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INSURANCE LAW

H. Michelle Caldwell*

FOR the first time in many years, the focus of Texas courts in many of the most important insurance decisions during the Survey period was the construction and interpretation of basic policy provisions.

I. EXTRACTIONAL LIABILITY

A. VICARIOUS LIABILITY FOR DEFENSE COUNSEL'S MALPRACTICE

One of the most talked-about decisions to come out of the Supreme Court during the Survey period was *State Farm Mutual Automobile Insurance Co. v. Traver*.¹ In *Traver*, vehicles driven by Mary Davidson and Calvin Klause collided. Both Davidson and Klause were insured by State Farm. Mary Jordan, Klause's passenger, was severely injured in the accident. State Farm hired separate attorneys to defend Davidson and Klause after Jordan sued both drivers. At trial, the jury found Davidson solely responsible for the accident. Davidson died shortly after trial. The executor of her estate, Ronald Traver, sued State Farm, alleging negligence, breach of the duty to defend, breach of the *Stowers*² duty, breach of the duty of good faith and fair dealing, and violations of both the Deceptive Trade Practice Act (DTPA) and Insurance Code. Traver alleged that Charles Bradshaw, Davidson's appointed defense attorney, committed malpractice by failing to attend key depositions and failing to offer a meaningful defense at trial. Traver also alleged that State Farm deliberately orchestrated Bradshaw's legal malpractice in order to avoid imposition of potential *Stowers* liability arising out of failed settlement

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1. 980 S.W.2d 625 (Tex. 1998). The Supreme Court originally issued its opinion in *Traver* on August 25, 1998. See 41 Tex. Sup. Ct. J. 1343 1998 WL 531685 (Aug. 25, 1998). The August opinion was withdrawn on December 31, 1998 and replaced by the current opinion. The primary difference between the two opinions is the removal of earlier citations to the Texas Disciplinary Rules of Professional Conduct and commentary suggesting that "an insurer has the right to control the insured's defense" in the absence of a coverage dispute. 41 Tex. Sup. Ct. J. at 1344-45. In the December opinion, the court expanded its prior allusion to the possible imposition of liability on a carrier who breaches the duty of good faith and fair dealing in the context of a third-party liability claim.

2. See *G.A. Stowers Furniture Co. v. American Indem. Co.*, 15 S.W.2d 544 (Tex. Comm'n App. 1929, holding approved). Under the doctrine outlined in *Stowers*, 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.

negotiations in the Jordan suit. State Farm obtained summary judgment in its favor on all counts at trial.³ The court of appeals held that under *Ranger County Mutual Insurance Co. v. Guin*,⁴ State Farm was responsible for Bradshaw's malpractice in handling the defense of its insured, remanding the negligence claims for trial along with the attendant DTPA and Insurance Code claims.⁵ The court of appeals found in favor of State Farm, however, on Traver's claims of violation of the *Stowers* doctrine and breach of the duty of good faith and fair dealing.⁶

The Texas Supreme Court began its analysis of the *Traver* case by emphasizing that the key to determining whether a principal is vicariously responsible for the conduct of an agent is the principal's right to control the agent with respect to the details of that conduct.⁷ While acknowledging that an insurer typically has the right of "complete and exclusive control" of the insured's defense, the court held that the defense attorney, as an independent contractor, is not subject to the carrier's control regarding the day-to-day details of conducting the defense.⁸ The carrier, under normal circumstances, has the authority to accept or reject settlement offers and, in the absence of a conflict of interest, make other decisions that normally lie with the insured/client.⁹ Noting that an attorney "is in complete charge of the minutiae of court proceedings and can properly withdraw from the case, subject to the control of the court, if he is not permitted to act as he thinks best,"¹⁰ the court held that an insurer cannot be vicariously liable for a lawyer's conduct, especially where the attorney is charged with protecting the interest of the insured when the instructions of the insurer might compromise the insured's interests.¹¹ In further dismantling *Guin*, the Texas Supreme Court reiterated that *Guin*'s broad language regarding the scope of the insurer's responsibilities was *dicta*.¹²

3. See *Traver*, 980 S.W.2d at 627.

4. 723 S.W.2d 656, 659 (Tex. 1987).

5. See *id.*

6. See *id.*

7. See *id.*

8. See *Traver*, 980 S.W.2d at 627 (citing *Stowers*, 15 S.W.2d at 547).

9. See *id.*

10. *Id.* at 627-28 (citing RESTATEMENT (SECOND) OF AGENCY, § 385, cmt. a).

11. See *id.* at 628. The Texas Supreme Court relied on a number of other jurisdictions in arriving at its decision: *Ingersoll-Rand Equip. Corp. v. Transportation Ins. Co.*, 963 F. Supp. 452, 454-55 (M.D. Pa. 1997) ("The attorney's ethical obligation to his or her client, the insured, to prevent the insurer from exercising the degree of control necessary to justify the imposition of vicarious liability."); *Merritt v. Reserve Ins. Co.*, 110 Cal. Rptr. 511, 526 (Cal. Ct. App. 1973) ("In our view independent counsel retained to conduct litigation in the courts act in the capacity of independent contractors, responsible for the results of their conduct and not subject to the control and direction of their employer over the details and manner of their performance."); *Aetna Cas. & Sur. Co. v. Protective Nat'l Ins. Co.*, 631 So.2d 305, 306-07 (Fla. Ct. App. 1993) (adopting *Merritt's* reasoning); *Feliberty v. Damon*, 527 N.E.2d 261, 265 (N.Y. 1988) ("The insurer is precluded from interference with counsel's independent professional judgment in the conduct of the litigation on behalf of its client."); *Brown v. Lumbermen's Mut. Cas. Co.*, 369 S.E.2d 367, 372 (N.C. Ct. App. 1988), *aff'd*, 390 S.E.2d 150 (1990).

12. See *Traver*, 980 S.W.2d at 628. In *American Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 849 (Tex. 1994), the Texas Supreme Court noted that *Guin* was a *Stowers* case

The *Traver* court specifically rejected any inference that it had held in *Guin* that a carrier is vicariously responsible for the conduct of a defense attorney it appoints for the insured.¹³ A liability insurer is not, the court held, vicariously liable for the conduct of an independent attorney it selects to defend an insured.¹⁴

The *Traver* court also repudiated State Farm's assertion that *Maryland Insurance Co. v. Head Industrial Coatings & Services, Inc.*¹⁵ exonerated State Farm for any breach of the duty of good faith and fair dealing in the context of third-party liability insurance. Noting that the factual circumstances of State Farm's alleged conscious undermining of Davidson's defense in the *Traver* case were "quite different" from the mere refusal of a defense in *Head*, the court nonetheless was unable to offer *Traver* further relief on appeal since he had failed to challenge the court of appeals' judgment on the *Stowers* duty, the duty of good faith and fair dealing, or any related statutory claims.¹⁶

B. USE OF OUTCOME-ORIENTED INVESTIGATION TO DENY CLAIM

In *State Farm & Casualty Co. v. Simmons*,¹⁷ Simmons (insured) bought a homeowners policy from State Farm. Due to financial difficulties, the insured arranged a repayment schedule for their mortgage payments with the Veterans Administration. In that same month, someone burglarized their home. State Farm paid the insured within a few weeks. Six months later, the house was destroyed by fire. The insured reported the loss and the claim was immediately tagged suspicious because of the relatively recent theft claim. Four months later, State Farm denied the insured's fire claim, and the insured sued State Farm. At trial, the jury found that the insured had not burned their own home, and that State Farm breached its duty of good faith and fair dealing and knowingly violated the DTPA, acting with conscious indifference. The court of appeals affirmed.¹⁸

The Texas Supreme Court first held that evidence supported the finding of a breach of the duty of good faith and fair dealing by State Farm because, according to the evidence, State Farm "engaged in an outcome-oriented investigation designed to place the Simmonses at the center of

only, and that there was no allegation that the carrier was negligent in the investigation or trial of the underlying suit.

13. In *Guin*, the court upheld a jury instruction that an attorney retained by an insurer: is deemed, under the law, to be the sub-agent of the insurance company. As such, the insurance company is as responsible to the insured for the conduct of the sub-agent with reference to the litigation as the insurance company is for its own conduct. Therefore, the insurance company is liable to the insured for damages caused to the insured, if any, by the negligence, if any, of the sub-agent in conducting the affairs of the insured with reference to the litigation.

Guin, 723 S.W.2d at 658.

14. See *Traver*, 980 S.W.2d at 628.

15. 938 S.W.2d 27, 28-29 (Tex. 1996).

16. See *Traver*, 980 S.W.2d at 629.

17. 963 S.W.2d 42 (Tex. 1998).

18. 857 S.W.2d 126 (Tex. App.—Beaumont 1993), *aff'd*, 963 S.W.2d 42 (Tex. 1998).

an 'arson triangle.'"¹⁹ First, the fire loss claim was immediately deemed suspicious despite the fact that the earlier theft was determined to be legitimate. Next, State Farm failed to investigate other possible suspects. Because State Farm had testified that revenge and spite are frequent motives for arson and that it was important to obtain all information with regard to the claim, the Texas Supreme Court held that the jury could logically conclude that State Farm's investigation was biased and unreasonable. Moreover, State Farm witnesses described the eight common indicators of insurance fraud by arson. The first six indicators were undisputedly absent. As to the remaining two indicators, evidence showed that the insured did not remove all furniture or personal items prior to the fire and that their financial burdens had improved by the time of the fire. The court also noted that if the insured had actually burned their house, they would have been homeless with a deficiency owed to their lender because their mortgage obligation exceeded the policy limits. The court noted that these facts implied bad faith because State Farm's fundamental premise of the insured's motive to commit arson lacked credibility. The insured also testified that State Farm never told them of any discrepancy between the information they provided and information State Farm obtained. Because State Farm's own witnesses testified that a reasonable insurer would approach its insureds to resolve such conflicts, the Texas Supreme Court noted the jury could reasonably conclude State Farm acted in bad faith. The sum of all evidence presented supported the bad faith claim.²⁰

In order to support the punitive damages award against State Farm, however, the insured had to show that State Farm was "actually aware that its action would probably result in extraordinary harm not ordinarily associated with breach of contract or bad faith denial of a claim—such as death, grievous physical injury or financial ruin."²¹ While the insured argued that State Farm never paid the VA, State Farm countered that it had contacted the VA and agreed to pay policy limits of \$47,000 in exchange for a lien assignment. The VA, however, never accepted State Farm's offer. The court held that in light of State Farm's undisputed efforts to settle with the VA, it could not conclude that State Farm was actually aware that its actions were likely to result in financial ruin to the insured. Therefore, the court reversed the punitive damages award against State Farm.²²

C. SOME INSURANCE EMPLOYEES ARE "PERSONS" UNDER ART. 21.21

In *Liberty Mutual Insurance Co. v. Garrison Contractors, Inc.*,²³ the court considered the issue of whether an insurance agent employed by an

19. *Simmons*, 963 S.W.2d at 45.

20. *See id.* at 47.

21. *See id.* at 47 (quoting *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 24 (Tex. 1994)).

22. *See id.* at 48.

23. 966 S.W.2d 482 (Tex. 1998).

insurance company is a "person" under Insurance Code article 21.21.²⁴ In 1986, Garrison Contractors asked Garrett, a Liberty employee-agent, for a quote on general liability, workers' compensation, and auto liability policies from Liberty. As part of his services to Garrison, Garrett explained policy provisions and premium calculations. Garrison ultimately purchased a three-year, multi-line insurance policy with a retrospective premium plan from Liberty. When the policy period ended, Liberty billed Garrison for almost \$160,000 in retrospective premiums. Garrison refused to pay and Liberty filed suit to collect the premiums. Garrison counterclaimed against Liberty and Garrett, alleging that Liberty and Garrett misrepresented the terms of the retrospective premiums, breached the duty of good faith and fair dealing, breached fiduciary duties, violated the Texas DTPA and Insurance Code, engaged in fraud and duress, and was estopped from collecting the alleged retrospective premiums.

The court of appeals affirmed Liberty's summary judgment,²⁵ disallowing Garrison's common law claims for bad faith and breach of fiduciary duty. The court, however, reversed the summary judgment on Garrison's DTPA and Insurance Code claims, finding 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. The court of appeals specifically held that the insured had separate causes of action against both Liberty and its agent.²⁶

Before the Texas Supreme Court, Liberty and Garrett argued that the definition of "person" in the Insurance Code only reached business entities, not the employees of those entities. The court, however, rejected this construction, noting that the Texas legislature had substituted the term "person" for the term "company."²⁷ The court also noted that the Department of Insurance's position that an insurance company employee could engage in the business of insurance was unquestionable authority that such an employee qualified as a "person" under the Insurance Code.²⁸ The court cautioned that not every insurance company employee is a "person" engaged in the business of insurance for purposes of the Insurance Code, giving examples of a janitor and clerical worker.²⁹ On the other hand, Garrett clearly established his engagement in the business of insurance by testifying that his job responsibilities included soliciting and obtaining insurance policy sales and explaining policy terms and premium calculations to consumers. Accordingly, the court held that section 16 of article 21.21 provides a cause of action against insurance company

24. See TEX. INS. CODE art. 21.21 § 2(a) (Vernon 1998).

25. See *Garrison Contractors, Inc. v. Liberty Mut. Ins. Co.*, 927 S.W.2d 296 (Tex. App.—El Paso 1996), *aff'd* 966 S.W.2d 482 (Tex. 1998).

26. See *id.* at 301.

27. *Garrison*, 966 S.W.2d at 485.

28. *Id.*

29. See *id.* at 487.

employees whose job duties call for them to engage in the business of insurance.³⁰

D. LOSS OF CREDIT REPUTATION MERITS ONLY NOMINAL DAMAGES

In *St. Paul Surplus Lines Insurance Co. v. Dal-Worth Tank Co., Inc.*,³¹ 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 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 interest 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.³² The court also flatly rejected St. Paul's advice-of-counsel defense to the charge that

30. *See id.*

31. 974 S.W.2d 51 (Tex. 1998).

32. *See* 917 S.W.2d at 56.

it wrongfully denied Dal-Worth's defense.³³ 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.³⁴ 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."³⁵

In connection with Dal-Worth's "loss of credit reputation" claim, the Texas Supreme Court noted that, under contract law, to harm a credit rating merits only nominal damages and compensable damages are not awarded until a loan is actually denied or a higher interest rate charged.³⁶ The court noted that although at least one authority did not believe that this rule applied to tort cases, the court was of the opinion that it should.³⁷ Although Dal-Worth had strong credit before filing for bankruptcy and a weaker credit rating afterwards, no evidence was presented that the decline injured Dal-Worth because Dal-Worth neither needed nor tried to use its credit. Accordingly, the court reversed the loss of credit reputation damages.³⁸

The court also reversed the award of additional damages against St. Paul for "knowing conduct" under the DTPA and Insurance Code.³⁹ The court noted that in order to sustain such an award, St. Paul must have acted "knowingly."⁴⁰ The court explained that although St. Paul did not do all it could have done to determine if Dal-Worth had been sued, its conduct constituted only negligence. Therefore, the court reversed the award of additional damages under the DTPA and Insurance Code because no evidence supported a knowing violation by St. Paul.⁴¹

E. ELECTION OF REMEDY

In *Waite Hill Services, Inc. v. World Class Metal Works, Inc.*,⁴² World Class Metal Works suffered a property loss when one of its nickel-plating tanks developed a hole. Colony Insurance Company was the carrier for the property and inland marine of World Class. A Waite Hill claims ex-

33. *See id.*

34. *See id.*

35. *Id.* (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)).

36. *See St. Paul Surplus*, 974 S.W.2d at 53.

37. *See id.* at 53 (citing LAWRENCE A. CUNNINGHAM, 5 CORBIN ON CONTRACTS § 1007 (Supp. 1998)).

38. *See id.*

39. *See id.* at 54.

40. "Knowingly" means an actual awareness of the falsity, deception or unfairness of the conduct in question. *See id.* at 53.

41. *See id.* at 54.

42. 959 S.W.2d 182 (Tex. 1998).

aminer denied the claim under the Colony policy. World Class then sued Colony, Waite Hill, and others for breach of contract, Insurance Code violations, breach of the duty of good faith and fair dealing, and deceptive trade practices. The trial court directed a verdict against Colony on the coverage question and the jury awarded World Class \$55,000 in contractual damages.⁴³ The jury then awarded World Class \$55,000 in extracontractual damages based on Colony's deceptive acts and practices.⁴⁴ The extracontractual damages, however, were based on the same elements of damages as the contractual damages: repair and restoration of property, lost profits, and replacement of lost solutions.⁴⁵ The trial court rendered judgment for World Class in the amount of \$110,000.⁴⁶

Before the Texas Supreme Court, Colony contended that the two damage awards constituted a double recovery, requiring World Class to elect its remedy. The supreme court noted that an objection to the charge was neither necessary nor proper at trial because a party may sue and seek damages on alternative theories.⁴⁷ Colony had properly requested, before judgment, that the trial court require World Class to elect its remedy. Because World Class failed to submit a damages request for distinct tort losses, the trial court erred when it refused Colony's request that World Class elect its remedy.⁴⁸

F. *STOWERS* LIABILITY FOR ORAL OFFER TO SETTLE

In *Trinity Universal Insurance Co. v. Bleeker*,⁴⁹ Bleeker, while under the influence of alcohol, struck the back of a pick-up truck, killing one and injuring thirteen others. The medical bills incurred by the injured parties quickly exceeded Bleeker's personal auto policy 20/40 limits. The plaintiff's attorney sent Trinity a *Stowers* demand for the policy limits, but Trinity failed to inform its insured of the settlement offer. After the settlement offer expired, judgment was entered against Bleeker for damages exceeding \$11 million. The plaintiffs acquired Bleeker's claim against Trinity and ultimately obtained a \$77 million judgment against Trinity.

The court of appeals held that Trinity breached its *Stowers* duty by failing to timely respond to an oral settlement offer made by the plaintiffs' attorney.⁵⁰ The court of appeals also held that the existence of hospital liens in excess of the policy limits does not excuse a carrier from the duty imposed by *Stowers* to respond as a reasonably prudent person.⁵¹ Before the Texas Supreme Court, however, the issue of whether an oral offer to

43. See *id.* at 184.

44. See *id.*

45. See *id.*

46. See *id.*

47. See *id.* at 184 (citing *Birchfield v. Texarkana Mem. Hosp.*, 747 S.W.2d 361, 367 (Tex. 1987)).

48. See *id.* at 185 (citing *Kish v. Van Note*, 692 S.W.2d 463, 466-67 (Tex. 1985)).

49. 966 S.W.2d 489 (Tex. 1998).

50. See *id.* at 490-91.

51. See *id.*

settle is adequate under *Stowers* was not decided. Instead, the court held that Trinity never had a duty to settle because none of the settlement offers proposed by the plaintiff's attorney included or mentioned the hospital liens that existed.⁵² The court held that any implied release of the hospital liens did not comply with Texas Property Code §57.000(a), which states the requirements for a valid release of a hospital lien.⁵³

The supreme court also considered whether Trinity's failure to inform Bleeker or his attorney of the plaintiff's oral settlement offer was unconscionable conduct under the DTPA. The court noted that Bleeker could not recover under the DTPA unless he proved that Trinity's conduct was a "producing cause" of his damages.⁵⁴ Trinity claimed that its failure to inform Bleeker and his attorney of the settlement offers was not a producing cause of Bleeker's damages because Bleeker produced no evidence that either he or his attorney would have been inclined to meet the demand. Because there was no evidence of Bleeker's propensity to accept the offers, the Texas Supreme Court did not consider Trinity's argument that Bleeker could not state a claim under the DTPA. The court rendered a take-nothing judgment against Bleeker.⁵⁵

G. BIFURCATED SETTLEMENT OFFER DOES NOT SATISFY *STOWERS*

In *State Farm Lloyds Insurance Co. v. Maldonado*,⁵⁶ Maldonado sued Robert for defamation. Robert was insured by State Farm under a policy covering up to \$300,000 in personal injury damages. The policy prohibited Robert from settling any claim against him without State Farm's permission. Maldonado made a total demand of \$1.3 million: \$1 million from Robert and \$300,000 from State Farm. Once the deadline passed without State Farm's acceptance to Maldonado's offer, Robert entered an agreement to pay Maldonado \$1 million from his own pocket. Maldonado agreed not to execute against any of Robert's personal assets except for insurance policies. Robert and Maldonado further agreed that Robert would be reimbursed \$1 million from any recovery against State Farm, and the two would split any remaining amount evenly.

The parties proceeded to trial on the defamation claim. Robert did not appear or offer any evidence. The court rendered judgment in favor of

52. See *Bleeker*, 966 S.W.2d at 491.

53. See *id.* When a hospital lien exists, a release is not valid unless:

- (1) the hospital's charges were paid in full before the execution and delivery of the release;
- (2) the hospital's charges were paid before the execution and delivery of the release to the extent of any full and true consideration paid to the injured individual by or on behalf of the other parties to the release; or
- (3) the hospital is a party to the release.

TEX. PROP. CODE § 55.007 (a) (Vernon 1998).

54. See *Bleeker*, 966 S.W.2d at 491 (citing TEX. BUS. & COM. CODE § 17.50 (a); *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 481 (Tex. 1995)).

55. See *id.* at 492.

56. 963 S.W.2d 38 (Tex. 1998).

Maldonado for \$2 million in damages.⁵⁷ Maldonado and Robert then brought suit against State Farm. The trial court awarded both contractual and extracontractual damages to Maldonado and Robert.⁵⁸ The court of appeals affirmed the award of contractual damages for Maldonado and the award of extracontractual damages for Robert based on State Farm's failure to settle, but reversed the award of extracontractual damages based on breach of good faith and fair dealing and on article 21.21 violations.⁵⁹

Before the Texas Supreme Court, State Farm contended that there was no evidence to support a payment under its policy. The court agreed and noted that the defamation trial violated the "actual trial" condition of the policy.⁶⁰ Although Maldonado appeared and presented evidence at trial, Robert did not. Because there was no real contest on the issues, the supreme court held that the judgment was collusive and that Maldonado was not entitled as a third-party beneficiary to collect under the policy.⁶¹

The Texas Supreme Court also considered whether Robert had a valid *Stowers* claim. State Farm contended that Maldonado never made a settlement demand within the \$300,000 policy limits of Robert's policy. There was no dispute that Maldonado never made a settlement demand of less than \$1.3 million. Maldonado claimed, however, that Robert's offer to pay \$1 million converted the \$1.3 million demand into a \$300,000 policy limits demand. The supreme court rejected this argument stating that there was no evidence to support Maldonado's claim that all the parties understood that the \$1.3 million settlement offer was bifurcated: \$1 million from Robert and \$300,000 from State Farm.⁶² In addition, the supreme court remarked that there was no evidence to indicate that State Farm knew, at a point when it had a reasonable amount of time to respond, that Robert had made an unconditional offer to pay the excess.⁶³ Based on these facts, the court concluded that the demand was not an unconditional offer to settle within policy limits and, therefore, did not trigger the *Stowers* doctrine.⁶⁴

II. CLAIMS HANDLING

A. DUTY TO INDEMNIFY MAY BE RESOLVED BY DECLARATORY ACTION

In *Farmers Texas County Mutual Insurance Co. v. Griffin*,⁶⁵ Griffin was shot in a drive-by shooting. Griffin sued Royal, the car's driver, and others for negligence and gross negligence. Royal had an automobile

57. *See id.* at 39.

58. *See id.* at 39-40.

59. *See id.* at 40.

60. *See id.* at 41.

61. *See id.* at 40.

62. *See id.* at 41.

63. *See id.*

64. *See id.*

65. 955 S.W.2d 81 (Tex. 1997).

policy with Farmers. Farmers initially defended Royal under a reservation of rights, but sought a declaratory judgment that it had no duty to indemnify or defend Royal. Although the trial court found in favor of Farmers, the court of appeals reversed in part, holding that Farmers had a duty to defend Royal, even if it did not have a duty to indemnify him.

The Texas Supreme Court reversed the court of appeals, holding that Farmers had no duty to defend or indemnify Royal.⁶⁶ Although Griffin's petition alleged legal theories of negligence and gross negligence, an insurer's duty to defend is determined by examining the petition's factual allegations and the policy's language.⁶⁷ The factual allegations in the petition stated that Griffin's injuries were the result of "a random act of violence," intentional conduct which was excluded under the policy.⁶⁸ Accordingly, Farmers had no duty to defend Royal in the *Griffin* action. In addition, the court held that Farmers had no duty to defend because the policy covered only injuries resulting from an "auto accident."⁶⁹ Since the *Griffin* petition failed to allege injuries caused by an "auto accident," Farmers' duty to defend Royal was not triggered.⁷⁰

But the significant issue decided by *Griffin* concerned the carrier's ability to obtain a declaratory judgment on the issue of its duty to indemnify the insured prior to the resolution of the underlying suit. In *Fireman's Insurance Co. v. Burch*,⁷¹ the Texas Supreme Court held that no justiciable controversy exists regarding an insurer's duty to indemnify before a judgment has been rendered against the insured. At the time *Burch* was decided, the Texas Constitution gave district courts original jurisdiction in cases where the matter in controversy was at least \$500. Since *Burch*, Texas Constitution article V, section 8 was amended to create original jurisdiction in the district courts over "all actions, proceedings and remedies."⁷² The Texas Supreme Court held that this "significantly broadened" the scope of district court jurisdiction to allow the courts to resolve declaratory judgment actions on the duty to indemnify.⁷³ The supreme court noted that not every coverage case may be properly decided prior to resolution of the underlying suit. The court held, however, that the duty to indemnify is justiciable prior to a judgment against the insured when the insurer has no duty to defend and the same reasons that negate a duty to defend will also operate to nullify any possibility that the insurer will ever have a duty to indemnify.⁷⁴ Based on that pronouncement, the court held that Farmers had no duty to indemnify Royal.

66. *See id.* at 82.

67. *See id.* (citing *National Union Fire Ins. Co. v. Merchants Fast Motor Lines, Inc.*, 939 S.W.2d 139 (Tex. 1997)).

68. *Id.* at 82.

69. *See id.* at 83.

70. *See id.*

71. 442 S.W.2d 331 (Tex. 1968).

72. *See Griffin*, 955 S.W.2d at 84 (citing TEX. CONST. art. V., § 8 (amended 1985)).

73. *Id.*

74. *See id.*

B. WITHDRAWAL FROM DEFENSE UNDER RESERVATION OF RIGHTS

In *Katerndahl v. State Farm Fire & Casualty Co.*,⁷⁵ the court held that an insured must prove harm or prejudice resulted from a carrier's withdrawal from defense where a valid reservation of rights was in place in order to estop the carrier from denying coverage.⁷⁶ In 1991, Dr. Katerndahl filed for divorce against his wife, who then counterclaimed against him for prescribing addictive medicines and causing her emotional distress. After he turned the suit over to his homeowners carrier, State Farm initially defended Dr. Katerndahl under a reservation of rights. During mediation, however, State Farm concluded that Mrs. Katerndahl's allegations against Dr. Katerndahl did not qualify for coverage because of the professional services, business pursuits, and intentional injury exclusions. Since all of Mrs. Katerndahl's claims against her husband involved either intentional acts of cruelty or actions taken by Dr. Katerndahl in his role as a physician, the court found that, as a matter of law, State Farm owed no duty to defend Dr. Katerndahl against Mrs. Katerndahl's allegations.⁷⁷

The court concluded that because State Farm had a valid reservation of rights, the carrier was legally able to withdraw its defense when it became clear that it was not obligated to offer such a defense under the policy.⁷⁸ The Katerndahls contended, however, that State Farm waived its right to withdraw from the defense because the reservation of rights letter did not specify that State Farm could withdraw the defense prior to a verdict. The court rejected this claim, maintaining that a reservation of rights permits the insurer the opportunity to research questions of liability, and in most instances there is "no way to determine the exact point in time that those questions will be resolved."⁷⁹ In response to the Katerndahls' estoppel argument based on a State Farm agent's representation that State Farm would defend Dr. Katerndahl to a verdict, the court held that the insured must produce evidence that he was clearly harmed by the insurer's actions, regardless of whether the insured relied upon waiver or estoppel to challenge the carrier's coverage defense.⁸⁰ In order to prevail, Dr. Katerndahl had to show that he detrimentally relied on the agent's statement. Instead, the court found that Dr. Katerndahl behaved exactly the same before and after the agent's statement; specifically, he participated in the defense of his case with his attorney of choice.⁸¹ The only harm alleged by the Katerndahls was that they were abandoned dur-

75. 961 S.W.2d 518 (Tex. App.—San Antonio 1997, no pet.).

76. *See id.* at 524.

77. *See id.* at 522.

78. *See id.*

79. *Id.* at 523 (citing *State Farm Lloyds, Inc. v. Williams*, 791 S.W.2d 542, 550 (Tex. App.—Dallas 1990, writ denied)).

80. *See id.* at 524 (citing *Paradigm Ins. Co. v. Texas Richmond Corp.*, 942 S.W.2d 645, 652-53 (Tex. App.—Houston [1st Dist.] 1997, writ denied); *State Farm Lloyds, Inc. v. Williams*, 791 S.W.2d 542, 552-53 (Tex. App.—Dallas 1990, writ denied); *Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Kitty Hawk Airways, Inc.*, 964 F.2d 478, 481 (5th Cir. 1992)).

81. *See id.*

ing the mediation of the lawsuit shortly before the trial date. Accordingly, the court affirmed the trial court's summary judgment for State Farm.⁸²

C. RIGHT TO REIMBURSEMENT FOR DEFENSE AND SETTLEMENT COSTS

In *Matagorda County v. Texas Association of Counties County Government Risk Management Pool*,⁸³ Matagorda County and its sheriff were covered under a TAC law enforcement liability policy. Beginning in 1991, an exclusion for liability arising out of the county's jail was included in the policy. In 1993, three county jail prisoners sued the County and the sheriff for sexual assaults that occurred in the jail. TAC provided a defense to the County and the sheriff under a reservation of rights and filed a declaratory judgment action seeking a determination of no coverage on account of the jail exclusion. During the fall of 1995, TAC informed the County that it had received and intended to accept a settlement offer of \$300,000 in the underlying matter. TAC also told the County that it would seek reimbursement of the full settlement amount if the declaratory judgment action was determined in TAC's favor. TAC settled the underlying lawsuit a few months later. TAC then amended the declaratory judgment suit to request reimbursement of both settlement and defense costs incurred by TAC in the underlying action. TAC ultimately prevailed on its declaratory action, obtaining a determination of no coverage and judgment for \$300,000 in settlement costs and more than \$53,000 in defense costs expended in the underlying action.⁸⁴

On appeal, the Corpus Christi Court of Appeals considered recent precedent for the recovery of defense costs expended on behalf of an insured. Following *Buss v. Superior Court*,⁸⁵ the court held that reimbursement of defense costs is not allowed when the reservation of rights letter is silent and there is no agreement or understanding that the insured would reimburse if it was later determined there was no duty to defend.⁸⁶ The court applied Texas law on quasi-contract, unjust enrichment and quantum meruit to determine that an insurer must provide "specific notice" of its intent to seek reimbursement for defense costs in its reservation of rights letter to the insured.⁸⁷ With respect to the reservation of rights letter sent to the County, the court held that although the

82. *See id.*

83. 975 S.W.2d 782 (Tex. App.—Corpus Christi 1998, pet. filed).

84. *See id.* at 784.

85. 16 Cal. 4th 35, 65 Cal. Rptr. 2d 366, 939 P.2d 766, 776-78, 784 n.27 (1997).

86. *See Matagorda County*, 975 S.W.2d at 784 (citing *Michaelian v. State Compensation Ins. Fund*, 50 Cal. App. 4th 1093, 58 Cal. Rptr. 2d 133, 144 n.8 (1996); *In re Hansel*, 160 B.R. 66, 70 (Bankr. S.D. Tex. 1993) (applying Texas law); *Terra Nova Ins. Co. v. 900 Bar, Inc.*, 887 F.2d 1213, 1219-20 (3d Cir. 1989) (concluding generally under Pennsylvania law that even when the insurer defends under a reservation of rights letter, it may not later recover costs expended in defending the insured, on the ground that the insurer's provision of a defense is as much for its own benefit as for the insured's)).

87. *See id.* at 785.

letter encouraged the County to consult with attorneys about coverage issues, there was no suggestion that TAC would try to recover any defense costs if it obtained a finding of no coverage in the declaratory judgment action.⁸⁸ Because TAC failed to specifically reserve the right to recoup defense costs, the County was not liable for them.⁸⁹

The court also found that quantum meruit and unjust enrichment theories do not apply to an insurer's settlement with a claimant which bypasses the insured and does not require the insured's acceptance or approval.⁹⁰ TAC argued that it was equitably subrogated to the rights of the underlying claimants once it settled the claims. The court rejected this position because principles of subrogation do not apply to a "mere stranger or volunteer who has paid the debt of another, without assignment or agreement for subrogation, without being under any legal obligation to make payment, and without being compelled to do so for the preservation of any rights or property of his own."⁹¹ The court held that an insurer has no right to reimbursement for settlement amounts absent the insured's specific agreement to be bound by the insurer's settlement and to allow reimbursement to the insurer if coverage is subsequently determined in the carrier's favor.⁹² Even though TAC communicated its intention to seek reimbursement for the settlement costs, there was no evidence indicating the County agreed to the settlement or agreed that TAC could later seek reimbursement. As a result, TAC was denied recovery for the amount of the settlement.⁹³

III. LIABILITY

A. OCCURRENCE AND ACCIDENT

In *Freedman v. Cigna Insurance Co. of Texas*,⁹⁴ the Marxes bought a house from the Freedmans. After various problems with the roof occurred, the Marxes learned that the Freedmans failed to disclose that the roof required repairs during the Freedmans' residence. The Marxes sued the Freedmans for violations of the Texas DTPA, common law fraud, fraud in a real estate transaction, and negligence. Cigna and ICNA refused the Freedmans' request for a defense under their policies because, among other things, there was no "occurrence." The court of appeals noted that the event for which the Marxes sued the Freedmans was the Freedmans' misrepresentations, about the condition of the roof, not the actual collapse of the roof. The court of appeals, affirming the trial court, held that fraudulent promises, misrepresentations, and untrue statements

88. *See id.*

89. *See id.*

90. *See id.*

91. *Id.* at 786 (citing *First Nat'l Bank of Kerrville v. O'Dell*, 856 S.W.2d 410, 415 (Tex. 1993) (citing *Oury v. Saunders*, 77 Tex. 278, 280, 13 S.W. 1030, 1031 (1890))).

92. *See id.* at 787.

93. *See id.*

94. 976 S.W.2d 776 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

do not fall within the definition of "occurrence."⁹⁵ The court also rejected the Freedmans' contention that the Marxes' alternative theories of negligence brought the claim within the coverage of the policies.⁹⁶ Noting that the mere allegation of negligence does not control the duty to defend, the court held that all of the *facts* alleged by the Marxes pointed to intentional conduct by the Freedmans in concealing the condition of the roof.⁹⁷ Cigna and ICNA were held to have no duty to defend the Freedmans.

In *Wessinger v. Fire Insurance Exchange*,⁹⁸ an intoxicated Wessinger punched Morrison several times, causing permanent disfigurement to Morrison's face. Morrison successfully sued Wessinger and was awarded \$127,000 in damages. Wessinger's homeowners carrier, FIE, filed a declaratory judgment action to challenge coverage for the underlying incident. The appellate court determined that the policy's exclusion for intentional acts included Wessinger's inebriated attack on Morrison. The court examined the policy and construed the term "accident" (which was not defined in the policy) in accordance with the definition provided in *Argonaut Southwest Insurance Co. v. Maupin*.⁹⁹ Using the *Maupin* analysis, the *Wessinger* court determined that the act was both voluntary and intentional, falling outside the definition of "accident."¹⁰⁰ The court then decided whether the resultant injuries were a natural result of the act. Under Texas law, the natural result of an act is the result that ordinarily follows, may be reasonably anticipated, and ought to be expected.¹⁰¹ The court determined that whether Wessinger intended or anticipated Morrison's injuries was not the deciding factor, but rather whether Morrison's injuries were quite simply the likely and natural result of Wessinger striking Morrison in the face.¹⁰² The court held that voluntary intoxication was no excuse and did not render Wessinger's actions unintentional.¹⁰³ Accordingly, the court of appeals held that FIE did not breach its contract or violate either the DTPA or the Insurance Code when it refused to defend or indemnify Wessinger.¹⁰⁴

B. NUMBER OF OCCURRENCES

In *H.E. Butt Grocery Co. v. National Union Fire Insurance Co.*,¹⁰⁵ a grocery store employee sexually molested two children. Although the as-

95. See *id.* at 778 (citing *Houston Petroleum Co. v. Highlands Ins. Co.*, 830 S.W.2d 153, 156 (Tex. App.—Houston [1st Dist.] 1990, writ denied)); see also *State Farm Lloyds v. Kessler*, 932 S.W.2d, 738 (Tex. App.—Fort Worth 1996, writ denied) (misrepresentations and failures to disclose are intentional acts, not accidents).

96. See *id.* at 778-79.

97. See *id.* at 779.

98. 949 S.W.2d 834 (Tex. App.—Dallas 1997, no writ).

99. 500 S.W.2d 633 (Tex. 1973).

100. See *Wessinger*, 949 S.W.2d at 838.

101. See *id.* at 841.

102. See *id.*

103. See *id.*

104. See *id.*

105. 150 F.3d 526 (5th Cir. 1998).

saults occurred at the same restroom of the store, they occurred about a week apart. The children's families sued the store for negligence, alleging that H.E. Butt Grocery (HEB) knew the employee had assaulted another child at another store in the past and that HEB's only response had been to transfer the employee to a new store. HEB settled with the families for \$1 million each. HEB then made a claim under its general liability policy with National Union. Under the terms of the policy, HEB was its own primary insurer with a self-insured retention of \$1 million per occurrence. Once HEB satisfied its self-insured retention, National Union was responsible for the remaining damages. A dispute arose between the insured and the carrier as to whether the two sexual assaults arose from a single occurrence. Although HEB contended that the term occurrence¹⁰⁶ was ambiguous, the district court granted summary judgment for National Union.¹⁰⁷ In affirming the summary judgment for National Union, the Fifth Circuit rejected HEB's argument that the cause of the children's injuries was the negligent supervision of the employee. Adopting a cause and effect analysis, the court reasoned that it was the act of molestation by the employee, rather than the employer's negligent supervision which resulted in the children's injuries.¹⁰⁸ The Fifth Circuit stated that it was bound by Texas law and the policy language to look at the independent events which gave rise to the insured's liability and caused the injuries, rather than the number of injuries or the number of victims.¹⁰⁹ The court specifically noted that HEB's advocacy of the single occurrence argument was short-sighted since the best interpretation of "occurrence" for the insured in this case "will not necessarily be the interpretation favorable to the insured in the next case."¹¹⁰

In *Foust v. Ranger Insurance Co.*,¹¹¹ Walters Farms retained Lindeman to crop dust its milo crop with herbicide. During the one-day application, some of the herbicide drifted from the target area onto tracts of land farmed by the McDaniels, causing extensive damage to the McDaniels' cotton crop and greatly reducing the cotton yield. The McDaniels sued Lindeman, Walters Farms and the herbicide manufacturer for loss of income they suffered as a result of the crop damage. Lindeman alerted Ranger, the carrier for his aircraft insurance that covered claims resulting from aerial application of chemicals. The limits of liability under the policy were \$100,000 per occurrence and \$200,000 per policy period. After dispute concerning the number of occurrences arose during settlement

106. The policy's definition of "occurrence" read "an event, including continuous or repeated exposure to conditions, which result[s] in Personal Injury or Property Damage during the policy period, neither expected or intended from the standpoint of the Insured. All Personal Injury or Property Damage arising out of the continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence." *Id.* at 529.

107. *See id.* at 528.

108. *See id.* at 530-34.

109. *See id.* at 535.

110. *Id.* at 534.

111. 975 S.W.2d 329 (Tex. App.—San Antonio 1998, pet. denied).

negotiations between the McDaniels and Ranger, Ranger filed a declaratory judgment action. The trial court determined that the application of the herbicide amounted to a single occurrence.¹¹²

On appeal, the court first considered the McDaniels' argument that the trial court had no jurisdiction in the case because its judgment effectively establishing Ranger's indemnity liability under the policy was based upon a hypothetical and was purely advisory in nature in contravention of *Firemen's Insurance Co. of Newark v. Burch*.¹¹³ The court of appeals focused on the wording of the judgment and found that the judgment, while reciting the limits of liability found in the policy, did not actually state that Ranger had to pay the limits of the policy.¹¹⁴ Therefore, because the judgment was rendered only on the duty to defend, the trial court was not in violation of *Burch*.¹¹⁵

The *Foust* court then turned to the question of the number of occurrences.¹¹⁶ The McDaniels argued that the damages resulted from multiple occurrences because the conditions during the application process were constantly changing. Specifically, the McDaniels contended that because the plane landed and was reloaded with herbicide several times during the three-hour spraying process, each return to the sky created a new cloud of damaging herbicide and a separate condition. On the other hand, Ranger contended that the damage to the McDaniels' cotton crop resulted from the same general conditions and, therefore, was caused by one occurrence. The court distinguished *State Farm Lloyds, Inc. v. Williams*,¹¹⁷ in which the court held that injuries resulting from separate gunshots were caused by multiple occurrences, on the basis that the policy in the *Williams* case contained no definition of "occurrence."¹¹⁸ Instead, citing cases which relied on the "same general conditions" language of the "occurrence" definition, the court held that the application process was a single procedure, despite the fact that it required several passes over various tracts of land, and that this single procedure as a whole was the cause of the damage to the McDaniels' cotton crop.¹¹⁹

C. TRIGGER OF COVERAGE

In *American Home Assurance Co. v. Unitramp Ltd.*,¹²⁰ the Fifth Circuit

112. *See id.* at 330.

113. *See* 442 S.W.2d 331, 333 (Tex. 1968).

114. *See id.*

115. *See id.*; *see also Griffin*, 955 S.W.2d at 84 (discussed at nn.35-40, *supra*).

116. The Ranger policy issued to Lindeman defined "occurrence" as: a sudden event or repeated exposure to conditions involving aircraft during the policy period, neither expected or intended by [the insured], that causes bodily injury or property damage to others during the policy period. All bodily injury or property damage resulting from the same general conditions will be considered to be caused by one occurrence.

975 S.W.2d at 333.

117. 960 S.W.2d 781 (Tex. App.—Dallas 1997, writ *dism'd by agr.*).

118. *See id.* at 783.

119. *See Foust*, 975 S.W.2d at 334.

120. 146 F.3d 311 (5th Cir. 1998).

forayed into the treacherous territory of trigger of coverage under a liability policy. Unitramp chartered a cargo vessel and purchased fuel from Enjet Refining. The fuel was delivered by Enjet from its Engleside facility and loaded onto the ship in Corpus Christi. At the time of loading, Unitramp sent a sample of the fuel for testing by a commercial laboratory. After the ship departed for Casablanca, Unitramp learned from the laboratory that the fuel contained an excessive amount of water. As a result, the ship was forced to divert to Florida to exchange fuel before continuing to Casablanca. Unitramp sued Enjet for losses caused by the delay. Enjet ultimately settled with Unitramp for \$210,000 while Enjet was in bankruptcy. Enjet's carrier, American Home, filed a declaratory judgment action against Unitramp, asserting that no indemnification coverage existed because the Engleside facility was not a scheduled location at the time the fuel was loaded. The facts revealed that several days after the fuel was loaded and two days before Unitramp discovered the fuel was contaminated, the Enjet policy was renewed and the Engleside facility added as a scheduled location. The trial court initially agreed with the carrier that, for purposes of insurance coverage, the "occurrence" happened when the contaminated fuel was loaded onto the cargo ship. On appeal, the Fifth Circuit vacated the judgment and remanded the case for a determination of when Unitramp sustained actual damage.¹²¹ After determining that Unitramp sustained actual damage on the date the fuel was loaded, the trial court again entered judgment for Unitramp.

The Fifth Circuit noted that under Texas law, the time of an "occurrence" is when the injured party was actually damaged, not when the wrongful act was committed.¹²² The court cited *Cullen/Frost Bank of Dallas, N.A. v. Commonwealth Lloyd's Insurance Co.*,¹²³ which held that "coverage is not afforded unless an identifiable damage or injury, other than merely causative negligence, takes place during the policy period."¹²⁴ Relying on the authority of *Cullen/Frost Bank*, the Fifth Circuit rejected American Home's attempt to extend the word "identifiable" to mean "capable of being known by testing" since such a holding would encumber insureds such as Unitramp with an "unprecedented duty to conduct limitless tests and inspections for hidden defects."¹²⁵ The court emphasized that insureds were not assigned constructive knowledge of all defects that are capable of being uncovered through testing. Instead, the Fifth Circuit reiterated that under Texas law the date of an "occurrence" under a liability policy is when the damage is capable of being easily perceived, recognized, and understood.¹²⁶ Accordingly, the Fifth Circuit

121. See *American Home Assurance Co. v. Unitramp Ltd.*, 91 F.3d 141 (5th Cir. 1996) (per curiam) (unpublished).

122. See *American Home Assurance Co. v. Unitramp, Ltd.*, 146 F.3d 311, 313 (5th Cir. 1998).

123. 852 S.W.2d 252 (Tex. App.—Dallas 1993), *order granting writ withdrawn*, 889 S.W.2d 226 (Tex. 1994).

124. *Id.* at 257.

125. *Unitramp*, 146 F.3d at 314.

126. See *id.* at 314.

held that Unitramp sustained no damage until it learned of the contamination from the lab results.¹²⁷

D. POLLUTION EXCLUSION

The Fifth Circuit was active during the last year concerning application of the pollution exclusion.¹²⁸ In *Guaranty National Insurance Co. v. Vic Manufacturing Co.*,¹²⁹ Pilgrim Enterprises purchased from Vic, a manufacturer, dry cleaning equipment which contaminated Pilgrim's property and adjoining property with perchlorethylene (perc), a toxic chemical. Pilgrim and adjoining homeowners sued Vic and other dry cleaning equipment manufacturers to recover cleanup costs. Vic subsequently made claims on liability policies issued by Guaranty for the relevant period. The policies contained a limited pollution exclusion.¹³⁰ The district court held that the Pilgrim suit did not allege damages within the "sudden and accidental" exception to the pollution exclusion and that Guaranty had no duty to defend Vic.

At the outset, the Fifth Circuit noted that the "sudden and accidental" clause contains a temporal element in addition to the requirement of being unforeseen or unexpected¹³¹ citing *Mustang Tractor & Equipment v. Liberty Mutual Insurance Co.*¹³² The court then examined the underlying pleadings for its analysis of the duty to defend. The court noted that although the underlying pleadings at one point alternatively alleged that the design of the equipment would result in "sudden and accidental" discharges of perc, the overall theme of the pleadings was that the pollution occurred and was designed to occur "in the regular course of the dry cleaning business."¹³³ The court specifically rejected Vic's attempt to "microanalyze" the case and create a duty to defend by pointing out a single spill (out of almost eighty) that may have been "sudden and accidental."¹³⁴ The Fifth Circuit held that "regardless of the catch phrases used in the petition, the pollution is not 'sudden and accidental' when it consists of repeated, regular discharges over numerous years in the usual

127. *See id.*

128. *See also* Lubbock County Hosp. Dist. v. National Union Fire Ins. Co. of Pittsburgh, Pa., 143 F.3d 239 (5th Cir. 1998) (holding pollution exclusion excluded coverage under aircraft liability policy for cleanup and monitoring costs associated with spill of fuel from hospital helipad); Snydergeneral Corp. v. Continental Ins. Co., 133 F.3d 373 (5th Cir. 1998) (discharge of trichloroethylene from dry wells used to drain the chemical from the insured's California manufacturing plant was not "accidental" under either Texas or Minnesota law as provided under "sudden and accidental" exception to pollution exclusion).

129. 143 F.3d 192 (5th Cir. 1998).

130. The limited pollution exclusion stated that the policy did not provide coverage for "bodily injury or property damage 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 water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental." *Id.* at 193.

131. *See id.* at 194.

132. *See* 76 F.3d 89, 91 (5th Cir. 1996).

133. *Vic Mfg.*, 143 F.3d at 194.

134. *Id.* at 195.

course of business operation.”¹³⁵ Interestingly, because Guaranty had stipulated at trial that a determination of its duty to indemnify Vic was premature, the Fifth Circuit was unable to reach the issue of indemnification.

In *Allen v. St. Paul Fire & Marine Insurance Co.*,¹³⁶ the Allens won a suit against Tawakoni, their water utility company, for its failure to provide potable water. St. Paul, Tawakoni’s CGL carrier, refused to defend because pollution exclusions in the policies applied to the *Allen* suit’s allegations that the water was contaminated. Tawakoni assigned its claim against St. Paul for wrongful refusal to defend to the Allens in return for a covenant not to execute. After the Allens sued St. Paul, the trial court granted summary judgment for St. Paul. On appeal, the Allens contended that St. Paul failed to establish that the pollution exclusions covered all of the Allens’ claims. The plaintiffs argued that, while their claims based on contamination were appropriately excluded by the pollution exclusions, their other claims concerning Tawakoni’s water (that it was “not potable,” not of “good quality” and “not reasonably fit for residential use”) should not have been excluded. The Allens argued that water could have a variety of conditions rendering it non-potable, without the water containing pollutants. The court responded that the Allens did not allege facts separate from contamination, and because “contaminants” were absolutely excluded, all of the Allens’ claims were rightfully excluded.¹³⁷ The court further ruled that St. Paul also had no duty to indemnify Tawakoni for the *Allen* judgment based on the pollution exclusions.¹³⁸

In *E & L Chipping Co., Inc. v. Hanover Insurance Co.*,¹³⁹ the insured sued its CGL carriers, St. Paul and Hanover, for refusing to defend four lawsuits over run-off water contaminated by the insured’s efforts to extinguish a fire on its property in late 1988. In addition to breach of contract, E&L sued the carriers for fraud, misrepresentation, negligence, breach of the duty of good faith and fair dealing, and violations of DTPA. The St. Paul policy covered “property damage” occurring in the policy period. Although the fire occurred prior to St. Paul’s coverage, the court found the resultant run-off contaminated lakes and underground water systems and four properties throughout St. Paul’s policy period, and caused property damage under the policy.¹⁴⁰ St. Paul argued that the claims fell within the policy exclusion for “expected or intended” property damage. While the insured intended to extinguish the fire (which caused the contaminated run-off), the court rejected St. Paul’s arguments that there was no accident, and that the expected and intended injury exclusion ap-

135. *Id.*

136. 960 S.W.2d 909 (Tex. App.—Texarkana 1998, no pet.).

137. *See id.* at 912.

138. *See id.* at 913.

139. 962 S.W.2d 272 (Tex. App.—Beaumont 1998, no pet.).

140. *See id.* at 275.

plied.¹⁴¹ This interpretation, the court reasoned, would render insurance coverage illusory for many of the things for which insured commonly purchase insurance.¹⁴² St. Paul also contended that the underlying claims were not covered because they were “known losses” or “losses in progress”¹⁴³ prior to the inception of the St. Paul policy. The court found that the pleadings alleged property damage during the policy period.¹⁴⁴ The court also found no evidence of E&L’s intent to deceive St. Paul on St. Paul’s claim that E&L made misrepresentations on its insurance application by failing to list claims regarding the fire water run-off.¹⁴⁵ The appellate court found that the trial court erred in granting St. Paul’s summary judgment, and reversed and remanded the case against St. Paul for trial.¹⁴⁶

The Hanover policy contained an “absolute pollution exclusion” upheld as unambiguous by the Texas Supreme Court in *National Union Fire Insurance Co. v. CBI Industries, Inc.*¹⁴⁷ E&L contended that groundwater, one of the alleged causes of damage, was not “pollution” and, therefore was not excluded by the “pollution exclusion.” E&L also asserted that the damage fell within the “hostile fire” exception to the pollution exclusion. In response to both claims, the court held that the damages resulted from contamination of the groundwater, not from fire or smoke.¹⁴⁸ The court held that the absolute pollution exclusion in the Hanover policies applied.¹⁴⁹ In addition, there was no dispute that E&L failed to timely notify Hanover of three pending lawsuits. E&L contended that Hanover waived the policy’s notice requirement since it had already denied coverage of another claim arising out of the fire. The court held that because E&L never timely notified Hanover of the three suits, the duty to defend was never triggered.¹⁵⁰ Consequently, the court ruled that E&L could not recover the costs of defending the three lawsuits, and affirmed the summary judgment in favor of Hanover.¹⁵¹

E. PROFESSIONAL LIABILITY EXCLUSION

In *Atlantic Lloyd’s Insurance Co. of Texas v. Susman Godfrey, L.L.P.*,¹⁵² the law firm of Susman Godfrey represented a woman in a medical negligence suit against Dr. Likover. The settlement agreement in the suit against Likover contained a confidentiality agreement. After the

141. See *id.* at 275-76.

142. See *id.* at 276.

143. For a discussion of the known loss and loss in progress doctrines, see *Two Pesos, Inc. v. Gulf Ins. Co.*, 901 S.W.2d 495, 501 (Tex. App.—Houston [14th Dist.] 1995, no writ).

144. *Id.* at 275. *E&L Chipping Co.*, 962 S.W.2d at 275.

145. See *id.* at 276.

146. See *id.*

147. 907 S.W.2d 517 (Tex. 1995).

148. See *E&L Chipping Co.*, 962 S.W.2d at 277-78.

149. See *id.* at 278.

150. See *id.*

151. See *id.*

152. 982 S.W.2d 472 (Tex. App. – Dallas 1998, no pet.).

suit was settled, one of the firm's attorneys sent a letter informing a former patient of Dr. Likover about the lawsuit. The letter invited the former patient to contact the firm to discuss any concerns the patient had about Dr. Likover's treatment or any questions the patient had about filing a lawsuit against Dr. Likover. Dr. Likover sued the firm for defamation after he learned of the solicitation letter. The firm tendered the Likover suit to Atlantic Lloyd's for a defense under its general liability policy. Atlantic filed a declaratory judgment action claiming that the policy did not cover the underlying defamation or, alternatively, the policy's exclusion for professional services applied to the claim. The trial court granted summary judgment for the firm and Atlantic appealed.

The Dallas Court of Appeals rejected Atlantic's argument that Dr. Likover's defamation claim did not constitute an "advertising injury" under the policy.¹⁵³ The policy's definition of "advertising injury" included an injury arising from a written publication which slanders a person. The court determined that the purpose of the firm's letter to Dr. Likover's former patient was to "cast Likover in an unfavorable light to encourage a lawsuit against Likover."¹⁵⁴ In addition, the letter's claims regarding its previous successful suits against the doctor were "to gain the business" of the doctor's former patients, the court held.¹⁵⁵ Accordingly, the court held that Dr. Likover's claim stated an "advertising injury" within the definition of the Atlantic policy.¹⁵⁶ The court then rejected Atlantic's claim that the policy's professional services exclusion applied to the claim.¹⁵⁷ Atlantic asserted that "professional services" included acts that are integral to the practice of law, such as the solicitation of clients. The firm, on the other hand, contended that the solicitation letter merely created the opportunity to provide professional services for others, but did not constitute the rendering of legal services or the practice of law. The court agreed, stating that an act is not a professional service simply because it is performed by a professional. Instead, the court held that a professional service must require the professional to use his specialized knowledge or training.¹⁵⁸ The court explicitly rejected Atlantic Lloyd's argument that the strict regulation of attorney solicitation changed the subject "into a matter inherent to the profession."¹⁵⁹ Atlan-

153. *See id.* at 475-76.

154. *Id.* at 475.

155. *Id.*

156. *Id.* at 475-76.

157. The professional services exclusion in the policy excluded coverage for "advertising injury," among other things, "due to the rendering or failure to render any professional services." The exclusion defined "professional services" as:

Legal services included but not limited to counseling, advice, or any other services regardless of where, how, and by whom provided which may be or are provided or rendered by lawyers, paralegals and others working in a law office and/or administration, management or other services arising out of or in any way connected with the legal services described herein.

Id. at 476.

158. *See id.* at 478.

159. *Id.* at 477.

tic Lloyd's also contended that the solicitation letter indicated that the firm had evaluated the situation, concluded that an injury was caused by medical negligence, discussed the prior settlement, and expressed its interest in filing suit on behalf of the patient. The court of appeals refused to adopt Atlantic Lloyd's characterization of the situation, holding that none of the opinions or language in the letter provided legal services and no legal opinion was expressed about the patient's individual case.¹⁶⁰ The court concluded that Susman, Godfrey had "merely engaged in a practice designed to acquire new business" a practice which did not rise to the level of rendering professional legal services.¹⁶¹ Distinguishing an attorney's daily professional functions of advising clients, drafting pleadings, analyzing case law and forming trial strategy, the court of appeals specifically noted that a lawyer's solicitation of clients does not require the use of the specialized education and knowledge of the legal profession.¹⁶² The appeals court affirmed the trial court's finding that Atlantic Lloyd's was obligated to defend the firm in the Likover action.¹⁶³

In another professional services exclusion case, the court arrived at the opposite conclusion. In *State Farm Lloyds v. Performance Improvement Corporation*,¹⁶⁴ Performance was sued by the mother of a child who was allegedly molested on more than one occasion by an employee who had been screened and tested by Performance for the apartment complex where the child lived. Performance carried liability insurance with State Farm. State Farm denied coverage to Performance based on an exclusion which listed "management consultant" as the excluded professional service. The underlying lawsuit alleged, among other things, that Performance was negligent in failing to check the criminal histories of potential employees and failing to administer a test more capable of revealing deviant or criminal tendencies or personality traits of potential employees. No testimony presented at the trial of the underlying lawsuit indicated that the test administered by Performance was in any way defective or unreasonably dangerous. The San Antonio Court of Appeals held that the undisputed facts established that the liability of Performance in the underlying lawsuit was solely based on its performance of the professional service of management consulting.¹⁶⁵ Although Performance argued that the term "professional services" was ambiguous, the court rejected the insured's position, holding that Performance's administration of pre-employment testing fell within the professional services exclusion to the policy.¹⁶⁶

160. *See id.* at 477.

161. *Id.*

162. *See id.* at 478.

163. *See id.*

164. 974 S.W.2d 135 (Tex. App.—San Antonio 1998, pet. denied).

165. *See id.* at 137.

166. *See id.* at 138.

F. BUSINESS PURSUITS EXCLUSION

In *State Farm Fire & Casualty v. Vaughan*,¹⁶⁷ the Texas Supreme Court did an about face from its decision in *State Farm Fire & Casualty Co. v. Reed*.¹⁶⁸ As in *Reed*, *Vaughan* involved the application of the business pursuits exclusion to a home-operated day care business. While the Vaughans' infant son was in the care of Solis, Solis buckled him into a car safety seat, threw a blanket over his head and left him in a closet. After law enforcement officers discovered the Vaughan boy and other unattended children, Solis was convicted of child endangerment. State Farm refused to defend Solis on the basis of the business pursuits exclusion¹⁶⁹ when the Vaughans sued Solis for emotional distress.

The Vaughans sued State Farm to collect on their judgment against Solis. The trial court granted summary judgment for State Farm on the basis of the business pursuits exclusion. The court of appeals reversed and remanded the summary judgment for trial. Before the Texas Supreme Court, the Vaughans argued that because in-home child care is an activity ordinarily incidental to a non-business pursuit, their claim against Solis fell within the exception to the exclusion. Interestingly, the Texas Supreme Court cited the *Reed* decision when it noted that "not every difference in interpretation of a contract or an insurance policy amounts to an ambiguity."¹⁷⁰ The court noted that because there was no factual dispute that Solis' day care operation was full-time, for profit, and regulated by the state, the question of the application of the business pursuits exclusion was a matter of law. The supreme court, in its per curiam opinion, distinguished *Reed*¹⁷¹ by noting that the inquiry must focus on the specific factual allegations against the insured.¹⁷² The *Vaughan* court noted that while the basis for liability in *Reed* concerned an activity which was ordinarily incidental to non-business pursuits, the litigation against Solis centered solely on how she conducted her "business pursuit."¹⁷³ The *Vaughan* court explicitly rejected the court appeals' conclusion that *Reed* "invariably stands for the proposition that, in the context of home child care, the 'business pursuits' exclusion and exceptions are ambiguous. . . ."¹⁷⁴ The *Vaughan* court concluded that the business pursuits ex-

167. 968 S.W.2d 931 (Tex. 1998).

168. 873 S.W.2d 698, 699 (Tex. 1993).

169. The business pursuits exclusion in Solis' policy excluded coverage for "bodily injury or property damage arising out of or in connection with a business engaged in by an insured." 968 S.W.2d at 932. An exception to the exclusion stated that "this exclusion does not apply to activities which are ordinarily incidental to non-business pursuits." *Id.*

170. *Vaughan*, 968 S.W.2d at 933 (citing *Reed*, 873 S.W.2d at 699, n.3; *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 134 (Tex. 1994)).

171. In *Reed*, a child crawled through a fence that separated a play area from the Reeds' swimming pool and drowned in a puddle of water on a tarp covering the pool. The Texas Supreme Court, holding that the business pursuits exclusion was ambiguous and did not apply to the *Reed* suit, determined that the maintenance of the fence was ordinarily incidental to a non-business pursuit. See 873 S.W.2d at 701 n.7.

172. See 968 S.W.2d at 933.

173. *Id.*

174. *Id.*

clusion in Solis' homeowners policy was not ambiguous when viewed in light of the "actual activity the Vaughans allege created Solis' liability."¹⁷⁵ The court affirmed summary judgment in favor of State Farm and rendered judgment that the Vaughans take nothing.¹⁷⁶

Little indication can be gleaned from the *Vaughan* court's opinion about the real reason for its drastic departure from *Reed*. At least one reference is made to Chief Justice Phillip's dissent in *Reed*.¹⁷⁷ But critics for both carriers and their insureds seem to have justifiable complaints against the court for failing to clearly draft the *Reed* decision so that lower courts could correctly interpret it.

IV. PROPERTY

A. DAMAGE TO FOUNDATION HELD COVERED

In *Sharp v. State Farm Fire & Casualty Insurance Co.*,¹⁷⁸ the Fifth Circuit considered whether damage to a residence caused by foundation movement resulting from a plumbing leak beneath the house was covered under a standard Texas homeowners policy. The Fifth Circuit held that the policy was not ambiguous, and flatly rejected the Sharps' attempt to gain coverage for the damage to their home.¹⁷⁹ But *Sharp* remained good law for only a year before the Texas Supreme Court, in answering a question of law certified by the Fifth Circuit, appeared to follow the preferences of the Texas Department of Insurance to provide coverage for this form of foundation damage. In *Balandran v. Safeco Insurance Co.*,¹⁸⁰ the Balandrans sought coverage for the foundation damage to their home as caused by an underground plumbing leak. Safeco, the homeowners carrier, contended that the damage to the dwelling was not covered under Coverage A of their Texas standard homeowners policy due to an exclusion for "settling, cracking, bulging, shrinking or expansion of foundations."¹⁸¹ Coverage B of the policy specifically insured personal property from "Accidental discharge, Leakage or Overflow from within a . . . system or household appliance," and advised that "Exclusions 1(a) through 1(h) under Section I exclusions do not apply to loss caused by this peril."¹⁸² The Balandrans, however, argued that an "exclusion repeal provision" in the personal property section of the policy applied to any loss suffered by the insured, not just those specified in the personal property section.¹⁸³ Relying on the precedent of *State Farm Life Insurance*

175. *Id.* at 934.

176. *See id.*

177. *See id.*

178. 115 F.3d 1258 (5th Cir. 1997).

179. *See id.* at 262.

180. 129 F.3d 747 (5th Cir. 1997), *certified questions answered by*, 972 S.W.2d 738 (Tex. 1998), *answer to certified question conformed to*, 148 F.3d 487 (5th Cir. 1998). *Accord Oram v. State Farm Lloyds*, 977 S.W.2d 163, 166 (Tex. App.—Austin 1998, no pet.).

181. 972 S.W.2d at 740.

182. *Id.*

183. *See id.*

Co. v. Beaston,¹⁸⁴ Safeco asserted that the exclusion repeal provision should not be taken from its context within the personal property section.¹⁸⁵

The Texas Supreme Court disagreed, holding that the exclusion repeal provision was subject to two reasonable interpretations.¹⁸⁶ The court found the Balandran's interpretation was reasonable because the policy on its face merely stated exclusion 1(h) did not apply to plumbing leaks; it did not specifically limit the exclusion to personal property losses.¹⁸⁷ The court stated that the location of the exclusion within Coverage B was not determinative.¹⁸⁸ Moreover, Safeco's construction rendered part of the policy meaningless. If exclusion 1(h) applied only to personal property, the court reasoned, it was unnecessary even to list it because, on its face, exclusion 1(h) applied to dwelling damages.¹⁸⁹ The court distinguished several cases cited by Safeco supporting its contention that exclusion 1(h) excludes damage to foundations regardless of cause because those cases interpreted the standard pre-1978 homeowner's policy.¹⁹⁰ Presented with the ambiguity, the Texas Supreme Court held that uncertain contractual language should be construed against the party selecting that language.¹⁹¹ As a result, the court concluded that the Balandrans' interpretation of the exclusion repeal provision was a reasonable and proper construction of the policy.¹⁹²

B. FLOOD EXCLUSION

In *State Farm Lloyds v. Marchetti*,¹⁹³ the Marchettis' house was damaged when water and raw sewage backed up through a drain opening in their utility room. As in the *Balandran* case, the Marchettis' homeowners policy covered both the dwelling and personal property of the insureds. State Farm denied the Marchettis' claim under their homeowners policy. The Marchettis then obtained a summary judgment from the trial court that their claim was covered. On appeal, the Marchettis asserted that the loss was caused by the accidental discharge or overflow of water and sewage, a covered peril. State Farm contended that the flood and surface water exclusion applied to the damage to the Marchettis' dwelling.¹⁹⁴ State Farm maintained that it was excessive rainfall which was the cause

184. 907 S.W.2d 430, 433 (Tex. 1995).

185. *See Sharp*, 972 S.W.2d at 740.

186. *See id.*

187. *See id.*

188. *See id.*

189. *See id.*

190. *See id.*

191. *See id.*

192. Justices Owen and Hecht dissented from the majority, preferring to adopt the reasoning of the Fifth Circuit in *Sharp*. *See Balandran*, 972 S.W.2d at 743-46.

193. 962 S.W.2d 58 (Tex. App.—Houston [1st Dist.] 1997, pet. denied).

194. The flood and surface water exclusion read: "i. We do not cover loss caused by or resulting from flood, surface water, waves, tidal water or tidal waves, overflow of streams or other bodies of water or spray from any of these whether or not driven by wind." *Marchetti*, 962 S.W.2d at 60.

in fact of the discharge of water and sewage through the Marchettis' drain. In affirming the summary judgment for the Marchettis, the court noted that the fact that excessive surface water may have initiated the chain of events which led to the insured's loss was immaterial.¹⁹⁵ As a result, the court held that when the insured's loss is a consequence of the invasion of the insured premises by non-flood water, even though the invasion may have been proximately caused by flood water, the flood and surface water exclusion does not apply.¹⁹⁶

C. EMPLOYEE DISHONESTY

The insured in *Lynch Properties, Inc. v. Potomac Insurance Co. of Illinois*¹⁹⁷ sued its commercial crime insurer after the carrier denied coverage under the employee dishonesty coverage for misappropriation of funds from customer's personal bank accounts by the insured's employee. The district court granted Potomac's motion for summary judgment. The Fifth Circuit noted that Potomac was obligated under the policy to pay for loss to "Covered Property" resulting directly from a "Covered Cause of Loss."¹⁹⁸ A provision in the policy, however, limited property loss coverage for Lynch to property owned or held by the insured or for which the insured was legally liable. Because the customer's funds were private and kept in a separate account from the insured's accounts, the court held the connection between the insured and customer's funds was tenuous, primarily based on family ties, and that Lynch Properties did not hold or rise to the level of being legally liable for the customer's property.¹⁹⁹

D. BUSINESS INTERRUPTION

In *Quality Oilfield Products, Inc. v. Michigan Mutual Insurance Co.*,²⁰⁰ Quality, a manufacturer of oilfield equipment used for drilling and production, made a claim with Michigan for business interruption losses after Quality's offices were burglarized and engineering drawings, computer disks, and design information used to process orders were stolen. Michigan denied the claim because Quality did not suspend operations as required by the policy. In its declaratory action, Michigan maintained that it had no obligation to indemnify Quality for a work "slowdown." The trial court agreed, granting Michigan a summary judgment. On appeal, Quality argued that the policy's coverage for "loss resulting directly from the necessary interruption of business caused by damage to or destruction of real or personal property"²⁰¹ included a work slowdown. Quality contended that the phrase "interruption of business" did not mean the total cessation, shutdown, or stoppage of business. The court of appeals dis-

195. *See id.*

196. *See id.*

197. 140 F.3d 622 (5th Cir. 1998).

198. *Id.* at 626.

199. *See id.*

200. 971 S.W.2d 635 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

201. *Id.* at 637 (emphasis in original).

agreed, explaining that "the purpose of a business interruption policy is to indemnify the insured for loss caused by the interruption of a going business due to the destruction of the building, plant or parts thereof."²⁰² Noting the language of the policy itself was more restrictive than authority cited by Quality, the court of appeals held the insured's loss of income caused by a theft which adversely impacted its production was not covered under the Michigan policy because Quality remained open and continued to operate.²⁰³

V. AUTOMOBILE

A. PIP BENEFITS

In *Kim v. State Farm Mutual Automobile Insurance Co.*,²⁰⁴ Kim was involved in an automobile accident with an uninsured driver. State Farm, her insurance carrier, paid her a total of \$2,500 in personal injury protection (PIP) benefits and \$7,500 in uninsured motorist (UM) benefits. Kim claimed, however, that she was entitled to \$10,000 in UM benefits in addition to the \$2,500 PIP benefits. Kim filed a declaratory action seeking the court's declaration that State Farm breached its contract and violated the DTPA and the Insurance Code. Both Kim and State Farm agreed that her total damages for bodily injury were \$10,000. The trial court granted State Farm's motion for summary judgment and Kim appealed, maintaining that she was entitled to the full amount of her UM policy limits, and that State Farm was not allowed to deduct her PIP payments from her UM coverage.²⁰⁵ The court of appeals determined that the policy language in contention was neither ambiguous nor uncertain when it stated that State Farm agreed to pay all covered damages that were not previously paid or otherwise payable from another source, including PIP coverage. Therefore, because the parties had stipulated \$10,000 as the value of Kim's bodily injury damages, the total amount owed to Kim was \$10,000, not \$12,500. Kim argued that *Dabney v. Home Insurance Co.*²⁰⁶ prevented this decision because it held "that an insurer cannot legally

202. *Id.* at 638 (citing 1G COUCH, COUCH ON INSURANCE § 1:28 (2d ed. 1984)).

203. *See id.* at 639.

204. 966 S.W.2d 776 (Tex. App.—Dallas 1998, no pet.).

205. There are two types of possible offsets with regard to PIP coverage: statutory and contractual. The applicable statute is TEX. INS. CODE Art. 5.06-3(h), which states:

When any liability claim is made by any guest or passenger described in paragraph (b) hereof against the owner or operator of the motor vehicle in which he was riding or the owner's or operator's liability insurance carrier, the owner or operator of such motor vehicle or his liability insurance carrier shall be entitled to an offset, credit or deduction against any award made to such guest or passenger in an amount of money equal to the amounts paid by the owner, operator or his automobile liability insurance carrier under "personal injury protection" as defined in this Act to such guests or passengers; provided, however, nothing herein shall be construed to authorize a direct action against a liability insurance carrier if such right does not presently exist at law.

TEX. INS. CODE art. 5.06-3 (h) (West 1998).

206. 643 S.W.2d 386 (Tex. 1983).

offset payments made under PIP coverage against claims made under UM coverage.”²⁰⁷ The *Kim* court distinguished *Dabney* because the *Kim* case involved “a specific contract provision that allows offsets to prevent recoveries in excess of actual damages.”²⁰⁸ The court affirmed summary judgment on behalf of State Farm.²⁰⁹

In *Nationwide Mutual Insurance Co. v. Gerlich*,²¹⁰ Gerlich was driving her vehicle when she was hit by an uninsured motorist. Gerlich was covered by a Nationwide policy that included both PIP and UM coverage. The Nationwide policy contained a contractual offset in the UM coverage identical to the one found in the Liberty policy issued to Goss. Nationwide initially paid Gerlich \$2,200 in PIP benefits. Gerlich and Nationwide later settled her UM claim for \$3,500. Nationwide asserted that it was entitled to a credit for the PIP benefits it had previously paid to Gerlich. Nationwide issued a check for \$1,300 to Gerlich in payment of the settlement amount. On appeal, the court held that Nationwide had the burden of proving that without the offset, Gerlich would obtain a double recovery.²¹¹ The parties had stipulated that the UM settlement was \$3,500, but did not stipulate that Gerlich’s actual damages were \$3,500. The court of appeals seized upon this distinction in holding that Nationwide was not entitled to an offset.²¹²

In addition, the *Gerlich* court referred to the holding in *Dabney*²¹³ where the Texas Supreme Court cited *Westchester Fire Insurance Co. v. Tucker*.²¹⁴ In connection with the *Dabney* passage, Nationwide argued that because the *Westchester Fire* court only held the offset provision was ineffective to the extent it reduced the UM coverage below the minimum limits required by art. 5.06-1,²¹⁵ an offset provision is effective so long as it does not reduce UM coverage below the minimum set by the legislature. The *Gerlich* court noted that the *Dabney* court “did not consider whether offsetting the PIP benefits against the uninsured motorist protection would reduce the UM protection to an amount less than the minimum limits set by the legislature,”²¹⁶ and that the UM limits of the Haynes policy were not even set forth in the *Dabney* opinion.²¹⁷ Therefore, the *Gerlich* court rejected Nationwide’s attempt to validate its offset provision by using the *Dabney*/*Westchester* analysis.²¹⁸ But the implication of the *Gerlich* court’s discussion is that to the extent that a PIP offset

207. 966 S.W.2d at 779.

208. *Id.*

209. *See id.*

210. 982 S.W.2d 456 (Tex. App.—San Antonio 1998, pet. granted).

211. *See id.*

212. *See id.* at 458.

213. 643 S.W.2d at 387 (Tex. 1982).

214. 512 S.W.2d 679 (Tex. 1974) (holding that an insurer was not entitled to set off payments under medical payments coverage against claims made under uninsured motorist coverage).

215. TEX. INS. CODE art. 5.06-1 (1) (Vernon 1998).

216. *Gerlich*, 982 S.W.2d at 458.

217. *See id.*

218. *See id.*

would reduce the available limits of the UM coverage below the statutory minimum, then such offset provision may not be enforceable.

B. NOTIFICATION OF OWNERSHIP

In *Foust v. Old American County Mutual Fire Insurance Co.*,²¹⁹ Foust sued Old American to recover for hail damage to an automobile that he claimed was covered by his existing insurance policy. Old American claimed that the car was not covered under the policy because the car was purchased for Foust's business. Old American also contended that even if it was covered, Foust had failed to notify Old American within 30 days of becoming the owner as required by the policy. The trial court granted summary judgment for Old American. On appeal, Foust contended that the certificate of title designated "Budget Auto—Todd Foust" as the owner of the car. Foust maintained that even though "Budget Auto" was a partnership that included another individual, the car was never intended to become partnership property. The court of appeals noted that Old American's policy could have required that Foust be the sole and unconditional owner of the car.²²⁰ However, because the policy did not so specify, the court held Foust and Budget Auto were at least co-owners of the car under the policy.²²¹ In addition, the court held that because the term "owner" has no definite legal meaning, such meaning must be based upon established facts.²²² The court stated that an insurable interest exists when the insured derives financial benefit by the preservation of property, and loss from its damage.²²³ Because Foust's payment for the car took place on April 11th, Foust's physical possession of the car took place on April 15th, and Foust filed his claim on May 11th, the court ruled that Old American was given timely notice of Foust's ownership because his claim was filed within the thirty days mandated by the policy. The court of appeals reversed the trial court's summary judgment and rendered judgment for Foust.²²⁴

C. UNINSURED MOTORIST COVERAGE

In *Essman v. General Accident Insurance Co. of America*,²²⁵ Essman was involved in an auto accident with Trevino and Contreras. General Accident, Essman's auto liability carrier, provided her with a defense in the suit by Trevino and Contreras. At no time during the defense of the underlying suit did Essman contend that either Trevino or Contreras were responsible for her own injuries. Essman later settled with Trevino and Contreras, and the parties entered into an agreed order of dismissal

219. 977 S.W.2d 783 (Tex. App.—Fort Worth 1998, no pet.).

220. *See id.* at 787.

221. *See id.* at 787.

222. *See id.*

223. *See id.* (citing *Smith v. Eagle Star Ins. Co.*, 370 S.W.2d 448, 450 (Tex. 1963); *Jones v. Texas Pacific Indemnity Co.*, 853 S.W.2d 791, 794 (Tex. App.—Dallas 1993, no writ)).

224. *See id.* at 789.

225. 961 S.W.2d 572 (Tex. App.—San Antonio 1997, no pet.).

stating they had settled and compromised all existing controversies between them. Shortly thereafter, Essman claimed uninsured motorist benefits under her policy with General Accident in connection with the same accident. General Accident denied Essman's claim for uninsured motorist coverage because Essman was no longer legally entitled to recover from the uninsured motorists in light of the settlement. Essman sued General Accident for breach of contract and the trial court granted summary judgment for General Accident. The court of appeals affirmed on the basis that an uninsured motorist carrier's liability to pay benefits to an insured is limited to that which the insured is legally entitled to recover from the tortfeasor. Under Texas law, the phrase "legally entitled to recover" means the insured must be able to establish fault on the part of the uninsured/underinsured motorist and the extent of damages.²²⁶

The *Essman* court held that the parties' agreed dismissal of the underlying tort case controlled the disposition of Essman's claim for uninsured motorist benefits.²²⁷ Because a judgment of dismissal entered by agreement of the parties in pursuit of a compromise or settlement of a controversy becomes a judgment on the merits, the *Essman* court noted that such an agreed judgment is conclusive, not only on the matters actually raised and litigated, but also on every other matter which the parties might have litigated and had decided as an incident to or essentially connected with the subject matter of the litigation.²²⁸ Thus, because the dismissal order acts as a judgment on the claims of Essman's suit against the uninsured motorist, and the primary issue in Essman's suit against General Accident was determined in the first suit's judgment, Essman could not establish the conditions precedent in order to trigger General Accident's obligation to pay under the uninsured motorist coverage.²²⁹ Thus, the court of appeals held that the trial court properly determined that the dismissal order barred Essman from establishing her predicate for recovery of uninsured motorist benefits.²³⁰

D. COVERED AUTO

*John Deere Insurance Co. v. Truckin' U.S.A.*²³¹ arose out of a fatal collision between a tractor trailer and the Kurocik family's automobile. The heirs of the Kurociks sued Tompkins, the truck driver; Suits, Tompkins' employer, individually and d/b/a Truckin' U.S.A.; Schmoie, Truckin'

226. *Id.* at 573 (citing *Franco v. Allstate Ins. Co.*, 505 S.W.2d 789, 792 (Tex. 1974); *United Serv. Auto. Ass'n v. Blakemore*, 782 S.W.2d 277, 279 (Tex. App.—Waco 1989, writ denied); *Members Mut. Ins. Co. v. Clancy*, 455 S.W.2d 447, 448 (Tex. Civ. App.—San Antonio 1970, no writ)).

227. *See id.* at 574.

228. *See id.* (citing *Rhoades v. Prudential Leasing Corp.*, 413 S.W.2d 404, 407 (Tex. Civ. App.—Austin 1967, no writ); *Murray v. Murray*, 611 S.W.2d 172, 174 (Tex. Civ. App.—El Paso 1981, no writ) (res judicata barred plaintiff's second suit because plaintiff entered into agreed dismissal even though claims were dismissed without prejudice)).

229. *See id.*

230. *See id.*

231. 122 F.3d 270 (5th Cir. 1997).

U.S.A.'s other principal owner; and Copp Trucking, Inc., the company whose name appeared on the tractor rig. Truckin' U.S.A. held an insurance policy with John Deere. Copp Trucking was insured by Transport. Transport settled all claims against Copp Trucking and Tompkins for \$600,000. Transport's settlement on behalf of Tompkins was limited to the extent that he was considered an employee of Copp Trucking. The petition was later amended, dropping Copp Trucking as a defendant and alleging that Tompkins was an employee of Suits, Schmoie, and Truckin' U.S.A., and that a "working agreement" existed between those three defendants and Copp Trucking. Transport demanded reimbursement from Deere for the \$600,000 settlement alleging that, because Copp Trucking was insured under the policy, Deere had a duty to defend and indemnify Copp and a concomitant duty to reimburse Transport for the settlement. Deere brought a declaratory judgment action seeking a determination that it had no duty to defend, indemnify, or reimburse Copp Trucking because (1) the rig involved in the Kurocik accident was not a "covered auto," and (2) Copp Trucking was not an "insured" under the Deere policy. The district court granted summary judgment for Deere.

Before the Fifth Circuit, Transport first argued that the district court violated the "complaint allegation rule" by considering evidence extrinsic to the pleadings in making its determination whether Deere had an obligation under the policy to defend or indemnify either Copp Trucking or Transport.²³² Examining the complaint, the Fifth Circuit held that the allegations were insufficient to determine coverage, even if taken as true.²³³ The policy only covered claims resulting from the ownership, maintenance, or use of a "covered auto." Since the Kurocik heirs failed to allege facts sufficient to determine whether the tractor/trailer rig was covered under the policy, the court held that district court properly considered extrinsic evidence.²³⁴

Transport next argued that the district court erred in holding that the rig was not a "covered auto" under the Deere policy. Under the Deere policy, a "covered auto" was an auto specifically scheduled on the policy,²³⁵ or one that met the definition of a "substitute auto,"²³⁶ an "after

232. Under the complaint allegation rule, an insurer's duty to defend is determined solely from the face of the plaintiff's complaint without reference to extrinsic evidence. However, if the complaint does not allege sufficient facts to state a cause of action under the policy, extrinsic evidence may be properly considered. See 122 F.3d at 272 (citing *Rhodes v. Chicago Ins. Co.*, 719 F.2d 116, 119 (5th Cir. 1983); *State Farm Fire & Cas. Co. v. Wade*, 827 S.W.2d 448, 452 (Tex. App.—Corpus Christi 1992, writ denied); *Cook v. Ohio Cas. Ins. Co.*, 418 S.W.2d 712, 714-15 (Tex. Civ. App.—Texarkana 1967, no writ)).

233. See 122 F.3d at 272.

234. See *id.*

235. There was no dispute the rig was not a scheduled vehicle. See 122 F.3d at 273, n.2.

236. The Deere policy defined a "substitute auto" as "Any 'auto' [that Truckin' U.S.A.] do[es] not own while used with the permission of its owner as a temporary substitute for a covered 'auto' that is out of service because of [various reasons]." *Id.* at 273.

acquired auto,"²³⁷ or an "undescrbed trailer." In determining whether the rig was a "substitute auto," the court held that Transport's proof was insufficient to determine ownership.²³⁸ Deposition testimony by Suits indicated that he had a practice of purchasing Copp Trucking rigs for Truckin' U.S.A.'s use without removing the Copp Trucking label. The court held Suits' testimony only established that the truck was labeled "Copp Trucking" and did not demonstrate ownership.²³⁹ Therefore, the court held that the rig was not a "substitute auto" under the Deere policy. With respect to whether the rig was an "undescrbed trailer," the court held that the Deere policy provided coverage for "undescrbed trailers" only if they were attached to a scheduled power unit.²⁴⁰ Transport argued that the district court erred in relying on this requirement because language in the schedule provided an independent basis for coverage for "undescrbed trailers, while in the care, custody, and control of the insured."²⁴¹ The Fifth Circuit rejected this argument since neither Transport or Copp Trucking qualified as "insureds" under the Deere policy.²⁴² The court stated that even if the trailer was covered as an "undescrbed trailer," Deere would have only a duty to defend and indemnify Truckin' U.S.A. and not Copp Trucking or Transport.

Transport also argued that Copp Trucking was an "insured" under policy language which included "anyone liable for the conduct of an insured described above but only to the extent of that liability."²⁴³ Transport argued this language provided coverage to Copp, and therefore to Transport, on the basis that Copp Trucking was sued for damages arising out of the actions of Tompkins, a Truckin' U.S.A. employee. Since Transport had paid \$600,000 to settle the claims against Copp Trucking, Copp Trucking and Transport's "liability" was due to the actions of Truckin' U.S.A., thereby making Copp Trucking an "insured" under the policy. The court rejected this argument on the grounds that neither Copp Trucking nor Transport was legally "liable" for the conduct of Truckin' U.S.A., its employees, or any other "insureds" under the policy.²⁴⁴ The court stated that even though Transport voluntarily settled the Kurocik claims for Copp Trucking to the extent that Tompkins was considered an employee of Copp Trucking, such actions did not make either Copp Trucking or Transport legally "liable" for the conduct of Truckin' U.S.A. or its employees.²⁴⁵ Finally, Transport argued that an endorsement to the policy providing that Deere was obliged to pay any final judgment recovered

237. An "after-acquired auto" under the Deere policy was one that replaced an auto that the insured previously owned, provided that the insured informed the carrier within 30 days after the acquisition that it wanted coverage for the vehicle. *See id.*

238. *See id.*

239. *See id.*

240. *See* 122 F.3d at 273-74.

241. *See id.* at 274.

242. *See id.*

243. *Id.*

244. *See id.*

245. *See id.*

against the insured regardless of whether or not the motor vehicles involved were described in the policy mandated indemnification to Transport for its payments. The Fifth Circuit rejected this argument, stating that since Copp Trucking was not an insured under the policy, the endorsement provided no grounds for indemnification.²⁴⁶

VI. WORKERS' COMPENSATION

A. CARRIER NEED NOT PROVE BENEFITS REASONABLE AND NECESSARY

In *Texas Workers' Compensation Insurance Fund v. Serrano*,²⁴⁷ the Texas Supreme Court determined whether the insurance carrier must prove the amount of benefits paid was reasonable and necessary before it is entitled to reimbursement. Serrano sued a truck's driver and owner after suffering a disabling accident at work. The Serranos settled, but the district court refused to authorize reimbursement for the medical benefits paid by the workers' compensation carrier because the insurer failed to prove that each amount was reasonable and necessary. The court of appeals affirmed the lower court. The Texas Supreme Court acknowledged that while Texas Labor Code Section 417.002(a) requires that a compensation carrier be reimbursed out of any third-party recovery for all benefits paid for an injury, the statute does not limit reimbursement to only those benefits deemed reasonable and necessary.²⁴⁸ Consequently, the court reversed the judgment of the court of appeals and remanded the case for reconsideration.²⁴⁹

B. MISTAKEN BELIEF OF "EMPLOYEE" STATUS IS NOT BAD FAITH

In *Alvarado v. Old Republic Insurance*,²⁵⁰ passengers in an automobile accident filed claims for workers' compensation benefits. Old Republic denied the passengers' claims on the basis that they were not employees of its insured, U.S. Home. The passengers sued Old Republic for breach of the duty of good faith and fair dealing. The court held, in accordance with *State Farm Lloyds v. Nicolau*,²⁵¹ that an insurer may negate an essential element of a bad faith claim by showing that its liability was not reasonably clear because there was a reasonable basis for believing that a claim was not covered.²⁵² Given the policy's definition of "employee," the court held that there was a reasonable basis for believing that the passengers were not employees of U.S. Home. For that reason, the court affirmed summary judgment for Old Republic and denied workers' compensation benefits to the passengers.

246. *See id.*

247. 962 S.W.2d 536 (Tex. 1998).

248. *See id.* at 538.

249. *See id.*

250. 951 S.W.2d 254 (Tex. App.—Corpus Christi 1997, no writ).

251. 951 S.W.2d 444 (Tex. 1997).

252. *See* 951 S.W.2d at 258.

C. FAILURE TO CONTEST COMPENSABILITY

In *Continental Casualty Co. v. Williamson*,²⁵³ NIBCO employed Williamson and carried workers' compensation insurance with Continental. Williamson claimed he suffered injuries to his right leg during a fall at work in March 1993. Williamson returned to light duty work at NIBCO in late July 1993 against his wishes. In August 1993, Williamson claimed to have fallen again, suffering injuries to his left leg, back, neck, shoulders and head. After the second fall, NIBCO's plant safety director immediately took Williamson to the doctor, who determined that Williamson had suffered no additional injuries and returned him to work. Instead of returning to work, Williamson requested vacation time until previously scheduled knee surgery could be performed. After the knee surgery, Williamson was released by his physician to return to light duty work. Shortly after returning to work, Williamson claimed to have suffered a third fall in the NIBCO restroom. At the contested case hearing, the hearing officer determined that Williamson had suffered no injury within the course and scope of his employment at the time of his alleged fall in August 1993, but that more than sixty days had elapsed from the time of the fall and Continental's contest of the compensability of that claim.²⁵⁴ The Commission determined that even though Williamson suffered no injury, because Continental did not timely contest compensability, Williamson's injury was established as a matter of law.²⁵⁵ The court of appeals, however, noted that "[a]n injury and a compensable injury are two different animals."²⁵⁶ The court noted that because Continental persisted in its position that Williamson never suffered an injury, the issue of compensability never arose.²⁵⁷ The court held that while Continental may have waived its rights to contest the compensability of Williamson's injury, it never waived its right to contest the injury itself.²⁵⁸ Accordingly, the court held that if a hearing officer determines no injury occurred, and that finding is not against the great weight and preponderance of the evidence, the workers' compensation carrier's failure to contest compensability cannot create an injury as a matter of law.²⁵⁹

253. 971 S.W.2d 108 (Tex. App.—Tyler 1998, no pet.).

254. TEX. LAB. CODE ANN. § 409.021 (Vernon 1998) provides: "If an insurance carrier does not contest the compensability of an injury on or before the 60th day after the date on which the insurance carrier is notified of the injury, the insurance carrier waives its right to contest compensability."

255. See 971 S.W.2d at 110.

256. *Id.*

257. See *id.*

258. See *id.*

259. See *id.* at 110-11. The *Williamson* court did note that a carrier elects to waive its contest of compensability at its own peril. If the Commission fails to agree with the carrier's assessment of no injury, then the carrier waives its defenses to compensability under TEX. LAB. CODE § 409.021. *Id.* at 111, n. 2.

VII. LIFE AND HEALTH INSURANCE

In *Stillwagoner v. Travelers Insurance Co.*,²⁶⁰ Stillwagoner was employed on a temporary basis by Advantage Medical Services, Inc., an in-home health care services provider. Without her knowledge, Advantage obtained an accidental death policy on Stillwagoner and other employees from Travelers. Stillwagoner was killed after her company-owned vehicle collided with another car. Advantage's president, Lummus, tearfully denied the existence of any insurance coverage when Stillwagoner's family inquired. Travelers denied policy benefits to Advantage on the basis that Stillwagoner died outside the scope of her employment. Travelers ultimately settled with Advantage, but paid no money to Stillwagoner's survivors or estate. The family sued Advantage, Lummus and Travelers, contending that Stillwagoner's employer had no insurable interest in her life.

After determining that Stillwagoner's estate was entitled to raise the issue of no insurable interest, the court addressed Advantage's creative argument that, as a non-subscriber to the Texas Workers' Compensation System, it was compelled to purchase the Travelers policy to defend and resolve any negligence suits that might be brought by the family of an employee who suffered a job-related accidental death. While Texas corporations have an insurable interest in the lives of officers and stockholders "to whom the other stockholders [look] primarily for the success of the business" or "on whose services the corporation depends for its prosperity, and whose death will be the cause of a substantial loss to it,"²⁶¹ the court found that Stillwagoner met none of these requirements.²⁶²

Under the evidence developed, Stillwagoner was a temporary employee hired two months before her death and replaced by Advantage the day after her death. Advantage was unable to identify any referrals produced by Stillwagoner or show any diminution in business caused by her death. Moreover, the court held that liability insurance, rather than life insurance, is the appropriate means of insuring against potential negligence suits by survivors of employees who die on the job.²⁶³ Because liability insurance would only indemnify the insured up to amount of the actual loss, while life insurance paid a certain sum regardless of actual damages, the court likened the policy held by Advantage to a wagering contract on Stillwagoner's life.²⁶⁴ The court concluded that because Advantage had no insurable interest in Stillwagoner's life, the proceeds of the policy were appropriately payable to Stillwagoner's estate under the Insurance Code.²⁶⁵

260. 979 S.W.2d 354 (Tex. App.—Tyler 1998, no pet.).

261. *Id.* at 361 (citing *McBride v. Clayton*, 140 Tex. 71, 166 S.W.2d 125, 128-29 (1942)).

262. *See id.* at 362.

263. *See id.* at 363.

264. *See id.*

265. *See id.* (citing TEX. INS. CODE ANN. art. 3.51-6, § 3 (Vernon 1998)).

VIII. AGENCY

A. DUTY TO RECOMMEND COVERAGE

In *Moore v. Whitney-Vaky Insurance Agency*,²⁶⁶ Moore was approached by McClain, an agent of Whitney-Vaky, who sought to manage the insurance for an apartment complex Moore had recently repossessed. Although McClain did not discuss any types of coverage specifically with Moore, Moore assumed that he would receive fire, extended coverage, liability and workers' compensation coverage because he had received such packages in similar situations. Moore did not discuss the details of the policy with McClain after the policy was delivered. Five years later, an employee filed suit after being fired, claiming retaliatory discharge. Moore believed that the claim was covered under the liability policy he had purchased from McClain, but he discovered that it was not. Moore sued the carrier, Whitney-Vaky, and McClain for negligence, breach of contract, fraud, and DTPA and Insurance Code violations. Moore claimed that he was led to believe that all liabilities were covered under the policy by Whitney-Vaky, Del McClain, and their agents.

After the insurance company was nonsuited, Whitney-Vaky and McClain filed a motion for summary judgment asserting that since neither party disputed whether McClain or any other Whitney-Vaky employee ever indicated to Moore that he was provided coverage, the only issue was whether a duty existed on the part of McClain and/or Whitney-Vaky to advise Moore of the coverage provided by the policy. The trial court granted summary judgment for Whitney-Vaky and McClain.

On appeal, both parties cited *May v. United Services Association of America*,²⁶⁷ to support their positions on the scope of an insurance agent's common-law duty to a customer regarding advice about and procuring a policy for insurance. Under *May*, a health insurance decision, an insurance agent owes a client the common-law duties to (1) use reasonable diligence in attempting to place requested insurance; and (2) inform the client promptly if unable to do so.²⁶⁸ However, the *May* court did not decide whether agent liability extended beyond an agent's misrepresentations to an agent's failure to disclose limitations in the policy's coverage. The *May* court noted that other jurisdictions were willing to make such an extension of liability where there was an "explicit agreement, a course of dealing, or other evidence establishing an undertaking by the agent to determine the customer's insurance needs and to counsel the customer as to how they can best be met."²⁶⁹

The court noted that although Moore claimed a "special relationship" with his agent, Moore failed to prove that their association was anything more than the perfunctory annual renewal of his insurance policy.²⁷⁰ The

266. 966 S.W.2d 690 (Tex. App.—San Antonio 1998, no pet.).

267. 844 S.W.2d 666 (Tex. 1992).

268. See *id.* at 669.

269. 966 S.W.2d at 692 (citing *May*, 844 S.W.2d at 670, n.10).

270. See *id.*

court held that even if a duty to disclose was based upon a "special relationship," Moore's case provided insufficient evidence that such a relationship existed.²⁷¹ The court also rejected Moore's claims for DTPA and Insurance Code violations.²⁷² Maintaining that the insured's belief about the scope of its policy is only actionable after a specific misrepresentation by the insurer, Moore's testimony that McClain never explained the policy in question to cover all lawsuits led the court to believe that no specific misrepresentations had been made concerning the insurance.²⁷³ Accordingly, the court held that neither Whitney-Vaky nor McClain owed Moore a common law or statutory duty to disclose any limitation in Moore's insurance coverage.²⁷⁴

B. AGENTS ARE NOT CONSUMERS

In *Tweedell v. Hochheim Prairie Farm Mutual Insurance Association*,²⁷⁵ insurance agents Tweedell, Hicks, and White were authorized to sell property and casualty insurance for the Hochheim Companies. In 1990, the Hochheim Companies terminated the agents' sales representative and agency contracts and refused to renew all policies issued by the agents because of overall combined high loss ratios from 1986 to 1989. The agents sued the Hochheim Companies and others under the DTPA²⁷⁶ and article 21.21 of the Insurance Code.²⁷⁷ The Hochheim Companies obtained a summary judgment based on the agents' lack of standing to assert the statutory causes of action. The Corpus Christi Court of Appeals determined that the agents failed to qualify as "consumers" under the DTPA.²⁷⁸ The court noted that although the agents purchased insurance policies for themselves from the Hochheim Companies, these policies were not the basis of their claims.²⁷⁹ Moreover, even though the agents alleged that they sought the carrier's products or services for their customers, the products or services were not obtained by the agents through lease or purchase.

The court then examined whether the agents qualified as "persons"²⁸⁰

271. *See id.*

272. *See id.*

273. *See id.* at 693.

274. *See id.*

275. 962 S.W.2d 685 (Tex. App.—Corpus Christi 1998, no pet.).

276. TEX. BUS. & COM. CODE ANN. §§ 17.41 *et seq.* (Vernon 1987 & Supp. 1998).

277. TEX. INS. CODE ANN. art. 21.21 (Vernon 1981 & Supp. 1998).

278. To have a cause of action under § 17.50 of the DTPA, a claimant must be a consumer. *See* TEX. BUS. & COM. CODE ANN. § 17.50; *Transport Ins. Co. v. Faircloth*, 898 S.W.2d 269, 274 (Tex. 1995). Section 17.45 of the DTPA defines consumer as "an individual, partnership, corporation, this state or agency of this state who seeks or acquires by purchase or lease, any goods or services." TEX. BUS. & COM. CODE ANN. § 17.45 (4). (Vernon 1987).

279. *See* 962 S.W.2d at 687.

280. Under article 21.21 of the Insurance Code, a "person" is defined as "any individual, corporation, association, partnership, reciprocal exchange, inter-insurer, Lloyds insurer, fraternal benefit society, and any other legal entity engaged in the business of insurance, including agents, brokers, adjusters, and life insurance counselors." TEX. INS. CODE ANN. art. 21.21, § 2 (a) (Vernon Supp. 1998).

under article 21.21 of the Insurance Code.²⁸¹ The Hochheim Companies argued that only insureds or beneficiaries of an insurance policy have standing to file an article 21.21 claim. The court of appeals noted that section 16(a) of article 21.21 “clearly grants standing to any person who has sustained actual damages as a result of another’s engaging in an act or practice declared in section 4 of article 21.21 to be unfair methods of competition or unfair or deceptive acts or practices in the business of insurance.”²⁸² Accordingly, the court held that because agents are included as in the definition of “person,” any agent who suffers actual damages because of another person’s engaging in activities listed in article 21.21, section 4 of the Insurance Code or by section 17.46 of the Business and Commerce Code has standing to bring a cause of action under article 21.21 of the Insurance Code.²⁸³

281. Section 16 (a) of article 21.21 provides:

Any person who has sustained actual damages as a result of another’s engaging in an act or practice declared in Section 4 of this Article or in the rules or regulations lawfully adopted by the Board under this Article to be unfair methods of competition or unfair or 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 person or persons engaging in such acts or practices.

TEX. INS. CODE ANN. art. 21.21, § 16 (a) (Vernon 1991 & Supp. 1998).

282. 962 S.W.2d at 689.

283. *See id.*

