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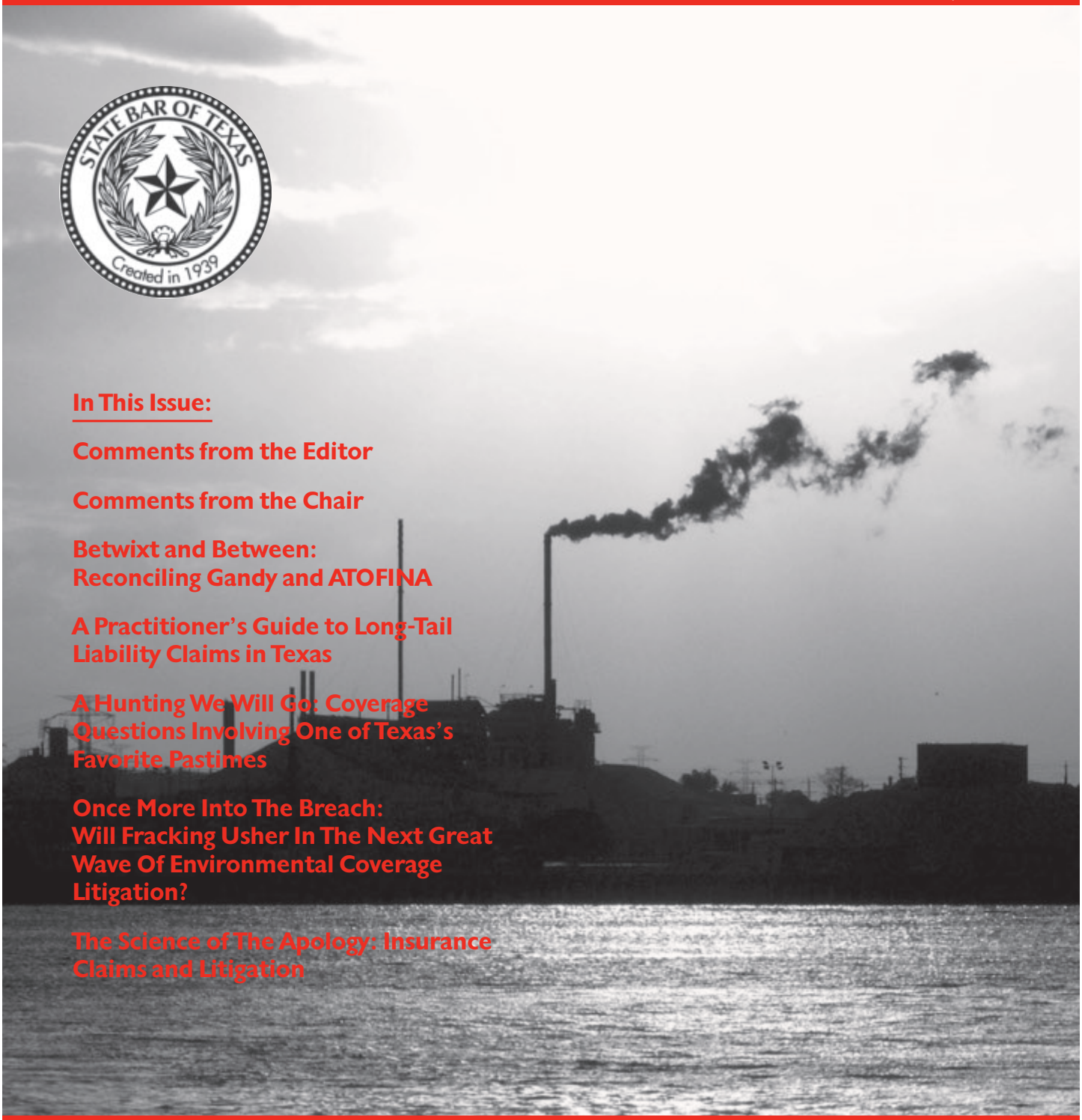

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Official publication of the Insurance Law Section of the State Bar of Texas

THE INSURANCE LAW SECTION OF THE STATE BAR OF TEXAS

Officers for 2015-2016

CHAIR:

J. James Cooper
Reed Smith LLP
811 Main St., Ste. 1700
Houston, TX 77002
Ph: (713) 469-3879
jcooper@reedsmith.com

CHAIR ELECT:

L. Kimberley Steele
Sedgwick, LLP
1717 Main St., Suite 5400
Dallas, TX 75201
Ph: (469) 227-4639
Fax: (469) 227-8004
kimberly.steele@sedgwicklaw.com

SECRETARY:

Meloney Perry
Perry Law P.C.
10440 North Central Expwy., Ste. 600
Dallas, TX 75231
Ph: (214) 265-6224
Fax: (214) 265-6226
mperry@mperrylaw.com

TREASURER:

Lisa A. Songy
Tollefson Bradley Mitchell & Melendi, LLP
2811 McKinney Avenue, Suite 250
Dallas, TX 75204
Ph: (214) 665-0107
Fax: (214) 665-0199
lisas@tbmmlaw.com

IMMEDIATE PAST-CHAIR:

Mark A. Ticer
Law Office of Mark A. Ticer
10440 North Central Expwy., Suite 600
Dallas, TX 75231
Ph: (214) 219-4220
Fax: (214) 219-4218
mticer@ticerlaw.com

Council Members 2015-2016

(2 Yr Term Exp 2016)

Robert J. Cunningham
Roach & Newton, LLP
1111 Bagby, Suite 2650
Houston, TX 77002
Ph: (713) 652-2033
Fax: (713) 652-2029
rcunningham@roachnewton.com

(2 Yr Term Exp 2016)

Rebecca S.C. DiMasi
Buchanan DiMasi Dancy & Grabouski, LLP
9600 Great Hills Trail, Ste. 300W
Austin, TX 78759
Ph: (512) 225-2800
Fax: (512) 225-2801
rdimasi@bddglaw.com

(2 Yr Term Exp 2016)

George L. Lankford
Martin, Disiere, Jefferson & Wisdom, L.L.P
Tollway Plaza One
16000 N. Dallas Parkway, Suite 800
Dallas, TX 75248
Ph: (214) 420-5522
Fax: (214) 420-5501
Lankford@mdjwlaw.com

(2 Yr Term Exp 2016)

Stephen A. Melendi
Tollefson Bradley Mitchell & Melendi, LLP
2811 McKinney Avenue, Suite 250
Dallas, TX 75204
Ph: (214) 665-0100
Fax: (214) 665-0199
stephenm@tbmmlaw.com

(2 Yr Term Exp 2016)

Candace A. Ourso
Hall Maines Lugrin PC
2800 Post Oak Blvd., Suite 6400
Houston, TX 77056
Ph: (713) 871-9000
Fax: (713) 871-8962
courso@hallmaineslugrin.com

(2 Yr Term Exp 2016)

Micah Ethan Skidmore
Haynes & Boone, LLP
2323 Victory Avenue, Suite 700
Dallas, TX 75219
Ph: (214) 651-5654
micah.skidmore@haynesboone.com

(2 Yr Term Exp 2017)

Jess Alexander
Dickey's Barbecue, Inc.
4514 Cole Avenue, Suite 1015
Dallas, TX 75231
Ph: (214) 987-9600
Email: jalexander@dickeys.com

(2 Yr Term Exp 2017)

Jamie Rohde Carsey
Thompson, Coe, Cousins & Irons, LLP
One Riverway, Ste 1400
Houston, TX 77056
Ph: (713) 403-8209
Fax: (713) 403-8299
Email: jcarsey@thompsoncoe.com

(2 Yr Term Exp 2017)

Linda M. Dedman
Dedman Law, PLLC
Meadow Park Tower
10440 N Central Expwy., Suite 1010
Dallas, TX 75231
Ph: (214) 363-8882
Fax: (214) 363-4902
Email:
ldedman@coveragelawdallas.com

(2 Yr Term Exp 2017)

Tarron L. Gartner-Ilai
Amy Stewart PC
5307 E. Mockingbird Lane, Suite 425
Dallas, TX 75206
Ph: (214) 347-9397
Fax: (214) 975-2806
Email: tarron@amystewartlaw.com

(2 Yr Term Exp 2017)

Pamella A. Hopper
McGuireWoods LLP
816 Congress Avenue, Suite 940
Austin, TX 78701
Ph: (512) 472-3067
phopper@mcguirewoods.com

(2 Yr Term Exp 2017)

The Honorable Gray H. Miller
Southern District of Texas
515 Rusk Avenue
Houston, TX 77002
Ph: (713) 250-5377
gray_miller@txs.uscourts.gov

(2 Yr Term Exp 2017)

Douglas P. Skelley
Shidlofsky Law Firm PLLC
7200 N Mopac Expwy., Ste. 430
Austin, TX 78731
Ph: (512) 685-1400
doug@shidlofskylaw.com

Executive Director

Donna J. Passons
Texas Institute of CLE
P.O. Box 4646
Austin, TX 78765
Ph: (512) 451-6960
donna@clesolutions.com

Technology Officer

Brian L. Blakeley
Blakeley Law Firm
7330 San Pedro Ave., Ste 510
San Antonio, TX 78216
Ph: (210) 826-0715
brian@blakeleylawfirm.com

Publications Editor

William J. Chriss
Gravely & Pearson, L.L.P.
606 N. Carancahua St.
Suite 1511
Corpus Christi, TX 78401
Ph: (361) 884-3330
wjchriss@gplawfirm.com

Council Advisor

Lance D. Sharp
The Sharp Firm
3307 Northland Dr., Ste. 470
Austin, TX 78731-4943
Ph: (512) 407-8800
Fax: (512) 407-8806
lance@sharpfirm.com

Council Advisor Alternate

Ruben S. Robles
Robles, Bracken & Hughes
310 N. Mesa St., Ste. 700
El Paso, TX 79901
Ph: (915) 544-1144
Fax: (915) 544-1288
rrobles@rbch.net

Journal of Texas Insurance Law

The Journal of Texas Insurance Law is published by the Insurance Law Section of the State Bar of Texas. The purpose of the ***Journal*** is to provide Section members with current legal articles and analysis regarding recent developments in all aspects of Texas insurance law, as well as convey news of Section activities and other events pertaining to this area of law.

Anyone interested in submitting a manuscript for publication should contact Bill Chriss, Editor In Chief, at (361) 884-3330 or by email at wjchriss@gplawfirm.com. Manuscripts for publication must be typed double-spaced with endnotes (PC-compatible disks are appreciated). Replies to articles published in the ***Journal*** are welcome.

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Mission Statement

The Insurance Law Section serves to promote the understanding and development of Texas insurance law by providing high quality educational resources to the bench, bar, and public and by promoting collegiality among those with an interest in insurance law.

STATE BAR OF TEXAS
Created in 1939

Comments

FROM THE EDITOR

By William J. Chriss
Gravely & Pearson, LLP

In this issue of the *Journal* you will find Tarron Gartner-Eli's analysis of *Yorkshire Insurance Co. v. Seger* recently argued in the Texas Supreme Court, Jason McLaurin's and David Kirby's guide to long-tail liability claims, Chris Avery's article on coverage for hunting accidents, an article about coverage for fracking liability by Cy Harelson and Brian Martin, and Chris Martin's interesting discussion of the science of apology as it relates to insurance claims handling.

We continue to be blessed by the quality writing and scholarship of our members and we would enjoy receiving a submission from you on any subject that has piqued your interest sufficiently for you to write about it.

Thanks go to all these authors, and to Associate Editors Jennifer Johnson and Candace Ourso, whose help with this issue was indispensible. I want to extend a special thank you to my Assistant Editor Pam Hopper, who was responsible for the management and administration of this issue, taking a great load off of me. The *Journal* would be happy to publish similar articles for the benefit of the bench and bar. Email articles to us at wjchriss@gplawfirm.com and phopper@mcguirewoods.com.

William J. Chriss
Publications Editor

William J. Chriss, of counsel to Gravely & Pearson, LLP, graduated from Harvard Law School and holds graduate degrees in History, Theology, and Political Science, including a Ph.D. in History from The University of Texas. His dissertation under H.W. Brands, Six Constitutions over Texas, was a constitutional history of the state. He has practiced insurance, trial, and appellate law for over twenty-five years and currently serves as editor-in-chief of the *Journal of Texas Insurance Law* and co-editor of the Appellate Advocate. He is a member of the American Law Institute and serves as vice-chair of the Texas Pattern Jury Charge Committee on Business, Consumer, Employment, and Insurance Law.

Comments

FROM THE CHAIR

By J. James Cooper

By the time you read this, we'll be well over a month into 2016 and more than halfway through the 2015–2016 membership year. This is the perfect time to take stock of our goals and to reflect on what we're doing well and what we can still achieve during the second half of the Bar year. In the spirit of Super Bowl 50 (which is only a few weeks away as I write these comments), I'd like to think of this column as my own little half-time speech to the Section membership.

> *"Winning is not a sometime thing, it is an all the time thing. You don't do things right once in a while . . . you do them right all the time."*
>
> *—Vince Lombardi*

Vince Lombardi could just as easily have been describing our Section's commitment to CLE and our successful initiatives during the first half of our "season." The 20th Annual University of Texas Insurance Law Institute in November—co-sponsored by the Insurance Law Section—featured highly-regarded speakers from across the state addressing such diverse topics as cyber insurance and emerging trends in auto claims. If you missed that seminar, you can still purchase the materials from UTCLE (https://utcle.org/conferences/IN15#schedule). We followed the UT seminar with an outstanding issue of the *Journal of Texas Insurance Law,* which featured stories on ERISA jurisprudence and unauthorized insurance. By the way, you can always find back issues of the *Journal* on the Section's website at http://insurancelawsection.org/journal_home.

Speaking of the Section's website, we continue to strengthen the Section's online presence by adding conference materials from past insurance law seminars, such as the UT Insurance Law Institute and the State Bar's Advanced Insurance Law Conference. Check out the latest additions at http://insurancelawsection.org/resources. We are also adding more articles and case notes, so please check those out as well. And don't think for a minute that our members haven't noticed these exciting developments. Over sixty of our members have logged onto the website to update their profiles, which allows their bios and photos to be featured on the Section's homepage. It's easy to do, and I encourage you to take advantage of this benefit of Section membership.

Now let's talk about our game plan for the second half of the season.

We're rolling out the 2016 South Texas Insurance Law Seminar on February 26th at The DoubleTree Hotel in McAllen, Texas. This is a must-attend seminar for practitioners in the Valley who want to learn about the latest developments in Texas insurance law. We have a top-notch faculty teaching this course and will be offering 7.5 hours of MCLE credit (including 2 hours of ethics credit). For more information about this one-day program, please visit the Section's website at http://insurancelawsection.org/News/Section_to_Host_South_Texas_Seminar/165.

Your Section leaders are also working with the State Bar to plan the 13th Annual Advanced Insurance Law Course on June 9–10, 2016 at the Hilton San Antonio Hill Country Resort & Spa. This seminar always features the most respected insurance authorities in Texas speaking on topics that are relevant to just about every practitioner. For more information about the seminar, and to purchase your advance tickets, please visit http://www.texasbarcle.com/materials/Programs/3272/Brochure.pdf.

Finally, just one week later we will end our season with CLE presentations and our Section meeting at the State Bar of Texas 2016 Annual Meeting in Fort Worth (June 16–17, 2016). We are honored to have Chief Justice Nathan Hecht of the Texas Supreme Court return for his annual Texas Supreme Court Update, and we will conclude the program with the ceremonial passing of the torch to the Section's Chair-Elect, Kimberly Steele. For those of you who plan to join us in Fort Worth, please stick around for the Joint Networking Reception with the Construction Law Section from 4:45 to 7:00 p.m. on June 16th.

As always, we welcome your comments and contributions. If you would like to become more involved in Section activities, please send me an email at jcooper@reedsmith.com.

Best,

By Tarron Gartner-Ilai

BETWIXT AND BETWEEN RECONCILING GANDY AND ATOFINA

I. Introduction

On September 3, 2015 the Texas Supreme Court heard oral arguments in what might be one of the most important *Stowers* decisions of the decade. In *Yorkshire Insurance Co., Ltd. v. Seger*,[1] the court is poised to address whether a post-answer default can be used to establish damages for an assigned *Stowers* claim, where the insurer has breached the duty to defend and settle within policy limits.[2] Falling somewhere in between the Texas Supreme Court's 1995 decision in *State Farm Fire & Casualty Co. v. Gandy*[3] and its later opinion in *Evanston Insurance Co. v. ATOFINA Petrochemicals, Inc.*,[4] the *Yorkshire* decision could answer questions left open by both.

II. *Yorkshire v. Seger*

Keeping track of the numerous appellate opinions in *Yorkshire* is like herding cats. The case has an impressive, if exhausting history.

The underlying claims arose out of the 1992 death of Randall Seger, who was killed when an oil rig owned by Diatom collapsed. At the time, Randall was employed by ECS, a corporation established by Diatom's general partner, Gillman, to provide oilfield services to Diatom and other drilling contractors. Diatom and ECS were insured under a "Lloyds-type" CGL policy issued by several different underwriters, including Yorkshire and Ocean Marine[5]. The policy excluded coverage for "Leased-In Workers."

Randall's parents (the Segers) filed suit against Diatom in 1993. However, the suit remained dormant until 1998, after which Diatom demanded that the insurers provide a defense against the Segers' claims. The insurers refused on the basis of the "Leased-In Workers" exclusion, also asserting that Diatom had failed to give timely notice under the policy.[6]

The Segers demanded $500,000—the full policy limit—to settle their claims. They later reduced their demand to $250,000, after being informed that two of the underwriting insurers had become insolvent.[7] Yorkshire and Ocean Marine refused to settle. The Segers non-suited all defendants prior to trial except Diatom. Diatom's counsel withdrew from the case because Diatom was unable to pay its attorney's fees.

At trial, Gillman appeared pro se on Diatom's behalf. However, Gillman did not identify herself in her representative capacity at trial, did not announce ready when called to trial, and failed to cross-examine any of the Segers' witnesses. Gillman testified at trial, and was then excused. The trial court entered judgment in the Segers' favor, awarding them each $7.5 million, plus post-judgment interest.

Gillman contacted Diatom's insurers. After hearing no response, Gillman assigned her claims against them to the Segers, who subsequently filed suit.[8] Yorkshire and Ocean Marine filed a third party action against Diatom, seeking a determination that the "Leased-In Workers" exclusion applied to the Segers' claims, or alternatively for a reformation of the policy. Diatom and ECS filed a motion for summary judgment on the third-party claims, which was granted by the trial court, and severed from the *Stowers* claims.[9]

The insurers appealed. Diatom argued that summary judgment was proper because the insurers were not entitled to a declaratory judgment on what was in reality a defense to the *Stowers* claim. The court of appeals disagreed, holding that the "Leased-In Workers" exclusion unambiguously excluded coverage for Diatom's liability for bodily injury sustained by a person performing work "under an agreement with another allowing temporary use of the worker, even though the worker would not be an employee of the insured."[10] The court remanded the case back to the trial court for a determination of the appropriateness of the attorney's fees awarded to Diatom and ECS.[11]

Meanwhile, in the *Stowers* action, the trial court granted the Segers' motion for partial summary judgment on the issues of "coverage, demand within limits, fully adversarial relationship, and trial," leaving for trial only a determination of the insurers' negligence, and damages.[12] At trial, the sole evidence introduced by the Segers in support of their damage claim was the judgment entered in the underlying suit. The court rendered a directed verdict on damages, but submitted the causative issues to the jury. The jury returned a verdict in favor of the Segers.[13]

Yorkshire appealed ("*Seger I*"), raising the "Leased-In Worker" exclusion and the issue of whether the Segers made a demand within the policy limit, and whether the underlying judgment conclusively established the Segers' damage claim.[14] Yorkshire also asserted that evidence of collusion between Diatom and the Segers was improperly concealed, and issues related to disqualification of the Segers' counsel

Tarron Gartner-Ilai is a Principal at Amy Stewart, P.C., a boutique firm representing policyholders in insurance coverage disputes. Tarron has more than 27 years of experience as an insurance coverage litigator. Tarron has been recognized as a Dallas' "Best Lawyer" for 2014 and 2015.

and recusal of the presiding judge.[15] The court affirmed as to the trial court's determination of the insurers' motions to recuse and disqualify counsel, and granted summary judgment on the sufficiency of the *Stowers* demand, but remanded the remaining issues back to the trial court.[16]

A jury determined the Segers' claims were covered under the policy, the judgment was the product of a fully adversarial trial, and the judgment conclusively determined the Segers' damages, awarding the Segers a total of $35,848,273.50 in total damages—a product of interest accumulated on the original $15 million judgment.[17]

Yorkshire presented seven issues on appeal, including that the evidence was factually and legally insufficient to establish that Diatom was damaged by the insurers' conduct, the assignment under which the *Stowers* action was maintained is invalid as against public policy, the evidence was factually and legally insufficient to show that the insurers breached a standard of care, the Segers' claims are excluded from coverage as a matter of law, the Segers' insurance code claims are immaterial, and the trial court improperly miscalculated post-judgment interest.[18]

The court of appeals sustained the first issue presented, which the court held was "dispositive," and did not address Yorkshire's remaining six points.[19] The court held that the underlying judgment—the only evidence the Segers introduced at trial as to their damage claim—was not the product of a "fully adversarial trial" as required by *State Farm Fire & Casualty Co. v. Gandy*.[20] The court agreed.

III. The Requirement of a Fully Adversarial Trial

According to the court, "in a *Stowers* action, damages are fixed as a matter of law in the amount of the excess of the judgment rendered in the underlying suit in favor of the plaintiff over the applicable limits of the policy. . . . Absent evidence that the underlying judgment is not reliable evidence of the damages suffered by the insured in the underlying suit, the judgment conclusively establishes the damages suffered by the insured and is sufficient evidence to support a directed verdict."[21]

The court held that *Gandy* creates an exception to the general rule "when the insured assigns his *Stowers* action to the plaintiff in the underlying suit" in a manner that "prolongs as opposed to resolves" the parties' dispute."[22] In such a case, the underlying judgment is inadmissible as evidence of the damages claimed, "unless rendered as the result of a 'fully adversarial trial.'"[23]

Unlike *Seger*, however, *Gandy* involved a situation where the insured (Pearce), accused of sexually abusing his stepdaughter, entered into a $6 million agreed judgment without notice to State Farm, after State Farm agreed to provide him with a qualified defense in the underlying suit, which Pearce essentially ignored.[24] The settlement included an assignment of Pearce's rights against State Farm, in exchange for Gandy's agreement not to execute on the judgment.[25]

Under *Gandy*, such assignments are void as a matter of law if made prior to an adjudication of liability, where the insurer has agreed to tender a defense, and has accepted coverage or made a good faith effort to adjudicate the coverage issues prior to a determination of liability, unless the assignment follows a "fully adversarial trial" on the merits of the underlying claims.[26] Because the claims between Gandy and Pearce were adjudicated by agreement, the court did not reach the issue of what constitutes a "fully adversarial" proceeding.

IV. The *ATOFINA/Block* Exception

Enter stage right: *ATOFINA.* In *Seger II* the Segers argued that the Texas Supreme Court's decision in *Evanston Insurance Co. v. ATOFINA Petrochemicals, Inc.*[27] eliminated the "fully adversarial trial" requirement imposed by *Gandy*, because the insurers had wrongfully denied coverage for the underlying claims.[28] The court of appeals disagreed.

Unlike the facts of Seger, however, or *Gandy*, ATOFINA sued Evanston directly to recover a $6.75 million settlement after Evanston wrongfully refused to acknowledge ATOFINA as an additional insured, or defend the underlying claims.[29] Relying upon its prior decision in *Employers Casualty Co. v. Block*, 744 S.W.2d 940 (Tex. 1988), the Texas Supreme Court barred Evanston from challenging the reasonableness of the settlement paid by ATOFINA holding that the settlement was conclusive evidence of ATOFINA's damages.[30] Distinguishing *Gandy*, the *ATOFINA* court held that by its own terms *Gandy* only applied "to cases that present its five unique elements."[31] Because ATOFINA had not assigned its claims, *Gandy* did not apply.

V. *Seger II*

In *Seger II*, the court of appeals held that the arrangement between Diatom and the Segers did not satisfy the *ATOFINA* exception to *Gandy*.[32] The court held that because the Segers asserted their claims as assignees of Diatom, the "key factual predicate" of *Gandy* was present.[33] According to the court, "the very point of the assignment was to prolong the litigation."[34] The court held, however, the assignment was valid under *Gandy* because the insurers refused to defend the underlying litigation and failed to make a reasonable attempt to adjudicate coverage before the underlying suit was tried.[35]

Nevertheless, the court held that the judgment "must still be the result of a fully adversarial trial."[36] The court held: "before the underlying judgment was obtained, Diatom was judgment-proof and each of the individual principals of Diatom had been nonsuited."[37] The "assignment distorted the litigation" because neither Diatom nor the principals had any financial exposure or incentive to contest liability.[38] Diatom's "participation was so minimal" the court could

not "conclude that the underlying judgment was the result of a fully adversarial trial."[39] "When the entire underlying proceeding is considered," reasoned the court, "the underlying judgment was the result of a proceeding more akin to a post-answer default than a fully adversarial trial."[40]

VI. Oral Proceedings

During oral argument, counsel for the insurers asserted that the fact Diatom was judgment-proof established, as a matter of law, that the judgment was not the product of a fully adversarial trial. Counsel for the Segers pointed out the alarming potential for such a ruling, which might incentivize insurers to intentionally breach their duties to the insured, particularly in situations where the insurer's target market is the indigent or transient insured—such as substandard auto insurance.

During the proceedings, the court posed three pivotal questions, giving insight into where the court might land. In a question directed to counsel for the Segers, the court asked what the legal standard should be for determining whether a judgment is the product of a fully adversarial proceeding. The court asked further what safeguards are in place to be certain the judgment is not the type of arrangement prohibited by *Gandy*. Finally, the court asked whether *ATOFINA* should apply where the judgment is not tied to specific evidence of the amount of compensatory damages.

VII. What About Coverage?

The facts of Seger seem to fall somewhere between the narrow concerns of *Gandy* and the overarching public policies underlying *Stowers*, *ATOFINA*, and *Block*. Each question warrants a thorough judicial response. There is just one small problem—the "Leased-In Worker" exclusion.

In *Yorkshire v. Diatom*, the Amarillo Court of Appeals held that Diatom's policy "unambiguously excluded coverage" at the time of Randall Seger's death.[41] But the decision was rendered on appeal from the trial court's ruling on the insurers' third-party claim against Diatom, which was severed from the Segers' claims.

The issue of coverage in *Seger II* is a product of the defenses asserted by the insurers to the Segers' *Stowers* claim. The court of appeals in *Seger I* did not address the "Leased-In Worker" exclusion because the court determined that the judgment rendered in the underlying suit was not the product of a fully-adversarial trial.[42] The Texas Supreme Court denied the petition for review the Segers filed in *Seger I*.

Although the decision the court of appeals rendered in *Yorkshire v. Diatom* may or may not be the law of the case, the supreme court asked numerous questions about whether the Segers' claims were covered under the policy at all. If the court holds that a determination of coverage is essential to any other issue, we might be holding our breaths for a long time before the questions the court posed are answered.

VIII. What are Potential *Stowers* Plaintiffs to Do?

Given the importance of the issues, the facts of *Seger* could certainly be better. To that end, it is difficult to gauge how the court will rule. Contrary to what the court held in *Seger II*, a *Stowers* plaintiff is not simply in the position of arguing that he would have *recovered* less than the full amount of the policy had the insurer properly defended the insured. This is only true as it pertains to Insurance Code claims based on breach of the duty to defend. A plaintiff asserting a *Stowers* claim by way of assignment need only prove that he would have *accepted a settlement for the amount of the policy limit*, or less, had the carrier discharged its duty to settle.

Seger presents the unique but dichotomous issues of whether a carrier is *always* bound by an underlying judgment in a subsequently assigned *Stowers* action when the insurer breaches the duty to defend; or whether a judgment entered in an underlying lawsuit is *always* inadmissible to show damages in a subsequent *Stowers* lawsuit when the judgment is not the product of a fully adversarial trial.

The insurers in *Seger* have made a career conflating these issues, arguing that the fact that the insured is judgment-proof establishes that the judgment was not the result of a fully adversarial trial, or is the product of collusion, as a matter of law. It is hard to imagine a situation in which the Texas Supreme Court reaches such a conclusion.

When the insurer breaches the duty to defend, the insurer may no longer enforce policy conditions, excusing the insured's duty to cooperate with the insurer.[43] This is black-letter law. Nothing in *Gandy* suggests that the insured is under an implicit duty to do a bang-up job defending him or herself at trial as a predicate to an assignment of claims, when the insurer breaches the duty to defend, or that the fully adversarial trial requirement can never be met when the insured is indigent.

The real danger seems to lie in cases where the insured does not participate in a meaningful way at trial, *and* the judgment is artificially inflated. During oral argument, the *Seger* court seemed troubled by this. The mere fact that the insurer breaches the duty to defend may not mitigate the problem. But if the case does not fall squarely within either *Gandy* or *ATOFINA*, does this put a *Stowers* plaintiff in the position of having to retry liability and/or damages in subsequent proceeding? In cases where the insured is judgment-proof, it might. At the end of the day, *Yorkshire v. Seger* is really a sufficiency of evidence case.

That said, it hardly seems economical or fair to impose this burden on a *Stowers* plaintiff in a case where the insurer hangs its insured out to dry. The public policy underlying *Stowers* far exceeds the interests protected by *Gandy*, at least as a global proposition. But somewhere betwixt and between the two is a healthy compromise.

In cases involving facts like *Seger*, the issue of the insured's

financial condition might be completely irrelevant if the judgment is partially satisfied, or the judgment debtor is contractually obligated to notify the judgment creditor of a material change in his or her financial condition, giving the judgment creditor the right to levy any portion of the judgment that remains unsatisfied.

Or, the court might consider creating a rebuttable presumption that judgment is the product of a fully adversarial trial, when the only evidence of damages introduced at a trial of the *Stowers* action is the underlying judgment. This would shift the burden of proof to the breaching insurer, and assuage the court's concern over the potential for collusive judgments.

Whatever else is said or done, the strident position taken by the insurers in *Yorkshire v. Seger* cannot be the law.

1 No. 13-0673; 407 S.W.3d 435 (Tex. App.—Amarillo 2013, pet. granted).

2 http://texassupremecourt.mediasite.com/mediasite/Play/995ab1dd593a4e60ac7f4d63368366b11d.

3 925 S.W.2d 626 (Tex. 1995).

4 256 S.W.3d 660 (Tex. 2008).

5 In *Yorkshire Ins. Co., Ltd. v. Diatom Drilling Co.*, 280 S.W.3d 278 (Tex. App.—Amarillo 2007, pet. denied), the court of appeals noted that Yorkshire and Ocean Marine respectively bore 16.472% and 10% of the policy risk, but that the insurer's obligation under the policy was "several," not joint.

6 *Id.* at 280.

7 The Segers initially reduced their demand to $368,190—the remaining limits of the solvent insurers, but then later reduced their demand to $250,000 for reasons that were not explained by the court. *Yorkshire Ins. Co., Ltd. v. Seger*, 480 S.W.3d at 436.

8 The Segers settled with the remaining solvent insurer, leaving Yorkshire and Ocean Marine and the only insurers in the *Stowers* action.

9 *Yorkshire Ins. Co., Ltd. v. Diatom Drilling Co.*, 280 S.W.3d at 280.

10 *Id.* at 283.

11 *Id.* at 284.

12 *Yorkshire Ins. Co., Ltd. v. Seger*, 279 S.W.3d 755 Tex. App.—Amarillo 2007, pet. denied).

13 *Yorkshire Ins. Co., Ltd. v. Seger*, 279 S.W.3d 755 Tex. App.—Amarillo 2007, pet. denied).

14 *Id.* at 761.

15 *Id.*

16 *Id.*

17 *Yorkshire Ins. Co., Ltd. v. Seger*, 407 S.W.3d 435 (Tex. App.—Amarillo 2013, pet. granted).

18 *Id.* at 438.

19 *Id.*

20 925 S.W.2d 696 (Tex. 1996).

21 *Id.* at 439, citing *Allstate Ins. Co. v. Kelly*, 680 S.W.2d 595, 606 (Tex. App.—Tyler 1984, writ ref'd n.r.e.); *Roccor Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 77 S.W.3d 253, 271 (Tex. 2002) (Baker, J., dissenting); *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 713 (Tex. 1996).

22 *Id.* at 713.

23 *Id.*

24 *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696 (Tex. 1996).

25 *Id.*

26 *Id.* at 714.

27 925 S.W.2d 626 (Tex. 1995).

28 *Yorkshire Ins. Co., Ltd., v. Seger*, 407 S.W.3d at 439, 440.

29 *Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc.*, 925 S.W.2d 626 (Tex. 1995).

30 *Id.* at 670–74.

31 *Id.* at 673.

32 *Yorkshire Ins. Co., Ltd., v. Seger*, 407 S.W.3d at 440.

33 *Id.*

34 *Id.*

35 *Id.* at 441.

36 *Id.* (citing *First Gen. Realty Corp. v. Mid-Continent Cas. Co.*, 981 S.W.2d 495, 499 (Tex. App.—Austin 1998, pet denied)).

37 *Id.*

38 *Id.*

39 *Id.* at 442.

40 *Id.* (citing *Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 930 (Tex. 2009)).

41 *Yorkshire Ins. Co., Ltd. v. Diatom Drilling Co.*, 280 S.W.3d at 283.

42 *Yorkshire Ins. Co., Ltd. v. Seger*, 407 S.W.3d at 438.

43 *Ideal Mut. Ins. Co. v. Myers*, 789 F.2d 1196, 1200 (5th Cir. 1986); *Wilcox v. Am. Home Assur. Co.*, 900 F. Supp. 850, 855 (S.D. Tex. 1995); *Great Am. Indem. Co. v. Corpus Christi*, 192 S.W.2d 917, 919 (Tex. Civ. App.—San Antonio 1946, writ ref'd n.r.e.).

By Jason C. McLaurin and David A. Kirby

A PRACTITIONER'S GUIDE TO LONG-TAIL LIABILITY CLAIMS IN TEXAS

In the insurance context, long-tail liability claims are claims that involve a continuous, progressive, or repeated injury over a period of time long enough to implicate multiple policy years. They often involve bodily injury or property-damage claims that do not become apparent for many years. While the long-tail nature of a claim is not necessarily dependent on the type of claim involved, there are certain types of claims that often give rise to long-tail liability.

Some of the more common examples of long-tail claims include (1) occupational disease claims, such as asbestos claims; (2) construction defect claims; and (3) environmental claims involving pollution events that occur over many years. However, other situations may also give rise to long-tail liability, such as medical malpractice, employment discrimination, child abuse, and cyber liability.

Because long-tail liability claims trigger multiple insurance policies and also generally manifest years or even decades after the event giving rise to the alleged liability takes place, they are fraught with unique and complicated legal issues. For example: Which insurance policies are triggered by the claim? How much is owed under each triggered insurance policy? How much coverage is available for a given claim?

This article addresses these questions, and others, in an effort to provide guidance to practitioners prosecuting or defending a long-tail liability claim under Texas law. By no means does this article address every legal issue that could be encountered in a long-tail insurance coverage matter, but it is designed to provide an overview of those issues most commonly confronted.

To that end, this article discusses long-tail claims and the different methods used to identify, select, provide notice for, and allocate losses that take place over multiple policy periods. Part I discusses issues of trigger and the methods by which a particular policy may be made to pay. Part II discusses allocation amongst various triggered policies and issues of tender and notice. Part III discusses issues of exhaustion. Part IV addresses policy limits and stacking of coverage. Part V concerns considerations surrounding settlement. Part VI discusses non-cumulation of liability clauses. Lastly, Part VII discusses some other significant long-tail claim considerations.

I. Trigger

The term "trigger" is generally defined as the operative event (or events) that gives rise to the insurer's duty to cover a loss under a specific policy. The "insuring agreement" language in comprehensive general liability (CGL) policies generally identifies the circumstances when a policy is triggered; i.e., when a carrier must respond to a claim. This language usually will be similar to the following:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage caused by an occurrence during the policy period.

As the above-quoted insuring agreement suggests, when a policy will be called upon to pay revolves around the policy's definitions of "property damage," "bodily injury," and "occurrence." Common, though not universal, definitions of these terms are as follows:

> "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.
>
> "Property Damage" means physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it.
>
> "Occurrence" means an accident, including continuous or repeated exposure

Jason C. McLaurin is a Partner at Strong Pipkin Bissell & Ledyard, L.L.P. with extensive experience in commercial and coverage litigation. He has been recognized as a Texas Super Lawyer "Rising Star" since 2013 and as one of the top attorneys in Houston by both Texas Monthly and Houstonia Magazine.

David A. Kirby is an associate at Strong Pipkin Bissell & Ledyard, L.L.P. He is an experienced commercial and insurance coverage litigator. Since 2014, he has been recognized as a Texas Super Lawyer "Rising Star."

> to substantially the same general harmful conditions."

Accordingly, the question of trigger will often be different, and require a separate analysis, in each jurisdiction depending upon whether the claims at issue involve bodily injury or property damage.

There are essentially four trigger theories that have been examined or adopted throughout the United States:

> **Exposure Trigger**: Under the exposure-trigger theory, a court will find that a policy is triggered during the time period that the person or property was exposed to harmful agents or substances.[1] This theory has been applied widely in a bodily-injury context, but has not really been applied in a property-damage context.
>
> **Manifestation (Discovery) Trigger**: Under this theory, a policy is triggered when the property damage or bodily injury is discovered or becomes readily identifiable.[2] While this coverage theory has definite advantages due to how easy it is to apply, it is not widely applied when interpreting liability policies.
>
> **Injury-in-fact Trigger**: Under the injury-in-fact or "actual-injury" trigger, a policy is triggered on the date that the damage was actually sustained.[3] There is no requirement that the damage be apparent or manifest, just that the damage has actually occurred.
>
> **Continuous Trigger**: Under the continuous-trigger theory or "triple-trigger" theory, an injury occurs continuously from the time of first exposure until manifestation.[4]

Correctly ascertaining which policies are triggered (or potentially triggered) is essential for a practitioner or insurance adjuster because it will determine which policies to place on notice and, ultimately, the policies from which an insured—or a participating insurer—will seek recovery or contribution.

A. What is the Policy Trigger in Texas?

While the Texas Supreme Court has given some guidance on the trigger rule to be applied with respect to long-tail property-damage claims, it has left several questions unanswered with respect to the trigger rule governing long-tail bodily-injury claims. Further, even when the court has taken steps to identify the appropriate trigger rule, as is the case with respect to property-damage claims, questions still remain as to how the rule should be applied in practice.

1. Property-damage claims

In *Don's Building Supply, Inc. v. OneBeacon Insurance Co.*,[5] which involved several homeowner claims of property damage resulting from defective siding installed in various homes between 1993 and 1996, the Texas Supreme Court adopted an injury-in-fact trigger for long-tail property-damage claims.

The Fifth Circuit submitted the following certified question to the Texas Supreme Court:

> When not specified by the relevant policy, what is the proper rule under Texas law for determining the time at which property damage occurs for purposes of an occurrence-based commercial general liability insurance policy?[6]

To answer this question, the Texas Supreme Court first turned to the coverage grant in the policy, which provided:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages.
>
> * * *
>
> This insurance applies to "bodily injury" and "property damage" only if:
>
> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory;" and
>
> (2) The "bodily injury" or "property damage" occurs during the policy period.[7]

The Texas Supreme Court next turned to the definition of "property damage" in the policy at issue:

> The policy defines "property damage" to mean:
>
> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
>
> b. Loss of use of tangible property that is not physically injured. All such loss shall be deemed to occur at the time of the

"occurrence" that caused it.

Reading these provisions together, the Texas Supreme Court found as follows:

> [W]e hold that property damage under this policy occurred when actual physical damage to the property occurred. The policy says as much, defining property damage as "[p]hysical injury to tangible property," and explicitly stating that coverage is available if and only if "'property damage' occurs during the policy period." So in this case, property damage occurred when a home that is the subject of an underlying suit suffered wood rot or other physical damage.[8]

In adopting this approach, the court acknowledged that there could be practical difficulties in retrospectively pinpointing the moment that an injury occurred, but reasoned that "[t]he policy asks when damage happened, not whether it was manifest, patent, visible, apparent, obvious, perceptible, discovered, discoverable, capable of detection, or anything similar."[9]

The Texas Supreme Court also considered a second certified question as to what allegations would be sufficient to invoke a duty to defend obligation under the trigger theory adopted by the court. The court answered the question as follows:

> Based on our answer to the first certified question, the insurer's duty to defend DBS depends on whether the homeowners' pleadings allege property damage that occurred during the policy term. Under the actual-injury rule applicable to this policy, a plaintiff's claim against DBS that any amount of physical injury to tangible property occurred during the policy period and was caused by DBS's allegedly defective product triggers OneBeacon's duty to defend. This duty is not diminished because the property damage was undiscoverable, or not readily apparent or "manifest," until after the policy period ended. Nor does it depend on whether DBS has a valid limitations defense. The parties could have conditioned coverage on identifiability, but the contract imposes no such limitation.[10]

The court cautioned that its finding was limited by the language of the specific insurance policy.[11]

2. Bodily Injury Trigger

The trigger test applicable to long-tail bodily-injury claims, which often arises in the context of progressive injury, is unclear under Texas law, and the Texas Supreme Court has not ruled upon the issue. However, the Fifth Circuit has rendered an *Erie* guess as to which trigger theory a Texas court would apply to long-tail bodily-injury claims caused by exposure to asbestos. After a short discussion regarding the four prominent trigger theories; i.e., manifestation, exposure, continuous trigger, and injury-in-fact, the court found that an exposure trigger applied to these types of bodily-injury claims:

> In arguing that we should reject the manifestation theory applied by the district court, however, Azrock correctly observes that we have twice adopted the "exposure" theory of triggerage when making an *Erie* guess on Louisiana law. *Porter v. American Optical Corp.*, like the instant case, involved asbestos litigation against the manufacturer of an asbestos-containing product. That case was tried before a jury and the record contained extensive medical evidence about the progressive nature of asbestos-related diseases. On the basis of that evidence, we noted: "Due to this progressive nature, it is generally quite difficult, if not impossible, to assign manifestation of the disease to a specific date." We reversed the district court's application of the manifestation theory and adopted the exposure theory.
>
> * * *
>
> We are not persuaded by any cases from Texas courts or from federal cases construing Texas law that there is any defensible reason to apply a different trigger of coverage theory for cases governed by Texas law than we have previously adopted in construing Louisiana law.[12]

Essentially, the Fifth Circuit reasoned that it could not find Texas authorities providing a clear enough answer to prevent the court from adopting the same reasoning it adopted when applying Louisiana law to similar circumstances.

When given the opportunity in *Don's Building Supply*, the Texas Supreme Court declined to render an opinion as to whether the bodily-injury trigger would be the same for bodily-injury claims as for property-damage claims.[13] The Texas Supreme Court further indicated that the trigger test applicable to bodily injury *may or may not* be the same as for property damage. Even further muddying the waters, the court remarked that "what some courts call the 'exposure rule' may actually be what others would call the injury-in-fact rule,"[14] a statement that may be construed by some as the

court's acknowledgement that the application of the injury-in-fact trigger may warrant the practical application of another trigger theory (e.g., exposure or continuous trigger theories). Consequently, it is currently unclear whether the Texas Supreme Court would apply an injury-in-fact trigger, an exposure test, or some other test; e.g., triple trigger, to progressive bodily-injury claims.[15]

If the Texas Supreme Court were to find that an injury-in-fact trigger was the correct trigger theory to be used with respect to bodily-injury claims, it is quite possible that the triggering event would vary based upon the type of progressive disease at issue. As an example, an individual with an asbestos-related disease may be determined to have suffered an injury-in-fact at the time of his or her exposure to asbestos or at times after exposure as the asbestos particles continue to remain in and do damage to the lung tissue.[16]

On the other hand, there are a few decisions since *Don's Building Supply* where courts, like the Fifth Circuit in *Azrock*, have continued to employ the exposure trigger to bodily-injury claims. For example, In *LSG Technologies, Inc. v. U.S. Fire Insurance Co.*, the Eastern District of Texas found that the application of the exposure trigger and injury-in-fact trigger would yield the same result when evaluating asbestos-related bodily-injury claims:

> In *Don's Building Supply, Inc. v. OneBeacon Ins. Co.,* 267 S.W.3d 20 (2008), the Supreme Court of Texas adopted an "injury-in-fact" trigger for property damage insurance policies. 267 S.W.3d at 30. In finding "injury-in-fact" to be the appropriate trigger, the *Don's Building* Court relied on the language of the policy at issue. *Id.* at 29–30. The Court also found an injury-in-fact trigger to be consistent with scholarly authority. *Id.* at 30 (citing 7A Appleman on Insurance § 4491.01 and 7 Couch on Insurance § 102:22). Admittedly, the *Don's Building* Court rejected an exposure trigger because it was unsupported by the policy language. *Id.* at 29. In this case, however, the language of primary policies amply supports the conclusion that the injury-in-fact is the exposure to the asbestos.[17]

Moreover, the Utah Court of Appeals in *OneBeacon American Insurance Co. v. Huntsman Polymers Corp.*, interpreting the decisions in the *Azrock* and *Don's Building Supply* cases, found Texas law provided for an exposure trigger theory for long-tail asbestos claims.[18]

Consequently, there does appear to be momentum suggesting that exposure may be the trigger test employed in Texas for long-tail bodily-injury claims, at least in some circumstances. However, there is room for a practitioner to argue that another trigger theory should apply to bodily-injury claims.[19]

B. What is an Injury?

While it seems clear that one should apply an injury-in-fact trigger when evaluating a long-tail property-damage claim, and possibly a bodily-injury claim, under *Don's Building Supply*, there are often substantial difficulties in ascertaining exactly what constitutes the "injury" that triggers coverage under this trigger approach.

For instance, even in a typical construction-defect claim, the point at which damage actually occurred may require the testimony of experts and substantial testing.[20] These difficulties are even further compounded when one considers long-tail environmental claims involving seepage and continuous migration of contaminants to other properties over decades, which often continue years after the pollution-causing event has ceased.[21] Similar complications would arise in the bodily-injury claim context, as experts will engage in a scientific debate as to when a particular disease, injury, or condition "caused" injury to the subject person.

In *Don's Building Supply*, the Texas Supreme Court acknowledged that adopting an injury-in-fact approach could cause practical problems, but it reasoned that its primary obligation was to interpret the policy as written:

> Pinpointing the moment of injury retrospectively is sometimes difficult, but we cannot exalt ease of proof or administrative convenience over faithfulness to the policy language; our confined task is to review the contract, not revise it. Our prevailing concern is not one of policy but of law, and we must honor the parties' chosen language—covering third-party claims if damage to the claimant's property occurred during the policy period. The policy asks when damage happened . . . .[22]

The Texas Supreme Court's solution, in practice, may very well present a moving target. Technology improves over time, and a party's ability to identify damage will likewise improve. Consequently, the method for ascertaining trigger under the Texas injury-in-fact test could change as the ability to identify damage to a building, land, or a person's lungs advances.

II. Allocation

While the issue of trigger answers the question as to which policies have an obligation to pay a long-tail claim, the issue of allocation answers the question of how a covered loss will be apportioned amongst multiple triggered policies. The question of allocation also necessarily implicates the issue of whether and to what extent losses must be borne

by the policyholder during times of self-insurance, under-insurance, insurer insolvency, or other circumstances giving rise to the unavailability of insurance.

In most instances, the question of allocation is determined in coverage litigation between the parties to the insurance contract. In other instances, insurers that have contributed money for defense, settlement, or satisfaction of a judgment seek to reallocate part or all of the loss to other insurers through contribution or subrogation claims. The question of allocation is therefore important to recovery for policyholders and insurers alike.

Although there have been a large number of cases over the years that concern the application of various approaches to the question of allocation of liability and defense costs for long-tail claims amongst triggered policies, courts generally are divided between two allocation methodologies: (1) the "All-Sums" approach—also known as the "joint and several" approach—and (2) the "Pro-Rata" approach—sometimes called the "time on the risk" approach.

A. All-Sums Allocation

The all-sums allocation approach, often urged by policyholders, allows the policyholder to "pick and choose" the policy or policies that will cover and respond to its claim amongst multiple triggered policies. Once the insured has chosen a policy or policies under this approach, the implicated carriers have the obligation to defend and/or indemnify the insured for a covered claim up to the limit of the targeted policy or policies. After the insurer has paid the claim, the insurer then has the right to seek contribution from other liability insurers that issued policies triggered by the claim pursuant to the "other insurance" provisions or under the common-law doctrine of contribution.[23]

Courts applying the all-sums approach rely on language found in a standard CGL policy's insuring agreement, which provides that the insurer is obligated to "pay on behalf of the Insured *all sums* which the Insured shall become legally obligated to pay as damages because of bodily injury to which this insurance applies." The seminal case regarding all-sums allocation is *Keene Corp. v. Insurance Co. of North America*, which involved many plaintiffs asserting lawsuits alleging personal injury or wrongful death as a result of asbestos inhalation. Interpreting the standard language quoted above, the United States Court of Appeals for the District of Columbia found that each insurer that issued a triggered policy was jointly and severally liable for the indemnity and defense costs in the underlying asbestos suits.[24]

The "all sums" allocation method has been adopted in Texas. The Texas Supreme Court first touched upon the issue in *American Physicians Insurance Exchange v. Garcia*.[25] *Garcia* involved a medical malpractice case wherein the plaintiffs alleged that the physician-defendant's negligence in treating a decedent took place over a period of two-and-a-half years.[26] In its opinion, the court remarked that:

> The insured is generally in the best position to identify the policy or policies that would maximize coverage. Once the applicable limit is identified, all insurers whose policies are triggered must allocate funding of the indemnity limit among themselves according to their subrogation rights.[27]

Thus, although the court did not directly rule upon the question as to which allocation method should be applied in a long-tail scenario, the Texas Supreme Court's comment suggested that it would follow an all-sums methodology; i.e., the insured chooses a policy to pursue and the insurer subsequently has the right to seek contribution.

As the issue of long-tail allocation was not directly at issue in *Garcia*, courts and practitioners struggled with the correct allocation method to apply to long-tail claims in Texas for nearly 20 years. However, courts interpreting the *Garcia* opinion consistently found that it stood for the proposition that Texas is an "all-sums" state.[28] It wasn't until 2013, in *Lennar Corp. v. Markel American Insurance Co.*, that the Texas Supreme Court offered clearer guidance regarding its decision in *Garcia* and the allocation method to be utilized in long-tail claims:

> Markel argues alternatively that it should be responsible along with Lennar's other insurers only for its pro rata share of the total remediation expenses. *Garcia* rejects this approach, leaving up to insurers who share responsibility for a loss to allocate it among themselves according to their subrogation rights. Markel urges us to abandon *Garcia*, based on recent cases in other jurisdictions that take a pro rata approach. While we have acknowledged that allocation issues have been treated differently in other jurisdictions the decisions of those courts do not persuade us to reconsider ours in *Garcia*.[29]

Given the Texas Supreme Court's explicit rejection of the pro-rata approach and characterization (perhaps re-characterization) of *Garcia* as standing for the proposition that Texas is an all sums state, it now appears fairly certain (subject to the policy provisions) that Texas courts must apply an "all sums" allocation methodology when evaluating long-tail claims.

B. Pro Rata Allocation

The pro-rata approach, often urged by carriers, allocates liability for a long-tail claim amongst all triggered policies.

The pro-rata approach was extensively discussed in *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*,[30] which is considered to be the seminal case examining this approach.

In jurisdictions where this approach is applied, which are the majority, the insured is restricted to recovering only a share of the overall loss from each insurer that issued a triggered policy or policies. However, the way a court determines the actual proportionate share that a particular insurer must pay under a triggered policy varies amongst the pro rata jurisdictions. For instance a court may choose to determine a triggered carrier's proportionate share based upon that carrier's (1) time on the risk,[31] (2) policy limits,[32] or (3) some combination of those two methods. Other jurisdictions have taken a more fact-based pro-rata allocation approach. For instance, some jurisdictions find that an insurer is only liable for the precise injury or damage that occurred during its policy period, while others have employed a simple proportionate-share approach—regardless of the time on the risk or limits.

C. Uninsured Periods

While not universal, one of the primary differences between the all-sums and pro-rata allocation approaches involves to what extent, if any, a portion of a long-tail loss may be attributed to the insured. In jurisdictions that exercise the pro-rata allocation method, some courts allow allocation of a portion of the liability to the insured during periods where the insured had no insurance coverage. While the reasoning behind allowing for such allocation varies amongst jurisdictions, allocation of a portion of the liability to a policyholder will often be restricted to time periods in which the policyholder intentionally chose to operate without insurance coverage.[33] Consequently, it is likely that a policyholder would not be required to contribute in cases where exclusions or other events, such as insurer insolvency, do not indicate an intention of the policyholder to forego coverage.

Whether amounts may be allocated to policyholders under an all-sums allocation approach is unclear. On one hand, it is arguable that an insurer would not be permitted to seek contribution from its own insured after being targeted, handling the defense, and paying the settlement or judgment.[34] On the other hand, courts in other all-sums jurisdictions have suggested that an insurer may seek contribution from its insured for periods in which the insured did not carry insurance:

> Under the pro rata approach, allocation occurs when the loss is paid in the first instance; under the joint and several approach, by contrast, allocation occurs in a second proceeding, when the loss becomes the subject of contribution among policies and insurers. Thus, it does not follow, as Treadwell appears to reason, that if the joint and several approach is warranted, Treadwell will be off the hook for the years in which it lacked insurance; instead, the question of whether to prorate to Treadwell would merely be postponed to a second proceeding.[35]

D. "Those Sums"

Newer CGL policy forms include the following language:

> We will pay *those sums* that the Insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies.
>
> * * *
>
> (b)—This insurance applies to "bodily injury" and "property damage" only if:
>
> (1) the "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and
>
> (2) the "bodily injury" or "property damage" occurs during the policy period.

The substitution of the term "those sums" to replace the "all sums" language may affect the allocation methodology applied by a court. Given that there have been few courts that have addressed this question directly, there is certainly room to argue that an insurer providing policies containing the "those sums" language in the coverage grant should only be obligated to pay damages that occur during its policy period (pro rata).[36]

E. Notice and Tender

Given that Texas law employs the all-sums method of allocation, it is worth discussing a few points at this juncture regarding notice and targeted tender. First, there is a difference between placing a carrier on notice and tendering the claim to a carrier. Notice is a contractual obligation in the insurance contract that requires an insured to notify its insurer of events that may potentially give rise to coverage under the policies at issue. Tender, on the other hand, is a request for defense and/or indemnity from a particular carrier under one or more policies.

When placing carriers on notice, it is wise to notify all carriers of an incident that triggers (or potentially triggers) their respective policies. This will prevent a carrier from subsequently asserting that a policyholder breached the notice provisions in the insurance contract.

Tendering to every triggered carrier, however, may result in traps for the unwary policyholder. As noted above, the

nature of long-tail claims will often involve several years or even decades of coverage. During those decades of coverage, the policies at issue will provide varying coverage—different coverage provisions, definitions, defense duties, exclusions, policy limits, etc. Those differences must be taken into account when choosing to target a particular policy or policies, as a failure to do so could lead to a loss of coverage for future long-tail claims that may be asserted against a policyholder. For instance, it may be better for a policyholder to target a later year with higher primary limits to preserve its ability to receive a defense without eroding policy limits. Alternatively, it may be more advantageous to target an earlier year if a long-tail claim may trigger the application of exclusions—such as the absolute pollution exclusion.

Similar reasoning is also applicable to carriers seeking contribution from other carriers under the all-sums approach. For instance, if an excess carrier seeks reimbursement from a primary carrier whose policy obligates it to defend the insured, that carrier may subsequently find itself liable for defense costs that a primary carrier would have otherwise had the obligation to pay. Likewise, primary carriers, in scenarios involving repeated cases of substantial long-tail liability—such as asbestos liability—may wish to avoid seeking contribution from primary policies in consecutive years, so as to more quickly exhaust limits and avoid the payment of uncapped defense costs.

One of the most significant legal issues with respect to exhaustion is how it occurs when multiple policies are triggered due to a long-tail claim.

III. Exhaustion of Policy Limits

Once a long-tail claimant's appropriate insurance carriers have been placed on notice, an allocation methodology has been applied, and the claim or claims have been tendered under one or more of the triggered policies, the next important consideration is monitoring the exhaustion of the limits of liability of the targeted policies. This holds true regardless of whether the insurers to whom tender is made accept their defense and/or indemnity obligations, deny their defense and/or indemnity obligations, or are insolvent at the time of tender. This section explains why monitoring exhaustion is important, reviews how exhaustion is treated under Texas law, and discusses whether exhaustion may be challenged by excess and/or umbrella carriers.

A. What is "Exhaustion" and Why is it Important?

"Exhaustion" refers to the diminishment of the limits of liability of a policy through payments made by the carrier on behalf of the insured. Depending on the specific language of the policy, the insured may also make payments on its own behalf to exhaust the policy limits; for example, in situations where an insurer is insolvent. Whether a given payment, made by the insured or the insurer, reduces a policy's limits of liability depends on the language of the policy and the type of payment made.

In the context of a primary CGL policy, the payment of defense costs usually does not reduce policy limits, since many such policies obligate the insurer to defend the insured and explicitly provide that such defense-related payments are "in addition" to the stated limit of liability. The payment of indemnity costs, on the other hand, generally results in the reduction of the limits of liability. When dealing with an excess and/or umbrella policy, however, it is customary that both defense and indemnity payments operate to reduce the available limits of the policy.

Typically, a first-layer excess insurance carrier has no duty to indemnify the insured until the limits of liability of the primary insurance policy have been exhausted. Similarly, a second-layer excess insurance carrier generally has no duty to indemnify the insured until the limits of liability of the underlying first-layer policy have been exhausted. This trend continues.

Matters of exhaustion are amplified in the long-tail liability context in a number of ways. For example, instead of dealing with a single injury-causing event resulting in one occurrence under an insurance policy, long-tail liability scenarios can sometimes involve thousands of claims, thousands of divisible injuries, and thousands of occurrences, triggering a number of insurance policies spanning many years. This happens regularly in occupational-disease litigation. In such instances, monitoring exhaustion is paramount, as many claims are dismissed or settled for sums less than the limits of liability of any single insurance policy. In such instances, the policyholder should be cognizant of the limits remaining on the policies under which indemnity is paid so as to appropriately monitor whether the indemnity payments are being allocated to the targeted policy and to inform its excess and/or umbrella carriers of the status of exhaustion and its duty to indemnify the insured.

B. Horizontal v. Vertical Exhaustion

One of the most significant legal issues with respect to exhaustion is how it occurs when multiple policies are triggered due to a long-tail claim. There are two principal exhaustion methodologies: horizontal exhaustion and vertical exhaustion.

Under a horizontal exhaustion scheme, each primary insurance policy triggered by a long-tail claim is required to indemnify the insured to the full extent of the policy limits before any excess insurer is required to pay.[37] Similarly, all first-layer excess and/or umbrella policies would be required to exhaust all limits of liability before any second-layer excess policies would be required to pay. This is sometimes referred to as "exhaustion by layers." This exhaustion scheme has

been adopted by the highest courts in New York, Illinois, and California, and according to some commentators, is the "dominant exhaustion theory courts apply."[38]

Vertical exhaustion provides that each excess and/or umbrella policy in a triggered policy tower is required to pay as soon as the limit of liability of the underlying policy is exhausted. This is true even if there are other triggered primary policies in other policy towers that have remaining limits.[39] Vertical exhaustion is sometimes referred to as "exhaustion by year" or "spiking," as it allows the insured to select the policy tower it wants to respond to a covered liability, including the primary and excess policies in that tower. Under this method of exhaustion, an insured does not have to exhaust the limits of liability of all primary policies before seeking payment from its excess and/or umbrella carriers.

The Texas Supreme Court has yet to wade into the debate regarding which exhaustion theory—horizontal or vertical—would apply under Texas law. Similarly, no Texas court of appeal has addressed the issue. However, in *LSG Technologies*, the United States District Court for the Eastern District of Texas made an *Erie* guess as to how the Texas Supreme Court may come down on the issue, and it concluded the court would endorse vertical exhaustion.

In *LSG Technologies*, the plaintiffs were manufacturers of gaskets that, until the 1980s, contained asbestos.[40] They were named in numerous lawsuits regarding asbestos exposure. Plaintiffs were insured by primary and excess policies during the years in which their asbestos-containing gaskets were manufactured, and they tendered the asbestos-related claims to those primary carriers. When plaintiffs requested that one of their excess insurers provide coverage following exhaustion of the underlying primary policies, the excess insurer declined, arguing in part that it had no obligation to provide coverage until all of the primary policies that could provide coverage were exhausted.[41]

The court, unguided by Texas cases addressing the issue, determined that the Texas Supreme Court would apply vertical exhaustion if confronted with this question of law.[42] The court's decision was largely based on the Texas Supreme Court's holding in *Garcia*.[43] In that case, the court held that consecutive primary policies covering distinct policy periods could not be stacked so as to increase coverage for a single claim involving an indivisible injury.[44] It reasoned:

> If a single occurrence triggers more than one policy, covering different policy periods, then different limits may have applied at different times. In such a case, the insured's indemnity limit should be whatever limit applied at the single point in time during the coverage periods of the triggered policies when the insured's limit was highest. The insured is generally in the best position to identify the policy or policies that would maximize coverage.[45]

The *LSG Technologies* court determined that horizontal exhaustion could not be reconciled with this rule, as it would be inconsistent "to require that the limits of consecutive, non-overlapping [policies] be exhausted before the excess insurer's obligations are triggered" when "consecutive, non-overlapping [primary] policies cannot be combined—or 'stacked'—to create a policy limit that equals the aggregate of the individual policies' limits."[46]

Moreover, the court dismissed the excess carrier's argument that the excess policies' "other insurance" clauses compelled the horizontal-exhaustion result. The court noted that the excess insurer cited no authority, Texas or otherwise, for its proposed construction of the "other insurance" clause.[47] The court also noted that such an interpretation of the "other insurance" clause appears contrary to Texas law, which sets out that in order for an "other insurance" clause to relieve an insurer of liability, the other insurance must generally cover that *same* property and interest against the *same* risk in favor of the *same* party.[48] Insurance policies issued for different policy periods do not cover the same interest against the same risk. Finally, the court justified its adoption of vertical exhaustion through public policy; namely, that vertical exhaustion makes efficient use of resources by neither maximizing nor minimizing primary or excess coverage, that it respects the distinction between primary and excess coverage, and that it is consistent with the policy language.[49]

The *LSG Technologies* court's argument that *Garcia*'s anti-stacking principles are irreconcilable with the premise of horizontal exhaustion is its strongest point in favor of the application of vertical exhaustion under Texas law. To be sure, it would be unworkable to require an insured to exhaust all of its primary liability limits before being able to reach its valuable excess and/or umbrella coverage while also denying it the ability to stack that coverage. However, the premise is not invulnerable to attack.

First, the vertical-exhaustion theory as propounded in *LSG Technologies* would only extend as far as the application of the Texas anti-stacking rule. As noted below, the application of this rule may be severly limited. Second, the issue before the *Garcia* court was whether the *Stowers* doctrine was implicated when the plaintiff made a demand of $600,000,[50] and one could argue that the *Garcia* court's discussion of stacking is limited to situations concerning the breach of the duty to settle under the *Stowers* doctrine. Nonetheless, other courts have followed *LSG Technologies*' reasoning and found that Texas law requires vertical exhaustion.[51]

C. Proof of Exhaustion

When an underlying insurer is solvent and paying indemnity on behalf of its insured and exhausts its limits of

liability, it is difficult for an excess and/or umbrella insurer to contest the exhaustion of those limits. Many excess and/or umbrella insurance policies have language conditioning the attachment of liability under the policy simply on notice of exhaustion or payment of the underlying limits. In such cases, Texas courts have rejected insurers' arguments that they are entitled to condition coverage on substantive proof of the validity of the claims that exhausted the underlying policy.

For example, in *ARM Properties Management Group v. RSUI Indemnity Co.*, an excess insurer refused to pay the insured's claim, as it disputed not only the amount of the claim, but also whether the underlying policies' limits of liability were properly exhausted.[52] The insurer argued that the exhaustion of underlying policy limits became an issue of fact when the insurer could "establish a reasonable question as to whether the payments on the underlying policies were outside the scope of the underlying policy coverage."[53] The excess policy at issue provided only that liability attached "after the primary and underlying excess insurer(s) have paid or have admitted liability for the full amount of their respective ultimate net loss liability."[54] The ultimate-net-loss liability of the primary and underlying excess insurer was $30 million.[55]

The court found the insurer's argument unpersuasive, noting that the plain language of the policy at issue established that liability attached after the underlying insurers paid $30 million, without further conditions.[56] That the underlying insurers actually paid $30 million was sufficient to trigger the excess insurer's duties under the policy. To the court, "whether or not the underlying insurers failed to take advantage of exceptions in their coverage or otherwise overpaid" was of no moment and was not relevant to the issue of whether the excess carrier's liability had attached.[57]

Similarly, in *LSG Technologies*, the excess insurer argued the insured was required to present proof that the underlying policy limits were exhausted properly, including evidence of "the location of employment of [each] plaintiff, medical history and records, employment records, product design or manufacture dates, product sales dates, product use dates, or yet other information."[58] In essence, the insurer maintained that it should be permitted to conduct mini-trials as to the validity of each underlying claim that was used to exhaust the underlying limits of liability.[59]

The court rejected this approach, noting that none of the provisions of the excess policy at issue conditioned coverage on examination of claims paid by the underlying insurer. The court, following the *ARM Properties* opinion, proclaimed "whether or not the underlying insurers properly paid claims, took advantage of any exclusions or exceptions, or otherwise overpaid does not bear on whether the excess insurer's liability has attached."[60] In the court's opinion, the fact that the underlying insurer paid its policy limits was sufficient to trigger the excess insurer's duties to indemnify the insured.[61]

Accordingly, where an excess policy simply conditions attachment of liability on the exhaustion of the underlying limits, it appears that Texas courts apply the language literally, rebuffing insurers' attempts to read into this language a right to contest whether the claims paid by the underlying insurer were indeed covered or were appropriately valued. Mini-trials concerning whether each of the underlying claims was covered appears to be a Pandora's box the courts do not wish to open. This is for good reason, as some long-tail liability matters concern thousands of underlying lawsuits, and review during a trial of the specific facts of each lawsuit leading to exhaustion of an underlying policy and attachment of liability as to an excess and/or umbrella policy would be judicially taxing, inefficient, and unduly burdensome to the policyholder.

IV. Policy Limits in a Continuous-Injury Case?

As discussed above, *Garcia* tends to suggest that even outside of the *Stowers*-doctrine context, the limits of all triggered policies in any given liability scenario may not be stacked to create a limit of liability equivalent to the aggregate limits of all implicated coverage.[62] Given the appearance that the Texas Supreme Court intended the anti-stacking rule to have broader application, the question then becomes what conditions must be met to warrant the rule's application.

In the *Garcia* decision, the Texas Supreme Court described the limitations on the application of the Texas anti-stacking rule in two separate passages:

> The consecutive policies, covering distinct policy periods, could not be 'stacked' to multiply coverage for a *single claim involving indivisible injury*.[63]
>
> * * *
>
> If *a single occurrence* triggers more than one policy covering different policy periods, . . . the insured's indemnity limit should be whatever limit applied at the single point in time during the coverage periods of the triggered policies when the insured's limit was the highest.[64]

Reading these passages together, it appears that the anti-stacking rule is only operative in scenarios involving (1) "a single claim involving indivisible injury" and (2) "a single occurrence." Applying this standard to the circumstances in the *Garcia* case, and finding a single indivisible injury, the court noted that "a malpractice event may involve numerous independent grounds of negligence that . . . constitute 'a series of acts or occurrences' that are related and form a single malpractice claim."[65] While cases applying the Texas

anti-stacking rule are relatively few, those decisions suggest both of these two elements; i.e., a "single claim involving indivisible injury" and a "single occurrence," must be met in order for the anti-stacking rule to apply.

For instance, in *Royal Insurance Co. of America v. Caliber One Indemnity Co.*, the Fifth Circuit was called upon to determine whether the *Garcia* anti-stacking rule applied to circumstances involving multiple incidents of mistreatment to a single resident of a single nursing home over a period of about three years.[66] In those circumstances, the Fifth Circuit separately addressed and examined (1) the number of occurrences at issue and (2) the divisibility of the injuries at at issue. Specifically finding that the injuries did not constitute "a single claim involving indivisible injury," the Fifth Circuit declined to apply the Texas anti-stacking rule:

> These breaches of the standard of care and the resulting injuries are divisible from the alleged acts of negligence that occurred a year later that caused pneumonia, and a massive, infected Stage IV pressure sore and resulting sepsis, leading to Trevino's death. If Trevino's injuries prior to those she sustained in the months preceding her death had been more severe, such as a broken arm on one occasion and a skull fracture a few months later, we would have no difficulty in concluding that these discrete injuries and their causes were divisible from the acts or omission that later caused the Stage IV pressure sore and other ailments occurring more than a year later. The fact that Trevino instead suffered rashes, bruises, pain, and infections in the year before she developed a severe pressure sore and other conditions does not alter the analysis.
>
> * * *
>
> The claims asserted in the Trevino family's lawsuit against Methodist were not "a single claim involving *indivisible injury*," and the rule set forth in the Supreme Court of Texas's decision in [*Garcia*] prohibiting "stacking" does not apply.[67]

Other cases interpreting the anti-stacking rule described in *Garcia* have likewise required a "single claim involving indivisible injury" in applying the Texas anti-stacking rule.[68]

Moreover, when the anti-stacking decision was rendered in 1994, the *Garcia* court noted that "even the jurisdiction embracing the broadest coverage trigger rule has held that multiple coverage does not permit an insured to 'stack' the limits of multiple policies that do not overlap" as a basis for its decision to apply the anti-stacking rule.[69] This reasoning no longer appears to be valid, given that some courts now embrace the concept that multiple coverage *does* permit an insured to stack the limits of consecutive, non-overlapping policies. For instance, the Supreme Court of California allowed for the formation of an "uber-policy," with a coverage limit equal to the sum of all triggered policies. As discussed below, its rationale was based on protecting the insured.

California v. Continental Insurance Co. concerned an insurance claim submitted by the state to its insurers based on environmental liability.[70] The environmental contamination occurred during the operation of a waste disposal site from 1956 to 1972. The state was uninsured prior to 1963 and after 1978. The state's insurers contested liability under the policies, particularly for periods where the state went bare and had no coverage but still operated the waste disposal site.

The matter was tried in phases over a number of years. By 2005, the trial court had made findings that the contamination constituted a single occurrence; all insurers were liable for damages, subject to their policy limits for the total amount of the loss; and that the state could not stack or combine policy periods to recover more than one policy's limits.[71] In essence, the state had to "choose a single policy period for the entire liability coverage, and it could recover only up to the total policy limits in effect during that policy period."[72] Because the state had already settled with several of its insurers for approximately $120 million, the court entered a $0 judgment in the state's favor as the amount of the settlement exceeded the policy limits in effect during the policy period of greatest coverage, which amounted to $48 million.[73]

The appellate court reversed, and the Supreme Court of California agreed. First, the court reaffirmed that California applies the continuous-injury trigger of coverage and the "all sums" rule.[74] Then the court turned to considerations of stacking. The court recognized that the "all sums" indemnity coverage "stopped short of satisfying the coverage responsibilities of the policies covering continuous long-tail loss, and potentially leaves the insured vastly uncovered for a significant portion of the loss."[75] To rectify this issue, the court adopted the "all-sums-with-stacking-rule," which "'effectively stacks the insurance coverage from different policy periods to form one giant "uber-policy" with a coverage limit equal to the sum of all purchased insurance policies.'"[76] The court continued, stating that the new rule "means that the insured has immediate access to the insurance it purchased" and does not put the insured "in the position of receiving less coverage than it bought."[77] Further, it "acknowledges the uniquely progressive nature of long-tail injuries that cause progressive damage throughout multiple policy periods."[78]

The court made clear that the outcome was dependent on the policy language. Specifically, it stated that the standard policy language permits stacking. The court recognized, however, that the all-sums-with-stacking-rule would not apply where a policy contained anti-stacking language.[79]

The all-sums-with-stacking rule certainly benefits the insured by providing a greater amount of triggered coverage to satisfy the liability arising out of any given occurrence. Such a policy could significantly affect the landscape of environmental and construction long-tail liability claims, which generally consist of single occurrences involving arguably indivisible claims. Its importance becomes less profound, though, when the number of occurrences and divisible injuries increases, as the insured should be able to spread those occurrences and claims out to different triggered policies, and the individual liabilities associated with those occurrences may be less significant. However, it remains to be seen whether any Texas court will follow the lead of the California Supreme Court and adopt the rule, where it is not otherwise prohibited by express policy language.

V. Considerations Surrounding Settlement

Settlements between an insured and its insurer in the long-tail liability setting can be complicated. This is particularly true where there are thousands of claims triggering multiple policies spanning a number of years and only certain of the insured's carriers want to settle, either through buy-out agreements, coverage-in-place agreements, some other form of mutually beneficial settlement, or a combination of these options. This section briefly discusses the very complex matter of settlement credits in long-tail liability matters, including whether Texas law requires them and how they are calculated and applied, as well as the potential hazards of entering into below-limits settlements with carriers when excess coverage is available.

A. Settlement Credits

In the long-tail liability context it is not uncommon for a policyholder to settle with certain of its triggered insurers while also having to litigate against other of its triggered insurers with respect to the same bundle of liability. In such a circumstance, it could be possible for a policyholder to receive a "double recovery" (just as it would be in the tort context where one joint tortfeasor settles while the other proceeds to trial and judgment is rendered against it). The question, then, is how such settlements should be treated with respect to the non-settling insurers so as to avoid an actual "double recovery."

In "all sums" jurisdictions, of which Texas is a member, two competing methods have been utilized to combat the potential for a "double recovery" in the coverage-litigation context. Some jurisdictions, such as the Third Circuit, apply a pro-rata settlement credit. For example, in *Koppers Co., Inc. v. Aetna Casualty & Surety Co.*, the court held that the non-settling insurer was entitled to an "apportioned share offset," or a credit equal to the pro-rated values of the limits of liability of the settled insurance policies.[80] Other jurisdictions apply a pro-tanto settlement credit, wherein the non-settling insurer may receive a credit equal to the amount received from the settled carriers for losses to which it is jointly liable.

1. How Does Texas Law Treat Settlement Credits in the Long-tail Liability Context?

One of the few authorities in Texas that addresses settlement credits in the long-tail liability context is *RSR Corp. v. International Insurance Co.*[81] *RSR Corp.* is factually and legally complex, and its facts and legal issues could occupy a paper this length in and of themselves. In the interests of brevity, *RSR Corp.* is discussed briefly.

RSR was in the lead-smelting business, among other ventures. The company had smelting and manufacturing sites across the United States that were operational during various periods.[82] With respect to at least thirty sites, RSR faced some form of liability to the EPA or other parties for contamination remediation and/or other damages.[83] RSR had significant insurance coverage, which included numerous years of primary, excess, and umbrella CGL policies covering its operations at all of its sites, including the Harbor Island Site—the site at issue in the coverage litigation. RSR also had Environmental Impairment Liability (EIL) policies that provided coverage for the Harbor Island site, among others. The EIL policies were issued by North River, with International Insurance Company (International) later succeeding to the obligations under the EIL policies.

In 1993, RSR sued approximately fifty-three of its CGL and excess insurance providers for "failing to comply with their obligations in connection with environmental cleanup costs incurred at, and personal injury lawsuits asserted in connection with, more than twenty-six environmental sites across the United States, including the Harbor Island site."[84] By 2005, RSR had either dismissed or settled its claims against all of its CGL insurance carriers, receiving an aggregate payment of just over $76 million.[85] In 2000, International and RSR began litigation concerning whether International had indemnity obligations to RSR under the EIL policies in relation to the Harbor Island site, among others.[86] Following a jury trial, the court entered partial final judgment holding that International was obligated to indemnify RSR for the cleanup and defense costs it became obligated to pay for the Harbor Island site.[87]

In March 2006, RSR filed a motion to reopen the federal court proceeding seeking, *inter alia*, reimbursement from International for environmental cleanup, defense, and settlement costs incurred by RSR in connection with the Harbor Island site. Having already determined that there

was coverage under the EIL policies, the court permitted International to make only certain defenses to the claim, including a settlement-credit defense.[88] The court ultimately determined that International was entitled to a settlement credit under two distinct theories: (a) by virtue of the "other insurance" clauses in the EIL policies and (b) under the common law "one-satisfaction" rule.[89] The court further found that RSR could not recover from International because the aforementioned theories limited RSR's recovery to amounts it already had received from settlements with other of its insurers.

RSR appealed the district court's holding on two grounds: (1) that as a matter of law the "other insurance" clauses in the EIL policies cannot be read to bar recovery based on RSR's settlements with its CGL carriers and (2) the common law "one-satisfaction" rule is inapplicable outside of tort cases.[90] The Fifth Circuit Court of Appeals did not reach the issue of the applicability of the "one-satisfaction" rule to the contract claim, instead affirming the district court's holding based only on the "other insurance" clauses.[91]

The Fifth Circuit found that there was no question that the CGL policies constituted "other insurance" as to the EIL policies, and further affirmed the district court's holding that RSR was estopped from arguing that the CGL and EIL policies covered different risks.[92] Having found that the EIL "other insurance" clauses could operate to require a settlement credit to be applied in favor of International, the court found that International could be responsible for the reimbursement of indemnification and defense costs only if the CGL settlements partially covered the Harbor Island site damages.[93] In essence, the EIL policies became excess insurance to the extent that RSR could prove that it sustained damages at the Harbor Island site for which it had not yet been compensated.

The Fifth Circuit recognized that the burden is on the plaintiff-insured to allocate its settlement to prove that it is not receiving a double recovery.[94] Essentially, the plaintiff-insured has to show that its settlements are allocable to liabilities other than those for which the insured is seeking recovery from the non-settling insurer. If the settlement cannot be so allocated, then the entirety of the settlement must be used as a credit to offset any damages assessed against the non-settling insurer.[95] The court found that because the liabilities that RSR sought reimbursement from International for totaled $13.1 million, while the offset that had to be applied exceeded $76 million, RSR could recover nothing from International.[96]

Thus, *RSR Corp.* directly stands for the proposition that a policy's "other insurance" clause can result in the application of a settlement credit or setoff in the long-tail liability context where an insured has already settled with one or more of its other insurers. Further, in such situations, the non-settling insurer may be entitled to a pro-tanto settlement credit. However, *RSR Corp.* stops short of directly addressing how settlement credits should operate in contexts where an "other insurance" clause may not apply. As the trial court recognized, under Texas law an "other insurance" clause applies only when the other insurance at issue covers the same property and interest against the same risk in favor of the same party.[97] Accordingly, if two policies protect different interests against different risks, then an "other insurance" clause may not operate to require a settlement credit as it did in *RSR Corp.*[98] For example, there is considerable authority that "other insurance" clauses do not apply in the context of consecutive insurance policies.[99]

Nevertheless, while *RSR Corp.* stopped short of directly addressing how settlement credits should operate in contexts where an "other insurance" clause may not apply, it likely addressed the issue indirectly. The court in *RSR Corp.* applied a pro-tanto settlement credit. Whether the basis for the settlement credit is an "other insurance" clause or the common-law "one-satisfaction" rule, it would be curious to apply a different credit standard. This rings true even if the basis for the credit is the general insurance principle that "[a]n insured's right of indemnity under an insurance policy is limited to the actual amount of loss."[100] The principle for applying a settlement credit is the same regardless of the basis for its application: to prevent the potential for a "double recovery." As such, *RSR Corp.* arguably stands for the proposition that the pro-tanto settlement credit method should be applied to determine the applicable settlement credit under Texas law.

2. How is the Settlement Credit Calculated and Applied?

In *RSR Corp.*, the district court recognized that courts around the country have utilized various settlement-credit methods. The court specifically identified *GenCorp, Inc. v. AIU Insurance Co.*, which calls for the application of a credit equivalent to the policy limits of the settled policies, and *Koppers*, which calls for a credit equivalent to the pro-rata shares of each settled insurance policy.[101] In rejecting these approaches, the district court stated that under Texas law, the "dollar-for-dollar, or pro tanto, credit method" is applicable in contract cases.[102] While the Fifth Circuit did not specifically address the aforementioned cases on appeal, it nevertheless appears to have applied a pro-tanto settlement credit.[103]

RSR Corp. suggests that there could be a number of ways to calculate the settlement credit. The settling party may show through appropriate evidence that the settlement proceeds, or a portion thereof, were allocated to specific liabilities other than those for which the non-settling insurer is jointly liable.[104] For example, had RSR provided evidence that the entirety of its settlements compensated for liabilities at its other sites (other than Harbor Island), then International would not have been entitled to a settlement credit. Had RSR provided evidence, for example, that all but $1 million

of its settlements compensated for liabilities at its other sites (other than Harbor Island), then International would only have been entitled to a $1 million settlement credit. In fact, RSR provided no allocation evidence whatsoever, instead declaring "that it has not and cannot allocate the settlement proceeds to specific sites."[105] As such, the entirety of the CGL settlements were assessed as a credit. Or, RSR could have established that its total liabilities exceeded the sum of its settlements. RSR took no such action. Instead, International hired an expert accountant to prove the opposite. International's expert took the sum of RSR's settlement proceeds and subtracted therefrom the remediation costs paid by RSR and an estimate of RSR's future liabilities.[106] The calculation resulted in a net gain for RSR, meaning it was not entitled to any additional funds from International.

As a practical point, a settling insured should attempt to allocate settlement payments to liabilities. However, this is not always possible, as settlements sometimes encompass future, yet unknown losses. In such instances, policyholders would benefit from retaining a qualified expert early in the dispute to assess the insured's losses and compare them against the reimbursements received from its insurers.

B. Below-Limits Settlements

From time to time, insureds and their insurers may desire to enter into settlements to resolve their disputes regarding coverage. Many times these settlements result in the insured accepting a lesser amount of coverage than is provided for by the policy-at-issue's limits of liability. Insureds may do this to buy peace of mind and money-in-hand, or to reach the more substantial limits of excess and/or umbrella policies. In any event, insureds should be cautious of entering into such agreements because below-limit settlements may result in the forfeiture of excess and/or umbrella coverage in certain circumstances. The seminal case on the issue in Texas is *Citigroup, Inc. v. Federal Insurance Co.*[107]

Citigroup involved a coverage dispute between an insured and certain of its excess insurers related to two underlying lawsuits concerning its business practices. Citigroup was insured in three discrete layers. The first layer consisted of $50 million in primary coverage limits provided through a primary policy issued by Certain Underwriters at Lloyd's of London (Lloyd's). The second layer consisted of $50 million in excess coverage provided through excess policies issued by National Union Fire Insurance Company of Pittsburgh and Starr Excess Liability Insurance International, Ltd., which each issued $25 million policies. The third and final layer consisted of $100 million in coverage shared among seven insurers: Ace Bermuda Insurance, Ltd., $25 million; Federal Insurance Company (Federal), $17 million; Chubb Atlantic Indemnity, $17 million; Twin City Insurance Company (Twin City), $17 million; St. Paul Mercury Insurance Company (St. Paul), $10 million; Steadfast Insurance Company (Steadfast), $9 million; and SR International Business Insurance Company (SR), $5 million.[108]

Citigroup settled the underlying lawsuits for a total of $263 million, inclusive of fess and costs.[109] While all of its insurers initially declined coverage, Lloyd's eventually entered into a settlement with Citigroup, paying it $15 million in exchange for a full release in relation to the two lawsuits.[110] Citigroup then turned to its excess insurers for reimbursement and a dispute ensued. The dispute resulted in litigation, with Citigroup suing Federal, St. Paul, Steadfast, and SR.[111] The district court found that "per the excess insurers' policies, their liability to provide coverage did not attach; i.e., they were not liable to provide Citigroup with coverage, until Lloyd's paid its full $50 million limit of liability."[112] Based on this reasoning, the court determined that Citigroup was not entitled to coverage from its excess insurers because of the below-limit settlement with Lloyd's.

The Fifth Circuit agreed. It looked at the language of each of the policies at issue and found that in each circumstance, the policy language unambiguously provided that the full limits of the underlying, primary policy must be *paid* by Lloyd's before the excess policies would attach. The court concluded that "the plain language of Federal's, Steadfast's, SR's, and St. Paul's policies requires that Lloyd's pay Citigroup the total limits of Lloyd's liability before excess coverage attaches."[113] Because Lloyd's only paid $15 million of its $50 million limits, none of Citigroup's excess coverage was held to have attached and Citigroup had no excess coverage for the settlement of its covered lawsuits.

The Fifth Circuit's decision substantially hampered the ability of insureds and their insurers to enter into commercial settlements in relation to their coverage disputes. Any insured with excess coverage containing wording similar to that of the policies reviewed in *Citgroup* would be abandoning all excess coverage by entering into a below-limit settlement with an underlying insurer. This leaves the parties in a precarious position. Either the insurer has to offer 100 cents on the dollar in settlement, which is unlikely, or the insured would have to surrender valuable excess coverage for which it paid a premium, and potentially internalize any additional losses not covered by the settlement. This is not advantageous to either party.

Recently, the Eastland Court of Appeals spoke up on the matter, which was otherwise unaddressed by Texas state courts. *Plantation Pipe Line Co. v. Highlands Insurance Co.* involved a claim related to environmental pollution, which cost Plantation Pipe Line approximately $12 million in remediation expenses.[114] Plantation Pipe Line sought reimbursement of these remediation expenses from its insurers, who provided coverage as follows:

1. $100,000 – SIR

2. $900,000 – American Reinsurance Co. (American)

3. $2 million – California Union Insurance Co. (Cal Union)

4. $5 million – Lumbermans Mutual Casualty Insurance Co. (Lumbermans)

5. $10 million – Highlands Insurance Co. (Highlands)[115]

Plantation Pipe Line's insurers disputed coverage, and a lawsuit ensued in state court in Georgia against American, Cal Union, and Lumbermans. The lawsuit resulted in a settlement with these insurers in the following amounts: American, $750,000; Cal Union, $1 million; and Lumbermans, $2.8 million.[116] Plantation Pipe Line then turned to Highlands for reimbursement of approximately $4 million ($12 million less the limits of the underlying coverage, or $8 million). Plantation denied coverage, arguing that it did not owe anything "because the policy limits of the other insurance policies had not been fully exhausted as was required under the excess policy." Litigation ensued and the trial court granted summary judgment in Highlands' favor based on its argument that liability could not attach to its policy given the below-limit settlements of the underlying insurers. Plantation Pipe Line appealed.

The provision at issue in the Highlands policy, referred to as the "exhaustion clause," reads as follows:

> It is expressly agreed that liability shall attach to the Company only after the Underlying Umbrella Insurers have paid or have been held liable to pay the full amount of their respective ultimate net loss liability as follows . . . .[117]

Highlands argued that this language was the equivalent of the "full policy limits" language that the *Citigroup* court relied on in reaching their holding regarding the Federal policy. However, the *Plantation Pipe Line* court found that the two were not equivalent. The court noted that the above-referenced language limited the payment to the full amount of the ultimate net loss liability.[118] The court then looked to the following definition of "ultimate net loss" in the underlying umbrella policy (the Highlands policy followed the form of the underlying umbrella policy:

> (a) all sums which the insured or any organization as his insurer, or both, become legally obligated to pay as damages, whether by reason of adjudication or settlement, because of personally injury, property damage or advertising injury . . .[119]

When the court replaced "pay the full amount of their respective ultimate net loss liability" with the first clause of the ultimate net loss definition, it found "nothing that requires payment of losses solely by the insurers up to the attachment amount in the Highlands policy."[120] There was no dispute that Plantation Pipeline was only asking Highlands to reimburse it for amounts in excess of $8 million, which were the limits of the underlying insurance policies.

Further, the court noted that finding otherwise would cause direct conflict with the maintenance of the underlying insurance clause. That clause reads as follows:

> It is a condition of this Policy that the Underlying Umbrella Policies shall be maintained in full effect during the currency hereof except for any reduction of the aggregate limits contained therein solely by payment of claims in respect of accidents and/or occurrences occurring during the period of this Policy. Failure of the Named Insured to comply with the foregoing shall not invalidate this policy but in the event of such failures, the Company shall only be liable to the same extent as they would have been had the Named Insured complied with the said condition.[121]

The court reasoned that "[u]nder this provision, it would not matter whether the underlying policies were even effective—much less the source of the payment for the loss—the Highlands policy would still attach, but not until its attachment point of $8 million was reached."[122] This provision would be rendered meaningless if only payments by insurers could cause the policy to attach.

The *Plantation Pipe Line* court then looked to *Citigroup*, which Highlands relied on heavily in its briefing. The court noted that the Highlands policy did not contain language like that contained in the policies at issue in *Citigroup*. Therefore, it distinguished that holding in its entirety.

Highlands petitioned the Texas Supreme Court for review of the *Plantation Pipe Line* opinion. The court requested a response to the petition for review and subsequently requested that the parties brief the merits of the appeal. However, following its review of the merits briefing, the court denied Highlands' petition for review.

The opinion in *Plantation Pipe Line* focused on the specific language of the insurance policy at issue in arriving at its holding. Thus, the opinion was narrow and did not represent a full-frontal assault on the Fifth Circuit's holding

in *Citigroup*. Recognizing this, and aware of the pending petition for review to the Supreme Court of Texas, the Fifth Circuit doubled down on its *Citigroup* holding in late 2015:

> We are bound by *Citigroup*'s interpretation and application of Texas law to insurance contract disputes. *See Ford v. Cimarron Ins. Co.*, 230 F.3d 828, 832 (5th Cir. 2000) ("[A] prior panel's interpretation of state law has binding precedential effect on other panels of this court absent a subsequent state court decision or amendment rendering our prior decision clearly wrong."). Appellant has not cited, and we have not found, a Texas state court decision that has held *Citigroup*'s analysis of Texas contract law to be clearly wrong. To the contrary, a recent state court of appeals decision regarding an excess-insurance contract quoted *Citigroup* at length but did not disagree with its interpretation or application of Texas law. *Plantation Pipe Line Co. v. Highlands Ins. Co.*, 444 S.W.3d 307, 314 (Tex. App.—Eastland 2014, pet. filed). Rather, the state court concluded that *Citigroup*'s reasoning was not dispositive because the policy at issue "did not contain language like the parties agreed to in the policies in Citigroup." *Id.* As explained below, we find that the operative portion of the AXIS policy contains language substantively similar to the Steadfast policy in *Citigroup*.[123]

Accordingly, the issue of below-limits settlements is still a significant issue under Texas law.

VI. Non-Cumulation of Liability Clauses

Non-cumulation clauses have come under increased scrutiny over the past couple of decades given the long-tail liability litigation, the unique nature of which commonly implicates the clauses. Policyholders and insurers commonly fight over their meaning and application. Insurers generally argue that the clauses reduce or eliminate coverage for a "loss" or "occurrence" that may also trigger an earlier policy. Policyholders generally argue that the clauses are ambiguous and in any event were never intended to reduce or eliminate coverage appropriately purchased by an insured based on amounts "due" or "paid" under prior policies. Texas courts have yet to issue any rulings regarding the clauses.

The clauses come in a number of varieties, but they generally state:

> It is agreed that if any loss covered hereunder is also covered in whole or in part under any other excess policy issued to the Insured prior to the inception date hereof the limit of liability hereon as stated in Item 2 of the Declarations shall be reduced by any amounts due to the insured on account of such loss under such prior insurance.

Later versions of the clauses tend to replace the word "loss" with the word "occurrence," providing:

> If the same occurrence gives rise to personal injury, property damage or advertising injury or damage which occurs partly before and partly within any annual period of this policy, each occurrence limit and the applicable aggregate limit or limits shall be reduced by the amount of each payment made by the company with respect to each occurrence, either under a previous policy or policies of which this policy is a replacement, or under this policy with respect to previous annual periods thereof.

The non-cumulation clause was first drafted in 1960 by the Underwriters at Lloyd's of London as part of a new umbrella liability form called the "LRD 60" form.[124] Commentators agree that non-cumulation clauses were initially included in the LRD 60 form for the limited purpose of preventing a policyholder from obtaining a double recovery.[125] At the time, underwriters were transitioning from the standard "accident"-based coverage to the LRD 60's "occurrence"-based coverage.[126] As such, it was conceivable that an insured could make a proper claim under both the prior "accident" policy and the new "occurrence" policy, but for the application of the non-cumulation clause.[127]

Now, however, insurers are utilizing the clauses in a much different manner, and courts around the country have arrived at wildly divergent opinions with respect to their application and enforceability.

A. Ambiguity

In general, the non-cumulation clauses that utilize the defined term "occurrence" have been held to be unambiguous and courts have applied them to reduce or eliminate coverage under a policy or series of policies for a given "occurrence."[128] As the term "occurrence" is defined, the scope of the clause's application is understood. The few courts that have reviewed non-cumulation clauses containing the word "loss" in place of "occurrence" have come to a similar opinion; however, the stated reasoning is subject to attack.

In *California Insurance Co. v. Stimson Lumber Co.*, the District Court of Oregon reviewed a non-cumulation clause containing the undefined term "loss."[129] The case involved an insured, Stimson, who manufactured an exterior

hardboard siding product called Forestex between 1986 and 1997; defects in the product subsequently led to lawsuits by its customers for property damage.[130] One insurer argued that the non-cumulation clause in its policy eliminated its coverage obligations, claiming that "loss" meant the "total loss for which Stimson seeks coverage," as opposed to the loss associated with each individual siding claim, the meaning put forward by Stimson.[131] The court noted that Stimson's interpretation was "plausible" but "unreasonable within the meaning of the policy."[132] It noted:

> Although the term "loss" is not defined by the policies, it is also not limited by any other language. There is no policy language that ties the term "loss" to only individual occurrences. Accordingly, the term should be afforded its broadest meaning. *See Hoffman*, 836 P.2d at 706.[133]

The court, then, determined that "loss" applied to the gross amount Stimson was seeking in its claim under the policy.[134] Therefore, "[t]o the extent that there [was] any excess insurance coverage available for the siding loss, the non-cumulation provision applie[d] to reduce [the insurer's] policy limits by the amounts paid in prior policy years or amounts paid by other excess settling insurers."[135]

The *Stimson* court's determination was based on its decision that the term "loss," which was undefined, "should be afforded its broadest meaning."[136] The case it cited as support, *Hoffman Construction Co. of Alaska v. Fred S. James & Co. of Oregon*, does not even stand for this proposition.[137] Indeed, the *Hoffman* court never made any pronouncement resembling that attributed to it in *Stimson*. Even if it were a proper attribute, there is no analogous interpretive rule under Texas law.[138] There was no legal basis for the *Stimson* court to afford "loss" its broadest possible meaning.

However, at least two other courts have blindly followed the reasoning set out in *Stimson* as it relates to "loss." In *Greene, Tweed & Co., Inc. v. Hartford Accident & Indemnity Co.*, the court cited *Stimson* approvingly, finding that "'loss' as used in the American Home Non-Cumulation Clause . . . means the gross amount [the insured] is seeking in its claim under the American Home Policy."[139] Similarly, in *Air & Liquid Systems Corp. v. Allianz Underwriters Insurance Co.*, the court followed *Stimson* and *Greene, Tweed* without any thoughtful analysis.[140]

Insurance practitioners should be on the lookout for other uses of the term "loss" in the policy at issue to provide additional or specialized context to the term. For example, many policies contain "loss payable" provisions which generally use the term "loss," and a savvy policyholder could use such a provision to bolster its argument that "loss" is not exceptionally broad in scope, but instead is limited to amounts paid to individual claimants.

B. Enforceability

Even in cases where a court may not necessarily find a non-cumulation clause to be ambiguous, it may nevertheless refuse to enforce the clause. For example, in *Greene, Tweed*—where the court refused to find the non-cumulation clause ambiguous—the clause was held to be an unenforceable escape clause.[141] It explained that an escape clause relieves the insurer from any obligation to its insured if other coverage is available. Under the facts of the case, the insurer would have been relieved of its coverage obligation by virtue of the non-cumulation clause, so the court held it "an invalid escape clause that cannot be enforced under Pennsylvania law."[142] Depending on the nature of the dispute at issue, insurance practitioners may consider advancing this argument or preparing a defense to such an argument.

In addition, practitioners may consider the argument that non-cumulation clauses are against Texas public policy and therefore void. The Texas Department of Insurance (TDI), through the Commissioner, has determined that: "'Other insurance' clauses or similar provisions should not contain 'anti-stacking' or 'non-cumulation' language that excludes or limits coverage in other separate but applicable policies that are issued by the same company, affiliated companies, or by other unaffiliated companies."[143] Certain anti-stacking clauses may be considered for approval if

> the anti-stacking provision is limited to the same "occurrence" and the other coverages are in the same policy or package issued by the same company [or] the anti-stacking provision is on a separate endorsement, is limited to the same "occurrence," and the company issued the policy for different operations or locations, and intended that only one policy limit apply to prevent unintended duplication of coverage for which no premium has been paid, and the applicable operations and locations are scheduled on the endorsement; or the company or affiliated companies issued separate policies and the applicable policies are scheduled on the endorsement.[144]

Under Texas law, contractual provisions that violate public policy are invalid.[145] Public policy is established by the Texas Legislature through its enactments[146] and "the Legislature has tasked TDI with prescribing and approving forms to be used by insurance companies in writing" general liability insurance.[147] This regulatory responsibility was delegated to the TDI so that it can, in part, ensure that insurance policies do not contain a provision that "is unjust or deceptive, encourages misrepresentation, or violates public policy."[148] By virtue of this authority, the Legislature has "expressly delegated authority to TDI to make initial decisions about whether provisions in an insurance policy violate public

policy."[149] Thus, a strong argument may be made that non-cumulation clauses in Texas are presumptively violative of public policy and should be held invalid, unless the exceptions for consideration of approval apply.

VII. Additional Considerations

There are many considerations to take into account when prosecuting or defending a long-tail liability matter; far too many to discuss in this paper. However, this opportunity is ripe to briefly identify some of the issues that may arise. The purpose of this section is not to exhaustively examine each topic, but instead to identify them for further thought.

A. Lost Policies

Long-tail liability claims can trigger insurance policies dating back many years. In some instances, triggered insurance policies may have been lost, be it through moves, acquisitions, or personnel changes. This can put the insured in a difficult situation, as an insurer may not respond to the claim without being able to analyze the policy under which coverage was provided.

In such cases, it is the insured's burden to prove the existence and terms of coverage (but not exclusions) in the lost policy.[150] This can be accomplished through the accumulation of secondary evidence of the terms of the lost policy. Such secondary evidence may include testimony from employees responsible for an insured's insurance program, testimony from brokers or adjusters who may be familiar with the policies issued to the insured, evidence of policy forms and available exclusions approved by the Texas Department of Insurance, historic communications regarding insurance or claims made thereunder, and similar documents.

B. Anti-Assignment Clauses

Many insurance policies contain provisions prohibiting the insured from assigning the policy to benefit a new entity without the express consent of the insurer. This is a significant problem in the context of long-tail claims because the liability usually triggers insurance policies that are many years old. In many cases, corporate entities have changed their structure or been purchased by other entities and have assigned their interests under the historic policies as part of the transaction. Insured and insurers should always take great care in assessing any anti-assignment clause in an applicable policy and reviewing a purported insured's corporate history to identify whether any assignments could jeopardize coverage.

1 *See, e.g.*, *Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 28 (Tex. 2008) ("[E]xposure rule . . . finds coverage if the plaintiff is exposed to whatever agent ultimately results in personal injury or property damage during the policy period."); *Guar. Nat'l Ins. Co. v. Azrock Indus. Inc.*, 211 F.3d 239, 245 (5th Cir. 2000) ("[C]overage under a CGL policy is triggered at the time the claimant is initially exposed to the injury-causing agent.").

2 *See, e.g.*, *Am. Physicians Ins. Exchange v. Garcia*, 876 S.W.2d 842, 853 n.20 (Tex. 1994) (noting that manifestation rule "triggers coverage upon actual discovery of injury"); *see also Guar. Nat'l Ins. Co.*, 211 F.3d 239 at 245 (5th Cir. 2000) (describing manifestation as "the time when the condition . . . becomes clinically evident, identifiable, or diagnosable").

3 *See, e.g.*, *Don's Bldg. Supply*, 267 S.W.3d at 25 ("the insurer must defend any claim of physical property damage that occurred during the policy term"); *Amerisure Mut. Ins. Co. v. Travelers Lloyds Ins. Co.*, No. H-09-662, 2010 WL 1068087, at *5 (S.D. Tex. Mar. 22, 2010) (holding insurer had no duty to defend because physical injury to defective roof deck did not occur during policy period).

4 *See, e.g.*, *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034, 1045–47 (D.C. Cir. 1981), *cert. denied*, 102 S. Ct. 1644 (1982) (finding that appropriate trigger test combined all trigger tests, e.g.. exposure, injury-in-fact, manifestation); *Guar. Nat'l Ins. Co.*, 211 F.3d at 245 (discussing theory in connection with progressive disease cases, "coverage is triggered continuously, from the initial exposure to asbestos to the manifestation of a disease").

5 267 S.W.3d 20 (Tex. 2008).

6 *Id.* at 23.

7 *Id.* at 23–24.

8 *Id.* at 24.

9 *Id.* at 30; *see also Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, 279 S.W.3d 650, 653 (Tex. 2009) ("[T]he focus should be on 'when damage comes to pass, not when damage comes to light.'"); *Amerisure Mut. Ins. Co.*, 2010 WL 1068087 (no duty to defend because date of actual harm was not alleged); *Vines-Herrin Custom Homes, LLC v. Great Am. Lloyds Ins. Co.*, 357 S.W.3d 166, 169 (Tex. App.—Dallas 2011, pet. denied) ("Under the 'actual injury' approach, property damage 'occurs' when actual physical damage takes place rather than when the damage manifests itself or becomes discoverable.").

10 *Id.* at 31–32.

11 *Don's Bldg. Supply*, 267 S.W.3d at 40. ("Finally, we stress that we do not attempt to fashion a universally applicable 'rule' for determining when an insurer's duty to defend a claim is triggered under an insurance policy, as such determinations should be driven by the contract language—language that obviously may vary from policy to policy.").

12 *Guar. Nat'l Ins. Co.*, 211 F.3d at 249 (emphasis in original).

13 267 S.W.3d at 28, n.29 ("[W]e express no view on whether the rule for determining the triggering of coverage is the same for bodily injury and property-damage claims.").

14 *Id.* at 28.

15 *Id.* at 28, n.32.

16 *See, e.g.*, *Keene Corp*, 667 F.2d at 1047 (finding that the policy is triggered in connection with asbestos-related exposure by (1) the inhalation exposure, (2) "exposure in residence" or the time in between initial exposure and manifestation, and (3) manifestation); *Indep. Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 654 F. Supp. 1334, 1359 (D.D.C. 1986), *on reconsideration*, 672 F. Supp. 1 (D.D.C. 1986) ("What is important, is whether the policy was in place at the time exposure to the dioxin caused injury in fact.").

17 *LSG Techs., Inc. v. U.S. Fire Ins. Co.*, No. 2:07-CV-399-DE, 2010 WL 5646054, at *8 (E.D. Tex. Sept. 2, 2010).

18 276 P.3d 1156, 1174–75 (Utah App. 2012) ("Ultimately, we agree with the district court that 'no Texas court has specifically adopted the continuous trigger theory and only the exposure theory has been adopted with respect to . . . bodily-injury claims.'").

19 *See Bristol-Myers Squibb Co. v. AIU Ins. Co.*, No. A-145, 672 (58th Jud. Dist., Jefferson Co., Tex., May 3, 1996) (Mot. Summ. Judg. Order) (finding continuous trigger theory applied in the case of "toxic or harmful" substances).

20 *See, e.g.*, *Lennar Corp. v. Markel Am. Ins. Co.*, 413 S.W.3d 750, 758 (Tex. 2013) (reh'g denied Dec. 13, 2013) ("According to the evidence at trial, water damage from EIFS begins within six to twelve months after home construction is completed and continues until it is repaired.").

21 *See Pilgrim Enter., Inc. v. Maryland Cas. Co.*, 24 S.W.3d 488, 498–99 (Tex. App.—Houston [1st Dist.] 2000, no pet.) ("All five of the lawsuits allege continuous exposure to contaminants released by Pilgrim that seeped or leaked into the surrounding property. Potentially, at least, all of the pleadings allege property damage occurring during the policy period because of *ongoing* contamination or seepage." (emphasis added)).

22 *Don's Bldg. Supply*, 267 S.W.3d at 29–30.

23 *See, e.g.*, *Keene Corp.*, 667 F.2d at 1048; *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 508 (Pa. 1993).

24 *Keene Corp.*, 667 F.2d at 1041.

25 876 S.W.2d 842 (Tex. 1994).

26 *Id.* at 843.

27 *Id.* at 855.

28 *See e.g. CNA Lloyds of Texas v. St. Paul Ins. Co.*, 902 S.W.2d 657, 661 (Tex. App.—Austin 1995) (writ dismissed by agreement Nov. 16, 1995) ("[T]he insurance policies in the instant case, like those analyzed in *Keene*, do not provide for a reduction of the insurer's liability limits if an injury only partially occurs during a policy period. Instead, both policies contract to pay the sums the insured becomes legally obligated to pay, not merely a pro rata portion of that amount.").

29 413 S.W.3d 750, 759 (Tex. 2013) (reh'g denied Dec. 13, 2013).

30 633 F.2d 1212 (6th Cir. 1980) (decision clarified on reh'g, 657 F.2d 814 (6th Cir. 1981)).

31 *See Liberty Mut. Fire Ins. Co. v. Harper Indus., Inc.*, No. 505-CV-243-R, 2007 WL 528523, at *4 (W.D. Ky. Feb. 12, 2007).

32 *See Keenan Hopkins Schmidt & Stowell Contractors, Inc. v. Cont'l Cas. Co.*, 653 F. Supp. 2d 1255, 1265 (M.D. Fla. 2009).

33 *See e.g. Owens-Illinois, Inc. v. United Ins. Co.*, 650 A.2d 974, 995 (N.J. 1994) ("When periods of no insurance reflect a decision by an actor to assume or retain a risk, as opposed to periods when coverage for a risk is not available, to expect the risk-bearer to share in the allocation is reasonable.").

34 *See Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, 246 S.W.3d 42, 54 (Tex. 2008) (declining to recognize that insurer had right to reimbursement for amounts paid on the insured's behalf).

35 *U.S. Fid. & Guar. Co. v. Treadwell Corp.*, 58 F. Supp. 2d 77, 97 (S.D.N.Y. 1999) (citation omitted).

36 *See Thomson Inc. v. Ins. Co. of N. Am.*, 49A05-1109-PL-470, 2014 WL 2772834 (Ind. Ct. App. June 19, 2014), *reh'g denied* (Aug. 15, 2014) (in an all-sums state, court found that policy language indemnifying insured for "those sums," as opposed to "all sums," obligated insurer to pay only bodily injury or property damage that occurred during the policy period).

37 *See LSG Techs.*, 2010 WL 5646054, at *10 (citing 23–145 APPLEMAN ON INSURANCE § 145.4).

38 Thomas M. Jones & Jon D. Hurwitz, *An Introduction to Insurance Allocation Issues in Multiple-Trigger Cases*, 10 VILL. ENVTL. L.J. 25, 36 (1999).

39 *See LSG Techs.*, 2010 WL 5646054 at *10.

40 *See id.* at *1.

41 *See id.* at *2.

42 *See id.* at *10.

43 876 S.W.2d 842 (Tex. 1994).

44 *Id.* at 854–55.

45 *Id.* at 855.

46 *LSG Techs.*, 2010 WL 5646054 at *11; *see also Commercial Underwriters Ins. Co. v. Royal Surplus Lines Ins. Co.*, 345 F. Supp. 2d 652, 672 (S.D. Tex. 2004) (declining to accept an excess carrier's argument that the primary policies should stack and the excess carrier should only become liable after all primary policy coverage limits had been exhausted in a continuous injury case, but instead finding that the excess carrier's "obligations are triggered after the limits of one primary policy period have been exhausted").

47 *See LSG*, 2010 WL 5646054, at *12.

48 *See id.* (citing *State Farm Fire and Cas. Co. v. Griffin*, 888 S.W.2d 150, 155 (Tex. App.—Houston [1st Dist.] 1994, no writ)).

49 *See id.*

50 *Garcia*, 876 S.W.2d at 853.

51 *Trammell Crow Residential Co. v. St. Paul Fire & Marine Ins. Co.*, No. 3:11-cv-2853, 2014 U.S. Dist. LEXIS 184876, at *8–11 (N.D. Tex. Jan. 21, 2014).

52 No. A-07-CA-718, 2008 WL 5973220, at *1 (W.D. Tex. Aug. 25, 2008).

53 *Id.* at *6.

54 *Id.* at *5.

55 *See id.*

56 *See id.* at *6.

57 *See id.* at *7.

58 2010 WL 5646054 at *13.

59 *See id.*

60 *Id.* at 14.

61 *See id.*

62 *Garcia*, 876 S.W.2d at 853 ("The consecutive policies, covering distinct policy periods, could not be 'stacked' to multiply coverage

for a single claim involving indivisible injury.").

63 *See id.* at 853 (emphasis added).

64 *See id.* at 855 (emphasis added).

65 *Id.* at n.21.

66 *See* 465 F.3d 614, 616 (5th Cir. 2006).

67 *Id.* at 623–25 (emphasis in original).

68 *See N. Am. Specialty Ins. Co. v. Royal Surplus Lines Ins. Co.*, 541 F.3d 552, 556–57 (5th Cir. 2008) ("The [*Garcia*] court held that the coverage limits 'could not be "stacked" to multiply coverage for a single claim involving indivisible injury' such that the coverage limit would be the 'sum of the limits provided by the applicable policies.'" (internal citations omitted)); *Employers Ins. of Wausau v. Burlington Northern & Santa Fe Ry.*, 336 F. Supp. 2d 637, 645 (E.D. Tex. 2003) (same); *Commercial Underwriters Ins. Co.*, 345 F. Supp. 2d at 666 (same); *RLI Ins. Co. v. Philadelphia Indem. Ins. Co.*, 421 F. Supp. 2d 956, 960–61 (N.D. Tex. 2006) ("[T]he Texas Supreme Court has adopted a rule against stacking, holding that 'consecutive policies, covering distinct policy periods, [cannot] be stacked to multiply coverage for a single claim involving indivisible injury.'" (internal quotations omitted)).

69 *Garcia*, 876 S.W.2d at 854.

70 281 P.3d 1000, 1002–03 (Cal. 2012).

71 *See id.* at 1003.

72 *Id.*

73 *See id.* at 1003–04.

74 *See id.* at 1005–08.

75 *Id.* at 1008.

76 *Id.* (quoting Rebecca M. Bratspies, *Splitting the Baby: Apportioning Environmental Liability among Triggered Insurance Policies*, 1999 B.Y.U. L. Rev. 1215, 10245 (1999)).

77 *Id.*

78 *Id.* at 1008–09.

79 *See id.*

80 98 F.3d 1440, 1453 (3d Cir. 1996).

81 612 F.3d 851 (5th Cir. 2010).

82 Plaintiff's Tenth Amended Petition at 9, *RSR Corp. v. A.I.U. Ins. Co. et al.*, No. 93-0127 (71st Dist. Ct., Harrison County, Tex. Nov. 2, 2002).

83 *See id.* at 11–27.

84 *RSR Corp. v. Int'l Ins. Co.*, No. 3:00-cv-0250, 2009 WL 927527, at *2 (N.D. Tex. Mar. 23, 2009) (unpublished).

85 *See id.*

86 *See id.* at *3.

87 *See id.*

88 *See id.* at *3.

89 *See id.* at *6–14.

90 *RSR Corp.*, 612 F.3d at 857.

91 *Id.*

92 *See id.* at 859.

93 *See id.* at 861.

94 *See id.* at 861–62.

95 *See id.* at 862.

96 *See id.*

97 *RSR Corp.*, 2009 WL 927527 at *8 (citing *Hartford Cas. Ins. Co. v. Executive Risk Specialty Ins. Co.*, No. 05-03-00546, 2004 WL 2404382 at *2 (Tex. App.—Dallas Oct. 28, 2004, pet. denied)); *see also LSG Techs.*, 2010 WL 5646054, at *12 (citing *State Farm Fire & Cas. Co. v. Griffin*, 888 S.W.2d 150, 155 (Tex. App.—Houston [1st Dist.] 1994, no writ)).

98 Unfortunately for RSR, it was estopped from making this argument because it had previously asserted, unknowing of the ramifications, that the CGL and EIL policies essentially cover the same risk.

99 *See* 23-145 APPELMAN ON INSURANCE § 145.4; *LSG Techs.*, 2010 WL 5646054 at *12. *See also St. Paul Fire & Marine Ins. Co. v. Vigilant Ins. Co.*, 919 F.2d 235, 241 (4th Cir. 1990) ("[W]hen policies provide consecutive coverage rather than concurrent coverage, 'other insurance' clauses are simply inapplicable.").

100 *Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 236 S.W.3d 765, 775 (Tex. 2007).

101 *RSR Corp.*, 2009 WL 927527 at *15 (citing *GenCorp., Inc. v. AIU Ins. Co.*, 197 F. Supp. 2d 995, 1007–08 (N.D. Ohio 2008) and *Koppers Co.*, 98 F.3d at 1440).

102 *Id.*

103 *RSR Corp.*, 612 F.3d at 862–63.

104 *RSR Corp.*, 2009 WL 927527 at *17–18.

105 *See id.* at *17.

106 *See id.* at *19.

107 649 F.3d 367 (5th Cir. 2011).

108 *See id.* at 369.

109 *See id.* at 370.

110 *See id.*

111 *See id.*

112 *Id.*

113 *Id.* at 373.

114 444 S.W.3d 307, 309 (Tex. App.—Eastland 2014, pet. denied).

115 *See id.*

116 *See id.* at 310.

117 *Id.* at 312.

118 *See id.* at 312–13.

119 *Id.*

120 *See id.* at 313.

121 *Id.*

122 *Id.*

123 *Martin Res. Mgmt. Corp. v. Axis Ins. Co.*, 803 F.3d 766, n.4 (5th Cir. 2015).

124 *See* Christopher C. French, *The "Non-Cumulation Clause":*

An "Other Insurance" Clause by Another Name, 60 U. KAN. L. REV. 375, 386 (2011).

125 *See id.* at 386–87; Jan M. Michaels et al., *The "Non-Cumulation" Clause: Policyholders Cannot Have Their Cake and Eat it Too*, 61 U. KAN. L. REV. 701, 717 (2013).

126 *See id.*

127 *See id.*

128 *See, e.g.*, *Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 418 F.3d 330 (3d Cir. 2005); *Endicott Johnson Corp. v. Liberty Mut. Ins. Co.*, 928 F. Supp. 176 (N.D.N.Y. 1996).

129 *See* No. Civ. 01-514-HA, 2004 WL 1173185, at *10 (D. Ore. May 26, 2004).

130 *See id.* at *1.

131 *See id.* at *10–11.

132 *See id.* at *11.

133 *Id.*

134 *See id.*

135 *See id.*

136 *See id.*

137 *See* 836 P.2d 703, 706 (Ore. 1992).

138 *See, e.g.*, *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 126 (Tex. 2010) ("The policy's terms are given their ordinary and generally-accepted meaning unless the policy shows the words were meant in a technical or different sense.").

139 No. 03-3637, 2006 WL 1050110, at *12–13 (E.D. Pa. April 21, 2006).

140 *See* No. 11-247, 2013 WL 5436934, at *26–27 (W.D. Pa. Sept. 27, 2013).

141 *See* 2006 WL 1050110, at *14–19.

142 *See id.* at *16.

143 *See* Review Requirements Checklist Commercial General Liability *and* Review Requirements Checklist Commercial Umbrella available at http://www.tdi.texas.gov/commercial/pcckgl.html

144 *Id.*

145 *See Gotham Ins. Co. v. Warren E&P, Inc.*, 455 S.W.3d 558, 564 (Tex. 2014) (noting that the "Texas Insurance Code renders invalid insurance clauses that make policies void or voidable due to misrepresentations in proofs of loss" under certain circumstances).

146 *See Greene v. Farmers Ins. Exch.*, 446 S.W.3d 761, 770 (Tex. 2014).

147 *See id.*; Tex. Ins. Code § 2301.003(b)(1).

148 *See* Tex. Ins. Code § 2301.007(a)(2).

149 *Greene*, 446 S.W.3d at 770.

150 *See Bituminous Cas. Corp. v. Vacuum Tanks, Inc.*, 975 F.2d 1130, 1132 (5th Cir. 1992).

By Christopher H. Avery

A HUNTING WE WILL GO: COVERAGE QUESTIONS INVOLVING ONE OF TEXAS'S FAVORITE PASTIMES

As the New Year passes, so does the time-honored ritual of hunting season. This year's season was particularly notable because Texas voters passed Proposition 6, which amended the Texas Constitution to protect the right to "hunt, fish, and harvest wildlife." What many voting Texans did not realize, however, is the impact that hunting has on insurance coverage issues.

Surprisingly, hunting has shaped insurance coverage law in Texas and several other states, in important ways. The unique facts associated with hunting not only make for interesting fact patterns, but occasionally difficult application of those facts to standard CGL or other policy terms. This article examines some of the more notable cases. Although the article will focus on Texas law, at least one area of coverage merits nationwide consideration.

A. How Does One Define "Hunting?"

An article about hunting seems straightforward enough, but when you think about the definition of "hunting," it actually can be quite broad. Consider, for example, that traveling to and from the hunting location could broadly be considered as both traveling and hunting. Many hunters, after all, keep their weapons loaded to and from the hunting location on the off-chance a buck or other prey could appear. In that case, although the hunt has not yet technically begun, it is still arguably "hunting." The same could be said for constructing blinds, setting feeders, or even setting up camp or unpacking gear.

In *Warrilow v. Norrell*, one Texas court of appeals tried to solve the ambiguity of what actually constitutes "hunting." In that case "three hunting buddies," Norrell, Kerr, and Wolfe, had been on a deer hunting trip in Colorado.[1] Upon arriving, the three men rented a four-wheel drive vehicle from a local resident for easy transport to and from the hunting fields.[2] On the last day of the hunt, Norrell shot a deer and secured it to the vehicle, while Kerr did not.[3] To take advantage of the last few hours of the hunt, Norrell suggested that Kerr keep his holster and fully-loaded pistol handy in case they spotted a deer on the way to return the vehicle.[4]

On the way to return the vehicle, the left rear tire went flat, and the three hunters exited the vehicle to change the tire.[5] To assist with the operation, Kerr removed his belt and moved to set his holster on the ground. Tragically, he dropped the pistol, which then discharged and hit Norrell in the left temple. Norrell died almost one week later. Norrell's family first brought suit against the pistol manufacturer, Sturm, Ruger & Company on products-defect theories. Ruger then made Kerr a third-party defendant and sought contribution. Kerr's homeowner's insurer, Foremost, provided a defense and also tendered its $50,000 limits in contribution to Ruger. The Norrells next brought suit directly against Kerr.

At the time of the accident, Kerr was a member of the NRA, and as such, was covered under a master policy of insurance referred to as a "Peacemaker" policy. The policy was underwritten by C.J. Warrilow, a Lloyds syndicate. Upon receiving the claim, Warrilow denied coverage on the basis that changing a tire did not constitute "hunting" and because of an automobile exclusion. The Peacemaker Policy provided coverage for:

> (a) bodily injury, or
>
> (b) property damage caused by an occurrence and rising [sic] out of the use by the Individual Insured Member of firearms, bows and arrows or trapping equipment, but only while engaged in the following activities:
>
> (i) Hunting or trapping on public or private land.

The Policy also excluded:

> (k) Bodily Injury or Property Damage arising out of the ownership, maintenance, operations, use, loading or unloading of:
>
> … (ii) Any automobiles

The evidence against Kerr was substantial.[6] Not only had he failed to take advantage of a free Ruger program to correct the defect in the pistol, he also failed to use the basic safety practice of keeping an empty chamber under the hammer's

Christopher H. Avery is a Senior Attorney with Thompson, Coe, Cousins & Irons, LLP in Houston. He is a veteran practitioner in defending high-profile coverage and bad faith cases across the country. He has defended all manner of insurance cases, including general liability, surplus lines, business interruption, and commercial property. He obtained his undergraduate degree from Texas A&M University and his law degree from South Texas College of Law.

pistol to prevent accidental firing.[7] Following the advice of his attorney, Kerr consented to the entry of judgment against him and in favor of the Norrells for $2.9 million.[8] Kerr was also able to obtain a covenant not to execute and an assignment of any potential claims against both the NRA and Warrilow.[9]

Based on the assignment, the Norrells then brought suit against the NRA and Warrilow.[10] The NRA settled and was dismissed from the case; however, the claims against Warrilow proceeded to trial.[11] The jury concluded that Kerr's loss occurred while hunting and that it was not excluded under the Warrilow policy.[12] It also found Warrilow intentionally breached its duty of good faith and fair dealing.[13] The jury found: $2.9 million in actual damages, $100,000 in mental anguish damages, and $7.5 million in punitive damages.[14] The trial court entered judgment for the Norrells to the tune of $10,963,066.53.[15]

The Corpus Christi Court of Appeals first examined whether coverage had been triggered by bodily injury that occurred during "hunting." It first observed that while "hunting has a plain and generally accepted meaning," the parties presented conflicting, but equally reasonable interpretations. The Norrells contended that "hunting" included travel to and from the fields, while Warrilow contended that the definition was limited solely to the "actual pursuit of game." The court observed that while the term "hunting" itself is not ambiguous, it was ambiguous when applied to the actual facts of the case. Given that ambiguities must be construed in favor of coverage, the court held the jury could reasonably conclude that this accident arose out of hunting activities.

In his concurrence, Chief Justice Nye disagreed with this finding by citing the Texas Parks & Wildlife Code, which says that "hunt" "includes take, kill, pursue, trap, and the attempt to take, kill, or trap."[16] On the facts before him, he could not conclude that the actions constituted a "hunt." Actual hunting had ceased for the day and the men were on a different mission, i.e., to return a vehicle.

Perhaps the most interesting upshot of these two holdings is that they never really resolve the question of what exactly constitutes "hunting." The court of appeals deferred to a jury's finding, which it noted was somewhat unusual given that judges must normally make the findings of law. As well, the definition relied upon by Chief Justice Nye no longer appears in the Parks and Wildlife Code. Therefore, it appears that for the time being, what constitutes "hunting" is fair game.

B. Does It Involve an Automobile or Truck?

With remote locations and the need for moving equipment, it comes as little surprise that the greatest number of coverage situations involving hunting also involve the use of a car, truck, or trailer. While several Texas cases provide interesting examples, several trends can be picked up from other cases across the country.

First, Texas cases involving the use of an auto will inevitably turn on the Texas Supreme Court's decision in *Mid-Century Insurance Co. of Texas v. Lindsey*, which set out the Texas test of what exactly constitutes "use" of an auto."[17] In *Lindsey*, a boy returned to his father's truck during a fishing trip[18] to retrieve his overalls.[19] Because the truck was locked, the boy climbed through the truck's sliding rear window.[20] As he climbed through the window, he accidentally hit a loaded shotgun.[21] The shotgun discharged and injured a passenger in a car parked next to the truck.[22] In determining whether the action was "use" of an "auto" for purposes of a UIM policy, the supreme court adopted three broad factors. For injury to arise out of the use of a motor vehicle for purposes of insurance coverage:

> (1) the accident must have arisen out of the inherent nature of the automobile, as such;
>
> (2) the accident must have arisen within the natural territorial limits of an automobile, and the actual use must not have terminated; and
>
> (3) the automobile must not merely contribute to cause the condition which produces the injury, but must itself produce the injury.[23]

Since *Lindsey*, courts have applied these factors to a variety of situations.[24] One case, however, arises out of a hunting incident and bears mentioning. In *Farmers Insurance Exchange v. Rodriguez*, the Fourteenth Court of Appeals confronted a situation in which one neighbor was injured while assisting another in unloading a deer stand from a trailer.[25] The first neighbor, Woodling, had transported the deer stand from his deer lease to his home via a trailer attached to his pickup truck.[26] After pulling into his driveway, he pushed the deer stand out of the trailer until the legs touched the driveway.[27] He then left the stand resting at a 30 degree angle against the trailer and attempted to use a come-along to bring the stand upright. "Realizing he could not accomplish the task alone, he requested assistance from his neighbor, Rodriguez."

The two men first attempted to move the deer stand by climbing into the trailer and walking forward onto the driveway.[28] Each used both hands to push the stand upward.[29] They then stepped onto the driveway and took one or two more steps.[30] Realizing the sheer weight of the stand, Woodling yelled to Rodriguez that he could not hold it and to jump.[31] Woodling then jumped away, and in a very un-neighborly fashion, left Rodriguez to hold the 350 pound stand by himself.[32] Necessarily, the stand fell and injured Rodriguez.[33] At the time Woodling had a homeowners insurance policy issued by Farmers and a

personal automobile policy issued by Allstate.[34]

Rodriguez brought suit first against Woodling and Allstate, asserting that the accident had arisen out of the use of an automobile. He later added Farmers to the suit. Farmers moved to sever, contending its joinder was improper. In response, Rodriguez filed a partial motion for summary judgment, seeking a declaration that it had a duty to indemnify Woodling. Farmers then filed its motion for summary judgment, contending that joinder was improper, the claims were not ripe, and in any event, its "trailers or semitrailers" exclusion barred coverage. Allstate also moved for summary judgment and asserted the accident did not arise out of the use of an automobile, which was necessary to trigger coverage. The trial court denied both motions, and the case ultimately resulted in a $211,618.42 judgment against Woodling.

On appeal, the court first addressed Farmers' ripeness claims, and concluded that the claims were not ripe.[35] It was undisputed that "when the trial court granted Rodriguez's summary judgment against Farmers, Woodling's obligation to pay damages to Rodriguez had not been established by final judgment or by agreement."[36] Therefore, any duty of indemnity could not have been triggered.[37]

The court then considered whether coverage had been triggered under the Allstate automobile policy. It first recognized the statutory requirement of underinsured motorist coverage and that "Texas state and federal courts . . . have concluded that automobile liability policies may cover loading and unloading of a vehicle even when those terms are not specifically included in the policy."[38] Because Allstate did not specifically exclude "loading and unloading," though it certainly could have, it could not rewrite its policy.[39] The court then examined the three factors set out by the Texas Supreme Court in *Mid-Century Insurance Co. of Texas v. Lindsey*, perhaps the most seminal case on use of an automobile.[40] In *Lindsey*, the supreme court explained:

> For an injury to fall within the "use" coverage of an automobile policy (1) the accident must have arisen out of the inherent nature of the automobile, as such; (2) the accident must have arisen within the natural territorial limits of an automobile, and the actual use must not have terminated; (3) the automobile must not merely contribute to cause the condition which produces the injury, but must itself produce the injury.[41]

On the facts before it, the court of appeals first recognized that the inherent nature of a trailer is to haul and tow materials.[42] Part of that task includes "not only the immediate action of loading and unloading materials from the trailer but also moving them from their starting point to their destination."[43] Thus, the first factor was met. Likewise, the second factor was met because the Texas "complete operation" doctrine indicated that use of automobile involves the "complete operation of transporting the goods between the vehicle and the place from or to which they are being delivered."[44] Finally, despite Allstate's causation arguments, the court held:

> The accident did not merely happen near the trailer: Woodling and Rodriguez could not have accomplished the same result without the presence of the trailer, and, as we have noted, the use of a trailer includes unloading materials.[45]

As such, the injury had arisen out of the use of an automobile, and Allstate's coverage obligations had been triggered.

The *Lindsey* court, among others, also recognized the legal research and categorization done by the Missouri Court of Appeals in *Cameron Mutual Insurance Co. v. Ward*.[46] *Ward* involved an accidental gun discharge while two friends were coyote hunting. In determining the coverage issue, the court recognized five broad types of accident patterns which generally appear to apply in hunting/coverage scenarios and the general conclusions courts have reached:

1) Accidents involving the discharge of firearms inside moving or motionless vehicles while an occupant of the vehicle is touching or handling the firearm. Courts generally find that there is no coverage because there is no causal connection between the firearm and the inherent use of the vehicle.

2) Accidents involving discharges of firearms while loading and unloading them from a vehicle. Courts generally have found that coverage is afforded because loading and unloading is part of the inherent process of using a vehicle.

3) Accidents that occur when using the auto as a "gun rest." Courts seem to be divided on this point, although the fact patterns generally are more diverse than those seen in the previous two categories.

4) Accidents involving firearms resting in or being removed from gun racks permanently attached to vehicles. Several courts have found that coverage applies in these situations.

5) Accidents involving a firearm discharge caused by the actual movement or operation of the vehicle, and not by a person. In these cases, causation is clearer than almost all of the other categories, and courts generally find

in favor of coverage.

While there are of course some exceptions to the categories and rulings, courts across the country seem to view these conclusions in a similar manner.

C. Can Hunting Further a Business's Activities?

Many hunters and non-hunters alike know and understand that hunting can frequently blur the line between working and recreation. The Fourteenth Court of Appeals addressed that line in dealing with a coverage question, in a way that many hunters may enjoy, and many companies should read closely.

In *Employers Mutual Liability Insurance Co. of Wisconsin v. Sanderfer*, Marion Sanderfer was rendered a paraplegic when he fell out of a tree while on a deer hut.[47] At the time of the accident, Sanderfer was vice president and superintendent of drilling for Henderson Drilling Company.[48] In addition to his work supervising drilling activities, Sanderfer was also charged with keeping up "good will" with various Henderson customers.[49] This was a 24-hour job and included entertaining clients, taking them to lunch, on fishing trips, and in other ways. *Id.*

Prior to the incident in question, Sanderfer was aware that a group of past, current, and potential clients planned to go hunting on the ranch of another customer.[50] Although Sanderfer did not exactly feel like going on this trip, his boss told him, "The fellows that would be up there and it would be good to be around. I should go on up there and be with them to create good will."[51] When asked on cross-examination how you promote good will, Sanderfer replied, "Well, up there like hunting with those guys and playing a little pitch or poker or drinking a little whiskey and just cutting up and telling lies about how big the deer was that you didn't get. . . . In other words, it is just a chance to get better acquainted with them."

Henderson Drilling's workers' compensation carrier brought suit against Sanderfer to set aside an award of compensation at the maximum rate allowable for total and permanent disabilities, medical expenses, and attorneys' fees.[52] Reviewing the findings of the underlying trial court, the Fourteenth Court of Appeals affirmed a judgment in Sanderfer's favor.[53] According the court of appeals "[Sanderfer] went to the lease to hunt and otherwise associate with persons who furnished business to Henderson Drilling Company. He was promoting good will for his company. That was one of his duties. This suffices to support course and scope of employment." [54]

The upshot of this decision is interesting from a coverage perspective. Although the case itself dealt with workers' compensation insurance, the impact on CGL and other types of liability coverage could be substantial. Large numbers of hunts every year involve business people and their current or potential clients. While hunting is the nominal purpose of such events, most people realize that the primary reason of the hunt is actually to stimulate more business. Under the right circumstances, coverage questions from similar accidents could become quite complicated. As such, businesses and insurers should carefully analyze their own liability policies when employees take to the woods.

The impact of the *Sanderfer* decision becomes even more interesting when compared to the Fourth Circuit's recent ruling that a hunting club member was not insured under the club's policy.[55] In *Marks v. Scottsdale*, Timothy Johnson, a member of a hunting club, was participating in a deer hunt with other members of the club. He had hunted on the property several times and was familiar with the general boundaries. He was also familiar with the shotgun he was using and how far a shot would travel when fired. Nevertheless, when Johnson fired towards a public highway approximately seventy-five yards away, pellets traveled across the highway and struck and injured a claimant.

The injured claimant sued both Johnson and the club. Johnson sought coverage under the club's policy. According to Johnson, because the policy insured club members "with respect to their liability for [the club's] activities," he was entitled to defense and indemnity. The Fourth Circuit, however, disagreed with Johnson's assertions. The court began by noting that two other courts had ruled that similar language was limited to activities a club member performed for the club as an entity.[56] It explained: "Members are covered with respect to their liability *for* the Club's own corporate activities, not with respect to anything they may do during or in connection with Club activities."[57] Therefore, the insurer did not owe Johnson a duty of defense or indemnity in the underlying suit.

Business owners should pay particular attention to the dovetail effect of the *Sanderfer* and *Marks* cases. While entertaining clients may be considered work performed on a company's behalf, the same is not necessarily true for members of a hunting club. How coverage will apply in an Other Insurance situation, or where the business actually is a hunting club does not appear to have been addressed. Until more decisions are issued, each question will need to be addressed with the general guidelines offered by these cases and their application to the unique set of facts presented.

D. Was It an Accident?

Many insurance practitioners are familiar with the well-established principles surrounding the question of whether something is, or is not, an accident. The Texarkana Court of Appeals recently applied those principals, along with the "eight corners" rule, in an insurance coverage scenario. In *Texas Farm Bureau Underwriters v. Graham*, an insured shot and killed a would-be burglar who broke into the insured's ranch house in Smith County.[58] The burglar's family later

brought suit against the homeowner, but this being Texas, a jury disagreed and an underlying court ultimately entered judgment in favor of the ranch owner.[59] The ranch owner then brought suit against his ranch-property insurer, which had denied a defense.

The insurer's defenses to coverage were twofold.[60] First, the underlying petition established that the shooting was not a covered occurrence.[61] Next, the policy expressly excluded coverage for bodily injuries caused by intentional acts.[62] The insurer filed a summary judgment motion on its coverage defenses and the insured filed a cross-motion.[63] The underlying court granted summary judgment for the insured.[64] The court of appeals, however, disagreed.

The court of appeals began its analysis by noting a critical omission from the underlying pleadings: that the decedent was in the act of burglary when he was shot and killed.[65] Instead, the petition asserted that the burglar's family "had no way of knowing why" he was killed and that the ranch owner had committed a "violent assault and battery."[66] The insured pressed the court of appeals to apply an exception to the Texas "eight corners" rule to include the omitted reference to burglary.[67] According to the insured, doing so would show a covered occurrence, rather than an intentional act.[68] Nevertheless, the court of appeals refused to apply the exception or to consider the evidence.

It then continued its analysis by recognized that while alternative theories of liability could theoretically trigger coverage, the proper analysis was to analyze the actual facts alleged in the petition.[69] In that case, the underlying petition asserted that a firearm had been used to carry out the insured's intended purpose of killing the burglar and committing a "vicious assault."[70] While the court of appeals did recognize that an intentional act can be made accidental depending on its effect, the facts alleged did not meet that conclusion. According to the court of appeals, "[b]ecause [the burglar's] death was the type of injury that ordinarily follows from pointing a shotgun at a person's head and shooting him or her 'at very close range,' we conclude that the injury was a natural and probable result of Graham's act."[71] Accordingly, the facts did not allege a covered occurrence that would have triggered a duty to defend.

The upshot of this decision is interesting when applied to hunting scenarios. While many of the fact patterns described in this paper involve accidental discharges, those involving targeted firing apparently differ in their conclusions. The *Graham* facts certainly present a unique scenario, but the conclusion that aiming firearms is an intentional act could be more wide reaching when applied to errant shots, mistaken targets, or any number of scenarios. Nevertheless, the ruling is clear and so hunters and insurers should be aware not only of the seriousness when aiming and firing, but also of the implications doing so could have on coverage.

E. Conclusion

There are dozens more cases across the country dissecting hunting scenarios and their application to insurance questions, but this paper simply provides a broad overview of the surprising ways in which hunting has influenced coverage law. Although the facts of the cases are diverse, two conclusions can be reached. First, hunters, hunting clubs, and property owners should review their insurance policies to see if other coverage may be necessary. Next, it is axiomatic that hunter's safety can never be overemphasized. The cases discussed above only add to this emphasis and remind all hunters that the most important practices are those that are the safest.

1 791 S.W.2d 515, 517 (Tex. App.—Corpus Christi 1989, writ denied).

2 *Id.*

3 *Id.*

4 *Id.* The case is not clear as to why the hunters felt a pistol would be sufficient to cleanly kill a Colorado deer.

5 *Id.*

6 *Id.* at 518.

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.* at 519.

16 Tex. Parks & Wild. Code Ann. § 61.005(1) (Vernon 1976). It is worth noting that this definition no longer appears in the hunting portions of the Texas Parks & Wildlife Code.

17 997 S.W.2d 153 (Tex. 1999).

18 Although *Lindsey* arose during a fishing trip, the presence of a shotgun in a gun rack makes it safe to assume that the truck owners were likely also hunters.

19 *Id.* at 154.

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.* at 157.

24 The *Warrilow* court also examined whether the accident arose from the use of an auto, but given that it predates *Lindsey*, there is some question as to its precedential value on the point.

25 366 S.W.3d 216, 219 (Tex. App.—Houston [14th Dist.] 2012, pet. denied).

26 *Id.* at 220.

27 *Id.*

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.* at 223.

36 *Id.*

37 *Id.*

38 *Id.* at 225 (internal citations omitted).

39 *Id.* at 226.

40 *Id.* (citing *Mid-Century Ins. Co. of Tex. v. Lindsey*, 997 S.W.2d 153, 157 (Tex. 1999)). Although *Lindsey* was based on facts involving a shotgun in a pickup truck, the accident itself actually began on a fishing trip. Since this article is based on hunting, a fuller discussion of *Lindsey* will have to wait until a new article discusses coverage in fishing situations.

41 *Lindsey*, 997 S.W.2d at 157.

42 *Rodriguez*, 366 S.W.3d at 227.

43 *Id.*

44 *Id.* at 227 (citing *Liberty Mut. Ins. Co. v. Am. Employers Ins. Co.*, 556 S.W.2d 242, 244 (Tex. 1977)).

45 *Id.* at 228.

46 *Id.*; *see also Taliaferro v. Progressive Specialty Ins. Co.*, 821 So.2d 976 (Ala. 2001), *Quarles v. State Farm Mut. Auto. Ins. Co.*, 533 So. 2d 809 (Fla. Ct. App. 1988) (both citing *Cameron Mut. Ins. Co. v. Ward*, 599 S.W.2d 13, 15–16 (Mo. Ct. App. 1980)).

47 382 S.W.2d 144, 145 (Tex. App.—Houston [14th Dist.] 1964, writ ref'd n.r.e.).

48 *Id.* at 146.

49 *Id.*

50 *Id.*

51 *Id.*

52 *Id.* at 145.

53 *Id.* at 148.

54 *Id.*

55 791 F.3d 448 (4th Cir. 2015).

56 *Id.* (citing *Everett Cash Mut. Ins. Co. v. Ins. Corp. of Hanover*, No. Civ. A 1:07-CV-0641, 2008 WL 4453113 at *5–6 (M.D. Penn. Sept. 30, 2008)); *Lenox v. Scottsdale Ins. Co.*, No. Civ. 04-2282 (SRC), 2005 WL 1076065, at *3–5 (D. N.J. May 5, 2005).

57 *Id.* at 453.

58 450 S.W.3d 919, 921 (Tex. App.—Texarkana 2014, pet. denied).

59 *Id.*

60 *Id.*

61 *Id.*

62 *Id.*

63 *Id.*

64 *Id.*

65 *Id.* at 924.

66 *Id.*

67 *Id.*

68 *See id.* at 924–25.

69 *Id.* at 926 (citing *Farmers Tex. County Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81 (Tex. 1997)).

70 *Id.*

71 *Id.* at 928.

By Brian S. Martin and Cy Haralson

Once More Into The Breach: Will Fracking Usher In The Next Great Wave Of Environmental Coverage Litigation?

I. INTRODUCTION

It is simply impossible to ignore the hundreds of articles covering the energy boom and attendant environmental concerns surrounding hydraulic fracturing, or "fracking." A decades-old practice, fracking allows energy producers to extract oil and natural gas from places where, in the past, it was either too expensive or too difficult to otherwise retrieve. Water, chemicals, and drilling materials are forced into underground shale formations to break up and release hydrocarbons, such as oil or gas.

As fracking operations have multiplied recently, environmentalists and property owners have raised concerns about groundwater contamination and other environmental problems. In June of 2014, New York's highest court upheld the right of towns to ban fracking via zoning ordinances, citing concerns about injury to the health, environment, and character of the towns.[1] Even in Texas, a recent ballot initiative banning fracking in Denton, Texas passed with approximately 60 percent of the vote.[2]

II. TYPES OF PROBLEMS POSED

A. Water Contamination

Claims of water contamination from fracking fluid have been made in numerous states, including Arkansas, Colorado, California, Louisiana, New York, Ohio, Pennsylvania, Texas, and West Virginia.[3] In 2011, the United States Environmental Protection Agency (EPA) issued a draft report blaming groundwater contamination on fracking in Wyoming.[4] More recently, in a 2015 draft report examining studies of fracking conducted throughout the United States, the EPA concluded that fracking activities have impacted drinking water through surface spills, subsurface fluid migration, and inadequately treated flowback and produced water.[5]

In 2014, the EPA began consideration of and sought public comments on new rules and incentives for energy companies to disclose the chemicals used in fracking operations.[6] The Government Accountability Office has also encouraged the EPA to increase its enforcement of water contamination (and seismic activity) protection.[7] Many energy companies have objected to increased federal oversight on the grounds that such disclosure would expose proprietary information and trade secrets, and that such regulations are best left to the states and voluntary industry standards.[8]

There have been several recent opinions involving cleanup and water contamination claims. Two of those cases, *Mangan v. Landmark 4 LLC*[9] and *Boggs v. Landmark 4 LLC*,[10] dealt with water contamination and health claims made against oil and gas well operators using hydraulic fracturing. In addition, a February 13, 2013 memorandum ruling in *Bombardiere v. Schlumberger Technology Corporation*[11] involved claims alleging health effects from exposure to fracking chemicals while an employee was working at the site of a natural gas well. Further, on January 30, 2013, the United States District Court for the Middle District of Pennsylvania issued an opinion in *Roth v. Cabot Oil & Gas Corporation*,[12] wherein land owners claimed groundwater contamination from the operator's fracking activities.

B. Earthquakes

Fracking is also blamed for minor earthquakes that have occurred in Ohio, Oklahoma, and Texas.[13] Researchers have long considered it possible that fluid-injection operations, such as fracking, can trigger seismic events such as earthquakes.[14] One University of Texas seismologist analyzed seismic activity in the North Texas Barnett Shale formation and identified an increase of earthquakes within a few miles of injection wells.[15] In 2013, National Geographic identified new studies tying fracking to a rash of earthquakes.[16] Geologist Heather Savage of Columbia University stated: "When you overpressure the fault, you reduce the stress that's pinning the fault into place and that's when earthquakes happen."[17]

Brian S. Martin is a partner in the Houston office of Thompson, Coe, Cousins & Irons. He represents clients in insurance coverage matters and has extensive experience including trials and appeals of general liability, environmental, toxic tort, construction, director's & officer's and bad faith coverage cases.

Cy Haralson is a Senior Attorney in the Houston office of Thompson, Coe, Cousins & Irons. His practice focuses primarily on insurance coverage and defense, including complex, multi-party insurance coverage litigation and disputes.

Likewise, in April 2012, the United States Geological Survey stated that the increased seismic activity experienced in an area of the Midwest with increased oil and gas production activity was "almost certainly manmade."[18] While the report does not conclusively link the actual process to specific earthquakes, the link is one that will almost certainly manifest itself in lawsuits for property damage.

C. Pending Fracking Litigation

Not surprisingly, given the nature of the risks, including potential health and environmental concerns, there already are a number of lawsuits relating to fracking operations across the United States, which include the following pending cases:

- *Anschutz Exploration Corp. v. Town of Dryden*, 35 Misc. 3d 450, No. 2011-0902, *complaint filed* (N.Y. Sup. Ct., Tompkins County Feb. 21, 2012)
- *Arbor Res. v. Nockamixon Township*, 2009 WL 1288232, 973 A.2d 1036 (Pa. Commw. Ct. 2009)
- *Armes v. Petro-Hunt, LLC*, No. 4:10-CV-078, 2012 WL 1493740 (D.N.D. April 27, 2012)
- *Armstrong v. Chesapeake Appalachia*, 2010 WL 4680899, *complaint filed* (M.D. Pa. 2010)
- *Baker v. Anschutz Exploration Corp.*, 68 F. Supp. 3d 368, No. 6:11-CV-061190, *complaint filed* (W.D.N.Y. Dec. 17, 2014)
- *Berish v. Sw. Energy Prod. Co.*, 763 F. Supp. 2d 702 (M.D. Pa. 2011)
- *Boggs v. Landmark 4 LLC*, No. 1:12-CV-614, 2012 WL 3485288 (N.D. Ohio Aug. 13, 2012) (slip op.)
- *Boggs v. Landmark 4 LLC*, 2013 WL 944776 (N.D. Ohio Mar. 11, 2013)
- *Bombardiere v. Schlumberger Tech Corp.*, 934 F. Supp. 2d 843 (N.D. W.Va. 2013)
- *Brockway Borough Mun. Auth. v. Flatirons Dev.*, *complaint filed* (Pa. Ct. Com. Pl., Jefferson County 2010)
- *Citizens for Pa.'s Future v. Ultra Res.*, No. 4:2011-CV-01360, *complaint filed* (M.D. Pa. 2011)
- *Clean Water Action v. Mun. Auth. City of McKeesport*, 2011 WL 2883571, *complaint filed,* (W.D. Pa. July 19, 2011)
- *Cooperstown Holstein Corp. v. Town of Middlefield*, 35 Misc. 3d 767, No. 2011-0930 (N.Y. Sup. Ct., Otsego County Feb. 24, 2012)
- *Delaware Riverkeeper Network v. Collier*, No. 11-0423, *complaint filed* (D. N.J. 2011)
- *Ely v. Cabot Oil & Gas Corp.*, 38 F. Supp. 3d 518 (M.D. Pa. 2014)
- *In re Envtl. Impact Statement*, 849 N.W.2d 71 (Minn. Ct. App. 2014)
- *Fiorentino v. Cabot Oil & Gas Corp.*, 750 F. Supp. 2d 506 (M.D. Pa. 2010)
- *Great W. Cas. Co. v. Cobra Trucking, Inc.*, 2013 WL 431949 (D. Mont. Feb. 4, 2013)
- *Hagy v. Equitable Prods.*, No. 2:10-CV-01372, *complaint filed* (S.D. W. Va. 2010)
- *Hill v. Sw. Energy Co.*, 2013 WL 5423847 (E.D. Ark. Sept. 26, 2013)
- *Hiser v. XTO Energy, Inc.*, 768 F.3d 773 (8th Cir. 2014)
- *Hughes v. Dep't of Envtl. Quality*, 2014 WL 547648 (Mich. Ct. App. Feb. 11, 2014)
- *Lancaster v. Chesapeake Appalachia, LLC*, No.11-C 694, *complaint filed* (W.Va. Cir. Ct. April 28, 2011)
- *Leighton v. Chesapeake Appalachia, LLC*, 2013 WL 6191739 (M.D. Pa. Nov. 26, 2013)
- *Magers v. Chesapeake Appalachia, LLC*, 2014 WL 4352084 (N.D. W.Va. Sept. 2, 2014)
- *Mangan v. Landmark 4 LLC*, 2013 WL 950560 (N.D. Ohio Mar. 11, 2013)
- *Parr v. Aruba Petroleum, Inc.*, No. 11-01650-E (Co. Ct. at Law No. 5—Dallas County, Tex. April 22, 2014)
- *Powder River Basin Res. Council v. Wyoming Oil & Gas Conservation Comm'n*, 2014 WY 37, 320 P.3d 222 (Wyo. 2014)
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• *Tucker v. Sw. Energy Co.*, 2011 WL 1980530 *complaint filed* (E.D. Ark. May 17, 2011)

• *TWA Resources v. Complete Prod. Servs., Inc.*, 2013 WL 1304457 (Del. Super. Ct. Mar. 28, 2013)

The primary focus in most cases is water contamination, which generally assert causes of action including:

• negligence based on allegations of improper or faulty well casings that allowed leaking of fracking fluids into aquifers or sources of water;

• trespass due to the migration of fracking fluids onto contiguous property; and

• breach of contract due to allegations that the energy companies failed to abide by or fulfill safety requirements.

Most of these cases have not proceeded to a final judgment on the merits, but those that have highlight the large potential exposures in fracking-related cases. Of particular note is the Dallas County, Texas case, *Parr v. Aruba Petroleum, Inc.*,[19] which some commenters are referring to as the "first fracking trial" in the United States. In *Parr*, Plaintiffs Bob and Lisa Parr sued Aruba Petroleum, Inc. (Aruba) in 2011 for health and property injuries arising out of fracking and other drilling operations by several companies near their ranch. In April 2014, a Dallas County jury returned a $2.925 million judgment against Aruba. Significant settlements have also been reported, such as a 2010 settlement by a Houston-based driller who settled with residents of Dimock, Pennsylvania for $4.1 million over contamination in their groundwater.[20] The number of fracking lawsuits is quickly growing. In many ways, the trajectory of these claims bears a resemblance to the 1980s hazardous waste claims that generated a decade of intense insurance litigation over coverage for environmental clean-up claims.

III. THE CONCERNS OF INSURANCE CARRIERS

A. Commercial General Liability Policies

Most energy companies, as well as those contractors or businesses who do work with them in the oil patch, have commercial general liability policies covering third-party claims for property damage and bodily injury. The most likely defendants in fracking claims are drilling companies, equipment suppliers, suppliers of fracking fluids, trucking companies, and other contractors doing work at fracking sites. Many companies have either general liability coverage or may claim additional insured status on another company's policy. Each of these participants in the drilling process face property and bodily injury claims for their role in groundwater contamination arising from blow-outs, faulty casings, failure to follow safety protocols, and fracking-related site accidents.

When these claims occur, a number of coverage issues are likely to arise. Generally, the nature of the insurance issues will bear more than a passing resemblance to those that arose in the hazardous waste clean-up cases that were widely litigated in Texas throughout the 1980s and 1990s. For instance, relevant issues will include the application of various forms of pollution exclusions, "own property" exclusions, failure to provide notice of claims or events, and long-tail coverage issues (i.e., claims involving a number of years and potentially numerous consecutive policy periods).

B. Long-tail Issues

A long-tail claim is simply one that potentially triggers multiple policies over an extended period of time. Given the nature of water contamination claims, putting aside the more complex claims involving seismic activities or man-made earthquakes, it is likely that many of these events or occurrences will be based upon a series of activities or events that take place over a long period of time. Consequently, there is inevitably a question as to which time periods are involved and which insurance policies would be implicated or responsive to the loss. These questions are common with hazardous waste claims in the past and are very complex. The key issues relating to claims occurring over long periods and potentially involving multiple policies (often including both primary and excess coverage) are trigger and allocation.

While trigger and allocation issues are complex, it is likely that fracking claims made against general liability policies will require factual and legal analysis of these issues. For example, various contamination claims in a single community may implicate the surveying professional services in one policy period, the drilling and extraction operations in a second period, and the shut-down and safety procedures in a third policy period. Further, in cases where there is coverage available under multiple policies, these are likely to be a main area of contention.

C. Pollution Exclusion

Given that most of the claims being brought at this time involve drilling that has taken place post-1986, most of the general liability policies at issue will have various forms of absolute or total pollution exclusions. The standard "absolute" pollution exclusion states as follows:

This insurance does not apply to:

> f. (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:

(a) At or from any premises you own, rent or occupy;

(b) At or from any site or location used by or for you for the handling, storage, disposal, processing or treatment of waste;

(c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for you or any person or organization for whom you may be legally responsible; or

(d) At or from any site or location on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations:

(i) if the pollutants are brought on or to the site or location in connection with such operations; or

(ii) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants.

(2) Any loss, cost or expense arising out of any governmental direction or request that you test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.

"Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.[21]

A typical "total" pollution exclusion states as follows:

This insurance does not apply to:

f. Pollution

(1) "Bodily injury" or "property damage" which would not have

occurred in whole or in part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.

(2) Any loss, cost or expense arising out of any:

(a) Request, demand, order or statutory or regulatory

requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants;" or

(b) Claim or suit by or on behalf of a governmental authority

for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants." [ISO Form CG 21 49 09 99]

In most states, these pollution exclusions have been upheld as unambiguous and applicable to groundwater contamination claims, especially those that involve "traditional" pollution, such as arising from industrial accidents or drilling.[22] In Texas, the effectiveness of these exclusions will likely be an area of intense litigation.

D. Own Property Exclusion

In cases where the alleged contamination involves only the insured's own property, with no offsite groundwater migration, there is a likelihood that the Own Property Exclusion found in general liability policies may preclude clean-up claims. A standard Own Property Exclusion provides as follows:

This insurance does not apply to:

* * *

j. Damage To Property

"Property damage" to:

(1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such

> property for any reason, including prevention of injury to a person or damage to another's property; [ISO Form CG 00 01 12 07]

For instance, when a regulatory body requires the clean-up of the groundwater at a site there may be no coverage if the site is owned by the insured and there has been no offsite contamination.[23] This exclusion, however, is unlikely to be viable in circumstances where there has been offsite contamination.[24] At this time, most of the pending suits involving bodily injury and property damage are based upon migration of the fracking fluids into aquifers or groundwater sources that are used for drinking water by third parties.[25] In those cases, the application of the Own Property Exclusion will be very fact dependent.

E. Notice Provisions

Most general liability policies have a provision in their condition sections requiring the insured to provide notice to their insurers not only of lawsuits or claims that are made against the insured, but also notice of events or occurrences that may give rise to a claim. This provision may apply to many fracking-type claims. For instance, it may be that a company involved in a fracking well may have been aware of a blow-out or a site accident that would be the source of the contamination, but failed to give notice to the insurance company until after a third-party claim or lawsuit was brought against it. In those cases, and especially where there has been a substantial passage of time, loss of evidence or opportunity to investigate, or other types of events that may prejudice the ability of the carrier to handle the claim, the failure to provide notice may invalidate coverage.[26] Consequently, policyholders need to be conscious of the need to promptly provide notice to insurance companies of accidents, well blow-outs, or other events that may lead to contamination. Likewise, insurers should be conscious of this issue when belated claims are presented.

IV. HOMEOWNERS POLICIES

Another potentially significant area is homeowners property insurance claims arising from fracking activities. In addition to potential groundwater contamination leading to bodily-injury claims, some homeowners may suffer various forms of subsidence or well-water contamination. Most homeowner insurance policies provide coverage for the policyholder's home and property for direct physical loss or damage during the policy period. However, many of these policies exclude events, such as contamination of land or water serving residents, as well as settling, cracking, shrinking, or other types of harm alleged by homeowners near fracking sites. While it may turn out that fracking is not responsible for this type of problem, it is a subject of extensive review, especially by consumer groups, that may lead to widespread litigation. Additionally, recent increases in seismic activity purportedly connected to fracking operations in states such as Oklahoma and Texas have spurred an increase in homeowners seeking earthquake coverage.[27]

V. CONTRACTUAL INDEMNITY AND ADDITIONAL-INSURED PROVISIONS

Some jurisdictions where fracking activities occur are either considering or, as in the case of Ohio, putting in place state regulations requiring drilling companies to maintain adequate insurance to protect homeowners and others who may be affected by fracking-based claims.[28] Most of the drilling companies operating well sites use oil and gas leases containing contractual-indemnity provisions, whereby the operating company promises to indemnify and hold harmless the property owner in the event of property damage or bodily injury.

In jurisdictions such as Texas, insurance may or may not be applicable under these contractual-indemnity provisions, depending upon who is an insured under the insurance policy as well as whether the indemnity provision is valid under the state's indemnity laws. In most cases, property owners or parties whom the indemnity provisions are meant to protect should be named as additional insureds on the relevant insurance policies. This applies to both the operators and any contractors that are involved in drilling operations.

VI. OTHER TYPES OF INSURANCE

In addition to the policies above, there are likely to be claims against operators, which will require the permanent or temporary closure of wells that may lead to claims on business-interruption policies. In those cases, the policies, which were meant to replace business income lost as a result of an event that completely interrupts the operations of the business, may be implicated. Consequently, the well blow-out or site accident that shuts down the well may also give rise to claims under a business-interruption policy.

Likewise, given the nature of the claims being made by environmental groups against drilling companies, suits may arise against directors and officers for alleged improprieties in their performance of their duties to the company. In those cases, directors-and-officers insurance (D&O) policies may be responsive to those claims.

Finally, many drilling companies and other businesses in the energy industry have purchased environmental-pollution-liability policies that provide coverage when general liability policies are not applicable due to their broad and expansive pollution exclusions.

VII. CONCLUSION

Although some settlements and judgments are cause for concern, at this early stage it remains possible that the

number of viable claims related to fracking may be limited or even non-existent. Nevertheless, given the current litigation climate and the fact that plaintiffs' attorneys are forming advocacy groups and websites seeking regulatory relief, it is clear that the plaintiffs' bar is primed for much broader litigation. With this litigation heating up, the insurance industry should pay close attention.

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By Christopher W. Martin

THE SCIENCE OF THE APOLOGY: INSURANCE CLAIMS AND LITIGATION

In a society that highly values a genuine apology, it is shocking that most in-house counsel and most trial lawyers never even consider whether an apology might be appropriate to resolve a claim or lawsuit. We teach our children to apologize at a very young age. As adults, we are well-versed in giving and receiving apologies with our spouses, coworkers, friends, and families. It seems one week cannot pass without a high-profile celebrity, sports figure, or politician issuing a public apology for some transgression. It seems, however, that the concept of even considering an apology rarely enters the thought process of claim professionals and trial lawyers when evaluating strategic options for dealing with the claims and lawsuits that cross their desks. The absence of any academic discussions within the field of insurance is certainly not because of the lack of psychological and legal work regarding the science of apology. Apology research is as old as the study of rhetoric and it has gained widespread popularity in other disciplines in the last two decades.

This article will examine the body of scientific thought and analysis on the fascinating topic of business-oriented apologies and then specifically apply it to the realm of resolving insurance claims and lawsuits. No one should assume this is advocating an apology for every claim or even a majority of claims. For most claims and lawsuits, an apology is not needed. In fact, in a handful of claims and lawsuits, an apology might be counterproductive. What needs to change, however, is the claims handling and lawsuit management paradigm which fails to even consider an apology as a viable claim or suit-resolution strategy. In-house counsel and trial attorneys are both foolish and shortsighted if they don't at least consider the viability of an apology as a means of trying to resolve some claims and some insurance lawsuits.

I. The Apology Culture

Any discussion of the science of the apology must begin with the recognition that we live in a culture that places an extremely high priority on the value of a genuine apology. We see this initially in the widespread attempts across all socio-economic, religious, political and racial lines to teach our children and grandchildren the importance of saying they are sorry when they do something considered inappropriate. In our personal lives, an effective apology frequently serves as the "lubricant" necessary for our most cherished relationships to function. Marriages, family relationships, close friends, and work environments seem to function with remarkably greater ease and fluidity if such relationships are lubricated with heartfelt apologies when one is wronged by another, or at least has her feelings hurt by another. In fact, one person's refusal to offer an apology when another believes it is owed can easily mean the end of a relationship or at least sow destructive seeds of distrust, anger, and resentment in the relationship. The best relationships, the best marriages, the best friendships, and the best work environments are ones in which wrongs are easily and quickly recognized and an appropriate apology is humbly offered.

Our culture of apology is most easily seen on the public stage. The act of offering public apologies is now so commonplace for politicians that it seems to have become a central part of their job functions. Sports figures seem to apologize weekly for cheating, lying, and stealing. Musicians, actors, television and radio personalities, journalists, and others seem to apologize constantly for arrests, sexual misconduct, and other moral transgressions. The cultural significance of the apologies of these public figures lies not in their desire or need to publically apologize for some transgression, but in the societal demand for apologies from those who are perceived to have transgressed in some way and the equally strong public desire to accept the apology and move past the perceived wrong.

This is a fascinating psychological concept because the overwhelming majority of people who hear, see, or read a public apology haven't been directly and adversely affected by the perceived transgression. For example, the public apology by former President Bill Clinton for his White House intern "adventures" was perceived by more Americans as directly affecting them because of the transgressions within the office of the president. This is exceptionally rare, however. Most athletes, movie stars, television and radio personalities, or other public figures publically apologize for something that involves some other person or some action typically done in private and certainly doesn't involve the general public. However, not only does our society expect an apology for individuals in positions of power, wealth, or

Chris Martin is the founding Partner of Martin, Disiere, Jefferson & Wisdom LLP with offices in Houston, Dallas and Austin. He is the author of four legal treatises and more than 100 articles. For 15 years, he served as the Professor of Insurance Law at the University of Houston Law School. He has tried more than 100 insurance coverage and bad-faith cases to verdict in 14 different states.

prestige, but also the public routinely judges the apology for its sincerity, assesses the apology for its accuracy, and rejects the apology for its perceived inadequacies. It is this third-party observation of one party's apology to another (or one party's apology to the uninvolved public) that we as Americans have not only been culturalized to expect but also socialized to demand.

II. Claims Apologies

Before discussing the historical development of the business apology, the parameters of the topic within the realm of claims and litigation need to be properly cast. Most in-house counsel and trial lawyers would never contemplate apologizing. It seems ironic that within the same culture that so highly prizes apologies from public figures and inside deeply personal relationships, the same concept is rarely employed in our business lives. Unfortunately for most claim professionals and trial lawyers, the only apology ever contemplated is an apology to one's own client, colleagues, boss, or business partners. For most, it never seems to be a viable concept for dealing with a claimant, an insured, or a plaintiff in a lawsuit. The primary purpose of this paper is to argue that a change in our collective mentality regarding the viability of apology is not only warranted but also greatly needed.

A. Self-assessment

Regardless of the relationship or magnitude of the transgression, the first step towards evaluating whether an apology is owed is always self-assessment. As for apologies within a personal relationship, for some people this seems to be very easy and for others very hard. In businesses, it seems to be exceptionally hard. Initially, the group-think of some organizations seems to create a presumption of righteous perfection. It's exceptionally rare for group assessment to conclude that some kind of wrongdoing occurred and that an apology may be owed. While among some individuals this seemingly arrogant group-think is the result of pride, the greater driving force seems to be fear. Most business leaders fear the implications of an apology. Fundamentally, however, those who both lead companies and the trial bar must be challenged to have a more candid, transparent, and accurate assessment of the shortcomings of any organization, its claim handling, and its litigation decision making. An organization can't accurately contemplate whether an apology is owed unless it can accurately assess whether something went wrong for which an apology might be owed. As simplistic as this sounds, it is mindboggling how hard it is for many business organizations to make an accurate self-assessment. Needless to say, far more work is needed in our industry to accurately assess when and how to apologize.

B. Admission of Liability or Guilt?

In the business context, most leaders of an organization are unwilling to apologize for anything because of the fear that doing so will constitute an admission of civil liability or criminal guilt. Research has shown that fear is the greatest impediment to an individual or organization ever being willing to issue an apology.

This corporate culture of fear in the context of an apology is frequently driven by in-house counsel or outside legal advice, which routinely discourage or even forbid corporate apologies in any context.[1] It is difficult to assess the frequency of corporate apologies in the context of liability claims or lawsuits because no comprehensive research has been done to date. Numerous individual examples can be found of instances of apologies being made to resolve claims or lawsuits, although these appear to be the exception and not the rule. Unfortunately, most apologies seem to involve public statements of regret with the primary purpose being public relations and consumer confidence. The actual instances of direct apologies to individuals or groups of individuals who have been wronged through corporate claims or litigation seem far more rare.[2] Any analysis of the issue quickly devolves into the inherent conflict between societal pressure to apologize for wrongs and realistic fears of legal exposure for any expressions which may imply culpability. Societal norms promote apologies, but legal fears discourage them.

To combat this inherent conflict, many states have now passed "apology statutes" intended to shield and safeguard certain communications of sympathy without creating legal exposure or legal liability for doing so. A growing number of states have sought to encourage apologies by explicitly precluding their admissibility as evidence in a civil lawsuit. The current wave of apology legislation, which has already resulted in the passage of apology statutes in 37 states as well as in Canada and Australia, appears to have originated from the first such statute passed in Massachusetts in 1986. Over the past three decades, dozens of state "apology laws" were drafted to encourage apologies by expressly precluding their admissibility to prove liability in court. Their motivation is clearly psychological and intended to encourage those who injure others to feel more freedom to apologize to those they hurt.

Most of the state apology laws do not go far enough to preclude the admissibility of apologies. Most preserve the admissibility of apologies that expressly admit fault in contrast to those that simply express remorse for circumstances. Most explicitly protect only expressions of regret about what happened, emotional feelings of empathy, and similar expressions that do not directly implicate legal culpability.[3] A handful of states, however, do protect all aspects of apologies by rendering legally inadmissible either partial or full apologies.[4]

III. Historical Context

Apologies date back to biblical times and were common in the earliest vestiges of Western civilization. Cain's lame

apology for the murder of his brother Abel provides one of the earliest examples of expressing regret for a circumstance without accepting responsibility for causing a serious wrong. Similarly, one of the most well-known apologies in Western civilization is that of Socrates, whose "apology" consisted of little more than blasting his accusers for being arrogant and political fools. Cain was banished into the wilderness and Socrates was executed, but these unimpressive apologies do illustrate the importance of differentiating among the three different emotional reactions to someone's belief that they have been wronged. These historically have been classified as blame, diversion, and apology.

A. Blame

When someone has a real or imagined belief that they have been wronged, one of the most frequent emotional responses by the accused is to deny blame for the offense or to blame the complaining party for having a role in the situation giving rise to the wrong. In a litigation context, this is seen in the defendant's denial of committing any act or omission that hurt the plaintiff. It is also exceptionally common to assert that it was not the accused who caused the harm, but rather that the accuser themselves, through some act of contributory negligence or direct action, caused the alleged harm. There's nothing wrong per se in the emotional theme of blame—either denying personal culpability or attempting to shift blame to a third party. It is mentioned simply to emphasize the point that this emotional theme has nothing to do with an apology. Many individuals destroy any hope of making an effective apology by attempting to recast their blame response as an apology. A claim or litigation-resolution strategy premised on denying culpability for blame or attempting to shift blame to the claimant/plaintiff is fine, but it should be recognized for what it is and should not be considered a misguided apology that is little more than a re-characterization of blame.

B. Diversion

An equally common emotional reaction to being accused of committing a wrong is to engage in diversion that rhetorically consists typically of seeking to shift blame to a third party. In the claim and litigation contexts, this is commonly seen in cross-claims and third-party suits involving third-party actors other than the accused or the accuser. This diversion strategy frequently seeks to blame another driver, another vendor, another business partner, or some other third party whom the accused believes is truly responsible and culpable for the alleged wrongdoing. Again, if the facts warrant, there's absolutely nothing wrong with this thematic response to accused wrongdoing. It is important, however, to not improperly interject an apology in this strategy. Most psychologists agree it does little to achieve the goals of an apology when an accused simply says, "I'm really sorry that other guy hurt you." When the accused makes such a statement to the accuser, it is much more likely to generate greater anger and resentment than if no "apology" was ever uttered.

C. Apology

There are many types of apologies, but they all have several key characteristics that are of interest to us in the context of insurance claims and lawsuits. Most expert apologists agree that a "true" apology must contain at least three elements: 1) the offender must identify the offense, 2) the offender has to admit regret for their act or omission leading to the offense and, most importantly, 3) the offender has to express remorse for the result of the act or omission and the harm it caused.[5] Additionally, most professionals agree the remorse and regret must also include a willingness to change on the part of the offender and an agreement to accept the consequences of the offense. It goes without saying that any apology must be sincere, timely, and given by the right person. The timing of an apology is critical because a poorly timed apology can be perceived as insincere, and thus invalidate any beneficial aspects of the apology. Apology professionals uniformly agree that the more time that elapses after a perceived wrong occurs, the less effective the apology is.[6]

IV. An Analysis of Claims Apologies

Pre-litigation apologies have been studied fairly intensely over the last two decades. The first "claim" apologies studied were in the criminal context where the criminally accused would apologize to their victims prior to the commencement of legal proceedings against them. Social scientists then easily made the jump into the realm of civil litigation, where they started studying the effects of pre-litigation apologies in a number of different civil contexts, most predominantly in the field of medical malpractice claims. Medical malpractice claims have received extensive academic scrutiny in recent years, but this research is generally also applicable to other tortfeasors and other types of claims. The bottom line revealed by the studies: apologies work.

A. A Claim Resolution Concept

Initially, academic research has clearly established that individuals who have not been injured generally anticipate that they would desire an apology if they were injured by another.[7] In an effort to determine the pre-litigation impact of effective apologies, extensive studies have been done at medical facilities across the country, including the VA Center in Lexington, Kentucky, The University of Michigan Health System, and John's Hopkins, as well as by private medical insurers. This research has determined that pre-litigation apologies strongly influence a variety of litigation-related judgments and decisions, including a victim's inclination to seek legal advice, the desire to settle prior to commencing litigation, and the likelihood of accepting monetary settlement offers when combined with an apology.[8] These studies also demonstrated that the value a negotiator sets as her "bottom line," her aspirations, and her judgments about

what a "fair settlement" would entail are all significantly influenced by whether an apology is made.[9]

Recent scientific research has established that the presence of an apology influences how individuals evaluate settlement offers in terms of the ability to "make up" for the harm suffered, how they appraise the need to punish the offending party, and how they assess their willingness to forgive the other party. The parties receiving apologies frequently judged an offer as being more adequate, felt less need to punish the accused party, and were more willing to forgive, than were parties who did not receive apologies. Recent scientific studies establish that apologies are valued by claimants, and may help to facilitate pre-litigation settlements.

B. Lawsuit Avoidance

Multiple recent studies have also established the effectiveness of a good apology in avoiding a victim's desire to file a civil lawsuit against the wrongdoer. University of Illinois Law Professor Jennifer Robbennolt did a series of studies concerning the science of apologies in the civil litigation context and repeatedly found that pre-litigation apologies can dampen the victim's desire to file a lawsuit. Professor Robbennolt explained: "The apology fulfills some of the goals that triggered the desire to file suit such as a need for respect, to assign responsibility, and to get a sense that what happened before won't happen again."[10] Many researchers have concluded that a well-placed apology will reduce the anger of those who would otherwise sue because of unresolved anger.

The issue has received considerable attention among medical doctors and healthcare organizations. Similar research has shown an apology by a doctor or hospital significantly decreases the desire by a patient to file suit following a perceived wrong.[11] If an apology leads even a few patients to forgive, forget, and forgo filing a lawsuit, the savings could be measured in millions of dollars. Extrapolated across the entire country, many believe apologies could save billions of dollars.[12]

C. Applicability and Timing

As stated before, not every claim is worthy of an apology. Many claims lack merit and the unmeritorious claim is certainly not worthy of any consideration of an apology. There are likewise very complicated claims that are simply not prone for an apology. Commercial disputes are much less appropriate for apology considerations than personal-lines claims. The more personal the offense, the more appropriate it is to consider an apology. A sexual harassment claim, for example, is much more appropriate for the consideration of an apology strategy than is a shareholder derivative suit. An auto accident likewise is more appropriate for an apology than is a tax liability claim. Just as every claim differs, so do the considerations of whether a claim may be appropriate for an apology.

The fertile fields in which an apology may be made are numerous. The number and types of claims for which an apology should never be considered are far outweighed by those for which it should be considered. As previously mentioned, the medical malpractice field contains the most scientific research regarding the appropriateness of issuing an apology. This is probably because of the inevitable interrelationship of medical-incident-disclosure laws as well as the national physician settlement database regarding medical malpractice settlements.[13] Because the research has recently been extended to many divergent tort claims, the research has consistently shown that claims involving personal injury and personal loss committed by individual actors are far more appropriate for consideration of an apology strategy.

There are situations in which making an apology is not an appropriate claim resolution strategy. As in personal relationships, there are some claimants and insureds who don't want an apology or will never accept an apology. Unlike the litigation context in which offering an apology can still be beneficial even if the claimant/plaintiff rejects it, in the pre-litigation context, certain personality factors may make it impossible for a claim professional or trial lawyer to ever seriously consider apology strategy.

Sometimes apologizing pre-litigation can create an inference of culpability which, in some instances, can lead to prolonged litigation, particularly in those states without apology-shield statutes. In those states with apology-shield statutes, however, an apology should be a consideration as a claim-resolution strategy in at least some circumstances. The states with apology statutes currently include Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming.[14]

V. Litigation Apologies

The academic research on the science of the apology is not limited to pre-litigation claim settlement strategies. Over the last decade, a number of studies have examined the effects of apologies in both resolving litigation and in influencing the outcome of trials. As with claim managers and in-house counsel, very few litigation managers and even fewer trial attorneys ever contemplate the viability of an apology to either resolve a lawsuit or to effectively impact the outcome of a trial.

A. The Ability to Test "Traction"

Unlike the pre-litigation claim scenario, once a suit is filed, in-house counsel and their lawyers have the ability to "test" the viability of an apology. Mock jury research is uniquely situated to help an insurer and its counsel evaluate how a claim is perceived, both with an apology and, alternatively, without an apology. Recent studies have shown that a juror's perception of the defendant changes if there is an apology. Testing jury reactions with an apology and separately without an apology provides a tremendous learning opportunity through mock trial research. The mock jury process can also be used to refine the type of apology used, the timing of the apology, the person who makes the apology, and a host of other issues.

B. Pretrial Apologies Including Mediation

The psychological components of apologies inherent in a pre-trial context, including mediation, are very similar to pre-litigation apologies. Apologies work best in personal-lines tort suits involving personal injury to an individual and work less effectively in commercial claims. The chance to apologize most frequently arises in the context of mediation. Mediation is a particularly beneficial place to consider the role of an apology because most states make everything that happens in mediation confidential. If everything said in mediation is confidential, in-house counsel and their lawyers would be very foolish to not consider an apology strategy as a potential means to resolve litigation because it is highly unlikely that any such apology could be used in the actual trial of the case. If in doubt, the participant should always check with the mediator and their lawyer regarding any applicable state laws governing the confidentiality of mediations. Because most mediations, however, are statutorily confidential, an apology should be a viable litigation resolution strategy in most states.

As with pre-litigation claims, not every suit is appropriate for an apology. In fact, in some suits, the defendant is the one feeling the need to receive an apology because of an overzealous, overreaching, or unscrupulous plaintiff (or their lawyer).

Outside of the mediation context, apologies in litigation can be much more risky. Unless a particular state has a very broad apology statute, offering a litigation apology outside of mediation should be discouraged because of the inevitable "evidence" that potentially could be used against the defendant. When carefully and timely used, however, a litigation apology can completely alter the litigation and trial dynamic.

C. Trial Apologies

The latest research regarding the science of apology has concerned the effects of apologies offered by defendants during the middle of trial. There are several unique components of a trial that change the apology dynamic from the mediation context or pre-litigation context previously discussed. In the context of an actual trial, the apology is heard and viewed by the jury. This is a very significant distinction that equates apology in the trial context more to the public apologies we see made by politicians, entertainers, and sports figures, in contrast to the apologies we receive in our personal and work lives.

This dichotomy between the victim and the observer is a critical one recently explored by researchers. A recent article in Science Daily noted:

> Apologizing for negative outcomes—a practice common even with children—may lead to more favorable verdicts for defendants in court, according to researchers at George Mason University and Oklahoma State University.... Research in psychology, management and medicine has concluded that remedial tactics are effective when expressed directly to injured parties. However, Cornell and Warne's research expands upon prior findings by examining the effects remedial tactics have on jurors who are indirectly involved and cannot directly forgive the accused. "We know victims often respond favorably to an apology but our findings suggest that even unharmed jurors react in a similar manner," says Cornell.[15]

Even in trial, the apology has to have the similar content to a pre-litigation apology. The trial apology has to acknowledge at least the harm suffered by the plaintiff, if not the acts or omissions of the defendant giving rise to it. Such an expression of sympathy must also engender a great deal of empathy, i.e., feeling sorry for the pain, disfigurement, loss, or other damage experienced by the plaintiff. The final component, the presence of action over words, frequently seems to be more important in public apologies and trial apologies than in other contexts. Because jurors have little prior exposure to the parties to a lawsuit other than when they first walk into the courtroom, jurors typically view the sincerity of an apology by whether or not there are any actions that provide evidence implying the genuineness of an apology. The presence of remedial actions such as the termination of problematic employees, undergoing certain types of professional treatment, and other related actions to which an apologizing party can point are frequently critical for a jury to assess the genuineness of the apology.[16]

Obviously, there are right and wrong ways to apologize. A wrong apology can be a complete disaster in our personal lives, as well as in trial. As a result, apologies have to be carefully evaluated and even more carefully executed. This is

one of the few areas of trial in which there is typically greater wisdom in the breadth of counsel sought. In other words, in this context, group-think is typically good. The diverse number of personality types that can provide input into the timing, content, and delivery of a trial apology is frequently critical to ensure its success.

D. Jury Receptivity and Voir Dire

Recent research has shown that the type of juror listening to a particular case has a tremendous impact on whether a defendant can actually make an apology during trial and have some likelihood of it being accepted by individual jurors. As such, any in-house counsel or trial lawyer going to trial with the thought of making an apology a part of their litigation strategy must carefully consider the types of jurors they seek to seat in the case. The case may be appropriate for an apology, but if jurors who are seated have a low propensity to accept an apology, then it's not a viable strategy.

Recent research has shown three unique "self-concepts" that make an individual more or less likely to accept an apology during trial: individual, relational, and collective.[17] A juror with an "individual self-concept" is the person whose life is typified by living and working by themselves. Those who have never been married, those who have been single for a very long time, those who work completely alone, and those with a history of relational or work conflict are described by psychologists as having an "individual self-concept." Research has shown these individuals are the least likely to accept an apology from litigants while sitting on a jury. Their individual self-concept prioritizes a rugged individualism that makes them less likely to offer an apology in their personal life and much less likely to accept an apology, regardless of whether it is directed publicly or individually to them.

In contrast, a collective self-concept is characterized by an individual whose perception of their own identity is always in the context of others. In other words, they see themselves as the spouse of another more than they see themselves as an individual. They see themselves as an employee in a large corporation rather than an individual with a certain employment skill set. This type of person sees herself more as a daughter, a sibling, or a member of an organization, far more than she sees herself as an individual. In contrast to the individual self-concept, this collective self-concept is the person with the highest likelihood of accepting an apology offered during trial and viewing the defendant who offered the apology in a favorable light.

The individual with a relational self-concept is the individual that psychologically will be considered more "middle of the road" and whose personal identity is not defined by either rugged individualism or a collective perception of their relationships to others. The important characteristic of this person is one who is willing to accept an apology but who is going to overvalue the third component of an effective apology: the presence of actions to gauge the effectiveness of the apology. In other words, a person with a relational self-concept places a great deal of importance on the genuineness of an apology and is more likely to be persuaded by the presence of action consistent with a heartfelt apology, in contrast to the other two identified self-concepts.

The diverse nature of these three self-concepts makes jury selection critically important in any case in which a defendant may be contemplating making an apology. It might lead to some unusual questions unrelated to the individual facts at issue in any particular lawsuit to ascertain which of the three self-concepts an individual might possess. Because of the complex nature of psychology, in a significant case in-house counsel and their trial lawyers may wish to hire a jury psychologist to assist with the jury selection in helping counsel frame questions or follow-up with individuals to most carefully diagnose their self-concept. This will help ensure that those on the jury have a higher likelihood of accepting an apology that is going to be a central part of trial strategy.

E. The Mechanics of a Trial Apology

A defendant considering making an apology during trial needs to consider who is going to make the apology and how it's going to be made. In some contexts, counsel can do it. In most instances, however, it needs to be the defendant, or in the event a corporate defendant, a person of leadership within the company. The socio-economic, gender, or racial profile of a jury might make the "right person" to deliver the apology differ from case to case. Physical appearance, speech patterns, tone, and other characteristics can impact how an individual is seen and therefore can have an impact on how an apology is perceived. All of these issues should be fully vetted before executing an apology strategy.

Psychologists agree that a trial apology typically consists of "four Rs." These are remorse, responsibility, repair, and reform. The expression of remorse is not particularly different in a trial apology than it is in a pretrial apology. The acceptance of responsibility, however, can frequently be very different. Sometimes the defendant's acts or omissions caused a domino of events that resulted in third parties doing unrelated things that caused problems for the plaintiff. It is much easier in this context for a defendant to accept responsibility for their actions and express remorse for the unintended consequences. This is generally perceived as a much easier scenario in which to accept responsibility.

Conversely, for a defendant whose primary trial strategy is to avoid the imposition of punitive damages (because of the lack of any real dispute about what the defendant did wrong), an acceptance of responsibility typically is tantamount to a complete acceptance of liability. In this situation, the acceptance of responsibility has proven to be

highly influential on a juror's willingness to award punitive damages. Studies have shown apologies lower a juror's desire to inflict economic punishment.

The defendant's ability to repair a situation and reform to make sure that bad conduct does not repeat are two factors that will vary from case to case and apology to apology. Repair efforts include things like refunding premiums, reimbursing a plaintiff for what they spent for an item, and providing a financial credit for something previously paid. In any apology before a jury, the action component is critical to the apology being perceived as genuine.

F. Jurors Reaction to a Plaintiff's Acceptance or Rejection of an Apology

One of the greatest surprises of recent research regarding litigation apologies is the jurors' reaction to how a plaintiff responds to an apology. This issue was first noted by psychologists two decades ago.[18] In their initial research, these psychologists noted that jurors reacted very unfavorably to plaintiffs who refused to accept an apology. In a series of interviews with actual jurors as well as studies of mock jurors, these researchers documented displeasure among jurors who believed a defendant's apology was genuine, but the plaintiff refused to accept the apology or reacted to it with disdain, disgust, or outright rejection. In those instances, Bennett and DuBerry's research showed an amazing shift in the willingness of jurors to award economic damages to plaintiffs who, in their opinion, unreasonably rejected an apparently sincere apology from a defendant.

One of the most profound implications of the recent apology research is the ability of an apology to have a direct impact on a juror's willingness to compensate an obviously harmed plaintiff. Studies show that an otherwise sympathetic plaintiff will be viewed unsympathetically when she rejects an apology that jurors believed should have been graciously accepted.[19] This finding provides perhaps the greatest economic incentive for a defendant (and her trial lawyer) to contemplate making an apology during trial.

Making an apology at trial can also be dangerous. There are some plaintiff lawyers on cross-examination who could cause great damage to a defendant who makes an apology during their direct examination when that lawyer has the opportunity for cross-examination. It is also possible that some jurors could have a negative reaction to the apology, particularly when the defendant had months or years to issue an apology but waited to do so until the end of trial. The dangers of making an apology during trial, however, do not justify an in-house counsel or its trial counsel refusing to consider making an apology at trial. Despite the risks, in-house counsel and their trial lawyers should at least consider making an apology in appropriate circumstances.

VI. Conclusion

We live in a culture that promotes, encourages, and even expects apologies following perceived wrongdoing. However, that same public perception of the apology of wrongdoers who have not directly wronged the person hearing the apology has profound litigation implications in America. In the claim and pre-litigation context, making and receiving an apology are not too different from those made and received in our personal and work life. In the litigation arena, apology spectators sitting on the sidelines (or in the jury box) are frequently in a position to change the way they view the parties to a lawsuit based upon one party's willingness to offer an apology and based on the other party's acceptance or rejection of that apology. Because Americans are so socialized to accept apologies made by politicians, entertainers, and sports figures, when we hear apologies as jurors, we frequently have the same reaction. We accept them, we generally believe them, we are glad when they are made, and we look forward to seeing evidence of change and redemption. Because such attitudes have the ability to completely change the outcome of litigation, in-house counsel and their trial attorneys must consider the viability of an apology in at least some cases as an effective strategy to resolve claims and lawsuits for the foreseeable future.

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