



Legal Beat

By MICHAEL SEAN QUINN

An Agent's Nightmare

Who Knew Forwarding Lawsuit Papers Could Get So Sticky

Insurance agencies mediate between insurance companies and policyholders all the time. One of the most important focal points for this kind of activity has to do with forwarding suit papers. An insured gets sued. He hands the lawsuit to the insurance agent. The insurance agent delivers it to the insurance company. The insurance company appoints counsel for the insured. Counsel answers the lawsuit. Things work themselves out.

Unfortunately, there is an ironclad law of social life that whatever can go wrong sometimes does, and there is a corollary to this fundamental axiom: sometimes, when the gods of cussedness will it, everything that can go wrong will—all at once in the same transaction. And that is not the only corollary. The gods of cussedness have ordained that any pile of papers stapled together—no

matter how large—can be lost in the bottom of a normal-sized gin bottle. This is an anomalous law of nature that is too infrequently explored in college science departments, for reasons that remain obscure.

In any case, one or more of these laws applies with special vengeance, it seems to me, to the forwarding of suit papers. Agents get sued relatively frequently—sometimes rightly and sometimes wrongly—in connection with lost and misdirected suit papers.

Not long ago, in *Reyna v. Safeway Managing General Agency*, the simple problem of a lost citation gave rise to hugely convoluted problems with high six figures at stake. Of course, the natural flow of events may have had some human help. Various interested parties may have cooperatively twisted events to their liking. In other words, the Reyna Insurance Agency, and the family

what happened in the *Reyna* case makes an excellent cautionary tale. It was decided by the San Antonio Court of Appeals on March 31, 2000.

The *Reyna* case is so complicated, it will take two columns to discuss it. This first column will sketch the “facts” of the case. (I put quotes around the word “facts,” because I draw pretty much everything from the opinion of the court of appeals. If they have it wrong, then—chances are—I have it wrong, too.) There are three categories of facts to recount: pre-suit, road-way suit, and agency suit.

Starting from the beginning: pre-suit

Richard Miera owned a car and an insurance policy. The policy was issued by State & County Mutual Fire Insurance Company through its managing general agent, Safeway. Miera lent his car to his brother-in-law Juan Alvarado. Thus, Alvarado was an insured under the policy.

In 1992, Alvarado was involved in a collision. Apparently he was charged with DWI and retained one Nelson Norman to represent him. Alvarado notified Safeway about the accident. Safeway sent Miera a questionnaire about the accident. Miera gave it to Alvarado. Norman helped Alvarado finish it, complete it, and it was sent back to

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6-15

AD Index

Bankers Underwriters of Texas Inc.	35
Burns & Wilcox Ltd	7
www.burnsandwilcox.com	
Capstone Underwriters Inc.	25
www.capstoneunderwriters.com	
Charter Insurance	19
www.charterins.com	
ConfirmNet Corporation	26
www.confirmnet.com	
Delta General Agency	32
www.deltains.com	
FEMA	40
www.floodedat.fema.gov	
Foremost Insurance Group	21
Frontier General Insurance Agency, Inc.	30
www.frontiergeneral.com	
Global Special Risks	11
Hall & Company	21
www.hallco.com	
AIAT	29
Independent Insurance Agents of Texas	26
www.iaat.org	
Leader National Insurance Company	10
McGraw Insurance Services	3
www.mcgrawgroup.com	
Merchant's Bonding Company	31
Midlands Management of Texas	20
National Cloyds Insurance Co.	33
www.natclayds.com	
North Island Group, Inc.	22
www.nisgroup.com	
Protegeny Services, Inc.	28
www.protegenynow.com	
RSI International, Inc.	23
www.rsiimga.com	
Sterra Insurance Group	27
www.sterraworkerscomp.com	
Stirling Cooke Texas, Inc.	24
Tax Refund Express	35
Tejas American General Agency	8
Texas Workers' Comp. Insurance Fund	4
www.txwcfund.com	
U.S. Risk	16
www.usrisk.com	
U.S. Transportation	18
Underwriters Indemnity - REI	39
Vista Insurance Partners	7
www.vistaprog.com	
Western Surplus Lines Agency, Inc.	36
www.westernsurplus.com	

Safeway. (Eventually the DWI was dropped.)

Almost two years later, just before the tort statute of limitations would have run and barred suit, the two others involved in the accident sued Alvarado and Miera. Miera, the owner of the car, was served almost immediately. He gave his suit papers to Alvarado, the driver; Alvarado gave them to Norman, the lawyer; and Norman gave them to the Reyna Insurance Agency, which had sold Miera the policy in the first place. Patricia Reyes, the daughter of the senior owner and who worked at Reyna, testified that she instructed an office worker to fax the suit papers to Safeway. (Nothing more is ever said in the report of this case about the original citation papers or about the fax cover sheet.)

Shortly thereafter, plaintiff's counsel wrote to Safeway, stating that Miera had not answered, and indicated that he intended to take a default judgment, if an answer was not filed forthwith. Safeway then hired Ken Richey, another lawyer, to represent Miera. He filed an answer on Miera's behalf.

At the same time, Safeway sent Miera another questionnaire; Miera again gave it to Alvarado; Alvarado completed it and returned it—this time, it appears, without the assistance of Norman. (Understandably, Alvarado was nervous, so he called a paralegal for Richey—Miera's lawyer and sometimes his—to confirm receipt and was told that he would be recontacted if problems arose.

Alvarado was served with citation in the road-way suit in July 1994. This date is after the statute of limitations had run, but suit was filed before the limitation period expired. So long as a filing is timely and service is had within a reasonable period of time, the statute of limitations does not kick in, at least under Texas law.

Alvarado quickly handed the suit papers to Norman. Norman sent them by certified mail to the Reyna agency, where they were actually received. (In fact, Reyes's mother, Carmen Reyna, signed the green slip.) So far so good. But not for long.

Reyes testified that her mother called her and that she told her mother to fax the suit papers to Safeway. Reyes further testified that her mother sent the papers as instructed and followed-up with one Maxine [Somebody-Or-Other] at Safeway. According to Reyes, her mother told her that Maxine stated that Safeway received the papers.

Maxine testified that she could not remember receiving the Alvarado suit papers. Reyes testified that Safeway lost suit papers from time to time, and Safeway officials agreed. Also, when called upon to do so, Safeway officials described a mail distribution procedure that involved the clumsy

handling of huge volumes of daily mail. In any case, there was no quotation in either Alvarado's or Miera's adjustment file to suggest that the suit papers had been received.

Approximately three months after Alvarado received citation, plaintiffs took a default judgment against him. One of them got \$250,000, while the other took \$100,000. Plaintiffs served the default judgment upon Alvarado. He took it to Norman. Norman contacted the Reyna agency, told the receptionist about the problem, but—incredibly—no one called him back. Norman then wrote to Reyna demanding that something be done. Norman also got in touch with Richey.

In the meantime, counsel for the plaintiffs sent to Norman a copy of the default judgment. Counsel for the plaintiffs stated that he had made a policy limits (i.e., a *Stowers*) demand earlier in the year but the insurance company had failed to respond. He also said that the case would have to be settled as an excess-of-policy limits case and that the plaintiffs would not take anything like policy limits. (Something is amiss here. Reasonable insurers don't fail to respond to such demands. That an insurer would both lose the mail and fail to respond to a *Stowers* demand—even a bogus pre-suit one—boggles the mind. One has one's doubts.)

Thus, a simple auto accident case with low insurance limits was magically converted into a substantial *Stowers* negligence case against the insurance company. The plaintiffs' lawyer reinforced this idea when he offered to take an assignment of any claims Alvarado might have against Safeway and Reyna in exchange for an agreement not to execute on the judgment. (Unfortunately, the court of appeals does not confirm that there actually was a *Stowers* demand letter. This should have played a large role.)

Safeway appointed Richey to represent Alvarado, along with Miera. Alvarado was apparently troubled by this idea, so he also retained Norman. Both Norman and Richey filed motions to set aside the default judgment. So Alvarado had two lawyers not on the same team. The trial court held a hearing. What a zoo!

At the hearing, plaintiff's counsel offered to agree to set aside the default, if he could go to trial the next week. In the end, there was a negotiated agreement: both sides agreed that the judgment be set aside and that everyone would start over. Ostensibly, all the animals had been herded into their cages.

Nevertheless, shortly after the hearing, the plaintiffs filed a motion to reconsider. For some reason, which is not clear to hardly anyone, the plaintiffs tried to back out of the set-aside agreement. Now, this is usually not easy to do, if the agreement is in writing. Nevertheless, the trial court let them do it.

There was a second hearing on Alvarado's motion to set aside default judgment against him. Apparently, neither Reyna nor Safeway cooperated. As a consequence, Norman could not present evidence that Alvarado's failure to answer was the result of an accident or mistake in the handling of the suit papers. Consequently, the trial court refused to set aside the default judgment.

The controversy re-ignites

For the next couple of years, everyone negotiated sporadically with everyone else. Lawyers took discovery. In 1995, Alvarado agreed to assign his rights to the plaintiffs in exchange for a covenant not to execute. The plaintiffs did not sign the agreement, however, until two years later. At about the same time, the controversy came alive again.

Safeway filed a declaratory judgment action to determine what duties it owed Alvarado. Alvarado filed a counterclaim. The plaintiffs intervened. Safeway sued Norman, the plaintiffs, and the Reynas. Alvarado and the plaintiffs sued the Reynas, and the Reynas sued everybody, including Norman.

Safeway, the plaintiffs, and Alvarado settled their claims against each other for \$75,000. The trial court then realigned the parties, so that everyone was lined up against the Reynas. Unfortunately, the Reynas overdid things a bit when they sued

Norman. The trial court dismissed their lawsuit against Norman and awarded sanctions of \$2,500 against the Reynas.

Basically, when the case went to trial, everyone was suing the Reynas for negligence, breach of contract, breach of fiduciary duty, violations of the Texas Deceptive Trade Practices Act, and violations of the Texas Insurance Code. For their part, the Reynas were permitted to assert contributory negligence as an affirmative defense. In other words, the Reynas said, "If we're negligent, so were some other folks."

Now, the Reynas had long since—as part of their regular business—entered into an indemnity agreement with Safeway, providing that they would pay Safeway in case suit papers got misdirected, even if Safeway were itself negligent. Safeway sought to enforce the agreement, while the Reynas sought to invalidate it. (If A indemnifies B against losses even when B is negligent, the indemnity agreement must expressly say so in pretty much those terms. This is called the "Express Negligence Rule." The Reynas said that the indemnity agreement between their agency and Safeway violated that rule.)

At the end of the trial, before the case went to the jury, the plaintiffs dropped their negligence claim, and thereby eliminated the plaintiffs' principal affirmative defense. Consequently, the case went to the jury on

all theories except negligence. Tricky devils—these lawyers.

Imagine! All of this arose out of a very simple failure by somebody to process suit papers correctly. We are talking here about A handing a sheaf of stapled papers to B and B not losing them as it puts them in a newly created file.

Of course, as I suggested earlier, lawyers probably helped the facts along. It is hard to see, absent lawyerly subterfuge, collusion, cahooting, and such, why either Reyna or Safeway failed to come with the second hearing on Alvarado's motion to set aside the default judgment. Had either of them come and testified, the default judgment would have been set aside as a routine matter.

Instead, the lawyers created a financial disaster for the insurance agent—a fiasco far in excess of what was deserved, even if the agency did something wrong. The contours of that catastrophe, its appellate resolution, and the denouement will be sketched in the next column. ■

Quinn is an Austin shareholder in the law firm of Sheinfeld, Maley & Kay. He litigates and testifies on insurance related problems and is currently the chair of the Insurance Section of the State Bar of Texas. He also is a Visiting Professor of Law at the University of Texas-Austin.

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