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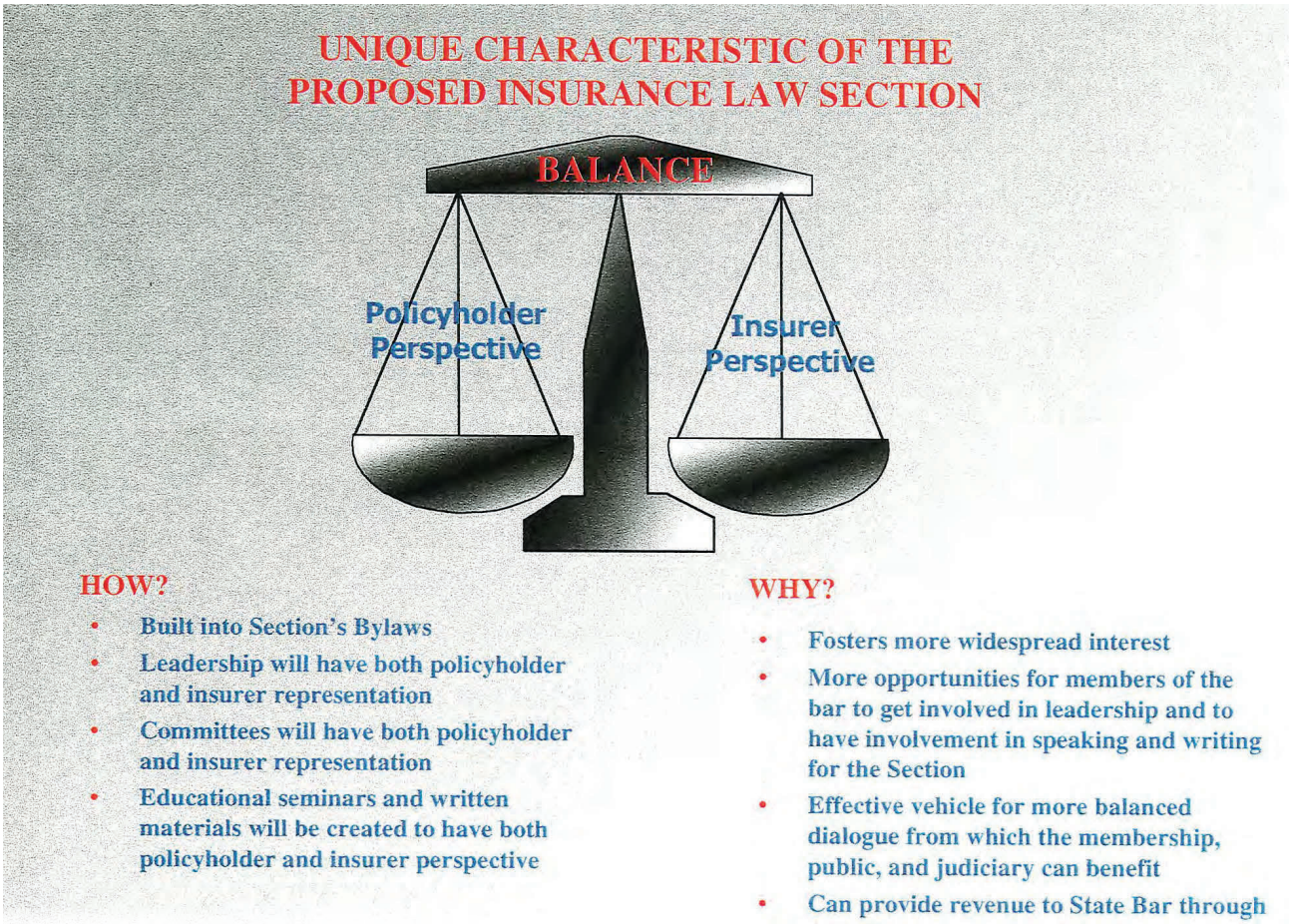

*The chart above was included in the submission with related support 25 years ago for creation of this section.

In This Issue:

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

www.InsuranceLawSection.org

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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.

Journal of Texas Insurance Law

SUMMER 2024 • VOLUME 20, NUMBER 3

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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

As we present this latest edition of our Journal, we do so with a deep appreciation for the leadership and contributions of those who have shaped our insurance section over the years. This 25th Anniversary edition is particularly meaningful, as we acknowledge the significant roles played by past chairs who have guided our section with dedication and vision.

We pay tribute to Mike Huddleston and John Tollefson, who sadly passed away during the preparation of this Journal. Their contributions, made even more poignant by their recent loss, reflect the profound impact they had on our community and the field of insurance law.

We also recognize the invaluable leadership of Mark Lawless, Pat Wielinski, Veronica Czuchna, Lee Shidlofsky, Stephen Walraven, and Lisa Songy. Each of these individuals has left an enduring legacy within our section, helping to steer us toward continued excellence.

A special note of recognition is reserved for Ernest Martin, one of the founders and first chair of our insurance section. His vision laid the very foundation upon which our community is built, and his influence continues to resonate in all that we do. Additionally, Chris Martin, another founder of our section and the first Editor-in-Chief of this Journal, deserves our heartfelt thanks for establishing this publication as one of the cornerstones of our educational mission. His work set the standard that guides us still.

In this edition, we also feature two articles that embody the rigorous analysis and insightful commentary our readers have come to expect. Mark Ticer (past chair), Jennifer Johnson, and other contributors provide a thorough exploration of the *American National Ins. Co. v. Arce* case, shedding light on the complexities of the misrepresentation defense within insurance law. Their work offers clarity and depth, making it an essential read.

We are also proud to include an article by Blair Dancy, who is poised to become the next chair of our section. In his piece titled *WHO'S ON FIRST? PRIORITY OF COVERAGE AND GETTING TO HOME PLATE*, Blair delves into the intricacies of payment responsibilities among multiple carriers. His forward-thinking approach and expertise make this a valuable contribution to our ongoing discourse.

As we continue to build on the legacy of those who have come before us, I extend my deepest gratitude to all the contributors to this edition, including our managing editors and associate editors. Their tireless efforts ensure that our Journal remains an indispensable resource for our Section.

We hope this edition informs, inspires, and pays fitting tribute to the remarkable individuals who have guided our path.

Jason C. McLaurin
Editor In Chief

COMMENTS FROM THE CHAIR

By: Robert J. Cunningham

Wrapping up the 2023-24 year, we reflect on the Section's many accomplishments during this 25th Anniversary milestone. In my tenure as chair, your Council consolidated organizational changes initiated by my predecessor, Steve Melendi. Congratulations and thanks are owed to those leaders, including fellow officers Rebecca DiMasi, Blair Dancy, Chris Avery, and welcoming Jennifer Johnson as incoming secretary next year.

As Publications Officer, Jason McLaurin deserves great credit for maintaining the pre-eminence of this Journal of Texas Insurance Law while moving to a digital format, all while designing and implementing a new system to manage articles and publication, and culminating in this second issue of the year with another in the pipeline. Kudos to the whole editorial team on this masthead. Matt Paradowski and the ROTP team earn special recognition, too, for reliable publication of Right Off the Press, one of the premier benefits of Section membership.

Katherine Knight was perhaps the hardest worker of all as Communications Officer, re-defining the role by managing Section-wide eblasts and social media, negotiating contracts to renovate and maintain the Section website, and publishing a first-ever Newsletter.

As chair of CLE, Jennifer Johnson and her deputies, Lauren Parker and Ben Doyle, coordinated closely with the Bar co-sponsoring the very successful 21st Annual Advanced Insurance Law / Insurance 101 course in San Antonio on June 5–7, including the marvelous Casino Night networking event. Earlier in the year Chris Avery and his team created a new online Comprehensive Overview course that will be updated regularly and remain available in upcoming years. Steve Schulwolf and Christina Culver organized multiple webinars and were instrumental in providing those free going forward as a benefit of Section membership.

As chair of Outreach, Marjorie Nicol provided oversight and leadership for some of the most important aspects of our work. Paul Stafford brought our annual Scholarship programs to maturity after essentially creating them in 2020. Blair Dancy reached new heights soliciting Sponsorships as a critical budget component. James Willis and Henry Moore provided improved pathways for website Articles. Steve Schulwolf and Jonathan Lisenby expanded our Social Media presence. Lauren Parker managed our Membership, including happy hour networking events throughout the state. The Young Lawyers committee reached full fruition under Christina Culver's guidance, with Daniel Lockwood serving as its first liaison to Council.

Task Forces provided guidance and leadership to expand a category of Associate Members comprising non-lawyers engaged in the business of insurance [Rebecca DiMasi]; working with TBLS for the specialization in insurance law, and negotiating a new MOU for executive services [Blair Dancy and Steve Melendi]; and managing the nominations process for new and renewing officers and council members [Melendi].

Thanks to all. It's been a singular honor to serve as your Chair, working with such dedicated Officers & Council Members to ensure the Insurance Law Section continues its Mission of promoting collegiality and educating the bench, bar, and public about Texas insurance law.

Bob Cunningham
2023-2024 Chair, Insurance Law Section of the State Bar of Texas

COMMENTS

By: Ernest Martin, Founding Chair

The Birth of The Insurance Law Section: The Founder's Perspective

On June 11, 1998, the Insurance Law Section of the State Bar of Texas was officially born. The journey to this incredible milestone, however, was by no means an easy one. This is my account of that important journey.

It began when, in 1996, I first attended the annual Insurance CLE Seminar sponsored by the Insurance Coverage Litigation Committee ("ICLC") of the ABA in Tucson, Arizona. I was a young partner building my policyholder practice when I had heard about this national seminar, which brought together insurance coverage practitioners from both sides of the aisle to learn about cutting edge coverage issues. I decided to attend. Admittedly, I was nervous when I first arrived—nervous due to feeling like a small fish in a big pond, surrounded by the big names. Yet, I was met with something profound. The collegiality of the place was something I had never experienced before, and the superb quality of the program content was remarkable. The insurance company lawyers as well as the policyholder lawyers interacted in a way that resembled a tight-knit club. I found myself surrounded by lawyers with a like-minded focus with great professionalism and therefore, on the flight home to Dallas, I was inspired to search for that same type of collegial legal fellowship in the Lone Star State.

So that is what I did. After returning to Texas, I immediately began searching for an organization with a group of insurance coverage practitioners, and preferably embodied in a section of the State Bar of Texas. However, I was disappointed to find . . . nothing! Nothing because no such organization existed, except for the Consumer Law Section of the State Bar. But that group had an altogether different focus—consumer protection, not what I was looking for. My disappointment led me to a realization—maybe I could start one myself. I knew very many accomplished insurance lawyers in Texas but no organization that brought them all together.

I began to make a few phone calls, the first being to the Texas State Bar itself. I inquired, "what would it take to create an insurance section of the State Bar?" The Bar's response was more discouraging than I had anticipated.

The State Bar brought two problems to my attention:

a. To create an Insurance section would be to create a section fairly similar—they thought—to an already existing section, the Consumer Law Section. To get approval for a new Insurance Section, the State Bar would have to be thoroughly and efficiently convinced of their differences.

b. At this time, the State Bar was in the process of reducing, not expanding, their number of sections.

Truly, my timing was impeccable—to begin a project already fighting an uphill battle.

At this time, however, I learned that another attorney in Houston had been debating the thought of creating an Insurance section as well, Jim Cornell. Together we agreed to pool our efforts and make it happen.

Thus began the battle. Our application for the creation of a new section was immediately sent to the newly formed Section Coordination Committee of the State Bar to make sure our proposed section didn't overlap with the Consumer Law Section, which claimed that insurance law was a fundamental part of what the Consumer Law Section covered and that it adequately represented insurance law. Not so, I thought.

I began to write the mission statement of the section, then the bylaws, as well as numerous graphs, charts, and other

Ernest Martin is a Partner and Chair of the Insurance Recovery Section at Haynes and Boone, LLP. He is also a member of the firm's managing Board of Directors. He is a former Chair of the Dallas Bar Association's Tort and Insurance Practice Section, the Founder and Founding Chair of the State Bar of Texas Insurance Section, and the former Chair of the American Bar Association's Insurance Coverage Litigation Committee. He also is serving and has served as Adjunct Professor of Insurance Law at the SMU Dedman School of Law for the last 18 years. Ernest is also the founder of the Texas Insurance Academy, a Texas organization comprised of risk managers and insurance brokers and which sponsors an annual conference to address insurance issues affecting businesses in a broad range of industries.

written materials to convince the Section Coordination Committee that our proposed insurance section, which focused on coverage issues, was different than the Consumer Law Section, which focused on tort and consumer remedies such as the Deceptive Trade Practices Act.

Meanwhile, Jim and I set out to create the original list of Officers and Council Members of our proposed section. In order to pattern our proposed section after the ABA's ICLC, I insisted that our roster of Officers and Council members be balanced between policyholder lawyers and insurer lawyers.

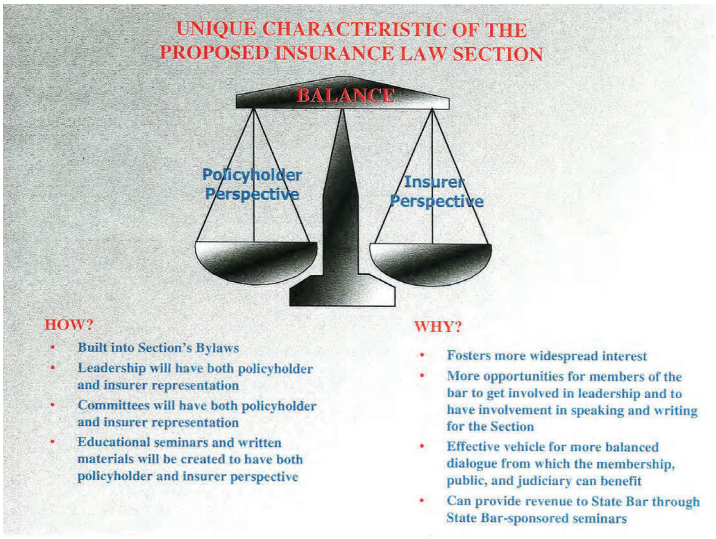
Our original Officers were me (Chairman), Michael Quinn (Chair-Elect), Michael Huddleston (Secretary), Reagan Brown (Treasurer), and Chris Martin (Publications Chairman).

Our original Council consisted of James Plummer, Mark Lawless, Jim Cornell, Veronica Bates, Ellen Pryor, Brent Cooper, and Rusty McMains. We also believed that inviting a couple of jurists to be members of our founding Council would give our group a certain amount of gravitas. Chris Martin suggested Justice Greg Abbott, who thankfully agreed to be a founding Council member. Wanting to comprise a Council that represented different parts of the state, we also reached out to Justice Susan Larson, who sat on the El Paso Court of Appeals. With an impressive Council in place, we were ready to face the battle ahead.

Over the course of the next several months, I travelled to numerous cities across Texas to present my pitch to various members of the State Bar leadership attempting to make them see the material distinctions between our proposed insurance section and the Consumer Law Section with the hope that our proposed section would get the stamp of approval. This became a tiresome process, but I was determined to press on. Others of our group reached out to Bar leaders urging them to support our newly proposed section. We faced multiple challenges to this lobbying effort but mainly from members of the Consumer Law Section. One meeting I vividly recall. I was asked to join a few leaders of the Consumer Law Section for a meeting at a local restaurant while I was on the road. I approached the meeting hopeful to convince them that our proposed section would not encroach on their turf and that our respective sections could peaceably coexist.

Needless to say, the Consumer Law folks were not in a compromising frame of mind. Rather than arriving at the conclusion I had urged, that both sections could easily co-exist, they insisted that they would not support the creation of the Insurance Law Section but proposed to make our insurance section nothing but a committee of the Consumer Law Section. In my mind, that was not a viable option. So I declined the offer, realizing we would be facing a real fight on our hands in the months ahead. I had come to learn that the Consumer Law Section sponsored a yearly Insurance Law CLE, which was quite popular. Naturally, our proposed new Insurance Law Section threatened to compete with the Consumer Law Section's crown jewel program. My efforts to convince the Consumer Law folks that our section's focus would be on coverage issues, and thus different from their CLE's focus, fell on deaf ears.

In trying to convince Bar leadership of the distinctiveness of our proposed section, I prepared the following slide, which I had hoped would drive home the point that the new Insurance Law Section would not overlap with the Consumer Law Section:



On June 11, 1998, a final meeting was held in Corpus Christi, Texas by the Board of Directors as a culmination of all the efforts to demonstrate our distinction from the Consumer Law Section. The Board of Directors had gathered for its regular session meeting during which the Board, among other business, would take up the proposal for a new Insurance Law Section.

I recall it was a packed room and there was no assurance our proposal would meet with approval. Naturally, I was nervous as I was slated to address the Board to make a final pitch before the vote. Beforehand, we had reached out to Justice Abbott and asked if he would also address the Board in support of approving the creation of our section. He graciously agreed to do so. In addressing the Board, he explained that the court had a tremendous focus on insurance coverage issues and stated, "I cannot think of a section more appropriate to create than this section." His comments would have been enough to garner approval, but I was also given an opportunity to address the Board. I focused my attention on explaining how our proposed section was unique, did not overlap with the Consumer Law Section, and that it would be structured to balance the interests of both policyholder and insurer lawyers. A representative of the Consumer Law Section,

William Walton, presented the argument against creation. Afterwards, Section Coordination Committee Chair Tim Sulak presented recommendations for approval with certain restrictions. Much discussion ensued, particularly concerning overlap and coverage issues.

It was clear from the floor discussions that a wholesale approval of our section was not guaranteed. Then an interesting development occurred. One Board member stood up and made a motion that the Board approve creation of the Insurance Law Section without conditions; seconded by another Board member. This was encouraging. But before a vote could be taken, another Board member offered a friendly amendment to the motion to approve the section on the condition the section change its name to "Insurance Coverage" instead of the "Insurance Law Section." The amendment was accepted by the Board member who made the original motion, but it was rejected by the Board member who seconded the original motion. Another Board member then moved to "call the question," which is normally done to end discussion and immediately bring a motion to vote, which was seconded by another Board member, and the motion passed. As a result, the original motion to approve the creation of the Insurance Law Section, without conditions, passed on a show of hands, 25 to 15. I have never witnessed anything quite like that in any subsequent Board meeting I have attended!

It was official. The Insurance Law Section was now the 43rd practice section of the State Bar of Texas, and today one of the largest sections of the State Bar.

In our Section's founding documents, I wrote the following "Statement of Purpose," which, in part, would define the heart and purpose of our newly found Section:

> ***The purpose of the Insurance Law Section will be to comprehensively address many substantive areas of Texas insurance law. Its goal will be to have a bi-partisan focus. Balancing the interests of both policyholder lawyers and insurance company lawyers. The section will seek to provide a forum for the Texas practitioner where all areas of substantive insurance law and procedural aspects of insurance litigation are addressed. Some of those areas include environmental coverage, directors' and officers' coverage, professional liability coverage, reinsurance coverage, agent/broker issues, London market issues, emerging coverage issues, regulatory issues and many others.***
>
> ***Insurance law touches a wide range of practice areas on both the transactional and litigation sides of the practice of law. Its widespread influence equally permeates the practice of both the plaintiffs' bar and defense bar. It must be understood by the solo practitioner, the in-house lawyer, the small-firm lawyer, the big-firm lawyer, and the pro bono lawyer alike. It is the subject of ever changing and often complex common law, statutory law. and regulatory laws. Texas insurance law is comprised of numerous topics of substantive law with varied and multiple specialties. The Insurance Law Section will serve to promote the better understanding of these substantive areas and to facilitate the exchange of ideas between Texas practitioners to enhance the quality of the law in this area.***

Once we became an official Section, the years that followed saw nothing but growth and success. We have grown from a few hundred to over two thousand members. Our new section was blessed with truly talented people who gave generously to our cause. Chris Martin, who I fondly call "brother" Martin is one such person. I asked him to be the original Editor of our publication, the *Journal of Texas Insurance Law.* Without question, Chris made our publication a first-class publication, the envy of all other sections. We also provided regular updates on new case law on insurance-related issues. Jim Cornell was the mastermind behind this significant member benefit, and he masterfully handled the insurance case updates for a long period of time. We also made sure that our leadership and Council were balanced between policyholder and insurer lawyers.

Without question, the creation of the Insurance Law Section is one of the crowning achievements I am most proud of in my career. To think that the idea came from attending the ICLC CLE seminar in Tucson so many years ago and wanting to replicate the same in Texas. As they say, "necessity is the mother of invention." Many years later, I would be honored to Chair the ICLC of the ABA.

I am thrilled that the Insurance Law Section of the State Bar of Texas has continued to flourish over the last 25 years, which is no doubt due to the incredible and talented people who have come after and who have capably steered the organization to its current state. My biggest hope is that the Section never loses its collegiality or its balance of interests between policyholders and insurers. I am confident that the spirit of collegiality and balance will live on!

COMMENTS

By: Christopher W. Martin, Founding Editor-in-Chief

The (Original) Editor's Perspective

It is hard to believe that 25 years have passed since the Insurance Law Section of the State Bar was created and we started the *Journal of Texas Insurance Law*. My "brother" Ernest and I discussed the idea of a SBOT section for our practice area for several years because we did not fit neatly within the Consumer Law Section. We had a desire to create a separate Insurance Law Section for networking among those within our specialty, creating a platform for legal scholarship within our practice, hosting our own insurance-specific CLE programming, and facilitating camaraderie among the insurance law lawyers of the state. Looking back at the past 2 1/2 decades, I think we accomplished the goal.

I was happy to serve in any way needed but Ernest asked me if I would serve as the Editor-in-Chief of the proposed Section's member publication. Having already authored my first legal treatise for West Publishing and having a dozen seminar articles under my belt by 1997, I guess he thought I was the only one foolish enough to say yes, which I did. At the time, I was a Partner with Bracewell & Patterson and our new Section in its first year only had a few hundred members. I suggested the name of our new publication, the *Journal of Texas Insurance Law*, and the new Section leadership unanimously approved it. Our first edition went to press in 1998. I did the entire thing in-house at Bracewell. I had a graphic artist who did the layout, and our in-house copy department produced the first several hundred copies of the 1st edition. As far as we knew, we were the only insurance-specific state bar journal in the country at the time.

My work as the Editor-in-Chief for the first 15 years was always a labor of love. The actual editing was quite easy because most of those who submitted articles were already good writers, so I never had to do major surgery on most of our submissions (except for a handful of eager submissions which needed some help). The biggest challenge was always getting busy, talented, and insightful attorneys to take the time to write an article for me and the *Journal*. For the first few years, we had difficulty keeping a quarterly publication schedule because we had tremendous difficulty getting articles submitted. We reworked CLE articles, and I begged every close friend I had with an insurance practice to do me a personal favor and write an article for us. They all responded positively (but some took months and some took years). As our membership grew larger, our quarterly schedule settled into a groove and the depth and breadth of our articles became quite impressive. Within just a few years, the *JTIL* was being cited by appellate courts across the state and the nation, and as members discovered the *Journal's* marketing potential, the written submissions flowed more easily. After our first three years, it was certainly easier to keep the quarterly publication schedule with constant submissions of new articles but the early years were quite difficult.

Insurance-related work in Texas exploded simultaneously with our creation of the Section. Thanks to Melinda Ballard, mold insurance cases proliferated overnight statewide in 2001. Quickly thereafter, the first construction defect coverage case appeared and was quickly followed by several dozen more. Tropical Storm Allison hit in 2001 followed by several years of significant hurricanes including Fay, Claudette, Rita, and Ike. Coverage B claims under CGL policies exploded with changing commercial technologies implicating such coverages. Specialized insurance products for specialized risks grew in both numbers and complexity, as did the coverage disputes over them. The *Journal of Texas Insurance Law* was always there to report on the latest developments in case law trends.

It's been an honor to help lead the Section over the past 25 years. Because of the regular rotation of leadership within the Section, we've had more than a hundred Section members assume leadership roles within the Section, including more than a dozen Editors and Assistant Editors of the *Journal* following my "retirement" as the Editor-in-Chief in 2013. I want to thank Brother Martin for trusting me with the reins of the *Journal* at its inception, the Section leadership for allowing me to serve for 15 years, and the long list of great friends who helped me edit over those years. It is an honor to be among the many member-volunteers who have sacrificed significant personal and professional time to help the Section remain true to our original goals established 25 years ago. I believe we created and have maintained the best state bar insurance law section in the nation. I look forward to continuing to serve our Section in the years ahead. The best is still yet to come!

Chris Martin is the Founding Partner of Martin, Disiere, Jefferson & Wisdom and was the Editor-in-Chief of the Journal of Texas Insurance Law for its first 15 years. He is the author of four treatises on Texas Insurance Law, a law school professor for the past 30 years, and has tried more than 175 insurance coverage and insurance bad faith jury trials over the past 34 years in 14 states.

COMMENTS

By: Mike Huddleston, Past Chair

Lessons From A Jedi/Sith

Insurance law has been a fascinating experience. The cases have involved every failure and foible to which human beings are prone to, and then some. From engineers having inappropriate relations with co-workers' shoes, to collapsing buildings in Puerto Rico, to air crashes requiring travel to a Guatemalan insurance company, to defective caskets, to molestation cases involving virtually every profession, to pipeline explosions, and so on. I am glad to share a few insights of sorts from my forty-one years in this business. I promise, it will not be all war stories.

Building relationships is one of the most important things you can do in any type of law practice, but especially in insurance. It is also one of the most rewarding. It starts with your own firm. Develop relationships with business sources. For a policyholder lawyer, that includes bankruptcy, real estate, construction, and general corporate practitioners. Insurance skills work well with risk management. Drafting insurance and indemnity provisions in commercial contracts can provide business and hone your skills for complex cases with additional insured and indemnity twists and turns.

Develop relationships with other lawyers in your practice area. Every case is an opportunity. Build bridges. Do not blow them up unless you absolutely have to do so. Attending seminars on your area of practice and getting involved in local, state, and federal organizations devoted to insurance and/or risk management is very helpful.

The Insurance Law Section has been a continuing source of professional relationships. Talk to speakers after presentations. Get to know them. Get involved. Find colleagues who you can exchange calls about troublesome topics in insurance law. I miss so much getting to talk shop with Mark Kincaid. I still converse with a number of dear friends and colleagues, both retired and still in practice, to get ideas about experts, new decisions, judges, opposing counsel, etc.

Do not hesitate to get involved in national organizations. The ABA provides a rich source of involvement, education, and networking. I wish I had done more with ABA over the years. The American College of Coverage Counsel has been one of primary commitments over the past twelve years or so. The friendships and relationships developed there, like with the State Bar Insurance Law Section, have enriched my knowledge of coverage law and have made the practice more meaningful.

Staying on top of developing issues and caselaw is a must. It gives you real credibility with clients and other lawyers. In 1983, when I started, I kept index cards with key cases involving insurance law and pertinent procedural law in state and federal court. I even had a set of dividers for all the key provisions and exclusions in CGL policies. Glean every case for subtle applications of the rules of construction and other rules like the "four corners rule."

I started as an appellate lawyer. Insurance was something then that came with that type of practice. Knowledge and experience with trying cases, defending cases, appealing cases, sorting out common law, and statutory and contractual indemnity issues are all essential. All of these varied experiences allow you to bring order and practicality to the chaos many of the tough cases present.

Coverage analysis for me begins with the language of the policy, not cases. I try to reach a decision based on nothing but the language and my basic knowledge of the rules of construction. I like to then get industry background and an overview of what a given provision or exclusion is intended to do. If multiple types of policies are involved, you need to know what each type is intended to cover, such as professional liability policies and CGL policies.

The language of the policy includes everything stated and represented in the policy. Headings, declarations, marketing assurances are all grist for the development of the case. I like to get the agent's file if I can, rummaging through applications, binders, etc., to get immersed in the project.

You need to assess how complicated the argument for or against coverage is going to be. My old test was whether it was "too complicated to win," or "TCTW." Never lose track

Mike Huddleston completed this piece before his untimely passing. Mike was a renowned and respected insurance coverage lawyer, as well as a talented musician. He was Chair of the Insurance Law Section from 2001 to 2002. For more information about Mike from his colleagues at Munsch Hardt, please visit: www.munsch.com/Newsroom/Blogs/169702/In-Memoriam-Michael-W-Huddleston.

of the fact that your coverage position is going to have to be sold to a judge and/or a jury. Try it on your spouse, your partner, your secretary, and your professional colleagues whom you trust.

Too often, insurance lawyers "drink the Kool-Aid." When I represented carriers, I tried to be careful to not be too much of a true believer, so devoted to the carrier line that I lost the ability to separate the forest from the trees. Policyholders have similar issues. For both, complicated arguments, carefully developed, are addicting and hard to let go, especially if it is contrary to the beliefs of the clan.

Having a solid knowledge of the ground rules has served me well. The eight corners rule seems simple, but it is not. Dealing with absent facts, hints at facts, omitted dates, contradictory allegations, extrinsic facts, etc., is very difficult legal work. Assessing indemnity in light of the "actual facts" rule also requires working knowledge of how you would try the indemnity case and what type of evidence can be used, such as historic facts, pleadings, new expert testimony, new facts, etc.

In communicating coverage positions, never say more than you have to. I have seen so many letters from carriers where the desire to hammer every position and reserve every theoretically possible defense winds up being self-defeating. Resist the natural human desire to compete, show off, and over-complicate a situation. I continue to see every day where anger gets the best of lawyers and leads to mistakes. Beware of the lawyer who responds to you softly and simply without hyperbole or rancor.

I have been blessed to work with many amazing lawyers. They served as the graduate school for my professional development. Jim Cowles was trail-blazing trial lawyer, who intimately knew the insurance law game. I spent over ten years learning and practicing insurance law with Brent Cooper. I played a game with each work project. I would reach my own conclusion and then test it against his. If they were different, I wanted to know why. Almost every appellate argument was preceded by a couple of days locked in a hotel room, preferably at a Holi-dome with foosball and ping pong tables, fencing, arguing and intensely researching with Brent. Kleber Miller, who, like Cowles, was an incredible trial lawyer. Wisdom, a keen mind, and intense preparation were givens with Kleber. He hammered AIG on a complex reinsurance case in his nineties.

The practice has changed dramatically since 1983 when I started. Coverage lawyers were cloistered appellate lawyers. I remember going to the steam room at the YMCA after racquetball with Ken Mighell. There was one guy on the far end of the room, huffing and puffing like he was doing birthing breathing exercises. I asked Ken what the deal was. He said, "Oh, that's Royal Brin, he's the guru of insurance coverage." It sort of said it all. But, in the end, it really all started with Royal on the defense side and guys like Phil Maxwell, Joe Longley, Frank Branson and Rusty McMains on the policyholder side. In 41 years, insurance has become a specialty with its own seminars, organizations, honorary groups, and a large number of practitioners. Many, many Jedi and Sith Lords. I will leave it to you to sort out which is which.

One of Jim Cowles' stories sums up the sort of homespun wisdom I always associated with insurance practice:

> There was once an Aggie working on a ranch in the Panhandle. It was winter and deep snow covered the ground. The cowboys had to round up the cattle to bring them to shelter and hay.
>
> The Aggie, wearing a big fur coat, thought he was saw something moving in the brush. It was a shivering, little bird. Being soft-hearted, the Aggie got down, picked him up and held him close to warm him.
>
> The ranch foreman rode up and told the Aggie to put the damn bird down and get to collecting cattle. The Aggie didn't know what to do. About then, his horse twitched and then relieved himself in the snow. Steam started coming up. The Aggie had an idea; he plopped the bird in the middle of it, all the way up to his neck. The bird warmed up quickly, wiggled a bit and then began to sing, "tweet, tweet, tweet . . . "
>
> Now, in another part of the prairie, there was a very hungry, near frozen coyote. What should he hear but the song of the little bird. He took off running, found the bird, and "snap", he yanked him out and ate him.
>
> That's the end of the story, but it has three morals. It is not always your enemies that put you in it. It is not always your friends who pull you out of it. But, when you are in it up to your neck, for God's sake, don't sing!

COMMENTS

By: Mark Lawless, Past Chair

The Maturation of Insurance Law Practice in Texas

First, congratulations to the Insurance Law Section of the State Bar of Texas on its 25th anniversary. Job well done! This story is about what insurance law practice looked like before the Insurance Law Section was created.

My personal journey to the land of insurance law began in 1980 when I graduated from Baylor Law School. As an aside, Baylor offered one insurance law course. I did not take it. If you had told me at the time that someday I would make a living suing insurance companies, I would have told you that you were insane.

In any event, upon graduation from law school, I promptly headed down to Austin seeking my fame and fortune as a "yet to be determined kind of" lawyer. Somehow, fate led me to practice environmental law throughout most of the 1980s. No, I was not a tree-hugging lawyer. I represented corporate polluters. That was my first important step toward becoming a corporate policyholder lawyer.

As any good, young associate in a national law firm should do, I spent a lot of time thinking about finding a market niche that would give me a platform (*i.e.*, clients and revenue) to justify making partner. We already had several environmental partners at the top. It was unclear whether there would be room for more.

By the late 1980s, I discovered that many companies across the country—like our clients—were suing their insurers over coverage for asbestos, environmental, and other toxic tort liabilities. I was a little late in making this discovery. Much of this litigation had been on-going since the 1960s, when I was still in grade school, but not so much in Texas. So, there it was, my pathway to becoming a partner in a large law firm—a corporate policyholder attorney, specializing in environmental coverage litigation. At least it sounded important.

The idea was easy. The implementation was more difficult. Once again, fate had a hand. This time my big national law firm filed bankruptcy. That left me unemployed, sitting at my kitchen table. And, that was a good thing. There, I wrote a comprehensive article on *Insurance Coverage for Environmental Liabilities: A Sleeping Giant in Texas*, which I published in 1990 in the State Bar of Texas Environmental Law Journal. Note that the Texas Insurance Law Journal did not yet exist. I would have never had the time to write the article as an associate in a large firm. Over the next 30 years, I republished that article many times, in various forms and gave many, many speeches about the topic. And, that, my friends, is how it all started.

When I entered the environmental coverage fray in Texas, there were not many players, and, of those playing in Texas, many were from out of state—on both the policyholder and carrier sides of the docket. Insurance law practice in Texas was pretty much still stuck in the days where a coverage case often involved a true plaintiff's attorney going after an insurer following an assignment of rights from the true underlying defendant policyholder. Most often, the cases were the foundation for bad faith claims, including *Stowers* claims. At that time, few Texas lawyers actually held themselves out as representing policyholders.

Also, at that time, there was very little substantive Texas coverage law, particularly in the environmental coverage arena. Despite the fact that scores of the highest courts in other states had decided important issues like trigger of coverage, allocation of liability among multiple insurers, the scope of the pollution exclusion, and the like, there was a dearth of such law in Texas.

In hindsight, the lack of Texas coverage law at that time actually made it easier to reach reasonable settlements. The financial stakes in many of these cases reached into the hundreds of millions. Few policyholders or carriers wanted to risk losing it all being the guinea pig for trying to develop new law. As the substantive law developed, I found that settlement became increasingly difficult.

The changes that were occurring in Texas insurance law practice were very confusing to many who apparently never got the memo about those changes. Many still saw the insurance world as underlying plaintiffs vs. insurance companies. Most so-called "insurance defense" law firms continued to get paid by insurers to defend their

Mark Lawless was a founding member of the State Bar of Texas Insurance Law Section Council and served as Section Chair in 2002-2003. He retired from law practice at the end of 2019. He currently resides in Walla Walla, WA near his twin daughters.

policyholders and to represent (often the same) insurers in coverage disputes—hopefully, not in the same case.

I cannot tell you how many times someone said to me, "I hear that you sue insurance companies, so that means you are a plaintiff's attorney, right?" Then, I would have to try to explain the proverbial triangle that exists in third-party claims. I usually described myself as a third-party plaintiff attorney (for lack of a better term), noting that the real plaintiff is the one suing my client that has caused me to sue the carrier for denying or limiting my client's insurance claim to begin with.

One revealing anecdote about this confusion involves a former Texas Supreme Court Justice who had just finished participating in a panel discussion at the annual ABA Coverage Litigation Seminar in Tucson. I was sitting poolside after the panel with my then law partner, a well-known appellate lawyer who routinely represented corporate defendants. The Judge, who knew my partner well, came over and asked my partner which insurance company he represents. My partner told the Judge that he didn't, that he sues carriers on behalf of his corporate clients. It was clear from the look on the Judge's face that he had no clue what was going on in Tucson, or what my partner had just told him. It just did not fit into the traditional plaintiff versus defendant paradigm. How could an appellate defense attorney possibly sue insurance companies?

I started my new career as an insurance coverage lawyer in about 1990 as a solo practitioner. In a short time, the volume of coverage litigation started increasing rapidly in Texas, and I fairly quickly had more work than I could handle solo. I initially merged with a small litigation boutique, then started a second litigation boutique, and finally moved on to Co-Chair the Insurance Recovery Group for McGuireWoods before retiring at the end of 2019.

By the late 1990s, insurance law practice in Texas was rapidly maturing. Many other Texas lawyers began doing what I was doing, and slowly displacing many of the out-of-state lawyers who previously had dominated the Texas insurance litigation landscape. Many of us regularly attended the annual ABA Coverage Litigation Conference. It was at about that time that a group of us decided that it was time to form our own Insurance Law Section within the State Bar of Texas.[1] It was modeled after the ABA's structure—attempting to provide equal leadership roles to both policyholder and carrier attorneys. Of paramount importance was to provide educational opportunities to Texas insurance law practitioners, and to attract new attorneys into the practice area.

I have focused here on the maturation of third-party liability insurance law practice in Texas. That's because I was known by many as the "pollution liability coverage" guy. However, all other areas of both first- and third-party insurance law have been maturing at the same time. Importantly, the Insurance Law Section, over the last 25 years, has provided a forum for insurance law practitioners to come together to teach (each other and the judiciary), learn, and socialize.

Although I am happily retired after 40 years of being a lawyer, I miss it every day. Not so much the practice itself, but the hundreds of friends who I made over the years on both sides of the docket. I will never forget those lively insurance law seminar debates with my good friend Brian Martin as we both tried to save the world from each other's clients (Brian is still wrong about most issues). It was those friendships, and the collegiality of the Insurance Law Section members that made it all worthwhile. Please do not ever let that change.

[1] I would attempt to provide a list of the many insurance lawyers involved in working to establish the Texas Insurance Law Section, but I am afraid that I will inadvertently leave someone out. It goes without saying that this original group went on to provide leadership to the Section for the first several years.

COMMENTS

By: Pat Wielinski, Past Chair

Observations for Younger Lawyers

I had the privilege of serving as the chair of the Insurance Law Section from 2004 to 2005, following Mark Lawless and Jim Cornell. At that time, the Section was still in its infancy, and the Council concerned itself with basics such as membership, development of CLE programs, budgetary matters, publication of a law journal, website development, and specialization. All of these tasks have come to fruition, and it is gratifying that the Section is now a vibrant resource and outlet for its membership.

Based on well-over forty years of practicing insurance coverage law (now, fashionably referred to by some as "insurance recovery law"), I offer the following observations to younger members of the Section:

- Don't be hesitant to learn and specialize in new areas of coverage. When I was a new lawyer, I was fortunate enough to be exposed to, and handle, construction defect coverage cases, which became my bread and butter. However, I never hesitated to hold myself out as knowledgeable in new and developing areas, such as fungus and mold and esoteric subcontractor default coverages. In other words, don't hesitate to make a leap into new and developing areas such as climate, pandemic, or the "next big thing." Becoming a specialist in certain coverages helps you to realize that even within the area of insurance coverage, you cannot be everything to everybody. Moreover, it distinguishes you in what is becoming an increasingly crowded area of law.

- Insurance coverage law remains something of an academic pursuit and is a perfect vehicle for publishing and presenting. These activities support my comments above as to the benefits of specializing and distinguishing yourself.

- Maintain collegiality with attorneys on both sides of the aisle, insured and insurer alike. This fosters credibility. In advising clients and litigating claims as coverage lawyers, it helps to remember that not all claims are within coverage, but, at the same time, all insureds are not bent on defrauding their insurers.

- Lastly, remember that regardless of whether you represent insurers or insureds, the relationship is firmly grounded on the language of the policy contract. In other words, be a slave to the policy language.

I thoroughly enjoyed my tenure as chair of the Insurance Law Section, and my years of practice, and I hope that all members of the Section can obtain the same level of satisfaction and professional reward.

Pat Wielinski is a Principal at Cokinos in Dallas/Fort Worth, practicing insurance coverage primarily in the construction industry. Pat was the Chair of the Insurance Law Section from 2004 to 2005 and has received several awards and distinctions throughout his career, including Lawyer of the Year by several publications and organizations for insurance and construction law. He has authored many articles and has spoken at numerous conferences and events throughout Texas and across the country on insurance-related topics in construction defect cases.

COMMENTS

By: Veronica Carmona Czuchna, Past Chair

Reflections of a Past Chair

It seems like a lifetime ago that I was Chair of the Section. I was not involved in the Section's formation, but I was there in the early years, having become a Council member in 1999 at the invitation of Michael Quinn and Mark Lawless, and eventually becoming Chair in 2005. I am proud and grateful to have been elected the first woman Chair of the Section. We have had a few women lead the Section in subsequent years, but I would like to see more women – in both Section leadership and membership – so that our representation more closely corresponds to or exceeds that of the State Bar of Texas. The most recent statistics available are from the 2022 – 2023 bar year. Last year, almost 40% of SBOT membership identified as female, 40% of SBOT board members were female, and 45% of SBOT committee members were female. The Section's numbers historically have trailed those numbers. During the 2022 – 2023 bar year, 32% of the Section's membership was female and, although 35% of the Council that year was female, I have seen that number fluctuate from year to year to as little as 25% of the Council. More telling is that in the Section's 25-year history, we only have elected seven women to chair the Section (28%). My mentors and role models as a young lawyer were all men. While they were all wonderful and I learned much from them, it would have been helpful to my career development had there been women leaders and mentors along the way. I would like to see more women chair the Insurance Law Section, so I encourage the Section to strive harder to diversify its leadership. I am aging myself, but I can remember when I was expected to wear a skirt to court in some venues. I mention this only to point out that we have made a lot of progress over the years, but we need to continue working to ensure further progress.

The mission of the Section is "promoting collegiality and educating the bench, bar, and public about Texas insurance law," while balancing the interests of both policyholder and insurance company lawyers. I cannot overstate the importance of our mission of collegiality. It has been one of the most valuable benefits that I have derived from belonging to this group. I spent almost 30 years in private practice before going in-house, and one of the things that I noticed in litigation over the years was that, increasingly, some lawyers were no longer able to "disagree without being disagreeable." Somehow, it seemed that lack of civility and zealous advocacy had been conflated, as though acrimony, the volume of one's voice, and a refusal to agree on anything, meant that they were being the better lawyer and best representing the client. Perhaps it was that way all along and I had just lost my tolerance for it, but I think not. In any event, I found the experience different when dealing with opposing lawyers who were members of the Section. We knew each other or of one another, interacted at insurance CLEs and Section meetings, and, while we disagreed, we could be respectful of one another, have courteous discussions about our disagreements without it devolving into something unpleasant, and cooperate as much as possible to move the litigation forward. That collegiality made litigation enjoyable. For those of you who are new to insurance litigation, regardless of whether your opposing counsel is a member of the Section, please endeavor to be courteous in your dealings with other attorneys, try to agree where possible, and resist the temptation to engage, even when baited. You can be a zealous advocate without being disagreeable.

Now, I will offer a few *basic* tips for less experienced practitioners navigating the insurance coverage landscape.

- First, look for coverage. Let me repeat – look for coverage. Even if you represent insurers, you should always approach a coverage analysis with a view to finding coverage, not looking for ways to deny it. That's what policyholders and insurers expect. I know it seems obvious, but you would be surprised at the number of practitioners who need to be reminded of this basic premise.

- When you analyze coverage under a policy, start by reading every page of the policy before reviewing the complaint or the claim facts. Don't skip it or skim it. You may know what the standard coverage forms look like, so there might be a tendency to skip reading the entire policy. You might be tempted to just glance at the Dec Page and the list of forms and endorsements, and then move on to the facts. But thinking that you know what the policy says is not the same as knowing what it says. A cursory review is an invitation for mistake, particularly if

Veronica Carmona Czuchna is Assistant General Counsel for AmeriTrust Group. She was the Chair of the Insurance Law Section from 2005 to 2006. Prior to her current position in-house, Veronica spent over 30 years in private practice with a stint at Kemper as well.

you are dealing with manuscript endorsements, general change endorsements, or endorsements on policies issued by non-admitted carriers. Inevitably, there will be language lurking in there that will modify coverage and you may miss it.

• Reading the entire policy first informs your review of the claim facts or the complaint and helps you to quickly identify what is important in your coverage analysis. For me, doing it in reverse order often means that I must go back to review the complaint or claim facts a second time after reviewing the policy.

• When I started writing coverage opinion letters years ago, my insurer clients wanted lengthy exhaustive letters that often felt like short legal treatises (fortunately, I learned from a "Legend of Texas Insurance Law"—Michael Sean Quinn). I wrote a lot of those lengthy opinion letters. But in later years, I increasingly saw clients who no longer wanted the treatise. Instead, they wanted the *CliffsNotes* version or even just a verbal opinion with drafting of only the necessary coverage position letter to the insured. Still, others continued to want the lengthy letter. I am in-house counsel now and approach the arrangement from the client's perspective. Now that I am the recipient of that letter, I will say that I do not want the lengthy treatise. Yes, I want to know what the determinative law is on the key issues under California law or Texas law or New York law, but it is not necessary to write a treatise. I do not want it, nor do I have the time to read it. I am looking for conciseness. My simple advice is to just make sure that you know the client, understand their expectations, and clearly communicate what you will be providing to them.

• Following up on my earlier comments about collegiality, never react in anger. I always found it best to sleep on it and contemplate my response. Your instinct might be to shoot off that quick retort, but an emotional response will be an inflammatory one and things will deteriorate in the blink of an eye. Tomorrow's measured response is always the better one.

• When handling bad-faith insurance litigation (this really applies to any kind of litigation), draft the jury charge at the beginning of your case. Do not wait for a pretrial conference to do it. Prepare an early draft of the charge that you anticipate will be submitted and use it to streamline your case. That will help you organize your evidence around the issues, determine what evidence and testimony is needed, and assess the strengths and weaknesses in your evidence and your case. Too often lawyers will react to what is happening in the litigation or go through the motions of preparing a case according to some script without really focusing on the issues and the evidence. The draft jury charge will force you to focus your case.

• Use experts. Even if your inclination is to forego using one and even if the other side has not designated one. Juries love experts *if* the witness can relate to them and does not condescend to everyone in the courtroom. They especially like experts who can wrap up the evidence and the case for them in a tidy bow. I once defended a case and had a claims-handling expert testify at trial even though the policyholder did not have an expert. The opposing counsel was so convinced that my client had committed bad faith that he did not believe he needed a claims-handling expert. The jurors liked my expert and made a point to talk about it after the verdict. Suffice it to say that opposing counsel regretted his decision and told me afterwards that he would never try another bad faith case without a claims-handling expert. I cannot emphasize this enough—juries love a good expert!

• As for resources for your insurance practice, the obvious ones are *The Journal of Texas Insurance Law* and the Section's Right Off the Press. I like Randy Maniloff's *Coverage Opinions* at https://www.coverageopinions.info--you can sign up for case alerts and view the publication. I refer to articles and news on the websites of trusted law firms, and they periodically offer seminars on developments in the law. The property insurance blog at www.propertyinsurancecoveragelaw.com is interesting and provocative. I certainly do *not* advocate the use of ChatGPT, although I will add that I recently heard oral arguments in an Eleventh Circuit case in which one of the justices announced what he had found on ChatGPT and asked whether we should rely upon it for interpretation of the insurance policy at issue in the case. I was stunned. I am concerned about source information used by AI platforms. That said, I am interested in AI-assisted research that is available on *closed systems* like Westlaw and Lexis. We all need to buckle up our seatbelts for this AI ride.

COMMENTS

By: Lee H. Shidlofsky, Past Chair

Perspective of a Past Chair

Happy 25th birthday to the Insurance Law Section. The Section started when I was a young lawyer just starting out. In lawyer years, I was a mere infant as opposed to my current toddler status. It was and continues to be a wonderful resource for information and collegiality. In the early days, before iPhones and way before Zoom, the meetings and CLEs were the best way to meet your colleagues as well as learn about new cases and developments in the law. Simply put, it was a hub for knowledge and comradery. I've learned a lot from my infant years through my toddler years as an insurance coverage lawyer, and the purpose of this essay is to try to impart some of those lessons.

Although it sounds self-evident, the biggest piece of advice I could give to any young coverage lawyer is simply this: read and digest as much as you can from both sides of the docket. When I was starting out, I devoured articles written by both policyholder lawyers and carrier lawyers. I used to read every article that Pat Wielinski, Mike Huddleston, Michael Sean Quinn, Ernest Martin, Brent Cooper, Beth Bradley and many others published. If I had questions, and I always did, I would call or e-mail. Now we just text. At my first job out of law school, I worked for Veronica Czuchna and Kim Steele. They couldn't get me out of their offices. Whether it was Veronica or Kim, or any of the other section members that I would pester, they always took the time to answer my questions and engage in discussions. Knowledge is key. Having knowledge is not limited to only arguments that support your position. I learned early on to treat a coverage case or a coverage opinion like it's an appellate argument. Anticipate the issues that the other side is going to raise and be armed with responses. My goal as an insurance coverage lawyer was always to be more prepared than my adversary and to be able to anticipate exactly what they would argue.

While being prepared is important, there are certainly other important things that I've learned over the years from my elders (read: most of the other past Chairs are a LOT older than me). One lesson stands out and has proven to be instrumental to my career. Years ago, Chris Martin authored a CLE presentation called Rock N' Roll Rules of Litigation. The basic premise was "Do unto others as you would have them to do you." Now, while I'm no biblical scholar, I'm pretty sure that Chris is not the originator of that sentiment. Even so, for whatever reason, the way Chris presented it just resonated with me. His point was quite simple. If someone needs an extension on a brief or a discovery deadline, and assuming it does not harm your client, then give them the extension. If someone wants to exceed the page limitations in a brief, then let them exceed the page limitations. No need to engage in a deposition of your opposing counsel as to why they need the extension. Instead of Nancy Reagan's "Just Say No," this is the "Just Say Yes" campaign. There is always a "but" and there was one in Chris's lesson. If you ask the same of your opponent and they say "no," then all bets are off and everything from that point on will be done by the book. I've tried to pattern my practice and my firm after this philosophy. What I've found is that most coverage lawyers—in Texas anyway—seem to operate the same way. Perhaps all of them attended Chris's CLE presentation.

While having overall knowledge of coverage law is great, and especially now that there is a Board Specialization exam, I chose relatively early on to specialize in insurance coverage for construction defects. My goal was to dethrone Pat Wielinksi as the king of construction defect coverage law. Think Game of Thrones. While I certainly have not dethroned Pat, having that specialty focus helped me to hone my skills and made it easier to expand my boundaries beyond Texas. I started by publishing articles and speaking at CLEs in Texas—mostly through the Section. That soon led to more articles and CLEs on a national level. And, in turn, that led to bigger and better cases.

I am a member of several national insurance coverage organizations, but I've never quite found the same level of collegiality that I've experienced in the State Bar Insurance Law Section. Although we have grown from the infant years, we remain a relatively small community of coverage lawyers. We can be adversaries, but life is too short to make any case or issue personal. After all, we are deciding whether something is covered or not –we are not mediating the Middle East Crisis.

Finally, one of things I'm most proud of is the friends that I've made in the Insurance Law Section. I remember oral arguments in front of the Fifth Circuit and the Supreme Court of Texas where we had 30 to 45 minutes of serious debate, and then promptly left the courtroom for happy hour—even if it was only 10:30 a.m. Our work is important, and knowledge and preparation are key, but don't take it too seriously. Life is more important. Happy 25th Anniversary to the Insurance Law Section. It has been a great ride so far.

Lee Shidlofsky is the founding member of Shidlofsky Law Firm PLLC. Lee has an active mediation and arbitration practice that focuses on construction/design defect and insurance coverage matters. He was the Chair of the Insurance Law Section from 2010 to 2011 and is the current Treasurer of the Construction Law Section. He is consistently ranked as a top insurance coverage lawyer by several organizations, including Chambers, Best Lawyers in America, Texas Monthly Magazine and others. He also is ranked as a Top 100 Lawyer by Super Lawyers since 2016. Lee has authored numerous articles and seminar papers and is a frequent speaker at continuing legal education seminars in Texas and across the country.

COMMENTS

By: John Tollefson, Past Chair

Practical Advice for Practicing Insurance Coverage Law, In No Particular Order

1) Key lessons learned that are valuable for other insurance coverage practitioners.

Keep a copy of every opinion and brief you write or work on, in a searchable format, in one folder on your desktop. I have done this my whole career. I've been in this game since 1977. My folder is several gigs. If you do this you can keep from reinventing the wheel, and also avoid taking inconsistent positions.

Keep other people's briefs and opinions as well, in a separate folder.

Word search your firm's document drive for research just as you would Westlaw. Your coverage practitioner partners have probably written on the subject.

Think of yourself as a judge rather than an advocate. In coverage work, it is better to be an accurate rather than aggressive advocate. Don't get the reputation of being a blowhard. If you think like a judge, you will be more apt to persuade a judge. And that is all that matters in our game.

Grant briefing and pleading extensions liberally. You will need such an extension one day, usually from the same lawyer who is asking. And you will often find that recipients of extensions are a lot more likely to buy you a beer at bar functions.

Research the judge, on Westlaw and on Google. Cite the judge's own opinions to them when you can. Cite your own published opinions when you can.

Concede or abandon weak positions. No court of appeals will ever consider more than four arguments.

Write, write, write, every chance you get. The more you write, the easier and better it is.

Read and Shepardize every case you cite and every case your opponent cites. If you don't, you will learn the meaning of bad karma. Look at cases where the party advocating your position actually won, but also where they lost. If their opponent won, even because of another issue, you need to know if that affects your case.

When you use Westlaw, try ordering the case results by date. Often more productive than by Westlaw's idea of relevance.

Remember that Courts of Appeals, and many district courts, read the appellant's reply brief first, then the appellee's original brief. Write it accordingly.

If opposing counsel is a blowhard or lacks character, do not ask for oral argument if you are the appellant. Point out their misstatements in the reply brief instead.

Never, ever, overstate the strength of a coverage position to your client. You, and only you, will be blamed when it does not pan out. Do not undersell, or you will be considered to lack confidence. Don't be a "maybe this will happen or maybe that" lawyer. No one wants to pay to learn how to sit on a fence. State what you believe the case is and let the chips fall where they may. Unless you are a shareholder in the company, it will not cost you a thing if an insurance company has to pay a claim or, from the other side, an insured has to pay for the damage or destruction they have caused. And you'll sleep better.

2) Recommended approaches to coverage analyses.

Liability insurance: read the underlying petition, then read the policy, (including the endorsements!) making notes of any issue you spot, and then read the petition again. Check the court record to make sure the petition has not been amended, and do so again the day you send the opinion to the client.

Property insurance: Read the claim file, then the policy. Go to the scene if at all possible and check out the neighborhood. At least look at Street View on Google. You'll be surprised at how that will deepen your understanding of what happened, and how much the joint was worth before the loss. Also, you

John Tollefson was a founding partner and Of Counsel at Tollefson Bradley Mitchell & Melendi LLP at the time of his passing. Per John, "[t]hese are my thoughts and only I should answer for them if they are wrong."

will get a better idea of the nature of any fact witnesses living/working nearby.

Any insurance: Google the insured and the claimant to learn who and what you are dealing with.

For insurer side: Get and read the entire claim file, including/especially the file notes. Get and read the underwriting file. Get and read the agent's file.

For policyholder side: get all correspondence to and from the client and the insurer and agent.

3) Beneficial areas of practice outside insurance coverage that enhance skills within the field.

Insurance defense, appellate practice and legal malpractice.

4) Advice for less experienced practitioners navigating the insurance coverage landscape.

Read the work of older lawyers (see above) before asking to pick their brains. Don't go window shopping to multiple partners advice on the same issue. We talk.

5) Evolution of the insurance coverage practice over the years.

The availability of online information has made it a lot easier. The enthusiasm of clients to pay for good work has waned.

6) The interplay between insurance coverage practice and other law practice areas.

In a liability insurance context, it is a very good idea to get a general understanding of the substantive law governing the underlying case so you can better understand the correlative coverage issues. Consult a nutshell or hornbook. But do not dabble in practicing in those areas unless you want to become an expert in how to get sued.

7) Essential resources for your insurance coverage practice.

--PACER and similar court record services. Read the key filings in the record in the underlying case to gauge how good your counterparties are, and get an idea of the strength and potential fluidity of their positions.

These services are also excellent legal research sources. If you find a good case on Westlaw or Lexis, look it up on PACER or similar and read the principal briefs of the parties. There are almost always more citations, arguments and issues than in any reported court opinion. In addition, shocking as it may seem, the lawyers in the cases may have some arguments you haven't thought of. You can use them. There is no copyright in legal filings. I usually send a note to the lawyer thanking them if the arguments are really good.

If you really want to get into it, search PACER by attorney and see what opposing coverage counsel has done in other matters.

--A good dictionary that is oft-cited by courts. Like Merriam-Websters. "'To discern the ordinary meaning of undefined terms in insurance contracts, Texas courts "look first to dictionary definitions'"." … *Century Sur. Co. v. Club Adventure Learning Ctr. LLC*, No. EP-22-CV-213-KC, 2023 WL 3575647, at *6 (W.D. Tex. May 22, 2023) (Citations omitted).

In footnote 7 in *Century*, the court was helpful in listing the dictionaries that Texas courts use, citing *Pharr-San Juan-Alamo*, 642 S.W.3d at 474 (considering Dictionary.com, Webster's New Collegiate Dictionary, Merriam-Webster.com, and CollinsDictionary.com); *Anadarko Petroleum Corp. v. Hous. Cas. Co.,* 573 S.W.3d 187, 192 (Tex. 2019)

(considering Black's Law Dictionary and the American Heritage Dictionary). These are good ones and you can't be accused of cherry-picking if you use them, because a federal judge says they are in common use.

Couch and Appleman

Mike Huddleston's Stowers paper, the "Power of Stowers"; Brent Cooper's paper, "Burden of Proof in Insurance Coverage Litigation" (In five parts). In fact, pretty much anything written by them, or any of my fellow past chairs.

A hard copy of the Texas Insurance Code, preferably with case annotations, with post-its tagging the good parts. Mine fell apart after many years of hard use (and a few episodes of being thrown across the room). You can write in the margins of a hard copy and it's easier to use in court or mediation.

A hard copy of the West Digest, Insurance volumes. You'd be surprised what you can find just browsing randomly in keynote 217, especially 217k1 through 217k100. Weird and interesting stuff. You can't really do that in the online version.

Texas Pattern Jury Charges—good to know what the underlying jury is going to answer in case you need to engage in post-verdict coverage litigation.

Mallen on Legal Malpractice. Scary book. But when you need to read it, you will know why it is important. Don't let your partners see you reading it. (Joke).

8) A light-hearted or thought-provoking question, such as "Jaws or Star Wars and why?" or a professional dilemma like "Carrier- side vs. Policyholder side and why?"

I've looked at coverage from both sides now, both light and dark and still somehow, it's all its illusions that I recall, it's nothing like real life, at all.

Note on John Tollefson's Past Chair Comment - Post-Mortem

By: Beth Bradley, Stephen Melendi, Past Chairs and proud partners of John Tollefson

John drafted the attached note at the request of the Insurance Law Section shortly before his untimely death on March 13, 2024. It seems apropos that the advice, which John always generously provided, is candid and references song lyrics.

High on the list of things John loved were words and imparting wisdom. He instigated composition of chain poems during CLEs and shared inside jokes about song lyrics. He kept a four word journal, describing each day. He also loved to share his experiences with other, sometimes younger and less-experienced, lawyers, whether that was forwarding his pdf of every opinion he ever authored or sending emails with quotes from cases in which he was involved. These experiences were often unsolicited, and there would be follow-up questions to ensure that you did, in fact, read what was provided. His letters to the Editor were legion and legendary. He also shared wisdom gained from conversations on the street, at Walgreen's, or in the streetcars of New Orleans (most of these conversations were probably initiated by John). His avid curiosity led him to research interesting issues pending before the courts—and even to compose amicus briefs for fun—but also made him an expert on the backstory of people with interesting obituaries.

It is not surprising that, when asked to compose an article for the Journal, he sought to share some of that experience with his characteristic wit. We can assure you that the practical advice provided by John was not aspirational or hyperbole, rather, it accurately represents the manner in which he conducted his practice for over forty years. His words, wit and wisdom will be missed, but we will still try to cite his published opinions as often as possible and "do the necessary."

COMMENTS

By: Stephen E. Walraven, Past Chair

Practicing Coverage Law: My How It Has Changed

Much has changed since I was first asked to write a coverage opinion in 1975. Certainly, the practice of law in general has changed dramatically, and the practice of insurance law may have changed even more. If you did not personally experience it, no doubt you have heard stories about dress codes requiring a suit and tie every day, use of carbon paper for file copies of documents, and the lack of computers for document preparation or legal research. It may seem strange to hear about law firm rules governing smoking or drinking, even away from the job. Some firms even had rules that punished an attorney for getting a divorce (although a married man dating his secretary was generally acceptable). While the use of hourly rate billing was common, many clients, including some insurance companies, accepted and paid flat fee billing without requiring any breakdown of individual tasks and hours expended on each task.

The practice of insurance law has also changed. In 1975, insurance coverage work was often considered a secondary type of practice, generally performed by one or two-year lawyers training to becoming tort trial lawyers. Hourly rates of $15 to $20 were common, even for partners, and the limit of liability under many insurance policies was only five or ten thousand dollars. Adjusters would negotiate with an injured claimant with a briefcase full of twenty-dollar bills. (The negotiations consisted of the adjuster piling the bills in the middle of the table and offering the claimant an opportunity to take the money whenever he thought it was enough, under threat that the adjuster might change his mind and remove all the bills from the table.)

There was blatant bad faith as the term is understood today, such as an insurance adjuster explaining to the claimant that he could take half what his claim is worth now, or let the litigation play for out for a year or two and then, get all the money admittedly owed.

No one was considered an insurance coverage specialist, nor would have been particularly respected if they claimed such a title.

Much has changed today. We have the first group of board-certified insurance coverage lawyers. Insurance coverage is recognized as a distinct specialty, often requiring sophisticated knowledge and experience and, generally, not to be delegated to new lawyers. There are a number of reasons for these changes. One is simply the dramatic increase in available insurance limits, and the amounts at stake. A second driver of this change is the proliferation of a wide variety of policy forms and language. A third driver can be attributed to the members of the insurance law section and, particularly, its leadership, who have dramatically increased the scholarship and professionalism in practicing insurance coverage law.

In the 1970s, a sizeable percentage of policies were written on regulated policy forms approved by the various departments of insurance. The language was standard from policy to policy within the same type of coverage. Because of that standardization, which had been consistent for many years, it was common for most coverage issues to have been addressed by a prior court. Coverage work often consisted of no more than finding prior case law on the particular provision.

However, legislatures and the departments of insurance began to authorize different types of insurance policy forms. Increasingly, coverage questions would deal with policy language that was different from anything seen before and unlike anything that had previously been construed. Many of these new policy forms were in response to the proliferation of new types of litigation, such as claims arising from exposure to asbestos or silica, pollution and environmental claims, foundation and mold claims

Stephen Walraven is a Shareholder at Langley & Banack where his practice consists primarily of handling insurance disputes. Stephen was Chair of the Insurance Law Section from 2013 to 2014. He is board certified in Insurance Law, has a Property and Casualty license from the Texas Department of Insurance, is associated with many organizations related to the insurance coverage practice, and has authored many articles on insurance-related issues. He has also spoken and presented at many conferences on insurance issues.

(particularly under homeowner's policies) all the way up to claims subject to COVID and virus exclusions. Analyzing coverage under these new and varied forms became much more challenging. Analyzing, interpreting, applying, and litigating new (sometimes very, poorly written) policy forms was no longer predominantly the province of first- and second-year tort lawyers. Instead of simply finding a prior decision interpreting a clause in a policy, complex and sometimes inconsistent rules of interpretation were the tools used by courts and coverage lawyers. Interest and attendance at insurance law seminars grew. The insurance coverage bar came to recognize itself as a separate and distinct practice area group of attorneys, and the insurance law section was born.

I believe another key factor in the evolving practice of insurance coverage law has been the role played by the Insurance Law Section (the "Section"). The Section's involvement in insurance coverage education has been tremendous in terms of quality and effectiveness. We are all smarter, more knowledgeable, and are better coverage lawyers because of the papers, seminars and work of the Section. The materials and presentations on substantive law are valuable tools that have enhanced the practice for all of us. The seminar presentations on practical tips and strategies that have worked or not worked in the past are also very valuable. Another significant contribution has been the Section's efforts to promote understanding and collegiality between policyholder lawyers and carrier lawyers. In some areas of law practice, and maybe for some in the insurance field, the perception is that the other side is evil, out "to cheat" them, and wholly undeserving of trust or cooperation on anything. The majority of the time, this is completely wrong. By and large, a much better outcome can be achieved through cooperation and understanding of the other side's position and objectives. Assuming the worst and cooperating on nothing usually just makes matters more difficult, expensive, and delayed. The Section's efforts to promote cooperation, understanding and respect for the other side have been invaluable for both practitioners and their clients.

Since the formation of the Section, the expertise and professionalism of the insurance bar has continued to flourish, and the standards for being recognized as a knowledgeable and effective coverage lawyer have increased exponentially. I expect this progress to continue.

It has been fun participating in this process. I am also glad that I am no longer required to wear a coat and tie to work every day.

COMMENTS

By: Lisa Songy, Past Chair

Beers & Brevity

My motto as Chair was "Beers & Brevity" with a focus on short meetings and collegial exchange between counsel on both sides of the docket. Leading up to my time as chair I worked to get the "Casino Night" at the Advanced Insurance Law Seminar started to try and help promote relationship building. Litigation is stressful enough and you can be a good advocate for your client without being a jerk to the other lawyer. At the end of the day, your professional reputation is tantamount to getting your case resolved either through settlement or trial.

During my time on the Insurance Council, I had the opportunity to get to know a number of very smart lawyers, all of whom were "coverage geeks" who enjoyed the intellectual aspects of the law as well as the competition of litigation. It was through this involvement on the Council as well as in other local Bar organizations that I came to appreciate what these professional relationships can do for you both personally as well as professional. Cases get resolved because of these personal relationships and when the cases have to get tried—some do—trying a case against a lawyer you know and respect makes that stressful time more manageable.

The Insurance Bar is, in reality, a very small percentage of the lawyers licensed in Texas. There are plenty of legal and factual issues which are and should be the subject of lively debate. But just because you disagree with the position taken by an opponent does not mean you need to be a jerk about it. Today when people seem to think being a jerk or a bully is the way to get something accomplished, just remember that people do talk . . . even the defense lawyers. We share information just as the plaintiffs' bar does. And you may be surprised to learn that those of us who have been practicing in this area on opposite sides of the docket talk to one another as well. We share information and we know the games that people play. Games that, in the end, do nothing to further your client's position and everything to damage your reputation.

So, I would encourage all young lawyers to go to the in-person events, raise a glass with a colleague or opposing counsel, and get to know them as a person, not just as a lawyer.

Lisa Songy is a Partner at Tollefson Bradley Mitchell & Melendi in Dallas. Lisa's practice consists primarily of first party and general civil litigation. She was the Chair of the Insurance Law Section from 2018 to 2019. She also served on the board of the Tort & Insurance Practice Section of the Dallas Bar Association. Lisa has been awarded several honors, including Lawyer of the Year for Insurance Litigation by Best Lawyers as well as recognition by several publications and organizations for her experience and achievements in Insurance Litigation and Insurance Law.

COMMENTS

By: William J. Chriss, Past Chair

MY BIG FAT CAREER IN INSURANCE LAW

At least half of what I learned about practicing insurance law was learned in kindergarten or in high school debate, contending against the likes of Tom Rollins, Randy Roach, Kathy Snapka, John Griffin, and a host of other future trial lawyers. Much of the other half I learned from my close friend, neighbor, and mentor, Rusty McMains, a co-founder and early chair of the Insurance Law Section.

Back in the day, it was not unusual for even the youngest of lawyers to try a dozen or more jury cases a year. While in my mid-twenties, I had already handled cases for insurance companies against some of Texas's legendary trial lawyers, all of whom quickly became friends: Guy Allison, Bill Edwards, David Perry, Broadus Spivey, and others. It was, I think, in 1984 or 1985 that I tried a particularly difficult wrongful death collision case against one such giant in what then was considered a plaintiff-friendly venue. My corporate client's driver had an embarrassing driving record and our own accident reconstructionist (quite a novel kind of expert witness in those days) had to admit the poor fellow might have been exceeding the speed limit by a small amount. The adverse driver, whose passengers were the plaintiffs' decedents, had blown a stop sign however, which made the case defensible. But the plaintiffs all having been passengers, there was no possibility of establishing any contributory negligence defense—*any* fault on my driver would spell a monumental defeat.

Under these circumstances, I recommended that my client's carrier make a high-low deal and they concurred: Plaintiffs agreed that no matter how high the verdict, they would accept the policy limits. We agreed that even if we won, they would still be paid $50,000, which was real money in those days. The trial was hotly contested, but ultimately we received a complete defense verdict, which I reported, with some bravado, to the carrier's adjuster. His response was, "Damn, do we still have to pay them the $50,000?" After replying that it did, and that the least we could do for this aggrieved family was to keep our word, I made myself a silent promise that I would never again try a case for an insurance carrier. And I never did.

It was around that time that I met and befriended McMains, who most of the readers of this memoir will not have known, but whose name lives on in the Russell H. McMains Legends of Texas Insurance Law Award bestowed by the Section from time to time. McMains would smoke cigars with me and advise me (in exchange for an eminently reasonable fee) on insurance issues that arose in my personal injury cases. Soon he was also helping me with the first-party homeowner's plumbing and water damage cases that I began handling after leaving the defense practice in 1986.

It was the handling of these cases, of which I was one of the early pioneers, that made me an insurance coverage lawyer and introduced me to the Section. In fact, it was McMains who told me about the Section sometime in the late 1990s and advised me to join. I began attending the Section's seminars and bantered and developed friendships with carrier lawyers against whom I had personal injury or first-party property cases: Roland Leon, Michael Quinn, Chris Martin, Bob Sheihing, Beth Bradley, John Tollefson, Aaron Mitchell, and many other very fine lawyers on both sides of the docket.

Soon McMains, who was a longtime Section Council member and CLE speaker, invited me to my first CLE planning committee meeting—the one planning the Section's annual Advanced Insurance Law Seminar. "It will give you a good chance of being tapped to speak," he told me, "And you're doing some interesting work you can speak on which hardly any of the other plaintiff's lawyers know about . . . ."

That led to my first State Bar CLE speech on insurance law (or at least the first I can recall), now remembered by some of our more senior members as the "My Big Fat Greek Insurance Policy" speech. I had already written my paper, a rather humdrum essay about conditions, covenants, and exclusions in insurance policies, and the night before delivering it I worried over how I could make the topic interesting. "My Big Fat Greek Wedding" was playing at theaters, and being a Hellene myself, I began channeling the

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voice of the Papa character, wondering what he would say about insurance policies. Probably he would argue that all the words in them had originally come from Greek words . . . and then my imagination provided the rest of a fictional etymological lexicon of insurance terms that some among us can still recall.

The rest, as they often say, is history: invitations to give more speeches, invitations to help plan Section seminars, invitations to serve on Section committees and then its Council, more friendships, more work, and ultimately service as Chair of the Section. But it all started with two things: what I learned in debate and kindergarten, and the generous tutelage of my friend McMains.

From McMains I learned the ins and outs of *Stowers*, bad faith, the Insurance Code, and the value of strategic thinking—what Chris Martin likes to call "playing chess while the other fellow is playing checkers . . . ." In debate and kindergarten, I learned the importance of asking for help from people like Rusty and Chris, and Ernest Martin, Mike Huddleston, Joe Longley, Mark Kincaid, Bob Roberts, and countless other legends. I also learned to work and play well with others, and that a kneejerk slight or insult on the playground today would make tomorrow's recess less enjoyable. I learned that a bit of humor and a dash of idiosyncratic originality can disarm a foe or win a friend, and as my father used to say, if you always tell the truth, you never have to remember what you said.

By Mark A. Ticer, Jennifer W. Johnson, John Smithee, Juan Hernandez, John Holman Barr

AMERICAN NATIONAL INS. CO. V. ARCE UNMISTAKABLE CLARITY FOR PROVING A MISREPRESENTATION DEFENSE

With unquestionable clarity and an emphasis on the principle of *stare decisis*, the Texas Supreme Court has reinforced the elements and burden of proof for a misrepresentation defense to a claim brought under an insurance policy. In *American National Insurance Company v. Arce*[1], the Court reaffirmed over a century of well-settled law for a misrepresentation defense, and specifically, that *an insurer must prove an intent to deceive by the insured to prevail on a misrepresentation defense,* including for a life insurance policy.

The road leading to this recent decision was not due to any uncertainty in Texas state courts. Rather it is a direct consequence from an unforced error originating from dicta in a single federal district court opinion stating that the 2003 non-substantive recodification of the Texas Insurance Code eliminated the intent to deceive element for a misrepresentation defense for a life insurance policy, and *Tex. Ins. Code* § 705.051, the recodified statute, was the exclusive basis for a misrepresentation defense during the contestability period. Unfortunately, this misanalysis by a federal district court was subsequently adopted by a "handful" of other federal district courts[2], creating some unnecessary substantive discord between a few federal district courts, longstanding precedent in Texas courts and almost all federal courts.

When a state district court in Hardeman County decided to adopt this outlier federal district court opinion rejecting over 100 years of precedent, the stage was set for a likely showdown before the Texas Supreme Court on whether well-settled law would give way to a handful of federal district courts who mis-analyzed and misconstrued both recodification and consistent precedent. The result in the Texas Supreme Court was not close—113 years of precedent and *stare decisis* was legally overwhelming and would not be abandoned, particularly because of misanalysis and an apparent subjective belief that a century of consistency was wrong.

A. Intent to Deceive

Intent to deceive is one of the five elements that an insurer must prove to establish a misrepresentation defense to any type of insurance policy, including a life insurance policy.[3] This element is often the most difficult to prove, and very often is inherently a fact question that can rarely be proven as a matter of law.[4]

The significance of the intent to deceive element begins with an understanding of its meaning. "Intent to deceive" means deceiving an insurer for the purposes of obtaining an insurance policy, including a life insurance policy.[5] Intent to deceive focuses on the insured's state of mind at the time of securing an insurance policy, which the Court labeled as the "common law scienter" requirement.[6] Intent to deceive may also involve the insurance agent if the agent is complicit in deliberately deceiving the insurer for purposes of obtaining an insurance policy or colluding with an applicant to do so.[7]

Mark Ticer is a Dallas coverage lawyer and former Chair of the State Bar of Texas Insurance Law Section. Mark is a frequent writer and speaker at CLE events dealing with insurance related matters and has also been counsel in several significant insurance cases decided by the Texas Supreme Court, including Northern County Mutual Insurance Company v. Davalos and Unauthorized Practice of Law Committee v. American Home Assurance Company, Inc. Mark is Board Certified in Texas Insurance Law and was part of the inaugural class for insurance board certification.

Jennifer Weber Johnson primarily handles first-party insurance disputes. For years, she has been in leadership positions on the Insurance Council of the State Bar of Texas and the Tort & Insurance Practice Section of the Dallas Bar Association. She has been recognized as a Texas Super Lawyer. Jennifer has repeatedly been the course director for the State Bar of Texas's 101 and Advanced Insurance Law seminars. She has been counsel in insurance cases decided by Texas courts of appeals, both federal and state, as well as the Texas Supreme Court, including the case made the subject of this article: American National Ins. Co. v. Arce.

John Smithee is board certified in civil trial law and civil appellate law. He is a Texas Super Lawyer, and a partner in the Amarillo firm of Smithee & Russell, PC.

Juan Hernandez is a trial lawyer who is board certified by the Texas Board of Legal Specialization in Personal Injury Trial Law. He is recognized as a Texas Super Lawyer by Thomson Reuters and is the founder and managing partner at Hernandez Law Group, PC with offices in Dallas, Amarillo, Abilene and Playa del Carmen Mexico.

John Holman Barr is a trial lawyer who has handled general civil litigation and appellate matters for 39 years. His practice includes insurance coverage and claims. He has been counsel in numerous cases involving significant issues surrounding insurance coverage and claims ultimately resulting in significant appellate court opinions.

A classic example of intent to deceive can involve an applicant diagnosed with cancer who learns from his physician that he only has a few weeks to live. The applicant, obviously aware his death is imminent and wanting to provide some protection for his family, drives straight from the doctor's office after receiving the bad news to a life insurance agent's office for the specific purpose of obtaining a life insurance policy. In answering questions on the life insurance application, the applicant with terminal cancer answers "no" to various health questions, including no history and diagnosis of cancer. The life insurer issues the policy a few days later but the insured, predictably, dies of cancer very shortly after the policy is issued.

Following the applicant's death and during the two-year contestability period, the life insurer commences an investigation and learns the insured had not answered the application questions accurately, and specifically regarding cancer, misrepresented that he was cancer free. Through its investigation, the insurer also learns the insured went straight from the doctor's office to secure the life insurance policy because of the terminal cancer diagnosis. From a witness statement, a close friend of the applicant reveals to the life insurer that the insured purposely misrepresented—lied—to secure life insurance; the applicant purposely deceived the agent/insurer to obtain life insurance to protect his family.

The life insurer, believing this evidence substantiates a misrepresentation defense, including the element of intent to deceive, institutes a declaratory judgment action and a claim for rescission because it would not have issued the policy had the applicant given accurate answers regarding a cancer diagnosis. Although intent to deceive is considered a fact issue, these facts, if proven, could likely establish a misrepresentation defense.

Courts have defined and discussed intent to deceive as "utterance of a *known* false statement, made with intent to induce action . . ."[8] Intent to deceive is not part of a negligence standard such as "knew" or "should have known."[9] As one court of appeals described, an intent to deceive means that material misrepresentations were made "willfully and with design to deceive or defraud."[10]

As previously noted, establishing intent to deceive as a matter of law is, for nearly all practical purposes, highly unlikely; this element is very usually inherently a fact question for the factfinder except in the narrowest of circumstances as Texas state courts have held for decades.[11] Mere differences between answers in a policy application and the applicant's medical records are not proof of intent to deceive as a matter of law.[12]

In contrast to Texas state courts, a few federal courts have held that intent to deceive can be established as a matter of law when the applicant warrants that the representations are true and when the applicant colludes with the insurance agent, but such circumstances are rare.[13] Federal courts acknowledge that misrepresentations alone in a policy application cannot establish intent to deceive by an insured as a matter of law.[14]

Proof of intent to deceive as a matter of law has become even more implausible since Texas adopted the Interstate Insurance Product Regulation Compact ("IIPRC") requiring an applicant's answers on a life insurance application be based on "knowledge and belief." In 2005, Texas joined 45 other states in adopting the IIPRC—*Tex. Ins. Code* § 5001.001. The adoption of the IIPRC meant applying uniform standards to certain insurance products and forms. As part of IIPRC standards, answers to questions on a life insurance application are made "to the best of [the applicant's] knowledge and belief" in contrast to certifying the answers as factually true.[15]

The factual and legal distinction between averring answers are "true" versus based on "knowledge and belief" are legally significant, particularly for purposes of rescission. When the IIPRC language is used, intent to deceive must be proven to succeed on a misrepresentation defense and is likewise difficult to establish as a matter of law.[16]

B. No Change in Longstanding Law

1. A Century of History

For over a century, Texas courts, including the Texas Supreme Court, have regularly held that in order to avoid a policy based on misrepresentation, and particularly for a life insurance policy during the contestability period, the insurer must prove that the insured (decedent) intended to deceive the insurer for purposes of obtaining a life insurance policy. Beginning in 1888, the Texas Supreme Court required proof of an insured's intent to deceive, based on common law, to avoid a policy based on misrepresentation.[17] Before an insured's rights under an insurance policy could be forfeited, the Texas Supreme Court required proof the applicant's conduct was "willful, and not the result of inadvertence or mistake."[18] This view persisted and in 1926, one Texas appellate court remarked that it was established Texas law that a misrepresentation defense—grounded in common law—required proof of: (1) an untrue statement; (2) made willfully; (3) with intent to deceive; (4) was material; and (5) was relied on by the insurer.[19]

Also early in the 1900s, Texas joined a nationwide reform movement regarding insurance regulation and began

passing and implementing insurance regulations, including protecting consumers from unscrupulous insurers. As part of that reform, the 1909 Texas Legislature passed Chapter 108, Section 28, which provided:

> No recovery upon any life, accident, or health insurance policy should be defeated because of any misrepresentation in the application which is of an immaterial fact and which does not affect the risks assumed.[20]

The legislative purpose of this statute was to protect beneficiaries/insureds from being denied benefits because of an applicant's immaterial misrepresentation(s).

In 1951, the statute was codified in the Texas Insurance Code as article 21.18 with no substantive change in wording.[21] In 2003, as part of the Texas Legislature's non-substantive recodification, article 21.18 was recodified as *Tex. Ins. Code* § 705.051 with no substantive change in wording (along with other related statutes**).**[22] This statute, for nearly 113 years, has been referred to as the Immaterial Misrepresentation Statute.[23]

In the 100-plus years of the existence of the statute, whether as originally codified or through recodification, no Texas court held that it operated as the exclusive basis for avoiding a life insurance policy based on a misrepresentation defense. Neither Section 705.051 nor the prior versions have operated as the exclusive grounds for a misrepresentation defense. On the contrary, a misrepresentation defense for an insurance policy, and particularly a life insurance policy during the contestability period, is grounded in common law, though Section 705.051 sets out some minimum conditions, or a "floor," for doing so.[24]

Case law demonstrates this legal consistency well. In 1941, an insurer unsuccessfully attempted to convince the Texas Supreme Court that the intent to deceive requirement should be eliminated because Texas was in the minority of states requiring such proof.[25] The Court rejected the overture and affirmed the intent to deceive requirement, noting that intent to deceive meant false statements willfully made and with the design to deceive or defraud.[26] Six years later, the Texas Supreme Court reaffirmed the intent to deceive requirement in another case where this element was questioned.[27]

In 1964, ANIC made its first direct effort to eliminate the intent to deceive element in *Allen v. American National Insurance Company*.[28] ANIC, like other insurers before it, met outright rejection, with the Texas Supreme Court holding "false statements must have been made willfully and with design to deceive or defraud" to succeed on a misrepresentation defense.[29]

Sixteen years later, yet another insurer sought to eliminate "intent to deceive" as part of a misrepresentation defense for a life insurance policy. In *Mayes v. Massachusetts Mutual Life Insurance Company*, the Texas Supreme Court reaffirmed the common law test for proving a misrepresentation defense to an insurance policy: (1) the making of a representation; (2) the falsity of the representation; (3) reliance thereon by the insurer; (4) the intent to deceive on the part of the insured in making same; and (5) the materiality of the representation.[30] This five-part test was not new, going back to 1926 in an El Paso Court of Appeals case.[31]

In 1994, the Texas Supreme Court decided *Union Bankers Insurance Company v. Shelton*, framing the primary issue to be decided as:

> whether an insured's intent to deceive must be proved in order for an insurance company to successfully raise a defense of misrepresentation to a breach of contract action in connection with the cancellation of an individual health insurance policy within two years of the date of its issuance when the cancellation is based upon the insured's misrepresentation in the application for insurance[.][32]

The insurer in *Shelton* argued that the Texas Insurance Code (article 21.16) permitted cancellation during the contestability period based on an insured's unintentional misrepresentation in the insurance application.[33]

The Court rejected the insurer's argument, holding that even though article 21.16 (now Section 705.003) was limited to a material misrepresentation and made no mention of intent to deceive, "[t]he proposition that an insured's intent to deceive is likewise required is well established in the common law of this state."[34] The Court in *Shelton* reconfirmed that the *Mayes* test for a misrepresentation defense applied to all types of insurance— life, auto, fire, health, auto dealers, theft and/or liability.[35]

2. 2003 Recodification

In 2003, as part of the Legislature's effort to recodify Texas statutes for easier reference and consistency, the Legislature passed H.B. 2922, recodifying significant parts of the Texas Insurance Code, including article 21.18 into Section 705.051.[36]

Section 705.051 states:

> Sec. 705.051. IMMATERIAL MISREPRESENTATION IN LIFE, ACCIDENT, OR HEALTH INSURANCE APPLICATION.
>
> A misrepresentation in an application for a life, accident, or health insurance policy does not defeat recovery under the policy unless the misrepresentation:
>
> (1) is of a material fact; and
>
> (2)affects the risks assumed.

Tex. Ins. Code § 705.051.

Article 21.18, the prior statute, provided:

> No recovery upon any life, accident or health insurance policy shall ever be defeated because of any misrepresentation in the application which is of an immaterial fact and which does not affect the risks assumed.

Tex. Ins. Code, art. 21.18.

This recodification expressly provided that no substantive changes were made or intended.[37] Indeed, a comparison of article 21.18 and Section 705.051 confirms that no substantive changes were made, just like numerous other related statutes, including articles 21.16-21.20 and 21.35, all now found in Chapter 705 of the recodified statute. Thus, the Immaterial Misrepresentation Statute was merely renumbered without any substantive change. The substantive consistency between article 21.18 and Section 705.051 did not depend on any special legal scholarship; it was obvious and easily verifiable.

3. The Advocation of the Theory of No More Intent to Deceive

Despite no obvious substantive change in Section 705.051 and related statutes, in 2004 (just one year following recodification), one Texas attorney, whose practice involved representing insurers, wrote several legal articles advocating the theory that recodification resulted in a substantive change in law regarding a misrepresentation defense, highlighting former article 21.18 and Section 705.051.[38] Specifically, this theory rested on the premise that intent to deceive was no longer required for a misrepresentation defense for life, health, and accident policies because recodification had not included this element and the failure to do so created a substantive change in the statute which required courts to reject common law in favor of the recodified statute.[39] This theory further relied on the proposition that the Legislature was aware of the five *Mayes* common law elements for a misrepresentation defense when recodification occurred but it declined to include that element in Section 705.051, the recodified version of article 21.18. Relying on *Fleming Foods*[40], the proponent of this theory reasoned that despite the Legislature's express intent of no substantive change in law from recodification, the omission of intent to deceive in Section 705.051 meant a substantive change occurred, the common law could not trump the statute, and Section 705.051 was the exclusive basis for avoiding a life policy during the contestability period based on a misrepresentation.[41]

The flaws in this analysis included: (1) there was no substantive change between article 21.18 and Section 705.051; and (2) article 21.18 and prior statutes had never operated as the exclusive requirement for rescinding a life, health or accident insurance policy based on a misrepresentation, and Texas courts consistently relied on five common law elements, including an intent to deceive.[42] Equally significant, statutory interpretation principles provide that common law rights and remedies are not eliminated by a subsequent statute unless it is clear the statute did so and the Legislature intended that result.[43]

Proponents of this exclusivity theory (relying solely on Section 705.051) declined to acknowledge that: no substantive change had occurred; recodification expressly provided that no substantives changes were a part of the recodification; and a misrepresentation defense was common law based, not exclusively dependent on statute, particularly Section 705.051. This theory received no acceptance in Texas or federal courts, but the theory continued to be advocated in writings such as the Journal of Texas Insurance Law and a Baylor Law Review article.

In 2013, this theory was tested and rejected in *Medicus Insurance Company v. Todd*,[44] involving a medical malpractice insurance policy and a claim of misrepresentation by the insurer against the insured physician in securing the policy. In *Medicus*, the insurer argued that the 2003 recodification had resulted in dual remedies for an insurer's misrepresentation defense.[45] Specifically, Medicus argued that the common law misrepresentation defense, which included the intent to deceive requirement that had existed for over a century remained, but as a consequence of recodification, a statutory remedy pursuant to Section 705.004 had also been created.[46]

The Dallas Court of Appeals, in an opinion tracing the origins and history of a misrepresentation defense over

a century old, demonstrated that no substantive change resulted from the 2003 recodification, a misrepresentation defense remained grounded in common law, and there was no alternate statutory remedy for a misrepresentation defense as a result of recodification.[47] Perhaps foreshadowing the Texas Supreme Court's analysis in *Arce*, the Dallas Court of Appeals observed that although the Texas Insurance Code statutes regarding avoidance of an insurance policy based on a misrepresentation did not include any intent to deceive requirement, the Texas Supreme Court "has continued" for over a century "to impose that requirement."[48] The court of appeals held: "there is only one cause of action for rescinding a policy due to misrepresentations in the application; that is, by application of both the relevant statutes and the common law, which includes the insured's intent to deceive."[49]

Medicus declined to seek review before the Texas Supreme Court. Its choice to do so perhaps necessitated the *Arce* opinion almost ten years later.

4. Several Federal District Courts Adopt Elimination of the Element of Intent to Deceive

For nearly 15 years following recodification, no courts—state or federal—adopted, much less acknowledged, any theory that the intent to deceive element had somehow been eliminated until 2019, when a single federal district court, through *dicta*, gave the theory temporary life. In *Colonial Penn Life Insurance Company v. Parker*,[50] the life insurer sued the beneficiaries to determine whether policy benefits were owed. In *Parker*, the decedent had a long history of substance abuse, but answered "no" to the question regarding substance abuse on the application for life insurance.[51] The policy was issued but the policy lapsed for nonpayment of premiums.[52] Parker subsequently died as a result of a motor vehicle accident during the two-year contestability period—seven months after the policy was issued.[53] The life insurer's investigation revealed Parker's long history of substance abuse.[54] Colonial Penn claimed it would not have issued the policy had Parker answered "yes" to questions regarding substance abuse as it contended he should have.[55]

Colonial Penn sought summary judgment.[56] The insurer's initial summary judgment ground was that it had no obligation to pay because of a lapse in premiums.[57] The federal district court agreed, granting it a case dispositive summary judgment.[58]

But, despite granting a case dispositive summary judgment on the basis of a lapse in premiums where the beneficiaries provided virtually no resistance, the federal court nevertheless discussed the insurer's second basis for summary judgment—no obligation to pay based on a misrepresentation by Parker in the life insurance application.[59] In embarking on its analysis, the district court referenced a 2015 article in the Journal of Texas Insurance Law, advocating the theory that intent to deceive for a life insurance policy was eliminated by the 2003 recodification.[60]

In accepting this theory, the federal court focused on Section 705.051, describing it as the "requirements for rescission" for a life insurance policy, but asserting such requirements varied with the type of policy at issue.[61] Despite no substantive change in law, this court held an "amendment" through recodification had occurred resulting in Section 705.051, which eliminated the intent to deceive requirement.[62] In doing so, the district court adopted the insurer's argument that recodification eliminated the five-part *Mayes* test but the new recodified statute, Section 705.051, incorporated four of the five elements (intent to deceive being eliminated).[63] The federal court concluded that Section 705.051 was the exclusive basis for rescinding a life insurance policy based on misrepresentation during the contestability period.[64]

In rejecting the *Mayes* test, the federal court noted there are no cases that clearly reconcile the inconsistency between the intent element from *Mayes* and the lack of an explicit intent requirement in parts of the updated legislation.[65] The district court cited to and relied on *Fleming Foods* for the proposition that prior law and legislative history cannot be used to disregard a statute's express terms when its meaning is clear, and that in *adopting the amendment*, the Legislature intended to make some change in existing law, requiring effect to be given to the amendment.[66] The federal district court reasoned that the Legislature was aware of the *Mayes* test but decided *not* to include it in the recodification.[67]

Additionally, the district court reasoned that including an intent to deceive element for a misrepresentation defense would make Section 705.104 dealing with life policies beyond the contestability period "superfluous."[68] Section 705.104 provides an insurer cannot contest a life policy after two years unless a misrepresentation was material and intentionally made.[69] This superfluous argument rested on the basis that if an intent to deceive was a required element for a life policy during the contestability period, then Section 705.104 would have no meaning—there would be no distinction between contestable and uncontestable policies.[70]

Lastly, the district court held that even if intent was required, Parker's medical records proved his intent to deceive as a matter of law.[71] But this holding is in direct conflict with other courts that have held an application and medical records alone cannot establish an intent to deceive.[72] The district court held in this summary judgment proceeding that Parker's medical records reflected that he admitted to

having a substance abuse issue, that he was asking for and receiving treatment for substance abuse during the time period of the application, and therefore, Parker intended to deceive the insurer to obtain a life insurance policy.[73]

Parker depends on a number of erroneous assumptions, flawed premises, and *dicta*. First, because the district court ruled that no policy was in effect, no further reasoning was necessary, specifically given the beneficiaries' failure to demonstrate the policy was in effect on the date of Parker's death. Given this holding, the discussion regarding Section 705.051, recodification, and a misrepresentation defense was *dicta* and legally unnecessary.

Second, the federal court: (1) did not trace or acknowledge that for over 100 years, a misrepresentation defense has been grounded in common law, not statute, including the *Mayes* test; (2) recodification was expressly intended and shown to be non-substantive; (3) a comparison between Section 705.051 (the recodified version) and article 21.18 (the prior statute) shows they are substantively the same; (4) there was no amendment from article 21.18 to Section 705.051; (5) the Texas Supreme Court has dealt with the language in Section 705.104 (including its predecessor statute) and the common law test, including in *Union Bankers Ins. v. Shelton*, rejected the superfluous argument involving the prior statutes to Section 705.051 and 705.104 (which were substantively consistent with these recodified statutes);[74] (6) no mention or discussion of *Medicus* is provided which the federal court was *Erie* bound to at least consider since it was a post-recodification decision dealing with intent to deceive; and (7) intent to deceive is often a fact issue. The result was an erroneous analysis and conclusion that spread to a handful of other courts.

Several other district courts adopted its reasoning, including that Section 705.051 was the exclusive basis for rescission of a life insurance policy during the contestability period, and rejecting intent to deceive as a required element for avoiding a life policy based on a misrepresentation. Several months following *Parker*, another judge in the Southern District of Texas adopted its analysis and conclusion. In *Landeros v. Transamerica Life Ins. Co.*, Judge Crane followed the *Parker* reasoning, relying on the premise that Section 705.051 was a product of substantive change, that Sections 705.051 and 705.104 should be considered in tandem, that the enactment of Section 1101.006 of the Texas Insurance Code affected Section 705.104 to give it its plain meaning, Section 705.051 is the exclusive basis for rescission of a life policy during the contestability period, and intent to deceive can no longer be required because it would make Section 705.104 meaningless.[75] Curiously, *Landeros* applied the *Mayes* common law test for a misrepresentation defense minus intent to deceive despite the *Parker* opinion eliminating common law for seeking rescission based on a misrepresentation defense.[76]

Following *Landeros* came *Guzman v. Allstate Assur. Co.*[77] *Guzman* mimicked the reasoning of *Parker* in finding intent to deceive was not a necessary element for a misrepresentation defense, failing to address the substantive consistency between article 21.18 and Section 705.051, ignoring over 100 years of well-settled law and the application of common law for a misrepresentation defense, and declining to confront the apples and oranges comparison between Sections 705.104 and 705.051, including prior Texas decisions rejecting such comparisons. Relying on *Parker*, the *Guzman* court granted summary judgment to the insurer based on the *Mayes* common law elements (invalidated by recodification), minus intent to deceive.[78] However, the Fifth Circuit reversed the *Guzman* district court on the basis that a fact question existed on whether the decedent made a misrepresentation at all, but noted whether the five-part *Mayes* test still applied following recodification was not being answered and expressed no opinion on the district court's reliance on *Parker*.[79]

About six months later, another federal district court held, in very brief language, that intent to deceive was no longer a required element for a misrepresentation defense for a life insurance policy during the contestability period.[80]

Thus, over a short three-year period (2019-2021), just a few district courts rejected the *Mayes* test, and specifically, the intent to deceive element on the basis of recodification. Then along came *Arce.*

5. *Arce v. ANIC* in the Texas Supreme Court

The facts in *Arce* are noteworthy, particularly regarding consideration of the intent to deceive element. Sergio Arce ("Sergio"), who had an elementary school education, had a chance encounter of sorts with an ANIC agent while visiting the business of a friend.[81] Sergio was not in the market or looking for life insurance but was pitched a policy by a relatively new ANIC agent who just happened to also be a friend of the business owner (also a prior ANIC agent).

The ANIC agent asked Sergio various questions and allegedly recorded his answers.[82] Based on the application, Sergio had a history of high blood pressure.[83] According to Sergio's medical records obtained after his death, he had been diagnosed and treated for hepatitis, but the application reflected a "no" answer to the question where hepatitis might be covered. This answer was part of the electronic life insurance application filled out by the agent.[84]

Testimony from ANIC's own representatives revealed that the questions posed to Sergio were confusing and hard to understand. Specifically, the agent admitted Sergio may have not understood the questions she was verbally asking and even ANIC's organizational representative admitted she was unsure what the question that allegedly included hepatitis meant or whether she herself understood it.[85] The ANIC agent also gave conflicting testimony regarding whether she permitted Sergio to review his answers before he allegedly electronically executed the application.

Other testimony from the ANIC agent reflected a number of irregularities on her part as well as with ANIC and the issuance of the policy. Among other things, the policy was issued without the accidental death benefit promised by the agent and also at double the premium quoted. Further, the initial premium may have been paid by the agent or other person supposedly contrary to ANIC's own policy.

Sergio died shortly after the policy was issued as a result of an automobile accident, which had nothing to do with hepatitis.[86] Because Sergio died during the contestability period, ANIC commenced an "investigation" consisting exclusively of gathering Sergio's medical records and comparing same to the application and questionnaire completed by the ANIC agent. The ANIC agent's answers to the questionnaire requested by ANIC stated that Sergio had not disclosed any negative health history though she subsequently confessed this was untrue, especially given Sergio's disclosure of high blood pressure.

Bertha Arce's ("Bertha"), Sergio's mother and the beneficiary, claim for the life insurance benefits was denied on the basis ANIC would not have issued the policy had Sergio disclosed his hepatitis diagnosis,[87] though the denial letter was not clear that ANIC was relying on a misrepresentation defense. Testimony from ANIC's organizational representative revealed it was a company-wide practice at ANIC to deny a claim where medical records were inconsistent with an application for life insurance, and she followed that practice in denying Bertha's claim. In addition, the undisputed evidence established that ANIC's claims representatives: receive no formal training involving the investigation, adjustment, analysis, evaluation, and determination of claims dealing with life insurance policies; were unlicensed to adjust claims; do not attend seminars or other continuing education regarding adjustment and handling of life insurance claims; and handle claims mostly by observing what others may do. In the case of the ANIC representative for Bertha's claim, she learned claims handling by typing letters dealing with claims during her role as a secretary.

Bertha filed suit against ANIC alleging breach of contract, prompt pay violations, and violations of Section 541.060.[88] ANIC answered and later moved for summary judgment, relying on *Parker* and the theory that Section 705.051 was the exclusive basis for rescission – intent to deceive was not an element of proof.[89] Following the deposition of the ANIC organizational representative, Bertha amended her petition, adding claims under Section 541.061 and also seeking class relief.[90]

The trial court granted ANIC summary judgment, accepting ANIC's argument that Section 705.051 was the exclusive basis for a misrepresentation defense for a life insurance policy during the contestability period, and intent to deceive had been eliminated by recodification.[91] The trial court declined to give legal significance to the 100-plus years of well-settled law, including the intent to deceive requirement, finding that there was no substantive difference between article 21.18 and Section 705.051.[92]

Bertha appealed, making the same arguments that she did in the trial court and ANIC reverted to its reliance on *Parker* – that recodification resulted in a change in law, and intent to deceive was no longer a required element of proof.[93] The Amarillo Court of Appeals reversed, holding, among other things, that recodification did not result in any change in law and no amendment to the prior statute had resulted, Section 705.051 was not the exclusive basis for rescission of a life insurance policy during the contestability period, the *Mayes* elements continue to be the exclusive basis for a misrepresentation defense, and intent to deceive must be proven to rescind a life policy falling within the contestability period.[94]

6. *ANIC v. Arce* in the Texas Supreme Court

ANIC sought review in the Texas Supreme Court but abandoned its argument made in the trial court and court of appeals that recodification resulted in a change in law and intent to deceive had been eliminated by recodification; ANIC continued to assert that Section 705.051 and the predecessor statutes thereto were the exclusive basis for proving a misrepresentation defense and entitlement to rescission.[95] ANIC also added a new argument: that the injection of common law, including the *Mayes* test as well as any intent to deceive requirement for a misrepresentation, was a product of "judicial drift" and for 113 years, the courts, including the Texas Supreme Court, have had it wrong.[96] ANIC asked the Court to wipe out 100-plus years of precedent, decree that there is no intent to deceive requirement and a plain reading of Section 705.051 provides the only requirements for rescission of a life insurance policy during the contestability period.[97]

The Texas Supreme Court accepted review to directly address and reflect its legal disagreement and analysis with *Parker*, *Landeros*, *Guzman*, and *Brown*.[98] "We granted ANIC's petition to resolve an incipient conflict between Texas state cases, *which consistently apply the common-law rule*, and a handful of federal district court cases that have recently departed from it."[99]

Initially, the Court observed ANIC's abandonment of its arguments in both the trial court and the court of appeals regarding a change in law as a result of recodification.[100] The Court observed that in the trial court and court of appeals, ANIC contended that recodification resulted in a change in law – eliminating the intent to deceive element – but now, ANIC conceded there was no substantive difference between Section 705.051 and the prior statute, article 21.18.[101] This confession acknowledged the obvious but ANIC provided no explanation why it had made this argument in the first place.

ANIC continued to argue that Section 705.051 was the exclusive test for rescission of a life insurance policy during the contestability period and prior statutes provided this same exclusivity; ANIC also insisted that any common law elements, and particularly the intent to deceive element, were the product of "judicial drift" which could not be reconciled with statutory interpretation principles.[102] "ANIC insists that – no matter how entrenched in our jurisprudence – the intent requirement cannot be squared with the statutory language and must therefore yield." ANIC unabashedly requested the Court to eliminate 113 years of consistent and well-settled jurisprudence because ANIC proclaimed it is wrong.[103]

In a wholesale rejection of ANIC's "judicial drift" argument and firm adherence to *stare decisis*, the Court refused ANIC's effort to rewrite well-settled, consistent, and identifiable law, undisturbed by any legislative action, regarding the elements to prove a misrepresentation defense, grounded in common law for well over a century that included the intent to deceive requirement. In a 9-0 decision with a powerful concurrence from Justice Young honoring *stare decisis*, the Court expressly disapproved of "a handful of federal district courts" that reasoned a change in law occurred; that Section 705.051 is the exclusive basis for rescission of a life policy during the contestability period; and that prior decisions over the last 113 years were a product of "judicial drift." In unmistakably unambiguous language, the Court reaffirmed the five-part common law *Mayes* test for a misrepresentation defense, that includes intent to deceive, and which applies to a life insurance policy during the contestability period or after.[104]

In its opinion, the Court first rejected the proposition that Section 705.051 is "effectively encompassing all the common-law rescission elements, except intent to deceive."[105] The Court characterized ANIC's interpretation as a "preferred reading," and forcefully rejected ANIC's plea for an abandonment of over 100 years of consistent decisions holding that "Section 705.051 is not discordant with the common law, either expressly or by necessary implication."[106]

Elaborating on its reasoning, the Court noted that a misrepresentation defense is governed by statutory and common law.[107] Further, the Court observed that Section 705.051 is limited to certain conditions that are necessary, but "not sufficient" to defeat a beneficiary's recovery.[108] Using the analogy "my car does not function unless it has gas and motor oil," the Court reasoned that while gas and motor oil are necessary for a vehicle to run, it is not all that is needed, including an engine, tires, and keys.[109]

According to the Court, Section 705.051 does not guarantee to defeat a recovery if both conditions in Section 705.051 are met; rather because the section is a consumer protection statute, it operates as "a floor" which cannot be avoided by contract or common law.[110] The Court made clear that Section 705.051 does not "grant insurers a rescission defense at *all*, let alone on exclusive terms."[111]

In post-submission briefing, ANIC attempted to elaborate on its Section 705.051 exclusivity argument, focusing on the term "unless" in the statute which it argued meant "except if."[112] The Court again rejected ANIC's reading, holding that the insurer's preferred interpretation might work if the statute was rewritten to change "does not defeat" to "does defeat" and "unless" to "if" in Section 705.051.[113] But the Court concluded that even taking "unless" to mean "except if" as ANIC urged, it did not alter the plain meaning of Section 705.051.[114]

Additionally, relying on the few federal court *Parker*-like decisions, ANIC contended that requiring an intent to deceive element for rescission during the contestability period would make Section 705.104 superfluous, and Section 705.104 cannot be reconciled with an intent to deceive requirement for a policy during the contestability period.[115] Having dealt with and rejected this same argument previously in *Shelton*, the Court was unpersuaded, holding that Section 705.104 involves a different set of circumstances (a different floor) – a misrepresentation defense for an uncontestable policy.[116] Specifically, Section 705.104 deals with a life insurance policy that is non-contestable – after two years from issuance – and prescribes the limited circumstances where that category of policy can be rescinded.[117]

A second but more specific reason for rejecting ANIC's "superfluous" contention is based on statutory history. In particular, the predecessor statute to Section 705.104, article 3096e passed in 1903, and included an intent element because prior to that time, a life insurance policy during the incontestability period could only be cancelled for a specific reason stated in a policy, which was strictly construed to avoid a forfeiture.[118] By allowing rescission during the incontestability period through proof of intent to deceive, the Legislature made the elements for misrepresentation for contestable and incontestable policies consistent.[119]

As a consequence, the Court rejected ANIC's contention that requiring intent to deceive be proven for a policy involving the contestability period would make Section 705.104 meaningless.[120] In an extensive footnote regarding this issue, the Court acknowledged two different federal district court decisions employing different rationales that concluded that Section 705.104 was substantively changed (or reversed) in light of Section 1101.006 of the Texas Insurance Code, which limited avoidance only to nonpayment of premiums.[121] Regardless of these two decisions, the Court concluded that whether Section 705.104 was rendered superfluous in 1909 or was effective by its plain language, it is relevant only to the extent it informed Section 705.051's construction, which the Court assumed it did.[122] Either way, Section 705.104 did not eliminate the intent to deceive element for policies during the contestability period, and the superfluous argument regarding Section 705.104 did not change the longstanding requirements for a misrepresentation defense.

The Court next turned to ANIC's plea to abandon the "intent to deceive" (referred to as "scienter") requirement "bemoaning the common-law rule as a product of 'judicial drift' that has placed Texas in the minority."[123] In unmistakably strong language, the Court refused to allow ANIC's efforts to "destabilize[] a body of jurisprudence that is not in conflict with the statutory scheme."[124]

While the Court noted that its early decisions regarding a misrepresentation defense, including intent to deceive, may have been "more conclusory than explanatory," the Court pointed out such opinions were not unlike other opinions during that era.[125] But from 1941 on, there could be no mistake regarding the law on a misrepresentation defense (the five *Mayes* elements) and its application as well as the acknowledgment that Texas was in the minority on this issue.[126] Underscoring the principle of *stare decisis*, the Court held that intent to deceive must be pled and proven "to avoid contractual liability based on a misrepresentation in an application for life insurance, whether the policy is contestable or not."[127] "Proof of material inaccuracy is not enough."[128] The Court further observed that the Legislature had not contested the common law approach to misrepresentation based on over 100 years of consistent judicial authority.[129] The Court concluded there has been no judicial drift by Texas courts who have remained consistent; equally important, the Court noted that the Legislature has consciously refused to interfere or modify this well-settled law. Accordingly, the Legislature's refusal to enact a statutory change means there is no judicial drift but a validation of 100-plus years of well-settled law.

In summary, the Court rejected any notion of a controversy and reaffirmed that a misrepresentation defense or for rescission of an insurance policy based on a misrepresentation, and particularly a life insurance policy, must include pleading the five *Mayes* elements and proof of intent to deceive.[130] The Court's opinion unambiguously disapproves of the holdings of *Parker* and its progeny, removing any temporary uncertainty that the intent to deceive requirement applied to life insurance policies whether contestable or not.[131] And finally, there can be no judicial drift when the Texas courts have remained consistent and the Legislature has accepted over a century of these consistent decisions.

7. Justice's Young Concurrence

While the unanimous opinion in *Arce* left no doubt on the elements of proof for a misrepresentation defense and an unequivocal rejection of the few *Parker*-like cases, Justice Young's concurrence represents a powerful affirmation of the importance and role of *stare decisis*, particularly here, involving 113 years of judicial consistency with no Legislative disagreement. Justice Young's concurring opinion, in polite terms, highlights ANIC's extreme positions and refusal to confront sound *stare decisis*. Justice Young criticizes ANIC's plea to wipe out 113 years of consistency without any regard for *stare decisis*, as well as ANIC's labeling of a century of consistency as a product of judicial error or drift.

Justice Young's concurring opinion reflects a reasoned and authoritative discussion of the importance of *stare decisis*, here in the case of insurance law. Not mincing words, Justice Young advocates and demonstrates a solid and credible case for the unequivocal rejection of ANIC's insistence that longstanding law should be overruled because of its judicial drift theory in the face of a consistent judicial history with no Legislative intervention.

Particularly significant, Justice Young discredits ANIC's claim that Section 705.051 and common law are incompatible and cannot exist – noting the two, for over a century, have not changed in any material way, and Section 705.051 is not exclusive or the last word on a misrepresentation defense.[132] Observing the Court was not writing on a blank slate, Justice

Young pronounces ANIC's analysis as D.O.A. – "that ship sailed long ago."[133] Stated succinctly, the compatibility of Section 705.051 (including the predecessor statutes) and the common law "was settled long ago.[134]

In recognizing the significance of *stare decisis*, Justice Young identified the traditional guideposts for overruling precedent – efficiency, fairness, and legitimacy – and none of those factors support a change in law with regard to the application of Section 705.051.[135] First, efficiency was no reason to overrule precedent simply because insurers might find intent to deceive difficult to prove.[136] Second, fairness did not support discarding precedent because *stare decisis* is especially important in statutory construction cases and there was no compatible conflicts between the statute and common law.[137] Third, legitimacy did not support overruling 100-plus years of law, especially in this circumstance when Section 705.051 and the common law have existed "in comparative quietude for so long . . . ."[138] None of these three guideposts supported overruling precedent.

Reasoning further, Justice Young pointed out nothing had changed – no intervention by the Legislature and no other intervening events have taken place to support changing longstanding law – and overruling precedent would create a destabilizing effect in the law, undoing what courts have been deciding for 100 years.[139] Justice Young concluded that if change was what ANIC wanted, it needed to come from the Legislature, not from the Texas Supreme Court.[140] In a telling demonstration of judicial candor, Justice Young observed that had the Court overruled longstanding law in these circumstances, it "would be an aggressive flexing of judicial muscle."[141] More bluntly, overruling precedent in these circumstances would be purely arbitrary with destabilizing consequences.

Justice Young's concurring opinion not only establishes the soundness of validating the requirement of pleading and proving the element of intent to deceive but the critical importance of *stare decisis*, not only in this appeal but where the Legislature has not intervened to change longstanding common law. The thoughtfulness and scholarship provided by Justice Young in his concurring opinion is remarkable, helpful, and reassuring, especially for an insurance case, but equally applicable to other types of cases.

Not only did the Court erase any doubt about the interpretation and limited application of Section 705.051 along with all misrepresentation requirements, but Justice Young affirmed the importance of consistency and *stare decisis*, which should not give way to a bald and self-serving claim that courts have had it wrong for over 100 years and asking the Court to arbitrarily reject well-settled law. Justice Young's concurring opinion certainly makes the Court's opinion more than ordinary.

C. There Is No Uncertainty or Wiggle Room

The *Arce* opinion provides courts, litigants, and the public clear guidance, reaffirming the requirements for a misrepresentation defense regarding any insurance policy, which is founded in common law with a statutory floor, at least for life, health and accident policies. Any reliance on the *Parker*-related rationale to support a change in law has been thoroughly discredited. The importance of *stare decisis* in Texas jurisprudence cannot be overstated and Justice Young's concurrence provides a fundamental analytic framework for any litigant seeking to overrule precedent.

Overall, the majority and concurring opinions reflect a measured and logical approach to the Legislature's deference to judicial interpretation of statutes in conjunction with a century-plus of common law and a conscious decision not to change longstanding common law. The result in *Arce* is not surprising, but perhaps the emphatic tone of the Court's opinion, along with Justice Young's concurring opinion, is. The message to accident, health, and life insurers (as well as other insurers) is unambiguous–prove the five *Mayes* elements. There is no wiggle room or uncertainty.

[1] 672 S.W.3d 347 (Tex. 2023).

[2] *Id.* at 352.

[3] *Id.* at 353–54.

[4] *Id.* at 361 (Young, J. concurring); *Flowers v. United Ins. Co.*, 807 S.W.2d 783, 784-86 (Tex. App.—Houston [14th Dist.] 1991, no writ).

[5] *Id.* at 349.

[6] *Id.*

[7] *Hinna v. Blue Cross Blue Shield of Tex.*, No. 4:06-cv-810-A, 2007 WL 3086025, at *4 (N.D. Tex. Oct. 22, 2007).

[8] *Union Bankers Ins. Co. v. Shelton*, 889 S.W.2d 278, 282 (Tex. 1994); *Allen v. American Nat'l Ins. Co.*, 380 S.W.2d 604, 608 (Tex. 1964).

[9] *Allen*, 380 S.W.2d at 608; *Soto v. Southern Life & Health Ins. Co.*, 776 S.W.2d 752, 756 (Tex. App.—Corpus Christi 1989, no writ) (". . . false statements which are made negligently, carelessly or by mistake are not sufficient to avoid a life insurance policy where the defense is based upon the insured's misrepresentation of a material fact.").

[10] *Haney v. Minnesota Mut. Life Ins. Co.*, 505 S.W.2d 325, 328 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.) (quoting *Clark v. National Life & Accident Ins. Co.*, 145 Tex. 575, 579, 200

S.W.2d 820, 822 (1947)).

[11] *Cartusciello v. Allied Life Ins. Co. of Tex.*, 661 S.W.2d 285, 288 (Tex. App.—Houston [1st Dist.] 1983, no writ); *Estate of Diggs v. Enterprise Life Ins. Co.*, 646 S.W.2d 573, 575-76 (Tex. Civ. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.).

[12] *Adams v. John Hancock Mut. Life Ins. Co.*, 797 F.Supp. 563, 567 (W.D. Tex. 1992), *aff'd*, 49 F.3d 728 (5th Cir. 1995); *Flowers*, 807 S.W.2d at 784–86.

[13] *Hinna*, 2007 WL 3086025, at *4; *see also American Family Life Assurance of Columbus v. Moran*, No. SA-09-CA-0876-FB, 2011 WL 13237549, at *4 (W.D. Tex. Mar. 30, 2011).

[14] *Hinna*, 2007 WL 3086025, at *4; *Kirk v. Kemper Investors Life Ins. Co.*, 448 F. Supp.2d 828, 834–36 (S.D. Tex. 2006); *Adams*, 797 F.Supp. at 569.

[15] Sergio Arce's answers to American Life Insurance Company's ("ANIC") application were based on Sergio's "knowledge and belief." This significant fact is discussed in greater detail, *infra.* However, the *Arce* opinion does not address this distinction, perhaps because it makes no difference in light of well-settled law.

[16] 6 Couch on Insurance § 81.39 (3rd ed. 2012); *Shelton*, 889 S.W.2d at 285 (Phillips, J. concurring).

[17] *Lion Fire Ins. Co. v. Starr*, 12 S.W. 45, 46 (Tex. 1888).

[18] *Id.*

[19] *National Life & Accident Ins. Co. v. Kinney*, 282 S.W. 633, 634 (Tex. Civ. App.—El Paso 1926, no writ).

[20] Acts 1909, 31st Leg., Ch. 108 § 28.

[21] Acts 1951, 52nd Leg. Ch. 491.

[22] *Arce*, 672 S.W.3d at 352-53.

[23] *Id.* at 355–56.

[24] *Id.*

[25] *See Great S. Life Ins. Co. v. Doyle*, 151 S.W.2d 197, 201 (Tex. 1941).

[26] *Id.*

[27] *Clark*, 200 S.W.2d at 822.

[28] 380 S.W.2d 604 (Tex. 1964).

[29] *Id.* at 607.

[30] 608 S.W.2d 612, 616 (Tex. 1980).

[31] *Kinney*, 282 S.W. at 634.

[32] 889 S.W.2d at 279.

[33] *Id.*

[34] *Id.* at 281. Critics of *Shelton* often argue that it is a plurality opinion. While this is technically accurate, no justice dissented from the view that intent to deceive is a required element of proof.

[35] *Id.* at 282. In a concurring opinion, Chief Justice Phillips observed that when an applicant signs an application, his answers are being made "to the best of [the applicant's] knowledge and belief," and proof of intent to deceive must be demonstrated. *Id.* at 286 (Phillips, C.J. concurring); *see also* Couch on Insurance 2d (Rev. Ed.) §§ 35:149-150, 36:35. As previously noted, this legal distinction, and how it could affect Section 705.051, is not discussed in the *Arce* opinion. But given the language in Section 705.051, and particularly the term "misrepresentation," which is not defined, a persuasive argument can be made that when an applicant attests that the answers in the application are made to the best of their knowledge and belief, versus that the answers are true and correct, proof of scienter is necessary. A statement based on knowledge and belief is nothing but an opinion and is not a representation of fact. *Roberts v. Davis*, 160 S.W.3d 256, 262 (Tex. App.—Texarkana 2005, pet. denied); *Bicknell v. Wells Fargo*, No. 11-08-00203-CV, 2010 WL 1635832, at *2 n. 1 (Tex. App.—Beaumont Apr. 22, 2010, no pet.); *Bifano v. Econo Builders, Inc.*, 401 S.W.2d 670, 676 (Tex. Civ. App.—Dallas 1966, writ ref'd n.r.e.); *see also Winnard v. J. Grogan Enters., LLC*, No. 05-10-00802-CV, 2012 WL 1604907, at *2 (Tex. App.—Dallas Apr. 30, 2012, no pet.). *Arce* likewise holds that the elements of a misrepresentation defense apply to all types of policies. 672 S.W.3d at 353-54. However, most reported opinions related to a misrepresentation defense involve life insurance policies.

[36] Acts 2003, 78th Leg., Ch. 1274 § 2, eff. April 1, 2005.

[37] *Id.* at § 27.

[38] Whitaker, A. "Update on Texas Law On The Rescission of Insurance Policies," 13 Journal of Tex. Ins. Law 23 (Spring 2015); Whitaker, A., "Rescission of Life Insurance Policies In Texas—Time to Correct Some Old Error," 59 Baylor L. Rev. 139, 156 (2007); Whitaker, A., "Rescission of Life, Accident, and Health Insurance Policies in Texas—The Rules Have Changed," 9 Journal of Tex. Ins. Law 2 (Spring 2008).

[39] *See Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999).

[40] *See* note 39, *supra*.

[41] *Id.* at 283-84.

[42] Compare *Tex. Ins. Code* art. 21.18 with *Tex. Ins. Code* § 705.051; *Shelton*, 889 S.W.2d at 281.

[43] *Jones v. Fowler*, 969 S.W.2d 429, 432 (Tex. 1998); *see also Energy Serv. Co. of Bowie v. Superior Snubbing Servs.*, 236 S.W.3d 190, 195 (Tex. 2007).

[44] 400 S.W.3d 670 (Tex. App.—Dallas 2013, no pet.).

[45] *Id.* at 676.

[46] *Id.*

[47] *Id.* at 677–78.

[48] *Id.* at 678.

[49] *Id.* at 679 (citing *Shelton*, 889 S.W.2d at 281–82, referencing the *Mayes* test).

[50] 362 F.Supp.3d 380, 384–85 (S.D. Tex. 2019).

[51] *Id.* at 384–85.

[52] *Id.* at 383.

[53] *Id.* at 382.

[54] *Id.* at 384–85.

[55] *Id.*

[56] *Id.* at 382.

[57] *Id.* at 383.

[58] *Id.*

[59] *Id.* at 384–402.

[60] *Id.* at 401 n. 11.

[61] *Id.* at 399; *but see Arce*, 672 S.W.3d at 353-54 (holding that this is not accurate because the requirements are the same).

[62] *Id.*

[63] *Id.*

[64] *Id.* at 401–02.

[65] *Id.* at 402.

[66] *Parker*, 362 F.Supp.3d at 402 (citing *Fleming Foods*, 6 S.W.3d at 284).

[67] *Id.* This conclusion is quite contrary to recodification and a century of well-settled law.

[68] *Id.* at 403.

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *See* note 10, *supra.*

[73] *Parker*, 362 F.Supp.3d at 403.

[74] 889 S.W.2d at 281.

[75] No. 7:17-cv-00475, 2020 WL 3107795, at *7 (S.D. Tex. May 8, 2020).

[76] *Id.* at *8.

[77] No. 2:19-cv-187-BR, 2020 WL 7868100 (N.D. Tex. Dec. 3, 2020), *rev'd*, 18 F.4th 157 (5th Cir. 2021).

[78] *Id.* at **6, 15.

[79] *Guzman*, 18 F.4th at 159–60 n. 4. One of the authors of this article, Mark Ticer, wrote an amicus brief in favor of Guzman, arguing the five *Mayes* elements still applied. The Fifth Circuit made clear it was not deciding that issue.

[80] *Brown v. Bankers Life and Cas. Co.*, No. 4:20-CV-00136, 2021 WL 2325448, at *3–4 (S.D. Tex. Mar. 29, 2021).

[81] *American Nat'l Ins. Co.v. Arce,* 672 S.W.3d, 347, 350 (Tex 2023).

[82] *Arce v. American Nat'l Ins. Co.*, 633 S.W.3d 228, 230 (Tex. App. – Amarillo 2021), *aff'd in part, revs'd in part*, 672 S.W.3d 347 (Tex. 2023).

[83] *American v. Arce*, 672 S.W.3d at 350.

[84] *Id.* at 349–50.

[85] *Id.*

[86] *Id.* at 350.

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id. at 351.*

[92] *Id.*

[93] *Arce v. American Nat'l Ins. Co.*, 633 S.W.3d 228, 234 (Tex. App. – Amarillo 2021), *aff'd in part, revs'd in part*, *American Nat's Ins Co v. Arce*, 672 S.W.3d 347 (Tex. 2023).

[94] *Id.* at 235.

[95] *American v. Arce*, 672 S.W.3d at 352.

[96] *Id.* at 358.

[97] *Id.* at 351–53.

[98] *Id.* at 352.

[99] *Id.* (emphasis supplied).

[100] *Id.* at 353–54.

[101] *Id.*

[102] *Id.* at 353–54, 358.

[103] *Id.*

[104] *Id.* at 352–58.

[105] *Id.* at 355–56.

[106] *Id.* at 356.

[107] *Id.* at 354-58. This follows the analysis of the Dallas Court of Appeals in *Medicus Ins. v. Todd*.

[108] *Id.* at 355–56.

[109] *Id.* at 356.

[110] *Id.* at 357–58.

[111] *Id.* at 356 (emphasis in original).

[112] *Id.*

[113] *Id. See* Section 705.051 provided herein, p. 10.

[114] *American v. Arce*, 672 S.W.3d at 356.

[115] *Id.*

[116] *Id.* at 357.

[117] *Id.* at 357–58.

[118] *Id.*

[119] *Id.*

[120] *Id.* at 357-58.

[121] *Id.* at 356.

[122] *Id.*at 357.

[123] *Id.* 358–59.

[124] *Id.* at 359.

[125] *Id.* at 358–59.

[126] *Id.*

[127] *Id.* at 359.

[128] *Id.*

[129] *Id.*

[130] *Id.* at 352–59.

[131] *Id.*

[132] *Id.* at 361 (Young, J. concurring).

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.* at 361–62.

[139] *Id.*

[140] *Id.* at 366.

[141] *Id.* at 367.

By: Blair Dancy

WHO'S ON FIRST? PRIORITY OF COVERAGE AND GETTING TO HOME PLATE

You've seen it before. A mess of defendants. A gaggle of insurance adjusters. The mediator borrows office space to have enough room to split up the factions. Or, if mediating remotely, breakout rooms are crammed with so many stakeholders that they cannot fit on the same screen. Plaintiff's counsel pitches a compelling liability theory and a simple damages model and then waits. And waits. And waits.

What went wrong? Where's the settlement offer?

Among the tangle of policies and indemnity agreements, one complicating issue is frequently priority of coverage—the order in which the policies pay out. Knowing the order in which the dominos fall allows counsel to target the right defendant—and the right policy—at the right time.

"Other insurance" provisions found in almost every liability policy are key, such as these taken from a General Commercial Liability form:

4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages **A** or **B** of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when Paragraph **b.** below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph **c.** below.

b. Excess Insurance

(1) This insurance is excess over:

(a) Any of the other insurance, whether primary, excess, contingent or on any other basis:

(i) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";

(ii) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;

(iii) That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or

(iv) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion **g.** of Section **I** – Coverage **A** – Bodily Injury And Property Damage Liability.

(b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured.

(2) When this insurance is excess, we will have no duty under Coverages **A** or **B** to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

(3) When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

(a) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and

(b) The total of all deductible and self-insured amounts under all that other insurance.

(4) We will share the remaining loss, if any, with any other insurance that is not described

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in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

c. Method Of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.[1]

Typical "other insurance" provisions can make a policy's coverage excess, or share pro rata, or even completely inapplicable when other coverage is available.

Hardware Dealers Mutual Fire Insurance Company v. Farmers Insurance Exchange is the seminal case in Texas on this issue.[2] The *Hardware Dealers* court recognized three kinds of "other insurance" provisions in auto policies at the time: Pro rata clauses, which apportion loss among concurrent policies; excess clauses, which make a policy excess when other insurance applies; and escape clauses, which avoid coverage all together when other insurance applies.[3] After rejecting other jurisdictions' approaches to reconciling conflicting "other insurance" provisions, the court resorted to "settled principles which give dominant consideration to the rights of the insured."[4] The court held, "When, **from the point of view of the insured, she has coverage from either one of two policies but for the other**, and each contains a provision which is reasonably subject to a construction that it conflicts with a provision in the other concurrent insurance, there is a conflict in the provisions."[5] When provisions so conflict, Texas courts will ignore them to find concurrent coverage with liability prorated between policies based on limits.[6]

The *Hardware Dealers* rationale also applies where two excess or umbrella policies have mutually repugnant "other insurance" clauses.[7] However, even in umbrella policies, there can be material differences based on policies to which they are excess. For example, when one umbrella is excess to all primary policies and the other is excess to "any other insurance providing coverage," inclusive of both primary and excess insurance, the former policy will come first.[8]

But the *Hardware Dealers* rule is not a blunt instrument. The Fifth Circuit recognized the limited policy behind the *Hardware Dealers* rule in *American States Insurance Company v. ACE American Insurance Company*.[9] In *American States*, the two policies had identical "other insurance" provisions, which provided primary coverage for vehicles owned by the policyholder and excess for non-owned vehicles.[10] As the provisions did not depend on the existence of the other policy, but rather on vehicle ownership, the rationale of *Hardware Dealers* did not apply.[11]

This same rationale has been extended to other contexts. In *Scottsdale Insurance Company v. Steadfast Insurance Company*,[12] the Southern District of Texas similarly distinguished *Hardware Dealers* based on "other insurance" language in an endorsement in relation to an apartment manager's liability for negligence. One policy had a pro rata clause and the other had an endorsement that read:

> With respects [sic] to your liability arising out of your management of property for which you are acting as real estate manager this insurance is excess over any valid and collectible insurance to you.[13]

The court found that because the insured "was a property manager, the endorsement in the Steadfast policy made [the] Steadfast insurance excess, whether the Scottsdale policy existed or not."[14] Because the availability of primary coverage did not depend on the availability of other insurance (as it did in *Hardware Dealers*), but depended on the insured's status, the court found the provisions did not conflict and *Hardware Dealers* did not apply.[15]

The Fifth Circuit has repeatedly held that where one policy has an excess clause and one has a pro rata clause, *Hardware Dealers* applies and the policies share pro rata.[16] The author is unaware of a Texas state court that has held similarly.

Hardware Dealers can apply to defense costs.[17] Whether an "other insurance" provision extends to defense costs depends, of course, on the specific language of the policy. In *Trinity Universal Insurance Company v. Employers Mutual Casualty Company*, the Fifth Circuit found that an "other insurance" provision that spoke only of an insured's "loss" was limited to indemnity and did not extend to defense costs.[18]

Even when "other insurance" provisions do conflict, the very nature of the policies may dictate against a *Hardware Dealers* result. "Where there is apparent conflict between clauses of applicable insurance policies, courts should look to the overall pattern of insurance coverage to resolve disputes among the carriers."[19] Specifically, when comparing a primary policy with an excess clause to a true excess policy, the primary coverage will typically come first.[20]

Whether a party is being defended as an insured, or as the indemnitee of an insured, may also implicate the "other insurance" analysis. In *American Indemnity v. Travelers*, the Fifth Circuit made an *Erie* guess on Texas law with respect to overlapping additional-insured and contractual-indemnity obligations and priority of coverage.[21] The Court noted the general rule that when "other insurance" provisions make policies share coverage, when one insurer pays more than its share, "the insurer paying more than its share . . . of the claim is ordinarily entitled to recover from the other insurer for the excess so paid."[22] In the context of a valid indemnity provision, the Fifth Circuit has recognized that "other insurance" provisions should not apply:

> [A]n indemnity agreement between the insureds or a contract with an indemnification clause, such as is commonly found in the construction industry, may shift an entire loss to a particular insurer notwithstanding the existence of an 'other insurance' clause in its policy.[23]

This different treatment may be material when weighing whether to pursue additional insured coverage (which is potentially subject to horizontal exhaustion, as noted above) or contractual indemnity (vertical exhaustion). The different treatment can impact deductibles, self-insured retentions, loss histories, exhaustion of available insurance for other claims, and of course future premiums.

There is another significant aspect of *American Indemnity v. Travelers*. The court discussed several non-Texas cases following this approach, including *Wal–Mart Stores Inc. v. RLI Ins. Co.*, 292 F.3d 583, 588–94 (8th Cir.2002), which noted that the insureds do not have to be part of the suit for recovery of paid amounts, to avoid "circuity of action" and "wasteful litigation."[24] In essence, one insurer may sue another insurer directly for its insured's contractual indemnity claims, without having to litigate separately the subrogated contractual indemnity claim. This approach may allow insurers to skip a step in litigation when it comes to subrogated claims for contractual indemnity. However, note that *American Indemnity v. Travelers* involved coverage under a single policy for a single defendant against a single claimant. Cookie-cutter avoidance of "circuity of action" may be inappropriate in cases involving multiple claimants, multiple insureds/indemnitees, eroding limits, or other myriad issues in complex litigation.

Self-insured retentions themselves can also pose priority problems. Unless expressly addressed in the policy, self-insurance is typically not considered other insurance for purposes of an "other insurance" clause.[25] Further, a self-insured retention can be satisfied by payments made on the insured's behalf by another carrier.[26] The key is, as might be expected, policy language which may dictate different results.[27]

The discussion above primarily addresses third-party coverages, but the same concepts apply to first-party coverages. For example, in *Zurich American Insurance Company v. Certain Underwriters*, the court addressed claims arising out of a well-pad fire that caused a crane to collapse and an out of control well that resulted in over $27 million in claims.[28] The insurers settled the claim collectively for $24 million, allocated to any specific costs and with a reservation of rights to litigate apportionment and allocation.[29] Three primary policies were implicated, two of which involved both first-party and third-party coverages (the third primary policy was third-party only). Key to the dispute, however, was that the policies overlapped on some of the losses but not all of them. The parties failed to allocate the losses to determine which were covered by all three policies, or just two, or just a single policy. Without allocation, the court could not apply *Hardware Dealers* and remanded the case for further proceedings.[30]

The concept that "other insurance" provisions apply only to overlapping coverages has also been recognized in Texas state court: "The provisions of an 'other insurance' clause apply only when the 'other' insurance covers the same property and interest therein against the same risk in favor of the same party."[31]

In sum, priority of coverage involves a detailed analysis of the underlying claims and the specific language of the policies and contractual indemnity obligations. Knowing how those provisions will work may make the difference between getting to first and getting all the way home.

[1] Commercial General Liability Coverage Form, CG 00 01 04 13, Insurance Services Office, Inc. (2012), at SECTION IV—COMMERCIAL GENERAL LIABILITY CONDITIONS, 4. Other Insurance.

[2] 444 S.W.2d 583, 590 (Tex. 1969).

[3] *Id.* at 586.

[4] *Id.* at 589.

[5] *Id.* (emphasis added).

[6] *See id.* at 590.

[7] *See, e.g.*, *St. Paul Mercury Ins. Co. v. Lexington Ins. Co.*, 888 F. Supp. 1372, 1385–87 (S.D. Tex. 1995), *aff'd,* 78 F.3d 202 (5th Cir. 1996); *Safeco Lloyds Ins. Co. v. Allstate Ins. Co.*, 308 S.W.3d 49, 60 (Tex. App.—San Antonio 2009, no pet.) ("[W]e hold Safeco and Allstate share liability on a pro rata basis in proportion to the amount of insurance provided by their respective policies");

Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. United L.P. Gas Corp., No. 01-00-00222-CV, 2002 WL 396533, at *11 (Tex. App.—Houston [1st Dist.] Mar. 14, 2002) (sharing pro rata), *judgment withdrawn and reissued* (Oct. 9, 2003), *opinion withdrawn and superseded in part,* 01-00-00222-CV, 2003 WL 22310045 (Tex. App.—Houston [1st Dist.] Oct. 9, 2003, no pet.).

[8] *See Great Am. Ins. Co. v. Employers Mut. Cas. Co.*, 18 F.4th 486, 491 (5th Cir. 2021).

[9] 547 F. Appx. 550, 553 (5th Cir. 2013) (following *Snyder v. Allstate Ins. Co.*, 485 S.W.2d 769 (Tex. 1972)).

[10] *Id.* at 552.

[11] *See id.* at 553–54.

[12] CIVIL ACTION NO. H-16-0273, 2017 WL 661520, at *1 (S.D. Tex. Feb. 17, 2017).

[13] *Id.* at *5.

[14] *Id.* at **12-13.

[15] *Id.*

[16] *See, e.g.*, *Royal Ins. Co. of Am. v. Hartford Underwriters Ins. Co.*, 391 F.3d 639, 643–44 (5th Cir. 2004) (following *Hardware Dealers* and *St. Paul Mercury Ins. Co. v. Lexington Ins. Co.*, 78 F.3d 202, 210 (5th Cir. 1996)); *Willbros RPI, Inc. v. Cont'l Cas. Co.*, 601 F.3d 306, 312–13 (5th Cir. 2010) (following *Royal Insurance*); *see also Crum & Forster Specialty Ins. Co. v. Great W. Cas. Co.*, No. EP-15-CV-00325-DCG, 2017 WL 4002713, at *8 (W.D. Tex. Sept. 11, 2017) (following *Royal Insurance* and *Willbros*).

[17] *See, e.g.*, *Willbros RPI*, 601 F.3d at 312–13; *Crum & Forster Specialty* , No. EP-15-CV-00325-DCG, 2017 WL 4002713, at *8.

[18] 592 F.3d 687, 694–95 (5th Cir. 2010).

[19] *Liberty Mut. Ins Co. v. United States Fire Ins. Co.*, 590 S.W.2d 783, 785 (Tex. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.).

[20] *See, e.g.*, *Carraba et al. v. Emp'rs Cas. Co.*, 742 S.W.2d 709, 714–15 (Tex. App.—Houston [14th Dist.] 1987, no writ) ("The policies are not of the same character; they do not supply coverage at the same level. The 'other insurance' clauses of a primary policy with an excess clause and an umbrella policy are not equivalent and are not mutually repugnant so that they cancel one another."); *see also St. Paul Mercury* , 78 F.3d at 209 (establishing that primary carriers exhausted first, followed by concurring excess policies); *Starnet Ins. Co. v. Fed. Ins. Co.*, Case No. A-16-CA-664-SS, 2017 WL 1293578, at *1 (W.D. Tex. Apr. 6, 2017) (rejecting an attempt to get an excess policy to participate with concurrent primary policies where (1) there was common ownership of one of the primary carriers and the excess carrier and (2) the excess policy scheduled only one of the two primary policies); *N. Am. Capacity Ins. Co. v. Colony Specialty Ins. Co*., 273 F. Supp. 3d 711, 716–17 (S.D. Tex. 2017) (following *Starnet* and rejecting attempt to compel umbrella policy to participate with primary policy which included "other insurance" provision identical to that in *Starnet*).

[21] *Am. Indemn. Lloyds v. Travelers Prop. & Cas. Ins. Co.*, 335 F.3d 429 (5th Cir. 2003).

[22] *Id.* at 435.

[23] *Id.* at 436 (quoting 15 *Couch on Insurance* § 219:1 (3rd ed.1999).

[24] *Id.* at 436-37.

[25] *See Lexington Ins. Co. v. National Oilwell Nov, Inv.*, 355 S.W.3d 205, 215 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (self-insured retention not "other insurance"); *Travelers Lloyds Ins. Co. v. Pacific Emp'rs Ins. Co.,* 602 F.3d 677, 684 (5th Cir. 2010) (self-insurance not "other insurance").

[26] *See Cont'l Cas. Co. v. N. Am. Capacity Ins. Co.*, 683 F.3d 79, 90 (5th Cir. 2012) (finding that because the policy did not explicitly require the insured to pay the amount of the self-insured retention itself, payments made for the insured's defense by other carriers satisfied the self-insured retention).

[27] *See, e.g.*, *id.* at 90 (noting that "the policy does not explicitly require the insured to pay the amount itself"); *Pak-Mor Mfg. Co. v. Royal Surplus Lines Ins. Co.*, SA-05-CA-135-RF, 2005 WL 3487723, at *2 (W.D. Tex. Nov. 3, 2005) ("The unambiguous text of the insurance policy compels the conclusion that Pak-Mor must pay the self insured part of the policy before Royal has any obligation to pay any excess."); *see also Citigroup, Inc. v. Federal Ins. Co.*, 649 F.3d 367, 372 (5th Cir. 2011) (considering whether coverage is triggered under an excess policy where the insured settles with the primary carrier for less than policy limits and assessing whether the plain language of the policies required actual payment by the primary insurer of the full amount of the limits before excess coverage was available).

[28] *Zurich Am. Ins. Co. v. Certain Underwriters Subscribing to OEE Policy NRG 475535-9-02*, 634 S.W.3d 131, 135 (Tex. App.—Houston [1st Dist.] 2020, pet. denied).

[29] *Id.*

[30] *Id.* at 153–54.

[31] *Hartford Cas. Ins. Co. v. Exec. Risk Specialty Ins. Co.*, No. 05-03-00546-CV, 2004 WL 2404382, at *2 (Tex. App.—Dallas Oct. 28, 2004, pet. denied) (holding "other insurance" provision inapplicable as between commercial general liability and errors and omissions policies as the policies "cover completely different risks").

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