the plaintiff received from the use of the allegedly defective car. *Schimmer v. Jaguar Cars, Inc.*, 384 F.3d 402 (7th Cir. 2004). The price of a replacement vehicle, when computed as directed by *Schimmer* and the Act, did not involve finance charges.

The present case revealed that the purchase price of $42,903, not including finance charges, was below the $50,000 limit such that the formula did not even have to be carried through. Because the amount in controversy between the parties was less than $50,000, the court lacked jurisdiction under the Act.

AUTO LESSEE CAN SUE FOR BREACH OF WARRANTY UNDER MAGNUSSON-MOSS

Peterson v. Volkswagen of America, Inc., 697 N.W.2d 61 (Wis. 2005)

FACTS: Peterson leased a new 1999 Volkswagen Beetle from North Shore Bank (Bank). An authorized Volkswagen dealer sold the Beetle to the Bank immediately prior to Peterson's leasing of the car. As part of the consideration for the sale of the Beetle, Volkswagen issued the Bank a written warranty that included "a two year or twenty thousand mile bumper to bumper coverage." On the day of the lease to Peterson and during the warranty period, the Bank assigned its rights under Volkswagen's written warranty to Peterson. Shortly after taking possession of the Beetle, Peterson experienced numerous problems with the vehicle that significantly impaired its value and utility. Authorized Volkswagen dealers asserted that the repairs were covered under the warranty and serviced the vehicle numerous times, but were unable to correct the defects. Consequently, Peterson attempted to revoke acceptance of the vehicle in writing, and Volkswagen refused this demand. Peterson then sued Volkswagen under the Magnuson-Moss Warranty Act (MMWA) alleging breach of warranty. The circuit court granted Volkswagen's motion to dismiss. Peterson appealed, and the court of appeals reversed and remanded.
HOLDING: Affirmed.
REASONING: The MMWA provides relief for a consumer against a warrantor in any state for failure to fulfill duties under a written or implied warranty. *Mayberry v. Volkswagen*, 692 N.W.2d 226 (2005). In order to seek relief under the MMWA, one must qualify as one of three categories of consumer under the act, and there must be a written warranty in effect. 15 U.S.C. §§ 2301(3), and 2301(6)(B). The court held that Peterson pled sufficient facts as an automobile lessee to qualify as a category two consumer under the MMWA. The court determined that the Volkswagen warranty assigned to Peterson met the definition of a written warranty. Additionally, the court found that the vehicle in question was transferred to her while the warranty was in effect, and the warranty was issued by Volkswagen in connection with the sale of the vehicle as part of the basis of the bargain between the dealer and the bank. As a consequence, Peterson was entitled to enforce the warranty against Volkswagen, since the court reasoned that "it would be unreasonable, if not illogical to conclude that a lessee does not enjoy the same right to enforce a warranty as a purchaser enjoys."

INSURANCE

ATICLE 21.55 APPLIES TO DUTY TO DEFEND

RX.com, Inc. v. Hartford Fire Ins. Co., 364 F.Supp.2d 609 (S.D.Tex. 2005).

FACTS: Rx.com was sued and notified its liability insurer, Hartford Fire Insurance Co. Hartford acknowledged receipt of the notice but refused to indemnify or defend Rx.com. Rx.com hired its own attorney to defend the underlying suit, and in this suit claimed that Hartford refused to pay for work that the attorney performed. Rx.com sued for breach of contract and violations of Articles 21.21 and 21.55 of the Texas Insurance Code. Hartford moved to dismiss the Article 21.55 claim on the basis that it applied only to "first party claims" but not to third-party suits.
HOLDING: Denied.
REASONING: Hartford argued that Article 21.55 of the Prompt Payment of Claims Act did not apply to the duty to defend a lawsuit. The court, recognized that a number of Texas state courts and federal courts have addressed the same question and arrived at different answers. Only one decision of the Texas Supreme Court considered this issue, and that was in dicta, stating that Article 21.55 applies to the duty to defend. The court in the instant case made an *Erie* guess, and disagreed with Hartford's arguments.

First, the court disagreed with Hartford's contention that by its terms, Article 21.55 cannot apply to a claim for a defense because such claim was a third-party claim, not a first-party claim. Section 1 of Article 21.55 defines "claim" as "a first-party claim…." A "first party claim" was defined by the Texas Supreme Court as "one in which an insured seeks recovery for the insured's own loss." By contrast, in a third-party claim, "an insured seeks coverage for injuries to a third party." The court examined authority which held that because an insured does not receive any direct payment as required by Article 21.55, a demand to defend a suit is not a first party claim but rather a breach of the duty to defend is a common-law contract claim for damages. The court rejected this line of reasoning and held that the duty to defend component of a liability policy is a first-party claim under Article 21.55.

The court next addressed Hartford's argument that Article 21.55 cannot apply to defense claims because the statute defines "claims" to require payment "by the insurer directly to the insured or the beneficiary," and a demand for defense requires only that the insurer provide defense, not pay claimant any amount of money. The court disagreed, reasoning a claim for defense costs is either paid to or for the benefit of the insured. The "paid directly" language distinguishes first-party from third-party claims, but does not make a claim for a defense a third-party claim. In the typical third-party liability claim, the insurer pays the claimant of behalf of the insured who has wronged the

claimant in some way. When the claim is for a duty to defend, by contrast, the insurer either pays the insured, who pays or has paid an attorney, or pays the attorney directly on behalf of the insured. The court found additional practical problems with interpreting the "paid directly" language as Hartford advocated. Hartford's interpretation would allow an insurer to refuse to defend the lawsuit, then swoop in at the last minute to "pay the insured" for its expenses and avoid fronting the defense costs. Also, the court found Hartford's interpretation would make the prompt payment statute meaningless in some of the most common first-party insurance situations. Health insurers, for example, often pay an insured's claims directly to hospitals, doctors, and other health care providers. The fact that the insurer pays claims for an insured's loss indirectly does not immunize that insurer from Article 21.55.

Finally, the court rejected Hartford's third argument. Hartford maintained that because Article 21.55 holds an insurer liable for the "amount of the claim," and a demand for defense is only a request for legal defense and has no "amount," applying Article 21.55 to a claim for legal defense is unworkable. In addition, Hartford argued that Article 21.55's timing requirements, providing a deadline for insurers to accept or reject a claim, requires as a trigger that the insured submit "proof of loss." When an insured demands defense of a claim, that insured has not necessarily incurred any legal expenses or suffered any loss and cannot therefore provide proof of loss. The court disagreed with this argument, reasoning that other courts that have applied Article 21.55 to insurers who refuse to pay defense costs have not encountered difficulty with "workability."

IT IS UNREASONABLE TO CONSTRUE THE LANGUAGE IN A POLICY TO MAKE ANY WIND DAMAGE A CATASTROPHE

V.L. Properties, Inc. v. Alleghany Underwriting Risk Serv., 130 Fed.Appx. 675 (5th Cir. 2005).

FACTS: The insured, V.L. Properties, Inc. owned a yacht basin on the Gulf Coast. In 2001 strong winds caused property damage totaling $64,410.22 to the facility. The insurer required that a $50,000 deductible be paid in order for insurance reimbursement. The record was limited regarding the weather conditions accompanying the winds or the extent or magnitude of the winds. The insurance policy consisted of a Certificate of Insurance including the following deductible clauses: 1. In respect of Catastrophe which will include wind, wave action, $50,000. 2. Any other loss, $5,000. The term "catastrophe" was not defined in the policy. Insured brought diversity action under Texas law against property insurer regarding the amount of the deductible. The United States District Court of the Southern District of Texas granted summary judgment to insurer. V.L. Properties, Inc. appealed.

HOLDING: Reversed and remanded

REASONING: Under Texas law, insurance policies are interpreted in accordance with the rules of construction that apply to contracts generally. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex.1995). If an insurance policy is expressed in unambiguous language, its terms will be given their plain meaning and it will be enforced as written. *Puckett v. U.S. Fire Ins. Co.*, 678 S.W.2d 936, 938 (Tex. 1984). If, however, a contract is susceptible to more than one reasonable interpretation, a court will resolve any ambiguity in favor of coverage. When the language chosen is susceptible of more than one construction, such policies should be construed strictly against the insurer and liberally in favor of the insured. *Barnett v. Aetna Life Ins. Co.*, 723 S.W.2d 663, 666 (Tex. 1987).

It is unreasonable to construe the language to make any wind damage a catastrophe. The terms used in the policy should be given their plain, ordinary meaning unless the policy itself shows that the parties intended terms to have a different, technical meaning. *Gonzalez v. Mission Am. Ins. Co.*, 795 S.W.2d 734, 736 (Tex. 1990). The word "catastrophe" has a plain and ordinary meaning defined as a momentous or tragic event or an utter failure. It was not given a contrary meaning in the definitions section of the policy. Moreover, if the insurance company intended the higher deductible to apply to any event resulting in damages caused by wind, it could have used the term "any insured event caused by" instead of "catastrophe which will include." The insurance company could have substituted "loss" for catastrophe, which would more clearly indicate that losses caused by wind are subject to the higher deductible. The court did not decide whether a catastrophe occurred and left that to further development in the district court.

If, however, a contract is susceptible to more than one reasonable interpretation, a court will resolve any ambiguity in favor of coverage.

INSURERS CAN RECOUP SETTLEMENT COSTS FOR UNCOVERED CLAIMS

Excess Underwriters at Lloyd's London v. Frank's Casing Crew & Rental Tools, Inc., ____SW.3d____ (Tex. 2005).

FACTS: Frank's Casing Crew & Rental Tools, Inc. fabricated a drilling platform for drilling company ARCO/Vastar. This platform was installed and collapsed several months later. Frank's Casing had a primary liability policy of $1 million and excess coverage up to $10 million from several companies, including Lloyd's London. Frank's Casing demanded that Lloyd's London accept and fund the proposed settlement offer, effectively triggering the insurer's *Stowers* duty to exercise ordinary care in considering an offer of settlement. *Stowers Furniture Co. v. Am. Indemn. Co.*, 15 S.W.2d 544 (Tex.Comm'n App. 1929, holding approved). Lloyd's paid out a settlement of $7.5 million to ARCO/Vastar, although it was disputed whether or not the claim against Frank's Casing was in fact covered under the excess liability policy. Upon subsequent determination that the claim was not covered by the policy, Lloyd's sought reimbursement from Frank's Casing. The 189th Judicial District Court, Harris County, entered summary judgment in favor of the insured, in accordance with the Supreme Court of Texas' ruling in *Texas Association of Counties County Government Risk Management Pool v. Matagorda County*, 52 S.W.3d, 128 (Tex. 2000). The Houston Court of Appeals, Fourteenth District,

affirmed. The Supreme Court of Texas granted review.
HOLDING: Reversed and remanded.
REASONING: The court held that an insured's agreement to reimburse insurer for settlement of a suit against insured is implied in law or quasi-contractual if an insured demands and expressly agrees that insurer accept a settlement offer within policy limits and the insurer notifies the insured that it intends to seek reimbursement, even absent an express agreement of reimbursement. Further, when there is a coverage dispute and insured demands that its insurer accept a settlement offer within policy limits, the insured is deemed to have viewed the settlement offer as a reasonable one. If the offer is one that a reasonable insurer should accept, it is one that a reasonable insured should accept if there is no coverage. Frank's Casing is thus estopped from taking the inconsistent position that a settlement paid by Lloyd's is reasonable, and yet the same settlement is unreasonable if the cost is ultimately born by Frank's Casing. The court stated that from the insured's point of view, it is in exactly the same position it would have been in absent any insurance policy, except that the insurer is now the insured's creditor, rather than the injured third party.

The Court clarified its prior ruling in *Matagorda County* stating that an insurer can seek reimbursement from an insured when 1) there exists an express agreement that there is a right to seek reimbursement, or 2) when there is a coverage dispute and the insured has expressly agreed the third party's settlement offer should be accepted and the insurer has notified the insured that it intends to seek reimbursement.

DEBT COLLECTION

IN BANKRUPTCY, OUT-OF-STATE HOMESTEAD EXEMPTION CAN BE APPLIED TO DEBTOR'S NEW HOME

In re Drenttel, 403 F.3d 611 (8th Cir. 2005).

FACTS: The Drentells lived in Minnesota until June of 2003 when they sold their Minnesota residence and purchased an Arizona home. On July 17, 2003, the Drenttels filed for Chapter 7 bankruptcy in Minnesota. They claimed that their unencumbered Arizona property, valued at $181,682, was exempt from the bankruptcy estate under Minnesota's statutory homestead exemption. The trustee objected, claiming that the Minnesota homestead exemption may not be applied to real property located outside of Minnesota. The bankruptcy court sustained the objection. The Drenttels appealed to the Bankruptcy Appellate Panel, which reversed the bankruptcy court's decision. The trustee appealed.
HOLDING: Affirmed
REASONING: Debtors are permitted to exempt from the bankruptcy estate property that is exempt under Federal law or State law or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition. 11 U.S.C Section 522(b)(2)(A). Minnesota permits an exemption of up to $200,000 for a house owned and occupied by a debtor as the debtor's dwelling place. Minn. Stat. Section 510.01-.02.

The trustee argued that the Minnesota exemption is unavailable to the Drentells because their homestead is located outside of Minnesota. The trustee pointed not to the statutory language of Minnesota's homestead exemption, but to Minnesota's choice of law principles. Following this approach, the bankruptcy court determined what exemption to apply by asking whether Minnesota courts would apply the Minnesota homestead exemption or another state's exemption to the property. Congress does not invoke state choice of law rules with this provision. References to state exemption statutes do not invoke the entire law of the state. The federal bankruptcy statute requires the debtor to file in the designated district, stating that the debtor is entitled to federal exemptions or the exemptions provided by the law of the state where the petition is filed. 11 U.S.C. Section 522(b)(2)(A). While the trustee suggested that its proposed rule is required to avoid forum shopping, the danger is actually increased if debtors benefit from the homestead exemptions in the state where they relocate. Under the current federal scheme, a debtor's domicile for bankruptcy does not change immediately when the debtor relocates. Creditors can force a debtor into bankruptcy proceedings in the state they have moved from. If the trustee's interpretation were adopted, it is not clear why they would bother since the homestead exemption from the new residence would still apply. The question is thus whether the Minnesota exemption can be applied to an Arizona homestead. Minnesota courts have historically construed the homestead exemption liberally in favor of the debtor. *Kipp v. Sweno*, 683 N.W.2d 259, 263 (Minn. 2004). The Minnesota statue does not preclude use of the homestead exemption for an out of state property. *In re Arrol*, 170 F.3d 934, 936 (9th Cir. 1999). Thus, the Minnesota exemption can be applied to the Drenttels' Arizona homestead.

ATTORNEY CAN BE HELD IN CIVIL CONTEMPT AND SANCTIONED FOR ADVISING CLIENT TO VIOLATE COURT-ORDERED JUDGMENT BY PAYING OTHER BILLS FIRST

Chicago Truck Drivers, et al. v. Brotherhood Labor, et. al., 406 F.3d 955 (8th Cir. 2005).

FACTS: The Chicago Truck Drivers, Helpers, and Warehouse Workers Union Pension Fund (the "Fund") and its trustees brought a suit against four trucking companies owned by Steven Gula to collect interim payments for withdrawal liability under ERISA. The law firm Dysart Taylor represented the trucking companies during part of the underlying action which gave rise to a finding of contempt. On December 4, 1996 the district court granted the Fund's motion for summary judgment which found the defendants liable for withdrawal of interim payments under