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## Insurance Law

Arno W. Krebs Jr.

Otway B. Denny Jr.

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# INSURANCE LAW

by

Arno W. Krebs, Jr.\*

and

Otway B. Denny, Jr.\*\*

## I. LIABILITY INSURANCE

*Personal Injury Protection Coverage.* One case was decided during the past year interpreting the scope of personal injury protection coverage. *Flores v. Dairyland County Mutual Insurance Co.*<sup>1</sup> dealt with the need for a causal relationship between the vehicle and the accident for which recovery was sought. Flores had a family automobile liability policy that provided personal injury protection coverage pursuant to article 5.06—3 of the Texas Insurance Code.<sup>2</sup> The accident made the basis of this suit occurred when Flores tripped and fell on a curb in a parking lot four steps from his parked car. Article 5.06—3 provides personal injury protection coverage for reasonable expenses arising from an accident and “arising out of the ownership, maintenance, or use of any motor vehicle.”<sup>3</sup> The *Flores* court stated that under article 5.06—3 it was necessary for a causal relationship to exist between the vehicle and the accident before recovery could be had under the policy.<sup>4</sup> As the facts in the instant case clearly established no such relationship, the court denied plaintiff’s recovery.<sup>5</sup>

*Uninsured Motorist Coverage.* The only case involving uninsured motorist coverage, *French v. Insurance Co. of North America*,<sup>6</sup> dealt with the retroactive effect of a 1977 amendment to the Texas Insurance Code that includes property damage coverage within uninsured motorist coverage.<sup>7</sup> Prior to the amendment, coverage for property damage caused by uninsured motorists was not required by statute. The amendment, effective August 29, 1977, requires that coverage for such property damage be included in all policies issued after its effective date.<sup>8</sup>

In *French* the insurer issued a policy of insurance to the insured prior to

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\* B.A., Texas A&M University; LL.B., University of Texas. Attorney at Law, Fulbright & Jaworski, Houston, Texas.

\*\* B.A., Texas A&M University; J.D., Baylor University. Attorney at Law, Fulbright & Jaworski, Houston, Texas.

1. 595 S.W.2d 893 (Tex. Civ. App.—Eastland 1980, writ ref’d n.r.e.).

2. TEX. INS. CODE ANN. art. 5.06—3 (Vernon Pam. Supp. 1963-1980).

3. *Id.* art. 5.06—3(a).

4. 595 S.W.2d at 895.

5. *Id.*

6. 591 S.W.2d 620 (Tex. Civ. App.—Austin 1979, no writ).

7. 1977 Tex. Gen. Laws, ch. 182, § 1, at 370 (codified at TEX. INS. CODE ANN. art. 5.06—1 (Vernon Pam. Supp. 1963-1980)).

8. TEX. INS. CODE ANN. art. 5.06—1(1) (Vernon Pam. Supp. 1963-1980).

the effective date of the amendment. Subsequent to the date of the amendment, an additional vehicle was added to the insured's policy by an amended declaration. This vehicle later collided with an uninsured motor vehicle, and the insured demanded payment from the insurer for the property damage. The insurer refused payment on the basis that the policy was issued prior to the effective date of the amendment; therefore, the insurer argued, the amended declaration did not include coverage for property damage to the vehicle in question.<sup>9</sup> The insured contended that coverage for the additional vehicle constituted a separate and distinct policy issued subsequent to the effective date of the amendment.<sup>10</sup> The court held for the insurer, stating the general rule that a rider attached to an insurance policy merges into the policy to which it is attached.<sup>11</sup> The court reasoned that because the amended declaration did not create a new policy of insurance, it would be contrary to article I, section 16 of the Texas Constitution to hold that the amended uninsured motorist statute imposed a new duty upon the parties.<sup>12</sup> The court also pointed out that the legislature was aware of the language necessary to provide for the application of the amendment to endorsements or riders to insurance policies.<sup>13</sup> The court stated that the fact that this language was not used was evidence that the legislature intended not to provide for such coverage.<sup>14</sup>

*Conditions.* During the survey period, a Texas court again addressed the responsibility of the insured to forward suit papers to his insurer. In *Wheeler v. Allstate Insurance Co.*<sup>15</sup> the insured failed to forward suit papers to his insurer until after a default judgment had been rendered against him in a suit by a third party. The policy in question had been issued prior to the effective date of the state Insurance Board's Endorsement 158L, under which coverage continues in the absence of prejudice to the company due to the insured's failure to comply with the notice or suit-paper provisions.<sup>16</sup> Consequently, the court held that Endorsement 158L did not apply to the instant case.<sup>17</sup> In a dictum the court stated that because a default judgment had been entered against the insured, it would be difficult to imagine more prejudice to the insurance company, which had no

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9. 591 S.W.2d at 621.

10. *Id.*

11. *Id.*; see *Glens Falls Ins. Co. v. Manning*, 362 S.W.2d 385, 387 (Tex. Civ. App.—Texarkana 1962, no writ). The rider is thus considered a part of the insurance contract with which it merges. See *Dunn v. Traders & Gen. Ins. Co.*, 287 S.W.2d 682, 687 (Tex. Civ. App.—Dallas 1956, writ ref'd n.r.e.).

12. 591 S.W.2d at 622; see TEX. CONST. art. I, § 16 (prohibits both retroactive laws and laws impairing the obligation of contract).

13. The court cited TEX. INS. CODE ANN. art. 21.35A (Vernon Pam. Supp. 1963-1980), in which the legislature explicitly provided that the article would apply to all policies, including those that were modified, altered, or reissued after the effective date of the statute. 591 S.W.2d at 622.

14. 591 S.W.2d at 622.

15. 592 S.W.2d 2 (Tex. Civ. App.—Beaumont 1979, no writ).

16. *Id.* at 3; see *Krebs, Insurance Law, Annual Survey of Texas Law*, 34 Sw. L.J. 289, 291-92 nn.17 & 20 (1980), for a discussion of this endorsement.

17. 592 S.W.2d at 3.

knowledge of the lawsuit until the time for appeal had expired.<sup>18</sup> Additionally, this lack of notice served as the basis for the court's holding that the insurance company was not estopped to raise the defense of failure to forward suit papers.<sup>19</sup> The court concluded that the insurer had no liability under the policy because the insured had not given notice to his insurer.<sup>20</sup>

In *Thoede v. International Service Insurance Co.*<sup>21</sup> the question before the court involved the no-action clause in an automobile insurance policy.<sup>22</sup> Under the advice of his insurance agent, Thoede insured one vehicle on his personal liability policy with International, while insuring all other vehicles under a policy with Aetna. The former vehicle was involved in a collision. Thoede, sued by the other driver, counterclaimed against both insurance companies for covered amounts that he might have to pay to the plaintiff, as well as against the agent for failing to provide coverage if none existed. The trial court held that no coverage existed under either policy and rendered judgment against the agent for damages.<sup>23</sup> Both the agent and the insured appealed.

On appeal, International contended that, even if coverage were found, it should not be liable on the policy due to the insured's violation of the no-action clause. International claimed that there had been no "actual trial" between Thoede and the other driver as required by the no-action clause because the trial was a mere sham. The court, however, held that an actual trial was not necessary in view of the facts and circumstances of the case.<sup>24</sup> The court reasoned that because International had denied coverage and repeatedly refused to settle, it had effectively repudiated the policy and, therefore, the insureds were no longer required to comply with the policy provision requiring an actual trial.<sup>25</sup> To hold otherwise would discourage settlements by forcing the insured to try a case in which it was subsequently determined that the insurance company had wrongfully refused to defend.<sup>26</sup> On this ground the court found International liable for the maximum amount of the policy plus attorney's fees and court costs.<sup>27</sup>

In *Farmers Texas County Mutual Insurance Co. v. Wilkinson*<sup>28</sup> the court

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18. *Id.*

19. *Id.* at 4.

20. *Id.*

21. 600 S.W.2d 389 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.).

22. This clause provided:

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

*Id.* at 391.

23. *Id.* at 390.

24. *Id.* at 391.

25. *Id.*; see *Gulf Ins. Co. v. Parker Prods., Inc.*, 498 S.W.2d 676 (Tex. 1973).

26. The only question in such cases, therefore, is whether the settlement was reasonable; this issue had been stipulated in the instant case. 600 S.W.2d at 391.

27. *Id.*

28. 601 S.W.2d 520 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.).

decided the question of the effectiveness of a reservation of rights letter and a waiver of noncoverage. The insurance company had issued an insurance policy to Bertha Wilkinson, covering an automobile she had purchased for her son. Subsequently, the automobile was sold and a pickup was purchased in its place. The son, while driving the pickup, was involved in an automobile accident with Sharyle Garza. The accident was timely reported to the insurance company, which investigated the matter. Four days after the collision the insurer paid Garza for damages to her vehicle, but Garza also demanded that the insurer pay her for personal injuries. Attorneys for the parties negotiated a settlement for over two years. No settlement was reached, however, and suit was filed by Garza against Wilkinson in January 1975. On July 11, 1977, the insurer brought this action for a declaratory judgment, alleging that it had no obligation to defend Wilkinson's son because he was not a named insured under the policy issued to his mother and his pickup truck was not an insured vehicle. On July 26, the branch claims manager for the insurer sent two letters to Wilkinson's son. One stated that the Garza claim had been turned over to its attorneys, who would unqualifiedly defend and protect his interests. The other letter was a form reservation of rights notice that stated that while the insurer would defend Wilkinson, it withheld the right to assert the defense of noncoverage.

At trial, the insurance company contended that there was no coverage under the policy, and that because there was no coverage, the action in assuming the defense of Wilkinson could not operate as a waiver or estoppel to provide coverage.<sup>29</sup> The trial court, based on jury findings, found that coverage existed and that the insurer had a duty to defend.<sup>30</sup> On appeal the court stated that although, as a general rule, estoppel may operate to void conditions of a policy that would cause noncoverage, an estoppel cannot change, rewrite, or enlarge the risk covered by the policy.<sup>31</sup> Further, the court noted that if an insurer assumes a defense with knowledge of facts indicating noncoverage, and without first obtaining a reservation of rights or nonwaiver agreement, all policy defenses, including those of noncoverage, are waived and the insurer is estopped from asserting the same.<sup>32</sup> Accordingly, the court held that because the insurer had assumed the defense with knowledge of the facts, coverage existed absent an effective reservation of rights or nonwaiver agreement.<sup>33</sup>

The court found no such reservation or agreement in the instant case. The two letters taken together expressed an ambiguous reservation of

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29. *Id.* at 521.

30. *Id.*

31. *Id.*; see *Minnesota Mut. Life Ins. Co. v. Morse*, 487 S.W.2d 317, 319 (Tex. 1972).

32. 601 S.W.2d at 521-22; see *Ferris v. Southern Underwriters*, 109 S.W.2d 223, 226 (Tex. Civ. App.—Austin 1937, writ ref'd). This rule is based on the apparent conflict of interest that might arise when the insurer represents the insured in a lawsuit and simultaneously formulates a defense of noncoverage against the insured. *Pacific Indem. Co. v. Acel Delivery Serv., Inc.*, 485 F.2d 1169, 1173 (5th Cir. 1973).

33. 601 S.W.2d at 522.

rights.<sup>34</sup> Construing the letters strictly against the insurer and liberally in favor of the insured, the court interpreted them as extending to Wilkinson an unconditional defense of the pending action.<sup>35</sup>

*Coverage.* *Gulf Insurance Co. v. Bobo*<sup>36</sup> was one of two cases decided by the Texas Supreme Court during this survey period that involved permissive use. *Bobo* dealt with the liability of an insurer on a policy of automobile liability insurance covering a vehicle that had been delivered to a buyer but for which the buyer had not yet paid. William Avett, the insured, agreed to sell his truck to David Havens, who took delivery of the vehicle prior to completion of the sale. Havens had an accident in the vehicle before the sale was completed. Two women injured by the accident brought suit against the seller's insurer. The court of civil appeals held that if there is a named insured in the policy, anyone using the vehicle described in the policy with the named insured's explicit or tacit consent is an additional insured.<sup>37</sup>

The supreme court, however, reversed, holding that Havens acquired the right to possession and the power to control the use of the vehicle when he agreed to the terms of the sale.<sup>38</sup> Therefore, the court reasoned, when the accident occurred, Havens was not driving with Avett's permission because he did not need anyone's permission to drive his own vehicle.<sup>39</sup> The court stated that, as a matter of law, a seller has no authority to grant his conditional vendee permission to drive the vehicle.<sup>40</sup> The court noted that because the vehicle was no longer owned by the insured he could not give or withhold his permission to the conditional vendee regarding use of the automobile; rather, the court pointed out, the vendor, by retaining title to the car until the purchase price is fully paid, does so only for security reasons.<sup>41</sup> The court concluded that Havens was not an additional insured under Avett's policy, and the parties injured in the accident were denied recovery.<sup>42</sup>

The second case, *Coronado v. Employers' National Insurance Co.*,<sup>43</sup> involved implied permission for the use of a vehicle and signaled the adoption of the minor deviation rule<sup>44</sup> in Texas. Sotello, an employee for White Well Service, was instructed to drive his crew in a company pickup from the company yard in Wickett to Monahans, where the crew lived. In disregard of company rules they stopped at two bars for drinks. After mid-

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34. *Id.* at 523.

35. *Id.*

36. 595 S.W.2d 847 (Tex. 1980).

37. 580 S.W.2d 914, 917 (Tex. Civ. App.—Fort Worth 1979). For a discussion of the court of civil appeals' opinion, see Krebs, *supra* note 16, at 298-99.

38. 595 S.W.2d at 848.

39. *Id.*

40. *Id.*

41. *Id.* at 848-49.

42. *Id.* at 849.

43. 596 S.W.2d 502 (Tex. 1980).

44. See notes 47-50 *infra* and accompanying text.

night Sotello left the second bar in the pickup and was involved in a collision that resulted in the death of another motorist. The motorist's widow recovered judgment against Sotello and then brought suit against White Well Service's automobile liability insurer, Employers' National, to collect the judgment.

After a jury trial, the court rendered judgment notwithstanding the verdict for the carrier, and the court of civil appeals affirmed.<sup>45</sup> The supreme court also affirmed, stating that the employer clearly had not granted Sotello express permission to use the vehicle on the occasion in question; thus, the question was whether Sotello had implied permission for such use by his employer's acquiescence or lack of objection to similar prior use.<sup>46</sup> The court examined three different approaches to the problem of deviation that have been used by courts throughout the United States: the strict rule; the liberal rule; and the minor deviation rule.<sup>47</sup> Under the minor deviation rule, which was adopted by the court, insurance protection exists so long as the actual use of the vehicle is not a material or gross violation of the terms of the initial permission. Under this rule the court must determine in each instance the extent of the deviation in actual distance and time, the purposes for which the vehicle was entrusted to the operator, and other relevant factors such as frequency of use and the relationships between the parties.<sup>48</sup> The court stated that in the instant case the eight-hour deviation was so gross as to be a material deviation as a matter of law.<sup>49</sup> The court reasoned that the use of the vehicle at the time of the accident was so far outside the scope of the permission granted to Sotello that no fact issue was raised that his employer had impliedly consented to such use.<sup>50</sup>

In *United Services Automobile Association v. Stevens*<sup>51</sup> the insurer brought a declaratory judgment action seeking a determination of its liability under the omnibus clause of an automobile insurance policy. The personal injury plaintiff received injuries when she was struck by a vehicle owned by Thomas, the named insured, while it was being driven by Debra Stevens and occupied by her father, William Stevens. Thomas had left the vehicle with a friend, Crump, who undertook to sell it for a commission. Crump had Thomas's permission to allow prospective purchasers to drive the vehicle. Stevens, an employee of Crump, told Crump he was interested in the vehicle and wanted to show it to his daughter. There was no discussion as to whether his daughter, an unlicensed driver, could operate the vehicle. The accident in question occurred while Stevens was sitting in the

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45. 577 S.W.2d 525, 532 (Tex. Civ. App.—El Paso 1979). For a discussion of the court of civil appeals' opinion, see Krebs, *supra* note 16, at 299.

46. 596 S.W.2d at 504.

47. *Id.* Under the strict rule, the actual use at the time of the accident must be within the specified geographical area and the time limits contemplated by the parties for there to be permissive use. Under the liberal rule, coverage is extended as long as the vehicle was originally entrusted by the insured to the person operating it at the time of the accident. *Id.*

48. *Id.* at 504-05.

49. *Id.* at 506.

50. *Id.*

51. 596 S.W.2d 955 (Tex. Civ. App.—Amarillo 1980, no writ).

front seat and his daughter was operating the vehicle. The trial court found this use of the vehicle to be within the permissive use provisions of the policy and concluded that coverage existed.<sup>52</sup>

On appeal the court noted that Thomas clearly expected Crump to show the vehicle to prospective purchasers and that he expected such parties to drive the vehicle.<sup>53</sup> Because Stevens and his daughter were prospective purchasers, and because Debra Stevens was operating the vehicle with her father seated in the front seat, the court found ample evidence to support the finding that Stevens and his daughter were using the vehicle with the implied consent of Thomas.<sup>54</sup> The court dismissed the insurer's argument that the implied permission for William Stevens to use the vehicle was nondelegable to his daughter, an unlicensed driver.<sup>55</sup> The insurer cited the general rule that permission to use a vehicle, given by the named insured to another, does not authorize such other person, the permittee, to allow a third party to use the vehicle.<sup>56</sup> The court, however, noted that this general rule is not without exception: recovery is not precluded when the original permittee is riding in the car with the second permittee at the time of the accident or when the second permittee, while using the vehicle, is serving the purpose of the original permittee.<sup>57</sup> The court held that the instant case fell within both exceptions to the general rule.<sup>58</sup> The court further noted that, in the absence of an express policy provision excluding liability on the part of the insurer, the fact that a driver is unlicensed ordinarily is not decisive on the question of omnibus clause coverage when the automobile accident occurs while the insured automobile is being used by a third person with the consent of the named insured's original permittee.<sup>59</sup> Under the terms of this policy an unlicensed driver was not excluded from coverage, and the court noted that no Texas case had ever excluded an unlicensed driver from coverage when the policy failed to do so.<sup>60</sup>

*Liberty Mutual Insurance Co. v. United States Fire Insurance Co.*,<sup>61</sup> a case of first impression in Texas, involved the responsibilities of an automobile liability insurer and an excess carrier under the "other insurance" clauses of their respective policies. This suit arose out of an accident that resulted in injuries to a passenger in a Jeep being driven by Steve Kennedy

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52. *Id.* at 956.

53. *Id.* at 959.

54. *Id.*

55. *Id.* at 960.

56. *Id.* at 959.

57. *Id.* It is generally reasoned that under such circumstances the second permittee presumably is operating the vehicle for the use of the first permittee and is thus within the coverage of the omnibus clause. *Id.*; see *Travelers Indem. Co. v. Employers Cas. Co.*, 474 S.W.2d 501 (Tex. Civ. App.—Waco 1971, no writ); *Indiana Lumbermen's Mut. Ins. Co. v. Hartford Accident & Indem. Co.*, 454 S.W.2d 781 (Tex. Civ. App.—Waco 1970, writ ref'd n.r.e.).

58. 596 S.W.2d at 959.

59. *Id.* at 959-60; see *Hays v. Country Mut. Ins. Co.*, 20 Ill. 2d 601, 192 N.E.2d 855 (1963); *Wood v. Kok*, 58 Wash. 2d 12, 360 P.2d 576 (1961).

60. 596 S.W.2d at 960.

61. 590 S.W.2d 783 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.).



and owned by Henry Taub. The passenger's personal injury claim was settled for \$250,000. Kennedy was insured by Liberty Mutual with policy limits of \$100,000. Taub was insured by American General Insurance Company under a family automobile policy with limits of \$100,000 and by United States Fire Insurance Company with a professional comprehensive catastrophe liability policy, commonly referred to as an umbrella policy, with limits of \$1,000,000 in excess of the insured's "retained limit." By the terms of Taub's automobile insurance policy it was clear that American General's coverage was primary and that its limits were exhausted, leaving a question as to the order of coverages between Liberty Mutual and United States Fire. Liberty's policy contained a standard "other insurance" clause, which provided that with respect to a nonowned vehicle it "shall be excess insurance over any other valid and collectible insurance."<sup>62</sup> United States Fire's policy provided that it would pay for the ultimate net loss in excess of the retained limit of the underlying policies listed in Schedule A of the policy and of "the applicable limits of any other underlying insurance collectible by the insured."<sup>63</sup> Schedule A listed the American General policy. The other insurance clause of the United States Fire policy provided that if other insurance is available to the named insured "the insurance hereunder shall be in excess of, and not contribute with, such other insurance."<sup>64</sup>

Liberty contended that the other insurance clauses of the policies were mutually repugnant and thus should be construed to provide a concurrent second layer of insurance on a pro rata basis based upon the respective policy limits.<sup>65</sup> In support of its position Liberty relied upon *Hardware Dealers Mutual Fire Insurance Co. v. Farmers Insurance Exchange*,<sup>66</sup> wherein the Texas Supreme Court held two primary insurers liable on a pro rata basis because the other insurance clauses were mutually repugnant.<sup>67</sup> The court, however, distinguished *Hardware Dealers* on the ground that both of the policies involved in that case were primary policies and one of them contained an escape clause.<sup>68</sup> In the instant situation, the court added, courts should look to the overall pattern of insurance coverage to resolve the dispute between carriers.<sup>69</sup> Although the other insurance clause of each policy limited coverage in the presence of other validly existing coverage, the court examined the purposes of the policies and found that they dictated a resolution of the dispute.<sup>70</sup> Liberty's policy afforded primary coverage and was excess only in the presence of a nonown-

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62. *Id.* at 784.

63. *Id.*

64. *Id.* at 785.

65. *Id.*

66. 444 S.W.2d 583 (Tex. 1969).

67. *Id.* at 590.

68. 590 S.W.2d at 785.

69. *Id.*; see *Berkeley v. Fireman's Fund Ins. Co.*, 407 F. Supp. 960 (W.D. Wash. 1975); *Prudential Property & Cas. Ins. Co. v. New Hampshire Ins. Co.*, 164 N.J. Super. 184, 395 A.2d 923 (Super. Ct. Law Div. 1978).

70. 590 S.W.2d at 785.

ed vehicle. United States Fire's policy, on the other hand, remained excess in all events and was intended as an umbrella policy.<sup>71</sup> Thus, the court of civil appeals affirmed the trial court's decision that Liberty be required to pay its full policy limits before United States Fire Insurance incurred any obligation.<sup>72</sup>

In *Martindale Lumber Co. v. Bituminous Casualty Corp.*<sup>73</sup> the Fifth Circuit interpreted the completed operations<sup>74</sup> and products hazard exclusions<sup>75</sup> in a general liability policy. Bituminous had refused to defend Martindale, and Martindale brought suit to determine the insurer's obligation to pay a tort claim asserted against Martindale by the injured party. The original suit resulted in a settlement between the injured party, Gray, and Martindale. The basis of Gray's suit against Martindale was its alleged failure to band a load of lumber loaded by Martindale employees at its plant onto a truck and trailer operated by Gray. As a consequence of

71. *Id.*; see *Allstate Ins. Co. v. Employers Liab. Assurance Corp.*, 445 F.2d 1278 (5th Cir. 1971); *Aetna Ins. Co. v. State Auto. Mut. Ins. Co.*, 368 F. Supp. 1278 (W.D. Ky. 1973).

72. 590 S.W.2d at 785.

73. 625 F.2d 618 (5th Cir. 1980).

74. The completed operations hazard exclusion in a standard general liability insurance policy provides:

"[C]ompleted operations hazard" includes bodily injury and property damage arising out of operations or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to the named insured. "Operations" include materials, parts or equipment furnished in connection therewith. Operations shall be deemed completed at the earliest of the following times:

- (1) when all operations to be performed by or on behalf of the named insured under the contract have been completed,
- (2) when all operations to be performed by or on behalf of the named insured at the site of the operations have been completed, or
- (3) when the portion of the work out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

Operations which may require further service or maintenance work, or correction, repair or replacement because of any defect or deficiency, but which are otherwise complete, shall be deemed completed.

The completed operations hazard does not include bodily injury or property damage arising out of

- (a) operations in connection with the transportation of property, unless the bodily injury or property damage arises out of a condition in or on a vehicle created by the loading or unloading thereof,
- (b) the existence of tools, uninstalled equipment or abandoned or unused materials, or
- (c) operations for which the classification stated in the policy or in the company's manual specifies "including completed operations" . . . .

75. The products hazard exclusion in a standard general liability insurance policy provides:

"[P]roducts hazard" includes bodily injury and property damage arising out of the named insured's products or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs away from premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others

. . . .

this failure, when Gray unchained the upper stacks at the premises of the purchaser, the lumber fell and injured him. Gray was employed as a truck driver by an independent contractor, Sears, who was retained and paid by Martindale to deliver the lumber to the purchaser.

Bituminous contended that the accident and resulting injuries fell within either or both the completed operations hazard exclusion and the products hazard exclusion. The completed operations hazard provision excluded from coverage injuries that occurred away from the insured's premises after the insured's operations had been completed.<sup>76</sup> Operations were considered completed when all the things to be performed by or on behalf of the insured were completed, or when the portion of the work out of which the injury or damage arose had been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for the insured as a part of the same project.<sup>77</sup> The products hazard exclusion provided that no coverage existed for damage caused by the insured's products that occurred away from the insured's premises if physical possession of such products had been relinquished to others.<sup>78</sup>

In the instant case, Martindale had sold the lumber to Elkins and contracted with Sears to deliver the lumber to the destination designated by Elkins. The delivery costs were paid by Martindale, who in turn charged Elkins the exact freight charges billed by Sears. The district court held, therefore, that Sears's activities were primarily for Martindale and not for Elkins because the seller's obligations included delivery through an independent contractor employed by him.<sup>79</sup> According to the court, such delivery was no less a part of the seller's operations than delivery by Martindale's own employees.<sup>80</sup> The court further held that the accident occurred when the operation was not complete because Gray was injured as he unchained the lumber preparatory to having Elkins's employees commence unloading.<sup>81</sup> The court found the completed operations exclusion inapplicable, because the accident occurred during the course of Martindale's operations.<sup>82</sup>

The products hazards exclusion was also held inapplicable because the product had not been relinquished to others at the time of the accident.<sup>83</sup> Bituminous contended that upon Martindale's relinquishing the lumber to Sears's physical possession, it had been relinquished to others.<sup>84</sup> The court disagreed, noting that by an attached endorsement Martindale had expressly purchased coverage for bodily injury to an independent contractor

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76. See note 74 *supra*.

77. *Id.*

78. See note 75 *supra*.

79. 625 F.2d at 621.

80. *Id.*

81. *Id.* at 622.

82. *Id.*

83. *Id.* at 623.

84. *Id.*

or to an employee of an independent contractor while such person was engaged in operations including logging and lumbering.<sup>85</sup> The court held that the temporary transfer of physical possession to one standing in place of the insured in the performance of operations did not constitute a relinquishment of possession to others for purposes of invoking the products hazard exclusion.<sup>86</sup> Thus, the court reasoned that the products hazard exclusion was inapplicable and coverage was provided under the policy.<sup>87</sup>

In *H.C. Price Co. v. Compass Insurance Co.*<sup>88</sup> the court interpreted a watercraft exclusion in a general liability policy. The accident occurred when the deceased's boat struck a cable stretched across a bayou. The cable was attached to a tree on one side of the bayou and to a winch located on a flexifloat, a barge-like boat, on the other side of the bayou. The flexifloat was owned by H.C. Price Company and was used to transport equipment between worksites on opposite sides of the bayou. At the time of the accident the flexifloat was against the shore with its ramp resting on the ground. While the bulk of the craft was in the water, it was as close to the shore as was possible without being completely grounded. In the resulting suit filed against the insured, H.C. Price, by the deceased's widow, the insurance company contended that the watercraft exclusion in Price's policy should be applied. This exclusion provided that coverage did not extend to damages resulting from watercraft owned or operated by the insured, but did extend to damages caused by watercraft while ashore on premises owned by, rented to, or controlled by the insured.<sup>89</sup> The insurance company agreed to defend under a reservation of rights letter. The insured refused this defense, however, and defended the suit itself. The action terminated in a settlement. This declaratory judgment action was later brought by the insured to determine coverage.

The district court held that the previous federal court judgment was binding upon the insurance company.<sup>90</sup> According to the court, an insurance company with notice of a suit and a duty to defend its insured is bound by any judgment in that suit if it fails to defend; the insurance company cannot relitigate material fact issues in a later suit.<sup>91</sup> The district court also found that the flexifloat was grounded ashore in an area under

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85. *Id.*

86. *Id.*

87. *Id.*

88. 483 F. Supp. 171 (N.D. Tex. 1980).

89. The exclusion specifically provided:

This insurance does not apply to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of

- (1) any watercraft owned or operated by or rented or loaned to any insured, or
- (2) any other watercraft operated by any person in the course of his employment by any insured; but this exclusion does not apply to watercraft while ashore on premises owned by, rented to or controlled by the named insured.

*Id.* at 173.

90. *Id.*

91. *Id.* at 173-74; see *Ridgeway v. Gulf Ins. Co.*, 578 F.2d 1026 (5th Cir. 1978).

the insured's control. Initially, the court stated that various dictionary definitions indicate that "ashore" may mean "on" or "to" the shore.<sup>92</sup> Since part of the flexifloat, the ramp, was on the shore and the flexifloat itself was moored to the shore, the court found that the craft was ashore. Further, the court held that the flexifloat was moored in an area controlled by Price.<sup>93</sup> The court added that Price had a contractual right to be on the premises for the limited purpose of performing the contract.<sup>94</sup> Based on the foregoing, the court held that coverage existed and that the insurance company was responsible for the settlement amount, costs of defense, and expenses, including attorneys' fees and interest.<sup>95</sup>

## II. PROPERTY INSURANCE

*Stewart v. Vanguard Insurance Co.*<sup>96</sup> concerned the definition of the term "logged" in an insurance policy covering an airplane. A Cessna 180 owned by Harvey Stewart crashed with Stewart in the left front seat and Jerry Greak in the right front seat. At the time of the crash, Greak was the pilot in command and was actively operating the controls. Mr. and Mrs. Stewart, the insureds, brought this action against Vanguard, their insurer, to recover for property damage and medical expenses under their policy. The policy contained a provision requiring the pilot in command to have logged ten hours as a pilot in command of a Cessna 180.<sup>97</sup> Greak lost his log book in the crash, but was permitted to testify about entries in the book. He testified that he had never made any record of any time as a pilot in command of a Cessna 180. The testimony indicated, however, that Greak had spent 9.1 to twelve hours as pilot in command of the plane. After a jury trial, judgment was entered for the Stewarts, based on a finding that Greak had logged at least ten hours as a pilot in command.

The court of civil appeals reversed, holding that Greak, as a matter of law, had not logged the necessary ten hours as a pilot in command of a Cessna 180.<sup>98</sup> In affirming the appellate court the supreme court defined

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92. The court noted that dictionaries have been used on other occasions to define the ordinary meanings of words used in insurance policies. See *Ramsay v. Maryland Am. Gen. Ins. Co.*, 533 S.W.2d 344 (Tex. 1976).

93. 483 F. Supp. at 175.

94. *Id.*

95. *Id.*

96. 603 S.W.2d 761 (Tex. 1980).

97. The applicable policy provision provided:

When the aircraft is operated while in motion, insurance will be effective only when said operation is by a pilot designated below who is possessed of a current and valid pilot certificate of the kind specified with appropriate ratings and a current medical certificate, all as required by the Federal Aviation Administration for the flight involved and who meets the additional requirement set forth below:

A pilot approved by the Named Insured provided he possesses a private or commercial pilot certificate and has logged at least 750 flying hours as pilot in command which includes at least 50 hours in single engine aircraft equipped with a conventional landing gear and 10 hours in Cessna 180 aircraft.

*Id.* at 761.

98. 593 S.W.2d 736 (Tex. Civ. App.—Houston [1st Dist.] 1979).

the term "logged": "The common-sense meaning of the term is that a record, however informal, is made of the event. . . . It is the record that gives reliability to the required time."<sup>99</sup> The court held that since none of Greak's hours in command had been recorded, there was no evidence that he had logged ten hours in a Cessna 180 as a pilot in command prior to the crash.<sup>100</sup> For that reason, the claim by the Stewarts was denied.<sup>101</sup>

In *United States Fire Insurance Co. v. Republic National Life Insurance Co.*<sup>102</sup> a claim was made on a fidelity bond issued to protect the insured against the fraudulent acts of its employees. One of Republic's employees forged the payee signatures and altered the amounts payable on numerous checks drawn on Republic's account. Most of these checks were paid. Upon learning of the withdrawals, Republic filed a "partial proof of loss" with its insurer for \$12,948.71. A supplemental proof of loss was filed showing the original face amount of the checks to be \$13,692.84. Both proofs stated the total loss to be \$32,924.84. Republic claimed the \$13,692.84 figure and sent a letter stating that the supplemental proof of loss "would be the final proof of loss."<sup>103</sup> The insurer paid the insured \$13,255.59, and Republic signed a release.<sup>104</sup> The check recited that it was in full and final settlement of any loss related to the employee involved in this matter. Republic, however, later filed suit seeking \$19,232, the difference between the original face amounts of the checks and the altered face amounts.

The trial court rendered judgment for the insurer, and Republic appealed. The court of civil appeals reversed, holding that Republic had neither released nor abandoned these claims because there was no consideration for the release of the \$19,232 claim.<sup>105</sup> The court reasoned that the payment of an undisputed claim could not serve as consideration for the release of a later one.<sup>106</sup>

In reversing, the supreme court noted that there was only a single claim that Republic could pursue to recover under the fidelity bond.<sup>107</sup> At the time the supplemental proof of loss was filed, the claim was undisputed in part and disputed in part.<sup>108</sup> Thus, the court stated, the full extent of the

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99. 603 S.W.2d at 762.

100. *Id.* at 763.

101. *Id.*

102. 602 S.W.2d 527 (Tex. 1980).

103. *Id.* at 529.

104. The release, signed by Republic on February 11, 1974, stated:

[Republic] does hereby forever release and discharge [United States Fire] from and against any demand, claim, cause or causes of action whatsoever under policy 606160 of [United States Fire] and arising out of the forgery and dishonesty of [Republic's employee], which is described and set forth in the Proof of Loss dated December 13, 1973 in which a claim of \$13,692.84 is made.

*Id.*

105. 589 S.W.2d 737, 740 (Tex. Civ. App.—Dallas 1979).

106. *Id.* at 740.

107. 602 S.W.2d at 529.

108. *Id.*

insurer's liability was unknown.<sup>109</sup> According to the court, the payment of that portion of the claim about which there was no dispute (\$13,255.59) provided valid consideration for a release of the remainder (\$19,232).<sup>110</sup> Because the total liability of the insurer was uncertain, the check had the notation "Final Settlement" on it, and a formal release was executed, Republic was held to have no cause of action.<sup>111</sup>

In *Ortiz v. Great Southern Fire & Casualty Insurance Co.*<sup>112</sup> the insurance company insured Ortiz's house against fire loss. No personalty was insured. A fire damaged the Ortiz home and the company paid them \$4,000 for the damage. Ortiz then filed suit against a carpet company for \$4,000 damage to realty and \$11,614 damage to personal property, alleging that the fire was caused by the negligence of the carpet company. The insurance company intervened, claiming subrogation up to the \$4,000 it had previously paid to Ortiz. Ortiz denied the company's right to subrogation. Subsequently, however, all three parties entered into a settlement whereby the carpet company paid \$10,000 into the registry of the court. The parties stipulated that Ortiz's damages were in excess of \$15,000, and the trial court granted summary judgment in favor of the company's right to intervene for the \$4,000. On appeal the court of civil appeals affirmed, stating that the company was entitled to equitable subrogation.<sup>113</sup>

In reversing, the supreme court recognized the right of equitable subrogation to prevent the insured from receiving a double recovery.<sup>114</sup> In this case, however, the court found no indication that the amount recovered was to any extent a double recovery.<sup>115</sup> The court, relying on an early case,<sup>116</sup> held that the insurer was not entitled to subrogation because the insured's loss was in excess of the amounts recovered from the insurer and the third party.<sup>117</sup> The court stated that an insurer can recover only the excess collected from the wrongdoer after the insured is fully compensated for his loss, including the expenses of collection.<sup>118</sup> The court did recognize that an insurer may recover that portion of a settlement that is intended to reimburse the insured for damages to insured real property, less the cost of collection; the insurance company, however, bears the burden of establishing what portion of the settlement is attributable to real prop-

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109. *Id.*

110. *Id.*

111. *Id.* at 530.

112. 597 S.W.2d 342 (Tex. 1980).

113. 587 S.W.2d 818 (Tex. Civ. App.—Amarillo 1979).

114. 597 S.W.2d at 343.

115. *Id.*

116. *Camden Fire Ins. Ass'n v. Missouri, K. & T. Ry.*, 175 S.W. 816 (Tex. Civ. App.—Dallas 1915, no writ).

117. 597 S.W.2d at 343. *See also* *Propeck v. Farmers' Mut. Ins. Ass'n*, 65 S.W.2d 390, 390 (Tex. Civ. App.—Dallas 1933, no writ) (neither subrogation nor set-off available to insurer if loss is in excess of amounts recovered from insurer and third party causing loss).

118. 597 S.W.2d at 343. In so stating, the court disapproved the holding of *State Farm Mut. Auto. Ins. Co. v. Elkins*, 451 S.W.2d 528 (Tex. Civ. App.—Tyler 1970, no writ). 597 S.W.2d at 344.

erty damages.<sup>119</sup>

*Standard Fire Insurance Co. v. Fraiman*<sup>120</sup> involved the recovery of rental losses, interest on rental losses, damages and attorneys' fees due to the insurer's breach of appraisal provisions contained in the policy. The insured had a fire policy covering his apartment complex. Damages to the complex were sustained as a result of two separate fires. The insurer failed to pay amounts claimed for the property loss; therefore, the insured demanded that the loss be determined through appraisal, as provided for in the policy. When the insurer refused, the insured brought a declaratory judgment action. On appeal, it was held that the insured had the right to enforce the appraisal provision of the insurance policy.<sup>121</sup> Pursuant to that judgment, the appraised losses were paid by the insurer.

Upon the subsequent trial of the loss of rentals claim, the insured was awarded rental losses as well as expenses incurred because of the insurer's breach of the appraisal policy provision. The court of civil appeals affirmed, holding that the damages sought by the insured were recoverable due to the breach of the policy provision requiring appraisal.<sup>122</sup> In so doing, the court analogized the instant situation to a suit for breach of an agreement to arbitrate.<sup>123</sup> Because this was a suit for breach of a policy provision as opposed to a breach of the policy itself, the court affirmed the trial court's award of damages in excess of those set out in the policy.<sup>124</sup> Further, the court reversed the trial court on the issue of prejudgment interest.<sup>125</sup> The court awarded the insured interest on those of his damages that were complete at a definite time with the amount determined by fixed rules of evidence and known standards of value.<sup>126</sup>

In *Northern Assurance Co. v. Stan-Ann Oil Co.*<sup>127</sup> the insured attempted to increase coverage by means of the doctrines of waiver or estoppel. Stan-Ann Oil held a \$75,000 "monthly reporting form" fire insurance policy with Northern Assurance. The policy required the insured to report to the insurer in writing not later than thirty days after the last day of each calendar month the total actual cash value of the insured property on the last day of each calendar month.<sup>128</sup> For several months prior to the fire, the

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119. 597 S.W.2d at 344.

120. 588 S.W.2d 681 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.).

121. *Standard Fire Ins. Co. v. Fraiman*, 514 S.W.2d 343, 346 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ).

122. 588 S.W.2d at 685.

123. *Id.* at 683; *see Owens v. Withee*, 3 Tex. 161 (1848); *Brown v. Eubank*, 443 S.W.2d 386 (Tex. Civ. App.—Dallas 1969, no writ).

124. 588 S.W.2d at 683.

125. *Id.* at 685.

126. *Id.* at 684-85; *see Statler Hotels v. Herbert Rosenthal Jewelry Corp.*, 351 S.W.2d 579 (Tex. Civ. App.—Dallas 1961, writ ref'd n.r.e.). In considering the award of interest, the court added that it must determine if the insurer retained monies that should have been paid to the insured but were not paid due to the insurer's wrongful breach of the policy provision. 588 S.W.2d at 684; *see Phillips Petroleum Co. v. Stahl Petroleum Co.*, 569 S.W.2d 480 (Tex. 1978).

127. 603 S.W.2d 218 (Tex. Civ. App.—Tyler 1979, no writ).

128. The value reporting clause in the policy stated:

It is a condition of this policy that the Insured shall report in writing to this



insured had been delinquent in making monthly reports. The insurance company had accepted all these delinquent monthly reports with the exception of the monthly report made after the fire. The last monthly report by the insured was filed on March 4, 1975, at which time the total value shown was \$52,600. The insured, however, omitted from that report certain additional property with an actual cash value of \$33,670.12. A fire occurred on April 27, 1975, resulting in a loss of over \$88,000 to the insured. Upon proper proof of loss, the insurer paid \$53,970.60, based on the applicable ratio under the full reporting clause of the policy.<sup>129</sup> The insured accepted the tendered amount under protest and thereafter sued to recover the balance of its alleged damages. The trial court granted judgment against the insurer and found that by accepting the late notices, it was estopped to deny coverage.<sup>130</sup>

On appeal, the court recognized that an insurer can be estopped by its conduct from seeking forfeiture of a policy.<sup>131</sup> The court added, however, that neither the insurer's coverage nor restrictions on such coverage may be extended or increased by the doctrines of waiver or estoppel.<sup>132</sup> The court emphasized that the full reporting clause and the value reporting clause contained in the policy concerned the coverage of the policy rather

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Company not later than 30 days after the last day of each calendar month, the exact location of all property covered hereunder, the total actual cash value of such property at each location and all specific insurance in force at each of such locations on the last day of each calendar month. At the time of any loss, if the Insured has failed to file with this Company reports of values as above required, this policy, subject otherwise to all its terms and conditions, shall cover only at the locations and for not more than the amounts included in the last report of values less the amount of specific insurance reported, if any, filed prior to the loss, and further, if such delinquent report is the first report of values herein required to be filed, this policy shall cover only at the respective locations specifically named herein and for not exceeding 75% of the applicable limit of liability of this Company specified in the Limit of Liability Clause. If the inception date of this policy is the last day of the calendar month, then the first report of values due shall show the total actual cash value(s) as of that date.

*Id.* at 221.

129. The full reporting clause stated:

Liability under this policy shall not in any case exceed that proportion of loss (meaning the loss as provided in the Excess Clause at the location involved), which the last reported value filed prior to the loss, less the amount of specific insurance reported, if any, at the location where any loss occurs bears to the total actual cash value less the amount of specific insurance, if any, at that location on the date for which report is made. Liability for loss hereunder, occurring at any location acquired since filing the last report (except as provided by the Value Reporting Clause) shall be apportioned in a like manner except that the proportion used shall be the relation that values reported at all locations less the amount of reported specific insurance, if any, bear to the total actual cash values less the amount of specific insurance, if any, at all locations on the date for which report is made.

*Id.* at 222.

130. *Id.* at 221.

131. *Id.* at 223.

132. *Id.*; see *Finger v. St. Paul Fire & Marine Ins. Co.*, 423 S.W.2d 460 (Tex. Civ. App.—Houston [1st Dist.] 1968, writ ref'd n.r.e.); *Great Am. Reserve Ins. Co. v. Mitchell*, 335 S.W.2d 707 (Tex. Civ. App.—San Antonio 1960, writ ref'd).

than the grounds for its forfeiture.<sup>133</sup> The court concluded, therefore, that the insurance company could not use the late reporting to declare the policy forfeited, but could limit liability or coverage to the last report filed under the monthly reporting clause.<sup>134</sup>

In *Port Arthur Towing Co. v. Mission Insurance Co.*<sup>135</sup> the Fifth Circuit ventured into a previously unexplored area of Texas law. On December 31, 1973, Port Arthur Towing obtained a policy of insurance from Mission Insurance. The policy contained a provision limiting the time for commencement of actions due to vessel damage to the longer of one year or the time permitted by the shortest statute of limitations.<sup>136</sup> On December 3, 1976, Port Arthur brought suit on the policy for the grounding of a vessel that had occurred on June 12, 1974. The insurer filed a motion for dismissal and, in the alternative, for summary judgment, claiming that the action was barred by the policy limitations provision. The trial court denied this motion and the insurer appealed.

It was undisputed that the twelve-month period provided by the policy was void under the laws of the State of Texas.<sup>137</sup> The appellate court was thus forced to determine whether the action had been "commenced within the shortest limit of time permitted" by Texas law.<sup>138</sup> The question arose whether the four-year statute of limitations<sup>139</sup> should apply, or whether the court should apply the shortest time available, the general two-year statute of limitations.<sup>140</sup> The court distinguished the instant situation from that in *American Surety Co. v. Blaine*.<sup>141</sup> In *Blaine* the policy provided that if the policy limitations provision was void, then the statutory provision applied.<sup>142</sup> The *Blaine* court stated that the policy reference to a "specific

133. 603 S.W.2d at 223.

134. *Id.*

135. 623 F.2d 367 (5th Cir. 1980).

136. The policy provided the following limitation on actions to recover under the policy:

It is a condition of this policy that no suit, action, or proceeding for the recovery of any claim for physical loss of or damage to the vessel named herein shall be maintainable in any court of law or equity unless the same be commenced within twelve (12) months next after the calendar date of the physical loss or damage out of which the said claim arose. Provided, however, that if, by the laws of the state within which this policy is issued such limitation is invalid, then any such claim shall be void unless such action, suit or proceeding be commenced within the shortest limit of time permitted by the laws of such state, to be fixed herein.

*Id.* at 368.

137. *Id.* at 369; see *National Military Mut. Life Ins. Co. v. Cross*, 379 S.W.2d 96 (Tex. Civ. App.—Corpus Christi 1964, no writ).

138. See note 136 *supra*.

139. TEX. REV. CIV. STAT. ANN. art. 5527 (Vernon Supp. 1980-1981) (applies to any action for debt, certain actions on bonds to convey real estate, and certain actions by one partner against a co-partner).

140. *Id.* art. 5545 (Vernon 1958) (invalidates any agreement providing for a limitations period of less than two years).

141. 272 S.W. 828 (Tex. Civ. App.—Texarkana 1925), *writ ref'd n.r.e. per curiam*, 115 Tex. 147, 277 S.W. 619 (1928).

142. The policy provision in *Blaine* read as follows:

If any limitation of time . . . for any legal proceeding herein contained is at variance with any specific statutory provision in relation thereto, in force in

statutory period" referred to the four-year statute of limitations.<sup>143</sup> In the instant policy, however, there was no specific mention of a statutory provision. For that reason, the *Port Arthur* court concluded that the parties clearly intended for the shortest statute of limitations to apply.<sup>144</sup> The court therefore held that the two-year statute of limitations should apply to bar Port Arthur's claim.<sup>145</sup>

In dissent Justice Fay argued that because the policy provision was void, the parties should not be allowed to contract in contravention of the statute. He opined that once the contract provision was declared void, the applicable four-year statute of limitations should apply.<sup>146</sup>

### III. LIFE, HEALTH, AND ACCIDENT INSURANCE

*Misrepresentations.* In *Mayer v. Massachusetts Mutual Life Insurance Co.*<sup>147</sup> the court faced the question of the validity of a life insurance policy when the physical condition of the insured changed for the worse between the time of his application and the time of the issuance of the policy. Massachusetts Mutual sought a declaratory judgment action against the beneficiary on two contracts of life insurance. The insured signed an application for life insurance in which he indicated no material conditions affecting his health. Before the policies were issued, however, the insured experienced material conditions affecting his health, yet he did not relate this information to the insurer. The jury answered the special issues generally in the insurer's favor. However, the jury failed to find that the insured's failure to disclose changes in his health was for the purpose of inducing the issuance of the policy. For that reason, the trial court rendered judgment for the beneficiary.

The court of civil appeals reversed and held that the issue of fraudulent intent was not decisive.<sup>148</sup> To the court of civil appeals, the controlling point was the written condition precedent to the policy, the application.<sup>149</sup>

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the state in which the premises of the assured as herein described are located, such specific statutory provisions shall supersede any condition in this contract inconsistent therewith.

272 S.W. at 829.

143. *Id.*

144. 623 F.2d at 370.

145. *Id.*

146. *Id.* at 371.

147. 608 S.W.2d 612 (Tex. 1980).

148. 592 S.W.2d 393, 393 (Tex. Civ. App.—Dallas 1979).

149. *Id.* at 395. The pertinent statements in the application were the insured's answers to certain questions:

4. During the past five years, have you had:
  - A. Advice from or attendance or treatment by physicians, other practitioners or psychologists?  
Answer: Yes. . . .
  - B. Treatment or observation in a hospital or sanitarium?  
Answer: No.
  - C. X-ray, electrocardiographic or blood examinations?  
Answer: No.
5. At any time have you been treated for or had any known indication of:

The court reasoned that because of a misrepresentation on the application, a condition precedent to the policy was not fulfilled, and, therefore, the policy never became effective.<sup>150</sup> In so holding, the court of civil appeals followed those authorities that give controlling effect to contractual provisions that a policy will not take effect unless it is delivered when the insured is in good health.<sup>151</sup>

In reversing, the supreme court found that the signature section of the application was not in the nature of a condition precedent.<sup>152</sup> The court did find, however, that the failure of the insured to advise the insurer of the changes in his prior answers was a misrepresentation.<sup>153</sup> Nevertheless, because the insurer failed to establish an intentional deception, the court held that the insurer failed in its defense of misrepresentation.<sup>154</sup>

*Coverage.* In *Life Insurance Co. v. Overstreet*<sup>155</sup> the supreme court was faced with a determination of the effective date of a life insurance policy. The insurer issued a policy covering the life of Maxie Overstreet with an effective date of March 15, 1972. On April 13, 1972, a check was issued by Overstreet for the premium. The insurance company received the check on April 17 and applied it on April 18, 1972. By April 15, 1973, Overstreet had not paid the second year's premiums, and the policy was terminated by the insurance carrier. Payment was made on April 25, 1973, however, and the policy was reinstated. Maxie Overstreet died on April 24, 1974, at which time the 1974 premium had not been paid.

The insurance company refused to pay the proceeds of the policy, stating that the policy's effective date was March 15. Because Overstreet's death occurred after the thirty-one-day grace period, the insurer contended that the policy had terminated. Mrs. Overstreet argued that the effective date of the policy was April 18, the date of the premium payment, rather

A. A disorder of the heart, blood vessels, blood or glands?

Answer: No.

6. During the past five years, have you had any known indication of:

A. Pain, pressure or discomfort in the chest?

Answer: No.

*Id.* at 394.

150. *Id.*

151. *See, e.g.,* *Lincoln Income Life Ins. Co. v. Mayberry*, 162 Tex. 492, 347 S.W.2d 598 (1961); *Texas Prudential Ins. Co. v. Dillard*, 158 Tex. 15, 307 S.W.2d 242 (1957); *Great Nat'l Life Ins. Co. v. Hulme*, 134 Tex. 539, 136 S.W.2d 602 (1940).

152. 608 S.W.2d at 616.

153. *Id.*

154. *Id.* The court stated:

It is now settled law in this state that these five elements must be pled and proved before the insurer may avoid a policy because of the misrepresentation of the insured: (1) the making of the representation; (2) the falsity of the representation; (3) reliance thereon by the insurer; (4) the intent to deceive on the part of the insured in making same; and (5) the materiality of the representation.

*Id.*

155. 603 S.W.2d 780 (Tex. 1980).

than March 15. Both the trial court and the court of civil appeals<sup>156</sup> agreed with Mrs. Overstreet.

The supreme court in reversing, however, concluded that the effective date of the policy was March 15.<sup>157</sup> The court recognized that earlier Texas decisions<sup>158</sup> had adopted the majority rule that a definite statement in the policy of the date on which the annual premiums will be due is the effective date.<sup>159</sup> The court explained:

Such a statement of the due date controls even over a provision stating that a policy will not be in force until it is initially delivered and the first premium is paid during the good health of the insured. Once the policy comes in force, all of the terms of the policy become operative including its provision about the "Effective Date."<sup>160</sup>

Because the policy fixed March 15, 1972, as the effective date, the policy had lapsed prior to Overstreet's death and the court denied recovery to the beneficiaries.<sup>161</sup>

In *Bocanegra v. Aetna Life Insurance Co.*<sup>162</sup> the supreme court decided a question involving the election of remedies between a claim made for health insurance benefits and a claim for workers' compensation benefits as a result of the same condition. Bocanegra was hospitalized for back injuries while employed by the Clegg Company. During her hospitalization, she filed a claim for workers' compensation benefits alleging an occupational disease. The workers' compensation carrier initially disputed liability but later settled the claim. Bocanegra then filed this action against Aetna for her medical expenses under a group policy held by her employer, alleging that her injury was nonoccupational. The trial court granted judgment in her favor.

The court of civil appeals reversed and rendered a take-nothing judgment against Bocanegra.<sup>163</sup> The court held that because Bocanegra recovered workers' compensation benefits on the ground that her injury occurred in the course of her employment, the doctrine of election of remedies precluded recovery of medical expenses for the same condition under an allegation of nonoccupational disease and injury.<sup>164</sup> In upholding Bocanegra's right to pursue this claim, the supreme court distinguished election of remedies from judicial estoppel,<sup>165</sup> equitable estoppel,<sup>166</sup>

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156. 580 S.W.2d 929 (Tex. Civ. App.—Fort Worth 1979). For a discussion of the court of civil appeals' opinion, see Krebs, *supra* note 16, at 307-08.

157. 603 S.W.2d at 783.

158. See *Southland Life Ins. Co. v. Vela*, 147 Tex. 478, 217 S.W.2d 660 (1949); *Great S. Life Ins. Co. v. Peddy*, 139 Tex. 245, 162 S.W.2d 652 (1942); *Kurth v. National Life & Accident Ins. Co.*, 79 S.W.2d 338 (Tex. Civ. App.—San Antonio 1935, writ ref'd).

159. 603 S.W.2d at 782.

160. *Id.*

161. *Id.* at 783.

162. 605 S.W.2d 848 (Tex. 1980).

163. 572 S.W.2d 355 (Tex. Civ. App.—San Antonio 1979). For a discussion of the court of civil appeals' opinion, see Krebs, *supra* note 16, at 309-10.

164. 572 S.W.2d at 356.

165. See *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361 (Tex. 1971); *Long v. Knox*, 155 Tex. 581, 291 S.W.2d 292 (1956).

ratification,<sup>167</sup> waiver,<sup>168</sup> and satisfaction.<sup>169</sup> The court noted that an election may bar relief if one successfully exercises an informed choice between two or more remedies, rights, or fact situations that are so inconsistent as to constitute manifest injustice.<sup>170</sup> The court found that the requirements for an effective election were not present in the instant case.<sup>171</sup> The initial treating physician told Bocanegra that her condition was related to her employment. Upon a subsequent examination, however, she was informed that it was not employment-related. The court concluded that the small amount of her settlement was due to the varying reports concerning her disease.<sup>172</sup> Because of the uncertain nature of her claim, the court reasoned that her settlement with the compensation carrier did not give rise to the informed election of remedies<sup>173</sup> that should operate to bar a second action for damages.

#### IV. DECEPTIVE TRADE PRACTICES AND THE INSURANCE CODE

In *Jay Freeman Co. v. Glens Falls Insurance Co.*<sup>174</sup> suit was brought in federal district court for numerous alleged violations of the Texas Deceptive Trade Practices—Consumer Protection Act<sup>175</sup> and for recovery of attorneys' fees under the Texas Insurance Code.<sup>176</sup> The insurance company had issued a boiler and machinery policy to the plaintiff. One of the plaintiff's food freezers failed, resulting in thawing and the loss of a substantial amount of frozen food. The insurance company conceded that the policy provided coverage, but maintained that it was excused from liability by the failure of the insured to use due diligence to protect itself from loss subsequent to the accident. The plaintiff brought suit alleging violations of four sections of the Act<sup>177</sup> due to the insurance company's denial of liability as well as its representations that the policy provided coverage for certain losses.

The court held that section 17.46(b)(7), providing that it is a deceptive trade practice to represent that goods and services are of a particular quality, standard grade, style, or model, if in fact they are not, was not applica-

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166. See *Barfield v. Howard M. Smith Co.*, 426 S.W.2d 834 (Tex. 1968); *Concord Oil Co. v. Alco Oil & Gas Corp.*, 387 S.W.2d 635 (Tex. 1965); *Gulbenkian v. Penn.*, 151 Tex. 412, 252 S.W.2d 929 (1952).

167. See *Texas & Pac. Coal & Oil Co. v. Kirtley*, 288 S.W. 619 (Tex. Civ. App.—Eastland 1926, writ ref'd).

168. See *Ford v. State Farm Mut. Auto. Ins. Co.*, 550 S.W.2d 663 (Tex. 1977).

169. See *James & Co. v. Statham*, 558 S.W.2d 865 (Tex. 1977); *McMillen v. Klingensmith*, 467 S.W.2d 193 (Tex. 1971); *Bradshaw v. Baylor Univ.*, 126 Tex. 99, 84 S.W.2d 703 (1935).

170. 605 S.W.2d at 851.

171. *Id.* at 853.

172. *Id.* at 854.

173. *Id.*

174. 486 F. Supp. 140 (N.D. Tex. 1980).

175. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1980-1981).

176. TEX. INS. CODE ANN. art. 3.62 (Vernon 1963).

177. TEX. BUS. & COM. CODE ANN. §§ 17.46(b)(7), (12), (19), .50(a)(2) (Vernon Supp. 1980-1981).

ble.<sup>178</sup> The court stated that an insurance policy is neither "goods" nor "services" in light of the fact that section 17.46(b)(12) proscribes similar conduct with regard to contractual rights.<sup>179</sup> It was thus apparent to the court that section 17.46(b)(7) did not include such intangible contract rights as those conferred by insurance policies.<sup>180</sup>

The court further held that section 17.46(b)(12), making it a deceptive trade practice to represent that an agreement confers or involves rights, remedies, or obligations that it lacks, was not violated.<sup>181</sup> The court held that a mere denial of liability under a policy cannot create a claim for treble damages.<sup>182</sup> Further, although the insured alleged that the policy contained an implied warranty of its benefits and of the company's obligation to the insured, because section 17.46(b)(12) speaks only in terms of representations, the court stated that it does not apply to implied warranties.<sup>183</sup>

The court also found inapplicable section 17.46(b)(19), which makes it a deceptive trade practice to represent that a guarantee or warranty confers or involves rights or remedies that it does not have or involve.<sup>184</sup> This section applies to representations about warranties rather than to ordinary representations about, or warranties or guarantees of the goods or services themselves.<sup>185</sup> Therefore, the court ruled that this section did not apply because there were here no misrepresentations concerning warranties or guarantees.<sup>186</sup>

Lastly, section 17.50(a)(2), making it a deceptive trade practice to breach an express or implied warranty, was likewise held to be inapplicable to this situation.<sup>187</sup> The court stated that the alleged implied warranty of policy benefits and obligations added nothing to the benefits and obligations of the insurance contract because the policy terms speak for themselves.<sup>188</sup> Hence, the court reasoned that there was no implied warranty of benefits or obligations that was not already contained in the contract, and the court held that the plaintiff was not entitled to recover under this provision.<sup>189</sup>

The court was presented with a more difficult question in determining whether article 3.62 of the Insurance Code, regarding the recovery of reasonable attorneys' fees, was applicable.<sup>190</sup> The court stated that its deci-

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178. 486 F. Supp. at 142.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*; see *Royal Globe Ins. Co. v. Bar Consultants, Inc.*, 577 S.W.2d 688 (Tex. 1979); *Lone Star Ins. Co. v. Griffin*, 574 S.W.2d 576 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.).

183. 486 F. Supp. at 143.

184. *Id.*

185. See TEX. BUS. & COM. CODE ANN. § 17.46(b)(19) (Vernon Supp. 1980-1981).

186. 486 F. Supp. at 143.

187. *Id.*

188. *Id.*

189. *Id.*

190. TEX. INS. CODE ANN. art. 3.62 (Vernon 1963) provides:

sion turned on whether the policy was an accident policy.<sup>191</sup> Although Texas authorities on this question are conflicting,<sup>192</sup> the court ultimately determined that because the portion of the policy in question covering property damage was a part of a liability policy, the policy was not an accident policy.<sup>193</sup> Consequently, the court held that the claim was not governed by article 3.62.<sup>194</sup> The court also denied the plaintiff attorneys' fees under article 2226,<sup>195</sup> the general attorneys' fees statute, because this statute is specifically made inapplicable to contracts issued by insurers subject to certain provisions of the Texas Insurance Code.<sup>196</sup>

*Hi-Line Electric Co. v. Travelers Insurance Co.*<sup>197</sup> similarly involved an interpretation of the Deceptive Trade Practices Act and the Insurance Code. Hi-Line's vehicle was involved in an accident with a Travelers' insured. Hi-Line alleged that after the accident Travelers agreed to pay for certain repairs, rental of another truck, and other related expenses, and made recommendations regarding repairs and rentals. Hi-Line further alleged that it was forced to pay the repairs and rental costs when Travelers refused to do so. Thus, Hi-Line argued that Travelers agreed to pay without intending to do so in violation of the Deceptive Trade Practices Act.

The question before the court was whether Hi-Line had a cause of action under the Deceptive Trade Practices Act when the services and leased items were sought and obtained from a third party.<sup>198</sup> The court agreed with Travelers' contention that the consumer must seek or acquire goods or services from the person being sued.<sup>199</sup> Further, the court concluded that the Deceptive Trade Practices Act was not intended to cover situations where the defendant did not sell, lease, offer, or advertise to sell or lease to

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In all cases where a loss occurs and the life insurance company, or accident insurance company, or life and accident, health and accident, or life, health and accident insurance company liable therefor shall fail to pay the same within thirty days after demand therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve (12%) per cent damages on the amount of such loss together with reasonable attorney fees for the prosecution and collection of such loss. Such attorney fee shall be taxed as a part of the costs in the case. The Court in fixing such fees shall take into consideration all benefits to the insured incident to the prosecution of the suit, accrued and to accrue on account of such policy.

191. 486 F. Supp. at 143.

192. Compare *Bybee v. Fireman's Fund Ins. Co.*, 160 Tex. 429, 331 S.W.2d 910 (1960) (policy covering hail damage to crops held not an accident policy) and *Evans v. Pacific Nat'l Fire Ins. Co.*, 367 S.W.2d 85 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.) (fire insurance policy held not an accident policy) with *National Live Stock Ins. Co. v. Gomillion*, 178 S.W. 1050 (Tex. Civ. App.—Austin 1915, writ ref'd) (policy covering a mule held an accident policy).

193. 486 F. Supp. at 144.

194. *Id.*

195. TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1980-1981).

196. 486 F. Supp. at 144.

197. 587 S.W.2d 488 (Tex. Civ. App.—Dallas 1979), writ ref'd n.r.e. per curiam, 593 S.W.2d 953 (Tex. 1980).

198. 587 S.W.2d at 489.

199. *Id.* at 490. The court ruled that although the plaintiff and defendant need not be in privity or in a contractual relationship, the consumer must seek or acquire goods or services furnished by the party alleged to have violated the Deceptive Trade Practices Act. *Id.*



the consumer.<sup>200</sup>

The court also held that Hi-Line was not entitled to recover under either article 21.21 or article 21.21—2 of the Insurance Code.<sup>201</sup> Article 21.21—2<sup>202</sup> provides remedies for injuries suffered as a result of unfair claims settlement practices, but does not confer a right of action upon the individual injured by an unfair settlement practice.<sup>203</sup> Instead, the State Board of Insurance is empowered to stop an unfair or unlawful practice by means of a cease and desist order.<sup>204</sup> Thus the court ruled that plaintiff had no cause of action under article 21.21—2.<sup>205</sup>

With regard to article 21.21, the court held that an individual may recover thereunder only if that individual could recover under the Deceptive Trade Practices Act.<sup>206</sup> Because Hi-Line was not a consumer under the Act, the court held that it was not entitled to recover pursuant to article 21.21.<sup>207</sup>

In a per curiam opinion the supreme court refused the writ of error, finding no reversible error.<sup>208</sup> The court cautioned, however, that its action should not be interpreted as approving the court of civil appeals' holding that a private action under article 21.21 of the Insurance Code must be based on the Deceptive Trade Practices Act.<sup>209</sup> The court further stated that it was not approving the position of the court of civil appeals that a person, as that term is used in article 21.21, section 16(a), must be a consumer as defined in the Deceptive Trade Practices Act.<sup>210</sup> Thus, these two elements of the lower court's opinion remain unsettled points of law.

In *McNeill v. McDavid Insurance Agency*<sup>211</sup> an insurance applicant brought suit alleging that he was misled to believe that he had liability coverage when in fact he only had property damage coverage. McNeill purchased a car from Bill McDavid Pontiac, and, as a condition to financing, the financing institution required that McNeill have property damage insurance. He obtained such coverage through the McDavid agency, which is associated with the car dealership. This agency solicits automobile insurance policies and applications for policies and submits them to various companies for acceptance. A soliciting agent for the McDavid agency met with McNeill, and an application form entitled "Automobile

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200. *Id.*

201. *Id.*

202. TEX. INS. CODE ANN. art. 21.21—2 (Vernon Pam. Supp. 1963-1980).

203. *See* Lone Star Life Ins. Co. v. Griffin, 574 S.W.2d 576, 580 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.).

204. *See* Russell v. Hartford Cas. Ins. Co., 548 S.W.2d 737, 742 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.).

205. 587 S.W.2d at 490.

206. *Id.*; *see* TEX. INS. CODE ANN. art. 21.21, § 16 (Vernon Pam. Supp. 1963-1980), which provides that any person injured by another engaging in any deceptive trade practice may maintain an action against the company or companies engaged in such practice.

207. 587 S.W.2d at 491.

208. 593 S.W.2d 953 (Tex. 1980).

209. *Id.*

210. *Id.*

211. 594 S.W.2d 198 (Tex. Civ. App.—Fort Worth 1980, no writ).

Liability and Physical Damage Insurance Application" was completed. The application did not include a request for liability coverage, as no premium charge was entered in the space providing for such coverage. After the application was completed, but prior to the issuance of the insurance policy by Vico County Mutual, McNeill was involved in an accident that resulted in a judgment against him for damages to the other vehicle involved in the accident. Vico honored the property damage portion of the policy and paid for the collision loss.

In this subsequent suit alleging deceptive trade practices, McNeill argued that the McDavid agency misled him to believe that he had liability coverage, coverage that he would have secured had he known it was not included in his policy. He did not allege any oral misrepresentation by the soliciting agent. Rather, he contended that because he requested liability coverage and saw a reference to such coverage in the title of the application form, and because he was not informed of the terms of the application or what coverages were included, he justifiably and detrimentally relied on the agent to apply for liability coverage. He thus argued that the agency violated article 21.21, sections 4(1) and (2), of the Texas Insurance Code,<sup>212</sup> which constituted a deceptive trade practice under section 17.50(a)(4) of the Deceptive Trade Practices Act.<sup>213</sup>

The trial court directed a verdict for the defendants as a matter of law,

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212. Sections 4(1) and 4(2) of art. 21.21 of the Insurance Code provide:

Sec. 4. Unfair Methods of Competition and Unfair or Deceptive Acts or Practices Defined.—The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:

(1) Misrepresentations and False Advertising of Policy Contracts. Making, issuing, circulating, or causing to be made, issued or circulated, any estimate, illustration, circular or statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby or the dividends or share of the surplus to be received thereon, or making any false or misleading statements as to the dividends or share of surplus previously paid on similar policies, or making any misleading representation or any misrepresentation as to the financial condition of any insurer, or as to the legal reserve system upon which any life insurer operates, or using any name or title of any policy or class of policies misrepresenting the true nature thereof, or making any misrepresentation to any policyholder insured in any company for the purpose of inducing or tending to induce such policyholder to lapse, forfeit, or surrender his insurance;

(2) False Information and Advertising Generally. Making, publishing, disseminating, circulating or placing before the public, or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine or other publication, or in the form of a notice, circular, pamphlet, letter or poster, or over any radio or television station, or in any other way, an advertisement, announcement or statement containing any assertion, representation or statement with respect to the business of insurance or with respect to any person in the conduct of his insurance business, which is untrue, deceptive or misleading.

TEX. INS. CODE ANN. art. 21.21, §§ 4(1)-(2) (Vernon 1963).

213. TEX. BUS. & COM. CODE ANN. § 17.50(a)(4) (Vernon Supp. 1980-1981) grants a cause of action to consumers injured by an act or practice in violation of art. 21.21 of the Texas Insurance Code.

and the court of civil appeals affirmed.<sup>214</sup> The court of appeals stated that it was beyond dispute that there were no oral misrepresentations and that the soliciting agent did not explain what coverages were sought.<sup>215</sup> The court further noted that explanations on the face of the policy clearly indicated that coverages existed only for items for which premium charges were made.<sup>216</sup> Accordingly, the court held that there was no misrepresentation or false advertising as proscribed by article 21.21, section 4(1) of the Insurance Code,<sup>217</sup> which prohibits misrepresentations as to a policy that is issued or about to be issued. The court viewed the application as a mere offer to purchase insurance rather than as a guarantee of coverage.<sup>218</sup> As the application could not be construed as a policy to which section 4(1) applies, the court could find no violation of this section.<sup>219</sup>

McNeill also contended that because he specifically requested liability coverage and used an application form referring to liability coverage, the agent's failure to inform him that he was not receiving such coverage was a deceptive trade practice. The court found no provision in the Texas Insurance Code, article 21.21, by which such a failure could be construed as a deceptive trade practice.<sup>220</sup> Because an insurance policy is viewed as a service under the Deceptive Trade Practices Act,<sup>221</sup> however, the court assumed, without deciding, that section 17.46(b)(23)<sup>222</sup> would govern.<sup>223</sup> That section defines a deceptive trade practice as the failure to disclose information concerning goods or services that was known at the time of the transaction if such failure to disclose was intended to induce the consumer into a transaction he otherwise would not have entered.<sup>224</sup> The court found the critical question to be whether the solicitor was an agent of the applicant or of the insurer, for it is the agency relationship that creates a duty to inform.<sup>225</sup> The court noted that McNeill never asserted that the soliciting agent was his agent;<sup>226</sup> rather, McNeill contended throughout that the solicitor was the agent of the McDavid agency and the insurance company.<sup>227</sup> The court stated that because the soliciting agent was not an agent of McNeill, the agent had no legal duty to prevent McNeill from

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214. 594 S.W.2d at 200.

215. *Id.* at 201.

216. The coverage page on the front of the insurance application stated: "The insurance afforded is only with respect to such of the following coverages as are indicated by specific premium charge or charges. The limit of the company's liability against each such coverage shall be as stated herein, subject to all the terms of this policy having reference thereto." *Id.*

217. *Id.* at 202.

218. *Id.*

219. *Id.*

220. *Id.*

221. *See* Dairyland County Mut. Ins. Co. v. Harrison, 578 S.W.2d 186, 190 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ).

222. TEX. BUS. & COM. CODE ANN. § 17.46(b)(23) (Vernon Supp. 1980-1981).

223. 594 S.W.2d at 202.

224. TEX. BUS. & COM. CODE ANN. § 17.46(b)(23) (Vernon Supp. 1980-1981).

225. 594 S.W.2d at 203; *see* Burroughs v. Bunch, 210 S.W.2d 211 (Tex. Civ. App.—El Paso 1948, writ ref'd).

226. 594 S.W.2d at 203.

227. *Id.*

being self-deceived.<sup>228</sup> Lastly, the court ruled that the Deceptive Trade Practices Act would not have applied to Vico County Mutual even if there had been a deceptive trade practice, because the act does not apply to county mutual insurance companies.<sup>229</sup>

In *Legal Security Life Insurance Co. v. Trevino*<sup>230</sup> the court decided a venue question in a suit against an insurer for an alleged deceptive trade practice. The insurance company had appointed Jesse Sanchez as a soliciting agent. The plaintiff's petition alleged that Sanchez had called upon him in Frio County to solicit an application for a hospitalization insurance policy. The plaintiff further alleged that Sanchez represented that the policy would take immediate effect. Trevino's son was injured shortly thereafter, and the insurance company refused to honor Trevino's claim for medical expenses. Trevino brought suit in Frio County for a deceptive trade practice under section 17.50.<sup>231</sup>

The question before the court was whether the insurance company had done business in Frio County.<sup>232</sup> The court held that because Sanchez was appointed as an agent for the purpose of soliciting insurance and did solicit insurance in Frio County, the company had done business in that county for the purpose of maintaining venue under section 17.56.<sup>233</sup> The court further held that a cause of action had been alleged as necessary under section 17.56.<sup>234</sup> Lastly, the court held that the plaintiff's allegation that Sanchez made the representation while in the course and scope of his employment was sufficient for the purpose of maintaining venue.<sup>235</sup>

On appeal, the supreme court in a per curiam opinion refused the writ of error, finding no reversible error.<sup>236</sup> The court held that the single transaction that was the basis of the suit had occurred in the county of the suit and, therefore, the defendant had done business in that county. The court noted<sup>237</sup> that this holding conflicted with the Dallas court of civil appeals' decision in *Moore v. White*.<sup>238</sup> While the court did not expressly overrule *Moore*, the holding of that case has apparently been disapproved by *Trevino*.

228. *Id.*

229. *Id.*; see *Mobil County Mut. Ins. Co. v. Jewell*, 555 S.W.2d 903, 909-10 (Tex. Civ. App.—El Paso 1977, writ ref'd n.r.e.).

230. 594 S.W.2d 481 (Tex. Civ. App.—San Antonio 1979), writ ref'd n.r.e. per curiam, 605 S.W.2d 857 (Tex. 1980).

231. TEX. BUS. & COM. CODE ANN. § 17.50 (Vernon Supp. 1980-1981).

232. *Id.* § 17.56. As originally written this section provided for venue in a county in which the person against whom suit is brought was "doing business." See 1973 Tex. Gen. Laws, ch. 143, § 1, at 331. It was amended in 1977 to use the term "has done business." See 1977 Tex. Gen. Laws, ch. 216, § 8, at 604. Although this section was amended again in 1979, the instant case was governed by the 1977 version.

233. 594 S.W.2d at 483.

234. *Id.* at 484.

235. *Id.* at 483-84.

236. 605 S.W.2d 857 (Tex. 1980).

237. *Id.*

238. 587 S.W.2d 549 (Tex. Civ. App.—Dallas 1979, no writ). In that case the court held that an isolated sale of one house in the county was not evidence that the defendant "has done business" in the county. *Id.* at 550.

