communicate by telephone. The court reasoned that a call subject to the TCPA occurs when the caller has made an attempt to communicate by telephone, even if the attempt does not present the potential for a two-way voice intercommunication. Therefore, a text message may constitute a call subject to the TCPA if the other requirements of the statute are met.

Congress prohibited calls made using "any automatic telephone dialing system." Congress described such a system in functional terms: "equipment which has the capacity - - (A) to store or produce telephone numbers to be called . . . and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). This wording demonstrated Congress anticipated the TCPA would be applied to advances in automatic telephone dialing technology. Acacia took advantage of Internet-to-phone SMS technology - technology that guaranteed its computer generated text messages would be delivered to Joffe's cellular telephone. By pairing its computers with SMS technology, Acacia did what the TCPA prohibits. It used an automatic telephone dialing system to call a telephone number assigned to a cellular telephone.

Congress prohibited calls made using "any automatic telephone dialing system."

INSURANCE

INSURER CAN INTERVENE IN CASE FOR FIRST TIME ON APPEAL

In re Lumbermens Mut. Cas. Co., 184 S.W.3d 718 (Tex. 2006).

FACTS: Cudd Pressure Control ("Cudd"), an oil well servicing company, entered into a Master Service Agreement ("MSA") contract with Sonat Exploration Company ("Sonat") to provide well servicing. The contract provided that Cudd and Sonat would defend and indemnify each other for claims brought by their respective employees. The contract also contained language requiring Cudd to provide insurance coverage to Sonat. Lumbermens Mutual Casualty Company ("Lumbermens") was Cudd's excess-liability insurer at the time the parties entered into the MSA contract.

In 1998, an explosion occurred during Cudd's operations for Sonat. The explosion killed seven people including four Cudd employees and seriously injured three others. Cudd employees and their families brought personal injury and wrongful death lawsuits in Texas against Cudd and Sonat. Cudd refused to indemnify Sonat and Lumbermens refused to provide coverage to Sonat. Sonat filed a cross-claim against Cudd for indemnity for the lawsuits, and the indemnity cross-claim was severed into a separate action. Sonat also filed a breach of contract action against Lumbermens and Cudd claiming that it was an additional insuree under Cudd's policy and, alternatively, that Cudd had breached a contractual obligation to procure insurance coverage for Sonat.

Sonat eventually settled the personal injury suits and the underlying indemnity action proceeded. One of the issues presented was whether Louisiana or Texas law applied to the indemnity claim. This issue was considered dispositive because under Louisiana law, the contract's indemnity provision was void, but was valid under Texas law. The trial court granted partial summary judgment in Sonat's favor, holding that Texas law applied and as a result, Sonat was entitled to indemnity for damages it had paid to settle the Cudd employees' lawsuits. The case went to trial to determine damages only, and a jury returned a verdict in favor of Sonat for $20.7 million. Cudd then filed a notice of appeal and Lumbermens posted a bond in the amount of $29 million on Cudd's behalf.

After perfecting its appeal in the indemnity case, Cudd and Sonat entered into an agreement under which Cudd agreed to forgo any further challenge to the trial court's choice of law ruling and Sonat agreed to nonsuit its breach of contract claim against Cudd. Two days later, Cudd filed its appellate brief in the indemnity appeal, which did not raise the choice of law issue. Ten weeks after Cudd filed its appellate brief, Lumbermens sought leave to intervene in the court of appeals in order to preserve the choice of law issue. The court of appeals denied Lumbermens' motion.

HOLDING: Reversed.

REASONING: The court concluded Lumberman should have been allowed to intervene and participate in the appeal pursuant to the virtual representation doctrine. The court dsicussed two cases in which it had previously determined that a person or entity who was not a named party in the trial court may pursue an appeal in order to vindicate important rights. *Motor Vehicle Bd. of Tex. v. El Pas Indep. Auto. Dealers Ass'n*, 1 S.W.3d 108 (Tex. 1999); *City of San Benito v. Rio Grande Valley Gas Co.,* 109 S.W.3d 750 (Tex. 2003). The court disagreed with Sonat's contention that Cudd and Lumbermens' identity of interest had diverged. The court believed that the identity of interest upon which the virtual representation doctrine turned was related to protecting the funds that the underlying judgment put at risk. That different legal theories could be asserted to defend those funds did not defeat the identity of interest and did not result in a conflict between Cudd's and Lumbermens' interests.

Sonat argued that Lumbermens should not be allowed to invoke the virtual-representation doctrine because Lumbermens could ultimately avoid coverage or the judgment by invoking a non-cooperation clause in Cudd's policy. The court thought Sonat's argument was irrelevant, stating that even if Lumbermens could eventually recoup the amount it had pledged through a potential coverage suit against Cudd, its obligation to pay the underlying judgment to Sonat was immediate and binding in the event that Cudd's appeal was unsuccessful.

The court noted that virtual representation was best understood as an equitable theory rather than as a crisp rule of law, and that a party's status as a virtual representative of a nonparty must be determined on a case by case basis. As a result, the court addressed the timing consideration as related to the intervention. Sonat contended that Lumbermens' intervention should have been denied because Lumbermen attempted to intervene after the final judgment. The court, however, held that Lumbermens

did not have a reason to intervene before the final judgment, because Cudd did not abandon the choice of law issue until it filed its appellate brief. Lumbermans should have been allowed to intervene and participate in the appeal pursuant to the virtual representation doctrine.

UNBROKEN CHAIN OF EVENTS WITH A CLEARLY DEFINABLE BEGINNING AND ENDING, OCCURRING IN A CONTINUOUS SEQUENCE, IS "ACTUAL PHYSICAL CONTACT"

Elchehimi v. Nationwide Ins. Co., 183 S.W.3d 833 (Tex. App. —Waco 2005).

FACTS: Elchehimi was involved in an accident in which wheels broke loose from a tractor trailer and struck Elchehimi's vehicle. Elchehimi sought to recover for the resulting injuries under the uninsured motorist provisions of his automobile insurance policy provided by Nationwide Insurance Company ("Nationwide"). The trial court granted summary judgment in favor of the Nationwide. Elchehimi then filed this appeal and argued there was a genuine issue of material fact as to whether the incident constituted "actual physical contact" as required under Article 5.06-1(2)(d) of the Texas Insurance Code.
HOLDING: Reversed and remanded.
REASONING: According to Article 5.06-1(2)(d) of the Texas Insurance Code, uninsured motorist coverage only extends to instances of "actual physical contact" with a vehicle owned or operated by an unknown person. Texas courts have interpreted the statute to exclude situations involving cargo that fell from an unknown vehicle. In *Smith v. Nationwide Mut. Ins. Co.,* No. 04-02-00646-CV, 2003 WL 21391534 (Tex.App.—San Antonio June 18, 2003), the court rejected coverage for a collision with an integral part of an unidentified vehicle. The court in the instant case distinguished *Smith*, however, for failing to adequately consider the distinction between cargo which has fallen from an unidentified vehicle and an integral part of an unidentified vehicle which strikes an insured's vehicle in an unbroken chain of events.

The court looked to other states with similar provisions. Of the thirteen states with "physical contact" requirements, nine allow coverage for collisions with an "integral part" of an unidentified vehicle. Of these, six also require temporal proximity. Of the seven states with "actual physical contact" requirements, five have addressed this issue and allow coverage for collisions with vehicular components. In states that allow "physical contact" restrictions via insurance policy provisions, half have interpreted such policies to include coverage for circumstances similar to the present case.

A clear majority of those states that required physical contact and have addressed circumstances similar to the present case require coverage. A few others likely would, and those states which allow a physical contact requirement absent a statute, likely would allow coverage. The court found this majority position persuasive. Thus, the court held an unbroken chain of events with a clearly definable beginning and ending, occurring in a continuous sequence, is "actual physical contact."

LAWYER UNABLE TO COLLECT PORTION OF CLIENT'S POST-JUDGMENT DISABILITY BENEFITS

Wampold v. E. Eric Guirard and Assocs., 442 F.3d 269 (5th Cir. 2006).

FACTS: Mervin Wampold hired attorney Thomas Pittenger to represent him in a suit against his insurance provider for denial of disability payments. Wampold agreed to the terms of Pittenger's standard form contingency contract, entitling Pittenger to "an undivided vested interest in [Wampold's] claim, to be paid from the gross proceeds of recovery." The contract did not mention whether Pittenger would recover a portion of future, post-judgment disability payments.

The jury returned a verdict in Wampold's favor and determined he was entitled to monthly disability benefits for as long as he was disabled. The district court also awarded Wampold a penalty and attorneys' fees. In accordance with the contingency contract, Pittenger received one third of that amount. Months later, Pittenger brought suit against Wampold, claiming he was entitled to a percentage of Wampold's future post-judgment payments. The district court held the term "gross proceeds of recovery" did not include future disability benefits, and granted Wampold's motion for summary judgment.

The court determined that Louisiana law required any ambiguity in a contingency-fee agreement to be construed against the attorney.

HOLDING: Affirmed.
REASONING: The court agreed with the district court's determination that the phrase "gross proceeds of recovery" did not include recovery of future, post-judgment monthly disability benefits. In making this determination, the court looked at three factors: (1) the unambiguous language of the contingency agreement; (2) Louisiana's statutory rules of construction; and (3) the Rules of Professional Conduct. In addressing these factors, the court first referred to the terms "gross proceeds" and "recovery" and concluded that "gross proceeds of recovery" was limited to money received by Wampold as a result of the judgment. Second, the court determined that Louisiana law required any ambiguity in a contingency-fee agreement to be construed against the attorney. Third, Louisiana's Rules of Professional Conduct imposed a heightened specificity standard for contingency fee agreements. Under that standard, if Pittenger intended to receive a portion of Wampold's monthly disability payment, the attorney-client agreement should have been more specific.

NO DAMAGES ARE RECOVERABLE WHEN DEFENDANT'S TENDER PRIOR TO SUIT EXCEED THE AMOUNT OF DAMAGES

A CONSUMER MUST RECOVER DAMAGES TO RECEIVE ATTORNEY'S FEES

Fire Ins. Exch. v. Sullivan, ____ S.W.3d ____(Tex.App.-Hous.[14th Dist.] 2006).

FACTS: In 2001, a pipe in the attic of Clifton and Diane Sullivan's home burst. Mr. Sullivan replaced the pipe and cleaned up the water and Mrs. Sullivan reported the leak to their insurance agent, Dwight Moody of Fire Insurance Exchange ("FIE"). FIE insured the Sullivan's home under a standard Texas Homeowner's Policy. After inspecting the Sullivan's home the FIE insurance adjuster estimated the cost of repairs at less than $3,000. Concerned that the actual cost of repair would be greater than the estimate, the Sullivans obtained a second opinion. The second estimate of the cost of repairs was over $7,000.

Because the Sullivans believed that they could not afford to pay the amount the insurance would not cover, they contacted a lawyer. Despite the attorney's efforts, the Sullivans did not receive satisfactory actions from FIE. After waiting four months for FIE to take action, the Sullivans moved into a hotel due to the extent of mold growth in their home from the original and later discovered water leaks. FIE then sent another insurance adjuster out to the house, who authorized additional living expenses for the Sullivans and ordered additional testing on the mold growth in the house. As a result of the testing, two additional checks were issued to the Sullivans totaling approximately $85,000. Unsatisfied with the amount of money FIE awarded them, the Sullivans sued FIE, alleging breach of contract, bad faith, violations of the Insurance Code, and violation of Deceptive Trade Practices Act. After a jury found for the Sullivans and the trial court awarded them approximately $98,000 in damages, FIE appealed.

HOLDING: Reversed.

REASONING: After examining the jury's arrival at the appropriate amount of damages and determining that the trial court erred in calculating the damages, the court held that because the amount of money that FIE gave to the Sullivans before they went to trial exceeded the amount to which they were entitled under the jury's verdict, the Sullivans were not entitled to damages. The court reasoned that because the jury's findings that the total amount of the Sullivan's potential recovery and the amount of coverage owed under the policy was less than $62,000, recovery was not allowed because FIE had given the Sullivans almost $85,000 before they filed suit.

The court also held that the Sullivans were not entitled to attorney's fees under the DTPA or Chapter 38 of the Civil Practice and Remedies Code. FIE argued the Sullivans could not recover attorney's fees because they were not prevailing parties. The court reasoned that because the law required an entitlement to damages before attorney's fees could be recovered, and the Sullivans should have recovered no damages, they could not collect attorney's fees. Thus, because FIE had paid the Sullivans more than they were entitled to recover on their breach-of-contract and DTPA claims, the Sullivans could not recover attorney's fees under the DTPA or the Civil Practice and Remedies Code.

DEBT COLLECTION AND BANKRUPTCY

A BANKRUPTCY TRUSTEE'S PROCEEDING TO SET ASIDE THE DEBTOR'S PREFERENTIAL TRANSFERS TO STATE AGENCIES IS NOT BARRED BY SOVEREIGN IMMUNITY

Central Virginia Cmty. Coll. v. Katz, 126 S. Ct. 990 (2006).

FACTS: Petitioners are higher education institutions considered to be "arm[s] of the state" and thus entitled to sovereign immunity. Wallace Bookstores, Inc. ("Debtor"), conducted business with the petitioners before it filed for bankruptcy protection under Chapter 11 of the Bankruptcy Code in the U.S. District Court in Eastern Kentucky. Respondent Katz, the court-appointed liquidating supervisor of the estate, initiated proceedings in the bankruptcy court to recover preferential transfers made from the Debtor to the petitioners when the Debtor was insolvent. The court denied the petitioners' claims to dismiss the action based on sovereign immunity. The denial was affirmed by the district court and the Sixth Circuit based on its' prior decision that Congress had decided to abrogate states' sovereign immunity in bankruptcy proceedings. The Supreme Court granted certiorari to determine whether Congress' attempt to abrogate sovereign immunity in 11 U.S.C. § 106(a) was valid.

HOLDING: Affirmed.

REASONING: The Court noted that bankruptcy proceedings are *in rem* proceedings which, by their nature, do not implicate states' sovereignty as great as other proceedings because jurisdiction is premised on the debtor and the estate, not the creditor. *Tennessee Students' Assistance Corp. v. Hood,* 541 U.S. 440 (2004). However, Congress was given the authority through Article I, §8, cl. 4, of the Constitution to establish uniform bankruptcy laws.

In exploring the history of the Bankruptcy Clause, the Court concluded that ancillary orders, such as orders directing turnover of preferential transfers, implicated states' sovereign immunity. However, the states had agreed at the Constitutional Convention not to assert this immunity. Thus, the Framers plainly intended to give Congress power to redress injustice resulting from states' refusal to respect one another's discharge orders.

The Court stated it believed Congress' enactment of §106(a) was unnecessary to give the Bankruptcy Court jurisdiction over adversarial preferential hearings such as the present one. The Court simplified the dispute by asking whether Congress was given the authority to subject states to bankruptcy proceedings within the scope of the "Laws on the subject of Bankruptcies." Because history clearly indicated Congress was given the authority over bankruptcy laws at the Convention, the "abrogation" was a plan effectuated by the Convention, not the statute. Thus, the Court responded in the affirmative