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INSURANCE LAW

by

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I. EXCESS LIABILITY

THE law of insurance in Texas, like so many other areas of Texas law, is in a state of great change and turmoil. No area more exemplifies this turmoil than that of excess liability or "bad faith." The Texas Supreme Court, over the past year, has expanded old theories of recovery, adopted new theories of recovery and extended the reach of statutory provisions for treble damages into the realm of insurance law.

A. Stowers *Liability*

Negligence in Handling Case. In *Ranger County Mutual Insurance Co. v. Guin*[1] Ranger issued an automobile policy naming Peden, the owner of a dump truck, as the insured. Guin operated the truck for various entities, including Peden's employer, Texas Bitulithic. Guin was involved in a collision with a truck owned by Eagle Trucking and operated by Fitch. Peden and Guin filed a suit against Fitch and Eagle for property damage to Peden's truck and for the personal injuries sustained by Guin. Fitch and Eagle cross-claimed for personal injuries to Fitch and for property damage to the truck operated by Fitch. The limits of liability under the policy issued by Ranger to Peden were $10,000 per person and $20,000 per occurrence for bodily injury and $10,000 per occurrence for property damage. The jury found that Guin's negligence was one hundred percent of the cause of the collision and awarded Fitch $216,232.25 for personal injury and awarded Eagle $47,000 for property damage.[2]

Peden and Guin subsequently brought suit against Ranger under the *Stowers* doctrine,[3] asserting that the cross-claim could have been settled

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1. 723 S.W.2d 656 (Tex. 1987).

2. *Id.* at 658.

3. The *Stowers* doctrine derives from G. A. Stowers Furniture Co. v. American Indem. Co., 15 S.W.2d 544 (Tex. Comm'n App. 1929, holding approved). This doctrine has typically been used to impose liability above the policy limits when (1) the insurer defending the case, (2) having received an unconditional offer to settle within the policy limits, (3) negligently

within their policy limits, because an offer within the limits was made by the claimants. Ranger attempted to defend the case on the basis that the offer to settle was not an unconditional offer. The jury found, however, that Ranger was negligent in the manner in which it handled the claim and lawsuit asserted against its insureds.[4]

The Texas Supreme Court found it unnecessary to decide whether the offer made was unconditional because the court found that the *Stowers* doctrine is broader than the failure of an insurer to settle within policy limits.[5] The court emphasized that the duty of the insurer extends to the full range of the insurer's responsibilities in the handling of the case against the insured.[6] The court stated that an insurer is liable to its insured for damages sustained as a proximate result of the insurer's negligence in investigation, preparation for the defense of the lawsuit, trial of the case, or reasonable attempts to settle.[7] In extending the holding of *Stowers*, the supreme court ruled that, when the representation of the insured is concerned, the attorney hired by the insurance carrier is the sub-agent of the insured and any negligence attributable to the attorney will be imputed to the insurance carrier.[8]

The court in *Guin* held that the failure of the insurer and its agents to inform the insured that an offer had been made was some evidence in support of the jury finding that Ranger handled the claim negligently.[9] The court also found that the tender of the full limits conditioned on something being paid to the insured on their own primary claim was also evidence sup-

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refuses to settle, (4) resulting in a judgment in excess of the policy limits being rendered against the insured. Comment, *Bad Faith: Limiting Insurers' Extracontractual Liability in Texas*, 41 Sw. L.J. 719, 722-23 (1987).

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

5. *Id.* at 659.

6. *Id.* The court reasoned that this duty comes from the fact that the policy gives the insurer "complete and exclusive control of the investigation, negotiation and defense of the claim." *Id.* One Texas court has specifically refused to extend *Stowers* to a situation where no policy was ever in existence. William M. Mercer, Inc. v. Woods, 717 S.W.2d 391, 400 (Tex. App.—Texarkana 1986, writ granted) (involving attempt to impose an excess judgment on an insurance agent and insurer for failure to procure and issue coverage).

7. *Guin*, 723 S.W.2d at 659. The court did not elaborate on the measure of damages in cases outside of the traditional *Stowers* context of settlement. Strong arguments can be made that in negligent handling or investigation cases the measure of damages should not automatically be the full extent of the excess judgment. It has been held that the excess judgment, while some evidence of actual damages, is not conclusive evidence of the amount of damages. William M. Mercer, Inc. v. Woods, 717 S.W.2d at 399 (citing Montfort v. Jeter, 567 S.W.2d 498, 499-500 (Tex. 1978)).

8. *Guin*, 723 S.W.2d at 659. This result conflicts with Employer's Casualty Co. v. Tilley, 496 S.W.2d 552, 558 (Tex. 1973), in which the court held an attorney retained by a liability carrier to defend an insured owes its duty of loyalty not to the carrier, but to the insured. The court held that the insured is deemed to be the client of the defense counsel as if the counsel had been retained by the insured in the first instance. *Id.* The court in *Guin* is apparently attempting to drive a wedge between the defense counsel and the insured. For purposes of fiduciary responsibility and loyalty, the court apparently holds that the defense counsel is the agent of the insured; while for purposes of imputing liability for any negligent act of the defense counsel, the court holds that the defense counsel is the agent of the insurer. 723 S.W.2d at 663 (Gonzalez, J., dissenting).

9. *Id.* at 660; *see* Allstate Ins. Co. v. Kelly, 680 S.W.2d 595, 608 (Tex. App.—Tyler 1984, writ ref'd n.r.e.).

porting the jury finding of negligence.[10] The court apparently found additional evidence of negligence in the fact Ranger authorized its attorney only to offer the personal injury limits, and not the separate property damage limits.[11]

Statute of Limitations. In *Nash v. Carolina Casualty Insurance Co.*[12] Nash was involved in a collision on December 29, 1976, with a truck owned by Lock. Nash filed suit against Lock and the driver of the truck. The insurer incorrectly refused to defend Lock or his driver on the grounds that the particular vehicle was not included within the coverage. The court rendered judgment in excess of the policy limits against Lock and his driver. Nash later obtained an assignment of any rights of the insured to recover the portion of the underlying judgment in excess of the policy limits. On December 23, 1983, Nash, as assignee, filed suit, alleging that the insurer acted negligently and breached the contract of insurance. Nash asserted that the insurer breached the contract willfully and in bad faith and violated the DTPA[13] and the Texas Insurance Code[14] by failing to defend and by failing to negotiate a settlement of the underlying suit.

The Dallas court of appeals ruled that the *Stowers* action brought by Nash was a tort action and barred unless filed within two years after the action accrued.[15] The court ruled that the *Stowers* action accrued on the date that the judgment against the insured became final, which was more than two years prior to the bringing of suit.[16] Nash asserted that the refusal to defend was contractual in nature and was therefore governed by the four-year statute of limitations.[17] The court agreed with this argument, but held that a claim for failure to defend matures when the defense is refused.[18] Because the insurer refused defense of the driver more than four years before suit, the court held these claims were also barred.[19]

Nash also asserted that the DTPA and Insurance Code claims were governed by the four-year DTPA and Insurance Code statute of limitations in force when the refusal to defend occurred. The court held that even applying this statute of limitations, the claims were barred because they accrued when the insurer refused to defend, more than four years prior to the filing

10. *Guin*, 723 S.W.2d at 660. The court's holding is difficult to understand. The court's ruling makes the insurer responsible for the actions of defense counsel even if the actions were taken in pursuit of his separate agency/contractual relationship with the insureds as their plaintiff's attorney pursuing their own rights of recovery.

11. *Id.* at 659.

12. 741 S.W.2d 598 (Tex. App.—Dallas 1987, writ denied).

13. Texas Deceptive Trade Practices-Consumer Protection Act, TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon 1987).

14. TEX. INS. CODE ANN. art. 21.21, § 16 (Vernon Supp. 1988).

15. *Nash*, 741 S.W.2d at 600.

16. *Id.*

17. *Id.* In William M. Mercer, Inc. v. Woods, 717 S.W.2d 391, 397-98 (Tex. App.—Texarkana 1986, writ granted), the court held that the two-year statute of limitations applied to refusal to defend and/or failure to procure insurance against an insurance agent.

18. *Nash*, 741 S.W.2d at 600-01; *accord Mercer*, 717 S.W.2d at 397-98.

19. *Nash*, 741 S.W.2d at 601.

of suit.[20]

B. Duty of Good Faith and Fair Dealing

First-Party Insurance. In *Arnold v. National County Mutual Fire Insurance Co.*[21] Glen Arnold was severely injured when a car driven by an uninsured motorist struck the motorcycle he was operating. Arnold had uninsured motorist coverage with National County with a limit of $10,000. A timely demand was made for payment, and National County refused to pay the claim. Arnold brought suit against the uninsured motorist and National County in late June 1974; in December 1977, Arnold obtained a judgment against both defendants for $17,975. National County subsequently paid Arnold the $10,000 policy limits. Arnold then filed suit on December 27, 1978, asserting that National County breached its duty of good faith and fair dealing and violated numerous statutory duties. The trial court granted summary judgment against Arnold, and the court of appeals affirmed.[22]

The Texas Supreme Court affirmed National County's summary judgment, rejecting Arnold's claims under the DTPA[23] and article 21.21-2 of the Texas Insurance Code[24] because county mutual insurance companies were exempted from the application of these acts when suit was brought. The court, however, reversed the rulings of the court of appeals and trial court in holding that a duty of good faith and fair dealing existed between Arnold and National County.[25]

The *Arnold* court found that the duty arises from the special relationship in the insurance context from the unequal bargaining power of the parties and the ability of unscrupulous insurers to take advantage of insureds.[26] The court emphasized that insurers have exclusive control of the evaluation, processing, and denial of claims and thus have a duty of ordinary care.[27] The court ruled that a cause of action for breach of the duty of good faith is stated when the insured alleges that no reasonable explanation or basis exists for denial of the claim or for delay on the part of the insurer in payment of the claim.[28] Such an action exists where it is alleged that the insurer failed

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20. *Id.*

21. 725 S.W.2d 165 (Tex. 1987).

22. *Id.* at 166.

23. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon 1987).

24. TEX. INS. CODE ANN. art. 21.21-2 (Vernon Supp. 1988).

25. 725 S.W.2d at 167. The duty of good faith and fair dealing had been rejected on several occasions by Texas courts. The duty was most recently raised in a contractual context in English v. Fischer, 660 S.W.2d 521, 522 (Tex. 1983), in which the court rejected the duty as being "contrary to our well-reasoned and long-established adversary system which has served us ably in Texas for almost 150 years." The court noted that the present system allows the parties to a dispute to bring their case to an impartial tribunal for an adjudication of their rights under the contract. *Id.* The danger noted by the court in adopting such a duty is that it "would abolish our system of government according to settled rules of law and let each case be decided upon what might seem fair and in good faith" to the fact finder. *Id.* at 522. A serious question exists as to why the supreme court reversed itself only three years after *Fischer.*

26. *Arnold*, 725 S.W.2d at 167.

27. *Id.*

28. *Id.*; *accord* Lee v. Safemate Life Ins. Co., 737 S.W.2d 84, 85 (Tex. App.—El Paso 1987, writ dism'd) (applying similar duty of good faith to a disability carrier). It would appear

to exercise ordinary care in its investigation to determine whether a reasonable basis existed for denial or delay in payment.[29]

The action for breach of the duty of good faith, because the court placed it in the law of torts, broadens the potential damages recoverable. Clearly, mental anguish damages may be recovered.[30] Importantly, exemplary damages may be recovered.[31] Recovery of damages in a bad faith action, however, will still be governed by the rules permitting recovery of damages in other tort actions.[32]

The court in *Arnold* last addressed whether the statute of limitations barred the breach of the duty of good faith claim.[33] The court agreed that the applicable statute of limitations was the two-year statute.[34] The court held, however, that the statute did not begin to run on a bad faith claim until the underlying insurance contract claims were finally resolved.[35] The court thus rejected the argument that the insured's cause of action accrued when

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that the Texas duty of good faith is a negligence concept that may be best described as an illegitimate child conceived by the law of tort and contracts, which some have referred to as the law of "contorts." In any event, as suggested in *Fischer*, 660 S.W.2d at 522, one must ask why the court finds it necessary to create another cause of action to regulate conduct that is already regulated by negligence, contract law, and a whole host of statutory causes of action under the DTPA and the Texas Insurance Code? Similar questions were raised in Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349, 352-55 (Tex. 1987) (adopting a new implied warranty cause of action in service contracts despite existence of available causes of action of negligence and breach of contract).

29. *Arnold*, 725 S.W.2d at 167. Justice Gonzales, in a concurring opinion, added the requirement that the person seeking relief establish a contractual relationship between himself and the insurer. *Id.* at 168. One significant issue remaining at this point is whether the duty will extend to third-party claimants under a liability policy who have no contractual relationship with the insurer. The majority rule in other jurisdictions is that the duty of good faith and fair dealing arises out of the personal relationship existing between the insured and insurer and no such duty exists to a claimant under a liability policy who is not an insured. *See infra* note 41 and accompanying text. Existing Texas law on this subject would support the majority position. *See infra* note 41 and accompanying text.

30. *Arnold*, 725 S.W.2d at 168.

31. *Id.* This holding would appear to be in conflict with the recent decision of the court in Jim Walters Homes, Inc. v. Reed, 711 S.W.2d 617, 618 (Tex. 1986), in which the court held that an action for negligence, based on a duty arising from a contract, seeking economic loss as damages is really a contract action that cannot support an award of exemplary damages. Under *Reed*, insureds would appear to be required to establish tort damages, such as mental anguish, to support an exemplary damage award because ordinarily economic damages for breach of contract will not support an exemplary damage award. 711 S.W.2d at 618.

32. *Arnold*, 725 S.W.2d at 168.

33. *Id.* at 167.

34. *Id.* TEX. REV. CIV. STAT. ANN. art. 5526 (Vernon 1958) (now TEX. CIV. PRAC. & REM. CODE § 16.003 (Vernon 1986)).

35. *Arnold*, 725 S.W.2d at 168. In the original majority opinion, written by Justice Ray, this holding was unaccompanied by a footnote. 30 Tex. Sup. Ct. J. 177, 179. In the opinion published by West Publishing Company, however, a footnote was added, which stated: "This does not mean that a contract claim and a claim for breach of the duty of good faith and fair dealing may not be tried together when possible." 725 S.W.2d at 168 n.1. This footnote was not added by any revisions to the opinion published in the Journal, and, because of its sudden and mysterious appearance in the West version of the opinion, it has become known as the "phantom footnote." On February 6, 1988, more than a year after the original publication of the opinion, the court finally published an errata noting the addition of the "phantom footnote." 31 Tex. Sup. Ct. J. 193 (Feb. 6, 1988).

the insurer rejected his claim.[36]

The duty of good faith and fair dealing was again raised in *Chitsey v. National Lloyds Insurance Co.*[37] In that case, Chitsey obtained a fire policy with National Lloyds at a face value of $16,000. On January 9, 1981, a fire occurred at the insured premises. Chitsey contended that the structure was a total loss, entitling him to the face value of the policy. Chitsey had obtained two estimates indicating that the cost of repairs would be $16,000. National Lloyds rejected the estimates obtained by the insured and obtained an estimate of its own of slightly over $7,000 and offered to settle for that amount. Chitsey refused the offer and filed suit, asserting, among other things, that National Lloyds had breached its duty of good faith and fair dealing in the handling of the claim.

The Texas Supreme Court ruled that a duty of good faith and fair dealing existed between Chitsey and National Lloyds that would give rise to tort damages.[38] Of particular importance in this case is footnote 1 to the opinion in which the court rejected the court of appeals' characterization of the case as involving a "covenant" of good faith and fair dealing.[39] The court noted that covenants are primarily contractual in nature and that the breach in this case was not of a contract but of a duty imposed by law.[40] The issue presented by this statement is whether the duty will ultimately be extended to persons lacking a contractual relationship with the insurer. The only cases addressing this point to date have held that the duty only extends to the insureds under the contract.[41]

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36. *Arnold*, 725 S.W.2d at 168 (citing Linkenhoger v. American Fidelity & Casualty Co., 152 Tex. 534, 539, 260 S.W.2d 884, 887 (1953) (involving accrual in a *Stowers* case)).

37. 738 S.W.2d 641 (Tex. 1987).

38. *Id.* at 643.

39. *Id.* at 558.

40. *Id.*

41. *See* Chaffin v. Transamerica Ins. Co., 731 S.W.2d 728, 732 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.). The majority rule in other jurisdictions is that the duty of good faith runs only to the insured, not to a third-party claimant. *See* Dickey v. Farm Bureau Mut. Ins. Co., 447 So. 2d 693, 694 (Ala. 1984) (attempting to recover from automobile insurer for repairs to auto damaged in collision with insured vehicle); Murphy v. Allstate Ins. Co., 17 Cal. 3d 937, 553 P.2d 584, 586, 132 Cal. Rptr. 424 (1976) (seeking balance of wrongful death judgment from insurer of tortfeasor); Eichler v. Scott Pools, Inc., 513 N.E.2d 665, 667 (Ind. Ct. App. 1987) (seeking damages from automobile accident in which plaintiff's parents were the insureds); Linscott v. State Farm Mut. Auto. Ins. Co., 368 A.2d 1161, 1163 (Me. 1977) (charging deceit and misrepresentation by tortfeasor's insurer); Magalski v. Maryland Casualty Co., 21 Md. App. 136, 318 A.2d 843, 849 (1974) (claiming damages for tortfeasor's insurer's refusal to pay property damage); Chavez v. Chenoweth, 89 N.M. 423, 553 P.2d 703, 709 (Ct. App. 1976) (claiming against defendant's insurer for unreasonable delay); D. H. Overmyer Telecasting Co. v. American Home Assur. Co., 29 Ohio App. 3d 31, 502 N.E.2d 694, 698 (1986) (claiming against attorney's liability insurer); Tank v. State Farm Fire & Casualty Co., 715 P.2d 1133, 1139 (Wash. 1986) (claiming against insurer of defendant in assault action).

Texas law would also dictate this result because the duty of good faith arises out of the special relationship that exists between the insurer and the insured. *Arnold*, 725 S.W.2d at 167. This special relationship does not exist between the insurer and the third-party claimant. Duncan v. Lumbermen's Mut. Casualty Co., 91 N.H. 349, 23 A.2d 325, 326 (1941); *see also* Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136, 1175-77 (1954) (discussing insurer's lack of duty to claimant). In a concurring opinion in English v. Fischer, 660 S.W.2d 521, 524 (Tex. 1983), Justice Spears noted that such a duty did not exist

Third Party Insurance. In *Chaffin v. Transamerica Insurance Co.*[42] Chaffin sued U.S. Seal for negligence in the waterproofing of roofs of townhomes owned by Chaffin. U.S. Seal admitted liability and notified Transamerica, its liability insurance carrier, of the claim. Transamerica denied the claim on the basis of no coverage. Chaffin sued Transamerica for tortious handling of the property claim. Transamerica later admitted that it was incorrect in denying coverage and paid its limits to Chaffin. Chaffin, however, continued the suit against Transamerica.

One of the bases upon which Chaffin predicated liability against Transamerica was the breach of the duty of good faith. The court of appeals held that the duty of good faith and fair dealing runs only from an insurer to its insured.[43] The court stated that a liability carrier owes no such duty when dealing with a third party claimant.[44]

Workers' Compensation. The duty of good faith and fair dealing was extended to the processing of claims by workers' compensation carriers in *Aranda v. Insurance Co. of North America.*[45] The court reasoned that the employee is a party to the insurance contact and that the contract creates the same type of relationship as other insurance contracts.[46] The court rejected arguments that the role of the Industrial Accident Board alters this relationship.[47] The court stated that the elements of a bad faith action require proof that a reasonable insurer would not have delayed or denied the benefits and that the carrier actually knew there was no reasonable basis for the denial or delay or that the carrier should have known there was no reasonable basis for denial or delay.[48] The court rejected arguments that the Workers Compensation Act exclusivity provision[49] barred bad faith claims.[50]

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in all contractual relationships but only those which involved a special relationship. One example cited by Justice Spears was the duty to make a good faith effort to settle a liability case. *Id.* (citing *Stowers*, 15 S.W.2d at 547). Indeed, under Texas law, the cause of action for excess damages for breach of this duty is personal to the insured and may not be brought by the underlying tort claimant. *See, e.g.*, Hernandez v. Great Am. Ins. Co., 464 S.W.2d 91, 95 (Tex. 1971) (holding insured entitled to sue liability insurer for failure to settle); Becker v. Allstate Ins. Co., 678 S.W.2d 561, 562 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (holding plaintiff had no standing to sue insurer for excess judgment against insured); Samford v. Allstate Ins. Co., 529 S.W.2d 84, 87 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.) (holding judgment creditor had no action against debtor's insurer for negligence in settling claim); Cook v. Superior Ins. Co., 476 S.W.2d 363, 364 (Tex. Civ. App.—Beaumont 1972, writ ref'd n.r.e.) (holding that judgment creditor could not sue judgment debtor's liability insurer).

42. 731 S.W.2d 728 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).

43. *Id.* at 732.

44. *Id.*

45. 31 Tex. Sup. Ct. J. 279 (March 23, 1988), *rev'g*, 722 S.W.2d 755 (Tex. App.—Houston [14th Dist.] 1986, writ granted).

46. 31 Tex. Sup. Ct. J. at 281.

47. *Id.*

48. *Id.*

49. TEX. REV. CIV. STAT. ANN. art. 8306, § 3 (Vernon Supp. 1988). The court also refused to find that the penalty provision in TEX. REV. CIV. STAT. ANN. art. 8306, § 18a (Vernon Supp. 1988) barred bad faith claims. *Aranda*, 31 Tex. Sup. Ct. J. at 283.

50. *Aranda*, 31 Tex. Sup. Ct. J. at 282.

C. Deceptive Trade Practices and Article 21.21 of the Insurance Code

First Party Insurance. As noted above, in *Chitsey v. National Lloyds Insurance Co.*[51] Chitsey brought suit against its insurer under article 21.21 of the Insurance Code[52] for failing to use due diligence in determining the amount of Chitsey's loss under a fire policy. The court of appeals rejected Chitsey's cause of action under article 21.21 for unfair practices and held that the acts which Chitsey complained of could not be the basis of a cause of action under the Insurance Code.[53]

The Texas Supreme Court in *Chitsey* affirmed the judgment of the court of appeals, holding that Chitsey failed to establish facts that would constitute a violation of the Insurance Code.[54] The court noted that section 16 of article 21.21 prohibits three types of conduct: (1) conduct prohibited under section 4 of article 21.21 as unfair competition or a deceptive trade practice; (2) conduct not permitted by the rules or regulations lawfully adopted by the State Insurance Board under article 21.21; and (3) practices prohibited by the DTPA in section 17.46 as unlawful deceptive trade practices.[55] Chitsey did not claim that National Lloyds engaged in the first or third types of prohibited conduct. Rather, Chitsey argued that National Lloyds engaged in the second type of conduct prohibited by section 16.

Chitsey asserted that National Lloyds was guilty of a violation of State Board of Insurance Orders 41060 and 41454.[56] Board Order 41454 defined an unfair claim settlement practice as the refusal to pay claims without conducting a reasonable investigation with such frequency as to indicate a general business practice.[57] The court ruled that this order required more than proof of a single act.[58] Because Chitsey neither proved nor obtained findings that Lloyds' refusal to reasonably investigate was committed with such frequency as to indicate a general business practice, the court held that there could be no recovery under Board Order 41454.[59]

In *Lee v. Safemate Life Insurance Co.*[60] the plaintiff brought suit for violations of article 21.21 and article 21.21-2 of the Texas Insurance Code. Lee purchased disability insurance from Safemate to secure payment of an automobile loan from a credit union. Lee claimed that she became ill from thrombophlebitis and she was terminated from her employment without pay. She applied to Safemate for the loan payments that she was unable to make, but Safemate denied these claims, asserting her disease was a preexisting condition. The plaintiff brought suit under article 21.21, section 16 of

51. 738 S.W.2d 641 (Tex. 1987).
52. TEX. INS. CODE ANN. art. 21.21 (Vernon Supp. 1988).
53. 738 S.W.2d at 643.
54. *Id.*
55. *Id.* at 642; TEX. INS. CODE ANN. art. 21.21, § 16 (Vernon Supp. 1988).
56. Texas State Bd. of Ins., Amendment of Unfair Competition and Unfair Practices of Insurers' Rules, Docket No. 41060 (June 4, 1982), Docket No. 41454 (Aug. 10, 1982).
57. Texas State Bd. of Ins., Docket No. 41454 (Aug. 10, 1982).
58. 738 S.W.2d at 643.
59. *Id.*
60. 737 S.W.2d 84 (Tex. App.—El Paso 1987, no writ).

the Texas Insurance Code.[61] The jury found that the insurance company engaged in unfair acts or practices in the handling of plaintiff's claim by (1) engaging in unreasonable and unjustified delays, (2) failing to use due diligence, and (3) failing to deal in good faith.[62] The trial court ruled that these findings would not support an award under article 21.21.[63]

The court of appeals in *Lee* addressed each of the three types of conduct actionable under article 21.21, section 16(a).[64] With respect to section 4 of article 21.21, the court noted that the section contains eight subsections defining unfair practices in the businesses of insurance, and none of them pertained to unfair claim settlement practices.[65] The court specifically held that the prohibitions regarding false advertising had no application to the denial of the claim by an insurance company.[66]

With respect to the violation of the State Board of Insurance's rules and regulations, Lee contended that Safemate had violated Board Orders 41060 and 27085.[67] The court noted that Board Order 27085 deals with unfair acts and practices in the settlement of claims.[68] The court, however, held that violation of the board order was not a violation of section 16 since Board Order 27085 was adopted under the provisions of article 21.21-2 rather than article 21.21.[69] The court also ruled that Board Order 41060 contained no prohibition relating to acts or practices in the settlement of claims.[70] The court concluded that, contrary to the supreme court's holding in *Chitsey*, nothing in Board Order 41060 required incorporation of the provisions of another board order requiring reasonable investigation of claims.[71]

With respect to the claimed violation of section 17.46 of the DTPA, the court in *Lee* noted that none of the proscribed practices dealt with claims settlement practices.[72] The court found nothing in section 17.46 that could form the basis for a judgment.[73] Finally, the plaintiff argued that the defendant's violation of Board Order 27085 would be actionable under article 21.21-2 inasmuch as the order was adopted pursuant to that provision. The court of appeals, however, following earlier authority, noted that article 21.21-2 provides no cause of action to individual insureds.[74]

The Texas Supreme Court has granted writ in the 1985 case of *Texas*

61. TEX. INS. CODE ANN. art. 21.21, § 16(a) (Vernon Supp. 1988).
62. 737 S.W.2d at 85.
63. *Id.* at 84.
64. *Id.* at 85.
65. *Id.* at 86.
66. *Id.*
67. Texas State Bd. of Ins., Amendment of Unfair Competition and Unfair Practices of Insurers' Rules, Docket No. 41060 (June 4, 1982); Docket No. 27085 (May 17, 1974) (now Texas State Bd. of Ins., Docket No. 41454 (Aug. 10, 1982)).
68. 737 S.W.2d at 86.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* TEX. BUS. & COM. CODE ANN. § 17.46 (Vernon 1987).
73. 737 S.W.2d at 86.
74. *Id.*; *see* Cantu v. Western Fire & Casualty Co., Ltd., 716 S.W.2d 737, 741 (Tex. App.—Corpus Christi 1986), *writ ref'd n.r.e. per curiam*, 723 S.W.2d 668 (Tex. 1987).

Farm Bureau Mutual Insurance Co. v. Vail,[75] which addresses the availability of statutory relief and excess damages in first-party cases. The court of appeals in *Vail* refused to extend the *Stowers* doctrine, apparently as a basis for a duty of good faith, to first-party carriers.[76] The *Vail* court noted that a liability carrier's duties and responsibilities differ from a property insurer's obligations.[77] The court added that because the legislature did not create a cause of action for unfair claims practice under the DTPA, the legislature intended to prevent actions for unfair claims settlements under the comprehensive wording of the DTPA and Insurance Code.[78] The court also held that a violation of section 4(a) of Board Order 18663 was not actionable because it was enacted pursuant to article 21.21-2, which does not create a private cause of action.[79]

Workers' Compensation. In *Aetna Casualty & Surety Co. v. Marshall*[80] Aetna entered into an agreed judgment with Marshall settling his workers' compensation claims. As part of the settlement, Aetna agreed to pay future medical costs incurred within five years from the date of the judgment. The settlement agreement was incorporated into a judgment signed August 3, 1978. After entry of the judgment, Marshall encountered difficulties with Aetna in obtaining reimbursement for medical expenses he had incurred, experiencing payments delays from four to seventeen months. Aetna asserted that its refusal to pay these expenses was based upon its mistaken reliance upon the terms of a copy of a proposed judgment in its file that would have given Aetna the right to approve Marshall's medical treatment. Aetna admitted the judgment actually entered by the trial court did not give it any such right. Marshall filed suit under article 21.21 of the Insurance Code for treble damages and also alleged breaches of the duty of good faith and fair dealing. The trial court entered a judgment awarding treble damages to Marshall, and the court of appeals affirmed.[81]

Although the Supreme Court granted writ to consider the validity of the cause of action for breach of the duty of good faith, the court declined to resolve the issue, because Marshall elected to proceed on the basis of his recovery under article 21.21 of the Insurance Code.[82] Aetna attempted to defend the article 21.21 claim by arguing that Marshall as a claimant under a workers' compensation policy was not a consumer of goods or services.[83]

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75. 695 S.W.2d 692 (Tex. App.—Dallas 1985, writ granted).

76. *Id.* at 694.

77. *Id.*

78. *Id.* (quoting Comment, *An Insurer's Failure to Settle: Standing Under the Stowers Doctrine, Texas Deceptive Trade Practices Act, and Article 21.21 of the Insurance Code*, 34 BAYLOR L. REV. 441, 455 (1982)).

79. *Vail*, 695 S.W.2d at 694; *accord* McKnight v. Ideal Mut. Ins. Co., 534 F. Supp. 362, 364 (N.D. Tex. 1982).

80. 724 S.W.2d 770 (Tex. 1987).

81. *Id.* at 771.

82. *Id.* at 772.

83. *Id.* The Fort Worth court of civil appeals in Rodriquez v. Texas Employers' Ins. Ass'n, 598 S.W.2d 677, 679 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.), had previously held that no cause of action existed under the DTPA for unfair claims settlement prac-

The supreme court rejected this argument on the grounds that article 21.21 does not require proof that Marshall was a consumer of goods or services.[84] The court, instead, noted that article 21.21 allows a cause of action to a person who was injured by the acts of another insurance carrier.[85]

Aetna contended that a compromise settlement agreement that is incorporated into a judgment is not an insurance policy and that the mere failure to pay a judgment is not actionable under article 21.21. The Texas Supreme Court disagreed and ruled that any person engaging in conduct prohibited by section 4 is liable to another pursuant to the provisions of section 16 of article 21.21.[86] Aetna next argued that Marshall's claim under the Workers' Compensation Act was limited to unpaid medical expenses plus twelve percent penalty. The supreme court held that the statutory penalties were not the exclusive remedy available to the injured claimant and that relief could be sought under article 21.21.[87] Aetna's last argument to the supreme court was that Marshall was required to submit his dispute to the Industrial Accident Board (IAB) prior to the bringing of the case in the district court.[88] The court rejected this argument because the statute did not become effective until August 29, 1983, more than four years after Marshall initiated his suit against Aetna.[89]

The holding in *Aetna* was followed by the El Paso court of appeals in *Liberty Mutual Fire Insurance Co. v. McDonough*.[90] In that case, McDonough and Liberty Mutual entered into a compromise settlement agreement requiring Liberty Mutual to pay all future hospital medical expenses resulting from the claimant's injuries, if the medical procedures were performed under the direction or referral of Dr. Mims or Dr. Driscoll during a five-year period. The claimant had two back operations prior to the execution of this settlement agreement and two operations after the agreement. Dr. Driscoll recommended a fifth surgery and the claims supervisor refused authorization until the claimant obtained a second opinion. The surgery was performed in October of 1984. The carrier did not pay the doctor and hospital bills until the setting of a hearing before the IAB in March of 1985. In February of 1985, McDonough filed suit seeking damages resulting from the delay in payment of the medical bills. The bases for his suit included violations of section 17.46 of the DTPA and section 16 of article 21.21 of the Insurance Code.[91] The jury found that the delay in payment of the medical benefits

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tices of a workers' compensation carrier because the worker did not occupy the status of a consumer as required by the DTPA.

84. *Marshall*, 724 S.W.2d at 772.

85. *Id.*

86. *Id.*

87. *Id.*

88. *See* TEX. REV. CIV. STAT. ANN. art. 8307, § 12b (Vernon Supp. 1988); *see also* King v. Texas Employers' Ins. Ass'n, 716 S.W.2d 181, 183-84 (Tex. App.—Fort Worth 1986, no writ) (holding that workmen's compensation claimant must give notice to Industrial Accident Board of refusal by defendant to pay claim before bringing action in district court).

89. 724 S.W.2d at 772.

90. 734 S.W.2d 66 (Tex. App.—El Paso 1987, no writ).

91. TEX. BUS. & COM. CODE ANN. § 17.46 (Vernon 1987); TEX. INS. CODE ANN. art. 21.21, § 16 (Vernon Supp. 1988).

constituted a misrepresentation of the benefits to be provided pursuant to the compromise settlement agreement.[92] Liberty Mutual contended that the claimant had no cause of action under article 21.21. The El Paso court of appeals rejected this argument, noting that under *Marshall*[93] misrepresentations as to the benefits contained in the compromise settlement agreement were precisely the sort of conduct intended to give rise to a cause of action under section 17.46.[94]

II. GENERAL LIABILITY

Broad Form Workmanship Exclusion. The Dallas court of appeals held in *Dorchester Development v. Safeco Insurance Co.*[95] that the insurer had no duty to defend a suit against the insured, a general contractor, for damage to an apartment complex the insured failed to repair.[96] The policy provided broad form property damage coverage, which included exclusion y(2)(d)(iii) for property damage due to faulty workmanship by the insured.[97] The court found that the plaintiff failed to allege damage to other, nondefective, work performed by the insured and indicated that this type of damage would be covered.[98] The court concluded that exclusion y(2)(d)(iii) obviated coverage under the policy because the policy was not intended to provide the contractor protection for his own failure to perform.[99]

The decision in *Dorchester* does not clearly indicate whether it involved damages within the "completed operations" hazard,[100] dealing with property damage occurring after the work has been completed and/or the property has been put to its intended use by the purchaser. The broad form property damage endorsement includes a specific exclusion y(3) for completed operations claims. This exclusion applies only to work performed by

92. 734 S.W.2d at 67.

93. 724 S.W.2d 770 (Tex. 1987).

94. *McDonough*, 734 S.W.2d at 68.

95. 737 S.W.2d 380 (Tex. App.—Dallas 1987, no writ).

96. 737 S.W.2d at 381-82. The damages alleged included (1) crumbling concrete flooring, (2) paint peeling from gutters, and (3) a failure to include perimeter beams in certain patio slabs.

97. Exclusion y(2)(d)(iii) states that:

> The insurance does not apply to . . . property damage to that particular part of any property not on premises owned by or rented to the insured, . . . the restoration, repair or replacement of which has been made or is necessary by reason of faulty workmanship thereon by or on behalf of the insured.

98. *Id.* As indicated in *Dorchester*, the scope of y(2)(d)(iii) is still restricted to excluding damage to "that particular part of the property that must be repaired because of defective workmanship. Thus, where the part" of the work that caused the damaged can be identified, only that particular part will be excluded. 737 S.W.2d at 382. For example, in C. O. Falter, Inc. v. Crum & Forster Ins. Co., 79 Misc. 2d 981, 361 N.Y.S.2d 968 (N.Y. Sup. Ct. 1974), a gas line built by a subcontractor leaked under the building under construction. The court held that only the cost of repairing the work on the gas line was excluded. *Id. See* Bond Brothers, Inc. v. Robinson, 393 Mass. 546, 471 N.E.2d 1332, 1333 (1984); Frankel v. J. Watson Co., Inc., 21 Mass. App. 43, 484 N.E.2d 104, 105 (1985); Lusalon, Inc. v. Hartford Accident & Indem. Co., 23 Mass. App. 903, 498 N.E.2d 1373, 1374 (1986).

99. 737 S.W.2d at 382 (citing Eulich v. Home Indem. Co., 503 S.W.2d 846, 849 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.)).

100. 737 S.W.2d at 381-83.

the named insured, not to work performed by or on behalf of the insured by subcontractors. This appears to be a major distinction in scope between y(3) and y(2)(d)(iii). In other words, if the work performed by subcontractors failed after the work was completed, it would not necessarily be excluded under the plain language of y(3). A number of courts, however, have held that the deletion of "by or on behalf of" in exclusion y(3) does not indicate that coverage was intended for the failure of component work performed by subcontractors.[101] These courts theorize that when the general contractor transfers the completed project to the owner, all work performed by the subcontractors merges into the contractor's product.[102]

Some commentators suggest that the exclusions under y(2)(d) were intended to apply to only property damage occurring prior to completion.[103] Nevertheless, several courts, including the court of appeals in *Dorchester*, have implicitly held that y(2)(d)(iii) applies even in the context of completed operations.[104]

Date of Occurrence. The court in *Dorchester* also addressed the issue of when property damage under a general liability policy has occurred for purposes of determining whether the damages fall within the policy period.[105] This appears to be the first Texas case addressing this issue.[106] The court followed the decision of the Florida Court of Appeals in *Travelers Insurance Co. v. C.J. Gayfer's & Co.*,[107] in which it was held that the words "caused by an occurrence" meant that coverage was only afforded if a detectable injury or damage, not merely an act or omission, occurred during the policy period.[108] The *Dorchester* court concluded that the insurer is liable only if the property damage is identifiable during the policy period.[109] The court in *Dorchester* noted that the insured had admitted, by failing to answer requests for admission, that the damages were not manifest during the policy

101. *See, e.g.*, Tucker Constr. Co. v. Michigan Mut. Ins. Co., 423 So. 2d 525, 528 (Fla. Dist. Ct. App. 1982) (holding constructed floor of restaurant not covered after contractor accepted subcontractor's work and transferred completed work to owner); Knutson Constr. v. St. Paul Fire & Marine Ins. Co., 396 N.W.2d 229, 236 (Minn. 1986) (holding faulty workmanship is business risk of general contractor).

102. *Knutson*, 396 N.W.2d at 236-37.

103. GIBSON, BROAD FORM PROPERTY DAMAGE COVERAGE: ANALYSIS, APPLICATION AND ALTERNATIVES 10 (2d ed. 1982); F. C. & S. Bulletin, PUBLIC LIABILITY Epb-7 (1982). This interpretation is consistent with the manner in which y(2)(d) is arranged. At least four of the six sections of y(2)(d) deal expressly with damage to property "while on the premises," "while being used . . . in performing operations," "while in custody" of the insured to be installed or constructed, and while operations are being performed.

104. Southwest Forest Indus., Inc. v. Pole Bldgs., Inc., 478 F.2d 185, 187 (9th Cir. 1973); C. O. Falter, Inc. v. Crum & Forster Ins. Co., 79 Misc. 2d 981, 361 N.Y.S.2d 968, 975 (N.Y. Sup. Ct. 1974).

105. 737 S.W.2d at 383.

106. *Id.*

107. 366 So. 2d 1199, 1201 (Fla. Dist. Ct. App. 1979).

108. 737 S.W.2d at 383 (quoting *C. J. Gayfers*, 366 So. 2d at 1201). The *Dorchester* court also noted that the Idaho Supreme Court had reached a similar result in Miller's Mut. Fire Ins. Co. v. Ed Bailey, Inc., 103 Idaho 377, 647 P.2d 1249, 1251 (1982), wherein the court held that the time of occurrence of an accident is not the time when the wrongful act was committed, but is the time that the complaining party was actually damaged. 737 S.W.2d at 383.

109. 737 S.W.2d at 383.

period.[110]

The rule adopted in *Dorchester* appears to be consistent with the majority rule in other jurisdictions.[111] A different rule may apply if the case involves property with latent defects that later cause injury or damage.[112] Some courts in other jurisdictions have followed the exposure rule rather than the manifestation or discovery rule when the problems are latent and involve identifiable, continued injuries.[113] In several cases involving property damages which slowly developed and/or accumulated, courts have used the exposure rule to invoke coverage for all carriers on the risk during the development or exposure period.[114] The *Dorchester* court apparently concluded that the damages alleged did not involve latent, continued and accumulated property damage.[115]

Deductibles/Construction. In *Clemtex, Inc. v. Southeastern Fidelity Insurance Co.*[116] the court addressed whether each liability insurer, with respect to silicosis claims, is entitled to a full per claim deductible when held liable to the insured for only that portion or percentage of the period of exposure of the claimant that falls within the policy period. Under the exposure rule,

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110. *Id.*

111. *See, e.g.*, MRAZ v. Canadian Universal Ins. Co., 804 F.2d 1325, 1327 (4th Cir. 1986) (holding that the date of discovery of damage applied in a case involving the depositing of toxic waste over a lengthy period of time); Blue Streak Indus., Inc. v. N. L. Indus. Inc., 650 F. Supp. 733, 736 (E.D. La. 1986) (holding that the manifestation rule applied despite the fact that the alleged damage to gears occurred in microtraumas from the moment the gears were installed until the actual date of manifestation); Bartholomew v. Insurance Co. of N. Am., 502 F. Supp. 246, 252-53 (D.R.I. 1980), *aff'd*, 671 F.2d 496 (1st Cir. 1981) (holding that damages resulting from defects in manufactured car wash unit did not occur until it became apparent that product was fundamentally flawed); United States Fidelity & Guar. Co. v. American Ins. Co., 345 N.E.2d 267, 271 (Ind. Ct. App. 1976) (holding that occurrence was not equivalent to time of tortious act, but was established when spalling of defective bricks first became apparent); United States Fidelity & Guar. Co. v. Johnson Shoes, Inc., 461 A.2d 85, 87 (N.H. 1983) (holding that there was no occurrence until time when damage, involving underground leaks from oil tank, became known to insured).

112. *See* Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1225 (6th Cir. 1980).

113. *See, e.g.*, Lac D'Amiante Du Quebec, Ltee. v. American Home Assurance Co., 613 F. Supp. 1549, 1561 (D. N.J. 1985) (adopting the "continuous trigger" rule in cases involving asbestos property damage); California Union Ins. Co. v. Landmark Ins. Co., 145 Cal. App. 3d 462, 476, 193 Cal. Rptr. 461, 469 (1983) (applying discovery rule to case involving progressive leaks from pipe running to pool); CPS Chem. Co. v. Continental Ins. Co., 199 N.J. Super. 558, 489 A.2d 1265, 1269 (1984) (holding that coverage was invoked during entire period deposits of toxic waste were made at city waste dump, a form of the exposure rule); Boggs v. Aetna Casualty & Sur. Co., 252 S.E.2d 565, 567 (S.C. 1979) (holding that drainage difficulties, resulting in gradual seepage of water into home, invoked coverage as result of language in policy to the effect that injurious exposure to conditions may be produced over a lengthy period of time); Gruol Constr. Co. v. Insurance Co. of N. Am., 11 Wash. App. 623, 524 P.2d 427, 430 (1974) (involving dry rot resulting from negligent backfill at apartment complex).

114. Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212, n.18 (6th Cir. 1980) (citing Maples v. Aetna Casualty & Sur. Co., 83 Cal. App. 3d 641, 644, 148 Cal. Rptr. 80, 81-82 (1978); Tisseling v. General Accident Fire & Life Assurance Corp., 55 Cal. App. 3d 623, 626, 127 Cal. Rptr. 681, 683 (1976); Remmer v. Glens Falls Indem. Co., 140 Cal. App. 2d 84, 295 P.2d 19, 21 (1956); Deodata v. Hartford Ins. Co., 143 N.J. Super. 396, 363 A.2d 361, 365 (1976), *aff'd*, 154 N.J. Super. 263, 381 A.2d 364 (1977)).

115. *Dorchester*, 737 S.W.2d at 382.

116. 807 F.2d 1271, 1272-73 (5th Cir. 1987) (applying Texas law).

the Fifth Circuit has held that when claims involving progressive diseases resulting from exposure to products such as asbestos and silicon are brought against the insured, each insurer during the period of exposure is liable for a pro rata portion of the overall liability of the insured.[117] The insurers in *Clemtex* paid only a portion of each claim, but they each required the insured to pay a full deductible for each claim.[118]

The insured argued that the deductible should be apportioned according to a prorata percentage based on each insurer's limit of liability. The *Clemtex* court rejected this argument.[119] The court held, however, that the policy was ambiguous on the amount of the deductible in progressive disease cases.[120] The court indicated that summary judgment evidence suggested that Clemtex understood a full deductible was expected when it entered into the insurance contracts.[121] The court held that the district court could look to extrinsic evidence of the intent of the parties and other permissible aids of interpretation to resolve the ambiguity.[122]

Contractual Liability. The Dallas court of appeals, in *Mary Kay Cosmetics, Inc. v. North River Insurance Co.*,[123] held that the insurer had no duty to defend a claim against an insured for the breach of contract resulting from the insured's failure to indemnify and hold harmless the claimant for loss and expenses arising out of the purchase and installation of a product from the insured. First, the court noted that the policy defined contractual liability as involving liability assumed under a written contract.[124] Second, the

117. *Id.* The Fifth Circuit adopted the exposure rule in Ducre v. Executive Officers of Halter Marine, Inc., 752 F.2d 976, 992, 994 (5th Cir. 1985) (Louisiana law) (silicosis) and Porter v. American Optical Corp., 641 F.2d 1128, 1142 (5th Cir.) (Louisiana law) (asbestosis), *cert. denied*, 454 U.S. 1109 (1981). As yet, no Texas court has addressed the issue of when there has been an occurrence under a liability policy when a progressive disease such as asbestosis is involved. The court in *Clemtex* noted that the parties agreed to application of the exposure rule. 807 F.2d at 1277-78. The courts in other jurisdictions have adopted at least three different interpretations: (1) period of exposure, Insurance Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212, 1219, 1225 (6th Cir. 1980); (2) the date of manifestation of bodily injury, Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co., 682 F.2d 12, 17, 24 (1st Cir. 1982); (3) the "triple-trigger"—finding coverage as to all insurers from the point of initial exposure up to the date of manifestation, Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034, 1044-45 (D.C. Cir. 1981), *cert. denied*, 102 S. Ct. 1644 (1982). *See* Kahn, *Looking for "Bodily Injury": What Triggers Coverage under a Standard Comprehensive General Liability Insurance Policy*, 19 FORUM 532, 538-39 (1984).

118. In fact, the settlements in some instances were so small that the insurers' pro rata portion under the exposure rule would not exceed the amount of the deductible. *Clemtex*, 807 F.2d at 1275-77.

119. *Id.*

120. *Id.*

121. *Id.* at 1277.

122. *Id.* (citing Monte Christo Drilling Corp. v. Universal Ins. Co., 376 F.2d 161, 163-64 (5th Cir. 1967); Vetrano v. Aetna Life & Casualty, 612 S.W.2d 689, 692 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ); Commercial Standard Ins. Co. v. Quality Meat & Provision Co., 556 S.W.2d 134, 135 (Tex. Civ. App.—Fort Worth 1977, no writ)). *But see* Brooks, Tarlton, Gilbert, Douglas & Kressler v. United States Fire Ins. Co., 832 F.2d 1358, 1364-66 (5th Cir. 1987) (suggesting only rule of strict construction, and not extrinsic evidence, can be used to resolve ambiguities in exclusions and limitations in policy terms).

123. 739 S.W.2d 608, 612-13 (Tex. App.—Dallas 1987 no writ).

124. *Id.* at 613. The underlying contract was a bilateral obligation to indemnify. Com-

court noted that the definition of contractual liability does not include liability under a warranty of fitness or quality of the insured's products or a warranty that work by or on behalf of the insured will be performed diligently.[125] The court held that the policy provisions in question were unambiguous.[126]

Completed Operations and Product Exclusions. In *Colony Insurance Co. v. H.R.K., Inc.*[127] the insured sought coverage and a defense for a wrongful death claim based on a suicide committed with a gun purchased from the insured. The underlying action alleged strict liability under Restatement (Second) of Torts section 402(a)[128] and the ultrahazardous activity rule and negligence in selling a gun to the deceased with actual or constructive knowledge of his mental instability.

The policy in *H.R.K.* excluded claims falling within the completed operations and products hazards exception. The court held that the completed operations exclusion did not apply because it was not intended to apply to the sale of a product.[129] The court also held the products exclusion inapplicable.[130] The court observed that this exclusion generally applies only if a defective product causes the injury.[131] The court emphasized that the underlying allegations involved negligent acts by H.R.K. and not the sale of a defective pistol.[132]

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mentators have recognized that an assumption of liability involves a tripartite relationship in which one party assumes the liability of another party to a third party. F. C. & S. Bulletin, PUBLIC LIABILITY B-1 (Oct. 1980); 8 J. APPLEMAN, INSURANCE LAW & PRACTICE § 4780 (1981); 6B J. APPLEMAN, INSURANCE LAW & PRACTICE § 4330 (1979). *See* Olympic Inc. v. Providence Wash. Ins. Co., 648 P.2d 1008, 1011 (Alaska 1982); Fireman's Fund Ins. Co. v. City of Turlock, 170 Cal. App. 3d 988, 999, 216 Cal. Rptr. 796, 803 (1985); Office Structures Inc. v. Home Ins. Co., 503 A.2d 193, 197 (Del. 1985). The agreement in *Mary Kay* did not involve the insured's assumption of the claimant's liability to a third party. Thus, the alleged breach of contract fell outside of the definition of contractual liability. 739 S.W.2d at 613.

125. *Mary Kay*, 739 S.W.2d at 613.

126. *Id.* The court refused to examine whether the doctrine of reasonable expectations should be adopted by Texas courts as a method of interpreting insurance contracts because the theory was not set forth in the insured's motion for partial summary judgment or response. *Id.* at 613-14.

127. 728 S.W.2d 848 (Tex. App.—Dallas 1987, no writ).

128. RESTATEMENT (SECOND) OF TORTS § 402(a) (1965).

129. 728 S.W.2d at 851 (citing numerous cases from other jurisdictions). The court stated this exclusion was intended to apply to service and maintenance businesses such as contractors. *Id.*

130. *Id.*

131. *Id. See* Gordon Yates Bldg. Supplies, Inc. v. Fidelity & Casualty Co., 543 S.W.2d 709, 714 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.). In *Yates* the claimant sued the insured for personal injuries resulting from improperly stacked lumber that the insured had delivered. *Yates*, 543 S.W.2d at 711. That case did *not* involve allegations of failure to warn. The court in *Yates* found no allegations in the underlying complaint stating that the lumber was defective and that no warranty was made in connection with the work in question. *Id.* In any event, the court's discussion of the meaning of the products' exclusion appears to have been incidental in the court's decision. The *Yates* court stated three separate and distinct reasons supporting its conclusion that the trial court erred in granting summary judgment in favor of the insured. *Id.* at 711-12. The court appears to have decided the case on the basis that the defendant failed to submit proper summary judgment proof. *Id.*

132. *H.R.K.*, 728 S.W.2d at 851.

The decision in *H.R.K.* did not directly address the important question of whether an allegation of a failure to warn is a sufficient allegation of a defective product to invoke the exclusion. One of the cases the court cited in *H.R.K.*, *Cooling v. United States Fidelity & Guaranty Co.*,[133] specifically held that a failure to warn of the need for adequate safety devices did not fall within the products hazard exclusion.[134] The *Cooling* court emphasized that the definition of products hazard does not include omissions or failures to warn unless there is an affirmative duty.[135] It can be argued that the reliance of the court in *H.R.K.* on the *Cooling* decision suggests the direction Texas courts will take on the issue. This does not, however, appear the better-reasoned approach under Texas law.

The courts in other jurisdictions, even those choosing to generally follow *Cooling*, have held that an allegation of failure to warn, when the danger results from a defective product, falls within the products hazard exclusion.[136] A number of other courts appear to have rejected strict adherence to the *Cooling* rule.[137] The Arizona Supreme Court in *Brewer v. Home Insurance Co.*[138] emphasized that the failure to provide adequate instructions and warnings was directly related to the product itself and thus fell within

133. 269 So. 2d 294 (La. Ct. App. 1972).

134. *Id.* at 297.

135. *Id.*

136. *See, e.g.*, Viger v. Commercial Ins. Co., 707 F.2d 769, 771 (3d Cir. 1983) (holding that failure to warn of contamination of fish fell within products hazard exclusion); State Farm Fire & Casualty Co. v. Avant, 404 So. 2d 1311, 1313 (La. Ct. App. 1981) (holding that failure to warn of defect in design and construction of brick structure fell within products exclusion); Oceanonics, Inc. v. Petroleum Distrib. Co., 280 So. 2d 874, 878 (La. Ct. App. 1973) (holding that failure to warn of defective weld in crane fell within products exclusion; distinguishing *Cooling* on basis of actual physical defect in product).

137. Brewer v. Home Ins. Co., 147 Ariz. 427, 710 P.2d 1082, 1087 (Ct. App. 1985) (holding exclusion applied to claims insured failed to give adequate installation advice and failed to warn of need for braces); Cravens Dargan & Co. v. Pacific Indem. Co., 29 Cal. App. 3d 594, 601, 105 Cal. Rptr. 607, 612 (1972) (holding that failure to warn of potential dangers of product was not separate fault of manufacturer in sale of product after product was relinquished to others and fell within product and completed operations hazard); K-C Mfg. Co. v. Shelby Mut. Ins. Co., 434 So. 2d 1004, 1006 (Fla. Ct. App. 1983) (holding that claims as to design and manufacture of go-kart involved allegations that bodily injury arose out of named insureds' product or reliance upon a necessarily implied warranty with respect to its fitness and thus fell within exclusion); Buckeye Union Ins. Co. v. Liberty Solvents & Chem. Co., 17 Ohio App. 3d 127, 477 N.E.2d 1227, 1236 (1984) (holding that defective condition includes design defect, manufacturing defect, failure to provide adequate warnings of dangerous or unavoidably unsafe product); Jones v. Sears & Roebuck Co., 80 Wis. 2d 321, 259 N.W.2d 70 (1977) (holding that failure to warn claim was clearly excluded by terms of policy). The rationale of these cases was explained by the Arizona Supreme Court in Brewer v. Home Ins. Co., 147 Ariz. 427, 710 P.2d 1082, 1085 (Ct. App. 1985):

> Products hazard coverage is intended to protect the manufacturer or seller of goods from claims for injury and damage arising out of the use of the insured's product. The risk which is being insured is that the product will not perform in the manner expected. If the product works as it is supposed to, but through other negligence, the insured's product causes injury or damage, there is no coverage. Thus, where products hazard coverage is excluded, the insurer is not responsible for the failure of the insured's products or goods to work as anticipated.

138. 147 Ariz. 427, 710 P.2d 1082 (Ct. App. 1985).

the exclusion.[139]

The resolution of the question of whether failure to warn of known potential hazards is excluded under the products hazard exclusion ultimately may be answered by looking to the Texas definition of a defective product. The failure to warn of known potential hazards has been found by Texas courts to render a product defective.[140] The courts have recognized three specific types of defects under Texas law: (1) manufacturing defects; (2) design defects; and (3) the failure to include sufficient warnings or instructions.[141] Texas courts appear to recognize that a product is defective or has something wrong with it whenever it is sold without sufficient warnings or instructions.[142]

III. AUTOMOBILE LIABILITY

Reservation of Rights. In *Texas Farmers Insurance Co. v. McGuire*[143] the insured argued that Texas Farmers waived and/or was estopped from asserting its defense of lack of coverage because Texas Farmers failed to provide the insured with a timely and specific nonwaiver agreement or reservation of rights letter. The supreme court held that the doctrine of estoppel cannot be used to create insurance coverage that does not otherwise exist under the terms of the policy.[144] The court distinguished *Employers Casualty Co. v. Tilley*[145] on the basis that the estoppel doctrine in that case related to the assertion of a late notice defense.[146] The court stated that a forfeiture defense, such as late notice, is subject to waiver or estoppel, but a defense dealing with the scope of the risks covered, such as the defense that the vehicle was not a covered auto, was not subject to waiver or estoppel.[147]

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139. *Id.* at 1085.

140. *See, e.g.*, Pittsburgh Corning Corp. v. Thomas, 668 S.W.2d 876, 878-79 (Tex. App.—Houston [14th Dist.] 1984, no writ) (holding failure to warn of danger of asbestos makes product unreasonably dangerous). *See also* J. SALES, PRODUCT LIABILITY LAW IN TEXAS 622 (1985). A leading commentator has stated, "It is commonly said that a product can be defective in the kind of way that makes it unreasonably dangerous by failing to warn or failing adequately to warn about a risk or hazard related to the way a product is designed." PROSSER & KEETON ON TORTS 697 (5th ed. 1984). This appears true despite the fact that a failure to warn cause of action very often involves elements of negligence. *Id.*

141. Patterson v. Gesellschaft, 608 F. Supp. 1206, 1209 (N.D. Tex. 1985).

142. *Id.*

143. 31 Tex. Sup. Ct. J. 217 (Feb. 10, 1988). The court originally issued an opinion in October of 1987; however, this opinion, reported at 31 Tex. Sup. Ct. J. 22 (Oct. 21, 1987), was withdrawn and a new opinion substituted for it in February of 1988.

144. 31 Tex. Sup. Ct. J. at 216. The court noted in a footnote added without explanation to its second opinion that one court of appeals has recognized that there is an exception to this general rule where the insurer, with knowledge of facts indicating noncoverage, assumes or continues the defense of an insured without obtaining a nonwaiver agreement or sending a reservation of rights letter. 31 Tex. Sup. Ct. J. at 216 n.1 (citing Farmers Texas County Mutual Insurance Co. v. Wilkinson, 601 S.W.2d 520 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.). The court mysteriously observed that this exception was not discussed in *McGuire* because it was not "outcome-determinative." *Id.* It is difficult to discern how this rule could not be "outcome-determinative" unless it is not a valid statement of the law or it is applicable only where a case is being defended as opposed to being investigated. *Id.*

145. 496 S.W.2d 552 (Tex. 1973).

146. *McGuire*, 31 Tex. Sup. Ct. J. at 216.

147. *Id. But see* Pacific Indem. Co. v. Acel Delivery Serv., Inc., 485 F.2d 1169, 1173 (5th

In order to appreciate the significance of the Texas Supreme Court's opinion in *McGuire*, it is essential to examine the opinion of the court of appeals. The appellate court noted that after an initial interview with the insured, the insurance company adjuster was aware of the existence of a coverage defense and thus a conflict of interest existed.[148] Apparently, the insurer failed to send out a reservation of rights letter or obtain a nonwaiver agreement informing the insured of the coverage problems and the conflict until later. The court of appeals noted that in *Tilley* the development of evidence for a denial of coverage by the attorney hired by the insurer, without notice to the insured of the coverage problems, and, the failure to inform the insured of the need to obtain separate counsel amounted to a waiver by the insurer of the policy defense and/or an estoppel to assert the policy defense.[149] The court held the same rule of conduct applied to the efforts of adjusters and investigators.[150]

The court of appeals in *McGuire* also held that a second statement, dealing with coverage matters, supported the application of the *Tilley* rule.[151] The court indicated that a general nonwaiver agreement executed before or at the time of the second interview was insufficient as was a later reservation of rights letter.[152] The court of appeals emphasized that the nonwaiver's terms were too indefinite and expansive and that the agreement failed to set out reasons for its execution, such as that the investigation conducted pursuant to the agreement might be used to bolster the insurer's noncoverage defense.[153]

The insurer in *McGuire* did not send a reservation of rights letter until after suit was filed against the insured, almost one year after its first notice of the claim. The court of appeals held that this letter, which was more specific and advised the insured he could seek his own attorney, was too late to be effective.[154] The jury in *McGuire* found that the actions of the insurer did not violate the DTPA or the Texas Insurance Code.[155] The court of appeals reversed the judgment based on these findings and held that the actions of

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Cir. 1973), *cert. denied*, 94 S. Ct. 1422 (1974) (holding all policy defenses waived if insurer has knowledge of noncoverage and assumes defense of an action without nonwaiver agreement or reservation of rights).

148. McGuire v. Texas Farmers Ins. Co., 727 S.W.2d 1, 2-3 (Tex. App.—Beaumont 1987), *rev'd*, 31 Tex. Sup. Ct. J. 22 (Oct. 21, 1987).

149. 727 S.W.2d at 2-3.

150. *Id.* at 2. The court added that adjustors are not subject to canons of ethics like attorneys, and, thus, there is greater need for close judicial scrutiny of their conduct. *Id.* at 5.

151. *Id.* at 4.

152. *Id.*

153. *Id.*

154. *Id.* at 5. This holding of the court appears to conflict with Ideal Mut. Ins. Co. v. Myers, 789 F.2d 1196 (5th Cir. 1986). In *Ideal* the reservation letter was not sent until two years after the plane crash that was the subject of the underlying claim. The court in *Ideal* stated that even if pre-suit investigation revealed a basis for noncoverage, any potential conflict, and thus any duty to reserve rights, did not arise until suit was filed. *Id.* at 1201. The court noted, however, that this may not be true in every case. *Id.* at 1202. The court indicated that in the case before it the insured did not show prejudice from any delay between discovery of the coverage issues and the bringing of the suit. *Id.* See A. WINDT, INSURANCE CLAIMS & DISPUTES § 206 (1982), for an extensive discussion of the issue of prejudice.

155. *McGuire*, 727 S.W.2d at 6-7.

the insurer in *McGuire* amounted to violations of the DTPA and the Texas Insurance Code as a matter of law.[156]

The Texas Supreme Court did not address whether the conduct in *McGuire* was actionable under the DTPA and the Texas Insurance Code, choosing to resolve this issue by proper application of the "no evidence" standard of review to the jury findings in favor of the insured.[157] Thus, the supreme court's opinion in *McGuire* does not strictly foreclose, or for that matter condone, insureds bringing suit under the DTPA, the Texas Insurance Code, and, perhaps, even the duty of good faith and fair dealing for acts or omissions in connection with the investigation and defense of claims where coverage issues exist.[158]

"Per Person" Limit. The Texas Supreme Court, in *McGovern v. Williams*,[159] held that "when only one person is actually involved in an automobile accident and sustains 'bodily injury' in that accident," article 6701h, the Texas Safety Responsibility Law,[160] "limits recovery for any and all claims to the 'per person' $10,000 limit."[161] In *McGovern*, Mrs. McGovern, who was not in the accident, sought recovery under a separate $10,000 limit for her claim for loss of consortium. The court noted that section 21 of article 6701h requires all motor vehicle liability policies to contain limits of $10,000 " 'because of bodily injury to or death of one person in any one accident.' "[162] The court in *McGovern* reasoned that section 21 refers to persons actually involved in the accident, and, because Mrs. McGovern was not in the accident, she was not entitled to a separate limit.[163] The court added that bodily injury does not include damages for loss of consortium, noting that such damage claims do not involve physical harm or mental anguish.[164] The court emphasized that loss of consortium is a derivative claim despite the fact Texas recognizes loss of consortium as a separate cause of action.[165] The court found its reasoning consistent with other decisions interpreting the similarly worded limits in the Texas Tort Claims Act.[166] The court also

156. *Id.* at 6.

157. 31 Tex. Sup. Ct. J. at 216-17.

158. *Id.* The insured in *McGuire* sued under TEX. BUS. & COM. CODE §§ 17.44, 17.46(a), (b)(12), and 17.50(b)(4) (Vernon 1987) and TEX. INS. CODE art. 21.21, § 16(a), (b)(1) (Vernon Supp. 1988). 31 Tex. Sup. Ct. J. at 216-17.

159. 741 S.W.2d 373 (Tex. 1987).

160. TEX. REV. CIV. STAT. ANN. art. 6701h (Vernon 1977).

161. 741 S.W.2d at 375.

162. *Id.* at 374 (emphasis omitted).

163. *Id.*

164. *Id.* (discussing Whittlesey v. Miller, 572 S.W.2d 665 (Tex. 1978) and Moore v. Lillebo, 722 S.W.2d 683, 687-88 (Tex. 1986)).

165. *Id.* Similar reasoning was used in Cradoct v. Employers Casualty Co., 733 S.W.2d 301, 302 (Tex. App.—El Paso 1987, writ ref'd), in which the court held that the each person limit in a general liability and automobile insurance policy referred to each person injured or killed and not to each person suffering damages deriving from the death or injury.

166. 741 S.W.2d at 375 (discussing Madisonville Indep. School Dist. v. Kyle, 658 S.W.2d 149 (Tex. 1983) and City of Austin v. Cooksey, 570 S.W.2d 386 (Tex. 1978)). In *Madisonville* the defendant's liability was limited to $100,000 under the Tort Claims Act, despite the fact that separate claims were made by both the mother and father of the deceased. 658 S.W.2d at 150. In *City of Austin* the Texas Supreme Court held that per person, as used in the Tort

noted that its decision accorded with the vast majority of other jurisdictions.[167]

In *Cradoct v. Employers Casualty Co.*[168] the court of appeals held that "all damage claims direct or consequential" resulting from the death of a person in an accident were subject to a single limit under a general liability and automobile insurance policy. The court stated that the derivative claims of beneficiaries who suffer damages as a result of the death of another do not make the beneficiaries separate "injured persons" and thus no separate limits are created by such claims.[169] The court of appeals, like the Texas Supreme Court in *McGovern*, relied upon the numerous decisions applying the limits of the Tort Claims Act in wrongful death cases.[170] The claims in *Cradoct* consisted of the full range of wrongful death damages, including mental anguish.[171]

The Texas Supreme Court, less than two months before its decision in *McGovern*, refused to grant the application for writ of error in *Cradoct* with the notation "writ refused."[172] Under the present "writ" system, this notation means that the opinion of the court of appeals was correct and that the principles of law declared in the opinion were correctly determined, thus giving the opinion precedential value equal to a supreme court decision.[173] Thus, it would appear that the Texas Supreme Court has adopted the *Cradoct* approach with respect to derivative mental anguish claims, as well as consortium claims, in wrongful death cases. The decision in *McGovern*, which came ten days prior to the denial of rehearing in *Cradoct*, strengthens this conclusion.[174]

The court in *McGovern* emphasized that the first requirement of section 21 of 6701h is that the person claiming damages be involved *in the accident* in

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Claims Act, refers to the person sustaining injury, not to the derivative claims of other parties. 520 S.W.2d at 388. Derivative claims, the *City of Austin* court held, are subject to a single limit. *Id.* Importantly, the court in *City of Austin* used insurance cases from other jurisdictions by analogy to support its interpretation. *Id.*

167. 741 S.W.2d at 375-76 (citing an extensive list of authorities). Courts adopting multiple limits based on consortium claims have done so for a variety of reasons: (1) inclusion of loss of services in the definition of bodily injury, Allstate Ins. Co. v. Handegard, 70 Or. App. 262, 688 P.2d 1387, 1389 (1984); (2) lack of specificity and clarity in the policy regarding whether bodily injury must be suffered by more than one person, Abellon v. Hartford Ins. Co., 167 Cal. App. 3d 21, 32, 212 Cal. Rptr. 852, 859 (1985); and (3) the term person as used in the policy is ambiguous because it does not indicate whether the injured party or those with derivative claims because of his or her injury may recover, Bilodeau v. Lumbermen's Mut. Casualty Co., 392 Mass. 537, 467 N.E.2d 137, 140 (1984). 8 INS. LITIG. RPTR. at 1103-04 (Sept. 1986). See Annotation, *Consortium Claim of Spouse, Parent or Child of Accident Victim is Within Extended Per Accident Coverage Rather than Per Person Coverage of Automobile Liability Policy*, 46 A.L.R. 4th 735 (1986), for a comprehensive review of cases involving the per person limit question. The court in *McGovern* distinguished these decisions on the basis that they either involved language different from article 6701h or the nature of the cause of action for consortium was different from Texas law. 741 S.W.2d at 376.

168. 733 S.W.2d 301, 303 (Tex. App.—El Paso 1987, writ ref'd).

169. *Id.*

170. *Id.* at 302.

171. *Id.* Apparently, no bystander claims were asserted by the claimants in *Cradoct*. *Id.*

172. Cradoct v. Employer's Casualty Co., 30 Tex. Sup. Ct. J. 604 (Sept. 16, 1987).

173. Hamilton v. Empire Gas & Fuel Co., 134 Tex. 377, 110 S.W.2d 561, 565 (1937).

174. Cradoct v. Employer's Casualty Co., 31 Tex. Sup. Ct. J. 132 (Dec. 19, 1987).

order to obtain a separate limit.[175] Moreover, the court noted that claims that derive from injuries to another, such as loss of consortium, do not constitute "bodily injury."[176] As recognized in *Cradoct*, loss of consortium, loss of inheritance, loss of financial support, and mental anguish claims in wrongful death actions would all appear to be derivative claims.[177]

Some suggest one vital issue is left unresolved after *McGovern* and *Cradoct* as to whether all mental anguish claims in nondeath actions will create separate limits. The primary requirement of *McGovern* is that the person claiming damages be involved in the accident in order to obtain a separate limit.[178] Thus, unless the party claiming mental anguish was in the accident itself, it would appear that separate limits would not be available.[179] This suggests that only independent bystander actions, based on presence within the zone of danger, might create separate limits. This certainly appears to be the approach suggested by *Cradoct*.

Notice. The insured in *Ratcliff v. National County Mutual Fire Insurance Co.*[180] failed to forward suit papers to the insurer. The insured failed to answer, and the claimant took a default judgment. After the insurer denied coverage, the claimant filed suit against the insurer, claiming that article 6701h of the Texas Motor Vehicle Safety Responsibility Act abolished the late notice defense.[181]

The insured in *Ratcliff* urged that the minimum coverage under the Responsibility Act is compulsory, in the same fashion as certified or assigned risk policies, and policy violations are not a defense.[182] The *Ratcliff* court flatly rejected the insured's arguments, noting that the legislature did not use language in the act sufficient to express such a far-reaching rule.[183] The court stated that the legislature had used specific language barring lack of notice as a defense to certified or assigned risk policies, but not to other automobile policies in the 1981 amendments at issue.[184] The court rejected the invitation to judicially abolish the notice defense.[185] The court stated

175. *McGovern*, 741 S.W.2d at 374.

176. *Id.*

177. One Texas court has suggested mental anguish claims are not derivative. City of Denton v. Page, 683 S.W.2d 180 (Tex. Civ. App.—Fort Worth 1985), *rev'd on other grounds*, 701 S.W.2d 831 (Tex. 1986). The Fifth Circuit has held this decision to be a "tenuous alien graft" on the otherwise "sturdy framework of Texas law." Mayo v. Tri-Bell Indus., Inc., 787 F.2d 1007, 1011 (5th Cir. 1986). The *Mayo* court held that mental anguish and consortium are in fact derivative claims. *Id.*

178. 741 S.W.2d at 374. *See* Nickens v. McGhebee, 184 So. 2d 271 (La. Ct. App. 1966) (refusing additional recovery when claimants not present at accident and apparently suffered no physical manifestations).

179. 741 S.W.2d at 374.

180. 735 S.W.2d 955 (Tex. App.—Dallas 1987, writ dism'd w.o.j.).

181. *Id.* at 956 (citing TEX. REV. CIV. STAT. ANN. art. 6701h (Vernon 1977 & Supp. 1988)).

182. *Id. See* TEX. REV. CIV. STAT. ANN. art. 6701h, § 21(f)(a) (Vernon 1977 & Supp. 1988).

183. 735 S.W.2d at 957.

184. *Id.*

185. *Id.*

that the Texas Supreme Court has consistently reserved such action for the State Board of Insurance and the Texas Legislature.[186]

The court in *Ratcliff* held that the notice defense obviated coverage in the case before it.[187] The court recognized that the default clearly prejudiced the insurer.[188] The court emphasized that the fact that the insurer was given no notice of the filing of the suit bolstered the court's conclusion even though the insurer knew of the claim.[189]

Change in Ownership. In *Black v. BLC Insurance Co.*[190] the insured, Webster, sold his car to Linville, who sold the vehicle to a third party, Sanchez. After the last sale, Sanchez was killed in a collision with Black. Black sued the estate of Sanchez. Black sought a declaratory judgment that Webster's insurer, BLC, covered Sanchez because Webster's policy still showed the vehicle in the policy's declarations.

The *Black* court held that no coverage was available because Webster neither retained control over the car nor had a familial relationship to Sanchez.[191] The *Black* court concluded that the insured's ownership of the car was a prerequisite to coverage under the policy.[192] The *Black* court reasoned that the policy language "your covered auto" implies that the insured must own, possess, or control the use of the car for coverage to exist.[193] The court recognized that absent such facts, Sanchez could not be a permissive user under the policy terms.[194] The court explained that public policy favors the more restrictive interpretation because the broader interpretation would greatly increase the risk in that a party is less careful in selecting buyers of his car than in selecting those to whom he will give permission to drive his car.[195]

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186. *Id.* at 958.

187. *Id.* at 959.

188. *Id.*

189. *Id.* In Allstate Ins. Co. v. Parce, 688 S.W.2d 680, 682 (Tex. App.—Beaumont 1985, writ ref'd n.r.e.), a case cited in *Ratcliff*, the court held that the insurer was not prejudiced by the insured's failure to forward suit papers when the insurer knew suit had been filed and was pending but the insured had not yet requested the company to provide a defense. The insurer is presented with a "Hobson's Choice" in such cases because it is not clearly authorized to act for an insured without a request to act and/or defend; indeed, by entering an unauthorized appearance, the insurer may waive certain rights of the insured.

190. 725 S.W.2d 286 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

191. *Id.* at 287-88. The court distinguished Snyder v. Allstate Ins. Co., 485 S.W.2d 769, 773 (Tex. 1972), in which the insured gave permission to use the vehicle to his daughter, and retained some control, and retained the certificate of title. *Black*, 725 S.W.2d at 287-88. The court noted that the Texas Supreme Court similarly distinguished *Snyder* in Gulf Ins. Co. v. Bobo, 595 S.W.2d 847, 848 (Tex. 1980) (holding that a conditional vendee was not an additional insured/permissive user because the insured retained no control over the use of the vehicle). *Black*, 725 S.W.2d at 288.

192. 725 S.W.2d at 288.

193. The court noted that the fact the named insured retained the certificate of title would not change the result. *Id.* (citing Johnson v. Safeco Ins. Co., 464 S.W.2d 164, 170 (Tex. Civ. App.—El Paso 1971, no writ) (Texas rule); Sowa v. Nat'l Indem. Co., 102 Wash. 2d 571, 688 P.2d 865, 868 (1984) (majority rule)).

194. 725 S.W.2d at 288.

195. *Id.*

Underinsured Motorists Coverage (Limits). The issue of whether a carrier may sell underinsured motorist coverage in an amount equal to the statutory minimum limit was addressed in *Tatum v. Mid-Century Insurance Co.*[196] In *Tatum* both the limits of the offending driver's policy and the insured's underinsured motorist coverage were for the minimum limits, $15,000 per person/$30,000 per accident. The court held that because the limits were the same, the driver was not an underinsured motorist.[197]

The *Tatum* court stated that the fact the underinsured limits equalled the minimum limits did not amount to a constructive fraud and was not against the public interest.[198] The court indicated that such limited coverage would not be illusory because even minimum limits are worthwhile when the underinsured driver carries insurance less than the minimum,[199] and the limits are reduced as a result of multiple claims.[200] The *Tatum* court stated that its interpretation of the policy was consistent with the legislative purpose of the Insurance Code and Motor Vehicle Safety Responsibility Act.[201] The court concluded that the act imposed no duty on the insurer, Mid-Century, to offer benefits exceeding the statutory minimum.[202]

Uninsured Motorists (Dismissal of Uninsured Motorist). The Dallas court of appeals, in *United States Fidelity & Guaranty Co. v. Cascio*,[203] held that dismissal of an uninsured driver with prejudice, without the consent of the insurer, barred all claims for relief against the uninsured motorist carrier. The court stated that the standard consent clause bars relief because of the destructive impact dismissal has on the insurer's subrogation rights.[204] The court added that dismissal with prejudice makes it impossible for the insured to establish a legal entitlement to recovery against the uninsured motorist, a predicate to recovery under the policy and the Texas Insurance Code.[205]

Owned and Unscheduled Vehicle Exclusion. In *Beaupre v. Standard Fire In-*

196. 730 S.W.2d 41 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).

197. *Tatum*, 730 S.W.2d at 42. Numerous Texas courts have held that policy provisions allowing for the reduction of underinsured limits by the amount of the tortfeasor's policy limits are valid and enforceable. Infante v. Texas Farmers Ins. Co., 640 S.W.2d 321 (Tex. App.—Beaumont 1982, writ ref'd n.r.e.); Montanye v. Transamerica Ins. Co., 638 S.W.2d 578 (Tex. App.—Houston [1st Dist.] 1982, no writ); American Gen. Fire & Casualty Co. v. Oestreich, 617 S.W.2d 833 (Tex. App.—Eastland 1981, no writ). The courts in other jurisdictions have taken a variety of approaches in dealing with such provisions. 2 WIDISS, UNINSURED AND UNDERINSURED MOTORIST INSURANCE § 41.7 (1987).

198. *Tatum*, 730 S.W.2d at 42.

199. This typically occurs where the driver is from a state where the minimum limits are less than Texas limits. *Id.*

200. *Id.* This situation is a serious and frequent concern whenever either the per person or per accident limits have been exhausted on other claims from the accident. *Id.*

201. *Id.*

202. *Id.*

203. 723 S.W.2d 209, 210 (Tex. App.—Dallas 1986, no writ).

204. *Id.*; *see also* Sentry Ins. Co. v. Siurek, No. 01-85-01054-CV, slip op. (Tex. App.—Houston [14th Dist.], April 30, 1987) (holding that settlement by insured under no-fault collision policy amounted to waiver of right to recover against insurer to extent of settlement amount).

205. *Cascio*, 723 S.W.2d at 210; *see* TEX. INS. CODE ANN. art. 5.06-1 (Vernon 1981).

surance Co.[206] the plaintiff brought suit against Standard Fire for uninsured motorist benefits. An entirely different carrier insured the vehicle involved in the suit. Standard insured the family of the claimant, a passenger in the vehicle, on two other vehicles. The Standard policy excluded uninsured motorist coverage for injuries sustained while occupying a vehicle owned by the insured or his family that was not insured under the Standard policy.

The *Beaupre* court held this exclusion did not constitute an invalid denial of coverage in violation of article 5.06-1 of the Texas Insurance Code.[207] The court recognized Texas's treatment of this exclusion had been somewhat inconsistent.[208] The court noted that in *Westchester Fire Insurance Co. v. Tucker*[209] the Texas Supreme Court, in dicta, suggested the exclusion was invalid.[210] The court stated, however, that the supreme court retreated from *Tucker* in *Holyfield v. Members Mutual Insurance Co.*[211] Indeed, in *Holyfield* the supreme court rejected holdings by courts of appeals based on a strict reading of *Tucker*.[212] The *Beaupre* court noted that three other courts of appeals, after the decision in *Tucker*, had held the exclusion valid under similar facts and circumstances, reasoning that article 5.06-1 dictated the type of coverage that must be offered but not the specific vehicles that must be covered.[213]

Other Insurance Clauses and Umbrella Policies. The Houston court of appeals, in *Carrabba v. Employers Casualty Co.*,[214] once again addressed the question of coverage priority between multiple primary carriers and an umbrella, or true excess carrier. In *Carabba* Employers had issued a comprehensive automobile liability policy to the owner of a tractor rig. Mission issued an umbrella policy for the same insured. Gulf provided hired auto coverage, by special endorsement, to the lessee of the tractor.

The *Carabba* court held that Employers, providing coverage for the owner of the tractor, had the initial layer of coverage.[215] The court held that the resolution of the conflict between Gulf, the primary insurer for the lessee, and Mission, the umbrella carrier, was controlled by the court's earlier decision in *Liberty Mutual Insurance Co. v. United States Fire Insurance Co.*[216]

206. 736 S.W.2d 237 (Tex. App.—Corpus Christi 1987, writ denied).
207. *Id.* at 239 (citing TEX. INS. CODE ANN. art. 5.06-1 (Vernon 1981)).
208. *Id.*
209. 512 S.W.2d 679, 685-86 (Tex. 1974).
210. 736 S.W.2d at 238 (citing *Tucker*, 512 S.W.2d at 685-86).
211. 572 S.W.2d 672, 673 (Tex. 1978) (per curiam).
212. 736 S.W.2d at 238 (discussing rejection of Western Alliance Ins. Co. v. Dennis, 529 S.W.2d 838, 840 (Tex. Civ. App.—Texarkana 1975, no writ), by the supreme court in *Holyfield*, 572 S.W.2d at 673).
213. *Id.* at 238-39 (discussing Equitable Gen. Ins. Co. v. Williams, 620 S.W.2d 608, 611 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.); Broach v. Members Ins. Co., 647 S.W.2d 374, 375 (Tex. App.—Corpus Christi 1983, no writ); and the court of appeals' opinion in Holyfield v. Members Mut. Ins. Co., 566 S.W.2d 28, 29 (Tex. Civ. App.—Dallas), *writ ref'd n.r.e. per curiam*, 572 S.W.2d 672 (Tex. 1978)).
214. 742 S.W.2d 709 (Tex. App.—Houston [14th Dist.] 1987, no writ).
215. *Id.* at 715.
216. *Id.*, at 714 (citing Liberty Mut. Ins. Co. v. United States Fire Ins. Co., 590 S.W.2d 783, 785 (Tex. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.)).

As in *Liberty Mutual*, the crux of the conflict in *Carrabba* was the other insurance clause in the hired auto endorsement to the Gulf policy, which provided that coverage under the endorsement would be excess insurance over other valid and collectible insurance.[217] In contrast, the Mission umbrella policy provided that it would pay only the "ultimate net loss after all other valid and collectible insurance had been exhausted."[218]

The court in *Carrabba* stated that when the provisions in multiple policies conflict, the court must resolve the conflict by examining the insurance scheme and construing the policies as a group.[219] The court held that the Mission policy, in contrast to the Gulf policy, was not intended to serve as a primary policy.[220] The court noted that an umbrella policy is unique in character and is always intended as "true excess over and above any type of primary coverage including excess provisions arising from primary policies."[221] The court concluded that if an umbrella policy covers losses in excess of underlying policies and their applicable limits, liability under the umbrella policy does not attach until all other collectible insurance is exhausted.[222] The *Carrabba* court rejected the alternative argument that Gulf and Mission were co-equal excess carriers and, because their other insurance clauses were mutually repugnant, liability should be prorated between them.[223] The court stated that the mutual repugnancy rule applies only to repugnancies between policies supplying the same level of coverage.[224]

IV. PROPERTY INSURANCE

Liability for Inspections. The court examined the tort liability of an insurer who undertakes inspection of the insured's property to determine insurability in *Seay v. Travelers Indemnity Co.*[225] A widow sued Travelers for negligent inspection of a hospital boiler whose safety release valve discharged scalding water onto her husband, a hospital maintenance worker, who later died of his injuries. Travelers had voluntarily inspected the boiler for its insured, the hospital, to determine the boiler's insurability. The Texas Boiler Inspection Act[226] covered the boiler and required periodic inspection and certification as a condition to operation. For a number of years, authorized inspectors employed by Travelers and commissioned by the State Department of Labor and Standards conducted inspections of the hospital

217. *Id.*, at 714-15.
218. *Id.* at 714.
219. *Id.* (citing *Liberty Mutual*, 590 S.W.2d at 785).
220. *Id.*
221. *Id.* at 715. The court stated that this was the majority rule. *Id.* at 12-13 (citing Allstate Ins. Co. v. Employers Liab. Assurance Corp., 445 F.2d 1278, 1284 (5th Cir. 1971); Berkeley v. Fireman's Fund Ins. Co., 407 F. Supp. 960, 969 (W.D. Wash. 1975); Illinois Emcasco Ins. Co. v. Continental Casualty Co., 139 Ill. App. 3d 130, 487 N.E.2d 110, 112 (1985); State Farm Fire & Casualty Co v. LiMauro, 65 N.Y.2d 369, 482 N.E.2d 13, 19 (1985)).
222. *Id.*, at 715.
223. *Id.* Gulf relied on the mutual repugnancy rule discussed in Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch., 444 S.W.2d 583, 590 (Tex. 1969).
224. *Carrabba*, 742 S.W.2d at 715 (discussing *Hardware Dealers*).
225. 730 S.W.2d 774 (Tex. App.—Dallas 1987, no writ).
226. TEX. REV. CIV. STAT. ANN. art. 5221c (Vernon 1987).

boilers and gave favorable reports to the hospital and the Labor and Standards Commissioner. The commissioner would then issue certificates allowing lawful use of the boilers. The trial court granted Travelers' motion for summary judgment on the basis that Travelers had no duty to the decedent that could form the basis of a cause of action.[227]

The court of appeals in *Seay* held that Travelers failed to establish as a matter of law that no legal duty arose from its allegedly negligent actions.[228] The court held that section 324A of the Restatement (Second) of Torts[229] imposes a duty on one who voluntarily undertakes to render services that may be necessary for the protection of third persons and describes the scope-of-duty concept prevailing in this state.[230] The court held that Travelers was not entitled to a summary judgment because it had not negated, as a matter of law, any of the essential elements of the plaintiff's cause of action under section 324A.[231] The court found evidence that at least one purpose of the inspections was to increase the safety of the boilers for employees of the insured.[232] The court held that Travelers did not establish that it had not undertaken to perform a duty owed to the plaintiff by the insured or that the insured did not rely on the insurer to uncover the danger that resulted in the harm to the plaintiff.[233]

Fire Coverage/Arson. In *Norman v. State Farm Fire & Casualty Co.*[234] the Fifth Circuit dealt with the question of whether either spouse could recover on a fire insurance policy when the husband destroyed the insured residence, which was community property, by arson. The trial court granted judgment to the insurer in reliance on the established Texas rule that neither spouse could recover insurance proceeds when either of them deliberately destroyed jointly owned insured property.[235] The trial court was unaware that the Texas Supreme Court, in *Kulubis v. Texas Farm Bureau Underwriters Insurance Co.*,[236] had recently held the rule inapplicable when separate property held in undivided interests by a husband and wife was destroyed by the husband's act of arson. The court in *Kulubis*, however, did not decide what would happen if the insured property were community property.[237]

The Fifth Circuit in *Norman* declined to follow the new separate property rule in a community property situation, holding that the dominant consideration in such cases is ensuring that the wrongdoer does not benefit from his

227. 730 S.W.2d at 775.
228. *Id.*
229. RESTATEMENT (SECOND) OF TORTS § 324A (1977).
230. 730 S.W.2d at 776 (citing Fox v. Dallas Hotel Co., 111 Tex. 461, 240 S.W. 517, 520-21 (1922)).
231. *Id.* at 778.
232. *Id.* at 778-79; *see* RESTATEMENT (SECOND) OF TORTS § 324A(a) (1977).
233. 730 S.W.2d at 780; *see* RESTATEMENT (SECOND) OF TORTS § 324A(b)(c) (1977). The court noted that TEX. R. CIV. P. 51(b), dealing with joinder of insurers, did not prohibit an action against the insurer for its own negligence. 730 S.W.2d at 781.
234. 804 F.2d 1365 (5th Cir. 1986).
235. *Id.* at 1365.
236. 706 S.W.2d 953, 955 (Tex. 1986).
237. *Id.*

wrongdoing.[238] The court stated that to hold otherwise would guarantee a potential arsonist a minimum one-half of the insured value of the building even if he were found guilty, so long as he arranged matters to prevent the insurance company from proving that he let his spouse in on his scheme.[239]

Scope of All-Risk Coverage. Highlands Insurance Co. v. City of Galveston[240] involved a dispute between an excess insurer and three primary all-risk insurers as to whether the all-risk policies provided liability coverage in addition to first-party property coverage. The critical issue was whether language in the all-risk policies indicating that coverage was for all losses for which the insured "may be liable or may assume liability," referred to legal liability, as covered by a liability insurance policy, or to a monetary loss to the insured for damage to his property.[241]

The court of appeals in *Highlands* agreed with the excess insurer, finding that the insuring language of the all-risk policy provided both property and liability coverage.[242] The court stated that the policies insured the city for the loss of property even though the property was not in its care, custody and control.[243] The court stated that if the insurers had intended to provide property insurance only and to restrict such coverage to property under the city's care, custody or control, they could have said so in their policies.[244] The court in *Highlands* also discussed the territorial limitation under the policies to property in the Port of Galveston on premises owned, leased, used or occupied by the board of trustees.[245] The court concluded that the waters adjacent to the piers at which the barge was damaged were part of the premises owned, leased, used or occupied by the board of trustees.[246]

Earth Movement Exclusion. In *Jones v. St. Paul Insurance Co.*[247] Jones sued St. Paul to recover under his property insurance policy after the roof of his commercial building collapsed. The issue before the court of appeals was whether the earth movement exclusion in the insurance policy was properly submitted to the jury. The court held that the exclusion contemplated abnormally large movements and was inapplicable as a matter of law.[248] The court reasoned that another exclusion, dealing with the settling of foundations, would be meaningless if earth movement were construed as any movement of the earth at all, as urged by the insurer.[249]

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238. *Norman*, 804 F.2d at 1366.
239. *Id.*
240. 721 S.W.2d 469, 470 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).
241. *Id.* at 471.
242. *Id.*
243. *Id.* at 472.
244. *Id.*
245. *Id.*
246. *Id.*
247. 725 S.W.2d 291 (Tex. App.—Corpus Christi 1986, no writ).
248. *Id.* at 294-95. The only evidence at trial was that the soil had contracted and expanded as a result of moisture content. *Id.* at 292.
249. *Id.* at 294-95.

Contamination Exclusion. Auten v. Employers National Insurance Co.[250] dealt with whether a contamination exclusion prevented coverage for damage to a home caused by a professional exterminator's misapplication of pesticides, rendering the home uninhabitable. The insureds sued the insurer, arguing that either the loss did not result from contamination or the exclusion did not apply because the exterminator's negligence caused the contamination. Based upon jury findings that the misapplication of pesticides was negligent, that it caused physical loss to the insureds' home, and that the loss was not caused by contamination, the trial court held that insurer liable under the policy.[251] The Dallas court of appeals reversed, holding that the contamination caused the loss as a matter of law and that the exclusion was unambiguous.[252]

The court in *Auten* rejected the insureds' request that the court circumvent the language excluding contamination by fixing the cause of the loss as the cause of the contamination.[253] The court held that the parties plainly intended to exclude all losses occasioned by contamination without regard to the cause of the contamination.[254] It reasoned that adopting the insureds' reading of the policy would limit the provision to exclude recovery only when the contamination itself was not the result of an excluded cause.[255] The Texas Supreme Court has granted writ in this case.[256]

V. HEALTH, LIFE, AND ACCIDENT INSURANCE

Change of Beneficiary. Two cases during the Survey period dealt with changing the primary beneficiaries of life insurance policies. In *Nichols v. Nichols*[257] the insured died in an auto accident in 1982. Nichols, the insured decedent, and his former wife, Betty Nichols, were married in 1963 and purchased the life insurance policy in question in 1964; they were divorced in 1977. Twenty months prior to the entry of the final divorce decree, the decedent and Betty Nichols separated, and the decedent wrote the insurer requesting that it change the beneficiary on the policy from his wife to his mother. The insurer responded to Nichols' request by informing him that he would have to return the forms required under the policy to effectuate the change of beneficiaries. At the time the Nicholses were divorced, the divorce decree awarded the cash value of the life insurance policy to Nichols, but the decree failed to mention the contingent beneficial interest of Betty Nichols.

The court in *Nichols* held that the divorce decree did not divest Betty Nichols of her contingent beneficial interest in the life insurance policy because the decree failed to specifically express that intent.[258] The court fur-

250. 722 S.W.2d 468 (Tex. App.—Dallas 1986, writ granted).
251. *Id.* at 468.
252. *Id.* at 470.
253. *Id.*
254. *Id.*
255. *Id.* at 470-71.
256. 30 Tex. Sup. Ct. J. 581 (July 15, 1987).
257. 727 S.W.2d 303 (Tex. App.—Beaumont 1987, writ ref'd n.r.e.).
258. *Id.* at 305.

ther held that Nichols did not comply, or substantially comply, with the policy requirements for changing the beneficiary because neither the policy nor the completed forms required by the policy provisions were returned to the insurer.[259] The court concluded that Nichols' intent in attempting to change the primary beneficiary of the policy was irrelevant in determining the issue of compliance or substantial compliance with the policy provisions.[260] The court emphasized that the intent of the insured is relevant in determining compliance or substantial compliance only in cases presenting extraordinary circumstances.[261]

Novotny v. Wittner[262] involved the extraordinary circumstances alluded to by the *Nichols* court. In *Novotny*, Joseph and Debra Novotny were divorced twenty-one days before Joseph Novotny's death. The divorce decree awarded all insurance on Joseph Novotny's life to him as his sole and separate property, and divested Debra Novotny of all interest in the policies. Joseph Novotny was shot to death by Debra Novotny twenty-one days after the divorce was finalized. At the time of his death, Joseph Novotny had not changed the beneficiary designation on his life insurance policy. After a trial, the probate court awarded the proceeds of the life insurance policy to Joseph Novotny's children, his heirs at law.[263]

On appeal, the court recognized that a divorced spouse can be eligible as a beneficiary of a life insurance policy on the life of the ex-spouse.[264] The court noted, however, that the divorce decree expressly terminated Debra Novotny's financial interest in Joseph Novotny's life insurance policy.[265] The court concluded that the decree expressed the clear intent of both parties to terminate the ownership and beneficial rights of Debra Novotny in the life insurance policy.[266] The court found that Joseph Novotny's failure to change the beneficiary of the policy was not controlling since his death occurred just twenty-one days after the divorce, thereby depriving him of the right to finalize matters relating to the divorce.[267] The court also stated that the evidence presented at trial rebutted the presumption of a gift of the insurance proceeds to Debra Novotny.[268] The court pointed to the fact that the divorce proceedings were hostile and contested and also that Debra Novotny killed Joseph.[269]

Qualification of Beneficiary. In *Crawford v. Coleman*[270] Cornelius Shoaf stabbed his wife, Sandra, to death. Four insurance policies, each designating

259. *Id.* at 306.
260. *Id.*
261. *Id.* at 306-07.
262. 731 S.W.2d 103 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).
263. *Id.* at 104.
264. *Id.*
265. *Id.* at 105.
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.*
270. 726 S.W.2d 9 (Tex. 1987).

Cornelius as the primary beneficiary, insured Sandra's life. The trial court disqualified Cornelius from receiving the proceeds under each of the policies because the jury found that Cornelius willfully killed Sandra.[271]

The supreme court concluded that distribution of the policy proceeds was governed by article 21.23 of the Texas Insurance Code.[272] The court rejected its prior construction of section 21.23 in *Deveroex v. Nelson*,[273] wherein it held that insurance proceeds are distributed to the nearest relative of the insured only if all primary and contingent beneficiaries are disqualified from receiving the proceeds. The *Crawford* court concluded that when any beneficiary under a life insurance policy willfully causes the death of the insured, the policy proceeds are distributed to the nearest relative of the insured.[274] This holding apparently deprives co-primary beneficiaries as well as contingent beneficiaries of the right to proceeds in instances contingent on article 21.23.

Coverage Period of Policy. In *Life Insurance Company of North America v. Klinger*[275] Klinger quit work with General Tire on July 26, 1985, and eleven days later an unknown assailant killed him. While employed by General Tire, Klinger was covered under an accidental death and dismemberment policy. The policy provided that coverage terminated on the premium due date immediately following the date Klinger ceased to be employed by the company. The applicable premium due date was July 31, 1985. The policy also had a conversion privilege, which provided that the insured, by making written application within thirty-one days after termination of insurance, could convert the group insurance coverage to an individual policy. At the time of his death, Klinger had not exercised the conversion privilege under the policy. The court of appeals concluded that coverage under the policy terminated on July 31, 1985, and that the coverage did not extend during the thirty-one day grace period.[276] The court recognized that section 2(10) of article 3.50 of the Insurance Code,[277] which provides that an insured with group life insurance remains covered during the grace period even if the insured does not exercise his option to convert, applies only to a life insurance policy and not to an accidental death and dismemberment policy.[278]

Disability Insurance (VA Benefits). The Texas Supreme Court, in *Barnett v.*

271. *Id.*

272. *Id.* at 10. TEX. INS. CODE ANN. art. 21.23 (Vernon 1981) provides: "The interest of a beneficiary in a life insurance policy or contract heretofore or hereafter issued shall be forfeited when the beneficiary is the principal or an accomplice in willfully bringing about the death of the insured. When such is the case, the nearest relative of the insured shall receive said insurance." The Texas Legislature has amended art. 21.23 to consider contingent beneficiaries if they are not principals or accomplices in bringing about the death of the insured. TEX. INS. CODE ANN. art. 21.23 (Vernon Supp. 1988) (eff. Aug. 31, 1987).

273. 529 S.W.2d 510, 513 (Tex. 1975).

274. *Crawford*, 726 S.W.2d at 11.

275. 730 S.W.2d 32 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.).

276. *Id.* at 34.

277. TEX. INS. CODE ANN. art. 3.50, § 2(10) (Vernon 1981 & Supp. 1988).

278. *Klinger*, 730 S.W.2d at 35.

Aetna Life Insurance Co.,[279] examined the issue of whether disability payments under the Veterans Benefits Act[280] may offset benefits payable under disability insurance issued by a group health carrier. The insured argued that VA benefits were not specifically mentioned in the contract's enumeration of offset sources. The insured also urged this construction under the rule of *ejusdem generis*. Finally, the insured argued that the rule of strict construction applied. The supreme court agreed, noting that the language in the policy was susceptible to more than one reasonable construction.[281] The court, however, rejected the insured's argument under the rule of *ejusdem generis* because the contract did not just include a specific enumeration, but also included a general language clause.[282]

With respect to the ambiguity issue, the court emphasized that it must adopt the construction urged by the insured if the construction is not unreasonable even if the insured's construction is not the most reasonable.[283] The court held that VA benefits were not sufficiently similar to the specifically enumerated sources (including the Social Security Act, Railroad Retirement Act, and Workers' Compensation Act) to justify inclusion in the general language clause.[284] The court held that if the insurance company had desired to exclude VA benefits it could have done so easily with plain and unambiguous language as it had in the case of the other sources.[285]

VI. MISCELLANEOUS

Title Insurance. In *Houston Title Co. v. De Toca*[286] the purchaser of a home sued her title insurer after the City of Houston razed her home pursuant to a demolition order filed in the county deed records several months before the house and lot were conveyed to the purchaser. The purchaser alleged that the insurer negligently failed to inform her of the demolition order. Although the purchaser prevailed in the trial court,[287] the court of appeals reversed and rendered judgment that she take nothing from the title insurer.[288] The court reasoned that, unlike an abstract examiner who is hired to detect flaws in a seller's title, a title insurer is legally obligated under the policy only to indemnify the purchaser for losses resulting from defects in

279. 723 S.W.2d 663, 664-65 (Tex. 1987), *rev'g*, 708 S.W.2d 911, 912 (Tex. App.—Houston [1st Dist.] 1986).

280. 38 U.S.C. § 3101(a) (1982).

281. 723 S.W.2d at 666.

282. *Id.* at 666, 668. The court emphasized that the use of *ejusdem generis* in this case would render the general language clause meaningless and, thus, fail to give meaning to all portions of the policy. *Id.* at 668.

283. *Id.* at 666.

284. *Id.* at 667.

285. *Id.* The court did not address the impact of § 3101(a) (commonly called the "anti-assignment provision") of the Veterans Benefit Act, which includes certain prohibitions against assignment and deductions from benefit payments. 38 U.S.C. § 3101(a) (1982). The court of appeals had held that this provision did not prohibit the offset desired by Aetna. 708 S.W.2d at 912-13.

286. 733 S.W.2d 325 (Tex. App.—Houston [14th Dist.] 1987, writ granted).

287. *Id.* at 326.

288. *Id.* at 328.

title.[289] Further, the court distinguished *Gibbs v. Main Bank*[290] and *Great American Mortgage Investors v. Louisville Title Insurance Co.*[291] because in both cases the title insurers were liable, not for the breach of a contractual duty, but for violating duties extrinsic to the indemnitor-indemnitee relationship.[292] Finding that the title insurer owed no contractual duty to the purchaser to disclose defects in the seller's title and that the purchaser failed to allege a breach of an extracontractual duty, the court held that the purchaser was not entitled to recover from the title insurer for negligence.[293]

ERISA. At issue in *Sams v. N. L. Industries, Inc.*[294] was the question of whether the federal Employer Retirement Income Security Act of 1975[295] preempted a former employee's common law causes of action to recover amounts allegedly owed under an employment contract. After the employee suffered an injury unrelated to his job, his employer discharged him because of the employee's excessive absences during the year preceding his injury. Seeking recovery of sick leave pay, severance pay and disability compensation, as well as punitive damages and attorney's fees, the employee sued his employer for breach of contract, conversion, and violating ERISA. All grounds of recovery arose from the employer's alleged refusal to pay the employee pursuant to the terms of a benefit plan the employer maintained for its employees. The trial court rendered summary judgment that the employee take nothing on the conversion and breach of contract theories because ERISA preempted the claims and dismissed the ERISA claim for failure to state a cause of action.[296]

With respect to the trial court's rendition of judgment on the employee's cause of action for breach of contract, the court of appeals faced two issues: first, did ERISA cover the benefit plan, and second, did the remedies provided under ERISA preclude recovery on state law causes of action.[297] The court concluded that the sick leave pay, severance pay and disability compensation claimed by the employee were all part of an ERISA-regulated employee welfare benefit plan because each benefit fell within the scope of the statutory definition of regulated plans.[298] Having determined that the benefit plan in question was within the scope of plans governed by ERISA,[299] the court held that the federal statutory scheme expressly precluded recovery on state common law grounds.[300]

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289. *Id.* at 327 (citing Tamburine v. Center Sav. Ass'n, 583 S.W.2d 942, 947 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.), and Wolff v. Commercial Standard Ins. Co., 345 S.W.2d 565, 569 (Tex. Civ. App.—Houston 1961, writ ref'd n.r.e.)).

290. 666 S.W.2d 554, 559 (Tex. App.—Houston [1st Dist.] 1984, no writ).

291. 597 S.W.2d 425 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.).

292. 733 S.W.2d at 327.

293. *Id.*

294. 735 S.W.2d 486 (Tex. App.—Houston [1st Dist.] 1987, no writ).

295. 29 U.S.C. §§ 1001-1461 (1976).

296. 735 S.W.2d at 487.

297. *Id.*

298. *Id.* at 488; *see also* 29 U.S.C. §§ 186(c), 1002(1) (1982).

299. *See* 29 U.S.C. § 1144(a) (1982).

300. *Sams*, 735 S.W.2d at 488-89 (citing Holland v. Burlington Indus., Inc., 772 F.2d 1140,

Aircraft. American Eagle Insurance Co. v. Lemons[301] arose from the crash of a new airplane on the day it was purchased. The craft's pilot and passenger, co-owners of the plane, died in the crash. Apparently, neither co-owner had obtained any insurance expressly declaring the plane as a covered aircraft; however, the pilot also owned another airplane that was covered under a personal injury and property damage aircraft policy issued by American Eagle. The American Eagle policy declared the pilot as the named insured.

The policy in *Lemons* specified coverage, under certain conditions, for aircraft the named insured purchased. The insurer argued that, in light of other policy provisions, ownership by the named insured required that the named insured be the sole owner. Noting that the newly acquired aircraft provision failed to expressly require sole and unconditional ownership, the court rejected the insurer's argument.[302]

The insurer also argued that, even if the policy covered the crashed airplane, the policy did not cover the passenger. As a co-owner, the passenger necessarily became an additional insured under the policy, whose estate was not entitled to compensation because the policy limited coverage to third parties and because the policy prohibited the transfer of policy interests to persons other than the named insureds. The court of appeals held that the newly acquired aircraft clause only provided coverage for additional aircraft, not additional named insureds.[303] Accordingly, the court affirmed the trial court's judgment that American Eagle indemnify the named insured's estate for $100,000 of the $250,000 settlement.[304]

Reinsurance. In *Great Atlantic Life Insurance Co. v. Harris*[305] the court held the reinsurer directly liable to the initial insurer. The case arose when the initial insurer, a Florida corporation, sought reinsurance from a Texas insurer not licensed in Florida. To avoid the licensing problems, an intermediary insurer reinsured the insurer's policies and then reinsured through the Texas reinsurer. When the intermediary went into receivership, the initial insurer and reinsurer cancelled their agreement.[306] Moreover, the reinsurer refused to reimburse the initial insurer for claims under policies the latter had agreed to reinsure before the parties terminated their agreement.

The insurer sued to recover that portion of the claims that it believed the reinsurer should have paid pursuant to the tripartite reinsurance agreement. The trial court, however, rendered judgment on jury findings that the insurer

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1146 (4th Cir. 1985); Winterrowd v. David Freedman & Co., 724 F.2d 823, 826 (9th Cir. 1984); Russell v. Massachusetts Mut. Life Ins. Co., 722 F.2d 482, 487 (9th Cir. 1983), *rev'd on other grounds*, 473 U.S. 134 (1985); Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208, 1215-16 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981); District 65, UAW v. Harper & Row, Publishers, Inc., 576 F. Supp. 1468, 1487 (S.D.N.Y. 1983)).

301. 722 S.W.2d 229 (Tex. App.—Amarillo 1986, no writ).

302. *Id.* at 231-32.

303. *Id.* at 233.

304. *Id.* at 234.

305. 723 S.W.2d 329, 333 (Tex. App.—Austin 1987, writ dism'd.).

306. *Id.* at 331.

take nothing.[307] On appeal, the reinsurer argued that the trial court's judgment was correct because only the intermediary was contractually obliged to reimburse the insurer; the insurer had no direct contractual relationship with the reinsurer.

The court of appeals rejected the contention that the contract between the insurer and the intermediary was unrelated to the contract between the intermediary and the reinsurer.[308] The court noted that it would be illogical to treat the two written instruments as separate contracts since both concerned the same transaction and were executed simultaneously to accomplish one purpose.[309] The court construed the two written instruments as one contract between the insurer and the reinsurer, with the intermediary acting merely as a conduit for their business relationship, and rendered judgment for the insurer.[310]

307. *Id.* at 332.
308. *Id.*
309. *See id.* at 332-33.
310. *Id.* at 333-34.