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## Automobile Insurance/Use

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### Bus Company's Business Automobile Liability Policy Does Not Cover Liability to Passengers Who Were Exposed to Bus Driver's Tuberculosis

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#### *Question of First Impression*

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*Lancer Insurance Company v. Garcia Holiday Tours*, \_\_ S.W.3d \_\_, 2011 WL 2586878 (Tex. 2011)

#### Case at a Glance

The transmission of a communicable disease from a bus driver to his passengers did not "result from operation, maintenance, or use" of the bus within the meaning of the bus company's business auto liability policy. The "passengers' injuries did not result from the vehicle's use but rather from the bus company's use of an unhealthy driver. The bus, itself, in its capacity as a mode of transportation, did not produce, and was not a substantial factor in producing, the passengers' injuries."

#### Summary of Decision

Garcia Holiday Tours drove the high school band students from South Texas to San Antonio to go to an amusement park. The driver was noticeably coughing. Upon return the driver was hospitalized after being diagnosed with active tuberculosis (TB).

The passengers were tested, and several tested positive for latent TB. These passengers sued the bus company and its driver for negligent exposure. Lancer, its liability carrier, was notified but it refused even to defend, maintaining that such injuries were not covered under the policy. The bus company defended itself, and a jury awarded \$5 million to the passengers who had contracted the disease.

In the ensuing coverage and declaratory relief action, both Lancer and the passengers filed for summary judgment, but the bus company and its driver filed no such motion. The passengers' motion sought judgment as to indemnity, while Lancer's motion sought judgment as to both the insured's

right to indemnity and the carrier's duty to defend.

The trial court granted the passengers' motion and denied that of the insurer. The parties and the court split up the elements of the suit to make an immediate appeal possible. The Texas Court of Appeals reversed and remanded, holding that there might be coverage, there was no evidence that the passengers caught the disease while on the bus. The Texas Supreme Court granted Lancer's petition for review to consider the novel coverage question presented.

The Texas Supreme Court reversed based on the wording of the policy. Like many vehicle liability insurance policies, Lancer's policy insured against bodily injuries caused by accidents and "resulting from the ownership, maintenance, or use of" a "land motor vehicle." Here, the issue was whether the accident and injuries resulted from "use" of the bus. In *Mid-Century Insurance Co. of Texas v. Lindsey*, 997 S.W.2d 153 (Tex. 1999), the supreme court had suggested three factors for determining whether injuries "arise[] out of" use a vehicle. Finding no substantive difference between "resulting from" and "arising out of," the court applied the *Lindsey* factors. They are these:

The accident must have arisen out of the inherent nature of the vehicle, as such.

The accident must have arisen within the natural territorial limits of the vehicle, and the use of the vehicle must not have been terminated.

The vehicle itself must produce the injury, not merely contribute to the condition which produced the injury.

In the case under discussion here, the court reviewed the three considerations at some length and decided, just as it had in *Lindsey*, that the third factor is "especially troublesome because of the difficulty in many circumstances of deciding what role a vehicle, as opposed to other things, played in producing a particular injury[.]" The court concluded that the unhealthy driver caused the passengers' injuries, not the bus itself. The court reviewed two types of auto coverage cases that generally do not satisfy the third factor: drive-by-shootings and assaults within a

vehicle. The court found the assault cases to most closely resemble this case. If assaults within a vehicle are not covered, then neither should disease spread by a vehicle's driver.

### Comment

One may question whether the court's analogy to assault and drive-by shooting cases works. The events in those cases were not fortuitous; indeed, they were intended, purposeful, and unlawful. Usually, there is no coverage for either one of these types of events. The driver's exposure of the passengers to a communicable disease was none of these. // Quinn

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## Bad Faith/Duty to Settle

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### Rhode Island Supreme Court Examines Duty to Settle When Multiple Claimants Seek to Settle for Policy Limits

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#### *Case of First Impression*

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*DeMarco v Travelers Insurance Company*, \_\_ A.3d \_\_, 2011 WL 2697038 (R.I., July 12, 2011)

#### Case at a Glance

The Rhode Island Supreme Court's holding *Asermely v. Allstate Ins. Co.*, 728 A.2d 461 (R.I. 1999)—that a liability insurer has fiduciary duty to engage in timely and meaningful settlement negotiations on behalf of its insured and will assume risk of judgment in amount exceeding policy limits, even in absence of bad faith—applies when an accident results in multiple claimants with claims exceeding policy limits. However, factual issues regarding whether the insurer engaged in meaningful settlement negotiations precluded summary judgment for the claimant. The "Asermely Rule" does not impose strict liability on an insurer that rejects an offer to settle within limits.

### Summary of Decision

This case arises from a one vehicle automobile accident that occurred on September 10, 2003. The vehicle was being operated by Leo H. Doire ("Doire") and owned by Virginia Transportation Corporation ("Virginia"). The accident involved a high speed impact with two telephone poles and resulted in severe personal injuries to Wayne DeMarco ("DeMarco") and Paul Woscyna ("Woscyna"). At the time of the accident, Plaintiff, Travelers Indemnity Company ("Travelers") insured the vehicle with policy limits in the amount of \$1,000,000.00.

DeMarco's counsel notified Travelers in writing on November 3, 2003 that the DeMarco claim would likely exceed the policy limit. DeMarco's counsel anticipated difficulty in resolving the claim with Travelers and filed a lawsuit against Virginia in Providence County Superior Court in early 2004. On or about February 2, 2004, DeMarco's counsel forwarded a courtesy copy of his lawsuit to Travelers and demanded the policy limit in settlement of the claim.

While the litigation was pending, DeMarco's counsel made various and repeated demands for settlement within Virginia's policy limit. Specifically, settlement demands were presented to Travelers in writing on February 25, 2004, July 22, 2005 and finally, on August 23, 2006. Notwithstanding these written demands for settlement within the policy limit, the only response ever received from Travelers was correspondence dated February 27, 2004 from the Travelers adjuster, asserting that Travelers could make no offer to settle the DeMarco claim because there were other claimants involved in the loss including Woscyna, who had also made a demand for settlement within Virginia's policy limit.

Approximately sixty days prior to the trial date, in July 2006, Travelers provided written notice that it was surrendering its policy limit to all interested claimants and that it was the claimants' responsibility to determine how to divide the money. Travelers' conditional surrender of the policy limit further required that *all* parties involved would have to agree to the settlement and a pro rata distribution of the policy limit and execute releases satisfactory to Travelers before any settlement money would be available to any one claimant. Travelers further warned that it would file an interpleader action and