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INSURANCE LAW

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I. EXTRACONTRACTUAL LIABILITY

A. WHETHER ARTICLE 21.55 APPLIES TO A CLAIM FOR DEFENSE COSTS UNDER A LIABILITY POLICY

AN ongoing issue of debate in Texas is whether Article 21.55 of the Texas Insurance Code¹ applies to an insured's claim for a defense under a liability policy. Federal district courts in Texas have generally held that a duty-to-defend claim constitutes a first-party claim for purposes of Article 21.55 and continued to do so during this Survey period.² However, in the first state appellate court decision to provide an in-depth analysis on this issue, the Dallas Court of Appeals concluded that Article 21.55 does not apply to claims for a defense. There, based on the court's determination that TIG wrongfully refused to tender a defense in the underlying lawsuit, the Dallas Mavericks contended that TIG's wrongful refusal violated Article 21.55, thus entitling the Mavericks to the eighteen percent statutory penalty. TIG countered that Article 21.55 applies only to first-party claims for payment to an insured or beneficiary and does not apply to claims for a defense.³

Based on its examination of the language and purpose of Article 21.55, the court of appeals determined that the entire structure of Article 21.55 presumes a tangible, measurable loss suffered by the insured for which it seeks payment from the insurance company, and that "[a]ny attempt to apply the statute's structure to a claim for a defense is unworkable and, based on the language of the statute, clearly unintended by the legislature."⁴ The court reasoned: (1) Article 21.55 is entitled "Prompt Payment of Claims," and a demand for a defense under a liability policy is not a claim for payment, but rather a demand that the insurer provide a

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1. TEX. INS. CODE ANN. art. 21.55 (Vernon Supp. 2004-05) (recodified in TEX. INS. CODE §§ 542.051-.061 (Vernon 2004-2005)).

2. *Hous. Auth. v. Northland Ins. Co.*, 333 F. Supp. 2d 595, 602-03 (N.D. Tex. 2004); *Travelers Indem. Co. v. Presbyterian Healthcare Res.*, 313 F. Supp. 2d 648, 653 (N.D. Tex. 2004).

3. *TIG Ins. Co. v. Dallas Basketball, Ltd.*, 129 S.W.3d 232, 239 (Tex. App.—Dallas 2004, pet. denied).

4. *Id.*

legal defense to the insured; (2) Article 21.55's definition of "claim" requires that the claim be a first-party claim that must be paid by the insurer directly to the insured or beneficiary; when an insurer provides a defense, the company pays the fees to the attorney engaged to represent the insured, and the insured does not receive any direct payment as required by Article 21.55; and (3) both the statute's deadlines and its consequences for failing to meet those deadlines presume that the insured's claim is one for compensation for a covered loss rather than for a defense.⁵ The court therefore concluded that Article 21.55 is not applicable to an insured's claim for a defense.⁶

In reaching this conclusion, the Dallas Court of Appeals recognized that its holding is contrary to the holdings of other Texas state and federal courts. The court, however, stated that few of those cases provide any analysis, those that do discuss the issue only cursorily, and to the extent the opinions of the federal courts offer any analysis of the issue, the reasoning relied upon is "faulty."⁷ Specifically, in those opinions, the federal courts concluded that Article 21.55 applies to a claim for a defense because such a claim is a first-party claim made pursuant to a third-party insurance policy. The Dallas Court of Appeals, however, reasoned that the fact that a claim is a first-party claim is not sufficient in and of itself to place it within the scope of claims to which Article 21.55 applies; rather, the claim must also be one for payment to be made directly to the insured or beneficiary, two factors which are not present in claims for a defense.⁸ The court therefore concluded that claims for a defense are fundamentally different than first-party claims for payment based on a loss suffered by the insured, and that the language of Article 21.55 cannot be applied to claims for a defense in any meaningful way.⁹

The Northern District of Texas subsequently issued an opinion expressly disagreeing with *TIG Insurance* and concluding that the Texas Supreme Court would likely decide that claims for defense are first-party claims for purposes of Article 21.55.¹⁰ Although this issue was raised in an appeal before the Texas Supreme Court, the court determined that the insurer's conduct did not violate the terms of Article 21.55, "whether or not that statute properly applies to a liability insurer who fails to promptly accept or reject its insured's defense," and thus did not resolve this issue.¹¹ Further, although a petition for review on this issue was filed in the *TIG Insurance* case, the Texas Supreme Court denied review, again declining to resolve this issue.¹² Given the ongoing conflict between state and federal courts, this unsettled issue will continue to be one to watch.

5. *Id.* at 239-40.

6. *Id.*

7. *Id.* at 241.

8. *Id.* at 241-42.

9. *Id.*

10. *Hous. Auth.*, 333 F. Supp. 2d at 603.

11. *N. County Mut. Ins. Co. v. Davalos*, 140 S.W.3d 685, 691 (Tex. 2004).

12. *TIG Ins. Co. v. Dallas Basketball, Ltd.*, No. 04-0474, 2005 Tex. LEXIS 153, at *1 (Tex. Feb. 11, 2005).

B. WHETHER ARTICLE 21.21 AND THE DUTY OF GOOD FAITH AND FAIR DEALING APPLY TO A CLAIM FOR DEFENSE COSTS UNDER A LIABILITY POLICY

In *Travelers Indemnity Co. v. Presbyterian Healthcare Resources*, a United States District Court for the Northern District of Texas addressed whether Article 21.21 of the Texas Insurance Code and the common law duty of good faith and fair dealing apply to an insured's claim for a defense under a liability policy.¹³ The insurer argued that the Texas Supreme Court in *Head*¹⁴ held that a liability carrier owes no common law duty of good faith and fair dealing to an insured in a third-party liability context. In response, the insured argued that the case involved only a first-party duty to defend claim, not a third-party indemnification claim and, thus, *Head* was inapposite. The court, however, explained that because it was alleged in *Head* that the insurer's refusal to defend was a breach of the duty of good faith and fair dealing, the duty to defend issue was squarely before the *Head* court, which unambiguously held that the refusal to defend cannot give rise to a tort claim for breach of the duty of good faith and fair dealing. Following *Head*, the court dismissed the insured's claim for breach of the duty of good faith and fair dealing.¹⁵

Then addressing the Article 21.21 claims, the court noted that Article 21.21 does not explicitly exclude claims that are based on breach of the duty to defend and there is no Texas Supreme Court case disallowing such a claim. The court further noted that the supreme court stated in *Rocor* that it could not identify a principled basis upon which to draw a distinction between first-party and third-party claims when the insured has been directly injured as a result of its insurer's unfair claim settlement practices.¹⁶ Although *Rocor* involved the duty to settle, the Northern District found that the insurer had not established that the supreme court would rule differently in the duty to defend context.¹⁷ The court therefore held that a private cause of action may be asserted under Article 21.21 when an insurer breaches its duty to defend its insured.¹⁸

C. COURT HOLDS THAT THIRD-PARTY CLAIMANT DOES NOT HAVE STANDING TO ASSERT CLAIMS AGAINST INSURER FOR VIOLATION OF ARTICLE 21.21 OR BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING

The Houston Court of Appeals addressed whether plaintiffs in an underlying suit had standing to sue the insurers of the defendant for viola-

13. *Travelers Indem. Co. v. Presbyterian Healthcare Res.*, 313 F. Supp. 2d 648 (N.D. Tex. 2004) (discussing TEX. INS. CODE ANN. art. 21.21 (Vernon Supp. 2004-05) (recodified in TEX. INS. CODE ANN. ch. 541 (Vernon 2004-2005))).

14. *Md. Ins. Co. v. Head Ins. Coatings & Servs., Inc.*, 938 S.W.2d 27 (Tex. 1996).

15. *Travelers Indem. Co.*, 313 F. Supp. 2d at 650.

16. *Id.* (discussing *Rocor Int'l, Inc. v. Nat'l Union Fire Ins. Co.*, 77 S.W.3d 253 (Tex. 2000)).

17. *Id.* at 651-52.

18. *Id.*

tion of Article 21.21 and breach of the duty of good faith and fair dealing, based on the insurers' alleged misrepresentations concerning the amount of insurance available for settlement.¹⁹ Sections 4(10)(a) and 4(11) of Article 21.21 prohibit an insurer from making various misrepresentations; however, Article 21.21 provides that claims based on unfair settlement practices, *i.e.* claims under section 4(10)(a), are unavailable to third-party claimants. The court found that although the plaintiffs classified themselves as non-insured "persons" entitled to sue for misrepresentations under section 4(11), they were in fact complaining about unfair settlement practices, which are covered under section 4(10)(a).²⁰ The court emphasized that allowing third-party claimants standing to sue an insurer would necessarily conflict with the duties that insurers owe their insureds, and that the legislature could not have intended such a result.²¹ Thus, the court held that the plaintiffs had no standing to assert claims for breach of an insurance contract, breach of the duty of good faith and fair dealing, or violations of Article 21.21 based on any conduct of the insurers prior to the settlement agreement.²²

The plaintiffs next argued that after the settlement was reached, they became third-party beneficiaries of the policies and assumed standing to bring suit for violations of the contractual and extra-contractual obligations owed by the insurer.²³ The court explained that the supreme court has held that in the context of a first-party lawsuit by an insured against its insurer based on an agreed judgment, the insurer's contractual duty of good faith and fair dealing does not extend beyond the signing of the agreed judgment, and, therefore, any claims that the insured may have against the insurer based on the agreed judgment sound in contract, not in tort.²⁴ The court concluded that, assuming the plaintiffs attained the status of third-party beneficiaries of the policies, the insurers owed the plaintiffs no extra-contractual duty of good faith and fair dealing thereafter; thus, any claims that the plaintiffs had regarding the alleged conduct of the insurers following the settlement sounded in contract, not in tort.²⁵ Therefore, the court also held that the plaintiffs had no standing to assert claims for breach of an insurance contract, breach of the duty of good faith and fair dealing, or violations of Article 21.21 based on the alleged conduct of the insurers subsequent to the settlement agreement.²⁶

19. *Atlantic Lloyds Ins. Co. v. Butler*, 137 S.W.3d 199, 206-07 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (op. on reh'g).

20. *Id.* at 220-22.

21. *Id.*

22. *Id.*

23. *Id.* at 222-23.

24. *Id.*

25. *Id.*

26. *Id.*

D. COURT HOLDS THAT AN INSURER HAS STANDING TO BRING CLAIMS AGAINST ANOTHER INSURER FOR VIOLATION OF ARTICLE 21.21

Conversely, the Western District of Texas has held that one insurance company may sue another insurance company under Article 21.21. There, the company was insured by Service Casualty under an occurrence policy for one policy period and by Travelers under a claims made policy for the next policy period. Travelers retained counsel to defend the insured in the underlying suit, but the suit was ultimately settled by Service Casualty. Service Casualty sued Travelers for recovery of the settlement amount and for violations of Article 21.21. The court emphasized that Article 21.21 states that “any person” who has sustained actual damages caused by another’s engaging in unfair or deceptive acts or practices in the business of insurance may maintain an action against the person engaging in such practices.²⁷ The court determined that Service Casualty met Article 21.21’s definition of a “person,” and that Service Casualty alleged that it had sustained actual damages by relying on Travelers’ statement that it would defend and indemnify the insured, which could be construed as a misrepresentation under Article 21.21.²⁸ The court therefore concluded that Service Casualty had standing to bring suit under Article 21.21.²⁹

E. AN INSURER’S BREACH OF CONTRACT DOES NOT CONSTITUTE A MISREPRESENTATION SUPPORTING AN ARTICLE 21.21 OR DTPA VIOLATION

In her suit for bad faith, violations of Article 21.21, and violations of the DTPA arising from the insurer’s denial of her mold claim, the insured asserted misrepresentation claims alleging that the insurer represented that its policy conferred certain rights, but later claimed the policy did not confer such rights. The insured did not assert that the insurer ever told her mold damage would be covered or that such representations induced her to purchase the policy. Rather, the insured contended only that the denials of coverage constituted a false representation because her claim should be covered. Stated differently, the insured’s argument was that the insurer represented it would provide coverage under the terms of the policy and the insurer’s denial means it misrepresented it would perform under the contract. In rejecting this argument, the court of appeals emphasized that when the alleged misrepresentations concern a party’s failure to fulfill its contractual duties, the alleged failure to later perform the

27. *Serv. Cas. Ins. Co. v. Travelers Ins. Co.*, No. CIV.A.SA-04-CV-251-XR, 2004 U.S. Dist. LEXIS 19797, at *11-12 (W.D. Tex. Oct. 4, 2004) (quoting TEX. INS. CODE ANN. art. 21.21, § 16 (Vernon Supp. 2004-2005)).

28. *Id.*

29. *Id.* at *12 (citing TEX. INS. CODE ANN. art. 21.21, §§ 2(a), 4(11) (Vernon Supp. 2004-2005)).

duties does not constitute a misrepresentation under the DTPA.³⁰ To accept the insured's reasoning would convert every breach of contract into a DTPA claim.³¹ Because the insured offered no evidence of a misrepresentation apart from the insurer's alleged failure to perform under the insurance contract, the court concluded that the trial court properly granted summary judgment against the insured on all of her misrepresentation claims.³²

F. IN THE CONTEXT OF ARTICLE 21.21, "REASONABLY CLEAR" DOES NOT MEAN "COMPLETELY CERTAIN"

The Corpus Christi Court of Appeals reviewed a jury finding of a knowing violation of Article 21.21 in a suit brought by the wife of the deceased insured alleging that the insurer unreasonably delayed payment on the proceeds of an accidental death policy. The court of appeals explained that Article 21.21 requires a good faith attempt to promptly settle claims once liability has become reasonably clear. The insurer argued that its liability did not become reasonably clear until it actually received additional hospital records that it had requested. In rejecting this argument the court emphasized that the insurer was essentially asking it to adopt a rule allowing insurers to delay settlement of a claim until liability is absolutely and conclusively established, not just reasonably clear. The court determined that an interpretation equating reasonably clear with completely certain would allow insurers to delay indefinitely concluding their own research of a claim without violating Article 21.21 and, therefore, was clearly unacceptable. Accordingly, the court concluded that once the insurer received the proof-of-loss documents noting an accidental cause of death, the insurer's liability became reasonably clear and the insurer was under a duty to use its best efforts in good faith to avoid further delay, and therefore affirmed the jury's finding of a violation of Article 21.21.³³

G. ARTICLE 21.21 DOES NOT APPLY TO SURETIES

During this Survey period, the Fort Worth Court of Appeals addressed whether Article 21.21 applied to a dispute over commissions to be paid under an agency agreement between an insurer and an agency for the

30. *DeLaurentis v. United Servs. Auto. Ass'n*, No. 14-03-00164-CV, 2004 Tex. App. LEXIS 8758, at *28-29 (Tex. App.—Houston [14th Dist.] Sept. 30, 2004, no pet.).

31. *Id.*

32. *Id.*; see also *J&D Aircraft Sales, LLC v. Cont'l Ins. Co.*, No. CIV.A.3:03-CV-0007-B, 2004 U.S. Dist. LEXIS 21518, at *49 (N.D. Tex. Oct. 26, 2004) (stating that Texas decisions are clear that when the alleged misrepresentations concern a party's failure to fulfill its contractual duties, the alleged failure to later perform those duties does not constitute a misrepresentation within the meaning of Article 21.21 or the DTPA).

33. *Minn. Life Ins. Co. v. Vasquez*, 133 S.W.3d 320, 328-30 (Tex. App.—Corpus Christi 2004, pet. granted).

agency to sell surety bonds on behalf of the insurer.³⁴ Attempting to distinguish the Texas Supreme Court's decision in *Great American Insurance Company v. North Austin Municipal Utility District No. 1*,³⁵ the court of appeals held that because the case did not involve a dispute between either an obligee on a bond or the insurer in its capacity as surety, the dispute arose out of the "business of insurance" and Article 21.21 therefore applied.³⁶ However, shortly after the end of this Survey period, the Texas Supreme Court reversed the Fort Worth Court of Appeals' judgment and rendered judgment that the agency take nothing. The supreme court emphasized that by limiting the scope of Article 21.21 to "the business of insurance," the legislature intended it to apply to a species of economic enterprise, not to particular contracts on a piecemeal basis, and that the holding in *Great American* excluded the business of suretyship rather than the particular parties involved.³⁷

H. FOR AN INSURER TO PREVAIL ON A TRADITIONAL MOTION FOR SUMMARY JUDGMENT ON AN INSURED'S CLAIM FOR BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING, THE INSURER MUST CONCLUSIVELY ESTABLISH THAT IT ACTED IN GOOD FAITH

The Fort Worth Court of Appeals articulated the standard to be applied when an insurer moves for a traditional summary judgment on the insured's claim for breach of the duty of good faith and fair dealing on the ground that there was a bona fide coverage dispute.³⁸ The court explained that in *Giles*³⁹ the supreme court held that whether an insurer acted in bad faith because it denied or delayed payment of a claim after it became reasonably clear was a question for the fact-finder. However, in *Williams*,⁴⁰ which was decided the same day, the supreme court held that where the summary judgment proof conclusively established that there was no more than a good faith dispute between the parties concerning the insurer's liability on the contract, bad faith is not shown, and the case may be decided as a matter of law. Applying these holdings, the court of appeals determined "that unless the summary judgment evidence conclusively established that [the insurer] acted in good faith, *i.e.*, that there was conclusive evidence of a bona fide dispute on the extent of [the insured's] injury, the issue presents a question of fact requiring resolution by trial."⁴¹ Finding that no such conclusive evidence was presented by the

34. *Dallas Fire Ins. Co. v. Tex. Contractors Sur. & Cas. Agency*, 128 S.W.3d 279, 282-83 (Tex. App.—Fort Worth 2004), *rev'd*, 48 Tex. Sup. Ct. J. 200, No. 04-0215, 2004 Tex. LEXIS 1368 (Tex. Dec. 17, 2004).

35. *Great Am. Ins. Co. v. N. Austin Util. Dist. No. 1*, 908 S.W.2d 415 (Tex. 1995).

36. *Dallas Fire Ins. Co.*, 128 S.W.3d at 287-92.

37. *Dallas Fire Ins. Co. v. Tex. Contractors Sur. & Cas. Agency*, 48 Tex. Sup. Ct. J. 200, No. 04-0215, 2004 LEXIS 1368, at *1, *5-7 (Tex. Dec. 17, 2004).

38. *Covington v. Travelers Indem. Co.*, 122 S.W.3d 330, 334-35 (Tex. App.—Fort Worth 2003, no pet.).

39. *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 56 (Tex. 1997).

40. *United States Fire Ins. Co. v. Williams*, 955 S.W.2d 267, 268 (Tex. 1997).

41. *Covington*, 122 S.W.3d at 335.

insurer, the court concluded that questions of material fact remained in dispute and therefore reversed the grant of summary judgment for the insurer.⁴²

I. INSURER'S RELIANCE ON AN EXPERT MUST BE REASONABLE

Addressing an insured's extra-contractual claims arising out of the insurer's denial of coverage for foundation damage, the Fort Worth Court of Appeals explained that an insurer's reliance on an expert's report, standing alone, will not necessarily shield the carrier if there is evidence that the report was not objectively prepared or the insurer's reliance on the report was unreasonable. However, in that case, there was no evidence that the engineer's investigation was unreliable or that the insurer acted unreasonably in relying on his investigation in denying the claim. The court therefore concluded that there was no evidence to support the jury's finding that the insurer breached the duty of good faith and fair dealing.⁴³

II. CONTRACTUAL LIABILITY

A. THE DUTY TO DEFEND

1. *Whether Any Exception to The "Eight Corners" Rule Exists to Permit the Consideration of Extrinsic Evidence*

During this Survey period, several opinions addressed the ongoing debate concerning whether Texas law recognizes any exception to the strict "eight corners" rule, under which a court determines an insurer's duty to defend based on the allegations in the underlying pleadings and the language of the insurance policy without resort to extrinsic evidence.

a. Houston Court of Appeals Holds That No Exception Exists

The Houston Court of Appeals weighed in on this issue, holding that there is no exception to the strict eight corners rule.⁴⁴ There, the policy required the insurer to defend any claim arising out of an alleged violation of any federal, state, or local truth-in-lending or truth-in-leasing law. The petitions asserted claims for DTPA violations and fraud, but did not allege that the insureds extended credit in connection with the purchases. The court determined that the pleadings did not allege facts necessary to support a cause of action under federal or state truth-in-lending or truth-in-leasing laws. The insureds argued that the court should create an exception to the eight corners rule and consider extrinsic evidence to supply the missing factual allegation that the sales were made on credit. The court emphasized that the Texas Supreme Court has never recognized an

42. *Id.*

43. Allstate Tex. Lloyds v. Mason, 123 S.W.3d 690, 703-06 (Tex. App.—Fort Worth 2003, no pet.).

44. Landmark Chevrolet Corp. v. Universal Underwriters Ins. Co., 121 S.W.3d 886, 888, 890-91 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

exception to the eight corners rule to permit the introduction of extraneous evidence, and that this court of appeals had already specifically considered and rejected such an exception.⁴⁵ The court therefore declined to apply an exception to the eight corners rule.⁴⁶

b. Courts Recognizing a Narrow Exception

The Fort Worth Court of Appeals stated that extrinsic evidence is permitted to show no duty to defend only in the following very limited circumstances: (1) whether a person has been excluded from any coverage; (2) whether the property in suit has been excluded from any coverage; and (3) whether the policy exists. Even when extrinsic evidence is allowed, the court may consider only evidence pertaining to coverage and cannot consider facts pertaining to liability. Further, extrinsic evidence may not be used to show that the allegations are false. The court determined that the pleading clearly alleged an occurrence during the policy period, even though the allegations about the dates of employment may not have been true, and that fundamental policy coverage was not implicated, because the defendant was a named insured, it was undisputed that a policy existed, and property was not an issue in the case. The court of appeals therefore refused to consider any extrinsic evidence.⁴⁷

In *Northfield Insurance Co v. Loving Home Care, Inc.*,⁴⁸ the Fifth Circuit explained that although the Texas Supreme Court has never recognized any exception to the strict eight corners rule that would allow courts to examine extrinsic evidence, certain Texas appellate courts, the Fifth Circuit, and federal district courts in Texas have recognized a narrow exception. For example, one line of cases based on the Corpus Christi Court of Appeals' decision in *State Farm Fire and Casualty Co. v. Wade*⁴⁹ holds that extrinsic evidence can be admitted when the facts alleged are insufficient to determine coverage and when doing so does not question the truth or falsity of any facts alleged in the underlying petition. The Fifth Circuit, however, noted that no Texas appellate decision has ever both cited and applied the *Wade* line of cases. Making an *Erie* guess, the *Northfield* court determined that, "[i]n light of the Texas appellate courts' unwavering unwillingness to apply and recent repudiations of the *Wade* type of exception," the current Texas Supreme Court would not

45. *Id.* at 890-91 (citing *Tri-Coastal Contractors, Inc. v. Hartford Underwriters Ins. Co.*, 981 S.W.2d 861, 862-64 (Tex. App.—Houston [1st Dist.] 1998, pet. denied)).

46. *Id.* at 886, 888, 890-91.

47. *Fielder Rd. Baptist Church v. Guideone Elite Ins. Co.*, 139 S.W.3d 384, 387-89 (Tex. App.—Fort Worth 2004, pet. filed); see also *Fritz Indus., Inc. v. Wausau Underwriters Ins. Co.*, No. CIV.A.3:02-CV-894-L, 2004 U.S. Dist. LEXIS 2638, at *22-23 (N.D. Tex. Jan. 26, 2004) (stating that a court may look at evidence outside the pleadings in circumstances in which fundamental policy coverage questions are resolved by readily determined facts, but declining to do so there because the extrinsic evidence referred to by the parties did not go to a fundamental coverage issue).

48. *Northfield Ins. Co. v. Loving Home Care, Inc.*, 363 F.3d 523, 529 (5th Cir. 2004).

49. *State Farm Fire & Cas. Co. v. Wade*, 827 S.W.2d 448 (Tex. App.—Corpus Christi 1992, writ denied).

recognize any exception to the strict eight corners rule.⁵⁰ The court further stated, in the unlikely situation the Texas Supreme Court were to recognize an exception, it would apply only in very limited circumstances, “when it is initially impossible to discern whether coverage is potentially implicated *and* when the extrinsic evidence goes solely to a fundamental issue of coverage which does not overlap with the merits of or engage the truth or falsity of any facts alleged in the underlying case.”⁵¹

However, in *Primrose Operating Co. v. National American Insurance Co.*,⁵² an opinion issued only a few months after *Northfield*, the Fifth Circuit permitted the consideration of extrinsic evidence in circumstances other than a fundamental issue of coverage. While acknowledging that under the eight corners rule the duty to defend analysis is not influenced by facts ascertained before the suit, developed in the process of litigation, or by the ultimate outcome of the suit, the court expressly stated, “Fact finders, however, may look to extrinsic evidence if the petition ‘does not contain sufficient facts to enable the court to determine if coverage exists.’”⁵³ Because the claimant “did not specifically allege when the pollution incidents occurred,” it was impossible to determine from the pleadings alone whether any pollution incident occurred during the policy period. Therefore, the court concluded that it could look to extrinsic evidence to answer this question.⁵⁴

2. *Under What Circumstances Will a Conflict of Interest Prevent the Insurer from Conducting the Defense*

The Texas Supreme Court held in *Davalos* that an insured who rejects its insurer’s defense without a sufficient conflict forfeits its right to recover defense costs.⁵⁵ The court explained that the issue of whether an insurer has the right to conduct its insured’s defense is a matter of contract, and that the right to conduct the defense includes the authority to select the attorney who will defend the claim and to make other decisions that would normally be vested in the insured as the named party in the case. However, an insurer may not insist upon its contractual right to control the defense where a conflict of interest exists between the insurer and the insured. While the existence or scope of coverage is ordinarily the basis for a disqualifying conflict, the insured also may rightfully refuse an inadequate defense and any defense conditioned on an unreasonable, extra-contractual demand that threatens the insured’s independent legal rights. There, the insured was sued in Dallas County, and his personal

50. *Northfield Ins. Co.*, 363 F.3d at 531.

51. *Id.*

52. *Primrose Operating Co. v. Nat’l Am. Ins. Co.*, 382 F.3d 546, 552, 557 (5th Cir. 2004).

53. *Id.* at 552 (quoting *W. Heritage Ins. Co. v. River Entm’t*, 998 F.2d 311, 313 (5th Cir. 1993)).

54. *Id.* at 557.

55. *N. County Mut. Ins. Co. v. Davalos*, 140 S.W.3d 685, 688-90 (Tex. 2004).

attorneys answered and moved to transfer venue to Matagorda County.⁵⁶ When notified of the suit, the insurer advised that it wished to substitute another attorney as defense counsel and that it opposed the motion to transfer venue. Because of the venue issue, the insured rejected the insurer's offered defense. The court determined that had the insured accepted the defense, he could have submitted the venue issue to the defense counsel for an independent determination and that the insurer's actions therefore did not deprive the insured of independent counsel. Thus, while the insured had the right to reject the insurer's tender and conduct his own defense, the insured lost his right to recover the costs of that defense because he rejected the insurer's defense without a sufficient conflict. The court therefore concluded that the insurer's offer to defend satisfied its obligation under the policy and that the insurer did not breach its duty to defend.⁵⁷

In a case applying *Davalos*, the Northern District of Texas emphasized that when the facts to be adjudicated in the liability lawsuit are the same facts upon which coverage depends, the conflict of interest will prevent the insurer from conducting the defense. The court determined that because the liability facts and coverage facts were the same, and because a potential conflict of interest was created by the insurer's issuance of a reservation of rights letter, a disqualifying conflict existed and the insurer could not conduct the defense. Accordingly, the court concluded that the insured properly refused the insurer's qualified tender of defense and defended the suit on its own and that the insurer was therefore responsible for the attorney's fees reasonably incurred by the insured in its defense of the lawsuit.⁵⁸

3. *Insurer Is Not Required to Pay Pre-Tender Defense Costs*

The Northern District of Texas has concluded that an insurer's duty to defend is not triggered until the insured tenders the suit to the insurer for a defense and, thus, an insurer is not required to reimburse the insured for defense costs it incurred prior to the tender of the suit to the insurer. There, the insureds hired their own counsel to defend them in the underlying suit and did not forward the suit papers to the insurer. Although the attorney for the claimant in the underlying suit contacted the insurer about the suit, the insureds did not ask the insurer to provide them with a defense until September 19, 2002, over two years after the suit was filed. The insurer then paid defense costs incurred after that date and settled the lawsuit. Nevertheless, the insureds sued the insurer for failure to pay the fees incurred prior to that date. The court explained that under Texas law, an insurer's duty to defend its insured is only triggered by the actual service of process upon its insured and its relay to the insurer, and that compliance with the notice of suit provision is a condition precedent to

56. *Id.*

57. *Id.*

58. *Hous. Auth. v. Northland Ins. Co.*, 333 F. Supp. 2d 595, 600-02 (N.D. Tex. 2004).

the insurer's liability on the policy. The insured argued that the notice could come from any source and that the insurers received notice of the litigation by the demand letters sent by the claimant's attorney. The court rejected this argument, emphasizing that it is the action by the insured in sending the suit papers to the insurer that triggers the insurer's obligation to tender a defense and answer the suit, and that the insurers were entitled to rely on the fact that the insureds were represented by counsel and surely would have made a demand for defense and indemnification if they wanted the insurers to be involved. Therefore, the court concluded as a matter of law that the insurers did not owe the insureds a duty to reimburse them for expenses incurred in violation of the voluntary payments clause.⁵⁹

4. *Insurer Was Not Estopped from Denying Coverage for Individual Where Insurer Did Not Undertake Defense of That Individual*

The Amarillo Court of Appeals in *Tull* addressed whether an insurer had waived or was estopped from asserting its policy defenses.⁶⁰ There, members of the Tull family sustained injuries when their vehicle was struck by the vehicle driven by Melissa Shaffer ("Shaffer") and owned by her employer, Chase Portable X-Ray of Texas, Inc. ("Chase"). Chase notified its insurer, Federal Insurance Company ("Federal"), which paid the Tulls' property damage claim. The Tulls then sued Shaffer for their personal injuries. Although Chase was not named as a defendant in the suit, Federal hired an attorney to defend Chase. The attorney obtained medical bills from the Tulls' attorney and confirmed that he did not need to file an answer at that point. Federal also sent a reservation of rights letter to Shaffer stating that a default judgment was probable if she did not file an answer and advising her of its position that the Chase policy did not provide coverage for her. After obtaining a default judgment against Shaffer, the Tulls sued Federal and their own insurer, which argued that Federal was estopped from denying coverage for Shaffer.⁶¹

The court of appeals explained that an insurer undertaking or continuing the defense of a claim without an effective reservation of rights, while having knowledge of facts indicating the claim is not covered, may waive or be estopped from asserting policy defenses. However, this rule is premised on the insurer's assumption of the defense of the underlying suit.

59. *L'Atrium on the Creek I, L.P. v. Nat'l Union Fire Ins. Co.*, 326 F. Supp. 2d 787, 790-93 (N.D. Tex. 2004); *see also Gulf Underwriters Ins. Co. v. Nucentrix Broadband Networks, Inc.*, 309 B.R. 907 (Bankr. N.D. Tex. 2004) (determining that based on the language of the policy, the insurer's authorization and approval of an expense was required prior to the expense being incurred for the expense to qualify as a covered "claim expense"; thus, because the insured did not obtain such authorization and approval, the insurer was not liable for attorney's fees and costs incurred in defending the suit prior to the date that the insured gave notice to the insurer).

60. *Tull v. Chubb Group of Ins. Cos.*, 146 S.W.3d 689, 694-95 (Tex. App.—Amarillo 2004, no pet.).

61. *Id.* at 691-93.

The court found that the attorney retained by Federal did not file an answer or otherwise appear in the lawsuit on behalf of Shaffer, and that neither the attorney's communications with the Tulls' attorney, nor Federal's payment of the property damage claim and offer to settle the personal injury claims, were evidence that Federal undertook or exercised control over Shaffer's defense. The court therefore concluded that Federal had not waived and was not estopped from asserting its coverage defenses.⁶²

5. *Section 16.071 of the Texas Civil Practice & Remedies Code Does Not Void a Notice Provision in an Insurance Policy*

The Northern District of Texas⁶³ has rejected a novel argument by an insured that the provision of the policy requiring it to give the insurer prompt notice of loss or damage was void based on section 16.071(a) of the Texas Civil Practice and Remedies Code, which provides that a contract stipulation that requires a claimant to give notice of a claim for damages as a condition precedent to the right to sue on the contract is not valid unless the stipulation is reasonable and that a stipulation that requires notification within less than ninety days is void.⁶⁴ Making an *Erie* guess on the issue, the court concluded that the Texas Supreme Court, if directly confronted with the issue, would hold that the notice provisions in the policy do not pertain to a "claim for damages," but merely are requirements that the insured give the insurer notice of a potentially covered event so that the insurer can promptly conduct an investigation of the event, and that the policy's notice provisions therefore are not affected by section 16.071(a). Then, addressing whether the insured complied with the notice provisions, the court explained that Texas law interprets "prompt notice" and "as soon as possible" language as requiring notice within a reasonable time from the occurrence of the event causing the loss or damage. There, the insured claimed damage from a hailstorm in 1995, but did not give the insurer notice of the loss until 2001. The court found that if the insured actually sustained the amount of damage it claimed, it could and should have discovered the damage within a few months after the storm occurred. Thus, the court determined that no rational finder of fact could conclude that the insured gave notice within a reasonable time and that the insurer was therefore entitled to summary judgment.⁶⁵

62. *Id.* at 694-95.

63. *Ridglea Estate Condo. Ass'n v. Lexington Ins. Co.*, 309 F. Supp. 2d 851, 857 (N.D. Tex. 2004).

64. TEX. CIV. PRAC. & REM. CODE ANN. § 16.071(a) (Vernon 1997).

65. *Ridglea Estate Condo. Ass'n*, 309 F. Supp. 2d at 854-60.

B. CGL POLICIES

1. The "Occurrence" Debate

As in the last Survey, insurers, insureds, and courts continue to struggle in determining whether allegations meet the "occurrence" requirement of general liability policies, particularly in the context of construction defect claims. Federal and state courts recently weighed in on both sides of this issue. Until the Texas Supreme Court addresses this issue, it will continue to present difficulties.

a. Claims for Negligence Allege an "Occurrence"

The Dallas Court of Appeals examined this issue in depth in *Gehan Homes*, holding that the construction defect claims did allege an "occurrence," thus triggering the duty to defend under the CGL policy.⁶⁶ The plaintiffs sued their home builder for construction defects, asserting causes of action for negligence, breach of contract and warranty, DTPA violations, and fraud. The builder sought coverage under policies containing the standard CGL policy language defining an "occurrence" as an "accident." The court explained that two lines of cases defining the term occurrence have evolved in Texas. The first line of cases is derived from the Texas Supreme Court's decision in *Maupin* and pertains to coverage of claims against an insured for damage caused by its alleged intentional torts.⁶⁷ The second line of cases is derived from the Texas Supreme Court's decision in *Orkin* which construed the term accident "to include negligent acts of the insured causing damage which is undesigned and unexpected."⁶⁸ Following *Orkin*, both state and federal courts in Texas have interpreted the terms accident and occurrence to include damage that is the unexpected, unforeseen, or undesigned happening or consequence of an insured's negligent behavior. Given these two lines of cases, Texas courts have split on the issue in construction defect cases, with some holding that there was an occurrence where the allegation was of defective workmanship, and others holding that such claims do not allege an occurrence.⁶⁹

The builder contended that the underlying lawsuit alleged an occurrence because the plaintiffs pleaded that the builder was negligent. Conversely, the insurers contended that there was no occurrence because the claims were based on an underlying contract, the construction was a voluntary and deliberate act, and the injury was to the subject of the contract. The court of appeals emphasized that acceptance of the insurers' position would require the court to ignore the negligence allegations, which were more than simply bare-bones allegations. While recognizing

66. *Gehan Homes, Ltd. v. Employers Mut. Cas. Co.*, 146 S.W.3d 833, 837, 843 (Tex. App.—Dallas 2004, pet. filed).

67. *Argonaut Southwest Ins. Co. v. Maupin*, 500 S.W.2d 633 (Tex. 1973).

68. *Mass. Bonding & Ins. Co. v. Orkin Exterminating Co.*, 416 S.W.2d 396, 400 (Tex. 1967).

69. *Gehan Homes*, 146 S.W.3d at 839-41.

that some courts have found no occurrence where the claimed damage is to the subject of the contract, the court stated that it agreed with the cases holding that negligence that results in damage to the subject of the contract constitutes an occurrence because the relevant inquiry is not whether the insured damaged his own work, but whether the resulting damage was unexpected and unintended. The court determined that the intentional act of performing the contract was allegedly performed negligently and that the purported damage was an unexpected and undesigned consequence of the builder's alleged negligence. The court therefore concluded that the insurers did not establish as a matter of law that the petition did not allege an occurrence.⁷⁰

b. Claims That the Insured Failed to Meet Its Contractual Obligations Do Not Allege an "Occurrence"

The Northern District of Texas has recently stated in *Tealwood* that it is aware of, and agrees with, the line of cases holding that construction defect claims arising from negligent work allege an occurrence.⁷¹ However, the court found the case before it to be different because the petition did not involve claims of construction defects and included only bare-bone allegations of negligence. The court emphasized that the mere allegation of negligence does not control the issue of the duty to defend; rather, the focus is on the factual allegations that show the origin of the damages, not on the legal theories alleged. There, the plaintiff's real complaint was that the insured did not live up to its contractual obligation. The court concluded that there was no genuine issue of material fact with respect to the existence of an "occurrence" and that the insurer was therefore entitled to judgment as a matter of law.⁷²

The Western District of Texas noted that it had previously concluded that an "underlying petition that factually alleges deficient and substandard construction, regardless of the legal theories it asserts, fails to allege an 'accident' or therefore an 'occurrence' and, consequently, does not give rise to the duty to defend on the part of the construction companies' CGL insurers."⁷³ The underlying lawsuit complained about the insureds' performance of their contractual and warranty obligations and that the insureds negligently landscaped and excavated, resulting in damage to the

70. *Id.* at 842-43; see also *Roman Catholic Diocese of Dallas v. Interstate Fire & Cas. Co.*, 133 S.W.3d 887, 894-95 (Tex. App.—Dallas 2004, pet. denied) (in a case arising from a priest's alleged sexual molestation of a child, the court determined that the plaintiff could prevail on its negligent hiring and negligent supervision claims without a showing that the Diocese actually knew about the priest's sexual propensities; and that if the Diocese did not know of the priest's sexual propensities, then the priest's conduct was both unexpected and unintentional from the standpoint of the insured and, therefore, a judgment for the plaintiff could fall within coverage).

71. *Tealwood Constr., Inc. v. Scottsdale Ins. Co.*, No. CIV.A.3:02-CV-2159-L, 2003 U.S. Dist. LEXIS 20993 (N.D. Tex. Nov. 19, 2003).

72. *Id.* at *13-20.

73. *Mid Arc, Inc. v. Mid-Continent Cas. Co.*, No. A-03-CA-242-55, 2004 U.S. Dist. LEXIS 7498, at *9-10 (W.D. Tex. Feb. 24, 2004) (citing *Vesta Fire Ins. Co. v. Nutmeg Ins. Co.*, No. A-00-CA-468-55, 2003 U.S. Dist. LEXIS 25324 (W.D. Tex. Sept. 29, 2003)).

property. The court determined that the insured was seeking coverage for its own faulty work, *i.e.* for performing its duties negligently, resulting in damage to the insured's own work or product as opposed to something other than the insured's own work or product. Following its prior holding, the court concluded that these allegations did not constitute allegations of an "occurrence."⁷⁴

2. *The Business Risk Exclusions*

a. The "Property Damage" Exclusion

The "property damage" exclusion of the standard CGL policy excludes coverage for property damage to that particular part of real property on which the insured, or any contractors or subcontractors working directly or indirectly on the insured's behalf, is performing operations, if the property damage arises out of those operations. However, the Northern District of Texas has explained that allegations that the insured's work caused damage to property other than that on which the insured worked fall outside the scope of this exclusion.⁷⁵

b. The "Your Product" and "Your Work" Exclusions

The Fifth Circuit has determined that the "your product" exclusion in a standard CGL policy is not ambiguous. There, the insurers argued that any "property damage" alleged in the underlying lawsuit fell within the "your product" exclusion. The plaintiff in the underlying lawsuit, now the judgment creditor of the insured, sued the insurers, urging that the definition of "products-completed operations hazard" conflicted with the "your product" exclusion. Specifically, while the "your product" exclusion removed coverage for "property damage" to the insured's product arising from its product, the "products-complete operations hazard" appeared to extend coverage to "property damage" arising out of the insured's product, as long as the damage occurred off the insured's premises and not while the insured still had physical possession of its product. The district court accepted this argument, concluding that the "your product" exclusion and the "product-completed operations hazard" definition, when read together with the "Products-Completed Operations Aggregate Limit" potentially created an ambiguity, and that the ambiguity should be construed in favor of coverage such that the "your product" exclusion was not enforceable.⁷⁶

The Fifth Circuit, however, concluded, after reading these three provisions within the context of the policy as a whole, that the district court erred in finding a conflict among the provisions. The court explained that the "your product" exclusion was included in the "Section I—Coverages"

74. *Id.* at *20-21.

75. *Scottsdale Ins. Co. v. Knox Park Constr., Inc.*, No. CIV.A. 3:01-CV-1852-K, 2003 U.S. Dist. LEXIS 19937, *7-8 (N.D. Tex. Nov. 6, 2003).

76. *Valmont Energy Steel, Inc. v. Comm'l Union Ins. Co.*, 359 F.3d 770, 774-75 (5th Cir. 2004).

section. Thus, “Section I—Coverages” is where coverage is both granted as to damages because of “property damage” caused by an “occurrence” and then limited by exclusions such as the “your product” exclusion. The court determined that the district court incorrectly assumed that the “Products-Completed Operations Aggregate Limit” in “Section III—Limits of Insurance” functioned to grant coverage; rather, this section simply explained the amount of damages the policy will cover. Read together with the definition of “products-completed operations hazard,” it delineated the declared limits of the insurance for off-premises “property damage” arising from the insured’s product.⁷⁷

The court determined that, because the “Products-Completed Operations Aggregate Limit” provision did not separately grant “products—completed operations hazard” coverage, there was no discord with the “your product” exclusion and the three clauses could easily be read together without conflict. Specifically, Section I of the policy grants broad coverage of damages due to “property damage”; the Section I “your product” exclusion limits that coverage, and Section III sets out limits on the amount of coverage the insurers will pay, depending on the location of the damage. The court found that the “your product” exclusion is susceptible to only one reasonable interpretation and can be given definite meaning within the policy as a whole and, therefore, is unambiguous as a matter of law. Then applying a plain reading of the “your product” exclusion, the court concluded that it barred coverage for “property damage” to the insured’s product arising from the insured’s representations made with respect to the quality of its product, regardless of the location where such “property damage” occurred.⁷⁸

c. The “Impaired Property” Exclusion

The “impaired property exclusion” in a standard CGL policy excludes coverage for property damage to impaired property arising out of a defect, deficiency, inadequacy or dangerous condition in “your product” or “your work.” Impaired property is defined as tangible property other than “your product” or “your work” that cannot be used or is less useful. The petition at issue alleged damages to a building caused by the insured or its subcontractors who constructed the building. The court determined

77. *Id.* at 775-76.

78. *Id.* at 776; *see also* Fritz Indus., Inc. v. Wausau Underwriters Ins. Co., No. CIV.A. 3:02-CV-894 L, 2004 U.S. Dist. LEXIS 2638, at *14-16, *24-27 (N.D. Tex. Jan. 26, 2004) (finding that the petitions failed to allege any facts which could be reasonably construed to allege physical damage to tangible property other than the tile installed by the insured and that the “your product” exclusion therefore barred coverage); Vogelbusch USA, Inc. v. State Farm Lloyds, No. 14-03-00700-CV, 2004 Tex. App. LEXIS 6157, at *11, *18-19 (Tex. App.—Houston [14th Dist.] July 13, 2004, no pet.) (not designated for publication) (concluding that the “your product” and “your work” exclusions were unambiguous and excluded coverage if the alleged property damage was allegedly caused by a product that the insured no longer possessed or by work the insured had completed, and that allegations that damage to the system occurred after the insured had transferred possession of the system to the owner and after the insured had completed its work clearly fell within the “your product” and “your work” exclusions).

that because the building constituted the insured's work, the building was not included in the definition of impaired property and, therefore, the exclusion did not apply.⁷⁹

3. *Texas Supreme Court Reiterates that "Arising out of" Language Requires Only But-For Causation, Not Proximate Causation*

In construing language in a policy that excluded coverage for injury "due to" the rendition of professional services, the supreme court contrasted this language with other policy exclusions which were drawn more broadly to exclude harm "arising out of" conduct instead of "due to" that conduct. The court explained that it has held that "arise out of" means that there is simply a causal connection or relation, which is interpreted to mean that there is but-for causation, though not necessarily direct or proximate causation. Further, other jurisdictions also interpret "arising out of" to exclude a proximate cause requirement, and the Fifth Circuit has concluded that "arising out of" are words of much broader significance than "caused by." Accordingly, the court concluded that because the policy used different wording in parallel exclusions, the phrases should have different meanings, and, therefore, "due to" requires a more direct type of causation that could tie the insured's liability to the manner in which the services were performed.⁸⁰ Given the frequency with which the language "arising out of" is used in policies, this decision is significant for its insight concerning how the supreme court interprets such language.

4. *Where the Named Insured Is a Sole Proprietorship, the Auto Exclusion Extends to Autos Owned by the Sole Proprietor*

The Houston Court of Appeals addressed the following issue of apparent first impression under Texas law: if an individual obtains an insurance policy under which the named insured is that individual doing business under another name, does a policy provision excluding coverage for automobiles owned by the named insured exclude coverage as to an automobile owned by that individual in his own name? The CGL policy at issue excluded coverage for bodily injury or property damage arising out of the ownership of any auto owned by any insured. The court determined that the provision was unambiguous. Relying on cases holding that a sole proprietorship has no separate legal existence apart from the sole proprietor, the court concluded that the sole proprietorship and its proprietor were one and the same for purposes of the CGL policy, and that the exclusion for vehicles owned by the named insured therefore applied to preclude coverage.⁸¹

79. *Amerisure Ins. Co. v. ML & Assocs., Inc.*, 302 B.R. 857, 861 (Bankr. N.D. Tex. 2003).

80. *Utica Nat'l Ins. Co. v. Am. Indem. Co.*, 141 S.W.3d 198, 202-03 (Tex. 2004) (op. on reh'g).

81. *CU Lloyd's of Tex. v. Hatfield*, 126 S.W.3d 679, 680, 684-86 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).

5. *Additional Insured Endorsement*

Global Sun Pools, Inc. d/b/a The Pool Depot (“Global”) built an above-ground swimming pool for the plaintiffs and was sued by the plaintiffs. Paul Simmons (“Simmons”), the man who actually constructed the pool, had a policy with Burlington Insurance Company (“Burlington”). The policy showed Simmons as the named insured engaged in the business of installing above-ground swimming pools, and an endorsement named Global as an additional insured with respect to liability arising out of Simmons’s operations or premises owned by or rented to Simmons. Global tendered the lawsuit to Burlington for defense and indemnity. Burlington denied coverage on the ground that nothing in the pleadings showed that the plaintiffs’ claims arose out of Simmons’s operations, the petition did not create any potential for coverage. The court of appeals, however, seized on a reference in the pleading to Global and “its builders,” and concluded that this broad, general statement was sufficient to trigger Burlington’s defense obligations under the additional insured endorsement.⁸²

C. AUTO POLICIES

1. *Texas Supreme Court Holds That the Spouse of the Named Insured Can Reject UM and PIP Coverages*

The Texas Supreme Court held that the insured spouse of the person identified as the named insured in the declarations of an auto policy falls within the class of persons statutorily entitled to reject UM and PIP coverages.⁸³ There, the wife applied for and purchased the policy and rejected the UM and PIP coverages. Although the wife’s name appeared on the application, she was not listed as a “named insured” on the declarations page. However, because the policy defined “you” and “your” to include the “named insured” and the spouse if a resident of the same household, the wife was an insured under the policy. While the husband was lying beneath his truck making repairs, the truck was struck by a vehicle driven by an uninsured motorist, and the husband sought UM coverage. The applicable statutes contain “two pertinent phrases regarding who may reject UM and PIP coverages: (1) ‘any insured named in the policy;’ and (2) ‘the named insured.’”⁸⁴ Based on legislative history, the court determined that “insured named in the policy” was synonymous with “named insured.” Then addressing the meaning of “named insured,” the court explained that the standard automobile policy form in use at the time the statutes were enacted defined “named insured” to include both the individual named in the declarations and that individ-

82. *Global Sun Pools, Inc. v. Burlington Ins. Co.*, No. 05-03-00765-CV, 2004 Tex. App. LEXIS 7552, at *2, *5-6 (Tex. App.—Dallas Aug. 23, 2004, no pet.).

83. *Old Am. County Mut. Fire Ins. Co. v. Sanchez*, 149 S.W.3d 111, 112, 119 (Tex. 2004).

84. *Id.* (discussing TEX. INS. CODE ANN. arts. 5.06-1(1), 5.06-3(a) (Vernon Supp. 2004-05)).

ual's spouse if a resident of the same household. Thus, when the legislature chose the phrase "named insured," it must have intended it to include the named insured's resident spouse. Accordingly, the court concluded that the wife could be classified as a "named insured" and thus an "insured named in the policy." The court held that the wife had statutory authority to reject UM and PIP coverages and rendered judgment for the insurer.⁸⁵

2. *Texas Supreme Court Interprets the Term "Motor Vehicle Accident"*

The Texas Supreme Court interpreted the term "motor vehicle accident" as used in the PIP coverage section of the standard Texas automobile policy.⁸⁶ There, the insured was injured when his foot became entangled with the raised portion of his truck door while he was exiting the vehicle. The insured sought PIP benefits under his auto policy, which provided that the insurer would pay PIP benefits because of bodily injury resulting from a "motor vehicle accident" and sustained by a covered person. The court emphasized that while the term "motor vehicle accident" does not require a collision or near collision, the vehicle must be more than the mere situs of the accident or injury-producing event; rather, the automobile must, in some manner, be involved in the accident. Accordingly, the court held that a "motor vehicle accident" occurs when: (1) one or more vehicles are involved with another vehicle, an object, or a person; (2) the vehicle is being used, including exit and entry, as a motor vehicle; and (3) a causal connection exists between the vehicle's use and the injury-producing event. Applying this standard, the court concluded that the insured's injury resulted from a "motor vehicle accident" within the policy's PIP coverage.⁸⁷

3. *Courts Interpret the Term "Occupying"*

The Dallas Court of Appeals interpreted the term "occupying" under the UIM coverage section of an auto policy, which defined an insured as anyone occupying a covered vehicle, and defined "occupying" as "in, upon, getting in, on, out or off."⁸⁸ There, the claimant, a passenger in Vehicle 1, was ejected from the vehicle when it skidded off the road. While the claimant was outside Vehicle 1, Vehicle 2 skidded off the road and struck the claimant. After receiving the limits of the liability policy for Vehicle 2, the claimant sought UIM benefits under the policy for Vehicle 1. The court noted that other Texas courts have considered the "getting in, on, out or off" language and the language is not ambiguous. Courts interpreting this language in the context of an injury that occurred outside of the covered vehicle have looked at whether there was a causal

85. *Id.* at 115-19.

86. *Tex. Farm Bureau Mut. Ins. Co. v. Sturrock*, 146 S.W.3d 123, 124-25 (Tex. 2004).

87. *Id.* at 127-34.

88. *McKiddy v. Trinity Lloyd's Ins. Co.*, 155 S.W.3d 307, 307-08 (Tex. App.—Dallas 2004, pet. denied).

connection between the incident that caused the injury and the covered vehicle. Applying this standard, the court emphasized that the claimant stated he was walking toward another vehicle when he was struck and produced no evidence showing how long he had been out of Vehicle 1 before being struck or that his injuries were related to any impact with Vehicle 1. Accordingly, the court found there was no causal connection between the claimant's injuries and Vehicle 1 and, therefore, that the claimant was not "occupying" Vehicle 1 and thus was not an insured under the policy covering Vehicle 1.⁸⁹

4. *A Material Deviation from the Permission to Use the Auto Precludes Coverage under the Omnibus Clause*

The Texas Supreme Court in *Renfro* addressed whether an employee has implied permission to use a company truck at the time of the accident so as to be covered under the "omnibus clause" of a commercial auto liability policy that insured an employer and "anyone else while using with your [the employer's] permission a covered auto."⁹⁰ The employee worked for a business in Bridgeport. One Friday night, the owner of the business let the employee take a company truck home, which was about half a mile away, because it was company policy to let an employee take a company truck home overnight when he had to be at a site early the next morning. The employee drove the truck to a friend's home and then drove forty miles away to Saginaw; on the return trip, a collision occurred in which the friend was killed. The employee testified that he knew he did not have permission to take the truck to the friend's home or to Saginaw. The rule in Texas is that a person may deviate from the permitted usage of an insured vehicle and still be covered under an omnibus provision if the use is not a material or gross violation of the terms if the initial permission. The supreme court determined that the employee's trip to Saginaw was, as a matter of law, a material deviation from any implied permission he may have had to use the vehicle in Bridgeport, and that the employee therefore was not covered under the omnibus clause of the company's policy.⁹¹

5. *An Insured Who Accepts Actual Cash Value for a Totaled Vehicle Must Assign the Title to the Vehicle to the Insurer*

In *Hamby*, the insured, on behalf of himself and other similarly situated persons, sued State Farm challenging State Farm's right to require

89. *Id.* at 309-10; see also *Ins. Co. of the State of Penn. v. Pearson*, No. 07-03-0340-CV, 2004 Tex. App. LEXIS 8155, at *2, *5-9 (Tex. App.—Amarillo Sept. 7, 2004, no pet.) (following *McKiddy* and concluding that, where claimant was struck by a taxi while standing outside a parked truck and performing work in the emergency lane of the interstate, there was no evidence of a nexus, or conjunction of time, place, purpose, and act, between the truck and the injuries, and therefore, the claimant was not "occupying" the truck and thus was not an insured under the policy).

90. *Old Am. County Mut. Fire Ins. Co. v. Renfrow*, 130 S.W.3d 70, 71 (Tex. 2004).

91. *Id.* at 71-73.

the insured to assign it title to a totaled vehicle in order for the insured to receive payment for the vehicle's actual cash value.⁹² The "Payment of Loss" provision of the policy provided that State Farm may pay for loss in money or repair or replace the damaged or stolen property; that State Farm may return any stolen property and that it would pay for any damage resulting from the theft; and that State Farm "may keep all or part of the property at an agreed or appraised value." The insured contended that the last clause applied only if the car had been stolen. The court, however, determined that based on the plain language of the provision, it was not reasonable to conclude that because the next-to-last sentence mentions only stolen cars, the last sentence only applies to stolen cars. Instead, the court held as a matter of law that the provision as a whole and the last sentence in particular applied to both stolen and damaged cars. Because the insured chose the higher actual cash value amount (rather than the option of accepting the actual cash value minus the salvage value and keeping the car himself), the insured was required to turn the vehicle and its title over to State Farm.⁹³

D. HOMEOWNERS POLICIES

1. *Fifth Circuit Certifies the Ensuing Loss Issue to Texas Supreme Court*

Texas state and federal courts have reached conflicting results in deciding whether coverage exists for mold claims under the ensuing loss provision of the standard Texas Homeowners Form B (HO-B) policy, which states, "We do not cover loss caused by: . . . rust, rot, mold or other fungi We do cover *ensuing loss* caused by collapse of building or any part of the building, water damage . . . if the loss would otherwise be covered under this policy."⁹⁴ The Fifth Circuit explained that "cases that have addressed the issue of the proper interpretation of the ensuing loss provision can be grouped into two categories: those that would extend coverage for mold resulting or ensuing from covered water damage, and those that would not."⁹⁵ Cases that would extend coverage for mold contamination "ensuing" from covered water damage interpret the ensuing loss provision as an exception to the exclusion for "rust, rot, mold or other fungi." Under this interpretation, mold contamination that results or ensues from a covered water damage event (*e.g.*, a bursting pipe releasing water into a house) is covered notwithstanding the exclusionary language specifically denying coverage for mold. However, if mold contamination results from a water event that is not covered under the policy (*e.g.*, naturally occurring water condensation accumulating in an inadequately

92. *Hamby v. State Farm Mut. Auto Ins. Co.*, 137 S.W.3d 834 (Tex. App.—Houston [1st Dist.] 2004, *pet. denied*).

93. *Id.* at 835-37.

94. *Fiess v. State Farm Lloyds*, 392 F.3d 802, 809 (5th Cir. 2004) (alterations and emphasis in original).

95. *Id.*

vented crawl space), coverage must be denied under the general mold exclusion.⁹⁶

Conversely, cases that would deny coverage for mold contamination caused by a covered water event interpret the ensuing loss provision not as an exception to the mold exclusion, but rather as a type of “savings clause” intended to safeguard otherwise covered losses from an overly expansive construction of the policy exclusions. These cases read the ensuing loss provision as requiring, in essence, a preceding cause, a proximate cause, and an ensuing loss. The preceding cause must be one of the types of damage enumerated in the exclusion, including rust, rot, mold, or other fungi. The proximate cause, in turn, must be one of the forms of damage listed in the ensuing loss provision, including otherwise covered water damage. Finally, a loss must occur as a result of the proximate cause.⁹⁷

The Fifth Circuit found that these two interpretations of the ensuing loss provision are irreconcilable and therefore certified the following question to the Texas Supreme Court: “Does the ensuing loss provision contained in Section I-Exclusions, part 1(f) of the Homeowners Form B (HO-B) insurance policy as prescribed by the Texas Department of Insurance effective July 8, 1992 (Revised January 1, 1996), when read in conjunction with the remainder of the policy, provide coverage for mold contamination caused by water damage that is otherwise covered under the policy?”⁹⁸

2. *HOB-T Policy Provides Coverage for Mold Damage*

As an issue of first impression, the Houston Court of Appeals concluded that coverage existed under a Texas Homeowners Form B-T policy (HOB-T) for mold damage caused by a leaking air conditioner. The “Perils Insured Against” section of the policy stated the insurer would insure against physical property to a listed peril unless the loss was specifically excluded. One of the perils listed was accidental discharge, leakage, or overflow of water or steam from within a plumbing, heating, or air conditioning system or household appliance. The insured contended that the air conditioning system leaked and caused mold to spread throughout her apartment and damage her personal belongings. Conversely, the insurer argued that because a named-perils policy excludes all risks not specifically included in the policy, and because mold was not a named peril in the policy, mold was excluded from coverage. Rejecting this argument, the court stated that it did not share the insurer’s narrow view and instead found that, depending on the circumstances, mold can be either damage or a cause of loss. The court determined that, applying the plain meaning of the policy language, the policy covers tangible damage to personal property by water leaking from an air conditioning unit and that such

96. *Id.* at 810.

97. *Id.*

98. *Id.* at 811-12.

leaks can produce mold damage, which is a tangible loss to the personal property. The court therefore concluded that the policy language was unambiguous and required payment for mold damage caused by a leaking air conditioning unit.⁹⁹

3. *When Insurer and Insured Both Offer Expert Testimony as to Disputed Coverage Issue, It Is Up to the Jury to Resolve the Dispute*

The homeowners policy at issue excluded coverage for foundation damage, unless it was caused by a plumbing leak. Based on a report from an engineer concluding that the foundation damage was not caused by a plumbing leak, the insurer denied the claim, and the insureds sued. At trial, the insured offered expert testimony that the foundation damage was caused by a plumbing leak, while the insurer offered expert testimony that the foundation damage was caused by soil movement. The court of appeals concluded that with competing contentions supported by expert witnesses on both sides, the burden fell to the jury to determine which contention was more credible. Thus, the court concluded that the evidence was legally and factually sufficient to support the jury's findings that the foundation damage was caused by a plumbing leak and that the insurer breached the policy.¹⁰⁰

E. DIRECTOR & OFFICER AND PROFESSIONAL LIABILITY POLICIES

1. *The Personal Profit Exclusion*

The Fifth Circuit interpreted the scope of the personal profit exclusion in a director and officer liability policy which excluded coverage for any claim based upon, arising from, or in consequence of an insured having gained any personal profit, remuneration, or advantage to which such insured was not legally entitled. There, investors sued the company, its former CEO, several other of its directors and officers, and a securities dealer representing the company, alleging that the CEO and the securities dealer solicited them to invest in the company by making misrepresentations. Analyzing whether the personal profit exclusion applied to the CEO, who was also the majority shareholder and chairman of the startup company, the court explained it had previously found that a majority shareholder in a small startup company gains a personal advantage from a sizeable capital investment in the company because it gives the majority shareholder the opportunity to become the owner of a successful business. Thus, the court determined that the CEO gained a personal advantage from the opportunity to own and participate in a successful business when the company was infused with capital as a result of his fraud. A defendant is not legally entitled to an advantage or profit result-

99. *DeLaurentis v. United Servs. Auto. Ass'n*, No. 14-03-00164-CV, 2004 Tex. App. LEXIS 8758, at *2, *14-22 (Tex. App.—Houston [14th Dist.] Sept. 30, 2004, no pet.).

100. *Allstate Tex. Lloyds v. Mason*, 123 S.W.3d 690, 694, 700-03 (Tex. App.—Fort Worth 2003, no pet.).

ing from his violation of law if he could be required to return such profit. Because return of the capital investment in the company could have been required, the court determined there was no legal entitlement to the capital investment and that the CEO was not legally entitled to profit from his fraud.¹⁰¹

The claimants then contended that even if the exclusion applied to the CEO, it should not apply to the company or the other directors and officers. Finding that this contention was contrary to the plain language of the exclusion, the court explained that the exclusion did not use language requiring that the insured against whom the claim is asserted be the same insured who gained the profit (*i.e.*, “the insured,” “that insured,” or “such insured”). Rather, the exclusion used the more general term “an insured,” thus indicating that coverage is excluded for all insureds, not merely the insured who profited. The court therefore concluded that the personal profit exclusion barred coverage for the CEO, the securities dealer, the other directors and officers, and the company.¹⁰²

2. Court Interprets “Related” as Having a Logical or Causal Connection

As an issue of first impression, the Houston Court of Appeals interpreted the term “related” in a medical malpractice policy. The policy at issue provided that the limit of liability stated in the policy for each claim was the limit of the insurer’s liability for all injury or damage arising out of, or in connection with, the same or related medical incident. In the absence of a definition in the policy, the court found that the term “related” should be given its plain, ordinary, and generally accepted meaning of “having a logical or causal connection.”¹⁰³ Although the underlying lawsuit contained allegations against two doctors, the court found that all the medical incidents at issue involved the same patient, at the same facility, during the same period of time, with regard to the same x-ray, and led to a single result that formed the basis of the lawsuit.¹⁰⁴ Thus, the court held that the medical incidents were related and, therefore, the insurer’s total liability was limited to a single “per loss event” limit of liability.¹⁰⁵

F. FORTUITY DOCTRINE, KNOWN LOSS RULE, AND LOSS IN PROGRESS RULE

The Fifth Circuit recently applied the principle of Texas insurance law known as the fortuity doctrine, the known loss rule, or the loss in progress rule. Because the purpose of insurance is to protect insureds against un-

101. TIG Specialty Ins. Co. v. Pinkmonkey.com, Inc., 375 F.3d 365, 370-71 (5th Cir. 2004).

102. *Id.* at 371-73.

103. Columbia Cas. Co. v. CP Nat’l, Inc., No. 01-00-01406-CV, 2004 Tex. App. LEXIS 8362, at *18 (Tex. App.—Houston [1st Dist.] Sept. 16, 2004, no pet.).

104. *Id.* at *21.

105. *Id.* at *9-10, *17-21.

known or fortuitous risks, fortuity is an inherent requirement of all risk insurance policies. The fortuity doctrine holds that insurance coverage is precluded where the insured is or should be aware of an ongoing progressive or known loss at the time it purchased the policy. When determining coverage under the fortuity doctrine, the key inquiry is not whether the insured actually knew of the underlying loss or potential liability, but rather whether it knew, at the inception of coverage, that they were engaging in activities which might reasonably be expected to expose them to or result in liability. The court rejected the insured's argument that the fortuity doctrine requires some sort of "watershed event," such as the receipt of a demand or the filing of a lawsuit, to give the insured sufficient notice that it is subject to potential liability, instead holding that the court considers whether the party knowingly acted in a manner in which it could possibly be found liable. Applying these principles, the court held that the fortuity doctrine barred coverage, where the alleged price discrimination that led to the underlying antitrust suit began four years prior to the purchase of the policy and the petition alleged that the insured intentionally and knowingly engaged in the price discrimination.¹⁰⁶

G. INSURED'S DUTY TO MITIGATE

The Fifth Circuit has reiterated that an insured owes its insurer an implied duty to mitigate liability to the insurer. There, the plaintiff sued the insured for injuries sustained at the insured's store. The insured did not notify the insurer of the suit until over five years after the original injury and over three years after the suit was filed, and informed the insurer that it did not intend to defend itself against the lawsuit. The excess policy at issue expressly stated that it did not apply to defense, and the insurer therefore had no duty to provide a defense to the insured. The insured did not appear at trial, and a default judgment was entered against it. The court determined that the insured had a duty to take some action to mitigate liability and damages arising out of the suit, but that the insured deliberately decided not to take any action. The court concluded that such inaction constituted a breach of the insured's duty to mitigate owed to its insurer, thus relieving the insurer of any obligation to pay the default judgment.¹⁰⁷

106. *RLI Ins. Co. v. Maxxon Southwest Inc.*, 108 Fed. Appx. 194, 198-200 (5th Cir. 2004); see also *Serv. Cas. Ins. Co. v. Travelers Ins. Co.*, No. CIV.A.SA-04-CV-251-XR, 2004 U.S. Dist. LEXIS 19797, at *13-18 (W.D. Tex. Oct. 4, 2004) (determining that because the allegations in the underlying lawsuit outlined facts, transactions, or events which were or reasonably would be regarded as wrongful employment practices that took place prior to the inception of the policy, coverage for the lawsuit was barred by the policy's prior knowledge exclusion and the fortuity doctrine). Cf. *Burlington Ins. Co. v. Tex. Krishnas, Inc.*, 143 S.W.3d 226, 230-31 (Tex. App.—Eastland 2004, no pet.) (setting forth the same legal standards, but declining to hold that the duty to defend was precluded by the fortuity doctrine under the facts of that case, because the underlying lawsuits did not plead when any specific event took place or whether the insured either knew or should have known of the loss or of an ongoing progressive loss at the time the policy was issued).

107. *ACE Prop. & Cas. Ins. Co. v. Dorismond*, 88 Fed. Appx. 695, 697-98 (5th Cir. 2004).

H. COVERAGE FOR PUNITIVE DAMAGES

The article for the last Survey period included an opinion issued by a panel of the Fort Worth Court of Appeals holding that punitive damages were covered under a liability policy and that such coverage did not violate public policy.¹⁰⁸ Subsequently, the court of appeals sitting en banc granted rehearing, withdrew its prior opinion, and issued a new opinion.¹⁰⁹ The insurer argued that punitive damages were not covered because they were based on conduct that results in expected or intended injuries, and the CGL portion of the policy provided coverage only for an occurrence, defined as an accident which results in bodily injury neither expected nor intended from the standpoint of the insured. However, the policy also contained a hospital professional liability portion which did not limit coverage to only an accident or occurrence. Because the damages would have been covered under this portion of the policy, the court determined that the policy did not preclude coverage for punitive damages.¹¹⁰

The court then addressed whether coverage for punitive damage violates Texas public policy. Noting that neither the legislature nor the supreme court has addressed the public policy implications of insurance coverage for punitive damage awards against nursing homes, the court examined the history of punitive damages in Texas and cases regarding coverage for punitive damages in other contexts. The court ultimately concluded that it could not say that coverage for punitive damages under the policy was void as against public policy at the times of the issuance of the policy in 1993, the occurrence in 1994, and the suit and settlement in 1995. However, the court emphasized that public policy is “not static and is subject to change” and that it was not addressing the present viability of insured punitive damages.¹¹¹

The Northern District of Texas has also held that the expected or intended injury exclusion does not bar coverage for punitive damages based on grossly negligent conduct, and that Texas public policy does not preclude coverage for punitive damages.¹¹² The debate on this issue will likely continue until it is squarely addressed by the Texas Supreme Court. Fortunately, the court will have the opportunity to do so, as the Fifth Circuit has certified the following question to it: “Does Texas public policy prohibit a liability insurance provider from indemnifying an award for punitive damages imposed on its insured because of gross negligence?”¹¹³

108. *Westchester Fire Ins. Co. v. Admiral Ins. Co.*, No. 2-01-227-CV, 2003 Tex. App. LEXIS 5468 (Tex. App.—Fort Worth June 26, 2003, no pet.).

109. *Westchester Fire Ins. Co. v. Admiral Ins. Co.*, 152 S.W.3d 172 (Tex. App.—Fort Worth 2004, pet. filed) (en banc) (op. on reh'g).

110. *Id.* at 181-82.

111. *Id.* at 182-91.

112. *Phila. Indem. Ins. Co. v. Stebbins Five Cos.*, No. CIV.A. 302CV1279M, 2004 U.S. Dist. LEXIS 6374, at *13, *18 (N.D. Tex. Jan. 27, 2004).

113. *Fairfield Ins. Co. v. Stephens Martin Paving, L.P.*, 381 F.3d 435, 437 (5th Cir. 2004).

III. PROCEDURAL ISSUES

A. THE TEXAS SUPREME COURT GRANTS MANDAMUS RELIEF TO ENFORCE FORUM SELECTION CLAUSES IN INSURANCE POLICIES

As an issue of first impression for the court, the Texas Supreme Court held that a forum selection clause in an insurance policy is enforceable and that mandamus relief is the appropriate remedy for a trial court's improper refusal to enforce a forum selection clause.¹¹⁴ The supreme court explained that although forum selection clauses were once disfavored by American courts, the United States Supreme Court has since held that a forum selection clause should be enforced unless the party opposing it can clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching. A clause may come within these exceptions if enforcement would contravene a strong public policy of the forum in which suit was brought, or when the contractually selected forum would be seriously inconvenient for trial. Where the inconvenience in litigating in the chosen forum is foreseeable at the time of contracting, "it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court."¹¹⁵ The supreme court concluded that because the insured failed to make this requisite showing, the forum selection clause at issue was enforceable and the trial court clearly abused its discretion in refusing to enforce it.¹¹⁶

The court then turned to whether the forum selection clause should be enforced by mandamus. The court explained that it has consistently granted mandamus relief to enforce another type of forum selection clause, an arbitration agreement, and that it saw no meaningful distinction between this type of forum selection clause at issue and arbitration clauses. The court emphasized that subjecting a party to trial in a forum other than that agreed upon and requiring an appeal to vindicate the rights granted in a forum-selection clause is clear harassment. Accordingly, the court concluded that the insurer did not have an adequate remedy by appeal and that mandamus relief was therefore appropriate.¹¹⁷

B. CHOICE OF LAW PRINCIPLES GOVERNING INSURANCE POLICIES

The Houston Court of Appeals set forth Texas choice of law principles for determining which state's law governs the interpretation of an insur-

114. *In re AIU Ins. Co.*, 148 S.W.3d 109, 111, 114-15, 120 (Tex. 2004) (orig. proceeding).

115. *Id.* at 112-13 (quoting *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972)).

116. *Id.* at 111-15.

117. *Id.* at 115-20. Two months after this holding, the supreme court granted mandamus relief in a second case to enforce a forum selection clause in an insurance policy. See *In re Automated Collection Techs., Inc.*, 156 S.W.3d 557 (Tex. 2004).

ance policy.¹¹⁸ Pursuant to Article 21.42 of the Texas Insurance Code,¹¹⁹ Texas law governs when: (1) the insurance proceeds are payable to a Texas citizen or inhabitant; (2) the policy is issued by an insurer doing business in Texas; and (3) the policy is issued in the course of the insurer's business in Texas. Because a corporation is an inhabitant only of its state of incorporation, the court found that because the insured was incorporated in Nevada, it could not be considered an inhabitant of Texas. Thus, Article 21.42 did not apply.¹²⁰ In the absence of a statutory directive, the court proceeded to determine which state had the most significant relationship under the factors in section 6 of the Restatement.¹²¹ When the policy provides nationwide liability coverage, the places of contracting and negotiation, and the domicile, residence, nationality, place of incorporation, and place of business of the parties are the primary factors to be considered. Applying these factors, the court found that the insurer was a Texas corporation with its principal place of business in Texas, the contracts were negotiated in Texas, the policy was issued in Texas, the premiums were to be paid in Texas, and notices were to be submitted in Texas. The court also determined that Texas had a strong interest in the outcome of a coverage dispute involving a Texas insurer and insured, but that Louisiana had little interest in whether any settlements or judgments were paid by the insured or by its insurers or in regulating an exclusion in a Texas policy. Thus, the application of Texas law was proper.¹²²

118. *Reddy Ice Corp. v. Travelers Lloyds Ins. Co.*, 145 S.W.3d 337, 340-46 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).

119. TEX. INS. CODE ANN. art. 21.42 (Vernon 1981).

120. *Reddy Ice Corp.*, 145 S.W.3d at 340-44.

121. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

122. *Reddy Ice Corp.*, 145 S.W.3d at 344-46; *see also* *Scottsdale Ins. Co. v. Nat'l Emergency Servs., Inc.*, No. 01-02-00929-CV, 2004 Tex. App. LEXIS 6885, at *16-28 (Tex. App.—Houston [1st Dist.] July 29, 2004, pet. denied) (applying the most significant relationship test and finding that, under either the Restatement section pertaining to contract actions or to the section pertaining to fraud and misrepresentation actions, the application of Texas law was proper).

