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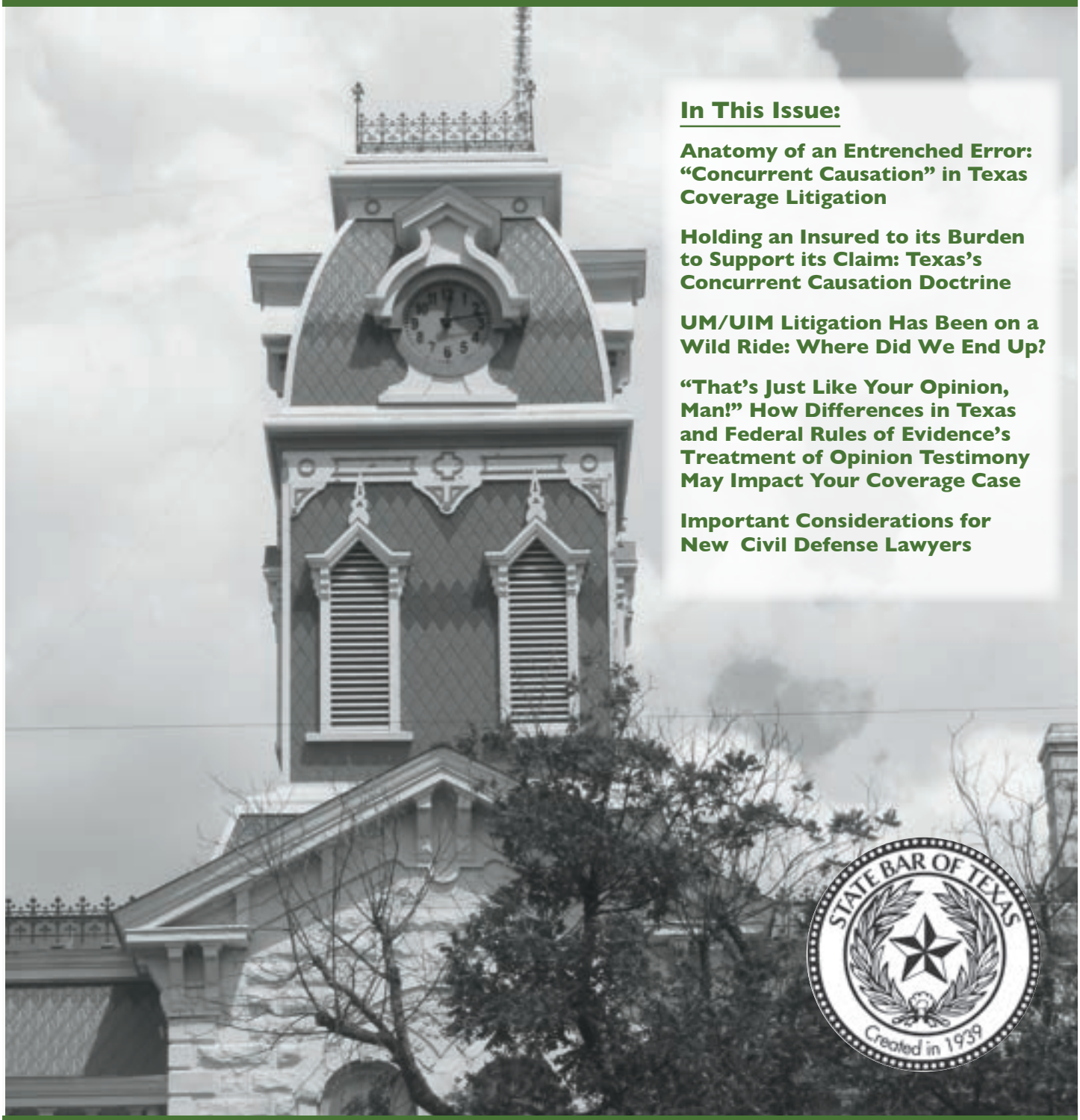

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Official publication of the Insurance Law Section of the State Bar of Texas

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Journal of Texas Insurance Law
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The Journal of Texas Insurance Law is published by the Insurance Law Section of the State Bar of Texas. The purpose of the ***Journal*** is to provide Section members with current legal articles and analysis regarding recent developments in all aspects of Texas insurance law and convey news of Section activities and other events pertaining to this area of law.

Anyone interested in submitting a manuscript for publication should contact Jason C. McLaurin, Editor In Chief, at (713) 461-6500 or by email at jmclaurin@mdlawtex.com. Manuscripts for publication must be typed and double-spaced with endnotes. Replies to articles published in the ***Journal*** are welcome.

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Mission Statement

The Insurance Law Section serves to promote the understanding and development of Texas insurance law by providing high quality educational resources to the bench, bar, and public and by promoting collegiality among those with an interest in insurance law.

STATE BAR OF TEXAS
Created in 1939

COMMENTS

FROM THE EDITOR

By Jason C. McLaurin
McLaurin Law, PLLC

The latest edition of our Journal presents an enriching and diverse exploration of key topics in insurance law. This issue thoughtfully curates a range of subjects, beginning with a compelling debate on the concurrent causation doctrine. Experts Brendan McBride and Marc Gravely offer insights from the policyholder's perspective, while Eric Bowers, Shannon O'Malley, and Claire Fialcowitz articulate the carrier's viewpoint, providing readers with a well-rounded understanding of this complex issue.

Laura Grabouski's comprehensive overview of UM/UIM case litigation in Texas is a highlight, offering an up-to-date snapshot of the legal landscape. Similarly, William E. McMichael's insightful analysis of the procedural nuances in appointing expert witnesses across state and federal courts is invaluable, shedding light on often-overlooked pitfalls and best practices.

For burgeoning legal professionals, Robert Valdez's contribution is particularly noteworthy. His roadmap for new civil defense attorneys is not just informative but also serves as an essential guide, pinpointing critical cases and areas for review, ensuring a robust foundation in their legal practice.

Looking forward, the anticipation for our 25th Anniversary Edition is palpable. This landmark issue promises to be a treasure trove of wisdom, featuring reflections and insights from many past chairs. Their collective experience and knowledge will undoubtedly offer a unique lens through which the evolution and nuances of insurance law practice can be appreciated.

Finally, our heartfelt appreciation goes to all the contributors, including the authors, managing editors Matthew Paradowski, Darin Brooks, and Summer Frederick, as well as the associate editors. Their dedication and hard work embody the collaborative spirit that is essential for the continued success of our mission: to provide an invaluable resource to our Section. This edition, like those before it, stands as a testament to their commitment and expertise.

Jason C. McLaurin
Editor In Chief

COMMENTS

FROM THE CHAIR

By Robert J. Cunningham, Chair

Congratulations, as the Section celebrates its 25th Anniversary! We're deeply grateful for 25 years of leadership and member contributions that helped achieve the Section's notable growth and successes. As mindful stewards of this legacy in 2023-24, your current Officers and Council are devoted to expanding and ever improving on programs established by our distinguished predecessors.

Specialization Exam: Our Section's maturity is highlighted by the inaugural Insurance Law specialization examination held in October, culminating several years of work coordinating with the Texas Board of Legal Specialization to obtain approval, develop the application and test, and continuing refinements.

Young Lawyers: At the other end of the spectrum, the recently formed panel of Young Lawyers representatives is fully engaged in the work of the Section, including a Webinar in October addressing legal advice, tips, and tricks relevant for members early in their careers. The YL reps provide support for many Section activities and engage in outreach focused on our younger members.

Publications: This pre-eminent Journal of Texas Insurance Law continues to publish articles on important coverage issues. Section members likewise rely on the weekly e-blast "Right Off the Press" updates, providing summaries and links to the latest decisions from Texas state and federal courts on insurance law, news about important Section events, and a link to current listings of insurance-related employment opportunities.

CLE: To help members new to insurance law or studying for the specialization exam, an online Comprehensive Overview course was designed and implemented in September. It will be updated regularly and is available in an on-demand format. Webinars on arbitration (September) and appraisals (December) also remain available online, with more to come in 2024. And plan to attend the Advanced Insurance Law / Insurance 101 courses—with the ever-popular Casino Night—on June 5-7, 2024, at the Hyatt Hill Country Resort in San Antonio.

Scholarships: Scholarship funds are available to students in all 10 accredited Texas law schools, awarded to winners of the annual writing competition and as best-in-class determined by insurance law faculty.

Outreach: Happy Hours continue in conjunction with Council meetings and other Section events, to provide networking opportunities and encourage collegiality. The Website continues to improve as an accessible repository of news, events, CLE materials, recent case opinions, current articles, and archives. Be alert for a first-ever newsletter this Spring, celebrating our 25-year milestone.

Sponsorship & Member Support: Write an article for the Journal or Website or help with editing; provide a CLE / Webinar presentation; give us your ideas and feedback; apply to join the Council; or help augment the Section's budget in providing all these member benefits, with a financial sponsorship contribution! Inquire to: admin@insurancelawsection.org.

Many thanks to my fellow Officers and Council Members, committee volunteers, and Section sponsors, for their hard work and dedication to the Section in our 25th Anniversary Year.

Sincerely,

Bob Cunningham
Chair of the Insurance Law Section

By Brendan K. McBride and Marc E. Gravely

ANATOMY OF AN ENTRENCHED ERROR: "CONCURRENT CAUSATION" IN TEXAS COVERAGE LITIGATION

"Substantial Gaps" and the Story of a Pervasive Legal Error . . .

Over the last three decades, what should be a fairly simple concept—concurrent causation—has been a source of conflicting and confusing jurisprudence, both in Texas state courts and federal courts applying Texas insurance law. Courts have tried to come to grips with where Texas stands on the burden to prove (or disprove) what role an excluded peril under an insurance policy may have played in causing an otherwise covered loss.

The question regularly arises. The United States Court of Appeals for the Fifth Circuit certified questions to the Supreme Court of Texas on the issue twice in the last two years.[1] Both times, the Texas high court accepted the certifications. Both times, the parties reached a settlement on the eve of oral argument.

The purpose of this paper is to discuss the basic concepts and issues that underlie the concurrent causation doctrine and the history of the doctrine in Texas, particularly as it relates to burdens of proof on policy exclusions. The legislature designed a 1991 statute specifically to abolish the doctrine. However, subsequent treatment of it illustrates how an obvious legal error can become entrenched in writings through repeated citation, until it appears that the error must be the law.

What Is Concurrent Causation?

Many courts and practitioners struggle with understanding and defining what constitutes a concurrent cause of a loss. Concurrent causation is a rule governing the insured's burden to allocate the amount of a loss between a covered cause of loss and an excluded peril. The question of burden is actually a separate matter, however, from the concept of concurrent causation itself. As the name of the doctrine suggests, it is a rule about causation concerning whether a covered cause of loss and an excluded peril combine at the same time, i.e., "concurrently," to cause a particular loss. Concurrent causes are distinguishable from "separate and independent" causes. The Texas Supreme Court concisely explained this distinction in *Utica National Insurance Company v. American Indemnity Company.*[2]

There are essentially four possibilities for how both an excluded and a covered peril can be causally related to a loss: (1) the covered peril is *sufficient* to cause the loss independent of the excluded peril, and the excluded peril is not *necessary* (the covered cause is an independent cause of the loss); (2) both the covered peril and the excluded peril are *sufficient* to cause the loss independent of the other (each is an independent cause of the loss); (3) the excluded peril is *sufficient* to cause the loss independent of the covered cause, and the covered cause was not *necessary* (the excluded peril is an independent cause of the loss); and (4) the excluded peril and the covered peril are both *necessary*, but neither are *sufficient* by themselves to cause the loss (the damage to the property would not have occurred unless both the excluded peril and the covered peril combined). The first two scenarios result in coverage for the insured, while the second two do not. The last category illustrates the concurrent causation doctrine.[3] As the *Utica* Court explained:

> In cases involving concurrent causation, the excluded and covered events combine to cause the plaintiff's injuries. Because the two causes cannot be separated, the exclusion is triggered.[4]

Understanding "concurrent causation" necessarily requires understanding the concept of "independent causation." The question is not one of allocation, but one of concurrence or independence of causes of a singular loss, as explained by the *Utica* Court:

> Texas courts and the Fifth Circuit applying Texas law have recognized a distinction between cases involving "separate and independent" causation and "concurrent" causation when both covered and excluded events cause a plaintiff's injuries. In cases involving separate and independent causation, the covered event and the excluded event each independently cause the plaintiff's injury, and the insurer must provide coverage despite the exclusion.[5]

Brendan K. McBride is of counsel to Gravely, P.C. in San Antonio. He has handled the litigation, strategy and/or appeal of more than seventy complex commercial insurance coverage cases over the past fifteen years in both first-party and third-party matters.

Marc E. Gravely is the founder of Gravely, P.C., and has primarily represented policyholders in insurance coverage disputes over the past 25 years. Dave Gravely performed some additional research used in this paper.

A separate and independent cause is one that caused the particular loss without the necessity of some other excluded cause. Thus, if both an excluded peril and a covered cause of loss independently caused the loss for which an insured seeks coverage, the loss is ordinarily covered.[6] It has long been Texas law that an insurer is liable when a loss "is caused by a covered peril and an excluded peril that are independent causes of the loss" and that "an insurer is not liable only when a covered peril and an excluded peril *concurrently cause* a loss."[7] Concurrent causes usually result in no coverage because most property policies contain "anti-concurrent causation" clauses. Anti-concurrent causation clauses provide that when a covered cause of loss and an excluded peril combine to cause the same loss, the loss is excluded. This was the subject of the Supreme Court of Texas' opinion in *JAW The Pointe v. Lexington*.[8]

Thus, the question of allocating or segregating damages caused by a covered cause of loss from damages caused by an excluded peril *is not a concurrent causation problem at all*. The general rule has been that where both covered and non-covered perils combine to cause a single loss, the insured satisfies its burden by showing that the covered peril would have been a separate and independent cause of the loss.[9]

The first problem that arises in the misapplication and misunderstanding of the doctrine is whether the two purported causes pertain to the same singular loss. If two events cause different damage to the same property or the same type of damage but at different times, those are not concurrent causes. When they combine to cause the same damage to the same property at the same time, they are concurrent causes. However, when either event acting by itself would have caused the loss, they are separate and independent causes.

For example, suppose a severe hailstorm causes substantial damage to the roof of a home that necessitates replacing the roof. A year later, a different hailstorm causes substantial damage that also necessitates replacing the roof. The events are separate and independent causes of the loss, not concurrent causes.

In sum, for the concurrent causation doctrine to be in play, the two causes must concern the same event of loss or damage. A few other examples should clarify this important distinction. For these examples, assume that a policy excludes "faulty workmanship" and "wear and tear," but water damage caused by discharge of water from a fire sprinkler system is a covered cause of loss.

(1) While remodeling a commercial kitchen, workers negligently scratch the surface of the kitchen countertops. Two months later, a small kitchen fire triggers the fire sprinklers, soaking the countertops and causing them to swell and warp. The faulty workmanship and fire are not concurrent causes of the covered water loss because they did not combine to cause the loss. They each caused a separate loss.

(2) The workers negligently spill some solvent on the kitchen countertop that dissolves a moisture-resistant barrier. The evidence shows that *if* the faulty workmanship had not caused damage to the moisture-resistant barrier, the water from the sprinklers would not have caused any damage to the countertops. These are concurrent causes of the water-damage loss because both events were necessary for the loss to have occurred.

(3) The countertop has been in use for several years and has some fading and scratches on its surface from ordinary wear and tear. The evidence shows that the water from the sprinkler system would have damaged the countertops the same amount regardless of whether they had been brand new. These are not concurrent causes of the water loss. If an insured made a claim for the wear and tear by itself, there would be no coverage. However, there would ordinarily be coverage for the water damage. The issue of ordinary wear would simply be resolved based on how the insurer agreed to handle depreciation (i.e., was it an "actual cash value"—ACV—policy or a "replacement cost value" —RCV—policy?).

As these examples and the discussion above demonstrate, the first question is whether the excluded peril and the covered cause of loss relate to the same event which the insured seeks coverage. When property is damaged by something else or at a different time or in a different way, it does not preclude coverage for damage resulting separately and independently from a covered cause of loss. Though such other damage might factor into the amount of ACV coverage (calculated as RCV less depreciation), it does not implicate a problem of concurrent causes. Most wear and tear situations fall into this category. Some ordinary use of the property resulted in a decline in the quality of the property at the time of the loss, but that decline is generally not the reason a subsequent covered cause of loss damaged the property.[10]

The bigger question, and the one that really underlies the confusion in Texas law over the past three decades, is that of *burdens*. Who has the burden of proof to demonstrate that an excluded peril was not a concurrent cause of an otherwise covered loss?

The Fifth Circuit recently addressed the confusion, explaining: "This Court has recognized the substantial gaps in the concurrent causation doctrine and, as a result, twice certified questions to the Supreme Court of Texas . . . Because both *Overstreet* and *Frymire* settled after certification, this Court's questions regarding when the doctrine applies, and a plaintiff's burden of proof remain unanswered."[11]

To understand how this issue has caused such confusion and where the "gaps" the Fifth Circuit has found so troubling lie,

a review of the history of Texas law as it relates to burdens of proof regarding policy exclusions is in order. There are three key periods in that history: (1) the early origin of the rule, wherein policyholders bore the burden of proof on exclusions, and the distinction between the burden of proof and the burden of pleading under Texas Rule of Civil Procedure 94; (2) the legislature's 1991 passage of a statute placing the burden of proof regarding exclusions on the insurer rather than the insured; and (3) the confusion in Texas law, as the statute is sometimes applied by courts, but frequently not mentioned. This is particularly true following the San Antonio Court of Appeals' opinion in *Wallis v. United Servs. Auto. Ass'n*.[12]

Paulson/Berglund/McKillip and Rule 94.

Hurricane Carla struck the Texas coast in the autumn of 1961, as the equivalent of what would today be a Category 4 storm. Out of the devastation wrought on Texas property owners emerged two important cases addressing the notion of concurrent causation. More importantly, the cases addressed which party bears the burden to prove how much damage an excluded peril caused.[13] The courts of appeals decided the cases just one day apart. However, there was a split of authority between them.

In *Paulson I*, an insured carried both a flood policy and a windstorm policy on a residential home. A question arose regarding which party had the burden to allocate the cost to repair damage caused by each peril. The wind insurer had an exclusion in its policy for loss caused by tidal waves and high water, whether driven by wind or not. It was essentially a flood exclusion.[14] In *Berglund I*, Hurricane Carla completely swept the policyholders' home away. The windstorm insurance company refused to pay. The issues in the case were framed as (1) whether the homeowners' total loss was caused by flood or by windstorm, and (2) how either proposition could be proven (and who had to prove it), when the whole home was washed out to sea in the dark of night.[15]

In both cases, the insureds asserted that they had "all risk" policies, as most homeowners do in Texas. Their position was that all insureds need do is prove that a physical loss to covered property happened during the policy period. If the insurer wanted to plead an avoidance such as a flood exclusion, it was an affirmative defense. As is generally still true today, when a defendant raises affirmative defenses, it has the burden of pleading and proof.

The *Berglund I* Court accepted this argument and placed the burden of proof upon the insurer to allocate between the concurrent causes. The *Paulson I* Court, however, held that it was solely the insured's burden. Because the courts split on this issue, the Texas Supreme Court heard the two cases, and decided them on the same day. Justice Norvell wrote both opinions. He based the opinions on the 1890 case of *Pelican Ins. Co. v. Troy Co-op*,[16] and specifically dictum that "a party suing upon an insurance policy has the burden of proving that the insurance policy covered the loss." From this dictum, he took the precarious leap of reasoning it is the insured's burden to disprove exclusions.[17]

Thus, the Court held in 1965, that Mr. Paulson and Mr. Berglund had the burden to prove a negative. In other words, they had the burden to prove that an excluded peril did not cause their losses (or how much of the loss, in the *Paulson II* case). In *Berglund II*, the home was destroyed and there was simply no way to prove how. The case was over. The Berglunds lost their home and their insurers paid nothing.

These two 1965 cases represent the initial adoption of a doctrine referred to as "concurrent causation" by Texas courts. It is epitomized by the flood/wind dichotomy. The initial iteration of that doctrine maintained that where two perils, one insured and one excluded, combined to cause a loss, it was the insured's burden to prove the extent to which the excluded peril caused damage and the insured peril caused damage. To reach this result, Justice Norvell had to distinguish Texas Rule of Civil Procedure 94, adopted in 1941. Rule 94 requires that any matter of avoidance, such as an exclusion or exception to general coverage provisions, must be affirmatively pleaded as an affirmative defense—just as the plaintiffs in *Paulson* and *Berglund* argued.[18]

Justice Norvell did not mention Rule 94 in his opinion in *Paulson II*, but he did discuss it in *Berglund II*. The Court navigated around Rule 94's express treatment of exclusions as affirmative defenses by concluding the rule only places the burden of *pleading* on the insurer, not the burden of proof. The Court relied on the last clause of Rule 94, which states that the Rule was not intended to "change the burden of proof on such issue as it now exists."[19] Looking back to two prior opinions that pre-dated the enactment of Rule 94, Justice Norvell found support for the proposition that it is the policyholder's burden to disprove exclusions.[20] He reached this assessment despite the long-standing rule, then as now, that the defendant bears the burden of proof on any other affirmative defense.

The Court reiterated that the insured must bear the burden of separating out what is excluded and what is covered in 1971, in *Travelers Indemnity Co. v. McKillip*.[21] The Court simply lifted the language about concurrent causation out of the *Berglund II* and *Paulson II* opinions and repeated it, to once again deny the policyholder a recovery on the basis that one excluded loss and one covered loss combined to cause his loss. Thus, the policy afforded no benefits to the homeowner because he could not disprove that an excluded peril had contributed to cause the loss.

With *Paulson*, *Berglund,* and *McKillip*, the Court had spoken: the burden of proof for policy exclusions was on the

policyholder and not the insurer, and nothing in Rule 94 changed that burden of proof.

The 1991 Statute – Texas Legislature Attempts to Bring Texas Law into Accord with Every Other State.

Matters rested here until the early 1990s, and the case of *Millers Cas. Ins. Co. v. Lyons*.[22] The *Miller* opinion cited *Berglund* for the proposition that it is the insured's burden to separate out an excluded cause from an otherwise covered loss. The case reached the Supreme Court of Texas in 1993, and is well known for its holding regarding the proof required to establish a bad faith claim. The *Lyons* Court applied the same rule as the Courts applied in *Berglund/Paulson/McKillip*: when an excluded peril is pleaded as a cause of an otherwise covered loss, it is the plaintiff's burden to separate the perils.

However, something important happened in between *Lyons I* and the Texas Supreme Court's opinion in *Lyons II*. Though the burden rule in Texas was well established after *Berglund/Paulson/McKillip*, over the years it became clear that Texas was in a disappearing minority of states that placed the burden on the insured to disprove exclusions which applied to otherwise-covered losses. Texas was out of step with the basic rule that the major insurance law treatises had recognized for decades.[23]

The Texas Legislature enacted Article 21.58 (now codified as Texas Insurance Code § 554.002), that explicitly placed the burden of pleading and proof on an insurer seeking to establish an exclusion or exception to coverage. The new section was rather obviously in response to the decision just six months earlier in *Lyons I*, bringing attention to the *Berglund/Paulson/McKillip* rule on burdens of proof, and the fact that Texas was the lone holdout in placing the burden of disproving exclusions on policyholders. In fact, when the Economic Development Committee introduced the bill containing this new section, the reason for the change was specifically to match Texas insurance law with the rest of the country:

> Under the Rules of Civil Procedure, Rule 94, insurance carriers, unlike other defendants, do not have the burden of proof for affirmative defenses. This would require insurers who assert affirmative defenses to plead and prove those defenses as required by every other party in Texas. ***This brings Texas in line with the rest of the nation.***[24]

However, the passage of that statute, which overrules the *Berglund/Paulson/McKillip* rule by legislative mandate, was not relevant to the Court's review in *Lyons II.* Article 21.58 was enacted after *Lyons I* was on appeal.

Confusion resulted from the timing of the opinion in *Lyons II*, which post-dates and seemingly ignores a contrary rule in Article 21.58 of the Insurance Code. Because of this chronological anomaly, many practitioners and courts are still simply unaware that the legislature attempted to abolish the burden rule on concurrent causation the Court announced and repeated in *Lyons II*, a full year before that opinion was even handed down.

Wallis and Post-*Wallis* Confusion; Burdens on Exceptions to Exclusions and Endorsements.

Two cases dealing with Article 21.58 from the San Antonio Court of Appeals demonstrate the confusion. The first is *Telepak v. United Services Auto. Assoc.*[25] *Telepak* presents a crucial difference from the prior concurrent-cause cases like *Paulson* and *Berglund*. It did not involve one covered peril and one excluded peril, or the burden of allocating between them. In *Telepak,* a "settling and foundation movement" exclusion entirely excluded the insured's damage. However, there was an exception to that exclusion for any amount of excluded damage that was also caused by plumbing leaks. The *Telepak* court acknowledged the legislature had recently passed Article 21.58, that the court was bound to follow it, and that it required the insurer (not the policyholder) to plead and prove how much of the claimed damage was caused by settling and cracking. The *Telepak* court explained that the statute unambiguously placed the burden of proof for exclusions on the insurer, overriding both *Berglund* and *McKillip*:

> Prior to September 1, 1991, an insurer claiming that the loss was excluded by the policy only needed to plead the applicability of the exclusion. Plaintiffs then had the burden to negate that exclusion. *Hardware Dealers Mutual Ins. Co. v. Berglund*, 393 S.W.2d 309, 311 (Tex. 1965); *Travelers Indemnity Co. v. McKillip*, 469 S.W.2d 160, 163 (Tex. 1971). However, as of September 1, 1991, insurers are now required to both plead and prove the applicability of an exclusion . . .
>
> . . . Neither party contends that article 21.58(b) or the insurance policy is ambiguous. Nor do we find that the statute requires judicial construction. The statute must therefore be enforced according to its express language. *Cail v. Service Motors, Inc.*, 660 S.W.2d 814, 815 (Tex. 1983). The statute requires insurers to sustain the burden of proof as to "any language of exclusion in the policy" and "any exception to coverage."[26]

The court expressly gave effect to the clear intent of the statute and held that the insurer had met that burden of proof by showing all the claimed damage was caused by settling and cracking, such that the damage fell within the exclusion. The real question was who had the burden to plead and prove an exception to the exclusion that would bring all or part of the loss back within coverage. The court

placed the burden back on the policyholder to prove the extent to which the exception applied, holding that an exception to an exclusion is neither "language of exclusion" nor "any exception to coverage."

The court's rationale was that Article 21.58 only requires insurers to bear the burden of proving the application of their exclusions, not negating exceptions to those exclusions. This is the same rule courts apply with respect to other affirmative defenses and exceptions to such defenses. For example, a defendant must prove facts surrounding a statute of limitations because it is an affirmative defense to liability. However, if the defendant shoulders that burden and the plaintiff wants to claim an exception such as equitable tolling, a tolling statute, fraudulent concealment, etc., then the burden of proving that exception to the affirmative defense lies with the plaintiff.

Nothing about *Telepak* is inconsistent with the plain and unambiguous language of Article 21.58. To the contrary, *Telepak* confirmed the purpose of the statute was to override the rule in concurrent cause/burden cases like *Paulson*, *Berglund*, and *McKillip*, and to place the burden of allocating loss caused by an excluded peril on the insurer.

But then came *Wallis v. United Servs. Auto. Ass'n*.[27] Seven years after *Telepak,* the same court of appeals reversed its position on the effect of Article 21.58 on the burden of proving exclusions in concurrent-causation cases. *Wallis,* habitually cited by subsequent courts as the basis for continuing the same concurrent-causation rule from *Paulson*, *Berglund*, *McKillip,* and *Lyons,* does not mention or analyze the 1991 statute that voided and superseded this rule.

To avoid the effect and intent of the statute, which was obvious and unambiguous to the same court and required no judicial construction seven years earlier in *Telepak*, the *Wallis* court simply redefined the concurrent causation doctrine as though it did not involve the burden of proof on an exclusionary provision. The court relied on the cases the statute was enacted to override, stating that when a covered and excluded peril combine to cause a loss, the burden is on the insured to allocate the amount excluded regardless of what Article 21.58 plainly states.[28]

To justify this distinction—and absent any language to support it in the statute—the *Wallis* Court cited *Employers Casualty Co. v. Block*[29] for the general notion that "insureds are not entitled to recover under an insurance policy unless they prove their damage is covered under the policy."[30] That is the same justification Justice Norvell originally used as the basis for his opinions in *Paulson II* and *Berglund II*. But critically, Justice Norvell was dealing with Rule 94's pleading requirements instead of the plain language and obvious purpose of a statute that shifted the burden of proof as well.

Therein lies the error in the *Wallis* Court's analysis. *Wallis* cited *Paulson* and *McKillip* as though the opinions were still good law after enactment of the statute. *Wallis* overlooked that the statute specifically overrode these prior cases as the Court had previously noted in *Telepak*. The only reason Justice Norvell disregarded the policyholders' arguments based on Rule 94 in *Berglund* is because he found the rule only applicable to the burden of *pleading* and not the burden of *proof*. In doing so, the *Berglund II* Court relied on the last clause of Rule 94, stating that the rule was not intended to change the burdens of proof that were already applicable when the rule was enacted. There is no logical way that same distinction can be applied to a statute that expanded Rule 94 to expressly include the burden of proof as well as the burden of pleading. Tellingly, the *Telepak* Court was aware of and cited the general rule, that an insured bears the initial burden of demonstrating a covered loss (also citing *Block*). However, the *Telepak* Court concluded that Article 21.58 was obviously and unambiguously intended to legislatively override *Paulson*, *Berglund*, and *McKillip*.[31]

The *Wallis* Court's reliance on the 1965 opinions in *Berglund* and *Paulson*, in disregard of the plain language of a 1991 statute that *does* shift the burden of proof onto an insurer, introduced a manifest and pervasive error into Texas jurisprudence. This error yielded the certified questions the Fifth Circuit keeps asking, which should be easily addressed by reference to a statute that is still good law and was intended to legislatively resolve this issue.

It is the *Wallis* case, combined with the timing of the Court's opinion in *Lyons II*, that seems to have created much confusion and seemingly erased the statute from Texas law, perpetuating the very rule the statute was enacted to legislatively override. But it is really with *Wallis* that the trouble starts, as *Wallis* is the case that is regularly cited to keep the concurrent causation/burden rule alive in case after case without any mention or discussion of the statute that abolished it.[32]

Where the dispute concerns what role, if any, a risk described by "language of exclusion"—i.e., loss that would otherwise be covered but for the exclusion—then the statute unambiguously places the burden on the insurer and was designed to override the concurrent causation doctrine as it was applied in cases like *Paulson*, *Berglund*, *McKillip*, and *Lyons*. Only when the coverage does not depend on "language of exclusion," but instead depends on an exception to an exclusion (as in *Telepak*) or an additional policy endorsement that reinserts coverage over an exclusion, does the burden shift back to the insured.

As outlined above, this distinction is often still missed by courts addressing Texas law. What keeps happening is that both trial courts and appellate courts are picking up the dicta that originated in 1890 and made pointedly obsolete by the 1991 adoption of Article 21.58/Section 554.002. Courts have continued to hold, without reflection or

commentary, that *Wallis* (and sometimes *Lyons*, *Paulson*, or *Berglund*) places the burden to allocate the damage between covered and excluded causes on the policyholder—ignoring the statute entirely or giving it no effect.

In short, the original argument made by Mr. Berglund when Hurricane Carla washed away his entire house that dark and stormy night in 1961 was vindicated by legislative action with the passage of Article 21.58. But the statute was buried by a plainly-erroneous decision from an intermediate court of appeals and the unfortunate timing of the Texas Supreme Court's opinion in *Lyons*, published the year after the statute became Texas law.

Allocation and Segregation of the Cause of a Loss Between Covered and Excluded Perils

What the *Wallis* Court (and courts since) purported to do is separate the burden of proof into two facets: (1) proving an exclusion applies in general and (2) "segregating" or "allocating" the loss between the excluded peril and the covered cause—a burden these cases have placed on the insured. The concept is that an insurer needs only produce evidence that an excluded peril was involved, but the extent to which this excluded peril is involved is then the insured's burden.

Such logic is suspect on its face. If the insurer cannot prove what portion of a loss was caused by an excluded peril, it effectively has not proven that any amount of the loss was caused by the excluded peril and has simply not met its burden under the statute. *Quantifying* the role the excluded cause played in causing a loss is an essential aspect of the burden of proving the affirmative defense. This is apparent from how Texas law treats other affirmative defenses that involve quantifying causation.

Logistically and procedurally, the concept of separating the burden of apportionment from the burden of proof and placing it on a policyholder is also problematic. That would require the defendant to raise evidence of the existence of some role played by an excluded peril in their experts' reports and case in chief. The only opportunity the policyholder would have to apportion the amounts would be in rebuttal experts and rebuttal evidence at trial. To require the policyholder to demonstrate an apportionment of causation as part of its principal case for something on which the claimant does not have the burden of proof effectively transfers the burden of proof entirely onto the policyholder. In order to meet the burden of allocation, the insured would have to anticipate what excluded perils the insurer *might* be able to prove. This would effectively relieve the insurer of its burden, as the insured's experts would have to address the perils in their reports or case-in-chief to meet the allocation burden.

There is no logical reason why an affirmative defense based on language of exclusion as a basis for avoidance should work any differently under Texas law than similar affirmative defenses such as "failure to mitigate"[33] or "comparative fault."[34] The actual use of the defense in avoidance to an exclusion (in the case of mitigation, comparative causation, or allocating causation) is that it avoids a liability the defendant would otherwise have. Placing the burden on the policyholder to *quantify* the insurer's exclusion defense-in-avoidance *still* places the burden of proof as to a key element of the defense on the policyholder. It does so in a way that is especially burdensome because it typically requires extensive testimony from causation and loss valuation experts, and in some cases (such as Mr. Berglund's house that was swallowed whole by Hurricane Carla) is simply impossible. Regardless, it places the burden incorrectly on the insured in direct contravention of Section 554.002.

Consequently, consistent with the basic logic of the American Rule, courts across the county (with the possible exception of Texas) have placed the burden of segregating the amount of the loss that is excluded on the insurer and generally left the final apportionment between covered and excluded losses for the finder of fact.[35]

When reviewing language from cases discussing this burden-shifting issue, it is important to note whether the dispute in a particular case concerns an exclusion or an exception to an exclusion. This distinction is still very much relevant to who has the burden. Cases will often state some version of the following rule: once the insurer establishes an exclusion applies to the loss, the burden shifts back to the insured to segregate the loss between covered and non-covered causes.[36] However, that rule comes from cases where the covered cause at issue is now in the form of an *exception* to an exclusion, as in *Telepak*.

Looking at two cases cited by the Fifth Circuit in *Fiess*, for instance, *both* specifically involved coverage disputes over exceptions to exclusions (as did *Fiess* itself), and not disputes about exclusions to otherwise-covered perils.[37]

Logically, as a matter of fundamental legal principle, whichever party has the burden of proof should also have the burden of quantifying that portion of the loss to correspond to the policy language upon which they rely.[38] The *insured* has the initial burden to quantify a loss to covered property during the policy period caused by a covered peril (or any physical loss within the term and area of the policy if the policy is all-risks). The *insurer* should then have the burden to plead, prove, and quantify how much, if any, of an otherwise-covered loss falls within an exclusion to avoid its

general coverage obligation. The burden shifts back to the insured to prove how much of a loss otherwise excluded falls within an exception to an exclusion or an endorsement that reinserts coverage over an exclusion. Each party should carry the burden of proof in accordance with those provisions on which they have the burden of pleading. That burden logically includes evidence from which a fact finder could find the amounts on which each party bears the burden of proof.

Conclusion: An Uncertain Future for the "Concurrent Causation" Doctrine in Texas Coverage Litigation.

As discussed at the opening of this paper, the Fifth Circuit has twice certified questions to the Supreme Court of Texas regarding these substantial gaps in the concurrent causation doctrine. Both times, the defendant-insurer has settled shortly before oral arguments, effectively ending each case. It remains unknown whether or when the Supreme Court of Texas will get an opportunity to address this issue directly. In the meantime, where an insurer claims an exclusion is at issue, policyholders seeking to recover underpaid or unpaid insurance benefits should be prepared to produce evidence quantifying the amount of the loss caused by an excluded peril, or evidence that *no* amount of the loss was caused by an excluded peril, as the policyholders did in *Advanced Indicator*.[39]

1 *Overstreet v. Allstate Vehicle & Prop. Ins. Co.*, 34 F.4th 496, 499 (5th Cir. 2022), *cert. granted*, No. 22-0414 (Tex. May 27, 2022), *cert. dism'd*, (Tex. Sept. 16, 2022); *Frymire Home Servs., Inc. v. Ohio Sec. Ins. Co.*, 12 F.4th 467, 471 (5th Cir. 2021), *cert. granted*, No. 21-0757 (Tex. Sept. 10, 2021), *cert. dism'd*, (Tex. Dec. 3, 2021) .

2 141 S.W.3d 198, 204 (Tex. 2004) .

3 *Utica Nat'l Ins. Co.*, 141 S.W.3d at 204 .

4 *Id* .

5 *Id*.

6 *Id*.; *see also Burlington Ins. Co. v. Mexican Am. Unity Council*, 905 S.W.2d 359, 362-363 (Tex. App.–San Antonio 1995, no writ) .

7 *Burlington Ins. Co.*, 905 S.W.2d at 362 (emphasis in original) (quoting *Guar. Nat'l Ins. Co. v. N. River Ins. Co.*, 909 F.2d 133, 137 (5th Cir. 1990)) .

8 *JAW The Pointe, L.L.C. v. Lexington Ins. Co.*, 460 S.W.3d 597, 606-610 (Tex. 2015). In *JAW The Pointe*, an excluded peril and covered cause both combined to trigger the City of Galveston's decision to condemn an apartment building damaged by covered flood damage and excluded wind damage during Hurricane Ike. The city's decision to condemn the building caused additional loss that could fall within the policy's "Demolition and Increased Cost of Construction" endorsement. Because it was undisputed that the city considered both the excluded and covered losses when it condemned the building, the Court did not reach the issue of whose burden it was to prove what role the excluded peril played in causing the loss. While *JAW The Pointe* is a case dealing with anti-concurrent causation clauses, it does not address the burden-of-proof issue discussed in the latter half of this paper .

9 *See e.g., Bituminous Cas. Corp. v. Maxey*, 110 S.W.3d 203, 215 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) ("Where a loss, however, is caused by a covered peril and an excluded peril that are independent causes of the loss, the insurer is liable.") (citing *Centennial Ins. Co. v. Hartford Acc. & Indem. Co.*, 821 S.W.2d 192, 194 (Tex. App.–Houston [14thDist.] 1991, no writ)); *Cagle v. Commercial Standard Ins. Co.*, 427 S.W.2d 939, 943-44 (Tex. Civ. App.—Austin 1968, no writ); *see also Guar. Nat'l Ins. Co.*,909 F.2d at 137 ("Where a loss, however, is caused by a covered peril and an excluded peril that are independent causes of the loss, the insurer is liable.") .

10 *See, e.g., Bible Baptist Church v. Church Mut. Ins. Co.*, No. 2:21-CV-93-Z-BR, 2023 U.S. Dist. LEXIS 23858, 2023 WL 1931912, at *5 (N.D. Tex. Jan. 18, 2023) *findings, conclusions, and recommendation adopted*, 2023 WL 1931350 (N.D. Tex. February 10, 2023) (concluding the concurrent causation doctrine did not apply to "wear and tear") .

11 *Advanced Indicator & Mfg. v. Acadia Ins. Co.*, 50 F.4th 469, 476 n.4 (5th Cir. 2022) .

12 *Wallis v. United Servs. Auto. Ass'n*, 2 S.W.3d 300 (Tex. App.-San Antonio 1999, no pet.) .

13 *See Fire Ins. Exch. v. Paulson*, 381 S.W.2d 199 (Tex. Civ. App.—San Antonio 1964) ("*Paulson I*"), *aff'd, Paulson v. Fire Ins. Exch.*, 393 S.W.2d 316, 318 (Tex. 1965) ("*Paulson II*") and *Berglund v. Hardware Dealers Mut. Fire Ins. Co.*, 381 S.W.2d 631 (Tex. Civ. App.—Houston 1964) ("*Berglund I*"), *rev'd, Hardware Dealers Mut. Ins. Co. v. Berglund*, 393 S.W.2d 309 (Tex. 1965) ("*Berglund II*").

14 *Paulson I,* 381 S.W.2d 199.

15 *Burgland I,* 393 S.W.2d 309 .

16 *Pelican Ins. Co. v. Troy Co-op.*, 77 Tex. 225, 13 S.W. 980 (1890) .

17 *Berglund II*, 393 S.W.2d at 310

18 *See* Tex. R. Civ. P. 94.

19 *Berglund II*, 393 S.W.2d at 311 (quoting Tex. R. Civ. P. 94) .

20 *Id*. at 312 .

21 *Travelers Indem. Co. v. McKillip*, 469 S.W.2d 160, 163 (Tex. 1971) .

22 *Millers Cas. Ins. Co. v. Lyons*, 798 S.W.2d 339, 340 (Tex. App.—Eastland 1990) ("*Lyons I*"), *aff'd, Lyons v. Millers Cas. Ins. Co.*, 866 S.W.2d 597, 601 (Tex. 1993) ("*Lyons II*") .

23 "That the insurer has the burden of proof to prove no coverage under an all-risks policy is the American rule in all states, *with the possible exception of Texas*." *Battishill v. Farmers All. Ins. Co.*, 2006-NMSC-004, ¶ 6, 139 N.M. 24, 26, 127 P.3d 1111, 1113 (N.M. 2006) (quoting 1 Eric Mills Holmes & Mark S. Rhodes, Holmes's Appleman On Insurance, § 1.10, at 45 (2d ed. 1996 (emphasis added). For decades, both Appleman and Couch have repeated the basic rule that the burden of proving that a loss falls within an exclusion is on *the insurer*. *See e.g., id.*; 5 Jeffery E. Thomas & Susan Lyons, New Appleman on Insurance Law Library Edition § 41.02(1)(b)(i) (2017 ed.) ("Once the insured makes a prima facie showing that the all-risks coverage exists and there is damage to or loss of the covered property, the burden shifts to the insurer to demonstrate that the damage or loss falls within one of the exclusions listed in the policy."); 7 Couch on Insurance § 101:7 (3d ed. 2015) ("In an 'All-Risk' policy, the insured has the initial burden to prove that the loss occurred. The burden then shifts to the insurer to prove that the cause of the loss is excluded by the policy."); *New Castle Cty. v. Hartford Accident & Indem. Co.*, 933 F.2d 1162, 1181 (3rd Cir. 1991) (citing 19 G. Couch, Couch on Insurance 2d § 79:315, at 256 (M. Rhodes rev. ed. 1983; Lee R. Russ & Thomas F. Segalla, 7 Couch on Insurance § 101:7 (3d ed. 2007); *Children's Friend & Serv. v. St. Paul Fire & Marine Ins. Co.*, 893 A.2d 222, 230 (R.I. 2006 (citing 19 Couch on Insurance § 79:315 (Ronald A. Anderson, 2d ed. 1981)

24 72nd Tex. Leg., Reg. Sess., Economic Devel. Comm., Subcommittee on Insurance, May 20, 1991, Tape 0588 Side 1 (emphasis added). Available for download from the Texas Digital Archive through the following URL: https://tsl.access.preservica.com/uncategorized/IO_5d29a6d9-b0b9-4d6b-a5a8-006afd45b13a

25 *Telepak v. United Services Auto. Assoc.*, 887 S.W.2d 506, 507–08 (Tex. App.—San Antonio 1994, writ denied) .

26 *Id.* at 507.

27 *Wallis v. United Servs. Auto. Ass'n*, 2 S.W.3d 300 (Tex. App.—San Antonio 1999, pet. denied.) .

28 *Id.* at 302-303 .

29 *Employers Casualty Co. v. Block*, 744 S.W.2d 940, 945 (Tex. 1988), *overruled in part on other grounds* by *State Farm Fire and Cas. Co. v. Gandy*925 S.W.2d 696 (Tex. 1996) .

30 *Wallis*, 2 S.W.3d at 303 .

31 *Telepak*, 887 S.W.2d at 507 .

32 *See e.g., Dall. Nat'l Ins. Co. v. Calitex Corp.*, 458 S.W.3d 210, 222 (Tex. App.—Dallas 2015, no pet.) for the concurrent causation burden-shifting rule, but making no mention of Section 554.002); *USAA v. Mainwaring*, No. 05–03–01250–CV, 2005 WL 667683, at *4 (Tex. App.-Dallas March 23, 2005 pet. denied) (not designated for publication) (mem. op.); *State Farm Fire & Cas. Co. v. Rodriguez*, 88 S.W.3d 313, 318 (Tex. App.—San Antonio 2002, pet. denied); *Seahawk Liquidating Tr. v. Certain Underwriters at Lloyds London*, 810 F.3d 986, 994-95 (5th Cir. 2016); *Mt. Hawley Ins. Co. v. JBS Parkway Apartments, LLC*, No. MO:18-CV-00092-DC, 2020 U.S. Dist. LEXIS 252528, at *23, 2020 WL 6821329, at *4 (W.D. Tex. Oct. 5, 2020) (W.D. Tex. Dec. 30, 2020); *Allison v. Allstate Tex. Lloyd's*, Civil Action No. 4:16-cv-00979-O-BP, 2017 U.S. Dist. LEXIS 180233, at *8, 2017 WL 4991108, at *8 (N.D. Tex. Oct. 16, 2017) (citing *Wallis* and *Lyons* with no mention that Section 554.002 was enacted the year before *Lyons* was decided); *Underwood v. Allstate Fire & Cas. Ins. Co.*, Civil Action No. 4:16-cv-00962-O-BP, 2017 U.S. Dist. LEXIS 165380, at *7, 2017 WL 4466451, at *2-3 (N.D. Tex. Sep. 19, 2017); *Nasti v. State Farm Lloyds*, No. 4:13-CV-1413, 2015 U.S. Dist. LEXIS 3009, at *9, 2015 WL 150468, at *3 (S.D. Tex. Jan. 9, 2015) (citing *Wallis*, *Paulson*, and *McKillip* without mentioning the statute); *U.E. Tex.-One Barrington, Ltd. v. Gen. Star Indem. Co.*, 243 F. Supp. 2d 652, 668 n.110-111 (W.D. Tex. 2001) .

33 *See e.g., Stucki v. Noble*, 963 S.W.2d 776, 781 (Tex. App.—San Antonio 1998, pet. denied.) ("[T]he burden of proving failure to mitigate is on the defendant, who must also show the amount by which the plaintiff's damages were increased by the failure to mitigate."); *Rauscher Pierce Refsnes, Inc. v. Great S.W. Sav. F.A.*, 923 S.W.2d 112, 117 (Tex. App.—Houston [14th Dist.] 1996, no writ) ("Appellant also had the burden of proving the amount the damag-

es were increased by the failure to mitigate, which it failed to meet."); *BMB Dining Servs. v. Willowbrook I Shopping Ctr., L.L.C.*, No. 01-19-00306-CV, 2021 Tex. App. LEXIS 4320, at *19, 2021 WL 2231258 at 7. (Tex. App.—Houston [1st Dist.] June 3, 2021, no pet.) (mem. op.) (quoting *Cole Chem. & Distrib., Inc. v. Gowing*, 228 S.W.3d 684, 688 (Tex. App. —Houston [14th Dist.] 2005, no pet.) ("[W]here a defendant proves failure to mitigate but not the amount of damages that could have been avoided, it is not entitled to any reduction in damages.")); *Z.M. Shay Jayadam3, LLC v. Omnova Sols., Inc.*, No. 14-19-00623-CV, 2020 Tex. App. LEXIS 8439, at *24, 2020 WL 6278615, at *9 (Tex. App.—Houston [14th Dist.] 2020, no pet.) (mem. op.) ("'The defendants bear the burden to prove failure to mitigate damages; they must prove lack of diligence as well as the amount by which the damages were increased as a result of the failure to mitigate.'") (quoting *Turner v. NJN Cotton Co.*, 485 S.W.3d 513, 523 (Tex. App.—Eastland 2015, pet. denied) .

34 The burden of proof in comparative-causation situations where a defendant alleges a claimant's acts or omissions were a proximate cause of the damages sought includes both proof of the claimant's fault *and* requires the defendant to produce evidence from which the jury can apportion an amount based on the claimant's alleged fault. *See e.g., Amstadt v. United States Brass Corp.*, 919 S.W.2d 644, 654 (Tex. 1996) (the defendant has the duty to apportion liability and if it cannot do so, it is liable for the whole damages); *PHI, Inc. v. LeBlanc*, No. 13-14-00097-CV, 2016 Tex. App. LEXIS 1899, 2016 WL 747930, at *6 (Tex. App.—Corpus Christi Feb. 25, 2016, pet. denied) (mem. op.) (citing *Amstadt* as "acknowledging that Texas courts usually apply comparative fault analysis unless the defendant who has the burden of apportioning its liability for the plaintiff's injuries cannot establish its percentage of liability, and thus remains liable for the whole"); *Onyung v. Onyung*, No. 01-10-00519-CV, 2013 Tex. App. LEXIS 9190, at *30, 2013 WL 3875548 at 11 (Tex. App.—Houston [1st Dist.] July 25, 2013, pet. denied) (mem. op.) ("When injuries resulting from the conduct of multiple tortfeasors cannot be apportioned with reasonable certainty, the plaintiff's injuries are indivisible and the tortfeasors are jointly and severally liable for the whole."); *see also* Restatement (Second) of Torts § 433B(2) and cmt. d (1963) (explaining that a defendant that has caused harm to the plaintiff seeks to avoid some part of the damages by claiming it was caused by some other person's wrongful conduct, the burden of proving an amount of apportionment is on the defendant seeking to avoid liability) .

35 *See e.g., Preis v. Lexington Ins. Co.*, 279 F. App'x 940, 944 (11th Cir. 2008) (Louisiana law); *Imperial Trading Co. v. Travelers Prop. Cas. Co. of Am.*, 638 F. Supp. 2d 692, 695 (E.D. La. 2009) ("The insurer therefore must show 'how much of the damage' was caused by an excluded peril.") (quoting *Dickerson v. Lexington Ins. Co.*, 556 F.3d 290 (5th Cir. 2009)(Louisiana law)); *Covington Lodging, Inc. v. W. World Ins. Grp. (In re Covington Lodging Inc.)*, 635 B.R. 675(Bankr. N.D. Ga. 2021 ("Where at least some of the damage is covered, the insurer has to prove how much of the damage is excluded from coverage under the policy.") (citing *Dickerson*, *supra*); *Leonard v. Nationwide Mut. Ins. CV.*, 499 F. 3d 419 (5th Cir. 2007) (the insurer had the burden of proving what portion of the total loss was attributable to water damage and was thus within the water damage exclusion)(Mississippi law); *Hoover v. United Servs. Auto. Ass'n,* 125 So. 3d 636, 642 (Miss. 2013) ("USAA bears the burden to prove, by a preponderance of the evidence, that the loss was caused by, *or concurrently contributed* to, by an excluded peril.") (emphasis in original); *Matthews v. Allstate Ins. Co.*, 731 F. Supp. 2d 552, 565 (E.D. La. 2010) (Louisiana law)(noting cases placing the burden to segregate on policyholders relying on pre-*Dickerson* authorities are mistaken); *Lightell v. State Farm Fire & Cas. Co*., 703 F. Supp. 2d 600, 603 (E.D. La. 2009) (same). In *Hoover*, the Mississippi Supreme Court specifically disagreed with the Fifth Circuit's *Erie* guess that Mississippi law switches the burden of segregating losses back onto the policyholder, expressly disapproving *Broussard v. State Farm Fire & Casualty Co.*, 523 F. 3d 618, 627 (5th Cir. 2008) .

36 *See e.g., Fiess v. State Farm Lloyds*, 392 F.3d 802, 807 (5th Cir. 2004); *Kelly*, 2007 Tex. App. LEXIS 1320, at *22 (citing *Telepak*, *supra*) .

37 *Fiess* at n.13, (citing *Guar. Nat'l Ins. Co. v. Vic Mfg. Co.*, 143 F.3d 192, 193 (5th Cir. 1998) ("Once the insurer has proven that an exclusion applies, the burden shifts back to the insured to show that the claim falls within an exception to the exclusion"); *Venture Encoding Serv., Inc. v. Atl. Mut. Ins. Co.*, 107 S.W.3d 729, 733 (Tex. App.— Forth Worth 2003, pet. denied) (same).

38 As the Kentucky Supreme Court has explained:

> The fundamental principle is that the burden of proof in any cause rests upon the party who, as determined by the pleadings or the nature of the case, asserts the affirmative of an issue and remains there until the termination of the action. It lies upon the person who will be defeated as to either a particular issue or the entire case if no evidence relating thereto is given on either side. In other words, one alleging a fact which is denied has the burden of establishing it .

Rodgers v. Roland, 309 Ky. 824, 828, 219 S.W.2d 19, 20 (1949) (quoting 20 Am. Jur. Evidence, § 135 at pp. 138–139). Courts have frequently cited this principle over the years for placing the burden of proof on the party to whom the benefit the matter to be proven would run. *See, e.g., Miller v. Westwood*, 238 Neb. 896, 908, 472 N.W.2d 903, 911 (1991) (same); *United States W. Communs., Inc. v. N.M. State Corp. Comm'n (United States W. Communs., Inc.)*, 1998-NMSC-032 ¶ 34, 125 N.M. 798, 808, 965 P.2d 917, 927 (N.M. 1998) (same); *Joseph A. Bass Co. v. United States*, 340 F.2d 842, 844 (8th Cir. 1965) (same); *see also Lincoln Intermediate Unit #12 v. Bermudian Springs Sch. Dist.*, 65 Pa. Commw. 53, 56-57, 441 A.2d 813, 815 (Pa. 1982) ("[T]he general rule is that the burden of proof is upon the party who, in substance, alleges that a thing is so, or, as it is more commonly put, the burden of proof rests upon the party having the affirmative of the issue as determined by the pleadings."); *Cox v. Roberts*, 248 Ala. 372, 374, 27 So. 2d 617, 618 (Ala. 1946)"); *Hancock v. Paccar, Inc.*, 204 Neb. 468, 485, 283 N.W.2d 25, 37 (1979) ("The fundamental principle of the law of evidence is to the effect the burden of proof in any cause rests upon the party who asserts the matter.") (citing 29 Am. Jur. 2d, Evidence, § 137, p.173.

39 *Advanced Indicator & Mfg. v. Acadia Ins. Co.*, 50 F.4th 469, 476 n.4 (5th Cir. 2022*); see also Marina Club Condo. Ass'n v. Phila. Indem. Ins. Co.*, No. 1:21-CV-429-DAE, 2022 WL 18046475, 2022 U.S. Dist. LEXIS 234369, at *11 (W.D. Tex. Nov. 7, 2022); *Valleyview Church of the Nazarene v. Church Mut. Ins. Co.*, No. 2:20-CV-222-Z-BR, 2022 WL 2718611, 2022 U.S. Dist. LEXIS 124229, at *11 (N.D. Tex. July 13, 2022); *Labourdette v. State Farm Lloyds*, No. 4:19-CV-2551, 2021 WL 2042974, 2021 U.S. Dist. LEXIS 97155, (S.D. Tex. May 21, 2021).

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HOLDING AN INSURED TO ITS BURDEN TO SUPPORT ITS CLAIM: TEXAS'S CONCURRENT CAUSATION DOCTRINE

No Texas insurance practitioner disputes that an insured may only recover for damage covered by a property insurance policy and that the *insured* bears the burden to establish that coverage under the policy. This basic principle applies across the board. But when two or more causes of loss combine to cause the insured's damage—some covered and some not covered—a question arises as to how the property insurance policy should respond. For the past five decades, when there are multiple causes of loss at issue, Texas courts have uniformly applied the concurrent causation doctrine. Specifically, under the concurrent causation doctrine, the Texas Supreme Court has held:

> [W]hen "excluded and covered events combine to cause" a loss and "the two causes cannot be separated," concurrent causation exists and "the exclusion is triggered" such that the insurer has no duty to provide the requested coverage. But when a covered event and an excluded event "each independently cause" the loss, "separate and independent causation exists, "and the insurer must provide coverage despite the exclusion."[1]

Under the Texas Supreme Court's guidance from *JAW The Pointe*, parties are reminded of the common law concerning concurrent causation and instructed to focus on whether the causes of loss—*i.e.,* the causes of the damage that is being claimed—would have separately and independently caused the damage or whether the causes are interdependent and concurrent. While this common-law doctrine may be contracted around through anti-concurrent causation provisions,[2] the doctrine has been repeatedly reinforced by the Texas Supreme Court, Texas appellate courts, and federal courts applying Texas law as the default causation doctrine in Texas.

The concurrent causation doctrine, as succinctly defined by the Texas Supreme Court in *JAW The Pointe*, could be read to give the parties an all-or-nothing resolution. Namely, if there is evidence that covered and non-covered causes of loss combined to cause the insured's claimed damage, the exclusion prevails and there is no coverage. But that is not the case. Courts have also recognized that if the insured can establish that the damage is capable of apportionment between the covered and non-covered causes of loss, the insured remains entitled to coverage for that portion of the damage caused by the covered cause of loss.[3] Essentially, by segregating the damage and providing evidence to apportion that damage, an insured can meet its threshold burden to prove coverage by showing the portion of claimed damage that was caused by the covered cause of loss.

Despite repeated guidance from the Texas Supreme Court and countless cases over the past fifty years requiring insureds to apportion damage, the Texas policyholder attorney bar has asserted several arguments regarding the application of the concurrent causation doctrine. From redefining the "cause of loss" to a "peril," not accounting for sequential causes of the same loss, and side-stepping the doctrine altogether through the allocation of all claimed damage to a specific event regardless of the factual evidence, the doctrine has been under attack in recent years. Despite these efforts, however, the concurrent causation doctrine remains well-defined in Texas. Repeatedly applied by numerous courts, including the Texas Supreme Court, the concurrent causation doctrine stands strong for the threshold proposition that the insured is entitled to recover only that which is covered under its policy.

Concurrent Causation Overview

There are essentially two doctrines used to determine coverage when two or more causes of loss contribute to an insured's property damage. Most states employ the efficient proximate cause doctrine. "Under the doctrine of efficient proximate cause, where covered and noncovered perils contribute to a loss, the peril that set in motion the chain of

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events leading to the loss or the 'predominating cause' is deemed the efficient proximate cause or legal cause of loss."[4] Conversely, a handful of other states, including Texas, follow the concurrent causation doctrine. Under Texas law, when covered and non-covered perils combine to create a loss, and the two causes cannot be separated, concurrent causation exists, and the insurer has no duty to provide the requested coverage.[5]

Notably, there are seemingly two definitions of concurrent causation in Texas jurisprudence – one set forth by the Texas Supreme Court in *JAW The Pointe* and the other as expressed by the San Antonio Court of Appeals in *Wallis v. United Services Automobile Association*. The *JAW The Pointe* definition focuses on whether the two causes of loss can be separated and mandates no coverage if the causes of damage, one not covered, are inseparable.[6] Conversely, the *Wallis* court, and the many courts following that decision, defined the doctrine of concurrent causation as when "covered and non-covered perils combine to create a loss, the insured is entitled to recover only that portion of the damage caused solely by the covered peril(s)."[7]

These two definitions, however, are two sides of the same coin. Both acknowledge that when two causes of loss cannot be separated, the exclusion applies. But the *Wallis* line of cases further recognizes that when damage is capable of apportionment between the non-covered cause and the covered cause, and the insured can provide sufficient evidence to allow a factfinder to allocate its damage between those causes, then the exclusion will not preclude coverage for the loss portion allocated to the covered cause.[8] This legal mechanism allows an insured to apportion, if possible, a jointly caused loss between covered and uncovered causes.

Policyholder attorneys suggest that the concurrent causation doctrine unduly requires the insured to bear the burden of proof to refute an insurer's exclusion. The *Wallis* court (and the many courts applying that analysis since) rejected that very argument. The *Wallis* court determined that the concurrent causation doctrine is "not an affirmative defense or an avoidance issue. Rather, it is a rule that embodies the basic principle that insureds are only entitled to recover that which is covered under their policy; that for which they paid premiums."[9] Quite simply, an insured's recovery under an insurance policy is limited to covered damage.[10]

In this regard, it is important to consider that concurrent causation issues are not limited to covered and excluded causes of loss. A non-covered cause of loss or peril is something that is simply not covered by the policy, even though it may not be reflected in a policy exclusion. For example, although it is not "excluded," damage that occurs outside of a policy period is not covered. It is indisputably the insured's burden to provide proof that the loss occurred within the policy period. Courts recognize this "is a *precondition* to coverage and, thus, the insured's responsibility."[11] Damage that fails to satisfy the insuring agreement of a named-peril policy is likewise not covered. Thus, it stands to reason that because an insured can recover only for a covered cause of loss, as opposed to an excluded or otherwise non-covered peril, the insured bears the burden to prove its claimed damage was caused solely by a covered cause of loss.[12] And, accordingly, the insured's failure to segregate damages caused by covered versus non-covered causes of loss is fatal to its ability to recover on the claim.[13]

Because the doctrine of concurrent causation limits an insured's recovery to the amount of damage caused solely by the covered peril, "the burden of segregating the damage attributable solely to the covered event is a coverage issue for which the **insured** carries the burden of proof."[14] Texas courts recognize that an insured must do more than simply show some damage was caused by a covered peril. The insured must both (1) show that a covered cause of loss caused damage to the insured's property during the policy period; *and* (2) provide some evidence indicating the extent to which the covered cause damaged the property. If damage by concurrent causes is tried, the insured bears the burden to present some evidence affording the jury a reasonable basis on which to allocate the damage.[15]

While this is a burden the insured bears, in applying this rule, the Texas Supreme Court has recognized that circumstantial evidence may constitute some evidence of the extent of damage attributable solely to a covered cause of loss.[16] But the insured may not simply rely on conclusory allegations, conjecture, or other unsubstantiated guesses (including unreliable expert opinions) to meet its burden.[17]

A History of Concurrent Causation in Texas

To fully understand concurrent causation in Texas, including the parties' respective burdens, it helps to understand the history behind the doctrine. The concurrent causation doctrine in the context of property insurance claims in Texas has developed largely because of weather events, including hurricanes, hailstorms, and freezes.

Texas's modern concurrent causation doctrine was addressed in the 1971 Texas Supreme Court case *Travelers Indemnity Co. v. McKillip* when the Court specifically rejected the efficient proximate cause doctrine.[18] In *McKillip*, turkey farm owners sought to recover damages to their turkey barn after

a "tremendous wind" blew across their farm and "struck" a turkey barn.[19] Six days after the windstorm, heavy snow hit the property, with five to six inches of snow accumulating on the barn roof and causing the barn to collapse. The policy at issue provided coverage for damage caused by windstorm but specifically excluded loss caused by snowstorm.[20] The parties disputed whether the covered windstorm or the excluded snowstorm caused the damage.[21] The trial court instructed the jury that if the windstorm was the "dominant efficient cause of the building's collapse, although other causes may have contributed to the loss, the insurer was liable."[22]

The Texas Supreme Court rejected that instruction. The Court held that the jury should have determined "whether damage to plaintiff's building was caused by a combination of the wind and the weight of the snow, and if so, the percentage or the proportionate part of the damage caused by the snow."[23] The Court found that the insured was obligated to introduce evidence to prove that the damage was caused by the insured peril or apportion the damage caused by the insured peril from the damage caused by the excluded peril once the insurer pled that the exclusion applied to bar coverage.[24] The Court explained that "[i]t is essential that the insured produce evidence which will afford a reasonable basis for estimating the amount of damage or the proportionate part of damage caused by a risk covered by the insurance policy."[25]

McKillip was essentially the start of Texas's modern concurrent causation journey. Since 1971, courts across Texas have relied on *McKillip*'s fundamental principle that an "insured cannot recover under an insurance policy unless facts are pleaded and proved showing that damages are covered by the policy."[26] Therefore, in order to recover damages "when a loss is caused by both covered and non-covered perils, an insured must present 'some evidence' to attribute the loss to just the covered peril."[27]

McKillip and its progeny have consistently held that it is the **insured's burden** to segregate damages caused by covered versus non-covered causes of loss. This is despite the Texas Legislature's adoption of article 21.58 of the Texas Insurance Code.[28] Article 21.58 provides that "the insurer has the burden of proof as to any avoidance or affirmative defense that must be affirmatively pleaded under the Texas Rules of Civil Procedure. Any language of exclusion in the policy and any exception to coverage claimed by the insurer constitutes an avoidance or affirmative defense."[29]

When article 21.58 was enacted, insureds argued that the insured's burden to segregate damages under *McKillip* and other Texas Supreme Court cases was legislatively overruled, as evidenced by the paper "Anatomy of an Entrenched Error" submitted by Messrs. McBride and Gravely. This argument is still being propounded today. But the San Antonio Court of Appeals in *Wallis v. United Services Auto Association* rejected that argument and specifically reiterated the insured's burden to prove coverage based on the universal rule that an insured bears the burden to demonstrate that the policy provides coverage.

In *Wallis*, the insureds sought coverage for foundation damage to their home arising from plumbing leaks. The insurer determined that the damage was caused by a combination of excluded and covered causes of loss.[30] While the insurer found the covered plumbing leaks to be negligible, the insureds' expert argued at trial that the plumbing leaks were a contributing cause of the damage.[31] Even if the plumbing leaks contributed to the loss, the insureds' expert did not refute that excluded perils had also contributed to the loss.[32] Although the jury found that 35% of the insureds' damage was caused by plumbing leaks, there was no testimony or evidence in the record supporting that allocation of damages.[33] The San Antonio Court of Appeals held that the insured "failed to produce any evidence to demonstrate what portion of the loss was caused solely by the plumbing leak."[34] The court further noted:

> Texas recognizes the doctrine of concurrent causes. This doctrine provides that when, as in the instant case, covered and non-covered perils combine to create a loss, the insured is entitled to recover only that portion of the damage caused solely by the covered peril(s). *Travelers Indem. Co. v. McKillip*, 469 S.W.2d 160, 163 (Tex.1971); *Paulson v. Fire Ins. Exch.*, 393 S.W.2d 316, 319 (Tex.1965); *Warrilow v. Norrell*, 791 S.W.2d 515, 527 (Tex. App.—Corpus Christi 1989, writ denied). To this end, the insured must present some evidence upon which the jury can allocate the damage attributable to the covered peril. *Lyons v. Millers Casualty Ins. Co. of Texas*, 866 S.W.2d 597, 601 (Tex. 1993) (citing *Paulson*, 393 S.W.2d at 319).[35]

The Wallises argued on appeal that the trial court had improperly shifted the burden of proof from the carrier to the insureds given the adoption of article 21.58 of the Texas Insurance Code.[36] The *Wallis* court rejected the argument that the insured's burden to segregate damages between covered and non-covered perils under the *McKillip* opinion and other Texas Supreme Court cases had been legislatively overruled.[37] The court explained:

> The Wallises' argument regarding article 21.58 fails because the doctrine of concurrent-causation is not an affirmative defense or an avoidance issue. Rather, it is a rule which embodies the basic principle that insureds are entitled to recover only that which is covered under their policy; that for which they paid premiums. It is well established that insureds are not entitled to recover under an insurance policy unless they prove their damage is covered by the policy.[38]

Notably, the Wallises sought review by the Texas Supreme Court, but review was denied.[39]

Since the *Wallis* opinion in 1999, numerous Texas courts have echoed the San Antonio appellate court's analysis reinforcing that the insured bears the burden to produce some evidence to afford the jury an opportunity to allocate covered damages from those that are not covered. This merely requires the insured to meet its threshold burden to show that it is entitled to coverage under its policy.

More recently, in *JAW The Pointe*, the Texas Supreme Court again discussed the concurrent causation doctrine where wind and flood during Hurricane Ike combined to damage an insured's property.[40] The insured sought to recover costs to complete code upgrades required by the city after the insurer paid for the portion of damage solely caused by wind, the covered peril under the policy, because the covered wind damage alone would have required the insured to complete upgrades to comply with the city's code.[41] However, the permit for the insured's hurricane-needed repairs failed to segregate damage caused by the covered wind or the excluded flood.[42] The Court reaffirmed the common law concurrent causation doctrine in Texas, noting:

> Under this doctrine, we have held that, when "excluded and covered events combine to cause" a loss and "the two causes cannot be separated," concurrent causation exists and "the exclusion is triggered" such that the insurer has no duty to provide the requested coverage. But when a covered event and an excluded event "each independently cause" the loss, "separate and independent causation" exists, "and the insurer must provide coverage despite the exclusion."[43]

The insured argued that the wind damage independently caused the city to require the damaged buildings to be brought up to code. The insured further argued that it merely had to show that damage to the covered property caused the enforcement of law and ordinances, thereby shifting the burden to the carrier to show the damage that caused the enforcement of the ordinances was damage that the policy excluded. The Court rejected both arguments.

The Court recognized, however, that there was an anti-concurrent causation clause in the policy, which precluded application of the concurrent causation doctrine.[44] The Court held that even if there are two separate and independent causes of loss, when there is an anti-concurrent causation provision that applies, the exclusion still precludes coverage.[45] It recognized that the property sustained both covered wind and excluded flood damage, and that the city based its decision to enforce the ordinances on the combined total of the two. "JAW's November 2008 permit application is critical here because the record shows that the city relied on information provided with permit applications to determine whether to enforce its ordinances against a particular property."[46] The Court found that the permit application, which included damage from both wind and flood, was the touchstone for the city's enforcement of the ordinances.[47] And because the insured offered no evidence to support an argument the city's determination was based solely on the independent damage caused by wind, the Court determined the insurer met its burden that the exclusion applied, and that there was no coverage.[48]

Although *JAW The Pointe* addressed the insured's burden of proof in the context of a policy with an anti-concurrent causation clause, the Court implicitly recognized that the insured has the burden to segregate and support that portion of its claim that is covered when two causes combine to cause the loss (and no anti-concurrent causation provision applies). In fact, the briefing for the insured submitted by Gravely and McBride's law firm in *JAW The Pointe* raised many of the same arguments concerning Section 554.002 (formerly article 21.58) of the Texas Insurance Code now being asserted again. The Texas Supreme Court again had the opportunity to "correct" the *Wallis* line of cases in *JAW The Pointe* and clearly chose not to do so.

Questionable "Confusion"

These debates have led to three certified questions from the Fifth Circuit to the Texas Supreme Court in two different cases.[49]

In *Frymire Home Services, Inc. v. Ohio Security Insurance Co.*, the insureds sought to recover proceeds under a commercial property insurance policy after the insured property sustained wind and hail damage from a thunderstorm in June 2018.[50] Despite evidence from a report that pre-dated the inception of the policy at issue, which stated that the

roof was deteriorated and had sustained prior hail damage requiring its replacement, the insureds maintained that "the June 2018 hailstorm was the sole cause of [the insureds'] losses," asserting that the hailstorm "caused the damage that requires the roof to be replaced."[51] The insurer denied the claim, however, after concluding that the damage was the result of pre-existing damage.[52] The district court granted the summary judgment for the insurer, finding the insured did not satisfy its burden under the concurrent causation doctrine.[53]

On appeal, the insureds argued (among other things) that: (1) pre-existing damage and wear and tear were not "perils" and therefore should not be considered in a concurrent causation analysis; (2) the hailstorm was the direct cause of the roof damage, rather than pre-existing damage; and (3) the insureds met their burden to segregate and apportion damage by alleging the sole cause of its damage was the hailstorm.[54] Based on the hypotheticals and arguments raised by the *Frymire* insureds, the Fifth Circuit certified three questions to the Texas Supreme Court:

> (1) Whether the concurrent cause doctrine applies where there is any non-covered damage, including "wear and tear" to an insured property, but such damage does not directly cause the particular loss eventually experienced by the plaintiffs?
>
> (2) If so, whether plaintiffs alleging that their loss was entirely caused by a single, covered peril bear the burden of attributing losses between that peril and other, non-covered or excluded perils that plaintiffs contend did not cause the particular loss?
>
> (3) If so, whether plaintiffs can meet that burden with evidence indicating that the covered peril caused the entirety of the loss (that is, by implicitly attributing one hundred percent of the loss to that peril)?[55]

Despite applying the concurrent causation doctrine in its analysis of the case, the Fifth Circuit remarked that "aspects of the concurrent causation doctrine are unsettled."[56]

Similarly, in *Overstreet v. Allstate Vehicle & Property Insurance Co.*, the insured homeowner sought to recover damages for his leaky roof under his homeowners named-peril insurance policy.[57] Overstreet asserted that the leaky roof was caused by a hailstorm after issuance of the policy, but Allstate denied the claim after its investigation revealed that the damage was caused by wear and tear and prior hailstorms.[58] The district court granted the insurer summary judgment on the insured's claims, finding that the insured failed to "prove what damages were solely attributable to the covered storm."[59] On appeal, however, the Fifth Circuit again noted that it was "unsure whether the doctrine applies if . . . the covered peril caused the entire loss," and "unsure whether, even assuming a plaintiff must attribute losses to this situation, attributing 100% of the damage to a covered peril satisfies an insured's burden."[60] The Fifth Circuit did not appear to consider the fact that the policy at issue was a named-peril rather than an all risk policy.

The parties in *Overstreet* and *Frymire* settled before the Texas Supreme Court resolved the Fifth Circuit's pending questions. But the questions are easily answered, as the concurrent causation doctrine is not "unsettled." The questions are answered by the Texas Supreme Court's analysis in *JAW The Pointe* and the *Wallis* line of cases. Specifically, the court needs to determine first whether the causes of loss at issue are concurrent or independent. If the covered cause (here, for example, hail in the policy period) would have damaged the roof and *independently* required the repair or replacement claimed, separate and apart from other non-covered causes (such as deterioration), then under *JAW The Pointe*, there is coverage.[61]

But if damage was caused by the combination of covered hail and the pre-existing deteriorated (and excluded) condition of the roof, then the causes of loss are concurrent and interdependent, and the concurrent causation doctrine applies to preclude coverage, *unless the insured can apportion the covered from the non-covered damage*. Merely alleging the entirety of the damage was caused by the covered cause of loss does not meet the insured's burden under *JAW The Pointe* and the *Wallis* line of cases, as the insured bears the burden to either rebut the insurer's showing that non-covered perils combined to cause the damage or segregate the covered damage from non-covered damage.

Recent Further Obfuscation of the Concurrent Causation Doctrine

The Fifth Circuit again addressed the concurrent causation doctrine in a Hurricane Harvey dispute in *Advanced Indicator & Manufacturing Inc. v. Acadia Insurance Company*.[62] The insured, Advanced Indicator, claimed that its damage was caused solely by the hurricane, and it presented evidence at summary judgment that the roofing system and building were in "good shape" before the loss, as well as expert testimony that "the damage was 'absolutely' caused by the hurricane."[63] The insurer denied the claim, arguing that the claimed roof damage was caused by pre-existing conditions, including long-term leaks from deterioration and

poor workmanship, which are excluded from the policy.[64] The district court granted summary judgment to Acadia, holding that the concurrent causation doctrine barred the insured's claim, because the asserted covered losses were not segregated from non-covered losses.[65]

On appeal, the Fifth Circuit questioned whether the insured had submitted sufficient summary judgment evidence to create a disputed issue of material fact regarding whether the damage to the building resulted from a covered cause—wind from Hurricane Harvey.[66] Nevertheless, the Fifth Circuit determined that the evidence presented was sufficient to meet the insured's evidentiary burden to show damage from a covered cause of loss.

The Fifth Circuit next turned to whether the concurrent causation doctrine barred the insured's claims "because it cannot segregate covered losses from non-covered losses."[67] The Court reiterated the rules from *Wallis* and its progeny but noted that an "insured may carry its burden by putting forth evidence demonstrating that the loss came solely from a covered cause or by putting forth evidence by which a jury may reasonably segregate covered and non-covered losses."[68] The Fifth Circuit determined that the insured met its burden, noting:

> Here, the same evidence that supports [the insured's] argument that Hurricane Harvey caused some of its damage supports its argument that Hurricane Harvey caused all of the damage. Indeed, both [the public adjuster] and [the insured's expert] testified that the hurricane was the sole cause of [the insured's] loss. Accordingly, because a jury could reasonably find that all of [the insured's] loss comes from a covered cause, the concurrent causation doctrine does not bar recovery.[69]

The Fifth Circuit acknowledged that its certified questions from *Overstreet* and *Frymire* remained unanswered. But the court also noted that any purportedly unresolved questions were "of no import . . . because [its] conclusion [did] not exclusively rest on the application of the concurrent causation doctrine."[70]

Similarly, the lack of answers to the Fifth Circuit's prior certified questions has not stymied various other courts' efforts to apply the concurrent causation doctrine. Texas federal district courts have recently both granted[71] summary judgment on the basis of the concurrent causation doctrine and also denied summary judgment.[72] These cases demonstrate that courts still require the insureds to meet their burden to show the claimed damage was caused by a covered cause of loss. And, to avoid summary judgment, insureds have taken the risky move of arguing that the entirety of the claimed damage was due to the covered event. It remains to be seen whether a jury will agree with the all-or-nothing positions taken by the insureds.

A Brief Rebuttal to "Anatomy of An Entrenched Error"

In their paper "Anatomy of An Entrenched Error: 'Concurrent Causation' in Texas Coverage Litigation," Gravely and McBride argue at length that the concurrent causation doctrine in Texas is rooted in an error. The authors barely mention the Texas Supreme Court's most recent application of the doctrine in *JAW The Pointe*, a case in which their law firm represented the insured, nor do they address the Court's analysis of the concurrent causation doctrine in that decision.

Instead, the authors attempt to re-write the parameters of the concurrent causation doctrine by arguing that concurrent causation must concern the same "event of loss." Similarly, plaintiffs' counsel argue that there must be an involved "peril" (*i.e.,* there has to be a risk of loss), as opposed to a condition of the property, such as wear and tear or deterioration. But the Supreme Court has never restricted the concurrent causation doctrine to either of those scenarios. Rather, the focus is always on whether a cause of the *loss claimed* is covered or not. There is no support for these restrictive applications of the doctrine.

McBride and Gravely also argue that Texas Insurance Code Article 21.58 (now Insurance Code 554.002) shifted the burden of proof from the insured regarding allocation of damage when concurrent causation applies. It did not. Article 21.58 merely requires an insurer to plead and prove that an excluded or non-covered peril was at least a partial cause of the loss:

> In any suit to recover under an insurance contract, the insurer has the burden of proof as to any avoidance or affirmative defense that must be affirmatively pleaded under the Texas Rules of Civil Procedure. Any language of exclusion in the policy and any exception to coverage claimed by the insurer constitutes an avoidance or an affirmative defense.[73]

Importantly, the statute does not require the insurer to *allocate* the loss or apportion the insured's claimed damages once the insurer has established that at least some of the loss resulted from the non-covered peril. It certainly does not change the insured's threshold burden to show that its claim is covered, especially when covered and non-covered

causes combine to cause the claimed loss. In the concurrent causation context, Section 554.002 merely requires the insurer to bear the burden to prove that an *excluded* cause of loss inseparably combined with a covered cause of the loss claimed. Once the insurer has met that burden, the insured must either show that the loss was independently caused by the covered cause or provide evidence to segregate the covered from non-covered damage.

Because the plain text of the statute does not support their argument, the authors pivot to legislative history, citing a sole legislative subcommittee comment as the basis for their argument that Article 21.58 somehow shifted the burden of apportionment away from the insured when the concurrent causation doctrine applies:

> Under the Rules of Civil Procedure, Rule 94, insurance carriers, unlike other defendants, do not have the burden of proof for affirmative defenses. This [statute] would require insurers who assert affirmative defenses to plead and prove those defenses as required by every other party in Texas. This brings Texas in line with the rest of the nation.[74]

This legislative comment does not even suggest, much less articulate, that Article 21.58 changed the burden of proof on loss apportionment. At most, the comment serves only to explain why the subcommittee sought to enact the statute.

Statutes can only abrogate common law rules when that was what the legislature clearly intended.[75] The statute's plain language is considered before all else, because it is the surest guide to the legislature's intent.[76] Because neither the text of the statute (*i.e.*, the best expression of the legislature's intent) nor the legislative comment cited by the authors supports their legislative intent argument, the argument is meritless on its face.

Importantly, as discussed previously, the San Antonio Court of Appeals in *Wallis* expressly considered whether Article 21.58 legislatively overruled the common law burden of proof. The court ruled on the plain language of the statute, correctly observing that the doctrine of concurrent causation is not an affirmative defense or avoidance issue to which Article 21.58 applied:

> Rather, [the concurrent causation doctrine] is a rule which embodies the basic principle that insureds are entitled to recover only that which is covered under their policy; that for which they paid premiums. It is well established that insureds are not entitled to recover under an insurance policy unless they prove their damage is covered by the policy.[77]

This concept is best reflected when the insured's claimed loss is concurrently caused by pre-existing damage combined with new damage caused by a hailstorm. An insurer does *not* bear the burden to demonstrate pre-existing damage, although, practically speaking, it should introduce such evidence. It is black letter law that a property insurer is only liable for damage occurring during the policy period.[78] It is the *insured's* burden to show the damage claimed occurred during the pendency of the policy.[79] If there is evidence of pre-existing damage contributing to the claimed loss, then the insured must segregate that damage accordingly.

The authors further argue that Article 21.58 *must* have shifted the insured's concurrent causation burden, because an insurer cannot meet its burden of showing the applicability of the exclusion or non-covered peril to the claimed loss without also quantifying the portion of the loss resulting from it. This is nonsensical. Courts have been requiring insureds to meet their burdens of proof under the concurrent causation doctrine **for fifty years without issue**—both before and after the statute was enacted. Five decades of successful judicial dispositions on these issues dispels the authors' assertion that the courts' logic in applying the burdens "is suspect on its face."

No one disputes that an insured should be provided the insurer's position on coverage and concurrent causes of loss. During adjustment, the insurer will provide the insured with its coverage position and try to work with the insured in determining whether damage caused by concurrent causes of loss may be apportioned. If the insured seeks recovery through litigation, the insurer's pleadings and discovery will identify the non-covered perils that the insurer contends caused the loss and the extent of same.

Like the insureds in *Advanced Indicator*, an insured is free to take the risky position that 100% of the loss resulted from the covered peril. Assuming the insured meets its threshold burden to prove the damage is covered and occurred during the pendency of the policy period, the factfinder can find either that (1) the insurer did not prove by a preponderance of the evidence that the loss was at least concurrently caused by a non-covered peril, negating the applicability of concurrent causation and the insured's duty to apportion the loss; or (2) that it did, and, ostensibly, reject the insured's 100% causation theory. In the latter circumstance, the court will necessarily have to hold that the insured failed to meet its burden to apportion the loss between covered and uncovered perils. The insured can mitigate this risk by genuinely attempting to apportion the loss, rather than relying on the "100% covered" all-or-nothing strategy.

Finally, the authors pose the question: Who has the burden of proof to demonstrate that an excluded peril was *not* a concurrent cause of an otherwise covered loss? On its face, this question makes no sense. Under Section 554.002, **the insurer** bears the burden to prove that an excluded cause of loss *was* a concurrent cause of claimed damage. Under the doctrine as set out by the Court in *JAW The Pointe*, if covered and non-covered causes combine to cause a loss, the exclusion applies, and there is **no coverage**. Therefore, if the insured does not address the concurrent causation doctrine by presenting evidence to either allocate the loss or demonstrate that the covered cause was an independent and separate cause of the loss claimed, then the insured cannot and will not prevail.

Conclusion

Concurrent causation under Texas law is not unsettled or based on a legal error. It is well-established and has been re-affirmed time and again by Texas courts, including the Texas Supreme Court. If there is evidence that covered and non-covered causes combined to cause the insured's claimed loss, and those causes cannot be separated, then concurrent causation applies, and the insured must provide sufficient evidence to segregate the loss to recover on its claim.

1 *JAW The Pointe, LLC v. Lexington Ins. Co.*, 460 S.W.3d 597, 608 (Tex. 2015) (citations omitted).

2 *Id.*

3 *Wallis v. United Servs. Auto. Ass'n*, 2 S.W.3d 300, 302-03 (Tex. App.—San Antonio 1999, pet. denied) (when "covered and non-covered perils combine to create a loss, the insured is entitled to recover only that portion of the damage caused solely by the covered peril(s)").

4 *Fourth St. Place v. Travelers Indem. Co.*, 270 P.3d 1235, 1243 (Nev. 2011), *as modified on reh'g* (May 23, 2012) (internal quotes omitted).

5 *JAW The Pointe*, 460 S.W.3d at 608.

6 *Id.*

7 *Wallis*, 2 S.W.3d at 302-03. *See also Travelers Indem. Co. v. McKillip*, 469 S.W.2d 160, 162 (Tex. 1971).

8 *See e.g. All Saints Catholic Church v. United Nat'l Ins. Co.,* 257 S.W.3d 800, 802 (Tex. App.—Dallas 2008, no pet.); *Wallis,* 2 S.W.3d at 303; *Prime Time Family Entm't Ctr. v. Axis Ins. Co.*, No. 11-18-00241-CV, 2020 WL 6108263 (Tex. App.—Eastland Oct. 16, 2020, no pet.); *Hamilton Props. v. Am. Ins. Co.*, 643 F. App'x 437, 441-42 (5th Cir. 2016); *State Farm Lloyds v. Kaip,* No. 05-99-01363-CV, 2001 WL 670497, at *1, *3 (Tex. App.—Dallas June 15, 2001, pet. denied) (mem. op); *Starco Impex, Inc. v. Landmark Am. Ins. Co.*, No. 1:19-CV-39, 2020 WL 3442842, at*5 (E.D. Tex. June 3, 2020), *report and recommendation adopted,* No. 1:19-CV-39, 2020 WL 3440575 (E.D. Tex. June 23, 2020); *Seahawk Liquidating Trust v. Certain Underwriters at Lloyds London,* 810 F.3d 986, 995 (5th Cir. 2016).

9 *Wallis*, 2 S.W.3d at 303.

10 *See id.*; *JAW The Pointe*, 460 S.W.3d at 603.

11 *New Hampshire Ins. Co. v. Martech USA, Inc.*, 993 F.2d 1195, 1199 (5th Cir. 1993). *See also Stagliano v. Cincinnati Ins. Co.*, 633 F. App'x 217, 219 (5th Cir. 2015) (affirming summary judgment in favor of the insurer because a conclusory expert affidavit did not establish that hail damage to the insured's commercial property occurred from a particular hailstorm within the policy period. The Fifth Circuit specifically recognized that the insured had to come forward with some evidence or indication that the damage to property was caused by a specific hailstorm within the policy period); *343 W. Sunset, LLC v. Seneca Ins. Co., Inc.*, No. 5-19-CV-01375-FB-RBF, 2021 WL 5227086, at *3 (W.D. Tex. July 27, 2021), *report and recommendation adopted*, No. SA-19-CV-1375-FB, 2021 WL 5195799 (W.D. Tex. Aug. 11, 2021) (granting summary judgment due to the insured's failure to demonstrate hail damage occurred during the policy period).

12 *See Wallis*, 2 S.W.3d at 303.

13 *Id.* at 304 (affirming judgment notwithstanding the verdict because the evidence was not legally sufficient to support the jury's finding on the amount of damages caused solely by the covered peril); *Hamilton Props. v. Am. Ins. Co.*, Civil Action No. 3:12-CV-5046-B, 2014 WL 3055801, at *4 (N.D. Tex. July 7, 2014), *aff'd*, 643 F. App'x 437 (5th Cir. April 14, 2016) (per curiam); *U.S. Fire Ins. Co. v. Matchoolian*, 583 S.W.2d 692, 694 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.) (reversing and rendering a take-nothing judgment where the insured did not attempt to segregate damage caused by the covered peril from the uncovered peril).

14 *Wallis*, 2 S.W.3d at 303 (emphasis added).

15 *See e.g.*, *Hamilton Props.*, 643 F. App'x at 442 (affirming summary judgment in favor of the insurer because the insured could not, as a matter of law, meet its burden to segregate property damage caused by covered and non-covered causes of loss).

16 *See One Way Invs., Inc. v. Century Sur. Co.*, Civ. A. No. 3:14-CV-2839, 2016 WL 5122124 (N.D. Tex. Sept. 21, 2016) (granting summary judgment because the insured failed to provide any evidence that would enable a reasonable jury to estimate or allocate the amount of damage or the proportionate part of damage caused by a covered cause of loss).

17 *See e.g.*, *Elizondo v. Krist*, 415 S.W.3d 259, 264 (Tex. 2013) ("Bare, baseless opinions will not support a judgment even if there is no objection to their admission in evidence," and we have "often held that such conclusory testimony cannot support a judgment." "A conclusory statement of an expert witness is insufficient to create a question of fact to defeat summary judgment." Further, "a claim will not stand or fall on the mere *ipse dixit* of a credentialed witness." Expert testimony fails if there is "simply too great an analytical gap between the data and the opinion proffered." Courts are not required "to ignore fatal gaps in an expert's analysis or assertions." (citations omitted)). *See also Eason v. Thaler*, 73 F.3d

1322, 1325 (5th Cir. 1996) (holding that mere conclusory allegations are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment").

18 *McKillip*, 469 S.W.2d at 161.

19 *Id.*

20 *Id.* at 162.

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.* at 163.

25 *Id.*

26 *Emp'rs Cas. Co. v. Block*, 744 S.W.2d 940, 944 (Tex. 1988) (citing *Royal Indem. Co. v. Marshall*, 388 S.W.2d 176, 181 (Tex. 1965)) (affirming that "the burden was on plaintiff to plead and prove facts showing that the damages done to his [property] was within the coverage provided in the insurance policy")), *overruled in part on other grounds by State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 714 (Tex. 1996). *See also Bethea v. Nat'l Cas. Co*., 307 S.W.2d 323, 325 (Tex. App.—Beaumont 1957, writ ref'd) (holding that "the burden rested on appellant to plead and prove facts showing that" the policy afforded coverage); *Reserve Life Ins. Co. v. Crager*, 421 S.W.2d 697, 698 (Tex. App.—Beaumont 1967, no writ) (recognizing the "burden was upon plaintiff to allege and prove facts showing the loss sustained was covered by the policy"); *JAW The Pointe,* 460 S.W.3d at 603 (recognizing that "[i]nitially, the insured has the burden of establishing coverage under the terms of the policy"); *Hamilton Props.*, 643 F. App'x at 441 (recognizing that under "Texas law, to recover under an insurance policy, the insured must show that its claimed damages are covered by the policy"); *Martech USA, Inc.*, 993 F.2d at 1199 (recognizing that under Texas law, even after the Texas legislature's amendment requiring the insurer to plead and prove an exclusion applies, "proof that the loss occurred within the policy period is a *precondition* to coverage and thus the insured's responsibility" (emphasis in original)); *Certain Underwriters at Lloyd's of London v. Lowen Valley View, LLC*, 892 F.3d 167, 170 (5th Cir. 2018) (recognizing the "insured bears the burden of establishing that its claim is covered by the policy").

27 *Frymire Home Servs., Inc. v. Ohio Sec. Ins. Co.*, 12 F.4th 467, 471 (5th Cir. 2021), *certified questions accepted* (Sept. 10, 2021), *certified questions dismissed* (Dec. 3, 2021); *Lyons v. Millers Cas. Ins. Co. of Texas*, 866 S.W.2d 597, 601 (Tex. 1993).

28 Article 21.58 is a prior version of section 554.002 of the Texas Insurance Code, which currently governs insurers and insureds. The two provisions are essentially the same.

29 Tex. Ins. Code Ann. Art. 21.58 (Vernon Supp. 1998).

30 *Wallis*, 2 S.W.3d at 301–02.

31 *Id.* at 302.

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.* at 303.

37 *Id.*

38 *Id.*

39 In "Anatomy of an Entrenched Error: 'Concurrent Causation' in Texas Coverage Litigation," the authors repeatedly cite *Wallis* with an incorrect petition history. It is instructive that the Texas Supreme Court had the opportunity to review *Wallis* in 1999 and chose not to.

40 *JAW The Pointe*, 460 S.W.3d at 600.

41 *Id.*

42 *Id.*

43 *Id.* at 608 (citations omitted).

44 *Id.*

45 *Id.* at 609-10.

46 *Id.* at 609.

47 *Id.*

48 *Id.* at 609-10.

49 *See Overstreet v. Allstate Vehicle & Prop. Ins. Co.*, 34 F.4th 496, 499 (5th Cir. 2022), *certified questions accepted* (May 27, 2022); *Frymire Home Servs., Inc.*, 12 F.4th at 472.

50 *Frymire Home Servs., Inc.*, 12 F.4th at 470.

51 *Id.*

52 *Id.*

53 *Id.*

54 *See id.* at 471.

55 *Id.*

56 *Id.* at 472.

57 *Overstreet*, 34 F.4th at 497.

58 *Id.*

59 *Id.*

60 *Id.* at 499.

61 Of course, if the damage pre-existed the policy period and the roof already required replacement, then under the fortuity doctrine, there also should be no coverage.

62 *Advanced Indicator & Mfg., Inc. v. Acadia Ins. Co.*, 50 F.4th 469, 472 (5th Cir. 2022).

63 *Id.* at 476.

64 *Id.* at 472.

65 *Id.* at 476. The Fifth Circuit reversed the district court's grant of summary judgment for the insured's breach of contract, bad faith, and TPPCA claims on other grounds after finding that a factual dispute involving whether the cause of loss was covered under the policy existed to defeat summary judgment.

66 *Id.*

67 *Id.*

68 *Id.* at 477.

69 *Id.*

70 *Id.* at 477, n.4.

71 *See e.g.*, *Hilltop Church of Nazarene v. Church Mut. Ins. Co*., No. 6:21-CV-00322, 2022 WL 17823931, at *4 (E.D. Tex. Dec. 20, 2022); *Shree Rama, LLC v. Mt. Hawley Ins. Co*., No. 1:21-CV-91, 2022 WL 18456616, at *1 (S.D. Tex. Dec. 6, 2022), *report and recommendation adopted*, No. 1:21-CV-00091, 2023 WL 375358 (S.D. Tex. Jan. 24, 2023); *Bagheri v. State Farm Lloyds*, No. 3:21-CV-1269-D, 2022 WL 16964753, at *4 (N.D. Tex. Nov. 15, 2022); *Smiley Team II, Inc. v. Gen. Star Ins. Co*., No. 3:21-CV-103, 2022 WL 18909496, at *5 (S.D. Tex. Oct. 28, 2022).

72 *See e.g.*, *Marina Club Condo. Ass'n v. Philadelphia Indem. Ins. Co.*, No. 1:21-CV-429-DAE, 2022 WL 18046475, at *1 (W.D. Tex. Nov. 7, 2022).

73 Tex. Ins. Code Ann. Art. 21.58(b) (recodified, as amended, at Tex. Ins. Code 554.002).

74 "Anatomy of An Entrenched Error" at p. 8 (citing the 72nd Tex. Leg., Reg. Sess., Economic Dev. Comm., Subcommittee on Insurance, May 20, 1991, Tape 0588 Side 1).

75 *Baylor Scott & White v. Peyton*, 549 S.W3d 242, 252 (Tex. App. —Ft. Worth 2018, no pet.).

76 *Terra XXI, Ltd. v. Harmon*, 279 S.W.3d 781, 785 (Tex. App.—Amarillo 2007, pet. denied) (citing *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865-66 (Tex. 1999)).

77 *Wallis*, 2 S.W.3d at 303.

78 *Martech USA, Inc.*, 993 F.2d at 1199 (Texas law is clear that "[p]roof that the claimed losses occurred during the policy period is an essential element of [an insured's] coverage claim on which it bears the burden of proof"). *See also Stagliano*, 633 F. App'x at 219; *Block*, 744 S.W.2d at 944. The Fifth Circuit in *Martech* specifically rejected the argument that article 21.58 changed the burden of proving when damage occurred. The Court noted, "Article 21.58 applies to language of *exceptions* to coverage. As the court in *Block* pointed out timing of loss is a *precondition* to coverage, not an exception." *Martech USA, Inc.*, 993 F.2d at 1199 (emphasis in original).

79 *Id.*

By Laura J. Grabouski

UM/UIM LITIGATION HAS BEEN ON A WILD RIDE: WHERE DID WE END UP?

Uninsured/underinsured motorist (UM/UIM) claims hold a unique spot in Texas first-party claims litigation. The seminal *Brainard* decision established the following: A UM/UIM insurer has "no contractual duty to pay benefits until the liability of the other motorist and the amount of damages suffered by the insured are determined."[1] *Brainard* thus requires a claimant to prove the "car crash case" on liability and damages *before* litigating entitlement to UM/UIM benefits and bad faith claims.

This, in turn, has profound implications on both procedural and substantive remedies. Attorney's fees and penalty interest available for other first-party claims must satisfy additional requirements in order to be awarded in UM/UIM litigation. While UM/UIM claims are subject to both the statutory Unfair Settlement Practices provisions of Chapter 541 of the Texas Insurance Code and the common law duty of good faith and fair dealing, such claims are subject to abatement or have been dismissed outright. The disparities among UM/UIM claims and most other first-party claims have led to efforts both to judicially and legislatively overturn *Brainard*.

For example, legislation was proposed in the Texas House of Representatives in 2019 that would have eliminated *Brainard*'s requirement that a UIM claimant first obtain a judgment as to the underinsured driver's liability and damages, paving the way to simultaneous litigation of bad faith claims. After stalling in the Senate, an identical bill was filed in the 2021 session and also failed to make it to the Governor's desk.

However, at the same time, some litigants perceived the Texas Supreme Court's sweeping *Menchaca* decision as a greenlight for UM/UIM reform.[2] After all, *Menchaca* did away with the defense that a bad faith claim could not be stated absent a breach of contract. In 2021 the Texas Supreme Court issued a series of decisions on bad faith, recovery of attorney's fees, and scope of discovery. Although those decisions provided much needed clarity, *Brainard* remains the law. In light of these developments, litigants need a roadmap prior to pursuing UM/UIM benefits.

This article will attempt to provide one while cruising through the following key issues:

The *Brainard* Roadblock: Why is Litigation of UM/UIM Claims So Complicated?

The *Brainard* Off-Ramp: Can claimants recover attorney's fees under the Uniform Declaratory Judgments Act without stating a claim for breach of contract?

Does *Brainard* curtail bad faith claims?

Should Bad Faith Claims Be Severed, Bifurcated, or Dismissed?

Did *Menchaca* overrule *Brainard* for bad faith claims?

Can you Depose the Carrier's Corporate Representative on bad faith claims?

Buckle up, it's going to be a bumpy ride.

I. The *Brainard* Roadblock

Courts recognize three avenues for claimants to sue for payment of UIM benefits:

> We note our holding is consistent with an insured's right to sue the UIM insurer without joining the UIM and litigate the UIM's liability and underinsured status in that lawsuit. *See In re Reynolds*, 369 S.W.3d at 655 ("[A]n insured seeking the benefits of his UIM coverage may [(1)] sue his UIM insurer directly without suing the UIM; [2] obtain written consent from his UIM insurer and then sue the UIM alone, making the judgment binding against the insurance company; or [3] sue the UIM without the written consent of the UIM insurer and relitigate liability and damages.")[3]

Pursuing any one of these options is known as the "car crash case." Although a suit on a contract, UM/UIM litigation uses principles of tort law to determine coverage. The implications of this hybrid claim are significant, creating major anomalies with other first-party claims.

➢ Attorney's Fees

Unlike most other first-party claims, attorney's fees are not available under Chapter 38 of the Texas Civil Practices & Remedies Code because no breach can occur prior to rendition of judgment on the tort claim.[4] *Brainard* provided the following rationale:

> Neither requesting UIM benefits nor filing suit

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against the insurer triggers a contractual duty to pay. Where there is no contractual duty to pay, there is no just amount owed. Thus, under Chapter 38, a claim for UIM benefits is not presented until the trial court signs a judgment establishing the negligence and underinsured status of the other motorist.

Of course, the insured is not required to obtain a judgment against the tortfeasor. The insured may settle with the tortfeasor, as Brainard did in this case, and then litigate UIM coverage with the insurer. But neither a settlement nor an admission of liability from the tortfeasor establishes UIM coverage, because a jury could find that the other motorist was not at fault or award damages that do not exceed the tortfeasor's liability insurance. *Brainard's* contention that a UIM policy is to be treated like other contracts, for which damages are liquidated in a judicial proceeding and attorney's fees incurred are recoverable, misinterprets the nature of UIM insurance.[5]

➢ Penalty Interest

The accrual of penalty and prejudgment interest is also starkly different for UM/UIM claims. A UM/UIM claim is not subject to penalty interest where the carrier timely pays the claim after the court enters judgment establishing liability.[6]

➢ Prejudgment Interest

Likewise, prejudgment interest does not accrue on a UIM claim under the policy until the carrier breaches the policy by withholding benefits after the insured obtains judgment.[7] However, *Brainard* holds that UIM insurance covers prejudgment interest *that the underinsured motorist would owe the insured* after the insured obtains judgment establishing liability and the underinsured status of the other motorist.[8]

➢ Bad Faith Claims

Claims for breach of the common law duty of good faith and fair dealing and statutory Unfair Settlement Practices are viable, but are effectively "paused," and are often dismissed as discussed at greater length below.

➢ Discovery

Discovery battles, which are infrequently, if ever, litigated on other first-party claims are often waged in UM/UIM litigation. New case law provides specific guidance for the scope of discovery.

➢ Punitive Damages

Under Texas law, UM/UIM carriers are not responsible for punitive damages for unique public policy reasons. In arguing against liability for the prejudgment interest that the tortfeasor would owe the claimant in *Brainard*, the carrier pointed to noncoverage for punitive damages. The Texas Supreme Court rejected the analogy and explained as follows:

> Trinity's argument fails for several reasons. First, although several courts of appeals have held that UIM insurance does not cover punitive damages assessed against the underinsured motorist, none reached this result by adopting Trinity's narrow interpretation of damages "because of bodily injury." In fact, their reasoning effectively supports UIM coverage for prejudgment interest. In *Shaffer*, the court concluded that the phrase "because of bodily injury" was ambiguous because it could mean that the damages must (a) literally derive from a bodily injury or (b) arise as a result of bodily injury. If this language were ambiguous and had been drafted by the insurance company, precedent would require that it be interpreted to favor the insured. Most UIM provisions, however, recite nearly the exact text of article 5.06-1(5). For that reason, the *Shaffer* court inquired into the statute's legislative intent, which it found addressed in one of this Court's opinions. In *Stracener*, we concluded that the Legislature sought to protect "conscientious motorists from 'financial loss caused by negligent financially irresponsible motorists'." Accordingly, the court of appeals observed that a primary purpose of UIM insurance is compensatory; it protects against financial loss. Other courts of appeals have added that neither deterring wrongful conduct nor punishing the defendant is accomplished when the UIM insurer pays punitive damages assessed against the underinsured motorist. Thus, they have held that neither the language of article 5.06-1(5) nor public policy supports coverage of punitive damages.[9]

The Texas Supreme Court's subsequent analysis of punitive damages in an unrelated context indicated its ongoing agreement with the lack of UM/UIM coverage of punitive damages. In *Fairfield Ins. Co. v. Stephens Martin Paving, L.P.*, the Court observed: "Recent Texas courts have uniformly rejected [UM/UIM coverage for punitive damages] as against public policy."[10]

II. The *Brainard* Off-Ramp: Can claimants recover attorney's fees under the Uniform Declaratory Judgments Act without stating a claim for breach?

Yes, the Uniform Declaratory Judgments Act (UDJA) effectively bypasses *Brainard*'s limitation on attorney's fees.[11]

In *Allstate Insurance Co. v. Irwin*, the Texas Supreme Court rejected the carrier's argument that because a carrier does not commit a breach of contract when denying a UIM claim prior to adjudication of liability and damages under *Brainard*, a claimant cannot bring claims for a declaratory judgment as to coverage. The Court explained:

> But even though no breach has occurred, a justiciable controversy may arise as to the parties' rights and status under the contract. When such a controversy exists, and a declaration of the parties' rights will terminate the controversy between the parties or otherwise serve a useful purpose, the remedy is available to the court. *See Bonham State Bank*, 907 S.W.2d at 468. Chapter 37's stated purpose is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." TEX. CIV. PRAC. & REM. CODE § 37.002(b). Part of the remedy it affords is a discretionary award of reasonable attorney's fees when equitable and just. *Id.* § 37.009.[12]

Irwin is significant because it paves the way for an award of attorney's fees otherwise foreclosed by *Brainard*.[13] Ironically, while some claims brought under the UDJA are subject to dismissal for being duplicative of a breach of contract claim, a UM/UIM claim under the UDJA is viable because of *Brainard*. As the *Irwin* court noted, "But here Irwin does not have a claim for breach of contract, so his request for declaratory relief does not merely duplicate that claim."[14]

However, while using the UDJA might help some litigants avoid the *Brainard* attorney's fees roadblock, the maneuver has its limitations. In a recent case that was removed from state court to federal district court *(Piazzo v. Allstate Indem. Co.*), the court dismissed the claim for attorney's fees solely as to declaratory relief because the attorney's fees provisions of the Texas Declaratory Judgments Act do not apply to actions pending in federal court.[15] The Fifth Circuit has explained as follows:

> The Mitchell defendants rely on the § 37.009 of the Texas DJA to authorize recovery of attorney's fees. Although the Texas DJA expressly provides for attorney's fees, it functions solely as a procedural mechanism for resolving substantive "controversies which are already within the jurisdiction of the courts." *Housing Authority v. Valdez,* 841 S.W.2d 860, 864 (Tex. App.--Corpus Christi 1992, writ denied). Unlike substantive law, however, Texas procedure does not govern this diversity action. *See Gasperini v. Center for Humanities, Inc.,* 518 U.S. 415, 116 S. Ct. 2211, 2219, 135 L. Ed. 2d 659 (1996) (observing that "under the Erie doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law").
>
> This court specifically noted in *Self-Insurance Institute of America, Inc. v. Korioth*, 53 F.3d 694 (5th Cir. 1995) that, although "a party may recover fees in a federal declaratory judgment action where 'controlling substantive law' permits such recovery," "the Texas DJA is neither substantive nor controlling." *Id.* at 697 (internal citation omitted). Though jurisdiction in *Korioth* arose through a federal question claim rather than diversity, the decision's language clearly indicates, and we now hold, that a party may not rely on the Texas DJA to authorize attorney's fees in a diversity case because the statute is not substantive law.[16]

Piazzo demonstrates a disparity that will continue for declaratory judgment claims litigated in federal court even post-*Irwin*. For state court actions, claimants should assert declaratory judgment claims to state a claim for attorney's fees.

III. Does *Brainard* Curtail Bad Faith Claims?

Not in substance. UM/UIM claims are subject to the Unfair Settlement Practices statutory provisions as well as the common law duty of good faith and fair dealing. In fact, the Texas Supreme Court first recognized the common law duty in a UIM case, *Arnold v. National County Mutual Fire Insurance Co.*:

> Arnold raises the issue of whether there is a duty on the part of insurers to deal fairly and in good faith with their insureds. We hold that such a duty of good faith and fair dealing exists."[17]

Brainard did not address bad faith claims other than to note that such claims had been severed and abated and remained pending.[18]

Moreover, as early as 2004, the United States Court of Appeals for the Fifth Circuit decided the *Hamburger* case, in which it rejected the argument that liability cannot be reasonably clear until a tort judgment has been issued.[19]

It is now settled that an insured may join bad faith claims with contractual and declaratory judgment claims. Most courts have held that such claims are not subject to dismissal prior to obtaining a judgment on entitlement to benefits, which is consistent with the *Hamburger* holding:

> In *Hamburger*, the Fifth Circuit implicitly recognized that there may be cases in which an insurer's liability to pay UM/UIM benefits is reasonably clear despite the fact that no judicial determination of the UM/UIM's liability has been made. When a reasonable investigation reveals overwhelming evidence of the UM/UIM's fault, the judicial determination that triggers the insurer's obligation to pay is no more

> than a formality. In such cases, an insurer may act in bad faith by delaying payment and insisting that the insured litigate liability and damages before paying benefits on a claim.[20]

Texas courts of appeal have also followed *Hamburger* in holding that "an insurer can act in bad faith by failing to reasonably investigate or delaying payment on a claim for uninsured motorist benefits until after the insured obtains a judgment establishing the liability and uninsured status of the other motorist."[21]

IV. Detour Ahead: Bad Faith Claims Still Must be Severed and Abated

In virtually all UM/UIM cases, trial courts grant motions to sever and abate the contractual and extracontractual claims. In *In re State Farm Mutual Auto. Insurance,* the Texas Supreme Court addressed the practice and confirmed that it is required even if no breach-of-contract claim has been pleaded.[22] The reason is two-fold: (1) bad faith claims may be rendered moot if the car crash case does not prove liability or damages in excess of the tortfeasor's coverage, and (2) the carrier also faces undue prejudice if the jury is presented with evidence of a settlement offer relative to the bad faith claims when such evidence is inadmissible on the coverage claims.[23] The Court adopted the "consensus view of the courts of appeals on this point," further holding denial of severance and abatement is an abuse of discretion.[24]

• Did Bifurcation Replace Severance and Abatement?

The Court ordered a bifurcated trial in *In re State Farm* as the claimants had not asserted breach of contract. In doing so, however, bifurcation did not end the standard practice of severance and abatement. In fact, both the Third and Thirteenth Courts of Appeals addressed the question head-on and held that severance and abatement, not bifurcation, was the proper remedy post- *In re State Farm*.[25] Both courts observed that the carrier specifically requested bifurcation in *In re State Farm*, and the Texas Supreme Court's analysis in granting the relief in fact relied on "severance and abatement" precedent.[26]

V. Did *Menchaca* Overrule *Brainard* for bad faith claims?

Almost immediately after the Texas Supreme Court issued its decision in *Menchaca* and its straightforward "rules" for first-party bad faith claims, practitioners perceived a detour around *Brainard*'s cumbersome litigation process. The *Menchaca* Court summarized five rules to govern first-party coverage and bad faith litigation as follows:

- The "general rule" is that an insured cannot recover policy benefits as actual damages if there is no right to the benefits.[27]
- The "entitled-to-benefits rule" announced in *Vail*[28] remains viable. As a corollary to the general rule, where an insured establishes that the insurer has unreasonably withheld covered benefits, those benefits are recoverable as actual damages under the Insurance Code.[29]
- Policy benefits may be recoverable as actual damages under the "benefits-lost rule" if an insurer, through a misrepresentation of coverage, waiver and/or estoppel, or statutory violation, causes the loss of benefits.[30]
- The "independent-injury rule" announced in *Stoker*[31] remains viable, although extremely limited in application, because the insured's statutory claim must be independent of the duty to pay contractual benefits and must cause injury that is independent of the loss of such benefits.[32]
- The "no-recovery rule" is a natural corollary to rules one through four and holds that an insured cannot recover damages for a statutory violation absent a right to benefits or independent injury.[33]

Menchaca also affirmed the "*Vail*" rule that actual damages, which include up to treble damages for a knowing violation, may be recovered for benefits wrongfully withheld, irrespective of independent damages.

Menchaca remains highly significant for first-party claims. **As applied to UM/UIM claims, did *Menchaca* effectively overrule *Brainard*? No.** The issue was squarely presented in *In re State Farm Mut. Auto. Ins. Co.*[34] The Court set the scene as follows:

> These original proceedings arise from suits by holders of underinsured motorist ("UIM") insurance seeking recovery against their insurers following traffic accidents. Plaintiffs in such cases often bring claims for breach of their insurance policies as well as statutory, extracontractual claims authorized by the Insurance Code. The common practice has been to sever and abate the Insurance Code claims while an initial trial is conducted on the breach-of-contract claim to determine whether the underinsured motorist was liable for the accident and, if so, the amount of damages suffered by the insured. A plaintiff who succeeds in this first phase of the case may then proceed to litigate its Insurance Code claims in light of the result of the initial trial.
>
> *A wrinkle in the cases before us is that the insureds did not sue for breach of their insurance policies.* Although they seek recovery of the amount they

> claim to be owed under their policies, *they brought only extracontractual, Insurance Code claims. They contend that, because they brought only statutory claims and because there are no breach-of-contract claims to sever and try first, no bifurcation of trial is required.* **As explained below, we disagree.**[35]

The Court admitted *Brainard*'s process is not "straightforward," but held that it is consistent with *Menchaca*'s "entitlement to benefits" rule that generally applies to bad faith claims:

> In *Menchaca*, this Court recognized two paths an insured may take to establish the damages caused by an insurer's violation of the Insurance Code: either the insured establishes (1) "a right to receive benefits under the policy" or (2) "an injury independent of a right to benefits." 545 S.W.3d at 500. Under the first path, if an insured "establishes a right to receive benefits under the insurance policy [he] can recover those benefits as 'actual damages' under the [Insurance Code] if the insurer's statutory violation causes the loss of benefits." *Id.* at 495. And under the second path, "if an insurer's statutory violation causes an injury independent of the insured's right to recover policy benefits, the insured may recover damages for that injury even if the policy does not entitle the insured to receive benefits." *Id.* at 499. As *Menchaca* made clear, **there is no alternative to these two pathways.** "An insured cannot recover *any* damages based on an insurer's statutory violation if the insured had no right to receive benefits under the policy and sustained no injury independent of a right to benefits." *Id.* at 489.[36]

The Court also rejected the claimants' argument that the "dual pathway" was limited to the type of homeowners insurance policy at issue in *Menchaca*, finding no distinction with the line of cases culminating in the 2018 decision.

Importantly, *In re State Farm* was largely concerned with the procedure, not the availability of bad faith claims under *Brainard*. As discussed above, *In re State Farm* also held that *Menchaca* did not alter the traditional sever-and-abate procedure. With or without a breach of contract claim, "the showings they must make in order to recover are the same showings required of other UIM plaintiffs who pleaded both breach-of-contract and statutory claims and were required to try those claims separately."[37]

VI. New Road for Discovery

With bad faith claims severed and abated, carriers have successfully resisted discovery that is more commonplace in non-UM/UIM litigation, namely discovery of the carrier's files and depositions of its corporate representatives. Under *Brainard*, carriers have argued that no corporate representative deposition would be relevant until after the "car wreck" case. However, appellate courts had split over whether *Brainard* prohibits discovery of the carrier's files and depositions of its corporate representatives prior to the car wreck phase and a judgment that entitle the claimant to benefits. Some decisions have allowed such discovery with limitations whereas other decisions have prohibited it outright.[38]

However, the Texas Supreme Court has recently authorized depositions of corporate representatives prior to resolution of the "car wreck" case, albeit with limitations. *See In re USAA General Indemnity Co.*[39] USAA moved to quash the notice of its corporate representative's deposition on the following topics:

> 1. Any policy(ies) of insurance issued or underwritten by the Defendant applicable to the wreck made the subject of this suit;
>
> 2. The occurrence or non-occurrence of all condition(s) precedent under the contract including, but not limited to, collision with an uninsured motorist; and compliance by the Plaintiff with the terms and conditions of his policy(ies);
>
> 3. Any facts supporting Defendant's legal theories and defenses;
>
> 4. The amount and basis for the Defendant's valuation of the Plaintiff's damages;
>
> 5.Whether [tortfeasor] was an uninsured/ underinsured motorist at the time of the collision;
>
> 6. Defendant's contention that Plaintiff has failed to comply with all conditions precedent to recovery;
>
> 7. Defendant's claims and defenses regarding Plaintiff's assertions in this lawsuit;
>
> 8. Defendant's contention that it is "entitled to offsets, including any recovery by Plaintiff from other parties or their insurance carriers";
>
> 9. Defendant's affirmative defense that there are "contractual provisions with which the Plaintiff has failed to comply."[40]

The notice also included a request for "any and all reports prepared" concerning the claim.[41] The trial court denied the motion.[42]

USAA's position was that coverage was not in dispute, provided that the plaintiff proved liability of the underinsured driver and damages in excess of the driver's limits. As such,

how USAA's employees investigated and evaluated the UIM claim was not relevant to the predicate liability issues. Furthermore, its employees had no personal knowledge of the accident.[43] The plaintiff argued that there was no basis in law for a complete ban on a carrier's representative's deposition and that it was proper to ascertain information regarding the carrier's evidence on liability and its defenses.[44] The Court agreed with the claimant but also cautioned against an expansive interpretation as follows:

> [W]e hold that the deposition of a UIM carrier's corporate representative in a suit for UIM benefits is not categorically prohibited on relevance grounds.
>
> However, we reiterate that the discovery conducted in such a suit—whether by deposition or any other method—may not exceed the bounds of the claims at issue. . . **A plaintiff may not obtain discovery on an unasserted, abated, or unripe bad faith claim under the guise of investigating a claim for benefits**.[45]

- **Scope of Deposition**

The Court also provided specific parameters for the scope of a deposition in UIM suits as follows:

- A claims professional can be questioned as to the facts supporting the carrier's legal theories and defenses, including "whether [the other driver] was uninsured/underinsured motorist at the time of the collision" and claims and defenses regarding plaintiff's assertions in the lawsuit.

- A claims professional may also have to provide testimony on damages and the carrier's evaluation of damages, but excluding work product and attorney-client communications.

- Plaintiff is not permitted to question the witness as to the policy generally (where the carrier stipulated as to potential coverage for the plaintiff), plaintiff's compliance with the policy's provisions, and conditions precedent to suit.

- Questions concerning pleaded offsets are not relevant at the car crash phase.

- Extracontractual matters including the claim-handling process are off limits until liability and damages have been established.[46]

Proportionality

The Court addressed the carrier's proportionality argument but noted such a determination is made on a case-by-case basis and the movant must support its complaint with evidence, not conclusory allegations.[47] For a recent decision disallowing a corporate representative deposition based on proportionality, see *In re Home State County Mut. Ins. Co.*, in which the court granted the carrier's writ of mandamus to quash a corporate representative deposition where the carrier supported its proportionality objection with specific evidence.[48] The appellate court held that "Safeco supported its proportionality objection with evidence," namely "a business record affidavit and two [] exhibits, one containing a chain of e-mails between counsel and the other containing its supplemental responses to Taiwo's request for disclosure."[49] The court further observed as evidence establishing the proportionality objection the claims specialist's declaration attesting to disclosure of the entirety of the unprivileged portions of the claim file, including the policy, correspondence, police report and witness statements.[50]

- **Takeaways on Bad Faith Discovery**

The lesson from *Arnold* and *Brainard*, up through *In re Allstate* and *In re USAA*, is that a claim for UM/UIM policy benefits is not immune from extracontractual liability and should be handled like any other first-party claim with the expectation of discovery as to claim-handling. The differences occur with respect to timing. In "phase 1," of a UI/UIM claim, the claimant may be able to depose the claims professionals on a limited basis, subject to proportionality objections. Conversely, no bad faith discovery is available in phase 1. If the case proceeds to "phase 2," discovery into claim-handling and depositions of the claims professionals are appropriate as in other first-party litigation.

Are we at the end of the road for battles over UM/UIM procedure?

Probably not, although with three Texas Supreme Court decisions, another direct challenge to *Brainard* would presumably be legislative, but no such legislation has emerged to date. Furthermore, these cases have modified the harsh effects of *Brainard*'s holding and may have somewhat leveled the playing field for UM/UIM claims. What remains true is that UM/UIM claims are still a hybrid among first-party claims, and practitioners have to know the rules of the road.

1 *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809, 815 (Tex. 2006).

2 *USAA Texas Lloyd's Company v. Menchaca*, 545 S.W.3d 479, 494 (Tex. 2018).

3 *State Farm County Mut. Ins. Co. v. Diaz-Moore*, 2016 Tex. App. LEXIS 11534, *6 (Tex. App.San Antonio Oct. 26, 2016, no pet.) (memorandum op.); *accord, In re Perry*, 2019 Tex. App. LEXIS 3176, *19-20 (Tex. App. Corpus Christi—Edinburg 2019) (orig. proceeding).

4 *Brainard.*, 216 S.W 3d at 818.

5 *Id.* (internal citations omitted).

6 *See Wellisch v. United Servs. Auto. Ass'n*., 75 S.W.3d 53 (Tex. App.—San Antonio 2000, pet. denied).

7 *Brainard,* 216 S.W 3d at 815.

8 *See id.* at 813.

9 *Brainard*, 216 S.W.3d at 813-14 (internal citations omitted).

10 *See Fairfield Ins. Co. v. Stephens Martin Paving, L.P.*, 246 S.W.3d 653, 684-85 (Tex. 2008).

11 *See Allstate Ins. Co. v. Irwin*, 627 S.W.3d 263 (Tex. 2021) (disapproving *Allstate Ins. Co. v. Jordan*, 503 S.W.3d 450 (Tex. App.—Texarkana 2016, no pet.)).

12 *Id.* at 271.

13 *See id.* at 269.

14 *Id.*

15 *See Piazzo v. Allstate Indem. Co.*, 601 F. Supp. 3d 190, 2022 U.S. Dist. LEXIS 98287, *194 (S.D. Tex. 2022).

16 *Utica Lloyd's v. Mitchell*, 138 F.3d 208, 210 (5th Cir. 1998).

17 725 S.W.2d 165, 167 (Tex. 1987).

18 *Brainard*, 216 S.W.3d at 811.

19 *See Hamburger v. State Farm Mut. Auto. Ins. Co.,* 361 F.3d 875, 880-91 (5th Cir. 2004).

20 *Accardo v. Am. First Lloyds Ins. Co*., 2012 U.S. Dist. LEXIS 62181, *5 (S.D. Tex. May 3, 2012); *accord, Piazzo v. Allstate Indem. Co.,* 601 F. Supp. 3d 190 (S.D. Tex. 2022); *Valdez v. Allstate Fire & Cas. Ins. Co*., 2021 U.S. Dist. LEXIS 181777, * (W.D. Tex. 2021); *but see Butts v. State Auto Mut. Ins. Co.*, 2023 U.S. Dist. LEXIS 95265 (W.D. Tex. 2023) (adopting magistrate report and recommendation and dismissing extracontractual claims for bad faith for lack of subject matter jurisdiction).

21 *State Farm Mut. Auto. Ass'n v. Cook*, 591 S.W.3d 677, 683 (Tex. App.—San Antonio 2019, no pet.); *see also Burgess v. Allstate Fire & Cas. Ins. Co.,* 641 S.W.3d 474 (Tex. App.—Austin 2021, no pet.) (reversing and remanding summary judgment as to common law duty of good faith and statutory violations of Chapter 541); *In re State Farm Mut. Auto Ins. Co.,* 614 S.W.3d 316, 321 (Tex. App.—Fort Worth 2020, orig. proceeding) (*Brainard* did not expressly overrule *Arnold* or *Murry v. San Jacinto Agency*, 800 S.W.2d 826 (Tex. 1990) and thereby foreclose accrual or ripening of common law bad faith claim; denying mandamus sought by carrier from discovery propounded on bad faith claims following carrier's payment of judgment for UIM benefits).

22 *In re State Farm Mut. Auto. Ins.,* 629 S.W.3d 866, 876 (Tex. 2021).

23 *Id.*

24 *Id.* at 877.

25 *See In re Allstate Fire Cas. Ins. Co.,* 2022 Tex. App. LEXIS 170, *7 (Tex. App.—Austin 2022, orig. proceeding) ("Severance and abatement is appropriate when, as in this case, an insured seeks a determination as to entitlement to UIM benefits and also brings extracontractual claims against the insured.")*; In re Farmers Tex. County Mut. Ins. Co.*, 2021 Tex. App. LEXIS 7288, *25-26 (Tex. App.—Corpus Christi 2021, orig. proceeding).

26 *See Allstate Fire Cas. Ins. Co.,* 2022 Tex. App. LEXIS 170, *6-7; *In re Farmers Tex. County Mut. Ins. Co.*, 2021 Tex. App. LEXIS 7288, *25; *see also In re Farmers Tex. County Mut. Ins. Co.*, 2021 Tex. App. LEXIS 2870 (Tex. App.—Fort Worth 2021) (granting mandamus as to motion to abate extracontractual case until claimant obtains judgment against tortfeasor)

27 *Menchaca,* 545 S.W.3d at 490.

28 *Vail v. Texas Farm Bureau Mutual Insurance Company*, 754 S.W.2d 129, 136-37 (Tex. 1988).

29 *Menchaca,* 545 S.W.3d at 495.

30 *Id.* at 497-99.

31 *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338, 341 (Tex. 1995).

32 *Menchaca,* 545 S.W.3d at 499-500.

33 *Id*. at 501.

34 629 S.W.3d 866.

35 *Id.* at 870 (emphasis added).

36 *See id*. at 873 (emphasis added).

37 *Id.* at 877.

38 *See In re USAA Gen. Indem. Co.,* 624 S.W.3d 782, 789 (Tex. 2021) (observing split among courts of appeal, including diverging decisions from the Fourteenth Court of Appeals).

39 *See id.*

40 *Id.* at 786.

41 *Id.*

42 *Id.*

43 *See id.* at 789.

44 *See id.* at 787.

45 *Id.* at 791 (emphasis added).

46 *Id.* at 794-795.

47 *See id.* at 792.

48 2022 Tex. App. LEXIS 3155 (Tex. App.—Dallas 2022, orig. proceeding).

49 *Id.* at *10.

50 *Id.*

By William E. McMichael

"THAT'S JUST LIKE YOUR OPINION, MAN!" HOW DIFFERENCES IN TEXAS AND FEDERAL RULES OF EVIDENCE'S TREATMENT OF OPINION TESTIMONY MAY IMPACT YOUR COVERAGE CASE

I. Introduction.

Imagine you are retained to try a coverage lawsuit stemming from damage to a commercial property following a severe weather event. On the eve of trial, the opposing counsel files a motion to strike one of your witnesses, Carl Contractor. Mr. Contractor is the owner of a local general contracting company. He personally came to the property, assessed the damage to the property, and provided an estimate to repair certain damage. Although he ultimately did not perform the repairs, his proffered testimony includes facts that are helpful to your client's position. Plus, his bid to repair the damage aligns more with your damage estimate than your opponent's valuation. However, the prior firm handling this case did not list Mr. Contractor as an expert witness, but only as a fact witness, because his testimony relies on his first-hand knowledge of events (*i.e.*, things he saw, things he heard, things he did, things that were said, etc.), not post-factual analysis.

During the pre-trial hearing, your opposing counsel decries Mr. Contractor's testimony as "unreliable expert opinion testimony." "Your Honor, while Mr. Contractor's proffer contains statements of fact, his testimony draws upon specialized knowledge gained through his years of working as a contractor. Furthermore, we have no way of knowing whether his repair bid is based on independently verifiable principles and methods, and it is prejudicial to make us cross-examine him after he's already spoiled the jury's perception of the evidence. That's undisclosed expert opinion testimony, Your Honor, and the Court should not allow it to be presented to the jury."

"But Your Honor," you respond, "Mr. Contractor runs the most successful contracting business in this county, and he is personally knowledgeable about facts at issue in this case and the value of the service he provides. Plus, it's a fact—not an *opinion*—that he came to the property and provided a bid. He is not going to testify as to the cause of the loss, whether his bid is reasonable, or whether the methods used to reach his bid were reasonable. He's also not opining about whether the opposing party's witnesses are reasonable. He is here only to talk about what he did, saw, said, and heard. That's admissible, factual testimony and should not be excluded.'"

What should the Court do? Is the proffered testimony admissible?

Would it surprise you to know that the answer may depend on whether you are in federal court or Texas state court?

II. A Review of How Federal and Texas Rules Treat Opinion Testimony.

There are two main distinctions between the Texas and Federal Rules of Evidence with respect to opinion testimony. First, Federal Rule of Evidence 701 provides that lay witnesses may not offer "opinion testimony" if their opinions are "based on scientific, technical, ***or other specialized knowledge*** within the scope of Rule 702."[1] In other words, under the Federal Rules, if a lay witness offers opinion testimony, the testimony must be based solely on rational perception (*i.e.*, what the witness saw, heard, said, or did), and may not rely on specialized knowledge.[2] By contrast, the Texas Rules of Evidence do not impose such limitation on lay opinion testimony.[3]

Texas Rule 701. Opinion Testimony by Lay Witnesses.

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception; and

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue.

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This article would not be possible but for the efforts of Tunrayo Lumpkin, a Summer Associate with Pillsbury's Houston Office. Ms. Lumpkin is a rising third-year law student at Thurgood Marshall School of Law.

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(c) ***not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.***

Additionally, Federal Rule of Evidence 702 requires that opinion testimony do more than merely "help the trier of fact to understand the evidence or to determine a fact in issue."[4] Rather, Rule 702 explicitly requires that opinion testimony must (1) rely on "sufficient facts or data;" and (2) be the product of "reliable principles and methods" properly applied to those facts or data.[5] The Federal Rules thus expressly require courts to go beyond the threshold relevance analysis and thoroughly evaluate whether the methods and data underlying any opinion testimony are sufficiently reliable.[6] This requirement is also supported by Federal Rule of Civil Procedure 26(a)(2)'s requirements that retained experts provide the substance of their opinions in published reports before the close of discovery, thereby giving courts ample time to assess their reliability.[7]

Texas law also requires trial courts to conduct similar "gatekeeper" analysis, but the Texas Rules of Civil Procedure expressly do not require parties to provide expert reports as part of discovery.[8] In the same way, many trial courts have historically preferred to apply Texas Rule of Evidence 702's more liberal construction and leave determinations as to the reliability of the witness's opinion to the jury (*i.e.*, "this goes to the weight, not the admissibility").[9] As such, expert opinion testimony is historically excluded far less in Texas state court than in federal court.

Texas Rule 702. Testimony by Expert Witness.

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

Federal Rule 702. Testimony by Expert Witness.

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) ***the testimony is based on sufficient facts or data;***

(c) ***the testimony is the product of reliable principles and methods; and***

(d) ***the expert has reliably applied expert's opinion reflects a reliable application of the principles and methods to the facts of the case.***

Taken together, under the Texas Rules, a witness who has reliable, specialized knowledge that can help the trier of fact in determining a fact at issue may qualify as an expert and provide opinion testimony.[10] However, if he is not designated as an expert, a witness may nevertheless provide lay opinion testimony that is based on his own perception of events, even if those perceptions are colored by specialized knowledge, training, education, or experience.[11] Conversely, under the Federal Rules, if a witness has certain specialized knowledge, but is not listed as an expert witness, he is unable to provide any opinion testimony that is colored by his specialized knowledge, *regardless* of whether he personally observed the materials or events in dispute.[12]

III. How Differences in Federal and Texas Rules Can Impact Treatment of Opinion Testimony in Insurance Coverage Cases.

In many cases, lawyers do not need expert witnesses to establish key facts at issue (*e.g.*, whether the light was green or red). But, in insurance coverage cases, the facts at issue are rarely (if ever) within the common knowledge of the average juror.[13] What is more, juries are inherently distrustful of retained expert witnesses and often attribute heightened credibility to witnesses with first-hand knowledge of the facts. Depending on the circumstances, a fact witness's impressions or opinions may be the difference in whether the jury believes a particular version of the facts.

At the same time, the differences in expert disclosure and opinion testimony rules between Texas state and federal courts create a paradigm that is uniquely challenging to certain categories of witnesses that often appear in insurance coverage cases. Specifically, there are witnesses who may have opinions that are helpful to the trier of fact in determining facts in dispute based on first-hand knowledge, but the matters of which they have specialized knowledge are not easily explained in terms of verifiable "facts and data," or so-called "reliable principles or methods" used in a particular industry.[14] There are also witnesses who might be able to offer admissible opinion testimony at trial, but whose opinions might not survive a *Daubert* challenge because they cannot credibly author an expert report that satisfies the applicable standards under Federal Rule 26(a)(2)(B), or because their reports cannot satisfy federal court-level scrutiny. As a result, there are witnesses who live "in limbo" between the Texas and Federal Rules – who are able to provide opinion testimony in state court, but who may not qualify to offer opinion testimony in federal court.

For example, imagine the hypothetical testimony of someone who performed triage work at a damaged property in the wake of a hurricane, like a debris removal subcontractor. Because of their personal involvement in assessing the damage, such a witness will have first-hand knowledge

regarding facts that may be relevant to a property coverage dispute. But consider the questions that an attorney might ask such a witness during trial to elicit such testimony:'

* *What did you think when you saw the damage to the property?*
* *How did you assess the damage to the property? Extensive? Why or why not?*
* *What did you assess needed to be done to remove debris from the property?*
* *How did you recommend that the clean-up work be accomplished?*
* *What equipment did you recommend using to perform the clean-up work?*
* *How many crew members did you need to perform the clean-up work?*
* *Why did you recommend performing the clean-up work in that way?*
* *Have you done that before? How many times? On similar properties?'n that county?*
* *Do others use similar methods to do this kind of work on this type of property?*
* *Why would you not perform the clean-up work in a different way?*
* *Did the property owner provide specific instructions about what to do/not do?*
* *Did those instructions impact your recommendations? If so, how and why?*
* *How much did you bid to perform that work? Is that what you would typically charge?*
* *Do you know whether that is similar to the rates charged by your competitors?*
* *Did the property owner accept your bid? Did he say why? What was his response?*

Each question is—by definition—a direct question relating to facts or events that the witness personally observed. No question calls for speculation. But each question also contains an inherent element of opinion (*i.e.*, a "view, judgment, or appraisal formed in the mind about a particular matter").[15] Indeed, "how did you recommend that the clean-up work be accomplished" implies that the witness has developed opinions regarding the extent of the damage, the work necessary to be performed, and the best way to accomplish that work. Similarly, "how much did you charge to perform that work" implies that the witness has opinions on the value of that work to be done, and how best to determine the value of that work. Ultimately, because these "fact questions" require the witness to rely on his specialized knowledge to answer them, courts may find such testimony is "opinion testimony."

To the extent the answers to such questions constitute an opinion, most debris removal company owners could likely answer such questions without issue in Texas state court. There would be no problem disclosing the witness's opinions, as the Texas state court rules only require a brief description of the subject matter and opinions (*e.g.*, "the nature of the damage observed at the property, the services required to remove debris from the property and restore it to its pre-storm condition, the reasonableness and necessity of the costs to perform such efforts, etc.").[16] There would also be no problem with his qualifying expert opinion testimony, as he is likely qualified to offer opinions relating to the debris removal process based on his "knowledge, skill, experience, [and] training."[17] Alternatively, were the Court to determine that he is unable to offer "expert opinion testimony," he could still answer the questions because his opinions are based on personal involvement with the facts (even though his testimony would be colored by specialized knowledge).[18] Therefore, his opinion testimony would likely come into evidence.

On the other hand, many debris removal professionals are likely to struggle to qualify as expert witnesses under the Federal Rules. For most working in the debris removal industry (*i.e.*, not those responsible for remediating specialized damages or hazardous waste like asbestos, etc.), the work is not as technical as other kinds of subcontracting work, and the tactics often used to remove debris are not easily described in terms of "facts or data" or so-called "industry standard practices" one might expect to see in more specialized industries.[19] After all, no two properties can ever be damaged in the same way, and circumstances may dictate that a debris removal company employ certain tactics to address unique issues, even if those methods are uncommon or differ from those traditionally embraced in a particular locality.

Additionally, the costs associated with debris removal work vary significantly depending on the capabilities and needs of a particular business, or otherwise on the property to be cleared (*e.g.*, national vs. regional vs. local business; whether the business owns or rents equipment; whether the land is developed or undeveloped; whether the land is cleared or has significant number of trees; what equipment the debris removal professional believes is best to accomplish the job under the circumstances; how many employees his business employs; how much time his business will need to do the job; etc.). Furthermore, while some national companies may employ so-called debris removal "experts," most debris removal professionals are simply not prepared to author an expert report that complies with the requirements of Rule 702 and *Daubert*. Considering the Federal Rules' prohibition on opinion testimony from non-experts, the owners of the debris removal company may not be answer many of the

above-listed questions in federal court, even though he is more familiar with the facts of the case than any other expert that could be retained.

This opinion testimony paradigm is complicated by the fact that the federal courts are sometimes divided over whether expert reports are required by *all* witnesses who offer opinion testimony. The plain language of Federal Rule 26(a)(2)(B) requires an expert report from witnesses who are "retained" or "specially employed" to provide expert opinion testimony.[20] However, Federal Rule 26(a)(2)(C) only requires a summary of facts and the expert's proffered opinion testimony if the witness is "not required to provide a written report."[21]

Most federal district courts follow the First Circuit's opinion in *Downey v. Bob's Discount Furniture* and find that the distinction between 26(a)(2)(B) experts and 26(a)(2)(C) experts is that 26(a)(2)(C) witnesses' opinions arise from firsthand knowledge of events that they were personally involved in before the commencement of litigation.[22] But, in insurance coverage cases, where litigants frequently dispute the date when they "reasonably anticipated" litigation would ensue, some witnesses with firsthand knowledge and personal involvement in the claims investigation may also be "retained" or "specially employed" to provide opinions testimony at trial (*e.g.*, an engineer retained to inspect a property and analyze potential cause of damage, but who is later hired to provide expert testimony at trial). As such, determinations of whether a witness needs to offer an expert report may depend on court-specific procedures or interpretations of the Federal Rules, or on case-specific factual inquiries into a witness' involvement.[23]

Furthermore, the Fifth Circuit has yet to clarify whether business owners can testify regarding the services that their business provides without first qualifying as an expert.[24] Accordingly, there is ample debate whether a witness's testimony regarding the value of the services his company provides (*e.g.*, a bid to perform work on a project) qualifies as a "fact" or "opinion," or whether he needs to be disclosed as an "expert" to be able to offer such testimony.

Ultimately, while these issues are highly nuanced and case-specific, they can have a devastating impact if not addressed proactively. Understanding the differences between the rules, and their effect, as practically applied, is critical to a lawyer's ability to admit or exclude opinion testimony at trial.

IV. How to Ensure Proper Admission or Exclusion of Opinion Testimony.

A. Be Proactive to Identify and Disclose Potential Opinion Testimony.

There will inevitably be opinion testimony that is subtle or unpronounced, and such may sneak past a lawyer's review unless safeguards are implemented. Failure to account for such risks may result in the court striking key opinion testimony that would otherwise be admissible. Accordingly, coverage litigators must take active steps to identify opinions that their proffered witnesses offer and disclose such opinions fully and openly in accordance with applicable rules.

The *Codner* case provides a real-world example of how a lack of proactivity can play out at trial.[25] In that case, Codner, a property owner, hired Audino Construction to build a house on his property.[26] Audino then hired Road Runner, a concrete subcontractor, to pour the foundation. *Id*. When the house later developed foundation-shifting problems, Codner sued both Audino and Road Runner. Codner settled with Audino on the first day of trial, leaving only the issue of Road Runner's alleged negligence for the jury.[27] However, Road Runner objected to Audino's testimony with respect to his opinions as to the alleged cause of the foundation shifting, claiming such testimony was undisclosed opinion testimony because Codner did not designate him as an expert.[28]

On *voir dire*, Audino stated that he would testify that the foundation at Codner's property was poured out of level, and that the problems with the foundation were not due to normal settling.[29] He went on to state that he personally took elevations at the house about a year after the it was finished, and these measurements led him to believe that the foundation was not level.[30] He concluded that the foundation had been poured out of level because he believed there would have been more cracking in the walls and problems with the doors had the issues been caused by normal settling.[31] He based his testimony on his "twenty-years experience in the business," as well as his experience "dealing with engineers on a pretty routine manner, getting their input on situations about loads and these types of things and how much a building can expand and contract."[32]

The trial court concluded that Audino could testify as to his "perceptions" because such was based on personal knowledge and involvement in key events, even though that knowledge was based on decades' worth of experience working as a general contractor.[33] However, the Court held, and the Court of Appeals affirmed, that he could not offer opinion testimony as to "the cause of the foundation shifting," or opinions that impacted upon issues of ultimate fact (*e.g.*, "I believe the foundation was not level *because*..." or "This foundation was unlevel due to shifting resulting from negligent work by Roadrunner…").[34] This all could have been avoided had Codner simply designated Audino as a non-retained expert to offer opinions based on his decades' worth of experience working as a contractor.

Considering the risks of an adverse outcome, some practitioners find it easiest to treat all opinion testimony as though it were being offered by a retained expert in federal court

and to prepare comprehensive designations and reports for all opinion witnesses. However, it is important to remember that even the Federal Rules do not require expert reports for all witnesses who offer opinion testimony (*e.g.*, company employees).[35] Also, as detailed above, there are witnesses who will face exposure to being stricken if their opinion testimony is proffered in an improper manner. Practitioners should evaluate the needs of their case and take appropriate measures (*e.g.*, admitting opinion through another witness, limiting scope of designation or opinions to protect offering witness from challenge, etc.).

B. Scrutinize Opposing Party's Expert Designations for Unforced Errors.

Far too many practitioners fail to appreciate the differences between the Federal Rules and Texas state court rules' treatment of opinion testimony, much less how these issues will manifest in an insurance coverage case. As such, lawyers may find that their opposing counsel failed to analyze whether key witness testimony includes undisclosed opinion testimony, or that they otherwise failed to apply the appropriate standard when disclosing the opinion testimony. Accordingly, coverage litigators must evaluate their opposing party's designations to assess whether they properly accounted for opinion testimony their own witnesses may offer and challenge opinions that fall outside the scope of permissible testimony in the particular venue.

However, skilled lawyers cannot afford to wait until the eve of trial to raise these issues, as courts may admit improper opinion testimony due to lack of prejudice or unfair surprise.[36] Rather, lawyers must raise challenges to improper opinion testimony early and often, starting at the *Daubert* or *Robinson* challenge stage, at the pre-trial conference, and throughout the presentation of evidence at trial. At worst, such objections will educate the court (and possibly the jury) as to issues with the witness's opinion testimony. But, in all likelihood, well-founded objections to improper opinion testimony will lay the groundwork for excluding such testimony from evidence at trial, or, alternatively, preserve the error for challenge on appeal.

C. Provide Ample Comfort for Court to Handle Proffered Opinion Testimony.

While most courts appreciate the distinctions between the Federal Rules' and Texas Rules of Evidence's treatment of opinion testimony, they also have an inherent desire to avoid committing reversible error. Accordingly, if presented with competing arguments as to the admissibility of certain opinion testimony, courts may feel inclined to default toward the posture that avoids the risk of error. For example, in federal court, judges may be inclined toward excluding opinion testimony on the basis that it constitutes "undisclosed expert opinion testimony," or otherwise exclude the witness's opinion testimony altogether as unduly prejudicial. Conversely, in Texas state court, judges may be inclined toward admitting certain opinion testimony on the basis that the opinions were derived from rational perceptions, even if the opinion is not materially helpful to the factfinder, or if the basis for the opinion is unsupported by reliable facts or data.

Given these risks, lawyers should take care to give courts ample authority to admit or exclude opinion testimony (depending on what the rules require). In federal court, lawyers should be prepared to identify clearly where they disclosed the opinion testimony in their expert and pre-trial disclosures, to demonstrate how the opinion satisfies the requirements of Federal Rule 702 and *Daubert*, or otherwise explain why the testimony at issue does not constitute an opinion. Similarly, in Texas state court, lawyers should be prepared to demonstrate why the testimony does or does not satisfy the standards articulated in *Robinson* and its progeny, to establish why the witness possesses or lacks first-hand knowledge of the facts in dispute, or to show how the testimony is or is not unfairly prejudicial under the circumstances. Ultimately, by providing the Court with sufficient authority, lawyers ensure that the Court makes evidentiary rulings based on the merits of the argument, rather than default tendencies simply to avoid reversal on appeal.

V. Conclusion.

The Federal and Texas Rules of Evidence differ in their treatment of opinion testimony. Under the Texas Rules, a witness may offer opinion testimony as an expert witness, or otherwise as a lay witness if such opinions are based on his own perception of events. It does not matter whether the lay witness's perception is enhanced by specialized knowledge, training, education, or experience, as long as the opinion testimony is helpful to the factfinder. However, under the Federal Rules of Evidence, if a witness has specialized knowledge but does not qualify as an expert witness, he is unable to provide any opinion testimony that is colored by specialized knowledge, *regardless* of whether he personally observed the events or facts in dispute.

This subtle difference can have significant implications for insurance coverage litigators, as there are certain witnesses that, considering the nature of their professional experience and subject matter expertise, may qualify as expert witnesses in Texas state court but not in federal court. Alternatively, even if the witness does not qualify as an expert witness, he may still be able to offer certain opinion testimony in Texas state court, while federal courts would exclude such testimony. As such, insurance coverage litigators should take care to scrutinize the testimony of all witnesses, and account for any potential opinions in accordance with the applicable rules. In doing so, lawyers will ensure that the evidentiary record is free of inadmissible testimony while also ensuring that the factfinder receives the full benefit of helpful opinion testimony.

1 Fed. R. Evid. 701(c) (emphasis added); *Miss. Chem. Corp. v. Dresser-Rand Co.*, 287 F.3d 359, 373 (5th Cir. 2002).

2 Fed. R. Evid. 701(a); *Miss. Chem. Corp.*, 287 F.3d at 373.

3 Tex. R. Evid. 701; *Reid Road Mun. Utility Dist. No. 2 v. Speedy Stop Food Stores, Ltd.*, 337 S.W.3d 846, 850-52 (Tex. 2011); *Knight Renovations, LLC v. Thomas*, 525 S.W.3d 446, 451 (Tex. App.—Tyler 2017, no pet.) ("The personal experience and knowledge of a lay witness may establish that the witness is capable, without qualification as an expert, of expressing an opinion on a subject outside the realm of common knowledge."); John F. Sutton, Jr. & Cathleen C. Herasimchuk, *Article VII: Opinions and Expert Testimony,* 30 Hous. L. Rev. 797, 826–27 (1993) ("If his opinion rests on firsthand knowledge – that is, if it is rationally based on his own perceptions – then testimony under Rule 701 is also permissible.").

4 Fed. R. Evid. 702; *E.I. du Pont de Nemours & Co., Inc. v. Robinson*, 923 S.W.2d 549, 557 (listing reliability factors as means to help courts determine whether an opinion is helpful to the trier of fact).

5 Fed. R. Evid. 702.

6 *Id.*; Fed. R. Evid. 104(a).

7 Fed. R. Civ. P. 26(a)(2).

8 Tex. R. Civ. P. 195.5(b).

9 *Robinson*, 923 S.W.3d at 557 ("We are confident that our trial courts will use great care when determining whether expert testimony is admissible under Rule 702."); *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 629 (Tex. 2002) ("Although the trial court serves as an evidentiary gatekeeper by screening out irrelevant and unreliable expert evidence, it has broad discretion to determine the admissibility of evidence."); *cf.* Tex. R. Civ. P. 195.5 (reports not required for expert witnesses).

10 Tex. R. Evid. 702.

11 Tex. R. Evid. 602, 701.

12 Fed. R. Evid. 602, 701-02; *Daubert v. Merrell Down Pharm., Inc.*, 509 U.S. 579 (1993).

13 *See*, *e.g.*, *Knight Renovations, LLC*, 525 S.W.3d at 45153 (establishing reasonableness and necessity of most property damage repairs requires expert opinion testimony to support recovery) (citing *Wortham Bros., Inc. v. Haffner*, 347 S.W.3d 356, 361 (Tex. App.—Eastland 2011, no pet.); *Pjetrovic v. Home Depot*, 411 S.W.3d 639, 649 (Tex. App.—Texarkana 2013, no pet.)).

14 Fed. R. Evid. 702(b)-(c); *cf.* Tex. R. Evid. 702.

15 *Opinion*, Merriam-Webster's Dictionary, https://www.merriam-webster.com/dictionary/opinion (last accessed Sept. 4, 2023).

16 Tex. R. Civ. P. 195.5.

17 Tex. R. Evid. 702.

18 Tex. R. Evid. 701.

19 Fed. R. Evid. 702; *Daubert*, 509 U.S. at 579.

20 Fed. R. Civ. P. 26(a)(2)(B); *Kim v. Time Ins. Co.*, 267 F.R.D. 499, 501 (S.D. Tex. 2008).

21 Fed. R. Civ. P. 26(a)(2)(C); *see also Tolan v. Cotton*, 2015 WL 5332171, at *5 (S.D. Tex. Sept. 15, 2015) ("[T]he Advisory Committee's Note for the 2010 amendment of this provision states, '[Rule 26(a)(2)(C)] disclosure is considerably less extensive than the report required by Rule 26(a)(2)(B). Courts must take care against requiring undue detail, keeping in mind that these witnesses have not been specially retained…").

22 633 F.3d 1, 7 (1st Cir. 2011); *Lewis v. Allstate Ins. Co.*, 2021 WL 415439, at *2*3 (S.D. Tex. Feb. 5, 2021) (citing *Downey*; *Tolan*, 2015 WL 5332171, at *7 (holding that a witness is "specially employed" if "she has no personal involvement in the facts giving rise to a case"); *Atlas Imports Inc. v. Atain Specialty Ins. Co.*, 2020 WL 4574521, at *5 (S.D. Tex. Jun. 10, 2020) (witness retained to offer opinions on insurance industry standards was a "retained" or "specially employed" expert because "he was not personally involved in the facts giving rise to this lawsuit")).

23 *Lewis*, 2021 WL 415439, at *3*5.

24 *See*, *e.g.*, *Tex. A&M Research Found. v. Magna Transp.*, 338 F.3d 394, 403 (5th Cir. 2003) ("[A]n officer or employee of a corporation may testify to industry practices and pricing [under Rule 701] without qualifying as an expert."); *Nat'l Hispanic Circus, Inc. v. Rex Trucking, Inc.*, 414 F.3d 546, 551–52 (5th Cir. 2005) ("Rule 701 does not exclude testimony by corporate officers or business owners on matters that relate to their business affairs, such as industry practices and pricing."); *but see Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 4659 (5th Cir. 1996) (excluding testimony from business owner about toxicity of chemicals used in business because it required special training and experience).

25 *Codner v. Arellano*, 40 S.W.3d 666, 676 (Tex. App.—Austin 2001, no pet.).

26 *Id.* at 668.

27 *Id.*

28 *Id.* at 675.

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.* at 675; Tex. R. Evid. 70102.

34 *Codner*, 40 S.W.3d at 676.

35 Fed. R. Civ. P. 26(a)(2)(B)-(C); *cf.* Tex. R. Civ. P. 195.5.

36 *Lewis*, 2021 WL 415439, at *5 (finding opinion testimony was not properly disclosed, but nevertheless permitting testimony because offering party's error was harmless and easily curable).

By Robert E. Valdez

IMPORTANT CONSIDERATIONS FOR NEW CIVIL DEFENSE LAWYERS

My perspective is that of a civil defense lawyer. I have spent most of my 42 years of practice representing insureds in third-party cases and insurers in first-party cases (both contractual and extra-contractual). I relish my time tutoring and mentoring young (and inexperienced) lawyers in the practice. What I include in this article are some of the fundamentals for new civil defense lawyers to consider—and the list is certainly not exhaustive.

1. A lawyer cannot serve two masters.[1]

My firm represents a lot of trucking companies and plenty of insurance companies, but this first rule is not limited to either type of litigation. The rule is often illustrated in routine auto accident cases in which the lawyer is assigned, most often by an insurer, to defend the driver and owner of a vehicle (or the trucking company and its driver). The question to ask when receiving such an assignment is, "Who is my client?" You would be surprised at how few lawyers review the assignment with attention to potential conflicts in the representation of multiple defendants.

Factual Considerations

Are there factual issues that pit one client against another? In a trucking company case, does the driver contend that there was some problem with the maintenance of the equipment or some malfunction in the equipment itself of which his employer was aware? Are there issues involving the use of the vehicle? Another question to consider in a typical auto accident case is whether there is an issue involving "permissive use" of the vehicle thereby potentially compromising insurance coverage? For example, there are coverage implications in a lawsuit in which a son uses his father's car without permission and gets drunk and causes an accident and damages to plaintiff. The lawsuit against both the father (for negligent entrustment) and the son (for negligently driving the auto) may create divergent interests. The father can defend against the negligent entrustment theory by proving that he did not give his son permission to drive the car (i.e., no "entrustment"). This factual defense may well affect insurance coverage for the son. This type of conflict is not reconcilable: the defense of one client is to the detriment of the other—and the lawyer can maintain his or her loyalty to one client only by withdrawing from the representation of the other.[2]

Insurance Considerations

Further, with respect to insurance issues, *Employers Casualty Co. v. Tilley*[3] is required reading. The legal (and ethical) dilemma posed by this case may have been avoided if the insurance defense lawyer understood that one may not serve two masters. Employer's Casualty Company (ECC) filed a declaratory judgment action against its insured, Joe Tilley, to obtain a declaration that his late notice of suit to the insurer relieved it from any obligation to defend Tilley in an underlying personal injury case (*Starky v. Tilley*). ECC secured a nonwaiver agreement[4] and hired an attorney to represent Tilley in the *Starky* lawsuit. The court noted:

> For a period of nearly 18 months, the attorney not only performed such services for Tilley in defending against Starkey, but *he also performed services for Employers which were adverse to Tilley on the question of coverage*. Tilley claimed that he had no knowledge of the Starky accident which occurred on November 25, 1967, until he was sued on September 19, 1969. This was his excuse for not notifying Employer before the suit was filed.[5]

The Court laid the conflict out specifically:

> Knowing of Tilley's contention, the attorney did not advise him of the apparent conflict of interest between Tilley and Employers. *Instead, he continued to act as Tilley's attorney while actively working against him in developing evidence for Employers on the coverage question.* Such evidence subsequently became the basis for this suit, filed by another attorney for Employers against Tilley, seeking to deny coverage on the grounds of late notice. Tilley filed a cross-action, alleging among other things, waiver and estoppel.[6]

The duty of loyalty to the client-insured—and not the insurance company—is clearly stated in the case:

> [The attorney for the insured] becomes the attorney of record and the legal representative of the insured, and as such he owes the insured the same type of unqualified loyalty as if he had been originally

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> employed by the insured. If a conflict arises between the interests of the insurer and the insured, the attorney owes a duty to the insured to immediately advise him of the conflict.[7]

The Court's colorful language is memorable: "An attorney employed by an insurer to represent the insured *simply cannot take up the cudgels of the insurer against the insured* as was done in the Starky case at Employers behest."[8] The Supreme Court of Texas held that the attorney's conduct was prejudicial to Tilley as a matter of law. The Court also held that ECC could not "[deny] the responsibilities under its policy for defense of the Starky suit."

Upon assignment of the case, make certain you understand whom you represent. If there are multiple parties, then ascertain whether there are conflicts that will potentially pit one client against the other. If there is a potential conflict of interest, you must choose which client you want to represent. In this regard, whether upon assignment (or usually later in the case as it develops), understand your ethical obligations—as the defense lawyer, you owe your loyalty to the insured even though the insurer pays your bills. As the defense lawyer, you may not offer coverage advice and you certainly may not work for the specific purpose of defeating coverage for your client.

2. Know the *Stowers* case and its iterations (*Bleeker*, *Soriano*).

Stowers: Negligent Failure to Settle within Limits

Next, I examine another required reading—the *Stower*s doctrine.[9] This case involved Bichon's third-party claim against Stowers Furniture Company, which was defended by an insurer. The insurer received a demand of $4,000 for settlement of the plaintiff's claim. The applicable policy limit was $5,000. The insurer declined settlement. The trial court ruled, and the appellate court agreed, that the insurer's obligation was only to defend the insured under the policy. The Commission disagreed and recommended a reversal and remand, holding the insurer to the "degree of care and diligence which a man of ordinary care and prudence would exercise in the management of his own affairs."[10] The Commission also noted the evidence indicating that the insurer had a rule "never to make a settlement for more than one-half of the amount of the policy" should have been admitted during the trial.[11]

The Supreme Court of Texas later in explained in *Garcia* that an insurer's *Stowers* obligations are not activated by a settlement demand unless three prerequisites are met:

> (1) the claim against the insured is within the scope of coverage,
>
> (2) there is a demand within policy limits, and
>
> (3) the terms of the demand are such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment.[12]

Stowers is not a case decided by the Supreme Court of Texas, although with the Texas judiciary's reliance upon the case since its publication in 1929, it might as well have been.[13] The import of *Stowers* is unmistakable and all new defense lawyers must know its rule—upon receiving a demand within an insured's policy limits, an insurer that negligently fails to settle within those policy limits is responsible for the payment of an excess judgment against the insured.[14]

The Iterations

Bleeker: Demand Must Be for All Claim Including Liens

Trinity Universal Insurance Co. v. Bleeker[15] gives defense lawyers critical guidance regarding the elements of a proper *Stowers* demand. Therefore, it too is required reading. The case involved a drunk driver who caused a fatality and significant bodily injuries to several people. An attorney representing five of the several injured plaintiffs wrote to the insurer demanding that the applicable $40,000 policy limit be placed into the registry of the court. The plaintiffs' attorney did not offer a release nor did he offer to pay any outstanding hospital liens. The attorney later came to represent all the plaintiffs in the case, but never made another demand. The trial resulted in a verdict of $11,500,000. The insured defendant then assigned any claim it had against its insurer to the plaintiffs. That trial resulted in a judgment of $13,000,000 plus attorneys' fees (total judgment some $38,500,000). The Supreme Court of Texas reversed and ordered that plaintiffs take nothing because there was not a proper *Stowers* demand triggering extra-contractual liability.[16]

The lesson of *Bleeker* as it relates to *Stowers* claims: make certain that the demand offers to release all claims against the insured, including hospital liens.[17]

Soriano: First Come, First Served

The control that causes such danger in cases like *Stowers* also provides an out: when faced with a reasonable demand for settlement within (or at) policy limits, the insurer is free to accept such a demand without extra-contractual exposure to its insured even if it diminishes available policy limits for

other claimants. The next case for required reading: *Texas Farmers Insurance Co. v. Soriano*.[18]

Soriano involved a wrongful death lawsuit in which Farmers chose to accept a demand from one family (wrongful death beneficiaries) for a total of $5,000, thereby reducing the available policy limits for another group of wrongful death beneficiaries to a total of $15,000 (the policy's aggregate limit was $20,000). Farmers offered the second group of wrongful death beneficiaries the remaining $15,000. They rejected that offer and demanded full aggregate limit of $20,000. Farmers declined this demand. These plaintiffs tried the case and obtained a judgment for $520,577.24 in actual damages and $5,000,000 in punitive damages. The court of appeals affirmed with some modifications and remittitur. The Supreme Court of Texas reversed and rendered judgment that plaintiffs take nothing.[19]

The rule:

> We conclude that when faced with a settlement demand arising out of multiple claims and inadequate proceeds, an insurer may enter into a reasonable settlement with one of the several claimants even though such settlement exhausts or diminishes the proceeds available to satisfy other claims.[20]

3. Know your role and stay in your lane.

Once you get your assignment and you know which client you will represent, then represent the client and do not confuse your roles. You have seen already how one may confuse his or her role in a conflict situation or a *Tilley* situation. Now it is your job to stay in your lane and do the job you were hired to do. It truly is easier said than done.

For all the talk one may hear from institutional clients who insist that they want to "build a relationship" with defense counsel, my experience in the last decade (or more) is that most institutional clients believe that lawyers are simply another set of vendors from whom they need to secure services at the lowest price possible. Vendors, such as honest folks who sell paper, computers, pencils, and other products, mostly offer fungible goods. That is, one pencil is pretty much like another. The same simply is not true of lawyers—but that is lost on most of the non-lawyers who presently serve the various industries who secure the services of the legal profession.

Treating a lawyer like a vendor often expresses itself in the blurring of lines that affect a lawyer's professional obligations, principally, the duty of loyalty. Let me begin with a question: who is responsible for *defending* the case (*i.e.*, discovery, development of admissible evidence, trial)—and who is responsible for *placing a monetary value* on the case (*i.e.*, setting reserves, establishing settlement values, responding to *Stowers* demands)? I believe the answer to this inquiry comes when the lawyer knows his or her role and stays in his or her lane: the lawyer is responsible for the former. The claims adjuster is responsible for the latter.

The Defense Lawyer Defends the Case and Owes the (Insured) Client Fiduciary Duties

It seems a simple declaration: the defense lawyer defends the insured-client in the third-party case. While the insurer may pay the bills, the client is the insured. The defense attorney owes that insured the fiduciary duties of loyalty and candor.[21] The attorney is not hired to give insurance coverage advice to the insurance company—or for that matter to the insured. Many adjusters (and lawyers) do not understand that it is the role of the adjuster to adjust the claim! That means it is the adjuster's job—not the lawyer's job—to assign a value to the claim.[22] There will be persistent attempts throughout the litigation to shift this responsibility.[23]

What is the role of the defense lawyer when presented with a demand?

Every defense lawyer defending a client in a third-party lawsuit has received a so-called "*Stowers* demand" from a plaintiff's attorney.[24] This is a critical point in the defense of your client (the insured under the insurance policy). What is the responsibility of the defense lawyer at this juncture and who responds to this demand letter?

At this point (and many times it comes very early in the assignment), I believe the defense lawyers obligations are met by the following:

- Inform the insurance adjuster, in writing, of the demand and provide a copy of the demand letter.[25]

- Stay in your lane: resist the temptation to be pulled into the dilemma presented by the demand letter. While an insurer may ask you to draft or respond to the demand letter, the decision to accept or decline the demand belongs *to the insurer*—not to you or even to the insured client. As the defense attorney, you can offer your evaluation of liability and damages as presented at a particular point in the case, but it is not your job (and not with-

> in your scope of authority) to accept or decline a settlement offer. It is your obligation to provide the insurer with the information necessary to allow it to make a decision concerning the demand. As the defense lawyer, you then simply communicate the insurance company's decision to the party making the demand.[26]

4. Understand the legal definition of "bad faith."

It is a fair question to ask your new associate (or experienced lateral attorney): what is bad faith? During my practice, I prepare plenty of corporate representatives for insurers giving testimony on this topic—and they have no idea of the Texas definition of bad faith.

Texas imposes on insurers a common law duty of "good faith and fair dealing" with its insureds in the first-party context.[27] The Supreme Court of Texas has clarified (and simplified) the elements of this common law duty by adopting the standard presented in the Texas Insurance Code: the bad faith claimant must prove that "a carrier failed to attempt to effectuate a settlement after its liability has become reasonably clear . . . [T]his solution unifies the common law and statutory standards for bad faith."[28] What is bad faith in Texas? It is the denial or delay of the payment of a claim after liability for the claim becomes reasonably clear. All attempts by opposing counsel to get non-lawyer corporate representatives to discuss the vagaries of bad faith law fade when the witness states this simple definition.[29] Instead of having a corporate representative or an adjuster argue with a lawyer about the nuances of bad faith law in Texas, the focus can then shift to the factual record—and those facts that provided a reasonable basis for the conduct of the insurer.

It is important to note that a dispute between the parties concerning contractual liability under the policy does not necessarily translate into bad faith. The Supreme Court of Texas explained:

> We also distinguished the insurer's liability under the contract of insurance from the insurer's liability for the tort of bad faith. "[C]arriers," we stated, "will maintain the right to deny invalid or questionable claims and will not be subject to [bad faith] liability for an erroneous denial of a claim." In other words, if the insurer has denied what is later determined to be a valid claim under the contract of insurance, the insurer must respond in actual damages up to the policy limits. But as long as the insurer has a reasonable basis to deny or delay payment of the claim, *even if that basis is eventually determined by the factfinder to be erroneous*, the insurer is not liable for the tort of bad faith.[30]

A reasonable basis may include the insurer's reasonable reliance upon expert witnesses.[31]

Recall also that individuals (*i.e.*, adjusters) are not liable for the breach of duty of good faith and fair dealing. That "non-delegable" duty is imposed on the insurer by virtue of its contractual relationship with the insured. The duty is not imposed on the insurer's employees or agents.[32]

5. Let your "Yes" mean "Yes" and your "No" mean "No."[33]

It was not too long ago that we did not need formal mediation in the personal injury arena. I began my practice of law in El Paso, Texas (in the early 80s), at a very fine law firm with some excellent teachers. New lawyers in the trial section had a docket of worker's compensation cases and low-exposure casualty cases. We did not have mediators, but we routinely settled our case with plaintiff's counsel —over the phone (or at lunch)!

What I remember fondly is that the leaders of our trial department had such a good reputation among the plaintiff's bar that I was cloaked with a wonderful indicia of credibility. The plaintiff's bar treated me like they would treat my senior partner in this sense: they knew I had the ability and resources (of the firm) to try a case, but they trusted that I would tell them the truth in our professional dealings regarding settlement and trial. This was because of the ground already ploughed by my senior partners.[34] The tradition was that my "yes" would mean "yes", and my "no" would mean "no." That credibility was mine to destroy, and although I am certain I have fallen short on occasions, I have spent the last four decades of my life trying to live up to a standard first set by my very fine teachers in El Paso, Texas.

How does this indicia of credibility express itself? In my opinion, in the following ways:

- **Show up**: at the office, at depositions, at hearings, and at trial. Show up on time *and prepared*. Your *physical* presence is required in our profession. Model the behavior you desire.

- **Be competent**. Take pride in continuing your education with focused CLE. Become adept at Westlaw (or Lexis) and the Microsoft Office suite, including PowerPoint and other programs that will make you a better advocate. Recently, an experienced lawyer assisting me

with a case told me, "I don't know anything about PowerPoint," and simply left that work to me. He was dropped from that serious litigation. Do what you need to do to keep abreast of technology so you will be a trusted advocate.

- **Communicate with others clearly and carefully**. Words do matter. Email, text messages, and the like blur effective communication. Email and texts are often composed in a hurry and are sloppy in grammar and construction. The result: unclear communication. It is the responsibility of the senior lawyer to review not only the pleadings and briefs of the less experienced lawyer, but any letter or other communication to clients or opponents. Personal communication (you can always follow up with a letter) is the best: in-person meetings, phone calls (or now video calls) with your clients, adjusters, and opposing counsel improve the process. Answer the phone. Respond timely to correspondence.

- **Do not make off-the-cuff promises (that you cannot deliver)**. "Oh, you will have that report on Monday." "My client will certainly go higher (or lower) on that offer." "Yes, I will agree to your third request for a continuance." Once a lawyer develops a reputation for empty promises, no one will trust him or her.

- **Sometimes the truthful answer is, "I don't know, but I'll find out."** When the answer is "yes," say so. The same is true when the answer is "no." Too often because of our lack of clarity and commitment, "yes" and "no" both mean "maybe." When that happens, you lose all credibility and no one really knows what you mean.

Conclusion

My list of considerations for new lawyers is by no means exhaustive—but it is a good start. Follow up with focused CLE (the State Bar's Advanced Personal Injury Course and the Advanced Insurance Course are good resources). I did not begin to feel comfortable in my role as a defense lawyer until I had about 30 years of practice behind me. These are challenging times for the civil defense lawyer, but I have a feeling we will make it.

1 I am particularly fond of Justice Gonzalez's concurring opinion in *State Farm Mutual Automobile Insurance Co. v. Traver*, 980 S.W.2d 625 (Tex. 1998). While the majority opinion dealt with whether an insurer is vicariously liable for malpractice committed by an independent defense lawyer it hired to represent the insured, in Justice Gonzalez's concurring opinion he explained the dilemma (or "uneasy alliance") in the "tripartite" relationship existing among the insurer, the insured, and the defense lawyer:

> The duty to defend in a liability policy at times makes for an uneasy alliance. The insured wants the best defense possible. The insurance company, always looking at the bottom line, wants to provide a defense at the lowest possible cost. The lawyer the insurer retains to defend the insured is caught in the middle. There is a lot of wisdom in the old proverb: He who pays the piper calls the tune. The lawyer wants to provide a competent defense yet knows who pays the bills and who is most likely to send new business. This so-called tripartite relationship has been well documented as a source of unending ethical, legal, and economic tension.

Id. (Gonzalez, J., concurring in part and dissenting in part). Justice Gonzalez noted lawyers "are under tremendous pressure to serve two masters" and "[a]lthough it has perhaps become trite, the biblical injunction found in Matthew 6:24 retains a particular relevancy in circumstances such as these, '[n]o man can serve two masters.'" *See id.* at 634 (quoting *U.S. Fid. & Guar. Co. v. Louis A. Roser Co.*, 585 F.2d 932, 938 n.5 (8th Cir. 1978)).

2 It is better to pick your client early to avoid such a conflict. Aside from raising ethical issues, as a practical matter you may obtain confidential information from one or both clients that may then prevent you from representing either one. *See* Tex. Disciplinary Rules Prof'l Conduct R. 1.06(b)(2), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, §9). As Bob Dylan once sang (about picking up loan proceeds): "But you'd better hurry up and choose which of those bills you want. Before they all disappear." Bob Dylan, *The Ballad of Frankie Lee and Judas Priest*, *on* John Wesley Harding (Columbia Records 1967).

3 496 S.W.2d 552 (Tex. 1973).

4 The court defined a "standard non-waiver agreement" as an agreement "that no action heretofore or hereafter taken by Employers shall be construed as a waiver of the right, if any, of Employers to deny liability under the policy." *Tilley*, 496 at 557.

5 *Id.* at 554 (emphasis added).

6 *Id.* (emphasis added).

7 *Id.* at 558.

8 *Id.* at 560 (emphasis added). We just do not get the opportunity to use the word "cudgel" often enough. I echo the lament of Elle Driver, also known as California Mountain Snake (Darryl Hannah) in the movie Kill Bill Vol. 2 when she reflected upon the use of the word "gargantuan" when she said, "you know, I've always

liked that word . . . 'gargantuan' . . . so rarely have an opportunity to use it in a sentence." *Kill Bill: Volume 2* (Miramax Films 2004).

9 *G.A. Stowers Furniture Co. v. Am. Indem. Co.*, 15 S.W.2d 544 (Tex. Comm'n App. 1929, holding approved).

10 *Id.* at 548.

11 *Id.*

12 *Am. Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 848–49 (Tex. 1994).

13 This is a case from the old Texas Commission of Appeals. Texas established appellate commissions "to alleviate the workload of its high courts." Texas Rules of Form: The Greenbook Ch. 5 (Tex. L. Rev. Ass'n ed., 14th ed. 2018) (hereinafter Texas Rules of Form). The significance of an opinion with the designation "holding approved" is that the Supreme Court of Texas adopted the judgment and approved the specific holding of the Commission discussed in the opinion but did not necessarily approve its reasoning. Texas Rules of Form §§ 5.2.2–5.2.3. In *Stowers*, the reasoning of the Commission of Appeal's decision was based upon the insurer's sole control of the third-party litigation. *See Stowers*, 15 S.W.2d at 547–48 ("Such exclusive authority to act in a case of this kind does not necessarily carry with it the right to act arbitrarily."). The Supreme Court of Texas, for all intents and purposes, now has adopted or approved the *Stowers* opinion. *See Garcia*, 876 S.W.2d at 846 ("These contractual obligations [to defend and indemnify the insured within policy limits], along with language in the insuring clause granting control over the insured's defense to an insurer . . . give rise to a third, generally recognized, implied duty of liability insurers—the duty to accept reasonable settlement demands within policy limits.") (quoting *Stowers,* 15 S.W.2d at 547–48). *The Greenbook* informs us that the designation of "Opinion Adopted or Approved" means that the opinion has the full authority of a Supreme Court of Texas decision. *See* Texas Rules of Form §§ 5.2.2–5.2.3.

14 The court held: "[W]e are constrained to believe that the correct rule under the provisions of this policy is that the indemnity company is held to that degree of care and diligence which a man of ordinary care and prudence would exercise in the management of his own business. *Stowers*, 15 S.W.2d at 548.

15 *Trinity Universal Ins. Co. v. Bleeker*, 966 S.W.2d 489 (Tex. 1998).

16 *See id*. at 491.

17 Note also that the release offered must be "unconditional." A release which calls for a defendant to represent that there is no other insurance is conditional and therefore does not provide a basis for *Stowers* liability. *See Ins. Corp. of Am. v. Webster*, 906 S.W.2d 77, 80 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

18 *Tex. Farmers Ins. Co. v. Soriano*, 881 S.W.2d 312 (Tex. 1994).

19 *See id*. at 314.

20 *Id.* at 315

21 *See Tilley*, 496 S.W.2d at 558.

22 *Employers Nat'l Ins. Co. v. Gen. Accident Ins. Co.* illustrates this proposition. Although it is cast in terms of an excess carrier's suit against a primary carrier for equitable subrogation (i.e., *American Centennial Insurance Co. v. Canal Insurance Co.*, 843 S.W.2d 480 (Tex. 1992)), the case demonstrates that the opinion of the defense lawyer concerning the value of the case will not get the insurer "off the hook." *See Employers Nat'l Ins. Co. v. Gen. Accident Ins. Co*., 857 F. Supp. 549, 553 (S.D. Tex. 1994).

23 As Michael Corleone (Al Pacino) noted in Godfather III: "Every time I think that I'm out, they pull me back in!" *The Godfather Part III* (Paramount Pictures 1990).

24 A detailed presentation on the intricacies of the *Stowers* doctrine and the demand letter are outside the scope of this article.

25 The insured is not in control of the litigation under the insurance policy. *See Employers Cas.*, 496 S.W.2d at 558. The insured-client may be advised of the right to retain separate counsel to make demands upon the insurance company to settle the case, but since the insurance company is in control of the settlement of the case, the opinion of an insured's separately retained lawyer is just that—the opinion of another lawyer. The insurance company controls the response to a settlement demand—not the attorney.

26 Beware of efforts to shift the responsibility for placing a monetary value on plaintiff's case to you, the defense lawyer. If the responsibility is shifted, your evaluation easily may become the reason for the rejection of the demand. *See infra* n.12. This situation presents itself often when the demand comes early in the assignment and the defense attorney has not yet had the time to review the file, conduct discovery, or assess the relative strengths and weaknesses of the case. I know from the experience in our firm that many insurers (or their third-party administrators) try to force an artificial value from an attorney upon the assignment of the case (or shortly thereafter). Nancy Reagan's slogan may come in handy here: "Just say no."

27 *See Arnold v. Nat. Cnty. Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987) (" A cause of action for breach of the duty of good faith and fair dealing is stated when it is alleged that there is no reasonable basis for denial of a claim or delay in payment or a failure on the part of the insurer to determine whether there is any reasonable basis for the denial or delay.")

28 *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 55 (Tex. 1997).

29 As the court explained: "The 'reasonably clear' standard recasts the liability standard in positive terms, rather than the current negative formulation. Under this standard, an insurer will be liable if the insurer knew or should have known that it was reasonably clear that the claim was covered." *Id.* at 56. This is a question for the jury. *Id*.

30 *Lyons v. Millers Cas. Ins. Co.*, 866 S.W.2d 597, 600 (Tex. 1993) (emphasis added) (internal citations omitted).

31 *See id*. at 601 (finding the plaintiff offered no evidence that the insurer's expert reports were not objectively prepared, or that the insurer's reliance on them was unreasonable, or any other evidence that it knew or should have known that it lacked a reasonable basis for its actions.).

32 *See Natividad v. Alexsis, Inc*., 875 S.W.2d 695, 698 (Tex. 1994).

33 *Matthew* 5:37.

34 A plaintiff's lawyer complaint to my senior partner concerning some misconduct on my part was more threatening to me than any motion for sanctions.

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