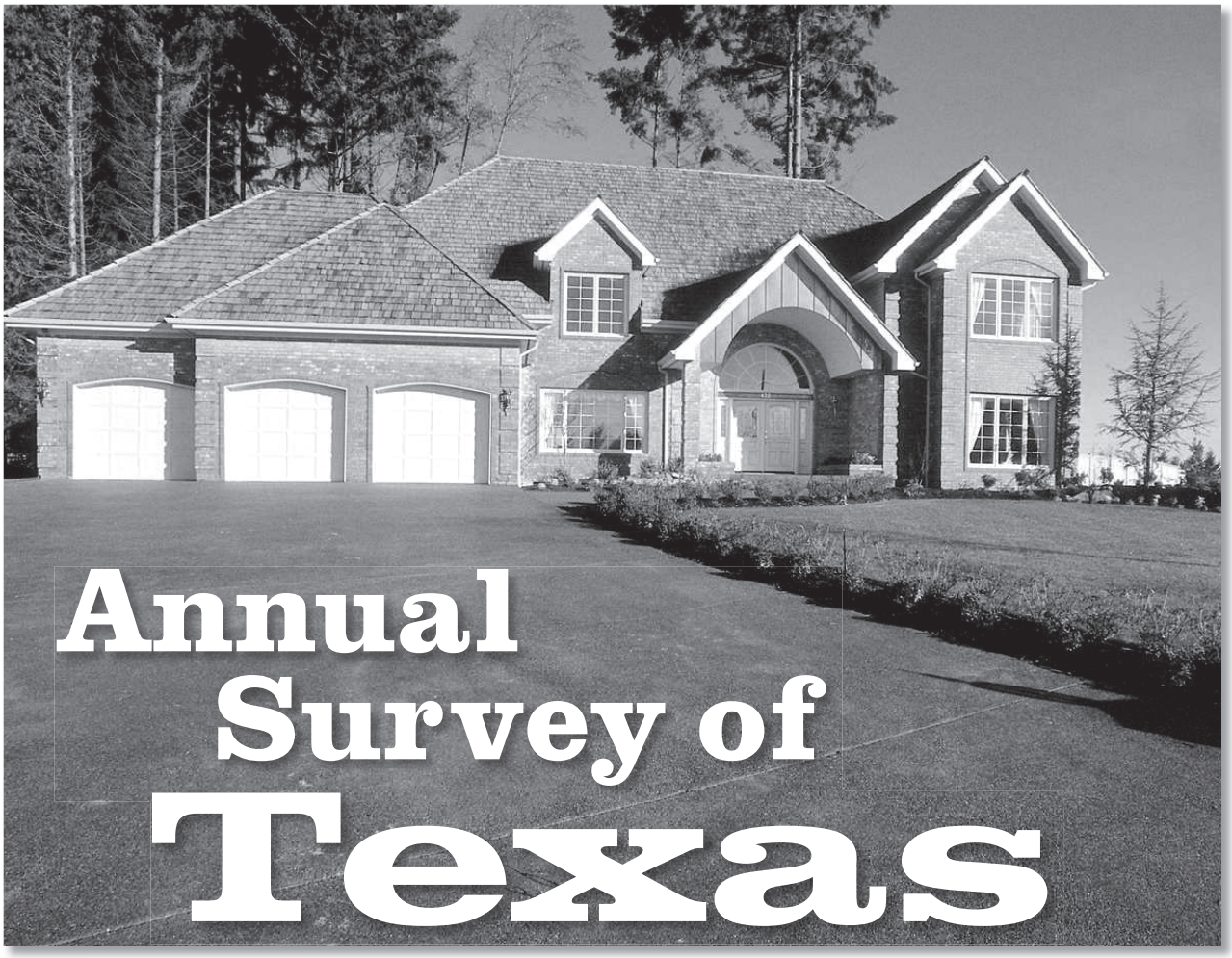


Annual Survey of Texas Insurance Law

By Mark L. Kincaid*

I. INTRODUCTION

This year's survey covers the period from January through November, 2005. In the most significant decision, which may have far reaching implications, the Texas Supreme Court held in *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, ___ S.W.3d ___, 2005 WL 1252321 (Tex. 2005), that in certain circumstances a liability insurer may settle a claim and then seek reimbursement from the insured by proving the loss was not really covered.

Other significant issues appeared in certified questions from the Fifth Circuit. The Fifth Circuit asked the Texas Supreme Court to decide the rights of co-insurers when one pays more than its share to settle a claim. The Fifth Circuit also asked the Texas Supreme Court to decide whether the prompt payment of claims statute applies to liability insurance, an issue that has divided the lower courts for several years.

The Fifth Circuit itself decided that a liability insurer could intervene and pursue an appeal of an adverse judgment, after the insured chose not to appeal, fired his defense lawyers, and assigned his claims to the plaintiffs.

Finally, a number of cases continued to wrestle with various aspects of mold and other water damage claims, addressing issues of coverage, evidence of causation, expert testimony, and whether the insurer acted in bad faith.

II. FIRST PARTY INSURANCE POLICIES & PROVISIONS

A. Automobile

A former Allstate insured was allowed to sue for declaratory relief challenging the insurer's payment of personal injury protection benefits based on a standard of paying only the portion that did not exceed the eighty-fifth percentile of medical expenses in a third party contractor's database. The insured sought an injunction requiring Allstate to reconsider past claims and pay "reasonable" medical expenses as determined by an independent, fair evaluation. She sought the same relief for future claims. The court concluded that the insured lacked standing with respect to future relief, because she was no longer an Allstate insured, but she had standing with respect to past claims. *Forth v. Allstate Indem. Co.*, 151 S.W.3d 732 (Tex. App.–Texarkana, 2004, pet. filed).

B. Homeowners

Homeowners were successful in recovering damages for breach of contract based on the insurer's failure to pay for piering of their foundation to make it level after a water leak caused heaving. *United Servs. Auto. Ass'n v. Croft*, 175S.W.3d 457, (Tex. App.–Dallas, Aug. 26, 2005, no pet.). The court found the expert testimony presented by the plaintiffs sufficient to show the cause of damage and the cost of repairs. However, a dispute between the experts led the court to conclude that the insurer did not breach its duty of good faith and fair dealing, commit a deceptive trade practice or unfair insurance practice, or act unconscionably in denying the claim.

An insurer had the right to require an examination under oath without having to justify the request with evidence supporting a reasonable suspicion of arson. Thus, the insurer did not breach its contract and did not act in bad faith by requiring the EUO before paying the claim. *Trahan v. Fire Ins. Exch.*, ___ S.W. 3d ___, 2005 WL 2810700, (Tex. App.–Beaumont, Oct. 27, 2005, no pet. h.).

C. Life

A life insurer acted unreasonably by rejecting the insured's designation of his second wife as beneficiary, even though the divorce decree required the insured to maintain a certain amount of life insurance for the benefit of his ex-wife. While the ex-wife might have a claim against the proceeds, the policy did not give the insurer the right to reject the beneficiary change. *State Farm Life Ins. Co. v. Martinez*, 174 S.W.3d 772 (Tex. App.–Waco, Aug. 17, 2005, pet. filed).

The Federal Employee Group Life Insurance Act did not preempt state law. Thus, proceeds payable to a beneficiary under the Act could nevertheless be subject to a constructive trust in favor of a prior spouse, where the insured had concealed the asset. *Fagan v. Chaisson*, ___ S.W.3d ___, 2005 WL 1629812 (Tex. App.–San Antonio, July 13, 2005, no pet.).

D. Disability

MetLife was found to have arbitrarily and capriciously denied a claim for short term disability benefits for an insured suffering from rheumatoid arthritis and optic neuritis. The court found MetLife ignored the insured's consistent complaints of pain as subjective, either minimized or ignored objective evidence of disability corroborating those complaints, and concluded the evidence did not show an inability to do her job functions without analyzing the effect that her conditions would have on her ability to perform her specific job requirements. The court reversed the district court's judgment for MetLife and remanded to the trial court for a proper determination. *Audino v. Raytheon Co. Short Term Disability Plan*, 129 Fed. Appx. 882 (5th Cir. 2005).

E. Commercial Property

An exclusion for "leakage" was ambiguous and could reasonably be read to apply only to gradually occurring leaks, because it appeared in a list that referred to "any other gradually occurring loss." *SMI Realty Mgmt. Corp. v. Underwriters at Lloyds, London*, ___ S.W.3d ___, 2005 WL 2123726 (Tex. App.–Houston [1st Dist.], Aug. 31, 2005, no pet.).

An insurer that owed half the amount of hail damage on an insured's property satisfied that obligation by paying the other insurer, which had paid the full amount. Thus, there was no breach of contract. *Harris v. American Prot. Ins. Co.*, 158 S.W.3d 614 (Tex. App.–Fort Worth 2005, no pet.).

The "errors and omissions" clause of a commercial property policy did not provide coverage for a property that was never insured. The court held that, even accepting that the failure to include the property was an unintentional error or omission, the clause only applied to errors that would void coverage; it could not be used to provide coverage after the flood loss had occurred. *Wentwood Woodside I, LP v. GMAC Comm'l Mtg. Corp.*, 419 F.3d 310 (5th Cir. 2005).

A policy defining catastrophe to include wind did not make all damage caused by wind a catastrophe. The court relied on the plain meaning of "catastrophe" as a "momentous tragic event or an utter failure." Because it was not clear the insured's wind damage was such a catastrophe, it was subject to the lower deductible for "any other loss." *V.L. Properties, Inc. v. Alleghany Underwriting Risk Serv. Ltd.*, 130 Fed. Appx. 675 (2005).

F. Other Policies

A renter's policy provided coverage for mold damage resulting from an air conditioner leak. The court reasoned that the policy specifically covered the accidental discharge or leakage of water as a named peril under the HOB-T policy, and mold that damaged the insured's personal property could be considered a loss caused by the named peril. *De Laurentis v. United Services Auto. Ass'n*, 162 S.W.3d 714 (Tex. App.–Houston [14th Dist.] 2005, pet. granted). Given the language in this policy, the court found decisions construing the meaning of "ensuing loss" as applied to mold claims under homeowner's policies were not controlling. The court remanded for a determination whether the property damage was caused by the mold which, in turn, was caused by the leak. An interesting detail about this decision is that the trial judge who found no coverage as a matter of law, was Judge (now Justice) Wainwright.

A furniture store's business interruption losses were to be measured by its historical sales, without regard to profits it made the weekend after its stores were closed. The court rejected the insurer's argument that the loss of sales should be reduced by amounts the store made the next weekend when sales soared after the store slashed its prices. *Finger Furniture Co. v. Commonwealth Ins. Co.*, 404 F.3d 312 (5th Cir. 2005).

III. FIRST PARTY THEORIES OF LIABILITY

A. Breach of Contract

A mortgage company potentially breached its contract with borrowers by failing to collect the first month premium for mortgage life insurance, resulting in the insurer denying coverage. *Monumental Life Ins. Co. v. Hayes-Jenkins*, 403 F.3d 304 (5th Cir. 2005). The court held that the conduct of the insurer and mortgage company in sending notice of insurance applications only once a month, which resulted in the policy being issued before the premium was collected, could support a claim for breach of contract.

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

An insurer breached its contract by failing to pay for foundation repairs for damage caused by a plumbing leak, but the court found the insurer did not commit an unfair insurance practice and did not act unconscionably. The insurer's denial of the claim was supported by engineering reports, and there was no evidence the engineer was biased or that the insurer knew the engineer was biased when it chose him. For this reason, the court concluded the insurer did not breach its common law duty of good faith and fair dealing. *United Servs. Auto. Ass'n v. Croft*, 174 S.W.3d 457 (Tex. App.–Dallas, Aug. 26, 2005, no pet.).

The court also found this also negated statutory liability for failing to effectuate a fair settlement or failing to pay a claim without conducting a reasonable investigation. Although the jury found other unfair insurance practices based on misrepresentations, the court found no argument other than a biased investigation to support those findings; thus, they were not supported by the evidence. The court also concluded that the insurer did not act unconscionably because the insurer did not perform an unreasonable investigation and the plaintiffs were knowledgeable about their foundation problem. *United Servs. Auto. Ass'n v. Croft*, 174 S.W.3d 457 (Tex. App.–Dallas, Aug. 26, 2005, no pet.).

In *De Laurentis v. United Servs. Auto. Ass'n*, 162 S.W.3d 714 (Tex. App.–Houston [14th Dist.] 2005, pet. granted), the court reversed a summary judgment finding no coverage for mold, and remanded for determination of the cause of the insured's damage. However, the court held the insurer was entitled to summary judgment denying the extra-contractual claims for bad faith in handling the claim. The insured's only complaints were that the insurer did not test her belongings so she would know how contaminated they were, the insurer did not offer to remediate her belongings, and the insurer continually denied her claim on the basis that mold was not covered.

Two insurers were found responsible for hail damage to a commercial building. Aetna paid the entire claim, and American reimbursed its half. The court concluded that American did not fail to settle once liability became reasonably clear because it had promptly discharged its responsibility to Aetna. *Harris v. American Prot. Ins. Co.*, 158 S.W.3d 614 (Tex. App.–Fort Worth 2005, no pet.). The court also found American did not commit an unfair insurance practice with respect to a supplemental claim for damage resulting from roof repairs. The plaintiff was a buyer of the property who took an assignment of the insured's claim. The assignment did not extend to future claims for bad repairs. This, along with policy exclusions for faulty workmanship and vacancy and the fact that American's policy expired before the supplemental claim was made, all gave the insurer a reasonable basis for delaying or denying payment of the supplemental claim. *Harris v. American Prot. Ins. Co.*, 158 S.W.3d 614 (Tex. App.–Fort Worth 2005, no pet.).

This holding is particularly significant because the representations were contradicted by other statements in the contract that required payment of the premium.

A life insurer and mortgage company that repeatedly told applicants they would have thirty days "risk free" without having to write any checks for mortgage life insurance could be liable for misrepresentations and nondisclosures, when the insurer later took the position that coverage was not effective because the first premium had not been paid at the time the policy was issued. *Monumental Life Ins. Co. v. Hayes-Jenkins*, 403 F.3d 304 (5th Cir. 2005). The court found the beneficiary stated claims under the DTPA for representing that the agreement had or involved rights, remedies, or obligations it did not have, and for failing to disclose information, intending to induce the consumer into a transaction which the consumer would not otherwise have entered. The court found a fact issue on whether the representations were a producing cause of the injuries. The court held that but for the confusing and misleading statements and omissions, the insureds likely would have known they needed to take additional steps to bring coverage into effect.

This holding is particularly significant because the representations were contradicted by other statements in the contract that required payment of the premium. The majority characterized these as "fine print" that did not preclude a fact issue on misrepresentation, waiver, and estoppel, considering all of the statements and the context of those statements. A dissenting judge felt the written disclaimers precluded liability.

C. Prompt Payment of Claims

The Austin Court of Appeals held that plaintiffs could not recover delay penalties where they gave oral notice of their claim instead of the written notice required by the statute. The court also rejected the argument that the insurer's internal telephone log which recorded the call satisfied the requirement of written notice. *McMillan v. State Farm Lloyds*, ___ S.W.3d ___, 2005 WL 2043847 (Tex. App.–Austin, Aug. 26, 2005, no pet.).

An insurer that breached its contract by failing to pay for foundation damage was also liable for delay penalties and attorney's fees. *United Servs. Auto. Ass'n v. Croft*, 175 S.W.3d 457 (Tex. App.–Dallas, Aug. 26, 2005, no pet.).

A life insurer's interpleader did not prevent statutory penalties, where the insurer should not have disputed the claim of the beneficiary. Further, the penalties would accrue from the date the insurer failed to pay the claim up to the date of judgment, not just up to the date of the interpleader. *State Farm Life Ins. Co. v. Martinez*, 174 S.W.3d 772 (Tex. App.–Waco, Aug. 17, 2005, pet. filed).

Res judicata barred a claim under former article 21.55 for delay by an insurer in paying underinsured motorist benefits, where the insured first sued for breach of contract and did not include the delay claim. The court found the contract claim and delay claim related to the same subject matter and both could have been raised in the first suit. *United States Fire Ins. Co. v. Fugate*, 171 S.W.3d 508 (Tex. App.–Waco, 2005, pet. filed).

The Dallas Court of Appeals held an insurer did not violate the part of the statute requiring payment within five days after accepting a claim, where the insurer offered $10,000 in response to the insured's demand for $25,000. The court noted that the statute allows the insurer to accept a claim and then pay once a condition has been performed. In this case, the court reasoned that the condition was the insured's acceptance of the compromise. *DeLaGarza v. State Farm Mut. Auto. Ins. Co.*, 175 S.W.3d 29 (Tex. App.–Dallas 2005, no pet. h.).

The *DeLaGarza* court also held that the insurer did not violate the provision requiring payment within five days by delaying payment after it agreed to pay the remaining $15,000 after suit was filed. The court reasoned that the payment was made in an effort to resolve litigation rather than to satisfy an accepted claim and the deadlines established by former article 21.55 did not apply to the litigation process.

On this point, the court is wrong. The statute provides that it is to be liberally construed. The Texas Supreme Court has held this language requires giving a statute the most comprehensive application possible without doing violence to the statute's terms.

Moreover, a number of cases such as *Higginbotham v. State Farm Mut. Auto. Ins. Co.*, 103 F.3d 456 (5th Cir. 1997, and *Oram v. State Farm Lloyds*, 977 S.W.2d 163 (Tex. App.–Austin 1998, no pet.), recognize that the provisions of the statute apply to litigation by holding that an insurer that loses a lawsuit disputing coverage is automatically liable for failing to pay within sixty days. The purpose of the statute is to encourage prompt payment of claims. There is nothing different or special about an insurer delaying payment by litigation that should shield it from penalties under the statute.

Where an insurer satisfied its obligation to pay for hail damage by paying its share to another insurer that paid the full amount, there was no liability under the prompt payment statute. Because the plaintiff failed to show the insurer was liable for the underlying insurance claim, it could not be liable under the statute. *Harris v. American Protection Ins. Co.*, 158 S.W.3d 614 (Tex. App.–Fort Worth 2005, no pet.).

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

An insurer was found to have breached its contract by failing to pay for foundation damage caused by a plumbing leak. But the court concluded that there was no evidence the insurer chose engineers who were biased to support its claim denial, so the insurer did not breach its duty of good faith and fair dealing. *United Servs. Auto. Ass'n v. Croft*, 175 S.W.3d 457 (Tex. App.–Dallas, Aug. 26, 2005, no pet.).

E. ERISA

A mother's assignment of benefits was sufficient to give the hospital standing to sue for treatment given to her premature twins. Further, the term "loss" was ambiguous in the plan's requirement of proof of loss within ninety days, so that the hospital's suit—filed within three years after the twins were discharged—was timely. The court rejected the plan's argument that each day of hospitalization counted as a separate "loss," which would have made all but two days' claims untimely. *Harris Methodist Fort Worth v. Sales Support Serv. Inc. Emp. Healthcare Plan*, 426 F.3d 330 (5th Cir. 2005).

F. Negligence

A mortgage servicing company was found not liable to a partnership for failing to notify it that the property was in a designated flood zone. There was no evidence that the servicer assumed a duty to notify the partnership, even though it had notified other partnerships. Further, there was no evidence that the servicer committed any negligence in notifying the other partnerships that affected the uninsured partnership. *Wentwood Woodside I, LP v. GMAC Comm. Mort. Corp.*, 419 F.3d 310 (5th Cir. 2005).

The court also declined to recognize a theory of negligence per se based on a federal National Flood Insurance Program. The court made an "*Erie*-guess" that the Texas Supreme Court would construe the federal statute as not including individual mortgagers in the class intended to be protected. *Wentwood Woodside I, LP v. GMAC Comm. Mort. Corp.*, 419 F.3d 310 (5th Cir. 2005).

G. Breach of Fiduciary Duty

A mortgage company was an insurer's agent with respect to selling and collecting premiums for mortgage life insurance. However, that did not create an agency relationship between the mortgage company and the borrower and thus impose on the mortgage company a fiduciary duty to collect the premium so that coverage would be effective. *Monumental Life Ins. Co. v. Hayes-Jenkins*, 403 F.3d 304 (5th Cir. 2005). While the court recognized there are some cases of dual agency, such as where the insured solicits the agent to obtain insurance coverage, this was not such a case.

H. Other Theories

In *Wright v. Allstate Ins. Co.*, 415 F.3d 384 (5th Cir. 2005), the court held that state law claims relating to a claim on a flood insurance policy were preempted by federal law. The court also held that equitable estoppel could not apply to keep the insurer from insisting on a proof of loss requirement, even though the insurer had told the insured his proof of loss was acceptable. However, the court did suggest that the insured might have a federal common law claim for fraud or negligent misrepresentation and remanded to the district court to determine whether the insured should have been allowed to amend his complaint.

IV. AGENTS, AGENCY & VICARIOUS LIABILITY

A. Individual Liability of Agents, Adjusters, and Others

An insured under a life policy developed a boil shortly after he applied for insurance. The boil turned out to be cancerous, and the insured died. The insurer sued the agent for breach of contract, breach of fiduciary duty, and negligence, asserting that the agent had a duty to personally deliver the policy, view the insured, and inform the company of any change in the insured's health. *Banner Life Ins. Co. v. Pacheco*, 154 S.W.3d 822 (Tex. App.–Houston [14th Dist.] 2005, no pet.). The court affirmed the jury verdict rejecting each of these theories. Nothing in the contract with the agent required personal delivery. The evidence showed it would have been unlikely the boil would have been considered a change in health or would have been noticed by the agent. Further, if the boil was a change in the insured's health, the insurer could have sued him for misrepresentation. While the court recognized that the agent has a fiduciary duty to the company, that duty does not require the agent to determine the insured's state of health nor to report things of which he had no knowledge.

A federal court held that an insurance agent was improperly joined, and the motion to remand would be denied, where the court concluded the plaintiffs were not able to establish a cause of action against the agent. The insureds alleged that they contacted the agent to secure health insurance, that the agent completed the application, and that the agent told them not to worry about the meaning of the term "disorder," because the insurer would contact their doctors and get their full medical history. Later, the health insurance policies were cancelled. The court concluded that these allegations against the agent were not sufficiently specific, and the plaintiff provided no authority for the proposition that the agent was under a duty to notify them that the insurer canceled the policies. *Johnson-Ramirez v. Araiza*, ___ F. Supp.2d ___, 2005 WL 3047950 (W.D. Tex., Nov. 15, 2005).

The court's opinion is vague as to why the insurer cancelled the policy. Depending on the facts, the court may be wrong in finding there was no duty for an agent to inform an insurer that their policy is being cancelled. In *Kitching v. Zamora*, 695 S.W.2d 553 (Tex. 1985), the agent was found to have just such a duty and was found liable for negligence. The court also is wrong in its analysis that the agent's misrepresentations were not sufficient to state a claim. Numerous cases have found such liability. *See State Farm Fire &Cas. Co. v. Gros*, 818 S.W.2d 908 (Tex. App.–Austin 1991), and *Cobb v. Underwriters Life Ins. Co.*, 746 S.W.2d 810 (Tex. App.–Corpus Christi 1988). It may be that the court focused on the absence of any allegations of how the agent's misrepresentations caused damages, not whether the agent's representation could support liability.

V. THIRD PARTY INSURANCE POLICIES & PROVISIONS

A. Automobile Liability Insurance

A fact issue existed on whether a truck driver's intoxication took him out of the scope of permission to use the vehicle so as to preclude coverage under the "omnibus clause" of a commercial auto policy. *Minter v. Great Am. Ins. Co.*, 423 F.3d 460 (5th Cir. 2005). The court found a fact issue on whether the driver's trip to his sister's house to get a ride back from the truck maintenance facility was a minor or material deviation. In addition, the court declined to hold that intoxication was a material deviation as a matter of law that would place his driving outside the scope of permission.

The court also held that the driver's intoxication and the jury's finding that the driver acted with malice did not preclude an "occurrence" under the policy. The policy defined "occurrence" to include an accident that occurs "unexpectedly and unintentionally." In contrast, malice requires a finding that the actor had "actual, subjective awareness of the risk involved." There was no allegation the driver intentionally caused the collision, and the court declined to hold that intoxication resulted in no "occurrence." *Minter v. Great Am. Ins. Co.*, 423 F.3d 460 (5th Cir. 2005).

B. Comprehensive General Liability Insurance

The Fifth Circuit certified to the Texas Supreme Court the question whether a homebuyer who sues a general contractor for construction defects and alleges only damage to or loss of use of the home itself is alleging an "accident," "occurrence," or "property damage" sufficient to trigger the duty to defend or indemnify under a CGL policy. The Fifth Circuit noted that state and federal courts have split on these issues. A number of courts hold there is no coverage because the damages are simply economic and there is no accident. The court also noted the argument that the 1986 amendments to the CGL policy changed the outcome by creating a coverage exception when defects in the contractor's work are caused by subcontractors. *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 428 F.3d 193 (5th Cir. 2005).

An indemnity provision in a drilling contract, providing that it applied notwithstanding any other contract provision, trumped a provision requiring insurance. Thus, the contractor was required to indemnify the operator for a loss, even though the insurance paragraph appeared to make the loss, within the deductible, the operator's responsibility. *Helmerich & Payne Int'l Drilling Co. v. Swift Energy Co.*, ___ S.W.3d ___, 2005 WL 2548417 (Tex. App.–Houston [14th Dist.], Oct. 11, 2005, no. pet.).

An insurer had a duty to defend an auto dealership sued for violating the Texas Motor Vehicle Installment Sales Act. The policy covered violations of any federal, state, or local truth in lending statute, and the court concluded that the MVISA served the same purpose and had similar prohibitions and thus was a "truth in lending statute." The court also found the petition sufficiently alleged violations to state a potential claim. To the extent the claims could be intentional and excluded or negligent and covered, the court liberally construed them in favor of coverage. *Serv. Lloyd's Ins. Co. v. J.C. Wink, Inc.*, ___ S.W.3d ___, 2005 WL 2438350 (Tex. App.–San Antonio, Oct. 5, 2005, no pet.).

An insured's intentional conduct in getting plaintiff companies to provide equipment ostensibly to be tested and destroyed was not an "accident" and thus not an "occurrence," even though the insured was unaware this was part of a hoax. A con man enticed EDS to agree to supply electronic equipment, and EDS in turn got Akai and Pioneer to agree to provide millions of dollars of equipment with the agreement it could be tested and destroyed. After the hoax was uncovered, Akai and Pioneer sued EDS for negligent misrepresentation. The court held there was no "accident" because EDS intended to induce Akai and Pioneer to ship the products, never to be returned, even though EDS was mistaken about the true use to which the property would be put and was unaware of the scam being perpetrated. *Federal Ins. Co. v. Ace Prop. & Cas. Co.*, 429 F.3d. 120, (5th Cir., Oct. 21, 2005).

An insurer was obliged to defend an insured contractor who was sued for the negligence of subcontractors in building a home, which resulted in water leaks. The court held the negligent conduct of the subcontractors could not have been intended from the viewpoint of the insured, so it was an "accident." The court also declined to exclude the claim as "economic loss," because that would require reading language into the policy that was not there. *Archon Invest., Inc. v. Great Am. Lloyds Ins. Co.*, 174 S.W.3d 334 (Tex. App.–Houston [1st Dist.] 2005, pet. filed).

Another court found that a home builder's negligent construction, which resulted in foundation damage, was covered as an "occurrence" causing "property damage." The insurer thus had a duty to defend and indemnify. The court rejected the argument that the loss was excluded as a liability assumed in a contract because the builder would have been liable even absent the contract. The court also rejected the argument that the insurer was not liable because part of the loss was paid by a warranty. The court concluded that the insured nevertheless was "legally obligated to pay" as required by the policy. *Homeowners Mgmt. Enter., Inc. v. Mid-Continent Cas. Co.*, ___ F. Supp.2d ___, 2005 WL 2452859 (N.D. Tex., Oct. 3, 2005).

An insurer only had to pay one policy limit for a single "sexual abuse occurrence" even though there were six victims of assaults by the person alleged to have been negligently hired by the insured. The court reasoned that the sexual abuse coverage form clearly provided for a single occurrence and did not provide coverage in addition to the general coverage for "occurrences" under the policy. *TIG Ins. Co. v. San Antonio YMCA*, 172 S.W.3d 652 (Tex. App.–San Antonio 2005, no pet.). However, since the complaint also alleged physical abuse in addition to sexual abuse, the insurer still had a duty to defend, because its aggregate limit under the policy was not exhausted by the payment for the single "sexual abuse occurrence."

A disclaimer in a certificate of insurance was not sufficient to conclusively notify a company that it was not in fact an additional insured, so that limitations on a claim for failing to provide coverage did not begin to run on the date the certificate was received. *TIG Ins. Co. v. Via Net*, ___ S.W.3d ___, 2005 WL 1189679 (Tex. App.–Houston [1st Dist.], May 19, 2005, pet. filed).

Safety Lights was supposed to be an additional insured under the liability policy for its vendor, Via Net. Via Net had sent a certificate of insurance but had failed to add Safety Lights as an additional insured. When a claim later arose, Safety Lights had no coverage. Safety Lights then sued Via Net for breach of contract. Via Net argued the claim was barred by limitations because it was filed more than four years after the certificate was delivered, and the certificate said it was issued as a matter of information only and conferred no rights upon the certificate holder. Via Net argued that this notified Safety Lights it was not an additional insured. The court disagreed, finding this warning could be construed only as notice to Safety Lights that its coverage might be limited, not to inform Safety Lights that it was not an additional insured.

A collision with a "crash truck" that was following a road striping crew fell within an "auto exclusion," which excluded bodily injury resulting from use or operation of any auto. *Employers Mut. Cas. Co. v. St. Paul Ins. Co.*, 154 S.W.3d 910 (Tex. App. –Dallas 2005, no pet.). The court rejected the argument

that the truck was being used as a "stationary steel barricade" and not as an auto. At the time of the wreck, it was being used as transportation for its driver and a flashing arrow.

The court also rejected the argument that the truck fit within exceptions for "specialized equipment" or "mobile equipment." "Specialized equipment" was defined to include such items as a cherry picker, and "mobile equipment" required proof—which was lacking in this circumstance—that the vehicle was kept primarily for purposes other than carrying people or cargo.

An insurer had no duty to defend or indemnify an insured for a claim arising from a third party's use of a borrowed piece of equipment to clear brush on his own property. The court found the equipment was not "mobile equipment" as defined by the policy, because it was not being operated along a public highway and was not registered to the insured. The court also held the equipment was not being used in the conduct of the insured's business, when it had been loaned by an employee to a third party. *Nat. Am. Ins. Co. v. Breaux*, 368 F. Supp.2d 604 (E.D. Tex. 2005).

C. Directors & Officers Liability Insurance

An insurer had no duty to defend claims against an officer by his ex-wife alleging breach of fiduciary duty based on his failure to honor obligations imposed by their divorce settlement agreement. The policy excluded obligations arising out of an express contract or prior litigation. Relying on the eight-corners rule, the court also refused to consider affidavits that purported to shed light on the allegations in the complaint. *Chapman v. Nat. Union Fire Ins. Co.*, 171 S.W.3d 222 (Tex. App.–Houston [1st Dist.] 2005, no pet.).

In a case resulting from the Enron collapse, the court held that a D&O policy required the insurer to advance criminal defense costs up to the final adjudication, but the insurer could recoup those costs if the insured were found guilty of committing acts of dishonesty, fraud, or criminality. *In re Enron Corp. Sec., Derivative & "ERISA" Litigation*, 388 F. Supp.2d 780 (S.D. Tex. 2005). The court also held that, even if a guilty plea before final sentencing was not a "final adjudication," the officers who pled guilty were judicially estopped to assert there had been no final adjudication sufficient to invoke the exclusion.

D. Environmental Impairment Liability

A notice from the EPA that it was putting the insured's site on the national priorities list, which in turn led to the insured being liable for clean up costs, was found sufficient to state a "claim" within the environmental impairment liability policy. *International Ins. Co. v. RSR Corp.*, 426 F.3d 281 (5th Cir. 2005). In addition, the court held the trial court properly charged the jury on the meaning of claim and properly allowed evidence of the parties' interpretation of the EPA notice as being a claim.

E. Homeowners Liability Insurance

A homeowner's lease of her property to a limestone mining company fit within the "business pursuit" exclusion, so her homeowners liability insurer had no duty to defend. *Allstate Ins. Co. v. Hallman*, 159 S.W.3d 640 (Tex. 2005). The policy excluded "bodily injury or property damage arising out of or in connection with a business engaged in by an insured. The court adopted a two-element test, considering: (1) continuity or regularity of the activity, and (2) a profit motive, usually as a means of livelihood, gainful employment, earning a living, procuring subsistence or financial gain, a commercial transaction or engagement. The court found the pleadings alleged facts satisfying both elements. While there was only one lease of her property, it continued for several years, satisfying the continuity requirement. The pleadings did not specifically allege a profit motive, but the court held one could be inferred from the nature of the activity, because a homeowner generally would not allow limestone mining with dynamite blasting to occur without some expectation of monetary gain.

F. Professional Liability Insurance

Notice letters sent to two physicians that did not state a claim against a clinic did not trigger the clinic's coverage under a claims made policy. *First Prof. Ins. Co. v. Heart & Vascular Inst. of Texas*, ___ S.W.3d ___, 2005 WL 2438527 (Tex. App.–San Antonio, Oct. 5, 2005, no pet.). The court reasoned that the policy specifically required notice of a claim against the insured clinic, and notice of the liability event was not enough.

G. Excess Insurance

The court in *TIG Insurance Co. v. North Am. Van Lines, Inc.*, 170 S.W.3d 264 (Tex. App.–Dallas 2005, no pet.), addressed several issues regarding the allocation of damages and defense costs among an insured and three excess insurers. The underlying personal injury suit resulted in a judgment against the insured for $8.9 million in actual damages, which was $15 million after pre-judgment and post-judgment interest.

First, the court held that the first level insurer's policy language stating coverage for "claim expenses" also provided coverage for pre-judgment and post-judgment interest, in addition to the policy limits. Thus, these were not expenses the insured had to pay out of its own pocket.

Second, the first level insurer was obligated to indemnify the insured for a larger portion of those claim expenses based on comparing the total actual damages exceeding the self-funded retention, divided by the insurer's policy limits. The court found the trial court erred by using the excess damages plus the self-funded retention as the denominator.

Third, the court held that defense costs were not included in the second level insurer's coverage, despite conflicting provisions in the policy and an endorsement, resulting in less of the loss being shifted to the third level insurer.

Fourth, the first and second level policies were exhausted by the payment of actual damages and "claim expenses," including pre-judgment and post-judgment interest, not just by the payment of actual damages, which resulted in more of the actual damages being pushed to the third level.

H. Title Insurance

A title insurance policy was found to exclude a claim that an absolute deed of real property from a brother to a sister was actually intended as a mortgage to secure a loan. The policy excluded any title defect that was created by the insured or that was known to the insured but not disclosed. Whether or not the allegations were true, they alleged a claim within these exclusions,

so the title insurer had no duty to defend. *Spurgeon v. Coan & Elliott*, ___ S.W.3d ___, 2005 WL 2090673 (Tex. App.–Eastland, Aug. 31, 2005, no pet.).

I. Other Policies

Neither the driver nor the passengers were insured under an auto dealer's garage liability and auto hazard coverage for a wreck during a test drive. Article 5.06-2(2) allows a garage policy to exclude garage customers except to the extent there is not other minimum coverage available. Because the policy contained language consistent with this provision under the auto hazard coverage, the court found it sufficiently excluded garage customers. Also, the fact that a standard form approved by the Texas Department of Insurance included permissive users in the definition of insured did not require that such coverage was offered. *Haro v. Universal Underwriters Ins. Co.*, 162 S.W.3d 661 (Tex. App.–Houston [14th Dist.] 2005, no pet. h.).

VI. DUTIES OF LIABILITY INSURERS

A. Duty to Defend

A liability insurer did not have a duty to defend one insurance agent sued by another after the break-up of their business. The allegation that one partner terminated the other and informed him he would be denied entry to the premises, the locks would be changed, and the police would be called if he showed up did not state a claim for "wrongful eviction." It was not alleged that the excluded agent had a superior right of occupancy. Also, there was no duty to defend based on claims of libel and slander that did not allege any statements reasonably capable of a defamatory meaning. *Hettler v. Travelers Lloyds Ins. Co.*, ___ S.W.3d ___, 2005 WL 2465908 (Tex. App.–Amarillo, Oct. 6, 2005, no pet. h.).

In *Transport Int'l Pool, Inc. v. Continental Ins. Co.*, 166 S.W.3d 781 (Tex. App.–Fort Worth 2005, no pet.), the court held that GE was an additional insured where it leased a construction trailer to another company, Vratsinas, and the lease required Vratsinas to provide coverage. The insurance policy extended coverage to organizations from whom Vratsinas leased equipment by an agreement requiring insurance. However, the insurer still had no duty to defend GE in a suit by an employee of Vratsinas alleging GE was negligent in failing to tie down the trailer. The policy excluded liability arising out of the sole negligence of an additional insured. The petition only alleged acts of negligence by GE, not negligence by anyone else.

This case illustrates why it is incorrect to say there is no duty to indemnify whenever there is no duty to defend.

The court refused to consider arguments that Vratsinas also had responsibility, which would be shown by evidence at trial, along with evidence of negligence by parties other than GE. The court held that under the "eight corners" rule it could not consider matters outside the policy and pleadings.

Thus, the court concluded that GE had no duty to defend and could not be liable for bad faith in denying a defense. The court also held that because there was no duty to defend, there could be no duty to indemnify. On this point, the court erred. It is quite possible that the pleadings were too narrow to allege negligence by others, but at trial there could be evidence of negligence by others. If so, such evidence would establish liability and a duty to indemnify, even though the insurer properly declined the defense.

This case illustrates why it is incorrect to say there is no duty to indemnify whenever there is no duty to defend. Courts often reason backwards from the premise that the duty to defend is broader than the duty to indemnify. This is true, generally, because the duty to defend extends to false allegations, allegations that lack merit, and allegations that would be excluded when extrinsic proof could be offered. However, there are cases, like this one, where the duty to defend fails because the pleadings are too narrow, but the duty to indemnify may still arise once extrinsic proof establishes liability.

Allegations that insureds knew about water encroachment in their home, but failed to disclose it to their buyers, which resulted in later water damage, was not an "occurrence" within the scope of the policy because it was not an "accident." The court reasoned that the water damage was the type of damage that would ordinarily follow from the failure to disclose water encroachment. Therefore, the insurer had no duty to defend. This result was not changed by the fact that the plaintiffs characterized the nondisclosure as negligence. It was the underlying facts that controlled, not the legal theory alleged. *Huffhines v. State Farm Lloyds*, 167 S.W.3d 493 (Tex. App.–Houston [14th Dist.] 2005, no pet.).

The phone company had a duty to indemnify a convenience store and to provide insurance coverage related to a wrongful death claim arising from placement of a pay phone at the location. However, these duties did not impose on the phone company a duty to defend the convenience store. *Coastal Mart, Inc. v. Southwestern Bell Tel. Co.*, 154 S.W.3d 839 (Tex. App.–Corpus Christi 2005, pet. filed).

The Fifth Circuit held that an employer's negligent hiring of a bus driver was not a covered "accident" where the driver's negligence caused a crash in Mexico, which was outside the coverage territory. *Lincoln Gen'l. Ins. Co. v. Reyna*, 401 F.3d 347 (5th Cir. 2005). The court distinguished the decision in *King v. Dallas Fire Ins. Co.*, 85 S.W.3d 185 (Tex. 2002), where there was coverage for an employer's negligent hiring of an employee who then committed an excluded intentional tort. The Fifth Circuit held that *King* was limited to cases of intentional conduct. The court concluded that when the underlying negligence is excluded, there also is no coverage for other negligence that would not give rise to a liability "but for" the excluded negligence.

An insured's failure to provide a communication device for a quadriplegic, leading to his death because he was unable to obtain assistance, fit within an exclusion for "medical services." Thus, there was no duty to defend. *Allstate Ins. Co. v. Disability Serv. of the Southwest, Inc.*, 400 F.3d 260 (5th Cir. 2005).

A CGL insurer had no duty to defend its insured whose oil well bore deviated from the leased property. *Mid-Continent Cas. Co. v. Camaley Energy Co.*, 364 F. Supp.2d 600 (N.D. Tex. 2005). The court held that the unintended deviation was an "occurrence" and that the allegations of constructive eviction stated a claim for "property damage." However, the court also found the claims were excluded by provisions excluding coverage for damage to the real property where the insured's workers performed and for damage or impairment to property that was not physically injured.

The *Camaley* court also held there was no coverage under the personal injury liability provisions because the alleged "constructive eviction" did not fit within the policy language covering "wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy[.]"

B. Duty to Settle

The Fifth Circuit certified to the Texas Supreme Court questions regarding the duty of co-insurers to settle. Liberty Mutual and Mid-Continent were co-insurers. They agreed the

liability case had a settlement value of $1.5 million, but they disagreed on their insureds' likely responsibility. Mid-Continent would only pay $150,000, so Liberty Mutual paid the remainder. Liberty also had an excess policy. Liberty then sued Mid-Continent to recoup Mid-Continent's share of the settlement. The Fifth Circuit certified the following questions:

(1) Does the underpaying insurer owe any duty to the overpaying insurer to reimburse a proportionate part of the settlement?

(2) If there is such a duty, does it depend on negligence, bad faith, or some other standard?

(3) If there is such a duty is it limited to a duty owed to the overpaying insurer respecting the amount paid under the excess policy?

Liberty Mut. Ins. Co. v. Mid-Continent Ins. Co., 405 F.3d 296 (5th Cir. 2005). The court also noted that this case presented a question the Texas Supreme Court had left open regarding the duty of co-insurers to respond to a settlement demand that exceeds their individual limits but is within their proportionate limits.

A. Settlements, Assignments & Covenants Not to Execute

The Fifth Circuit allowed a liability insurer to intervene and pursue an appeal upon an adverse judgment against its insured, even after the insured fired his defense lawyers, withdrew his notice of appeal, and assigned his insurance claims to the plaintiffs. *Ross v. Marshall*, 426 F.3d 745 (5th Cir. 2005). Wayne Mathews and some college buddies, after drinking, decided to build a cross and set it on fire in the yard of an African-American family, the Rosses. Among others, the Rosses sued Wayne's father, Kent Mathews, for negligently entrusting the use of his property to his son, and the court found Kent vicariously liable based on a jury finding that Kent's son was his agent.

The Fifth Circuit held that the insurer was entitled to intervene under Fed. R. Civ. P. 24 because the motion was timely, the insurer had a direct interest in setting aside the judgment against its insured to limit its own liability, the disposition of the appeal would impair the insurer's ability to protect its interest, and the insured did not adequately represent the insurer's interests. While the court recognized the insurer could avoid liability by proving there was no coverage in the subsequent suit, the insurer also had an interest in avoiding liability by getting the judgment against the insured reversed.

After allowing the intervention, the court did just that—it reversed the judgment against the insured, finding that the son's conduct was outside the scope of any agency relationship with his father.

VII. THIRD PARTY THEORIES OF LIABILITY

A. Prompt Payment of Claims

In a divided opinion, the San Antonio Court of Appeals joined the Dallas court in holding that the prompt payment of claims statute does not apply to a claim for defense costs under a liability policy. The court reasoned that the statute only applies to "first party" claims and that an insurer's refusal to provide a defense or to reimburse defense costs is not a first party claim. *Service Lloyd's Ins. Co. v. J.C. Wink, Inc.*, ___ S.W.3d ___, 2005 WL 2438350 (Tex. App.–San Antonio, Oct. 5, 2005, no pet.). The court recognized numerous decisions reaching the opposite conclusion, but agreed with the Dallas Court of Appeals. The dissenting justice would have joined the other decisions applying the statute to a claim for defense.

In *Lamar Homes, Inc. v. Mid-Continent Casualty Co.*, 428 F.3d 193 (5th Cir. 2005), the court certified to the Texas Supreme Court the question whether the prompt payment of claims statute applies to a liability insurer's breach of its duty to defend. The Fifth Circuit noted the split of decisions on the issue.

Another federal district court concluded that the prompt payment statute does apply to a demand for a defense under a liability policy. *RX.com, Inc. v. Hartford Fire Ins. Co.*, 364 F. Supp.2d 609 (S.D. Tex. 2005). The court noted that at least ten other federal courts have reached this conclusion, although a minority of Texas courts has reached the opposite result. The court concluded, first, that a demand for a defense is a first party claim because it is owed to the insured. Second, the court held that it was also a claim that had to be paid "directly to the insured." Finally, the court rejected the argument that the statute was unworkable as applied to claims for a defense. Obviously, the ten other courts found the statute to be workable. The court made an "*Erie*-guess" that the Texas Supreme Court would apply the statute to insureds' demand for a defense.

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

The phone company had a contractual duty to indemnify and provide insurance coverage for a convenience store to protect it against a wrongful death suit arising from the placement of a pay phone at the store. Although the phone company breached these obligations, it could not be held liable for bad faith as an insurance company. *Coastal Mart, Inc. v. Southwestern Bell Tel. Co.*, 154 S.W.3d 839 (Tex. App.–Corpus Christi 2005, pet. filed).

VIII. SUITS BY INSURERS

A. Reimbursement by Insured

The Texas Supreme Court held in *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, ___ S.W.3d ___, 2005 WL 1252321 (Tex. 2005), that in certain circumstances an insurer may settle a liability claim and then seek reimbursement from the insured if the loss was not covered, even without the insured expressly agreeing to a right to seek reimbursement. In *Frank's Casing*, both the insured and the excess insurer agreed the case ought to be settled for the plaintiff's $7.5 million demand. The insured demanded that the excess insurer accept the offer but would not agree that the insurer could seek reimbursement. The insurer settled, advising the insured it would seek reimbursement anyway.

The court distinguished its prior decision in *Texas Ass'n of County Gov't Risk Mgm't Pool v. Matagorda County*, 52 S.W.3d 128 (Tex. 2000), where the court expressed the concern that, when the insurer settles and seeks reimbursement, "the insured is forced to choose between rejecting a settlement within policy limits or accepting a possible financial obligation to pay an amount that may be beyond its means, at a time when the insured is most vulnerable." The court concluded that this concern is reduced or eliminated:

2) when an insured has demanded that its insurer accept a settlement offer that is within policy limits, or

3) when an insured expressly agrees that the settlement offer should be accepted.

52 S.W.3d 128 (Tex. 2005).

The court concluded that in these situations the insurer has a right to be reimbursed if it has timely asserted a reservation of rights, has notified the insured it intends to seek reimbursement, and has paid to settle claims that were not covered.

The court reasoned that under *Stowers* an insurer has a duty to accept an offer within the policy limits when the demand is a reasonable one. Further, the court reasoned that, when there is a coverage dispute and the insured demands that the insurer accept a

settlement offer, the insured is deemed to have viewed the demand as a reasonable one. The court held that the reasonableness of the settlement offer is not judged by whether the insured has no assets or substantial assets, nor by the policy limits, but instead is an objective assessment of the insured's potential liability.

Finally, the court "clarified" its prior *Matagorda County* decision to hold that the insurer's right to reimbursement is quasi-contractual and exists even when there is no express agreement that there is a right to reimbursement.

Justice O'Neill concurred, but only because the policy contained a consent to settle clause so that the insurer could not have settled without the insured's consent. Justice O'Neill distinguished cases involving a standard automobile or homeowner's policy, where insureds do not have that right. In such cases, Justice O'Neill would not allow the insurer to seek reimbursement absent an agreement by the insured.

Justice Wainwright would hold there is no right to reimbursement absent an express agreement by the insured, but would also conclude that the insured in this case, by demanding settlement and then acquiescing to the settlement, bound itself to the condition that the insurer would seek reimbursement. Justice Wainwright reasoned that the insured had accepted the insurer's condition.

B. Subrogation

The "made-whole" doctrine barred a health insurer's claim for subrogation in *Fortis Benefits v. Cantu*, 170 S.W.3d 755 (Tex. App.–Waco 2005, pet. filed). Cantu was severely injured and recovered a settlement of $1.4 million. Her past medical expenses were $250,000, and she had two life care plans estimating her future medical expenses at $1.7 million or $5.3 million. Under the "made-whole" doctrine an insurer is not entitled to subrogation, despite a contractual provision, if the insured's loss exceeds the amount recovered from a third party that caused the loss. The court found the evidence established that Cantu's injuries exceeded the settlement.

IX. DAMAGES & OTHER ELEMENTS OF RECOVERY

A. Policy benefits

Evidence supported the jury's award of $1,000 as damages for repairs for water and mold damage. The plaintiffs offered proof of up to $242,000 in damages, and the insurer argued it had paid all that was owed. The jury award was between these two points and was sustained, even though no specific proof explained the $1,000 award. *McMillan v. State Farm Lloyds*, ___ S.W.3d ___, 2005 WL 2043847 (Tex. App.–Austin, Aug. 26, 2005, no pet.).

The *McMillan* court also sustained the jury's award of no damages for additional living expenses. The plaintiffs sought to recover mortgage payments, taxes, and insurance for eight months after they bought another house to replace the one damaged by mold. Plaintiffs argued this period of time was covered by policy language allowing additional living expenses "for the reasonable time required for your house to become settled." The insurer argued the damages were not proper because becoming settled only meant to be moved in.

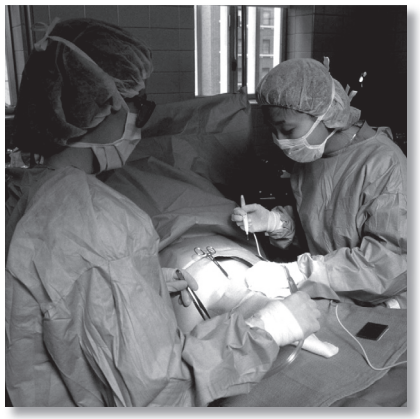
Based on the disputed evidence, the jury could determine that the "reasonable time" during which the policy provided coverage was two days or less and that the damages sought were not increases in living expenses but were expenses dedicated to the acquisition of an asset.

The *McMillan* court also found the evidence conclusively established that plaintiffs were entitled to $990 for a tarp to cover the roof to prevent further damage. The insurer admitted that the plaintiffs incurred this amount and were entitled to payment. The insurer argued that the amount had been paid. While the insurer would be entitled to a rebuttable presumption that the plaintiffs received the check, the insurer did not introduce evidence that any letter with the check was properly addressed, stamped, and mailed. Further, there was no proof that the money left the insurer's account and was received in the plaintiffs' account. Therefore, the court concluded the jury's zero award was wrong.

B. Attorney's Fees

The Austin Court of Appeals reversed a jury's refusal to award attorney's fees in *McMillan v. State Farm Lloyds*, ___ S.W.3d ___, 2005 WL 2043847 (Tex. App.–Austin, Aug. 26, 2005, no pet.). The plaintiffs ultimately recovered only $1000 in damages, and the court added another $990. The court rejected the argument that the plaintiffs' claim for attorney's fees was barred by an excessive pre-suit demand. The court recognized that if a claimant makes an excessive pre-suit demand and will not take a lesser amount, the claimant is not entitled to attorney's fees expended in litigation thereafter. However, the insurer failed to prove the plaintiffs would not have taken a lesser amount. The fact that the verdict was smaller than the plaintiffs' demand did not show the demand was unreasonable. Even though there was proof that some amount of fees would be reasonable, the amount was not conclusively established, and the court had awarded additional damages the jury declined to award. Therefore, the attorney fee issue was remanded.

In *DeLaGarza v. State Farm Mut. Auto. Ins. Co.*, 175 S.W.3d 29 (Tex. App.–Dallas 2005, no pet. h.), the court held that an insured seeking underinsured motorists benefits could not recover attorney's fees for breach of contract, where he never established the insurer's liability, even though the insurer tendered the balance of the policy benefits after suit was filed. The court concluded there was no "just amount owed," so there was no failure to tender that amount.



An insured that successfully sued for breach of contract was entitled to recover some pre-lawsuit fees. Otherwise, the court reasoned, a party could never recover fees for researching and drafting a complaint. However, the insured was not entitled to recover fees associated with the pre-lawsuit appraisal and claim process because the contract provided for this process. Also, the insured could not recover fees related to a pre-lawsuit mediation because the policy required cooperation. *Finger Furniture Co. v. Commonwealth Ins. Co.*, 404 F.3d 312 (5th Cir. 2005).

The court rejected the argument that the insured's fees were excessive merely because they exceeded the amount of the insurance company's fees. While a number of factors go into the determination of a reasonable fee, the fact that the award exceeds the amount billed by the other party "is not determinative."

X. DEFENSES & COUNTERCLAIMS

A. Appraisal Award

A trial court abused its discretion by failing to enforce a homeowner's policy appraisal provision in *In re State Farm Lloyds, Inc.*, 170 S.W.3d 629 (Tex. App.–El Paso 2005, orig. proc.). The court rejected the argument that the insurer waived its right to demand an appraisal. The insured argued waiver based on the

insurer's failure to comply with policy provisions requiring it to request a sworn proof of loss, to notify the insured whether it was accepting or rejecting the claim, and to give the insured reasons. The court found no evidence of any of these breaches by the insurer, but held that even if there were such evidence, this would not show intent to relinquish the right to demand an appraisal.

B. Arbitration

An arbitration clause in an agreement between a nursing home and its patient was void where it did not comply with the provisions of former Tex. Rev. Civ. Stat. article 4590i, section 15.01(a). In a case of first impression, the court held the Federal Arbitration Act did not apply because the entirety of article 4590i was enacted for the purpose of regulating the business of insurance and thus was protected from federal preemption by the McCarran-Ferguson Act. *In re Kepka*, ___ S.W.3d ___, 2005 WL 1777996 (Tex. App.–Houston [1st Dist.], July 28, 2005, orig. proc.).

C. Breach of Policy Condition by Insured

The Fifth Circuit held that an insured breached a policy condition requiring prompt notice, as a matter of law, by waiting six years after a hail storm to give the insurer notice of the claim. The evidence showed significant damage at the time of the storm that should have put the insured on notice that there might be roof damage. *Ridglea Estate Condo. Ass'n v. Lexington Ins. Co.*, 415 F.3d 474 (5th Cir. 2005). The court rejected the insured's argument that the prompt notice requirement violated section 16.071 of the Tex. Civ. Prac. & Rem. Code, which voids any contract provision requiring "notice of a claim for damages" within less than ninety days. The court distinguished notice of a claim as being different from a claim for damages.

Significantly, the *Ridglea* court held that the insurer had to show it was prejudiced by the insured's failure to give prompt notice. The court predicted that, under Texas law, the prejudice requirement applies equally to all insurance policies. The court reasoned that (1) all insurance polices are contracts; (2) all contracts require a material breach to excuse nonperformance; and (3) for a breach to be material, it must prejudice the nonbreaching party in some way.

It will be interesting to see how far the courts will apply this prejudice requirement. Numerous liability insurance cases deny coverage, based on late notice, even without a showing of prejudice.

An insurer was entitled to abatement of a suit on a fire loss where the insured did not submit to an examination under oath as required by the policy. The court held that the insurer did not waive the right to demand an EUO by waiting more than fifteen days. While former article 21.55 and the contract both called for the insurer to request information within fifteen days, both the statute and the contract allowed additional requests. Further, the court found the insurer's delay in seeking the EUO until after it obtained a cause and origin report suggesting arson did not show intent to waive the requirement. *In re Foremost County Mut. Ins. Co.*, 172 S.W.3d 128 (Tex. App.–Beaumont 2005, orig. proc.).

D. Fraud by Insured

In a criminal prosecution for insurance fraud based on the insured falsely reporting her car had been stolen, the court properly introduced evidence that the car had been involved in a homicide, which was offered to show the insured's motive to get rid of the car and still be paid for it. Further, the evidence supported the conviction for insurance fraud, where the insured submitted a proof of loss, made supporting statements to the adjuster, and asked for the actual cash value for the car, even though she did not state a specific dollar amount. *Nguyen v. State*, 177 S.W.3d 659(Tex. App.–Houston [1st Dist.], 2005, no pet.).

A court properly granted a directed verdict against the insurer on its claim of fraud by the insured, despite evidence that the insured submitted an inflated claim for hail damage. The evidence showed the claim was submitted to Aetna and that Aetna fully paid the claim and appeared to be the only insurer involved. Given these circumstances, there was no reason for the plaintiff to suppose his false statement was especially likely to reach another insurer that reimbursed half the claim. *Harris v. American Prot. Ins. Co.*, 158 S.W.3d 614 (Tex. App.–Fort Worth 2005, no pet.).

E. Lack of Notice

In *Minter v. Great Am. Ins. Co.*, 423 F.3d 460 (5th Cir. 2005), the court rejected the liability insurer's argument that it did not receive notice of the underlying tort suit until after entry of the judgment and therefore could not be liable. The insured's agent had received notice of the suit, and notice of the agent constituted notice to the principal.

The Dallas court held that a six month delay in reporting a suit seeking damages for copyright infringement breached the policy condition requiring notice as soon as practicable, even though insurer was not prejudiced by the delay. *PAJ, Inc. v. Hanover Ins. Co.*, 170 S.W.3d 258 (Tex. App.–Dallas 2005, no pet.). The court noted that Texas courts have consistently considered these clauses to be conditions precedent and have not required prejudice. While the Texas Department of Insurance adopted an endorsement requiring a showing of prejudice for other coverage, it had never adopted one for this type of coverage.

F. Lack of Actual Trial

A commercial auto liability insurer argued that it was not bound by a judgment in an underlying suit that was not the result of an "actual trial." The insurer argued that the negligent driver failed to answer discovery requests, respond to a motion for summary judgment on liability, participate in a pretrial hearing, participate in jury selection, make an opening statement, cross examine any witnesses, object to evidence, call witnesses, introduce any evidence, or make a closing argument. The insurer argued the underlying trial was not an "actual trial" because liability and damages were not vigorously litigated. The court rejected this argument because there was no evidence of collusion between the plaintiff and defendants. In addition, a codefendant did defend himself pro se and the driver as codefendant. Further, the excess insurer had notice of the suit but failed to provide a defense. The court held it is well established that a liability insurer that has notice of a suit and a duty to defend but fails to defend is bound by the judgment and is precluded from collaterally attacking it. *Minter v. Great Am. Ins. Co.*, 423 F.3d 460 (5th Cir. 2005).

G. Limitations

Limitations began to run from the date of the insurer's letter saying the claim was denied. The fact that the denial expressed a willingness to consider additional information, and that the insured later supplied an engineer's report, which the insurer did consider, did not restart limitations. *Pace v. Travelers Lloyds of Texas Ins. Co.*, 162 S.W.3d 632, (Tex. App.–Houston [14th Dist.] 2005, no pet.).

H. Preemption

ERISA preempted a claim by a deceased insured's mother, who was the policy beneficiary that the insured's wife tortiously interfered with her claim by asserting a baseless community property interest. *Haynes v. Haynes*, ___ S.W.3d ___, 2005 WL 2230405 (Tex. App.–Houston [14th Dist.], Sept. 15, 2005, no pet.). The court reasoned that the tortious interference claim

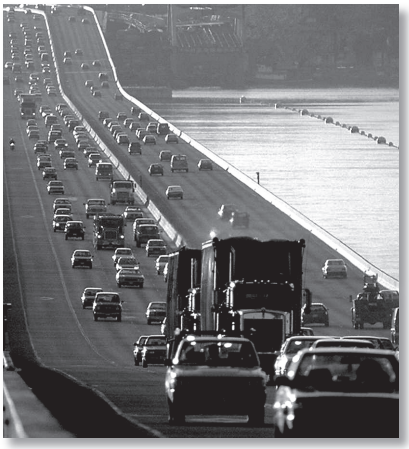
was directed at rectifying an alleged denial of benefits due under the policy, sought to decide the claim based on state tort law rather than the terms of the plan or ERISA, and sought state law compensatory and exemplary damages against the spouse that are not provided by ERISA. Therefore, the court concluded that the claim was preempted by ERISA.

The court got it wrong on the ERISA preemption issue. The spouse is not an ERISA entity, and the claim against her is not one for benefits under the plan. Perhaps the better reason for the court's result is that the beneficiary had no damages from the alleged tortious interference because she recovered the benefits from the insurer.

All state law claims relating to the handling of a flood insurance claim under the National Flood Insurance Program were preempted by federal law. The Fifth Circuit clarified its prior holdings that seemed to limit preemption and held that state law tort claims (and statutory claims) arising from claims handling on a flood insurance claim are preempted. *Wright v. Allstate Ins. Co.*, 415 F.3d 384 (5th Cir. 2005).

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

In *Ridglea Estate Condo. Ass'n v. Lexington Ins. Co.*, 415 F.3d 474 (5th Cir. 2005), the court held that an insurer did not waive the right to assert that the insured gave late notice of a claim for property damage, even though the insurer initially denied the claim, because no damage occurred during the policy period. The court determined that, under Texas Law, an insurer waives the requirement of notice when it denies the claim for other reasons prior to the notice deadline. On the other hand, an insurer does not waive the requirement when it denies coverage after the notice deadline. In this case, the insurer denied the claim after the period for giving prompt notice had expired, so the insurer did not waive its defense of late notice.



The *Ridglea* court also considered whether the insurer waived the defense of late notice by failing to state that as a reason in its letter denying the claim, as required by Tex. Ins. Code article 21.55, section 3(c). The court rejected this argument and found that the statute merely requires that an insured state the reason for its rejection of a claim. The court reasoned that four years after the statute was enacted, the Texas Supreme Court held in *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338, 340 (Tex. 1995), that it is not dispositive whether an insurer relied on a different, perhaps erroneous, reason for denying coverage.

It appears the court erred in its analysis regarding 21.55. There was no discussion of article 21.55 in the *Stoker* decision, so it is not authority for deciding whether failure to comply with the statute estops the insurer from raising additional grounds for denying the claim. Also, a review of the court of appeals decision in *Stoker* reveals that the claims occurred in 1989 – before article 21.55 was enacted. Thus, despite the short shrift given to the argument by the *Ridglea* court, there is a legitimate question whether an insurer that fails to comply with the requirement of article 21.55 to give the reasons for denying a claim can later raise additional grounds for the denial. It seems that allowing an insurer to do so frustrates the purpose of the statute and is inconsistent with the liberal construction mandate of the statute.

When an insurer told the insured it was not going to pay for any damage caused by mold, the insurer waived the requirement that the insured file an inventory of her damaged personal property. *De Laurentis v. United Serv. Auto. Ass'n*, 162 S.W.3d 714 (Tex. App.–Houston [14th Dist.] 2005, pet. granted).

On a flood insurance claim under the National Flood Insurance Program, the insurer could not be equitably estopped to assert the defense of failure to file a proof of loss. The court reasoned that claims under the National Flood Insurance Program are paid by the federal treasury and equitable estoppel cannot be used to require payment of federal funds. The court recognized that this situation may seem harsh in a case such as this where the insurer told the insured his proof of loss was acceptable. Nevertheless, the court felt bound by constitutional principles and Supreme Court authority. *Wright v. Allstate Ins. Co.*, 415 F.3d 384 (5th Cir. 2005).

A mortgage company and insurer repeatedly represented in letters, brochures, and notices that mortgage life insurance would be available "risk free" for thirty days with no check to write. When Jenkins died during the first thirty days, before the mortgage company added the premium to his monthly invoice, the insurer took the position there was no coverage because the first premium had not been paid. On these facts, the Fifth Circuit found fact issues on whether the insurer was equitably estopped to demand payment of a first premium or had waived this condition. *Monumental Life Ins. Co. v. Hayes-Jenkins*, 403 F.3d 304 (5th Cir. 2005). The court recognized the principle that waiver and estoppel cannot be used to create or extend insurance coverage. In this case, the theories were used to avoid imposition of a condition that was inconsistent with the positions the insurer had taken. The resulting coverage and risk were exactly what the insurer intended to cover by the policy it issued.

XI. PRACTICE & PROCEDURE

A. Choice of Law

A federal district court found a contract provision choosing the law of a state with no substantial relationship to the insurance dispute was unenforceable. The court stated that the law of the state that had the most significant relationship should be applied. *In re Enron Corp. Securities, Derivative & "ERISA" Litigation*, 388 F. Supp.2d 780 (S.D. Tex. 2005).

B. Jurisdiction

In a split decision, the Austin Court of Appeals held that an out-of-state preferred provider organization did not have sufficient contacts to support personal jurisdiction or general jurisdiction in Texas. *Medcost, L.L.C. v. Loiseau*, 166 S.W.3d 421 (Tex. App.–Austin 2005, no pet.). Medcost was a North Carolina PPO providing coverage to North and South Carolina insureds. It joined a larger network that also included Texas entities – the Neal entities. The Neal entities turned out to be fraudulent and went into receivership. The receiver chose to maintain jurisdiction in Texas because more people were harmed here.

The court of appeals held there were not sufficient contacts to maintain jurisdiction over Medcost. The primary act alleged against Medcost was that it had approved identification cards listing the names of the Texas entities. Even if the court accepted this as a gate-keeping function, the court found the act occurred in the Carolinas and caused harm there, not in Texas.

The court also held the only reason there was an injury in Texas, which was argued to be the receiver having to pay claims here, was because the receiver chose to file suit here. Finally, the court rejected general jurisdiction based on Medcost's website showing other ongoing contacts with Texas entities. The court

noted that the website was current at the time of the hearing and did not show Medcost's status at the time of the conduct that gave rise to the suit.

C. Venue

A school district sued its risk management pool in Duval County for indemnity for property damage which occurred in that county. The pool sought to transfer venue to Travis County based on a provision in the agreement stating that venue would be in Travis County. The fund also relied on a venue statute making such a venue clause mandatory for a "major transaction." In turn, "major transaction" was defined as one "under which a person pays or receives, or is obligated to pay or is entitled to receive, consideration with an aggregate stated value equal to or greater than $1 million." Tex. Civ. Prac. & Rem. Code § 15.020. The school district paid $42,000 in premiums in return for $17 million in coverage. The Texas Supreme Court concluded this was not a "major transaction," because the value of the consideration by the insurer was equal to the amount of premiums, not the face amount of the coverage. *In re Texas Ass'n of School Boards*, 169 S.W.3d 653 (Tex. 2005).

D. Discovery

The trial court did not abuse its discretion by declining to give spoliation of evidence instruction based on the insurer's failure to produce a witness for deposition in Austin to discuss internal operations guidelines for handling mold claims, despite the insurer's delay in producing the documents and its failure to comply with a court order. *McMillan v. State Farm Lloyds*, ___ S.W.3d ___, 2005 WL 2043847 (Tex. App.–Austin, Aug. 26, 2005, no pet.). The court of appeals noted that the trial court sanctioned the insurer $1,000 and that the insurer offered an explanation for why the witness could not attend and offered to make him otherwise available by video or by flying plaintiffs' counsel to where he was located.

E. Jury Selection

In a suit for damage caused by water and mold, the trial court did not abuse its discretion by failing to strike for cause three jurors who expressed differing levels of bias against plaintiffs' claim. *McMillan v. State Farm Lloyds*, ___ S.W.3d ___, 2005 WL 2043847 (Tex. App.–Austin, Aug. 26, 2005, no pet.). One juror said she thought that the mold crisis was very much overstated, that she was concerned the suit would raise her premiums, and that the plaintiffs had difficulty proving they should get $5 million for a house that was worth $500,000. A second juror said she could not award $5 million under any circumstances and would require higher levels of proof for mental anguish and punitive damages. A third juror said he could not award the full amount of damages requested no matter what. All three jurors, however, when questioned further, said they would listen to the evidence and apply the relevant standards of proof. The court also noted that the statements that the plaintiffs' demand far exceeded the value of the house were statements of fact, not evidence of bias.

F. Experts

In *United Serv. Auto. Ass'n v. Croft*, 175 S.W.3d 457 (Tex. App.–Dallas, Aug. 26, 2005, no pet.). the court found that expert testimony on behalf of homeowners was not conclusory and supported both the jury's finding that a plumbing leak caused foundation damage and the jury's award for repairs. This case involved Laurence Peeler, an engineer with experience in investigating foundation damage. He inspected the property, considered the insurer's expert's report, and based his conclusion that the heaving would not level out on a recognized engineering treatise. Similarly, the expert on the cost of repairing the foundation had quite a bit of experience and his price estimate was reasonable. The cost of repairs was supported by expert testimony from a witness experienced in the remodeling business who testified that leveling the house would cause damages in at least the amount that was spent on repairing cracks before leveling.

Expert testimony was required, however, to establish that a sewer leak caused mold in the plaintiffs' house. The court did not hold that expert testimony would always be required, but in this case there were alternate potential causes of the mold, and the buried sewer pipe did not leak under normal flow conditions. *Qualls v. State Farm Lloyds*, 226 F.R.D. 551 (N.D. Tex. 2005).

The *Qualls* court also held that the plaintiffs' designation of their experts was too late. Plaintiffs attempted to designate experts on causation several months after the issue was raised in the insurer's summary judgment motion, after they had been given leave to designate other fact witnesses late by assuring the court they were not experts, and after the trial date had been continued. Without plaintiffs' experts on causation, the court found that summary judgment for the insurer was proper.

G. Declaratory Judgment

Plaintiffs were properly joined as parties in a declaratory judgment suit by an insurer seeking a declaration that it had no duty to defend or indemnify. The court reasoned that, because the injured parties were third party beneficiaries of the liability insurance policy, the determination of coverage would be binding on them. *National American Ins. Co. v. Breaux*, 368 F. Supp.2d 604 (E.D. Tex. 2005).

H. Class Actions

A class action could not be maintained under the DTPA for misrepresentations related to the interest rate on a deferred annuity because individualized reliance issues predominated. *Fidelity & Guar. Life Ins. Co. v. Pina*, 165 S.W.3d 416 (Tex. App.–Corpus Christi 2005, no pet.). The court noted that under the Texas Supreme Court's decision in *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675 (Tex. 2002), it is practically impossible to ever maintain a class action when reliance is an issue, because reliance almost always requires an individualized determination. The court reasoned that, in theory, reliance may be shown by class-wide proof. In the present case, each of the three class representatives testified differently about how they relied on the representations regarding the interest rates. Thus, there would not be class-wide evidence revealing consistency in how individual members of the class relied on the misrepresentations. The court questioned whether there could ever be a class action under the DTPA based on misrepresentation, given the individualized nature of reliance.

I. Arbitration

An arbitrator had authority to dismiss a claim as untimely under the federal crop insurance policy. The court rejected the argument that the dismissal as untimely was a refusal to arbitrate. *Tucker v. Fireman's Fund Agribusiness, Inc.*, 365 F. Supp.2d 821 (S.D. Tex. 2005).

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