HOLDING: Reversed and remanded.
REASONING: According to the court, a mere breach of contract claim is not actionable under the DTPA. The distinction "between a DTPA violation and a breach of contract claim, properly lies when an alternative interpretation of the contract is asserted, and the dispute arises out of the performance of the contract." The court stated that "in such a case the DTPA is not violated, and the legal rights of the parties are governed by traditional contract principles."

The court held that Life Partners' interpretation of the contract was not reasonable and the language in the contract was not ambiguous. Life Partners used two different terms, "fees" and "costs," in the course of describing the purchaser's financial obligations. The contract's plain language expressly stated that the "PURCHASER will not incur costs of any type" and does not limit "costs" to fees for Life Partners' services. The court stated that when called upon to interpret a contract, it will give plain meaning to the words used in the writing, and that language may be given a certain and definite meaning that is not ambiguous. Because the language had a plain meaning, the State's DTPA claim was actionable.

INSURANCE

HOMEOWNER'S INSURANCE DOES NOT COVER MOLD

MITIGATION IS NOT AN AFFIRMATIVE DEFENSE

Carrizales v. State Farm Lloyds, 518 F.3d 343 (5th Cir. 2008).

Facts: Javier and Eva Carrizales held a standardized homeowners insurance policy ("Form B") issued by State Farm. They filed a claim for damages resulting from a plumbing leak in their garage. State Farm paid for the claim plus additional living expenses. The Carrizaleses later submitted three mold remediation claims which State Farm denied.

The Carrizaleses sued State Farm for alleged violations of the insurance code, breach of the insurance contract, and breach of the duty of good faith and fair dealing. The court granted State Farm summary judgment, concluding that Form B did not extend coverage to a dwelling for damage caused by mold. Because of the summary judgment ruling, when the case proceeded to trial, evidence of the mold damage was excluded. The jury found for State Farm.

On appeal the Carrizaleses argued that the interaction of two provisions in Form B, the mold exclusion and the exclusion repeal provision, was such that it was ambiguous as to whether Form B covered mold damage to a dwelling caused by a plumbing leak. Carrizaleses also challenged the jury instruction arguing that their duty to mitigate damages was not a condition precedent to recovery, but an issue for the jury to consider in determining the amount of damage to award.
Holding: Affirmed.
Reasoning: The court agreed that Form B did not cover mold damage to a dwelling resulting from a plumbing leak. Form B specifically divided coverage into two distinct subdivisions: A and B. Coverage A insured all risks to the dwelling except those which were excluded within Section I. Damage resulting from mold was excluded from coverage in 1.f of Section I. Coverage B insured personal property against certain, enumerated perils, not excluded by Section I. Damage from plumbing leaks was listed as a covered peril in the ninth subsection of Coverage B ("Section 9").

Section 9 also includes the exclusion repeal provision which provided that "exclusions 1.a through 1.h under [Section I] do not apply to loss caused by this peril." According to the court, the location of the exclusion repeal provision within the text of Form B implied that the mold exclusion was only repealed in regard to a loss insured by Section 9 of Coverage B. Stated another way, the mold exclusion was repealed for plumbing leaks resulting in loss of personal property, not damage to a dwelling.

Additionally, the court stated that in Texas, Form B did not cover mold damage to a dwelling resulting from a plumbing leak because ruling otherwise would eviscerate the mold exclusion entirely. The court based its conclusion on an answer to a certified question that was received in a previous case, *Fiess v. State Farm Lloyds*, 202 S.W.3d 744 (Tex. 2006). The Texas Supreme Court had been asked in *Fiess* whether mold damage was covered under Form B when it occurred as a result of water damage that was otherwise covered. The Court answered that mold damage was not covered under Form B.

In general, the duty to mitigate damages is an equitable doctrine, allowing for a reduction in the amount of damages, not an affirmative defense.

The Fifth Circuit looked to various sources to inform itself on the duty to mitigate damages. The court found that in general, the duty to mitigate damages is an equitable doctrine, allowing for a reduction in the amount of damages, not an affirmative defense. The Texas Rules of Civil Procedure does not list mitigation of damages as an affirmative defense that must be pled.

The court found that while the policy language firmly required insureds to take certain steps as "Duties After Loss" the policy did not expressly render these "conditions" as prerequisites to recovery. Consequently, Texas courts have concluded some "Duties After Loss" are conditions precedent while others are not. The duty to provide notice has been held to be a condition precedent to recovery so long as the insurer is prejudiced by the insured's breach of the duty.

According to the court, holding that the breach of the duty to mitigate constitutes an affirmative defense would be contrary to the Texas court decisions finding conditions precedent only when the insurer is prejudiced. The court stated that an offset to any award of damages based on failure to mitigate is more analogous to the "prejudice" bar. The court found barring all recovery for failure to mitigate would be an onerous consequence upon the insured that did not conform with the rule that ambiguous policy provisions are construed in favor of the insured.

INSURANCE AGENTS GENERALLY HAVE NO DUTY TO INSUREDS FOR NEGLIGENCE IN INVESTIGATING CLAIMS

Justice v. State Farm Lloyds Ins. Co., 246 S.W.3d 762 (Tex. App.—Houston [14th Dist.] 2008).

FACTS: In 2000, a tree fell on the Justices' home and they filed a claim under their homeowner insurance policy, which State Farm paid. In 2001, the Justices made another claim with State Farm for mold damage to the walls of the home. State Farm hired FTI/SEA Consulting ("FTI") to evaluate the mold damage and subsequently paid the Justices for remediation of their home, alternate living expenses, and cleaning costs. The Justices then filed suit against State Farm and FTI for additional mold damage. Both State Farm and FTI moved for summary judgment, which the trial court granted. The Justices appealed.
HOLDING: Affirmed.
REASONING: The Justices alleged that State Farm was responsible for damage to the house because State Farm was negligent in identifying the part of their house that had been damaged by the tree and water from subsequent heavy rains entered the house through this damaged area, causing additional mold damage. State Farm moved for summary judgment on the ground that Texas per does not recognize an action for negligent claim handling. (*Higginbotham v. State Farm Mut. Auto. Ins. Co.*, 103 F.3d 456, 460 (5th Cir. 1997)) The Justices asserted that *Higginbotham* was not applicable because the adjuster assumed a duty to claimants when assessing damage. The court found the Justices' cited no legal authority or evidence supporting their claim that there was a duty, or explaining how any such negligence would fall outside the scope of the claim handling for which Texas recognizes no negligence duty.

The Justices also alleged that FTI was negligent because it failed to initially detect some of the areas containing mold causing the Justices to incur additional expenses. FTI argued that there was no evidence it owed a duty to the Justices or that any breach by FTI proximately caused any additional damage. The court again found the Justices' cited no legal authority for their position. The court held that agents of insurance companies generally have no duty to insureds for negligence in investigating claims.

ARTICLE 21.35B AUTHORIZES INSURERS TO SOLICIT AND COLLECT PREMIUMS AND TAXES

Mid-Century Ins. Co. v. Ademaj, 243 S.W.3d 618 (Tex. 2007).

FACTS: Shefqet Ademaj and others brought a class action suit against Mid-Century Insurance Company of Texas and Texas Farmers Insurance Company ("Mid-Century") seeking a declaratory judgment that insurers did not have the right to collect an automobile theft prevention fee in addition to the premium. The court of appeals affirmed the trial court's ruling in favor of Ademaj. Mid-Century appealed.
HOLDING: Reversed.
REASONING: The Supreme Court of Texas held that "rates filed with Commissioner did not need to include all taxes and the Automobile Theft Prevention Authority fee." The court centered its discussion on whether insurance carriers must include authority fees within rates filed under Article 5.101 of the Texas Insurance Code or whether carriers may recoup the fee independently under Article 21.35B. The issue was which article took precedence concerning insurers recouping authority fees from the insured. The court determined that Article 21.35B authorize all insurers to solicit and collect payments within its enumerated categories considering there was no intervening statute to the contrary. The court looked to the plain meaning of Article 21.35B which addressed "all insurers" as indicative of the legislative intent.

The court stressed that the commissioner had already specified which statute most appropriately applied to authority fees. The commissioner promulgated a rule which stated that the insurers were not required to include the authority fee in their Article 5.101 filings. The court justified its choice to defer to the commissioner's ruling because the commissioner "is well positioned to protect insureds from abusive and unregulated charges under construct of Article 5.101." "Because the Commissioner made a reasonable determination that the Authority fee should be charged directly and not as part of the Article 5.101 premium, . . . Mid-Century properly recouped the fee from Ademaj." The court reversed the court of appeals and a take-nothing judgment was rendered in Mid-Century's favor.

UNTIMELY NOTICE MAY NOT DEFEAT INSURANCE COVERAGE

PAJ, Inc. v. Hanover Ins. Co., 243 S.W.3d 630 (Tex. 2008).

FACTS: PAJ, Inc., a jewelry manufacturer and distributor, purchased a commercial general liability ("CGL") policy from Hanover Insurance Company that covered, among other things, liability for advertising injury. The policy required PAJ to notify Hanover of any claim or suit brought against PAJ "as soon as practicable." In 1998, PAJ was sued for copyright infringement. Initially unaware that the CGL policy covered the dispute, PAJ did not notify Hanover of the suit until four to six months after litigation commenced. PAJ brought this suit against Hanover seeking a declaration that Hanover was contractually obligated to defend and indemnify PAJ in the copyright suit. The parties stipulated that PAJ failed to notify Hanover "as soon as practicable" and that Hanover was not prejudiced by the untimely notice.

Both parties moved for summary judgment on the notice issue based on these undisputed facts. The trial court granted Hanover's motion and denied PAJ's, holding that Hanover was not required to demonstrate prejudice to avoid coverage under the policy. The court of appeals affirmed.
HOLDING: Reversed.
REASONING: The court held that 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. Hanover contended the prompt-notice provision created a condition precedent, the failure of which defeated coverage under the policy irrespective of prejudice to the insurer. PAJ contended that the policy language created a covenant such that only a material breach would excuse performance and that even if the language created a condition precedent, the insurer was still required to demonstrate prejudice to excuse performance.

While the parties disputed whether the policy's prompt-

notice requirement constituted a condition precedent or a covenant, the court did not take that factor into account. The court based its holding on *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691 (Tex. 1994). In *Hernandez*, the insured's breach of a settlement-without-consent provision was held to be an immaterial breach because it did not deprive the insurer of the benefit of the bargain; thus, the insurer was not excused from performance of the contractual obligation. The court stated it so concluded in *Hernandez* "[w]ithout distinguishing between covenants and conditions." Additionally, the court noted a footnote in *Hernandez* that recognized that many other jurisdictions have "likewise imposed a prejudice requirement, primarily on public purpose grounds." The court went on to state that since the *Hernandez* decision, courts and several major treatises have acknowledged that Texas had in fact adopted a notice-prejudice rule. The Fifth Circuit noted the modern trend which required insurers to show proof of prejudice and emphasized that, in *Hernandez*, the Texas Supreme Court considered the law of other jurisdictions.

The dissent argued that *Hernandez* did not do away with the condition precedent or covenant distinction, but rather only applied the prejudice requirement to a covenant. According to the dissent, a breach of a condition precedent need not prejudice the insurer and PAJ's policy provision was a condition precedent. The court questioned the dissent's fundamental premise that PAJ's timely notice provision created a condition precedent rather than a covenant because conditions are not favored in the law. When a reasonable reading is available that would avoid forfeiture, the court must construe the language as a covenant rather than a condition. The court held PAJ's notice-of-claim requirement was a covenant rather than a condition because the "as a condition precedent" language did not appear in PAJ's policy, and the notice-of-claim requirement appeared in a subsection that spoke in terms of what the insured "must do" if a claim is made against it, language more closely resembling a covenant.

Any notice requirement under an occurrence policy is subsidiary to the event that triggers coverage and courts have not permitted insurance companies to deny coverage on the basis of untimely notice.

The court concluded the timely notice provision was not an essential part of the bargained-for exchange under PAJ's occurrence-based policy. Any notice requirement under an occurrence policy is subsidiary to the event that triggers coverage and courts have not permitted insurance companies to deny coverage on the basis of untimely notice under an occurrence policy, unless the company shows actual prejudice from the delay. Finally, the court stated the dissent's analysis of the policy language would impose draconian consequences even for small deviations from the duties the policy places on insureds. The court believed under the dissent's construction, an insured's failure to promptly forward a deposition notice or a certificate of conference would allow for a forfeiture of coverage, even when the insurer was not at all harmed. The court concluded this was precisely the result that was rejected in *Hernandez*.

Thus, the court reversed the court of appeals' judgment, and rendered judgment that the insurer could not deny coverage because of untimely notice.

COURT FINDS EVIDENCE IS LEGALLY SUFFICIENT TO SUPPORT JURY'S FINDING OF "KNOWING" VIOLATION OF THE INSURANCE CODE

Tex. Mut. Ins. Co. v. Ruttiger, ____ S.W.3d ____ (Tex. App.—Houston [1st Dist.] 2008).

FACTS: Ruttiger alleged that he sustained bilateral inguinal hernias after lifting a heavy bundle of metal conduit while working as an employee of A & H Electric Company ("A & H"). He further alleged that Texas Mutual Insurance Company ("TMI"), A & H's workers' compensation carrier, denied him timely payment of benefits and necessary medical treatment without a reasonable basis "until finally agreeing to do so, much later in a benefit dispute agreement." Ruttiger contended that an unbiased investigation would have confirmed that he sustained his injuries in the workplace and TMI's delay in paying medical and income benefits caused him substantial financial hardship and medical problems. Ruttiger attached to his petition a copy of the Benefit Dispute Agreement, wherein TMI agreed that Ruttiger sustained a compensable injury in the form of a hernia and that Ruttiger suffered a disability for a specific period of time.

The jury found that TMI failed to comply with its duty of good faith and fair dealing, engaged in unfair and deceptive acts or practices, and engaged in these acts and practices knowingly. The trial court rendered judgment in Ruttiger's favor on his Texas Insurance Code theory of liability, awarded Ruttiger $163,500 in actual damages and $20,000 in additional damages based on the jury's finding that TMI's conduct was committed knowingly. TMI appealed.

HOLDING: Affirmed as modified.

REASONING: The jury was instructed that "knowingly" means actual awareness of the falsity, unfairness, or deceptiveness of the act or practice. Actual awareness may be inferred if objective manifestations indicate that a person acted with actual awareness. The Texas Insurance Code does not allow policyholders to recover extra-contractual damages when insurers are merely negligent. Such damages are reserved for cases in which an insurer knew its actions were false, deceptive, or unfair. In reviewing all the evidence the court stated that "extra-contractual damages should not be a routine addition to every breach-of-policy case" and that the Texas Constitution requires exacting appellate review of damages that punish rather than compensate.

Ruttiger presented evidence that TMI did not attempt to contact him during the course of its investigation, or, at best, made only minimal efforts to do so. Given Ruttiger's evidence that Culbert deliberately refused to speak with him, the evidence that Culbert made little to no effort to contact Ruttiger or his treating doctors prior to disputing his claim, and the evidence that Culbert instead chose to rely upon an unverified rumor supplied by A & H, the jury could have reasonably inferred that TMI was not merely negligent, but instead knowingly engaged in unfair acts that gave rise to its liability and failed to attempt in good faith to effectuate a prompt, fair, and equitable settlement of

a claim with respect to which its liability had become reasonably clear and refused to pay a claim without conducting a reasonable investigation.

Moreover, the jury was entitled to believe that Culbert's subsequent investigation into any preexisting injury suffered by Ruttiger was merely an attempt to justify Culbert's prior dispute of Ruttiger's claim. In fact, Culbert conceded that, according to TMI's own standards, TMI needed "extremely persuasive medical opinions" to deny coverage based on a preexisting medical condition. He further agreed that, as of the date of trial, TMI did not have any extremely persuasive medical opinions establishing this defense. Accordingly, the court held that the evidence was legally sufficient to support the jury's finding that TMI "knowingly" violated the Texas Insurance Code.

DEBT COLLECTION

DEMAND FOR USURIOUS INTEREST IN LETTER IS A CHARGE EVEN IF LETTER NEVER RECEIVED

Allen v. Am. Gen. Fin., ____ S.W.3d ____ (Tex. App.—San Antonio 2007).

FACTS: Kyle Allen was served a citation for delinquent taxes on a San Antonio property deeded to him by his father. Upon learning of the citation, Allen came to Texas from his home in Oregon and sought a home equity loan from American General Finance ("AGF") for the purpose of paying the property taxes. AGF assured Allen that it routinely paid customers' delinquent taxes, and that it would "pay the taxes and handle the suit." AGF loaned Allen the minimum loan amount of $15,000 and agreed to pay Bexar County for the delinquent taxes and the remainder to Allen. However, AGF underpaid Bexar County. As a result, Bexar County continued its tax suit and eventually foreclosed on the San Antonio property in late July. After the foreclosure sale, Allen filed a redemption action and recovered approximately $30,000, the excess proceeds of the foreclosure sale.

AGF filed suit against Allen seeking a constructive trust against Allen's redeemed proceeds for his failure to pay the home equity loan. In response to the suit, one of the issues raised by Allen was AGF's usurious interest rate. The trial court found, inter alia, that AGF's interest rate was indeed usurious, as it was in excess of the 18% allowable by law. The trial court awarded Allen the difference between the proceeds obtained from the foreclosure sale and the amount due for delinquent taxes. Allen and AGF appealed.

HOLDING: Affirmed.

REASONING: The Court of Appeals disagreed with AGF's contention that it was not liable for usury as a matter of law, because there was no evidence it "charged" a usurious rate of interest because Allen never received the letter demanding the rate.

In *George A. Fuller Co. v. Carpet Servs., Inc.*, the Supreme Court of Texas held that a claim for prejudgment interest in a pleading is not a "charge" within the meaning of the usury statute because a charge must be communicated to the debtor and a pleading was not a communication to the debtor. 823 S.W.2d 603 (Tex.1992). In *Fuller,* the supreme court explained that the required communication to the debtor need not be direct, as long as the charge is ultimately demanded from the debtor. In the present case, the usurious charge was "demanded from the debtor" by and through AGF's August 1998 letter. The letter constitutes a "communication outside the organization making the charge" and it was unnecessary for the debtor to actually receive the demand letter in order for AGF's charge to be usurious.

COMPANY THAT PURCHASED BAD CHECKS IS A "DEBT COLLECTOR"

F.T.C. v. Check Investors, Inc., 502 F.3d 159 (3rd Cir. 2007).

FACTS: Check Investors purchased $348 million worth of checks written on accounts with insufficient funds ("NSF checks"). Check Investors purchased the NSF checks from Telecheck and other businesses that guaranteed checks tendered to pay for consumer transactions. In collecting the checks, Check Investors added a fee that exceeded the legal limit for such fees under the laws of most states. Check Investors then aggressively demanded payment from defaulting payors without disclosing the original face amount and the addition of the fee.

Check Investors' collection practices included letters and phone calls accusing the payors of being criminals and threatening criminal or civil prosecution. It also mailed phony letters purporting that an attorney had been retained in pursuit of a criminal or civil action. Check Investors never notified law enforcement authorities nor took any steps towards civil actions. Check Investors also contacted payors' family members, inundated payors with phone calls, and used abusive language.

The Federal Trade Commission ("FTC") filed a seven-part complaint against Check Investors alleging violations of the Federal Trade Commission Act ("FTCA"), the Fair Debt Collection Practices Act ("FDCPA"), and sought injunctive relief and restitution for injured consumers. Specifically, the FTC alleged use of abusive language, calling consumers repeatedly, falsely representing that communications came from an attorney, falsely representing that the consumers would be arrested or imprisoned, falsely threatening legal action, and adding impermissible charges to the face amounts of the debts it was collecting. The district court granted the FTC's motion for summary judgment, denied Check Investors' motion for summary judgment, permanently enjoined Check Investors and charged it with restitution damages of over $10 million. Check Investors appealed.

HOLDING: Affirmed.

REASONING: Check Investors did not dispute that it engaged in the practices listed in the FTC complaint. It instead argued that the FDCPA and the FTCA did not apply because it was not a "debt collector" as defined in the FDCPA. Check Investors argued it was a "creditor" because it bought the obligations outright and that they were neither transferred nor assigned. Additionally, it