

INSURANCE LITIGATION™

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The Duty To Defend: New Texas Developments

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In all American jurisdictions, the fundamental norm governing the duty to defend is the same: an insurer has a duty to defend if there is a potential that the insurer will be obligated to indemnify (or, to pay on behalf of) its insured. This norm is open-ended, to say the least, and some might call it vague. When the law utilizes broad, ambiguous norms, it often articulates relatively specific rules to use in place of the wide-reaching norms. Generally speaking, American jurisdictions employ one of four relatively specific rules in making duty-to-defend determinations. These are the Strict Eight Corners Rule, the Defeasible Eight Corners Rule, the California Rule, and the Tiny Minority Rule.

I. Duty to Defend Rules

According to the Strict Eight Corners Rule, one begins a duty-to-defend analysis by examining the factual allegations in a complaint. If those allegations¹ being proved true would render the insured liable to the plaintiff, the insurer obligated on the insured's behalf, then there is a duty to defend. That is the first step in applying the Strict Eight Corners Rule. If that simple test is inconclusive, then the factual allegations in the complaint are to be construed broadly (or, which is to say the same thing, liberally). If the insurer would be liable, should the factual allegations—broadly construed—be proved true, then there is a duty to defend. This is the second step in applying the Strict Eight Corners Rule. The insurer never has a duty to examine any extrinsic evidence to determine whether there is a duty to defend. Extrinsic evidence is simply not relevant for the duty to defend. One looks only at that which is within the four corners of the insurance contract and within the four corners of the plaintiff's pleading.

There are several twists in the Strict Eight Corners Rule. For one thing, it is tied to the live pleading of the plaintiff. Hence, the duty may change as

amendments are filed. For another, if the reasonable insurance adjuster, having construed the petition broadly, is uncertain what to do, then the insurer has a duty to defend. This relatively specific rule is a corollary of the broad maxim that doubt is to be resolved in the favor of coverage. The next twist in the Strict Eight Corners Rule is that the relatively specific rule prescribing that the insurer should construe the complaint broadly is a principle which is itself to be understood broadly. Any ambiguity in the complaint is to be resolved in favor of providing a defense. Gaps in an otherwise relatively complete petition are to be filled in with assumed prepositions which tend to favor a duty to defend. Sketchy pleadings are not similarly honored.

The Defeasible Eight Corners Rule appears to be identical to the strict version in its first and second steps. (1) When the factual allegations in the complaint, if proved true, would establish a duty to indemnify, then there is the duty to defend. (2) If the pleadings are somewhat vague, so that the first step doesn't work very well, then the insurer must construe the language of the complaint broadly. When the language is thusly construed, if a case can be proved under that language which would render the insurer liable to pay, then it has a duty to defend. The strict version and the defeasible version now diverge. Under the strict version, the insurer may not defeat a potential duty to defend by reference to extrinsic facts. If an insurer decides not to defend, it must do so solely on the basis of the language of the petitioning instrument. On the Defeasible Eight Corners Rule, (3) if a complaint, even when construed broadly, remains murky, ambiguous, or otherwise unhelpful, then—but only then—an insurer should look at extrinsic evidence and determine whether it has a duty to defend. This is the third step of the Defeasible Eight Corners Rule, and—as stated—that step distinguishes the Defeasible Rule from the Strict Rule. On the defeasible version, a prima facie duty to

defend arising from murkiness, unclarity, ambiguity, or gappiness, can be defeated by extrinsic evidence.

Of course, on both the strict version and the defeasible version, an insurer may decide to defend a case based on extrinsic evidence. The legal question is not how may an insurer decide to help its insured. The legal question pertains to the structure of its legal obligations. No liability insurer has a legal obligation to refrain from granting an insured a defense. Responsible insurers frequently say to themselves, "Could this complaint fairly easily be repleaded so as to trigger the duty to defend?" If the answer to this question is affirmative, many responsible insurers who are interested in hanging onto their insureds for the future, will defend, even though they have no legal obligation to do so.

The California Rule resembles the Eight Corner Rules in the first and second steps. Thus, the factual allegations contained in a liberally construed complaint can establish a duty to defend. At that point, however, the California Rule diverges substantially from either of the eight corners rules. Under the California Rule, the insurer should look to the reasonable expectations of the insured, and not just to the language of the complaint and the insurance contract. If the insured has a reasonable expectation that it will be defended, given the content of the complaint, the content of the policy, the insured's course of dealing with the insurer, and the expectations most people have of their insurers, then the insurance company has a legal duty to defend. But if, after performing this third step, the matter is still not resolved in favor of defending, the California Rule involves a fourth step. The insurer is to gather and review extrinsic evidence. If a reasonable investigation would reveal that a complaint could have been devised which would have triggered a duty to defend under any of the first three steps, then there is a duty to defend.¹

The California Rule makes legally obligatory what many responsible insurers do anyway: defend if a complaint could have been pleaded which would

1. The locus classicus for the California Rule is *Gray v. Zurich Ins. Co.*, 419 P.2d 168 (Cal. 1966). See *Waller v. Truck Ins. Exch.*, 900 P.2d 619 (Cal. 1995). See also *Horace Mann Ins. Co. v. Barbara B.*, 846 P.2d 792 (Cal. 1993).

have triggered a duty to defend, had it been pleaded correctly. Under the California Rule, extrinsic evidence may not only defeat a duty to defend; it may also establish the legal obligation to defend.

The Tiny Minority Rule departs sharply from both the Eight Corner Rules and the California Rule. According to the Tiny Minority Rule, an insurer may defeat a duty to defend, otherwise established by the factual allegations in the complaint, by reference to extrinsic facts which are not reflected in the complaint but which are plainly excluded by the insurance contract. The burden of proof, of course, is on the insurance company to establish that it has no duty to defend by means of this rule, and the extrinsic facts must be absolutely clear.²

II. Recent Texas Trends

Until recently, most people would have classified Texas as a state adhering to the Defeasible Eight Corners Rule. For many years, significant Texas Supreme Court decisions have embraced the essence of the Eight Corners Rule.³ There was authority, however, holding that extrinsic evidence was admissible to show that an exclusion applies, when the pleadings are unclear.⁴ On February 21, 1997, the Texas Supreme Court issued two per curiam opinions which make it clear that Texas is (now) a Strict Eight Corners Rules state. Both of the cases were vehicle cases, and both cases involved shootings.

A. Merchants Fast Motor Lines

There are two reported opinions in this case. My focus is on the per curiam opinion of the Texas Supreme Court. However, it is also necessary to discuss the opinion of the intermediate court of appeals.⁵

2. *Hagen v. U.S. Fidelity & Guarantee Ins. Co.*, 675 P.2d 1340 (Ariz. 1983). See *Kepner v. Western Fire Ins. Co.*, 509 P.2d 222 (Ariz. 1973).

3. *Fidelity & Guar. Ins. Underwriters, Inc. v. McManus*, 633 S.W.2d 787. See also Michael Sean Quinn and L. Kimberly Steele, *Insurance Coverage Opinions* 36 S. TEX. L. REV. 479, 510 (1995).

4. *State Farm Fire & Casualty Co. v. Wade*, 827 S.W.2d 448 (Tex. App.-Corpus Christi 1992, writ denied).

1. The Case

This case was a declaratory judgment action asking whether the insurer owed the insured a defense under a trucker's policy.⁶ The insuring agreement provided as follows:

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

The plaintiff's petition had alleged that a truck driver, employed by Merchants, negligently discharged a firearm while driving a Merchants' truck and that the shot severely injured a person in another vehicle, ultimately causing his death. No other facts about the shooting were pleaded.

In reciting the Eight Corners Rule, the Texas Supreme Court emphasized that an insurer's duty to defend is triggered by the factual allegations pleaded, and not by any legal theories. It emphasized that the petition is to be read broadly, so that if there is genuine doubt as to the meaning of the factual allegations, then the insurer must defend. At the same time, the Supreme Court said this: "[i]f a petition does not allege facts within the scope of coverage, an insurer is not legally required to defend the suit against its insured."⁷

In analyzing the pleadings and the policy, the court observed that the petition asserted only that the driver discharged a firearm while he was driving. Nowhere did the petition assert that the discharging of the firearm resulted from the use of the truck (ex hypothesi, a "covered auto"). The mere fact that the truck was the place where the accident took place (i.e., was the place of the negligent firing of the gun) was not sufficient to establish that the discharge of the

weapon resulted from the use of the truck. In order for there to be a duty to defend, the plaintiff must plead that there was a causal relationship between the use of the truck and the firing of the weapon. Because no such factual proposition was pleaded, the insured had no right to a defense.

Interestingly, the court seemed to assume that the pleading of negligence constituted the pleading of an accident, sufficient to trigger the duty to defend. At the same time, the court said that it did not pay any attention to what causes of action were pleaded against the insured. The concept of negligence, of course, is ambiguous. Whether someone has been negligent is an issue of fact. The term "negligence" also names a cause of action. Presumably, insurers and courts should look to the context to determine whether an allegation of negligence is a factual claim or the assertion of legal theory. On the other hand, if the plaintiff asserts a cause of action for negligence, then a fortiori the plaintiff has impliedly alleged the fact of negligence against the defendant. The real issue underlying this uncertainty as to whether every factual assertion of negligence constitutes a factual assertion that an accident took place. The answer is almost certainly negative: some assertions of negligence do not imply the occurrence of an accident, even when someone was injured. Most courts loath to take this subtle matter up, however.⁸

There is a profound and difficult problem lurking here. The Supreme Court observed that the plaintiff's petition pleaded no factual contention which explicitly asserted some act of negligence on the part of the policyholder-defendant. Indeed, the Court went on to say that the plaintiff was plainly asserting intentional acts and therefore triggered an exclusion. Our problem arises now. The concept of a factual assertion is itself ambiguous. This makes the concept of a factual pleading likewise ambiguous. Obviously, the idea of a factual assertion is to be contrasted with an assertion of law or a legal conclusion. Within the concept of a factual assertion, however, there is a spectrum of ideas. At one end of the spectrum, there are (what might be called) pristine factual assertions. These are assertions of fact with no conclusions built into them. At the other end of the spectrum, there are conclusory factual assertions. These are

5. Merchants Fast Motor Lines, Inc. v. Nat'l. Union Fire Ins. Co. Pgh., Pa., 919 S.W.2d 903 (Tex. App. Eastland 1996 rv'd).

6. Nat'l. Union Fire Ins. Co. of Pgh, Pa. v. Merchants Fast Motor Lines, 40 TEX. SP. CT. J. 353 (February 21, 1997).

7. Merchants Fast Motor Lines, 40 TEX. SP. CT. J. at 354.

8. Quinn and Steele, supra, note 3 at 513 ff.

assertions of fact which may be inferred from more basic, more specific, less conclusory factual assertions. The sentence, "I see a red patch before me now," is a very pristine factual assertion. The sentence, "I see a red light," is a factual assertion with some factual conclusions built into it. The sentence "He was driving very fast when he went through the red light," has even more factual conclusions in it, and "He was negligent when he ran the red light," if it is factual at all, it is highly conclusory. A general and conclusory pleading of negligence is not the same as a pleading alleging a specific act of negligence. The Texas Supreme Court seems to be implying that an insurer's duty to defend is not governed by unsupported factual assertions which are highly conclusory in nature. (Of course, at the same time, it is not demanding that the factual assertions in a petition be pristine. When placed upon the pristine-to-conclusory spectrum, however, they cannot converge upon the conclusory.) When this principle is applied to petition in Merchants Fast Motor Lines it is pretty clear that all of the factual assertions approach the conclusory end of the spectrum. Moreover, the petition is gappy. Most significantly, the plaintiff's pleadings do not allege that the plaintiff's injuries resulted from the use of an auto.

2. Court of Appeals Opinion

The Court of Appeals had faced two issues. The first one was whether the carrier had a duty to defend under the trucker's policy. The Court of Appeals held that there was a duty to defend, and —of course— the Supreme Court explicitly reversed the lower court. The key premise the Court of Appeals relied upon was this:

Any doubt as to whether the complaint states a covered cause of action is resolved in the insured's favor. If a driver were authorized by Merchants to carry a weapon when operating its truck in order to protect the truck and its contents and if the driver negligently discharged a firearm while operating that truck, then damages caused by the discharge would arguably arise out of the operation of the vehicle.⁹

The Court of Appeals held that until the facts were

developed by competent evidence, there was a scenario consistent with what was pleaded which would result in the insurer being liable, and that fact establishes that the insurer has a duty to defend. Obviously, the Court of Appeals did not utilize the idea that an insurer need not consider conclusory factual allegations when determining its duty to defend.

There was a second issue before the Court of Appeals. There was a second policy, a commercial general liability policy, also issued by National Union. The insuring agreement of that policy apparently stated that the insurer would "pay those sums and the insured becomes legally obligated to pay his damages because of 'bodily injury.'" Obviously, the plaintiff's pleadings were sufficient to trigger the insuring agreement. There were exclusions, however. The only one which appears to have been in play was the expected or intended exclusion, and it read as follows:

This insurance does not apply to "bodily injury". . . expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.¹⁰

National Union had argued that the trucker was not within the scope of his employment at the time of the shooting. The Court of Appeals answered by observing that the pleadings alleged that the driver negligently discharged a firearm while operating the company's truck. The Court of Appeals held that this pleading does not establish conclusively that the driver was in the course and scope of his employment, but that it suggests that he was.¹¹ Moreover, even though the probable facts of the case have the flavor

9. Merchants Fast Motor Lines, 919 S.W.2d at 906. (Citations omitted.)

10. *Id.* at 907. (Emphasis in the court's quotation, but not in the original policy.)

11. Under the Strict Eight Corners Rule, if one is uncertain what to do after construing a pleading broadly, then defend. The word "operate" is ambiguous. Generally, when one operates a commercial vehicle, one is doing one's job. However, it is possible to operate a truck without permission. If ambiguities in a pleading are automatically resolved in favor of there being a duty to defend, the insurer should defend.

of intentionality about them, they would still be within the coverage, if the driver was protecting the truck. The Court of Appeals says nothing whatever about the motor vehicle exclusion which is usually found in commercial general liability policies.

3. Supreme Court Reasoning

The Supreme Court did not discuss whether the insurer has a duty to defend under the commercial general liability policy. Perhaps that issue had dropped out, somehow. Perhaps the insurer elected not to take the general liability issue to the Supreme Court. Perhaps the carrier had decided to defend under that policy. Still, one would expect the Supreme Court to note the disappearance of the issue.

With respect to the trucker's policy, however, the Supreme Court is critical of the reasoning of the Court of Appeals quoted above. According to the Supreme Court, duty-to-defend decisions are controlled by the language of the petition and the language of the policies. These two instruments alone control duty-to-defend decisions. "[A]n insurer's contractual duty to defend must be determined solely from the face of the pleadings without reference to any facts outside the pleadings."¹² Courts (and therefore insurers) are not to "imagine factual scenarios which might trigger coverage."¹³ They are not to read (or imaginatively project) factual assertions into a petition. This conclusion is not just about extrinsic evidence.

Thus, a second important thrust of the argument of the Supreme Court is that plaintiffs must plead the facts with particularity. Policyholder-defendants will not be entitled to a defense when facts are pleaded vaguely and when an adjuster or a judge can envisage or theorize a scenario, consistent with the pleadings which would generate coverage under the policy. In recent years, Texas jurisprudence has seen many cases in which the plaintiff's pleading has added up to no more than this:

The miserable, miscreant, sloppy defendant has hurt me.
Make him pay.

In negotiations, plaintiffs and policyholders consistently demand that the insurer step in and defend the policyholder given pleadings conforming to the above paradigm. They submit that notice pleadings are sufficient under Texas pleading rules and case law, as well as federal pleading rules and cases, that the use of words like "sloppy" connotes an accident, and so the policyholder has a right to a defense. Obliquely, the Supreme Court is putting a stop to this gambit. In effect, the Supreme Court has said that pleading rules for insurance coverage are different than pleading rules for the purpose of civil procedure.

This is a salutary move in many ways. It has been the habit of many plaintiffs' lawyers to try to involve an insurer based on sketchy pleadings, because the insurer and everyone else knew quite well that if the facts were pleaded with particularity, an exclusion would apply. Many sexual molestation cases have been pleaded this way. No one should believe, however, that the rule in *Merchants Fast Motor Lines* will put an end to all forms of this tactic. For one thing, factual assertions are not easily divisible into two exclusive categories: those which are pristine and those which are conclusory. We are dealing with a spectrum here. Almost all factual assertions utilized in practical life are conclusory to some degree. How conclusory must a factual allegation be before an insurer can ignore it with impunity? The Texas Supreme Court is not given an answer to this question. No other court has ever given an answer to the question. No court will ever give an answer to the question. It is essentially unanswerable. It would be nice to suppose that ignorable-because-too-conclusive factual allegations are like pornography, in the sense that, although there are no stable principles for identifying them, you know them when you see them. Alas, this idea simply does not apply to conclusory factual assertions. There are a few paradigm cases of obviously-too-conclusive factual allegations, the most important one being: "The defendant was negligent." Short of that one, however, insurers are at sea, and the law provides them with no reliable principles for making their decisions. Pleading "The driver was negligent in discharging a firearm while operating the company's truck whilst doing his job," won't do. But what about this one, the use of which was: "The driver

12. *Merchants Fast Motor Lines*, 40 TEX. SP. CT. J. at 355. (Emphasis added.) (The court is quoting from *Houston Petroleum Co. v. Highlands Ins. Co.*, 830 S.W.2d 153 (Tex. App.-Houston [1st Dist.] 1990, writ denied).

13. 40 TEX. SP. CT. J. at 355

was negligent by discharging a firearm integral to the process of operating the company's truck whilst doing his job." Is this pleading sufficiently specific from a factual point of view?

It should be kept in mind that there is a dynamic, interactive process by means of which petitions can be amended so that duty to defend coverage is invoked. This process allows a measure of cooperation — which is not to say collusion — between the plaintiff and the defendant-insured. The process begins with the plaintiff filing a sketchy petition. The insured denies that there is any duty to defend. At the request of the defendant-insured, the plaintiff repleads. The new petition goes to the insurer. It rejects it again and again refuses to defend. Counsel for the policyholder then assists the plaintiff in drafting a sketch of the facts which conforms to the requirements of the policy and trigger coverage. (Of course, many plaintiffs' lawyers don't need this kind of help, but some do, and if the lawyer for the policyholder is "insurance smart;" even the proudest plaintiffs' lawyer usually says "Thank you" and relies) The plaintiff utilizes the proffered amended pleading. It is submitted to the insurer, and the insurer offers a defense. Of course, all of the lawyers involved must avoid violating rules of civil procedure and rules of professional conduct prohibiting sharp practice, but that is generally not too difficult. Some people worry that the defendant-insured who drafts the plaintiff's amended petition will breach the cooperation clause. This is unlikely. The insured's duty to cooperate with the insurer does not entail that the insured may never cooperate with the plaintiff. By the way, one can easily imagine pleadings in *Merchants Fast Motor Lines* which would have entailed a duty to defend.)

B. Griffin

This case, *Farmers Texas Mutual Insurance Company v. Griffin*,¹⁴ another per curiam opinion, also concerned a shooting. In *Griffin* the policyholder defended drove his car. He transported two other people therein. The passengers discharged one or more firearms from that car. Griffin sustained injury to his right leg.

Griffin sued the policyholder-defendant. The

insurer provided the driver with a defense subject to reservation of right and filed a declaratory judgment action seeking to be acquitted both of its duty to defend and of his duty to pay. The policyholder was accused of negligence in operating his car, including a "failure to operate a motor vehicle in a safe manner."

The insuring agreement stated that the insurer would "pay damages for bodily injury or property damage for which any covered person becomes legally responsible because of an auto accident." Under the policy, a covered person included the named insured or any family member for the ownership maintenance, or use of any auto or trailer. However, the insurance policy excluded coverage for any person "[w]ho intentionally causes bodily injury or property damage."

The Supreme Court reversed the decision of the Court of Appeals, which is unpublished and found that there was no duty to defend. It made this finding on two grounds. First, the intentional injury exclusion was satisfied. Second, the plaintiff's petition failed to plead an auto accident. The petition suing Griffin described the event as a "drive by shooting" and "a random act of violence[.]"

The reasoning of the Supreme Court in *Griffin* is quite similar to its reasoning in *Merchants Fast Motor Lines*. Both emphasize the importance of factual allegations in making duty-to-defend decisions, and it is clear that the court means specific factual allegations. At the same time, *Griffin* goes a step beyond most other cases, because it determines that the insurance carrier has neither a duty to defend nor a duty to pay. In fact, the Supreme Court deduces the carriers' lack of a duty to indemnify, from the absence of any duty to defend. The court observes that even if all of the factual allegations in the plaintiff's petition were proved, they could not invoke the insurer's duty to indemnify. This fact, the Court says, necessarily means that the insurer has no duty to indemnify.

As a general rule, Texas courts may not determine the duty to indemnify prior to the resolution of the underlying case.¹⁵ Perhaps some inroads may have been made into this principle which is known as the "Burch Doctrine"¹⁶ but the doctrine has never been overruled and the Supreme Court has never

14. 40 TEX. SP. CT. J. 362 (Feb. 21, 1997).

15. *Firemen's Ins. Co. of Newark, New Jersey v. Burch*, 442 S.W.2d 331 (Tex. 1968).

subjected it to explicit critique. It looks as though the parties to the underlined litigation in Griffin agreed to seek an adjudication as to the duty to indemnify as well as an adjudication as to the duty to defend. The Burch Doctrine is jurisdictional, so that Griffin may constitute another inroad into the rule that an insurer's duty to indemnify cannot be litigated in Texas before the resolution of the underlying case. This is what the court said in Burch:

This court has repeatedly held that under our Constitution, [i.e., the Texas Constitution,] the judicial power does not embrace the giving of advisory opinions. Article 5, §8 of the Texas Constitution...does not empower the district court to render such opinions and as jurisdiction is a matter of constitutional delineation, the Legislature could not and has not by the passage of the Uniform Declaratory Judgments Act, empowered the district courts to render advisory opinions... [The Declaratory Judgments Act] gives the court no power to pass upon hypothetical or contingent situations or determine questions not then essential to the decision of an actual controversy, although such controversies may in the future require adjudication..¹⁷

On this basis, the court held that declaratory adjudications as to an insurer's duty to pay could not be made before the conclusion of the underlying tort case. It is difficult to see how parties could agree to endow a district court with the authority to adjudicate a duty-to-pay question prior to the conclusion of the underlying case. Nevertheless, that is exactly what happened in Griffin, and the Supreme Court, which normally zealously and jealously watches over jurisdictional questions, acquiesced. Burch is a dying doctrine, and rightly so.

The Texas Supreme Court is mistaken to suggest if the pleadings in a tort case never invoke a duty to defend, then there can never be a duty to pay. A plaintiff may present proof at a trial which invokes the insurer's duty to indemnify, even though the insurer

never had a duty to defend, because the pleadings were sketchy, misleading, or gappy. It is clearly possible under Texas law, for a plaintiff to develop proof in a trial which is unsupported by the pleadings. Unobjected to evidence is admissible, and if the evidence supports it, courts will submit questions to juries which could lead to covered judgments. Moreover, if a defendant were to object to evidence on the grounds that it was not within the issues set up by the pleadings, a Court may allow the pleadings to be amended. Under the Texas Rules of Civil Procedure, courts are required to permit trial amendments fairly freely, when the presentation of the merits of the action will be served thereby, and when the objecting party fails to satisfy the court that the allowance of such an amendment would prejudice him in maintaining his action or defense upon the merits.¹⁸ If a defendant is perfectly clear as to what facts the plaintiff intends to prove—say, because of written discovery—trial amendments will generally be allowed. At least under some circumstances, a trial amendment will be deemed to exist as a result of what is said in court and what is on the record. Although lawyers often draft and file formal, written pleadings entitled "Trial Amendment[s]," this is not, strictly speaking, required by the rules. Counsel and the court, for example, could agree that a trial amendment will be deemed to have been filed by what is in the record. Consequently, there can be a duty to defend without there ever being a pleading which would trigger the duty to defend.¹⁹

C. Summary

Merchants Fast. Motor Lines and Griffin stand for three propositions, at least. First, they concur in the idea that Texas is a Strict Eight Corners Rule state. No liability insurer ever has the duty to go outside the pleadings and the insurance policy to determine

16. State Farm Fire and Casualty Co. v. Gandy, 925 S.W.2d 696 (Tex. 1996).

17. Burch, 442 S.W.2d at 333.

18. Rule 66, TEX.R.CIV.PROC. (1996).

19. 2 Roy W. McDonald, MCDONALD TEXAS CIVIL PRACTICE 10:11 at 487-98 (1992 Ed.) It is also true, of course, that the insurance company might not receive word of a trial amendment—even a formal, written trial amendment—so that the insurer would never have a duty to defend because it never received appropriate notice. The worth of a late notice defense under the circumstances seems questionable.

whether it had a duty to defend. Indeed, it is forbidden to do so. Second, in order to invoke the duty to defend, the plaintiff's pleadings in the underlying tort case must be specifically pleaded from a factual point of view. Very conclusory factual allegations do not trigger the duty to defend. Third, and finally, although there is sometimes doubt whether the policyholder has a right to a defense, there are degrees of doubt. It is not the case that any doubt at all as to whether there might be coverage triggers the duty to defend. There must be doubt of a fairly substantial degree as to whether or not there is a duty to defend, and that doubt must be generated by specifically pleaded factual propositions. The mere fact that some conceivable factual scenario is consistent with the general and conclusory language of a plaintiff's vague pleadings is not sufficient to generate a duty to defend. Academic doubt — the doubt of a dedicated, systematic skeptic — does not generate a duty to defend.

Although the Supreme Court does not say so, it is perfectly clear that there are varying degrees of specificity when it comes to factual pleadings. There is surely no such thing as a perfectly specific factual pleading, nor need there be. On the other hand, the court implies, common sense people, business people, lawyers, and insurance professionals, can all readily distinguish between specific factual pleadings, and skimpy, vague, and every gappy pleadings. The court is implying that it does not need a worked out criterion for how specific factual pleadings have to be. The court is impliedly hinting that it can rely on the good judgment of the bar, and other participants in the insurance game. I have already argued that this faith conclusion is probably false.

The duty-to-defend decisions discussed herein are made even more interesting by certain other recent trends in Texas jurisprudence. Two of them are worth special mention. First, the Supreme Court of Texas has significantly altered the law of bad faith recently. Second, last year, Texas Supreme Court may have substantially altered the law of attorneys fees in insurance disputes.

II. Bad Faith and the Duty to Defend

In *Head Industrial Coatings*, yet another per curiam opinion, the issue was whether a liability insurer owes its policyholder a common law duty of

good faith and fair dealing with respect to investigating and defending claims by third parties. The court of appeals had held that there was such a duty.²⁰ The Supreme Court disagreed.²¹

The substantive drift of the underlying tort case was relatively simple. The procedural facts in the underlying tort case were rather complicated, as were the facts in the coverage and bad faith litigation. Together, they involved a critical error by the insurance broker, interesting questions about insurer-broker relations, an imaginative sweetheart deal between the plaintiff and the defendant, and a side-deal involving the insurance broker. In the end, judgment was entered against Maryland based upon a jury verdict, in an amount just under \$4.4 million.

The Supreme Court saw itself as trying to answer a question it had reserved elsewhere,²² to wit: whether there is a cause of action by an insured against an insurer for a breach of the common law tort duty of good faith and fair dealing when the insurer fails to settle a third-party claim against its insured. Normally, such claims are regulated by the "Stowers Doctrine"²³ which created a negligence cause of action. According to *Stowers*, a liability insurer is liable for damages in excess of its policy limits, if it fails to settle within policy limits when (1) it is presented with an unconditional liquidated demand within policy limits, and (2) a prudent liability insurer would have settled.²⁴ So, the question the court saw before it was whether Texas jurisprudence needs common law insurance bad faith to regulate the conduct of liability insurers, or whether the "Stowers Doctrine"

20. *Head Indus. Coatings and Services, Inc. v. Maryland Insurance Co.*, 906 S.W.2d 218 (Tex.App.—Texarkana 1996, rvd.)

21. *Maryland Ins. Co. v. Head Indus. Coatings and Services, Inc.*, 938 S.W.2d 27 (Tex. 1996).

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

23. *G.A. Stowers Furniture Co. v. Am. Indem. Co.*, 15 S.W.2d 544 (Tex. Comm'n App. 1929, holding approved). Earlier in the Twentieth Century, the Texas Supreme Court became clogged with appeals. A Commission on Appeals was created appearing when its holdings were approved, citizens of the Commission on Appeals became decisions equal standing with those of the Supreme Court.

24. See *Am. Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842 (Tex. 1994) (case updating *Stowers*).

is sufficient. In *Head*, the Supreme Court held that "Texas law recognizes only one tort duty in this context, that being the duty stated in [Stowers]." ²⁵ According to the court, an insured simply does not need the protection created by the common law duty of good faith and fair dealing, since it has both contractual and Stowers rights. Because of the existence of these rights, it is unnecessary and therefore inappropriate, to impose any additional duties on liability insurers in the context of claims handling. Besides, the Supreme Court might have said — although it did not — the legal standard for common law insurer bad faith in Texas is more stringent than the standard in Stowers. The tort of insurer bad faith requires that the insurer act without any reasonable basis (or, arguably good reason), that the insurer should have realized it had no acceptable reason, and that there actually be no reasonable basis upon which the insurer might have acted. ²⁶

The Supreme Court did not decide in *Head* whether liability carriers may be guilty of statutory bad faith in the duty to defend context. In Texas, Article 21.21 of the Insurance Code regulates the conduct of insurers and it requires, for example, that insurance companies make prompt fair and equitable payment, once liability becomes reasonably clear. It is not known, at the present time, whether such provisions as that one apply to liability carriers in defending and investigating claims against their policyholders. It is clear that a third-party claimant does not have a cause of action against the insurance company. ²⁷ Policyholders may have statutory bad faith claims, however.

To some degree, it is surprising that the court would say that the common law duty of good faith and fair dealing does not apply to a liability carrier in the context of defending its insured. After all, the duty to provide a defense to a policyholder is a first-party component of the liability insurance contract. And it is not at all clear that the "Stowers Doctrine" provides enough protection to the policyholder. What happens when a liability carrier wrongfully denies its policyholder a defense, the plaintiff offers to settle with the defendant for a sum which happens to be

within policy limits, the policyholder decides to defend the case, because it doesn't have that much money, and the case is lost for a sum substantially in excess of policy limits? The immediate rationale of Stowers does not apply here. The liability carrier was not in command of defending the case. But, *Head* suggests that there is no common law insurer bad faith for misconduct by a liability carrier. The Supreme Court draws this conclusion because it says that Stowers gives the insured all the protection it needs. This inference, therefore, suggests that Stowers applies when there is a wrongful refusal to defend. Presumably, if the carrier declined to defend and did so wrongfully, then, for Stowers purposes, Texas law will treat the liability carrier as if it were controlling the defense.

There is another situation where the common law of insurer bad faith would provide an insured a remedy, where Stower's does not. This situation arises when the carrier does a bad job of defending the lawsuit, and causes a judgment to be entered in excess of policy limits, but where there is no offer from the plaintiff to settle within policy limits. The law of common law insurer bad faith would provide a remedy, for example, if the bad job performed by the insurer in defending the case were attributable to an actionable failure to investigate. Thus, here is a situation where the policyholder can be hurt by the wrongful conduct of an insurer and that situation is not made actionable by Stowers. How can the Supreme Court of Texas say that the insured doesn't need Stowers? The Supreme Court has an answer: Contract law. A far-reaching, silent implication of *Head* is that the contractual duty to defend in a liability insurance contract contains within it an implied covenant or warranty that the insurer will do a reasonably good job in providing the insured a defense. ²⁸ Only if the insurance contract contains such an implied warranty could the insured use breach of contract as its remedy. Moreover, the insured must be able to recover consequential damages in its contract action. Otherwise, the insured needs the common law tort of insurer bad faith. *Head* therefore breathes new life into contract actions.

25. *Head Indus. Coatings*, 978 S.W.2d at 28.

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

27. *Allstate Ins. Co. v. Watson*, 876 S.W.2d 145 (Tex. 1994).

III. *Mayfield*

In 1996, the Texas Supreme Court decided *Travelers Indemnity Co. of Connecticut v. Mayfield*, ²⁹

an attorney's fee case arising out of a worker's compensation situation. This case has indicia of litigation which was intended to be landmark, but which misfired. In 1991, the Texas legislature substantially overhauled the worker's compensation system. The new system introduced fee restrictions and—as a result—many plaintiff's personal injury lawyers have refused to do comp cases. The Mayfield case has some of the earmarks of a case which was set up by persons other than original parties with a view towards making politically significant law. Early in the case, for example, the claimant challenged the constitutionality of various portions of the new Worker's Compensation Act.

These are not the issues which came to the Texas Supreme Court, however. During the course of litigation in the trial court, the claimant requested that the trial court appoint a lawyer for her. The trial court did so, and ordered the insurer to pay the attorney's reasonable fees after they were approved by the court, at an hourly rate not to exceed \$85. The court authorized appointed counsel to submit fee statements to the court every thirty days, and ordered the insurer to pay them within thirty days after the court approved the statements. The insurer applied for a writ of mandamus from the Supreme Court on the issue as to whether the trial court, having appointed an attorney to represent the claimant, could require the insurer to pay the fees of that attorney. The Supreme Court held that the trial court could not enter such an order.

Attorneys' fees may be recovered from an opposing party in Texas only if "such recovery is

provided for by statute or by contract between the parties."³⁰ The Worker's Compensation Act does not provide for the recovery of such attorneys fees. They are not provided for in the insurance contract. And the general statute in Texas which authorizes awarding attorneys fees in breach of contract cases does not apply to many sorts of insurance contracts.

It is this last portion of the court's reasoning which constitutes a really important legal norm for general insurance law purposes. In general, awards of attorneys fees in contract cases is authorized by § 38.001 of Texas Civil Practice & Remedies Code. Section 38.001 is trumped by §38.006, however. That provision provides that the entire chapter "does not apply to a contract issued by an insurer that is subject to the provisions of ... (4) Article 21.21 of the [Insurance Code]; and (5) the Unfair Claims Settlement Practices Act (Article 21.21—2 [of the] Insurance Code." Mayfield does not spell out what it is for an insurance contract to be "subject to" article 21.21. A perfectly commonsensical reading of § 38.006(4), however, suggests that if there is anything about the insurance contract which could be litigated under Article 21.21, then attorneys fees are never recoverable if the insurer breaches that contract. Another literal reading of the statute is this: If the face of the contract is to any degree subject to civil litigation under Article 21.21, or if the conduct of an insurance company pursuant to its understanding of its obligations under Article 21.21, then no insured may ever recover attorneys fees under § 38.001 for any conduct arising out of that contract.

The federal Fifth Circuit appears to have construed § 38.006 in this manner.³¹ In *Vacuum Tanks*, the Fifth Circuit observed that the Texas Supreme Court has remarked, as a general matter, that the attorney's fees statutes do not apply to insurers that fall within a statutory exemption.³² The *Vacuum Tanks* Court took the Texas Supreme Court to have implied that "an insurer who falls within the provisions of section 38.006 is exempt from the

28. Some service contracts contain such an implied warranty. See *Melody Homes Mfg Co. v. Barnes* 741 S.W.2d 349, 352-53 (Tex. 1987) (contracts to repair existing tangible goods. See also *Archibald v. Act III Arabians*, 775 S.W.2d 84 (Tex. 1988) (horsetraining). But see *Dennis v. Allison*, 698 S.W.2d 94 (Tex. 1985) (no implied warranty of workmanlike performance running from physician-psychiatrist to patient). So, is adjusting liability claims more like psychiatry or more like horse training?" The implied warranty of workmanlike performance...has never been imposed in a professional services setting involving the exercise of professional judgment." *Drury v. Baptist Memorial Hospital System*, 933 S.W.2d 675 (Tex. App. — San Antonio 1996, no writ).

29. 923 S.W.2d 590 (Tex. 1996).

30. *Id.* at 593.

31. *Lafarge Corp. v. Hartford Cas. Ins. Co.*, 61 F.3d 389, 402-03 (5th Cir. 1995) and *Bituminous Cas. Court v. Vacuum Tanks, Inc.*, 975 F.2d 1130, 1133 (5th Cir. 1992).

32. *Dairyland County Mut. Ins. v. Childress*, 650 S.W.2d 770, 775 (Tex. 1983).

payments of attorney's and that only those insurers who do not qualify for the exemption are subject to the payment of attorneys fees."³³

Another recent Fifth Circuit case confronted the issue directly. An insured sought attorney's fees and coverage action. Insurers sought the protection of §38.006(4). They construed the "subject to" language of §38.006 as meaning that "any entity that could potentially face liability under article 21.21 is exempt from award of attorney's fees." The insured took the opposite position: "a insurer is only subject to article 21.21 if it has been successfully sued under that article[.]"³⁴ In the Fifth Circuit, once one panel has determined a question, it may not be overruled by another panel. A panel decision must be followed by other panels, as well as by district courts, absent an overruling by the entire Fifth Circuit, or a superseding decision of the United States Supreme Court.³⁵ The Lafarge court took itself to be bound by Vacuum Tanks, so it applied §38.006 and denied the insured any attorneys.

If the Mayfield-Lafarge-Vacuum line of cases shapes the future, a series of court of appeals cases will be overruled. Some Texas courts of appeals have taken a position that § 38.006 is a "default" provision, designed to provide attorneys fees in some situations where other statutes do not provide attorneys fees. Hence, according to these courts, if another statute does provide attorneys fees, then § 38.006 is unavailable.³⁶ The Vacuum Tanks court and the Lafarge court were aware of this line of cases. Thus, we now have a situation in which the Courts of Appeals in Texas have been going in one direction, the Fifth Circuit is going in another direction, and the Texas Supreme Court appears to be lining up with the Fifth Circuit.

Arguably, the Supreme Court's reliance upon § 38.006 in Mayfield is a sort of dicta. After all, the action of the trial court was truly extraordinary. It ordered

one party to pay the attorneys fee of the other party whilst the case was pending. Obviously, § 38.001 does not mandate actions of this sort. If, however, Mayfield is accepted at face value, and if § 38.006 is read literally, then policyholders are hardly ever entitled to attorneys fees in insurance breach of contract cases. (Of course, they may be entitled to them in declaratory judgment cases, because of the attorneys fees' shifting provisions of that statute³⁷).

This result may strike even the most partisan advocates for insurance companies as an unjust result. The problem may not be the court's doing, however. One could reasonably regard the result in Mayfield as profoundly unjust and yet see the court's

36. Prudential Ins. Co. v. Burk, 614 S.W.2d 847, 850 (Tex.Civ.App.—Texarkana, writ ref'd n.r.e.). Accord Aetna Fire Underwriters Ins. Co. v. Southwestern Engineering Corp., 626 S.W.2d 99, 103 (Tex.App.—Beaumont 1981, writ ref's n.r.e.) (predecessor of §38.006 applies only if insurer sued under Article 21.21.0); Vanguard Ins. Co. v. McWilliams, 680 S.W.2d 50, 52 (Tex.App.—Austin 1984, writ ref'd n.r.e.); (predecessor of §38.006 applies only if the attorney fees may be recovered in the instantsuit); State Farm Mut. Auto Ins. Co. v. Clark, 694 S.W.2d 572, 574-75 (Tex.App.—Corpus Christi 1985, no writ); Martin v. Travelers Indem. Co. v. Clark, 694 S.W.2d 572, 574-75 (Tex.App.—Dallas 1985, writ ref'd n.r.e.); Hochheim Prairie Farm Mut. Ins. Ass'n v. Burnett, 698 S.W.2d 271, 277-78 (Tex.App.—Fort Worth 1985, no writ)(collecting cases); American General Fire & Cas. Co. v. McInnis Book Store, Inc., 860 S.W.2d 484 (Tex.App.—Corpus Christi 1993, no writ). ("Courts have consistently construed the precursor to §38.006 to preclude a general award of attorney's fees only for those claims against insurance companies which allow for these fees under other statutes. None of the statutes enumerated in §38.006 apply to this suit. Appellees only sought recovery of payment under the insurance contract. All of the appellees' other claims against appellant (breach of duty of good faith and fair dealing and violations of Insurance Code and DPPA) were severed from this case and were not made a part of this trial." Id. at 490-91).

37. In Texas, declaratory judgments are governed by §37.001 et. seq of the Civil Practice and Remedies Code. Section 37.009 of the statute states as follows: "In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just." Notice that award of attorney's fees under §37.009 is quite discretionary. Awards of attorney's fees under §38.001 are not nearly so discretionary.

33. Vacuum Tanks 975 F.2d 1133.

34. Lafarge, 61F.3d at 402.

35. Bertram v. Freeport McMoran Inc. 35 F.3d 1008, 1016-17 (5th Cir. 1994). This rule applies even to Eire decisions, unless subsequent state court decisions or statutory amendments make the decision of the previous panel clearly wrong. Broussard v. Southern Pacific Transportation Co., 665 F.2d. 1387, 1389 (5th Cir. 1982)(en banc).

hands as tied by the clear language of the statute. After all, courts are supposed to refer to the legislature when it manages to make itself clear. The statute seems clear. From the point of view of the technicalities of statutory interpretation, the argument insured's have deployed, and which several intermediate-level courts of appeals have adopted, suffers from an additional problem. Art. 21.21-2 is never at issue in litigation between private parties. Private parties lack standing to invoke the provisions of Art. 21.21-2.³⁸ Hence, no case between a policyholder and an insurance company is ever "subject to" art. 21.21—2 for the purposes of §38.006. But that would deprive the statute of any range of application. It is a fundamental principle of statutory interpretation that no statute should be rendered vacuous — and therefore meaningless — by its interpretation.

IV. Conclusion

Three of the four cases discussed in this article are per curiam decisions. Each of them was the unanimous decision, and — as is part of the definition of the term "per curiam" — each was issued without oral argument. Often, per curiam decisions are simply concerned with correcting errors committed by lower courts. Frequently, they do not involve controversial issues of state-wide concern. As a result of what is generally true about per curiam decisions, some lawyers believe that they should be given less precedential authority than decisions which are signed by an individual justice and issued after oral argument. Such is not the case. There is no reason whatsoever to believe per curiam decision should be accorded less weight than any other court decision.³⁹ Some per curiam opinion should receive more weight than 5-4 opinions delivered after oral argument. This is especially true if the composition of the court has

38. *Vail v. Texas Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129 (Tex. 1988).

changed. The issuance of a per curiam opinion is a way the Supreme Court can signal the bar that it regards a certain matter as completely settled, rather obvious, and beyond debate. Thus, in effect, the Texas Supreme Court has told participants in the insurance game that an insurer's duty to defend will be triggered only by factually specific pleadings and that extrinsic evidence may not be used to defeat a duty to defend.

The actions of the Texas Supreme Court in *Mayfield* and in *Head* will encourage insurance companies to be more literal in reviewing insurance contracts when making duty-to-defend decisions. Moreover, insurers have a right to refrain from providing their insureds with defenses unless the petitions filed against their insureds contain fairly specific, relatively non-conclusory factual allegations which accuse the defendant-insured of causing unrecovered loss. At the same time, insurers should not indulge in crabbed constructions of their own policies. After all, the Supreme Court has announced that contract remedies are about to have a new day. If consequential damages are really — from a practical point of view, and not simply from the point of view of law school theoretics — recoverable, then insurers face significant exposure, especially in business cases. (Their exposure is less in a personal case, since mental anguish damages are not recoverable in contract theories). This exposure is even more significant if *Mayfield* does not, in the end, contain profound implications.

39. Pamela Stanton Baron, *Beyond Debate: Per Curiam Disposition by the Texas Supreme Court 6* (March 26, 1997). This so-far unpublished paper was handed out at the Appellate Practice Section of the Houston Bar Association on March 26, 1997. The author is a lawyer in Austin, Texas and a former briefing attorney for the Supreme Court of Texas. See Ewell H. Muse Jr., *Per Curiam Opinions of the Supreme Court of Texas*, 12 TEX. L. REV. 469-70 (1934).