

**INSUREDS GONE WILD:**  
**FRAUD,**  
**POLICY CONDITIONS**  
**& INSURER ALTERNATIVES**

OR

HOW TO PROTECT RATEPAYERS  
FROM THE SEVEN DEADLY SINS

WARREN TAYLOR & BETH M. TAYLOR  
Taylor, Taylor, & Russell  
Attorneys at Law

815 WALKER, SUITE 250  
HOUSTON, TX 77002  
(713)615-6060 Telephone  
(713)615-6070 Facsimile  
[wtaylor@taylaw.com](mailto:wtaylor@taylaw.com)  
[btaylor@taylaw.com](mailto:btaylor@taylaw.com)  
[www.taylaw.com](http://www.taylaw.com)

South Texas College of Law  
Texas Insurance Law Symposium  
Continuing Legal Education  
January 22-23, 2009

# TABLE OF CONTENTS

## **INSUREDS GONE WILD: FRAUD, POLICY CONDITIONS, & INSURER ALTERNATIVES OR HOW TO PROTECT RATEPAYERS FROM THE SEVEN DEADLY SINS**

<b>I.</b>	<b>LEGAL BASES FOR DENIAL</b> .....	<b>G - 2</b>
	<b>A. Burden of Proof</b> .....	<b>G - 2</b>
	<b>B. Public Policy.</b> .....	<b>G - 5</b>
	<b>C. Policy Exclusions.</b> .....	<b>G - 5</b>
	<b>D. Innocent Spouse Issues.</b> .....	<b>G - 7</b>
	<b>E. Insanity.</b> .....	<b>G - 9</b>
	<b>F. Effect of Criminal Proceedings.</b> .....	<b>G - 10</b>
	<b>G. Duties After Loss.</b> .....	<b>G - 11</b>
<b>II.</b>	<b>INSURANCE COMPANY PARAMETERS</b> .....	<b>G - 13</b>
	<b>A. Anti-technicality Issues.</b> .....	<b>G - 14</b>
	<b>B. Other Legal Boundaries</b> .....	<b>G - 25</b>
	<b>C. Caveat Insurer.</b> .....	<b>G - 26</b>
<b>III.</b>	<b>PRACTICE POINTERS</b> .....	<b>G - 26</b>
	<b>A. Do Your Investigation Early, Preferably Prior to Denial</b> .....	<b>G - 26</b>
	<b>B. Don't Get Distracted By Procedural Issues.</b> .....	<b>G - 26</b>
	<b>C. Evaluate Your Case Early And Often</b> .....	<b>G - 27</b>
	<b>D. Plan Your Closing Argument Early</b> .....	<b>G - 27</b>

<b>E.</b>	<b>Pick A Single Consistent Theory.</b> .....	<b>G - 27</b>
<b>F.</b>	<b>Challenge The Jury to Find "Who Done It"</b> .....	<b>G - 27</b>
<b>G.</b>	<b>Openly Discuss (And Eliminate) Alternative Theories</b> .....	<b>G - 28</b>
<b>H.</b>	<b>Do Not Over-try The Case.</b> .....	<b>G - 28</b>
<b>I.</b>	<b>Do Not Let Your Client Hide Behind A "Committee Decision".</b> .....	<b>G - 28</b>
<b>J.</b>	<b>Avoid Hyper-technicalities</b> .....	<b>G - 29</b>
<b>K.</b>	<b>Maintain Your Credibility At All Times, Both To The Judge</b> .....	
	<b>And The Jury</b> .....	<b>G - 29</b>
<b>L.</b>	<b>Try Your Case Simply And Quickly</b> .....	<b>G - 29</b>

# INSUREDS GONE WILD: FRAUD, POLICY CONDITIONS, & INSURER ALTERNATIVES

OR

## HOW TO PROTECT RATEPAYERS FROM THE SEVEN DEADLY SINS

Lust, greed, envy, pride, gluttony, sloth and wrath. Juries love a good fraud case. Even without salacious details jurors pay attention. More importantly, a fraud case is probably the only time a jury identifies the insurance company as being on the noble side. The right side.

In the ordinary case, jurors view insurance companies with suspicion and fear. They believe insurers are unfair, arbitrary and too powerful. They fear that if they have a claim, it will be unpaid or at least underpaid. They fear cancellation or higher rates if they do make a claim, even if they are not paid. Most of all, they do not understand the nature of insurance and the process of making a claim. They fear the unknown.

But there is a group jurors fear even more - criminals. Any review of criminal verdicts shows dominance by the prosecution. Jurors are fed up with crime and angry towards people who play the system, drive up rates for everyone else, and profit from fraudulent claims.

Jurors instinctively know insurers do not routinely deny claims for fraud. In fact, their assumption is just the opposite: that a lot of criminal activity goes undetected and, therefore, unpunished. Even worse, the criminals are paid by the jurors' premium dollars. As a result of these concerns, the carrier begins a fraud trial with credibility at least equal to that of the plaintiff. The key to winning the trial is to maintain that credibility and to tap into juror attitudes favorable to identifying and stopping fraud.

In a fraud case, I do not represent the insurer: I represent the policy holders - in their capacity as rate payers. I am not trying to nickel and dime a claim. I am protecting ratepayers from the seven deadly sins, or more precisely, from the consequences of those sins. In short, plaintiff is the villain; ratepayers are the victim; the jury is the vindicator. These three elements combine for a compelling story.

This paper will set forth the legal bases for a fraud denial, the parameters of handling such a claim, and practice pointers for the trial itself.

## I. LEGAL BASES FOR DENIAL

### A. **Burden of Proof.**

In general, insurance carriers may deny fraudulent claims based on public policy, contractual exclusions, and the insured's failure to comply with conditions of the policy. Often overlooked, however, is the simplest reason of all: "We don't believe you." In many cases, particularly theft losses, it is the insured's burden to prove a loss even occurred.

It is well settled that an insured bears the burden of establishing that he has sustained a covered loss. *Employers Cas. Co. v. Block*, 744 S.W.2d 940, 944 (Tex. 1988), overruled in part on other grounds, by *State Farm Fire & Casualty v. Gandy*, 925 S.W.2d 696 (Tex. 1996); *Venture Encoding Serv., Inc. v. Atlantic Mut. Ins. Co.*, 107 S.W.3d 729, 733 (Tex. App.—Fort Worth 2003, pet. denied); *Wallis v. United Services Automobile Assn.*, 2 S.W.3d 300, 303 (Tex. App.—San Antonio 1999, pet. denied). An insured is not entitled to recover unless he pleads and proves facts showing damages occurred and are covered by the policy. *Block*, 744 S.W.2d at 944; *Wallis*, 2 S.W.3d at 303.

When an exception to coverage is potentially in play, the insured still bears the initial burden to plead and prove that the benefits sought are covered. *Harken Exploration Co. v. Sphere Drake Ins. PLC*, 261 F.3d 466, 471 (5<sup>th</sup> Cir. 2001); *Western Alliance Ins. Co. v. Northern Ins. Co. of New York*, 176 F.3d 825, 831 (5<sup>th</sup> Cir. 1999); *Block*, 744 S.W.2d at 944. The insurer, however, bears the burden of establishing that one of the policy's limitations or exclusions constitutes an avoidance or affirmative defense to coverage. Tex. Ins. Code §554.002 (formerly Article 21.58(b)); *Harken*, 261 F.3d at 471; *Guar. Nat'l Ins. Co. v. Vick Mfg. Co.*, 143 F.3d 192, 193 (5<sup>th</sup> Cir. 1998). Once the insurer demonstrates that an exclusion arguably applies, the burden then shifts back to the insured to show that the claim does not fall within the exclusion or that it comes within an exception to the exclusion. *Guar. Nat'l Ins.*, 143 F.3d at 193; *Telepak v. United Serv. Auto. Ass'n*, 887 S.W.2d 506, 507-08 (Tex. App.—San Antonio 1994, writ denied); *Britt v. Cambridge Mut. Ins. Co.*, 717 S.W.2d 476, 482 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.). Where covered and uncovered damages both occur the insured must allocate between the two. *Atwill v. State Farm Lloyds*, Civil Action 304CV1343-K, 2006 WL 1118155 (N.D. Tex April 27, 2006).

The jury charge may not improperly place the burden of proof on the insurer. *American Home Assurance Co. v. Brandt*, 778 S.W.2d 141, 143 (Tex. App.—Texarkana 1989, writ denied). When an insured asserts a breach of contract claim, the charge must require the insured to prove that he sustained a covered loss. The charge cannot require the insurer to show that the insured's claim did *not* come within the policy coverage.

*Brandt* illustrates the importance of the burden of proof being properly placed when an insurer pleads an exclusion. 778 S.W.2d 141. The general rule, that the insured bears the initial burden of showing that he sustained a loss within the coverage of the policy, still applies. See, e.g., *Venture*, 107 S.W.3d at 733. *Brandt* involved a life insurance policy which extended coverage for riding as a

passenger in an aircraft, but excluded coverage for riding as a pilot or crew member in an aircraft. The insured was killed in an airplane crash. The trial court refused to submit the question proposed by the insurer: "Do you find from a preponderance of the evidence that [the insured] was riding as a passenger but not as a pilot or crew member in the aircraft on the occasion in question?" Instead, the trial court's submitted question was "Does the preponderance of the evidence show that the accident occurred while [the insured] was either operating the plane, or serving as a member of the crew?" Thus, the trial court's submission placed the burden on the insurer to prove that the exclusion applied. *Id.* The appellate court reversed, holding that the charge improperly placed the burden on the insurer to prove the loss came within the exclusionary language, when it should have placed the burden on the insured to prove that the occurrence came within the grant of coverage. *Brandt, supra.*

In some cases, it is undisputed that a loss occurred. For example, if a business is destroyed by fire, that fact is usually undisputed and alone is enough to place the claim within coverage. In that instance, the practical effect is that the insurer has the burden to prove an exclusion, usually the insured's involvement in the loss or concealment or fraud.

On the other hand, consider a potentially fraudulent theft loss. Our firm recently tried a case where the claimant alleged he had accidentally thrown away \$96,000 worth of jewelry. The insurer contended the loss was fraudulent.

In our not so hypothetical case, the Court first looked to the coverages involved. Personal property coverage under the Texas HO-W is provided for named perils, with "theft" being a named peril. Expensive jewelry is typically covered under a separate Personal Articles Policy ("PAP"), which is an "all risk" policy. The HO-W provides:

#### **"SECTION I – LOSSES INSURED...**

##### **COVERAGE B - PERSONAL PROPERTY**

We insure for accidental direct physical loss to property described in Coverage B caused by the following perils

- ...9. **Theft**, including attempted theft and loss of property from a known location when it is probable that the property has been stolen.

This peril does not include:

- ...b. loss caused by theft:

- (1) committed by an **insured** or by any other person regularly residing on the **insured location...**"

(HO-W Policy p. 7)(emphasis in original)

Had this been an insurer's loss, the business policy typically has similar language : "We ensure for accidental direct physical loss..."

The HO-W also contains a separate "Intentional Acts" exclusion:

- ...12. **Intentional Acts.** If you or any person insured under this policy causes or procures a loss to property covered under this policy for the purpose of obtaining insurance benefits, then this policy is void as to you and any other insured that caused or contributed to the loss or its procurement.

(HO-W p. 15)(emphasis in original)

In our theft case then, it was the insured's burden to prove that "non-accidental" theft occurred. Note that if the defense was that a spouse or other co-insured committed the theft, then the insurer would have the burden to establish exceptions under 9(b) and/or 12.

The PAP provides:

#### **"PERILS INSURED AGAINST**

We insure for all risks of direct physical loss to the property described [on the schedule of covered property]."

(PAP p. 1)

Again, it is the insured's burden to prove there was a loss. Under the PAP, he doesn't have to prove "non-accidental" theft, but he still must show that some loss occurred.

Thus, the HO-W both requires that the loss be "accidental" and provides a contractual exclusion for thefts caused by an insured. The PAP, on the other hand, covers "all risks of direct physical loss" and does not provide an exclusion for losses caused by the insured. (Both contain a concealment or fraud provision discussed later). Under either policy, the insured has the burden of proving a covered loss occurred, namely the theft, and to establish the amount of loss. This burden exists regardless of whether the insurer contends the loss is fraudulent. *Brandt, supra*.

When our theft case was tried, the Court (correctly, under *Brandt*) submitted one issue: "Did the plaintiff sustain a theft?" The burden was correctly placed on the plaintiff and the insurer prevailed – without obtaining a single finding in its favor.

Only after the insured establishes such a loss does the burden shift to the carrier to prove an exception to coverage. This may take the form of a contractual exclusion, but may also be grounded in public policy.

## **B. Public Policy.**

Historically, fraud by the insured has been a defense to liability under an insurance policy. Numerous cases have held that public policy does not permit recovery by an insured who knowingly burns insured property. *Greenfield v. San Jacinto Insurance Company*, 319 S.W.2d 134 (Tex. Civ. App. – Houston, 1958). Fraudulent losses are excepted from coverage based on principles of public policy and morals because in contracts of insurance, there is an implied agreement that the risks insured against are those risks to which property is usually subject, and the insured cannot voluntarily and intentionally vary them. *Id.* quoting *Columbia Insurance Company of Alexandria v. Lawrence*, 35 U.S. 507, 10 Pet. 507, 9 L.Ed. 512 (1836), and *Ritter v. Mutual Life Insurance Company*, 169 U.S. 139, 18 S.Ct. 300, 42 L.Ed. 693 (1898); and *Jones v. Fidelity and Guaranty Insurance Corp.*, 250 S.W.2d 281 (Tex. Civ. App. – Waco 1952, writ ref'd n.r.e.). Thus, public policy acts: 1) to prevent an insured from fraudulently benefitting from his criminal acts, and 2) to protect insurance companies from incurring increased risks which are voluntarily and unilaterally increased by the insured.

Note that even in the absence of fraud, the fortuity doctrine prevents an insurer from assuming liability for a loss in progress. *Scottsdale Ins. Co. v. Travis*, 68 S.W.3d 72 (Tex. App. – Dallas 2001, pet. denied); *Two Pesos, Inc. v. Gulf Ins. Co.*, 901 S.W.2d 495 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1995, no writ.)

At first glance, the public policy argument seems sound and easy to apply. In practice, however, the focus on public policy left the courts with some uncomfortable issues. For example, is it against public policy for an innocent spouse to recover for the intentional acts of the other spouse? As discussed in section I - D, page G - 6, several courts struggled with the competing concerns (culpability vs. community property, for example) until the Supreme Court decided that public policy was not a useful tool for answering these questions and shifted its focus to policy language. *Texas Farmers Ins. Co. v. Murphy*, 996 S.W.2d 873 (Tex. 1999). Even after *Murphy* however, there remains a public policy exclusion adopted by the courts to prevent fraud by insureds and to protect insurance carriers from incurring increased degrees of risk occasioned voluntarily and unilaterally by insureds. See *Ritter*, 18 S.Ct. at 300; *Jones*, 250 S.W.2d at 281; *Greenfield*, 319 S.W.2d at 136.

As *Murphy* illustrates, it is dangerous to rely on public policy alone when there are other defenses. We turn, then to common exclusions.

## **C. Policy Exclusions.**

In addition to public policy arguments, there are often contractual provisions against fraud and concealment. Insurance policies are contracts and are controlled by the rules of construction applicable to other types of contracts. *Barnett v. Aetna Life Insurance Co.*, 723 S.W.2d 663, 665 (Tex. 1987). If a policy provision can be given only one reasonable construction, it will be enforced as written. *Puckett v. U.S. Fire Insurance Co.*, 678 S.W.2d 936, 938 (Tex. 1984). A policy is

considered "ambiguous" when there is a genuine uncertainty as to which of two or more meanings is proper. *State Farm Lloyds, Inc. v. Williams*, 791 S.W.2d 542, 545 (Tex.App. – Dallas 1990, writ denied). If policy language is susceptible to more than one reasonable interpretation, courts must resolve the uncertainty by adopting the construction that most favors the insured. *National Union Fire Insurance Co. of Pittsburgh, PA v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991). The court must adopt the construction of exclusionary clauses urged by the insured so long as that construction is not unreasonable, even if the insurer's proposed construction is more reasonable. *Id.*, 555. These general rules of construction apply because, generally, the language and terms of insurance policies are deemed to be chosen by insurance companies. *Barnett*, 723 S.W.2d at 665. Therefore, any ambiguities regarding coverage, particularly exclusions to coverage, are construed against the insurer.

The standard HO-W contains a concealment or fraud exclusion that appears unambiguous and reads as follows:

**"SECTION I AND SECTION II – CONDITIONS**

- ...2. **Concealment or Fraud.** This policy is void as to you and any other insured, if you or any other insured under this policy has intentionally concealed or misrepresented any material fact or circumstance relating to this insurance, whether before or after a loss.”

(HO-W p. 15)

The PAP contains a similar exclusion that reads:

**"GENERAL CONDITIONS**

- ...2. **Concealment or Fraud.** We do not provide coverage for any insured who has intentionally concealed or misrepresented any material fact or circumstance relating to this insurance.”

(PAP p. 3)

While the HO-W voids the policy as to all insureds in the event of concealment or fraud by any insured, the PAP merely does not cover any insureds who intentionally conceal or misrepresent information relating to the insurance.

Similarly, a typical business policy reads:

- ...3. **Concealment, Misrepresentation or Fraud.** This policy is void in any case of fraud by you as it relates to the policy at any time. It is also void if you or any other insured intentionally conceal or misrepresent a material fact concerning.”

(Business Policy p. 34)

Interestingly, there is no comparable provision in the standard Texas auto policy. Thus, coverage on a questionable loss is more likely to turn on the definition of “theft,” for example, or questions of public policy than on an exclusion for fraud.

An interesting question is whether fraud under one coverage voids the entire policy or only the coverage involved in the fraud. Two courts have held that the entire policy is void. *McEwin v. Allstate Texas Lloyds*, 118 S.W.3d 811 (Tex. App.—Amarillo 2003, no pet.); *Corcoran v. State Farm Lloyds Ins. Co.*, Civil Action No. JH-0303077 (S.D. Tex. 2005). The *Corcoran* case is particularly significant since the Court granted summary judgment to the insurer on the property damage claim based on fraud committed by the insured on his Additional Living Expenses claim.

The result in each case is likely to turn on a literal reading of the exclusion. To understand why, we review the history of the “innocent spouse” doctrine.

#### **D. Innocent Spouse Issues.**

For years, Texas law prohibited co-insureds from recovering insurance proceeds when one of the co-insureds deliberately destroyed jointly owned property. *See, e.g. Jones*, 250 S.W.2d at 283. In 1986, the Texas Supreme Court partially abandoned this rule, holding that “the illegal destruction of jointly owned property by one co-insured shall not bar recovery under an insurance policy by an innocent co-insured.” *Kulubis v. Texas Farm Bureau Underwriters Ins. Co.*, 706 S.W.2d 953, 955 (Tex. 1986). Thus, in *Kulubis*, the court allowed a wife owning an undivided one-half interest in the couple’s home as separate property, to recover fire insurance proceeds after her husband burned down their house. The court expressly declined to address the issue of an innocent spouse’s right to recover under a policy insuring community property. *Id.*

The Fifth Circuit addressed the community property issue in *Norman v. State Farm Fire & Casualty*, 804 F.2d 1365 (5<sup>th</sup> Cir. 1986). In *Norman*, the court examined concerns addressed in *Kulubis*— the potential for wrongdoers to benefit from their wrongs, the possibility of fraud on insurers, the prevention of unjust enrichment of insurers, and the avoidance of imputing the crimes of the wrongdoer to his innocent victim. *Id.* at 1366. Placing the greatest emphasis on the first of these, the Fifth Circuit denied recovery to an innocent co-insured whose community property was destroyed by her husband. *Id.* The court noted, however, that “developments after the fact of destruction – developments such as a divorce and property allocation – may so bring matters about that the culpable spouse receives no benefit from his act of arson.” *Id.* at 1366-67.

In 1992, the Fifth Circuit extended the holding in *Norman* to bar recovery of the innocent spouse even in the face of a subsequent divorce. *Webster v. State Farm Fire & Casualty*, 953 F.2d 222 (5<sup>th</sup> Cir. 1992).

The *Webster* result was rejected by one court in *Travelers Companies v. Wolfe*, 838 S.W.2d 708, 712 (Tex. App. – Amarillo 1992, no writ) and followed by another in *Chubb Lloyds Insurance Co. v. Kizer*, 943 S.W.2d 946, 952 (Tex. App. – Ft. Worth 1997, writ denied), setting the stage for the Texas Supreme Court to resolve the issue in *Texas Farmers Insurance Co. v. Murphy*, *supra*. The essential holding of *Murphy* is that the Court wanted to answer these questions on policy language grounds, not public policy grounds, a decision with ramifications far beyond the innocent spouse issue itself.

The *Murphy* case concerned Daisy Murphy's ability to recover insurance proceeds for a fire set by her husband Robert to their home and contents. After the fire, Daisy filed for divorce and obtained a partition agreement of any insurance proceeds on March 8, 1996. The insurance trial began March 12, 1996, resulting in a verdict that Robert set the fire but that Daisy was innocent of any prior knowledge or complicity in the arson. The divorce became final on October 11, 1996. The trial court entered a take nothing on October 17, 1996, as to both Murphys based on the jury finding that Robert set the fire.

The Texas Supreme Court was clearly troubled by the public policy implications of the case. The Court reviewed *Norman*, *Webster*, *Wolfe* and *Chubb*, and then stated:

“The foregoing cases share a common shortcoming. They all focus on conflicting public policy considerations without first evaluating the contract language. Although *Kulubis* may not make it clear, a court should not decide the question of public policy without first defining the contractual rights of the parties under the policy.”

*Murphy*, 996 S.W.2d at 878.

Interestingly, the Court then proceeded to ignore the policy language, holding that Farmers failed to plead and prove its affirmative defense of the policy exclusion, in that Farmers did not argue the policy exclusion as a ground for relief to the trial court or the court of appeals. Thus, the court held that public policy alone did not bar Daisy's recovery and that Farmers had waived its right to rely on the policy itself.

A careful reading of *Murphy* is essential. The Court is clearly saying it is willing to enforce the policy exclusions as written. This is a trend that has continued in other areas of the law: insurability of punitive damages, *Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653 (Tex. 2008); reimbursement after settlement, *Excess Underwriters at Lloyd's London v. Frank's Casing Crew & Rental Tools, Inc.*, 246 S.W.3d 42 (Tex. 2008); definition of occurrence, *One Beacon Ins. Co. v. Don's Bldg. Supply, Inc.*, 496 F.3d 361 (5<sup>th</sup> Cir. 2007); extent of liability coverage under a CGL, *Lamar Homes, Inc. v. Mid-Continent Casualty Co.*, 242 S.W.3d 1 (Tex. 2007).

As set forth above, the HO-W “Concealment or Fraud” provision states:

This policy is void as to you **and any other insured**, if you **or any other insured** under this policy has intentionally concealed or misrepresented any material fact or circumstance relating to his insurance, whether before or after a loss.

(HO-W, p.20, emphasis added)

Standard Homeowners Policy - Form B, the predecessor to the HO-W, does not include a clause barring or limiting recovery for losses intentionally caused by the insured. *Murphy*, 996 S.W.2d at 879. However, the court pointed out that the "Concealment or Fraud" provision of the HO-B would bar coverage for *all* insureds if *any one* of them commits fraud or intentionally conceals or misrepresents a material fact or circumstance. *Id.* (emphasis added). The clause the *Murphy* court considered is virtually identical to that in the HO-W. *Id.* *Murphy* clearly indicated that in the absence of waiver, this clause will be enforced.

More recently, the Amarillo Court of Appeals held that the same "Concealment and Fraud" provision considered in *Murphy* was not ambiguous, and the policy was void as to the innocent spouse because of the culpable spouse's conduct. *McEwin v. Allstate Texas Lloyds, supra.*

#### **E. Insanity.**

An interesting side issue is whether diminished mental capacity allows the insured to recover in avoidance to the public policy defense. The general rule, as stated above, is that intentional destruction of insured property by an insured does not ordinarily allow recovery, even though such a loss is not expressly excepted from the coverage of the policy. *Jones*, 250 S.W.2d at 282 citing 29 Am.Jur. p. 777, §1028 and authorities; 45 C.J.S., Insurance Section 822(a) p. 870, and authorities; see also *Greenfield, supra.* But there are no Texas cases addressing the issue of whether an otherwise voluntary act by an insane insured gives rise to recovery.

In Texas, it appears that if the insured's acts are voluntary and intentional and the resulting injury is the natural result of the act, an insurer is not liable for the resulting damage or injury, even though the insured did not intend the harmful result. *Argonaut Southwest Insurance Co. v. Maupin*, 500 S.W.2d 633 (Tex. 1973). If the injury is not what one would usually expect, an insurer remains liable on the policy. *State Farm Fire and Casualty Co., v. S.S. & G.W.*, 858 S.W.2d 374 (Tex. 1993).

Unfortunately, there are two Texas life insurance cases that reach opposite results. In *Simon v. Dibble*, 380 S.W.2d 898 (Tex. Civ. App. – San Antonio 1964, writ ref'd), the husband shot and killed his wife while he was insane. The Court of Appeals held that the husband could recover under the life insurance policy, both directly under the policy and through his wife's estate. The court ruled that since he was insane, the shooting could not be considered "willful." This is consistent with Texas' law of descent and distribution which adopts the public policy of disallowing inheritance by a person who kills his benefactor, but which allows inheritance in the case of insanity because the wrongdoer cannot form the necessary intent to bar his inheritance. See *Ovalle v. Ovalle*, 604 S.W.2d 526, 528 (Tex. Civ. App. – Waco 1980, no writ), *Simon v. Dibble*, 380 S.W.2d at 899.

The other case, not discussed in *Simon*, is *Republic Nat'l Life Ins. Co. v. Hamilton*, 373 S.W.2d 275 (Tex. Civ. App. – San Antonio 1963, writ ref'd n.r.e.). In *Republic*, the wife was seeking recovery under a life insurance policy in favor of her husband who allegedly had committed suicide. The policy in question was an accidental death policy. The court determined the husband had intentionally injected himself with heroin, which was a producing cause of his death. The court did not reach the issue of whether he intended to commit suicide. The court simply said that if he intended to inject himself with heroin, then his death was not an accident. The court hardly considered the wife's contention that he could not have intended to commit suicide because he was insane.

In another suicide case, *Aetna Life Insurance Company v. McLaughlin*, 380 S.W.2d 101 (Tex. 1964), the Texas Supreme Court held that if an insured committed an act which would be regarded as suicide in a sane person, the loss occasioned by that act would be excluded from coverage regardless of whether the insured was sane or insane or was capable of realizing that the act would cause death, and regardless of whether he was capable of entertaining an intention to kill himself. A crucial distinguishing factor in the *McLaughlin* case which was not discussed in *Hamilton*, and which is not involved in denial of arson claims based on public policy, was that "suicide, sane or insane" was expressly excluded from coverage in the life insurance policy in question. Texas only requires that the insured intend the act that results in suicide to be excluded from coverage. *Id.*

#### **F. Effect of Criminal Proceedings.**

Occasionally, in a fraud case, the claimant will have prevailed on criminal charges and will argue the carrier is bound by the criminal court finding. However, for *res judicata* to bar relitigation of a finding of a previous court, the same parties must have been involved in the previous litigation of the same issue. *McGuire v. Commercial Union Insurance Co. of New York*, 431 S.W.2d 347, 352 (Tex. 1968). A former judgment bars a second suit against all who were in "privity" with the parties to the first suit. *Getty Oil Co. v. Insurance Company of North American*, 845 S.W.2d 794 (Tex. 1992). To be in privity, a person must have had some control over the previous action or his interests represented by a party to the first action. *Id.* For collateral estoppel to bar re-litigation of an issue, a party must establish that "1) the facts sought to be litigated in the second action were fully and fairly litigated in the first action; 2) those facts were essential to the judgment to first action; and 3) the parties were cast as adversaries in the first action." *Sysco Food Service Inc. v. Trapnell*, 890 S.W.2d 796 (Tex. 1994), citing *Allen v. McCurry*, 449 U.S. 90, 94, 66 L.Ed.2d 308, 101 S.Ct. 411 (1980), *Hicks v. Quaker Oats Company*, 662 F.2d 1158, 1166 (5th Cir. 1981); *Eagle Properties, Ltd. v. Scharbauer*, 807 S.W.2d 714, 721 (Tex. 1990); *Tarter v. Metropolitan Savings and Loan Association*, 744 S.W.2d 926, 927 (Tex. 1988); *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex. 1984). For collateral estoppel to apply, it is not necessary that the parties in the second action be identical, but only that the party against whom collateral estoppel is asserted was a party or in privity with a party in the first action. *Id.*, citing *Eagle Properties*, 807 S.W.2d at 721; *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 363 (Tex. 1971). A determination of what constitutes "privity" requires careful examination into the circumstances of each case. *Id.* Privity is not established by the mere fact that persons may happen to be interested in the same question or in proving the same facts. *Id.*, citing *Coleman v. Bosworth*, 180 Iowa 975, 164 N.W. 238 (Iowa 1917).

Due process requires that collateral estoppel only operate against persons whose asserted interests were actually and adequately represented in the prior trial. *Id.*, citing Restatements of Judgments §84 (1942).

Given the different considerations between punishment (the state) and compensation (insurance), as well as the different burdens of proof between civil and criminal, an insurer should not be estopped from presenting its defense of fraud by the lack of a criminal conviction.

More commonly, the insured will try to bolster her argument by trying to introduce evidence she was never charged with a crime at all. Admission of such evidence is incurable error. See *Munoz v. State Farm Lloyds*, 522 F.3d 568 (5<sup>th</sup> Cir. 2008).

#### **G. Duties After Loss.**

Even in cases where a loss occurred and the carrier cannot establish fraud, the claim may nevertheless remain unpayable. As a condition to coverage under most policies, the insured has to comply with certain duties. For example, the HO-W provides:

#### **“SECTION I – CONDITIONS**

**2. Your Duties After Loss.** After a loss to which this insurance may apply, you shall see that the following duties are performed:

- ...c. prepare an inventory of damaged or stolen personal property. Show in detail the quantity, description, age, replacement cost and amount of loss. Attach to the inventory all bills, receipts and related documents that substantiate the figures in the inventory.
- d. as often as we reasonably require:
  - ...(2) provide us with records and documents we request and permit us to make copies;
  - (3) submit to and subscribe, while not in the presence of any other **insured**:
    - (a) statements; and
    - (b) examinations under oath....”.

(HO-W p. 13)

Similarly, the PAP requires the following:

## “GENERAL CONDITIONS

**8. Examination Under Oath.** You agree:

- ( a) to be examined under oath...
- ( d) to produce such records as we may need to verify the claim and its amount; and to permit copies of such records to be made if needed.”.

(PAP p. 3)

A Standard Commercial Policy requires:

**3. Duties in the Event of Loss.** You must see that the following are done in the event of loss to covered property:

- ( e) at our request, give us complete inventories of the damaged and undamaged property. Include quantities, costs, values and amount of loss claimed;
- ( f) permit us to inspect the property and records proving the loss;
- ( g) if requested, permit us to question you under oath at such times as may be reasonably required about any matter relating to this insurance or your claim, including your books and records. In such event, your answers must be signed;
- ( h) send us a signed, sworn statement of loss containing the information we request to settle the claim. You must do this within 60 days after our request. We will supply you with the necessary forms;
- ( i) cooperate with us in the investigation or settlement of the claim.”.

(Business Policy) Interesting distinctions between these duties include that under the HO-W and the business policy, the insured is required to give multiple examination under oath “as often as reasonably required”. Under the PAP, there is some uncertainty whether multiple EUOs can be required. Additionally, regarding requests for records, the HO-W imposes the same “reasonableness” requirement on the insurer as it does on EUOs. But the PAP merely says the policyholder agrees “to produce such records as we may need to verify.” There are no Texas cases explaining the difference between a “reasonable request” for records and records “we may need,” but the different language does suggest that a different standard might apply.

One court has held that the insurer does not need to justify its demand for the examination under oath. *Trahan v. Fire Ins. Exchange*, 179 S.W.3d 669 (Tex. App. – Beaumont, 2005, no pet.) In a case that predated the HO-W, the Houston Court held that the insurer could require separate examinations under oath, even in the absence of policy language specifically authorizing it to do so. *Lidawi v.*

*Progressive County Mutual Ins. Co.*, 112 S.W.3d 725 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2003, no pet.)

Note, however, that the remedies available to the carrier appear to vary depending on which clause is involved. An insured's failure to timely submit a proof of loss can bar recovery. *American Teacher's Life Ins. Co. v. Brugette*, 728 S.W.2d 763 (Tex. 1987). See also, *Griggs v. State Farm Lloyds*, 181 F.3d 694 (5<sup>th</sup> Cir. 1999) (Inventory and documentation are in the nature of a proof of loss and are each independent conditions precedent to recovery). *Griggs* is particularly instructive because it is a summary judgment case. The court held there was a fact question as to whether the insured had submitted a "Proof of Loss;" however, the insured failed to provide the inventory and supporting documentation. The Court held that failure was fatal to the claim.

An insured's failure to submit to an examination under oath has been held to be grounds for abatement, not an absolute bar. *State Farm General Ins. Co. v. Lawlis*, 773 S.W.2d 948 (Tex. App. – Beaumont 1989, no writ). Submitting to an examination under oath is such a vital requirement of the policy that refusal to do so requires abatement of a lawsuit on the policy. *Humphrey v. National Fire Ins. Co. of Hartford Conn.*, 231 S.W. 750 (Tex. Comm'n App. 1921, judgment adopted). The policy provision authorizing an examination under oath is such a material provision that if it "were breached, the insurer would be deprived of a valuable right for which it had contracted." *Philadelphia Underwriters' Agency of Fire Ins. Ass'n of Philadelphia v. Driggers*, 238 S.W. 633, 111 Tex. 392 (1922). Interestingly, the examination under oath requirement has the same condition precedent language as the proof of loss, raising the question of why failing to provide an examination under oath should not also be a bar. One court has held that it is. *Perrotta v. Farmers Insurance Exchange*, 47 S.W.3d 569 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2001, no writ).

## II. INSURANCE COMPANY PARAMETERS

Armed with the knowledge of the concealment or fraud language, you take the examination under oath of the insureds in an arson claim. The evidence linking the insureds to the fire is not strong, but you have compelling evidence that one of the insureds lied about two issues: how much he paid for the house that burned, and where he was at the time of the fire. Safe to deny the claim? Not so fast. Welcome to the world of the Texas anti-technicality statute.

The arson facts in the preceding paragraph are taken from an actual case: *Aetna Casualty & Surety Co. v. Guynes*, 713 F.2d 1187 (5<sup>th</sup> Cir. 1983). In affirming an instructed verdict in favor of the insureds on the misrepresentation issue, the Fifth Circuit focused on what was then Article 21.19 of the Texas Insurance Code and held that the statute barred a strict enforcement of the concealment or fraud provision. Other cases applying the statute in a similar fashion are: *McCombs v. Travelers*, Case No. A-06-CA-507-55 in the United States District Court for the Western District of Texas, entered June 21, 2007; and *Stokes v. State Farm Lloyds Inc.*, Case No. 14-95-01094-CV, 1997 WL 96608 1997 Tex. App. LEXIS 1079 (Tex. App. – Houston [14<sup>th</sup> Dist.], writ denied).

How far does the statute reach? It's not clear.

**A. Anti-Technicality Issues.**

There are three sections of the current Texas Insurance Code which are sometimes referred to as "anti-technicality statutes." These statutes are §705.003, §705.004, and §862.054. Each statute is discussed individually below:

**1. Misrepresentations in Proofs of Loss or Death (Tex. Ins. Code §705.003)<sup>1/</sup>**

**§705.003 Policy Provisions: Misrepresentation in Proof of Loss or Death**

- (a) An insurance policy provision that states that a misrepresentation, including a false statement, made in a proof of loss or death makes the policy void or voidable:
  - (1) has no effect; and
  - (2) is not a defense in a suit brought on the policy.
- (b) Subsection (a) does not apply if it is shown at trial that the misrepresentation:
  - (1) was fraudulently made;
  - (2) misrepresented a fact material to the question of the insurer's liability under the policy; and
  - (3) misled the insurer and caused the insurer to waive or lose a valid defense to the policy. (Acts 2003, Leg., ch. 1274, effective April 1, 2005).

**a. Common Law.**

A historical review of Texas law regarding the effect of an insured's misrepresentations or false swearing in proofs of loss shows that insurers included forfeiture clauses for fraud, misrepresentation and false swearing in their policies long before the State of Texas had a Board of Insurance charged

---

<sup>1/</sup>The first "anti-technicality statute" similar to the current version was enacted in approximately 1903. Since then, it has been codified under several different cites. See *Gallagher v. Fire Ins. Exchange*, 90 S.W.2d 833, (Tex. App. – San Antonio, 1998), on remand from *Gallagher v. Fire Ins. Exchange*, 950 S.W.2d 370 (Tex. 1997, reversing *Gallagher v. Fire Ins. Exchange*, 950 S.W.2d 379 (Tex. App. – San Antonio, 1997, writ granted)). In order to distinguish current Ins. Code §705.003 and its predecessors from the other two "anti-technicality statutes" discussed in this paper, §705.003 and its predecessors will be referred to as "anti-technicality statute(s) regarding when an insurer can void a policy or avoid a claim based on false swearing, misrepresentations or fraud by the insured."

with approving policy forms.<sup>2/</sup> One of the earliest reported cases involving such a forfeiture clause<sup>3/</sup> was *Lion Fire Ins. Co. v. Starr*, 12 S.W. 45 (Tex. 1888). The Concealment or Fraud forfeiture clause in that case provided: “Any fraud, or attempt at fraud, or any false swearing, on the part of the assured, shall cause a forfeiture of all claims under this policy.” *Id.* Other early cases contained similar clauses: “The entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof...” *Phoenix Ins. Co. v. Swann*, 41 S.W. 519 (Tex. Civ. App. 1897); and “This entire policy, unless otherwise provided by agreement indorsed herein or added hereto, shall be void in case of any fraud or false swearing by the insured touching any matter relating to this insurance, or the subject thereof, whether before or after a loss.” *Phoenix Ins. Co. v. Shearman*, 43 S.W. 930 (Tex. Civ. App. 1897). These early policy provisions were not very different than Concealment or Fraud forfeiture language we find in present-day policies.

At common law, Texas courts seemed to recognize the insurer’s contractual right - and practical need - to obtain truthful information from the insured in proof of loss. For example, in *Starr*, the Texas Supreme Court relied on the U.S. Supreme Court case *Clafin v. Commonwealth Ins. Co.*, 110 U.S. 81, 3 S.Ct. 507 (1884), a Minnesota insurance case dealing with a Concealment or Fraud forfeiture clause triggered by the insured’s false swearing. In *Clafin*, the insured’s representative, Murphy, was found to have made false statements in his examination under oath. The stated purpose of those statements, however, was not to deceive the insurer, but to protect his reputation in the community as he had made contrary statements to a business associate days prior to the loss. Despite Murphy’s lack of intent to deceive the insurer, the Supreme Court stated:

“ it is no palliation of the fraud that Murphy did not mean thereby to prejudice [the insurer], but merely to promote his own personal interest in a matter not involved in the contract with them. By that contract the companies were entitled to know from him all the circumstances of his purchase of the property insured, including the amount of the price paid and in what manner payment was made; and false statements, willfully made under oath, intended to conceal the truth on these points, constituted an attempted fraud by false swearing which was a breach of the conditions of the policy, and constituted a bar to the recovery of the insurance.”  
*Clafin*, 110 U.S. at 97.

Similarly, in *Starr*, the Texas Supreme Court found that when the insurer raised the Concealment or Fraud forfeiture clause in its pleadings and there was evidence to support the allegation, the insurer was entitled to a jury question as whether the insured committed any fraud or false swearing – regardless of the truthfulness of the rest of the insured’s testimony. *Starr*, 12 S.W. at 46.

---

<sup>2/</sup>The Texas Legislature created the Insurance Board in 1910. See *Fidelity-Phenix Fire Ins. Co. v. Sadau*, 167 S.W. 334, 336 (Tex. Civ. App. – Amarillo 1914, no writ).

<sup>3/</sup>Referred to generally throughout this section as a “Concealment or Fraud forfeiture clause”.

Despite acknowledging the insurer's right and dependence on truthful information from the insured in proof of loss, the *Starr* court nonetheless began a subtle trend toward tightening the scope of the Concealment or Fraud forfeiture clauses and raising the elements of proof necessary for an insurer to avoid a claim under these provisions. In *Starr*, while acknowledging the insurer's right to avoid policy obligations if the insured committed false swearing, the court stressed that in order to cause a forfeiture of all claims under the policy, the fraud, or attempt at fraud, or false swearing, must have been willful, and not the result of inadvertence or mistake. *Id.* A few years later, in *Swann*, the Court of Civil Appeals held the insured was not required to specially plead that his misstatements to the insurer were not willful in order to offer evidence that the misstatements were inadvertent or the result of a mistake. *Swann*, 41 S.W. at 520. In *Shearman*, a case where a jury found the insured did not submit an exaggerated proof of loss and in which the jury found the amount of personal property destroyed in the fire greatly exceeded the policy's contents limits, the court stated: "Something more than swearing to what is not true must be shown, to make out a case of false swearing, within the meaning of the policy; and this distinction the charge recognized, and in effect stated, at least sufficiently with reference to the facts of this case." *Shearman*, 43 S.W. at 932.

**b. Interpretation of the Statute (historical development).**

When the Texas Legislature adopted the first insurance statutes, it included the anti-technicality statute regarding when an insurer can void a policy or avoid a claim based on false swearing, misrepresentations or fraud by the insured. Tex. Rev. Stats. Art. 5046 (1903). This statute added additional requirements for the insurer to plead and prove to be able to void policies or avoid paying claims when the insured committed fraud or false swearing in proofs of loss. For example, one of the earliest versions of the "anti-technicality statute" addressing when an insurer can void a policy or avoid a claim based on false swearing, misrepresentations or fraud by the insured provided:

"Any provision in any contract or policy of insurance issued or contracted for in this state, which provides that the same shall be void or voidable, if any misrepresentations or false statement be made in proofs of loss or of death, as the case may be, shall be of no effect, and shall not constitute any defense to any suit brought upon such contract or policy, unless it be shown upon the trial of such suit that the false statement made in such proofs of loss or death was fraudulently made, and misrepresented a fact material to the question of the liability of the insurance company upon the contract of insurance sued on, and that the insurance company was thereby misled, and caused to waive or lose some valid defense to the policy." Tex. Rev. Stats. Art. 4949 (1911).

Thus, it has been the requirement in Texas for over one hundred years that to void a policy or avoid a claim based on the insured's fraudulent post-loss behavior, the insurer must show: 1) false statement; 2) fraudulently made; 3) about a material fact regarding the insurance company's liability; 4) the insurance company was misled; and 5) the insurance company lost or waived a valid defense to the policy. The insurance statutes have been recodified several times, but the requirements of the

“anti-technicality statutes regarding when an insurer can void a policy or avoid a claim based on false swearing, misrepresentations or fraud by the insured have not changed in any significant way.

Despite these limitations, insurers have consistently included Concealment or Fraud forfeiture clauses in their property insurance policies. Also despite these increased requirements, insurers have occasionally stood on the Concealment or Fraud forfeiture clauses in order to void policies or avoid claims. In most of the reported opinions, the insurer has failed: either by failing to plead and prove all elements of the anti-technicality statute (particularly that it was misled by the fraud or caused to lose a valid policy defense) or because it attempted to avoid the statutory requirements by arguing the statute did not apply to certain types of fraud or false swearing (such as false swearing in post suit affidavits, in examinations under oath or in other parts of its claim investigation).<sup>4/</sup> See *Camden Fire Ins. Assoc. of Camden, N.J. v. Puett*, 164 S.W. 418 (Tex. Civ. App. – Ft. Worth 1914)(A possibly intentional overvaluation of the cost of a stove in the insured’s proof of loss did not affect the insurer’s liability on the contract when the rest of the unchallenged evidence supported a policy limits recovery.); *Fidelity-Phenix Fire Ins. Co. v. Sadau*, 167 S.W. 334 (Tex. Civ. App. – Amarillo 1914, no writ)<sup>5/</sup> (The insurer was not entitled to a jury question on the Concealment or Fraud forfeiture clause because it did not plead and prove it had been misled or lost a policy defense); *Fireman’s Fund Ins. Co. v. Reynolds*, 85 S.W.2d 826 (Tex. Civ. App. – Waco 1935, writ ref’d)(Although the insured testified falsely under oath regarding her claim, the false testimony was “palpably contrary” to the insured’s interest; therefore, it could not reasonably have been considered to have been knowingly or fraudulently made and the insurer could not show it had been misled or caused to lose a valid defense as the result of it); *Vernon v. Aetna Ins. Co.*, 301 F.2d 86 (5<sup>th</sup> Cir.1962, cert. denied 371 U.S. 819, 83 S.Ct. 33 (1962))(The anti-technicality statute regarding when an insurer can void a policy or avoid a claim based on false swearing, misrepresentations or fraud by the insured does not apply to an insured’s false swearing during suit after denial. However, Texas public policy is “flatly opposed” to the use of forfeiture clauses to avoid the obligations of insurance contracts solely upon a showing that the insured has made a false statement with respect to the insurance; therefore, an insurer cannot avoid a claim based on the insured’s false swearing during suit which is of less significant consequence than is false swearing during claim investigation.); *U.S. Fire Ins. Co. v. Skatell*, 596 S.W.2d 166 (Tex. Civ. App. – Texarkana 1980, writ ref’d n.r.e.)(The “anti-technicality statute” does apply to insured’s statements in examinations under oath; therefore, even when the insured’s misrepresentations in the EUO are material to the risk, the insurer must

---

4/This argument is analogous to a successful argument insurers made regarding one of the other “anti-technicality” statutes, current Ins. Code §862.054 and its predecessors (regarding forfeiture of policies based on the insured’s breach of policy terms – discussed below). While the argument was generally successful regarding §862.054, the courts have not adopted this reasoning in §705.003 cases.

5/*Sadau* is also interesting because the court believed it was the first court in Texas and in the rest of the U.S. to interpret the “anti-technicality statute” relating to misrepresentations of an insured in proof of loss. The court did not specifically address the statutory elements nor offer any meaningful definition of the added requirements. It simply noted art. 4949 “place[d] a greater burden upon insurance companies, in order to avoid insurance policies in the event of false swearing, than was formerly placed thereon by the courts.” *Sadau* 167 S.W. at 335.

plead and prove all of the statute's elements in order to void the policy or avoid a claim under it.); *Aetna Casualty & Surety Co. v. Guynes*, 713 F.2d 1187 (5<sup>th</sup> Cir. 1983)(Statements made to the insurer during its post-loss claim investigation fall under the requirements of the anti-technicality statute(s) regarding when an insurer can void a policy or avoid a claim based on false swearing, misrepresentations or fraud by the insured. But even with a jury finding that the insured made material misrepresentations regarding the claim during the post-loss investigation, the insurer could not avoid liability for the claim under the policy's Concealment or Fraud forfeiture clause without pleading, proving and obtaining jury findings supporting all elements of the anti-technicality statute regarding when an insurer can void a policy or avoid a claim based on false swearing, misrepresentations or fraud by the insured – including that it was purposely and significantly hurt by the insured's false statements.); *Delta Lloyds Ins. Co. v. Williamson*, 720 S.W.2d 732 (Tex. App. – Beaumont 1986, no writ)(Before Delta Lloyds could void Williamson's policy, it had to prove not only that his misrepresentation of loss were material to its liability under the policy, but also that it was misled by that overvaluation and waived or lost a valid defense as a result.).

### c. Recent Statutory Interpretation.

In 1983, in *Guynes*, the 5<sup>th</sup> Circuit began the courts' defining "misled the insurer and caused the insurer to waive or lose a valid defense to the policy" requirement in the anti-technicality statute regarding when an insurer can void a policy or avoid a claim based on false swearing, misrepresentations or fraud by the insured.<sup>6/</sup> It has only been in the last 10 - 15 years, though, that Texas courts have begun grappling with these crucial provisions' meanings. In 1997, in an unreported opinion from the Houston [14<sup>th</sup> Dist.] Court of Appeals, the court considered the proper construction of the phrase "loss of an otherwise valid defense" in the context of the anti-technicality statute regarding when an insurer can void a policy or avoid a claim based on false swearing, misrepresentations or fraud by the insured. *Stokes v. State Farm Lloyds Inc.*, 1997 WL 96608 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1997, writ denied).

*Stokes* involved a fire insurance claim for a fire at Stokes' vacation home. The jury found Stokes did not commit arson, but he did make false representations to State Farm during its investigation. Based on these answers, the trial court entered judgment in favor of State Farm. The court of appeals reversed and remanded because there was no evidence that State Farm was caused to waive a valid defense. Focusing heavily on the jury's finding that Stokes had not set the fire, the court rejected State Farm's proposed interpretation of "loss of an otherwise valid defense" as meaning "that had Stokes been truthful, the valid defense of arson could have been established." The court rephrased State Farm's proposed definition as really being a complaint that the insurer "fail[ed] to win." *Stokes*, 1997 WL 96608. Instead, the Court defined "waive or lose a valid defense" as follows: "a defense is lost when it cannot be presented or litigated by the insurer. When the insurer tries the defensive issue before the jury and receives a submission of it, then the defense is not lost as a matter of law." *Id. citing Guynes, supra.*

---

<sup>6/</sup>The insurer must plead and prove that it was purposely and significantly hurt by the insureds' false statements.

*McEwin v. Allstate Texas Lloyds*, 118 S.W.3d 811 (Tex. App. – Amarillo 2003, no pet.) is the most recent case regarding whether an insurer can avoid liability on a policy under a Concealment or Fraud forfeiture clause in light of the anti-technicality statute regarding when an insurer can void a policy or avoid a claim based on false swearing, misrepresentations or fraud by the insured.<sup>7/</sup> *McEwin* is the only reported case on this issue supporting the insurer's denial of liability for fraud. It also goes further than any other Texas case in identifying what kinds of specific proof the insurer must present in order to deny a claim based on the insured's post-loss fraud.

*McEwin* was an appeal of a summary judgment in favor of Allstate based on the James McEwin's post-loss fraud and concealment. After a fire destroyed their home, James and Kathy McEwin filed a claim with Allstate under their homeowners policy. Allstate initiated an investigation into the claim, including hiring an investigator to determine the cause of the fire, hiring attorneys to take examinations under oath from the McEwins, and incurring additional investigation expenses. Allstate advanced \$1,000 to the McEwins on contents coverage and \$10,648 for additional living expenses. Allstate also paid Security State Bank its mortgage balance of \$37,725.09. During examinations under oath, both McEwins denied any knowledge of the cause of the fire. It was later discovered James was involved in burning the house and he was convicted of arson. There was no evidence that Kathy knew of James' involvement with the fire pre- or post-loss, including when the McEwins filed their claim and gave their examinations under oath.<sup>8/</sup>

In upholding the trial court's grant of summary judgment, the Amarillo Court of Appeals analyzed the traditional elements of fraud and noted that fraud can take on many forms and is not subject to one definition. However, the gist of fraud is successfully using cunning, deception or artifice to cheat another to the other's injury. *Id.* at 816. With evidence of the insured's involvement in causing the loss, his filing a claim with Allstate when he knew the loss was fraudulent (for the purpose of Allstate acting on his representations), Allstate having acted on the insured's representation that an accidental loss occurred and then making payments and incurring expenses, the court found Allstate met its burden of proving James' actions with regard to the insurance were fraudulent.

Having found fraud, the Court determined the Concealment or Fraud forfeiture clause would void the policy unless art. 21.19 (the anti-technicality statute regarding when an insurer can void a policy or avoid a claim based on false swearing, misrepresentations or fraud by the insured) made the clause of no effect. The court did not address whether Allstate's evidence of the McEwins' post-loss communications in proof of loss (including the examination under oath) met the requirements of art. 21.19. Instead, the court determined that James' fraud in perpetrating the loss and in filing a claim on a loss he knew to be fraudulent fell outside the scope of article 21.19. James' deceptive actions in (1) causing the house to be intentionally burned, and (2) filing a loss report without

---

<sup>7/</sup>Tex. Ins. Code art. 21.19 at the time

<sup>8/</sup>Kathy was determined to be an "innocent co-insured," but her claims were also barred per the Concealment or Fraud forfeiture provision based on James' conduct. *Id.*

disclosing his complicity in the fire with the resulting expense and detriment to Allstate, were a fraud on Allstate without regard to his later false statements in examinations under oath. *Id.* at 817. Since art. 21.19 did not apply, Allstate could rely on the Concealment and Fraud forfeiture provision and the policy was void.

**d. Pending.**

At the time of this writing, *Temacharoen v. United Fire Lloyds*, 11-08-00031-CV, is pending before the Eastland Court of Appeals on appeal from the 136<sup>th</sup> Judicial District Court, Jefferson County, Texas. In *Temacharoen*, the insurer argues that “outright fraud,” including manufacturing of receipts, does not fall under Ins. Code §705.003. United Fire Lloyds claims the insured’s act of submitting false receipts and invoices for reimbursement when no underlying payment was made, is obviously an act that formed the basis of the claim for reimbursement and should be considered outside of the scope of a statement made in a “proof of loss.”

**2. Misrepresentations in Policy Applications (§705.004)**

**§705.004 Policy Provision: Misrepresentation in Policy Application.**

- (a) An insurance policy provision that states false statements made in the application for the policy or in the policy make the policy void or voidable:
  - (1) has not effect; and
  - (2) is not a defense in a suit brought on the policy.
- (b) Subsection (a) does not apply if it is shown at trial that the matter misrepresented:
  - (1) was material to the risk; or
  - (2) contributed to the contingency or event on which the policy became due and payable.
- (c) It is a question of fact whether a misrepresentation made in the application for the policy or in the policy itself was material to the risk or contributed to the contingency or event on which the policy became due and payable.  
(Acts 2003, Leg., ch. 1274, effective April 1, 2005)

As with the development of Texas law regarding the anti-technicality statute regarding when an insurer can void a policy or avoid a claim based on false swearing, misrepresentations or fraud by the insured, at common law, the courts were less tolerant of misrepresentations made by insureds in policy applications than the legislature turned out to be. Prior to enactment of the anti-technicality statute regarding misrepresentations by policyholders in policy applications,<sup>9/</sup> Texas common law provided: “false representations in an application for insurance, which the applicant warrants to be

---

<sup>9/</sup>In order to distinguish current Ins. Code §705.004 and its predecessors from the other two “anti-technicality statutes” discussed in this paper, §705.004 and its predecessors will be referred to as “anti-technicality statute(s) regarding misrepresentations by policyholders in policy applications.”

true, and which are relied upon by the company, will avoid the policy without reference to the materiality of such representations." *Texas State Mut. Fire Ins. Co v. Richbourg*, 257 S.W. 1089 (Tex. Com. App., 1924). Also, "it is...established law..., that, where false statements and representations, which are warranted to be true, are written into an application for insurance by the agent, and the applicant knows or has the means of knowing that such statements are contained in the application, and are not true, the insurance company is not precluded from avoiding the policy where it has been conditioned upon such false representations." *Id.* at 1091 (citing *Equitable Life Assr. Soc. v. Hazlewood*, 75 Tex. 338, 12 S.W. 621, 7 L. R. A. 217, 16 Am. St. Rep. 893 (1889); *Fitzmaurice v. Mutual Life Ins. Co. of New York*, 84 Tex. 61, 19 S. W. 301 (Tex. 1892); *Aetna Ins. Co. v. Holcomb*, 89 Tex. 404, 34 S. W. 915 (Tex. 1896); *Sovereign Camp W. O. W., v. Lillard* 174 S. W. 619 (Tex. Civ. App. 1914, writ denied); *Supreme Lodge, K. of H. v. Payne*, 101 Tex. 449, 108 S. W. 1160 (Tex. 1908); *Modern Woodmen v. Angle*, 127 Mo. App. 94, 104 S. W. 297 (Mo. App. 1907); *Insurance Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934 (1886); *Insurance Co. v. Hilton-Green*, 241 U. S. 613, 36 Sup. Ct. 676, 60 L. Ed. 1202 (1916); *Layton v. N. Y. Life Ins. Co.*, 55 Cal. App. 202, 202 Pac. 958 (Cal. App. [1<sup>st</sup> Dist.] 1921); *Goldstone v. Life & Trust Co.*, 33 Cal. App. 119, 164 Pac. 416 (Cal. App. [3<sup>rd</sup> Dist.] 1917); *Life Ins. Co. v. Freedman*, 159 Mich. 114, 123 N. W. 547 (Mich. 1909).

While over time Texas courts have tightened their standards for allowing insurers to avoid policy obligations based on misrepresentations by insureds in policy applications, their application of these types of anti-technicality statutes has not been as onerous to forfeiture as their treatment of Ins. Code §705.003 and its predecessors has been. For example, in 1970, the Texas Supreme Court stated in *Odom v. Ins. Co. Of Pennsylvania*, 455 S.W.2d 195(Tex. 1970), "the rule is well recognized that where, as here, an application for insurance is attached to and made a part of the policy and is accepted and retained by the insured, the insured is conclusively presumed to have knowledge of its contents and to have ratified any false statements therein." *Fitzmaurice v. Mutual Life Ins. Co. of New York*, 84 Tex. 61, 19 S.W. 301 (Tex. 1892); *Sovereign Camp Woodmen of the World v. Lillard*, 174 S.W. 619 (Tex.Civ.App.1914, writ denied); *Texas State Mutual Fire Ins. Co. v. Richbourg*, 257 S.W. 1089 (Tex.Comm.App.1924); *Willis v. Texas Prudential Ins. Co.*, 101 S.W.2d 857 (Tex.Civ.App.1937, writ denied); and *Lindley v. Franklin Fire Ins. Co.*, 137 Tex. 196, 152 S.W.2d 1109 (Tex.Comm.App.1941).

However, in *Washington v. the Reliable Life Insurance Company*, 581 S.W.2d 153 (Tex. 1979), the Texas Supreme Court distinguished the facts from those in *Odom* by characterizing the misrepresentations made in the application in *Odom* (which dealt with the insured's driving record on an application for auto insurance) as "warranties," whereas it found the misrepresentations on the *Washington* application (which dealt with the insured's medical history on a life insurance policy) as "representations." The 5<sup>th</sup> Circuit has written on its interpretation of the *Washington* decision: "*Washington* appears to establish the rule that intent to deceive or induce issuance of an insurance policy can never be proved as a matter of law to establish the misrepresentation defense in the absence of a warranty that the facts contained in the application are true or evidence of collusion between the applicant and the insurance agent." *Lee v. National Life Assur. Co. of Canada*, 632 F.2d

524 (5th Cir.1980). Thereafter, the Texas Supreme Court clarified “an insured's intent to deceive is required for an insurer to cancel an individual health insurance policy within two years of the date of its issuance on the grounds of a misrepresentation in the application.” *Union Bankers Ins. Co. v. Shelton*, 889 S.W.2d 278 (Tex. 1994).

*Mayer v. Massachusetts Mut. Life Ins. Co.*, 608 S.W.2d 612 (Tex.1980) confirmed the elements an insurer must plead and prove before being able to avoid a policy based on the insured's misrepresentations in a policy application: (1) the making of the 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 the same; and (5) the materiality of the representation. *Mayer*, 608 S.W.2d at 616. “[T]he utterance of a known false statement, made with intent to induce action ... is equivalent to an intent to deceive.” *Shelton*, 889 S.W.2d 278 at, fn 7 (citing *Allen v. American Nat'l Ins. Co.*, 380 S.W.2d 604, 608 (Tex.1964) (citing *Texas Industrial Trust, Inc. v. Lusk*, 312 S.W.2d 324 (Tex.Civ.App.--San Antonio 1958, writ ref'd)).

Insurers who identify misrepresentations in policy applications must be cautious that all elements of Ins. Code §705.004 are addressed before cancelling a policy based on those misrepresentations. A duty of good faith and fair dealing potentially applies to an insured's mid-term cancellation of insurance policies. *Id.* Therefore, an insurer may breach the duty of good faith and fair dealing if it cancels a policy without a reasonable basis.

### 3. **Breach of Policy Warranties, Conditions or Provisions by Insured (§862.054):**

#### **§862.054. Fire Insurance: Breach by Insured; Personal Property Coverage**

Unless the breach or violation contributed to cause the destruction of the property, a breach or violation by the insured of a warranty, condition, or provision of a fire insurance policy or contract of insurance on personal property, or of an application for the policy or contract:

- (1) does not render the policy or contract void; and
- (2) is not a defense to a suit for loss.

Today's Ins. Code §862.054 is a successor to Gen. Laws 1913, 33d Leg. Sayles' Civ. Stats. art. 4784a. Article 4784a was enacted to curtail what the legislature declared an “emergency” situation in the insurance industry. In that statute the legislature stated its purpose:

“...to prevent fire insurance companies from avoiding liability for loss and damage to personal property under technical and immaterial provisions of the policy or contract of insurance where the act breaching such provision has not contributed to bring about the loss...” (Tex. Rev. Civ. Stats. Art. 4874a (repealed)).

However, since the enactment of art. 4874a, Texas courts have made it clear that not all fire policy property coverage provisions fall under its purview. See *McPherson v. Camden Fire Ins. Co.*, 222

S.W. 211 (Tex. Com. App. 1920, jdgmt adopted); *Humphrey v. Nat'l Fire Ins. Co. of Hartford, Conn.*, 231 S.W. 750 (Tex. Comm. App. 1921, jdgmt adopted) ; *Texas Farm Bureau Mut. Ins. Co. v. Carnes*, 416 S.W.2d 863 (Tex. Civ. App. – Corpus Christi 1967, writ ref'd n.r.e.) . The statute only applies to policy provisions affecting the likelihood of a loss. If the policy provision being breached could affect the likelihood of risk, §862.054 applies and there must be a causal relationship between the breach and the loss. If the provision does not affect the likelihood of risk, then it does not fall within the realm of §862.054 and the statute does not prohibit the insurer from voiding the policy or denying the claim in the event of a breach. Thus, an insured's breach of a fire policy property coverage provision is only a basis for denial of a claim IF the breach COULD affect the likelihood of risk and DID, in fact, contribute to the loss. *Id.*<sup>10/</sup>

Policy provisions which have been found to fall within the scope of §862.054 or its predecessors, thus requiring the breach to have contributed to causing the loss are:

1. Provisions regarding territorial limits to coverage; *Carnes*, 416 S.W.2d at 867;
2. Vacancy clauses. *See Reynolds*, 85 S.W.2d at 826;
3. Provisions specifying the number of persons required to operate a vessel or machinery; *Perez v. Los Fresnos State Bank*, 512 S.W.2d 796 (Tex. Civ. App. – Corpus Christi 1974, writ ref'd n.r.e.);
4. Provisions of aviation insurance policies setting out inspection requirements for airplanes; *Puckett v. U.S. Fire Ins. Co.*, 678 S.W.2d 936 (Tex. 1984);
5. Provisions of aviation policies requiring minimum experience levels for pilots. *AIG Aviation (Texas) Inc. v. Holt Helicopters Inc.*, S.W.3d (Texas, January 11, 2008).

Policy provisions which have been found to be outside the scope of §862.054's predecessors<sup>11/</sup> are:

---

10/“Following the passage of [art. 4874a] there developed a marked split among the several courts of civil appeals as to its interpretation and applicability. At least three of the courts of civil appeals held that the act applied to all promissory warranties, conditions and agreements. On the other hand at least three other inter-mediate appellate courts reasoned that there seems to be a class of insurance policy clauses to which the application of the test of non-contribution to a loss (this being the only test set out by the Legislature in the Act) seemed illogical, since obviously the violation of some such clauses could never contribute to the loss. The Commission in the *McPherson* case acknowledges that the language in the body of the Act is broad enough to apply to all warranties, conditions and provisions. In order to justify holding that it does not apply to some clauses in the fire insurance policies, the Commission turns to the title of the Act wherein the phrase ‘immaterial provisions’ is found. This shows, the Commission reasons, that the Legislature did not intend to reach all provisions in the insurance policies. In other words, the court limited the application to that class of fire insurance policy provisions, the breach of which might have contributed to bring about a loss by fire, but which did not. If the cancellation clause in a policy was a material provision and the violation of which could not from the very nature of the provision contribute to bring about the destruction of the *prote Bank v. American Fire & Cas. Co.*, 198 F.2d 57 (5<sup>th</sup> Cir. 1952).

11/There are no Texas cases interpreting or applying §862.054 since it became effective in April, 2005, which have addressed whether the policy provision fell outside the scope of §862.054.

1. Policy requirement that the insured submit to an Examination Under Oath; *Humphrey*, 231 S.W. at 750. <sup>12/</sup>
2. The three fourths value clause; *See Carnes*, 416 S.W.2d. at 866 .
3. The co-insurance clause; *Id.*
4. The incumbrance clause; *Id.*
5. The “iron safe” or record warranty clause; *Id.*
6. Provisions against other, concurrent, or additional insurance; *Id.*
7. Provisions that require the insured to be the sole and unconditional owner; *Id.*
8. Representations to the effect that the insured has never been denied insurance; *Id.*
9. Representations that the insured property was fully paid for; *Id.*
10. Requirements that the insured furnish a certificate from a magistrate or notary public as part of proof of loss; *Id.*
11. Provisions or conditions that the policy shall be void if the insured, prior to a loss, is informed that foreclosure proceedings have been commenced; *Id.* And
12. Provisions that limit the time within which to commence suit to two years and a day after cause of action arose. *Holston v. Implement Dealers Mut. Fire Ins. Co.*, 206 F.2d 682, 685 (5<sup>th</sup> Cir. 1953)

Often, a case must be examined after a loss has occurred to determine whether the breach of a particular policy provision can be raised as a defense. One test that has been suggested as to the determination of whether the breached provision was material to the risk, is together or refuse to accept it unless it received a higher premium. *See St. Paul Fire & Marine Ins. Co. v. Huff*, 172 S.W. 755 (Tex. Civ. App. – 1915, no writ).

Finally, the practitioner should be familiar with the case of *PAJ, Inc. v. Hanover Ins. Co.*, 243 S.W.3d 630 (Tex. 2008). *PAJ* concerns a notice requirement, and whether failure to comply with the notice requirement bars coverage in the absence of prejudice. There is an extended discussion in the opinion as to whether the notice requirement is a condition precedent to coverage, and therefore a bar even in the absence of prejudice or a covenant. The majority appears to say both that the notice requirement is a covenant and that the court would require a showing of prejudice even if it were a condition. The ruling focuses on precedent set in *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691 (Tex. 1994) and on an insurance board order adopted in 1973 requiring a showing of prejudice in policies in effect at that time.

Most telling is this language which serves as a caution to being overly aggressive in asserting policy language:

---

<sup>12/</sup>The EUO requirement is a material one in an insurance contract. If breached, the insurer would be deprived of a valuable right for which it contracted. *Humphrey*, 231 S.W. at 751.

“Finally, and perhaps most disturbingly, the dissent’s analysis of the policy language would impose draconian consequences for even *de minimis* deviations from the duties the policy placed on insureds. The policy in this case requires, in the same section at issue, not only notice of suit “as soon as practicable,” but also that PAJ “immediately send ... copies of any demands, summonses or legal papers.” Thus, under the dissent’s construction, an insured’s failure to promptly forward a deposition notice or a certificate of conference would work a forfeiture of coverage, even when the insurer is not at all harmed.

*PAJ*, 243 S.W.3d at 636.

## **B. Other Legal Boundaries.**

An insurer commits a breach of the duty of good faith and fair dealing by “failing to attempt in good faith to effectuate a prompt, fair and equitable settlement of a claim with respect to which the insurer’s liability has become reasonably clear. *The Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48 (Tex. 1997). Breach of contract does not equal bad faith. *Lyons v. Millers Cas. Ins. Co. of Texas*, 866 S.W.2d 597 (Tex. 1993). An insurer’s liability under an insurance contract remains separate and distinct from the insurer’s liability for the tort of bad faith. An erroneous denial of a claim in and of itself is not bad faith. The focus is on the reasonableness of the insurer’s conduct in making the claim decision. If the insurer establishes a reasonable basis for its decision on the claim, then it cannot be liable for extra-contractual claims.

A *bona fide* controversy concerning a insurer’s liability is sufficient reason for an insurer to not pay a claim, and will not rise to the level of bad faith. *Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994), *National Union Fire Insurance Co. of Pittsburgh, PA v. Dominguez*, 873 S.W.2d 373 (Tex. 1994). Bad faith is not established when the trier of fact, with the benefit of hindsight, decides the insurer was simply wrong about the factual basis for its denial of a claim or about the proper construction of the insurance policy. *Emscor Manufacturing, Inc. v. Alliance Insurance Group*, 879 S.W.2d 894, 910 (Tex.App. – Houston [14th Dist.] 1994, writ denied) (citing *Moriel, supra*). When there is a *bona fide* controversy, the insurer has a right to have its day in court without facing a bad faith claim. *Pioneer Chlor Alkali Co., Inc. v. Royal Indemnity Co.*, 879 S.W.2d 920, 939 (Tex.App. – Houston [14th Dist.] 1994, no writ) (citing *St. Paul Guardian Life Insurance Co. v. Luker*, 801 S.W.2d 614, 621-22 (Tex.App. – Texarkana 1990, no writ). In other words, the determination of whether an insurer breached its duty of good faith and fair dealing should not be based on the insurer’s success or failure in court on liability for the claim, but on whether the insurer’s actions at the time of denial were reasonable. *Id.*

There is no bad faith if a carrier makes the right claim decision for the wrong reasons. *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338 (Tex. 1995). There can be no claim for bad faith when an insurer has promptly denied a claim that is in fact not covered. *Id.* Therefore, an insurer cannot be held liable for breaching the duty of good faith and fair dealing by denying a claim for the wrong reasons when proper grounds for denial exist.

### **C. *Caveat Insurer.***

Insurers should not conduct an outcome-oriented investigation. *State Farm Fire & Cas. Co. v. Simmons*, 963 S.W.2d 42 (Tex. 1998). An insurer cannot insulate itself from bad faith liability by investigating a claim in a manner calculated to construct a pretextual or outcome-oriented basis for denial of a claim. Insurers must perform objective investigations designed to discover objective facts, not outcome-oriented investigations designed to defeat coverage. Evidence of an outcome-oriented investigation is not conclusive, but is evidence that will support a jury finding of bad faith.

Insurers should be careful when hiring an expert. *State Farm Lloyds v. Nicolau*, 951 S.W.2d 444 (Tex. 1997). An insurer's reliance upon an expert's report, standing alone, will not necessarily shield the carrier if there is evidence that the report was not objectively prepared or the insurer's reliance on the report was unreasonable. In this case, the court held there was some evidence from which the jury could have inferred that the expert's reports were not objectively prepared, and the insurer's reliance on the reports was merely pretextual. *Id.*

### **III. PRACTICE POINTERS**

The following pointers are useful in most cases, but are particularly necessary in cases involving fraud. Unfortunately, they are not often followed.

#### **A. *Do Your Investigation Early, Preferably Prior To Denial.***

A fraud case often turns on medical, financial, or bank records, or on the existence of prior claim files. These records are often purged on a regular basis and can become unavailable without notice to you. Accordingly, you should order these records as soon as possible, preferably prior to denial. Key witnesses should be asked for recorded interviews, or if that is not practical, an early deposition. Once the lawsuit is filed, the fraud case will not get better: it usually gets worse.

#### **B. *Don't Get Distracted By Procedural Issues.***

I have seen investigations break down over the insured's refusal to provide documentation or to answer questions at an examination under oath. I have seen suits stayed for several months awaiting the insured's compliance with the policy requirement of an examination under oath. Although abatement is at the present time the only remedy available to the insurance company where the insured fails to comply with the requirement for an examination under oath, it is a cumbersome remedy, and the time delay often works to the disadvantage of the carrier. The examination under oath can be used to develop a list of witnesses, and to test the alibi of the insured. If several months pass before the witnesses are identified and before the insured commits to his whereabouts at the time of the loss, it becomes difficult for the carrier to use the information received. I personally do not believe that abatement is an adequate remedy, and would argue for a rule that lack of compliance plus harm equals a policy defense.

At the very least, complete the investigation, and use the delay by the insured as evidence of guilt. This is not a criminal case, so the insured has no right against self-incrimination, and you have every right to comment on the insured's lack of cooperation and lack of forthcoming information in the handling of the claim.

**C. Evaluate Your Case Early And Often.**

Fraud cases are not static. There are always twists and turns, and sometimes new witnesses or other information appear. Just because the case was solid at the time of the denial does not mean it is a good case to take to trial. Most carriers want to know if something changes during discovery that alters your evaluation of the case.

**D. Plan Your Closing Argument Early.**

Very often I am called upon to write an opinion letter on coverage. In that opinion letter, I will often discuss arguments for coverage and arguments against coverage. From that opinion letter forward, I am constantly preparing in my mind the closing argument. As the case develops, I make notes of points to be raised on closing argument. All of my discovery, all of my witness preparation, and all of my trial preparation and presentation is designed around the closing argument that I know I want to make. Invariably, something happens at trial to add to or subtract from the closing argument. However, the basic theme, the basic theory, and the basic message are in place from the beginning of the lawsuit.

**E. Pick A Single, Consistent Theory.**

Presenting a fraud defense requires a single consistent theory of how the loss occurred and who is responsible. In a case of divorcing spouses, it is not enough to say that one of the two did it, you need to decide which one you believe committed the act, and tell the jury. If you find yourself mulling over dual theories, particularly inconsistent theories, take another look at your evaluation. You should not be defending the case if you do not know who committed the act.

**F. Challenge The Jury To Find "Who Done It".**

One of the interesting jury dynamics in a fraud case is the natural curiosity of the jury to determine who committed the crime. Moreover, the jury is more emotionally satisfied if it makes the determination who committed the crime than if it says "we don't know who did it but this person didn't." Use those psychological needs to your advantage. Challenge the jury to find the truth; challenge the jury to point the finger at the person responsible; remind the jury that their oath as jurors requires them to find the truth, and play on the jurors' sense of civic responsibility to make a tough call.

### **G. Openly Discuss (And Eliminate) Alternative Theories.**

Oftentimes plaintiff's counsel will argue that someone else could have broken in and set a fire, or that someone else committed the act of vandalism or theft. Do not be afraid to take that idea and run with it. What would that mean? In one case I tried, the "break-in" theory would have required the burglar to break into a house, locate a child's bedroom, ignite gasoline on the wall next to the window, climb out the window through the fire, close the window from the outside, and then put the screens back on the window. In the abstract, it made more sense that a burglar would have set the fire than the homeowner. However, once that theory was placed side by side with the physical evidence at the scene, it was obvious that an intruder had not set the fire, since no intruder would step through the fire and then replace the screens. Once it was obvious that no intruder was involved, it was difficult for the jury not to see that the homeowner had set the fire.

### **H. Do Not Over-try The Case.**

If you have a case involving ring activity or professional criminals, do not shy away from presenting that evidence to the jury. However, the vast majority of fraud cases, at least the ones that get tried, involve ordinary people who, for whatever reason, decided to try to solve their problems by making an insurance claim. These people are not career criminals, are not a threat to society, and are probably somewhat embarrassed by their conduct, but can not face their friends and neighbors and tell them that they withdrew their insurance claim because they were the guilty party. We tried a case involving a young mother who at two o'clock in the morning had set a small fire in her child's bedroom, probably without the intent of making an insurance claim. After that claim became a multi-million dollar bad faith lawsuit, we were faced with the prospect of how to present the mother's guilt to the jury. At one point, my closing argument went something like this "I'm not saying Ms. \_\_\_\_\_ was a bad person. I'm not saying she's a career criminal, I'm not saying she's done this before, and I'm not saying she's a threat to do this again. All I'm saying is that at one moment in her life, in a moment of weakness, with circumstances pressing in on her, she committed an act that she probably would never have committed at any other point in her life. We're not asking you to send her to jail for it. But we are asking you not to reward her for it."

This lower standard of culpability made it easier for the jury to find in our favor, since it did not have to pass on her general value as a person.

### **I. Do Not Let Your Client Hide Behind A "Committee Decision".**

Many insurance companies require a committee or group decision for a fraud denial. The theory behind the committee is to make sure the decision is not personal, and that the insured's rights are protected.

The danger of a committee decision is that a large corporation doing business in fifty states, with multi-millions of dollars of assets, can not produce the person, the single individual, with the

responsibility for the decision. Oftentimes, explaining the committee process to the jury makes it sound as if the carrier, or its individual witnesses, are each trying to avoid individual responsibility for a decision (all of which implies that the decision was somehow bad).

I avoid that problem by having the individual with management responsibility for the claim present himself as the company representative at trial, and testify that he had responsibility for the investigation and that it was his recommendation that the claim be denied. That way he can explain the committee process while still taking responsibility both for the investigation and the recommendation to the company. The committee decision is a response to his recommendation as opposed to an effort to avoid blame.

**J. Avoid Hyper-technicalities.**

The insurer did not require the insured to "document" his claim, it asked him to support his claim. The investigation did not drag on because of "inconsistencies" in the insured's story, the insured dragged out the process by hiding facts.

**K. Maintain Your Credibility At All Times, Both To The Judge And The Jury.**

Do I really need to explain this one?

**L. Try Your Case Simply And Quickly.**

The more complicated your case is the less likely it is that you are going to win. You have a simple theory, which is the homeowner/policyholder committed an act that voided coverage. You have the added advantage that the policyholder proceeds first, and has to place the claim within coverage, and prove the amount of damages (plus put on whatever evidence of bad faith they may try to put on). Thus, before you take control of the case, you have had the opportunity to cross-examine the plaintiff, the plaintiff's experts, and any other fact witnesses. Some of your witnesses may already have been called. It should not take long for you to put on your case in chief. A good rule of thumb, which could always be followed, is that your case should take approximately half the time of the plaintiff's. Keep the presentation crisp, stay to the matter at hand, and don't get bogged down in peripheral details.

In summary, many of the principles which apply to trying any case apply all the more to a fraud case. Defendants in a fraud case, however, have the unique advantage of some jury sympathy and some suspicion towards the plaintiff. Moreover, if the denial is solid, you can present your case as being on the side of truth and justice, and calling on the jury's sense of civic responsibility not to pay the insured for committing a crime. Good luck. May the truth always prevail.