 1976) (stating that the legislature’s intent in requiring UIM coverage was “to protect conscientious motorists from financial loss caused by negligent, financially irresponsible motorists”)).

181. Valentine’s sole remedy against the negligence of her employer was workers’ compensation benefits.

182. *Id.* at 642 (citations omitted).

183. TEX. LAB. CODE ANN. art 408.001 (Vernon 1996).

gally entitled to recover" from her employer.¹⁸⁴ The court noted that the Insurance Code also requires the insured to be "legally entitled to recover damages from owners or operators of uninsured or underinsured motor vehicles."¹⁸⁵ Declaring that this requirement manifests the legislature's intent that the insured be legally entitled to sue the tortfeasor for damages as a prerequisite to UM/UIM coverage, the court held that Valentine's claims did not fall within the scope of the UM/UIM coverage provided by Safeco's policy as a matter of law.¹⁸⁶

D. NAMED DRIVER EXCLUSION

In *Zamora v. Dairyland County Mutual Insurance Co.*,¹⁸⁷ Vela was named as an excluded driver on her husband's automobile policy. While driving her husband's car, Vela was involved in an automobile accident with the Zamoras. The Zamoras sued Vela and her husband for negligence, gross negligence and negligent entrustment. Dairyland denied coverage based on the named driver exclusion. Later, Vela, her husband and the Zamoras filed suit against Dairyland alleging that the carrier wrongfully failed to provide coverage and a defense. The trial court granted summary judgment in favor of Dairyland.

On appeal, the court upheld the summary judgment. The court noted that, unlike the family member exclusion, the named driver exclusion does not violate public policy because it "does not create the same inequitable effects on a potential class of claimants. . . ."¹⁸⁸ The named driver exclusion, reasoned the court, "further public policy by enabling drivers with family members having poor driving records to secure" affordable insurance, rather than being relegated to the assigned risk pool.¹⁸⁹ The court also theorized that the named driver exclusion "deters insured drivers from entrusting their automobiles to unsafe excluded drivers, thus, keeping those unfit drivers off public roadways."¹⁹⁰ The court held that the allegations of negligent entrustment against Vela's husband did not overcome the language of the family member exclusion because the purpose of the exclusion was "to suspend coverage when a specific person, considered or known to be an unsafe driver, is operating a covered vehicle."¹⁹¹ Therefore, Dairyland was under no duty to defend Vela's husband for the negligent entrustment allegations.

184. *Valentine*, 928 S.W.2d at 644.

185. *Id.*; TEX. INS. CODE ANN. art. 5.06-1 (1) (Vernon 1981).

186. *Valentine*, 928 S.W.2d at 644.

187. 930 S.W.2d 739 (Tex. App.—Corpus Christi 1996, writ requested).

188. *Id.* at 740.

189. *Id.* at 741 (citing *Wright v. Rodney D. Young Ins. Agency*, 905 S.W.2d 293, 296 (Tex. App.—Fort Worth 1995, no writ); *Greene v. Great Am. Ins. Co.*, 516 S.W.2d 739, 740 (Tex. Civ. App.—Beaumont 1974, writ ref'd n.r.e.)).

190. *Id.* (citing *Wright*, 905 S.W.2d at 296; *DiFrancesco v. Houston General Ins. Co.*, 858 S.W.2d 595, 597 (Tex. App.—Texarkana 1993, no writ)). This is a plausible theory, but in the real world it probably doesn't work that way.

191. *Id.* at 742 (citing *DiFrancesco*, 858 S.W.2d at 599).

E. FAMILY MEMBER EXCLUSION

In *State Farm Mutual Automobile Insurance Co. v. Nguyen*,¹⁹² the court explored the parameters of the "resident of [the insured's] household" requirement within the definition of "family member" found in the Texas personal automobile policy. In 1992, Mrs. Nguyen, who was pregnant, was involved in an automobile accident. As a result of the collision, she sustained injuries which required an emergency caesarean section. Her daughter survived for six days, then died from accident related injuries. It was undisputed that the child spent her entire life in the hospital and never went to the Nguyens' home. Dr. Nguyen subsequently sued his wife under the wrongful death statute for the child's death. State Farm defended Mrs. Nguyen in the lawsuit, which resulted in a \$100,000 judgment against her. State Farm then denied indemnity coverage for the judgment under the "family member" exclusion and filed a declaratory judgment action. The trial court granted summary judgment in favor of the Nguyens on the ground that the "family member" exclusion was inapplicable.

On appeal, the court initially held that, consistent with the Texas Supreme Court's opinions in *National County Mutual Fire Insurance Co. v. Johnson*,¹⁹³ and *Liberty Mutual Fire Insurance Co. v. Sanford*,¹⁹⁴ "the family member exclusion is invalid only to the extent it conflicts with the minimum liability limit of the Texas Safety Responsibility Act;"¹⁹⁵ therefore, "if the family member exclusion applies, State Farm's liability cannot exceed \$20,000."¹⁹⁶ Next, the court of appeals considered whether the infant qualified as a "resident" of Mrs. Nguyen's household. In reviewing cases in Texas and other jurisdictions on this issue, the court found that the duration of the individual's stay in the household, the relationship between the individual and the named insured, and the parties' intent are factors to be considered in the analysis.¹⁹⁷ Additionally, the court noted that the term "resident" is an elastic and amorphous term, but that the age and self-sufficiency of the injured person, along with the absence of other lodging are significant factors.¹⁹⁸ Concluding that the infant was not a resident of the hospital, the court held that the child was a resident of the Nguyens' household for purposes of determining the applicability of the "family member" exclusion because there was no intent that she would remain at the hospital after recovery.¹⁹⁹ Accordingly, because the "family member" exclusion was applicable, the court of ap-

192. 920 S.W.2d 409 (Tex. App.—Houston [1st Dist.] 1996, no writ).

193. 879 S.W.2d 1, 5 (Tex. 1993).

194. 879 S.W.2d 9, 10 (Tex. 1994).

195. Formerly TEX. REV. CIV. STAT. ANN. art. 6701h, § 1(10); Act of May 28, 1983, 68th Leg., R.S., ch. 535, § 1, 1983 Tex. Gen. Laws 3122, 3124, *repealed by* Act of April 21, 1995, 74th Leg. R.S., ch. 165, § 24(a), 1995 Tex. Gen. Laws 1870, 1871 (to be codified in the Texas Transportation Code).

196. *Nguyen*, 920 S.W.2d at 410-11.

197. *Id.* at 412-13.

198. *Id.* at 413 (citing *Amco Ins. Co. v. Norton*, 500 N.W.2d 542, 546-47 (Neb. 1993)).

199. *Id.*

peals reformed and rendered judgment that Dr. Nguyen could recover \$20,000 against State Farm, the minimum liability limits within the Texas Safety Responsibility Act.²⁰⁰

VI. PROFESSIONAL LIABILITY

In *Thomas J. Sibley, P.C. v. National Union Fire Insurance Co. of Pittsburgh*,²⁰¹ the Sibley law firm and some of its attorneys were sued by Covey Energy for violations of RICO²⁰² and the Louisiana Unfair Trade Practices Act.²⁰³ The Sibley firm represented Genesis Energy in a Chapter 7 bankruptcy proceeding in Louisiana. Covey Energy purchased Genesis' oil and gas lease interests from the bankruptcy trustee. After determining that the lease interests were essentially worthless, Covey sued the Sibley firm and others. The Sibley firm presented the claim to its professional liability carrier, National Union, which denied coverage on the basis that the RICO and LUTPA claims fell within the exclusion for dishonest, fraudulent or malicious acts.²⁰⁴

Initially, National Union argued that the policy did not provide coverage for the claim against the Sibley firm because Covey Energy was not a client of the firm. The district court, however, rejected this argument and held that a lawyer or a firm can be covered even if the underlying suit is brought by a party other than a client.²⁰⁵ The court then determined that

200. *Id.*

201. 921 F. Supp. 1526 (E.D. Tex. 1996).

202. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 (1994).

203. Louisiana Unfair Trade Practices Act, LA. REV. STAT. § 51:1401 (1996).

204. National Union's professional liability policy issued to the Sibley firm provided:

I. Coverage

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of any claim or claims, including claim(s) for personal injury, first made against the insured and reported to the Company during the policy period or extended reporting period, arising out of any act, error or omission of the insured in rendering or failing to render professional services for others in the insured's capacity as a lawyer, fiduciary or Notary Public, and caused by the insured or any other person for whose acts, errors or omissions the insured is legally responsible, except as excluded or limited by the terms, conditions and exclusions of this policy.

* * *

EXCLUSIONS

This policy does not apply:

- (a) to any claim arising out of any criminal act, error or omission of any insured;
- (b) to any claim arising out of any dishonest, fraudulent or malicious act, error or omission of any insured, committed with actual dishonest, fraudulent, or malicious purpose or intent.

Sibley, 921 F. Supp. at 1529-30.

205. *Id.* at 1530 (citing *Sachs v. St. Paul Fire & Marine Ins. Co.*, 303 F.Supp. 1339, 1340-41 (D.D.C. 1969) ("coverage for suit against lawyer brought by another lawyer claiming wrongful interference with the latter's agreement with his client"); *Continental Casualty Co. v. Reinhardt*, 247 F. Supp. 173, 174 (D. Or. 1965) ("coverage for trade libel suit against law firm brought by a principal of an insolvent debtor who had been the target of a judgment collection by a client of the law firm"), *aff'd*, 358 F.2d 306 (9th Cir. 1966) (per curiam)).

because a finding of actual intent was required for the RICO violations, National Union was not obligated to indemnify the Sibley firm for any liability it might incur as a result of those allegations.²⁰⁶ With regard to the LUTPA allegations, however, the court concluded that the law was ambiguous on whether a plaintiff must prove intent to have a viable LUTPA violation. Therefore, the court found that National Union was obligated to defend the Sibley firm on all claims arising from the Covey litigation.²⁰⁷ In *Matthews v. Home Insurance Co.*,²⁰⁸ Matthews represented Durango Associates and won a judgment for \$11.6 million. After the judgment was set aside, Durango sued Matthews, alleging that his acts caused the judgment to be set aside. In April 1991, Matthews was served with the Durango suit. Home was Matthews' professional liability carrier through a policy effective May 4, 1990, to May 4, 1991, and renewed the policy for the next two years. The policy excluded coverage for acts of malpractice occurring before May 4, 1990. The Durango suit alleged Matthews committed malpractice in 1989, and possibly earlier. Home denied coverage because the claim arose before May 4, 1990, and because Matthews did not notify Home of the claim until October 1991, more than six months after the original policy ended.

The policy required three events in order to trigger coverage: "(1) the act causing the claim must have occurred on or after May 4, 1990; (2) a claim must be made against the insured during the policy period; and (3) the insured must notify Home of the claim during the policy period."²⁰⁹ There was no dispute that only the second event occurred. Matthews sued Home for breach of contract, bad faith, and Insurance Code and DTPA violations. The trial court granted summary judgment for Home on all claims.

Alleging that he only received the declarations page to the policy, Matthews contended that the prior acts endorsement was not part of his policy (even though he signed it shortly before the policy was issued), and that the policy jacket's limitations on coverage and reporting periods conflicted with the declarations page's "claims made" language. Citing Texas rules of policy construction, the court held that the more specific provisions of the policy control over the general language in the declarations page.²¹⁰ The court also found that even if Home did not provide all of the documents listed on the declarations page to Matthews, Matthews knew that the insurance contract was incomplete on its face. As a result, the court held that "there was no fact issue concerning what the contract of the parties was."²¹¹ Finally, the court rejected Matthews' contention that the declarations page constituted a misrepresentation under the Insurance Code and the DTPA, citing Texas law holding "that an endorse-

206. *Id.* at 1530-31.

207. *Id.* at 1532.

208. 916 S.W.2d 666 (Tex. App.—Houston [1st Dist.] 1996, writ denied).

209. *Id.* at 667.

210. *Id.* at 669.

211. *Id.*

ment to a policy prevails over inconsistent printed provisions of the policy."²¹²

VII. HEALTH AND LIFE INSURANCE

A. HEALTH INSURANCE

In *Columbia Universal Life Insurance Co. v. Miles*,²¹³ Miles met with his insurance agent to change his health insurance coverage. The agent filled out the application by asking Miles the questions listed on the form and filling in the answers. Miles testified that he provided the agent with a complete medical history. The agent testified that Miles related only the conditions that appeared on the form. In actuality, Miles had an extensive medical history which was not listed on the form, including immune deficiency, and other chronic illnesses. Miles claimed that he signed the application without reading it. Shortly after filling out the form, Columbia called Miles to conduct a personal history interview and to confirm the information on the application. During the interview, Miles represented to Columbia that the medical information in the application was complete and accurate. At this time, he did not mention anything about his chronic conditions. Subsequently, Columbia issued the policy to Miles.

Later, Miles was treated for an illness related to his immune deficiency condition. He filed a claim with Columbia. Columbia requested a statement from Miles, but he delayed forwarding the statement until the third request from Columbia. Columbia then requested medical records from Miles' doctors relating to Miles' condition. Upon receiving these records, Columbia learned for the first time that Miles suffered from immune deficiency and related chronic illnesses. Columbia requested advice from its underwriting department and attorneys. Columbia concluded that Miles had intentionally concealed his conditions to induce Columbia to provide coverage. Columbia's attorney wrote Miles and offered him an opportunity to agree to rescind the policy in return for immediate refund of his premiums and a release of all claims Miles might have against Columbia. Miles refused this offer. Then, instead of canceling the policy, Columbia filed a declaratory judgment action to determine its rights under the policy and to accomplish a rescission. Miles filed claims of breach of contract and bad faith against Columbia. At trial, Miles prevailed.

The court of appeals noted that the cancellation of a policy may constitute bad faith.²¹⁴ Columbia's cancellation was based on Miles' alleged misrepresentations. The court noted that before an insurance company may cancel a policy based on misrepresentation in the application, the

212. *Id.* at 670.

213. 923 S.W.2d 803 (Tex. App.—El Paso 1996, writ requested).

214. *Id.* at 811 (citing *Union Bankers Ins. Co. v. Shelton*, 889 S.W.2d 278, 283 (Tex. 1994) ("A cause of action is stated by alleging that the insurer had no reasonable basis for the cancellation of the policy and that the insurer knew or should have known of that fact.")).

carrier must show an intent to deceive on the part of the insured.²¹⁵ Specifically, the insurer must prove: "(1) the making of a representation; (2) the falsity of that representation; (3) reliance by the insurer on that representation; (4) the insured's intent to deceive the insurer with the misrepresentation; and (5) the materiality of the representation."²¹⁶ The failure of the insurance company to show intent to deceive makes any cancellation within two years of the policy issuance a breach of contract as a matter of law.²¹⁷ The court found that in Miles' case Columbia went the extra mile, offering Miles an opportunity to agree to the proposed rescission and refund. Once Miles refused, Columbia brought a declaratory judgment action to determine the parties' rights. The court held that Columbia had ample evidence to satisfy all of the elements of the misrepresentation defense. The court reversed the judgment in favor of Miles and rendered that he take nothing.²¹⁸

B. LIFE INSURANCE

In *Bates v. Jackson National Life Insurance Co.*,²¹⁹ Jackson National issued a policy insuring the life of Bates. On his application for the Jackson National policy, Bates represented that within the past five years he had not consulted, been examined, or treated by a physician, and that he had not submitted to any laboratory test or study. He also represented that within the past ten years he had not been diagnosed with any disease or abnormality of the heart, blood, or blood vessels, or with diabetes. Notwithstanding these representations, Bates had been examined by a physician within a month prior to submitting his application, and he had been diagnosed with a mild case of diabetes. Approximately one year after the policy was issued, Bates died of a gunshot wound. Jackson National denied the claim by Bates' beneficiaries for the policy proceeds based on his misrepresentations on the policy application. The beneficiaries brought suit for breach of contract, bad faith, and violations of article 21.21 of the Texas Insurance Code.

The court first analyzed the beneficiaries' contractual claim by noting that there are five elements an insurer must plead and prove under Texas law to establish a misrepresentation defense: "(1) the making of a representation; (2) the falsity of the representation; (3) reliance on the misrepresentation by the insurer; (4) intent to deceive on the part of the insured in making the misrepresentation; and (5) the materiality of the misrepresentation."²²⁰ The beneficiaries conceded that Bates made misrepresentations on his application and that Jackson National relied on them. However, they denied that Bates acted intentionally with the purpose of deceiving Jackson National, and that the misrepresentations were mate-

215. *Id.* (citing *Shelton*, 889 S.W.2d at 281-82).

216. *Id.* at 812 (citations omitted).

217. *Id.* at 811.

218. *Id.* at 814.

219. 927 F. Supp. 1015 (S.D. Tex. 1996).

220. *Id.* at 1018 (citations omitted).

rial. In opposition to Jackson National's motion for summary judgment, the beneficiaries submitted evidence that Bates was generally a truthful man, and that the agent, who helped him complete the application, induced Bates' false answers because she worked on commission and needed the sale. They also submitted an affidavit from an underwriting agent from another company stating that it is not unusual for a sales agent to induce a proposed insured to give incorrect answers on policy applications. The underwriting agent's affidavit also opined that Jackson National would have issued Bates a policy even had it known of his true condition, albeit with slightly different coverage and for a higher premium.

The court concluded that misrepresentations in an application for a policy, even where the insured has knowledge of his health condition, cannot alone establish an intent to deceive by the insured as a matter of law.²²¹ Accordingly, the court concluded that the evidence submitted by Jackson National of the timing of Bates' visits to his physician, even when coupled with evidence that he had made similar misrepresentations on applications for disability insurance with other carriers within two months after being diagnosed with diabetes, did not prove his intent to deceive as a matter of law.²²² Accordingly, Jackson National's motion for summary judgment on the beneficiaries' contract claim was denied.

Next, in analyzing the beneficiaries' bad faith claim, the court noted that, unlike employees covered by workers' compensation, the beneficiaries were not parties to the insurance contract between Jackson National and Bates and did not provide any consideration for the benefits payable upon Bates' death. Further, unlike employees who give up their common law remedies in exchange for workers' compensation benefits, the beneficiaries gave up nothing to obtain their status as beneficiaries of the Jackson National policy. This evidence, according to the court, suggested that the beneficiaries were third-parties claimants under the policy who did not have standing to sue Jackson National for bad faith.²²³ Even assuming that the beneficiaries had standing to bring a bad faith claim, the court noted that the undisputed evidence that Bates made misrepresentations concerning his health on his application for insurance furnished, as a matter of law, a reasonable basis for Jackson National to question the claim and to deny payment to the beneficiaries.²²⁴ Accordingly, the court concluded that Jackson National was entitled to summary judgment on the beneficiaries' bad faith claim.²²⁵

Finally, the court questioned whether the beneficiaries were entitled to assert a claim under article 21.21 of the Insurance Code,²²⁶ noting that they did not fall into any clearly recognized category of persons entitled

221. *Id.* at 1020.

222. *Id.* at 1021.

223. *Id.* at 1023.

224. *Id.* at 1024.

225. *Id.*

226. TEX. INS. CODE ANN. art. 21.21 (Vernon 1981 & Supp. 1996).

to standing to assert Insurance Code violations. Nonetheless, relying on a Texas appellate court decision²²⁷ holding that named beneficiaries of a life insurance policy have standing to assert violations of the Texas Insurance Code, the court held that the beneficiaries had standing to assert the claim. The court went on, however, to state that the Insurance Code is “essentially a statutory codification of already existing common law requirements” concerning the “reasonableness” of denying a claim.²²⁸ In other words, in order to establish a statutory violation under the Insurance Code, the same elements necessary to establish a claim for breach of the duty of good faith and fair dealing must be proven.²²⁹ Thus, the court concluded that, due to Bates’ misrepresentations of his condition on the application, Jackson National had a reasonable basis for denying the claim and was entitled to summary judgment on the beneficiaries’ article 21.21 claims.²³⁰

In *Pankow v. Colonial Life Insurance Co.*,²³¹ the Pankows obtained credit life insurance from Colonial at the same time they acquired a mortgage loan from Colonial Savings. After the Pankows defaulted on both obligations, they paid to reinstate both the loan and the insurance after a representative of Colonial Savings, Guiberteau, told them that he had the authority to reinstate both. Due to an apparent lack of communication between the two Colonial entities, a representative of Colonial Life informed the Pankows in a letter that the credit life policy had lapsed and referenced a refund check for six premiums which had previously been sent to them. Mrs. Pankow had already cashed the refund check, and later claimed that she did not know why it was sent. The letter from Colonial Life, however, informed the Pankows that the policy could be reinstated for \$360. After Mrs. Pankow called to say that she did not have the money, the Colonial Life representative informed her that there was a sufficient amount of money in an escrow account to pay for the policy. Mrs. Pankow requested that the funds be transferred, but apparently action was never taken by Colonial Life. Later, Mrs. Pankow called again to ask if the funds had been transferred, and represented that her husband was in good health. Colonial Life reinstated the policy, but later refused to satisfy the Pankow mortgage when it discovered that Mr. Pankow had actually died a day before Mrs. Pankow’s last call.

On appeal, Pankow argued that, even though she and her husband had not presented Guiberteau with the requisite proof of insurability when he offered to reinstate the policy, Guiberteau had the actual or apparent authority to reinstate the insurance by other means. The court concluded

227. *Mendoza v. American Nat. Ins. Co.*, 932 S.W.2d 605, 611-12 (Tex. App.—San Antonio 1996, no writ).

228. *Bates*, 927 F. Supp. at 1026 (citing *Robinson v. State Farm Fire & Cas. Co.*, 13 F.3d 160, 162 (5th Cir. 1994); *Standard Fire Ins. Co. v. Rominger*, 827 F. Supp. 1277, 1279 (S.D. Tex. 1993)).

229. *Id.*

230. *Id.*

231. 932 S.W.2d 271 (Tex. App.—Amarillo 1996, writ denied).

that the policy itself negated Guiberteau's actual authority to modify the policy.²³² The court also denied Pankow's claim for misrepresentation, by noting that "to the extent that Guiberteau may have told them that he could personally reinstate the policy through means other than those expressed in the policy, [the Pankows] knew, as a matter of law, that he could not."²³³ The court also found that before the Pankows delivered proof of insurability to Colonial Life, Mrs. Pankow received and cashed the premium refund check. Because Mr. Pankow died before the outstanding payments were made, the court held that the offer to reinstate was not accepted in the manner required by the policy.²³⁴ The court did find, however, that agents of Colonial Life may have made misrepresentations to the Pankows when they told the Pankows that the policy could be reinstated through a transfer of funds from the escrow account, but failed to follow through on the transfer. The court ordered that the allegations of fraud and deceptive trade practices arising from the misrepresentation that the monies would be transferred from the escrow account to pay the outstanding premiums be remanded to the trial court for further proceedings.²³⁵

VIII. TITLE INSURANCE

The Corpus Christi Court of Appeals addressed the failure of title to a ranch in *Stewart Title Guaranty Co. v. Becker*.²³⁶ The Beckers sued Stewart Title and other defendants after discovering that the sellers did not have clear title to at least part of the ranch which the Beckers purchased. The Beckers argued that Insurance Code article 9.34²³⁷ gave rise to a private cause of action²³⁸ through article 21.21.²³⁹ The court determined that Stewart Title's conduct in writing a title policy, without determining the insurability of title in accordance with sound title underwriting practices, was not a basis for a private cause of action under article 9.34 and did not constitute a false, misleading or deceptive act or practice as de-

232. *Id.* at 275.

233. *Id.* at 277.

234. *Id.* at 276.

235. *Id.* at 279.

236. 930 S.W.2d 748 (Tex. App.—Corpus Christi 1996, writ denied).

237. TEX. INS. CODE ANN. art. 9.34 (Vernon Supp. 1996).

238. Article 9.34 regulates the conditions which title insurers must meet before issuing a title policy. One of the conditions prohibits the writing of a title insurance policy unless "(3) there has been made a determination of insurability of title in accordance with sound title underwriting practices" TEX. INS. CODE ANN. art. 9.34 (3) (Vernon Supp. 1996).

239. TEX. INS. CODE ANN. art. 21.21, § 16(a) (Vernon 1981). Section 16(a) provides:

Any person who has been injured by another's engaging in any of the practices declared in Section 4 of this Article or in rules or regulations lawfully adopted by the Board under this Article to be unfair methods of competition and unfair and deceptive acts or practices in the business of insurance or in any practice defined by Section 17.46 of the Business & Commerce Code, as amended, as an unlawful deceptive trade practice may maintain an action against the company or companies engaging in such acts or practices.

fined by DTPA section 17.46.²⁴⁰

IX. WORKERS' COMPENSATION

A. RESCISSION OF SETTLEMENT AGREEMENT

Saenz sued her employer's workers' compensation carrier and its adjuster for wrongfully inducing her to settle her claim in *Saenz v. Fidelity & Guaranty Insurance Underwriters*.²⁴¹ While on the job, Saenz fell over a chair, and hit her head on the floor. She was hospitalized for several days. After being released, Saenz saw numerous physicians for chronic headaches, drowsiness, seizures and other ailments. She was diagnosed as having post-concussion syndrome which could require indefinite medical treatment. Fidelity & Guaranty, the workers' compensation carrier, promptly began paying her weekly wage benefits, as well as medical bills. During the next year, Fidelity's adjuster, Gisela Armstrong, had many conversations with Saenz to settle her claim. Saenz repeatedly told Armstrong that her primary concern was that her medical expenses be paid for the rest of her life, a benefit which the workers compensation act provides. Armstrong, however, never told Saenz that she might be entitled to lifetime medical coverage for the injury. Saenz contended that Armstrong told her that workers' compensation would cover medical expenses for only five years. Saenz did not have an attorney because she did not want to pay any attorney's fees out of her potential settlement. Saenz claimed that Armstrong told her that having an attorney would not affect the size of the settlement.

Fidelity's attorney wrote Armstrong stating that Saenz's claim was potentially dangerous. Eventually, the attorney was able to effect a settlement with Saenz for \$65,000 and five years of medical treatment. After the settlement, Saenz called Fidelity's office and asked for copies of her medical records. The records Fidelity sent included two letters from Fidelity's attorneys that indicated that Saenz's claim was very serious, and that settling with a limitation of five years of medical treatment was important for Fidelity to avoid the possibility that Saenz's condition would deteriorate to the point where Fidelity would be required to pay statutory lifetime compensation benefits in addition to lifetime medical benefits. Saenz contended in court that from these letters in her medical file, she learned for the first time that she had been entitled to lifetime medical treatment. Saenz sued Fidelity and Armstrong under various theories, but did not pursue a claim for rescission of the settlement. At trial, the jury awarded exemplary damages in addition to substantial damages for past and future mental anguish and future medical costs.

On appeal to the Texas Supreme Court, the court determined that

240. *Stewart*, 930 S.W.2d at 753-54; TEX. BUS. & COM. CODE ANN. § 17.46 (Tex. UCC) (Vernon 1987 & Supp. 1996).

241. 925 S.W.2d 607 (Tex. 1996).

Saenz's sole remedy for loss of medical benefits was rescission.²⁴² The court held that "[a] person who is fraudulently induced to settle a workers compensation claim cannot recover as damages in a lawsuit the value of the benefits she would have been entitled to but for the settlement."²⁴³ The Workers' Compensation Act vests the power to award benefits solely in the Workers' Compensation Commission.²⁴⁴ The court concluded that the Commission's jurisdiction would be circumvented if courts were allowed to award damages for wrongful deprivation of benefits.²⁴⁵ Therefore, the claimant's sole remedy was rescission of the settlement agreement and reassertion of the compensation claim.²⁴⁶ The court also found that Saenz had presented inadequate evidence to support an award for mental anguish damages.²⁴⁷ Because Saenz was not entitled to an award of actual damages, the court also reversed her punitive damages award.²⁴⁸

B. ABANDONMENT OF SPOUSE

*Williams v. Crum & Forster Commercial Insurance*²⁴⁹ involved an alleged breach of the duty of good faith and fair dealing by an insurer in the handling of a workers' compensation claim. The court considered whether to affirm a summary judgment granted to U.S. Fire on bad faith claims asserted by Essie Williams. The workers' compensation claim was based on the death of Nathaniel Williams. At the time of Nathaniel's death, his employer had a workers' compensation policy with U.S. Fire. Following Nathaniel's death, U.S. Fire received a first report of the injury from the employer which identified Nathaniel's spouse as Lessie Voyd, Nathaniel's current girlfriend. The insurer later learned that another woman, Essie Williams, contacted the employer claiming to be Nathaniel's spouse and therefore entitled to the benefits. U.S. Fire conducted an investigation and concluded that Essie Williams was not entitled to benefits, but that Lessie was.

Essie Williams filed a claim for benefits with the Workers' Compensation Commission. After a Benefit Review Conference and a Contested Case Hearing were held, the Contested Case Hearing Officer agreed with U.S. Fire that Williams was not entitled to the benefits under the policy. Williams appealed the officer's decision to the Workers' Compensation Appeals Panel. The Appeals Panel reversed the officer, concluding Williams was entitled to benefits.

242. *Id.* at 612.

243. *Id.*

244. *See id.*; TEX. LAB. CODE ANN. §§ 408.001, 410.168, 410.203-205, 410.208 (Vernon 1996).

245. *Saenz*, 925 S.W.2d at 612.

246. *Id.*

247. *Id.* at 614.

248. *Id.*

249. 915 S.W.2d 39 (Tex. App.—Dallas 1995, writ requested).

Williams filed suit against U.S. Fire, alleging various causes of action for breach of the duty of good faith and fair dealing and violations of the Texas Deceptive Trade Practices Act (DTPA) and the Insurance Code. U.S. Fire obtained a summary judgment at the trial court level. However, the Dallas Court of Appeals concluded that there were fact issues as to whether U.S. Fire conducted a reasonable investigation prior to denying Williams' claim and that fact issues existed as to whether they had a reasonable basis to deny her claim. The court held, consistent with *Viles v. Security National Insurance Co.*,²⁵⁰ that in determining whether an insurer had a reasonable basis for denying a claim, the court reviews the facts before the insurer at the time the claim was denied.

U.S. Fire conceded that, in making its decision to deny Williams' claim, it relied exclusively on its reading of Workers' Compensation Commission Rule 132.3.²⁵¹ U.S. Fire contended that because Williams had not lived with Nathaniel for over a year immediately prior to his death, she was deemed to have abandoned him under the rule and was thus not entitled to benefits as a surviving spouse. Williams, however, contended that Rule 132.3 did not preclude her recovery because under the rule, surviving spouses are ineligible for benefits only if all three of the following requirements are met: (1) the surviving spouse abandoned the employee, (2) without good cause, and (3) for more than one year immediately preceding the employee's death. Williams contended that U.S. Fire failed to consider if all three conditions were met, and therefore, failed to conduct a sufficient investigation to justify denying her claim.

The court agreed with Williams that there was little, if any, information on whether good cause existed for her deemed abandonment of Nathaniel. According to the court, the U.S. Fire adjuster never attempted to determine the reasons for the separation of Nathaniel and Williams or whether there was any good cause for the abandonment. As a result, the court held that U.S. Fire did not have sufficient evidence before it to determine whether Rule 132.3 justified denying Williams' claim, as U.S. Fire had no evidence before it indicating whether good cause existed for the abandonment. The court then held that there were fact issues as to whether U.S. Fire conducted a reasonable investigation before denying Williams' claim and whether it had a reasonable basis for denying Wil-

250. 788 S.W.2d 566, 567 (Tex. 1990).

251. 28 TEX. ADMIN. CODE § 132.3 (West 1996). Workers' Compensation Commission Rule 132.3(b) stated in pertinent part:

A surviving spouse who abandoned the employee, without good cause for more than one year immediately preceding the death, shall be ineligible to receive death benefits. The surviving spouse shall be deemed to have abandoned the employee if the surviving spouse and the employee had not been living in the same household for more than one year preceding the employee's death unless the spouse is: (1) hospitalized; (2) in a nursing home; or (3) living apart due to career choices, military duty, or other reasons where it is established that their separation is not due to the pending breakup of the marriage.

Id. § 132.3(b).

liams' claim.²⁵² As a result, the summary judgment in favor of U.S. Fire was reversed.

C. REMOVAL

The case of *Patin v. Allied Signal, Inc.*²⁵³ addressed the issue of removal to federal court of an employee's claims against his workers' compensation carrier for breach of the duty of good faith and fair dealing in connection with the carrier's handling of the employee's workers' compensation claim. Patin sustained a work-related injury while employed by Allied Signal. Travelers Indemnity Company, Allied's workers' compensation insurance carrier, paid medical bills for Patin's treatment, but never paid weekly workers' compensation benefits because Patin had lost no time from work as a result of his injury and because he had a pre-existing physical limitation in his shoulder. Patin filed a workers' compensation claim with the Texas Industrial Accidents Board, which awarded him \$42,000. Both parties to that administrative proceeding appealed to state district court. Following trial, the jury awarded Patin \$75,000 for permanent partial disability, but rejected his claim for total temporary disability.

Patin and his wife later filed suit, which included a claim against Travelers for breach of the duty of good faith and fair dealing. Travelers removed the case to federal district court on the basis of diversity of citizenship. The Patins timely filed a motion to remand the case to state court contending that as an insurance company conducting business in Texas, Travelers was a *de facto* citizen of Texas and that removal was not proper. They also alleged that no proof existed that the required \$50,000 minimum jurisdictional amount was met. The district court denied the Patins' motion to remand.

Travelers filed a motion for summary judgment that was granted. Then, the Patins timely filed a notice of appeal, insisting that 28 U.S.C. § 1445(c), which precludes the removal of claims arising under state workers' compensation laws, mandated remand to state court because the claims against Travelers arose under the Texas Workers' Compensation Act.

The court began its analysis by reiterating the rule that the "arising under" standard expressed in § 1445(c) should be interpreted broadly and in a manner consistent with the court's interpretation of that standard under 28 U.S.C. § 1331, which governs federal question jurisdiction.²⁵⁴ The court held that, as the Texas Supreme Court in *Aranda v. Insurance Co. of North America*²⁵⁵ made clear, good faith and fair dealing claims arise under common law, not under the workers' compensation

252. *Williams*, 915 S.W.2d at 44.

253. 69 F.3d 1 (5th Cir. 1995), *aff'd*, 77 F.3d 782 (5th Cir. 1996).

254. *Id.* at 5.

255. 748 S.W.2d 210 (Tex. 1988).

statute.²⁵⁶ Section 1445(c) was passed to encourage the use of administrative procedures and to prevent the undue burden placed on a worker when an action is removed to federal court, where such procedures generally do not apply.²⁵⁷ However, the court concluded that the policy does not apply when the cause of action at issue is independent of the administrative procedures applicable to a state workers' compensation claim, as is a claim for breach of the duty of good faith and fair dealing.²⁵⁸ The court concluded that claims for breach of the duty of good faith and fair dealing do not arise under the state workers' compensation statutes, but are, at most, "related to" those statutes and thus do not come within the ambit of the non-removability provision of § 1445(c).²⁵⁹ As a result, the court concluded that § 1445(c) does not preclude the removal of a worker's bad faith claims against the employer's workers' compensation carrier.²⁶⁰

X. AGENCY

A. DUTIES OF AGENT TO INSURER

In *Southland Lloyd's Insurance Co. v. Tomberlain*,²⁶¹ Charles Tomberlain owned Tomberlain Insurance Agency. His son, Chuck, was an agent with the agency. Chuck also owned and managed numerous real properties in the area. Chuck purchased a house at an auction, and subsequently signed a contract for sale with Trennis Willis for \$20,000 to be paid over twenty years. In his capacity as an agent, Chuck issued a policy on the house. Three years later, when the policy expired, he applied for insurance with Southland, which approved the application and coverage on the house for \$20,000. After Chuck learned that Willis had vacated the house, he began preparing the house for a new tenant. Shortly before the new tenant was to move into the house, a fire caused \$20,000 worth of damage to the house. The fire department's report concluded that the fire was of suspicious origin as it had started with the aid of accelerants. Chuck submitted a claim with Southland on the day of the fire. Over the next two months, Chuck periodically contacted Southland to check on the status of his claim and was told that an investigation was being conducted. Finally, Southland sent a letter to Chuck stating that the fire was the result of arson and required further investigation. Two weeks later, Southland advised Tomberlain that Southland was immediately canceling its agency agreement with the agency and would seek damages as a result of misrepresentations on the application submitted by Chuck. On that same day, Southland sent Chuck a letter stating that it was investigating the

256. *Patin*, 69 F.3d at 5-6.

257. *Id.* at 7.

258. *Id.*

259. *Id.*

260. *Id.*

261. 919 S.W.2d 822 (Tex. App.—Texarkana 1996, writ denied).

claim as potential arson and that Southland believed it had been "duped" by misrepresentations in Chuck's application.

Chuck sued Southland for statutory claims handling violations, bad faith and negligence. Southland counterclaimed against Chuck for breach of fiduciary duties as an agent, breach of contractual responsibilities and negligence in preparing the application. In the middle of the case, Southland paid Chuck \$20,900 to settle his claim and then sued the agency for indemnification. The trial court granted a directed verdict for Chuck on his claims against Southland for failing to promptly pay claims and granted a directed verdict for Chuck and the agency as to all counterclaims and third-party claims raised by Southland. The jury found knowing and intentional violations on the bad faith and statutory unfair insurance practices claims.

On appeal, Southland argued that an individual has no private cause of action under article 21.21²⁶² pursuant to *Allstate Insurance Co. v. Watson*.²⁶³ The court, however, explained that *Watson* only precluded third-party claimants.²⁶⁴ Because Chuck was an insured under the policy, the court concluded that he had a cause of action under article 21.21.²⁶⁵ The court also held that Chuck was a fiduciary of Southland as a result of the agency relationship.²⁶⁶ The court noted that the fiduciary duty becomes especially pronounced when an agent undertakes to write insurance for himself.²⁶⁷ The court determined that on the application, Chuck misrepresented the age of the house, the purchase price, and owner occupancy status, and failed to report serious structural deficiencies that an agent would normally report.²⁶⁸ Accordingly, the court held that sufficient evidence existed to preclude a directed verdict against Chuck and the agency.²⁶⁹

B. REPRESENTATIONS REGARDING RETROSPECTIVE PREMIUMS

Garrison Contractors, Inc. v. Liberty Mutual Insurance Co.,²⁷⁰ concerned retrospective premiums due under a multi-line insurance policy. Garrison purchased a three-year, multi-line insurance policy from Liberty Mutual. Garrison paid Liberty standard premiums in the aggregate amount of \$865,000 and retrospective premiums over the three year policy period. At the end of the policy period, Liberty demanded an additional \$157,371.85 in retrospective premiums, which Garrison refused to pay. Liberty filed suit on a sworn account to collect the retrospective

262. TEX. INS. CODE ANN. art. 21.21 (Vernon 1981 & Supp. 1996).

263. 876 S.W.2d 145 (Tex. 1994).

264. *Tomberlain*, 919 S.W.2d at 830.

265. *Id.*

266. *Id.* at 831 (citing *American Indem. Co. v. Baumgart*, 840 S.W.2d 634, 639 (Tex. App.—Corpus Christi 1992, no writ)).

267. *Id.* (citations omitted).

268. *Id.*

269. *Id.*

270. 927 S.W.2d 296 (Tex. App.—El Paso 1996, no writ).

premiums, and Garrison counterclaimed against Liberty and its agent/employee, Robert Garrett, who sold Garrison the policy. Garrison alleged that Liberty misrepresented the terms of the retrospective premiums, breached the duty of good faith and fair dealing, breached fiduciary duties, violated the Texas DTPA, violated article 21.21 of the Insurance Code, engaged in fraud and duress, and was estopped from collecting the alleged retrospective premiums. Summary judgment was awarded in favor of Liberty and Garrett, and Garrison was ordered to pay the \$159,371.85 retrospective premium.

The court of appeals found that Liberty's alleged misrepresentation that the retrospective premiums would not exceed ten to fifteen percent of the standard premiums could constitute an actionable misrepresentation under both the DTPA and the Insurance Code.²⁷¹ The court also found that under section 16 of article 21.21, Garrison had a private cause of action against Liberty's employee/agent, Garrett. Specifically, the court held that under section 16, any person who has suffered actual damages caused by another's engaging in deceptive acts or practices may maintain a cause of action against the person or persons, including agents, engaging in the act.²⁷² The court noted, however, that there is no general fiduciary duty between an insurer and its insured,²⁷³ and that the duty of good faith and fair dealing does not include the purchase transaction or the calculation and payment of premiums.²⁷⁴ The court reversed and remanded Garrison's claims of DTPA and Insurance Code violations, but affirmed Liberty's summary judgment on the breach of fiduciary duty and good faith and fair dealing claims. Lastly, the court noted that a fact issue existed as to whether Liberty's retrospective premiums were agreed to, reasonable, usual, or customary.²⁷⁵

C. DUTY TO ADVISE INSURED

*Sledge v. Mullin*²⁷⁶ addressed whether an insurance agent is obligated to advise a customer of her insurance needs. Mullin sold Ruby Sledge an automobile liability policy for her three cars, including a Chevrolet Nova. The policy was in effect when Sledge notified Mullin that she had acquired a Chevrolet Citation and was selling the Nova to her son, Dale. In her deposition testimony, Sledge conceded that she could not afford the cost of insuring four cars, and that she contacted Mullin and instructed him to "take the Nova off the insurance policy" and substitute the Citation for the Nova as one of the insured vehicles.²⁷⁷ Several days after Mullin received these instructions from Sledge, Dale was involved in an

271. *Id.* at 300 (citing *Celtic Life Ins. Co. v. Coats*, 885 S.W.2d 96, 98-99 (Tex. 1994)).

272. *Id.* at 301.

273. *Id.* (citing *Caserotti v. State Farm Ins. Co.*, 791 S.W.2d 561, 565 (Tex. App.—Dallas 1990, writ denied)).

274. *Id.* at 302.

275. *Id.* at 303.

276. 927 S.W.2d 89 (Tex. App.—Fort Worth 1996, no writ).

277. *Id.* at 91.

accident while driving the Nova. In the subsequent suit that Sledge and Dale brought against Mullin, the trial court granted Mullin's motion for summary judgment and Sledge and Dale appealed.

Sledge argued on appeal that she believed and expected that the substitution would occur on the anniversary date of the policy, which was subsequent to the accident. This contention was inconsistent with her deposition testimony in which she swore that in asking Mullin to cancel the Nova's insurance, she did so with the intent that it would be canceled on the date of the request, not on a later date. Additionally, there was no evidence that Sledge asked Mullin to insure four cars under the policy or that she intended that result. The undisputed evidence was that she asked Mullin to substitute the Citation for the Nova. The Sledges argued that Mullin was negligent because he breached a duty to Sledge by not investigating and determining all the details of her disposition of the Nova at the time she told him to effect the substitution. Sledge also contended that Mullin had a duty to warn her of the potential for her liability if the Nova was no longer insured by the policy. The gist of her argument was that, although she could only afford to insure a total of three cars and told Mullin that she was selling the Nova and wanted him to substitute the Citation on the policy, he nonetheless had a duty to make certain all four cars continued to be insured or to inform her that the Nova would not be covered after the date she requested him to effect the substitution. Sledge also contended that Mullin should have told her that the policy provisions extended automatic insurance coverage for any car she might acquire, such as the Citation, for her first thirty days of ownership, she claimed that if Mullin had told her about these provisions, she could have kept all four cars insured and the collision would have been covered.

Although the policy made the thirty-day coverage available automatically, there was no evidence that a fourth car would have been insured free of charge for thirty days or that Sledge would have had a four-car coverage for the same price had she paid to insure only three cars. In fact, the policy provided that if a change required a premium adjustment, the adjustment would be made as of the effective date of change.²⁷⁸ There was no evidence that Sledge would have accepted the "automatic" insurance coverage even if Mullin had told her about it.

The court stated that no legal duty arises on the part of an insurance agent to expand the insurance protection of his customer. This is true even if the agent has knowledge of the customer's need for additional insurance, if there is no evidence showing that the customer and agent have a special business relationship through a history of dealings in which they share an expectation that the agent will habitually satisfy all of the customer's insurance needs without consultation.²⁷⁹ The court found that no special business relationship existed between Sledge and Mullin and

^{278.} *Id.* at 92.

^{279.} *Id.* at 93 (citing *McCall v. Marshall*, 398 S.W.2d 106, 109 (Tex. 1965); *Pickens v. Texas Farm Bureau Ins. Co.*, 836 S.W.2d 803, 805 (Tex. App.—Amarillo 1992, no writ)).

concluded that Mullin complied with Sledge's specific instructions in effecting the substitution of the Citation for the Nova.²⁸⁰ The court also concluded that Mullin owed no duty to make certain the Nova was insured after Sledge requested that he substitute one car for another, and that he owed no duty to tell her how she might keep all four cars insured for a while longer.²⁸¹ Thus, Mullin was not negligent in having the Nova and its drivers deleted from the policy coverage.²⁸² The court also rejected Sledge's claim that, as an insurance agent, Mullin had a duty to see that the Sledges complied with the Texas Safety Responsibility Act,²⁸³ concluding that the language of the act imposes no such duty on insurance agents.²⁸⁴

Finally, the court rejected a claim that Mullin was liable under the DTPA and Insurance Code. The Sledges conceded that Mullin made no false statements or affirmative misrepresentations, but argued that his failure to take steps to protect her interests by keeping the Nova and its drivers insured, or to advise her about the automatic thirty-day coverage provision of the policy, was an omission of material fact that amounted to a passive misrepresentation. The court held that, as a matter of law, Mullin did not violate the Insurance Code or commit a misrepresentation or deceptive trade practice by following Sledge's instructions in substituting the Citation for the Nova on the policy.²⁸⁵ This is consistent with the court's holding that Mullin owed Sledge no duty to suggest alternatives for insuring the Nova when she explained that she was selling it.²⁸⁶ The court stated that in the absence of specific misrepresentation, a policyholder's mistaken belief about the scope or availability of coverage is generally not actionable.²⁸⁷ Accordingly, the court affirmed the summary judgment in favor of Mullin.

XI. MISCELLANEOUS

A. RESERVATION OF RIGHTS LETTERS

In *American Eagle Insurance Co. v. Nettleton*,²⁸⁸ Nettleton's husband was killed in a crash while test flying a plane he was considering purchasing. Nettleton sued the pilot, the flight museum which owned the plane, and the airport from which the plane departed. The defendants were insured under a general liability airport policy written by American Eagle for "bodily injury . . . arising out of the sale of aviation fuel and oil."²⁸⁹

280. *Id.*

281. *Id.*

282. *Id.* (citing *May v. United Servs. Ass'n*, 844 S.W.2d 666, 672 (Tex. 1992)).

283. TEX. REV. CIV. STAT. ANN. art. 6701h (Vernon 1977 & Supp. 1997).

284. *Sledge*, 927 S.W.2d at 93.

285. *Id.* at 94.

286. *Id.* (citing *Lochabay v. Southwestern Bell Media*, 828 S.W.2d 167, 172 (Tex. App.—Austin 1992, no writ)).

287. *Id.* (citing *State Farm County Mut. Ins. Co. v. Moran*, 809 S.W.2d 613, 620 (Tex. App.—Corpus Christi 1991, writ denied)).

288. 932 S.W.2d 169 (Tex. App.—El Paso 1996, writ denied).

289. *Id.* at 170.

The policy, however, excluded coverage for aircraft "owned or operated by or rented or loaned to any insured" or "operated by any person in the course of his employment by any insured."²⁹⁰ Although American Eagle initially refused to defend the Nettleton suit, after Nettleton alleged that the defendants negligently provided contaminated aviation fuel for the aircraft, the carrier offered a defense under reservation of rights to the defendants. The defendants refused the offer and demanded an unconditional defense. American Eagle then offered to pay for defendants' choice of counsel, which was also rejected. Two weeks prior to trial, Nettleton and the defendants made an assignment and a covenant not to execute. At trial, the defendants put on no testimony or witnesses and a judgment was entered for more than \$600,000.

In the suit on the policy, Nettleton contended that she was entitled to summary judgment because: (1) her judgment against American Eagle's insureds was obtained following an actual trial and was final; (2) Nettleton had satisfied her only obligation to receive payment under the policy; (3) American Eagle waived any policy defenses it had by continuing investigation and settlement efforts on behalf of its insureds without obtaining their agreement that it could do so; (4) American Eagle breached its policy obligations by refusing to unconditionally defend its insureds and by not notifying them about settlement offers it was making on their behalf; and (5) American Eagle's breach of its policy obligations prevented it from collaterally attacking the underlying judgment.²⁹¹ The El Paso Court of Appeals, faced with an amended petition which alleged some covered causes of action and some non-covered causes of action, held that American Eagle did not breach its duty to defend by refusing to offer the insureds an unconditional defense.²⁹² The court noted that had American Eagle tendered an unconditional defense to the insureds, "all policy defenses, including noncoverage, would be waived or [American Eagle] would be estopped from raising them."²⁹³ The court also rejected Nettleton's assertion that American Eagle's continued investigation and settlement negotiations after the insureds refused a defense under reservation of rights waived all of its policy defenses.²⁹⁴ The decision also held

290. *Id.*

291. *Id.* at 172.

292. *Id.* at 174.

293. *Id.* (citing *Farmers Texas County Mut. Ins. Co. v. Wilkinson*, 601 S.W.2d 520, 521-22 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.); *State Farm Lloyds, Inc. v. Williams*, 791 S.W.2d 542, 550 (Tex. App.—Dallas 1990, writ denied)).

294. *Id.* "[T]he insurer's participation in conferences looking toward settlement does not estop the company from denying liability, nor constitute a waiver of a defense. . . ." 16C JOHN A. APPLEMAN, *INSURANCE LAW AND PRACTICE* § 9365, at 559 (Walter F. Berdal ed., 1981); see *Arkwright-Boston Mfrs. Mut. Ins. Co. v. Aries Marine Corp.*, 932 F.2d 442, 445 (5th Cir. 1991) ("We have found no authority for the proposition that an insurer's participation in settlement negotiations, where the insured has retained independent counsel, is tantamount to assuming the assured's defense."); *Wilkerson v. Maryland Casualty Co.*, 119 F. Supp. 383, 386 (E.D. Va. 1953) (negotiations held not to constitute a waiver of insurer's rights), *aff'd*, 210 F.2d 245 (4th Cir. 1954); *Jacksonville Adjustment Bureau v. National Ben Franklin Fire Ins. Co.*, 1 F.2d 800 (S.D. Fla. 1924) (insurer's negotiations for settlement held not to give rise to estoppel).

that American Eagle did not collaterally attack the judgment in the underlying case because under the policy's "no action" clause²⁹⁵ since the requirement of an "actual trial" was not satisfied.²⁹⁶

B. ADMINISTRATIVE

The Texas Supreme Court addressed the validity of two administrative rules adopted by the State Board of Insurance in *National Ass'n of Independent Insurers v. Texas Department of Insurance*.²⁹⁷ Several insurance companies and insurance trade associations challenged the validity of the rules. The first rule, Rule 1000, prohibits insurance companies from refusing to sell certain types of insurance to prospective purchasers because they have had an insurance policy canceled by another carrier, or because they have been insured by a county mutual or a surplus lines insurance carrier.²⁹⁸ The second rule, Rule 1003, prohibits insurers from conditioning the sale of automobile insurance on the purchase of another policy or denying an application because the applicant owns only one

295. The "no action" clause in the American Eagle policy provided:

No action shall lie against the company unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been fully determined by judgment against the insured after *actual trial* or by written agreement of the insured, the claimant and the company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy.

Nettleton, 932 S.W.2d at 175 (emphasis added).

296. *Id.* at 176-77 (citing *State Farm Fire & Casualty Co. v. Gandy*, 925 S.W.2d 696, 714 (Tex. 1996) ("In no event, however, 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.")).

297. 925 S.W.2d 667 (Tex. 1996).

298. Rule 1000 states:

(a) The fact that another insurer canceled, non-renewed, or refused to insure an applicant shall not be a reason, in whole or in part, for an insurer or agent writing or offering personal automobile, residential property, life, accident or health insurance to refuse to insure or submit an application or binder or conditional receipt for that applicant. An insurer may base its decision whether to insure an applicant on the same factor on which another insurer made its adverse decision if that insurer would have based its decision on that factor without knowledge of the previous insurer's actions.

(b) The fact that an applicant was previously insured by a county mutual or surplus lines insurer shall not be a reason, in whole or in part, for an insurer or agent writing or offering personal automobile or residential property insurance to refuse to insure or submit an application or binder or conditional receipt for that applicant.

(c) The failure to comply with this rule shall constitute unfair competition and unfair practices under the Insurance Code, Article 21.21, and shall be subject to the provisions thereof. This rule does not prohibit an insurer or agent from asking if another insurer canceled, non-renewed or refused to insure the applicant.

28 TEX. ADMIN. CODE § 21.1000 (West 1996).

car.²⁹⁹ The violation of these rules constitutes an unfair trade practice³⁰⁰ and subjects an insurer to sanctions.³⁰¹ The carriers argued that these rules were not adopted in substantial compliance with the procedural requirements for agency rule-making. The trial court held that the rules were valid and the court of appeals affirmed.

The supreme court reversed the lower courts and held in favor of the carriers. The court noted that a board order must explain the agency's reasoning in adopting the rule.³⁰² In this case, the board failed to explain in its order why consideration of a previous denial, along with other permissible factors, is unfair or anti-competitive.³⁰³ The board merely concluded that consideration of a previous denial will lead to "blacklisting."³⁰⁴ The board failed to explain why an insurer's consideration of a previous denial is unfairly discriminatory or what affect these rules will have on consumers or the insurance market.³⁰⁵ The order made no effort to explain why tethering automobile coverage to an umbrella or excess coverage is acceptable, while linking coverage to other types of policies is unfair.³⁰⁶ Because the board failed to meet the procedural requirements, the supreme court held the rules invalid.³⁰⁷

C. SETTLEMENT AGREEMENTS

IMC Fertilizer, Inc. v. Angus Chemical Co.,³⁰⁸ examined the effectiveness of a liability release agreement that names an insured party, but not the insurer. Angus Chemical owned a nitroparaffin plant in Louisiana managed by IMC Fertilizer. Following an explosion at the plant, numerous individuals sued Angus Chemical and IMC Fertilizer in Texas for personal injuries. Angus Chemical cross-claimed against IMC Fertilizer,

299. Rule 1003 states:

An insurer or agent shall not condition the issuance, renewal, price, continuation, or amount of coverage of personal automobile insurance on the number of vehicles to be insured on the policy or on the purchase from the insurer or any affiliated insurer of any other policy or policies. This rule does not preclude the application of a type of discount as provided in a rate manual approved by the Texas Department of Insurance or the conditioning of the sale of any umbrella or excess policy on the purchase of an underlying policy.

28 TEX. ADMIN. CODE § 21.1003 (West 1996).

300. 28 TEX. ADMIN. CODE § 21.1000(c).

301. TEX. INS. CODE art. 21.21, § 7 (Vernon 1981 & Supp. 1996). At the time these rules were promulgated, a violation also subjected an insurer to a private cause of action for damages. See TEX. INS. CODE art. 21.21, § 16 (Vernon 1981); see also *Allstate Ins. Co. v. Watson*, 876 S.W.2d 145, 147 (Tex. 1994). This portion of the statute has been repealed. See Act of June 8, 1995, 74th Leg., R.S., ch. 414, § 13, 1995 Tex. Gen. Laws 2988, 3000 (codified as TEX. INS. CODE art. 21.21, § 16(a)).

302. *National Ass'n*, 925 S.W.2d at 669.

303. *Id.* at 670.

304. *Id.*

305. *Id.*

306. *Id.* at 671.

307. *Id.*

308. 925 S.W.2d 355 (Tex. App.—Houston [1st Dist.] 1996), *rev'd per curiam*, 939 S.W.2d 138 (Tex. 1997).

seeking recovery for property damage as well as reimbursement for third-party claims Angus Chemical had settled. Angus Chemical and IMC Fertilizer subsequently signed a settlement agreement providing that IMC Fertilizer would pay Angus Chemical a sum of money over three years. In exchange, Angus Chemical released IMC Fertilizer from all claims arising from the explosion, except indemnity or contribution arising from any third-party claims. The settlement agreement was incorporated into an agreed judgment in favor of Angus Chemical. Angus Chemical subsequently filed suit against IMC Fertilizers and its insurers in Louisiana for recovery of its costs relating to third-party claims. Four days later, IMC Fertilizer filed suit against Angus Chemical in Texas under various theories of recovery, including declaratory judgment on the interpretation of its settlement agreement. Angus Chemical counterclaimed in the Texas suit on the same causes of action asserted in its Louisiana suit. Angus Chemical then moved for partial summary judgment in the Texas suit on the grounds that the settlement agreement did not release IMC Fertilizers' insurers from any liability because the release did not specifically name the carriers. In its cross motion for summary judgment, IMC Fertilizers argued that its insurers were released because their liability was derivative of its liability. The trial court entered partial summary judgment in favor of Angus Chemical, finding that the agreement did not release IMC Fertilizers' insurers under Texas law. The trial court severed this claim, and IMC Fertilizer appealed.

Angus Chemical argued to the court of appeals that the release of an insured party does not release its insurers under Texas law unless they are specifically named in the release. IMC Fertilizer acknowledged that the settlement agreement did not mention its insurers, but argued that they were nonetheless released from liability because IMC Fertilizer was released and because its insurers' liability was derivative of its liability.³⁰⁹ The court of appeals acknowledged the general rule that a tortfeasor cannot be released from liability unless he is specifically named in the release document.³¹⁰ However, they noted that a party who releases a tortfeasor retains no cause of action against the tortfeasor's liability insurer.³¹¹ This is because an insurance policy is based on contractual liability rather than primary liability. In other words, an injured party does not have a claim against an insurer unless the insured has a legal obligation to pay damages. Accordingly, when the injured party releases an insured from liability, it cannot pursue liability from the insurer.³¹² Thus, the court of appeals concluded that while it is the better practice to specifically name liability insurers in releases of their insureds, it is not necessary under Texas law.³¹³ In a per curiam opinion, however, the Texas Supreme

309. *Id.* at 359.

310. *Id.* (citing *McMillen v. Klingensmith*, 467 S.W.2d 193, 196 (Tex. 1971)).

311. *Id.* (citing *Pool v. Durish*, 848 S.W.2d 722, 723 (Tex. App.—Austin 1992, writ denied)).

312. *Id.*

313. *Id.*

Court rejected the court of appeals' reasoning, holding that a party must be specifically named in a release to be released from liability.³¹⁴ The court found that Angus could not sue IMC's carriers in Texas because the release precluded the prerequisite determination of IMC's liability, not because IMC's carriers were themselves released.³¹⁵ The court reversed the judgment of the court of appeals and remanded the case to the trial court.³¹⁶

314. 939 S.W.2d at 139.

315. *Id.*

316. *Id.*