

# RECENT DEVELOPMENTS

## CHAPTER 33 DOES NOT APPLY TO UCC IMPLIED WARRANTY

JCW Electronics, Inc. v. Garza, 176 S.W.3d 618 (Tex.App.—Corpus Christi 2005).

**FACTS:** In 1998, the City of Port Isabel contracted with JCW Electronics, Inc (JCW) to provide telephone service for the Port Isabel City Jail. As a part of its contractual agreement with the city, JCW installed telephones in each jail cell. The following year nineteen year old Rolando Domingo Montez (Montez) was arrested and placed in a Port Isabel City Jail cell. Montez placed a number of collect calls from the jail cell phone to Pearl Iriz Garza (Garza).

Two days later Garza arrived at the city jail to retrieve Montez. While Garza waited for Montez to be released, Montez hung himself with the cord of the telephone installed in his cell. Garza filed suit against JCW on behalf of the Estate of Rolando Domingo Montez and Belinda Leigh Camacho and as “next friend” of Rolando Kadric Montez, a minor child. The suit alleged breach of express and implied warranties, strict liability, misrepresentation, and negligence. The trial court found in favor of Garza on the issues of misrepresentation, negligence, and implied warranty of fitness. The trial court also awarded damages and attorney’s fees. JCW appealed.

**HOLDING:** Affirmed with modification.

**REASONING:** The court held that the Proportionate Responsibility Statute (Chapter 33), which precluded recovery in tort by a plaintiff if he was found to be more than 50% responsible for his injury, did not apply to a judgment for breach of implied warranty of fitness for particular purpose. It pointed out that the UCC was created to be a complete framework of rights and remedies with the express purpose of governing the sale of products. The court opined that because the UCC was a complete and integrated legal framework governing the sale of products, the court must be careful not to interpret any statute to modify its rules on recovery without an express designation of that statute’s power to do so. The court emphasized that although Chapter 33 designated that it applied to tort and Deceptive Trade Practices Act claims, the statute did not address how it applied to UCC cases. Therefore, because the statute did not expressly designate that it affected recovery under the UCC, the court could not extend Chapter 33’s proportionate responsibility scheme to cover UCC article two claims.

**The UCC was created to be a complete framework of rights and remedies with the express purpose of governing the sale of products.**

## INSURANCE

### AN INSURED’S CLAIM FOR DEFENSE COSTS IS NOT A “FIRST PARTY CLAIM”

Serv. Lloyd’s Ins. Co. v. J.C. Wink, Inc., \_\_\_ S.W.3d \_\_\_ (Tex. App.—San Antonio 2005).

**FACTS:** J.C. Wink (“Wink”) was sued in a class action suit for allegedly violating the Texas Motor Vehicle Installment Sales Act (“TMVISA”). Wink was insured by Serv. Lloyd’s Ins. Co. (“SLIC”). Wink’s policy covered negligent errors and omissions. There was some dispute as to whether or not Wink’s violation of TMVISA was intentional or negligent, and as a result, SLIC refused to defend Wink. Wink sued SLIC under Article 21.55 of the Texas Insurance Code (“TIC”). TIC requires insurers to pay claims by their insured in a prompt manner, or notify the insured if more time is needed to investigate the claim.

Wink moved for declaratory judgement and the trial court granted the motion and awarded Wink attorney’s fees and damages under TIC. SLIC sought review of the declaratory judgment. The appellate court found that Article 21.55 only applies to first party claims or claims by the actual insured, and does not apply to claims against the insured by third parties.

**HOLDING:** Affirmed in part and Reversed in part.

**REASONING:** The appellate court reversed the award of attorney’s fees and damages and entered a take nothing judgement on these claims based on *TIG Ins. Co. v. Dallas Basketball, Ltd.*, 129 S.W.3d 232 (Tex. App.—Dallas 2004, pet. denied). In *Dallas*, the court found that a demand for defense is not a claim within the meaning of TIC. The TIC statute is entitled “Prompt Payment

of Claims,” and a demand for defense is not a claim for a definite sum of money for a tangible loss, which is what Article 21.55 was intended to cover. Because there was not a definitive loss, SLIC was not required to promptly provide money for Wink’s defense.

Wink additionally asserted that once it had incurred expenses in its own defense, those expenses became an insurable loss. The court found that the expense incurred by Wink in defending itself gave rise to a breach of contract claim but not to a prompt payment claim under TIC.

### A \$21 MILLION PUNITIVE AWARD IN BAD FAITH CASE WITH \$900,000 IN COMPENSATORY DAMAGES IS UNCONSTITUTIONAL

Goddard v. Farmers Ins. Co. of Oregon, 202 Or.App. 79 (Or. Ct. App. 2005).

**FACTS:** Plaintiff, Margie A. Goddard, as personal representative for the estate of Marc E. Goddard, deceased, brought an unfair claims settlement action against defendant (insurer) for damages from unsatisfied excess judgment she obtained against the insured (John Munson) in a wrongful death action. On October 29, 1987, plaintiff’s son, Marc Goddard, was killed in a collision with a pickup truck driven by Munson. Munson had an auto insurance policy issued by defendant with a policy limit of \$100,000. Defendant defended Munson in the wrongful death action. In May 1990, plaintiff, as Munson’s assignee, filed this action, asserting that defendant had acted in bad faith in defending the wrongful death claim and seeking compensatory damages in the

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amount awarded (\$863,274) to plaintiff against Munson in the wrongful death case, and also seeking \$450 million in punitive damages. The jury awarded plaintiff compensatory damages of \$863,274 and punitive damages of \$20,718,576. *Goodard v. Farmers Ins. Co. of Oregon*, 202 Or.App. 79. Defendant appealed, challenging the amount of the punitive damage award among other things. The issue was whether the punitive damage award was unconstitutionally excessive under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

**HOLDING:** Vacated and remanded

**REASONING:** Before discussing whether the punitive damage award was excessive, the court reviewed the “rational juror” standard. First, the record pertaining to the “historical facts” of the defendant’s conduct must be reviewed in the light most favorable to the plaintiff. Second, it must be determined as a matter of law that the award of punitive damages comports with due process. That is, the constitutionally prescribed “guideposts” as delineated in *State Farm Mut. Ins. v. Campbell*, 538 U.S. 408 (2003) are applied to the predicate historical facts to determine the maximum constitutionally permissible award of punitive damages. The three guideposts are: 1) the degree of reprehensibility of the defendant’s misconduct; 2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and 3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Guidepost one: this case involved only economic, not physical injury and that defendant’s conduct did not implicate any disregard of the health and safety of others. However, Munson’s financial vulnerability is material to the assessment of reprehensibility and exacerbates defendant’s punitive liability. Also, defendant’s conduct here was manifestly malicious and deceitful. Guidepost two: three post-*State Farm Mut. Ins.* cases, all involving significant personal injury or death and a substantial threat to the health and safety of the consuming public, have fixed constitutionally permissible punitive damages at a ratio of 4:1 or greater. There was no personal injury or death in this case. Guidepost three: although the injury here was purely economic, defendant’s conduct was far more reprehensible than the Court found in *State Farm Mut. Ins.* Nor was this an isolated incident. On balance, the egregiously unethical character of defendant’s conduct justified a proportionately greater award of punitive damages than the 1:1 ratio. Conversely, the lack of serious physical injury or disregard for the health and safety of the consuming public dictates a proportionately lower award of 4:1. Accordingly, a 3:1 (three times the compensatory damage award) ratio of punitive damages to compensatory damages in this case comports with due process.

## NURSING HOME RESIDENT’S CLAIMS ARE CAUSES OF ACTION FOR DEPARTURES FROM ACCEPTED STANDARDS OF PROFESSIONAL HEALTH CARE AND SAFETY SUBJECT TO THE MEDICAL LIABILITY INSURANCE IMPROVEMENT ACT

*Diversicare General Partner, Inc. v. Rubio*, \_\_\_\_ S.W.3d \_\_\_\_ (Tex. 2005).

**FACTS:** Maria Rubio (“Rubio”) was a resident of Goliad Manor nursing home. She suffered from Senile Dementia that rendered

her mentally incapacitated for the duration of her residency at Goliad. Rubio’s daughter, Mary Holcomb, brought suit on Rubio’s behalf against Diversicare General Partner, Inc. and others for negligence for injuries Rubio sustained in two separate falls. She later amended her complaint to include damages arising from an alleged failure to protect Rubio from sexual abuse and assault by another resident based on findings that a nurse had entered Rubio’s room and discovered a resident straddling Rubio on the bed. Diversicare moved for summary judgment on all of Rubio’s claims arising from the alleged sexual assaults, arguing that the Medical Liability and Insurance Improvement Act’s (“MLIIA”) two-year statute of limitations barred recovery on the claims. Rubio resisted this claim and argued that because her claims were not health care liability claims under the MLIIA, they were governed by the general statute of limitations for personal injury claims, which tolls the statute of limitations due to mental incapacity.

The district court severed all the claims arising from the assaults and granted Diversicare’s motion for summary judgment. The court of appeals reversed. It held that Rubio’s claims arising from the alleged assaults were claims for common law negligence and were not covered by the MLIIA. Diversicare petitioned for review.

**HOLDING:** Reversed and rendered.

**REASONING:** The court rejected the contention that Rubio’s claim was for premises liability based on ordinary negligence, and argued that this would lower the standard from professional to ordinary care for residents in health care facilities under similar circumstances. Accordingly, the court agreed with Diversicare that the Legislature broadly defined health care liability claim in the MLIIA, and this definition included Rubio’s claims. In the MLIIA, the Legislature modified the liability laws relating to health care claims to address what the Legislature described as a medical crisis in Texas.

The court further noted, the Legislature instituted heightened requirements for filing and maintaining lawsuits that asserted professional liability claims against health care providers, shortened statute of limitations and restricted tolling for such claims, and capped certain types of damages recoverable from these lawsuits. It concluded that Rubio’s causes of action are claims for breaches of the standard of care for a health care provider because the supervision of Rubio and the patient who assaulted her and the protection of Rubio are inseparable from the health care and nursing services provided her. The court reasoned that the supervision and monitoring of Rubio and other nursing home residents and nursing services provided to Rubio by Diversicare’s staff were part of her health care. As a result, Rubio’s claims were covered by the MLIIA and thus her claims were barred by statute of limitations prescribed in Tex. Rev. Civ. Stat. art. 4590i, Section 10.01.

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