Journal of Texas Insurance Law

Winter 2017 Volume 15 Number 1

In This Issue:

Are They or Aren't They? Attorney's Fees as "Damages" Under a CGL Policy

Nuts & Bolts: Directors & Officers Liability Policies

Recent Fifth Circuit and Texas Supreme Court Insurance Decisions

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

www.InsuranceLawSection.org

THE INSURANCE LAW SECTION OF THE STATE BAR OF TEXAS

Officers for 2016-2017

CHAIR:

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

CHAIR ELECT:

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

SECRETARY:

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

TREASURER:

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

IMMEDIATE PAST-CHAIR:

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

Pamella A. Hopper
McGuireWoods LLP
816 Congress Avenue, Ste. 940
Austin, TX 78701
Ph: (512) 472-3067
Fax: (512) 472-3068
phopper@mcguirewoods.com

Council Members 2016-2017

(2 Yr Term Exp 2017)

Jes Alexander
IRMI
12222 Merit Drive, Suite 1600
Dallas, TX 75251-2266
Ph: (972) 687-9312
jes.a@irmi.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
ldedman@coveragelawdallas.com

(2 Yr Term Exp 2017)

Tarron L. Gartner-Ilai
Cooper & Scully, P.C.
900 Jackson St., Ste. 100
Dallas, TX 75202
Ph: (214) 712-9570
Fax: (214) 712-9540
Tarron.Gartner@cooperscully.com

(2 Yr Term Exp 2017)

Juan "Trey" Mendez, III
Mendez Law Firm
243 E. Elizabeth St.
Brownsville, TX 78520
Ph: (956) 541-7600
Fax: (956) 541-7612
Treymendez34@yahoo.com

(2 Yr Term Exp 2017)

Hon. Gray H. Miller
Southern District of Texas
515 Rusk Avenue
Houston, TX 77002
Ph: (713) 250-5377

(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

(2 Yr Term Exp 2018)

Tamara D. Bruno
Pillsbury Winthrop Shaw Pittman LLP
Two Houston Center
909 Fannin St., Ste. 2000
Houston, TX 77010-1028
Ph: (713) 276-7608
Fax: (713) 276-7673
tamara.bruno@pillsburylaw.com

(2 Yr Term Exp 2018)

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 2018)

Rebecca S.C. DiMasi
Shidlofsky Law Firm PLLC
7200 N. Mopac Expwy., Ste. 430
Austin, TX 78731
Ph: (512) 685-1400
rebecca@shidlofskylaw.com

(2 Yr Term Exp 2018)

Catherine L. Hanna
Hanna & Plaut, L.L.P
211 E.7th Street, Suite 600
Austin, TX 78701
Ph: (512) 472-7700
Fax: (512) 472-0205
channa@hannaplaut.com

(2 Yr Term Exp 2018)

Jason C. McLaurin
Strong Pipkin Bissell & Ledyard, L.L.P.
4900 Woodway Dr., Ste. 1200
Houston, TX 77056
Ph: (713) 210-4379
Fax: (713) 651-1920
jmclaurin@strongpipkin.com

(2 Yr Term Exp 2018)

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 2018)

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

Executive Director

Donna J. Passons
Texas Institute of CLE
P.O. Box 4646
Austin, TX 78765
Ph: (512) 451-6960
Fax: (512) 451-2911
donna@clesolutions.com

Judicial Liaison

Hon. Justin "Brett" Busby
14th Court of Appeals
301 Fannin St., Ste. 245
Houston, TX 77002
Ph: (713) 274-2800

Council Advisor

Fidel Rodriguez, Jr.
Law Offices of Fidel Rodriguez, Jr.
111 Soledad St., Ste. 1300
San Antonio, TX 78205
Ph: (210) 224-1057
Fax: (210) 224-0533

Council Advisor Alternate

Michael "Carter" Crow
Norton Rose Fulbright US LLP
1301 McKinney St., Ste. 5100
Houston, TX 77010
Ph: (713) 651-5218
Fax: (713) 651-5246
carter.crow@nortonrosefulbright.com

Journal of Texas Insurance Law
InsuranceLawSection.org

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 Pamella Hopper, Editor In Chief, at (512) 617-4504 or by email at phopper@mcguirewoods.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.

Journal of Texas Insurance Law

WINTER 2017 • VOLUME 15, NUMBER 1

TABLE OF CONTENTS

Comments from the Editor 1
By Pamella A. Hopper

Comments from the Chair 2
By L. Kimberly Steele

Are They or Aren't They? Attorney's Fees as "Damages" Under a CGL Policy 3
By R. Brent Cooper, Tarron Gartner-Ilai, and Katya Long

Nuts & Bolts: Directors & Officers Liability Policies 13
By Marisa Jeffrey

Recent Fifth Circuit and Texas Supreme Court Insurance Decisions 20
By Rachelle H. Glazer and John P. Atkins

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 Pamella A. Hopper
McGuireWoods LLP

In this issue of the *Journal*, I am pleased to include an illuminating article on the recovery of attorney's fees under CGL policies authored by Brent Cooper, Tarron Gartner-Ilai, and Katya Long. You will also find Marisa Jeffrey's helpful primer on directors and officers coverage, and Rachelle Glazer and John Atkins's review of recent Fifth Circuit and Texas Supreme Court insurance decisions.

Thanks go to these authors, and to Associate Editor Rebecca DiMasi, whose editing skills once again have proved essential. As always, I extend a special thank you to Alyson Wagner, whose assistance in getting the *Journal* to print is indispensable.

The *Journal* would be happy to publish similar articles relating to Texas insurance law for the benefit of the bench and bar. Please email articles or proposed topics to me at phopper@mcguirewoods.com.

Pamella A. Hopper
Editor In Chief

Pamella A. Hopper is Senior Counsel in the Austin office of McGuireWoods LLP. Her over 20-year practice is devoted exclusively to representing corporate policyholders in a wide variety of first- and third-party insurance coverage-related disputes and litigation, including environmental and other long-tail claims, construction, business interruption, and directors and officers. Her previous experience includes working for numerous years as an insurance coverage lawyer and adjuster on behalf of the insurance industry.

Comments

FROM THE CHAIR

By L. Kimberly Steele

It is hard to believe that the first two months of 2017 have come and gone and I am already two-thirds of the way through my tenure as your Chair of the Insurance Law Section. Time sure flies.

I am pleased to report that we continue to grow as a section and currently have more members than we have had in almost five years. This can only be attributed to the hard work of the Section's Executive Board, Council, and its Committee Chairs and Members. It truly takes a village.

Speaking of the Council, we received another very impressive group of applications from section members interested in serving on our Council for the 2017–2018 term. The Nominating Committee of the Council is currently in the process of reviewing the applications and interviewing candidates and we will vote on our new members at the year-end meeting to be held at 5:00 p.m. on June 7, 2017 in conjunction with the Advanced Insurance Law Course being held at the fabulous Hyatt Hill Country Resort & Spa in San Antonio on June 8–9th. We hope that you will join us both at the Section meeting and at the seminar—it promises to be not only an educational and informative seminar but also a whole lot of fun. Some of the topics to be covered this year include:

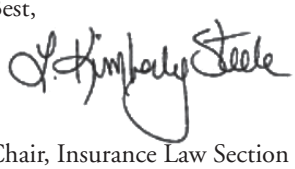
- Legislative Update: What Insurance Practitioners Need to Know
- What We Learned from the *Manchaca* Case
- Recent Developments in Insurance Coverage and Indemnities for Oil and Gas Policyholders
- Professional Liability Insurance: Errors and Omissions to Avoid!
- *Gandy*, a New Frontier? The Repercussions of *Great American v. Hamel*
- Strategic Insurance Considerations for Corporate Policyholders
- And much more. . . .

There will be a number of fun networking opportunities as well, including a Welcome Cocktail Social after the Section meeting on the 7th and our Third Annual Casino Night being held after the first day of the seminar on the 8th. Then, of course, there are all the perks of the Hyatt Hill Country itself, with its lazy river, numerous pools and slides, Windflower Spa, championship golf course, and unique dining experiences. We hope to see you there!

In the event that you are interested in becoming more involved in the section but did not have the chance to submit an application this year, we nevertheless welcome your involvement in the Section. Please consider volunteering for a committee, submitting an article for the Journal, preparing a case note for inclusion on our website, or submitting a current case to be reviewed in the Section's weekly *Right Off The P*ress email blast. We are always looking for interesting content for our publications while also striving to diversify and improve our Section and Council. Many hands make light work and no contribution is too small.

I hope to see many of you in San Antonio in June.

Best,



Chair, Insurance Law Section

By R. Brent Cooper, Tarron Gartner-Ilai, and Katya Long

ARE THEY OR AREN'T THEY? ATTORNEY'S FEES AS "DAMAGES" UNDER A CGL POLICY

I. Introduction

The Southern District's recent decision in *Mid-Continent Casualty Co. v. Petroleum Solutions, Inc.*[1] has all the earmarks of a case destined for a long and illustrious history, paved with amicus briefing. In *Mid-Continent v. PSI*, the court addressed, as a matter of first impression, whether a Commercial General Liability ("CGL") policy "provide[s] coverage for a judgment against a manufacturer for loss incurred in meeting its statutory obligation under section 82.002 of the Texas Civil Practice and Remedies Code, which requires manufacturers to indemnify an innocent seller for losses incurred by the seller in a products liability action."[2] Applying *In re Nalle Plastics Family Limited Partnership*[3]—wherein the Texas Supreme Court held that prevailing party fees are not "damages," but merely "costs" for purposes of calculating the amount needed by a judgment debtor to secure a supersedeas bond—the *Mid-Continent* court reached two important conclusions.[4] First, attorney's fees recoverable as "loss" under section 82.002(a) of the Texas Civil Practice and Remedies Code are "damages because of" "property damage" under a CGL policy.[5] Second, attorney's fees awarded under section 82.002(g) of the Texas Civil Practice and Remedies Code, a fee-shifting provision, are not.[6] In this article, we will peel back the layers of the *Mid-Continent* decision and discuss the potentially broader impact of the case. We will also examine how courts in other jurisdictions have ruled, as well as the overarching question as to why the issue has become a matter of emerging importance.

II. Why is This Even an Issue?

This is an issue, for one, because CGL policies are just that: *general* liability policies. Unlike policies issued to cover a specific type of loss, CGL policies cover a broad range of risks. For instance, Directors and Officers ("D&O") liability policies cover economic "loss" arising out of shareholder derivative actions, and wrongful acts committed by a company's officers and directors on the company's behalf. The insuring agreement of a D&O policy is narrow, while the exclusions are very specific. In addition, because of the specific types of claims unique to D&O liability, the definition of "loss" is typically defined to include or exclude precisely what damages are covered; namely, fines, penalties, punitive damages, and/or attorney's fees.

CGL policies, on the other hand, cover risks many business, both large and small, universally face, from slip and falls to certain types of intellectual property claims. CGL policies contain a very broad insuring agreement, which provides:

> **SECTION I - COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY**
>
> 1. Insuring Agreement
>
> a. 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. . . .

Risks that the carrier does not insure are carved out by exclusions, some of which are equally as broad.

R. Brent Cooper is a named shareholder at Cooper & Scully, P.C. His 40 years of practice has been focused on commercial and insurance litigation. He has been at the forefront of appellate law. He is Board Certified by the Texas Board of Legal Specialization in Personal Injury Trial Law. He is a frequent lecturer on insurance litigation, coverage and bad faith seminars for the State Bar of Texas, University of Houston Law Center, South Texas College of Law and the University of Texas School of Law. He is co-author of Cooper, Hensley & Marshall's Texas Rules of Civil Procedure Annotated, and has written numerous articles for law reviews and legal publications.

Tarron Gartner-Ilai is a shareholder at Cooper & Scully, P.C. She has more than 25 years of experience in first-and third-party insurance coverage litigation, including general liability, errors & omissions, directors & officers liability, oil & gas, cyber liability, commercial property, specialty risk, disability, bond and fidelity disputes. Tarron's business and management experience, coupled with her legal acumen, enables her to provide a broad range services to her clients, including coverage analysis and litigation skills, risk management, and insurance program reviews.

Katya Long is an associate in the Dallas office of Cooper & Scully, P.C. She focuses her practice in the area of insurance, intellectual property, business litigation, and bankruptcy law.

The standard CGL defines the term "bodily injury" to mean "bodily injury, sickness or disease." The term "property damage" is defined to mean both "physical injury to tangible property" and "loss of use of tangible property that has not been physically injured." The phrase "damages because of 'bodily injury' or 'property damage' . . . conveys a broad promise" and thus includes consequential damages arising out of a covered claim.[7] However, the fact that the standard CGL does not define the more general term "damages" is central to the dispute in *Mid-Continent v. PSI*. While it seems intuitive that attorney's fees awarded to a judgment creditor would be consequential to, or damages "because of" bodily injury or property damage within the meaning of a CGL policy, it's not quite that simple. In fact, attorney's fees can be considered "costs," or "damages," depending on the jurisdiction, or even the particular claim. The distinction, discussed at length in *Mid-Continent v. PSI*, brings us to another reason the issue has become a focal point of insurance coverage litigation: Supplementary Payments.

The Supplementary Payments part of a CGL policy provides that the company will pay certain expenses in addition to the Limits of Liability, chief among them the cost of defending a lawsuit filed against the insured.

The 1986 ISO form CG 00 01 11 85 contained the following Supplementary Payments provision:

> **SUPPLEMENTARY PAYMENTS - COVERAGES A AND B**
>
> We will pay, with respect to any claim or "suit" we defend:
>
> 5. All *costs* taxed against the insured in the "suit."

Courts interpreting this provision hold that prevailing party fees are "costs" within the meaning of the policy.[8] The provision remained in use (although numbered differently) for all subsequent iterations until 2007. But then somebody somewhere got tired of paying other peoples' attorney's fees; and if you think about it, it makes sense. Consider the implications for the insurer of having to pay the prevailing party's fees awarded in a class action products liability suit, in relation to the relatively miniscule policy limits—typically $1,000,000 at the primary tier. The numbers are mind-boggling.

The Supplementary Payments clause of the ISO 2007 CGL form, and all subsequent revisions, provides:

> **SUPPLEMENTARY PAYMENTS - COVERAGES A AND B**
>
> 1. We will pay, with respect to any claim we investigate or settle, or any "suit"
>
> against an insured we defend:
>
> e. All court costs taxed against the insured in the "suit." However,
>
> these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.

Yes, it's expressed in plural possessive, meaning *no ones'* fees are getting paid as "costs," no matter how many lawyers are on the case. As a result, policyholders (or rather, their erudite lawyers) began making the argument that attorney's fees (or attorneys' fees, as ISO prefers) are "damages because of 'bodily injury,'" or, in most cases, "property damage" under a CGL policy. At a surface level, getting your client's fees paid by an insurer makes sense. But there are far more significant concerns at stake. Consider the issue in the context of the *Stowers* doctrine, which places the burden on the insurer, in certain circumstances, to settle covered claims within policy limits, thus protecting the insured from a judgment in excess of policy limits. Think of the possibilities, or calamity of horrors, depending upon what side of the docket you happen to be on, if the plaintiff's attorney's fees became a part of that equation. The *Mid-Continent* decision lays that concern to rest in the majority of cases, for now. But it may just well be the first of more white-knuckled opinions to come. With that in mind, let's examine the court's decision.

III. *Mid-Continent v. PSI*

A. Facts

In *Mid-Continent v. PSI*, PSI sold and installed an underground fuel storage system on property owned by Bill Head.[9] PSI purchased a component part for the fuel tanks from Titeflex.[10] In 2001 it was discovered that 20,000 gallons of fuel had seeped into the surrounding soil.[11] Mid-Continent insured PSI under a CGL policy in effect from May 1, 2001 to May 1, 2002.[12] PSI tendered the claim, and Mid-Continent undertook an investigation.[13] PSI and Mid-Continent theorized that a flex connector manufactured by Titeflex might have caused the spill; however, the expert retained to investigate could not make a conclusive determination one way or the other.[14] The flex connector was then stored in a lab, which was later torn down.[15]

In February of 2006, Head sued PSI for breach of contract, breach of warranty, breach of implied warranties, and

negligence.[16] Mid-Continent tendered a defense, subject to a reservation of rights.[17] In October of 2006, PSI filed a third party claim against Titeflex for contribution and indemnity under The Texas Products Liability Act, section 82.002 of the Texas Civil Practice and Remedies Code.[18] In January of 2007, Head amended his own pleadings, asserting claims directly against Titeflex for strict products liability.[19] Titeflex defended the claims on the basis that the evidence had been spoliated, requiring the inclusion of a presumptive instruction in its favor in the jury charge at trial.[20]

In March of 2008, Head non-suited Titeflex without prejudice.[21] In May of 2008, Titeflex asserted a counterclaim as an "innocent seller" against PSI under section 82.002(a) and (g) of the Texas Civil Practice and Remedies Code for "costs of court, reasonable expenses, and attorney's fees . . . expended in defense of th[e] action and in prosecution of [its] demand for indemnity."[22] In August of 2008, PSI non-suited its affirmative claims against Titeflex without prejudice.[23] Titeflex, however, refused to dismiss its counterclaims unless PSI dismissed its affirmative claims with prejudice.[24] PSI refused—an issue that would later become a point of contention for Mid-Continent. Titeflex subsequently amended its pleadings to assert claims for "all *past and future* costs of court, reasonable expenses, and reasonable attorney's fees . . . expended in defense of th[e] action and in prosecution of [its] demand for indemnity."[25]

The case proceeded to trial in September of 2008. The court instructed the jury that PSI had "destroyed, lost, or failed to produce . . . material evidence" and that the jury could presume that this evidence was unfavorable to PSI.[26] At trial, the jury awarded Head $1,131,321.26 in damages, plus prejudgment interest and $91,500.00 in attorney's fees.[27] The jury awarded Titeflex $382,334.00 in attorney's fees, $68,519.12 in expenses, $12,393.35 in costs, and post- judgment interest.[28] The trial court failed to indicate whether the attorney's fees were awarded pursuant to section 82.002(a) or (g).[29] Further—and importantly as it turns out—PSI did not challenge or oppose Titeflex's claim for costs incurred defending PSI's affirmative claims.

PSI appealed. The court of appeals affirmed, after which PSI petitioned the Texas Supreme Court for review. The Texas Supreme Court reversed the judgment in favor of Head, holding the trial court's spoliation instruction was in error, and remanded for retrial on Head's claims.[30] The Texas Supreme Court held, however, that the spoliation instruction did not affect the verdict in favor of Titeflex.[31]

While the case was on appeal Mid-Continent instituted an action for declaratory relief, which was later stayed. After the Texas Supreme Court affirmed the judgment, Mid-Continent denied coverage and reopened the declaratory judgment action. PSI paid the Titeflex judgment and filed a counterclaim for reimbursement of the Titeflex judgment.

B. Analysis and Holding

Mid-Continent filed a motion for summary judgment on the basis that prevailing party fees did not fall within the meaning of the term "damages" under the policy. Irrelevant to our immediate discussion, Mid-Continent argued also that the intentional injury exclusion applied to the Titeflex claim, and that PSI had breached the duty to cooperate by refusing to dismiss its affirmative claims against Titeflex with prejudice while the offer was still on the table.

The court first addressed the nature of Titeflex's section 82 claims.[32] Section 82.002(a) creates a cause of action for an innocent seller to obtain indemnity from a manufacturer. Under section 82.002(a):

> A manufacturer shall indemnify and hold harmless a seller against loss arising out of a products liability action, except for any loss caused by the seller's negligence, intentional misconduct, or other act or omission . . . for which the seller is independently liable.

The court stated:

> a "products liability action" is "any action against a manufacturer or seller for recovery of damages arising out of personal injury, death, or property damage allegedly caused by a defective product whether the action is based in strict tort liability, strict products liability, negligence, misrepresentation, breach of express or implied warranty, or any other theory or combination of theories." A "manufacturer" is "a person who is a designer, formulator, constructor, rebuilder, fabricator, producer, compounder, processor, or assembler of any product or any component part thereof and who places the product or any component part thereof in the stream of commerce." A "seller" is "a person who is engaged in the business of distributing or otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption a product or any

> component part thereof" . . . . [U]nder Section 82.002, "an innocent seller who suffers a loss is protected regardless of whether it is upstream or downstream of [the] product's manufacturer."[33]

According to the court, the purpose of section 82.002 is to "allocate losses attributable to products liability actions under Texas law." While the common law permitted indemnity against the manufacturer only upon a finding of liability, section 82.002(a) requires the manufacturer to indemnify allegations of liability against the seller, even if the manufacturer is not ultimately held liable. Under section 82.002(b), the manufacturer is liable for "loss," including court costs, reasonable attorney's fees, and reasonable damages. Section 82.002(g) allows a party to recover attorney's fees for pursuing an indemnity claim.

Under section 82.002, a party can be both a manufacturer and a seller. This arises when one party manufactures a component part that is later incorporated into a product sold by the seller. "[T]he first party is a component-part manufacturer and the second party is a finished-product manufacturer."[34] The court held: "the manufacturer of a component product alleged by a claimant to be defective has a duty to indemnify an innocent seller/ manufacturer of a finished product which incorporates the component from the loss arising out of a products liability action related to the alleged defect, but the manufacturer of an allegedly defective finished product has a duty to indemnify the innocent seller/manufacturer of a component product for the same loss."[35]

In cases where the injured party asserts claims directly against the component-part manufacturer and the finished-part manufacturer, both parties are entitled to assert competing claims against each other for indemnity under section 82.002(a) to recover the costs incurred defending the injured party's claims. Importantly, section 82.002(a) does not allow either the component-part manufacturer or the finished-product manufacturer to seek indemnity from the other for attorney's fees incurred defending cross-claims asserted directly between them (i.e., prevailing party fees).[36] However, section 82.002(g) allows a party seeking indemnity to recover costs pursuing that claim.

In February of 2006, Head sued PSI. PSI filed a third party (affirmative) claim against Titeflex in October of that year. In January of 2007, Head amended its pleadings to assert claims against PSI. The allegations Head made converted both parties into "manufacturer-sellers," entitling both to assert competing claims for indemnity against the other under section 82.002(a) for costs of defending Head's claims.

Head dismissed its claims against Titeflex in March of 2008. PSI did not dismiss its affirmative claims against PSI until August of 2008, more than five months later. Technically, Titeflex was only entitled to recover indemnity under section 82.002(a) for costs incurred between January of 2007 and March of 2008 in defense of Head's claims, and additional fees in pursuit of its indemnity claim against PSI under section 82.002(g). Titeflex nevertheless admitted evidence at trial as to the costs incurred defending both Head's claim, and PSI's direct third party claim, as well as the cost to pursue indemnity under section 82.002(g).[37] PSI did not object at trial. As a result, the trial court awarded all of the fees incurred, but did not segregate these amounts. PSI raised the impropriety of the section 82.002(a) claims on appeal, but the court of appeals held that the issue was waived.[38]

Addressing the most pertinent question—coverage—the court first addressed whether the fuel spill was "property damage" caused by an "occurrence" under the policy, or in the alternative, "property damage" (or "money damages") caused by the rendition of professional services pursuant to an endorsement contained in the policy.[39] Concluding that there was "property damage" to Head's property caused by the rendition of professional services, the court then addressed "(1) whether the Titeflex Judgment constitutes 'damages'; and (2) whether PSI became legally obligated to pay the Titeflex Judgment 'because of" the damage to Head's property."[40]

As with all standard CGL policies, the Mid-Continent policy did not define the term "damages."[41] As a result, the court looked to the law to define the term. Mid-Continent argued that pursuant to *In re Nalle Plastic Family Limited Partnership*, 406 S.W.3d 168 (Tex. 2013), "attorney's fees do not constitute compensatory damages."[42] In *In re Nalle*, the Texas Supreme Court addressed whether attorney's fees awarded pursuant to Texas Civil Practice and Remedies Code section 38.001 must be included in calculating the amount of a "compensatory award" for purposes of determining how much a judgment debtor must pay to secure an appellate bond to supersede the judgment.[43] Examining the statute, the *In re Nalle* court held that section 38.001, which permits recovery of fees "in addition to the amount of a valid claim and costs," was a fee-shifting statute, not a compensatory award.[44] Only when the underlying suit "concerns a claim for attorney's fees as an element of damage" must the award be included in determining the amount of a compensatory award.[45] PSI argued that the Titeflex judgment fell within the stated exception in *In re Nalle*. The *Mid-Continent* court agreed.

Section 82.002(a) allows a component-part manufacturer to seek indemnity against a finished-product manufacturer for "loss" arising out of a products liability action asserted by an injured party.[46] Pursuant to section 82.002(b) the term "loss" is defined to include attorney's fees. According to the *Mid-Continent* court, "Section 82.002(a) creates an independent cause of action that, as the Titeflex Judgment exemplifies, may comprise solely attorney's fees, expenses and court costs incurred in defense of claims by a third party in an underlying products liability action."[47] Further, the court held that the judgment was a direct product of, and therefore consequential to the "property damage" Head sustained.[48] As such, the court concluded, as with other forms of consequential damage covered by a CGL policy (i.e., lost profits and diminution in value), the amount awarded to Titeflex under section 82.002(a) constituted "damages because of 'property damage'" under Mid-Continent's policy.[49]

[A]s with other forms of consequential damage covered by a CGL policy … the amount awarded to Titeflex under section 82.002(a) constituted "damages because of 'property damage'" …

In contrast, the attorney's fees awarded to Titeflex in pursuit of its indemnity claim under section 82.002(g) "are ancillary to recovery of the substantive cause of action created by § 82.002(a)."[50] To the contrary, section 82.002(g) is a fee-shifting statute akin to Texas Civil Practice and Remedies Code section 38.001, which is not "damages because of 'property damage'" under a CGL policy.[51]

The court next turned to an endorsement contained in Mid-Continent's policy not typically found in a standard CGL.[52] The policy issued to PSI contained an endorsement modifying, but not amending, the insuring agreement found in section I(A)(1):

> "Bodily Injury", "Property Damage" or "Money Damages" arising out of the rendering or failure to render professional services shall be deemed to be caused by an "occurrence."[53]

The endorsement defined the term "money damages" to mean "a monetary judgment, award or settlement."[54] PSI argued that the endorsement created a new insuring agreement providing coverage for the entirety of the Titeflex award. The court disagreed. Conceding that the definition of "money damages" was broad enough to encompass the fees awarded under both sections 82.002(a) and (g), the court nevertheless held that the endorsement did not create additional coverage, but simply deemed "money damage" arising out of the rendering or failure to render professional services to be caused by an occurrence.[55] The endorsement did not, held the court, expand the insuring agreement found in section I(A)(1) to include coverage for "money damages" independent of or in addition to "damages because of 'bodily injury' or 'property damage'", but merely expanded the definition of the term "occurrence."[56]

C. Motion for Reconsideration

PSI filed a motion for reconsideration based, in part, on the Fifth Circuit's opinion in *Hollybrook Cottonseed Processing, L.L.C. v. American Guarantee & Liability Insurance Company*, in which the court determined, along with a previous ruling in relation to a direct action claim brought against American Guarantee, that attorney's fees awarded pursuant to Louisiana Civil Code article 2545 (creating liability for a product manufacturer who knowingly sells a defective product) were "damages caused by 'property damage.'"[57] According to PSI, the Louisiana rehabilitation statute contained a fee shifting provision similar to Texas Civil Practice and Remedies Code sections 38.001 and 82.002(g). The *Mid-Continent* court was unpersuaded, holding that like section 82.002(a), the rehabilitation statute provided a substantive cause of action for the buyer of a defective product.

IV. What Do Other Courts Say?

A. Cases Holding that Attorneys' Fees are "Damages"

Mid-Continent v. PSI is representative of an emerging trend in insurance coverage litigation. Very few jurisdictions have addressed the issue squarely. Of those who have, there is no clear majority falling on either side of the fence. Of the courts holding that attorney's fees are "damages because of 'bodily injury' or 'property damage'" under a CGL policy, most have focused exclusively on the fact that the term "damages" is not defined in the standard CGL, without the depth of analysis given by the court in *Mid-Continent v. PSI*.

For instance, in *Neal-Pettit v. Lahman*, the Ohio Supreme Court addressed whether attorney's fees awarded as part of a punitive damage award were damages because of "bodily injury" in relation to an underlying personal injury claim.[58]

In *Lahman*, Neal-Pettit filed suit against Lahman for compensatory and punitive damages resulting from personal injuries sustained in a motor vehicle accident.[59] Lahman, who was intoxicated when she struck Neal-Pettit, fled the scene. Following a jury trial, the court entered an award of $113,000 in compensatory damages, $75,000 in punitive

damages, $46,825 in attorney's fees, and $10,084.96 in costs.[60] Allstate, Lahman's insurer, paid the compensatory award, interest, and expenses, but denied payment of the claims for punitive damage and attorney's fees. Neal-Pettit filed a supplemental complaint against Allstate for the remainder of the award.[61]

The trial court granted judgment in favor of Neal-Pettit. Allstate appealed, arguing that public policy precluded coverage for the punitive award, as well as the attorney's fees award, which was based solely on the punitive damage claim. The Ohio Supreme Court agreed with Neal-Pettit.

The court held:

> The question is whether the attorney fees awarded are damages that Lahman is legally obligated to pay because of the bodily injury sustained by Neal-Pettit. The policy does not define the word "damages." Allstate argues that the award is not covered under the policy, because attorney fees are not damages themselves, but are derivative of punitive damages and thus are not awarded as a result of bodily injury. . . . [T]he fact that the awards have similar bases is irrelevant. We have recognized that attorney-fee awards and punitive damage awards are distinct. . . . Although, in this case, attorney fees were awarded as a result of an award of punitive damages, they also stem from the underlying bodily injury. The language of the policy does not limit coverage to damages *solely* because of bodily injury.[62]

In *City of Ypsilanti v. Appalachian Insurance Co.*, the Southern District of Michigan determined whether attorney's fees awarded in an underlying discrimination lawsuit filed by residents of adult foster care facilities against police officers who were enforcing city housing and zoning ordinances were covered under a professional liability policy.[63] The policy obligated Appalachian to insure against sums the city became "legally obligated to pay as damages because of . . . claims growing out of the performance of the duties of law enforcement officers or their employees."[64] Appalachian refused to defend or indemnify the suit. The city entered into a consent judgment with the underlying plaintiffs, after which a final judgment was entered that included an award of attorney's fees in the amount of $13,427.55. The city filed suit against Appalachian.

First addressing the supplementary payments part of the policy, the court held that the attorney's fees award could not reasonably be construed to encompass "costs," which were defined in the policy to mean "investigations, adjustments and legal expenses."[65] The court then held that a "reasonable person in the position of the Insured would believe the words 'all sums which the Insured shall become legally obligated to pay as damages' would provide coverage for all forms of civil liability, including attorney fees."[66]

In *Association of Apartment Owners v. Dongbu Insurance Co.*, the court held that attorney's fees awarded to underlying plaintiffs in a construction defect case were "damages because of 'property damage'" under a liability policy.[67] Citing to other jurisdictions that had ruled in favor of the insured, the court reasoned: "The Policy does not define the term 'damages' and does not expressly state whether attorneys' fees are damages. Hawaii courts have not addressed the specific issue before this Court, but in other contexts, the Hawaii Supreme Court has acknowledged that attorneys' fees are in the nature of damages."[68] Turning to the policy, the court held that the plain and ordinary meaning of the word "damages" meant "any remunerative payment made to an aggrieved party, including the restitutive and punitive measures."[69] The court defined the term "because of" to mean "arising out of" or "originating from."[70] The court held that based on the terms as defined, the policy covered the attorney's fees awarded in the underlying arbitration because they were restitutive payments flowing from the property damage the underlying plaintiffs sustained.[71]

In *American Family Mutual Insurance Company. v. Spectre West Building Co.*,[72] the court held that both the damages awarded to a prevailing party in an underlying construction defect claim were "damages because of 'property damage'" under a CGL policy, but not "property damage" themselves for purposes of applying the contractual liability exclusion.[73] According to the court, "attorneys' fees and non-taxable costs qualify as damages an insured becomes legally obligated to pay *because of*. . . 'property damages.' But the court does not find that the attorneys' fees and non-taxable costs qualify as 'property damage,'" as "required for the exclusion to apply."[74]

The problem with the court's analysis, in our opinion, is not the nuanced difference between "damages *because of* 'property damage'" and "property damage" itself; it's that the court failed to consider that an insurer is obligated to pay only damages because of "property damage" to which the insurance applies. While attorney's fees falling within the supplementary payments provision may not be tied to whether the underlying loss is actually covered,[75] whether attorney's fees qualify as "damages" should be dependent upon coverage.

B. Cases Holding that Attorneys' Fees are not "Damages"

There are a number of cases holding that an insurer has no obligation to pay prevailing party fees awarded in an underlying suit. Those cases typically involve situations where there is no coverage under the policy in the first place, or where the claim upon which the award is based is uninsurable as a matter of law.[76] Again, however, few decisions are as well reasoned as *Mid-Continent v. PSI*.

One such example is *Alea London, Ltd. v. American Home Services, Inc.*[77] In that case, the court held that, under Georgia law, statutory attorneys' fees recoverable as "expenses of litigation" in an underlying suit for violations of the Telephone Consumer Protection Act ("TCPA") were not "damages" under a CGL policy.[78] In *Alea London*, the court held: "attorneys' fees, even where recoverable, are not typically included within the ordinary species of damages."[79]

In *Sullivan County v. Home Indemnity Company*, the court addressed whether attorney's fees awarded in an underlying civil rights lawsuit were "costs" or "damages" under an errors and omissions policy that was similar to the standard ISO CGL.[80] The policy at issue in that case obligated Home Indemnity to pay for "all sums the insured [became] legally obligated to pay as damages" to which the insurance applied. The policy also contained a supplementary payments provision obligating Home Indemnity to pay "all costs taxed against the insured," which was rendered inapplicable by endorsement.[81]

Contrasting 42 U.S.C. § 1988 with other statutes authorizing for the recovery of attorneys' fees as *damages*, the court held that section 1988 clearly only authorized the award of litigation expenses as "costs" to a party prevailing in the action.[82] According to the court, "there is a clear distinction between 'costs' and 'damages.'"[83] The policy Home Indemnity issued demonstrated "very persuasively that this particular policy used 'damages' only in its conventional sense."[84] Thus, held the court, the underlying award was not compensable under the insuring agreement, or the supplementary payments part of the policy for "costs," which had been supplanted by amendment.[85]

V. What are the Broader Implications In Texas?

Given the court's ruling in *Mid-Continent v. PSI*, the logical question follows as to the circumstances under which prevailing party fees may qualify as "damages" under a CGL policy. Texas follows the "American rule" for attorney's fees, which provides that a party may not recover attorney's fees unless a statute[86] or contract authorizes such recovery.[87] As it pertains to contractual liability, there generally is no obligation on the part of an indemnitor to pay for costs and attorney's fees where the agreement does not meet the express negligence test.[88] When it does, however, and assuming that the agreement is not otherwise excluded, the indemnitee's attorney's fees almost certainly qualify as "damages" under a CGL policy. The fees, however, will erode the limits of liability just like any other covered loss.

The statutory award of attorney's fees in Texas is not quite so promising to policyholders. As set forth below, there are very few statutes quantifying attorney's fees as compensatory; but notably among them are fees awarded pursuant to the Texas Deceptive Trade Practices Act:

ACTION	STATUTE	RECOVERY
Action Against Persons or Insurers Unauthorized to Conduct Insurance Business in Texas	Ins. Code § 101.202(a)	As costs
Action Against Carrier Based on Misrepresentation or Unfair Competition	Ins. Code § 541.152(a)(1)	As costs
Carrier's Failure to Pay Promptly Action	Ins. Code § 542.060	As costs
Farm Mutual Insurance Company's Action Against Policyholder for Failure to Pay Premiums	Ins. Code § 911.202(b)(3)	As costs
Mutual Insurance Company's Action Against Policyholder for Failure to Pay Premiums	Ins. Code § 912.203(b)(3)	As costs
Suit Against a Local Government	Loc. Gov't Code § 89.004(b)	As costs
Suit Against a County on a Claim for Breach of a Written Contract for Engineering, Architectural, or Construction Services or for Goods Related to Engineering, Architectural, or Construction Service	Loc. Gov't Code § 262.007(b)(3)	As damages
Proceeding to Have Court Order Delivery of Goods or Issuance of Substitute Document by Bailee When Document is Lost, Stolen, or Destroyed	Bus. & Com. Code § 7.601(b)	As costs
Action by Person/Gov't Injured by Conduct of Another in Restraint of Trade	Bus. & Com. Code § 15.21(a)	As costs
Action to Enforce a Non-Compete Covenant	Bus. & Com. Code § 15.51(c)	As costs
Action for Trademark Infringement	Bus. & Com. Code § 16.104 (c)(2)	As costs

ACTION	STATUTE	RECOVERY
Action on Improper Sale or Promotion of Annuity Contract	Bus. & Com. Code § 17.49	As costs
Consumer Action under the DTPA	Bus. & Com. Code § 17.50(c)	As costs
DTPA—Consumer Protection Act	Bus. & Com. Code § 17.506(d)	As damages
Action for Indemnity under the DTPA	Bus. & Com. Code § 17.555	As damages
Action by Creditor's Assignee	Bus. & Com. Code § 23.21	As costs
Uniform Fraudulent Transfer Act	Bus. & Com. Code § 24.013	As costs
Fraud in Real Estate and Stock Transactions	Bus. & Com. Code § 27.01(e)	As damages
Open Meetings Act	Gov't. Code § 551.142(b)	As damages
Whistleblower Action by Public Employee	Gov't. Code § 554.003(a)(4)	As costs
Action on Agreement for Goods/ Services b/w Texas Gov't and Vendor	Gov't. Code § 2251.043	As costs
Suit Against Principal and Surety on Payment Bond for Amount Due	Gov't. Code § 2253.073(b)(2)	As costs
Paternity Suit	Fam. Code § 160.636(c)	As costs
Suit to Collect Proceeds and Interest under Texas Natural Resources Code	Nat. Res. Code § 91.406(1)	As damages
Texas Workers' Compensation Act permits the recovery of attorney's fees in three distinct situations: (1) where the insurer has an attorney but the attorney does not actively represent the insurer; (2) where the worker's attorney represents both the worker and the insurer; and (3) where the insurer has an attorney who actively represents it and participates in obtaining recovery.	Lab. Code § 417.003(d)	As damages
Action Based on Restrictive Covenant Pertaining to Real Property	Prop. Code § 5.006	As costs
Motion to Dismiss Condemnation Proceeding	Prop. Code § 21.019(c)	As costs
Landlord Suit for Forcible Entry & Detainer	Prop. Code § 24.006(c)	As costs
Unreasonable Offer to Settle In Action to Recover Damages for Residence Construction Defect	Prop. Code § 27.004	As damages
Foreclosure of Lien Proceeding	Prop. Code § 53.156	As costs

ACTION	STATUTE	RECOVERY
Suit on Possessory Lien Concerning Possession of a Motor Vehicle or Vessel and the Indebtedness on the Vehicle or Vessel	Prop. Code § 70.008	As costs
Suit to Enforce Lien for Repair or Maintenance of Aircraft	Prop. Code § 70.306	As costs
Tenant's Action Against Landlord to Enforce Landlord's Duty to Disclose Ownership of Residential Unit/Failure to Make Repairs	Prop. Code § 92.005	As costs
Tenant's Suit for Landlord's Unlawful Interruption of Utilities, Removal of Property from Premises, or Willful Exclusion From Premises	Prop. Code § 92.008(f)(2)	As damages
Landlord's Suit Against Tenant for Wrongful Withholding of Last Month's Rent	Prop. Code § 92.108(b)	As costs
Tenant's Suit Against Landlord for Retaining Security Deposit in Bad Faith	Prop. Code § 92.109	As costs
Landlord's Action Against Tenant for Withholding Last Month's Rent	Prop. Code § 93.010(b)	As costs
Tenant's Action Against Landlord for Failing to Itemize Damages and Charges Withheld from Security Deposit	Prop. Code § 93.011(b)(2)	As costs
Tenant in Manufactured Home Lot Community Action Against Landlord, Including Action for Eviction, Retaliation, and Breach of Warranty	Prop. Code §§ 94.159(a)(2), 94.254, 94.255	As costs
Texas Trust Code	Prop. Code § 114.064	As costs
Homeowners Association's Action to Collect Costs for Enforcing its Restrictions, Bylaws, or Rules	Prop. Code § 209.008	As costs
Discriminatory Housing Practice Action	Prop. Code § 301.153(2)	As costs
Failure of Corporation to File Required Documents with SOS	Bus. Org. Code § 21.802(d)	As damages
Derivative Action on Behalf of Limited Partnership	Bus. Org. Code §§ 153.404(a), (e), 153.405	As costs
Proceeding for Sanctions for Filing Frivolous Pleading	C.P.R.C. §§ 10.002(c), 10.004(c)(3)	As costs
Action for Possession of Land b/w Party Claiming Under Record Title & Party Claiming by Adverse Possession	C.P.R.C. § 16.034	As costs
Collection of Judgment	C.P.R.C. § 31.002(e)	As costs

ACTION	STATUTE	RECOVERY
Uniform Declaratory Judgment Act	C.P.R.C. § 37.009	As costs
Recovery on certain specified claims	C.P.R.C. § 38.001	As costs
Suit to Dissolve Writ of Sequestration	C.P.R.C. § 62.044(b)	As costs
Indemnity Action Under Product Liability Statute	C.P.R.C. § 82.002(b)	As costs
Discrimination Because of Race, Religion, Color, Sex, or National Origin	C.P.R.C. § 106.002(b)	As costs
Employee's Suit for Damages Resulting from Employer's Termination of Employee After Jury Service	C.P.R.C. § 122.002(b)	As costs
Suit for Relief from Interception or Attempted Interception of Communications	C.P.R.C. § 123.004(5)	As damages
Abatement of Nuisance Action	C.P.R.C. § 125.003(d)	As costs
Texas Civil Theft Liability Act	C.P.R.C. § 134.005(b)	As costs
Action for Damages for Harmful Access by Computer	C.P.R.C. § 143.002(2)	As damages
Texas General Arbitration Act	C.P.R.C. § 171.048(c)	As damages

VI. Conclusion

Mid-Continent v. PSI has a way to go before it makes Texas history. For one, the attorney's fees need to be segregated. Given the importance of the issue, however, it is a decision that may very well end up before the Texas Supreme Court.

1 *Mid-Continent Cas. Co. v. Petroleum Solutions, Inc.*, No. 4:09-0422, 2016 WL 5539895 (S.D. Tex. Sept. 9, 2016), as amended in 2016 WL 7491858 (S.D. Tex. Dec. 30, 2016) (unpublished).

2 *Id.* at *9.

3 *In re Nalle Plastics Family Ltd. P'ship*, 406 S.W.3d 168 (Tex. 2013).

4 *Id.* at *27.

5 *Id.*

6 *Id.* at *28.

7 *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Puget Plastics Corp.*, 532 F.3d 398, 403 (5th Cir. 2008).

8 *Emp'rs Mut. Cas. v. Donnelly*, 300 P.3d 31, 34 (Idaho 2013); *Prichard v. Liberty Mut. Ins. Co.*, 84 Cal. App. 4th 890, 911–12 (2000); *State Farm Gen. Ins. Co. v. Mintarsih*, 175 Cal. App. 4th 274, 286 (2009); *Mid-Continent Cas. Co. v. Trece*, 186 So. 3d 11, 11 (Fla. Dist. Ct. App. 2015); *Geico Gen. Ins. Co. v. Hollingsworth*, 157 So. 3d 365, 367 (Fla. Dist. Ct. App. 2015).

9 *PSI*, 2016 WL 5539895, at *2.

10 *Id.*

11 *Id.*

12 *Id.* at *24.

13 *Id.* at *3.

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.* at *4.

23 *Id.*

24 *Id.*

25 *Id.* at *5.

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.* at *9.

33 *Id.* at *9.

34 *Id.* at *10.

35 *Id.* (citing *Gen. Motors Corp. v. Hudiburg Chevrolet, Inc.*, 199 S.W.3d 249, 256 (Tex. 2006)).

36 *Id.* at *12 (citing *Equitable Recovery, L.P. v. Health Ins. Brokers of Tex., L.P.*, 235 S.W.3d 376, 387 (Tex. App.—Dallas 2007, pet. denied)).

37 *Id.* at *12.

38 *Id.*

39 *Id.* at *22.

40 *Id.* at *26.

41 *Id.* at *27.

42 *Id.*

43 *In re Nalle*, 406 S.W.3d at 170.

44 *Id.* at 172–73.

45 *Id.* at 174–75.

46 *PSI*, 2016 WL 5539895, at *11–12.

47 *Id.* at *27.

48 *Id.*

49 *Id.*

50 *Id.* at *28.

51 *Id.* at *26–30.

52 *Id.* at *37.

53 *Id.*

54 *Id.* at *37.

55 *Id.* at *38.

56 *Id.* at *37–39.

57 662 Fed. App'x. 282, 284 (5th Cir. 2016).

58 *Neal-Pettit v. Lahman e al.*, 928 N.E.2d 421, 424 (Ohio 2010).

59 *Id.* at 422.

60 *Id.*

61 *Id.*

62 *Id.* at 423–24.

63 *City of Ypsilanti v. Appalachian Ins. Co.*, 547 F. Supp. 823, 827 (S.D. Mich. 1982).

64 *Id.* at 824–25.

65 *Id.* at 827.

66 *Id.* at 828. *See also Hyatt Corp. v. Occidental Fire & Cas. Co.*, 801 S.W.2d 382 (Mo. Ct. App. 1990).

67 *Ass'n of Apartment Owners of the Moorings, Inc. v. Dongbu Ins. Co., Ltd.*, 15-00497 BMK, 2016 WL 442952 (D. Hawaii Aug. 18, 2016).

68 *Id.* at *3 (citing *Am. Fam. Mut. Ins. Co. v. Spectre West Builders Corp.*, No. CV09-968-PHX-JAT, 2011 WL 488891 (D. Ariz. Feb. 4, 2011) and *APL Co. Pte. v. Valley Forge Ins. Co.*, 754 F.2d 1084 (N.D. Cal. 2010)).

69 *Id.* at *4.

70 *Id.*

71 *Id.*

72 2011 WL 488891 at*9.

73 *Id.*

74 *Id.*

75 *Donnelly*, 300 P.3d at 31.

76 *See, e.g.*, *San Diego Hous. Comm'n v. Ind. Indem. Co.*, 95 Cal. App. 4th 669, 688 (2002); *Combs v. State Farm Fire & Cas. Co.*, 143 Cal. App. 4th 1338, 1346 (2006); *PNC Fin. Servs. Grp., Inc. v. Houston Cas. Co.*, 647 F.App'x. 112, 122 (3d Cir. 2016) (unpublished); *Church Mut. Ins. Co. v. Exec. Bd. of the Missouri Baptist Convention*, No. 03-4224-CV-W-SOW, 2005 WL 1532948 *10 (W.D. Mo. June 24, 2005) (unpublished).

77 *Alea London Ltd. v. Am. Home Servs., Inc.*, 638 F.3d 768 (11th Cir. 2011).

78 *Id.* at 780.

79 *Id.*

80 925 F.2d 152, 152 (6th Cir. 1991).

81 *Id.*

82 *Id.* at 153.

83 *Id.*

84 *Id.*

85 *Id.*

86 Attorney's fees may be recovered where the legislature has so provided by statute. *Kelsey v. Corbett*, 396 S.W.2d 440, 442 (Tex. Civ. App.—El Paso 1965, writ ref'd n.r.e.). Such a statute provides a remedy, not a vested right; attorney's fees are not part of the claim but are a penalty designed to discourage unnecessary litigation. *Campos v. State Farm Gen. Ins. Co.*, 943 S.W. 2d 52, 55 (Tex. App.—San Antonio 1997, writ denied). Being in derogation of common law and penal in nature, the statute must be strictly construed, and authorization to recover attorney's fees cannot be implied but must be provided for by the express terms of the statute. *Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 95 (Tex. 1999); *Knebel v. Capital Nat'l Bank*, 518 S.W. 2d 795, 804 (Tex. 1974); *Gard v. Bandera Cnty. Appraisal Dist.*, 293 S.W. 3d 613, 617 (Tex. App.—San Antonio 2009, no pet.).

87 *Wells Fargo Bank v. Murphy*, 458 S.W.3d 912, 915 (Tex. 2015).

88 *Fisk Elec. Co. v. Constructors Assoc, Inc.*, 888 S.W.2d 813, 814–15 (Tex. 1994).

By Marisa Jeffrey

NUTS & BOLTS: DIRECTORS & OFFICERS LIABILITY POLICIES

Directors and officers (D&O) liability insurance provides the executives of a company with protection against liability for "wrongful acts" committed in their corporate capacities and the cost of defending such claims. D&O insurance is often packaged with other executive coverages like employment practices liability (EPL) insurance, fiduciary liability insurance, and kidnap and ransom (K&R) insurance. This article provides a primer on D&O insurance, common policy provisions, and key considerations to guide policy evaluation.[1] Keep in mind, however, that D&O policies are not standardized and the coverage provided can vary widely depending on a particular policy's terms.

I. Coverage for "Wrongful Acts"

In the most basic sense, D&O policies cover liability for "wrongful acts," often defined as an "actual or alleged error, a misstatement, a misleading statement, act, omission, neglect, or a breach of duty by the insured while acting in his corporate capacity."[2] Importantly, some D&O policies define "wrongful acts" to include only negligent conduct and do not provide coverage for intentional misconduct, although defense costs may still be covered.

Notably, D&O policies typically cover executives and directors for "wrongful acts" only in their capacity as directors or officers of the insured company. This limitation may appear in the definition of wrongful acts, in the definition of "insured person," or both. D&O policies may also provide coverage for the "wrongful acts" of the entity itself, which could be more limited in scope than the coverage issued to individual insureds under the policy. For instance, public company D&O policies typically limit entity coverage to securities claims. On the other hand, private company or not-for-profit D&O policies may cover a wide range of entity liabilities, potentially extending as far as individual D&O coverage.

Corporate executives are exposed to potential claims for alleged "wrongful acts" asserted by the corporation itself, the corporation's trustee in bankruptcy, successors of the corporation, or shareholders in shareholder derivative actions. The company's investors, lenders, customers, vendors, suppliers, consumer groups, competitors, and regulators or enforcement agencies could also bring claims covered by a D&O policy.[3]

II. Typical Insuring Agreements

Most D&O policies contain three separate insuring agreements, providing coverage as follows:

- **Coverage A or "Side A" Coverage:** Protects individual directors and officers against personal liability for "wrongful acts" not indemnified by the company
- **Coverage B or "Side B" Coverage:** Protects the company against liability for "wrongful acts" of directors and officers indemnified by the company
- **Coverage C or "Side C" Coverage**: Protects the company against its own liability for "wrongful acts"—sometimes limited to securities violations

The insuring agreements may share a combined policy limit of liability or may have separate and independent limits, as stated in the declarations. Some D&O policies also include a fourth insuring agreement for outside director liability, discussed below.

a. Individual D&O Coverage—Coverage A

Coverage A or "Side A" coverage applies to loss incurred by individual directors and officers of the insured company that is not, or cannot be, indemnified by the company.[4] Corporations organized under the laws of many states are permitted to indemnify their directors and officers against defense costs incurred in shareholder derivative lawsuits, but are not allowed to provide indemnification against settlements and judgments paid in derivative cases. Side A coverage may also kick in if the company is insolvent and

Marisa Jeffrey is an associate attorney at Amy Stewart PC in Dallas, Texas. Marisa's practice is focused solely on the representation of corporate policyholders in both first- and third-party coverage matters. A valuable asset to policyholders, Marisa assists the firm's clients in all phases of the insurance process: procurement and renewal, claim submission, creative pre-litigation solutions, and coverage litigation.

unable to indemnify the affected executives. Consider the following example:

> **Insuring Clause (A): Insured Person Liability Coverage**
>
> (A) The Company shall pay, on behalf of each of the **Insured Persons**, **Loss** for which the **Insured Person** is not indemnified by the **Organization** and which the **Insured Person** becomes legally obligated to pay on account of any **Claim** first made against the **Insured Person**, during the **Policy Period** or, if exercised, during the Extended Reporting Period, for a **Wrongful Act** by such **Insured Person** before or during the **Policy Period**.[5]

Because Side A protects the directors and officers directly when the insured company is not providing indemnification, it is different in several respects from Side B coverage (which applies to the same liability when it *is* indemnified by the company). For example, Side A coverage often applies without any deductible or retention, there are generally fewer exclusions, and the policy is usually non-rescindable.

Stand-alone Side A policies or excess Side A policies are also available and have become more popular in recent years, as these policies allow directors and officers the benefit of full policy limits dedicated exclusively to risks they may face individually, without the risk of limits being depleted by a claim against the company. Stand-alone or excess Side A coverage may be crucial when, for instance, ousted executives are blamed for the corporation's financial troubles, causing each party to retain separate legal counsel, and quickly exhausting the available limits through the payment of defense costs.

b. Corporate Reimbursement Coverage—Coverage B

Coverage B or "Side B" corporate reimbursement coverage applies to losses incurred in connection with claims against directors and officers when the corporation is providing indemnity. For example:

> **Insuring Clause (B): Insured Person Indemnification Coverage**
>
> (B) The Company shall pay, on behalf of an **Organization**, **Loss** for which such **Organization** grants indemnification to an **Insured Person**, and which the **Insured Person** becomes legally obligated to pay on account of any **Claim** first made against the **Insured Person**, during the **Policy Period** or, if exercised, during the Extended Reporting Period, for a **Wrongful Act** by such **Insured Person** before or during the **Policy Period**.[6]

As mentioned above, because Side B coverage protects the entity, a deductible or retention typically applies to claims covered under the Coverage B insuring agreement. Even though the insured entity benefits from the coverage, the Side B insuring agreement *does not* insure the corporation against claims brought against the entity itself.

c. Entity Coverage—Coverage C

Coverage C or "Side C" coverage applies to claims against the insured entity. Not all D&O policies contain entity coverage and the coverage may be limited to defense costs or restricted to securities claims for public company policies. Consider the following example drafted for a public company, limited to securities claims:

> **Insuring Clause (C): Entity Securities Liability Coverage**
>
> (C) The Company shall pay, on behalf of an **Organization**, **Loss** which such **Organization** becomes legally obligated to pay on account of any **Securities Claim** first made against the **Organization** during the **Policy Period** or, if exercised, during the Extended Reporting Period, for a **Wrongful Act** by the **Organization** before or during the **Policy Period**.[7]

Private company D&O policies tend to provide broader coverage, akin to the coverage provided to the directors and officers, with certain common exclusions. For example:

> **Insuring Clause (C): Entity Liability Coverage**
>
> (C) The Company shall pay, on behalf of an **Organization**, **Loss** which such **Organization** becomes legally obligated to pay on account of any **Claim** first made against the **Organization** during the **Policy Period** or, if exercised, during the Extended Reporting Period, for a **Wrongful Act** by the **Organization** before or during the **Policy Period**.[8]

d. Outside Director Liability Coverage

Outside director liability coverage may also be included in a D&O policy as a fourth insuring agreement or issued separately as part of an executive liability package. Essentially, outside director liability coverage is intended to cover the executives of the insured entity against liability arising from the executive's service at the request of the insured entity as a director, trustee, or equivalent position with an outside entity. Consider the following example:

> **Insuring Clause (D): Outside Directorship Liability Coverage**
>
> (D) The Company shall pay, on behalf of each of the **Insured Persons**, **Loss** which the **Insured Person** becomes legally obligated to pay on account of any **Claim** first made against the **Insured**, during the **Policy Period** or, if exercised, during the Extended Reporting Period, for a **Wrongful Act** by such **Insured Person** while acting in an **Outside Capacity**, before or during the **Policy Period**; provided that coverage under this Insuring Clause (D) shall be specifically excess of any indemnity (other than the indemnity provided by the **Organization**) and insurance available to such **Insured Person** by reason of serving in an **Outside Capacity**, including any indemnity or insurance available from or provided by the **Outside Entity**.[9]

D&Os may be acting in their "Outside Capacity" when, say, an executive is asked to serve on the board of a charitable or professional organization that has a mission related to the insured company's goods or services.

III. D&O Claims

D&O policies are written on a claims-made or claims-made-and-reported basis. As with other claims-made policies, coverage under a D&O policy is generally triggered by a "claim" against an insured during the policy period and typically requires the insured to provide notice of the claim to the insurer "as soon as practicable" or within a specified reporting period while the policy is in effect.[10] As discussed above, D&O insureds face a wide range of potential claim activity, including:

- regulatory investigations—both formal and informal;
- internal investigations—including mandatory and voluntary derivative demand investigations;
- administrative subpoenas;
- grand jury subpoenas;
- Wells notices;[11]
- regulatory proceedings;
- criminal proceedings; and
- private civil litigation.

Because policy definitions vary widely, the precise wording of the definition of "claim" is crucial to determine whether an action constitutes a claim under a particular D&O policy. For instance, a policyholder could have concerns about potential legal or regulatory exposure, causing the insured to proactively hire counsel. Even if the insured submits a notice of potential claim (discussed more fully below), any legal fees incurred before a "claim" arises under the policy definition would (a) not be covered by the insurer and (b) not apply to satisfy the retention amount. Keep in mind, however, that based on the types of claims commonly asserted against directors and officers, D&O policies may define "claim" more broadly than, for example, a typical Errors and Omissions policy to include both civil, criminal, regulatory, and/or administrative proceedings. The "claim" definition could also include a letter demand for redress of grievances, alternative dispute resolution, grand jury subpoenas, or informal document requests. As always, the specific policy wording is paramount. Compare the following sample definitions of a D&O "claim":

Example 1:

> **Claim** means:
>
> (1) a written demand for monetary damages or non-monetary relief;
>
> (2) a civil proceeding commenced by the service of a complaint or similar pleading;
>
> (3) an arbitration proceeding commenced by receipt of a written demand for arbitration or similar document;
>
> (4) a criminal proceeding commenced by the return of an indictment, information or similar document; or
>
> (5) a formal administrative or formal regulatory proceeding commenced by the filing of a notice of charges, entry of a formal order of investigation, or similar document,

against an **Insured** for a **Wrongful Act**, including any appeal therefrom.[12]

Example 2:

"**Claim**" means:

(i) a written demand for monetary or non-monetary relief (including any request to toll or waive any statute of limitations);

(ii) a civil, criminal, administrative, regulatory or arbitration proceeding for monetary or non-monetary relief which is commenced by:

(1) service of a complaint or similar pleading;

(2) return of an indictment, information or similar document (in the case of a criminal proceeding); or

(3) receipt or filing of a notice of charges; or

(iii) a civil, criminal, administrative or regulatory investigation of an **Individual Insured**:

(1) once such **Individual Insured** is identified in writing by such investigating authority as a person against whom a proceeding described in Definition 2(b)(ii) may be commenced; or

(2) in the case of an investigation by the Securities Exchange Commission ("**SEC**") or a similar state or foreign government authority, after:

(a) the service of a subpoena upon such **Individual Insured**; or

(b) the **Individual Insured** is identified in a written "Wells" or other notice from the **SEC** or a similar state or foreign government authority that describes actual or alleged violations of laws by such **Individual Insured**.

The term "**Claim**" shall also include any **Securities Claim** and any **Derivative Demand**.[13]

The distinctions between these definitions can significantly impact the scope of coverage, depending on the nature of the claim. For instance, note that Example 2 above explicitly provides for "any request to toll or waive any statute of limitations" and does not require a "formal" administrative or regulatory proceeding as specified in Example 1.

IV. Loss

Of course, the definition of "loss" is also critical to the scope of coverage. Consider what constitutes "loss"—and what does not—in this sample definition:

Loss means the amount that an Insured becomes legally obligated to pay on account of any **Claim**, including but not limited to damages (including punitive, exemplary, or multiplied damages, if and to the extent that such punitive, exemplary, or multiplied damages are insurable under the law of the jurisdiction most favorable to the insurability of such damages; provided such jurisdiction has a substantial relationship to the relevant **Insured**, to the Company, or to the **Claim** giving rise to the damages), judgments, settlements, pre-judgment and post-judgment interest, and **Defense Costs**.

Loss shall not include:

(1) any costs incurred by an Insured to comply with any order for injunctive or other non-monetary relief, any agreement to provide such relief, or any regulatory or administrative directive;

(2) taxes, fines or penalties, except as provided above with respect to punitive, exemplary or multiplied damages;

(3) any amount not insurable under the law pursuant to which the Policy is construed, except as provided above with respect to punitive, exemplary or multiplied damages;

(4) regular or overtime wages, salaries, commissions, or fees of **Insured Persons**; or

(5) any amount that represents or is substantially equivalent to an increase in any consideration paid (or proposed to be paid) by an **Organization** in connection with its purchase of any securities or assets.[14]

Defense costs are commonly included in the definition of "loss," generally set forth as a duty to defend the insured, a duty to pay or advance defense costs as they are incurred, or to reimburse defense costs. As mentioned above, however, defense costs typically erode the limits of a D&O policy.

Along with the specified exclusions from "loss" noted above, insurers often argue that restitution and disgorgement do not qualify as "loss." Insurers frequently base their restitution and disgorgement argument on the California Supreme Court's holding in *Bank of the West v. Superior Court* that a CGL insurer's duty to indemnify was limited to damages and did not extend to a claim where damages were unavailable.[15] However, a policy that obligates the insurer to pay amounts other than damages may provide broader coverage than the policy analyzed in *Bank of the West*.

V. Common Policy Limitations and Exclusions

D&O policies generally contain expansive insuring agreements that could cover a broad swath of claims against the insureds and may overlap with other coverages maintained by the entity. To properly assess the scope of a D&O policy, the exclusions are a central piece of the analysis. Unsurprisingly, D&O policies generally exclude claims arising from risks intended to be insured under other coverages like CGL, EPL, fiduciary, cyber, and E&O policies. Commonly, catastrophic hazards like nuclear events, environmental damage, and war also will be excluded. Like other claims-made policies, D&O also may limit the scope of coverage with retroactive dates. D&O policies also will generally exclude certain conduct related to fraudulent acts or personal profit and claims brought by other insureds, discussed more fully below.

a. Conduct Exclusions

D&O policies typically exclude from coverage claims arising from conduct that is intentionally fraudulent, dishonest, or is committed "with actual dishonest purpose and intent."[16] Some policies contain exclusions that also specifically bar coverage for criminal conduct. However, many times these exclusions require an "adjudication in fact" of the insured's guilt before the exclusion applies—a carve-back that usually allows the insured to benefit from an insurer-funded defense.

Many times D&O policies also will contain a personal profit exclusion, which precludes coverage for losses attributable to or arising from an action of an executive that results in a personal profit, advantage, or other personal remuneration to which the insured is not legally entitled. For example, in a case applying Texas law, the personal profit exclusion in a D&O policy barred coverage for a judgment won by investors against the insured entity's chief executive officer for stock fraud where the CEO procured funds to which he was not legally entitled.[17]

b. Insured v. Insured

Like many other liability policies, D&O policies commonly exclude claims brought by insureds against other insureds to prevent collusive lawsuits, whereby a corporate insured stages a lawsuit to raise funds, the tab to be paid by the insurer.[18] Specifically common to D&O, disputes over the "insured v. insured" exclusion often arises in the bankruptcy and receivership contexts as to whether the exclusion bars trustee and receiver claims against the insured. The whistleblower provisions of the Sarbanes Oxley Act and the Dodd-Frank Act also have led to "insured v. insured" disputes, but carve-backs for whistleblower claims also may be available.[19]

VI. Other Significant Provisions

When evaluating a D&O policy, many include several key policy provisions that are uniquely common to D&O insurance including: (a) severability clauses, (b) presumptive indemnification provisions, (c) allocation or recoupment clauses, and (d) notice of potential claim provisions.

a. Severability

A "severability" clause oftentimes provides that the knowledge or actions of one insured will not be imputed to another insured for purposes of determining coverage, meaning that the "innocent" insured may be covered while the bad actor is not. (Consider the impact on the conduct exclusions, discussed above.) Many of these clauses pertain to representations made in the application process, as exemplified by the WorldCom and Enron settlements in the mid-2000s, both of which involved substantial personal contributions from the D&O defendants. WorldCom's settlement, in particular, was comprised in part of $18 million in personal payments by individual directors and officers.[20] The D&O insurer denied coverage to all WorldCom directors and officers as a result of alleged misrepresentations in the insurance application.[21]

b. Presumptive Indemnification

Presumptive indemnification clauses require the insured entity to indemnify its directors and officers unless it is unable to do so or to pay the Side B deductible before coverage is triggered under Side A (with no deductible). These provisions essentially are intended to prevent the insured entity from refusing to indemnify the directors and officers—when it has the ability to do so—to mandate application of Side A coverage with no retention.

c.

d. Apportionment and Recoupment

Some D&O policies also contain crucial allocation or apportionment provisions that detail how covered and non-covered causes of action will be allocated under the policy for purposes of payment. Many times, however, these provisions require full payment of defense costs with a later allocation as to indemnity payments.

Relatedly, D&O insurance may also explicitly allow the insurer to seek reimbursement of defense costs for claims that ultimately are determined to be outside the scope of coverage. Recoupment provisions may apply only to certain excluded conduct, or could be more generally applicable to any claims that do not ultimately fall within the policy's coverage.

e. Notice of Potential Claim

D&O policies sometimes contain a notice-of-potential-claim provision, which effectively expands the coverage the policy provides to claims arising after the policy period from incidents that occur or are discovered during the policy period if proper notice is given. If the notice-of-potential-claim is given during the policy period, the claim will be treated as having been first made during that policy period even if it is not actually asserted until after the policy period expires.

A notice-of-potential-claim provision can benefit the insured by causing a claim asserted after the policy expires to relate back, potentially allowing the insured to avoid encumbering a new policy with the risk of that particular claim and eliminating the risk that a future claim will be barred by a prior-knowledge or fortuity defense to coverage. On the other hand, if the policy under consideration is nearing exhaustion, giving notice of a potential claim pursuant to the provision may force the claim into the policy period with low remaining limits.

VII. The Wrap-Up

In extremely general terms, D&O policies typically cover "loss" arising from a "claim" made during the policy period, alleging a "wrongful act" against an "insured" in their insured capacity, which is not subject to exclusions within the policy. Of course, each one of the quoted terms above is a defined term and the particular language of each definition will steer coverage. The bottom line: as with all policies, the key to D&O coverage is a careful reading of the policy provisions, applied to the specific circumstances of the case.

1 This article is adapted from, and additional information can be found in, Amy Elizabeth Stewart, Texas Insurance Coverage Litigation 73–104 (2016).

2 *See Fed. Deposit Ins. Corp. v. Mijalis*, 15 F.3d 1314, 1328 (5th Cir. 1994).

3 In addition to directors and officers, corporate managers, non-executive officers, and employees of the company may be covered for the same types of risks, depending on the policy's terms.

4 *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Willis*, 139 F. Supp. 2d 827, 829–31 (S.D. Tex. 2001).

5 Chubb Group of Insurance Companies, Asset Management ProtectorSM by Chubb, Private Company Directors and Officers Liability Coverage Part 14-02-13781 (02/2008); *see, e.g., In re First Cent. Fin. Corp.*, 238 B.R. 9, 13–14 (Bankr. E.D.N.Y. 1999) (adversary proceeding in bankruptcy, *Ochs v. Lipson*).

6 Chubb Group of Insurance Companies, Asset Management ProtectorSM by Chubb, Private Company Directors and Officers Liability Coverage Part 14-02-13781 (02/2008).

7 Chubb Group of Insurance Companies, Asset Management ProtectorSM by Chubb, Public Company Directors and Officers Liability Coverage Part 14-02-13782 (02/2008).

8 Chubb Group of Insurance Companies, Asset Management ProtectorSM by Chubb, Private Company Directors and Officers Liability Coverage Part 14-02-13781 (02/2008).

9 Chubb Group of Insurance Companies, Asset Management ProtectorSM by Chubb, Public Company Directors and Officers Liability Coverage Part 14-02-13782 (02/2008).

10 *Fed. Deposit Ins. Corp. v. Mijalis*, 15 F.3d 1314, 1330 (5th Cir. 1994); *Prodigy Commc'ns Corp. v. Agric. Excess & Surplus Ins. Co.*, 288 S.W.3d 374, 380 (Tex. 2009).

11 A Wells notice is a notification from the Securities and Exchange Commission that regulators intend to recommend that enforcement proceedings be brought against a person or entity. *See* 17 C.F.R. § 202.5(c).

12 Chubb Group of Insurance Companies, Asset Management ProtectorSM by Chubb, Private Company Directors and Officers Liability Coverage Part 14-02-13781 (02/2008).

13 Chartis Directors, Officers and Private Company Liability Insurance ("D&O Coverage Section"), 95727 (9/07).

14 Chubb Group of Insurance Companies, Asset Management ProtectorSM by Chubb, Private Company Directors and Officers Liability Coverage Part 14-02-13781 (02/2008).

15 *Bank of the West v. Superior Court*, 833 P.2d 545, 560 (Cal. 1992).

16 *Eglin Nat'l Bank v. Home Indem. Co.*, 583 F.2d 1281, 1288 (5th Cir. 1978) (internal quotation marks omitted).

17 *TIG Specialty Ins. Co. v. Pinkmonkey.com Inc.*, 375 F.3d 365, 371 (5th Cir. 2004).

18 *Fidelity & Deposit Co. of Md. v. Conner*, 973 F.2d 1236, 1238 (5th Cir. 1992).

19 *See* 18 U.S.C. § 1514A (2010); 15 U.S.C.A. § 78u-6 (2010).

20 *See* Michael Klausner et al., *Outside Directors' Liability: Have WorldCom and Enron Changed the Rules?*, 71 STAN. LAW. 36, (2005).

21 *Id.*

By Rachelle H. Glazer and John P. Atkins

RECENT FIFTH CIRCUIT AND TEXAS SUPREME COURT INSURANCE DECISIONS

FIFTH CIRCUIT

One email does not computer fraud make.

***Apache Corp. v. Great American Insurance Co.*, 2016 WL 6090901 (5th Cir. Oct. 18, 2016)**

Insurance for losses resulting from computer fraud, unauthorized access to computer systems, and other types of cyber-loss has become vitally important. As more businesses get covered for losses of this kind, coverage litigation is bound to result. The Fifth Circuit recently decided a case that required it to construe computer fraud coverage in a crime protection policy.

In March 2013, Apache Corporation (a Texas oil production company) received a phone call from a person purporting to be from Petrofac, an Apache vendor. In fact, the caller was part of a criminal conspiracy to defraud Apache. The caller advised Apache that it needed to change the account it was using to make payments to Petrofac. Apache refused without a formal request on Petrofac's letterhead. This was shortly forthcoming, in the form of a fraudulent email from an account made to resemble Petrofac's email address attaching a false letter on counterfeit Petrofac letterhead. The email and attached letter directed Apache to direct future Petrofac payments to a new account.[1]

Apache did as it was told, and over the course of about a month sent payments totaling over £4.3 million to the new account. Shortly thereafter, however, Apache heard from actual representatives of Petrofac, who were concerned that they had not received the payments they were due. A short investigation ensued, and while Apache recovered a substantial part of the loss, it was still on the hook for a loss of about £1.5 million, or roughly $2.4 million.[2]

Apache had crime-protection insurance from Great American Insurance Company, which extended the following coverage to losses caused by "computer fraud":

> We will pay for loss of, and loss from damage to, money, securities and other property resulting directly from the use of any computer to fraudulently cause a transfer of that property from inside the premises or banking premises: (a) to a person (other than a messenger) outside those premises; or (b) to a place outside those premises.

Great American promptly denied Apache's claim on the basis that the "loss did not result directly from the use of a computer nor did the use of a computer cause the transfer of funds."[3]

Apache sued and both parties moved for summary judgment on whether the claim fell within the scope of coverage. The district court found for Apache, holding that while the non-computerized components of the scheme were important, this did not mean that the email was not a "substantial factor" in the loss. The court further determined restricting coverage to losses due to computer hacking would render the policy "pointless." Nevertheless, the district court denied Apache any late penalties under section 542.060 of the Texas Insurance Code.[4]

Both parties appealed. The Fifth Circuit noted that the computer fraud provision presented a case of first impression, and that therefore it was required to hazard an *Erie*-guess.[5]

The court determined that the Texas Supreme Court had expressed a strong preference for cross-jurisdictional uniformity in cases involving insurance provisions that might be interpreted in many jurisdictions. The court then surveyed the authority cited by the parties in their briefing interpreting similar provisions in other jurisdictions.[6]

The court first analyzed a Ninth Circuit case Great American cited, *Pestmaster Services, Inc. v. Travelers Casualty & Surety Company of America*,[7] in which the Ninth Circuit affirmed a lower court's denial of coverage under a similar computer

Rachelle ("Shelley") H. Glazer is a Partner at Thompson & Knight LLP in Dallas and focuses her practice on business and contract disputes, including complex insurance contract disputes. She has previously chaired the Torts and Insurance Practice Section of the Dallas Bar Association and been named one of The Best Lawyers in America® in Insurance Law for 2012–2016 and a Texas Super Lawyer® in Insurance Coverage for 2012–2016. She can be reached at Rachelle.Glazer@tklaw.com.

John P. Atkins is an Associate at Thompson & Knight LLP in Dallas, and focuses his practice on commercial litigation, health, and insurance law.

fraud coverage provision covering "the use of any computer system to fraudulently cause a transfer[.]" In *Pestmaster*, a payroll contractor had diverted payments intended to pay a company's payroll taxes for its own benefit. The lower court held, and the Ninth Circuit affirmed, that although the payments were made using a computer, there was no coverage because the transfers were authorized (even if the use to which they were put was not), and therefore the transfers themselves were not fraudulent. The court found that if any use of a computer in the course of a fraud triggered coverage under this provision, this would convert "computer fraud" provisions into general fraud provisions, because it is difficult to conceive of a modern fraud that does not, to some extent, make use of computers.[8]

The Fifth Circuit then analyzed a pair of district court cases—one from the Southern District of Indiana,[9] and one from the Northern District of Texas.[10] In the Indiana case, the district court found that faxed fake purchase orders did not "fraudulently cause" a business to transfer prepaid phone cards to fraudsters, because the faxes did not directly cause the transfer, because the business required the fraudsters to forward additional physical documents before it would send the phone cards.[11] In the Texas case, the district court similarly found that an employee's fraudulent electronic submission of over a hundred false loan applications (which caused the insured company to send out loan checks which the employee pocketed) did not *directly* cause a fraudulent transfer, as the computer fraud provision of the applicable insurance policy required, because the use of a computer did not actually cause the transfer.[12]

Losses due to email-based fraud schemes that do not involve actual hacking are unlikely to be covered by typical computer fraud provisions.

The court found no authority to offset these holdings, since the one supportive holding offered by the insured had been vacated. The Fifth Circuit therefore determined, on the strength of these out-of-jurisdiction precedents, that the email was merely incidental to the fraudulent scheme, especially since Apache specifically requested it (in response to the phone call), and because the transfers themselves were made to pay genuine invoices (albeit to the wrong party). To construe the policy otherwise would, as the Ninth Circuit had found, convert the computer fraud provision into a general fraud provision, given the ubiquity of computer usage in modern business.[13]

Insureds should be aware of this kind of case when they acquire crime protection, fraud, or cyber coverage. Losses due to email-based fraud schemes that do not involve actual hacking are unlikely to be covered by typical computer fraud provisions. Given the frequency of email fraud, and the ease with which a criminal can attempt it, it is crucial for businesses to fully understand their risk exposure and the scope of their coverage.

Policyholder should not rely on *insurer* to figure out who its additional insureds should be.

***AIG Specialty Insurance Co. v. Tesoro Corp.*, 840 F.3d 205 (5th Cir. 2016)**

In this case, the Fifth Circuit had to decide whether a subsidiary not designated as an additional insured under an excess policy, was nevertheless to be covered, because the insurer (according to the insured) ought to have known the insured intended the subsidiary to be covered.

The story of this case begins with a refinery, subject to a series of federal and state pollution remediation orders, changing hands twice. First, Tosco Corporation sold the refinery to Ultramar Diamond Shamrock, a Texas company. Tosco indemnified Ultramar to the tune of $50 million, and Ultramar acquired $100 million in excess insurance coverage from Chartis, predecessor to AIG Specialty Insurance Co. Then Ultramar sold the refinery to Tesoro Corporation (Tesoro).[14] As part of the sale agreement, Ultramar assigned Tosco's indemnity to Tesoro, and transferred the Chartis policy as well.[15]

This is where the trouble began. The transfer endorsement for the Chartis policy named only Tesoro, and named no additional insureds. But it was Tesoro Refining, a subsidiary of Tesoro, that actually acquired ownership of the refinery. Chartis claimed that it was directed to name only the parent on the transfer endorsement.[16]

Tesoro Refining sued Tosco, claiming Tosco had concealed the scope of the environmental remediation requirements still associated with the refinery. Tesoro's acquisition of the Chartis policy became an issue in this litigation, as Tosco argued that it showed that Tesoro had not relied on any (purportedly inadequate) disclosures Tosco had made regarding the remediation orders. As the matter approached settlement, Tesoro Refining notified Chartis, which responded with a reservation of rights letter that did two things: (1) it recognized the possibility that the remediation orders could constitute a claim, and (2) it named Tesoro (not Tesoro Refining) as the insured.

Ultimately, Tesoro Refining settled with Tosco's successor. Tesoro then demanded coverage for remaining liabilities from Chartis, naming itself as insured, on behalf of Tesoro Refining. Chartis began a coverage investigation, which proceeded too slowly for Tesoro, who sued in California. Chartis brought a declaratory judgment action in Texas. The disputes were consolidated in the Western District of Texas.[17]

Chartis claimed that it was not obligated to pay because its only insured was Tesoro Corporation. Tesoro sought

both reformation and third-party beneficiary coverage. The district court found that the reformation claim was time-barred, and that the third-party beneficiary claim was not viable under either Texas or California law. The district court therefore granted summary judgment for Chartis. Tesoro appealed.[18]

On appeal, Tesoro did not dispute that its third-party beneficiary argument was unavailing under Texas law, but argued that California law applied, under which it was clear that Tesoro Refining was a third-party beneficiary, since that was the obvious intent of the parties. Brushing past the choice-of-law issue, the Fifth Circuit found Tesoro's claim failed even under California law, which required third-party beneficiaries to be explicitly contemplated in a contract to be covered. Since Tesoro Refining was not named, it was not covered.[19]

The Fifth Circuit then considered the merits of Tesoro's reformation request under Texas law. The court explained that an insured is entitled to reformation of a policy if the insured shows that the policy contains a mistake that arises from the insurer's specialized knowledge, on which the insured relied. Essentially, Tesoro's argument was that it relied on Chartis's specialized knowledge as an insurer to determine that Tesoro intended to have the subsidiary that owned the refinery covered as well.[20]

The Fifth Circuit found Tesoro's position strange. The court was not sure why it would assume that Chartis, as opposed to Tesoro, was in a better position to know who owned the refinery, or why it would make sense for Tesoro to rely on Chartis knowing this. The court therefore held that Tesoro was not entitled to reformation.[21]

Also, the court found that Tesoro should have known that Tesoro Refining was not named; as a result, Tesoro's reformation claim was time-barred.[22]

Insureds must be diligent in monitoring and defining the scope of their coverage, and should not rely on courts to enforce coverage for additional insureds based on what the insured *really meant* at the time a claim is made. This is especially true in cases where insurance is being assigned from an original insured to a new one—in the haste to get a deal done, important details like who actually needs the insurance cannot be overlooked.

"Environmental damage" may include losses not excluded by a pollution exclusion, at least for purposes of insurer's duty to defend.

***Federal Insurance Co. v. Northfield Insurance Co.*, 837 F.3d 548 (5th Cir. 2016)**

This case arose from a dispute between insurers about responsibility to cover a mutual insured.

The mutual insured, Bryan Wagner, bought certain oil and gas properties from ExxonMobil, and agreed to indemnify and defend ExxonMobil against certain claims and liabilities. Landowners subject to the acquired interests sued both Wagner and ExxonMobil for claims including "environmental damage." ExxonMobil demanded indemnity from Wagner, then sued when it was not forthcoming. ExxonMobil alleged that Wagner was obliged to indemnify it for landowner claims alleging environmental damage.[23]

Wagner had a pollution liability policy from Federal Insurance Co. and a general liability policy from Northfield Insurance Co. Federal agreed to defend Wagner in ExxonMobil's suit, but argued that Northfield's policy might also encompass "environmental damage" claims, and that Northfield should have to share the burden of defense. Northfield countered that a pollution exclusion in its policy precluded both coverage and defense. Federal sued Northfield. The district court determined that the pollution exclusion excused Northfield of any duty to defend.[24]

On appeal, the Fifth Circuit first set out the traditional eight-corners rule for determining whether an insurer had a duty to defend. Northfield's general liability policy contained a pollution exclusion which specifically excluded coverage for:

> '[b]odily injury', 'property damage', 'personal injury', loss of, damage to or loss of use of property, or any other form of liability or damages to which any insured may be subject arising out of the actual, alleged, or threatened discharge, dispersal, release, seepage, migration or escape of pollutants at any time at any location by whomsoever caused.

ExxonMobil's petition alleged:

> [a]ll three lawsuits in the underlying [Louisiana] litigation allege environmental damage and seek restoration and remediation of the land subject to mineral rights purchased by the Wagner Group.

The court noted that there was likely substantial overlap between the pollution exclusion and the claims in Exxon's complaint.[25] Federal, however, argued that while "environmental damage" can be caused by release of pollutants, that is far from the only possible cause. Federal proposed, for instance, that negligent construction could cause soil erosion, or operation of heavy machinery could damage plant and animal life or habitats, and these kinds of damage would fall within ExxonMobil's claim but outside of Northfield's exclusion.[26]

Hamstrung by the eight-corners rule, the Fifth Circuit decided it could not rule out that ExxonMobil's demand for indemnity for environmental damage claims might

encompass some claims properly coverable under Northfield's policy. For this reason, the Fifth Circuit reversed the district court, holding that Northfield was required to assist Federal in the defense of ExxonMobil's claim.[27]

But the Fifth Circuit was not done. In the interests of judicial economy, the court also considered a couple of additional questions relating to Northfield's duty to defend. First, the court considered an alternative argument advanced by Federal that even if the pollution exclusion applied, an Underground Resources & Equipment Buyback endorsement nevertheless would restore coverage. The court determined that Federal had simply failed to allege that ExxonMobil's claims could reach hazards of the type described in the endorsement.[28]

Second, the court considered but rejected Northfield's argument that a contractual liability exclusion in the Northfield policy precluded a duty to defend. Northfield contended that this provision excluded coverage, since the indemnity ExxonMobil demanded arose from its agreements with Wagner. Federal responded that the indemnity arrangement between ExxonMobil and Wagner was not excluded because it fell within the definition of "insured contract" in Northfield's policy, which was an exception to the contractual liability exclusion. The policy defined "insured contract":

> That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.[29]

Northfield argued that the exception did not apply because Exxon alleged no tort liability, but the court disagreed, finding that ExxonMobil's complaint clearly asked for tort as well as contractual indemnity where it requested indemnity "from and against all damages, losses, claims, demands, and causes of action . . . brought by any and all persons . . . on account of any personal injury, death, damage, destruction, [or] loss of property. . . ."[30] Northfield's alternative argument, that any alleged injury did not fall within the period contemplated by the exception to the contractual liability exclusion, was foreclosed by the fact that ExxonMobil's petition did not state the dates of the injuries it alleged. Northfield, therefore, had a duty to defend.

As Texas insurance lawyers know well, the duty to defend and the duty to indemnify are very different beasts, and this case shows just how tenuous a thread may support a duty to defend before actual liability is determined. If ExxonMobil had pleaded just a few more facts, had clarified the natures of its indemnity claims, or had set out the dates of the alleged injuries, Northfield's exclusion could have precluded any defense. But because the complaint was vague—as is likely to happen where the claim is for indemnity associated with *another* ongoing lawsuit—all that was required to establish a duty to defend was a pleading of hypotheticals that would both fit within the pleaded claims and be covered under the policy.

Fact of prior knowledge is a question for the jury, and offer of full release by single plaintiff is sufficient to constitute a *Stowers* demand.

***OneBeacon Insurance Co. v. T. Wade Welch & Associates*, 841 F.3d 669 (5th Cir. 2016)**

The Fifth Circuit in this case affirmed a *Stowers* judgment against a legal malpractice insurer even though the *Stowers* demand did not include a release of all insureds: a somewhat surprising result.

The insured, Wade Welch & Associates (the Welch Firm) represented DISH Network in litigation against Russian Media Group (RMG). The Welch Firm's first-chair attorney on the case, Wooten, failed to timely respond to discovery requests, then failed to respond to a motion to compel, resulting in the entry of a discovery order with which Wooten appears to have attempted to comply, producing significant numbers of documents and promising future supplementation. The discovery order was issued in February of 2006.[31]

In November of 2006, the Welch Firm applied for malpractice insurance with Westport Insurance Company, denying in its application that it knew of any "fact or circumstance, act, error, omission or personal injury which might be expected to be the basis of a claim or suit for lawyers . . . professional liability." In December of the same year, the Welch Firm applied for coverage with OneBeacon Insurance Company, and represented to OneBeacon that its representations in the Westport application were still true. OneBeacon issued a policy for the 2006–2007 policy year, with a retroactive date for coverage of liability arising from wrongful acts as far back as January 4, 1995. The policy contained a "prior knowledge" exclusion for claims arising from wrongful acts prior to the policy period if the insured had a reasonable basis to believe that it had committed a wrongful act, violated a disciplinary rule, or engaged in professional misconduct, or could foresee a claim being made.[32]

In February of 2007, RMG moved for sanctions against Wooten for failure to comply with the discovery order, citing several problems with Wooten's productions. RMG asked for the "death penalty"—conclusive presumptions in favor of RMG's claims. In July, the magistrate granted

RMG's motion. Wooten failed to inform his firm or the client of this result.[33]

In December of 2007, the Welch Firm renewed its coverage with OneBeacon and again affirmed that none of its attorneys had been sanctioned. The 2007–08 renewal contained the same prior knowledge exclusion. In February of 2008, the district court affirmed the magistrate's sanction, and around the same time, an associate informed the Welch Firm's management of the situation, and Wooten resigned from the firm.[34]

The Welch Firm informed OneBeacon that DISH (the client) might have a malpractice claim in April 2008, and in June informed OneBeacon of RMG's settlement demand. In December 2010, DISH formally requested that OneBeacon makes its policy limits available for a settlement with RMG, offering to settle and release the Welch Firm, but not Wooten. OneBeacon refused, and instead filed a declaratory judgment action in the Southern District of Texas seeking either rescission of the policy or a finding that the prior knowledge exclusion barred coverage. The Welch Firm counterclaimed for OneBeacon's failure to settle pursuant to its *Stowers* duty.[35]

The district court denied both parties' summary judgment motions on the prior knowledge exclusion, finding that the question of whether Wooten should reasonably have expected he would be sanctioned in December of 2006 was a fact question for the jury. The district court also determined that DISH's settlement demand—to release the Welch Firm in exchange for the policy limits—was a valid *Stowers* demand even though Wooten was not included. At trial, the jury found for DISH and the Welch Firm on all questions, determining that Wooten could not have foreseen the sanctions in December 2006. OneBeacon appealed on the prior knowledge exclusion issue and on the *Stowers* question.[36]

The Fifth Circuit treated the prior knowledge exclusion first. Given the extremely broad definition of "wrongful act" in the policy, even OneBeacon had to agree that the policy could not be applied literally without rendering coverage illusory. The exclusion, therefore, could extend only to wrongful acts that the attorney could reasonably foresee would lead to a malpractice claim. In December of 2006, Wooten was subject merely to a discovery order, and even RMG's counsel had testified that Wooten likely would not have been sanctioned had he complied with that order. Therefore, the question was properly for the jury, which had evidence sufficient to support its verdict.[37]

The court then turned to OneBeacon's argument that DISH's settlement demand had not triggered the *Stowers* doctrine,[38] because DISH had not offered to release all of the insureds in exchange for the policy limits—DISH had only offered to release the Welch Firm, and not Wooten.[39]

The court noted that while it found no Texas Supreme Court precedent on point, it had previously held that an insurer fulfilling its *Stowers* obligation "is free to settle suits against one of its insureds without being hindered by potential liability to co-insured parties who have not yet been sued." Although OneBeacon had offered a Texas appeals case, *Patterson v. Home State County Mutual Insurance Co.*,[40] for the proposition that *Stowers* obligations were only triggered by offers to settle against all insureds, the court distinguished *Patterson*, in which the insured employer had *specifically instructed* the insurer not to settle unless all insureds were released.[41] The court determined, therefore, that since an insurer *could* reasonably settle for policy limits on behalf of only one insured, such an offer could constitute a valid *Stowers* demand.

The more important holding in this case clearly is that an insurer has a duty to accept a settlement offer under the *Stowers* doctrine if the *Stowers* criteria are met, even if the settlement offer does not release all of its insureds. Insurers should therefore be wary of refusing settlement offers that release only certain insureds, and should be prepared to defend the prudence of any such refusal.

1 *Apache Corp. v. Great Am. Ins. Co.*, 2016 WL 6090901, *1 (5th Cir. Oct. 18, 2016).

2 *Id.*

3 *Id.* at *1–2.

4 *Id.* at *2.

5 *Id.* at *2–3.

6 *Id.* at *4–6.

7 656 Fed. Appx. 332, 333 (9th Cir. 2016).

8 *Pestmaster Servs., Inc. v. Travelers Cas. & Sur. Co. of Am.*, 656 Fed. Appx. 332, 333 (9th Cir. 2016).

9 *Brightpoint, Inc. v. Zurich Am. Ins. Co.*, 1:04-CV-2085-SEB-JPG, 2006 WL 693377 (S.D. Ind. Mar. 10, 2006).

10 *Great Am. Ins. Co. v. AFS/IBEX Fin. Servs., Inc.*, CIV. A. 307-CV-924-O, 2008 WL 2795205 (N.D. Tex. July 21, 2008), aff'd, 612 F.3d 800 (5th Cir. 2010).

11 *Brightpoint*, 2006 WL 693377, at *6–7.

12 *Great Am. Ins. Co.*, 2008 WL 2795205, at *14.

13 *Apache*, 2016 WL 6090901, at *5–7.

14 The subsidiary, Tesoro Refining, will be identified with its full name throughout to avoid confusion. "Tesoro" will always mean the parent company.

15 *AIG Specialty Ins. Co. v. Tesoro Corp.*, 840 F.3d 205, 207 (5th Cir. 2016), *reh'g denied*, 15-50953, 2016 WL 6993769 (5th Cir.

Nov. 29, 2016).

16 *Id.* at 207.

17 *Id.* at 207–08.

18 *Id.* at 208.

19 *Id.* at 209.

20 *Id.* at 210–11.

21 *Id.* at 211.

22 *Id.* at 211–12.

23 *Fed. Ins. Co. v. Northfield Ins. Co.*, 837 F.3d 548, 550–51 (5th Cir. 2016).

24 *Id.* at 551.

25 *Id.* at 553.

26 *Id.* at 554.

27 *Id.*

28 *Id.* at 554–55.

29 *Id.* at 555–56.

30 *Id.* at 556.

31 *OneBeacon Ins. Co. v. T. Wade Welch & Assocs.*, 841 F.3d 669, 671–72 (5th Cir. 2016).

32 *Id.* at 672–73.

33 *Id.* at 673.

34 *Id.*

35 *Id.* at 674.

36 *Id.* at 674–75.

37 *Id.* at 676–77.

38 In Texas, an insurer with a duty to defend has a duty to settle a claim, such that a failure to discharge that duty is negligent, where (1) the claim at issue is within the scope of coverage, (2) the demand is within the policy limits, and (3) the terms of the demand are such that an ordinarily prudent insurer would accept it. *See G.A. Stowers Furniture Co. v. Am. Indem. Co.*, 15 S.W.2d 544, 547 (Tex. Comm'n App. 1929); *Am. Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 849 (Tex. 1994).

39 *OneBeacon*, 841 F.3d at 678.

40 No. 01-12-00365-CV, 2014 WL 1676931 (Tex. App.—Houston [1st Dist] Apr. 24, 2014, pet. denied).

41 *One Beacon*, 841 F.3d at 678–79.

TexasBarCLE

14th Annual Course

Advanced Insurance Law

Co-sponsored by the Insurance Law Section of the State Bar of Texas
Approved CE Sponsor of the Texas Department of Insurance

LIVE San Antonio
June 8-9, 2017

REGISTER

EVENT LOCATION
Hyatt Hill Country Resort and Spa
9800 Hyatt Resort Drive
San Antonio, Texas, 78251
(210) 647-1234

VIDEO Dallas
July 6-7, 2017

REGISTER

Cityplace Events
2711 North Haskell Avenue
Dallas, TX 75204
214-515-5100
No rooms have been blocked for this showing

> **TENTATIVE PROGRAM:** Hours and topics are subject to change. Check back in February for more complete information

TENTATIVE TOPICS

- Appraisals: The Game is Changing
- Attorney's Fees
- How to Stay out of or Stay in Federal Court
- Independent Counsel
- Issues That are Important to Corporate and Company Policyholders
- Lawyers Conduct
- Legislative Update
- Mindfulness in the Practice of Law
- Post-Judgment Assignments and Turnovers
- Preserving Error
- Priority of Coverage
- Professional Coverage
- Recent Developments in Insurance Coverage and Indemnities for Oil and Gas Policyholders
- *Stowers*
- Supreme Court Update
- Trial Strategies
- What We Learned from the *Manchaca* Case

SAVE

LIVE Register by May 25 and **save up to $75!**
Section Members **can save up to $100!**

VIDEO Register by June 22 and **save up to $75!**
Section Members **can save up to $100!**

COURSE AMENITIES

- Breakfast and lunch provided each day
- Complimentary parking at all sites
- Course materials provided as a PDF download and a printed notebook or receive the PDF download only at a discount!
- Casino Party!
- Free Webcast to registrants of the Advanced Insurance Law Course

MCLE CREDIT
Approximately 12 hours including 2.5 hours ethics

TexasBarCLE.com
800.204.2222 x1574

Education by the Bar, for the Bar

STATE BAR OF TEXAS
Created in 1939

STATE BAR OF TEXAS
Insurance Law Section
P.O. Box 12487, Capitol Station
Austin, Texas 78711-2487

NON PROFIT ORGANIZATION

U.S. POSTAGE
PAID
PERMIT NO. 1804
AUSTIN, TEXAS