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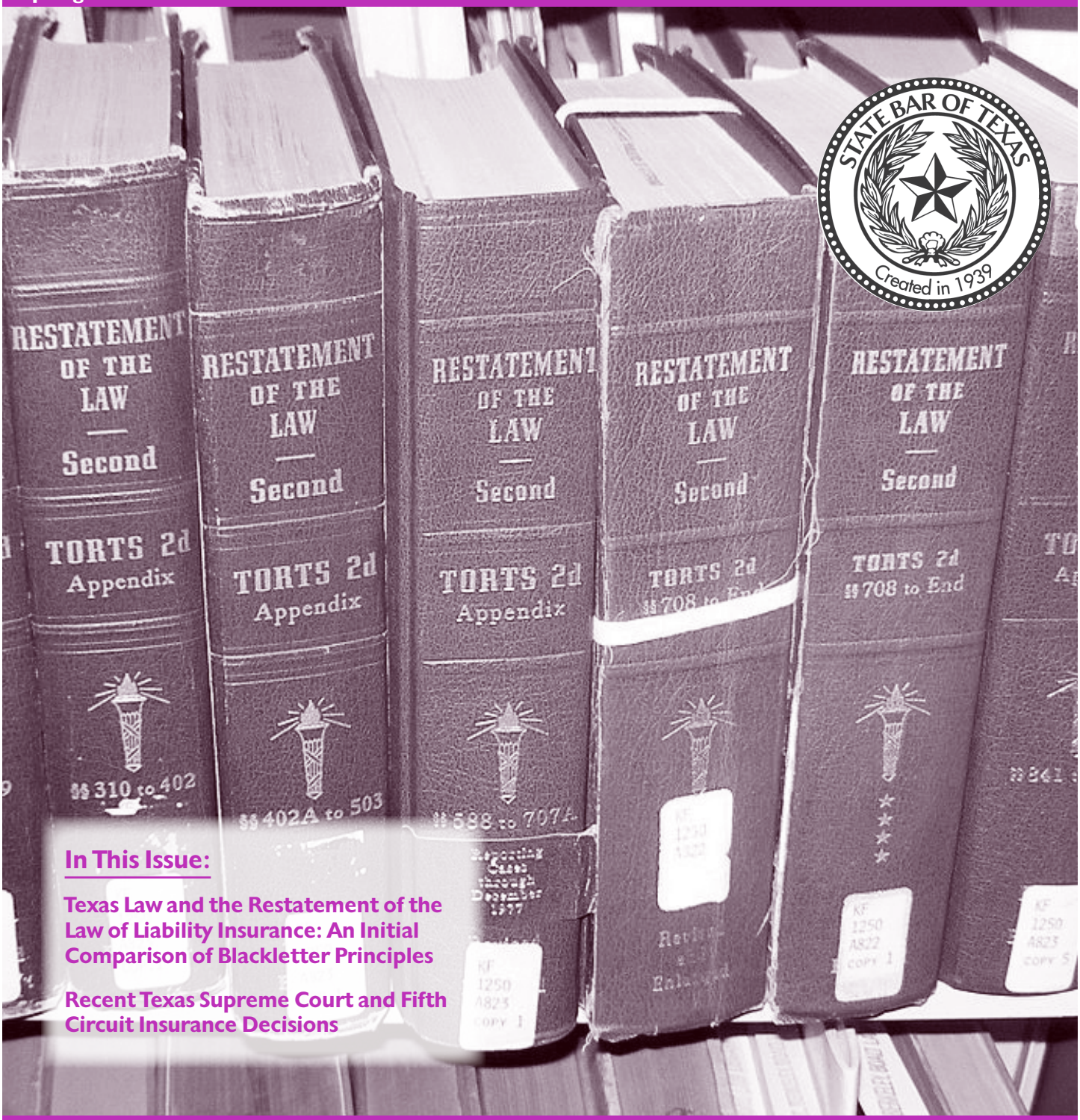

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THE INSURANCE LAW SECTION OF THE STATE BAR OF TEXAS

Officers for 2018-2019

CHAIR:

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

CHAIR ELECT:

William J. Chriss
The Snapka Law Firm (Of Counsel)
606 N. Carancahua St.
Suite 1511
Corpus Christi, TX 78401
Ph: (361) 884-3330
wjchrisspc@gmail.com

SECRETARY:

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

TREASURER:

Douglas P. Skelley
Shidlofsky Law Firm LLP
7200 N Mopac Expwy., Ste. 430
Austin, TX 78731
Ph: (512) 685-1400
Fax: (866) 232-8710
doug@shidlofskylaw.com

TECHNOLOGY OFFICER:

George L. Lankford
Fanning Harper Martinson Brandt & Kutchin, P.C.
4849 Greenville Ave., Ste. 1300
Dallas, TX 75206
Ph: (972) 860-0362
glankford@fhmbk.com

PUBLICATIONS OFFICER:

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

Council Members 2018-2019

(2 Yr Term Exp 2019)

Jes Alexander
Esurance, an Allstate Company
1122 Alma Rd., Ste. 100
Richardson, TX 75081
Ph: (972) 755-5851
JAlexander2@esurance.com

(2 Yr Term Exp 2019)

Christopher H. Avery
Thompson, Coe, Cousins & Irons, L.L.P.
One Riverway, Ste. 1400
Houston, TX 77056
Ph: (713) 403-8210
Fax: (713) 403-8299
cavery@thompsoncoe.com

(2 Yr Term Exp 2019)

Cathlynn H. Cannon
Wilson Elser Moskowitz Edelman & Dicker LLP
901 Main St., Ste. 4800
Dallas, TX 75202-3758
Ph: (214) 789-2613
Fax: (214) 698-1101
cathlynn.cannon@wilsonelser.com

(2 Yr Term Exp 2019)

Blair Dancy
Cain & Skarnulis PLLC
400 West 15th St., Ste. 900
Austin, TX 78701
Ph: (512) 474-5040
Fax: (512) 477-5011
bdancy@cstrial.com

(2 Yr Term Exp 2019)

Linda M. Dedman
Dedman Law, PLLC
Hillcrest Tower
12720 Hillcrest Rd., Ste. 1045
Dallas, TX 75230
Ph: (214) 361-8885
Fax: (214) 363-4902
ldedman@coveragelawdallas.com

(2 Yr Term Exp 2019)

Tarron L. Gartner-Ilai
Nationwide - Trial Division
105 Decker Court, Ste. 150
Irving, TX 75062-2211
gartnt1@nationwide.com

(2 Yr Term Exp 2019)

Andrew R. Kunau
The Travelers Companies
9601 McAllister Fwy., Ste. 700
San Antonio, TX 78216
Ph: (210) 525-3727
Fax: (866) 354-1630
akunau@travelers.com

(2 Yr Term Exp 2019)

Juan "Trey" Mendez, III
Mendez Law Firm
647 E. St. Charles St.
Brownsville, TX 78520-5457
Ph: (956) 541-7600
Fax: (956) 541-7612
Treymendez34@yahoo.com

(2 Yr Term Exp 2020)

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 2020)

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 2020)

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 2020)

Jason C. McLaurin
McLaurin Law, PLLC
4544 Post Oak Place, Suite 350
Houston, TX 77027
Ph: (713) 461-6500
Fax: (713) 237-0401
jmclaurin@mdlawtex.com

(2 Yr Term Exp 2020)

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 2020)

Jennifer Weber Johnson
Law Office of Mark A. Ticer
10440 N. Central Expressway
Suite 600
Dallas, TX 75231
Ph: (214) 219-4220
Fax: (214) 219-4218
jjohnson@ticerlaw.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

Council Advisor

Matthew J. Kolodoski
Thompson, Coe, Cousins & Irons, LLP
700 N. Pearl St., 25th Fl.
Dallas, TX 75201
Ph: (214) 871-8200
matthew.kolodoski@gmail.com

Council Advisor Alternate

David C. Kent
Drinker Biddle & Reath LLP
1717 Main St., Ste. 5400
Dallas, TX 75201-7367
Ph: (469) 357-2535
david.kent@dbr.com

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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 Rebecca DiMasi, Editor In Chief, at (512) 685-1400 or by email at rebecca@shidlofskylaw.com. Manuscripts for publication must be typed double-spaced with endnotes (PC-compatible disks are appreciated). Replies to articles published in the ***Journal*** are welcome.

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MISSION STATEMENT

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

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Comments

FROM THE EDITOR

By Rebecca DiMasi
Shidlofsky Law Firm PLLC

This issue of the *Journal* offers a timely comparison of the newly adopted Restatement of the Law of Liability Insurance and Texas law on various issues addressed by the Restatement. Christina Culver and Cy Haralson have summarized Texas law, compared it to the Restatement provisions, and provided analysis of the similarities and differences. Their analysis provides a practical guide for Texas insurance practitioners to use in determining how the Restatement compares to Texas common law and statutory provisions. Rachelle Glazer and John Atkins have again provided an excellent review of recent insurance law decisions from the Supreme Court of Texas and the Fifth Circuit.

Thanks to the authors and to Managing Editor Jason McLaurin for his invaluable assistance. Thanks also to Associate Editor David Kirby for his excellent editing skills.

The *Journal* is always open to publishing articles relating to Texas insurance law for the benefit of the bench and bar. If you have an article to submit, or a proposed topic, feel free to send me an email at rebecca@shidlofskylaw.com.

Rebecca DiMasi
Editor In Chief

Comments

FROM THE CHAIR

By Lisa A. Songy
Tollefson Bradley Mitchell & Melendi LLP

What a year it has been. As my tenure as Chair of the Section comes to a close, it seems to have gone by so very quickly. It began in June 2018, in San Antonio, at the Advanced Insurance Law Seminar at the Hyatt Hill Country with phenomenal CLE from knowledgeable speakers and, as always, the premiere networking event of the year at the Casino Night. What a great opportunity it was to get know people in the Section and make connections to help put the "civil" back in civil litigation.

We followed it up with networking events in Dallas, Houston and Austin, one a quarter, where members could gather informally, enjoy a beverage or two and just get to know one another while making professional connections.

Our stand alone "How to try an Insurance Case" CLE in Houston in March brought together experienced litigators and industry people to share practical tips to navigate everything from the initial claim through the jury charge and closing arguments. It was great to see so many new and familiar faces there. We continue to put out a quality Insurance Law Journal with insightful articles helpful to all areas of the insurance law practice. The frequent "Right of the Press" email blasts with up to date case law summaries continue to keep all our members tuned in to the latest developments from the courts.

This year, due to the success of the seminar, we were able award two Ben Love Scholarships to deserving SMU law students to help further their legal education and foster their interest in Insurance Law. We wrap up my time in office back down in San Antonio for the Advanced Insurance Law Seminar and to award the Rusty McMains Legends award to a distinguished colleague who has contributed greatly to the practice of insurance law in Texas and shown a dedication to the Section as one of its founding members.

It has been both my pleasure and my privilege to serve all of the members of the Section this year. During my ten years on the Council and as an officer it has been a tremendous experience getting to know so many great lawyers who share a passion for the practice. I want to send my heartfelt thanks to the Officers and Council Members with whom I served over the years, for without all of them and their hours of hard work in volunteer positions, the Section would not be as successful as it is today. I hope this past year has seen you all appreciate the many opportunities the Section can provide for you both as a practitioner of insurance law and as a professional in the legal community. My best wishes to the incoming Chair Bill Chriss and the Insurance Council for a successful year.

Sincerely,

Lisa A. Songy
Chair of the Insurance Law Section of the State Bar of Texas

By Cyrus W. Haralson & Christina A. Culver

TEXAS LAW AND THE RESTATEMENT OF THE LAW OF LIABILITY INSURANCE: AN INITIAL COMPARISON OF BLACKLETTER PRINCIPLES

In 2018, the American Law Institute approved the final draft of their first ever Restatement of the Law of Liability Insurance.[1] Given the ALI's influential reputation among Texas courts and attorneys, it is important to review blackletter Texas law and compare it with the blackletter principles adopted by the Restatement. A comprehensive analysis of the Restatement and its Comments and Reporters Notes, is beyond the scope of this single paper. But this initial 30,000 foot comparison of the blackletter principles in the Restatement is intended to provide a useful consolidation of Texas law, as illuminated by the conflicting and complimentary views of the Restatement.

The Restatement Project

ALI's stated mission is "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work."[2] To that end, ALI publishes Restatements, Principles, and Codes. Restatements are intended to be objective and are "primarily addressed to courts and aim at clear formulations of common law and its statutory elements, and reflect the law as it presently stands."[3] Principles take a more normative view and are "primarily addressed to legislatures, administrative agencies, or private actors."[4] Similarly, Codes "are addressed to legislatures with a view toward legislative enactment. They are written in prescriptive statutory language."[5] ALI Restatements enjoy a respected reputation, regularly cited by practitioners and courts, including the Texas and United States Supreme Courts.[6]

Initially begun in 2010 as a Principles project, the ALI's review of liability insurance law was converted to a Restatement project in October 2014. Since then, the various drafts of the Restatement of the Law of Liability Insurance have engendered intense controversy, as judges and practitioners have questioned whether the Restatement goal of saying what the law is has been skewed by the original Principles goal of saying what the law should be.[7]

There is no doubt that critical evaluations of the Restatement will take place in the future. Here, we simply offer a comparison of blackletter Texas principles to blackletter Restatement principles to clarify the broad agreements and disagreements. What follows is loosely organized around the topic structure of the Restatement, which is itself organized around broad sections of topics and sub-topics in liability insurance law. Each section of the Restatement is broken down into three parts: the black letter principles, comments on those principles, and Reporter Notes collecting cases and other sources relevant to the blackletter principles and comments. Again, this paper focuses primarily on a comparison between Texas blackletter principles and Restatement blackletter principles by first stating Texas law, then reciting the relevant Restatement provision, and finally, discussing any key differences,.

The Duty to Defend

1. Determining Duty to Defend

Under Texas law, "[t]he duty to defend depends on the language of the policy setting out the contractual agreement between insurer and insured."[8] Whether an insurer has a duty to defend its insured is a question of law.[9] "An insurer must defend its insured if a plaintiff's factual allegations potentially support a covered claim, while the facts actually established in the underlying suit determine whether the insurer must indemnify its insured."[10] "Thus, an insurer may have a duty to defend but, eventually, no obligation to indemnify."[11] The initial burden is placed on the insured to demonstrate that coverage exists considering only the policies and the underlying petition.[12] The burden then shifts to the carrier to establish that one or more of the policy exclusions apply to negate any otherwise-applicable duty to defend.[13] Courts consider the factual allegations without regard to their truth or falsity, and resolve all doubts regarding the duty to defend in favor of the insured.[14] Further, in making the determination, courts "look to the factual allegations showing the origin of the damages claimed, not the legal

Cy Haralson is a partner with Thompson Coe in Dallas. His practice focuses primarily on insurance coverage and defense, including complex, multi-party insurance coverage and bad-faith litigation involving general liability, environmental pollution, construction defects, directors' and officers' coverage, errors and omissions coverage, and property insurance.

Christy Culver is also a partner with Thompson Coe in Dallas, and her practice focuses on complex, multi-party insurance coverage litigation, including bad faith litigation, and direct-action coverage litigation in Louisiana, involving general liability, environmental pollution, commercial property coverage, construction defects, product defects, professional liability, errors and omissions coverage, and supplemental accident only coverage.

theories or conclusions alleged."[15] If the petition asserts one claim that could potentially be covered by the insurance policy, the insurer must defend the entire suit.[16]

The duty to defend is a sprawling topic on which Texas law and the Restatement agree on many issues. For example, it is well settled that an insurer's "right to conduct the defense includes the authority to select the attorney who will defend the claim and to make other decisions that would normally be vested in the insured as the named party in the case."[17] Likewise, the Restatement outlines the scope of an insurer's right to control the defense as follows:

> § 10. Scope of the Right to Defend
>
> **When a liability insurance policy grants the insurer the right to defend a legal action, that right includes, unless otherwise stated in the policy or limited by applicable law:**
>
> **(1) The authority to direct all the activities of the defense of any legal action that the insurer has a right to defend, including the selection and oversight of defense counsel; and**
>
> **(2) The right to receive from defense counsel all information relevant to the defense or settlement of the action, subject to the exception for confidential information stated in § 11(2).**

Both Texas law and the Restatement also recognize that an insurer will have a duty to defend the whole suit so long as one claim is potentially covered. Under Texas law, the duty to defend obligates an insurer to "defend the insured in any lawsuit that 'alleges and seeks damages for an event potentially covered by the policy.'"[18] Likewise, the Restatement provides as follows:

> § 13. Conditions Under Which the Insurer Must Defend
>
> **(1) An insurer that has issued an insurance policy that includes a duty to defend must defend any legal action brought against an insured that is based in whole or in part on any allegations that, if proved, would be covered by the policy, without regard to the merits of those allegations.**

The major divergence between Texas law and the Restatement on the duty to defend is the use of extrinsic evidence to determine whether the duty is owed. In determining whether an insurer has a duty to defend a claim against its insured, Texas courts apply the eight-corners rule.[19] "Under the eight-corners rule, the duty to defend is determined by the claims alleged in the petition and the coverage provided in the policy."[20] "If a petition does not allege facts within the scope of coverage, an insurer is not legally required to defend a suit against its insured."[21] The court may not "(1) read facts into the pleadings, (2) look outside the pleadings, or (3) imagine factual scenarios which might trigger coverage."[22] In examining the petition, courts "construe the allegations in the pleadings liberally."[23]

In contrast, the Restatement requires a broad reliance on extrinsic evidence for finding a duty to defend, and a narrow allowance for extrinsic evidence to deny the duty:

> § 13. Conditions Under Which the Insurer Must Defend
>
> * * *
>
> **(2) For the purpose of determining whether an insurer must defend, the legal action is deemed to be based on:**
>
> **(a) Any allegation contained in the complaint or comparable document stating the legal action; and**
>
> **(b) Any additional allegation known to the insurer, not contained in the complaint or comparable document stating the legal action, that a reasonable insurer would regard as an actual or potential basis for all or part of the action.**
>
> **(3) An insurer that has the duty to defend under subsections (1) and (2) must defend until its duty to defend is terminated under § 18 by declaratory judgment or otherwise, unless facts not at issue in the legal action for which coverage is sought and as to which there is no genuine dispute establish that:**
>
> **(a) The defendant in the action is not an insured under the insurance policy pursuant to which the duty to defend is asserted;**
>
> **(b) The vehicle or other property involved in the accident is**

not covered property under a liability insurance policy pursuant to which the duty to defend is asserted and the defendant is not otherwise entitled to a defense;

(c) The claim was reported late under a claims-made-and-reported policy such that the insurer's performance is excused under the rule stated in § 35(2);

(d) The action is subject to a prior-and-pending-litigation exclusion or a related-claim exclusion in a claims-made policy;

(e) There is no duty to defend because the insurance policy has been properly cancelled; or

(f) There is no duty to defend under a similar, narrowly defined exception to the complaint-allegation rule recognized by the courts in the applicable jurisdiction.

"Despite various requests over the years to recognize exceptions to the eight-corners rule, the Supreme Court of Texas has never done so."[24] In 2006, the Texas Supreme Court discussed the possibility of recognizing an exception to this rule, but did not ultimately adopt the exception.[25] Since that time, the Texas Supreme Court has continued to adhere to the eight-corners rule.[26]

In *GuideOne*, the Texas Supreme Court noted the Fifth Circuit's observation that, if Texas were to recognize any exception to the eight-corners rule, it would be a limited exception for "when it is initially impossible to discern whether coverage is potentially implicated and when the extrinsic evidence goes solely to a fundamental issue of coverage which does not overlap with the merits of or engage the truth or falsity of any facts alleged in the underlying case."[27] In *GuideOne*, the insurance policy provided coverage for sexual misconduct occurring during the policy period.[28] The insurer sought to introduce extrinsic evidence that the individual alleged to have engaged in the sexual misconduct left the insured's employ before the policy's effective date.[29] The Texas Supreme Court held that the proffered extrinsic evidence was relevant to both coverage and the merits and, therefore, did not fall within the limited exception to the eight-corners rule.[30] The Texas Supreme Court in *GuideOne* rejected "the use of overlapping evidence as an exception to the eight-corners rule because it poses a significant risk of undermining the insured's ability to defend itself in the underlying litigation."[31]

2. Consequences of Breach of the Duty to Defend

If an insurer breaches the duty to defend, it may not contest a determination that its insured was liable in the underlying lawsuit, or the reasonableness of the settlement or verdict.[32] Texas law recognizes that attorney's fees and expenses incurred by an insured in an underlying lawsuit are damages produced by the insurer's breach of its duty to defend."[33] The insurer is also subject to penalty interest under the Prompt Payment of Claims statute for breach of its duty to defend under a liability policy.[34]

Similarly, the Restatement provides as follows:

> § 19. Consequences of Breach of the Duty to Defend
>
> **An insurer that breaches the duty to defend a legal action forfeits the right to assert any control over the defense or settlement of the action.**

However, the Restatement also contains the following provision on remedies for breaching the duty to defend:

> § 48. Damages for Breach of a Liability Insurance Policy
>
> **The damages that an insured may recover for breach of a liability insurance policy include:**
>
> * * *
>
> **(4) Any other loss, including incidental or consequential loss, caused by the breach, provided that the loss was foreseeable by the insurer at the time of contracting as a probable result of a breach, which sums are not subject to any limit of the policy.**

According to the comments, this includes "any amount by which a noncovered settlement or judgment entered in the case is larger than it otherwise would have been as a result of the breach of the duty to defend," and "an insurer that breaches the duty to defend may lose its coverage defenses only if the breach was in bad faith." In Texas, however, an insurer that breaches its duty to defend remains free to argue that the assumed liability was not actually covered under its policy.[35]

3. Liability of Insurer for Conduct of Defense

The Texas Supreme Court has concluded that an insured cannot bring a claim against its insurer on the basis of vicarious liability for the conduct of the insured's attorney in a third-party action.[36]

The Restatement takes a radically different position:

> § 12. Liability of Insurer for Conduct of Defense
>
> **(1) If an insurer undertakes to select counsel to defend a legal action against the insured and fails to take reasonable care in so doing, the insurer is subject to liability for the harm caused by any subsequent negligent act or omission of the selected counsel that is within the scope of the risk that made the selection of counsel unreasonable.**
>
> **(2) An insurer is subject to liability for the harm caused by the negligent act or omission of counsel provided by the insurer to defend a legal action when the insurer directs the conduct of the counsel with respect to the negligent act or omission in a manner that overrides the duty of the counsel to exercise independent professional judgment.**

At a fundamental level, Texas law and the Restatement simply disagree as to insurer liability for defense counsel, with Texas courts preferring a bright line rule for certainty and the Restatement preferring a fact-sensitive approach that invites a substantial increase in inadequate defense litigation. For example, the comments strongly support holding insurers liable for failing to ensure that defense counsel has a "reasonable amount of liability insurance." "Reasonable" is not defined. The Restatement comments also state that a "liability insurer can become subject to liability for the negligence of defense counsel if the insurer fails to exercise reasonable care in selecting defense counsel." Again, however, this limited circumstance is "a fact-specific question" requiring an examination of the selection process, the conduct of the defense, and whether the "acts or omissions within the scope of the risk that made the selection of counsel."

Also in contrast with Texas law, subsection (2) is based explicitly on the idea that an insurer can "override[] the duty of the counsel to exercise independent professional judgment." Texas law rejects this possibility. In Texas, in light of the special relationship between attorney and client and the special duties owed by an attorney to the client, an attorney must exercise unfettered control and discretion over his or her representation of the client.[37] "This vesting of control and responsibility in the attorney necessarily precludes an insurer from exercising control over the attorney's representation of the insured to the degree necessary to justify the imposition of vicarious liability."[38]

4. The Obligation to Provide an Independent Defense

The Texas Supreme Court has held that an insurer's "right to conduct the defense includes the authority to select the attorney who will defend the claim and to make other decisions that would normally be vested in the insured as the named party in the case."[39] "Under certain circumstances, however, an insurer may not insist upon its contractual right to control the defense."[40] The Restatement takes the following approach:

> § 16. The Obligation to Provide an Independent Defense
>
> **When an insurer with the duty to defend provides the insured notice of a ground for contesting coverage under § 15 and there are facts at issue that are common to the legal action for which the defense is due and to the coverage dispute, such that the action could be defended in a manner that would benefit the insurer at the expense of the insured, the insurer must provide an independent defense of the action.**

Texas has taken a narrower approach. In *Davalos*, the Texas Supreme Court noted one circumstance in which independent counsel is warranted:

> In the typical coverage dispute, an insurer will issue a reservation of rights letter, which creates a potential conflict of interest. And when the facts to be adjudicated in the liability lawsuit are the same facts upon which coverage depends, the conflict of interest will prevent the insurer from conducting the defense.[41]

Although the Texas Supreme Court did not elaborate on the meaning of "facts to be adjudicated," the term "adjudicate" means "to rule upon judicially."[42]

This is another area where Texas law and the Restatement simply adopt different blackletter rules. While Texas keeps a narrow focus on the actual coverage issues of a given claim, the Restatement, read broadly, would require independent counsel in nearly all cases unless the carrier offers an unqualified defense. The Restatement comments say that the need for independent counsel arises "when there are facts that are common to the claimant's allegations in the legal action for which a defense is sought and to the insurer's asserted ground for contesting coverage." But with few exceptions, the very need for reserving rights arises because there are factual issues in the suit that might impact coverage.

5. When Multiple Insurers Have a Duty to Defend

In Texas, "the duty to defend creates a debt which is equally and concurrently due by all of [an insured's] insurers."[43] This is true because "if even a single claim in a lawsuit potentially falls within an insurance policy's coverage, the insurer has a duty to provide a complete defense."[44]

The Restatement takes a different approach:

> § 20. When Multiple Insurers Have a Duty to Defend
>
> **When more than one insurer has the duty to defend a legal action brought against an insured:**
>
> **(1) The insured may select any of these insurers to provide a defense of the action;**
>
> **(2) If that insurer refuses to defend or otherwise breaches the duty to defend, the insured may select any of the other insurers that has a duty to defend the action; and**
>
> **(3) The selected insurer must provide a full defense until the duty to defend is terminated pursuant to § 18 or until another insurer assumes the defense pursuant to subsection (4)(a).**
>
> **(4) If the policies establish an order of priority of defense obligations among them, or if there is a regular practice in the relevant insurance market that establishes such a priority, that priority will be given effect as follows:**
>
> **(a) An insurer selected pursuant to subsection (1) or (2) may ask any insurer whose duty to defend is earlier in the order of priority to assume the defense; and**
>
> **(b) An insurer that incurs defense costs has a right of contribution or indemnity for those costs against any other insurer whose duty to defend is in the same position or earlier in the order of priority.**
>
> **(5) If neither the policies nor the insurance-market practice establish an order of priority:**
>
> **(a) The duty to defend is independently and concurrently owed to the insured by each of the insurers;**
>
> **(b) Any nonselected insurer has the obligation to pay its pro rata share of the reasonable costs of defense of the action and the noncollectible shares of other insurers; and**
>
> **(c) A selected insurer may seek contribution from any of the other insurers for the costs of defense.**

Again, this is an area where Texas and the Restatement simply adopt different schemes. Still, it is interesting to note the practical benefits of each approach. The obvious benefit from the Restatement is the certainty gained from being able to identify a single carrier who then has the burden of chasing down other carriers with a defense obligation. On the other hand, the Texas rule potentially keeps more carriers engaged and "at the table" for settlement purposes since they are all paying defense costs. Recalcitrant carriers are further incentivized by the statutory 18% penalty interest on unpaid defense costs.[45]

6. Insurer Recoupment of the Costs of Defense

In Texas, absent policy language to that effect, a liability insurer generally cannot recoup defense costs from its insured.[46] On this point, the Restatement agrees:

> § 21. Insurer Recoupment of the Costs of Defense
>
> **Unless otherwise stated in the insurance policy or otherwise agreed to by the insured, an insurer may not seek recoupment of defense costs from the insured, even when it is subsequently determined that the insurer did not have a duty to defend or pay defense costs.**

Moreover, a unilateral reservation-of-rights letter cannot create rights not contained in the insurance policy.[47] The insurer also cannot rely on the insured's, failure to object to a reimbursement proposal, because, as a general rule, "silence and inaction will not be construed as an assent to an offer."[48]

7. Reservation Letters

"When an insurer is faced with the dilemma of whether to defend or refuse to defend a tendered claim, it has four options: (1) completely decline to assume the insured's defense; (2) seek a declaratory judgment as to its obligations and rights; (3) defend under a reservation of rights or a non-

waiver agreement; and (4) assume the insured's unqualified defense."[49] An insurer who defends its insured under a full reservation of rights provides a defense in the liability action, but reserves the right to contest coverage later.[50] Once a defense is taken under a valid reservation of rights, the insurer may withdraw the defense if it becomes clear that there is no coverage under the applicable policy.[51]

The Restatement's blackletter principles on reservation letters are set out below:

> § 15. Reserving the Right to Contest Coverage
>
> **(1) An insurer may reserve the right to contest coverage for an action before undertaking the defense of the action if it gives timely notice to the insured of any ground for contesting coverage of which it knows or should know.**
>
> **(2) If an insurer already defending a legal action learns of information, which it did not have constructive notice of under subsection (1), that provides a ground for contesting coverage for that action, the insurer must give notice of that ground to the insured within a reasonable time to reserve the right to contest coverage for the action on that ground.**
>
> **(3) Notice to the insured of a ground for contesting coverage must include a written explanation of the ground, including the specific insurance policy terms and facts upon which the potential ground for contesting coverage is based, in language that is understandable by a reasonable person in the position of the insured.**
>
> **(4) When an insurer reasonably cannot complete its investigation before undertaking the defense of a legal action, the insurer may temporarily reserve its right to contest coverage for the action by providing to the insured an initial, general notice of reservation of rights, in language that is understandable by a reasonable person in the position of the insured, but to preserve that reservation of rights the insurer must pursue that investigation with reasonable diligence and must provide the detailed notice stated in subsection (3) within a reasonable time.**

In several ways, Texas law and the Restatement mirror one another. For example, similar to the Restatement, in Texas, an insurer properly reserves its rights when it has a good faith belief that the tendered claim may involve conduct for which the policy does not provide coverage.[52] "In such a situation, reservation of rights will not be a breach of the duty to defend, but notice of intent to reserve rights must be sufficient to inform the insured of the insurer's position and must be timely."[53]

Of course, the devil is in the details. For example, both Texas and the Restatement require some level of detail in a reservation letter. In Texas, the purpose of a reservation of rights letter is to notify the insured of a potential or actual conflict of interest, and to permit the insurer to provide a defense for its insured while it investigates questionable coverage issues.[54] For that reason, an unclear reservation letter may serve to estop the insurer from certain defenses or the ability to withdraw from a defense.[55] The Restatement, on the other hand, proposes a standard under which a reservation letter is insufficient unless "understandable by a reasonable person in the position of the insured."

Both Texas law and the Restatement also require timely issuance of reservation letters. In Texas, timeliness is not just a matter of prejudice and estoppel, as discussed above, it is also governed by the Prompt Payment of Claims Statute in the Texas Insurance Code, which has specific deadlines with regard to when an insurer must accept or deny coverage or request additional information from the insured,[56] and by chapter 541 of the Texas Insurance Code:

> (a) It is an unfair method of competition or an unfair or deceptive act or practice in the business of insurance to engage in the following unfair settlement practices with respect to a claim by an insured or beneficiary:
>
> * * *
>
> (4) failing within a reasonable time to:
>
> (A) affirm or deny coverage of a claim to a policyholder; or
>
> (B) submit a reservation of rights to a policyholder;[57]

The Duty to Indemnify

1. Indemnification from Multiple Policies

Generally speaking, under Texas law, "if two or more insurers bind themselves to pay the entire loss insured against[,]" the

"debt . . . is equally and concurrently due by" each of the carriers.[58]

The Restatement does not fundamentally diverge from this principle:

> § 40. Indemnification from Multiple Policies: The General Rule
>
> **(1) When more than one insurance policy provides coverage to an insured for a legal action, the insurers are independently and concurrently liable under their policies, subject to the limits of each policy, except as otherwise provided in subsection (2) and § 41.**
>
> **(2) An insurance policy term that alters the default rule stated in subsection (1) will be given effect, except to the extent that the term cannot be harmonized with another policy and provided that the insured is not required to bear more of the costs of the claim than the insured would have borne under the applicable policy that is most favorable to the insured in this regard.**
>
> **(3) When more than one insurer has a duty to defend an insured, the insurers' defense obligations are governed by § 20.**

Indeed, subsection (2) highlights the issue of reconciling competing "other insurance provisions" that the Texas Supreme Court addressed in *Hardware Dealers Mutual Fire Ins. Co. v. Farmers Insurance Exchange*.[59] In *Hardware Dealers*, the Court announced the following rule of interpretation:

> When, from the point of view of the insured, she has coverage from either one of two policies but for the other, and each contains a provision which is reasonably subject to a construction that it conflicts with a provision in the other concurrent insurance, there is a conflict in the provisions.[60]

After finding that the two policies were reasonably subject to conflicting constructions, the Court concluded that it should disregard the conflicting provisions and apportion liability between both insurers on a pro rata basis.[61]

Hardware Dealers thus creates a two-step inquiry to discover whether two other-insurance provisions actually conflict. In conducting the test, the court must first look at the coverage provided by each policy as if that policy were the only policy. The court must consider whether, "from the point of view of the insured, she has coverage from either of the two policies but for the other."[62] Second, the court must evaluate the impact that the two other-insurance provisions would have when read together on the coverage of the insured, and whether "each contains a provision which is reasonably subject to a construction that it conflicts with a provision in the other concurrent insurance."[63] If the answer is yes to both steps, then the policies conflict and coverage should be apportioned on a pro rata basis between the insurers.[64]

2. Allocation for Long-Tail Harm Claims Covered by Occurrence-Based Policies

When indivisible injury from a single occurrence takes place over several policy periods, the Restatement adopts a pro rata scheme for allocating across the policy periods:

> § 41. Allocation in Long-Tail Harm Claims Covered by Occurrence-Based Policies
>
> **(1) Except as stated in subsection (2), when indivisible harm occurs over multiple policy periods, the amount of any judgment entered in or settlement of any liability action arising out of that harm is subject to pro rata allocation under occurrence-based liability insurance policies as follows:**
>
> **(a) For purposes of determining the share allocated to an occurrence-based liability insurance policy that is triggered by harm during the policy period, the amount of the judgment or settlement is allocated equally across years, beginning with the first year in which the harm occurred and ending with the last year in which the harm would trigger an occurrence-based liability insurance policy; and**
>
> **(b) An insurer's obligation to pay for that pro rata share is subject to the ordinary rules governing any deductible, self-insured retention, policy limit, or exhaustion terms in the policy.**
>
> **(2) When an insurance policy contains a term that alters the default rule stated in subsection (1), that term will be given effect, except to the extent that the term cannot be**

> **harmonized with an allocation term in another policy that provides coverage for the claim.**
>
> **(3) Defense obligations relating to multiple triggered policies are subject to the rules in § 20.**

The Texas Supreme Court addressed allocation for indivisible injuries across multiple policy periods in *American Physicians Insurance Exchange v. Garcia*:

> If a single occurrence triggers more than one policy, covering different policy periods, then different limits may have applied at different times. In such a case, the insured's indemnity limit should be whatever limit applied at the single point in time during the coverage periods of the triggered policies when the insured's limit was highest. The insured is generally in the best position to identify the policy or policies that would maximize coverage. Once the applicable limit is identified, all insurers whose policies are triggered must allocate funding of the indemnity limit among themselves according to their subrogation rights.[65]

Although *Garcia* is commonly invoked—for example, in construction defect cases—the threshold question of whether an indivisible injury exists is often glossed over. In *Don's Building Supply*, the Texas Supreme Court adopted an injury-in-fact trigger for a property damage claim under a liability policy.[66] In doing so, the Court stressed that, while "pinpointing the moment of injury retrospectively is sometimes difficult," courts "cannot exalt ease of proof or administrative convenience over faithfulness to the policy language."[67] In section 33, the Restatement adopts "the injury-in-fact approach to determining the trigger of coverage for long-tail harms under standard-form occurrence-based liability insurance policies." Like *Don's Building Supply*, the Restatement also acknowledges the difficulty of allocating damage in long-tail claims, but suggests that "if a court concludes that the injury or property damage in question is the result of a continuous process that takes place over the course of time, the injury-in-fact approach can produce results that are indistinguishable from the exposure and continuous-trigger approaches":

> Thus, when the available scientific evidence is not able to determine the precise amount of harm attributable to a particular year or to particular years, most courts have concluded either that the continuous-trigger rule applies or, applying the injury-in-fact trigger, that the bodily injury or property damage actually takes place continuously from the moment of first exposure to asbestos or environmental contaminants. In such cases, there is little ultimate difference between the injury-in-fact trigger and the continuous trigger. This is true, for example, in cases involving asbestos-related bodily injuries or certain types of environmental property damage.[68]

On the other hand, in comment b to section 41, the Restatement acknowledges that even in common long-tail claims like toxic-tort, indivisibility cannot be assumed:

> b. Divisible harm. The rule in this Section addresses allocation in liability claims involving indivisible harm. For liability claims involving divisible harm, courts generally will attempt to allocate among the policy periods according to the actual injury or harm that occurred during the policy period even if the total harm occurred over a long period of time. For example, in some toxic-tort cases, courts have allocated harm among policy periods and thus among multiple triggered insurers based on the relative amount of harm that occurred, or the relative volume of the injuring substance that was released, in each period.

The Texas Supreme Court more recently addressed the indivisible nature of property damage in the context of the language quoted above in *Garcia* and the policy language in *Lennar Corp. v. Markel American Insurance Co*.[69] In that case, the insurer was held responsible even for damage before its policy period due in part to the "practically impossible" task of segregating the damage.[70]

3. Contribution

The elements of a contribution claim "require that several insurers share a common obligation or burden and that the insurer seeking contribution has made a compulsory payment or other discharge of more than its fair share of the common obligation or burden."[71] For years, Texas courts and coverage attorneys recognized "the general rule that, if two or more insurers bind themselves to pay the entire loss insured against, and one insurer pays the whole loss, the one so paying has a right of action against his co-insurer, or co-insurers, for a ratable proportion of the amount paid by him, because he has paid a debt which is equally and concurrently due by the other insurers."[72] The Restatement contains a similar understanding of the relationship between co-insurers:

§ 42. Contribution

(1) An insurer that indemnifies an insured for a legal action has a right of contribution against any other insurer with an indemnification obligation to that insured for that action to the extent that:

(a) The first insurer has paid more than its share of the costs;

(b) The other insurer has not settled with and been released by the insured; and

(c) The other insurer has paid less than its share of the costs.

(2) In determining the insurers' share of the costs, principles of restitution and unjust enrichment apply, subject to any allocation terms contained in the liability insurance policies at issue that are consistent with each other.

However, in *Mid-Continent*, the Texas Supreme Court upended this common understanding. In *Mid–Continent*, the Court held that a pro rata "other insurance" clause makes the insurance contracts several and independent of each other, so co-insurers are unable to meet the common obligation requirement of a contribution claim.[73] *Mid–Continent* further held that "a co-insurer paying more than its proportionate share cannot recover the excess from the other co-insurers."[74]

Since then, the Fifth Circuit has limited *Mid–Continent* to its narrow facts. As a practical matter, "*Mid–Continent* [appears to] appl[y] in cases where 'the insurers (1) were co-primary insurers; (2) did not dispute that both covered the loss; and (3) were subject to pro rata clauses.'"[75] For example, the Fifth Circuit rejected application of *Mid–Continent* in a case for defense costs, finding that the duty to defend is not rendered several and independent by "other insurance" clauses, thereby holding that the insurer satisfied the common obligation requirement for a contribution claim.[76]

A related issue also addressed by *Mid-Continent* is subrogation rights between co-insurers. "Insurers may have either 'contractual subrogation rights, which arise from contract language, or 'equitable' subrogation rights, which exist in equity to prevent the insured from receiving a double recovery to the insurer's detriment."[77] Either way, if the insured is made whole, the carrier has no subrogation rights.[78]

The Duty to Settle

1. *Stowers* Duty to Settle

Under the so-called "*Stowers* Doctrine," insurers in Texas may be liable for negligently failing to settle claims made against their insureds within policy limits.[79] The duty imposed by *Stowers* is implicated by a settlement demand when "three prerequisites are met: (1) the claim against the insured 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, considering the likelihood and degree of the insured's potential exposure to an excess judgment."[80] The demand must offer to release fully the insured in exchange for a sum equal to or less than the policy limits.[81] If an insurer breaches its duty to use ordinary care to protect the insured to the policy limits, it can be liable to the insured for an excess judgment.[82]

A *Stowers* plaintiff cannot recover under a *Stowers* cause of action without first satisfying the precondition of establishing each element.[83] Also, an insurer who refuses to settle a claim within its policy limits before trial is not negligent if its insured is absolved of liability for the underlying claim.[84]

Stowers principals have been incorporated into the analysis under the Texas Insurance Code's settlement provisions, under which an insurer faces liability if it does not attempt in good faith to effectuate prompt, fair, and equitable settlements of claims submitted for which liability has become reasonably clear.[85]

In place of a *Stowers*-like duty-to-settle, the Restatement proposes a "duty to make reasonable settlement decisions":

§ 24. The Insurer's Duty to Make Reasonable Settlement Decisions

(1) When an insurer has the authority to settle a legal action brought against the insured, or the insurer's prior consent is required for any settlement by the insured to be payable by the insurer, and there is a potential for a judgment in excess of the applicable policy limit, the insurer has a duty to the insured to make reasonable settlement decisions.

(2) A reasonable settlement decision is one that would be made by a reasonable insurer that bears the sole financial responsibility for the full amount of the potential judgment.

(3) An insurer's duty to make reasonable settlement decisions includes the duty to make its policy limits

> **available to the insured for the settlement of a covered legal action that exceeds those policy limits if a reasonable insurer would do so in the circumstances.**

Beyond simply offering a different scheme for insurers' settlement obligations, a comparison of Texas law and the Restatement raises several questions. For one, it is not clear under the Restatement whether "reasonableness" includes a consideration of covered versus noncovered damages. Subsection (2) does not appear to allow such consideration, while Texas law suggests that insurers may take coverage defenses into account.[86] The Restatement comments also make clear that "reasonable settlement decisions" can include a duty to initiate settlement negotiations or make counteroffers. Texas law imposes no such obligation.[87]

A major issue commonly faced in the *Stowers* context is "Stowerizing" a tower of coverage. When a carrier is faced with a settlement demand above its limits but within the tower of coverage above it, the Restatement obligates the carrier to "make its policy limits available to the insured for the settlement of a covered legal action that exceeds those policy limits." Again, Texas law imposes no such obligation.[88] Although the Texas Supreme Court has not explicitly addressed whether a settlement offer triggers an insurer's duty to settle when the plaintiffs' settlement terms require funding from multiple insurers, and no single insurer can fund the settlement within the limits that apply under its particular policy, the Court may have rejected that idea with its decisions in *Mid–Continent Insurance Company* and *Keck, Mahin & Cate*.[89]

In *Mid-Continent*, the Texas Supreme Court rejected any right of reimbursement against a carrier under *Stowers* for another carrier's payment to settle the case in excess of its policy limits.[90] In so ruling, the Court explained that "Mid–Continent did not breach a *Stowers* duty to [the insured] because the [claimants] did not make a settlement offer within Mid–Continent's policy limits."[91] While the $1.5 million settlement demand in *Mid–Continent* exceeded the value of each primary policy, it came within the limits of the total primary coverage available, as well as the aggregate available under the primary and excess policies provided by Liberty Mutual. "*Mid–Continent* thus stands for the proposition that, in a claim involving multiple policies, a settlement demand does not activate one primary insurer's *Stowers* duty unless the demand falls within the applicable limits available under that single policy."[92]

In *Keck*, the Texas Supreme Court observed that "[a]n excess insurer owes its insured a duty to accept reasonable settlements, but that duty is also not typically invoked until the primary insurer has tendered its policy limits."[93] The Court noted, on the facts before it, that "the primary insurer did not tender its limits until the trial began, well after the $3.6 million settlement demand [at issue] had been withdrawn."[94] The Court concluded that, because INA had not tendered its limits in response to that demand, National had no duty to evaluate or respond to it.[95] Accordingly, "*Keck* makes plain that the *Stowers* duty does not arise for an excess insurer until the primary carrier has tendered its limits."[96]

Reading *Mid-Continent* and *Keck* together, a primary carrier cannot be Stowerized by a demand above its limits (*Mid-Continent*), and an excess carrier cannot be Stowerized by a demand not already partially satisfied by the tender of all underlying limits (*Keck*). For that reason, a tower of coverage cannot be Stowerized because the demand will necessarily be above primary coverage, while not implicating excess coverage due to lack of underlying exhaustion.[97]

Another interesting difference between Texas law and the Restatement is how sections 24, 25, and 27 of the Restatement combine to fundamentally alter an insurers' ability to control the defense of its insured and evaluate settlement options. As discussed above, in Texas, an insurer faced with a valid *Stowers* demand has two options. It can accept the offer or it can decline the offer, continue the defense, and risk being liable for an excess verdict. Either way the insured is protected.

Section 24 sets out the Restatement's version of Texas' *Stowers* duty to settle, or make reasonable settlement decisions, defining a "reasonable settlement decision [a]s one that would be made by a reasonable insurer that bears the sole financial responsibility for the full amount of the potential judgment."

Section 25 provides:

> § 25. The Effect of a Reservation of Rights on Settlement Rights and Duties
>
> * * *
>
> **(3) When an insurer has reserved the right to contest coverage for a legal action, the insured may settle the action without the insurer's consent and without violating the duty to cooperate or other restrictions on the insured's settlement rights contained in the policy if:**
>
> * * *
>
> **(e) The settlement agreed to by the insured is one that a reasonable person who bears the sole financial responsibility for the full amount of the potential covered judgment would make.**

Section 27 likewise provides that if an insurer does not make a reasonable settlement decision, the insured can settle the claim:

> § 27. Damages for Breach of the Duty to Make Reasonable Settlement Decisions
>
> **(1) An insurer that breaches the duty to make reasonable settlement decisions is subject to liability for any foreseeable harm caused by the breach, including the full amount of damages assessed against the insured in the underlying legal action, without regard to the policy limits. (2) When an insurer has breached the duty to make reasonable settlement decisions, the insured may settle the action without the insurer's consent and without violating the duty to cooperate or other restrictions on the insured's settlement rights contained in the policy if:**
>
> * * *
>
> **(d) The settlement agreed to by the insured is one that a reasonable person who bears the sole financial responsibility for the full amount of the potential covered judgment would make.**

In short, under the Restatement, if a "*Stowers*-consistent" settlement is offered or even available to solicit, the insurer loses the right under Texas law to determine whether it would prefer to agree to the settlement or continue defending and bear the risk for an excess verdict.

2. Effect of Multiple Claimants on a Settlement Demand

Application of the *Stowers* Doctrine becomes more complicated when multiple claimants are involved. Under Texas law, it is well settled that an insurer may "favor a claim by one claimant over a claim by another claimant in pursuit of this [*Stowers*] duty."[98] Thus, an insurer "faced with a settlement demand arising out of multiple claims and inadequate proceeds . . . may enter into a reasonable settlement with one of the several claimants even though such settlement exhausts or diminishes the proceeds available to satisfy other claims . . . . Such an approach . . . promotes settlement of lawsuits and encourages claimants to make their claims promptly."[99]

The Restatement, however, adopts an "overall exposure" test and supports interpleading of the proceeds:

> § 26. The Effect of Multiple Claimants on the Duty to Make Reasonable Settlement Decisions
>
> **(1) If multiple legal actions that would count toward a single policy limit are brought against an insured, the insurer has a duty to the insured to make a good-faith effort to settle the actions in a manner that minimizes the insured's overall exposure.**
>
> **(2) The insurer may, but need not, satisfy this duty by interpleading the policy limits to the court, naming all known claimants, and, if the insurer has a duty to defend or a duty to pay defense costs on an ongoing basis, continuing to defend or pay the defense costs of its insured until:**
>
> **(a) Settlement of the legal actions;**
>
> **(b) Final adjudication of the actions; or**
>
> **(c) Adjudication that the insurer does not have a duty to defend or to pay the defense costs of the actions.**

Thus, Texas law and the Restatement diverge on the effect of multiple claimants. Texas courts have also held that a valid *Stowers* demand requires that an insurer settle on behalf of one of several insureds when doing so exhausts policy limits, leaving other insureds exposed:[100]

> A settlement offer given to only one insured that would exhaust coverage under the liability limit of the policy creates a dilemma for the insurer. An insurer should not be precluded from accepting a reasonable settlement offer for fewer than all insureds. By accepting the offer the insurer would avoid being subjected to liability exceeding the policy limits due to its rejection of a reasonable offer. Further, any settlement would benefit all insureds by decreasing the total amount of liability in the underlying suit.[101]

3. Excess Insurer's Right of Subrogation

"If an excess insurance carrier is required to pay a portion of a judgment rendered against its insured in favor of a third party, it is equitably subrogated to its insured's rights against a primary insurance carrier under [*Stowers* and *Guin*] for negligently investigating, preparing to defend, trying or settling the third party action."[102]

The Restatement essentially mirrors Texas law on these interpretive principles:

> § 28. Excess Insurer's Right of Subrogation
>
> **An excess insurer has an equitable right of subrogation for loss incurred as a result of an underlying insurer's breach of the duty to make reasonable settlement decisions.**

Liability Insurance Fundamentals

1. Interpretation

An insurance policy is a contract, generally governed by the same rules of construction as all other contracts.[103] Under Texas law, the interpretation of an insurance policy is a matter of law for the court to determine.[104] When construing a contract, a Texas court's primary concern is to ascertain the intentions of the parties as expressed in the document.[105] This analysis begins with the language of the contract because it is the best representation of what the parties mutually intended.[106] When an insurance policy defines its terms, those definitions control.[107] Only the terms of the contract should be consulted when interpreting an unambiguous contract provision.[108] Texas courts "may neither rewrite the contract nor add to its language."[109]

Unless the policy dictates otherwise, Texas courts will give words and phrases their ordinary and generally accepted meaning, reading them in context and in light of the rules of grammar and common usage.[110] To determine a term's common, ordinary meaning, courts typically look first to dictionary definitions and then consider the term's usage in other authorities.[111] Courts strive to give effect to all of the words and provisions so that none are rendered meaningless.[112] "No one phrase, sentence, or section [of a contract] should be isolated from its setting and considered apart from the other provisions."[113] When construing an insurance policy, Texas courts are mindful of other courts' interpretations of policy language that is identical or very similar to the policy language at issue.[114] "Courts usually strive for uniformity in construing insurance provisions, especially where . . . the contract provisions at issue are identical across the jurisdictions."[115]

If only one party's construction of a policy term is reasonable, the policy is unambiguous and Texas courts will adopt that party's construction.[116] But if the parties present different interpretations and both constructions are reasonable, the policy is ambiguous.[117] In that event, Texas courts "must resolve the uncertainty by adopting the construction that most favors the insured, . . . even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties' intent."[118] "This widely followed rule is an outgrowth of the general principle that uncertain contractual language is construed against the party selecting that language," and is "justified by the special relationship between insurers and insureds arising from the parties' unequal bargaining power."[119]

In contract law, the terms "ambiguous" and "ambiguity" have a more specific meaning than merely denoting a lack of clarity in language.[120] "An ambiguity does not arise simply because the parties offer conflicting interpretations."[121] Instead, "a contract is ambiguous only when the application of pertinent rules of interpretation to the face of the instrument leaves it genuinely uncertain which one of two or more meanings is the proper meaning."[122] Thus, a contract is ambiguous only if, after applying the rules of construction, it remains "subject to two or more reasonable interpretations."[123]

Sections 2-4 of Chapter 1, Topic 1 of the Restatement deal with interpretation of policy provisions, including application of the plain meaning rule, and resolving ambiguities:

> § 2. Insurance Policy Interpretation
>
> **(1) Insurance policy interpretation is the process of determining the meaning of the terms of an insurance policy. Whether those terms as so interpreted are enforceable is determined by reference to other legal rules.**
>
> **(2) Insurance policy interpretation is a question of law.**
>
> **(3) Except as this Restatement or applicable law otherwise provides, the ordinary rules of contract interpretation apply to the interpretation of liability insurance policies.**
>
> § 3. The Plain-Meaning Rule
>
> **(1) If an insurance policy term has a plain meaning when applied to the facts of the claim at issue, the term is interpreted according to that meaning.**
>
> **(2) The plain meaning of an insurance policy term is the single meaning to which the language of the term is reasonably susceptible when applied to facts of the claim at issue in the context of the entire insurance policy.**

> **(3) If a term does not have a plain meaning as defined in subsection (2), that term is ambiguous and is interpreted as specified in § 4.**
>
> § 4. Ambiguous Terms
>
> **(1) An insurance policy term is ambiguous if there is more than one meaning to which the language of the term is reasonably susceptible when applied to the facts of the claim at issue in the context of the entire insurance policy.**
>
> **(2) When an insurance policy term is ambiguous as defined in subsection (1), the term is interpreted against the party that supplied the term, unless that party persuades the court that a reasonable person in the policyholder's position would not give the term that interpretation.**

These blackletter principles essentially mirror Texas's blackletter interpretative principles. Section 2 notes that interpretation is a question of law and that normal contract rules apply. Section 3 adopts a plain-meaning rule based on the entire context of the policy. Section 4 adopts the common understanding of ambiguity based on conflicting reasonable interpretations, and resolving those ambiguities against the insurer.

While Texas blackletter law and Restatement blackletter provisions largely match, the Restatement Comments on interpretation suggest conflicting views of the goal of interpretation. Texas law is clear that the primary concern is to ascertain the intentions of the parties as expressed by the plain meaning of the policy's terms.[124] To the extent that intent is unclear—that is, the provision in question is ambiguous—the policy is construed in favor of the coverage.[125] Comment C to section 2 of the Restatement identifies several other "objectives of liability-insurance-policy interpretation":

> These objectives include: effecting the dominant protective purpose of insurance; facilitating the resolution of insurance-coverage disputes and the payment of covered claims; encouraging the accurate description of insurance policies by insurers and their agents; and providing clear guidance on the meaning of insurance policy terms in order to promote, among other benefits, fair and efficient insurance pricing, underwriting, and claims management. These objectives provide guidance for the interpretation of insurance policies.

It is unclear whether the Restatement considers "objectives" to be goals to guide interpretation or merely the happy result of proper interpretation.

2. Insuring Agreement and Exclusions

Insurance policies are construed liberally in favor of the insured.[126] In contrast, "[e]xclusions [in the insurance policy] are narrowly construed, and all reasonable inferences must be drawn in the insured's favor."[127]

The Restatement essentially mirrors Texas law on these interpretive principles:

> § 31. Insuring Clauses
>
> **(1) An "insuring clause" is a term in a liability insurance policy that grants insurance coverage.**
>
> **(2) Whether a term in a liability insurance policy is an insuring clause does not depend on where the term is in the policy or the label associated with the term in the policy.**
>
> **(3) Insuring clauses are interpreted broadly.**
>
> § 32. Exclusions
>
> **(1) An "exclusion" is a term in an insurance policy that identifies a category of claims that are not covered by the policy.**
>
> **(2) Whether a term in an insurance policy is an exclusion does not depend on where the term is in the policy or the label associated with the term in the policy.**
>
> **(3) Exclusions are interpreted narrowly.**
>
> **(4) Unless otherwise stated in the insurance policy, words in an exclusion regarding the expectation or intent of the insured refer to the subjective state of mind of the insured.**

(5) An exception to an exclusion narrows the application of the exclusion; the exception does not grant coverage beyond that provided in the insuring clauses.

3. Timing of Events That Trigger Coverage

Under Texas law, when a policy covers risks for a certain time period, the time of the event allegedly triggering coverage is a precondition to coverage and is not considered a defensive matter to be pleaded and proved by the insurer.[128] "Courts traditionally distinguish between two types of insurance policies: 'occurrence' policies and 'claims-made' policies. Typically, an occurrence-based policy generally covers all claims based on an event occurring during the policy period, regardless of whether the claim or occurrence is brought to the attention of the insured or made known to the insurer during the policy period.[129] In contrast, a claims-made policy covers only claims made during the policy period for injuries or occurrences within a coverage period.[130] Numerous trigger-of-coverage theories exist, including the manifestation trigger, the exposure trigger, the continuous trigger, and the injury-in-fact trigger.[131]

For property claims, the Texas Supreme Court has adopted an "actual injury" approach.[132] Under the "actual injury" approach, property damage "occurs" when actual, physical damage takes place, rather than when the damage manifests itself or becomes discoverable.[133] This is also known as the "injury-in-fact" trigger, and is the trigger adopted by the Restatement in the comments to section 33.

With respect to bodily injury claims, the Texas Supreme Court has not adopted a trigger theory. In the absence of binding precedent, the federal courts and the intermediate state courts of appeal have attempted to predict the trigger theory the Texas Supreme Court would adopt. In latent or progressive bodily injury cases, those courts have recently applied the exposure test.[134]

The few other state courts considering Texas law on a bodily injury trigger, on the other hand, have adopted a variety of triggers. A continuous trigger theory was adopted by a Beaumont trial court in a breast implant case, concluding that the "continuous trigger theory best comports with common sense dictates that 'damage or injury,' in the case of toxic or harmful substances, begins with the first exposure and continues up to and through the manifestation of illness."[135]

Section 33 of the Restatement sets out the general principles regarding the timing of triggering events:

> § 33. Timing of Events That Trigger Coverage
>
> **(1) When a liability insurance policy provides coverage based on the timing of a harm, event, wrong, loss, activity, occurrence, claim, or other happening, the determination of the timing is a question of fact.**
>
> **(2) A liability insurance policy may define a harm, event, wrong, loss, activity, occurrence, claim, or other happening that triggers coverage under a liability insurance policy to have taken place at a specially defined time, the timing of which is also a question of fact, even if it would be determined for other purposes to have taken place at a different time.**

Texas courts have provided more specific guidance on the trigger of coverage than the Restatement.

4. Waiver and Estoppel

In Texas, waiver and estoppel come up most commonly in claims against carriers. Although commonly used interchangeably, waiver and estoppel refer to different concepts. Waiver requires the voluntary surrender of a known right.[136] Estoppel requires a showing that the insured was prejudiced by the conduct of the insurer.[137] In some cases, estoppel can prevent an insurer from asserting policy defenses.[138] This can occur when an insurer undertakes defense of a case without qualification or reservation of the right to later deny its obligation to provide indemnity if its insured is found liable.[139] However, while "the insurer may be estopped from denying benefits that would be payable under its policy as if the risk had been covered, . . . the doctrines of waiver and estoppel cannot be used to re-write the contract of insurance and provide contractual coverage for risks not insured."[140] In other words, "if an insurer defends its insured when no coverage for the risk exists, the insurer's policy is not expanded to cover the risk simply because the insurer assumes control of the lawsuit defense."[141] "But, if the insurer's actions prejudice the insured, the lack of coverage does not preclude the insured from asserting an estoppel theory to recover for any damages it sustains because of the insurer's actions."[142]

The Restatement provides the following blackletter principles for waiver and estoppel in the liability coverage context:

> § 5. Waiver
>
> **A party to an insurance policy waives a right under the policy if**
>
> **(1) that party, with actual or constructive knowledge of the facts giving rise to**

that right, expressly relinquishes the right, or engages in conduct that would reasonably be regarded by the counterparty as an intentional relinquishment of that right, and

(2) the relinquishment or conduct is communicated or known to the counterparty.

§ 6. Estoppel

A party to an insurance policy who makes a promise or representation that can reasonably be expected to induce detrimental reliance by another party to the policy is estopped from denying the promise or representation if the other party does in fact reasonably and detrimentally rely on that promise or representation.

Although the blackletter principles are not radically different, the comments to the Restatement suggest a more liberal application, especially around concepts such as "reasonably expected" and "reasonably be regarded."

5. Misrepresentations

Under Texas law, misrepresentations contained in the insurance application process constitute defenses to coverage or insurability and allow rescission of the policy.[143] A defense based upon a misrepresentation in an application is a valid defense against a claim for breach of contract and extracontractual claims.[144]

Section 7 of the Restatement concerns misrepresentations by insureds:

§ 7. Misrepresentation

(1) Any statement of fact made by a policyholder in an application for an insurance policy is a representation by the policyholder.

(2) Subject to the rules governing defense obligations, an insurer may deny a claim or rescind the applicable insurance policy on the basis of an incorrect representation made by a policyholder in an application for an insurance policy (hereinafter referred to as a misrepresentation) only if the following requirements are met:

(a) The misrepresentation was material as defined in § 8; and

(b) The insurer reasonably relied on the misrepresentation in issuing or renewing the policy as specified in § 9.

(3) When the policy is rescinded under subsection (2), the insurer must return all of the premiums paid for the policy.

The Restatement principles largely align with Texas law. For example, under Texas law, there are five elements an insurance carrier must plead and prove in order to establish a misrepresentation defense:

(1) the making of a representation;

(2) the falsity of the representation;

(3) reliance on the misrepresentation by the insurer;

(4) the intent to deceive on the part of the insured in making the misrepresentation; and

(5) the materiality of the misrepresentation.[145]

Likewise, the Restatement recognizes the materiality and reliance elements:

§ 8. Materiality Requirement

A misrepresentation by an insured during the application for, or renewal of, an insurance policy is material only if, but for the misrepresentation, a reasonable insurer in this insurer's position would not have issued the policy or would have issued the policy only under substantially different terms.

§ 9. Reasonable-1 Reliance Requirement

The reliance requirement of § 7(2)(b) is met only if:

(1) But for the misrepresentation, the insurer would not have issued the policy or would have issued the policy only with substantially different terms; and

(2) Such actions would have been reasonable under the circumstances.

"[M]ateriality of the risk must be viewed as of the time of the issuance of the policy, rather than at the time the loss

occurred, and . . . the principal inquiry in determining materiality is whether the insurer would have accepted the risk if the true facts had been disclosed."[146]

6. Cooperation

In Texas, an insured has a duty to cooperate with its insurer in the defense of claims for which the insurer has a duty to defend.[147] These "[c]ooperation clauses are intended to guarantee to insurers the right to prepare adequately their defense on questions of substantive liability."[148] The Restatement recognizes the same duty:

> § 29. The Insured's Duty to Cooperate
>
> **When an insured seeks liability insurance coverage from an insurer, the insured has a duty to cooperate with the insurer. The duty to cooperate includes the obligation to provide reasonable assistance to the insurer:**
>
> **(1) In the investigation and settlement of the legal action for which the insured seeks coverage;**
>
> **(2) If the insurer is providing a defense, in the insurer's defense of the action; and**
>
> **(3) If the insurer has the right to associate in the defense of the action, in the insurer's exercise of the right to associate.**

The Restatement and Texas law also agree on the consequences of breaching the duty to cooperate. The Restatement provides as follows:

> § 30. Consequences of the Breach of the Duty to Cooperate
>
> **(1) An insured's breach of the duty to cooperate relieves an insurer of its obligations under an insurance policy only if the insurer demonstrates that the failure caused or will cause prejudice to the insurer.**
>
> **(2) If an insured's collusion with a claimant is discovered before prejudice has occurred, the prejudice requirement is satisfied if the insurer demonstrates that the collusion would have caused prejudice to the insurer had it not been discovered.**

Texas law also provides that an insured's breach of a cooperation provision relieves an insurer of liability on the policy.[149]

Importantly, both the Restatement, in section 30.(1) above, and Texas law require a prejudice showing. To breach its duty to cooperate, an insured's conduct must materially prejudice the insurer's ability to defend the lawsuit on the insured's behalf.[150] It is notable, however, that an insurer who first "wrongfully refuses to defend" an insured is precluded from insisting on the insured's compliance with other policy conditions.[151]

7. Insurance of Known Liabilities

Insurance is designed to protect against unknown, fortuitous risks, and fortuity is a requirement of all policies of insurance.[152] "Texas has long recognized that it is contrary to public policy for an insurance company knowingly to assume a loss occurring prior to its contract."[153] An insured cannot insure against something that has already begun and which is known to have begun.[154] The fortuity doctrine precludes coverage for two categories of losses: known losses and losses in progress.[155] A "known loss" is one that the insured knew had occurred before the insured entered into the contract for insurance.[156] A "loss in progress" involves those situations in which the insured knows, or should know, of a loss that is ongoing at the time the policy is issued.[157] Application of the fortuity doctrine in the duty-to-defend context is resolved by the eight-corners rule; "we focus only on those facts that are alleged in the pleadings in the underlying lawsuit."[158]

The Restatement takes the following approach:

> § 46. Insurance of Known Liabilities
>
> **(1) Unless otherwise stated in the policy, a liability insurance policy provides coverage for a known liability only if that liability is disclosed to the insurer during the application or renewal process for the policy.**
>
> **(2) For purposes of the rule stated in subsection (1), a liability is known when, prior to the inception of the policy period, the policyholder knows that, absent a settlement, an adverse judgment establishing the liability in an amount that would exceed the amount of any applicable deductible or self-insured retention in the policy is substantially certain.**

In short, while Texas provides bar on coverage for known losses, the Restatement leaves room for such coverage.

8. Punitive Damages

In Texas, determining whether exemplary damages are insurable requires a two-step analysis.[159] First, courts decide whether the plain language of the policy covers the exemplary damages sought in the underlying suit against the insured.[160] Second, if the policy provides coverage, courts determine whether the public policy of Texas allows or prohibits coverage in the circumstances of the underlying suit. Courts first look to express statutory provisions regarding the insurability of exemplary damages to determine whether the Legislature has made a policy decision.[161] If the Legislature has not made an explicit policy decision, it will then consider the general public policies of Texas.[162]

The Restatement contains the following section for certain serious offences:

> § 45. Insurance of Liabilities Involving Aggravated Fault
>
> **(1) Except as barred by legislation or judicially declared public policy, a term in a liability insurance policy providing coverage for defense costs incurred in connection with any legal action is enforceable, including but not limited to defense costs incurred in connection with: a criminal prosecution; an action seeking fines, penalties, or punitive damages; and an action alleging criminal acts, expected or intentionally caused harm, fraud, or other conduct involving aggravated fault.**
>
> **(2) Except as barred by legislation or judicially declared public policy, a term in a liability insurance policy providing coverage for civil liability arising out of aggravated fault is enforceable, including civil liability for: criminal acts, expected or intentionally caused harm, fraud, or other conduct involving aggravated fault.**
>
> **(3) Whether a term in a liability insurance policy provides coverage for the defense costs and civil liability addressed in subsections (1) and (2) is a question of interpretation governed by the ordinary rules of insurance policy interpretation.**

As indicated by the language above, the Restatement largely leaves the issue of coverage for punitive damages to the states.

9. Notice and Reporting Conditions

"Courts traditionally distinguish between two types of insurance policies: 'occurrence' policies and 'claims-made' policies. In the case of an 'occurrence' policy, any notice requirement is subsidiary to the event that triggers coverage.[163] In the case of a 'claims-made' policy, however, notice itself constitutes the event that triggers coverage."[164] An "insured's failure to timely notify its insurer of a claim or suit does not defeat coverage if the insurer was not prejudiced by the delay" because "an immaterial breach does not deprive the insurer of the benefit of the bargain and thus cannot relieve the insurer of the contractual coverage obligation."[165]

In the claims-made context, it is important to distinguish between the policy's central reporting requirements and any prompt-notice-of-claims provisions. "An insurer must show prejudice to deny payment on a claims-made policy, when the denial is based upon the insured's breach of the policy's prompt-notice provision, but the notice is given within the policy's coverage period."[166] However, courts typically strictly apply the reporting requirements.[167] "A claims-made policy containing a requirement that claims must be reported to the insurer during a specified period is known as a 'claims-made and reported' policy, and that requirement is 'considered essential to coverage' such that 'an insurer need not demonstrate prejudice to deny coverage when an insured does not give notice within the policy's specified time frame.'"[168] The reporting requirement "define[s] the scope of coverage by providing a certain date after which an insurer knows it is no longer liable under the policy."[169] Allowing coverage beyond that period would grant the insured more coverage than she bargained and paid for and would require the insurer to assume coverage for risks for which it had not bargained.[170] The notice requirements in claims-made policies allow the insurer to "close its books" on a policy at its expiration and thus "attain a level of predictability unattainable under standard occurrence policies."[171] By increasing predictability and reducing their potential exposure, insurers may be able to reduce the policy cost to the insured, or so the theory goes.[172] Thus, notice provisions are integral parts of claims-made policies.[173]

The Restatement mirrors Texas law on the need for the insured to show prejudice if relying on untimely notice as a defense for coverage:

> § 35. Notice and Reporting Conditions
>
> **(1) Except as stated in subsection (2), the failure of the insured to satisfy a notice-of-claim condition excuses an insurer from performance of its obligations under a liability insurance policy only if the insurer demonstrates that it was prejudiced by the failure.**

(2) With respect to claims first reported after the conclusion of the claim-reporting period in a claims-made-and-reported policy, the failure of the insured to satisfy the claim reporting condition in the policy excuses an insurer from performance under the policy without regard to prejudice, except when:

(a) The policy does not contain an extended reporting period;

(b) The claim at issue is made too close to the end of the policy period to allow the insured a reasonable time to satisfy the condition; and

(c) The insured reports the claim to the insurer within a reasonable time

However, 35(2) does support limited prejudice requirements in the claims-made context.

10. Assignment of Rights Under a Liability Insurance Policy

Anti-assignment clauses have been "consistently enforced by Texas courts."[174] Contrary to the majority rule, Texas courts enforce anti-assignment clauses post-loss and without requiring the insurer to show prejudice.[175] Indeed, "Texas courts uphold anti-assignment provisions so long as they do not interfere with the operation of a statute."[176]

The Restatement contains the following section regarding assignment:

> § 36. Assignment of Rights Under a Liability Insurance Policy
>
> **(1) Except as otherwise stated in this Section, rights under a liability insurance policy are subject to the ordinary rules regarding the assignment of contract rights.**
>
> **(2) Rights of an insured under an insurance policy relating to a specific claim that has been made against the insured may be assigned without regard to an anti-assignment condition or other term in the policy restricting such assignments.**
>
> **(3) Rights of an insured under an insurance policy relating to a class of claims or potential claims may be assigned without regard to an anti-assignment condition or other term in the policy restricting such assignments, if the following requirements are met:**
>
> **(a) The assignment accompanies the transfer of financial responsibility for the underlying liabilities insured under the policy as part of a sale of corporate assets or similar transaction;**
>
> **(b) The assignment takes place after the end of the policy period; and**
>
> **(c) The assignment of the rights does not materially increase the risk borne by the insurer.**

Assignment is simply one of the sections of the Restatement that takes a different approach to Texas courts that have addressed the issue.

11. Number of Accidents or Occurrences

For liability policies, the number of occurrences is determined by finding the number of "events or incidents for which [the insured] is liable."[177]

The Restatement essentially mirrors Texas law in adopting a "cause" standard:

> § 38. Number of Accidents or Occurrences
>
> **For liability insurance policies that have per-accident or per-occurrence policy limits, retentions, or deductibles, all bodily injury, property damage, or other harm caused by the same act or event constitutes a single accident or occurrence.**

One potentially interesting wrinkle comes in the comments to section 38. In comment C, the Restatement articulates common, and Texas-consistent, principles of interpretation in the context of the number-of-occurrences analysis:

> If the facts are not in dispute, the court can make as a-matter-of-law determinations of the number of causes and thus the number of per-occurrence or per-accident policy limits or deductibles to apply in a given case. In making such determinations courts may take into account the structure of the overall insurance program to determine what number of causes is most consistent with the intent of the parties. In such cases, the court should follow the ordinary

rules of insurance policy interpretation, assuming the policy contains standard form terms, and, to the extent that the policy is ambiguous as applied to the claim at issue, choose the interpretation that favors the insured, unless the insurer persuades the court that this interpretation is unreasonable. See § 4.

A subsequent illustration of the above principle seems to extend the doctrine of construing ambiguous language in favor of the insured to allow courts to make "matter-of-law determinations regarding of the number of causes." A question arises as to whether this amounts to judicial usurpation of a fact question that should be more properly left to the jury.

12. Excess Insurance: Exhaustion and Drop Down

When a claim implicates both a primary policy and an excess policy, the primary policy is exhausted first to cover a loss, and the excess policy covers losses in excess of the amount covered by any primary policy.[178]

The Restatement does not fundamentally alter this relationship between primary and excess policies:

> § 39. Excess Insurance: Exhaustion and Drop Down
>
> **When an insured is covered by an insurance policy that provides coverage that is excess to an underlying insurance policy, the following rules apply, unless otherwise stated in the excess insurance policy:**
>
> **(1) The excess insurer is not obligated to provide benefits under its policy until the underlying policy is exhausted;**
>
> **(2) The underlying policy is exhausted when an amount equal to the limit of that policy has been paid to claimants for a covered loss, or for other covered benefits subject to that limit, by or on behalf of the underlying insurer or the insured; and**
>
> **(3) If the underlying insurer is unable to perform, whether because of insolvency or otherwise, the excess insurer is not obligated to provide coverage in the place of the underlying insurer.**

However, subsection (2) reflects, and the Restatement comments discuss, what has come to be known as the "*Zeig* Rule."[179] *Zeig* stands for the proposition that, if an excess insurance policy ambiguously defines "exhaustion," settlement with an underlying insurer constitutes exhaustion of the underlying policy for purposes of determining when the excess coverage attaches. *Zeig* also supports the principle in subsection (2) that payments by the insured may "exhaust" the primary limits. Neither the Texas Supreme Court nor the Fifth Circuit sitting in diversity and applying Texas law, have adopted the *Zeig* Rule.[180]

Extracontractual Claims

Texas courts and the Texas Legislature have extensively addressed the availability of extracontractual claims. In that regard, Texas does not recognize a common law tort of bad faith premised on third-party insurance, except in the limited situation in which an insurer fails to settle third-party claims against its insured (*i.e.*, a so-called *Stowers* claim).[181]

Instead, the Texas Legislature has set out a comprehensive and detailed extracontractual liability scheme applicable to third-party claims. Statutory bad faith claims are broken down into violations of the Texas Insurance Code Chapter 541, violations of the Texas Deceptive Trade Practices – Consumer Protection Act,[182] and violations of the Texas Prompt Payment of Claims Statute.[183]

Extracontractual claims under Chapter 541 are tort claims—requiring a negligence-type standard—that revolve around whether the insurer's actions were reasonable under the circumstances. Section 541.060 contains a "laundry list" of actions by an insurer that may give rise to a claim under the statute:

> **Sec. 541.060. UNFAIR SETTLEMENT PRACTICES.**
>
> **(a) It is an unfair method of competition or an unfair or deceptive act or practice in the business of insurance to engage in the following unfair settlement practices with respect to a claim by an insured or beneficiary:**
>
> **(1) Misrepresenting to a claimant a material fact or policy provision relating to coverage at issue;**
>
> **(2) Failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of:**

(A) a claim with respect to which the insurer's liability has become reasonably clear; or

(B) a claim under one portion of a policy with respect to which the insurer's liability has become reasonably clear to influence the claimant to settle another claim under another portion of the coverage unless payment under one portion of the coverage constitutes evidence of liability under another portion;

(3) Failing to promptly provide to a policyholder a reasonable explanation of the basis in the policy, in relation to the facts or applicable law, for the insurer's denial of a claim or offer of a compromise settlement of a claim;

(4) Failing within a reasonable time to:

(A) affirm or deny coverage of a claim to a policyholder; or

(B) submit a reservation of rights to a policyholder;

(5) Refusing, failing, or unreasonably delaying a settlement offer under applicable first-party coverage on the basis that other coverage may be available or that third parties are responsible for the damages suffered, except as may be specifically provided in the policy;

(6) Undertaking to enforce a full and final release of a claim from a policyholder when only a partial payment has been made, unless the payment is a compromise settlement of a doubtful or disputed claim;

(7) Refusing to pay a claim without conducting a reasonable investigation with respect to the claim;

(8) With respect to a Texas personal automobile insurance policy, delaying or refusing settlement of a claim solely because there is other insurance of a different kind available to satisfy all or part of the loss forming the basis of that claim; or

(9) Requiring a claimant as a condition of settling a claim to produce the claimant's federal income tax returns for examination or investigation by the person unless:

(A) a court orders the claimant to produce those tax returns;

(B) the claim involves a fire loss; or

(C) the claim involves lost profits or income.

a cause of action to a third party asserting one or more claims against an insured covered under a liability insurance policy.

A breach of Chapter 541 can result in trebled damages. Trebled damages equate to three times the economic

damages. Additionally, prejudgment interest should not be included in the amount trebled. Rather, it should be added after the additional damages are added to the economic damages.[184]

An insured can also recover mental anguish damages by establishing that the defendant acted "knowingly." The Texas Supreme Court has clarified that a knowing violation of the Insurance Code occurs where the offending party has "actual awareness" of the deception.[185] The *St. Paul* court explained:

> "Actual awareness" does not mean merely that a person knows what he is doing; rather it means that a person knows that what he is doing is false, deceptive, or unfair. In other words, a person must think to himself at some point, "Yes, I know this is false, deceptive or unfair to him, but I'm going to do it anyway."[186]

The Prompt Payment of Claims Statute sets out rules for timing of communications and payments of first-party claims.[187] In the liability policy context, the Texas Supreme Court has interpreted this to mean that claims concerning indemnity for third-party claims are not covered by the statute, but claims for the insured's defense are included.[188] Section 542.055 concerns acknowledgement of the claim, and Section 542.056 sets forth the deadline to accept or reject the claim. Under section 542.058, if an insurer fails to make payment on a valid claim within the specified deadlines, then it is liable for the penalties set forth in section 542.060:

> **Sec. 542.060. LIABILITY FOR VIOLATION OF SUBCHAPTER.**
>
> **(a) If an insurer that is liable for a claim under an insurance policy is not in compliance with this subchapter, the insurer is liable to pay the holder of the policy or the beneficiary making the claim under the policy, in addition to the amount of the claim, interest on the amount of the claim at the rate of 18 percent a year as damages, together with reasonable attorney's fees.**
>
> **(b) If a suit is filed, the attorney's fees shall be taxed as part of the costs in the case.**

Accordingly, an insurer who does not pay a valid claim within the specified statutory period is subject to an 18 percent interest penalty. Currently, there is no good faith exception to this rule, as several courts have stated that an insurer who wrongfully denies a claim should not be in a better position than one who delays, but ultimately pays, the claim.[189] The 18 percent per annum penalty is simple interest and is not compounded.[190] Further, because the penalty is punitive in nature, prejudgment interest is not assessed on it.[191]

The Restatement proposes the following standard for common law bad faith claims in the liability policy context:

> § 49. Liability for Insurance Bad Faith
>
> **An insurer is subject to liability to the insured for insurance bad faith when it fails to perform under a liability insurance policy:**
>
> **(a) Without a reasonable basis for its conduct; and**
>
> **(b) With knowledge of its obligation to perform or in reckless disregard of whether it had an obligation to perform.**
>
> § 50. Remedies for Liability Insurance Bad Faith
>
> **The remedies for liability insurance bad faith include:**
>
> **(1) Compensatory damages, including the reasonable attorneys' fees and other costs incurred by the insured in the legal action establishing the insurer's breach of the liability insurance policy and any other loss to the insured proximately caused by the insurer's bad-faith conduct;**
>
> **(2) Other remedies as justice requires; and**
>
> **(3) Punitive damages when the insurer's conduct meets the applicable state law standard.**

Thus, while the Restatement incorporates similar standards, the common law and statutory schemes for extracontractual claims in Texas are more specific and well defined than under the Restatement.

1 https://www.ali.org/projects/show/liability-insurance

2 https://www.ali.org/about-ali/how-institute-works

3 *Id.*

4 *Id.*

5 *Id*.

6 It must be noted that this esteem is not universally shared, as demonstrated by the late Justice Antonin Scalia's remark that modern Restatements "are of questionable value and must be used with caution." *Kan. v. Neb.*, 135 S. Ct. 1042, 1064, 191 L. Ed. 2d 1 (2015) (Scalia, J. dissenting).

7 We certainly do not mean to downplay the intensity or impact of that controversy. In April 2018, for example, the governors of Iowa, Maine, Nebraska, South Carolina, Texas and Utah sent a letter to the president of the ALI expressing concerns with the then-draft version of the Restatement, arguing that certain rules were "the prerogative of our state legislatures [and/or] at odds with established common law." They also threatened legislative or executive action if the rules were approved. In July 2018, Governor John Kasich of Ohio did exactly that, signing the bill that would become Ohio Revised Code of Insurance, Title XXXIX, Chapter 3901.82, which provides that "the 'Restatement of the Law of Liability Insurance' that was approved at the 2018 annual meeting of the American Law Institute does not constitute the public policy of this state and is not an appropriate subject of notice."

8 *Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, 279 S.W.3d 650, n. 28 (Tex. 2009) ("A defense of third-party claims provided by the insurer is a valuable benefit granted to the insured by the policy," which protects the insured "'against the expense of any suit seeking damages' covered by the policy.") (quoting *Heyden Newport Chem. Corp. v. S. Gen. Ins. Co.*, 387 S.W.2d 22, 25 (Tex. 1965)).

9 *Ooida Risk Retention Grp. Inc. v. Williams*, 579 F.3d 469, 472 (5th Cir. 2009) (applying Texas law).

10 *Zurich Am. Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487, 490 (Tex. 2008).

11 *Id*. at 490–91.

12 *See Federated Mut. Ins. Co. v. Grapevine Excavation, Inc*., 197 F.3d 720, 723 (5th Cir. 1999) (applying Texas law).

13 *See id*.

14 *Id*. (quoting *Ewing Constr. Co. v. Amerisure Ins. Co.*, 420 S.W.3d 30, 33 (Tex. 2014)).

15 *Id*. (quoting *Ewing Constr. Co*., 420 S.W.3d at 33).

16 *Evanston Ins. Co. v. Legacy of Life, Inc.*, 370 S.W.3d 377, 380 (Tex. 2012); *Tex. Farm Bureau Underwriters v. Graham*, 450 S.W.3d 919, 923 (Tex. App.—Texarkana 2014, pet. denied)

17 *N. Cnty. Mut. Ins. Co. v. Davalos*, 140 S.W.3d 685, 688 (Tex. 2004). This right is not absolute, however, as the insured may be entitled to independent counsel under certain, limited circumstances. The right to independent counsel is discussed below.

18 *Colony Ins. Co. v. Peachtree Constr., Ltd*., 647 F.3d 248, 253 (5th Cir. 2011) (applying Texas law) (quoting *D.R. Horton-Texas, Ltd. v. Markel Int'l Ins. Co*., 300 S.W.3d 740, 743 (Tex. 2009)).

19 *Pine Oak Builders, Inc.*, 279 S.W.3d at 654.

20 *Id*. (quoting *Nat'l Union Fire Ins. Co. of Pittsburgh, Penn. v. Merchs. Fast Motor Lines, Inc*., 939 S.W.2d 139, 141 (Tex. 1997)).

21 *Id*.

22 *Test Masters Edu. Servs. v. State Farm Lloyds*, 791 F.3d 561, 564 (5th Cir. 2015) (applying Texas law) (quoting *Gore Design Completions, Ltd. v. Hartford Fire Ins. Co*., 538 F.3d 365, 369 (5th Cir. 2008)).

23 *Graham*, 450 S.W.3d at 923 (quoting *GEICO Gen. Ins. Co. v. Austin Power, Inc*., 357 S.W.3d 821, 824 (Tex. App.—Houston [14th Dist.] 2012, pet. denied)) (citing *Nat'l Union Fire Ins. Co*., 939 S.W.2d at 141).

24 *Allstate Cnty. Mut. Ins. Co. v. Wootton*, 494 S.W.3d 825, 833 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (citing *Pine Oak Builders, Inc.*, 279 S.W.3d at 654–56).

25 *See GuideOne Elite Ins. Co. v. Fielder Road Baptist Church*, 197 S.W.3d 309, 305 (Tex. 2006).

26 *See Wootton*, 494 S.W.3d at 834 (citing *Ewing Constr. Co.*, 420 S.W.3d at 33); *see also Legacy of Life, Inc*., 370 S.W.3d at 380; *Burlington N. & Santa Fe Ry. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 334 S.W.3d 217, 219 (Tex. 2011); *D.R. Horton-Texas*, 300 S.W.3d at 744; *Nokia, Inc*., 268 S.W.3d at 497.

27 *GuideOne*, 197 S.W.3d at 309 (quoting *Northfield Ins. Co. v. Loving Home Care, Inc.*, 363 F.3d 523, 531 (5th Cir. 2004) (emphasis in original)).

28 *See GuideOne*, 197 S.W.3d at 307.

29 *See id.* at 308.

30 *See id.* at 309.

31 *See id.*

32 *W. Alliance Ins. Co. v. N. Ins. Co. of N.Y.*, 176 F.3d 825, 830 (5th Cir. 1999) (applying Texas law); *see also Employers Cas. Co. v. Block*, 744 S.W.2d 940, 943 (Tex. 1988), *overruled on other grounds*, *State Farm Fire & Casualty Co. v. Gandy*, 925 S.W.2d 696, 714 (Tex. 1996).

33 *Evanston Ins. Co. v. Legacy of Life, Inc.*, 645 F.3d 739, 750 (5th Cir. 2011) (applying Texas law) (citing *U.S. Cas. Co. v. Schlein*, 338 F.2d 169, 175 (5th Cir. 1964)).

34 *Pine Oak Builders, Inc.*, 279 S.W.3d at 652.

35 *See Block*, 744 S.W.2d at 943; *see also Hartford Cas. Co. v. Cruse*, 938 F.2d 601, 605 (5th Cir. 1991) (applying Texas law); *Enserch Corp. v. Shand Morahan & Co., Inc.*, 952 F.2d 1485, 1493 (5th Cir. 1992) (applying Texas law).

36 *State Farm Mut. Auto. Ins. Co. v. Traver*, 980 S.W.2d 625, 627-29 (Tex. 1998); *Taylor v. Allstate Ins. Co.*, 356 S.W.3d 92, 97 (Tex. App.—Houston [1st Dist.] 2011, pet. denied).

37 *Traver*, 980 S.W.2d at 627–29.

38 *Taylor*, 356 S.W.3d at 97.

39 *Davalos*, 140 S.W.3d at 688.

40 *Id*.

41 *Id*. at 689. The Texas Supreme Court went on to note a few "other types of conflicts may also justify an insured's refusal of an offered defense." *Id*. The Court stated:

> One authority lists four separate circumstances in which the insured may rightfully refuse to accept the insurer's defense: (1) when the defense tendered "is not a complete defense under circumstances in which it should have been," (2) when "the attorney hired by the carrier acts unethically and, at the insurer's direction, advances the insurer's interests at the expense of the insured's," (3) when "the defense would not, under the governing law, satisfy the insurer's duty to defend," and (4) when, though the defense is otherwise proper, "the insurer attempts to obtain some type of concession from the insured before it will defend." See 1 Windt § 4:25 at 393. Thus, the insured may rightfully refuse an inadequate defense and may also refuse any defense conditioned on an unreasonable, extra-contractual demand that threatens the insured's independent legal rights.

Id.

42 *Downhole Navigator, L.L.C. v. Nautilus Ins. Co.*, 686 F.3d 325, 328 (5th Cir. 2012) (applying Texas law); Black's Law Dictionary (9th ed. 2009); *see also Rx.com Inc. v. Hartford Fire Ins. Co.*, 426 F.Supp.2d 546, 559 (S.D. Tex. 2006) (applying Texas law) (citing *Davalos*, 140 S.W.3d at 688, for the proposition that "[a] conflict of interest does not arise unless the outcome of the coverage issue can be controlled by counsel retained by the insurer for the defense of the underlying claim"); *Partain v. Mid–Continent Spec.Ins. Servs., Inc.*, Civ. No. H–10–2580, 2012 WL 201864, at *15 (S.D. Tex. Jan. 20, 2012) (applying Texas law) (interpreting *Davalos*, 140 S.W.3d at 688, to stand for the proposition that "[i]n order for a disqualifying interest to exist . . . it must be apparent that facts upon which coverage depends will be ruled upon judicially in the Underlying Suit").

43 *Trinity Universal Ins. Co. v. Employers Mut. Cas. Co*., 592 F.3d 687, 695 (5th Cir. 2010) (applying Texas law) (internal quotations and citations omitted).

44 *Id*. (emphasis in original).

45 Tex. Ins. Code Ann. § 542; *Pine Oak Builders, Inc.*, 279 S.W.3d at 652.

46 *Matagorda Cnty. v. Tex. Ass'n of Cntys. Cty. Gov't Risk Mgmt. Pool*, 975 S.W.2d 782, 784 (Tex. App.—Corpus Christi Edinburgh 1998), *aff'd*, 52 S.W.3d 128 (Tex. 2000).

47 *Tex. Ass'n of Cntys. Cnty. Gov't Risk Mgmt. Pool v. Matagorda Cty*., 52 S.W.3d 128, 131 (Tex. 2000) (citing *Shoshone First Bank v. Pac. Employers Ins. Co*., 2 P.3d 510, 515–16 (Wyo. 2000) (rejecting the notion that the insurer could base a right to recover defense costs on a reservation letter and stating "we will not permit the contract to be amended or altered by a reservation of rights letter.")).

48 *Id*. (citing Williston on Contracts § 6:49 (4th ed. 1991)).

49 *Farmers Texas Cnty. Mut. Ins. Co. v. Wilkinson*, 601 S.W.2d 520, 522 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.).

50 *Ross v. Marshall*, 456 F.3d 442, 443 (5th Cir. 2006) (applying Texas law).

51 *Am. Eagle Ins. Co. v. Nettleton*, 932 S.W.2d 169, 174 (Tex. App.—El Paso 1996, writ denied).

52 *Rhodes v. Chicago Ins. Co., Div. of Interstate Nat'l Corp.*, 719 F.2d 116, 120 (5th Cir. 1983) (applying Texas law).

53 *Rhodes*, 719 F.2d at 120; *see also Hous. Auth. of City of Dallas, Tex. v. Northland Ins. Co.*, 333 F.Supp.2d 595, 600 (N.D. Tex. 2004).

54 *See Rhodes*, 719 F.2d at 120 (notice to insured); *see also J.E.M. v. Fid. & Cas. Co. of N.Y.*, 928 S.W.2d 668, 673 (Tex. App.—Houston [1st Dist.] 1996, no writ) (opportunity to investigate).

55 *See* Estoppel discussion, *supra*.

56 *See* Tex. Ins. Code Ann. § 542.056.

57 *Id*. § 541.060.

58 *See Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 236 S.W.3d 765, 772 (Tex. 2007) (quoting *Traders & Gen'l Ins. Co. v. Hicks Rubber Co.*, 169 S.W.2d 142, 148 (Tex. 1943)).

59 444 S.W.2d 583 (Tex. 1969).

60 *Id*. at 589.

61 *Id*. at 590.

62 *Id*. at 589.

63 *Id*.

64 *Id*.; *see also* the discussion of Contribution below and the impact of *Mid–Continent Ins. Co*., 236 S.W.3d 765 on these issues.

65 876 S.W.2d 842, 853 (Tex. 1994).

66 *Don's Building Supply v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 29 (Tex. 2008).

67 *Id.* at 29–30.

68 Section 33, Comment f.

69 413 S.W.3d 750, 758 (Tex. 2013).

70 *Id.*

71 *Mid-Continent Ins. Co.*, 236 S.W.3d at 772; *see also Trinity Universal Ins. Co.*, 592 F.3d at 695.

72 *Mid-Continent Ins. Co.*, 236 S.W.3d at 772 (quoting *Hicks Rubber*, 169 S.W.2d at 148).

73 *Id*.

74 *Id*.

75 *Cont'l Cas. Co. v. N. Am. Capacity Ins. Co.*, 683 F.3d 79, 86 (5th Cir. 2012) (applying Texas law); *see also Peachtree Const., Ltd.*, 647 F.3d at 258 ("*Mid-Continent* does not preclude subrogation claims by excess insurers, but rather, is limited to disputes between co-primary insurers."); *Amerisure Ins. Co. v. Navigators Ins. Co.*, 611 F.3d 299, 307–08 (5th Cir. 2010) (applying Texas law) ("Limiting *Mid-Continent* to such circumstances is faithful to the longstanding view of the Texas Supreme Court, as articulated over half a century ago by Justice Jack Pope, that dueling coinsurers must place the interests of their insureds before their own.").

76 *Trinity Universal Ins. Co.*, 592 F.3d at 695 ("An 'other insurance' clause does not modify [the duty to defend] so as to render it several and independent . . . Appellants satisfied the 'common obligation' requirement for a contribution claim.").

77 *Concierge Nursing Centers, Inc. v. Antex Roofing, Inc.*, 433 S.W.3d 37, 44 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

78 *Mid-Continent Ins. Co.*, 236 S.W.3d at 772.

79 *Tex. Farmers Ins. Co. v. Soriano*, 881 S.W.2d 312, 314–15 (Tex. 1994).; *G.A. Stowers Furniture Co. v. Am. Indem. Co.*, 15 S.W.2d 544, 547 (Tex. Comm'n App. 1929).

80 *Am. Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 849 (Tex. 1994).

81 *Garcia*, 876 S.W.2d at 848–49.

82 *G.A. Stowers Furniture Co.*, 15 S.W.2d at 544.

83 *State Farm Lloyds Ins. Co. v. Maldonado*, 963 S.W.2d 38, 41 (Tex. 1998) (holding that the insured had the burden to show that the second element of his *Stowers* claim was met).

84 *Nationwide Mut. Ins. Co. v. Holmes*, 842 S.W.2d 335, 338-39 (Tex. App.—San Antonio 1992, writ denied).

85 *See* Tex. Ins. Code Ann. § 541.060(a)(2)(A); *see also Universal Life Ins. Co. v. Giles*, 950 S.W.2d 48, 56 (Tex. 1997).

86 *Hernandez v. Truck Ins. Exch.*, 553 S.W.3d 689, 692 (Tex. App.—Fort Worth 2018, pet. filed) (elements of *Stowers* claim include whether "the claim against the insured is within the scope of coverage").

87 *Rocor Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Penn.*, 77 S.W.3d 253, 261 (Tex. 2002).

88 *See AFTCO Enterprises, Inc. v. Acceptance Indem. Ins. Co.*, 321 S.W.3d 65, 69 (Tex. App.—Houston [1st Dist.] 2010, pet. denied).

89 *Mid-Continent Ins. Co.*, 236 S.W.3d at 776; *Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co.*, 20 S.W.3d 692, 701–02 (Tex. 2000).

90 *Mid-Continent Ins. Co.*, 236 S.W.3d at 776.

91 *Id.*

92 *AFTCO Enterprises, Inc. v. Acceptance Indem. Ins. Co.*, 321 S.W.3d 65, 69 (Tex. App.—Houston [1st Dist.] 2010, pet. denied).

93 *Keck, Mahin & Cate*, 20 S.W.3d at 701–02 (internal citations omitted).

94 *Id.*

95 *Id.*

96 *AFTCO Enterprises, Inc.*, 321 S.W.3d at 69.

97 *Id.*

98 *Travelers Indem. Co. v. Citgo Petroleum Corp.*, 166 F.3d 761, 764 (5th Cir. 1999).

99 *Soriano*, 881 S.W.2d at 315.

100 *Citgo Petroleum Corp.*, 166 F.3d at 768,

101 *Pride Transp. v. Cont'l Cas. Co.*, 804 F.Supp.2d 520, 526 (N.D. Tex. 2011) (applying Texas law) (quoting *Millers Mut. Ins. Ass'n of Ill. v. Shell Oil Co.*, 959 S.W.2d 864, 870 (Mo. Ct. App. 1997)); *see also Citgo Petroleum Corp.*, 166 F.3d at 764 (noting difficulties imposed by *Stowers* duties when multiple parties and claims are involved, including that "if insurers are subject to both liability for failure to settle under *Stowers* and liability for disparate treatment of nonsettling insureds, insurers would find the policy limits they carefully bargained for of little utility").

102 *Am. Centennial Ins. Co. v. Canal Ins.*, 843 S.W.2d 480, 482 (Tex. 1992) (citing *G.A. Stowers Furniture Co.*, 15 S.W.2d 544, and *Ranger Cnty. Mut. Ins. Co. v. Guin*, 723 S.W.2d 656 (Tex. 1987)).

103 *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 126 (Tex. 2010).

104 *Regency Title Co., LLC v. Westchester Fire Ins. Co.*, 5 F.Supp.3d 836 (E.D. Tex. 2013) (applying Texas law); *Lubbock Cnty. Hosp. Dist. v. Nat'l Union Fire Ins. Co.*, 143 F.3d 239, 241–42 (5th Cir. 1998) (applying Texas law).

105 *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 514 (Tex. 2014).

106 *Gilbert Tex. Constr.*, 327 S.W.3d at 126; *see also Anglo–Dutch Petroleum Int'l, Inc. v. Greenberg Peden, P.C.*, 352 S.W.3d 445, 451 (Tex. 2011).

107 *Gastar Expl. Ltd. v. U.S. Spec. Ins. Co.*, 412 S.W.3d 577, 583 (Tex. App.—Houston [14th Dist.] 2013, pet. denied); *Gilbert Tex. Constr.*, 327 S.W.3d at 126.

108 *State Farm Lloyds v. Page*, 315 S.W.3d 525, 527 (Tex. 2010); *see also Brown v. Palatine Ins. Co.*, 89 Tex. 590, 35 S.W. 1060 (Tex. 1896).

109 *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 162 (Tex. 2003); *see also Nicholas Petroleum, Inc. v. Mid-Continent Cas. Co.*, No. 05-13-01106, 2015 WL 4456185, at *5 (Tex. App.—Dallas July 21, 2015, no pet.); *Calpine Producer Servs., L.P. v. Wiser Oil Co.*, 169 S.W.3d 783, 787 (Tex. App.—Dallas 2005, no pet.).

110 *See Gilbert Tex. Constr.*, 327 S.W.3d at 126; *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133 (Tex. 1994).

111 *Anadarko Petroleum Corp. v. Houston Cas. Co.*, No. 16-1013, 2019 WL 321921, at *4 (Tex. 2019).

112 *See Gilbert Tex. Constr.*, 327 S.W.3d at 126; *Forbau*, 876 S.W.2d at 133.

113 *Forbau*, 876 S.W.2d at 134 (quoting *Guardian Trust Co. v. Bauereisen*, 132 Tex. 396, 121 S.W.2d 579 (Tex. 1938)).

114 *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 824 (Tex. 1997).

115 *Nat'l Union Fire Ins. Co. of Pittsburgh, Penn. v. CBI Indus., Inc.*, 907 S.W.2d 517, 522 (Tex. 1995); *see also Nokia, Inc.*, 268 S.W.3d at 496-97 ("We have repeatedly stressed the importance of uniformity 'when identical insurance provisions will necessarily be interpreted in various jurisdictions.'") (quoting *Cowan*, 945 S.W.2d at 824).

116 *See Grain Dealers Mut. Ins. Co. v. McKee*, 943 S.W.2d 455, 459 (Tex. 1997).

117 *See id.* at 458; *see also Balandran v. Safeco Ins. Co. of Am.*, 972 S.W.2d 738, 741 (Tex. 1998).

118 *Nat'l Union Fire Ins. Co. of Pittsburgh, Penn. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991).

119 *Balandran*, 972 S.W.2d at 741, n.1 (citing Steven Plitt, *et al.*, 2 Couch on Insurance § 22.14 (3d ed. 1997); *Arnold v. Nat'l Cnty. Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex.1987)).

120 *Universal C.I.T. Credit Corp. v. Daniel*, 150 Tex. 513, 243 S.W.2d 154 (Tex. 1951).

121 *Schaefer*, 124 S.W.3d at 157.

122 *Daniel*, 243 S.W.2d at 157; *see also Balandran*, 972 S.W.2d at 741.

123 *Balandran*, 972 S.W.2d at 741.

124 *Kingwood Home Health Care, LLC*, 437 S.W.3d at 514.

125 *Hudson Energy Co.*, 811 S.W.2d at 555.

126 *Kelly Assocs., Ltd. v. Aetna Cas. & Sur. Co.*, 681 S.W.2d 593, 596 (Tex. 1984).

127 *Gore Design Completions, Ltd.*, 538 F.3d at 370.

128 *Ulico Cas. Co. v. Allied Pilots Ass'n*, 262 S.W.3d 773, 778 (Tex. 2008).

129 *See Garcia,* 876 S.W.2d at 844, n. 4; *Pilgrim Enters., Inc. v. Md. Cas. Co.*, 24 S.W.3d 488, 496 (Tex. App.—Houston [1st Dist.] 2000, no pet.)

130 *Garcia*, 876 S.W.2d at 844, n. 3; *Pilgrim Enters., Inc.*, 24 S.W.3d at 496.

131 *Accord Guar. Nat'l Ins. Co. v. Azrock Indus. Inc.*, 211 F.3d 239, 243–47 (5th Cir. 2000) (explaining various triggers of coverage); *Garcia*, 876 S.W.2d at 853, n. 20 (recognizing the existence of various trigger-of-coverage theories).

132 *See Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 24-25 (Tex. 2008).

133 *Id*. at 24

134 In *Mustang Tractor & Equip. Co. v. Liberty Mut. Ins. Co*., 1993 WL 566032, *aff'd*, 76 F.3d 89 (5th Cir. 1996) the court rejected the manifestation theory but declined to decide between the continuous trigger and exposure theories. In *Dayton Ind. School Dist. v. Nat'l Gypsum Co.*, 682 F. Supp. 1403 (E.D. Tex. 1988) the court adopted the continuous trigger theory, but the opinion was vacated on appeal on the grounds that the plaintiffs lacked standing. The *Dayton* court relied on *Nat'l Standard Ins. Co. v. Cont'l Ins. Co.*, 1984 WL 23448 (N.D. Tex., April 9, 1994), an unpublished decision that held that the insurer had a duty to defend the insured in all cases alleging exposure to various chemicals "from the date of initial exposure to such chemicals to the date of manifestation of disease." *See also Millennium Petrochemicals, Inc. v. Brown & Root Holdings, Inc.*, 2004 WL 2011478 (5th Cir., Sept. 10, 2004) (citing *Pustejovsky v. Rapid-Am. Corp.*, 35 S.W.3d 643, 647 (2000) for the proposition that the Texas Supreme Court has adopted the exposure theory). The *Pustejovsky* court merely quoted language from *Gideon* and discussed the single action rule in the context of asbestos litigation. *See Pustejovski*, 35 S.W.3d at 647 (quoting *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1137 (5th Cir. 1985).

135 *Bristol-Myers Squibb Co. v. AIU Ins. Co.*, No. A-145,672 (58th Jud. Dist., Jefferson Co., Tex., May 3, 1996) (Order on Motions for Summary Judgment) (emphasis in original).

136 *See Utilities Ins. Co. v. Montgomery*, 134 Tex. 640, 644, 138 S.W.2d 1062, 1064 (Tex. 1940); *State Farm Lloyds, Inc. v. Williams*, 791 S.W.2d 542, 551 (Tex. App.—Dallas 1990, writ denied).

137 *See Employers Cas. Co. v. Tilley*, 496 S.W.2d 552, 560 (Tex. 1973).

138 *See id*.

139 *See Am. Indem. Co. v. Fellbaum*, 114 Tex. 127, 263 S.W. 908 (Tex. 1924); *Wilkinson*, 601 S.W.2d at 520.

140 *See Allied Pilots Ass'n*, 262 S.W.3d at 775.

141 *Id.* at 787.

142 *Id.* at 787 (emphasis added).

143 *See Mayes v. Mass. Mut. Life Ins. Co.*, 608 S.W.2d 612, 616 (Tex. 1980); *Koral Indus., Inc. v. Security–Conn. Life Ins. Co.*, 788 S.W.2d 136, 141 (Tex. App.—Dallas 1990), *writ denied*, 802 S.W.2d 650 (Tex. 1990) (per curiam).

144 *See Koral Indus., Inc.*, 788 S.W.2d at 147–48 (if a policy is properly avoided or rescinded, it would be "ludicrous" to nevertheless hold that the insurance company denied a claim based on the policy when its liability under the policy had become reasonably clear, because there can be no liability whatsoever under an avoided or rescinded policy).

145 *Mayes*, 608 S.W.2d at 616; *Lee v. Nat'l Life Assur. Co.*, 632 F.2d 524, 527 (5th Cir. 1980) (applying Texas law) (citing *Southern Farm Bureau Life Ins. Co. v. Reed*, 563 S.W.2d 634, 636 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.)); *Garcia v. John Han-*

cock Variable Life Ins. Co., 859 S.W.2d 427, 431 (Tex. App.—San Antonio 1993, writ denied); *Flowers v. United Ins. Co. of Am.*, 807 S.W.2d 783, 785 (Tex. App.—Houston [14th Dist.] 1991, no writ); *Tam Nu La v. Aetna Life Ins. Co.*, 781 S.W.2d 630, 634 (Tex. App.—Houston [14th Dist.] 1989, writ dism'd); *Cartusciello v. Allied Life Ins. Co.*, 661 S.W.2d 285, 288 (Tex. App.—Houston [1st Dist.] 1983, no writ); *Estate of Diggs v. Enterprise Life Ins. Co.*, 646 S.W.2d 573, 574 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.).

146 *Robinson v. Reliable Life Ins. Co.*, 569 S.W.2d 28, 29 (Tex. 1978).

147 *See State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 385 (Tex. 1993).

148 *Martin v. Travelers Indem. Co.*, 450 F.2d 542, 553 (5th Cir. 1971).

149 *Filley v. Ohio Cas. Ins. Co.*, 805 S.W.2d 844, 847 (Tex. App.—Corpus Christi 1991, writ denied); *see also Universal Auto. Ins. Co. v. Culberson*, 54 S.W.2d 1061, 1062 (Tex. Civ. App.—Waco 1932), *aff'd*, 126 Tex. 282, 87 S.W.2d 475 (Tex. Comm'n App. 1935), *overruled on other grounds*, 464 S.W.2d 91 (Tex. 1971) (holding that an insured's failure to cooperate according to the policy relieves an insurer of liability, but that failure is a question of fact for the jury); *Employers Liab. Assur. Corp. v. Mosley*, 460 S.W.2d 201, 203 (Tex. Civ. App.—Houston [14th Dist.] 1970, no writ) (holding that an automobile insurer may be relieved of liability by an insured's breach of a cooperation clause, although the determination of breach is one of fact); *Griffin v. Fid. & Cas. Co. of N.Y.*, 273 F.2d 45, 48 (5th Cir. 1959) (applying Texas law) (holding that, in order to be relieved from liability under an insurance policy, an insurer must show that it was actually prejudiced by an insured's breach of a cooperation clause); *Frazier v. Glens Falls Indem. Co.*, 278 S.W.2d 388, 392 (Tex. Civ. App.—Fort Worth 1955, writ ref'd n.r.e.) (holding that although the determination of whether an insured has breached the duty to cooperate is usually a fact question, circumstances are possible which would justify resolving the question as a matter of law, but the insurer must always demonstrate actual prejudice); *Quorum Health Res. v. Maverick County Hosp. Dist.*, 308 F.3d 451, 469-71 (5th Cir. 2002).

150 *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691, 692-93 (Tex. 1994); *S.S.*, 858 S.W.2d at 385; *Oil Ass'n v. Royal Indem. Co.*, 519 S.W.2d 148, 150 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.).

151 *See Block*, 744 S.W.2d at 943; *St. Paul Ins. Co. v. Rahn*, 641 S.W.2d 276, 278 (Tex. App.—Corpus Christi 1982, no writ); *Enserch Corp.*, 952 F.2d at 1496, n. 17.

152 *Burlington Ins. Co. v. Tex. Krishnas, Inc.*, 143 S.W.3d 226, 230 (Tex. App.—Eastland 2004, no pet.); *Scottsdale Ins. Co. v. Travis*, 68 S.W.3d 72, 75 (Tex. App.—Dallas 2001, pet. denied); *Two Pesos, Inc. v. Gulf Ins. Co.*, 901 S.W.2d 495, 502 (Tex. App.—Houston [14th Dist.] 1995, no writ) (op. on reh'g).

153 *Two Pesos, Inc.*, 901 S.W.2d at 501.

154 *Summers v. Harris*, 573 F.2d 869, 872 (5th Cir. 1978).

155 *Tex. Krishnas, Inc.*, 143 S.W.3d at 230; *Travis*, 68 S.W.3d at 75.

156 *Burch v. Commonwealth Cnty. Mut. Ins. Co.*, 450 S.W.2d 838, 840–41 (Tex. 1970); *Tex. Krishnas, Inc.*, 143 S.W.3d at 230; *Travis*, 68 S.W.3d at 75.

157 *Tex. Krishnas, Inc.*, 143 S.W.3d at 230; *Travis*, 68 S.W.3d at 75; *Two Pesos, Inc.*, 901 S.W.2d at 502.

158 *Tex. Krishnas, Inc.*, 143 S.W.3d at 230.

159 *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 655 (Tex. 2008) (citing *Grinnell Mut. Reinsurance Co. v. Jungling*, 654 N.W.2d 530, 535-37 (Iowa 2002); *Fluke Corp. v. Hartford Accident & Indem. Co.*, 145 Wash.2d 137, 34 P.3d 809, 814 (Wash. 2001); *Brown v. Maxey*, 124 Wis.2d 426, 369 N.W.2d 677, 685 (Wis. 1985)).

160 *Id.*

161 *See Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 628 (Tex. 2004) ("generally, 'the State's public policy is reflected in its statutes.'") (quoting *Tex. Commerce Bank, N.A. v. Grizzle*, 96 S.W.3d 240, 250 (Tex.2002)); *see also FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 873 (Tex. 2000).

162 *Fairfield Ins. Co.*, 246 S.W.3d at 655.

163 *Pennzoil-Quaker State Co. v. Am. Int'l Spec. Lines Ins. Co.*, 653 F.Supp.2d 690, 697 (S.D. Tex. 2009) (applying Texas law).

164 *Matador Petroleum Corp. v. St. Paul Surplus Lines Ins. Co.*, 174 F.3d 653, 659 (5th Cir. 1999) (applying Texas law).

165 *PAJ, Inc. v. Hanover Ins. Co.*, 243 S.W.3d 630, 636–37 (Tex. 2008) (internal quotations omitted) (citing *Hernandez*, 875 S.W.2d at 692); *see also Prodigy Commc'ns Corp. v. Agric. Excess & Surplus Ins. Co.*, 288 S.W.3d 374, 377 (Tex. 2009).

166 *Fin. Indus. Corp. v. XL Spec. Ins. Co.*, 285 S.W.3d 877, 879 (Tex. 2009).

167 *Fed. Ins. Co. v. CompUSA, Inc.*, 319 F.3d 746, 753 (5th Cir. 2003) (applying Texas law).

168 *East Tex. Med. Ctr. Reg'l Healthcare Sys. v. Lexington Ins. Co.*, 575 F.3d 520 (5th Cir. 2009) (applying Texas law).

169 *Resolution Trust Corp. v. Ayo*, 31 F.3d 285, 289 (5th Cir. 1994) (applying Texas law).

170 *See Komatsu v. U.S. Fire Ins. Co.*, 806 S.W.2d 603, 607 (Tex. App.—Ft. Worth 1991, writ denied) (noting that "[e]xtension of the notice period in a claims-made policy constitutes an unbargained for expansion of coverage"); *see also Yancey v. Floyd West & Co.*, 755 S.W.2d 914, 923 (Tex. App.—Ft. Worth 1988, writ denied) (noting that both the insured and insurer negotiate for their respective advantages in a claims-made and reported policy).

171 *F.D.I.C. v. Mijalis*, 15 F.3d 1314, 1330 (5th Cir. 1994) (quoting *Burns v. Int'l Ins. Co.*, 709 F.Supp. 187, 191 (N.D. Cal.1989), *aff'd*, 929 F.2d 1422 (9th Cir.1991)).

172 *Id*. (citing *F.D.I.C. v. St. Paul Fire and Marine Ins. Co.*, 993 F.2d 155, 158 (8th Cir.1993)).

173 *Id*.

174 *See Tex. Farmers Ins. Co. v. Gerdes*, 880 S.W.2d 215, 218 (Tex. App.—Fort Worth 1994, writ denied).

175 *See Keller Foundations, Inc. v. Wausau Underwriters Ins. Co.*, 626 F.3d 871, 875–76 (5th Cir. 2010).

176 *Choi v. Century Surety Co.*, 2010 WL 3825405, *4 (S.D. Tex. Sept. 27, 2010) (citing *Tex. Dev. Co. v. Exxon Mobil Corp.*, 119 S.W.3d 875, 880 (Tex. App.—Eastland 2003, no pet.) and *Reef v. Mills Novelty Co.*, 126 Tex. 380, 89 S.W.2d 210, 211 (1936)).

177 *Maurice Pincoffs Co. v. St. Paul Fire & Marine Ins. Co.*, 447 F.2d 204, 206 (5th Cir. 1971); *H.E. Butt Grocery Co. v. Nat'l Union Fire Ins. Co.*, 150 F.3d 526, 535 (5th Cir. 1998) (Benavides, J., concurring); *State Farm Lloyds, Inc. v. Williams*, 960 S.W.2d 781, 784–85 (Tex. App.—Dallas 1997, writ dism'd by agr.) (relying on *Maurice Pincoffs* in finding that three random gunshots fired by one person constituted three occurrences because they caused three liability-triggering injuries); *but see Foust v. Ranger Ins. Co.*, 975 S.W.2d 329, 334 & n. 3 (Tex. App.—San Antonio 1998, writ denied) (finding that multiple passes by a crop duster together formed one occurrence and distinguishing *Williams* because the *Williams* policy did not define occurrence, whereas the definition of occurrence found in the policy at issue included "repeated exposure to [the same general] conditions").

178 *Carrabba v. Employers Cas. Co.*, 742 S.W.2d 709, 714-15 (Tex. App.—Houston [14th Dist.] 1987, no writ); *Utica Nat. Ins. Co. of Tex. v. Fid. & Cas. Co. of N.Y.*, 812 S.W.2d 656, 657 (Tex. App.—Dallas 1991, writ denied).

179 *See Zeig v. Massachusetts Bonding & Insurance Co.*, 23 F.2d 665 (2d Cir. 1928).

180 *Citigroup Inc. v. Fed. Ins. Co.*, 649 F.3d 367, 371–72 (5th Cir. 2011).

181 *See Maryland Ins. Co. v. Head Indus. Coatings & Servs., Inc.*, 938 S.W.2d 27, 28–29 (Tex. 1996).

182 *See* Tex. Bus. & Comm. Code § 17.41, *et seq.*

183 *See* Tex. Ins. Code Ch. 542.

184 *Aetna Cas. & Surety Co. v. Garza*, 906 S.W.2d 543, 556 (Tex. App.—San Antonio 1995, writ denied).

185 *St. Paul Surplus Lines Ins. Co. v. Dal-Worth Tank Co.*, 974 S.W.2d 51, 53-54 (Tex. 1998).

186 *Id.*; *see also Allison v. Fire Ins. Exch.*, 98 S.W.3d 227, 256 (Tex. App.—Austin 2002, pet. vac'd w.r.m.).

187 Tex. Ins. Code Ch. 542.

188 *See Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 16 (Tex. 2007).

189 *See, e.g., Higginbotham v. State Farm Mut. Auto. Ins. Co.*, 103 F.3d 456 (5th Cir. 1997) (applying Texas law); *Teate v. Mutual Life Ins. Co. of N.Y.*, 965 F. Supp. 891 (E.D. Tex. 1997) (applying Texas law); *Oram v. State Farm Lloyds*, 977 S.W.2d 163 (Tex. App.—Austin 1998, no pet.).

190 *See Primrose Operating Co. v. Nat'l Amer. Ins. Co.*, No. Civ. A. 5:02-CV-101-C, 2003 WL 21662829, at *3 (N.D. Tex. July 15, 2003), *rev'd in part,* 382 F.3d 546 (5th Cir. 2004) (applying Texas law).

191 *Id*.

By Rachelle H. Glazer and John P. Atkins

RECENT TEXAS SUPREME COURT AND FIFTH CIRCUIT INSURANCE DECISIONS

The Texas Supreme Court continues its recent trend of focusing on critical insurance issues this year. Since the last case law update, there was a new *Menchaca* decision, argument *and* decision on the *Anadarko* coverage matter, and an interesting decision out of the Fifth Circuit interpreting what constitutes an "event."

Texas Supreme Court Cases

Plain meaning does not always mean "common usage."

***Anadarko Petroleum Corp. v. Houston Casualty Co.*, No. 16-1013, 2019 WL 321921, 2019 Tex. LEXIS 53 (Tex. Jan. 25, 2019)**

Hot off the presses and just in time for inclusion in this edition of the *Journal*, the Texas Supreme Court's *Anadarko* opinion disentangles a thorny question regarding how to read a heavily negotiated insuring agreement for a joint venture.

Anadarko arises out of the Deepwater Horizon incident, which the Court takes time to remind us was "the largest accidental marine oil spill in U.S. history." The two Anadarko entities involved in this case were minority interest holders who were sucked into the vortex of litigation that ensued after that disaster. Over the course of the litigation, a dispute arose between Anadarko and its excess insurers regarding whether *some* or *all* of Anadarko's defense costs were properly payable.

The insurance at issue was not an off-the-shelf insurance policy. This was an insurance agreement for excess liability coverage of up to $150 million per occurrence, with a provision limiting Anadarko's coverage for "liability" by its proportionate share of ownership of the joint venture that operated the Deepwater Horizon. Essentially, the question at issue in this litigation was whether this "joint venture" limitation applied to Anadarko's *defense costs*. Put another way, do Anadarko's defense costs count as "liability" for the purposes of the limitation provision? At stake was an amount of defense costs so great it would exhaust the full coverage limit of the policy if not construed to be limited by the joint venture provision.

The trial court granted summary judgment for the insured, finding that the joint venture limitation did not apply to claimed defense costs. The court of appeals reversed, finding that the underwriters' view of the policy was correct. The briefing before the Supreme Court was extensive, touching on a variety of potential issues, including everything from canons of construction to the doctrine of *contra proferentem*. This placed in controversy a series of issues that could, in principle, be broadly applied in Texas insurance law.

Ultimately, the Court proved able to avoid some of the knottier questions. The Court focused its attention on the primary liability limiting clause in the joint venture provision. Specifically, the provision read "as regards any liability of [insured] which is insured under this Section III . . . the liability of Underwriters under this Section III shall be limited to" the joint venture ownership percentage multiplied by the $150 million limit of liability. To determine whether "liability of [insured]" was intended to include defense costs, the Court started, as it always does, with a "plain meaning" analysis.

The Court began by reminding the parties that the words of the policy itself best represent what the parties intend. That principle was important in this case, because the *way* a policy uses a word can fix its meaning just as definitively as an express definition of the term. The Court then hinted at its ultimate decision by noting that while the primary heuristic for defining undefined terms is to look to common usage, this must be done "in context."

The dictionary definitions of "liability" are all broad, and in fact, this had been very persuasive to the court of appeals below. On its own, the term "liability" can include almost any kind of debt or obligation, including (presumably) the obligation to pay defense costs. The underwriters bolstered this argument by pointing out that the phrase "liability of [insured]" is not modified by the inclusion of the extra

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 Coverage for 2012–2016 and in Insurance Law and Litigation–Insurance for 2017-2019 and a Texas Super Lawyer® in Insurance Coverage for 2012–2016 and Business Litigation 2017-2018. 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. He can be reached at John.Atkins@tklaw.com.

words "to third parties" or anything like that. To read it as though it did, the underwriters argued, would be to add words to the policy, which the Court has repeatedly held is an improper way to read a policy.

Dictionary definitions will not do it on their own, however. The court pointed out that in a "plain meaning" analysis, common usage must be balanced and construed through context, and that this required looking at how the term "liability" was used elsewhere in the policy. After all, common usage only gives the proper meaning when the policy does not give or demonstrate a different intended meaning. And this policy, the Court explained, consistently distinguished between two categories of loss: "liabilities" and "expenses."

For instance, the policy's primary coverage provision provided indemnity for "ultimate net loss" "by reason of liability" imposed by law or assumed in contract for bodily injury, personal injury, or property damage arising out of or caused by an occurrence and for which a claim was made against the insured. While the "ultimate net loss" covered here included defense expenses, the "liability of [insured]" did not, since the term liability does not include voluntarily assumed obligations to pay lawyers to defend against the liability. Instead, defense expenses were covered separately under the "ultimate net loss" clause "by reason" of the "liability of [insured], just not as a part of the insured's legally imposed obligation to pay for a third party's damages in response to a written claim."

The underwriters argued that the inclusion of both judgment amounts and defense expenses in the definition of "ultimate net loss" made both "liability," but the court disagreed. In the Court's view, the various uses of "liability" and "expenses" made clear that, as far as the policy was concerned, these were separate categories, and consequently the joint venture provision did not function to limit defense expenses to Anadarko's proportional ownership share.

The underwriters finally argued that this construction would render the policy absurd, in that it would be bizarre for the policy to pay only $37.5 million in third-party damages but pay $112.5 million in defense costs. This would, the underwriters argued, essentially create two policy limits: one for defense expenses and one for liability. But, as the Court pointed out, there was still only one liability limit: $150 million. There was a separate provision limiting payment for liability, as the Court had already held, but the remaining limit could be dedicated to defense costs without absurdity resulting. After all, absurdity is a high standard—an arrangement being arguably unwise or undesirable does not make the arrangement absurd. The Court therefore reversed the court of appeals and reinstated the trial court's partial summary judgment in Anadarko's favor.

The big lesson here, which is not *new* but certainly bears repeating, is that "plain meaning" does not mean "common usage." Common usage is the way to determine what words in a contract mean when nothing in the contract tells you what those words mean. But where, as here, the use of a term makes its meaning clear, whether or not the term is itself defined in the contract, that is sufficiently determinative to support a decision, regardless of what the dictionary might say.

Unanimity on the rules does not make them easy to apply.

***USAA Texas Lloyds Co. v. Menchaca*, 545 S.W.3d 479 (Tex. 2018)**

The Spring 2017 caselaw update covered the Texas Supreme Court's omnibus review of the relevant law on how claims for policy benefits, and claims for Insurance Code violations, interact in *USAA Texas Lloyds Co. v. Menchaca*, 14-0721, 2017 WL 1311752 (Tex. Apr. 7, 2017). At that time, the definition of "independent injury" remained elusive, and although the Court's review had provided much needed clarity, it had not resolved all of the questions in this thorny area. In 2018, the Texas Supreme Court showed just how thorny this issue remains. The Court's opening paragraph in its decision after rehearing of the *Menchaca* case states:

> Having granted Petitioner's motion for rehearing, we withdraw the judgment and opinion we issued on April 7, 2017. We unanimously reaffirm the legal principles and rules announced in that opinion, but we disagree on the procedural effect of those principles in this case. Because a majority of the Court agrees to reverse the court of appeals' judgment and remand the case to the trial court for a new trial, our disposition remains the same.

So the Court agrees, unanimously, with all of the legal principles stated in its previous opinion, which are *re*-stated in this new opinion. The Court cannot, however, agree on the *effect* of these rules on the particular case in front of them. No doubt, this statement makes clear just how difficult the case law in this area has become.

As a refresher, here are the pertinent facts. Gail Menchaca made a claim under her homeowner's insurance policy with USAA Texas Lloyds Company. The claim arose from damage caused by Hurricane Ike. USAA adjusters found insufficient damage to exceed Menchaca's deductible, and so USAA paid nothing. Menchaca sued, both for breach of the policy and for unfair settlement practices under the Texas Insurance Code. She sought only insurance benefits, court costs, and attorney fees as damages.

The strange factual situation in this case arises out of the seemingly contradictory verdict rendered by the jury in the trial court. The jury found that USAA had not breached the terms of the policy but had engaged in unfair or deceptive practices under the statute because they had refused to pay a

claim without conducting the required investigation. The jury awarded Menchaca damages based on what they concluded she *should* have received from USAA under the policy.

The appeal pitted Texas caselaw against *other* Texas caselaw. As covered in 2017, the primary conflict was between the Texas Supreme Court's decisions in *Provident American Insurance Co. v. Castañeda* (which USAA contended favored them) and *Vail v. Texas Farm Bureau Mutual Insurance Co.* (which Menchaca claimed favored her). In *Vail,* the Texas Supreme Court held that an unfair refusal to pay resulted in damages equal to at least what was wrongfully withheld, which Menchaca interpreted to mean that policy damages could be recovered as recompense for statutory violations. In *Castañeda*, however, the Court indicated that a bad investigation did not entitle an insured to obtain policy benefits from the insurer.

In its prior decision, the Court walked us through five rules taken from its precedent. In its new decision, it summarized the rules as followa:

> **First**, as a general rule, an insured cannot recover policy benefits as damages for an insurer's statutory violation if the policy does not provide the insured a right to receive those benefits. **Second**, an insured who establishes a right to receive benefits under the insurance policy can recover those benefits as actual damages under the Insurance Code if the insurer's statutory violation causes the loss of the benefits. **Third**, even if the insured cannot establish a present contractual right to policy benefits, the insured can recover benefits as actual damages under the Insurance Code if the insurer's statutory violation caused the insured to lose that contractual right. **Fourth**, if an insurer's statutory violation causes an injury independent of the loss of policy benefits, the insured may recover damages for that injury even if the policy does not grant the insured a right to benefits. And **fifth**, an insured cannot recover any damages based on an insurer's statutory violation if the insured had no right to receive benefits under the policy and sustained no injury independent of a right to benefits.

The Court reiterated these rules, and indeed indicated that they represent the Texas Supreme Court's unanimous statement of the governing principles bridging the gaps between policy claims and claims under the penalty provisions of the Texas Insurance Code. The Court fully re-explained these rules, with the same examples or (in the case of the independent injury rule) the same lack of examples as the Court's previous decision.

The Court then turned to the question of how a future conflicting result, like the one at issue in this case, might have been avoided. The Court suggested that the key is to ensure that the question of whether the insured is entitled to benefits under the policy is answered only once, and then tied to the potential for recovery under any other statutory claim. Ultimately, though, the Court declined to suggest a specific instruction, as any such instruction would need to be tailored to the needs of the case.

This is where the Court began to depart from its previous decision, and the unanimity with which the Court had addressed the other issues began to fray. The Court unanimously determined that the trial court erred when it ignored the jury's finding that USAA did not breach the insurance contract, but only a majority, led by Justice Boyd, concluded that this failure created an irreconcilable conflict. A plurality of the Court further concluded that a judgment based on this fatal conflict did not create a "fundamental error," and consequently the parties were required to preserve the error by objecting to the conflict before the trial court discharged the jury. Based on the majority view that the court committed error, and the plurality view that this error could not be reconciled, the Court determined that the trial court's judgment should be reversed, and the matter remanded for a new trial.

That summary does not do justice to the split. Justices Boyd, Lehrmann, and Devine concluded that, since *neither* party had objected to the conflict in the jury's verdict, and since Menchaca had prevailed, it would have been proper for the Court to affirm the judgment in Menchaca's favor. However, the justices determined that, given the lack of clarity in the law, it was unfair to penalize USAA and it was just and equitable for the Court to use its discretion to order a retrial.

Justice Blacklock concurred in the judgment but joined no opinion. Chief Justice Hecht, alone, filed a concurring opinion in which he joined the relevant pluralities, but for his own reasons. In Justice Hecht's view, a new trial was *mandatory*, rather than merely equitable. Justice Hecht disagreed with Justice Boyd's view that any objection was necessary, because here neither side objected to the verdict, the jury verdict was clearly contradictory, and there appeared to him to be no solution *but* retrial. Justice Hecht resisted the dissent's argument that judgment was proper for USAA because in his view, the jury actually answered the contract and statute questions inconsistently—the jury's answer to the question regarding the statutory violation actually *implied* a contractual violation the jury refused to find. Consequently, the verdict conflicted, and retrial was necessary. Justice Hecht also joined the dissent's opinion on the limited question of whether the issue of the conflicting verdict needed to be, or actually was, properly preserved.

Three justices (Green, Guzman, and Brown) dissented, and argued that the five rules reiterated by the court required

judgment to be entered for USAA. There was no conflict, the dissent reasoned, because the only real question in issue on whether policy benefits should be provided was whether Menchaca or USAA were correct about the amount of insured damages. When the jury held that the insurer did not violate the terms of the policy, it also therefore foreclosed any argument that Menchaca was entitled to policy benefits under the policy. Menchaca never sought, and the verdict did not mention, any amount of damages for any independent injury. Consequently, in the dissent's view, USAA had prevailed.

As noted above, Justice Hecht joined the dissent as to the question of error preservation, but for nothing else. This created a plurality for the proposition that USAA did not need to object to the conflict before the trial court, because (1) the issue had been brought up (by Menchaca) before the court, and (2) both parties believed, at the time the verdict was read, that they had won—neither could be expected to object, and the rules therefore did not require them to.

Ultimately, the questions presented confused even the Texas Supreme Court, as this multi-opinion decision shows. The ultimate result was decided by the narrow plurality of the three justices who would remand in the interest of justice, joined by the Chief Justice, who believed this result was not optional but obligatory, and Justice Blacklock, who declined to join any opinion but agreed with that disposition.

As with the Court's previous *Menchaca* decision, this replacement is sure to be cited frequently in future litigation. This new decision, and the narrowness of the court's determination that remand (rather than disposition in the insurer's favor) was proper, is instructive to litigators on the question of how to preserve objections to a jury verdict that is (1) arguably inconsistent but (2) has multiple legal interpretations. This is an important fact pattern to consider in the realm of disputes mixing questions of coverage and allegations of Insurance Code violations, where a poorly worded charge or a confused jury can easily create a verdict that runs afoul of one or more of the court's rules. This is especially true given that even *this* decision still leaves many questions outstanding, including what exactly might constitute an independent injury.

Fifth Circuit Cases

Multiple effects do not create multiple accidents.

***Evanston Insurance Co. v. Mid-Continent Casualty Co.*, 909 F.3d 143 (5th Cir. 2018)**

In the 2015 Tom Hanks movie *Bridge of Spies*, Hanks's character, James Donovan, plays an insurance attorney pressed into service representing a Russian spy. In an early scene, he argues with opposing counsel regarding an auto claim, about whether a car accident in which five motorcyclists were hit counted as one accident or five. Their conversation on that point is illuminating:

> Bates: "According to your description, 'He hit my five guys.'"
>
> Donovan: "The guy insured by my client had one accident. One, one, one. Losing control of the car and hitting five motorcyclists."
>
> Bates: "From *their* point of view, five things happened."
>
> …
>
> Donovan: "If I go bowling and I throw a strike, one thing happened. Ten things didn't happen."

The same argument is at the core of the Fifth Circuit's recent decision in *Evanston v. Mid-Continent*. The question is whether a serious automobile accident constituted one accident or several.

The case arises from a Mack truck accident, in which an employee of Evanston's insured lost control of his vehicle, striking two trucks a few minutes apart (these collisions were unrelated to the later dispute), then two minutes later struck one car, then another, damaging them and injuring the passengers. The truck driver and one of the passengers in one of the struck cars were killed. Litigation ensued, and the claims were settled, but Mid-Continent, the primary insurer, paid only $1,000,000 (its per-accident limit) in one of the settlements, then withdrew from the litigation and refused to pay more. Evanston paid the balance of the settlements, and then sued Mid-Continent under the theory that the impacts on each of the two later cars were separate accidents, and that Mid-Continent therefore owed roughly an additional $1,000,000. On cross-motions for summary judgment, Evanston prevailed. Mid-Continent appealed.

On appeal, the court first pointed out that the definition of "accident" in the Mid-Continent policy expressly included "continuous or repeated exposure to the same conditions resulting in 'bodily injury' or 'property damage.'" The court pointed out that this is language commonly used in insurance agreements, whether the term being defined is "accident" or "occurrence." In Texas, language like this is interpreted through a "cause" test. That is, the question is whether the events arise from the same cause. This the court contrasted with Louisiana's approach, which is based on *effects* rather than *causes*. In the court's words:

> Although the Supreme Court of Texas has never said so, we have repeatedly observed that "Texas courts agree that the proper focus in interpreting 'occurrence' is on the events that cause the injuries and give rise to the insured's liability, rather than on the number of injurious effects."

The question, then, is how tight the causal nexus has to be for two events to count as one "occurrence." The court therefore turned to Texas authority construing the "cause test" as a question of whether there was one or more acts of an insured that gives rise to liability. The court pointed out that while this approach was *instructive*, it was not complete, since it did not clarify how broadly an "act" could be construed. The court then cited to its own prior precedent to the effect that the relevant question was whether all of events resulted from a single unbroken chain of proximate causation.

In so doing, the court warned against misinterpretation of its precedent. Several district courts had interpreted the holding in the *H.E.B.* case (on which the court now relied) to rule out consideration of any "overarching" cause of injury where more direct causes could be identified. But the court pointed out that where, the "overarching" cause was also the *proximate* cause—that is, where the chain of causation is unbroken—it is still proper to consider all injuries to have arisen from a single "occurrence" under policy language like that at issue in this case.

Here, the court determined, that is precisely what happened. The evidence showed that the driver never applied the brakes, and there was no evidence that the driver ever regained control, or that his negligence was interrupted by any intervening events. Consequently, all of the injuries arose from a single "occurrence," the district court was to be reversed, and the judgment rendered for the insurer.

Apart from suggesting that occasionally Hollywood can identify interesting legal questions, this case suggests that the nexus of argument in litigation about whether multiple injuries arise from multiple occurrences or only one is whether intervening events break the chain of causation. If not, the injuries will arise from a single occurrence. If so, even if the negligence causing the separate injuries is similar across all injuries, the injuries will be treated independently.

1 *Anadarko Petroleum Corp. v. Houston Cas. Co.*, No. 16–1013, 2019 WL 321921, at *1 (Tex. Jan. 25, 2019).

2 *Id.* at *1–2.

3 *Id.* at *3.

4 *Id.* at *4.

5 *Id.*

6 *Id.* at *4–5.

7 *Id.* at *5.

8 *Id.* at *6–7.

9 *Id.* at *7–9.

10 *Id.* at *9.

11 *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 484 (Tex. 2018).

12 *Id.* at 485.

13 *Id.* at 485–86.

14 *Provident Am. Ins. Co. v. Castañeda*, 988 S.W.2d 189, 198 (Tex. 1998).

15 *Vail v. Tex. Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129, 136 (Tex. 1988).

16 *Menchaca*, 545 S.W.3d at 486–87.

17 *Id.* at 489 (emphasis added).

18 *Id.* at 501–03.

19 *Id.* at 504–05.

20 *Id.* at 511–21 (running through issues of fundamental error and concluding that remand in the interest of justice was proper).

21 *Id.* at 522 (C.J. Hecht, concurring)

22 *Id.* at 523–26.

23 *Id.* at 530–31.

24 *See Quotes*, *Bridge of Spies*, www.imdb.com, *available at* https://www.imdb.com/title/tt3682448/quotes (last visited Dec. 17, 2018).

25 *Evanston Ins. Co. v. Mid–Continent Cas. Co.*, 909 F.3d 143, 145–46 (5th Cir. 2018).

26 *Id.* at 147–48.

27 *Id.* (quoting *H.E. Butt Grocery Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 150 F.3d 526, 530 (5th Cir. 1998)).

28 *Id.* at 148–49 (citing *H.E. Butt*, 150 F.3d at 534).

29 *Id.* at 150–51.

30 *Id.* at 151.

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