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## Insurance Law

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# INSURANCE LAW

by

Jeff Dykes\* and Otway B. Denny, Jr.\*\*

## I. HEALTH, LIFE, AND ACCIDENT INSURANCE

**E**XCLUSIONS from Coverage. Three cases during the survey period dealt with policy clauses excluding certain risks from coverage. *Entzminger v. Provident Life & Accident Insurance Co.*<sup>1</sup> involved the construction and application of an aviation exclusion clause in the accidental death portion of a group life and accidental death insurance policy. The insured, a major in the Texas Air National Guard, died in the crash of a military aircraft during a Guard sortie that was one of a minimum number of missions the officer was required to log each month. The insurer refused to pay the \$25,000 accidental death indemnity on the grounds that the flight was excluded under a clause in the policy denying coverage for loss caused by a training flight.<sup>2</sup> The beneficiaries sued, arguing that the policy's exclusionary provision was ambiguous, in that "training" could mean either student flight or flying by an experienced pilot to prevent loss of skills. The beneficiaries also claimed the provision did not give fair notice to them of what was excluded in the policy.

The court found the exclusion to be clear and unambiguous and to provide fair notice as a matter of law.<sup>3</sup> The court stated that in the absence of a policy provision showing the parties intended the term "training" to be used in the sense claimed by the beneficiaries, the court must give the word its generally understood meaning, and concluded that the exclusion applied to any aviation training purpose.<sup>4</sup> The beneficiaries also relied upon the testimony of the insurance company's own representative, who testified that the policy was not meant to have a military exclusion. The beneficiaries argued that if proficiency flight were included in the definition of "training," the policy would exclude all military flight from coverage. The

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1. 652 S.W.2d 533 (Tex. App.—Houston [1st Dist.] 1983, no writ).

2. The exclusion read: "No Accidental Death or Dismemberment Insurance will be payable for any loss caused directly or indirectly, wholly or partly by: . . . 2. flight in an aircraft operated for any training or testing or experimental purpose . . ." *Id.* at 536.

3. *Id.* at 537.

4. *Id.* at 536-37.

court ruled that this testimony could not be used to contradict the clearly stated intention of the parties, as shown in the contract.<sup>5</sup> Finally, the court held that if no ambiguity exists, parol evidence is not admissible to create an ambiguity.<sup>6</sup>

*McFadden v. American United Life Insurance Co.*<sup>7</sup> involved interpretation of a dental exclusion. The insured brought suit against American to recover expenses incurred for oral surgery to repair a condition known as retrographic mandible. The trial court granted summary judgment for American, and the court of civil appeals affirmed.<sup>8</sup> The insured's policy with American, which he obtained through his employer, contained a dental exclusion.<sup>9</sup> In the trial court the plaintiff relied upon the affidavit of the treating dentist, who described the procedure as an operation on the mandible, or jaw, and stated that it had nothing to do with the teeth. The insurer relied upon the deposition and affidavit of another dentist, who stated that the procedure was dental surgery and that the purpose of the surgery was to realign the teeth. Thus the insurer claimed the surgery was not covered under the policy.

The court of appeals relied on a state statute<sup>10</sup> and one case to define dentistry as including jaw surgery.<sup>11</sup> It ruled that summary judgment was proper because surgery for a retrographic mandible was excluded as a matter of law under the policy.<sup>12</sup> The Texas Supreme Court reversed the summary judgment, however, holding that the conflicting affidavits created a fact issue for the jury to decide as to the purpose of the surgery.<sup>13</sup>

In *Sekel v. Aetna Life Insurance Co.*<sup>14</sup> Richard Sekel fell at his home and sustained a fatal blow to his head. The autopsy showed that he had a

5. *Id.* at 537.

6. *Id.* (citing *Eggert v. American Standard Life Ins. Co.*, 404 S.W.2d 99, 104 (Tex. Civ. App.—Corpus Christi 1966, no writ)).

7. 658 S.W.2d 147 (Tex. 1983).

8. 643 S.W.2d 232 (Tex. App.—Fort Worth 1982).

9. The exclusion read: "This insurance does not provide any benefits for charges . . . incurred for dentures, dentistry or dental surgery, except as required for treatment of accidental injuries to natural teeth." 658 S.W.2d at 147.

10. TEX. REV. CIV. STAT. ANN. art. 4551a(2) (Vernon Supp. 1984) states:

Any person shall be regarded as practicing dentistry within the meaning of this Chapter:

(2) Who shall offer or undertake by any means or methods whatsoever, to clean teeth or to remove stains, concretions or deposits from teeth in the human mouth, or who shall undertake or offer to diagnose, treat, operate, or prescribe by any means or methods for any disease, pain, injury, deficiency, deformity, or physical condition of the human teeth, oral cavity, alveolar process, gums, or jaws.

11. The court of appeals stated: "Dentistry has been defined by statute and reiterated in at least one case as 'undertaking and offering to diagnose, treat, operate or prescribe by any means or methods for any disease, pain, injury, deficiency, deformity, or physical condition of the human teeth, oral cavity, alveolar process, gums or jaws.'" 643 S.W.2d at 233 (quoting *Kelley v. Texas State Bd. of Medical Examiners*, 467 S.W.2d 539, 542 (Tex. Civ. App.—Fort Worth 1971, writ ref'd n.r.e.), cert. denied, 405 U.S. 1073 (1972)) (emphasis added by court).

12. 643 S.W.2d at 233.

13. 658 S.W.2d at 148.

14. 704 F.2d 1335 (5th Cir. 1983).

severe atherosclerotic and hypertensive cardiovascular disease that probably caused the fall.<sup>15</sup> The accident benefits coverage clause in his group life and accidental death policy provided that Aetna would pay the benefits under certain conditions.<sup>16</sup> An exclusion clause prohibited payment when bodily infirmity or disease contributed to an injury resulting in loss even when accident was a proximate or precipitating cause.<sup>17</sup> Aetna claimed that this exclusion clause prevented the recovery of accidental death benefits.

The court noted the similarity of this clause to one restricting coverage to loss caused "directly and independently" or "independently and exclusively" by an accident. Texas courts have construed this latter type of clause to preclude recovery when disease and bodily infirmity is a concurrent proximate cause of death,<sup>18</sup> but if the disease is a remote cause, the courts have not barred recovery.<sup>19</sup> The court pointed out, however, that the Texas Supreme Court has recognized two types of exclusion clauses, those that exclude coverage only when the disease is a proximate cause, and those that also exclude it when the disease is a more remote cause of the subsequent loss.<sup>20</sup> In *Sekel* the Fifth Circuit Court of Appeals found that the Aetna exclusion clause fell into the second category.<sup>21</sup> The court held that the clause barred coverage where a risk excluded by the policy is a functionally, closely related significant cause or contributing factor to the loss, even if a covered risk is a proximate and more immediate precipitating cause.<sup>22</sup> According to the court, a contrary result would disregard the clear and unambiguous meaning of the exclusion clause.<sup>23</sup> The judges maintained that the exclusion provision would be meaningless unless it precluded recovery in at least some cases where the causal or contributory

15. The autopsy report stated: "In our opinion Richard Sekel . . . died from severe head trauma . . . . The initiating event was probably an arrhythmia . . . secondary to the victim's very severe hypertensive and atherosclerotic cardiovascular disease . . . . Therefore, the victim probably passed out because of his natural disease processes and subsequently struck his head when he fell." *Id.* at 1336.

16. The coverage clause provided that Aetna would pay if the insured suffered a "bodily injury caused by an accident and as a direct result of such injury and, to the exclusion of all other causes, sustains within not more than ninety days . . . any of the losses [covered]." *Id.*

17. The exclusion clause stated:

The insurance provided under this Title does not include, and no payments shall be made for, any loss resulting from any injury caused or contributed to by, or as a consequence of, any of the following excluded risks, even though the proximate or precipitating cause of loss is accidental bodily injury:

- (a) bodily or mental infirmity; or
- (b) disease.

*Id.* at 1336-37.

18. *See Mutual Benefit Health & Accident Ass'n v. Hudman*, 398 S.W.2d 110, 115 (Tex. 1965) (when overexertion and diseased heart concurrently caused death, death not covered by insurance policy limiting coverage to accidental injury independent of other causes).

19. *See Stroburg v. Insurance Co. of N. Am.*, 464 S.W.2d 827, 830-31 (Tex. 1971).

20. 704 F.2d at 1337; *see Stroburg v. Insurance Co. of N. Am.*, 464 S.W.2d 827, 831-32 (Tex. 1971).

21. 704 F.2d at 1338.

22. *Id.*

23. *Id.*

relationship between the death and disease was less than proximate.<sup>24</sup> The court noted that other jurisdictions' constructions support this interpretation of the "even though" phrase.<sup>25</sup> The court distinguished an earlier case applying Texas law, *Zorn v. Aetna Life Insurance Co.*,<sup>26</sup> which denied coverage under an almost identical exclusion clause because "bodily infirmity" concurred with an accident in causing the insured's death.<sup>27</sup> The *Sekel* court found that *Zorn* did not reach the issue of whether a nonproximate cause would have barred recovery; therefore, the Fifth Circuit was free to refer to other jurisdictions' decisions.<sup>28</sup>

*Choice of Laws.* The Fifth Circuit dealt with one case on choice of laws during the survey period. In *New York Life Insurance Co. v. Baum*<sup>29</sup> the Fifth Circuit had to determine whether Texas conflict of laws rules required the application of New York or Louisiana law to an insurance policy before it could decide which of two claimants was the proper beneficiary. The evidence showed that the insured signed the insurance application in Louisiana and that his physical examination took place in Louisiana. New York Life issued and executed the policy in New York, however, and premiums were paid to the company in exchange for a receipt signed by the president of the company or its secretary in New York. The district court, relying on Texas conflict of laws provisions, ruled that Louisiana law applied to this case, and that the policy was void because neither claimed beneficiary had an insurable interest under Louisiana law.<sup>30</sup> The Fifth Circuit disagreed, finding that the contract was made in New York and most of its performance was to have taken place there. Therefore, the Fifth Circuit held that New York law governed.<sup>31</sup>

In so holding, the Fifth Circuit noted the validity of two early Texas Supreme Court cases. In *Seiders v. Merchants Life Association*<sup>32</sup> the court held that where an insurance contract provided that the principal and premiums be paid in an insurance company's home office in Missouri, even though the contract was actually made in Texas, Missouri law controlled.<sup>33</sup> In *Fidelity Mutual Life Association v. Harris*<sup>34</sup> the court noted that the test is governed by the final agreement of minds, which concludes the contract.

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24. *Id.* at 1339-40.

25. *Id.* at 1340; see *Britt v. Travelers Ins. Co.*, 556 F.2d 336, 342-43 (5th Cir. 1977), *modified*, 566 F.2d 1020, 1022-23 (5th Cir. 1978) (applying Mississippi law); *Huff v. Aetna Life Ins. Co.*, 120 Ariz. 548, 587 P.2d 267, 270-71 (Ct. App. 1978); *cf.* *Aetna Life Ins. Co. v. Kegley*, 389 F.2d 348, 352 (5th Cir. 1967), *cert. denied*, 390 U.S. 946 (1968) (clause denying recovery if disease contributed to loss is attempt to place heavier burden on insured, but is limited by public policy). The *Sekel* court drew support for its interpretation from dictum in *Kegley*. 704 F.2d at 1340 n.6.

26. 260 F. Supp. 730 (E.D. Tex. 1965), *aff'd per curiam*, 368 F.2d 1013 (5th Cir. 1966).

27. *Id.* at 732-33.

28. 704 F.2d at 1340 n.6.

29. 700 F.2d 928 (5th Cir. 1983).

30. *Id.* at 930.

31. *Id.* at 933.

32. 93 Tex. 194, 54 S.W. 753 (1900).

33. *Id.* at 198-99, 54 S.W. at 754.

34. 94 Tex. 25, 57 S.W. 635 (1900).

The place where the agreement occurs is the place where the contract generally is made.<sup>35</sup> Applying these cases, the Fifth Circuit held that, under Texas law, if an agent must verify to his satisfaction a certain condition of the insured prior to delivering the insurance contract, the making of the contract occurs where the insured resides.<sup>36</sup> Where delivery of the policy is unconditional, however, the contract is deemed to have been made at the domicile of the insurance company.<sup>37</sup>

## II. LIABILITY INSURANCE

*Nonowner's Policy Endorsement.* In *Dairyland County Mutual Insurance Co. v. Childress*<sup>38</sup> the Texas Supreme Court considered whether a non-owner's policy endorsement covered a car furnished for the regular use of the named insured but not owned by him, and whether injured plaintiffs were bound by a declaratory judgment action to which they were not parties. *Dairyland* involved a suit by plaintiffs injured in an automobile accident against the driver's insurer. In a prior proceeding the plaintiffs obtained a judgment against the insured, who was driving his girlfriend's car when the accident occurred. In addition, the insurer had filed a declaratory judgment action claiming that the insured's nonowner's policy did not cover an automobile furnished to the insured for his regular use and had received an agreed judgment declaring that the insured was not covered in this case. The injured plaintiffs, however, were not parties to this declaratory judgment action. After securing a judgment against the insured, the injured plaintiffs sued Dairyland, the insurer, for the amount of the judgment, as well as for attorney's fees. The trial court found that the plaintiffs were bound by the agreed judgment in the suit between the insured and the insurer, and rendered a take-nothing judgment. The court of appeals reversed, granting the plaintiffs judgment for the policy limits and for attorney's fees.<sup>39</sup>

In affirming the court of appeals decision, the Texas Supreme Court considered whether the named insured's nonowner's policy covered a car furnished for his regular use but not owned by him. In the trial court the

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35. *Id.* at 35, 57 S.W. at 638.

36. 700 F.2d at 932.

37. *Id.* The district court had disregarded *Seiders* and *Fidelity* because it believed a firm "home office" rule had been rejected in Texas. The court relied on TEX. INS. CODE ANN. art. 21.42 (Vernon 1963), which provides that Texas laws govern an insurance contract payable to a Texas citizen or inhabitant when the insurer is doing business in Texas. 700 F.2d at 933. The Fifth Circuit said art. 21.42 did not apply to the *Baum* policy for several reasons. First, the identity of the beneficiary, the fundamental issue in *Baum*, must be known before art. 21.42 can be applied. *Id.* Second, the original beneficiary was a Louisiana resident. *Id.* Third, Texas courts have interpreted art. 21.42 to apply only when the insurance contract is made in the course of the company's Texas business, which the court said was not the case here. *Id.* (citing *Howell v. American Live Stock Ins. Co.*, 483 F.2d 1354, 1361 (5th Cir. 1973) (Texas statutes do not apply in suit to recover on policy insuring horse where contract was made in New Mexico and horse was kept in New Mexico); *Austin Bldg. Co. v. National Union Fire Ins. Co.*, 432 S.W.2d 697, 700-01 (Tex. 1968) (art. 21.42 has no extraterritorial effect; Kansas law controls where parties contracted in that state with Kansas citizen)).

38. 650 S.W.2d 770 (Tex. 1983).

39. 636 S.W.2d 282 (Tex. App.—Eastland 1982).

jury had found that the automobile was furnished to the insured for his regular use. Dairyland contended that the finding precluded coverage, basing its reasoning on the definition of nonowned automobiles in the policy, which excluded coverage for cars either owned by the named insured or furnished for his regular use.<sup>40</sup> A nonowner's endorsement attached to the policy, however, precluded coverage only for cars owned by the insured.<sup>41</sup> The supreme court held that the policy did provide liability coverage for the insured while he drove his girlfriend's automobile.<sup>42</sup>

Turning to the insurance company's *res judicata* and collateral estoppel defenses, the supreme court held that the agreed declaratory judgment between the insurer and insured did not bind the injured plaintiffs.<sup>43</sup> The court rejected Dairyland's claim that the plaintiffs' suit was derivative of the insured's coverage and that as such they were in privity with the insured. The court said that the plaintiffs could exercise no control over the declaratory judgment action and therefore were not bound by its result.<sup>44</sup>

Finally, the court found that the plaintiffs were entitled to recover attorney's fees under article 2226 of the Texas Revised Civil Statutes, which allows such fees to parties who have a valid claim against a person as a result of a suit founded on an oral or written contract.<sup>45</sup> Dairyland contended that the plaintiffs' suit was to enforce the judgment and was, therefore, not founded on an oral or written contract. The court initially determined that Dairyland, as a county mutual insurance company, was not one of the insurers exempt from the provisions of article 2226.<sup>46</sup> The court stated that in Texas a third person not a party to a contract has a cause of action to enforce the contract if the contract was made for that

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40. The definition in the policy read: "Non-owned automobile means an automobile . . . not owned by or furnished for the regular use of either the named insured or any relative, other than a temporary substitute automobile." 650 S.W.2d at 773.

41. The court stated:

[T]he non-owner's endorsement . . . states that it becomes a part of the policy to which it is attached, that the insurance . . . for bodily injury liability and personal property damage liability applies with respect to the use of *any* automobile by or in behalf of the named insured subject to the following provisions:

2. The insurance does not apply

(a) to any automobile owned by the named insured.

*Id.* (emphasis in original).

42. *Id.*

43. *Id.* at 774.

44. *Id.*

45. TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1984).

46. 650 S.W.2d at 775. Article 2226 states:

The provisions hereof shall not apply to contracts of insurance issued by insurers subject to the provisions of the Unfair Claim Settlement Practices Act (Article 21.21—2, Insurance Code), nor shall it apply to contracts of any insurer subject to the provisions of Article 3.62, Insurance Code, or to Chapter 387, Acts of the 55th Legislature, Regular Session, 1957, as amended (Article 3.62—1, Vernon's Texas Insurance Code), or to Article 21.21, Insurance Code, as amended, or to Chapter 9, Insurance Code, as amended, and each such article or chapter shall be and remain in full force and effect.

TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1984).

person's benefit.<sup>47</sup> The court said that allowing such a person to sue for attorney's fees is a logical extension of this rule, if the claim is not excluded by the statutory exemptions.<sup>48</sup> The plaintiffs in *Dairyland* qualified as third-party beneficiaries because the compulsory insurance requirement of Texas motor vehicle safety laws implies that all potential claimants for damages resulting from automobile accidents are intended as beneficiaries of statutorily required automobile liability coverage.<sup>49</sup> Thus the court held that the plaintiffs had standing to enforce the contract between the insured and the carrier, Dairyland, and that they were also entitled to seek attorney's fees under article 2226 for actions founded upon contract.<sup>50</sup>

*Aviation Liability.* In *Marr's Shortstop of Texas, Inc. v. United States Fire Insurance Co.*<sup>51</sup> the court of appeals addressed the issue of whether the pilot of an airplane that crashed, killing all aboard, was properly rated for the flight within the meaning of the aviation liability insurance policy.<sup>52</sup> The trial court submitted two issues to the jury. The first issue asked whether the weather conditions at the beginning of the flight required the use of instrument flight rules (IFR).<sup>53</sup> The second issue asked whether or not the pilot knew that he would be flying in IFR weather conditions at the beginning of the flight. The jury found that visual flight rules (VFR) conditions existed at the time of takeoff, but that the pilot knew when he took off that he would be flying in IFR conditions some time before the end of the flight. Under the policy, the first answer supported the owner, while the second answer supported the insurer. The trial court disregarded the first answer and rendered judgment for the insurance company. The court of appeals found that Texas precedent required the flight to be characterized at its inception and that the jury's answer to the second issue was therefore immaterial.<sup>54</sup> The court of appeals reversed, holding that the in-

47. 650 S.W.2d at 775; see *Quilter v. Wendland*, 403 S.W.2d 335, 337 (Tex. 1966); *Knox v. Ball*, 144 Tex. 402, 409, 191 S.W.2d 17, 21 (1945).

48. 650 S.W.2d at 775.

49. *Id.* at 775-76; see TEX. REV. CIV. STAT. ANN. art. 6701h, §§ 1(10), 1A, 2(b), 5, 32 (Vernon 1977 & Supp. 1984).

50. 650 S.W.2d at 776.

51. 643 S.W.2d 514 (Tex. App.—Eastland 1982, writ granted).

52. The policy contained the following pilot clause: "Only the following pilot or pilots holding valid and effective pilot and medical certificates with ratings as required by the Federal Aviation Administration for the flight involved will operate the aircraft in flight: Ronald Eugene Marr." *Id.* at 515 n.1.

53. 14 C.F.R. §§ 61.3(e), 91.115 (1983).

54. 643 S.W.2d at 516; see *Glover v. National Ins. Underwriters*, 545 S.W.2d 755 (Tex. 1977). The supreme court in *Glover* stated:

The remaining question is whether the flight of the . . . aircraft in this case was a VFR flight, for which the pilot was properly rated, or an IFR flight, for which he was not. The answer to this question depends on at what point in time the status of the flight should be determined. We have concluded, as did the *King Craft* court [see *National Ins. Underwriters v. King Craft Custom Prods., Inc.*, 368 F. Supp. 476 (N.D. Ala. 1973), *aff'd per curiam*, 488 F.2d 1393 (5th Cir. 1974)] that the flight should be characterized as of its inception. The weather conditions at the beginning of the flight should thus be looked to in determining whether the flight is a VFR flight or an IFR flight.

545 S.W.2d at 762.



insurance company had failed to prove the pilot was not properly rated for the flight.<sup>55</sup> The Texas Supreme Court has granted a writ in his case but has not yet rendered a decision.<sup>56</sup>

*Limitation to "Household."* In *Brown v. Tucker*<sup>57</sup> Stephen Craig Stubbs, a passenger injured in an automobile accident, sued under the uninsured motorist coverage issued to his stepfather, Glen A. Brown. Stubbs had to show that he was a resident of Brown's household in order to recover.<sup>58</sup> At the time of the accident Stubbs had been living in a trailer five miles from his stepfather's home, but some testimony indicated this arrangement was temporary. During deliberations the jury asked for a definition of the term "household." At the carrier's request the trial court defined the term as "those who dwell under the same roof and compose a family."<sup>59</sup> The plaintiff objected to this definition and asked that household be defined as "a family or a group of persons who habitually reside under one roof and form one domestic circle."<sup>60</sup> Rejecting the plaintiff's contention that the definition as submitted placed too much emphasis on geographical location, the court of appeals found that the two definitions were so nearly the same that it was doubtful the jury could have been misled. The court ruled, therefore, that the trial court did not abuse its discretion in submitting the definition.<sup>61</sup>

*Construction of Endorsement.* In *All Star Van & Storage v. Admiral Storage & Van, Inc.*<sup>62</sup> the insurance carriers for two moving companies, All Star and Admiral, brought a declaratory judgment action to determine which policy of insurance applied to a loss. The case involved a truck, owned by All Star but leased by Admiral, that damaged a Border Patrol Station when Admiral used the truck to transport some of its property. The Fireman's Fund policy issued to All Star provided coverage when the truck was operated by another with permission of the owner, All Star. The policy contained an endorsement, however, that limited its coverage to persons who do not carry liability insurance required by law and who do not transport property for the named insured or others.<sup>63</sup> All Star and Fireman's Fund claimed that the endorsement excluded coverage to Admiral because Admiral held a common carrier permit from the Texas Railroad Commission and was, therefore, required to carry liability insurance cov-

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55. 643 S.W.2d at 516.

56. 26 Tex. Sup. Ct. J. 456 (June 15, 1983).

57. 652 S.W.2d 492 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.).

58. *Id.* at 494.

59. *Id.* at 495; see *Travelers Indem. Co. v. American Indem. Co.*, 315 S.W.2d 677, 680-81 (Tex. Civ. App.—Fort Worth 1958, no writ).

60. 652 S.W.2d at 495.

61. *Id.*

62. 658 S.W.2d 213 (Tex. App.—El Paso 1983, writ ref'd).

63. The text of the exclusion read: "[T]he insurance does not cover as an insured any person or organization, or any agent, employee or contractor thereof, who is required to carry liability insurance under any motor carrier law because of transporting property for the named insured or for others." *Id.* at 214.

erage.<sup>64</sup> Admiral and its carrier argued that the endorsement did not apply because Admiral was transporting its own property at the time of the accident, not property of the named insured or others.

The court of appeals said that the policy was subject to two constructions. The endorsement could apply to any carrier required to have liability insurance, or it could apply only to the transportation of property of the named insured or others.<sup>65</sup> The first construction was the proper one, the court found, reasoning that the purpose of the statutory liability insurance requirement is to protect the public, and to conclude that coverage goes on and off depending on whose property was being transported would not be in the public interest.<sup>66</sup> The court's opinion was that Fireman's intended to avoid giving additional coverage under its policy to motor carriers who already had the insurance required by the statute. The court concluded that the driver of the Admiral truck and Admiral were not covered under the insurance policy issued to the truck's owner by Fireman's.<sup>67</sup>

### III. PROPERTY INSURANCE

*"Bad Faith" Claims for Extracontractual Damages.* In one of the most important cases of the past decade, *English v. Fischer*,<sup>68</sup> the Texas Supreme Court refused to read into every Texas contract an "implied covenant of good faith and fair dealing," the breach of which would give rise to a tort action for damages beyond the usual contractual measure.<sup>69</sup> The California Supreme Court created the "bad faith" tort action in 1973 in *Gruenberg v. Aetna Insurance Co.*<sup>70</sup> In *Gruenberg* a restaurant owner suffered a fire loss and made a claim under his fire policies. The fire insurers, suspecting arson, began an investigation and engaged counsel to examine the insured under oath in accordance with the policy terms. The authorities initiated a criminal arson prosecution against the insured, which was later dismissed. During the pendency of the criminal proceedings, the insured refused to

64. See TEX. REV. CIV. STAT. ANN. art. 911b, § 13 (Vernon 1964).

65. 658 S.W.2d at 215.

66. *Id.*

67. *Id.*

68. 660 S.W.2d 521 (Tex. 1983).

69. *Id.* at 522-23.

70. 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973). Before *Gruenberg* the California courts had recognized a cause of action against insurers for damages beyond the policy limits in liability policy cases in which the insurer had acted in bad faith in failing to settle a claim against the insured within policy limits. *E.g.*, *Crisci v. Security Ins. Co.*, 66 Cal. 2d 425, 426 P.2d 173, 176-77, 58 Cal. Rptr. 13, 16 (1967); *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 328 P.2d 198, 200-01 (1958). Texas courts have recognized a similar cause of action against liability insurers, but the standard of care in Texas had been the familiar negligence standard rather than "good faith." *G.A. Stowers Furniture Co. v. American Indem. Co.*, 15 S.W.2d 544, 546-47 (Tex. Comm'n App. 1929, holding approved). *Gruenberg* was the first case to carry the bad faith theory from the liability insurance cases to a first party property insurance case. Some courts have held that fundamental differences exist in the relationship between a liability insurer and its insured and between a property insurer and its insured. *E.g.*, *Wilkie v. Home Sec. Life Ins. Co.*, 514 F. Supp. 896, 900 (D.S.C. 1981); *Farris v. United States Fidelity & Guar. Co.*, 284 Or. 453, 587 P.2d 1015, 1018-19 (1978). *Gruenberg* failed to recognize such differences.

submit to examination under oath by the insurers' attorneys, and the insurers denied the claim on the basis of the insured's refusal. The insured sued his insurers for policy proceeds *and* for tort damages beyond the policy limits, alleging that the insurers acted in bad faith by falsely implying that the insured had a motive to set the fire in order to avoid paying the insured's just claim. The insured sought tort damages, including emotional upset, loss of earnings, and punitive damages. The trial court sustained the insurers' demurrer to the bad faith theory, but the California Supreme Court reversed, holding the allegations of bad faith sufficient to state a cause of action.<sup>71</sup> The court found that all insurance contracts contain an implied covenant of good faith and fair dealing, and concluded, "[W]hen the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort."<sup>72</sup> The court held that damages for the bad faith refusal to pay an insured's claim could include payment for loss of property and mental distress.<sup>73</sup> California decisions after *Gruenberg* have affirmed and further refined the bad faith theory.<sup>74</sup> Some states have accepted the theory,<sup>75</sup> and others have rejected it.<sup>76</sup> Until *English v. Fischer*, Texas had done neither.

*English v. Fischer* arose from a dispute between a homeowner and his mortgagee over fire insurance policy proceeds. After a fire loss, both the homeowner and the mortgagee claimed the policy proceeds. The deed of trust provided that in the event of fire loss the insurance proceeds would be payable to the mortgagee.<sup>77</sup> The mortgagee wanted to exercise her rights under the deed of trust to receive and to apply all the insurance proceeds against the mortgage loan.<sup>78</sup> The insured wanted to use the proceeds to repair the fire damage, and argued that the mortgagee should be prohibited from claiming the insurance money because applying the proceeds to the mortgage debt would breach an implied covenant of good faith and fair dealing, which is inherent in every contract. The insurer interpleaded the insurance proceeds and was discharged. The suit proceeded between

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71. 9 Cal. 3d at 576, 510 P.2d at 1038, 108 Cal. Rptr. at 486.

72. *Id.*

73. *Id.* at 581, 510 P.2d at 1041-42, 108 Cal. Rptr. at 489-90.

74. See *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal. 3d 809, 818, 620 P.2d 141, 145, 169 Cal. Rptr. 691, 695 (1979); *Johansen v. California State Auto. Ass'n Inter-Ins. Bureau*, 15 Cal. 3d 9, 14-20, 538 P.2d 744, 747-51, 123 Cal. Rptr. 288, 291-95 (1975); *Schoolcraft v. Ross*, 81 Cal. App. 3d 75, 81, 146 Cal. Rptr. 57, 59 (1978).

75. See *Timmons v. Royal Globe Ins. Co.*, 653 P.2d 907, 911 (Okla. 1982); *MFA Mut. Ins. Co. v. Flint*, 574 S.W.2d 718, 720-21 (Tenn. 1978).

76. *Tate v. Aetna Casualty & Sur. Co.*, 149 Ga. App. 123, 253 S.E.2d 775, 777 (1979); *Spencer v. Aetna Life & Casualty Ins. Co.*, 227 Kan. 914, 611 P.2d 149, 158 (1980); *Kewin v. Massachusetts Mut. Life Ins. Co.*, 409 Mich. 401, 295 N.W.2d 50, 56 (1980); *Tyson v. Aetna Life & Casualty Co.*, 75 A.D.2d 1023, 429 N.Y.S.2d 120 (1980).

77. The deed of trust provision read: "It is agreed and stipulated that . . . [the mortgagee] . . . shall keep said property fully insured in some company or companies approved by the holder of said indebtedness [the mortgagee], to whom the loss, if any, shall be payable and by whom the policy shall be kept." 27 Tex. Sup. Ct. J. at 75.

78. The mortgagee had initially expressed willingness to endorse the insurance check to the owner, but later refused to do so. Her attorney stated that while the house had been a good deal for the owners when they bought it, it was now a good deal for the mortgagee.

the homeowner and the mortgagee. The homeowner prevailed in the trial court upon a jury finding that the mortgagee's refusal to endorse the insurance check over to the homeowner was a breach of an implied covenant of good faith and fair dealing. The court awarded the homeowner both policy proceeds and consequential damages.<sup>79</sup>

The court of appeals affirmed the trial court's judgment for the homeowner,<sup>80</sup> but the supreme court reversed, thus squarely rejecting the California theory that underlay the judgments of the lower courts.<sup>81</sup> The court stated that the bad faith theory would threaten a contracting party with treble damages merely for seeking to compel performance due under the contract.<sup>82</sup> The court, therefore, refused to create a separate tort action for a bad faith breach of contract.

Seven justices signed the majority opinion. In overruling a motion for rehearing, Justices Spears and Robertson concurred separately on the narrower ground that the duty of good faith dealing did not apply to the case before it, because both parties were represented by counsel at the time the deed of trust was given and, therefore, had entered a "fairly negotiated contract."<sup>83</sup>

While *English v. Fischer* was a suit on a deed of trust, not an insurance contract, its holding arguably precludes reliance on the bad faith tort theory in insurance policy suits. The argument against recognizing bad faith as a cause of action in Texas is actually stronger in insurance policy cases than in other contract cases, because of the heavy statutory regulation of the insurance industry in Texas.<sup>84</sup> Other states with similar penal statutes have declined to create new common law remedies.<sup>85</sup>

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79. The consequential damages totalled \$127,616, the amount of increase in construction costs incurred by the owners due to the delay in receiving the insurance money.

80. 649 S.W.2d 83, 85 (Tex. App.—Corpus Christi 1982).

81. 660 S.W.2d at 522.

82. The court said:

This concept is contrary to our well-reasoned and long-established adversary system which has served us ably in Texas for almost 150 years. Our system permits parties who have a dispute over a contract to present their case to an impartial tribunal for a determination of the agreement as made by the parties and embodied in the contract itself. To adopt the laudatory sounding theory of "good faith and fair dealing" would place a party under the onerous threat of treble damages should he seek to compel his adversary to perform according to the contract terms as agreed upon by the parties. The novel concept advocated by the courts below 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," by each fact finder. This we are unwilling to do.

*Id.*

83. 27 Tex. Sup. Ct. J. 130 (Dec. 14, 1983).

84. See TEX. BUS. & COM. CODE ANN. § 17.41 (Vernon Supp. 1984); TEX. REV. CIV. STAT. ANN. arts. 21.21, .21—2 (Vernon 1981). Article 21.21—2 is also known as the Unfair Claims Settlement Practices Act.

85. *E.g.*, Associated Photographers, Inc. v. Aetna Casualty & Sur. Co., 677 F.2d 1251, 1258 (8th Cir. 1982); Robinson v. MFA Mut. Ins. Co., 629 F.2d 497, 501-02 n.5 (8th Cir. 1980); Tate v. Aetna Casualty & Sur. Co., 149 Ga. App. 123, 253 S.E.2d 775, 777 (1979); Spencer v. Aetna Life & Casualty Ins. Co., 277 Kan. 914, 611 P.2d 149, 158 (1980);

*Attorney's Fees*. In *Texas Farmers Insurance Co. v. Hernandez*<sup>86</sup> the court of appeals approved recovery of attorney's fees in a suit on a property insurance policy under article 2226 of the Texas Revised Civil Statutes, despite language in the statute specifically excluding suits on insurance policies from its scope.<sup>87</sup> The court recognized that the insurance company was entitled to attorney's fees only by statute because attorney's fees are not recoverable at common law and the insurance contract itself did not provide for recovery of attorney's fees.<sup>88</sup> The court adopted a construction of the statute that originated in *Prudential Insurance Co. v. Burke*.<sup>89</sup> In *Burke* the Texarkana court of appeals interpreted article 2226 to exempt suits on insurance contracts only when attorney's fees were recoverable under one of the other Insurance Code provisions listed in article 2226.<sup>90</sup> This construction, in effect, allows recovery of attorney's fees in all suits based on insurance contracts.<sup>91</sup> Thus, the court read the exclusionary language entirely out of the statute.

By following *Burke*, the *Hernandez* court ignored a line of decisions holding that attorney's fees under article 2226 are not recoverable in a suit based on a fire insurance policy.<sup>92</sup> For example, in *Standard Fire Insurance Co. v. Fraiman*<sup>93</sup> the court rejected a claim for attorney's fees, indicating that article 2226's provisions were inapplicable to a fire insurance company because the company was subject to the Unfair Claims Settlement Practices Act and so was exempted.<sup>94</sup> Thus, two opposing lines of cases have developed on the application of article 2226 to fire insurance policies, and the question has not been resolved by the Texas Supreme Court.<sup>95</sup>

The *Hernandez* court also decided from what date prejudgment interest should be calculated. The insured asserted that the prejudgment interest should begin to run sixty days after the casualty because the policy required payment of proceeds within sixty days after proof of loss. The in-

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D'Ambrosio v. Pennsylvania Nat'l Mut. Casualty Ins. Co., 494 Pa. 501, 431 A.2d 966, 969-70 (1981).

86. 649 S.W.2d 121 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.).

87. *Id.* at 125; TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1984). Article 2226 generally provides for recovery of attorney's fees in contract cases, but specifically excludes suits arising under insurance contracts subject to specified Insurance Code provisions. TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1984).

88. 649 S.W.2d at 123.

89. 614 S.W.2d 847 (Tex. Civ. App.—Texarkana 1981), writ ref'd n.r.e. per curiam, 621 S.W.2d 596 (Tex. 1981).

90. 614 S.W.2d at 850.

91. *Hernandez*, 649 S.W.2d at 124.

92. *Reynolds v. Allstate Ins. Co.*, 633 F.2d 1208, 1209 (5th Cir. 1981); *Standard Fire Ins. Co. v. Fraiman*, 588 S.W.2d 681, 685 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ); *Allstate Ins. Co. v. Chance*, 582 S.W.2d 530, 533-34 (Tex. Civ. App.—Beaumont 1979), rev'd on other grounds, 590 S.W.2d 703 (Tex. 1980).

93. 588 S.W.2d 681 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ).

94. *Id.* at 685.

95. The supreme court arguably favored a plain language approach to construction of the statute in *Dairyland County Mut. Ins. Co. v. Childress*, 650 S.W.2d 770 (Tex. 1983). The court said, "Art. 2226 does not apply to contracts of certain insurers who are identified in those sections of the Insurance Code enumerated in Art. 2226." *Id.* at 775.

sured's pleadings stated that he filed the proof of loss "immediately" after the fire. The court disagreed, holding that in the absence of proof showing the date the proof of loss was submitted, prejudgment interest begins on the date of the insurer's denial of liability.<sup>96</sup>

*"Actual Cash Value."* In *Custom Controls Co. v. Ranger Insurance*<sup>97</sup> the Houston court of appeals considered the proper measure of replacement cost for goods manufactured by the insured. Fire destroyed four wellhead control panels manufactured by the insured, Custom Controls. Custom Controls submitted a claim under its Ranger Insurance policy, and Ranger paid \$79,536.30, which represented the cost to the insured of remanufacturing the panels. The insured claimed entitlement to \$237,248, the price the panels would have been sold for had no fire occurred. Custom Controls had manufactured the panels pursuant to a purchase order from National Iranian Gas Company. The purchase order provided for inspection and acceptance by an agent of the buyer, but the inspection had not taken place at the time of the fire. The portion of the policy controlling valuation for claim purposes provided that the insured could recover the actual cash value of lost or damaged property, which was not to exceed the cost to repair or replace the property with material of like kind and quality.<sup>98</sup> The insured contended that the cost of replacement should be determined by the amount required to purchase similar panels, fully manufactured, from a third party, rather than the cost of remanufacture by the insured. The insurer contended that the cost of remanufacture was the proper measure.

The court of appeals affirmed a summary judgment for the insurer, holding that the actual cash value definition was not ambiguous and that the proper measure of recovery under the policy provision was the cost to the insured of remanufacturing the panels.<sup>99</sup> This holding is consistent with earlier rulings and with the fundamental concept of indemnity inherent in all insurance, in that it repays actual loss but does not include a profit or mark-up.<sup>100</sup>

*Notice of Loss Versus Notice of Claim.* In a per curiam opinion refusing the insurer's application for writ of error, the Texas Supreme Court in *St.*

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96. 649 S.W.2d at 126.

97. 652 S.W.2d 449 (Tex. App.—Houston 1983, no writ).

98. The policy provision read:

All other property—The *actual* cash value of the property at the time any loss or damage occurs and the loss or damage shall be ascertained or estimated according to such *actual cash value with proper deduction for depreciation*, however caused, and shall in *no event exceed what it would then cost to repair or replace* the same with *material of like kind and quality*.

*Id.* at 451 (emphasis added by court).

99. *Id.* at 453.

100. See *Crisp v. Security Nat'l Ins. Co.*, 369 S.W.2d 326, 328 (Tex. 1963); *Northwestern Nat'l Ins. Co. v. Cope*, 448 S.W.2d 717, 719 (Tex. Civ. App.—Corpus Christi 1969, no writ).

*Paul Mercury Insurance v. Tri-State Cattle Feeders, Inc.*<sup>101</sup> distinguished between notice of claim and notice of loss. St. Paul issued an insurance policy to Tri-State that required notice of loss within twenty-four hours after the loss occurred. The claim arose because of the nefarious dealings of a cattle buyer. After delivery of the cattle by Tri-State, the buyer's draft was dishonored. Tri-State made several unsuccessful attempts to collect the money, and the buyer was eventually convicted of theft. Tri-State gave St. Paul notice of the theft some four months after it occurred. After the verdict in the first trial was invalidated for jury misconduct, Tri-State recovered judgment in a second trial upon a jury finding that the notice provisions were unreasonable and that Tri-State gave notice within a reasonable period. The court of appeals affirmed, holding that the twenty-four-hour notice provision was void because it required a notice of claim in less than ninety days, thus violating article 5546(a) of the Texas Revised Civil Statutes.<sup>102</sup>

In its application for writ of error the insurer contended that the court of appeals erred in holding the notice provision statutorily void. The supreme court agreed. The statute invalidates any policy provision requiring notice of a claim for damages within a period less than ninety days from the date of loss. The policy provision in question, however, required notice within twenty-four hours of "every loss which may become a claim."<sup>103</sup> The court held such a notice of loss provision permissible under the statute but declined to grant the writ of error because the jury had found the twenty-four-hour notice of loss provision to be unreasonable under the circumstances.<sup>104</sup>

*Constructive Trust for Insurance Proceeds*. In *Indiana Lumbermens Mutual Insurance Co. v. Metro Material Marketing, Inc.*<sup>105</sup> the Dallas court of appeals considered whether a purchaser who held equitable title to a piece of property could recover under the vendor's insurance policy, the proceeds of which were assigned to the purchaser after the loss. The purchaser contracted to buy a lot and a partially constructed building. Before closing, fire destroyed the building, and the purchaser had no insurance in effect. The seller, however, was fully covered. After the fire the purchaser completed the sale, accepting the lot and an assignment of the seller's insur-

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101. 638 S.W.2d 868 (Tex. 1982). The court refused the writ of error with the notation, "no reversible error."

102. 628 S.W.2d 844, 846 (Tex. App.—Amarillo 1982). Article 5546(a) provides: No stipulation in a contract requiring notice to be given of a claim for damages as a condition precedent to the right to sue thereon shall ever be valid unless such stipulation is reasonable. Any such stipulation fixing the time within which such notice shall be given at a less period than ninety (90) days shall be void, and when any such notice is required, the same may be given to the nearest or to any other convenient local agent of the company requiring the same.

TEX. REV. CIV. STAT. ANN. art. 5546(a) (Vernon Supp. 1984).

103. 638 S.W.2d at 869.

104. *Id.*

105. 646 S.W.2d 547 (Tex. App.—Dallas 1982, no writ).

ance claim. The insurer denied the claim on the ground that the assignor-seller had suffered no loss, since the sale was completed for the original price. The trial court disagreed and granted summary judgment for the purchaser.

The court of appeals agreed that the purchaser should recover, and established an exception to the rule of *Paramount Fire Insurance Co. v. Aetna Casualty & Surety Co.*<sup>106</sup> *Paramount Fire* held that when a loss occurred after the real estate contract was signed but before closing, the contract was later performed at the original price, and both parties were protected by insurance, the purchaser's insurance company should pay the loss "because the insured vendors suffered no pecuniary loss to premises destroyed by fire while under the contract of sale, which was ultimately completed."<sup>107</sup> The *Paramount Fire* court expressly left open the question of whether a different result would be reached when the vendee had no insurance.<sup>108</sup> Considering the entire transaction in *Indiana Lumbermens*, including events after the fire, the court of appeals acknowledged that the seller did not suffer a loss, but held that the purchaser who had suffered a loss should receive the benefit of the insurance.<sup>109</sup> The court held that when the purchaser has no insurance, the seller can recover on its policy subject to a constructive trust for the purchaser.<sup>110</sup> The summary judgment was reversed, however, due to insufficient evidence establishing damages.<sup>111</sup>

*"Compulsory" in Marine Coverage.* In *Continental Oil Co. v. Bonanza Corp.*<sup>112</sup> the Fifth Circuit interpreted a marine protection and indemnity insurance policy that covered all amounts a vessel owner was legally liable to pay for the removal of a wrecked vessel when that removal was "compulsory by law" or "in connection with any fixed or movable object."<sup>113</sup> Conoco, which operated an offshore drilling rig, chartered a vessel from Bonanza. The vessel sank beneath the rig, and Conoco removed the wreck. Conoco sought to recover the cost of removal under a standard marine protection and indemnity policy, which named it and Bonanza as insureds.

The court first dealt with the question of whether the removal was compulsory by law. The court refused to follow the Second Circuit, which found this phrase to be a term of art, and instead construed the words in their ordinary sense.<sup>114</sup> Thus the court interpreted "compulsory by law" to mean that removal is "compulsory when a reasonable owner, fully informed, would conclude that failure to remove would likely expose him to

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106. 163 Tex. 250, 353 S.W.2d 841 (1962).

107. 646 S.W.2d at 549; see 163 Tex. at 256, 353 S.W.2d at 845.

108. 163 Tex. at 256, 353 S.W.2d at 845.

109. 646 S.W.2d at 549-50.

110. *Id.* at 550.

111. *Id.*

112. 706 F.2d 1365 (5th Cir. 1983) (en banc).

113. *Id.* at 1367.

114. *Id.* at 1369.



liability imposed by law sufficiently great in amount and probability of occurrence to justify the expense of removal."<sup>115</sup> The duty to remove must be present and unconditional, and may be imposed by any law.<sup>116</sup> The court concluded that, under the circumstances, the insured's removal of the wrecked ship was not compulsory by law.<sup>117</sup>

The court next addressed the issue of whether the insured could recover the removal costs under a clause providing indemnity of sums that "as owner [Conoco] . . . shall have become *legally liable* to pay and shall have paid on account of [l]oss of, or damage to, or expense in connection with any fixed or movable object. . . ." <sup>118</sup> The court found that this clause provided indemnification "for sums paid in consequence of damage to and expense incurred in connection with property, contemplating reparative measures," but it did not cover expenses taken to avert liability.<sup>119</sup> The court concluded that this provision did not provide coverage for expenses incurred in removing the wreck because the insured was under no legal obligation to remove the wrecked vessel.<sup>120</sup>

Five judges dissented, arguing that the majority's interpretation of "compulsory at law" changed the "crafted and balanced test" of *Progress Marine* to require a statutorily imposed present and unconditional legal duty.<sup>121</sup> The dissent took what it considered the more reasonable and practical approach and concluded that the insured was compelled by law to remove the wreck because it was faced with a large amount of potential liability as compared to the relatively small cost of removal.<sup>122</sup>

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

*Parties Who May Sue.* The Texarkana court of appeals held in *Rosell v. Farmers Texas County Mutual Insurance Co.*<sup>123</sup> that neither an additional insured, who did not purchase the insurance policy, nor the assignee of that additional insured was a consumer as defined by the Deceptive Trade Practices Act (DTPA).<sup>124</sup> Only consumers, as defined by the DTPA, may sue under that Act. Rosell sued the insureds, Wood and his parents, on behalf of her daughter for personal injuries and on her own behalf for emotional distress, alleging damages arising from an automobile accident

115. *Id.* at 1372. This test is similar to one adopted by the Fifth Circuit in *Progress Marine, Inc. v. Foremost Ins. Co.*, 642 F.2d 816 (5th Cir. 1981), *cert. denied*, 454 U.S. 860 (1981). The full court, however, eliminated the subjective element imposed by the *Progress Marine* panel, which asked "whether removal was performed as a result of a subjective belief on the part of the insured that such was reasonably necessary . . ." 706 F.2d at 1371 (quoting *Progress Marine*, 642 F.2d at 820).

116. 706 F.2d at 1372-73.

117. *Id.* at 1373.

118. *Id.* at 1374 (emphasis added by court).

119. *Id.*

120. *Id.*

121. *Id.* at 1378 (Williams, J., dissenting).

122. *Id.* at 1379.

123. 642 S.W.2d 278 (Tex. App.—Texarkana 1982, no writ).

124. *Id.* at 279. The DTPA is codified at TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1984).

in which a vehicle driven by Wood struck Rosell's daughter. Wood's parents had purchased an automobile insurance policy from Farmers, and Wood was an additional insured under the policy. Rosell refused Farmers' settlement offer of \$10,000 for her daughter's injuries and \$5000 for her own injuries. The policy limits on bodily injury were \$10,000 per person and \$20,000 per occurrence. The suit resulted in a take-nothing judgment as to Wood's parents and a judgment for \$60,625 against Wood. Following that suit, Rosell secured an assignment from the Woods of their claims against Farmers for its failure to negotiate a settlement within policy limits. The trial court granted summary judgment in favor of Farmers in Rosell's suit against Farmers, in which she alleged on behalf of herself, her daughter, and the Woods that "Farmers committed an unconscionable action, failed to negotiate in good faith for settlement, and breached its implied warranty of good faith."<sup>125</sup>

The court of appeals affirmed, concluding that Rosell did not have a cause of action under the DTPA because neither she nor Wood was a consumer.<sup>126</sup> The DTPA defines consumers as individuals who seek or acquire "by purchase or lease any goods or services."<sup>127</sup> The court found that Rosell was not a consumer because she did not purchase the insurance policy from Farmers.<sup>128</sup> She could derive a claim from Wood's assignment, but not from his parents' assignment because no judgment was rendered against them. Wood, however, was not a consumer because his parents, not he, had purchased the insurance policy.<sup>129</sup> Further, the court found that the insurance company's failure to negotiate a settlement did not give rise to a cause of action under the DTPA because the failure was post-sale conduct by the insurer, which is not actionable under the DTPA because it does not occur in connection with the purchase of goods or services.<sup>130</sup> Thus, even if Rosell or Wood had been consumers, Farmers' actions could not have resulted in a finding of DTPA violations.<sup>131</sup>

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125. 642 S.W.2d at 279.

126. *Id.*

127. TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon Supp. 1984). The statutory definition includes partnerships, corporations, and government entities as well as individuals. *Id.*

128. 642 S.W.2d at 279.

129. *Id.*

130. *Id.* (citing *American Ins. Cos. v. Reed*, 626 S.W.2d 898, 902 (Tex. App.—Eastland 1981, no writ)).

131. 642 S.W.2d at 279. The court of appeals also interpreted the Stowers Doctrine, which governs an insurer's negligent failure to settle as it applies in the two-claim situation. The doctrine "allows an insured to recover from his insurer the entire amount of a judgment rendered against him if, prior to the judgment, the insurer negligently failed to accept a settlement offer *within the liability limits* of the insurance policy between them." *Id.* at 279-80 (emphasis in original). The court held no duty was breached if the insurer refused to pay up to its per occurrence limits in a situation where the parties made two claims, one that could result in an excess judgment and the other that was within the insurer's per person limit. Thus, the per person limit is the maximum amount the insurer is required to offer to each claimant. *Id.* at 280. The court reasoned that setting this maximum would discourage the use of per occurrence policy limits "as 'trust funds' to divide between various plaintiffs as they see fit" and discourage "requiring insurance companies to accept 'package deal' settlements from multiple claimants." *Id.* Because Farmers offered to settle Rosell's daughter's

In *St. Paul Insurance Co. v. McPeak*<sup>132</sup> the Houston court of appeals refused to apply the statutory remedies for unfair or bad faith settlement practices provided in article 21.21 of the Insurance Code, which allows treble damages for unfair insurance practices,<sup>133</sup> to actions brought under the Worker's Compensation Act.<sup>134</sup> The plaintiff alleged that the insurance company committed unfair practices by terminating his benefits. The plaintiff had received benefits for several months when his claim was reviewed. The insurance company concluded that the plaintiff was not disabled and terminated his benefits. The plaintiff sued the insurance company, and a jury found that the company had violated article 21.21. Based on this finding, the trial court tripled the plaintiff's statutory award of worker's compensation benefits.

The court of appeals gave three reasons for refusing to apply article 21.21. First, the award of worker's compensation benefits did not constitute actual damages as defined by section 16 of article 21.21. Actual damages under section 16 include only those damages recoverable at common law, while worker's compensation benefits are statutory awards.<sup>135</sup> Second, actual damages must be presented to the jury by special issue. In this case the court only presented the jury with issues concerning disability and unfair insurance practices, not actual damages.<sup>136</sup> Third, the trial court erred in trebling the disability award because worker's compensation benefits and article 21.21 damages have "separate and independent statutory bases."<sup>137</sup> According to the court, the provisions of the two acts should not be commingled because the purposes of the statutes are distinct.<sup>138</sup> The court found that the purpose of the Worker's Compensation Act is to ensure compensation for the worker for loss of earning capacity and to limit the amount the worker can recover.<sup>139</sup> The court arguably is indicating that the balance between the recovery of the worker and the liability of the employer should not be disturbed by applying article 21.21 principles to the Worker's Compensation Act. The court specifically limited its decision as holding that the remedies provided by article 21.21 do not apply to suits brought under the Worker's Compensation Act.<sup>140</sup> The court refused to decide whether actions for unfair insurance practices can be brought against a compensation carrier, whether article 21.21 is applicable to un-

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claim at the per person policy limits and Rosell's award on her own injuries was below the per person limits, Farmers did not breach its duty. *Id.* This interpretation is in accord with that of other jurisdictions cited by the court. *See, e.g.*, *Standard Accident Ins. Co. v. Winget*, 197 F.2d 97, 103-05 (9th Cir. 1952); *Roberie v. Southern Farm Bureau Casualty Ins. Co.*, 185 So. 2d 619, 625 (La. Ct. App. 1966); *Clark v. Hartford Accident & Indem. Co.*, 61 Tenn. App. 596, 457 S.W.2d 35, 39 (1970).

132. 641 S.W.2d 284 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.).

133. TEX. INS. CODE ANN. art. 21.21 (Vernon 1981).

134. TEX. REV. CIV. STAT. ANN. arts. 8306-8309.1 (Vernon 1967 & Supp. 1984).

135. 641 S.W.2d at 287.

136. *Id.*

137. *Id.* at 288.

138. *Id.*

139. *Id.* at 286, 288.

140. *Id.* at 288.

fair or bad faith settlement practices, or whether the plaintiff's allegations were otherwise actionable.<sup>141</sup>

*Limitations.* The Fifth Circuit in *Marcotte v. American Motorists Insurance Co.*<sup>142</sup> applied a two-year statute of limitations period to claims brought under the Texas DTPA in cases arising prior to the 1979 amendments to the Act, and in which the claim is not evidenced by a contract in writing.<sup>143</sup> In this case a jury found that Marcotte, the plaintiff, was permanently and totally disabled as defined by his disability insurance policy, and that the insurer, American Motorists (AMIC), violated the DTPA by making misrepresentations at the time Marcotte became insured.<sup>144</sup>

When this cause of action arose, the DTPA did not include a limitations period for misrepresentation claims.<sup>145</sup> Thus the court faced the question of what statute of limitations applied. Article 5526(4) of the Texas Revised Civil Statutes provided a two-year statute of limitations period for suits in which "the indebtedness was not evidenced by a contract in writing."<sup>146</sup> Marcotte's claim for misrepresentations under the DTPA was not based upon a written contract. Further, Texas courts have long held that claims for statutory damages are actions in debt and thus fall under the two-year limitations period provided in article 5526(4).<sup>147</sup> Additionally, a two-year limitations period has traditionally been applied to claims for fraudulent misrepresentation.<sup>148</sup> Therefore, the court concluded that the applicable limitations period was two years, and that Marcotte's claim was barred.<sup>149</sup> Marcotte claimed that, due to AMIC's misrepresentations, he was unaware that the policy did not provide the type of disability benefits he thought he

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141. *Id.* On a motion for rehearing, the court ruled that the trial court erred in refusing the plaintiff's motion to sever the worker's compensation claim from the art. 21.21 claims, and affirmed the worker's compensation award, but reversed and remanded the art. 21.21 claim. *Id.* at 288-89.

142. 709 F.2d 378 (5th Cir. 1983).

143. *Id.* at 380.

144. The policy defined two types of total disability. During the first two years following an injury, an employee was totally disabled if he was unable to perform all aspects of his occupation. After two years, total disability consisted of the complete inability of an employee to engage in every occupation for which he was trained.

145. In August 1979 the legislature amended the DTPA to provide a two-year statute of limitations for all DTPA actions. TEX. BUS. & COM. CODE ANN. § 17.56A (Vernon Supp. 1984).

146. 709 F.2d at 380; TEX. REV. CIV. STAT. ANN. art. 5526(4) (Vernon Supp. 1984). The court in *Marcotte* noted that *id.* art. 5527 now provides a four-year statute of limitations period in an action on a debt, whether or not the indebtedness is evidenced by or founded upon a written contract. 709 F.2d at 380 n.1.

147. *See* *Rose v. First State Bank*, 122 Tex. 298, 302, 59 S.W.2d 810, 811 (1933) (cause of action against insolvent bank for return of funds deposited barred by two-year statute of limitations); *Overton v. City of Houston*, 564 S.W.2d 400, 403 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.) (suit against city of Houston to compel payment of termination pay barred by two-year statute limitations).

148. *Mooney v. Harlin*, 622 S.W.2d 83, 84-85 (Tex. 1981) (two-year statute applied to bar action against estate for fraudulent misrepresentation about will); *Reynolds-Southwestern Corp. v. Dresser Indus., Inc.*, 438 S.W.2d 135, 140 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.) (two-year statute applied to bar cross-action on unfair appropriation of trade secrets and fraudulent inducement to execute contract).

149. 709 F.2d at 380-81.

would receive. Marcotte discovered the misrepresentation in July 1976, however, and did not file suit until December 1979. Thus he had not filed his claim within the limitation period and was barred.<sup>150</sup>

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150. *Id.* at 380.