

AUTO POLICY/LITIGATION UPDATE

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ARTICLES, AWARDS, AND PRESENTATIONS

Author and Presenter: "Overview of State/Government Employee Legal Rights and Liabilities for Job-Related Activities,"
Fire and Investigation Certification Curriculum, Texas State Fire Marshall's Office, 2000
"Wearing the Bull's Eye: Adjuster/Agent Liability After Liberty Mutual v. Garrison Contractors," 1999
"Issues Raised in Insurance Claims Brought by Divorcing Spouses", Texas Department of Insurance accreditation, 1997, 1999; State Bar of Texas MCLE accreditation, 1997

Co-Author: "Commonly Litigated Areas of Premises Liability Law," Houston Bar Association CLE course, presented 1993

MEMBERSHIPS AND SERVICE

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State Bar of Texas; Houston Bar Assoc.; Houston Young Lawyers Assoc.

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The United States Fifth Circuit Court of Appeals
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Taylor & Taylor, Founding Partner, May, 1995
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University of Houston Law Center, J.D., May 1991; Licensed November, 1991
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AUTO POLICY/LITIGATION UPDATE

Scope of Article

The following are summaries of Texas cases over the last eighteen months that address issues impacting lawsuits and insurance claims involving Texas auto policies.

I. Attorney Fees Under Art. 21.55 where there is No Contract Liability

Allstate Ins. Co. v. Bonner, 51 S.W.3d 289 (Tex. 2001):

This lawsuit involved uninsured motorist (“UM”) and Personal Injury Protection (“PIP”) claims. Allstate paid \$1619.00 in PIP benefits on December 11, 1997. Bonner made a UM claim under the same policy on December 15, 1997, which Allstate did not acknowledge until January 16, 1998. Allstate stipulated that it did not timely acknowledge Bonner’s UM claim in violation of Art. 21.55 section 6.

At trial, the jury found the uninsured motorist was the proximate cause of Bonner’s injuries and awarded her \$1,000.00 for past medical, nothing for pain and suffering or impairment, and \$7500.00 in attorney fees. The trial court entered a take nothing judgment, declined to award attorney fees, and taxed costs against Bonner. The court of appeals affirmed the take-nothing judgment, but awarded attorney fees under art. 21.55 because Allstate did not timely acknowledge the claim.

The Texas Supreme Court held art. 21.55 section 6 makes the insurer’s liability on the claim a prerequisite for imposing art. 21.55 penalties. Because what was awarded to Bonner on her UM claim did not exceed what Allstate already paid in PIP, attorneys fees were not owed under art. 21.55. The Court stated that to successfully maintain a claim under section 6, a party must establish three elements:

- 1) a claim under an insurance policy;
- 2) that the insurer is liable for the claim; and
- 3) that the insurer failed to follow one or more sections of art. 21.55 with respect to the claim.

In this case, contrary to Bonner’s argument, Allstate’s stipulation that it violated section 6 did not satisfy the second element necessary to invoke section 6, it merely satisfied the non-compliance element.

The Court explained in order for Bonner to establish a claim under her insurance policy, she had to prove not only that an uninsured motorist negligently caused the accident resulting in covered damages, but also that all applicable policy provisions were satisfied. Citing *Mid-Century Ins. Co. v. Kidd*, 997 S.W.2d 265, 276 (Tex. 1999), the Court re-iterated that the non-duplication of benefits provision in the auto policy is valid and enforceable. Therefore, Allstate would only have had contractual liability to Bonner if Bonner had proved more in damages than Allstate had already paid in PIP benefits.

The Court stated its holding enforced the insurance contract as written in distinguishing its holding in this case from other Texas cases in which attorney fees were permitted even when a prevailing party did not receive a net recovery of damages. *Bonner*, 51 S.W.3d at 291, citing *McKinley v. Drozd*, 685 S.W.2d 7, 9-11 (Tex. 1985); *Perez v. Baker Packers*, 694 S.W.2d 138, 143 (Tex. App. – Houston [14th Dist.] 1985, writ ref’d n.r.e.). In *McKinley*, the plaintiff proved an ordinary breach of contract but the defendant proved a counterclaim under the DTPA, thus attorney fees were awarded. In *Perez*, the plaintiff succeeded on a negligence claim but received nothing because he already settled with another defendant for more than his actual damages. In this case, though, the non-duplication of benefits provision was a policy defense which defeated Bonner’s UM claim. Thus, no benefits were owed to her under the policy, and no penalty would be

applied under the DTPA.

II. *Res Judicata* Effect of Judgment against Reinsurer on Subsequent Claims against Insurer

State and County Mutual Fire Ins. Co. v. Miller, 52 S.W.3d 693 (Tex. 2001).

Before this suit, Windsor, the reinsurer of a personal auto policy in favor of Miller, obtained a declaratory judgment of Miller's auto insurer's duties and obligations to Miller under his UIM coverage as the result of an auto accident in which Miller was injured. After the declaratory judgment action concluded and Windsor paid Miller the amount the trial court determined to be owed to Miller as the result of the accident in question, Miller pursued a separate suit against State and County Mutual, one of the Windsor companies which was his personal auto insurer (on the same policy which Windsor reinsured).

This suit discusses whether the second suit against State and County Mutual is barred by *res judicata*. The Supreme Court held that *res judicata* did not preclude the action against State and County Mutual since State and County Mutual and Miller were not adverse in the first suit. However, the focus in the first suit against Windsor involved the extent to which Windsor was obligated to pay under the terms of the policy. Because Windsor's liability to Miller was derivative of and coexisted with State and County Mutual's liability to Miller, to the extent that obligations under the policy were litigated in the first suit, the doctrine of collateral estoppel estopped Miller from relitigating those issues against State and County Mutual.

As a result, all claims in this suit involving the liability of an insurer under the terms of the policy for damages caused by the subject accident were barred. Miller did, however, include claims of misrepresentation of policy terms in his suit against State and County Mutual. Those claims, which were not raised in the Windsor suit, could

be pursued in this subsequent action.

III. Enforcement of Workers' Comp. Commission's Subrogation Right

Texas Workers' Compensation Ins. Fund v. Knight, 61 S.W.3d 91 (Tex. App.-- Amarillo 2001, no pet.)

In March 1999, Houston Ewing, while driving a vehicle owned by his employer, Sterling Cleaning Services, was involved in an accident with an uninsured intoxicated individual. At the time of the accident, Ewing had two passengers, Susannah Knight and Susana Maldonado. In addition to workers compensation insurance, the employer, Sterling, had uninsured/underinsured motorist insurance with Safeguard Insurance Company.

Knight filed suit for UM/UIM benefits, and the Workers' Compensation Fund intervened to recover its subrogation right under Tex. Labor Code sec. 417.001(b)(1) & (2). Under the Labor Code, the Fund claimed it was entitled to reimbursement from monies paid by Safeguard equal to the amount the Fund had paid in benefits to Ewing, Maldonado and Knight. Safeguard paid \$480,952.10 into the registry of the court because it did not know whom to pay. At an apportionment hearing, the trial court entered a judgment effectively denying the Workers' Compensation Fund's subrogation claim.

Knight argued, 1) the court of appeals should reexamine prior case law which upheld the Fund's subrogation right against an employer's uninsured motorist coverage; *Employers Casualty Co. v. Dyess*, 957 S.W.2d 884 (Tex. App.-- Amarillo 1997, pet. denied); 2) despite any statutory right of subrogation the Fund may have, the trial court was authorized to apportion proceeds as it saw fit; and 3) the trial court did not err because once Knight recovered from a third party, the Fund would suspend payment of additional benefits until what she received from the UM carrier was exhausted.

The Amarillo Court of Appeals rejected all three arguments, however, and upheld the Fund's right to compensation. First, case law from Amarillo and other jurisdictions have upheld the Fund's right to reimbursement. *Dyess and Texas Workers' Comp. Ins. Fac. v. Aetna Cas. & Surety Co.*, 994 S.W.2d 923 (Tex. App. – Houston [1st Dist.] 1999, no pet.). Second, the statute itself clearly states that the Fund is entitled to recover 100% of the compensation paid to an injured employee as the result of the injured employee's recovery from a third party and the employee has no right to any funds from a third party until the compensation carrier receives payment in full. Finally, according to the Legislature's repayment scheme regarding repayment to a compensation carrier from third party recoveries, the compensation carrier has first right to third party recoveries AND has no further obligation to pay the claimant until all funds from the third party recovery are exhausted.

IV. DTPA and Insurance Code Claims may not be Coextensive

Colonial County Mutual Ins. Co. v. Valdez, 30 S.W.3d 514 (Tex. App.-- Corpus Christi 2000, no pet.).

This is the second of two suits against Colonial County Mutual arising out of Colonial's denial of a theft claim brought by Hector Valdez. The first suit, filed in Travis County, was for breach of contract. After the Travis County trial court granted summary judgment in favor of Colonial, finding no contractual liability to Hector Valdez, Hector Valdez brought this DTPA and Insurance Code misrepresentation suit in Cameron County.

The facts of the dispute were: Hector Valdez purchased a 1992 Plymouth Acclaim in 1994. When Hector Valdez purchased insurance for the vehicle, an employee of the insurance agency told him the car was insured "against theft, against accidents, against medical expenses, everything

concerning the insurance." A few months after obtaining the insurance, Hector sold the car to his son, Renee Valdez, who obtained a loan from Mercantile Bank to pay his father for the car.

After the sale to Renee, Hector called the insurance agency to tell them Mercantile Bank would be contacting them to make changes and arrangements on the insurance. Mercantile Bank did call and asked to verify insurance on the car for "Mr. Valdez." The agent told the bank that "Mr. Valdez" had insurance. It was undisputed that Hector never told the insurance company or the agency that he had sold the car to Renee. It was also undisputed that the insurance company and the agency never told Hector he could only insure the car if he owned it.

After purchase of the vehicle, Renee traveled to Mexico City and left the car in Hector's possession. Hector continued to make the insurance payments on the car while Renee owned it. The insurance policy automatically renewed in November 1995. The car was stolen in January 1996 while in Hector's possession and while Renee was out of the country. Hector made a theft claim as the result of the theft.

Colonial investigated the theft claim under a reservation of rights and filed a declaratory judgment action to determine if Hector had an insurable interest in the car. The Travis County trial court found he did not have an insurable interest and granted summary judgment for Colonial. Hector then filed this DTPA and Insurance Code suit in Cameron County. This case was tried in February 1998. The jury found Colonial had engaged in false, misleading, or deceptive act or practice under the DTPA, had engaged in an unfair or deceptive act under Insurance Code art. 21.21, and had engaged in this conduct knowingly. Colonial appealed, contending the jury's findings on liability and damages were not supported by legally or

factually sufficient evidence.¹

A. DTPA Analysis

Colonial appealed the DTPA misrepresentation finding because, it claimed, a mere nondisclosure of material information is not enough to establish DTPA liability under the definition of false, misleading, or deceptive act or practice set out in Tex. Bus. Com. Code Ann. Sec. 17.46(b)(23)(Vernon Supp. 2000). The court agreed, holding that under the plain language of 17.46(b)(23), to prove a DTPA action for failure to disclose, a plaintiff must show:

- 1) A failure to disclose information concerning goods or services;
- 2) Which was known at the time of the transaction;
- 3) Which was intended to induce the consumer into a transaction; and
- 4) The consumer would not have entered into the transaction if the information had been disclosed. *Colonial v. Valdez*, 30 S.W.3d at 514, citing *Kessler v. Fanning*, 953 S.W.2d 515, 521 (Tex. App. -- Fort Worth 1997, no pet.).

Since Valdez did not tell the insurer of his intention to sell the car and keep the policy, and since there was no evidence that this information was important at the time Valdez purchased the policy, there was no evidence that the withholding

¹ Interestingly, in June 1999, the Third Court of Appeals reversed and remanded the Travis County trial court summary judgment on the contract, finding the insurer did not prove as a matter of law that Hector did not have an insurable interest in the car. See *Valdez v. Colonial County Mutual Ins. Co.*, 994 S.W.2d 910 (Tex. App. -- Austin 1999, pet. denied).

of information about the necessity of the policy holder having an insurable interest was done with the intention of inducing Valdez to purchase the policy. Thus, there could be no liability against Colonial under DTPA sec. 17.46(b)(23).

The court found that the jury's answer to the DTPA question was harmless error, though, since its positive finding to other questions based on the Insurance Code supported the damages awarded by the jury. However, the court spent some time discussing the Texas Supreme Court's 2000 opinion in *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000), in which the Supreme Court departed from the reasoning of four leading appeals court cases discussing harmless error and broad-form submission and held that when a trial court submits a single broad-form liability question incorporating multiple theories of liability, the error is harmful and a new trial is required when the appellate court cannot determine whether the jury based its verdict on an improperly submitted invalid theory. In this case, though, the jury's answer to the DTPA question submitted on four alternative theories of liability -- one of which was found to be erroneous -- was harmless error because the jury's answer to separate Insurance Code questions supported the damage award.

B. Insurance Code Analysis

1. Failure to Disclose Material Information

The court confined the rest of its analysis, then, only to Colonial's liability under the Insurance Code. Under the Insurance Code, the jury was asked, and answered affirmatively, whether Colonial 1) failed to disclose in violation of the Insurance Code, 2) committed unfair claim settlement practices, or 3) made misrepresentations actionable under the Insurance Code. Colonial argued that Valdez' Insurance Code claims based on failure to disclose failed for the same reasons the DTPA claims failed. The court disagreed under the terms of Ins. Code art. 21.21 sec. 4(11)(b), (c), and (e) (Vernon Supp.

2000) which prohibit making any misrepresentation relating to an insurance policy by:

- Failing to state a material fact that is necessary to make other statements not misleading, considering the circumstances under which the statements are made; or
- Making any statement in such a manner as to mislead a reasonably prudent person to a false conclusion of material fact; or
- Failing to disclose the full terms of the policy.

The court held that Colonial's failure to disclose to Valdez that his car would not be insured if he transferred the title to his son is actionable under each of these sections.

In reaching its decision, the court found persuasive that Colonial did not tell Hector Valdez the material fact that transfer of title would void the insurance coverage. That material fact was necessary to make the terms of the policy not misleading since the policy showed coverage on the vehicle was effective. Colonial's failure to state either orally or in writing (the policy was silent to this fact) that transfer of title would void the coverage, would have misled a reasonably prudent person to believe the vehicle was still covered since the policy listed the vehicle as covered and Hector Valdez as an insured. The court found the fact that the insurance company verified to the bank the vehicle was covered to be compelling evidence of the reasonableness of Hector Valdez' belief that the car was covered. Finally, the court found it a violation of section 4(11)(e) that Colonial did not disclose the full terms of the policy. Under these circumstances, Colonial's actions violated the Insurance Code.

Contrary to Colonial's argument that the Insurance Code claims were merely restated

breach of contract claims, the court found that Hector Valdez' complaints related to the impression created by the policy and the conduct of Colonial's agents, not to the fact that the policy did not cover his vehicle after he sold it to his son.

2. Unfair Claim Settlement Practices

Regarding Valdez' unfair claim settlement practices claim, the court agreed with Valdez' argument that violation of Insurance Code art. 21.55 deadlines can constitute failure to affirm or deny coverage within a reasonable time in violation of art. 21.21 sec. 10(v)(A) or (B) (Vernon Supp. 2000). The court also agreed with Valdez that Colonial failed to meet the article 21.55 deadlines, even though Colonial argued Valdez had not provided four of the eight items Colonial had requested from Valdez in proof of loss of the claim. The court noted it was unaware of any Texas case discussing what documents are "required by the insurer to secure final proof of loss." According to its own judgment, then, the court determined that four of the eight items requested of Valdez by Colonial were not required to secure final proof of loss.² Significantly, Colonial presented no evidence and offered no argument explaining why it required those materials.

Because the court determined items Colonial requested were not necessary to secure final proof of loss, it also determined Colonial did not promptly accept or reject Valdez' claim in violation of art. 21.55. This, the court found, was an unfair claim settlement practice under art. 21.21.

3. Misrepresentation

²The items the court determined were not necessary to secure final proof of loss of the theft claim were: copies of the vehicle service records, recent photographs of the vehicle, copy of the Bill of Sale or a License Registration receipt; negotiable title or a copy of the title, and all sets of keys to the vehicle.

Colonial's final argument regarding the jury's Insurance Code findings was that in the absence of an affirmative misrepresentation, a mistaken belief about the scope of coverage is not actionable under the Insurance Code. The court disagreed. Unlike the cases cited by Colonial in which courts found no misrepresentation absent an affirmative misrepresentation about the scope of coverage where the policies in question stated the policy terms and exclusions, in this case, the policy itself indicated the vehicle was insured at the time the claim arose. This, the court found, amounted to an affirmative representation.

4. "Knowing" Conduct

Although the court upheld the Insurance Code findings against Colonial, the court sustained Colonial's point of error complaining of the jury's finding it committed the Insurance Code violations "knowingly." Since Valdez conceded he never told Colonial he sold the car to his son, there was no evidence Colonial's actions were done with any intention to deceive or treat Valdez unfairly.

5. Damages

The court upheld Valdez' mental anguish award based on Valdez' testimony he "felt deceived, very mad, and powerless," and that these feelings affected his health in the form of high blood pressure and sleep disorders. The court upheld the jury's award of Valdez' attorney fees for both the Travis County and Cameron County cases as the court found neither suit would have been necessary had Colonial not misrepresented the terms of the policy. And the court upheld a \$6,500.00 "loss of benefit of the bargain" award since Valdez would be required to pay that amount for the stolen vehicle since the insurance policy did not cover it. The court did, however, reverse the additional damage award since it did not find Colonial acted knowingly.

V. Dallas Court of Appeals Considers Whether a Breach of Contract Is Necessary for Breach of the Duty of Good Faith and Fair Dealing and other Extra-Contractual Actions

1. *Lias v. State Farm Mutual Automobile Ins. Co.*, 45 S.W.3d 330 (Tex. App. – Dallas 2001, no pet.).

This is an appeal of a summary judgment granted in favor of State Farm on Lias' bad faith and Insurance Code claims. The suit arose out of Lias' UIM claim which he brought in January 1995, after settling with the other driver's liability carrier for the policy limits of \$25,000.00 and after receiving \$2,500.00 in PIP under his State Farm policy.

As the result of the underlying accident, Lias incurred \$8,760.64 in medical expenses and \$2,700.00 in lost wages. State Farm made offers of \$1,500.00 and \$3,000.00, which Lias rejected. In August 1995, State Farm sent Lias a check for \$11,000.00.

Lias sued State Farm for breach of contract, breach of the duty of good faith and fair dealing, and violations of Insurance Code art. 21.55, alleging State Farm unreasonably refused to pay benefits due within a reasonable time when it knew there was no reasonable basis for its refusal to pay, and, for an unreasonable amount of time, State Farm offered an amount less than it knew the claim was worth. After suit was filed, State Farm successfully moved for separate trials of the contract and extra-contractual claims. Lias non-suited the contract suit before trial, but proceeded with the bad faith and statutory causes of action.

State Farm moved for summary judgment arguing it was reasonable in contesting the amount of Lias' claim because there were questions about contributory negligence and Lias' impairment rating. State Farm's summary judgment motion was also based on the authority of *Republic Insurance Co. v. Stoker*, 903 S.W.2d 338, 340-41 (Tex. 1995) which holds there can generally be no

breach of the duty of good faith and fair dealing without the insurer first being liable on the contract.

The Dallas Court of Appeals rejected State Farm's argument that the non-suit of the contract claim precluded the suit for breach of the duty of good faith and fair dealing. The court stressed that although the tort claim and the contract claim involve policy coverage, the tort claim and the contract claim are separate actions and the insured could establish policy coverage in the tort action. Additionally, the court noted, a non-suit is not a determination on the merits of policy coverage. Therefore, in this case, the non-suit of the contract claim did not preclude the action for breach of the duty of good faith and fair dealing.

After pointing out that liability in a separate contract action is not a prerequisite to pursuing a tort claim against an insurer, the court analyzed the evidence in the case and affirmed the summary judgment on the merits. The court found State Farm's delay in determining the value of the claim when faced with conflicting medical evidence was reasonable and there was no evidence that it was unreasonable for State Farm to seek the additional medical information it sought during its investigation. Further, there was no evidence that State Farm ever paid an amount less than it thought to be a fair settlement of the claim. For these reasons, summary judgment was appropriate and the judgment of the trial court was affirmed.

2. *Gates v. State Farm County Mutual Ins. Co. of Texas*, 53 S.W.3d 826 (Tex. App. – Dallas 2001,)

Appeal of summary judgment in favor of auto insurer on UIM claim and breach of the duty of good faith and fair dealing claim.

The Gates were involved in an auto accident with an uninsured motorist and filed a UM claim with State Farm. The parties exchanged settlement demands and offers, but no agreement as to settlement value could be reached. The Gates filed suit against State Farm in September 1996

alleging breach of contract and bad faith. The trial court severed and abated the bad faith claims from the breach of contract suit.

The trial court granted summary judgment for State Farm on the contract suit, finding there was no evidence of proximate cause and no medical testimony supporting the Gates' damage claims. The Gates did not appeal that judgment, but instead attempted to pursue the abated extra-contractual action.

This appeal arose out of the trial court's granting summary judgment in favor of State Farm disposing of all the extra-contractual claims.³ In addition to arguing there was no evidence of extreme conduct which would give rise to extra-contractual liability, State Farm also argued under the reasoning of *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338, 340 (Tex. 1995) and *Liberty Nat'l Fire Ins. Co. v. Akin*, 927 S.W.2d 627, 629 (Tex. 1996), that in most cases, an insured may not prevail on a bad faith claim without first showing the insurer breached the contract.

In this case, unlike the *Lias* case discussed above, the trial court, by granting summary judgment on the contract suit, found State Farm was not liable to the Gates under the policy. This final summary judgment had the preclusive effect of preventing the Gates from claiming State Farm breached their insurance policy with regard to the underlying accident claim. The court noted that to allow the Gates to present evidence of a contract breach in a later lawsuit after summary judgment had already been granted on the contract question would be an impermissible collateral attack on the final judgment in the contract case.

Because the Gates' statutory claims were premised on the same bad faith allegations as their common law claims, they were prevented from pursuing those claims for the same reasons.

³Breach of the duty of good faith and fair dealing, and violations of the DTPA and Insurance Code art. 21.21.

Finally, the court found that the Gates' only evidence of extreme conduct in State Farm's claim handling was again based on its denial of the contract claim. Since it had already been determined State Farm was not liable on the contract, there was no evidence of extreme conduct which could warrant an extra-contractual suit against State Farm. Thus, the court of appeals affirmed the summary judgment.

VI. Facts Constituting "Use" of a Vehicle "Causing" Injury

1. State and County Mutual Fire Ins. Co. v. Trinity Universal Insurance Companies, 35 S.W.3d 278 (Tex. App. – El Paso 2000)

Reversal and remand of a declaratory judgment action against a commercial general liability insurer (Trinity) by a business auto insurer (State and County Mutual). The suit arose out of the death of Shirley Cox Evans ("Evans") when she was struck by traffic on I-35 as she was attempting to escape from a vehicle owned by Raudin McCormick ("Raudin") and driven by Don Melton Laird ("Laird"). Evans had car trouble on I-35 and accepted assistance and a ride from Laird, a "railroad taxi" driver for Raudin. Laird attempted to sexually assault Evans, who jumped out of Laird's van to escape the assault and was struck and killed by an oncoming car.

Raudin had a business auto policy with State and County Mutual and a commercial general liability policy with Trinity. Raudin requested defense from both companies to the suit brought by Evans' heirs. Each insurer contended the other owed the duty to defend and provide coverage. However, the insurers entered into a written agreement to jointly fund the defense while reserving for later the coverage dispute between them. State and County Mutual filed this Default Judgment action seeking a declaration that it did not have the duty to defend. The case was submitted on cross motions for summary judgment. After hearing, the trial court granted Trinity's motion for summary judgment, finding the auto insurer was

responsible to defend and indemnify Raudin. The El Paso Court of Appeals reversed and remanded finding the auto policy did not provide coverage as Evans' death did not involve the "use" of the insured vehicle.

Raudin's State and County Mutual auto policy provided:

"We will pay all sums an insured legally must pay as damages because of bodily injury or property damage to which this insurance applies, caused by an accident and resulting from the ownership; [sic] maintenance or use of a covered auto...."

Raudin's CGL policy provided:

"We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies...."

Raudin's CGL policy excluded from coverage:

"'Bodily injury' or 'property damage' arising out of the ownership, maintenance, use or entrustment to others of any aircraft, 'auto....Use includes operation and 'loading and 'unloading....'"

In considering which policy provided coverage under these facts, the El Paso Court of Appeals relied on the Texas Supreme Court's reasoning in *Mid-Century Ins. Co. v. Lindsey*, 997 S.W.2d 153 (Tex. 1993) and the Houston 14th Court of Appeals' opinion in *Collier v. Employers Nat'l Ins. Co.*, 861 S.W.2d 286 (Tex. App. – Houston [14th Dist.] 1993, writ denied). In considering the evidence in light of the reasoning of these two cases, the court decided Evans' death did, in fact, arise out of the use of Raudin's vehicle as a vehicle, but the use of the vehicle was merely incidental in producing Evans' death. Evans was struck by an unrelated third-party vehicle while fleeing Raudin's van, therefore the auto policy did not apply.

2. *Lyons v. State Farm Lloyds and National Casualty Co.*, 41 S.W.3d 201 (Tex. App. – Houston [14th Dist.] 2001).

Real estate agent, Gerlene Lyons, fell from a trailer being pulled by a truck, sustaining a closed head injury, at a “hayride” promotional event for real estate agents at the newly-developed Cinco Ranch subdivision. Lyons sued a number of parties, including Goswick & Associates, the event’s planner, who was responsible for the evening’s itinerary and arrangements. Goswick was the sole defendant at trial, “went through the motions” of defending itself, and sustained a \$786,000.00 verdict against it from the trial court. Goswick assigned its claims against State Farm and National Casualty to Lyons, who then filed this suit against both insurers. All three parties brought motions for summary judgment, and the trial court granted State Farm’s and National Casualty’s motions.

The State Farm policy in question was a commercial general liability policy that excluded coverage for injury arising from the use of an auto. Lyons, claimed, though, that State Farm owed Goswick a defense as a matter of law because the original petition alleged that Goswick “did not provide or arrange for any assistance in helping guests safely board the hayride in the dark.”

Using the factors set out in *Mid-Century Ins. Co. of Tex. v. Lindsey*, 997 S.W.2d 153, 156 (Tex. 1999)⁴ and *Collier v. Employers Nat. Ins. Co.*, 861 S.W.2d 286, 288-90 (Tex. App. – Houston [14th Dist.] 1993, writ denied), the court concluded that

⁴1) the accident must have arisen out of the inherent nature of the automobile, as such, 2) the accident must have arisen within the natural territorial limits of an automobile, and the actual use must not have terminated, [and] 3) the automobile must not merely contribute to cause the condition which produces the injury, but itself must produce the injury. *Lindsey*, 997 S.W.2d at 157.

Lyons’ injuries arose from the use of the vehicle. The court reasoned that: 1) the accident arose from Lyons’ entry onto the trailer, and entry is part of the inherent nature of a vehicle; 2) Lindsey’s fall occurred within the natural territorial limits of the trailer because her foot caught as she stood on the trailer looking for a seat and she toppled over the side; 3) the trailer did not merely “contribute to cause the condition which produced the injury;” and 4) Lyons’ entered the trailer for the purpose of transportation to and from the model homes. For these reasons, there was no coverage under the State Farm policy and the appeals court affirmed the trial court’s summary judgment in favor of State Farm.

VII. Multiple Competing Claims to Insufficient Policy Proceeds

Carter v. State Farm Mutual Automobile Ins. Co., 33 S.W.3d 369 (Tex. App.-- Fort Worth 2000, no pet.)

This suit arose out of multiple UIM claims against Michelle Keeffe’s State Farm UIM coverage after an auto accident which resulted in the death of one of Keeffe’s passengers (Kari Brunson) and injury to Keeffe and her three other passengers (Thomas Carter, Jeff Goodman, and Craig Derrick). The accident in question was caused by the negligence of Jennifer Puterbaugh, an underinsured motorist operating her vehicle at a high rate of speed, when her vehicle rear-ended the Keeffe vehicle. Keeffe’s UIM policy limits were \$50,000.00 and \$100,000.00 per occurrence.

Faced with competing serious claims for insufficient policy benefits, State Farm suggested all parties meet for a settlement conference. Carter’s attorney replied that a settlement conference was premature since Carter was still treating for his injuries sustained in the accident. In the meantime, Brunson’s estate made a \$50,000.00 demand for settlement of its claims associated with the accident and Brunson’s death. State Farm accepted that settlement demand and

paid Brunson's estate \$50,000.00, leaving only \$50,000.00 available for settlement of any remaining claims. Carter and Goodman thereafter each demanded \$50,000.00 to settle their claims, but State Farm stood on its decision to pay \$50,000.00 to Brunson's estate. State Farm again encouraged Carter and Goodman to participate in a settlement conference regarding the remaining \$50,000.00. At the settlement conference, Carter's lawyer would not settle for less than \$50,000.00 and Goodman said he did not wish to make a claim on Keeffe's policy at that time as he had UIM coverage under his own policy. State Farm settled Keeffe's and Derrick's claims for \$35,000.00 and \$10,000.00 respectively, and unconditionally tendered the remaining \$5,000.00 to Carter and Goodman.

Carter brought this suit against State Farm, claiming its settlement of the competing UIM claims breached its duty of good faith and fair dealing and violated the DTPA and Insurance Code, as well as breached Keeffe's insurance policy to which he was a third-party beneficiary.

The Fort Worth Court of Appeals affirmed the trial court's grant of summary judgment in favor of State Farm. The court relied on *Tex. Farmers Ins. Co. v. Soriano*, 881 S.W.2d 312, 315 (Tex. 1994) that an insurer will not be liable in bad faith for settling reasonable claims with one of several claimants even if such settlement exhausts or diminishes the available policy proceeds, when faced with settlement demands arising out of multiple claims and inadequate proceeds. Further, an insurance company does not breach its contract by settling with covered persons, even when the settlement depletes or exhausts policy proceeds. *Lane v. State Farm Mutual Automobile Ins. Co.*, 992 S.W.2d 545, 552 (Tex. App. – Texarkana 1999, pet. denied). Finally, State Farm did not breach a duty owed to Carter by considering the competing claims over his claim because reasonable settlements that result in the exhaustion of policy limits excuse further performance by the insurer on behalf of the other insureds. *Am. States Ins. Co. of Tex. v. Arnold*, 930 S.W.2d 196, 201 (Tex. App. – Dallas 1996, writ denied).

VIII. Post Judgment Duty of Good Faith and Fair Dealing

Mid-Century Ins. Co. of Tex. v. Boyte, 49 S.W.3d 408 (Tex. App. – Fort Worth 2001).

In a highly controversial opinion, the Fort Worth Court of Appeals held Mid-Century could be liable to Boyte for breach of the duty of good faith and fair dealing based on Mid-Century's decision to appeal a jury award in favor of Boyte on his UIM claim under his Mid-Century policy. Mid-Century did not pay the \$80,000.00 judgment until the court of appeals affirmed the trial court's judgment on appeal.

Boyte then filed this suit claiming Mid-Century's "delay" in settling his first party insurance claim was bad faith, breach of fiduciary duty, and a violation of the DTPA and Insurance Code. The jury agreed, finding Mid-Century knowingly failed to attempt to effectuate a prompt, fair, and equitable settlement of Boyte's claim when it knew or should have known its liability was reasonably clear.

The court rejected Mid-Century's argument that after judgment it and Boyte were no longer in the relationship of insurer/insured, but of judgment debtor/judgment creditor, based on *Stewart Title Guar. Co. v. Aiello*, 941 S.W.2d 68, 70-71 (Tex. 1997). The court claimed the facts of *Aiello* are distinguishable since *Aiello* dealt with an agreed judgment between policyholder and insurer instead of a judgment suspended by an appeal.

Mid-Century has filed a Rule 53.7(f) Motion which is currently pending before the Texas Supreme Court.

IX. Insurer's Duty to Pay Diminution in Value

Carlton v. Trinity Universal Ins. Co., 32 S.W.3d 454 (Tex. App. – Houston [14th Dist.] 2000, pet. denied).

After a thorough and comprehensive analysis of various jurisdictions on the issue, the 14th District Court of Appeals held where an insurer has fully, completely, and adequately "repaired or replaced the property with other of like kind and quality," any reduction in market value of the vehicle based on the fact the damage occurred or on factors not subject to repair or replacement cannot be deemed a component part of the cost of repair or replacement. Under the "repair or replace"

provision of the auto policy's limit of liability, the insurer's liability is capped at the cost of returning the damaged vehicle to substantially the same physical, operating, and mechanical condition as existed immediately before the loss. This duty does not include liability for any inherent diminished value caused by conditions such as a stigma on resale based on a "market psychology" that a damaged and repaired vehicle is worth less than one that has never been damaged.