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INSURANCE LAW

by

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

I. HEALTH, LIFE, AND ACCIDENT INSURANCE

IN *Tomlinson v. Jones*¹ the father of a deceased insured brought suit against the insured's wife to recover life insurance proceeds. While the jury found that the deceased lacked sufficient mental capacity to change the beneficiary on his life insurance policy, the trial court granted the wife judgment n.o.v. and gave the proceeds to the deceased's wife. The court of appeals affirmed.² The deceased's father, Herschel Tomlinson, Sr., was named the original beneficiary of the insurance policies and remained the beneficiary for approximately six years until the week before the insured's death in 1975.

The deceased was involved in a serious automobile accident on December 15, 1974, and remained in the hospital until his death on January 25, 1975. On January 18, 1975, the deceased allegedly consented to the execution of a special power of attorney authorizing his wife to change the beneficiary on his life insurance policy from his father to his wife. The deceased was too badly burned to sign this document. His wife signed it on his behalf. His wife, together with the two witnesses, testified that they believed that the deceased was alert, understood what was being contemplated, and affirmatively consented to the execution of the document in question. Later that day the wife notified the trustees of the retirement plan to change the beneficiary.

The trial court in granting a judgment n.o.v. noted the lack of evidence to support the jury finding of insufficient mental capacity and ruled, in any event, that such a finding was irrelevant because the contract between the trust and the insurer gave the trustees the power to change the beneficiary on their own initiative.³ The court of appeals affirmed, finding sufficient evi-

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1. 27 Tex. Sup. Ct. J. 445 (June 20, 1984).

2. 664 S.W.2d 123 (Tex. App.—Corpus Christi 1983).

3. 27 Tex. Sup. Ct. J. at 446. Two provisions of the trust agreement clearly gave the deceased the right to designate the beneficiaries of his policies. The trustees were authorized to name the beneficiaries only if for some reason the deceased failed to do so. The relevant provisions of the contract are:

Section 5.07—In the event of the death of a participant prior to normal retire-

dence to support the jury finding of mental incapacity, but agreeing with the trial court that such a finding was irrelevant.⁴

The supreme court agreed with the appellate court's holding that enough evidence existed to support the jury's finding of no capacity. The court, however, disagreed with the court of appeals that such a finding was irrelevant.⁵ The supreme court decided that the trust agreement gave the right of designating the beneficiary to the deceased, thereby making the determination of the deceased's mental capacity critically important.⁶ The court held that the special power of attorney executed on January 18, 1975, was a nullity in light of the jury's finding of no capacity on behalf of the deceased.⁷

In *Members Mutual Insurance Co. v. Hermann Hospital*⁸ the court was presented with the issue of whether a hospital lien attached to the insurer's payment of uninsured motorist benefits to a hospital patient. The insured, Hall, was involved in an automobile accident with an uninsured motorist. Her passenger, George Walker, suffered injuries and was hospitalized in Hermann Hospital. Hermann charged approximately \$60,000 for services to Walker and filed notice of its hospital lien with the county clerk as provided by article 5506a, section 4.⁹ Walker sued the uninsured motorist and Members Mutual for recovery under the uninsured motorist coverage of Hall's policy provided by Members Mutual. Walker died during the suit, and Members Mutual paid \$7,000 to Walker's heir. Hermann Hospital received no money from the settlement and was not a party to the release. Hermann Hospital then sued Members Mutual to impose the article 5506a hospital lien on the uninsured motorist benefits that had already been paid by Members Mutual. Both parties moved for a summary judgment, agreeing that the sole issue of law was whether a hospital lien attaches to settlement proceeds of uninsured motorist coverage. The trial court held in favor of Hermann Hospital and ruled that Members Mutual was liable to the hospital for \$7,000. The Houston court of civil appeals affirmed.¹⁰

The supreme court stated that the purpose of article 5506a was to encourage hospitals to provide immediate care and treatment to persons in-

ment date, the Trustees shall instruct the life insurance company to pay the beneficiary or beneficiaries *designated by the employee* in the policy or policies on his life or annuity, or, if none be so designated, to his estate, the death benefits provided by the terms of such policy or policies

Section 9.02—*If any participant shall fail to instruct the Trustees to designate a beneficiary or beneficiaries*, the Trustees shall designate as beneficiary or beneficiaries on his behalf, in the order named, these persons in the following classes who survive the participant: (1) spouse, (2) issue, per stirpes, (3) parents, (4) brothers and sisters, (5) nephews and nieces, and (6) estate of the participant.

Id. at 445 (emphasis by the court).

4. 664 S.W.2d at 125-26.

5. 27 Tex. Sup. Ct. J. at 446.

6. *Id.*

7. *Id.*

8. 664 S.W.2d 325 (Tex. 1984).

9. TEX. REV. CIV. STAT. ANN. art. 5506a (Vernon 1958) (recodified as TEX. PROP. CODE ANN. §§ 55.001-.008 (Vernon 1984)).

10. 659 S.W.2d 132 (Tex. App.—Houston [14th Dist.] 1983).

jured in accidents and to compensate hospitals for treating such patients.¹¹ The court further noted that the legislature specifically exempted from the article 5506a statutory lien all proceeds from an insurance policy in favor of the injured party, as a beneficiary or a legal representative.¹² A lien, however, does attach to public liability insurance carried by the insured to protect him against loss or damage occurring because of an accident or collision covered by the public liability insurance policy.¹³ The court held that the lien attached only if the insurance proceeds are paid under a public liability insurance policy.¹⁴ A public liability policy protects the insured against damage claims for which the insured may become liable instead of insuring against injuries suffered by the insured himself in an accident.¹⁵ The court noted that in contrast to liability insurance, uninsured motorist coverage insures against accidents caused by negligent, financially irresponsible motorists.¹⁶ Since in this case the uninsured motorist coverage did not protect the insured from liability for damages caused to others, it did not fit within the definition of public liability insurance. The court, therefore, held that the proceeds of uninsured motorist coverage are not subject to a hospital lien filed under article 5506a.¹⁷

The case of *Alvarado v. Pilot Life Insurance Co.*¹⁸ concerned the interpretation of "severance" in an accidental death and dismemberment policy issued by Pilot Life to Alvarado. Under the terms of the policy, the insured would recover one-half of the policy proceeds if he suffered a loss of a member because of or within ninety days of an accident. Additionally, the terms of the policy provided that loss of a member means "[a] loss of a foot by severance at or above the ankle."¹⁹ Alvarado apparently shot himself in the left ankle with a .44 magnum pistol and was hospitalized in Fort Worth on November 3, 1979. This accident caused severe injuries to his left ankle and on April 1, 1981, his left leg was surgically amputated below the knee. Pilot

11. 664 S.W.2d at 326; see *Baylor Univ. Medical Center v. Borders*, 581 S.W.2d 731, 733 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.); Hospital Lien Act, ch. 85, § S, 1933 Tex. Gen. Laws 182, 185.

12. 664 S.W.2d at 326.

13. *Id.* at 326-27.

14. See *id.* The court stated:

The term "public liability insurance" has been defined as: "[i]nsurance liability protection against claims arising out of the insured's property, conduct or the conduct of his agent," *Black's Law Dictionary* 724 (rev. 5th ed. 1979); "general liability insurance, or insurance such as protects a person against loss or liability by reason of personal injuries to other than employees," 1 *G. Couch, Couch on Insurance* § 1:93 (Rev.2d Ed. 1984); and "insurance . . . to indemnify the insured against loss by reason of legal liability . . .," 2 *R. Long, The Law of Liability Insurance* § 10.01 (1983).

Id. at 327.

15. 664 S.W.2d at 326; see *Cain v. American Policyholders Ins. Co.*, 120 Conn. 645, 183 A. 403 (1936).

16. 664 S.W.2d at 327; see *Frances v. International Serv. Ins. Co.*, 546 S.W.2d 57 (Tex. 1976); *Employers Casualty Co. v. Sloan*, 565 S.W.2d 580 (Tex. Civ. App.—Austin 1978, writ ref'd n.r.e.).

17. 664 S.W.2d at 328.

18. 663 S.W.2d 108 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.).

19. *Id.* at 109.

Life moved for a summary judgment, arguing that as a matter of law Alvarado's loss was not covered since he did not suffer a loss of the foot by severance at or above the ankle within ninety days of the November 3, 1979, date of occurrence. The trial court granted the summary judgment.

Alvarado's position on appeal was that the term "severance" is ambiguous and should be strictly construed against the carrier and that fact issues existed as to whether appellant did suffer a severance within ninety days. Alvarado relied on *Reliance Insurance Co. v. Kinman*,²⁰ which held that the term severance was ambiguous. The court distinguished *Kinman* because in that case the leg was not removed or amputated for some eighteen months because doctors feared amputation might cause death.²¹ The court, in affirming the trial court's grant of the summary judgment, held that the term severance was not ambiguous.²² The court would not thus rewrite the policy, and since the insured did not suffer a severance at or below the ankle within ninety days of the date of the incident, the summary judgment was affirmed.

II. LIABILITY INSURANCE

In *United States Fire Insurance Co. v. Marr's Shortstop of Texas, Inc.*²³ the court considered whether the pilot of an airplane that crashed was properly rated for the flight within the meaning of the aviation liability insurance policy.²⁴ The trial court submitted two issues to the jury: first, whether the weather conditions at the beginning of the flight required the use of instrument flight rules (IFR),²⁵ and second, whether 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 take off, but the pilot knew when he took off that he would be flying in IFR conditions some time before the end of the flight. The first answer supported the owner, and the second answer supported the insurer. The trial court disregarded the first answer and rendered judgment for the carrier. The court of appeals held that *Glover v. National Insurance Underwriters*²⁶ required the flight to be characterized at its inception and that the jury's answer to the second issue was immaterial.²⁷ The court, therefore, reversed the holding of

20. 252 Ark. 1168, 483 S.W.2d 166 (1972).

21. 663 S.W.2d at 110.

22. *Id.* The court quoted from *Webster's Third International Dictionary* in stating that "'severance' means the act or process of severing, the state of being severed." *Id.*; see WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2091 (1981). "Sever" means "to put asunder . . . to disjoin or disunite from one another . . . to divide or break up into parts" *Id.* at 2090; see also *Cornellier v. American Casualty Co.*, 389 F.2d 641, 643 (2d Cir. 1968) (similar policy interpretation).

23. 27 Tex. Sup. Ct. J. 310 (Apr. 7, 1984).

24. 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 question: RONALD EUGENE MARR." *Id.*

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

26. 545 S.W.2d 755 (Tex. 1977).

27. 643 S.W.2d 514 (Tex. App.—Eastland 1982).

the trial court and held that the insurance company had failed to prove that the pilot was not properly rated for the flight.²⁸

The Texas Supreme Court reversed the court of appeals and affirmed the judgment of the trial court.²⁹ The court agreed with the court of civil appeals' holding that some evidence supported the finding that at the inception of the flight in question, Marr knew that he would be flying into IFR weather conditions.³⁰ The supreme court, however, believed that the court of appeals erred in relying upon the *Glover* case.³¹ The error was in ignoring the finding that Marr, at the inception of the flight, knew he would be flying in IFR weather conditions. In the *Glover* case, the supreme court had held that a court in deciding whether a pilot was properly rated for the flight must make the determination from the flight in its entirety.³² In *Glover* the supreme court held that it would not break the flight into segments, so that coverage flickered on and off as the plane moved from VFR to IFR conditions.³³ The court also held in *Glover* that weather conditions that existed at the beginning of the flight should be examined to make the determination.³⁴ In *Glover* the pilot flew in visual flying weather about one-third of the way and then ran into unexpected IFR conditions. The pilot did not know when he took off that he was flying into IFR weather conditions. In contrast, the jury found that Marr knew he would face IFR conditions when he took off. The supreme court, therefore, affirmed the trial court and entered judgment for the carrier.³⁵

In a dissenting opinion,³⁶ Justices Robinson and Ray acknowledged that Marr knew that he would be flying in IFR weather, for which he was not properly rated. The question to them was the relevance of Marr's knowledge to the issues presented. Justices Robinson and Ray argued that the pilot's knowledge was immaterial and that the majority opinion was overruling the *Glover* rules since the pilot's knowledge of weather conditions rather than the actual weather conditions existing at the beginning of the flight is now to be considered the ultimate issue in characterizing flights for the purpose of aircraft insurance pilot clauses.³⁷

*Puckett v. United States Fire Insurance Co.*³⁸ was a declaratory judgment action concerning whether an insured's failure to have his plane inspected must be the cause of an accident in order for the insurance company to avoid liability under an aviation policy. The trial court held that causation was

28. *Id.* at 517.

29. 27 Tex. Sup. Ct. J. at 312.

30. *Id.* at 310.

31. *Id.* at 312.

32. 545 S.W.2d at 762.

33. *Id.*

34. *Id.* at 762-63. The court in *Glover* also stated that the pilot's knowledge of weather conditions along his flight path or at his destination would not be controlling in characterizing the flight as VFR or IFR. *Id.* at 763.

35. 27 Tex. Sup. Ct. J. at 312.

36. *Id.* at 313 (Robinson, J., dissenting).

37. *Id.*

38. 28 Tex. Sup. Ct. J. 55 (Oct. 24, 1984).

not required and granted a summary judgment for the carrier. The court of appeals in an unpublished opinion affirmed. The supreme court reversed the judgment of both courts and remanded the case for trial.³⁹

An airplane jointly owned by Holt and Puckett crashed on July 18, 1981. Puckett as pilot and two passengers were killed, and a third passenger was seriously injured. A declaratory judgment action was brought by United States Fire Insurance against Holt and the administrators of Puckett's estate to determine whether the carrier was obligated to pay any damages or defend any claim arising out of the crash. The carrier relied on a clause in a policy suspending coverage if the aircraft's air worthiness certificate was invalid. Under federal law the certificate in question was effective only so long as all maintenance requirements had been met.⁴⁰ The requirements also included an annual inspection.⁴¹ The parties stipulated that no such inspection had been performed and that the failure to have the plane inspected was in no way a cause of the accident.

The supreme court noted that most courts addressing the question have held that causation is not required for an insurance company to avoid liability on the basis of a breach of a condition in an aviation policy.⁴² The court noted, however, that unanimity in holding that causation was required did not exist.⁴³ The court reasoned that the better rule was to require causation.⁴⁴ United States Fire Insurance, therefore, could avoid liability only if the failure to inspect was either the sole or one of the several causes of the accident, even though the policy did not require a causal connection between the breach of the policy and the accident.

The court held that the clause violated public policy since no causation existed.⁴⁵ The accident was caused by pilot error, which was unquestionably covered by the policy. The court decided that it would be against public policy to allow the insurance company to avoid liability because of a breach

39. *Id.* at 56.

40. 14 C.F.R. § 21.18(a)(1) (1981).

41. *Id.* §§ 91.165, .169.

42. For cases holding that causation is not required, see *Arnold v. Globe Indem. Co.*, 416 F.2d 119 (5th Cir. 1969) (applying Kentucky law); *DiSanto v. Enstrom Helicopter Corp.*, 489 F. Supp. 1352 (E.D. Pa. 1980); *National Ins. Underwriters, Inc. v. Bequette*, 280 F. Supp. 842 (D. Alaska 1968), *aff'd*, 429 F.2d 896 (9th Cir. 1970); *Middlesex Mut. Ins. Co. v. Bright*, 106 Cal. App. 3d 282, 165 Cal. Rptr. 45 (1980); *O'Conner v. Proprietors Ins. Co.*, 661 P.2d 1181 (Colo. Ct. App. 1982); *Grigsby v. Houston Fire & Casualty Ins. Co.*, 113 Ga. App. 572, 148 S.E.2d 925 (1966); *Kilburn v. Union Marine & Gen. Ins. Co.*, 326 Mich. 115, 40 N.W.2d 90 (1949); *Macalco, Inc. v. Gulf Ins. Co.*, 550 S.W.2d 883 (Mo. Ct. App. 1977); *Omaha Skydivers Parachute Club, Inc. v. Ranger Ins. Co.*, 189 Neb. 610, 204 N.W.2d 162 (1973); *Security Mut. Casualty Co. v. O'Brien*, 99 N.M. 638, 662 P.2d 639 (1983); *Baker v. Insurance Co. of N. Am.*, 10 N.C. App. 605, 179 S.E.2d 892 (1971); *Ochs v. Avemco Ins. Co.*, 54 Or. App. 768, 636 P.2d 421 (1981).

43. For cases holding that causation is required, see *Migues v. Universal Airways Co.*, 18 Av. Cas. (CCH) 17,250 (S.D. Miss. 1982); *Bayers v. Omni Aviation Managers*, 510 F. Supp. 1204 (D. Mont. 1981); *American States Ins. Co. v. Byerly Aviation, Inc.*, 456 F. Supp. 976 (S.D. Ill. 1978); *Avemo Ins. Co. v. Chung*, 388 F. Supp. 142 (D. Hawaii 1975); *Ranger Ins. Co. v. Phillips*, 25 Ariz. App. 426, 544 P.2d 250 (1976); *South Carolina Ins. Co. v. Collins*, 269 S.C. 282, 237 S.E.2d 358 (1977).

44. 28 Tex. Sup. Ct. J. at 55-56.

45. *Id.* at 56.

that amounted to nothing more than a technicality.⁴⁶ By so holding the court overruled an earlier decision directly on point with United States Fire's position.⁴⁷

Justice Pope noted in dissent that the insurer lived up to its contract and the insured did not.⁴⁸ He agreed with the majority that the policy was clear and unambiguous.⁴⁹ The policy required only that the insured comply with federal safety regulations and that the plane be submitted to periodic safety inspections. These actions were not taken, and for that reason no coverage should result.⁵⁰

In *State Farm Mutual Automobile Insurance Co. v. Francis*⁵¹ the court of appeals determined the meaning of "user" as it applied in the context of the insurance policy in question. In December 1975 Joseph Chevalier, Earl Ellis, and two other men embarked on a hunting trip to Galveston County. Before the trip a trailer holding a boat and motor, both owned by Ellis, was hooked to a pickup truck owned by Chevalier and insured by State Farm. Chevalier, the driver, and Ellis, a passenger, were traveling on Highway 45 toward Galveston when the boat and motor fell from the trailer and struck an automobile being driven by Francis. Francis sued Chevalier and Ellis for personal injuries. Ellis was found negligent, but Chevalier, the driver, was found not negligent. State Farm refused to pay the judgment on behalf of Ellis, and as a result Francis sued to collect on the judgment, claiming that Ellis was an insured under the policy because he was a permissive user as defined by the policy.⁵² State Farm contended that Ellis was not a user because only Chevalier, as driver, was using the trailer and boat and that the negligence, as found by the jury in the personal injury case against Ellis, preceded the use of the boat with the truck. It further argued that as a passenger, Ellis could not be a user under the policy. The trial court dis-

46. The court thought this situation analogous to the antitechnicality statute covering fire insurance policies, TEX. INS. CODE ANN. art. 6.14 (Vernon 1981), and believed that the legislature's action in passing such an antitechnicality statute was indicative of public policy. 28 Tex. Sup. Ct. J. at 56.

47. *Schepps Grocer Supply Co. v. Ranger Ins. Co.*, 545 S.W.2d 13 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.) (pilot's failure to adhere to rating requirements was a bar to recovery even though no causal connection existed between the failure and the accident).

48. 28 Tex. Sup. Ct. J. at 57 (Pope, J., dissenting).

49. *Id.* at 58.

50. *Id.* According to Justice Pope:

Today's decision means that insurance policies—life, casualty, fire—though agreed upon by insured and insurer, though authorized by the Board of Insurance, though clear and unambiguous, are burdened with uncertain terms that this court may from time to time determine should have been included in the parties' contract. The court characterizes the insurer's breach as "nothing more than a technicality." Aircraft safety a technicality? The object of the policy provision requiring compliance with the federal regulations is safety.

28 Tex. Sup. Ct. J. at 58.

51. 669 S.W.2d 424 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

52. In Part 1, Coverage B, Persons Insured, the policy provided as follows: "(2) any other person using such automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission" *Id.* at 426. Under Definitions, Part 1, the policy provided that "'use' of an automobile includes the loading and unloading thereof." *Id.*

agreed and granted summary judgment for Francis. In agreeing with the trial court, the court cited several cases in other jurisdictions that held that a passenger may be a user.⁵³ Since the policy in question provided coverage for damages caused from the ownership, maintenance, or use, no proximate causation need be shown between the use of the automobile or trailer and the accident.⁵⁴

The trial court's finding that Ellis failed to secure the boat properly to the trailer entailed a finding that Ellis had negligently loaded the trailer.⁵⁵ Properly securing the boat to the trailer would be an important aspect of the loading, since it would be absolutely necessary for the safe operation and transportation of the boat.⁵⁶ Loading and unloading is not confined to acts occurring during the actual loading and unloading, but also includes the intermediate step of the transportation of the goods from the starting point to the destination.⁵⁷

*Aetna Casualty & Surety Co. v. Protective Insurance Co.*⁵⁸ involved a determination of duty to defend. Protective Insurance Company, as the carrier for Atlas Truck Lines, Inc., sought a declaratory judgment against Aetna, as the carrier for B.F. Walker, Inc., to discover whether Aetna should defend Atlas. In October 1979 Stebbens leased his truck to his employer, B.F. Walker, for various hauling jobs. When Stebbens, in the course of his employment for Walker, arrived at Atlas he was instructed by a security guard to wait until Atlas employees could load his truck. After waiting approximately forty-five minutes, Atlas's yard foreman told Stebbens where to park his truck so it could be loaded. Stebbens parked the truck as instructed, and Atlas began loading pipe onto the trailer. Stebbens was directing the loading and arrangement of the pipe when the accident occurred and Stebbens was injured. Stebbens then sued Atlas and Protective, contending that Atlas was an omnibus insured under Walker's insurance policy with Aetna. Protective demanded that Aetna defend and indemnify Atlas from the third-party suit. Aetna refused to accede to the demand.

Aetna had issued a comprehensive automobile liability insurance policy to B.F. Walker.⁵⁹ The coverage question presented was the existence of a fact

53. *Id.* at 427 (citing *Home Indem. v. Lively*, 353 F. Supp. 1191 (D.C. Okla. 1972); *National Am. Ins. Co. v. Insurance Co. of N. Am.*, 74 Cal. App. 3d 565, 140 Cal. Rptr. 828 (1977); *Transamerica Ins. Group v. United Ins. Co.*, 92 Wash. 2d 21, 593 P.2d 156 (1979)).

54. *See Blue Bird Body v. Ryder Truck Rental*, 583 F.2d 717 (5th Cir. 1978).

55. 669 S.W.2d at 427.

56. *Id.*

57. *Travelers Ins. Co. v. Employers Casualty Co.*, 380 S.W.2d 610 (Tex. 1964).

58. 661 S.W.2d 291 (Tex. App.—Houston [1st Dist.] 1983, no writ).

59. The pertinent portions of the policy are as follows:

II. PERSONS INSURED

Each of the following is an insured under this insurance to the extent set forth below:

(a) the named insured [B.F. Walker, Inc.];

. . . .

(c) any other person while using an owned automobile or a hired automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission, but with respect to bodily injury or property

issue as to whether Atlas was a borrower of the truck within the meaning of the loading and unloading coverage provisions of the insurance policy issued by Aetna. In resolving this issue, the court relied on *Liberty Mutual Insurance Co. v. American Employers Insurance Co.*,⁶⁰ which held that in order for one to be a borrower of a vehicle one must have use and possession of the vehicle.⁶¹ The court noted that the loading of the vehicle in question by Atlas was no doubt a use of the vehicle.⁶² Possession of the truck, on the other hand, was not so clear. The court construed possession to mean the right to exercise dominion and control over the truck.⁶³ No evidence was presented that Atlas had such a right, and for that reason Atlas was not a borrower under the policy and Aetna had no duty to defend.⁶⁴

*Rhodes v. Chicago Insurance Co.*⁶⁵ involved a suit by Rhodes seeking damages that had been agreed upon by Rhodes and Chicago's insured in a prior state court proceeding. Rhodes had applied for a modeling position and was interviewed by a counselor. Rhodes alleged that during subsequent counseling, the counselor engaged in sexual misconduct with her, hypnotized her, and was otherwise negligent in performing his duties as a personal and guidance counselor. Chicago and Interstate Fire and Casualty Company were the malpractice insurers for the counselor under a group policy. Chicago refused to defend the counselor under Rhodes's original complaint and did not respond to a request for a defense under the first amended original complaint. Chicago, however, tendered a defense to the counselor under the second amended original complaint only under reservation of rights. The reservation of rights was tendered because the insurers contended that sexual misconduct was not covered by the policy. The counselor refused the tender and pursued his own defense. He subsequently settled the case in state court. This lawsuit arose out of the claim by Rhodes against Chicago in which Rhodes sought payment of the assessed damages.

The court held that the insurer's duty under Texas law to defend is determined solely from the face of the pleadings without reference to facts outside the pleadings.⁶⁶ Whether a complaint pleads in the alternative or alleges more than one cause of action, the insurer is obligated to defend, as long as the complaint alleges at least one cause of action within the coverage of the policy.⁶⁷ The court did not decide the issue of whether the carrier's duty to defend arose in the original, first amended, or second amended complaint.

damage arising out of the loading or unloading thereof, such other person shall be an insured only if he is:

- (1) a lessee or borrower of the automobile, or
- (2) an employee of the named insured or of such lessee or borrower

Id. at 292.

60. 556 S.W.2d 242 (Tex. 1977).

61. *Id.* at 245.

62. 661 S.W.2d at 292.

63. *Id.*

64. *Id.*

65. 719 F.2d 116 (5th Cir. 1983).

66. *Id.* at 119.

67. See *Superior Ins. Co. v. Jenkins*, 358 S.W.2d 243 (Tex. Civ. App.—Eastland 1962,

The question presented in this case was the effect on the carrier of its failure to defend.

Once an insurer breaches its duty to defend, the insured is free to proceed as he sees fit, engage his own counsel, and either settle or litigate at his option.⁶⁸ Having breached its duty to defend, the insurer is bound by the settlement or judgment.⁶⁹ In addition, the insurer who breaches his duty to defend does not have the ability to enforce against the insured any conditions of the policy, and the insured is no longer constrained by no-action and no-voluntary-assumption-of-liability clauses.⁷⁰ The carrier is liable for any damages up to the policy limits assessed against the insured, subject only to the condition that any settlement be reasonable.⁷¹

The court explained the complexity of the situation if the duty to defend arose under the second amended original complaint. In that situation the carrier offered to defend, but only with the reservation of rights. The court noted that a reservation of rights is a proper action if the insurer believes, in good faith, that the complaint alleges conduct that may not be covered by the policy.⁷² Notice of intent to reserve rights must be timely and in sufficient form to inform the insured of the carrier's position.⁷³ A reservation of rights, however, allows the insurer to refuse a tender of defense and pursue his own defense. The carrier would remain liable for attorney's fees if it has the duty to defend and may not insist on conducting the defense.⁷⁴ The carrier also is barred from enforcing voluntary assumption of the liability in no-action clauses.⁷⁵

The court stated that if the insurer breached its duty to defend, the insurer is bound to pay any damages up to the policy limits assessed against the insured.⁷⁶ If the insured properly reserved its rights and the insured elected to pursue its own defense, the carrier is bound to pay damages that resulted from covered conduct and that were reasonable and prudent up to the policy limits.⁷⁷ In either situation, however, the insured is not constrained by conditions in the policy that limit the insured's ability to settle the claim, and the carrier cannot object to the insured's conduct of the defense.⁷⁸

writ ref'd n.r.e.); *Maryland Casualty Co. v. Moritz*, 138 S.W.2d 1095 (Tex. Civ. App.—Austin 1940, writ ref'd).

68. See *Great Am. Indem. Co. v. Corpus Christi*, 192 S.W.2d 917 (Tex. Civ. App.—San Antonio 1946, writ ref'd n.r.e.).

69. *Ridgeway v. Gulf Life Ins. Co.*, 578 F.2d 1026 (5th Cir. 1978); *Ranger Ins. Co. v. Rodgers*, 530 S.W.2d 162 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).

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

71. See *Blakely v. American Employers Ins. Co.*, 424 F.2d 728 (5th Cir. 1970) (an insurer may be liable even for amounts in excess of the policy limits).

72. 719 F.2d at 120.

73. *Id.*

74. *Id.*

75. *Travelers Indem. Co. v. Equipment Rental Co.*, 345 S.W.2d 831 (Tex. Civ. App.—Houston 1961, writ ref'd n.r.e.).

76. 719 F.2d at 121.

77. *Id.*

78. *Id.*

III. PROPERTY INSURANCE

"Bad Faith" Claims for Extracontractual Damages. In *Thompson v. M & B. Construction Corp.*⁷⁹ the federal district court, following recent Texas precedent,⁸⁰ held that no cause of action exists under Texas law against a property insurer for an alleged bad faith denial of a claim. Thompson's building collapsed when a contractor removed lateral supports during construction of a water pipeline near the building. When Thompson's claim for proceeds under his property insurance policy was denied, he sued both the contractor and his insurer, American Economy Insurance Company. Thompson made claim against American Economy not only for policy proceeds, but also for \$500,000 in exemplary damages on the theory that the insurer had breached an implied covenant of good faith and fair dealing by failing to investigate the loss fully before denying the claim.⁸¹ American Economy moved for partial summary judgment on the claim for exemplary damages, on the ground that Texas law recognized no such cause of action.

The court agreed and dismissed the exemplary damages claim.⁸² Exemplary damages are not available for breach of contract in Texas, even when the breach is malicious or willful, unless a separate tort is also alleged and proved.⁸³ The court examined the recent case of *English v. Fischer*,⁸⁴ in which the Texas Supreme Court declined to create and read into all Texas contracts an implied duty of good faith and fair dealing, expressly rejecting the California bad faith tort theory. *English v. Fischer* controlled the *Thompson* result and forced the court to dismiss the exemplary damages claim against American Economy.⁸⁵

Arson Defense. In *Western Fire Insurance Co. v. Sanchez*⁸⁶ the court reaffirmed the rule that, when spouses have a joint interest in insured property, the arson of one spouse will bar not only his own insurance claim, but also that of the innocent spouse. Under the facts stipulated in the trial court, Western Fire Insurance Company issued a fire policy to Charlotte Sanchez

79. 585 F. Supp. 561 (N.D. Tex. 1984).

80. *Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563 (Tex. 1981).

81. 585 F. Supp. at 562.

82. *Id.* at 563.

83. *Id.*; see *Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563, 571 (Tex. 1981); *A.L. Carter Lumber Co. v. Saide*, 140 Tex. 523, 526, 168 S.W.2d 629, 631 (1943).

84. 660 S.W.2d 521 (Tex. 1983).

85. In *English v. Fischer* the court held:

A basis for the judgments below was the adoption of a novel theory of law enunciated only by California courts. That theory holds that in every contract there is an implied covenant that neither party will do anything which injures the right of the other party to receive the benefits of the agreement. The courts below called this a covenant of "good faith and fair dealing."

This concept is contrary to our well-reasoned and long-established adversary system which has served us ably in Texas for almost 150 years 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. at 522.

86. 671 S.W.2d 666 (Tex. App.—Tyler 1984, writ ref'd n.r.e.).

in January 1980 covering her residence up to a maximum limit of \$64,000. Charlotte was married, but owned the house as her separate property. She and her husband Delfin occupied the house together as their homestead at the time of the fire in December 1980. Delfin intentionally set the fire without the knowledge or participation of Charlotte, causing damages of over \$36,000. The trial court rendered judgment for Charlotte on the policy, holding that since Delfin owned no interest in the house and was not an insured under the policy, Delfin's arson would not bar Charlotte's claim. The court reasoned that since Delfin did not own the residence, the public policy rationale of the arson defense, preventing profit from wrongdoing, was inapplicable.

The court of appeals reversed and rendered a take nothing judgment.⁸⁷ Delfin owned a homestead interest in the property jointly with Charlotte, notwithstanding the fact that the residence was her separate property. A homestead right is an estate in land in the nature of a legal life estate created by operation of law.⁸⁸ The court followed the established rule⁸⁹ that when two persons have a joint interest in property, intentional burning by one will bar the claim of the other. One of the early cases relied upon by the court, *Bridges v. Commercial Standard Insurance Co.*,⁹⁰ specifically held a homestead right to be a sufficient joint interest to bar the claim of the innocent spouse.

The Texas rule barring the claim of the innocent spouse reflects sound public policy and economic reality. When ownership of the insured property is joint, payment of insurance proceeds to the innocent owner necessarily benefits the wrongdoer. Within the facts of the *Sanchez* case, if the insurance proceeds were used to repair the damage to the home, the guilty spouse living in the house at the time of trial would obviously benefit. If the property were jointly owned as community property, as would normally be true for marital property in Texas, payment of proceeds to the innocent spouse would necessarily benefit the community estate. When the property is mortgaged, payment and discharge of the mortgage debt would necessarily benefit the guilty as well as the innocent owner. The Texas rule, therefore, is clearly consistent with the public policy underlying the arson defense, to avoid rewarding a wrongdoer and deter insurance fraud. Further, when intentional wrongdoing is proved on the part of one joint owner, the ever present potential for collusion or passive acquiescence on the part of the innocent spouse provides additional justification for the rule. The rule will act to deter even passive participation and encourage vigilance on the part of the innocent spouse. Until recent years, the rule denying recovery to an innocent

87. *Id.* at 670.

88. *Id.* at 668.

89. See *Bridges v. Commercial Standard Ins. Co.*, 252 S.W.2d 511, 512 (Tex. Civ. App.—Eastland 1952, no writ) (innocent husband barred from collecting fire insurance proceeds when wife intentionally set fire to building); *Jones v. Fidelity & Guar. Ins. Corp.*, 250 S.W.2d 281 (Tex. Civ. App.—Waco 1952, writ ref'd) (innocent divorced wife barred from insurance proceeds recovery when former husband intentionally burned property).

90. 252 S.W.2d 511, 512 (Tex. Civ. App.—Eastland 1952, no writ).

spouse has been regarded as the majority rule, but in the past decade other states increasingly have begun permitting recovery by innocent spouses.⁹¹ *Sanchez*, therefore, stands as an exception to the current trend.⁹² In another arson case, *Buffkin v. Texas Farm Bureau Mutual Insurance Co.*,⁹³ the court reaffirmed the rule that results of a polygraph examination are not admissible.⁹⁴

Accidental Loss. Traditionally insurance only covers fortuitous or accidental losses, not those losses that are certain to occur or intentionally caused.⁹⁵ In *Southern Farm Bureau Casualty Insurance Co. v. Brock*⁹⁶ the court construed the term "accidental" in an automobile collision policy. The insured, Brock, while driving his car, saw Hawkins in a second vehicle. Hawkins pointed a shotgun in the direction of a third vehicle in which Brock's sister was a passenger. Brock drove into the Hawkins' vehicle deliberately to "prevent someone getting shot, like my sister."⁹⁷ Brock sued on his auto policy for collision damage to his vehicle and obtained a favorable jury verdict on which the trial court rendered judgment.

The appellate court reversed, holding that as a matter of law the damage was not accidental.⁹⁸ Applying a test developed in life insurance controversies, the court held that an injury is considered accidental only if "from the viewpoint of the insured, the injuries are not the natural and probable consequence of the action or occurrence which produced the injury."⁹⁹ Since Brock's driving into Hawkins' vehicle was admittedly deliberate, the damage was not accidental.

Other Insurance. In *Farmers Texas County Mutual Insurance Co. v. Jones*¹⁰⁰ the court determined the proper measure of recovery when two separate policies cover the same property and considered evidentiary questions related to proof of motive for arson. The insured, Jones, bought a tornado-damaged mobile home for \$5,000, spent about \$700 for building materials, and personally performed some repair work on the mobile home with the assistance

91. See, e.g., Butler & Freemon, *The Innocent Coinsured: He Burns It, She Claims—Windfall or Technical Injustice?*, 17 FORUM 187 (1981); Annot., 11 A.L.R. 4TH 1228 (1982).

92. Washington, another community property state, has also created an exception to the current trend. See *Federated Am. Ins. Co. v. Strong*, 36 Wash. App. 256, 673 P.2d 873 (1983).

93. 658 S.W.2d 317 (Tex. App.—Tyler 1983, no writ).

94. *Id.* at 322.

95. Life insurance is an exception to this rule, since death is a certainty. See generally S. Cozen, *Fortuity: The Unnamed Exclusion* (unpublished paper presented to the Joint Meeting of the Property Insurance Law Committee and the Excess, Surplus Lines and Reinsurance Committee of the Tort and Insurance Practice Section of the American Bar Association, Chicago, Illinois, Aug. 7, 1984) [probably to be published in *The Forum*]. For a recent judicial discussion of the concepts of risk, fortuity, and accident in insurance law, see *Compagnie des Bauxites des Guinee v. Insurance Co. of N. Am.*, 554 F. Supp. 1080 (W.D. Pa.), *rev'd*, 724 F.2d 369 (3d Cir. 1983).

96. 659 S.W.2d 165 (Tex. App.—Amarillo 1983, writ *ref'd n.r.e.*).

97. *Id.* at 166.

98. *Id.* at 167.

99. *Id.* (quoting from *Republic Nat'l Life Ins. Co. v. Heyward*, 536 S.W.2d 549, 557 (Tex. 1976)).

100. 660 S.W.2d 879 (Tex. App.—Forth Worth 1983, no writ).

of family members. Jones then purchased a \$25,000 fire policy with Farmers and a second \$20,000 policy with EMMCO Insurance Company. Each policy contained an other insurance clause and a pro rata clause, providing that the insurer would be liable for loss in the proportion that its policy's limits bore to the total coverage on the risk.

The mobile home was damaged by fire and Jones sued on both policies. EMMCO settled with Jones for \$12,000, but Farmers Mutual asserted arson by the insurer as a defense. At trial estimates of the mobile home's pre-fire value ranged from \$8,000 to \$38,000. Jones estimated the value at \$32,000 to \$38,000. The jury found in favor of Jones on the liability issue and fixed the value of the mobile home at \$12,300 and the value of the contents at \$10,444. The trial court accordingly rendered judgment against Farmer for \$10,444 (the amount of the contents loss) plus \$6,833 (25/45th of \$12,300, the value of the home as found by the jury), plus interest.

On appeal Farmers argued that the \$12,000 settlement from EMMCO should be credited against the \$12,300 found by the jury to be the value of the mobile home. Furthermore, it argued that evidence of the original purchase price and other insurance should have been admitted on the question of motive. The appellate court rejected these arguments and affirmed.¹⁰¹ When two or more policies with pro rata clauses cover the same property, each is considered separately and independently, and payment or settlement of a claim under one policy does not alter the measure of recovery under another.¹⁰² Even if one insurer pays the entire loss, the liability of the other will not be discharged.¹⁰³ The court, thus, held that Farmers was properly denied a credit or offset for the EMMCO payment.¹⁰⁴

On the evidentiary questions the court held that the original purchase price of the mobile home and the existence of the EMMCO policy were properly excluded from evidence, because the probable prejudice of these facts far outweighed their marginal relevance.¹⁰⁵ This ruling rests on faulty reasoning. The evidence was offered to show financial or profit motive on the part of the insured.¹⁰⁶ An arson defense must frequently be proved circumstantially, and financial motive is an essential part of the insurer's proof.¹⁰⁷ In arson cases the evidence should be permitted a wide scope,¹⁰⁸

101. *Id.* at 881-82.

102. *Id.* at 881.

103. *Id.*

104. *Id.* at 881-82.

105. *Id.* at 882.

106. *Id.*

107. *See generally* Garrett v. Standard Fire Ins. Co., 541 S.W.2d 635, 636-37 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.) (evidence that insured increased policy amount was relevant).

108. The courts have recognized that "[a]rson may be established by circumstantial evidence." Garrett v. Standard Fire Ins. Co., 541 S.W.2d 635, 638 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.); *see* Payne v. Hartford Fire Ins. Co., 409 S.W.2d 591, 595 (Tex. Civ. App.—Beaumont 1966, writ ref'd n.r.e.); Williams v. Banker's Fire & Marine Ins. Co., 277 S.W.2d 742, 743-44 (Tex. Civ. App.—Waco 1955, writ dism'd); Joy v. Liverpool, London & Globe Ins. Co., 74 S.W. 822, 825 (Tex. Civ. App.—San Antonio 1903, writ ref'd). A corollary to this rule is that circumstantial evidence is admissible broadly, objections on the ground of

the question of its weight being for the jury. In *Jones* a possible profit motive clearly would have been demonstrated by showing insurance in a total amount substantially higher than the insured's own valuation of the property, over three times greater than the actual value as found by the jury, and over seven times greater than the insured's cash investment in the mobile home.

Two Fires, Two Occurrences, Two Deductibles. In *Goose Creek Consolidated Independent School District v. Continental Casualty Co.*¹⁰⁹ the court determined that two fires in separate buildings were two loss occurrences and that the deductible amount should be applied separately to each. Goose Creek bought a single fire policy covering several buildings. In the early morning hours of December 23, 1979, fires occurred within about one and one-half hours at two separate insured properties. The Baytown Fire Department concluded that each fire was the result of arson. The insurer paid the losses, except for \$200,000, which represented a separate application of the \$100,000 deductible to each loss. Goose Creek sued the insurer for \$100,000, contending that the two fires should be considered a single loss occurrence within the meaning of the policy, since a single individual or group probably set both fires as part of a single scheme or plan. The appellate court affirmed the summary judgment in favor of the insurer.¹¹⁰ The policy defined "loss occurrence" as a loss arising out of a single event.¹¹¹ The court held that the ordinary meaning of single event required considering each fire as a separate loss occurrence.¹¹² The court was unpersuaded,

relevancy being disfavored. In *Garrett v. Standard Fire Ins. Co.*, 541 S.W.2d at 638, the court said:

The crime of arson, being in defiance of law, is ordinarily conceived in secrecy and executed in such a manner as to avoid detection and exposure; and proof of such an unlawful enterprise must, in the very nature of things, be made by circumstances, and every circumstance which tends to cast light upon the incident is legitimate and proper.

Similarly, in *Joy v. Liverpool, London & Globe Ins. Co.*, 74 S.W. at 825, the court said: "In the proof of an issue of such a character as arson, involving, as it does, such moral turpitude and criminal intent, every circumstance tending to prove the guilt of the party charged with the commission of the offense is admissible in evidence." Perhaps the best statement concerning the scope of admissibility of circumstantial evidence in arson cases is found in *Girard v. Vermont Mut. Fire Ins. Co.*, 103 Vt. 330, 154 A. 666, 668-69 (1931) [citations omitted], wherein the court said:

As we have often said, when fraud is the issue, the evidence necessarily takes a wide range. . . . So here, though the fraud in its ultimate aspect was the burning of the buildings, any fact or circumstance, before or after that event, which in any way indicated a purpose to accomplish that fraudulent result, was admissible. Indeed, that ultimate fact might be wholly established by circumstantial evidence. . . . And, when such evidence is resorted to, objections to testimony on the ground of irrelevancy are not favored, because the force and effect of circumstantial facts depend largely upon their relation to each other; the acts and circumstances, although wholly unconvincing when separately considered, may by their number and joint operation be entirely sufficient to establish the *factum probandum*.

109. 658 S.W.2d 338 (Tex. App.—Houston [1st Dist.] 1983, no writ).

110. *Id.* at 341.

111. *Id.* at 340.

112. *Id.* at 341.

under the policy language, that two fires set at different times and places should be considered part of a process of continuum.¹¹³

Suit Limitation Clause. The Houston court of appeals considered the validity of a savings clause in a contractual limitations provision of an insurance policy in *Duster v. Aetna Insurance Co.*¹¹⁴ Duster bought a policy from Aetna covering his yacht. The policy provided that no suit upon the policy could be maintained unless brought within twelve months after the loss, or within the shortest time permitted by applicable state law. A loss occurred in September 1979, but Duster did not file suit until February of 1982, over two years later and well beyond the twelve-month period specified in the policy. The trial court rendered a summary judgment in the insurer's favor on the basis of the suit limitation clause, but the appellate court reversed and remanded, holding the limitations clause void.¹¹⁵ Article 5545¹¹⁶ permits parties to fix a limitation period for actions on a contract at not less than two years. Since the statute clearly prohibited the twelve-month period specified, the issue on appeal was the validity of the policy's savings clause, which specified the shortest limit of time permitted by state law as an alternative limitations period. In approaching the question, the court adverted to the two rules of construction that ambiguities must be construed against the author of a contract and that policy provisions should be construed strictly against the insurer.¹¹⁷ It held that the savings clause was not sufficiently specific to survive under these two rules.¹¹⁸ Absent a valid limitations period in the contract, the four-year statute¹¹⁹ for written contracts applied. Since the suit was filed within the four-year period, it was remanded for trial.¹²⁰

Hitting Chug Hole as Collision. In *Nutchey v. Three R's Trucking Co.*¹²¹ the court held that damage to a trailer caused by impact with a sudden depression in the roadbed, or chug hole, constituted a collision loss within the meaning of an insurance policy.¹²² After the loss occurred, the owner of the trailer, Three R's Trucking Co., sued on the policy, claiming that the trailer was damaged beyond repair by a collision with a chug hole. The insurer denied the claim on the basis of the exclusion for "wear and tear . . . , mechanical or electrical breakdown or failure."¹²³ The trial court rendered summary judgment for Three R's in the amount of \$15,000, and the appellate court affirmed.¹²⁴ The court reviewed the rules of construction that re-

113. *Id.* at 340.

114. 668 S.W.2d 806 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd).

115. *Id.* at 807.

116. TEX. REV. CIV. STAT. ANN. art. 5545 (Vernon 1958).

117. 668 S.W.2d at 807.

118. *Id.*

119. TEX. REV. CIV. STAT. ANN. art. 5527 (Vernon 1958).

120. 668 S.W.2d at 807.

121. 674 S.W.2d 928 (Tex. App.—Amarillo 1984, no writ).

122. *Id.* at 931.

123. *Id.* at 930.

124. *Id.* at 932.

quire resolution of ambiguities in favor of coverage, as well as previous opinions dealing with similar policy provisions, and concluded that a collision can occur when the vehicle strikes only the roadbed.¹²⁵

Squirrel As Vermin. Homeowner's insurance policies in Texas contain an exclusion for loss caused by "vermin," but do not define that term. In *Jones v. American Economy Insurance Co.*¹²⁶ the Joneses claimed under their homeowners policy for approximately \$2,300 damage to their house and furniture caused by a squirrel, and the insurer asserted the vermin exclusion. The trial court rendered summary judgment for the insurer, but the appellate court reversed. Finding cases from other jurisdictions divided on the question, the court considered the dictionary definition and ordinary meaning of vermin. It concluded that the term has no generally accepted meaning as applied to squirrels. "Vermin," therefore, was ambiguous and should be construed in favor of coverage. The court accordingly reversed and rendered judgment for the insureds.¹²⁷

Subrogation to Insured's Contractual Rights. In *Duval County Ranch Co. v. Alamo Lumber Co.*¹²⁸ the court considered the rights of owner, lienholder, and insurer after a fire loss. The Duval County Ranch Co., as owner, contracted with Alamo Lumber Co., as general contractor, for the construction of a ranch house in Duval County. Alamo built the house, but a dispute arose as to the amount Duval owed Alamo for the construction. Alamo sued and obtained a judgment against Duval in the amount of \$443,414.05.¹²⁹ The judgment also provided for foreclosure of Alamo's mechanic's lien on the tract of land where the ranch house was built.

During the appeal from that judgment, the house was totally destroyed by fire, and Duval and Alamo were paid by their respective insurers.¹³⁰ Duval then sued Alamo, claiming that Duval was entitled to insurance proceeds received by Alamo and that those proceeds should be credited upon Alamo's \$443,414.05 judgment. Alamo's insurers intervened, seeking subrogation to the extent of payment to Alamo's judgment against Duval. The trial court rendered judgment on the jury verdict, denying Duval's claim for the proceeds of Alamo's insurance policies and granting to the intervening insurers a subrogation interest in Alamo's original judgment. Both Duval and Alamo appealed.

Duval argued that under equitable principles¹³¹ it should receive the bene-

125. *Id.* at 931.

126. 672 S.W.2d 879 (Tex. App.—Dallas 1984, no writ).

127. *Id.* at 881.

128. 663 S.W.2d 627 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.).

129. *Id.* at 630; see *Duval County Ranch Co. v. Alamo Lumber Co.*, 597 S.W.2d 528 (Tex. Civ. App.—Beaumont 1980, writ ref'd n.r.e.).

130. Alamo Lumber Company was paid \$330,610.20 and Duval was paid \$350,000. 663 S.W.2d at 630-31.

131. When an owner agrees to insure both his own interest in property and that of the mortgagee, but fails to insure the interest of the mortgagee, the mortgagee is entitled to a lien on the insurance proceeds payable to the owner. *Fidelity & Guar. Ins. Corp. v. Super-Cold Southwest Co.*, 225 S.W.2d 924, 927 (Tex. Civ. App.—Amarillo 1949, writ ref'd n.r.e.). Duval

fit of the insurance payment to Alamo because Alamo would otherwise receive a double recovery and be unjustly enriched. The court rejected this argument, observing that Alamo, as lienholder on the property, clearly had an insurable interest.¹³² Relying on the rule that contracts of insurance are personal and that ordinarily a stranger to the policy is not entitled to maintain a claim on it, the court held that Alamo's insurers properly paid their named insured and that Duval had no valid claim for the proceeds.¹³³ The court noted that awarding Alamo's insurance proceeds to Duval would in fact give Duval a double recovery, since Duval had already received the proceeds of its own policy.¹³⁴

Alamo challenged its own insurers' right to a partial interest in its original \$443,414.05 judgment against Duval on the basis of the mortgagee clause found in the policies that provided for subrogation to the mortgagee's rights when the insurer makes payment to the mortgagee, but denies the owner's claim.¹³⁵ Alamo argued that because the \$330,610.20 insurance proceeds received from its insurers were insufficient to pay the entire mortgage debt, the insurers should acquire no subrogation rights in Alamo's original judgment under the policy language. The court rejected this argument, noting the Texas courts' policy favoring subrogation rights and the importance of upholding that policy.¹³⁶ The court expressly avoided passing on the question of who would be entitled to first monies out of the judgment, as between Alamo and its subrogated insurers.¹³⁷

IV. DECEPTIVE TRADE PRACTICES ACT AND TEXAS INSURANCE CODE

*Consumer Under DTPA.*¹³⁸ In *Gibbs v. Main Bank*¹³⁹ the court decided several questions concerning the availability of remedies under the DTPA for a purchaser of title insurance. Gibbs bought a small apartment complex from Wortham Investments, Inc. in 1975. Before the closing he received a preliminary title report from Guardian Title Company, and at closing a title policy

based its claim to Alamo's insurance proceeds first upon an alleged agreement by Alamo to insure the interest of Duval. The jury, however, failed to find that Alamo had made such an agreement. 663 S.W.2d at 631. Having failed to secure the necessary jury finding to invoke the rule of the *Super-Cold* case, Duval asserted that it should recover Alamo's insurance proceeds upon equitable principles, regardless of any agreement by Alamo to insure Duval's interest.

132. 663 S.W.2d at 632.

133. *Id.* at 632, 637.

134. *Id.* at 632.

135. The mortgage clause provided:

If this Company shall claim that no liability existed as to the mortgagor or owner, it shall, to the extent of payment of loss to the mortgage, be subrogated to all of the mortgagee's rights of recovery, but without impairing mortgagee's right to sue; or it may pay off the mortgage debt and require an assignment thereof and of the mortgage.

Id. at 637.

136. *Id.*

137. *Id.*

138. "DTPA" indicates the Texas Deceptive Trade Practices—Consumer Protection Act, TEX. BUS. & COM. CODE ANN. §§ 17.41-63 (Vernon Supp. 1984).

139. 666 S.W.2d 554 (Tex. App.—Houston [1st Dist.] 1984, no writ).

was issued to him by Safeco Title Insurance Company. Neither the preliminary report nor the title policy listed a \$10,000 lien against the policy held by William Craig. In 1976 Gibbs learned that Main Bank of Houston, assignee of the Craig note and lien, had foreclosed and caused the property to be sold at public auction. Unsuccessful in his suit to set aside the foreclosure, Gibbs sued the title company (Guardian), the title insurer (Safeco), his seller (Wortham Investments), and its principal, alleging an action on the title policy and also fraud and violations of the DTPA and Texas Insurance Code article 21.21.¹⁴⁰ The trial court directed a verdict in favor of all defendants, and Gibbs appealed.

The first issue presented on appeal was limitations. Gibbs learned of the undisclosed Craig lien on December 9, 1976, and filed suit against the DTPA defendants more than two but less than four years later. The court made the assumption that Gibb's DTPA cause of action arose when he first learned of the outstanding lien in 1976.¹⁴¹ A two-year limitations provision was added to the DTPA effective August 27, 1979,¹⁴² but no specific limitations statute applied to the DTPA before that date. Since the acts of which Gibbs complained occurred before 1979, the court looked to the general limitations statutes. It determined that the four-year statute for written contracts applied,¹⁴³ reasoning that his DTPA and article 21.21 claims were derived from transactions in writing.¹⁴⁴ The court also held that fact issues were present on whether the defendants were estopped to assert limitations, since some statements by defendants may have induced Gibbs to postpone suit.¹⁴⁵ The defendants may have also fraudulently concealed their own roles and responsibility until well beyond the date Gibbs first learned of the Craig lien.¹⁴⁶

The court next decided whether Gibbs was a consumer with standing to sue under the DTPA, as amended in 1975. A frequent threshold matter in DTPA cases is the question of which version of the act applies. The court selected the 1975 version of the DTPA (the 1975 Act) as applicable because the title report and title policy omitting the Craig lien were issued in 1975.¹⁴⁷ Consumer in the 1975 Act included an individual "who seeks or acquires by

140. TEX. INS. CODE ANN. art. 21.21 (Vernon 1981) and the DTPA were enacted together in 1973 as parts of the same legislative bill. 1973 Tex. Gen. Laws, ch. 143, at 322. Originally the two statutes were largely identical. In the 11 years since its original enactment, the DTPA has been amended substantially, but art. 21.21, whether through design or oversight, has not been amended since 1973. Although the differences between the two statutes are now substantial, each refers to the other, and they are evidently intended to be read together. The courts seldom distinguish between the DTPA and art. 21.21 in suits against insurance companies. See, e.g., Dykes & Nistico, *Insurers' Liability for Deceptive Trade Practices in Texas*, 1 TEX. INS. L. REP. 33 (1983). No such distinction is made in the *Gibbs* opinion, and none will be attempted in this Article.

141. 666 S.W.2d at 558.

142. TEX. BUS. & COM. CODE ANN. § 17.56A (Vernon Supp. 1984).

143. TEX. REV. CIV. STAT. ANN. art. 5527 (Vernon 1958).

144. 666 S.W.2d at 558.

145. *Id.* at 558-59.

146. *Id.*

147. *Id.* at 558.

purchase or lease, any goods or services."¹⁴⁸ The definition of services, however, excluded services for business or commercial use.¹⁴⁹ Guardian and Safeco argued that their furnishing a title report and a policy of title insurance were commercial services outside the scope of the 1975 Act. The court disagreed on two grounds. First, the substance of Gibbs's action related to the purchase of real estate, a good¹⁵⁰ under the 1975 Act, and the alleged violations occurred in connection with the real estate transaction.¹⁵¹ Second, inasmuch as Gibbs purchased the apartments as part of a personal investment plan, and not for resale or production of other goods, the court held that the services in question were not commercial under the facts.¹⁵²

Last, the court rejected Guardian's and Safeco's argument that no action would lie under the DTPA because as mere insurers and indemnitors against title failure, they owed no duty to disclose the outstanding lien. The court held that the DTPA, even before the 1979 amendments that added a specific section on nondisclosure of material facts,¹⁵³ was intended to reach a conspiracy to conceal material information. Finding that Gibbs's liability theories were realistic and supported by evidence at trial, the court reversed and remanded.

Insurance as a Service Under the DTPA. In *McCran v. Klaneckey*¹⁵⁴ the trial court sitting without a jury found that insurance agent McCran had misled the plaintiffs by telling them that they had automobile liability insurance when they did not. The plaintiffs had a minor traffic accident on August 2, 1980, while uninsured, and were awarded treble damages plus attorney's fees under the DTPA against the agent. On appeal, the agent urged that sale of insurance was outside of the scope of the DTPA because insurance is intangible property, and neither a good nor a service within the Act. The court rejected this argument and followed other opinions that have either assumed or held that insurance is a service within the meaning of the DTPA.¹⁵⁵

Pre-Loss Misrepresentation. An insurance agent's pre-loss misrepresentation to an insured concerning the coverage provided by his policy, relied on by the insured to his detriment, subjects the company to liability for treble dam-

148. TEX. BUS. & COM. CODE ANN. § 17.45 (Vernon Supp. 1984). Under the 1975 DTPA, "consumer" was defined as "an individual, partnership, [or] corporation . . . who seeks or acquires by purchase or lease, any goods or services." *Id.* § 17.45(4). "Goods" were defined as "tangible chattels or real property purchased or leased for use." *Id.* § 17.45(1). "Services" were defined as "work, labor, or service purchased or leased for use, including services furnished in connection with the sale or repair of goods." *Id.* § 17.45(2).

149. *Id.* § 17.45(2).

150. *Id.* § 17.45(1).

151. 666 S.W.2d at 559.

152. *Id.*

153. TEX. BUS. & COM. CODE ANN. § 17.46(22) (Vernon Supp. 1985) was added by amendment effective Aug. 27, 1979.

154. 667 S.W.2d 924 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).

155. *Id.* at 926.

ages under the DTPA and article 21.21.¹⁵⁶ This rule was applied in *Tidelands Life Insurance Co. v. Harris*.¹⁵⁷ In *Harris* the trial court found that the agent misrepresented the terms of a family health policy to the plaintiff, by telling him that future heart problems would be covered notwithstanding the plaintiff's known, existing heart condition. The policy in fact contained an exclusion for preexisting conditions. The parties stipulated that the exclusion applied to coverage for plaintiff's subsequent heart attack. The court found that the agent had actual and apparent authority to represent the policy terms to prospective insureds, and that but for his misrepresentation the plaintiff would have purchased other coverage. The plaintiff was awarded three times his medical expenses plus attorney's fees in the trial court.

The primary issue on appeal was whether the company could be subjected to liability on account of the agent's statements. The court ruled that the company was properly held responsible, by reason of the trial court's fact findings on actual and apparent authority and by reason of Texas Insurance Code article 21.02—1, which statutorily establishes one who takes policy applications as an agent of the insurer.¹⁵⁸

Post-Loss Misrepresentations. The courts have generally held that post-loss conduct does not give rise to liability under the DTPA or article 21.21, because the insured's rights under the policy are fixed at the moment of loss and are not altered by later conduct of the insurer or its adjusters.¹⁵⁹ Nevertheless, *Bellefonte Underwriters Insurance Co. v. Brown*¹⁶⁰ imposed liability for treble damages for an insurer's post-loss conduct.

In January of 1978 Brown contacted Avrohm Wisenberg of the Sol L. Wisenberg Insurance Agency to purchase fire coverage for his commercial buildings, in which he operated an industrial rag recycling business. The business stored tons of highly flammable cloth near hot dryers and was a high fire insurance risk. Wisenberg secured the coverage through Bellefonte Underwriters Insurance Company, a surplus lines carrier, and six other carriers, who shared in the risk as coinsurers. The premiums charged to Brown

156. *Royal Globe v. Bar Consultants, Inc.*, 557 S.W.2d 688 (Tex. 1979).

157. 675 S.W.2d 224 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).

158. *Id.* at 227. TEX. INS. CODE ANN. art. 21.02—1 (Vernon 1981) reads in part:

Whoever solicits insurance on behalf of any insurance company, . . . or who takes or transmits . . . any application for insurance, or any policy of insurance, to or from such company, . . . or shall receive or deliver a policy of insurance of any such company, . . . or receive or collect or transmit any premium of insurance . . . or do any other act in the making or consummating of any contract of insurance for or with any such insurance company . . . shall be held to be the agent of the company for which the act is done or the risk taken

159. See *McKnight v. Ideal Mut. Ins. Co.*, 534 F. Supp. 362, 366 (N.D. Tex. 1982); *Rosell v. Farmers Tex. County Mut. Ins. Co.*, 642 S.W.2d 278 (Tex. App.—Texarkana 1982, no writ); *American Ins. Co. v. Reed*, 626 S.W.2d 898, 905 (Tex. Civ. App.—Eastland 1981, no writ); *Rodriguez v. Texas Employers Ins. Ass'n*, 598 S.W.2d 677, 679 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.); *General Accident, Fire & Life Assurance Corp. v. Legate*, 578 S.W.2d 505 (Tex. Civ. App.—Texarkana 1978, writ ref'd n.r.e.); *Lone Star Life Ins. Co. v. Griffin*, 574 S.W.2d 576 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.).

160. 663 S.W.2d 562 (Tex. App.—Houston [14th Dist.] 1983, no writ).

were discounted because of an automatic wet sprinkler system¹⁶¹ in one of the buildings, and the policy contained an automatic sprinkler clause that provided that the insured must exercise due diligence in maintaining the sprinkler system.¹⁶² Within three days of the time the coverage was initially bound with Bellefonte, Wisenberg forwarded to Bellefonte's agent, Armco Underwriters Agency of Texas, Inc., an engineering report and other papers. The report recommended conversion from a wet system to a dry system, but noted that Brown did not intend to implement this recommendation at that time.¹⁶³ The papers also explicitly described Brown's customary practice of draining the sprinkler system when freezing weather was predicted. On February 20, 1978, about one month after Brown obtained the coverage, freezing weather was predicted and Brown drained the wet sprinkler system. In the morning hours of February 21, the building was destroyed by fire.

Brown submitted his proof of loss and initially all carriers were inclined to pay the loss, but a property manager with Armco erroneously concluded that Wisenberg had misrepresented the nature of the sprinkler system and had failed to advise the carriers that the wet sprinkler system was drained and inoperative in freezing weather. The Armco property manager telexed his conclusion to one of the coinsurers, Lloyds of London, and sought concurrence to deny the claim on the basis of Wisenberg's alleged misrepresentation concerning the system and failure to notify that it would be drained in freezing weather. All carriers except Bellefonte paid their portions of the claim, but Bellefonte denied the claim on the basis of Wisenberg's alleged misrepresentations, violation of the automatic sprinkler clause, and material increase in hazard within the knowledge and control of the insured. A complex multiparty suit followed, in which Brown sued Bellefonte on the policy and Wisenberg sued Bellefonte for libel and violation of article 21.21, on the basis of Armco's telex to Lloyds of London. Brown and Wisenberg prevailed on these claims after a lengthy trial, and those portions of the judgment were affirmed on appeal. The jury found Wisenberg's damages due to the libelous telex to be \$50,000, and this figure was trebled in the trial court's judgment.

Bellefonte argued on appeal that damages found in favor of Wisenberg on account of the libelous telex should not be trebled, but the court disagreed. The court first pointed out that Wisenberg had pleaded article 21.21, and

161. A wet sprinkler system has water in the pipes continuously, whereas water enters the pipes of a dry system only when the system is triggered. *Id.* at 570 n.1.

162. The clause provided:

This policy being written at a reduced rate, based on the protection of the premises by automatic sprinkler, it is a condition of this policy that, in so far as the sprinkler equipment and the water supplies therefor, and in connection therewith the approved Central Station sprinkler supervisory service complete, are under the control of the assured, due diligence shall be used by the assured to maintain them in complete working order, and that, on the premises of assured, no change shall be made in said water supplies and/or the Central Station sprinkler supervisory service complete without the consent of this company in writing.

Id. at 571 n.4.

163. *Id.* at 570.

that section 4(2) of that statute declares untrue statements about persons in the insurance business to be unfair and deceptive acts or practices in the business of insurance.¹⁶⁴ Section 16 of article 21.21¹⁶⁵ creates a treble damages remedy for persons injured by acts described in section 4. The court held that since Wisenberg had established an untrue statement about himself, which caused \$50,000 damages according to the jury verdict, the trial court properly rendered judgment for three times this amount plus attorney's fees under article 21.21.¹⁶⁶ The court thus used article 21.21 to treble a libel award.

As to Brown's action on the policy, Bellefonte argued that Brown had violated the automatic sprinkler clause as a matter of law and failed to exercise due diligence to maintain the system in working order by draining the pipes on the night of the freeze. The court rejected this argument, holding that the due diligence language was ambiguous under the circumstance of freezing weather, since not draining the system would cause the pipes to rupture and thus inevitably prevent the system from being in working order.¹⁶⁷ The court disposed of Bellefonte's argument that draining the system violated the policy condition relating to increase in hazard on similar grounds. The court noted that the hazard would have been increased even if the pipes had not been drained, since they would have frozen and burst.¹⁶⁸ It held the jury findings in favor of Brown on both the due diligence and increase in hazard issues amply supported by the evidence.¹⁶⁹

The court also approved the award of attorney's fees to Brown and against Bellefonte, holding that recovery of attorney's fees in an action on an insurance policy is authorized under Texas Revised Civil Statute article 2226, despite a clear proviso to the contrary in the statute.¹⁷⁰ The court's view, though contrary to the plain language of the statute and to an earlier opinion of the same appellate court, accords with two other opinions holding that the proviso of article 2226 exempts suits on policies from its ambit only if

164. *Id.* at 584. TEX. INS. CODE ANN. art. 21.21, § 4(2) (Vernon 1981) provides that "causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, . . . in any . . . way, an advertisement, announcement or statement containing any assertion, representation or statement . . . with respect to any person in the conduct of his insurance business, which is untrue, deceptive or misleading" is an unfair and deceptive act or practice in the insurance business.

165. TEX. INS. CODE ANN. art. 21.21, § 16 (Vernon 1981).

166. 663 S.W.2d at 584.

167. With reference to draining the pipes in freezing weather, the court observed that "Brown was 'damned if he did and damned if he didn't' . . ." *Id.* at 577.

168. *Id.* at 576.

169. *Id.*

170. The proviso of TEX. REV. CIV. STAT. ANN. art. 2226 (Vernon Supp. 1984) reads:

The provisions hereof shall not apply to contracts of insurers 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.

attorney's fees are recoverable under some other statute.¹⁷¹

Discovery of Claims Files. In *Aztec Life Insurance Co. v. Dellana*¹⁷² Jennings sued on a credit life and disability policy, and the insurer, Aztec Life Insurance Company, asserted the policy's exclusion for preexisting conditions as a defense. Jennings alleged that Aztec had failed to investigate the claim before denial and was guilty of bad faith and violations of the DTPA and Texas Insurance Code article 21.21. In the trial court, Jennings sought production both of Aztec's claims denial journal, which reflected the names of other insureds whose claims were denied during the past seven years, and of Aztec's claims files reflecting denials of other claims under the preexisting condition exclusion. The trial court ordered production of the claims denial journal, but not of the other files. Both parties sought further relief in the appellate court through applications for writ of mandamus.

The appellate court conditionally granted Jennings' application, requiring production of all the requested claims files. The court reasoned that the other files "may well contain information relevant to Jennings' claim that Aztec was engaged in a course of dealing that was unfair or deceptive in the business of insurance."¹⁷³ The court noted that the privacy interests of the other claimants could be adequately protected by in camera review of the files by the trial court.¹⁷⁴

The wisdom of this ruling may be questioned. While the scope of discovery extends to nonprivileged matters that appear "reasonably calculated to relate to the discovery of evidence admissible at such trial,"¹⁷⁵ the court did not specify or describe the admissible evidence to which other claims files would lead. The court suggests that if Aztec could be shown to have denied without reasonable investigation other claims because of the preexisting condition exclusions, then such evidence would be admissible to prove that Jen-

171. See *Texas Farmers Ins. Co. v. Hernandez*, 649 S.W.2d 121 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.); *Prudential Ins. Co. of Am. v. Burke*, 614 S.W.2d 847 (Tex. Civ. App.—Texarkana), writ ref'd n.r.e. per curiam, 621 S.W.2d 596 (Tex. 1981). The proper construction of the proviso has not been authoritatively resolved. The supreme court seemed to favor the plain language approach in *Dairyland County Mut. Ins. Co. v. Childress*, 650 S.W.2d 770, 775 (Tex. 1983), when it 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."

172. 667 S.W.2d 911 (Tex. App.—Austin 1984, no writ).

173. *Id.* at 915. The court's language, evidently taken from TEX. INS. CODE ANN. art. 21.21, § 16(a) (Vernon 1981) suggests that its holding may be grounded on a fundamental misconception of the scope of art. 21.21 and a failure to distinguish between art. 21.21 and *id.* art. 21.21—2. The latter statute, known as the Unfair Claim Settlement Practices Act, empowers the attorney general to take action when certain prohibited practices are repeated "without cause and with . . . such frequency as determined by the State Board of Insurance." *Id.* art. 21.21—2, § 2. Article 21.21—2 aims at repetitious patterns of conduct, but does not create a private cause of action for the individual claimant. See, e.g., *McKnight v. Ideal Mut. Ins. Co.*, 534 F. Supp. 362 (N.D. Tex. 1982); *Hi-Line Elec. Co. v. Travelers Ins. Co.*, 587 S.W.2d 488, 490 (Tex. Civ. App.—Dallas 1979), writ ref'd n.r.e. per curiam, 593 S.W.2d 953 (Tex. 1980); *Lone Star Life Ins. Co. v. Griffin*, 574 S.W.2d 576, 580 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.). Article 21.21, by contrast, creates a private cause of action on the basis of certain actions toward the insured, but does not require or cover repetitive practices.

174. 667 S.W.2d at 914.

175. TEX. R. CIV. P. 186a.

nings' claim was similarly denied without reasonable investigation.¹⁷⁶ Apart from the difficulties in determining which investigations were reasonable, the court's reasoning is fundamentally at odds with the principle that each particular claim must stand or fall on its own facts. A personal injury plaintiff's prior claims are not admissible to show that the plaintiff is claims-conscious or to suggest that the plaintiff's claim is fraudulent or made in bad faith.¹⁷⁷ The same rationale underlying exclusion of a plaintiff's other claims should exclude evidence of other denials by an insurer.

The privacy interest of other claims should be considered, as the court recognized.¹⁷⁸ The court suggested that privacy considerations could be protected through an in camera inspection by the trial court. One may question the efficacy of in camera review for the purpose of determining what files and what parts of files are privileged or nondiscoverable by the trial court when that endeavor will involve a large number of files and consideration of subjective factors.

In *Maryland American General Insurance Co. v. Blackmon*¹⁷⁹ the supreme court held that an insurer's claims file, reflecting its investigation of a claim in litigation and its evaluation and mental processes, is privileged as work product. The court rejected the insured's argument that the privilege should be abrogated because of his allegation of bad faith, recognizing that such a ruling would effectively vitiate the work-product privilege in all suits against insurers. Plaintiffs could always overcome the privilege by the simple expedient of alleging bad faith.¹⁸⁰ The *Dellana* court failed to cite the *Blackmon* opinion and failed to consider the extent and duration of the insurance company's privilege and right to keep its work product in other claims files confidential. If the *Dellana* ruling is followed in future cases, insurers will be threatened in every individual case with the prospect of trying the merits of hundreds of other claims and defending its claims handling procedures and practices broadly, in addition to dealing with the merits of the plaintiff's claim. Even if other claims are thought to have some marginal relevance to the merits of a particular individual claim asserted in litigation, the possible prejudice that might flow from admitting evidence of other claims and the extreme expenditure of time in litigating other claims would appear greatly to outweigh such relevance. Finally, one may question the efficacy of in camera review by the trial court for the purpose of determining what files and what parts of files are privileged or nondiscoverable, particularly when that endeavor will involve a large number of files, consideration of subjective factors, and exercise of judgment.

176. 667 S.W.2d at 915.

177. See *Brinkley v. Liberty Mut. Ins. Co.*, 331 S.W.2d 423 (Tex. Civ. App.—Texarkana 1959, no writ) (in worker's compensation case, evidence of 12 similar compensation claims held inadmissible); *San Antonio Traction Co. v. Cox*, 184 S.W. 722 (Tex. Civ. App.—San Antonio 1916, no writ) (in personal injury case, evidence of 17 similar claims by a plaintiff and members of her family properly excluded).

178. 667 S.W.2d at 915-16.

179. 639 S.W.2d 455 (Tex. 1982).

180. *Id.* at 458.

