Annual Survey of Texas Insurance Law 2006

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I. INTRODUCTION

This year's survey highlights two cases of special interest. In a particularly significant decision, the Texas Supreme Court in *Guideone Elite Insurance Co. v. Fielder Road Baptist Church*, 197 S.W.3d 305 (Tex. 2006), declined to modify the "eight corners" rule and declined to create exceptions allowing extrinsic evidence on coverage issues or on issues that overlap liability and coverage. The court held that the policy required the insurer to defend claims potentially within coverage, even if they were false and fraudulent.

The Texas Supreme Court also held in *Fiess v. State Farm Lloyds*, 202 S.W.3d 744 (Tex. 2006), that mold caused by water damage is not covered as an "ensuing loss caused by … water damage" under a Homeowners B insurance policy. Two dissenting judges and the Texas Department of Insurance, which was the author of the policy, found that the policy could reasonably be interpreted as an exception to the mold exclusion.

This year's survey covers the period from January through November, 2006.

II. FIRST PARTY INSURANCE POLICIES & PROVISIONS

A. Automobile

The Waco Court of Appeals held that a collision with an axle and attached wheels that broke away from a truck was sufficient "actual physical contact" with a vehicle to allow uninsured motorist ("UM") coverage. After reviewing decisions from other states, the court followed what it considered to be the highly persuasive majority position and concluded that there is "actual physical contact" when "an integral part of an unidentified vehicle collides with insured's vehicle as a 'result of an unbroken chain of events with a clearly definable beginning and ending, occurring in a continuous sequence.'" *Elchehimi v. Nationwide Ins. Co.*, 183 S.W.3d 833 (Tex. App.—Waco 2005, pet. filed). One judge dissented.

An insurer breached an automobile insurance policy by failing to pay the full value of a totaled vehicle. The court rejected the argument that the insured failed to provide necessary information. The information the insurer requested related to obtaining possession of the vehicle after payment was made, but the insurer did not make payment. *Allstate Indem. Co. v. Hyman*, 2006 WL 694014 (Tex. App.—Texarkana Mar. 21, 2006, no pet.) (not reported).

The *Hyman* court also rejected the insurer's argument that the insured impaired its subrogation rights by settling with another driver who caused the damage. The court held that the subrogation provision is not a covenant, so that a breach does not void coverage. Furthermore, the insurer was only entitled to offset the amount of the full value that could have been recovered from the other driver, less the deductible. *Id.*

In what is becoming a recurring theme, another court held that an individual was not a "covered person" under a business auto policy issued to a corporation. The company president was not named in the policy, and he did not qualify as a "family member" of the corporation. His personal vehicle, which he was driving at the time of the accident, was not listed in the policy. Thus, he had no coverage. *Truck Ins. Exch. v. Chalfant*, 192 S.W.3d 813 (Tex. App.—Houston [1st Dist.] 2006, no pet.). The *Chalfant* court also held that it was not necessary to have a written rejection of UM coverage for a non-owned auto.

The Fourteenth Court of Appeals held that a vehicle occupant was entitled to recover policy limits under both the driver's liability coverage and his underinsured motorist's coverage. The court rejected the argument that payment of benefits under one coverage reduced the other. *Jankowiak v. Allstate Prop. & Cas. Ins. Co.*, 201 S.W.3d 200 (Tex. App.—Houston [14th Dist.] Aug. 8, 2006, no pet.).

The court held that by reading all parts of the policy together, the liability limits applied separately to each coverage type. For example, the court found it would be unreasonable to suppose that a payment of the $40 policy limit for towing would preclude recovery under other coverage. Likewise, payment of the UM benefits would not preclude payment under the liability coverage.

The *Jankowiak* court disagreed with the contrary decision in *Hanson v. Republic Ins. Co.*, 5 S.W.3d 324 (Tex. App.—Houston [1st Dist.] 1999, pet denied). The court also held that if the policy could be read to reduce limits as argued by the insurer, such a construction would be void as against public policy in light of the statute providing for uninsured/underinsured motorist coverage.

An insured was "occupying" a covered auto when he had pulled over, exited the vehicle, and was walking toward another car that had collided with a retaining wall. A third car collided with the other car causing it to hit the covered auto, pinning the insured between the covered auto, and the retaining wall. The court held that the insurer failed to conclusively show that the insured was not occupying the covered auto. *Goudeau v. United States Fid. & Guar.*, ____ S.W.3d ____, 2006 WL 2506958 (Tex. App. —Houston [1st Dist] Aug. 31, 2006, no pet.). Interestingly, the court held that the policy was not ambiguous, even though the insurer in one capacity asserted that it did not provide coverage, but in another capacity asserted that it did.

B. Homeowners

The Texas Supreme Court held that mold caused by water damage is not covered as an "ensuing loss" under a Homeowners B insurance policy. *Fiess v. State Farm Lloyds*, 202 S.W.3d 744 (Tex. 2006). The Homeowners B policy excludes damages caused by mold, but this exclusion is modified by a provision stating, "we do cover ensuing loss caused by … water damage … if the loss would otherwise be covered under this policy."

The insureds argued that this provision was an exception to the exclusion and that it provided coverage for mold caused by water damage. The majority held that the plain language of the policy would not allow such a construction of the ensuing loss clause. The court focused on the language excluding coverage for loss caused by mold. The majority held there is no other reasonable construction, even though two dissenting justices did find such an interpretation reasonable, as did the Texas Department of Insurance, which was the author of the policy.

The dissenters and Texas Department of Insurance read the ensuing loss clause as an exception, as argued by the insureds.

For a case applying the holding in *Fiess* and dismissing the plaintiff's claims for mold damage, see *Gordon v. Allstate Texas Lloyd's*, ____ F.Supp.2d ____, 2006 WL 2827233 (S.D. Tex., Sept. 27, 2006).

Another court found no coverage for mold, based on similar reasoning, before *Fiess* was decided. *Lundstrom v. United Serv. Auto. Ass'n-CIC*, 192 S.W.3d 78 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

In a case decided before *Fiess*, the trial court submitted the issue of damage caused by mold and the application of the ensuing loss clause as a fact question to the jury. *Fire Ins. Exch. v. Sullivan*, 192 S.W.3d 99 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). In *Sullivan*, the jury found forty-five percent of the damages resulted from a covered water leak; therefore, the trial court erred by awarding the plaintiffs the full amount of remediation damages. Because the jury

found no breach of the contract with respect to personal property, the trial court also erred by awarding those damages. Because the damages, properly reduced, were less than the insurer had tendered before suit, the court rendered a take nothing judgment against the plaintiffs on their breach of contract and Deceptive Trade Practices Act ("DTPA") claims relating to the handling of their mold claim.

Homeowners met their burden to produce evidence that afforded a reasonable basis for submitting the amount of damage to their foundation caused by a covered plumbing leak, as distinguished from the damage caused by natural causes. *Travelers Pers. Sec. Ins. Co. v. McClelland*, 189 S.W.3d 846 (Tex. App.—Houston [1st Dist.] 2006, no pet.). The homeowners' expert testified that natural causes would cause movement in the first fifteen years, and that the more likely cause of the foundation movement after thirty-five years was some "trigger," and that was the plumbing leak. The court rejected the argument that the insureds were required to specifically state what damages were solely attributable to the covered cause.

The Fourteenth Court of Appeals held that a single policy limit applied to damages caused by several water sources. The court rejected the insured's argument that each loss caused by each water source was subject to a separate policy limit. *Coats v. Farmers Ins. Exch.*, ____ S.W.3d ____, 2006 WL 1765925 (Tex. App.—Houston [14th Dist.] June 29, 2006, no pet.).

C. Life

A deceased's child was entitled to recover policy proceeds as the "nearest relative," over the former mother-in-law, where there was insufficient proof that the deceased intended to name the mother-in-law as contingent beneficiary, after the deceased was murdered by his wife. *Clifton v. Anthony*, 401 F.Supp.2d 686 (E.D. Tex. 2005).

III. FIRST PARTY THEORIES OF LIABILITY

A. Unfair Insurance Practices, Deceptive Trade Practices & Unconscionable Conduct

Evidence that a homeowner's insurer hired an engineer with a proclivity to find that foundation movement was caused by excluded natural causes, instead of a covered plumbing leak, did not support a finding of bad faith, where the court found the evidence showed a bona fide dispute and honest difference of opinion between engineers for the two sides. *Travelers Pers. Sec. Ins. Co. v. McClelland*, 189 S.W.3d 846 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

Where the absence of coverage negated the plaintiffs' claim for bad faith, summary judgment was also proper on claims under the DTPA and Insurance Code that arose from the same underlying theory as the bad faith claim. *Lundstrom v. United Serv. Auto. Ass'n-CIC*, 192 S.W.3d 78 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

A student injured during a college club event sued another student who was supposed to catch him after a basket toss, but failed to do so. The court held that the student could not advance claims against insurer under the DTPA or Texas Insurance Code for bad faith denial or delay in payment of claim for any alleged breach of duty to defend because there was no duty to defend. *Crawford v. Guideone Mut. Ins. Co.*, 420 F.Supp.2d 584, 589 (N.D. Tex. 2006).

Evidence supported a jury finding that an auto insurer made misrepresentations and failed to act in good faith to settle by not paying the full value of a totaled vehicle. The court found evidence that the insurer falsely represented that it needed to protect the lienholder in settling the claim, when in fact the insurer could have paid the insured without involving the lienholder. Furthermore, the insurer falsely told the insured it had surveyed the value of similar vehicles to determine the value of the insured's vehicle. In addition, the insurer had relied on a national service's valuation reports from the Dallas-Fort Worth area, which did not necessarily reflect the value of the vehicle in the insured's home market in Lamar County. Finally, the jury found the offer of $3,500 less than the $18,000 value was a substantial difference. *Allstate Indem. Co. v. Hyman*, 2006 WL 694014 (Tex. App.—Texarkana Mar. 21, 2006, no pet.) (not reported).

The court is correct to reject those decisions requiring damages other than policy benefits, but the court did so for the wrong reason.

The *Hyman* court distinguished and declined to follow other decisions, including one from the same court that appeared to require that damages be something other than the policy benefits. The court rejected the line of cases requiring other damages and held that "a mere breach of contract" does not give rise to liability for unfair or deceptive practices. The court distinguished these cases, because this was not "a questionable claim." The court held that the policy benefits were part of "actual damages" recoverable under the unfair insurance practices statute.

The court is correct to reject those decisions requiring damages other than policy benefits, but the court did so for the wrong reason. The difference is not whether a claim is questionable. The correct analysis is simply that the unfair insurance practices statute allows recovery of actual damages, and policy benefits are part of those actual damages. The Texas Supreme Court settled this issue in *Vail v. Texas Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129 (Tex. 1988), by holding that policy benefits may be damages for unfair insurance practices as a matter of law.

There is no basis in a statute, or in common sense, for holding that a statute intended to protect insureds from unfair insurance practices would somehow fail to include as recoverable damages the benefits available under the policies. Courts requiring some other kind of damage before a claim is stated are simply wrong.

The grain of truth that exists in cases holding that a "mere breach of contract" does not establish an unfair insurance practice is that the *conduct* that proves a breach of contract does not necessarily establish an unfair insurance practice. There must be additional evidence, such as a misrepresentation or unfair settlement practice, as defined by the statute. The distinction is not the different kinds of *damages* that result; instead, the distinction is the proof necessary to establish liability for the *conduct* establishing breach of contract or a violation of the statutes.

In *AIG Aviation, Inc. v. Holt Helicopters, Inc.*, 198 S.W.3d 276 (Tex. App.—San Antonio 2006, pet. filed), the insurer denied liability for a helicopter crash, because the pilot did not have sufficient experience, even though the insurer knew causation would be required and the insurer's investigation did not show that the pilot's lack of experience contributed to causing the crash. The court of appeals found there was sufficient evidence to support the jury's finding that the insurer knowingly denied the claim without a reasonable basis and failed to conduct a reasonable investigation. The evidence showed that the insurer failed to consider any other cause of the loss and failed to develop any evidence that pilot error had caused the loss.

The insurer's own expert testified that a pilot would need forty hours in certain conditions to be qualified, but conceded that the pilot had the requisite number of hours in the required

conditions. The adjuster for the insurer acknowledged that he did not try to determine the cause of loss, because he was not asked to, and he would have investigated further if he had been asked. The insured's expert testified that while the pilot lacked the total hours of experience, he was well-qualified based on the number of hours he had in this specific helicopter. Based on this evidence, the court found the jury could have concluded that AIG knowingly conducted an outcome-oriented investigation.

The statement in the consumer bill of rights, included with an automobile policy, that if the insurer did not comply with deadlines, the insured had the right to collect eighteen percent interest and attorney's fees was not a misrepresentation. Thus, the insurer did not make a misrepresentation when it failed to voluntarily pay these amounts and the trial court denied such recovery to the insured. *Thomas v. Allstate Ins. Co.*, 2006 WL 2290840 (Tex. App.—Houston [14th Dist.] Aug. 10, 2006, no pet.) (not reported).

The Texas Supreme Court held that a life insurer did not "knowingly" fail to pay a claim after liability became reasonably clear and did not knowingly fail within a reasonable time to affirm or deny coverage of the claim, in *Minn. Life. Ins. Co. v. Vasquez*, 192 S.W.3d 774 (Tex. 2006). The beneficiary filed a claim requesting payment on a mortgage policy after her insured husband died. The policy covered death resulting from an accident "independently of all other causes" and excluded claims caused directly or indirectly by bodily infirmity or illness. The insurer initially denied the claim because it was not clear whether the insured died from a seizure or from an accidental blow to the head. Both were listed as a single cause of death in the death certificate and autopsy report. The insurer asked for medical records through a third-party vendor. That resulted in many delays, most of them caused by the hospital. When the medical records were finally produced, they provided no way to determine exactly what occurred, so the insurer paid the claim roughly six months after the claim was made.

The court did not consider whether there was evidence that the insurer committed an unfair settlement practice, because by the time of trial the insurer had already paid. Instead, the court considered whether there was evidence that the insurer acted "knowingly," to support the awards of mental anguish and additional damages. The court found there was no evidence that the insurer knowingly committed an unfair insurance practice. The court found that liability was not reasonably clear from the initial documents, so there was never a time when the insurer failed to pay after coverage became reasonably clear.

The court also held there was no evidence that the insurer "knowingly" caused delays with awareness that the protracted efforts were unfair to the beneficiary, nor that it intentionally prolonged the investigation, nor gave false reasons for the delay, nor that it knew the beneficiary was suffering mental anguish in the interim. Thus, the court reversed the awards for mental anguish and additional damages.

The court's opinion cannot be read too broadly to apply to reviewing evidence of whether there was an unfair settlement practice, considering that the court was only reviewing evidence supporting the finding that the insurer acted "knowingly." Nevertheless, the court does include troubling language about the standard of review in insurance bad faith cases. The court rejected the standard, which applies in all other factual sufficiency review cases, of "considering only the evidence offered in support of the finding." Instead, the court held that an appellate court must look "at all the evidence in such cases, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not." While the court cited its decision in *City of Keller v. Wilson*, 168 S.W.3d 802, 817-18 (Tex. 2005), for this standard of review, it seems inconsistent with the standard of review adopted in *Universal Life v. Giles*, 1998 WL 612731 (Tex. App.—Texarkana July 21, 1998) (not reported). In that case the court reaffirmed that the standard of review in insurance bad faith cases is the same as the standard of review in any other appeal.

B. Prompt Payment of Claims

An insurer that was not liable under a homeowner's policy for mold damage also was not liable for failing to meet the deadlines imposed by the prompt payment of claims statute. *Lundstrom v. United Serv. Auto. Ass'n-CIC*, 192 S.W.3d 78 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). The court cited the elements from *Allstate Ins. Co. v. Bonner*, 51 S.W.3d 289, 291 (Tex. 2001), that a party must establish: (1) a claim under an insurance policy; (2) that the insurer is liable for the claim; and (3) that the insurer has failed to follow one or more sections of the statute with respect to the claim. The court found the insureds did not satisfy the second element.

Note that there are substantial arguments for the position that failure to meet a deadline under the prompt payment of claims statute may impose liability even if the claim is not otherwise covered. *See* Mark L. Kincaid & Christopher W. Martin, *Texas Practice Guide: Insurance Litigation* § 17:44 (West 2005) (Coincidentally, one of the authors of this text — Chris Martin — was also the attorney for USAA in *Lundstrom*). *See also Fire Ins. Exch. v. Sullivan*, 192 S.W.3d 99 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (liability under prompt payment statute is contingent on a finding of coverage).

A trial court erred by awarding statutory penalties on the entire amount of the claim and should have deducted the unconditional payments made by the insurer. *Fire Ins. Exch. v. Sullivan*, 192 S.W.3d 99 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). The court concluded that the trial court should have stopped calculating the penalty on the day the amount tendered by the insurer exceeded the amount of coverage.

An insurer was not liable for offering to pay an uninsured motorist claim within five days of receiving the notice that the insured was willing to settle for the undisputed amount, where there was no evidence that the insured was entitled to more than the amount that was offered. *De la Garza v. State Farm Mut. Auto. Ins. Co.*, 181 S.W.3d 755 (Tex. App.—Dallas 2005, no pet.).

C. Breach of the Duty of Good Faith and Fair Dealing

Because there was no coverage for mold, an insurer was not liable for bad faith, absent any allegation of proof of conduct so extreme as to cause injury independent of the insurer's denial of the claim. *Lundstrom v. United Serv. Auto. Ass'n-CIC*, 192 S.W.3d 78 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

To show a breach of the duty of good faith and fair dealing, a claimant in a worker's compensation case must show that the carrier's actions delayed or denied the payment of benefits. *Wolford v. Am. Home Assurance Co.*, ____ S.W.3d ____, 2006 WL 1228660, *4 (Tex. App.—Houston [1st Dist.] May 4, 2006, no pet.). The court held that the carrier's decision to seek judicial review of the Texas Workers' Compensation Commission appeal panel's determination of benefits did not delay or deny the benefits. Therefore, the duty of good faith was not breached, because the carrier's entitlement to the disputed benefits remained binding during the pendency of the insurer's appeal.

D. Fraud

The owner of an insurance business was not liable for fraud where there was no evidence that he made any misrepresentation regarding an insured's investment; however, other evidence supported the owner's liability for being engaged in a "joint

enterprise" with the agent. *Watts v. Green*, 190 S.W.3d 44 (Tex. App.—Amarillo 2005, no pet.).

E. ERISA

The Supreme Court held that a fiduciary of a health plan may bring an equitable claim for subrogation to require a beneficiary to reimburse the plan from settlement proceeds for injuries caused by a third-party. *Sereboff v. Mid Atlantic Med. Serv., Inc.*, 126 S.Ct. 1869 (2006). The court of appeals in *Sereboff* also held that based on an expressed provision in the plan, the fiduciary's reimbursement share was properly reduced for a pro rata portion of a beneficiary's litigation expenses. On the other hand, the district court also had discretion to award the fiduciary its attorney's fees for collecting the subrogation amount. *Mid Atlantic Med. Serv., L.L.C. v. Sereboff*, 407 F.3d 212 (4th Cir. 2005).

The Court of Appeals for the Fifth Circuit rendered summary judgment awarding disability benefits to a salesman whose visual impairment made it unsafe for him to drive, in *Robinson v. Aetna Life Ins. Co.*, 443 F.3d 389 (5th Cir. 2006, pet. denied). The court found Aetna did not provide a reasonable opportunity for an administrative appeal, where Aetna first denied benefits on the basis that Robinson's vision had improved and then changed the basis to state that driving was not a material duty of his occupation, and provided no review of that determination. The court also found there was no evidence to support Aetna's determination, because the dictionary of occupation titles, which Aetna relied on in court, was not part of the record it relied on in making its decision. Thus, no concrete evidence supported Aetna's determination. The evidence that was on record showed that Robinson was required to drive twenty-five percent of the time, and this was some evidence of what would be material duties for a sales representative.

A plan administrator could begin deducting Veterans Administration benefits from a beneficiary's disability benefits, even though the prior administrator did not deduct those benefits for six years. The court found the offset was supported by the language of the plan, and the doctrines of estoppel and waiver would not apply. *High v. E-Systems, Inc.*, 459 F.3d 573 (5th Cir. 2006). The court did recognize that there is a theory of estoppel in ERISA cases if the plaintiff establishes a material misrepresentation, reasonable and detrimental reliance upon the representation, and extraordinary circumstances. The court found no extraordinary circumstances in this case, and the reliance was not reasonable because the plan language supported the offset.

Where the plan documents did not give the administrator discretion, the court would review a benefit denial de novo. The court found the administrator improperly construed the plan documents to require that an accident caused the disability, independent of all other causes. Properly construed, there was not sufficient evidence to support the administrator's denial of benefits. Nevertheless, the court declined to exercise its discretion to award the claimant attorney's fees. *Collinsworth v. AIG Life Ins. Co.*, 404 F.Supp.2d 911 (N.D. Tex. 2005).

An administrator did not abuse its discretion by considering a Department of Labor job description for a technical writer and then determining the employee was not disabled, because she could perform the work with seven functional limitations agreed to by one of her doctors. *Pylant v. Hartford Life & Accident Ins. Co.*, 429 F.Supp.2d 816 (N.D. Tex. 2006).

F. Other Theories

A motorist was injured by a driver whose employer and then insurer both became bankrupt. The motorist sought to recover against the Texas Property & Casualty Insurance Guaranty Association. The court affirmed dismissal of the claim, finding that the driver had to first establish liability of the driver's employer. *Webb v. Tex. Prop. & Cas. Ins. Guar. Ass'n*, 2005 WL 3234580 (Tex. App.—Austin Dec. 2, 2005, no writ.) (not reported).

In a malpractice action against an actuary firm, the court held the firm did not cause injury to the Fire and Police Retiree Health Care Fund, because there was no evidence that any defendant failed to meet the applicable standard of care with regard to the estimated claims or was the proximate cause of damage to the plaintiff. *Bd. of Trustees of the Fire & Police Retiree Health Fund v. Towers, Perrin, Forster & Crosby, Inc.*, 191 S.W.3d 185, 190 (Tex. App.—San Antonio 2006, pet. denied).

The mortgagee's assignee brought an action in state court against an insurer, seeking to establish under the Texas equitable lien doctrine that it should be treated as if it were an additional insured and loss payee. *U.S. Bank Nat'l Ass'n v. Safeguard Ins. Co.*, 422 F.Supp.2d 698, 701 (N.D. Tex.—Dallas 2006, no pet.). The mortgagee's assignee met its burden of establishing that a deficiency existed on the mortgage. Therefore, it was entitled under the equitable lien doctrine to insurance policy proceeds for hail storm damage to the property.

IV. AGENTS, AGENCY & VICARIOUS LIABILITY

A. Joint enterprise

Where an agent and insurance business owner worked together and discussed a plan to sell investments in pay telephones to an insured, the owner could be held liable as part of a "joint enterprise" for the fraudulent representations of the agent. The court found sufficient evidence to support the following elements: (1) an agreement, express or implied, with respect to the enterprise or endeavor; (2) a common purpose; (3) a community of pecuniary interests in that purpose among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control. *Watts v. Green*, 190 S.W.3d 44 (Tex. App.—Amarillo 2005, no pet.).

B. Suits by Agents

An insurance agency failed to state claims for tortious interference with existing and prospective contracts based on the rejection of certain health insurance contracts, which would have yielded the agency a higher commission. The school district rejected the contracts because they did not meet its requirements, so there was no evidence that the administrator's interference, if any, caused the agency to lose the contracts. Likewise, there was no evidence that any unfair insurance practice by the administrator caused damages to the agency. *Richardson-Eagle, Inc. v. William Mercer, Inc.*, ____ S.W.3d ____, 2006 WL 2435594 (Tex. App.—Houston [1st Dist] Aug. 24, 2006, no pet.).

V. THIRD PARTY INSURANCE POLICIES & PROVISIONS

A. Automobile Liability Insurance

Insurers of automobiles do not owe third party claimants first party duties. *Coats v. Ruiz*, 198 S.W.3d 863, 883 (Tex. App.—Dallas 2006, no pet.). The court in *Coats* held that an insurer did not owe claimants any extracontractual duties in connection with the settlement of their action against the insured.

A car owner and her insurer were not liable for negligently entrusting a vehicle to a mechanic for repairs, where the mechanic chose to borrow the vehicle to take his girlfriend to dinner, which was outside the scope of his permissive use. *Atkinson v. Snodgrass*, 2006 WL 648334 (Tex. App.—Eastland Mar. 16, 2006, no pet.) (not reported).

A fact issue existed as to whether an employee materially

deviated from his implied permission to use a company truck, so that the trial court erred by rendering summary judgment finding no coverage. The evidence showed that the employee had permission to drive the truck from Bryan to Houston, and to make deliveries, and that he was allowed to use the truck for minor errands such as getting lunch. He had an accident at one or two in the morning as he drove to get cigarettes, after consuming several beers with a meal before he slept for four hours. The court concluded that his deviation was not so egregious as to preclude coverage as a matter of law. *Adams v. Travelers Indem. Co. of Conn.*, 465 F.3d 156 (5th Cir. 2006).

B. Comprehensive General Liability Insurance

A policy potentially covered claims for an accident caused in part by mud tracked onto the roadway by the insured's truck and in part by mud that washed onto the roadway from the insured's sandpit resulting in an obstruction to the road. Although the policy did not cover damages resulting from the use of the trucks, it would cover damages resulting from the obstruction, so there was a fact issue whether the mud that washed onto the road was sufficient to have caused the accident. *Emcasco Ins. Co. v. Am. Int'l Specialty Lines Ins. Co.*, 438 F.3d 519 (5th Cir. 2006).

A nursing home resident sued an employee and the nursing home, claiming she was a third-party beneficiary of a liability policy. The employee was an additional insured under the terms of the insurance policy and was entitled to a defense. However, a defense was only provided to the nursing home because the employee failed to request a defense. *Crocker v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 466 F.3d 347 (5th Cir. 2006).

The insurer tried to contact the employee to notify him that he was an additional insured, but those attempts failed. A certified letter was sent to the insured, but was returned unclaimed.

The Fifth Circuit certified three questions to the Supreme Court of Texas:

(1) Where an additional insured does not know of coverage, does an insurer that has knowledge that a suit implicating policy coverage has been filed against its additional insured have a duty to inform him of the available coverage?

(2) If yes, what is the extent of the insurer's duty to inform, and what is the extent of any duty on the additional insured to cooperate with the insurer up to the point he is informed of the policy provisions?

(3) Does proof of an insurer's actual knowledge of service of process in a suit against its additional insured establish as a matter of law the absence of prejudice to the insurer from the additional insured's failure to comply with the notice-of-suit provisions of the policy?

Id.

An exclusion for synthetic stucco was approved by the Texas Department of Insurance and thus was valid to exclude claims. The court found the Commissioner of Insurance had approved an exclusion for "designated work," and the insurer had included a description of synthetic stucco as the designated work that was excluded. *Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, ____ S.W.3d ____, 2006 WL 1892669 (Tex. App.—Houston [14th Dist.] July 6, 2006, no pet.).

The *Pine Oak* court also addressed the issue of which trigger for coverage applied to claims arising from repeated and continuous water damage caused by improper application of the synthetic stucco. The court rejected the argument that liability only arose for damage that "manifested" within the insurers' policy periods. Instead, the court construed policy language covering "continuous or repeated exposure" to provide coverage for any damage that occurred during a policy period, whether or not it manifested within the insurer's policy periods.

The same issue regarding coverage for claims arising from synthetic stucco and work by subcontractors was addressed by the Dallas Court of Appeals in *Summit Custom Homes, Inc. v. Great Am. Lloyds Ins. Co.*, 202 S.W.3d 823 (Tex. App.—Dallas 2006, no pet.). The *Summit* court did adopt the rule that coverage only applied for the years in which damage manifested itself. Applying this test, the court found a duty to defend where the petition was not specific enough to state which date because the insurer could not show there was no potential for coverage. However, another insurer's policy expressly excluded liability for synthetic stucco, so there was no duty to defend. As to that insurer, either the loss manifested outside of its policy period, or it was excluded.

A liability insurer had a duty to defend a cell phone manufacturer in a class action alleging that radiation from the phones caused injuries to the cells of users. The court found this sufficiently alleged "bodily injury" by alleging an adverse cellular reaction. The court rejected the insurer's argument that "bodily injury" required some manifestation of an injury, sickness, or disease. *Samsung Electronics Am., Inc. v. Fed. Ins. Co.*, 202 S.W.3d 372 (Tex. App.—Dallas 2006, pet. denied). The court also held that the relief sought — providing a headset or the cost of one — sufficiently alleged damages "due to" bodily injury.

The courts reached the same conclusions in *Nokia, Inc. v. Zurich Am. Ins. Co.*, 202 S.W.3d 384 (Tex. App.—Dallas 2006, pet. denied) and *Ericsson, Inc. v. St. Paul Fire & Marine Ins. Co.*, 423 F.Supp.2d 587 (N.D. Tex. 2006).

In these cases, however, there was no duty to defend claims in another class action that only alleged that the phones did not comport with the description that had been provided and did not allege any form of physical injury.

C. Directors & Officers Liability Insurance

Two letters stating amounts of damages alleged because a company was denying a claimant's ability to cash in warrants were "claims" within the meaning of two directors and officers' liability policies. The court reasoned that the letters counted as demands for money, because both specified damages, offered to settle, and threatened litigation. Because the insured delayed for nine months, it violated the policy condition precedent requiring notice "as soon as practicable," and the insurer was not required to show prejudice to avoid coverage under the claims. *Precis, Inc. v. Fed. Ins. Co.*, 184 Fed. Appx. 439 (5th Cir. 2006).

D. Additional Insureds

Fina hired A&B to do work on its premises, and A&B agreed to provide insurance to Fina as the premises owner. In a suit by a worker injured on Fina's premises, the court found that Fina was an additional insured under an endorsement to the contractor's liability policy, based on the agreement between the parties. *Atofina Petrochemicals, Inc. v. Continental Cas. Co*., 185 S.W.3d 440 (Tex. 2005). The court rejected the argument that the agreement was not specific enough because it did not specify the type of insurance coverage or policy limits. The parties had worked together before and A&B understood Fina required that it be named as an additional insured for any work done for Fina, and the court also referred to standard practice in the industry. The court also held that later purchase orders did not supersede the commitment to furnish insurance, and the lack of a certificate of insurance prior to the accident did not change the result. The certificate itself said that it conferred no rights, and there was nothing to indicate that it was a condition precedent to coverage.

An excess insurance policy did not provide coverage for an additional insured's sole negligence. The court agreed that the contract provided coverage for the additional insured, while another provision made clear that the coverage did not extend to the additional insured's sole negligence. The court concluded these provisions had to be read together. *Evanston Ins. Co. v. Atofina Petrochemicals, Inc.*, ____ S.W.3d ____, 2006 WL 1195330 (Tex. May 5, 2006). The court also noted that coverage under the policy stood on its own and did not depend on the scope of the indemnity agreement by which the contract was required to provide coverage to the additional insured.

E. Excess Insurance

An excess insurer had a right of "conventional" subrogation based on the primary insurers' contractual obligations, which did not require proof that the primary insurers were negligent. *Royal Ins. Co. v. Caliber One Indem. Co.*, 485 F.3d 614 (5th Cir. 2006). The court found that several instances of harm to a nursing home patient that led to visible injuries were separate occurrences under the policies of two primary insurers. However, the incidents were a single occurrence for one primary insurer whose policy defined "medical incident" to include all related acts or omissions. The acts and omissions were not a single "occurrence" based on exposure to the same conditions. The court reasoned that the injuries were caused by specific acts by the defendants, not by general conditions. Nevertheless, the excess insurer was not entitled to subrogation against a primary insurer whose policy period predated the excess insurers. The excess insurer was only entitled to require exhaustion of the policy limits of the primary insurer for the same coverage period.

VI. DUTIES OF LIABILITY INSURERS

A. Duty to Defend

In a significant decision, the Texas Supreme Court declined to modify the "eight corners" rule and declined the invitation to create exceptions allowing extrinsic evidence on coverage issues or on issues that overlap liability and coverage. A church was sued for sexual misconduct alleged to have been committed by its associate youth pastor from 1992 to 1994. Extrinsic evidence showed that the youth pastor ceased working for the church before the liability policy took effect. The Texas Supreme Court held this evidence could not be considered, because it was extrinsic to the eight corners of the complaint and the insurance policy. *Guideone Elite Ins. Co. v. Fielder Road Baptist Church*, 197 S.W.3d 305 (Tex. 2006). The court rejected the argument of the insurer and several amicus curiae urging the court to adopt an exception that would allow the court to consider "the true facts" to determine whether there was coverage. The policy required the insurer to defend claims potentially within coverage, even if they were false and fraudulent.

The Texas Supreme Court declined to modify the "eight corners" rule and declined the invitation to create exceptions allowing extrinsic evidence on coverage issues or on issues that overlap liability and coverage.

The court then held that the allegations of sexual assault, abuse, molestation, and violation were sufficient to state a claim for "bodily injury" within the policy, without further description of those injuries.

Four justices concurred, but would hold merely that there was coverage even if the stipulation regarding the pastor's date of employment were considered. Thus, the concurring justices would not reach the question whether extrinsic evidence should ever be allowed, suggesting that it might be an issue they would revisit in another case.

Conduct of EDS in negligently misrepresenting to electronics vendors that it had a deal to supply billions of dollars of equipment to NATO, which turned out to be a hoax causing them to part with millions of dollars of equipment, was not an "accident" and thus was not a covered "occurrence." The court reasoned that even though EDS had been duped, it intended for the vendors to part with their property, and that was the cause of their damage. *Fed. Ins. Co. v. Ace Prop. & Cas. Co.*, 429 F.3d 120 (5th Cir. 2005).

An insurer's duty to defend included post judgment relief to set aside a default judgment against an insured who did not receive proper notice. *Gibbons-Markey v. Tex. Med. Liab. Trust*, 163 Fed. Appx. 342 (5th Cir. 2006). The *Gibbons-Markey* court also held that a five month delay in the insured giving the insurer notice of the default judgment did not establish prejudice where there was no showing that the delay caused any harm to the insurer's ability to set aside the judgment. The Court of Appeals for the Fifth Circuit predicted that the Texas Supreme Court would not find an insurer prejudiced as a matter of law by post-default notice where the insured was also unaware of the suit until after the default judgment had been entered.

A commercial auto liability insurer had a duty to defend against claims that the insured's truck tracked mud onto the roadway, causing an accident. These allegations stated a claim "resulting from … use of a covered auto." *Emcasco Ins. Co. v. Am. Int'l Specialty Lines Ins. Co.*, 438 F.3d 519 (5th Cir. 2006).

A claim for negligence in installing a restroom lavatory was excluded as a "construction defect," so there was no duty to defend. *Primary Plumbing Serv., Inc. v. Certain Underwriters at Lloyd's London*, 2006 WL 181403 (Tex. App.—Houston [1st Dist.] Jan. 26, 2006, pet. filed) (not reported).

An insurance policy excluded from coverage "property damage" to "personal property in the care, custody or control of the insured." The court held that the insured was holding the property in its exclusive control, and, therefore, the exclusion applied, and the insurance company did not have a duty to defend the insured. *Pine Oak Ctr., Ltd. v. Travelers Lloyds Ins. Co.*, 2006 WL 853177, at *3 (Tex. App.—Houston [1st Dist] Mar. 30, 2006, no pet.) (not reported).

An employee of Southwest Plumbing was killed when a trench

caved in. Southwest Plumbing carried no worker's compensation insurance. The court held that the insurer had no duty to defend or indemnify Southwest because the death occurred in the scope of the employee's employment. *Arrellano v. State Farm Fire & Cas. Co.*, 191 S.W.3d 852, 854 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

The policy in *Smith v. McCarthy*, 195 S.W.3d 301, 307 (Tex. App.—Fort Worth 2006, pet. filed), excluded coverage for losses and costs resulting from rights of parties in possession. The plaintiff pled that she was the owner of the land by adverse possession and had spent money on the land by caring for it. This fell directly under an exclusion stated in the policy for the rights of parties in possession.

A student was injured during a college club event. The student sued another student who was supposed to catch him after the basket toss, but failed to do so. The court held that vicarious liability claims applicable to the club and university did not impose a duty on the insurer to defend the student who was sued because the student was not an insured under the policy, and therefore, had no standing to sue for breach of duty to defend. *Crawford v. Guideone Mut. Ins. Co.*, 420 F.Supp.2d 584 (N.D. Tex. 2006).

A court found there was no duty to defend in a case involving a homebuilder whose clients refused to pay, alleging, problems with their home. *Grimes Constr., Inc. v. Great Am. Lloyds Ins. Co.*, 188 S.W.3d 805, 808 (Tex. App.—Fort Worth 2006, pet. filed). The court held that because the damages were reasonably foreseeable, the alleged acts did not qualify as an unexpected occurrence.

Drivers sued Offshore Joint Services for injuries sustained when a chemical being hauled in containers provided by Offshore spilled due to a container defect. The court held that the insurer has a duty to defend Offshore because the pollutant exclusion in the policy only applied to pollutants that were included within the definition of waste. The pollutant being carried was not waste. *Urethane Int'l Products v. Mid-Continent Cas. Co.*, 187 S.W.3d 172 (Tex. App.—Waco 2006, pet. denied).

A homeowner's insurer did not have a duty to defend claims alleging that the sellers of the home made misrepresentations regarding the construction. The court concluded that these allegations did not state claims for "property damage." Likewise, a claim that the sellers failed to properly locate an irrigation line that would encumber the neighboring property also did not state a claim for property damage. *Jennings v. State Farm Lloyds*, 2006 WL 66408 (Tex. App.—Austin Jan. 12, 2006, no pet.) (not reported).

A homebuilder that was an additional insured under a subcontractor's liability policy was not entitled to a defense, where the plaintiff's petition did not allege that the damage was caused by the subcontractor's work. *D.R. Horton-Texas, Ltd. v. Markel Int'l Ins. Co., Ltd.*, 2006 WL 1766120 (Tex. App.—Houston [14th Dist.] June 29, 2006, no pet.) (not reported); *see also Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, ____ S.W.3d ___,2006 WL 1892669 (Tex. App.—Houston [14th Dist.] July 6, 2006, no pet.) (finding a duty to defend where a subcontractor's conduct was alleged, but no duty where it was not alleged).

Unfortunately, the *Horton* court went on to erroneously hold that summary judgment was also proper on the insurer's duty to indemnify. The court mistakenly reasoned that the same arguments that disposed of the duty to defend also disposed of the duty to indemnify. This is wrong, because at trial, evidence could establish the subcontractor's fault, despite the absence of a specific pleading regarding the subcontractor. Pleadings do not have to give as much detail as the evidence to be introduced at trial.

Furthermore, the subcontractor's fault might not be an issue that would be tried between plaintiffs and the homebuilder. In that event, that coverage issue would remain to be tried in a subsequent coverage suit between the homebuilder and the insurer. The court's error is an outgrowth of the mistaken notion that the duty to defend is always broader than the duty to pay. This may be true sometimes because the duty to defend encompasses claims that are potentially covered, while the duty to pay only encompasses claims that are actually covered. Nevertheless, when there is no duty to defend because of the absence of allegations, there nevertheless may be a duty to pay, if a covered claim is proven.

In addition, the *Pine Oak* court held there was no duty to defend or indemnify claims that only alleged damages caused by synthetic stucco, which was expressly excluded under the policy. To the extent this exclusion would preclude any evidence of covered damages, the court's conclusion regarding no duty to indemnify would be correct.

A federal district court summarized the rules for determining when an insurer's reservations of rights allows the insured to select its own counsel in *RX.com, Inc. v. Hartford Fire Ins. Co.*, 426 F.Supp.2d 546 (S.D. Tex. 2006). The court held that an insured does not always have the right to choose its own counsel at the insurer's expense any time the insurer defends subject to a reservation of rights. Instead, the right to independent counsel arises when there is a conflict of interest, because the outcome of the coverage issue depends on the same facts as the issues in the underlying case.

B. Settlements, Assignments & Covenants Not to Execute

An underlying judgment that had been vacated by the trial court but then reinstated by a settlement agreement between the parties was not a "fully adversarial trial" as required by *Gandy*, so it could not be enforced against the liability insurer. *Burney v. Odyssey Re (London) Ltd.*, 169 Fed. Appx. 828 (5th Cir. 2006).

In an earlier decision, the Fifth Circuit held that an insurer was entitled to intervene and pursue an appeal to reverse a negligence judgment against its insured, even though the insured had chosen to abandon the appeal. On rehearing, the court clarified that the insurer's right to intervene was based on the fact that the insurer had defended under a "limited" reservation of rights, accepting coverage for any negligent conduct while denying coverage for any intentional conduct. Thus, the court concluded the insurer had a sufficient interest to intervene, even though when an insurer defends under a "full" reservation of rights, its interest in the liability lawsuit is contingent upon the outcome of the coverage lawsuit, so there would not be sufficient interest to allow the insurer to intervene. *Ross v. Marshall*, 456 F.3d 442 (5th Cir. 2006) (on rehearing).

VII. THIRD PARTY THEORIES OF LIABILITY

A. *Stowers* Duty & Negligent Failure to Settle

In an automobile accident case, where the issue of who was driving was in dispute, the court held there was no right or duty under *Stowers* for an insurer to require a settling third party claimant to give up her defenses (i.e., that she was not the driver). *Coats v. Ruiz*, 198 S.W.3d 863, 882-83 (Tex. App.—Dallas 2006, no pet.). The court agreed with the insurer that it had a right and a duty under *Stowers* to the insured to accept the claimant's within-limits demand for her injury claim.

There can be no liability for negligently failing to settle when the defendant wins. *Archer v. Med. Protective Co.*, 197 S.W.3d 422 (Tex. App.—Amarillo 2006, pet. filed). The insured was found liable for medical malpractice, but that judgment was reversed on appeal, and judgment was rendered in her favor. The

court held that an insurer that refuses to settle a claim within policy limits is not negligent if its insured is absolved of liability for the underlying claim. While the court recognized that the underlying judgment may cause damage, when the judgment is reversed there is no breach of the insurer's duty.

B. Prompt Payment of Claims

The Fort Worth Court of Appeals in *Ulico Casualty Co. v. Allied Pilots Ass'n*, 187 S.W.3d 91 (Tex. App.—Fort Worth 2005, pet. denied), joined several other courts in holding that a claim for attorney's fees for an insurer's refusal to defend under a liability policy is not a "claim" subject to the provisions of the prompt payment statute. The *Ulico* court noted a split in authority but concluded that such a claim was not a "first party" claim within the meaning of the statute. The court primarily relied on the Dallas Court of Appeals' decision in *TIG Ins. Co. v. Dallas Basketball, Ltd.*, 129 S.W.3d 232 (Tex. App.—Dallas 2004, pet denied).

A claim for attorney's fees for an insurer's refusal to defend under a liability policy is not a "claim" subject to the provisions of the prompt payment statute.

The Dallas Court of Appeals reaffirmed its position that the prompt payment statute does not apply to a claim for a defense or for reimbursement of defense costs, in *Summit Custom Homes, Inc. v. Great Am. Lloyds Ins. Co.*, 202 S.W.3d 823 (Tex. App.—Dallas 2006, no pet.).

The Fourteenth Court of Appeals reached the same conclusion in *Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, ____ S.W.3d ____, 2006 WL 1892669 (Tex. App.—Houston [14th Dist.] July 6, 2006, no pet.).

C. Other Theories

An insurer did not breach its settlement contract with a tort plaintiff by making the checks payable to a hospital that had asserted liens, and filed them on the day the checks were issued and before the checks were delivered to the plaintiff's attorney. The court reasoned that a lien attached because notice was filed before the money was paid, so the insurer acted properly and reasonably. *Richards v. Am. Nat'l Prop. & Cas. Co.*, 195 S.W.3d 758 (Tex. App.—Beaumont 2006, no pet.).

A trial court committed reversible error by allowing an attorney for the insurer to falsely appear as an attorney for an uninsured driver defendant in a suit brought by an insured. *Perez v. Kleinert*, ____ S.W.3d ____, 2006 WL 2507435 (Tex. App.—Corpus Christi Aug. 31, 2006, no pet.). Perez was injured in a collision between Kleinert and Garza while he was a passenger in Garza's car. Perez was insured by State Farm under a policy issued to persons who loaned the car to Garza. State Farm sued Garza and got a default judgment establishing that she had no coverage. When the case against Kleinert and Garza proceeded to trial, Garza was unrepresented, but an attorney for State Farm appeared, argued, and examined witnesses in the role of attorney for Garza, even though he did not represent Garza and was representing State Farm. In addition, State Farm's attorney misrepresented to the jury that he represented Garza. The court of appeals found that the trial court committed reversible error by allowing this because of the conflict of interest it created with State Farm's primary duty to its insured, Perez.

VIII. SUITS BY INSURERS

A. Indemnity & Contribution

When an indemnitee enters into a settlement with a third party, it may recover from the indemnitor only upon a showing that potential liability existed, and that the settlement was reasonable, prudent, and in good faith under the circumstances. Where an employee of a subcontractor was burned due to the negligence of the general contractor and the subcontractor, the court found that a $4 million settlement by the general contractor was reasonable as required for contractual indemnity. Therefore, the subcontractor had to indemnify the general contractor. *XL Specialty Ins. Co. v. Kiewit Offshore Services, Ltd.*, 426 F.Supp.2d 565, 569-70 (S.D. Tex. 2006).

B. Subrogation

An employee benefit plan was entitled to receive the first money recovered by a tort claimant, based on a subrogation provision in the employee benefit plan, which was then incorporated into a settlement agreement in a prior friendly suit. The court rejected the argument that the "made whole" doctrine applied to prevent the plan receiving the first dollars for subrogation, concluding that the agreement in the prior judgment controlled. *Rosa's Café, Inc. v. Wilkerson*, 183 S.W.3d 482 (Tex. App.—Eastland 2005, no pet.).

A subcontractor and its liability insurer lacked standing to sue a product manufacturer under the theory of equitable subrogation. The subcontractor contended that the manufacturer's valve was defective and that caused a water leak, resulting in the subcontractor having to pay its customer's damages. The court held that equitable subrogation allows one who involuntarily pays another's debt to seek repayment of that debt, but it does not apply when one person confers upon another a benefit that is not required by a legal duty or contract. The court reasoned that the subcontractor conferred a benefit on its customer that was owed under the contract with the customer, rather than to satisfy a hypothetical tort liability of a valve manufacturer. *Frymire Engineering Co. v. Jomar Int'l, Ltd.*, 194 S.W.3d 713 (Tex. App.—Dallas 2006, pet. filed).

An insurer that paid underinsured motorists benefits to its insured and who also was the liability insurer for the defendant was entitled to intervene in this court suit against the defendant to assert a subrogation right based on its prior payment. *State Farm Mut. Auto. Ins. Co. v. Perkins*, ____ S.W.3d ____, 2006 WL 1914627 (Tex. App.—Eastland July 13, 2006, no pet.). The court held this intervention did not violate the rule that an insurer may not seek subrogation against its own insured. The concerns that justify the "anti-subrogation" rule were not present in this case. The insurer had a contractual and statutory right of subrogation, and enforcing that right would not avoid the insurer's responsibilities to its insured.

The *Perkins* court further held that the insured could not argue that she was not made whole by the jury's damage award as a defense against the insurer's subrogation claim. The court reasoned that when the issue of damages has been fully litigated before a jury, the insured is collaterally estopped from denying that she was made whole.

Finally, the *Perkins* court recognized that under the "common fund" doctrine an insurer that does not assist in collecting damages from a third party must pay its share of costs and expenses, including attorney's fees, but there was no evidence of the extent of the insurer's expenses, so that issue was remanded.

An insurer that paid medical expenses under an occupational accident insurance policy stated claims against the employee's attorney and a third party's insurer for settling the tort claim without honoring the first insurer's subrogation claim. The court

rejected the argument that the employee was not made whole by the settlement so that the insurer could not receive subrogation. The employee's injuries were questionable, so it was not clear that the settlement failed to make him whole, even though it did not cover his medical expenses and lost wages. The court remanded for consideration of the insurer's claims for conversion and conspiracy, and for exemplary damages related to those claims. *AIG Life Ins. Co. v. Federated Mut. Ins. Co.*, 200 S.W.3d 380 (Tex. App.—Dallas 2006, pet. filed).

C. Other Theories

The evidence was sufficient to support an insurance fraud conviction where there was testimony that the insured took his car to a repair shop and then later reported it stolen. *Adelaja v. State*, 2006 WL 1459765 (Tex. App.—Houston [14th Dist.] May 25, 2006, no pet.) (not reported).

IX. DAMAGES & OTHER ELEMENTS OF RECOVERY

A. Actual Damages

An insured whose claim was for the value of her totaled vehicle was also entitled to recover damages for the reasonable rental value of a vehicle, as a proper measure of her damages for lost use. The court recognized that the correct measure of damages of loss of use is the reasonable rental value of the substitute, but the plaintiff does not have to actually rent a substitute vehicle. The evidence of the daily rental value supported the jury's award of $3,600. *Allstate Indem. Co. v. Hyman*, 2006 WL 694014 (Tex. App.—Texarkana Mar. 21, 2006, no pet.) (not reported).

B. Statutory Additional Damages

When the insurance code allows "treble damages," that means a total of three times the actual damages — not actual damages *plus* treble damages. *Allstate Indem. Co. v. Hyman*, 2006 WL 694014 (Tex. App.—Texarkana Mar. 21, 2006, no pet.) (not reported).

The *Hyman* court further held that while the insurer was entitled to an offset for the value of the vehicle recovered from another driver, that offset would apply after calculating the cap on additional damages. Otherwise, the court reasoned, there would effectively be no punitive award.

C. Prejudgment & Postjudgment Interest

An indemnitor was entitled to prejudgment interest on settlement payment from the time of its release to tort plaintiffs. *XL Specialty Ins. Co. v. Kiewit Offshore Services, Ltd.*, 426 F.Supp.2d 565, 578 (S.D. Tex. 2006). Therefore, a general contractor who paid a claim was indemnified for the $4 million paid plus interest at six percent.

An insured whose recovery from the other driver and recovery of PIP benefits totaled more than the amount of actual damages found against his UM insurer was not entitled to recover prejudgment interest. The prior amounts were properly offset against the UM insurer's liability. *Marley v. Allstate Ins. Co.*, 2006 WL 1098946 (Tex. App.—Houston [1st Dist.] Apr. 27, 2006, no pet.) (not reported).

D. Attorney's Fees

Once the plaintiff's damages were reduced by amounts they were not entitled to recover, below the amount the insurer had tendered, they were no longer entitled to recover attorney's fees. *Fire Ins. Exch. v. Sullivan*, 192 S.W.3d 99 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

In a dispute over indemnity for a claim paid by a general contractor for the death of an employee, the court held that the losing party, R.B.T. Welders, Inc., would pay attorneys' fees for the contractor. *XL Specialty Ins. Co. v. Kiewit Offshore Services, Ltd.*, 426 F.Supp.2d 565, 578 (S.D. Tex. 2006). However, the only fees that must be paid are those fees that have itemized bills and other supporting documentation. Additionally, those fees incurred before notification to the liability insurer present a fact issue that precluded summary judgment regarding indemnity for defense costs.

The insured's attorney's fees in defending the underlying suit were properly awarded as damages for the insurer's failure to defend. The court also held that the trial court acted properly in awarding the amount of defense costs shown by the evidence, and in setting aside the jury's award of half that amount. *Ulico Cas. Co. v. Allied Pilots Ass'n*, 187 S.W.3d 91 (Tex. App.—Fort Worth 2005, pet. denied). Although the insurer put in evidence its litigation guidelines, there was no evidence as to what the reasonable fee would have been if the guidelines had been complied with. In addition, the *Ulico* court found the insured was entitled to recover its fees for pursuing the claim to recoup its defense costs, as a claim for breach of contract, by showing that under the "*Wilkinson* exception" the insurer was estopped to deny coverage under the policy.

In a suit by an insured for payment of its attorney's fees after the liability insurer initially denied a defense, the court found fact issues regarding several challenges to the fee claim. Such challenges included the insurer's defense of accord and satisfaction, whether the invoices for legal fees included defense costs on the claims that were not covered, and whether the insured was entitled to reimbursement for amounts that were invoiced but that it did not pay and was not liable to pay. *RX.com, Inc. v. Hartford Fire Ins. Co.*, 426 F.Supp.2d 546 (S.D. Tex. 2006).

X. DEFENSES & COUNTERCLAIMS

A. Accord and satisfaction

After an insurer denied a defense, the insured hired its own lawyers. The insurer later agreed to defend, and there was discussion between the parties about the outstanding legal bills. The court found there was a fact issue on the insurer's defense of accord and satisfaction based on evidence that the parties agreed to settle the fee dispute by allowing the insurer to review the bills and pay

what it found to be reasonable. *Id.*

B. Breach of Policy Condition by Insured

The San Antonio court reaffirmed the rule in *Puckett* that breach of a policy condition that does not cause a loss does not provide a basis for the insurer to deny coverage. *AIG Aviation, Inc. v. Holt Helicopters, Inc.*, 198 S.W.3d 276 (Tex. App.—San Antonio 2006, pet. filed). Holt's helicopter crashed and Holt asserted a claim against AIG. AIG's investigation showed that the pilot did not have the required number of hours, but that pilot error did not cause the loss. The Texas Supreme Court held in *Puckett v. U.S. Fire Ins. Co.*, 678 S.W.2d 936 (Tex. 1984), that it is against public policy to deny coverage when the insured's breach of a policy condition does not contribute to cause the loss. AIG argued that *Puckett* was no longer good law nor did not apply to the facts of this case. The court rejected both arguments. The court also concluded that the trial court properly placed the burden of proof on AIG to show that breach of a policy condition regarding the pilot's experience had a causal connection to the loss.

A commercial landlord failed to give notice "as soon as practicable" by delaying over two and one-half years to notify the insurer of complaints about leaks in the roof that later led to a suit by the tenant against the landlord. Because notice as soon as practicable was a condition precedent, this unexcused late notice negated coverage. The summary judgment evidence established prejudice to the insurer, based on testimony that the insurer lost the right to timely investigate and take steps to reduce the damage. *Blanton v. Vesta Lloyds Ins. Co.*, 185 S.W.3d 607 (Tex. App.—Dallas 2006, no pet.).

The fact that a liability insurer defended under a reservation of rights did not relieve the insured of its obligations under the cooperation clause and the consent to settle clause of the liability policy. *Motiva Enterprises, L.L.C. v. St. Paul Fire & Marine Ins. Co.*, 445 F.3d 381 (5th Cir. 2006). The court noted its earlier language in *Rhodes v. Chicago Ins. Co.*, 719 F.2d 116 (5th Cir. 1983), supporting the argument that an insurer's reservation of rights releases the insured from compliance with a consent to settle clause, but the court found that the reasoning in *Rhodes* had been undermined by the decision in *State Farm Lloyds Ins. Co. v. Maldonado*, 963 S.W.2d 38 (Tex. 1998). In *Maldonado* the court held that an insured had to comply with the "actual trial" condition in the policy, even though the insurer had reserved its right to deny coverage. The *Motiva* court found the reasoning of *Maldonado* extended to the other clauses as well.

However, the *Motiva* court held that the insurer had to show it was prejudiced by any breach of the cooperation and consent to settle clauses. The mere fact that the insured asked the insurer to leave the mediation and then settled without the insurer's consent was not sufficient to show prejudice. The court held the insurer had to show actual concrete prejudice to avoid payment. The court found the summary judgment evidence established prejudice as a matter of law by being denied the right to participate in the settlement process.

An insurer showed actual prejudice from late notice of a claim where the insurer lost the opportunity to settle for an amount within the insured's self-insured retention. The court found the insurer was not required to show that it would have settled the claim if it had been given notice. The court reasoned that the insurer did not need to show precisely what the outcome of the underlying case would have been in order to show actual prejudice. *Clarendon Nat'l Ins. Co. v. FFE Transp. Serv., Inc.*, 176 Fed. Appx. 559 (5th Cir. 2006).

The Dallas Court of Appeals continued to hold that late notice bars coverage, with no showing of prejudice to the insurer. *Prodigy Comm. Corp. v. Agric. Excess & Surplus Ins. Co.*, 195 S.W.3d 764 (Tex. App.—Dallas 2006, pet. filed). The court further held that notice eleven months later was not "as soon as practicable" as a matter of law.

In contrast, showing prejudice was required where the policy expressly stated that late notice would only bar coverage if the insurance company was prejudiced. *Coastal Refining & Mktg., Inc. v. U.S. Fid. & Guar. Co.*, ____ S.W.3d ____, 2006 WL 1459869 (Tex. App.—Houston [14th Dist.] May 30, 2006, no pet.). That court found no evidence that the insurer was prejudiced, even though it was belatedly brought into a case that was being defended with ongoing settlement negotiations by another insurer. There was no showing that the defense was deficient or that the complaining insurer's investigation was impaired.

The *Coastal Refining* court also rejected the argument that the settlement was a voluntary payment and that settlement without the insured's consent would bar coverage. The insurer could not show how it was prejudiced by the settlement, which the evidence showed to be "more than reasonable" given the potential liability of the insured defendant. Finally, the *Coastal Refining* court rejected the insurer's argument that the insured failed to cooperate by giving late notice and by demanding coverage. The court also found the insurer did not show it was otherwise prejudiced by any failure to provide information.

The San Antonio Court of Appeals held that the cooperation clause in an automobile liability policy was a condition precedent, so the insured bears the burden of proving compliance, but the insurer still must show prejudice from any lack of cooperation. *Progressive County Mut. Ins. Co. v. Trevino*, 202 S.W.3d 811 (Tex. App.—San Antonio 2006, pet. filed). The court then found the insurer had shown prejudice from the insured's lack of cooperation where the insured filed a pro se answer and counterclaim, despite the insurer having hired counsel to represent him; a phone call by the insured's wife saying they did not want a defense and that the insurer could simply deny coverage; and the resulting default judgment taken against the insured.

The *Trevino* court rejected the argument that the cooperation clause was void because it violated a provision of the Texas Transportation Code which provides that an insurance policy may not be cancelled by agreement between the insurance company and the insured and that any statement made by or on behalf of the insured, or a violation of the policy, does not void the policy. The court held that, despite the statutory language, numerous policy defenses had been recognized, including enforcement of the cooperation clause.

C. Limitations

There is a two-year limitation period on a property owner's tort claims against a title insurer. *U.S. v. Mayberry*, 444 F.Supp.2d 742 (S.D. Tex. 2006). The limitation period begins to run on the date of the deed. When plaintiff bought the property, it was burdened by a tax lien and the statute of limitations began to run. Therefore, plaintiff's claims were barred.

Disregarding dicta in several other cases, one court has held that the four year statute of limitations for contract claims applies to a claim under the prompt payment of claims statute (formally article 21.55). *RX.com, Inc. v. Hartford Fire Ins. Co.*, 426 F.Supp.2d 546 (S.D. Tex. 2006). The court recognized that the prompt payment statute, unlike the unfair insurance practices statute (formally article 21.21), does not contain a two year statute of limitations.

D. Release

A release in a prior suit between an insurance consultant and an insurance broker barred a subsequent suit when the consultant

learned the broker appeared to have made other overcharges. The prior settlement released all claims the consultant had or might have had, whether known or unknown. The court rejected the argument that the broker owed a fiduciary duty to the consultant with respect to the settlement agreement. Even if the broker was a fiduciary, that relationship terminated before the parties entered into the settlement agreement, and both were represented by independent counsel. The court declined to attach a presumption of unfairness to a settlement of a formal adversarial proceeding entered into by sophisticated parties separately advised by counsel. *CIC Prop. Owners v. Marsh USA, Inc.*, 460 F.3d 670 (5th Cir. 2006).

E. Res Judicata & Collateral Estoppel

Res judicata and collateral estoppel did not bar an action brought by mortgagee's assignee against insurer, seeking to establish under the Texas equitable lien doctrine that it was entitled to the insurance policy proceeds for hail storm damage to the property, based on a judgment assignee obtained in a prior action against mortgagor, where the parties were distinct. *U.S. Bank Nat'l Ass'n v. Safeguard Ins. Co.*, 422 F.Supp.2d 698, 710 (N.D. Tex. 2006, no pet.). Res judicata and collateral estoppel apply if this action is based on the same claims as were raised or could have been raised in state court.

F. Insurer's Waiver of, or Estoppel to Assert, Defenses

An insurer that, on a previous appeal, argued that a settlement had to be allocated between compensatory and punitive damages waived the later argument that on remand, the district court also had to allocate the settlement between covered and non-covered claims. *Am. States Ins. Co. v. Synod of the Russian Orthodox Church Outside of Russia*, 170 Fed. Appx. 869 (5th Cir. 2006). The court also held that an insurer that participates in a settlement cannot challenge the reasonableness of the settlement. The district court did not err by finding that the insurer participated in the settlement, based on evidence that the insurer received and rejected prior demands; the insurer received an evaluation from the defense lawyer it had hired, setting a settlement range in amounts that included a settlement amount; the insurer's adjuster received updates regarding the progress of negotiations; and the defense lawyer hired by the insurer drafted the settlement agreement that memorialized the parties' intentions.

An insurer that offered to pay for the insured's defense under a reservation of rights was estopped to later attempt to deny coverage under the policy, even though the insured was defended by counsel of its own choosing and the insurer never did pay any fees. *Ulico Cas. Co. v. Allied Pilots Ass'n*, 187 S.W.3d 91 (Tex. App.—Fort Worth, pet. denied). The court applied the "*Wilkinson* exception," which provides an insurer undertaking defense of a claim while having knowledge of facts indicating the claim is not covered, without an effective reservation of rights, may be estopped to assert all policy defenses, including the defense of noncoverage. The court rejected the argument that the insurer had to actually control the defense. Likewise, it did not matter that the insured won the case on summary judgment. The court reasoned that the potential for conflict between the insurer and insured was enough.

The *Ulico* court also found sufficient evidence that the insured was prejudiced. There was evidence that if the insurer had timely raised its defense of late notice, the insured, under custom and practice in the industry, could have asked for an extension of policy coverage, which likely would have been granted. The court also found the insured was harmed by the delay in the insurer responding to its request for payment by initiating a declaratory judgment suit, causing the insurer to incur additional attorney's fees.

In *Prodigy Comm. Corp. v. Agric. Excess & Surplus Ins. Co.*, 195 S.W.3d 764 (Tex. App.—Dallas 2006, pet. filed), the insurer tried to avoid the effect of the late notice provision by arguing that the provision was unenforceable because the policy was sold in violation of the surplus lines statute. The court rejected this argument, because the statute contains an exception for policies "procured by a licensed surplus lines agent from an eligible surplus lines insurer." The insured failed to show this exception did not apply. Furthermore, the court rejected the insured's argument that the insurer violated the statute by failing to market the policy to admitted carriers. The evidence showed that the failure to market the primary policy to admitted carriers was because no admitted carrier had expressed any interest in the excess layer, which would have been easier to place.

G. Release

The mother of a minor son involved in a car accident brought a class action lawsuit alleging that the insurer and its affiliates engaged in unlawful behavior by forcing her to accept an annuity from one of the insurer's affiliates rather than allowing her to choose where to purchase the annuity. *Stafford v. Allstate Life Ins. Co.*, 175 S.W.3d 537, 541 (Tex. App.—Texarkana 2005, no pet.). The release the mother signed barred any claims that grew out of the accident. Therefore, the release contained in the settlement agreement barred the mother's claims against all parties that were released — i.e. insurer, its life insurance affiliate, and its settlement corporate affiliate.

XI. PRACTICE & PROCEDURE

A. Standing

An insured under an automobile policy did not have standing to sue her insurance company for paying her healthcare providers at a reduced rate, when there was no showing that this caused her any injury. *Allstate Indem. Co. v. Forth*, 204 S.W.3d 795 (Tex. 2006). The court held that to have standing a party must have suffered a threatened or actual injury. While Forth complained that Allstate paid a reduced amount based on eighty-five percent of expenses shown in a third-party database, she did not allege how that harmed her, and it did not appear that the healthcare providers had any complaint or took any action against her as a result.

B. Parties

To establish standing, a person must show a personal stake in the controversy. *Stafford v. Allstate Life Ins. Co.*, 175 S.W.3d 537, 543 (Tex. App.—Texarkana 2005, no pet.). The person must allege personal injury fairly traceable to the defendant's unlawful conduct and likely to be redressed by the requested relief. The claimant in *Stafford* alleged the insurer and affiliated companies participated in a conspiracy in settlement negotiations to force her to accept an annuity from the insurer's affiliate. The court found that this allegation was sufficient to show personal injury directly traceable to the defendant's conduct. Therefore, the claimant had standing.

A liability insurer was improperly joined as a third party defendant and was entitled to mandamus relief after the trial court denied its motion to sever. The court rejected the argument that the insurer could be joined for discovery. Rule 51(b) of the Texas Rules of Civil Procedure expressly provides that joinder of a liability insurer in a tort suit is not allowed unless the insurer is, by statute or contract, directly liable to the injured person. *In re Am. Economy Ins. Co.*, 202 S.W.3d 362 (Tex. App.—Beaumont 2006, orig. proc. [mand. pending]).

C. Removal

One court held that a petition under Rule 202 of the Texas Rules of Civil Procedure for authorization to conduct a deposition to perpetuate testimony or to investigate a potential claim is not a "civil action" subject to being removed to federal court. *Davidson v. S. Farm Bureau Cas. Ins. Co.*, ____ F.Supp.2d ____, 2006 WL 1716075 (S.D. Tex. June 19, 2006). When a plaintiff filed a Rule 202 petition related to her claims for underinsured motorist coverage, that proceeding was not properly removed to federal court.

In contrast, the court in *Page v. Liberty Life Assurance Co.*, ____ F.Supp.2d ____, 2006 WL 2828820 (N.D. Tex. Oct. 3, 2006), held that a Rule 202 proceeding was a civil suit subject to removal. The plaintiff in *Page* filed the petition to get testimony relating to a life insurance policy. However, the *Page* court found there was not a sufficient showing of ERISA preemption to give a federal court jurisdiction, so the court remanded for that reason.

D. Jurisdiction

Where a Texas plaintiff sued a Texas insurer, the case was improperly removed and the federal court lacked jurisdiction to join an out of state insurer as the proper party and dismiss the instate insurer to create jurisdiction. *Salazar v. Allstate Texas Lloyds, Inc.*, 455 F.3d 571 (5th Cir. 2006).

The parent company of a life insurer, which was also its sole shareholder, did not have sufficient minimum contact with Texas to establish specific jurisdiction. The parent company bought the life insurer after the policies were issued to policyholders in Texas, but there was no evidence that the parent company controlled the internal business operations of the insurer, so as to become alter ego, or that it was involved in denial of the plaintiffs' claims or that the liability to the plaintiffs arose from the parent company's contacts with Texas in purchasing the insurer's stock. *Commonwealth Gen. Corp. v. York*, 177 S.W.3d 923 (Tex. 2005). The court remanded to determine whether there was sufficient evidence to support general jurisdiction as to the parent company based on sufficient continuous and systematic contacts with the forum.

E. Discovery

Beck was sued for allegedly exposing claimants to asbestos between 1960 and 1990. TIG provided liability insurance to Beck from 1969 to 1972. Beck sued TIG and other insurers seeking damages for breach of contract and other relief. Beck served a number of requests for production on TIG and the trial court ordered TIG to comply. TIG sought a writ of mandamus. *In re TIG Insurance Co.*, 172 S.W.3d 160 (Tex. App.—Beaumont 2005, orig. proceeding). The court of appeals first held that discovery requests seeking insurance policies and related documents from 1960 to 1986 were overly broad, where there was nothing showing this to be a reasonable time period. The court noted the absence of evidence demonstrating the years alleged in the asbestos claim that overlapped with the years TIG issued policies.

The court also found overly broad a request for production of documents supporting TIG's contention justifying its denial of Beck's claims. A request for documents supporting allegations is vague, ambiguous, and overly broad.

The court of appeals found that the trial court acted within its discretion in ordering TIG to produce files regarding its decision not to provide Beck a defense; manuals and guidelines reviewed in determining whether or not to provide a defense; documents identified in answers to interrogatories; reports of actual projected defense costs; and consulting expert documents that had been reviewed by testifying experts.

Parties in an automobile liability case failed to establish the crime/fraud exception to the attorney-client privilege. *Coats v. Ruiz*, 198 S.W.3d 863, 877 (Tex. App.—Dallas 2006, no pet.). The court held that a mere allegation of fraud in the pleadings is insufficient. The attorney-client privilege is lost only when the legal communications were obtained in order to commit or plan the fraud.

Claims among insureds over how to distribute policy benefits in the Enron litigation were not subject to arbitration. The arbitration clause related to disputes between the insured and the insurers.

F. Experts

In a malpractice action against an actuary firm, lay testimony by union negotiators that the union and city would have adopted higher rates was speculative and inadmissible. *Bd. of Trustees of the Fire & Police Retiree Health Fund v. Towers, Perrin, Forster & Crosby, Inc.*, 191 S.W.3d 185, 194 (Tex. App.—San Antonio 2006, pet. denied). Rule 701 of the Texas Rules of Evidence requires that the testimony be based on the witness's perception. This presumes that the witness observed or experienced the underlying facts, which the court in *Towers* held was not met.

G. Arbitration

Appraisers did not exceed their authority in determining the amount of damage caused by a water leak, where they did not attempt to determine whether there was coverage. *Lundstrom v. United Serv. Auto. Ass'n-CIC*, 192 S.W.3d 78 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

Claims among insureds over how to distribute policy benefits in the Enron litigation were not subject to arbitration. The arbitration clause related to disputes between the insured and the insurers. In this case, the insurer had tendered all the money, so the dispute was only between and among the insureds. *Tittle v. Enron Corp.*, 463 F.3d 410 (5th Cir. 2006).

A liability insurer was entitled to have the suit dismissed in favor of arbitration, where the policy specifically provided for arbitration. The court rejected the argument that the insurer waived its right to seek arbitration by conducting a certain amount of discovery or by participating in the litigation. Also, the court rejected the argument that by wrongfully refusing to defend the insured, the insurer waived the right to invoke the arbitration clause in the policy. The court reasoned that it would be improper to require the insurer to litigate the merits of whether it properly denied a defense as a condition to relying on the arbitration clause. *Michael Angelo's Gourmet Foods, Inc. v. Nat'l Union Fire Ins. Co.*, ____ F.Supp.2d ____, 2006 WL 2241225 (W.D. Tex. Aug. 4, 2006).

H. Appraisal

The Dallas Court of Appeals held that appraisal to determine the "amount of loss" properly applied to determine the amount of hail damage a house sustained, as well as the cost to fix the damage. The court rejected the insurer's argument that any decision on the extent of damage would be beyond the scope of the appraisers' authority because it would necessarily involve decisions about causation, coverage, and liability. *Johnson v. State Farm Lloyds*, 204 S.W.3d 897 (Tex. App.—Dallas 2006, no pet. h.).

I. Severance & Separate Trials

A plaintiff was required to prevail on his contract claim for uninsured motorist coverage before he could pursue a bad faith claim against his insurance company. *In re Miller*, 202 S.W.3d 922 (Tex. App.—Tyler 2006, no pet. h.) Therefore, the insurance company's motion to sever and abate the bad faith claims until the contract claims were adjudicated was properly granted.

An insurer did not show how it was prejudiced, so severance of the contract and bad faith claims was not required, where the trial court ordered bifurcation of those issues, to the extent any extracontractual evidence was prejudicial to the contract claims. *In re Allstate Texas Lloyds*, 202 S.W.3d 895 (Tex. App.—Corpus Christi 2006, orig. proceeding [mand. pending]).

XII. OTHER ISSUES

The Dallas Court of Appeals addressed the question of whether a third-party claimant had standing to sue a defendant's liability insurer for breach of a reimbursement contract, promissory estoppel, fraud, negligent misrepresentation, and insurance code violations. *Cessna Aircraft Co. v. Aircraft Network, L.L.C.*, 200 S.W.3d 203 (Tex. App.—Dallas 2006, pet. denied). Cessna damaged a plane belonging to Aircraft Network. Cessna's insurer, AAU, undertook to resolve Cessna's liability, including damages resulting from the delay while repairs were made. AAU paid for some of the costs of the replacement plane, but then a dispute arose as to costs covered for other chartered flights. The court held that Aircraft Network lacked standing to sue AAU "because a third-party claimant cannot sue an insurer."

The court relied on the Texas Supreme Court decisions in *Transportation Ins. Co. v. Faircloth*, 898 S.W.2d 269 (Tex. 1995), and *Allstate Ins. Co. v. Watson*, 876 S.W.2d 145 (Tex. 1984). Both decisions held that third-party claimants lack standing to sue liability insurers for unfair settlement practice. The Texas Supreme Court in those cases noted that the insured's interests are adverse to those of the third-party claimant, and that if the insurer owed duties to the third-party the duties to the insured would necessarily be compromised.

The *Cessna* court distinguished the decision in *Webb v. Int'l Trucking Co., Inc.*, 909 S.W.2d 220 (Tex. App.—San Antonio 1995, no writ.). The *Webb* court allowed a third-party claimant to sue the insurer for representations made regarding repair costs. The *Cessna* court found the distinction was that in *Webb,* liability had not been determined, but in both *Watson* and *Faircloth,* liability had been determined as reasonably clear when the facts giving rise to the claims against the insurer arose. The *Cessna* court reasoned that the liability of Aetna was never disputed, and the claims against AAU arose while it was trying to settle a claim for which Cessna was liable.

Whether the court reached the result that the Texas Supreme Court would reach, its analysis is superficial and flawed. *Faircloth* and *Watson* both addressed standing to sue under the Insurance Code and DTPA. They did not address other theories such as these alleged in the *Webb* case. The court's failure to analyze these theories is erroneous. Furthermore, both *Faircloth* and *Watson* dealt with cases where the insurer did not directly interact with the claimant but instead was sued essentially for taking too long to pay the claims. In that context, the Texas Supreme Court refused to recognize duties to the third-party claimant that might conflict with duties to the insured. In contrast, the *Webb* court allowed liability where the insurer directly interacted with the claimant and made misrepresentations upon which the claimant detrimentally relied. It appears Aircraft Network's circumstances are similar to those in *Webb*, so that the decisions in *Faircloth* and *Watson* do not necessarily control or decide the issue.

Faircloth and *Watson* would preclude standing under the Insurance Code and DTPA. Under *Faircloth*, Cessna would not be a "consumer" entitled to sue under the DTPA. *Watson* is besides the point, because the Insurance Code was amended in 1995 to only grant standing to the insured or beneficiary, and to deny standing to a third-party claimant. However, the fundamental concern in *Watson* and *Faircloth* was the risk of conflicting duties by recognizing duties to the claimant at the same time the insurer had duties to defend the insured. Those concerns are not implicated in the present case. Cessna admitted liability, so it needed no defense. If, as Aircraft Network alleged, Cessna made misrepresentations or engaged in other conduct that would create a reimbursement contract, promissory estoppel, fraud, or negligent misrepresentation, there is nothing about pursuing those claims that would conflict with any duty owed to Cessna. If there is a basis for denying standing to Aircraft Network, it does not find support in either *Faircloth* or *Watson*.

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