What You "Auto" Know About Texas Auto and General Liability Policies

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I. INTRODUCTION

Texas case law with respect to the personal automobile policy has remained relatively unchanged based on the use of a standard uniform policy (the Texas Personal Auto Policy) over the past years. The Texas Legislature recently approved laws allowing carriers to submit their own policies to the Texas Insurance Commissioner for approved use. TEX. INS. CODE ANN. art. 5.06 (Vernon Supp. 2007). Under Article 5.06, "[t]he Board may approve the use of a policy form adopted by a national organization of insurance companies, or similar organization, if the form, with any endorsement to the form required and approved by the Board, provides coverage equivalent to the coverage provided by the form adopted by the Board…." former TEX. INS. CODE ANN. art. 5.06(3).

An insurance policy form or endorsement may not be delivered or issued for delivery in Texas unless the form has been filed with and approved by the Texas Insurance Commissioner. Filings must be submitted to the Texas Department of Insurance at least 60 days before the effective date of filing. An insurer may continue to use the policy forms and endorsements promulgated, approved, or adopted under Chapter 1952 (formerly Article 5.06) on notification to the commissioner in writing that the insurer will continue to use those forms. Given that carriers have the freedom to change, modify, or vary the Texas Personal Auto Policy; it is likely that more disputes may arise between an insured and its carrier over the new language. This paper will discuss recent Texas court decisions regarding the auto policy and legislative initiatives.

Additionally, the Texas Supreme Court kept the arena of insurance cases active this past year. The Texas Supreme Court is clearing out its backlog of important insurance cases, some involving additional insured coverage, construction defects, and the insurability of punitive damages. However, this paper will primarily focus on the lower court decisions from 2007 and early 2008 involving general liability policies.

II. AUTOMOBILE UPDATE

A. *Allstate Insurance Company v. Abbott* – Insurer Run Collision Shops

In February, the United States Supreme Court rejected Allstate's challenge to a Texas law that restricted insurance company ownership of auto collision repair shops. *See Allstate Ins. Co. v. Abbott*, 495 F.3d 151 (5th Cir. 2007), *cert. denied*, 2008 U.S. LEXIS 1297 (U.S., Feb. 19, 2008). Allstate sought review of its case at the Supreme Court, arguing the Texas law violates the Constitution. *See id*. The Fifth Circuit upheld the 2003 law, which barred Allstate from opening new collision repair shops. *Id*. at 168.

Allstate purchased Sterling Collision Centers in 2001, a move that gave it nationwide entry into the automobile repair business. In total, Allstate owned 15 repair shops in Texas. Portions of the Texas law restricting Allstate from participating in the business activities of those shops were rejected by a U.S. District Court. *Allstate Ins. Co. v. Abbott*, 2006 U.S. Dist. LEXIS 9342 (N.D. Tex. Mar. 9, 2006).

Allstate argued that the law, which aimed to protect smaller in-state collision repair companies from insurance industry competition, violated restrictions the Constitution placed on state regulation of interstate commerce.

"Texas in particular has legislatively shuttered its borders against interstate competition," Allstate said in its appeal. "This time, Texas targeted an intrinsically interstate initiative developed to improve the automobile accident repair business."

A United States District Court rejected Allstate's challenge, however. *Allstate Ins. Co. v. Abbott*, 2006 U.S. Dist. LEXIS 9342 (N.D. Tex., Mar. 9, 2006). The Fifth U.S. Circuit Court of Appeals in New Orleans followed suit, saying the law was "based not on domicile but on business form" and did not violate the Constitution. *Allstate Ins. Co. v. Abbott*, 495 F.3d 151 (5th Cir. 2007), *cert. denied*, 2008 U.S. LEXIS 1297 (U.S., Feb. 19, 2008).

"This court should deny the petition because the challenged law is one that relates to the 'business of insurance' and thus is not subject to scrutiny under the dormant Commerce Clause," said the Automotive Service Association and Consumer Choice in Autobody Repair. The two Texas-based advocacy groups are involved in the lawsuit and support the law restricting insurance company ownership of repair centers. *Supreme Court Rejects Allstate Challenge to Texas Repair Shop Law*, INS. J., Feb. 21, 2008, http://www.insurancejournal.com/news/southcentral/2008/02/21/87523.htm.

B. *EMCASCO Ins. Co. v. American Int'l Specialty Lines Ins. Co.* – Concurrent Causation: "Use of a Motor Vehicle"

In *EMCASCO Ins. Co. v. American Int'l Specialty Lines Ins. Co.*, 438 F.3d 519 (5th Cir.), reh'g denied, 179 F. Appx. 244 (5th Cir. 2006), the Fifth Circuit Court of Appeals analyzed the "use of a motor vehicle" under a commercial auto policy.

A mother was driving down a paved road with her young son when she skidded on a patch of slick mud, clay, and/or sand. The car swerved off the road and hit a tree, seriously injuring the mother and killing her son. The mud was tracked onto the roadway by trucks exiting a driveway from a sand pit. Both the operator of

the sandpit and owner of the property were named as defendants.

Two different policies applied to the activities at the sand pit, a commercial auto policy and a commercial general liability policy. The commercial auto carrier settled with the family involved in the accident and the CGL carrier claimed its policy coverage did not apply.

The commercial auto carrier sued the CGL carrier for subrogation, seeking to recover all or part of the $350,000 it had paid to the family. Both carriers filed for summary judgment. The district court granted the CGL carrier's motion, finding that the family's damages were covered by the commercial auto policy and were explicitly excluded under the GL policy. The court found that the mud tracked onto the public road "necessarily involved the use of motor vehicles, triggering coverage under its auto policy with the insurance carrier for the commercial auto liability policy."

The Fifth Circuit reversed the trial court's grant of summary judgment in favor of the CGL carrier and remanded for further proceedings.

As a matter of first impression in Texas, the appellate court concluded that "mud, clay, sand, or other debris tracked by a truck's tires or fallen from its cargo is incident to its use" and thus, the commercial auto policy covered the losses that followed. Next, the Fifth Circuit found that there may have been a question of fact that the washing of the mud off the unpaved roadway onto the public roadway could have been a "concurrent causation" of the accident. The court noted that the washing of mud from the unpaved roadway is covered by the GL policy because it could have independently caused the injuries. The court, applying Texas law, determined that "when two separate events, one that is excluded and one that is covered by the general liability policy, may independently have caused the accident, Texas law mandates that the general liability policy also provide coverage despite the exclusion."

C. *Walker v. Travelers Indemnity Company* -

In *Walker v. Travelers Indemnity Company*, 2008 Tex. App. LEXIS 250 (Tex. App.—Houston [14th Dist.], no pet.) (mem. op.), the insured's new car was damaged when a tree fell on it; the insurer refused to pay additional policy benefits after it paid for repairs, the insured sued for breach of contract and extra-contractual damages.

On April 13, 2002, Walker purchased a new 2003 vehicle for $39,664.20. From the date of its purchase, the automobile was insured by Travelers under a standard Texas personal automobile insurance policy ("the Policy"). On August 3, 2002, less than four months after the purchase, a tree fell on the vehicle during a rainstorm. The vehicle sustained interior and exterior damage and was towed to Independent Body Paint Shop ("Independent Body"). While Walker filed a claim with Travelers and demanded that the vehicle be totaled, Travelers determined that the vehicle could be restored and elected to repair it. Travelers initially estimated the repairs at $8,407.50 and later supplemented the estimate with an additional $8,494.58. Thus, Travelers' total damage estimate was $16,902.08, which Travelers paid to Walker. Although Independent Body performed certain repairs on the automobile, it was not restored to its pre-accident condition, and Walker requested additional policy benefits. Travelers refused and Walker sued for breach of contract and extra-contractual claims.

Walker took the vehicle to a second body shop, Guidry's Body Shop, to be inspected. Walker then invoked her right to appraisal pursuant to the terms of the Policy to resolve the dispute over the amount of the loss.

Walker chose James Walden as her appraiser, and Travelers chose Joe Conwill as its appraiser. Walden and Conwill chose J.A. "Doc" Watson as the umpire. Watson determined that the cost to repair the automobile was $25,177.52. Travelers disagreed with the $25,177.52 figure because it believed that Watson had awarded additional money that he was not authorized to award. Specifically, Travelers contended that Watson calculated the $25,177.52 figure by adding the cost of repairing the vehicle, $16,902.08, to the cost of "re-repairing" the automobile, $8,275.44. The latter sum represented the amount necessary to correct substandard work performed by Independent Body. Travelers filed a motion to strike the umpire award on the basis that Watson had awarded an additional $8,275.44 for re-repairs unrelated to the tree incident. The trial court denied the motion.

Walker argued in her summary judgment motion that Travelers breached the Policy by failing to pay additional benefits in accordance with the umpire award. Travelers argued that the Policy did not cover the additional $8,275.44 for the re-repairs; therefore, it was only liable for $16,904.08, which had been paid to Walker.

On the issue of the appraisal, the court of appeals examined Texas case law regarding appraisal methods. Appraisal awards made under the provisions of an insurance contract are binding and enforceable, and a court will indulge every reasonable presumption to sustain an appraisal award. *Franco v. Slavonic Mut. Fire Ins. Ass'n.*, 154 S.W.3d 777, 786 (Tex. App.—Houston [14th Dist.] 2004, no pet.). The effect of an appraisal provision is to estop one party from contesting the issue of damages in a suit on the insurance contract, leaving only the question of liability for the court. *Id.* Because a court indulges every reasonable presumption to sustain an appraisal award, the burden of proof is on

the party seeking to avoid the award. *Id*. There are, however, three situations in which the results of an otherwise binding appraisal may be disregarded: (1) when the award was made without authority; (2) when the award was made as a result of fraud, accident, or mistake; or (3) when the award was not in compliance with the requirements of the policy. *Id*.

Walker argued that the trial court erred by setting aside the appraisal award. The Houston Court of Appeals noted that the record reflects that the trial court did not strike the umpire award. Rather, the trial court sustained the award, comprised of current damages and the amount needed to make necessary repairs to the automobile. The trial court determined that Travelers had fully performed under the Policy by paying $16,902.08.

Appraisers have no power or authority to determine questions of coverage or liability. *See Wells v. American States Preferred Ins. Co.*, 919 S.W.2d 679, 684-85 (Tex. App.—Dallas 1996, writ denied) (holding that an appraiser's power is limited to the function of determining the money value of the property damage and, therefore, has no authority to determine questions of coverage or liability). Watson's umpire award determines loss and damages, the Policy determines coverage and liability. *See id*. Because the trial court sustained the umpire award and Travelers moved for summary judgment on the basis of coverage, the trial court did not set aside the umpire award. The court of appeals overruled Walker's argument.

Next, the court examined Walker's argument that Travelers failed to show performance of its obligation under the Policy. The relevant portions of the Policy state as follows:

> We will pay for direct and accidental loss to your covered auto . . . .
>
> . . . .
>
> Our limit of liability for loss will be the lesser of the:
>
> 1. Actual cash value of the stolen or damaged property;
>
> 2. Amount necessary to repair or replace the property with other of like kind and quality . . . .

The coverage provided by the Policy includes loss from a collision or a direct accident, with the exception of specific exclusions not relevant to Walker's loss. The Policy specifically defines collision as "the upset, or collision with another object." The necessity of re-repairs due to shoddy work does not constitute a collision as defined under the Policy. Additionally, the Court of Appeals determined that the defective work performed by Independent Body was not a direct accident under the Policy.

The court of appeals shut down Walker's argument that the loss did not include the re-repairs to her vehicle for shoddy work done by Independent Body. "As a matter of law, the Policy did not cover damages resulting from the substandard work performed by Independent Body; only damages from the fallen tree were covered by the Policy." The court determined there was sufficient summary judgment evidence that the "extent of damages incurred by the fallen tree was $16,902.08." Travelers paid that amount and there was thus full performance under the Policy. The court overruled Walker's second issue.

D. *Lopez v. Farmers Texas County Mut. Ins. Co.* – Waiving UM/UIM Coverage

In *Lopez v. Farmers Texas County Mut. Ins. Co.*, 2007 WL 703496 (Tex. App.—Texarkana 2007, no pet.), the insured, who neither spoke or read English, signed several waivers of his UM/UIM coverage with the carrier. After an accident, the insured applied for UM/UIM coverage and was denied. The insured brought suit against the carrier alleging breach of contract and bad-faith settlement practices. TEX. INS. CODE ANN. § 541.060(a)(2); TEX. BUS. & COM. CODE ANN. § 17.46 (Vernon Supp. 2006).

The insured argued that the insurance code's requirement that the insured must sign a written waiver of UM/UIM coverage to be effective did not apply to this insured because he did not understand the waivers. TEX. INS. CODE ANN. art. 5.06-1(1). The insured relied upon *Uniguard Sec. Ins. Co. v. Schafer*, 572 S.W.2d 303 (Tex. 1978), for the proposition that an insured must have some knowledge of what he is waiving or rejecting. The carrier filed for summary judgment and the trial court granted the summary judgment.

The Texarkana Court of Appeals affirmed the trial court's decision. The court held that it would not create a duty of translating or explaining waivers. The court rejected the proposition that *Schaefer* imposed a burden on the carrier to show that the insured actually understood the waiver. The court instead interpreted *Schaefer* to mean that "[a] waiver [need only] be sufficiently explicit so [that] it objectively communicates its effect as waiving or rejecting the coverage in question."

The court of appeals concluded that the insured's multiple signing of waivers was sufficient to create a showing that the insured had waived his UM/UIM coverage.

Recall that although Personal Injury Protection and Uninsured/Underinsured Motorists coverage must be rejected in writing if the insured does not wish to have these coverages; there are no promulgated rejection

forms from the Texas Department of Insurance. The rejection/selection forms would be internal company forms and are not required to be filed with the Texas Department of Insurance.

E. *Kelley v. Progressive County Mut. Ins. Co.* – Stacking Multiple Policies

In *Kelley v. Progressive County Mut. Ins. Co.*, 10-06-00263-CV, (Tex. App.—Waco 2007) (unpublished opinion), Progressive County Mutual Insurance Company and Regan Kelley disputed the stacking of insurance policies. While riding her horse, Kelley suffered injuries as a result of being struck by a motorist. Kelley made a claim with Progressive for underinsured benefits under a policy issued to her father. Kelley received $100,000 from the motorist's insurance carrier, and Progressive paid the policy limits of $500,025 to Kelley. Kelley requested further payment under an alleged second policy. When Progressive refused to make further payments, Kelley sued Progressive for breach of contract and Insurance Code violations. Progressive sued Kelley seeking a declaratory judgment that it was required to pay the maximum amount under only one policy and that stacking was prohibited. These two suits were consolidated. Progressive and Kelley filed competing summary judgment motions. The trial court granted Progressive's motion, denied Kelley's, and dismissed the case. In two issues, Kelley argued that the trial court erred by granting Progressive's motion and denying her motion because: Progressive issued two separate insurance policies; and (2) the two policies may be stacked. The Waco Court of Appeals reversed and rendered in part and reversed and remanded in part.

Kelley argued that Progressive issued two "separate and distinct policies" that she was entitled to stack.

"Stacking" constitutes the "aggregation of multiple insurance coverages to cover the insured's loss." *Upshaw v. Trinity Cos.*, 842 S.W.2d 631, 632 n.1 (Tex. 1992). An insured may "stack" multiple insurance policies providing for uninsured/underinsured motorists coverage. *See Stracener v. United Servs. Auto. Assoc.*,777 S.W.2d 378, 382-83 (Tex. 1989); *Am. Motorists Ins. Co. v. Briggs*, 514 S.W.2d 233, 236 (Tex. 1974).

Progressive issued a policy to James Kelley to insure four vehicles. Progressive later insured a fifth vehicle on a separate declarations page. These two documents bear different coverage dates and policy numbers, require payment of different premiums, and insure different vehicles and drivers. According to the affidavit of Debra Henry, Progressive's litigation underwriting specialist, Progressive's computer software provides space for only four vehicles on a declarations page. In order to add a fifth vehicle, Progressive was required to split the policies and issue a second declarations page with a different policy number. Henry stated that Progressive did not charge a separate policy fee as it would have been entitled to do had two policies been issued and gave a multi-car discount for the fifth vehicle, which it would not have done had it issued a separate policy. Thus, Progressive maintains that, even though there are two policy numbers and two declarations pages, only one policy existed.

Progressive relied on *Allstate Insurance Co. v. Zellars* and *Monroe v. Government Employees Insurance Co.* to support its position. *See* 462 S.W.2d 550 (Tex. 1970). In *Zellars*, Allstate issued separate renewal certificates in the amount of $5,000 for each of Zellars' vehicles and charged separate premiums for each vehicle. *Id*. at 554. The Supreme Court rejected the contention that this amounted to the issuance of two insurance policies. *Id*. at 555. In *Monroe*, the First Court, in reliance on *Zellars*, rejected the contention that a "policy should be construed as two separate policies because there are `separate Declaration Sheets . . . used in the policy' concerning each vehicle." 845 S.W.2d 394, 397-99 (Tex. App.—Houston [1st Dist.] 1992, writ denied).

The Waco Court of Appeals agreed that separate premiums and declarations pages do not, standing alone, establish the existence of two policies. *See Zellars*, 462 S.W.2d at 555; *Monroe*, 845 S.W.2d at 397-99. However, the court noted that neither *Monroe* nor *Zellars* discussed the existence of separate policy numbers.

Progressive's "Product & Underwriting Guide," which provides that "policies for five or more vehicles" must be "split" into a primary policy and a secondary policy, indicates the existence of separate policies:

> ProRater will prompt you to indicate whether it is for the second policy of a "5 + car" policy. Answering "Yes" to this question will generate a multi-car discount, and will prevent a policy fee and installment fee from being charged on the second policy. Only answer "Yes" when quoting the second policy. The primary policy should be answered "No."
>
> Named Insureds must be the same on the policies to match the market classification between the policies.
>
> Named Insured's spouse (if applicable) will need to be listed on both policies.
>
> If a driver is to be excluded from coverage, the excluded driver should be

> listed and excluded on each policy. A signed exclusion is required for each policy.
>
> Financial Responsibility (FR) will be ordered for the Named Insured on each policy.
>
> ProRater will determine the market classification for each policy. The market classification on the primary policy is the true market classification since all drivers and their complete driving records are included. The market classification on the secondary policy may be different (more favorable) since only the Named Insured, spouse (if applicable) and non-chargeable incidents are listed.
>
> The "5 + Car" Bill Plan does not charge installment fees or a policy fee. It also allows multi-car discount even when the secondary policy has only one car.
>
> If a customer wants to add a fifth vehicle to the policy mid-term, you must upload a second application. Indicate in ProRater that the application is for a "5 + Car" policy. Quote the secondary policy on ProRater using the current rate revision. The existing policy may be in a different rate revision.
>
> If limits on the existing Progressive policy need to be changed, quote the new policy with revised limits.

Evaluating the guidelines, the court of appeals concluded that Progressive treats the primary and secondary policies as not one, but two separate policies with separate policy numbers. The declarations pages do not reference each other or appear to be part of a single document. The court of appeals could not determine that Progressive issued only one policy of insurance. The court sustained Kelley's first issue.

Next, Kelley argued that the two policies could be stacked and that a provision in the policy prohibiting stacking violates public policy.

Policy provisions are "invalid if they are inconsistent with express statutory requirements or purposes." *Mid-Century Ins. Co. v. Kidd*, 997 S.W.2d 265, 271-72 (Tex. 1999). The uninsured/underinsured motorist statute applies to situations in which a party is "legally entitled to recover from the person responsible for the accident but is unable to do so." *Progressive County Mut. Ins. Co. v. Sink*, 107 S.W.3d 547, 554 (Tex. 2003). The statute is intended to protect "conscientious motorists from `financial loss caused by negligent financially irresponsible motorists.'" *Stracener*, 777 S.W.2d at 382. It is "designed to place the injured claimant in a position as though a financially irresponsible motorist had been insured." *Jankowiak v. Allstate Prop. & Cas. Ins. Co.*, 201 S.W.3d 200, 210 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (citing *Kidd*, 997 S.W.2d at 272). The statute must be "construed, liberally to give full effect to the public policy which led to its enactment." *Stracener*, 777 S.W.2d at 382. A policy provision frustrates the statute's intended purpose by "limit[ing] the possibility that an injured insured can recover actual damages" or reducing protection "below the minimum [statutory] limits." *Id*. at 383; *Kidd*, 997 S.W.2d at 270, 276.

Progressive's policies state that it "will pay damages which a covered person is legally entitled to recover from the owner or operator of an uninsured motor vehicle." A vehicle is underinsured where "its limit of liability" is insufficient to "pay the full amount the covered person is legally entitled to recover as damages" or "has been reduced by payment of claims to an amount which is not enough to pay the full amount the covered person is legally entitled to recover as damages." The policies also contain a "Two or More Auto Policies" provision:

> If this policy and any other auto insurance policy issued to you by us apply to the same accident, the maximum limit of our liability under all the policies shall not exceed the highest applicable limit of liability under one policy.

Citing *Fidelity & Casualty Co. v. Gatlin*, *American Liberty Insurance Co. v. Ranzau*, *Stracener*, and *Briggs*, Kelley argued that this clause is an "other insurance" provision that "contravenes the purpose and intent of the UM Statute and is contrary to public policy."

In *Gatlin*, Margaret Gatlin was killed when the vehicle in which she was riding, owned by Mrs. James W. Talley, was struck by an uninsured motorist. *See* 470 S.W.2d 924, 925 (Tex. Civ. App.—Dallas 1971, no writ). Talley carried insurance with Republic Insurance Company, and Margaret's husband carried insurance with Fidelity & Casualty Company. *Id*. Fidelity argued that Gatlin could not recover under its policy "because of the `pro rata clause of the Republic policy' and the `excess insurance' clause" in Fidelity's policy. *Id*. at 926. The Dallas Court disagreed and held:

> (1) that our uninsured motorist statute sets a minimum amount of coverage but it does not place a limit upon the total amount of recovery so long as that amount does not exceed the amount of actual loss; (2) that where the loss exceeds the limits of one policy, the insured may proceed under other available policies; (3) and that where uninsured motorist coverage has been provided, we cannot permit an insurer to avoid its statutorily imposed liability by its insertion into the policy of a liability limiting clause which restricts the insured from receiving the benefit of that coverage.

Id. at 928.

In *Ranzau*, Paula Ranzau suffered injuries when the vehicle in which she was riding, owned by Victor Raphael, was struck by an uninsured motorist. 481 S.W.2d 793, 794-95 (Tex. 1972). Raphael carried insurance with USAA, and Paula's father carried insurance with American Liberty. *Id*. at 795. USAA paid the policy limits to Paula, but American Liberty refused payment based on an "other insurance" provision in its policy. *Id*. The Texas Supreme Court held that a provision may not "`limit the recovery of actual damages caused by an uninsured motorist:"

> The statute does not expressly or by any reasonable inference limit the recovery of actual damages to the statutory limits of required coverage for one policy in circumstances where the conditions to liability are present with respect to two policies with different insurers and insureds. This is the effect, however, of "other insurance" clauses, whether in the form of "pro-rata," "excess insurance," "excess-escape" or like clauses; one or the other insurer escapes liability, or both reduce their liability.

Id. at 797.

The court further held that "to permit one policy, or the other, to be reduced or rendered ineffective by a liability limiting clause would be to frustrate the insurance benefits which the statute sought to guarantee and which were purchased by the respective insureds." *Id*.

In *Briggs*, Thomas and JoJean Briggs suffered injuries while riding in a vehicle belonging to their employer. 514 S.W.2d at 234. The employer carried insurance with International Insurance Company and the Briggs carried insurance with American Motorists Insurance Company. *Id*. Both policies contained "other insurance" provisions. *Id*. The Briggs settled with International and won a judgment against American. *Id*. The Supreme Court held:

> [W]henever coverage exists under the uninsured motorist endorsement, the person covered has a cause of action on the policy for his actual damages to the extent of the policy limits without regard to the existence of other insurance. If coverage exists under two or more policies, liability on the policies is joint and several to the extent of plaintiff's actual damages, subject to the qualification that no insurer may be required to pay in excess of its policy limits.

Id. at 236.

In *Stracener*, the Texas Supreme Court considered two cases involving the stacking of underinsured benefits. 777 S.W.2d at 379-81. In the first case, LaDonna Stracener was killed when the car in which she was riding was struck by a vehicle driven by Robert Lampe. *Id*. at 380. Stracener was covered by four insurance policies issued by different insurers. *Id*. All the insurers settled, except USAA. *Id*. The First Court held that the Straceners could not "combine or `stack' the limits of underinsured motorist coverage under four separate insurance policies." *Id*. at 379. In the second case, Scott Hestilow was injured when the car he was driving was struck by a vehicle driven by Alvino Casarez. *Id*. at 380. A settlement was reached with Casarez's insurance carrier. *Id*. Scott's parents each carried a policy with USAA. *Id*. The Fourth Court held that "coverage may be stacked," but the "total coverage available to the beneficiary should be reduced by the limit of the tortfeasor's liability coverage." *Id*. at 379. Both *Stracener* and *Hestilow* involved clauses stating that the "limit of liability shall be reduced by the amount recovered or recoverable from, or on behalf of the owner or operator of an underinsured motor vehicle." *Id*. at 380. The Texas Supreme Court reversed *Stracener* and affirmed *Hestilow*, holding that "clauses in insurance policies which are not consistent with and do not further the purpose of article 5.06-1 [the uninsured/underinsured motorist statute] are invalid." *Id*. at 384.

The court of appeals concluded that while Texas law allows an insured to stack two or more policies to the extent of the insured's actual damages, Progressive's "Two or More Auto Policies" provision effectively

prohibits the stacking of multiple policies. *See Stracener*, 777 S.W.2d at 382-83; *Briggs*, 514 S.W.2d at 236. In doing so, this clause improperly inhibits the injured insured's ability to recover actual damages. *See Ranzau*, 481 S.W.2d at 797. This frustrates the very purpose of the statute. *See Stracener*, 777 S.W.2d at 383-84; *Jankowiak*, 201 S.W.3d at 212 (finding "limiting provisions" invalid to the extent they "provide less than the statutory minimum amount of coverage" or "limit a covered person's recovery of actual damages"). Accordingly, we conclude that the "Two or More Auto Policies" clause is inconsistent with the uninsured/underinsured motorist statute and is invalid. *See Stracener*, 777 S.W.2d at 384; *Jankowiak*, 201 S.W.3d at 212. Kelley's second issue is sustained.

The court of appeals determined that because Kelley established as a matter of law that Progressive issued two separate policies of insurance and that Progressive's "Two or More Auto Policies" provision violated public policy, the appellate court reversed the trial court's judgment and rendered judgment that Kelley was entitled to recover under the second policy to the extent of her actual damages. The appellate court remanded the case to the trial court for further proceedings.

F. *Jenkins v. State & County Mutual Fire Insurance Company* – Who Is an Insured

Garry Jenkins sought a reversal of the trial court's order granting summary judgment against him. *Jenkins v. State & County Mutual Fire Ins. Co.*, 2-06-067-CV (Tex. App.—Fort Worth 2007) (mem. op.) (unpublished opinion).

In 1997, Jenkins' foot was crushed when he and Mark Lemmon, hired as independent contractors, moved oilfield equipment for L & G Pipe. Mark drove the truck that was covered by the automobile insurance policy issued by State & County to Deborah Grisamer. When Mark abruptly stopped the truck, the 2,000 pound tank skid he carried on the truck's winch dropped on Appellant's foot. Jenkins sued Mark, individually and d/b/a M & T Trucking, L & G Pipe, and L & G Pipe's owners, Deborah Grisamer and her husband, Richard Lemmon. Mark is Richard's brother.

In a severed action in May 2003, the jury found no liability for L & G Pipe, Deborah, or Richard; it placed full liability on Mark.

The parties disputed whether Mark was an insured under the State & County policy. Jenkins filed this suit, claiming that Mark was a covered driver under the policy. In its motion for summary judgment, State & County argued in a single ground that although the policy listed the truck as a "covered auto," Mark did not qualify as an "insured" under the policy's terms, so, as a matter of law, the policy afforded no coverage for Jenkins' default judgment claim against Mark.

The policy terms at issue are found in Section II, Liability Coverage:

> A. COVERAGE: We will pay all sums an insured legally must pay as damages because of bodily injury or property damage to which this insurance applies, caused by an accident and resulting from the ownership, maintenance or use of a covered auto. . . . We have no duty to defend suits for bodily injury or property damage not covered by this Coverage Form. . . .
>
> 1. WHO IS AN INSURED: The following are insureds:
>
> a. You for any covered auto. The policy defines "you" and "your" as referring to the Named Insured, in this case, Deborah
>
> b. Anyone else while using with your permission a covered auto you own, hire or borrow . . . .

State & County asserted that it was entitled to summary judgment because the truck was owned by Mark, and was not owned, hired, or borrowed by Deborah, the named insured; therefore, Mark was not an "insured" under the policy's terms. State & County submitted as summary judgment evidence certified excerpts from the trial of the prior suit, a certified copy of the truck's title and registration records listing Mark as the truck's owner, a copy of the default judgment rendered against Mark, a certified copy of the policy, and a copy of the final judgment rendered on the jury verdict in the prior suit on behalf of Deborah, Richard, and L & G Pipe. The trial court granted State & County's motion for summary judgment.

The court of appeals examined whether summary judgment was appropriate. The court examined the policy itself as well as the policy language. The court determined that the two-page policy application was a part of the policy because it was placed immediately before the last page of the policy. *See Odom v. Ins. Co. of State of Pa.*, 455 S.W.2d 195, 199 (Tex. 1970) (stating that when an application for insurance is attached to and made a part of the policy and is accepted and retained by the insured, the insured is conclusively presumed to have knowledge of its contents and to have ratified any false statements therein).

When terms are defined in an insurance policy, those definitions control. *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 823 (Tex. 1997). An insurance policy's terms are unambiguous as a matter of law if a court can give disputed words and phrases a

definite legal meaning. *See Progressive County Mut. Ins. Co. v. Sink*, 107 S.W.3d 547, 551 (Tex. 2003). Here, the policy defines "insured," in Section II(A)(1), subsections (a) through (c). However, not all of the terms within that definition of "insured," specifically, "own," "hire," or "borrow," within subsection (b), are defined.

The right to possession and the power to control the use of the auto determines the auto's ownership for insurance coverage purposes. *See Gulf Ins. Co. v. Bobo*, 595 S.W.2d 847, 848 (Tex. 1980). State & County attempted to establish through both Richard's and Jenkins' prior trial testimony and the truck's title and registration that Mark was the truck's owner. Richard did testify at the prior trial that Mark owned the truck and that neither he, L & G, nor Deborah ever owned the truck. But Richard also provided the other testimony with regard to Plaintiff's Exhibit 1, a copy of the policy application admitted at the prior trial.

> Q I show you what's been marked in evidence as Plaintiff`s Exhibit 1 and admitted this morning. The first page shows that there's an International tractor on the schedule of autos, right?
>
> A Yes, that's correct.
>
> Q And this is for Deborah Grisamer up here the name?
>
> A That's correct.
>
> Q That's your wife?
>
> A That's correct.
>
> Q On the second page of Exhibit 1 we have her signature in three places . . . , right?
>
> A Yes, that's right.
>
> Q On the second page we have a number of vehicles owned. We list two, right?(fn7)
>
> A That's correct.
>
> Q The two on the first page of Exhibit 1 being the International truck that was involved in this accident, right?(fn8)
>
> A That's what it says.
>
> Q The name of drivers on the truck owned by Deborah Grisamer and L & G Pipe would show Mark Lemmon, right?
>
> A That's what it says . . .
>
> Q But on this certificate it shows that you owned the truck, L & G owned the truck?
>
> A That policy is not in my name. . . . It's in Deborah's name. She signed the application.
>
> Q And she says on this certificate that the International truck was owned by her?
>
> A That's what it says.

Richard did not testify at all with regard to whether he, Deborah, or L & G had the right to possession and the power to control the use of the truck. *See Gulf Ins. Co.*, 595 S.W.2d at 848. Neither did Appellant. Deborah did not testify at the prior trial.

On the policy application, Deborah checked "no" under the non-owned auto section. This indicated that the insured, Deborah, owned all of the vehicles listed on the application. The truck was listed on the policy application as one of the automobiles to be covered, and Mark was listed as a driver. Within the policy itself, the truck was listed with other vehicles under the heading, "Schedule of Covered Autos You Own, Extension of Declarations." There is no requirement that the named insured have actual ownership of the automobile covered by the policy. *See Snyder v. Allstate Ins. Co*., 485 S.W.2d 769, 771 (Tex. 1972). However, the evidence on the face of the policy application and the policy itself, that Deborah owned the truck listed on the policy application and in the "Schedule of Covered Autos You Own," creates a conflict with Richard's testimony in the prior trial that Mark owned the truck, and raises a genuine issue of material fact as to the truck's actual ownership. Determining whether Deborah had actual ownership of the truck, i.e., the right to possession and the power to control the use of the truck, is the crux of the policy coverage issue. *See Gulf Ins. Co.*, 595 S.W.2d at 848. The court of appeals determined that there was a genuine issue of material fact as to whether Deborah, and not Mark, was the truck's owner. The court of appeals reversed and remanded to the trial court.

III. AUTOMOBILE NEWS

A. Texas' Auto Insurance Verification Program

The Texas Department of Insurance's auto insurance verification program launched in early 2008.

Texas Department of Insurance, Texas Financial Responsibility Verification Program (FRVP) (Jan. 10, 2008), http://www.tdi.state.tx.us/ auto/frvp.html. The technology-based program is designed to allow law enforcement officers to immediately verify whether a person has car insurance.

The Texas Financial Responsibility Verification Program is a joint project authorized by SB 1670 (79th Legislature) and developed by the Texas Department of Insurance (TDI), the Texas Department of Public Safety (DPS), the Texas Department of Transportation (TXDOT), and the Texas Department of Information Resources (DIR). The goal is to reduce the number of uninsured motorists in Texas, estimated to be between 15-20% of all vehicles on the road. Law enforcement officers and other state entities will have immediate, real-time access to insurance information on a given vehicle and/or driver. *Id*.

Texas law (the Motor Vehicle Safety Responsibility Act) states that a person may not operate a motor vehicle in this state unless financial responsibility is established for that vehicle. Most people do this by buying automobile liability insurance. The law currently requires minimum liability limits of $25,000 per injured person, $50,000 for everyone injured in an accident, and $25,000 for property damage ("25/50/25" coverage). *Id*.

"We hope this program can significantly reduce the number of uninsured drivers and relieve responsible drivers of the headaches and costs of uninsured motorist coverage with minimal adverse effects and encourage Texas drivers to make sure their insurance information is up to date and that VIN numbers match the information on their insurance cards," said Sandra Helin, SIIS Public Affairs Director for the insurance trade group Southwest Insurance Information Service. *Texas Says Auto Insurance Verification Program on for Early 2008*, INS. J., Aug. 24, 2007, http://www.insurancejournal.com/news/south central/2007/08/24/82981.htm.

According to Helin, the insurance industry opposed the legislation after seeing the unintended consequences this program has caused in other states. *Id*. Now that the verification program is law, insurers are complying and are working closely with TDI in providing all information requested of them during the implementation process, she said. *Id*.

"Maintaining a mammoth database on a real time basis can lead to errors and glitches in reporting information that could leave responsible drivers who have valid insurance in the lurch with a fine or impoundment of their vehicle. Any mismatch in data would create a very bad day for the motorist who has kept their insurance up to date," she said. *Id*. Helin noted that more than a dozen cities in Texas have passed ordinances that let police have a vehicle towed and impounded if the driver can't show proof of insurance. *Id*.

B. Corpus Christi's New Means of Combating Uninsured Vehicles

To combat the high number of uninsured vehicles being operated in Nueces County, the Corpus Christi Policy Department is using a new tactic. *Corpus Christi, Texas, Police to Impound Uninsured Drivers' Cars*, INS. J., Feb. 4, 2008, http://www.insurance journal.com/news/southcentral/2008/02/04/86995.htm. The Corpus Christi Police Department will start impounding the cars of uninsured drivers. *Id*. Approximately one in three Nueces County drivers are uninsured, compared to about one in five statewide, according to Chief Bryan Smith. *Id*. The City Council authorized the program in November. The police planned to begin enforcing it Feb. 1. *Id*.

"It's pretty simple - the law requires drivers to have the minimum amount of liability coverage," Capt. Todd Green said. *Id*. "Anyone that doesn't carry that insurance now runs the risk of having their vehicle impounded and a citation issued." *Id*. According to police officials, officers will have some discretion in deciding when to tow. *Id*. The city's impound lot has a capacity of 540 vehicles in dry weather. *Id*.

IV. RECENT AUTOMOBILE BULLETINS

The Texas Commissioner of Insurance issued several Bulletins relating to the Texas Auto Policy over the last year. Bulletins B-0003-08 and B-0022-07 relate to the increase in minimum financial responsibility limits of liability and procedures for insurers regarding providing proper notice to claimants on their motor vehicle repair rights.

Additionally, insurers can track the number of complaints filed with the Texas Department of Insurance. The Texas Department of Insurance rates each carrier based upon the total number of complaints filed with the total number of policies issued. However, note that when a carrier has a small number of policies in force, the complaint ratio will be large. You can check the number of complaints using the following website: http://www.tdi.state.tx.us/ consumer/cpportal.html.

A. Bulletin B-0003-08

On January 16, 2008, the Commissioner of Insurance (Commissioner), in accordance with the statutory requirements of the Insurance Code Section 2151.207, issued Commissioner's Order No. 08-0037 relating to changes in the rates and the Texas Automobile Insurance Plan Association (TAIPA) Rules and Rating Manual (manual) for private passenger and

commercial automobile insurance provided through TAIPA, the state's assigned risk plan. These changes are effective April 1, 2008. The changes reflect the new minimum financial responsibility limits of $25,000 per person and $50,000 per occurrence for bodily injury liability and $25,000 for property damage liability that are also effective April 1, 2008. Limits for coverage sold through TAIPA will also increase to $25,000 per person and $50,000 per occurrence for uninsured/underinsured bodily injury coverage and to $25,000 for uninsured/underinsured property damage coverage due to the new minimum financial responsibility limits. Texas Department of Insurance, Commissioner's Bulletin B-0003-08 (Jan. 16, 2008), http://www.tdi.state.tx.us/bulletins/2008/cc2.html.

B. Bulletin B-0022-07

By Commissioner's Order No. 06-0977, the Commissioner of Insurance has adopted amendments to 28 Texas Administrative Code (TAC), § 5.501, concerning the procedures an insurer is required to follow in order to provide the proper notice to claimants regarding their motor vehicle repair rights as required by the Insurance Code §§ 1952.301–1952.307.

Under § 5.501(b), an insurer is required to provide the prescribed written notice to any insured or third-party claimant who makes a claim regarding damage to a vehicle.

Amended § 5.501 distinguishes the responsibilities of the Texas Department of Insurance (Department) from the responsibilities of insurers by adding new language that clarifies the Department's and insurers' responsibilities. The amendments also require special formatting in the notice to further distinguish the different responsibilities.

The revised written notice incorporates new language clarifying that the Department is responsible for providing information about the Insurance Code §§ 1952.301–1952.307 and incorporates new language explaining that insurers are responsible for providing detailed information about the nature of coverage under a particular policy.

The revised notice requires insurers to add their contact information. Amended § 5.501(h) requires that the insurer's name, mailing address, phone number, and fax number be provided in bold type. The amendment also provides that insurers may opt to include their e-mail or website address contact information in the notice. If an insurer chooses to provide an e-mail or website address, it is required to be provided in bold type.

In an effort to better serve the increasing number of Spanish-speaking consumers, amended §5.501(h) requires that the written notice also be provided in Spanish. A Spanish translation of the English version is added to the front page of the revised one-page notice.

There is no requirement that Insurance Code §§ 1952.301–1952.307 or possible introductory remarks supplementary to the written notice be translated into Spanish. However, an insurer may provide a translation to consumers who may benefit from having this information provided in Spanish. In such case, a copy of the English version of the statutes is required to be provided as well.

If an insurer has preprinted inventories of the old notice inseparable from the copy of the Insurance Code §§ 1952.301–1952.307, the insurer may attach the amended notice on top of the old notice, with a clear explanation as to which notice is in force, until the existing inventories are exhausted.

The amendments took effect April 1, 2007. After April 1, 2007, the revised notice must be used. Texas Department of Insurance, Commissioner's Bulletin B-0022-07 (May 22, 2007), http://www.tdi.state.tx.us/bulletins/2007/cc21.html.

V. GENERAL LIABILITY CASELAW UPDATE

A. *Ohio Casualty Insurance Co. v. Time Warner Entertainment Company, L.P.*

In. *Ohio Casualty Insurance Co. v. Time Warner Entertainment Company, L.P.*, 2008 Tex. App. LEXIS 869, (Tex. App.—Dallas 2008, no pet. h.), Time Warner sued the insurers for policy proceeds, claiming that it was an additional insured on certain liability insurance policies and that the named insured on those same policies had negligently caused the company to suffer certain losses.

Time Warner alleged that it was hired to construct a fiber-optic communications loop in and around Plano, Texas. It subcontracted a part of that work to a company called Signal Images Telecommunications, Inc., which in turn subcontracted much of its work to others. Evidence showed that Signal performed its work from April 19, 2001 through February 2002. During that time period, West American Insurance Company insured Signal under a commercial general liability (CGL) policy, and appellant Ohio Casualty Insurance Company insured it under a commercial umbrella policy. West American and Ohio Casualty (the "Insurers") made Time Warner an additional insured on those policies. *Id.* at *1-2.

Time Warner alleges that Signal and its subcontractors negligently performed their work, causing damage both to the work itself and to surrounding property. Specifically, Time Warner alleges that Signal's negligence and negligent supervision of its subcontractors caused some of the fiber-optic cables to be installed outside of the proper easements and also caused some of the cable to be buried at a depth shallower than permitted by the

contract. Time Warner further alleges that it spent over $ 1.5 million to repair and correct the damage caused by Signal. It contends that it had to spend those sums to avoid liability to the owner of the project for breach of contract and to avoid liability in trespass to property owners around the easement. *Id*. at *2.

Signal sued Time Warner for nonpayment, and Time Warner counterclaimed against Signal. The parties agree that this underlying lawsuit has been abated and remains pending in the trial court. *Id*.

The Dallas Court of Appeals examined the arguments asserted by the Insurers. Essentially they argued that the trial court erred by granting summary judgment for Time Warner because Time Warner lacked standing to sue them for policy proceeds via their coverage of the named insured, Signal, and that Time Warner adduced no evidence of a claim against it to trigger its own coverage as an additional insured. *Id*. at *6.

"Texas is not a direct action state." *Jones v. CGU Ins. Co.*, 78 S.W.3d 626, 629 (Tex. App.—Austin 2002, no pet.). "A tort claimant has no direct cause of action against the tortfeasor's liability insurer until the insured-tortfeasor is adjudged liable to the tort claimant." *Id*.; *accord Angus Chem. Co. v. IMC Fertilizer, Inc.*, 939 S.W.2d 138, 138 (Tex. 1997) (per curiam) ("In Texas, the general rule (with exceptions not relevant here) is that an injured party cannot sue the tortfeasor's insurer directly until the tortfeasor's liability has been finally determined by agreement or judgment."); *State Farm County Mut. Ins. Co. v. Ollis*, 768 S.W.2d 722, 723 (Tex. 1989) ("[An injured third party] cannot enforce the policy directly against the insurer until it has been established, by judgment or agreement, that the insured has a legal obligation to pay damages to the injured party.").

Time Warner neither pleaded nor proved that Signal's liability to Time Warner was determined by judgment or settlement. The Dallas court of appeals held that the rule prohibiting direct actions before judgment barred Time Warner's claim. *Id*. at *9.

Next, the court examined whether Time Warner proved its entitlement to summary judgment. *Id*. at *10. The court determined the issue was whether Time Warner proved an entitlement to policy proceeds under the duty to indemnify. The Dallas court determined it did not. *Id*. at *12.The CGL policy stated that West American would pay sums "that the insured becomes legally obligated to pay as damages," with certain other qualifications. The umbrella policy contained a similar requirement that the insured be "legally obligated to pay" as a prerequisite to indemnification. *Id*. The court noted that the defect in Time Warner's additional-insured argument was not technically a defect of standing—because as a named beneficiary of the insurance policies, Time Warner was entitled to seek a declaration of its rights. The court of appeals held that Time Warner failed to prove facts showing that Insurers owed it any duties as an additional insured at that time. *Id*. at * 14-15.

The court held that Time Warner did not prove with conclusive evidence that it held a judgment against or settled with Signal. Thus, it did not show that it had standing to sue Insurers pursuant to the duties they owed as Signal's liability insurers. The court also held that Time Warner did not prove that it was held "legally obligated to pay" covered damages, as is necessary to trigger its own coverage as an additional insured. *Id*. at *15.

Next the court examined the arguments by the Insurers that they were entitled to a take-nothing judgment based on their motion for summary judgment. *Id*. at * 16. The Insurers contended that Time Warner's underlying claims against Signal were not covered by the policies as a matter of law. They argued that Time Warner alleged no "property damage" caused by an "occurrence," as those terms are defined in the policies, and alternatively that certain exclusions apply. The court of appeals stated that the "same problems of standing and nonjusticiability that preclude Time Warner from obtaining judgment against the Insurers also preclude us from rendering judgment in favor of the Insurers against Time Warner." *Id*. at *17. The court held that it had no jurisdiction to render the judgment requested by Insurers, nor did the trial court. The Dallas Court of Appeals reversed the judgment of the trial court in its entirety, and remanded the case for further proceedings.

B. *Yorkshire Insurance Co., Ltd. v. Diatom Drilling Company and Employer's Contractor Services, Inc.*

In *Yorkshire Insurance Co., Ltd. v. Diatom Drilling Company and Employer's Contractor Services, Inc.*, 2007 Tex. App. LEXIS 6634 (Tex. App.—Amarillo 2007, pet. filed Nov. 11, 2007), insurers sought a declaration that injury and death claims made by employees that were leased by one insured to the other were specifically excluded by their comprehensive general liability (CGL) policy.

Essentially the underlying action involved negligence and gross negligence claims brought by a deceased employee's parents against the insureds and their partners. Randall Jay Seger did drilling work for two related companies, Diatom Drilling Co., L.P., and Employer's Contractor Services, Inc. *Id*. at *1. ECS was a corporation established by Diatom's general partner, Cynthia Gillman, to provide oil field services to Diatom and other drilling contractors. *Id*. at *1-2. On July 13, 1992, while employed by ECS but providing services to Diatom, Randall was killed when a Diatom rig he was working on collapsed. *Id*. at *2. Diatom, who was insured by a Lloyd's of London-type

comprehensive general liability insurance policy at the time of the accident, notified the subscribing insurers of the accident. Insurers were members of this group. *Id*.

In June of 1993, Randall's parents filed suit against Diatom/ECS and its partners alleging negligence and gross negligence. *Id*. at *2-3. The CGL insurers were not specifically notified of the suit at the time that it was filed. *Id*. at *3. The CGL insurers refused to provide a defense arguing that Randall's death was not covered and that Diatom/ECS failed to provide timely notice of suit. *Id*.

On March 27, 2001, the Segers' suit against Diatom/ECS was tried. The trial court entered judgment against Diatom/ECS and awarded the Segers $ 15,000,000, plus pre- and post-judgment interest. *Id*.

Subsequently, the Segers filed suit against the CGL insurers seeking damages based on the CGL insurers' wrongful refusal to defend Diatom/ECS and negligent failure to settle the Segers' claim when demand was made within policy limits. *Id*.

The trial court granted summary judgment for Diatom and ECS on Insurers' declaratory judgment action seeking a declaration that injury and death claims made by employees that were leased by ECS to Diatom were specifically excluded by the CGL policy. *Id*. at 5.

Insurers contended that the CGL policy unambiguously excluded coverage for injury and death claims made by ECS employees leased in to Diatom, like the claims asserted by the Segers. *Id*. at *6. Additionally, Insurers contended that their construction of the exclusion is bolstered when the circumstances surrounding the policy's formation are considered. *Id*. Diatom/ECS contended that the trial court did not err because declaratory relief was unavailable to Insurers because Insurers sought to establish their construction of the exclusion as a defense to the Segers' claim. Diatom/ECS contended, in the alternative, that Insurers produced no evidence that the Segers' claim was excluded by the CGL policy.

The Insurers specifically sought a declaration that "on the date of Randall Seger's death, the operative insurance documents excluded liability for injury or death to 'leased-in employees/workers' . . . ." *Id*. *8. The appellate court held that the insurers were entitled to seek a declaration regarding the CGL policy's coverage independent of the parents' Stowers action. A declaratory judgment regarding construction of the leased-in worker exclusion was available to the insurers.

The condition "Excluding Leased-In Employees/Workers" in the CGL policy, as a matter of law, unambiguously excluded from coverage all claims for a named insured's liability for bodily injury or property damage brought by or on behalf of persons that performed work for the insured under an agreement with another allowing temporary use of the worker, even though the leased worker would not be an employee of the insured. *Id*. at *12. Accordingly, the court declared that, on the date of the employee's death, the CGL policy excluded liability for injury or death to leased-in employees/workers.

C. *Vansteen Marine Supply, Inc. v. Twin City Fire Insurance Company*

In *Vansteen Marine Supply, Inc. v. Twin City Fire Insurance Company*, 2008 Tex. App. LEXIS 1657 (Tex. App.—Corpus Christi 2008, no pet. h.) (mem. op.), the termination of Gunnar Skarbovik, former president of Vansteen lead to a dispute regarding a non-competition clause. Skarbovik was employed by Vansteen under a contract that contained a non-competition clause. After termination, Skarbovik sued Vansteen for a declaratory judgment that the non-competition clause void and sought damages for libel and defamation, both of which were covered by a commercial general liability insurance policy that Vansteen had purchased from Hartford. Vansteen notified Hartford of the suit and retained its regular outside counsel. Hartford tendered a qualified defense by issuing a reservation of rights letter and began paying Vansteen's counsel.

During the course of defending Vansteen, its counsel filed various counterclaims against Skarbovik, which Vansteen's counsel thought were compulsory. In an affidavit, Vansteen's counsel states that the counterclaims were part of an overall defensive strategy to diminish Skarbovik's causes of action against Vansteen and limit Skarbovik's recovery. The trial court granted summary judgment for Vansteen, which defeated Skarbovik's claims and left only Vansteen's counterclaims pending before the trial court. Vansteen's counterclaims were tried before a jury, which rendered a take nothing verdict. *Id*. at *2.

After the litigation an adjuster for Hartford sent a letter stating, "It appears from the clarification of the judge's ruling that there are no longer any causes of action remaining against the insured for us to defend. This will therefore end Hartford's involvement in this case as of the date of the judge's order." Shortly after receiving the termination letter, Vansteen's counsel contacted Snyder regarding the termination letter and the status of the litigation. *Id*. at *3.

Vansteen sued Hartford for breach of contract, estoppel, waiver, breach of the duty of good faith and fair dealing, and violations of the insurance code and deceptive trade practices act. *Id*. at *4. Hartford answered with a general denial and the affirmative defense that it had fulfilled its contractual obligations to Vansteen. Hartford also alleged that Vansteen had "unclean hands" because it did not sever Skarbovik's

claims that had been dismissed by summary judgment from Vansteen's counterclaims against Skarbovik. *Id*.

The appellate court determined whether Hartford had a duty to defend. The court analyzed the fact that the only "live pleadings" when the case was tried to a jury was Vansteen's counterclaims against Skarbovik's for his alleged violation of a non-disclosure agreement and breaches of fiduciary duty. *Id*. *8. The court then examined the language of the policy. The court determined that the policy clearly created a duty to defend "against any 'suit' seeking [personal injury or advertising injury damages]." However, court noted that the policy excluded any other obligation, sums, acts, or services. *Id*.

Vansteen argued that the insurance policy's language covered its counterclaims because the counterclaims were "an integral part of [its] defensive strategy." *Id*. at *8-9.

The court, using the plain meaning rule, determined that the term "defense" did not include the purely offensive claims that Vansteen pursued after its potential liability to Skarbovik had been eliminated by summary judgment. *Id*. at *10. The appellate court went on to hold that Hartford's duty to defend, under the insurance policy, did not obligate it to pay for the prosecution of Vansteen's independent and purely offensive counterclaims. *Id*. at *11.

Next the court of appeals examined the arguments of waiver and estoppel. Vansteen argued that Hartford could not withdraw its defense payments because Hartford's payment after its termination letter essentially vitiated the reservation of rights. *Id*. at *11-12. It argued that Hartford's continued payments after the termination meant that it had assumed Vansteen's defense anew, without any reservation of rights or qualifications, and waived any policy defenses. *Id*. at *12.

Generally estoppel cannot be used to create insurance coverage where none exists. *Tex. Farmers Ins. Co. v. McGuire*, 744 S.W.2d 601, 602-03 (Tex. 1988). However, an exception to this rule exists where, an insurer undertaking, or continuing, defense of a claim while having knowledge of facts indicating the claim is not covered under its policy, without an effective reservation of rights, may waive, or be estopped from asserting, all policy defenses, including the defense of non-coverage. *Farmers Tex. County Mut. Ins. Co. v. Wilkinson*, 601 S.W.2d 520, 521-22 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.).

The Corpus Christi court of appeals examined the reservation of rights letter issued by Hartford. The court determined that Hartford issued a reservation of rights letter that unequivocally provided only a qualified defense. *Id*. at *15. The reservation of rights states, "Nothing we have done heretofore, nor anything we do hereafter shall act as a waiver or estoppel to our rights under the policy. We reserve the right to withdraw the defense at any time . . . ." *Id*.

The court determined that Vansteen did not establish as a matter of law that Hartford waived its policy defense of non-coverage.

D. *Trotter v. Trinity Universal Insurance Company*

In *Trotter v. Trinity Universal Insurance Co.*, 2007 Tex. App. LEXIS 7475 (Tex. App.—Austin 2007, pet. denied), *Robert Trotter Gift Fund v. Trinity Universal Ins. Co.*, 2008 Tex. LEXIS 39 (Tex., Jan. 11, 2008), there was an insurance coverage dispute under a Commercial General Liability (CGL) policy between the carrier and its insured regarding whether there was a duty to defend the insured. After he was sued by several lot owners in a subdivision he had developed, appellant Thomas S. Trotter, who had acted through the Robert Trotter Gift Fund for Thomas U/A/D 5-3-81 (collectively, "Trotter"), requested a defense and indemnity under his CGL policy with Trinity.

Trinity declined, in the view that "the plaintiff does not seek to recover damages for Bodily Injury or Property Damage caused by an occurrence or Personal Injury or Advertising Injury caused by an offense as defined." Trotter ultimately incurred liability and litigation expenses in this underlying lawsuit.

Trotter sued Trinity, asserting that the carrier breached the policy by refusing to defend and indemnify him and that Trinity's failure to defend him violated the insurance code. Trinity counterclaimed for declaratory judgment that it had no duty to defend Trotter under the CGL policy. On cross-motions for summary judgment, the district court granted Trinity's motion, denied Trotter's, and rendered judgment that Trotter take nothing. The Court of Appeals affirmed the trial court's decision. *Id*. at *2.

The Court of Appeals examined the issue of whether Trinity had a duty under the CGL policy to defend Trotter against the underlying suit as a matter of law. *Id*. at *3. To determine whether Trinity had a duty to defend Trotter, the appellate court looked to the "eight corners" of the petition in the underlying suit and the insurance policy, comparing the facts alleged in the petition with the policy language to determine whether the petition alleges acts within the policy's scope of coverage. *See Allstate Ins. Co. v. Hallman*, 159 S.W.3d 640, 643 (Tex. 2005); *National Union Fire Ins. Co. v. Merchants Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex.1997).

The plaintiffs were a group of individuals who had purchased lots in the Thurman Bend Estates subdivision on Lake Travis (the "underlying plaintiffs"). The defendants included Trotter, the developer of Thurman Bend Estates. The underlying plaintiffs alleged that:

> At various times beginning in 1994 through 1996, Plaintiffs solicited

> information about Thurman Bend Estates . . . . Defendants . . . represented to Plaintiffs that a one-acre homeowners' lakeside park would be conveyed by [Trotter] to the Thurman Bend Owners' Association for the benefit of all of the owners of lots in Thurman Bend Estates. It was represented that the park could have facilities consistent with those found in other lakeside parks, including, but not limited to, boat trailer and automobile parking, recreational areas, barbeque pit(s), picnic facilities, a boat launch and space to build a boat dock and/or swim platform. Plaintiffs were led to believe that a true park for the benefit of Thurman Bend lot owners would be conveyed by Defendant Trust.

"Substantiating this representation," the underlying plaintiffs added, "a Declaration of Covenants, Conditions, and Restrictions for Thurman Bend Estates Subdivision ("Declaration") was signed and filed by Defendant Trotter . . . in July, 1995, which represented that [Trotter] would convey to the Thurman Bend Owners' Assn. a lake side park area easement and an access easement for the usage by all Owners.'"

The underlying plaintiffs further alleged that "[b]ased upon and in reliance upon these representations, in 1994 through 1996, Plaintiffs paid substantial amounts of money to purchase lots in Thurman Bend Estates . . . ." However, the underlying plaintiffs pled, Trotter and the other defendants ultimately failed to provide the represented easement. They alleged that defendants "failed to disclose the true nature of the park'" and that "[t]his failure to disclose and false representations were very material facts which induced Plaintiffs to agree to purchase their Thurman Bend lots."

Specifically, the underlying plaintiffs elaborated, Trotter "sold Lot Number 18 to Defendant [Robert L.] Haug in February 1996" and "signed a Grant of Easements dated February 26, 1996 . . . to Thurman Bend Estates Owners' Association for the benefit of all of the [lot] owners" on Lot 18. The easement, whose terms were negotiated "without any input or knowledge of the current Thurman Bend Estates property owners," "created a 'Boat Launch Easement' which could be used only for ingress and egress from Lake Travis.'" Further, the grant of easement prohibited "'[a]ctivities of extended duration'" within the areas of the easement outside of a 20-foot strip. "The twenty (20) foot easement strip is land reserved by the Lower Colorado River Authority for the rise and fall of Lake Travis" that "is on a relatively severe incline with a very rocky surface making it unsuitable for most recreational activities."

The underlying plaintiffs added that, "Prior to July, 1998, the Plaintiffs not knowing about the 'Boat Launch Easement' used the property as a park, [with] such activities as, parking vehicles and boat trailers, recreating and picnicking." In July 1998, at the first meeting of the Thurman Bend Owners' Association, Haug "stated that the easement was solely for ingress and egress," but "those Plaintiffs that heard him thought that he was referring to the access easement only, not the park easement." However, "on April 5, 2000, it was made clear when Defendant Haug sent a letter to all Thurman Bend lot owners" explicitly prohibiting "'parking, fishing, picnicking, loitering, camping, including fires, [or] swimming'" on his lot, and that, "because the easement did not allow doing anything of extended duration, unattended vehicles would be towed." At this juncture, "Plaintiffs learned for the first time that the park which had been previously represented was in fact merely an easement to launch a boat. There was no park." They added that, "Needless to say, the Plaintiffs wondered what happened to the one-acre homeowners' park that was represented by Defendants . . . ."

The underlying plaintiffs alleged, under the heading of "Actionable Conduct,"

> Defendants' representations concerning the nature of the "park" and their failure to disclose and false explanations were very material facts which induced Plaintiffs to purchase their Thurman Bend lots. Had the true nature of the Boat Launch Easement "park" been fully disclosed, Plaintiffs would not have purchased the lots.

The plaintiffs pled causes of action for DTPA violations (based on misrepresentations, failure to disclose, and unconscionability), breach of the sales contract, breach of the Declarations, statutory and common-law fraud, negligent misrepresentation, tortious interference, and civil conspiracy. The plaintiffs also pled that the defendants were equitably estopped from prohibiting the use of Lot 18 as a park and also sought a declaration construing the Declarations to permit certain recreational activities on Lot 18. Finally, the plaintiffs sought reformation of the grant of easement based on mutual or unilateral mistake. The plaintiffs sought unspecified actual damages, additional damages, and the declaratory and equitable relief already noted.

The Thurman Bend Owners' Association intervened as plaintiffs, citing "the same basis as the Plaintiffs' suit." It sought relief including reformation of

the Declarations and grant of easement or, in the alternative, monetary damages.

Trotter contended that the pleadings invoked a duty to defend under both Coverage A and Coverage B of the policy. *Id*. at *10. Coverage A, Bodily Injury and Property Damage Liability, provided that Trinity "will pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury' or property damage' to which this insurance applies. [Trinity] will have the right and duty to defend any 'suit' seeking those damages. . . ." However, Coverage A also provided: "This insurance applies to 'bodily injury' or 'property damage' only if the 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the coverage territory.'" "Property damage" was defined in the policy as either "[p]hysical injury to tangible property, including all resulting loss of use of that property," or "[l]oss of use of tangible property that is not physically injured." "Occurrence" was defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

Trotter argued that the underlying plaintiffs alleged a "loss of use of tangible property that is not physically injured"—essentially, the plaintiffs' inability to use Lot 18 (indisputably a piece of "tangible property") as a lakeside park. Trinity responded that while Lot 18 was "tangible property"—property "capable of being handled or touched" or that "may be seen, weighed, measured, and estimated by the physical senses," *see Lay v. Aetna Ins. Co.*, 599 S.W.2d 684, 686 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.)—the underlying plaintiffs alleged only that Trotter **failed** to grant them the promised right to use Lot 18, not a loss of use of that property. *Id*. at 11.

The court of appeals determined that "*Loss* of use of tangible property" in the policy plainly contemplates some preexisting interest in using the "tangible property" (Lot 18) whose deprivation would constitute "loss of use." The underlying plaintiffs alleged instead that the defendants' actions caused the **absence** of such an interest. Without an interest in Lot 18 that would allow the underlying plaintiffs to use it, the underlying plaintiffs could not state a claim for the loss of that use. *Id*. at 12.

Whatever rights the underlying plaintiffs conceivably alleged they obtained in Lot 18 through prior usage, their alleged subsequent "loss of use" was caused by conduct that is not an "occurrence" under the policy. The "loss of use" on which Trotter relies here was caused, according to the pleadings, by Haug's actions in April 2000, "sen[ding] a letter to all Thurman Bend lot owners" explicitly prohibiting "parking, fishing, picnicking, loitering, camping, including fires, [or] swimming" on his lot, and stating that, "because the easement did not allow doing anything of extended duration, unattended vehicles would be towed." *Id*. at 14-15. The court of appeals determined that the underlying plaintiffs did not allege a "loss of use of tangible property" caused by an "occurrence" within Coverage A. *Id*. at 15.

Turning to Coverage B, the policy states that "[Trinity] will pay those sums that the insured becomes legally obligated to pay as damages because of 'personal injury' or 'advertising injury' to which this insurance applies. [Trinity] will have the right and duty to defend any "suit" seeking those damages." *Id*. at 17. The policy defines "personal injury," in relevant part, as "[t]he wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies by or on behalf of its owner, landlord, or lessor." *Id*.

Trotter argues that the claims asserted against him were potentially covered as an "invasion of the right of private occupancy of . . . premises." Trotter relies on the allegations that the plaintiffs had begun to use Lot 18 as a park and that their access to the property was later restricted. *Id*. at 17-18. Trinity responded that the underlying plaintiffs did not allege any "right of private occupancy" in Lot 18 that could have been "invaded." *Id*. at 18.

Trinity argued that term "right of private occupancy" in the "personal injury" definition has been held by Texas courts to refer to the rights "associated with an individual's acts of inhabiting the premises, and not to the rights associated with the individual's rights to use and enjoy the inhabited premises." *See Decorative Ctr. of Houston v. Employers Cas. Co.*, 833 S.W.2d 257, 261 (Tex. App.—Corpus Christi 1992, writ denied). The Corpus Christi court also held that coverage for any "'other invasion of the right of private occupancy' does not apply outside the landlord-tenant scenario, or when the occupier has a vested interest in the occupancy of the premises." *Id*. at 263. It reasoned that, under *ejusdem generis* principles, the policy's reference to "other right of private occupancy" was immediately preceded by "wrongful eviction" and "wrongful entry," and must have been intended to encompass actions of the same general type or refer to an similar invasion of interests. *Id*. at 261-62; *see id*. at 261 n.4 (collecting cases).

The court of appeals determined that that any property interest alleged by the underlying plaintiffs is not one whose alleged infringement would constitute an "invasion of the right of private occupancy." *Liberty Mut. Ins. Co. v. East Cent. Okla. Elec. Coop.*, 97 F.3d 383, 390-91 (10th Cir. 1996); *see also Evergrow Indus. Co., Inc. v. The Travelers Ins. Co.*, 37 Fed. Appx. 300, 301-02 (9th Cir. 2002). The court concluded that the claimed nonpossessory interests made the basis of the underlying suit were so clearly distinguishable from the

general type or nature of property interests implicated by wrongful eviction or wrongful entry that their alleged infringement could not potentially be a covered "invasion of right of private occupancy." *East Cent. Okla. Elec. Coop.*, 97 F.3d at 390-91. The court held that Trinity did not have a duty to defend Trotter.