RECENT DEVELOPMENTS IN AUTOMOBILE INSURANCE COVERAGE AND VEHICULAR ACCIDENT LAW

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I. SCOPE OF ARTICLE

This Article focuses on legal developments during the past year in automobile accident litigation practice. Topics covered include uninsured/underinsured motorist claims, liability coverage under automobile insurance policies, and recent developments related to vehicular accident claims in general. Issues raised in papers presented on these topics at this Seminar in prior years are updated with recent court opinions and legislative action. Matters indirectly affecting vehicular accident claims that are addressed in other papers presented at this Seminar are not considered here.

II. UNINSURED/UNDERINSURED MOTORIST COVERAGE

A. Legislature Adds Venue Provision to Uninsured/Underinsured Motorist Statute

Effective September 1, 1995, venue for all claims against an uninsured or underinsured motorist carrier—both contractual and extracontractual—will be governed by the new Section 8 of Article 5.06—1 of the Texas Insurance Code, which provides in pertinent part:

> An action against an insurer in relation to the coverage provided by this article, including an action to enforce that coverage, may be brought only:
>
> (a) in the county in which the policyholder or beneficiary instituting the suit resided at the time of the accident; or
>
> (b) in the county in which the accident involving the uninsured or underinsured motor vehicle occurred.

This new provision sets forth the exclusive venue for all uninsured/underinsured motorist cases, regardless of whether the insurer is a foreign corporation or not.

B. Uninsured Motorist Carrier's Notice of Subrogation Rights Letter to Insured Does Not Constitute Consent to Sue

In State Farm Mutual Automobile Insurance Co. v. Azima, ___ *S.W.2d* ___, *38 Tex. Sup. Ct. J. 463 (Mar. 30, 1995) (per curiam), the Texas Supreme Court held that an uninsured motorist carrier's letter to its insured concerning subrogation rights did not constitute consent to sue the uninsured motorist so as to bind the uninsured motorist carrier to pay the judgment obtained by the insured against the uninsured motorist.*

The uninsured motorist coverage portion of the standard Texas Personal Auto Policy provides that "[a]ny judgment for damages arising out of a suit brought without the insurer's written consent is not binding on the insurer." Azima, a State Farm policyholder, obtained a $1 million default judgment against Sturdivant, and then demanded payment of the $100,000

policy limits under the uninsured motorist provision of her policy. State Farm refused to pay, taking the position that Azima never obtained its written consent to sue Sturdivant in accordance with the requirements of her policy. Azima then filed suit for breach of contract.

Azima contended that a letter that State Farm had sent her constituted consent to sue, as did a conversation that she had with a State Farm agent. The letter mentioned State Farm's subrogation rights with regard to any uninsured motorist coverage payments it made. It also made reference to non-covered losses with the following language:

> Please understand, if you have any out of pocket expenses, that are *not covered by your policy,* you will have to contact the other party or their insurance carrier and *make a claim* for reimbursment [sic].

[Emphasis added.] The trial court excluded from evidence the subrogation notice letter as well as a conversation between a State Farm representative and Azima, who alleged that she was told that she would have to sue Sturdivant to recover any damages that State Farm did not reimburse. The trial court then presented the case to the jury as a negligence action against Sturdivant, and the jury awarded Azima $7000 in damages. The court of appeals reversed and remanded, holding that the letter and the testimony were admissible to determine whether State Farm gave Azima its consent to sue, which would constitute an agreement to be bound by the judgment, subject only to the coverage limits. *Azima v. State Farm Mutual Automobile Insurance Co.*, 884 S.W.2d 900, 902-03 (Tex. App.—San Antonio 1994).

The Supreme Court reversed and affirmed the judgment of the trial court, holding that the letter presented no evidence that State Farm consented to Azima's suit against Sturdivant. *Azima*, 38 Tex. Sup. Ct. J. at 464. According to the Court, while the letter directed Azima to make a claim with the other party for any expenses *not covered* by her policy, it did not authorize her to file suit for damages that *were covered* by her policy. The Court reasoned that the purpose of the consent-to-sue clause is to protect insurance carriers from liability arising from default judgments against uninsured motorists or from unsubstantial defense of uninsured motorists. To allow Azima to bind State Farm with the default judgment against Sturdivant, according to the Court, would contravene this purpose. Finally, the Court held that testimony regarding Azima's conversation with the State Farm representative was inadmissible and thus properly excluded from evidence. Parol evidence is admissible to determine the meaning of a writing only if the writing is reasonably susceptible to more than one interpretation, and the Court held that because the subrogation letter was unambiguous, evidence regarding the conversation was properly excluded.

C. Severance of Contractual Claim from Extracontractual Claim Discretionary

In Allstate Insurance Co. v. Evins, *No. 13-95-030-CV (Tex. App.—Corpus Christi Feb. 28, 1995, n.w.h.), the Corpus Christi Court of Appeals denied an insurance company's mandamus action seeking severance of contractual claims from extracontractual claims arising from uninsured motorist coverage.*

Rene Cano and Jose Luis Barrera were injured in a motor vehicle accident with an uninsured motorist and sought uninsured motorist benefits from Allstate. When negotiations stalled, Cano and Barrera sued Allstate under the terms of the insurance agreement as well as for extracontrac-

tual causes of action for breach of the duty of good faith and fair dealing, violations of the Insurance Code and the DTPA, and for negligence and fraud.

Allstate moved to sever the contractual cause of action from the extracontractual causes of action on the ground that settlement offers it had made on the policy would be highly prejudicial to its defense of the contract claims but necessary to its defense of the extracontractual bad faith claims. The trial court refused to sever, and the Corpus Christi Court of Appeals denied mandamus relief.

The Court of Appeals recognized that several courts have held that a trial court is required to sever contract causes of action from bad faith causes of action when there is evidence of settlement offers or privileged communications that are admissible in one action but highly prejudicial in the other. One of these courts, the Houston Court of Appeals, considered the merits of a jury instruction not to interpret evidence of a settlement offer as an admission of liability in the contract action, and held that such an instruction would be insufficient to prevent undue prejudice to the insurer. *See State Farm Mutual Automobile Insurance Co. v. Wilborn*, 835 S.W.2d 260, 262 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding).

However, the Corpus Christi Court disagreed, stating that it was "unwilling to hold that such an instruction would not be followed by the jury or that the situation created here is so prejudicial to the insurance company that a severance is always required." Holding that the decision whether to sever such cases should be left generally to the trial court's discretion, the Court denied mandamus relief.

D. Employees and Their Relatives Are Not "Family Members" with Regard to Uninsured Motorist Coverage in Employer's Policy

In Webster v. United States Fire Insurance Co., *882 S.W.2d 569 (Tex. App.—Houston [1st Dist.] 1994, writ denied), the Houston Court of Appeals held that employees and their relatives are not covered as named insureds or as "family members" under an employer's uninsured motorist insurance policy.*

Jeffrey Webster was test-driving an automobile in his capacity as a service adviser for Gullo-Haas Toyota when another car's muffler came off and smashed through the windshield of the car, severely injuring Jeffrey and his wife, who was accompanying him on the test drive. The driver of the other car fled the scene. The Websters sued Allstate (the insurance carrier for the owner of the vehicle the Websters were test-driving) and U.S. Fire (the insurance carrier for Gullo-Haas) for violations of the DTPA and the Texas Business and Commerce Code, breach of the duty of good faith and fair dealing, intentional infliction of emotional distress, and duress. The trial court severed the claims against Allstate from the claims against U.S. Fire and granted summary judgment in favor of U.S. Fire. The Houston Court of Appeals affirmed.

Gullo-Haas' insurance policy, issued by U.S. Fire, defined "insured" as "[y]ou and any designated person[1] and any family member of either," and defined "family member" as "a person related to you by blood, marriage or adoption who is a resident of your household,

[1]The policy defined a "designated person" as an individual named in the schedule. The Websters conceded that they did not qualify as "designated persons."

including a ward or foster child." The Websters contended that since "you" referred to Gullo-Haas in the Gullo-Haas policy, "family member" was meant to entitle Gullo-Haas' employees and their relatives to coverage.

The Houston Court of Appeals, with one judge dissenting, held that when a corporate-employer is a named insured on an insurance policy, the family-oriented language contained therein does not extend coverage to the corporation's employees, and that summary judgment was proper because the policy was unambiguous and thus susceptible to only one reasonable interpretation.

E. Underinsured Motorist Coverage Unavailable to Relative Who Was Not Member of Insured's Household

In Cicciarella v. Amica Mutual Insurance Co., *869 F. Supp. 488 (S.D. Tex. 1994), the Southern District of Texas held that the insured's mother, who lived in New York, was not a resident of the insured's household where the insured's legal domicile was Houston, and thus was not entitled to underinsured motorist benefits under the insured's policy.*

James and Vickey Halloran were involved in a motor vehicle accident with an underinsured motorist while in New York for a medical seminar. Vickey's mother, Lillian Cicciarella, who was a resident of New York, was a passenger in the Hallorans' rental car at the time of the accident. Cicciarella and the Hallorans filed claims with Amica Mutual Insurance Company ("Amica") for uninsured/underinsured motorist benefits under the Hallorans' policy. Amica denied the claims, and Cicciarella and the Hallorans sued Amica for breach of contract, breach of the duties of good faith and fair dealing, and violation of Article 21.21 of the Texas Insurance Code. Amica later settled with the Hallorans.

After Cicciarella's underinsured motorist claim was severed from her other claims, Amica filed a motion for summary judgment on the grounds that Cicciarella was not a resident of the Hallorans' household on the date of the accident and thus could not avail herself of the underinsured motorist benefits under the Hallorans' policy. Cicciarella alleged that her daughter maintained a dual residence in New York and in Houston, and thus Cicciarella was covered as a resident of her daughter's New York household.

The policy defines a "covered person" entitled to uninsured motorist coverage benefits as "you or any family member" and "family member" is defined as "[a] person who is a resident of your household and related to you by blood, marriage or adoption."

The Court noted that under Texas law, a "household" generally constitutes "those who dwell under the same roof and compose a family." The test for whether persons are residents of the same household, however, goes beyond whether they reside together under one roof, contemplating instead "whether the absence of the party at interest from the household of the alleged insured is intended to be permanent or only temporary—*i.e.*, whether there is a physical absence coupled with an intent not to return." Under either definition, the Court held that Cicciarella was not a resident of the Hallorans' household.

Essential to the Court's determination that Cicciarella was not a resident of the Hallorans' household were the facts that: (1) the Hallorans did not dwell under the same roof as Cicciarella;

(2) Vickey Halloran testified that she and her husband spent the vast majority of their time in Houston; (3) the Hallorans' visits to Cicciarella's New York house were for short periods of time; and (4) despite keeping clothing at the New York house and paying the repair bills, taxes, mortgage, and casualty insurance on the New York house, the Hallorans' only true physical presence at the New York house occurred during these isolated visits. The Court found these facts to be more compelling than those presented by Cicciarella, who contended that the Hallorans maintained a New York residence because they spent forty to fifty days per year in New York, and because Vickey Halloran was the sole owner of the New York house, financially supported Cicciarella, claimed Cicciarella as a dependent on her income tax returns, maintained a joint savings account in New York with Cicciarella, contacted Cicciarella by phone up to three times daily, and maintained her medical license in New York.

The Court also rejected Cicciarella's argument that the Hallorans maintained a dual residence, concluding that the term "residence" as contained in an insurance policy is analogous to the legal concept of domicile, the elements of which are (1) an actual residence (2) in conjunction with an intent to make it a permanent home. The Court held that the Hallorans' legal domicile was in Houston, which was the location of their primary home and where they were registered to vote. Furthermore, the Hallorans did not pay state income taxes in New York.

According to the Court, even if "residence" is not analogous to "domicile" in the context of an insurance policy, the Hallorans did not meet the test for a second residence away from a domicile. The elements of that test are: (1) a fixed place of abode within the possession of the concerned individual; (2) which is occupied or intended to be occupied consistently over a substantial period of time; and (3) which is permanent rather than temporary. Although the Hallorans satisfied the first prong of the test because Vickey Halloran was the legal owner of the New York house, her sporadic visits with her husband to the New York house were insufficient to satisfy the second or third prongs of the test.

F. Uninsured Motorist Policy Does Not Provide Coverage for Punitive Damages

In Vanderlinden v. United Services Automobile Ass'n Property & Casualty Insurance Co., *885 S.W.2d 239 (Tex. App.—Texarkana 1994, writ denied) and in* State Farm Mutual Automobile Insurance Co. v. Shaffer, *888 S.W.2d 146 (Tex. App.—Houston [1st Dist. 1994, writ denied], the Texarkana and Houston Courts of Appeals held that policyholders cannot recover punitive damages from their underinsured motorist carriers based on the gross negligence of the uninsured motorists.*

Suzanne Vanderlinden was injured in a motor vehicle accident caused by a drunk driver. After the drunk driver's insurer paid Vanderlinden $50,000, Vanderlinden sued her own insurer, USAA, for underinsured motorist benefits, seeking compensatory damages as well as punitive damages based on the drunk driver's gross negligence. The trial court granted USAA's special exception that struck Vanderlinden's request for punitive damages, and the Texarkana Court of Appeals affirmed.

The Court of Appeals relied on language from Vanderlinden's USAA policy, which stated that USAA would pay uninsured/underinsured motorist benefits in the following manner:

> We will pay damages which *a covered person is legally entitled to recover from the owner or operator* of an uninsured motor vehicle *because of bodily injury* sustained by a covered person, or property damage, caused by the accident.

Vanderlinden, 885 S.W.2d at 241 (quoting identical language from policy cited in *Government Employees Ins. Co. v. Lichte*, 792 S.W.2d 546, 549 (Tex. App.—El Paso 1990), *writ denied per curiam*, 825 S.W.2d 431 (Tex. 1991) (Supreme Court reserving decision on the question of whether punitive damages are recoverable under uninsured motorist coverage)) (emphasis in original). The Texarkana Court agreed with the reasoning of the El Paso court in *Lichte*, whose interpretation of the same coverage provision was that while it requires the insurer to pay damages suffered by the plaintiff because of bodily injury, it does not include coverage for an award of exemplary damages. The purpose of allowing the recovery of punitive damages is to punish the wrongdoer, according to the Court, and since the wrongdoer was the uninsured motorist and not the insured, punitive damages were not recoverable under the uninsured/underinsured motorist provision of the policy.

The Houston Court of Appeals came to the same conclusion in *State Farm Mutual Automobile Insurance Co. v. Shaffer*, 888 S.W.2d 146 (Tex. App.—Houston [1st Dist.] 1994, n.w.h.). Cherie Shaffer was injured in a motor vehicle accident with an uninsured motorist who was driving while intoxicated. Shaffer sued the uninsured motorist for negligence and gross negligence, and in the same lawsuit sued State Farm, her own insurance carrier, seeking to recover benefits under the uninsured motorist provision of her policy. The trial court found the uninsured driver negligent and grossly negligent and awarded Shaffer $10,000 in compensatory damages and $10,000 in exemplary damages, holding State Farm and the uninsured driver jointly and severally liable. The Court of Appeals reversed the portion of the judgment assessing exemplary damages against State Farm and rendered judgment that State Farm was liable, jointly and severally, only for the compensatory damages awarded to Shaffer.

Recognizing that the language of the uninsured/underinsured motorist provision of Shaffer's policy precisely tracked that of the language of the provision in *Vanderlinden*, the Court held that the use of the phrase "because of bodily injury" in language contained in relevant portions of the Texas Insurance Code and the Texas Motor Vehicle Safety—Responsibility Act signaled that the legislative intent of those statutes was only to provide compensatory damages to an injured party under an uninsured motorist policy. *Shaffer*, 888 S.W.2d at 147-49. Furthermore, exemplary damages are assessed to punish wrongdoers and to serve as a deterrent to future wrongdoers; neither objective would be achieved by imposing punitive damages on an uninsured motorist carrier for an uninsured motorist's wrongful act.

G. Recoverability Vel Non of Attorney's Fees in Underinsured Motorist Action

In Novosad v. Mid-Century Insurance Co., *881 S.W.2d 546 (Tex. App.—San Antonio 1994, n.w.h.), the San Antonio Court of Appeals held that attorney's fees are recoverable in an action on an underinsured motorist contract.*

Janice Novosad sued Mid-Century Insurance Company pursuant to the underinsured motorist provisions of her Mid-Century automobile insurance policy for injuries she sustained in a motor vehicle accident with a third party. Mid-Century stipulated to the negligence of the underinsured third party, thereby reducing the issues presented at trial to the nature and extent of Novosad's

injuries and the amount of reasonable attorney's fees incurred by Novosad. Novosad was awarded $7600 for past and future medical expenses and $5000 for attorney's fees. Mid-Century appealed the award of attorney's fees, and the San Antonio Court of Appeals affirmed.

Novosad's Mid-Century policy provided in pertinent part:

> We will pay damages which a covered person is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of bodily injuries.

Mid-Century maintained that it breached no contractual duty to Novosad, because it could not ascertain what damages Novosad was legally entitled to recover until a verdict was received. The Court disagreed, because Mid-Century granted consent to Novosad to settle with the tortfeasor for policy limits and it stipulated that the negligence of the underinsured driver caused the accident.

Whether this case conflicts with the Austin Court of Appeal's decision in *Sikes v. Zuloaga,* 830 S.W.2d 752 (Tex. App.—Austin 1992, no writ) is questionable. The *Sikes* Court held that attorney's fees were not recoverable, although that was a *uninsured* motorist case and consequently involved no such consent to settle or stipulation of liability.

H. Avoiding Prejudice and Multiplicity of Trials Through Use of Order Allowing Underinsured Motorist Carrier to Participate in Trial Without Being Identified

In cases where it appears that the defendant may not have adequate liability insurance coverage, the plaintiff typically joins his underinsured motorist carrier in the same suit. Ordinarily, a joint trial of the plaintiff's claim against the alleged tortfeasor and his claim against the underinsured motorist carrier will result in the jury learning of the existence of both liability and underinsured motorist insurance. The injection of insurance into such a joint trial operates to the prejudice of both the alleged tortfeasor, and, to a lesser extent, the underinsured motorist carrier. Underinsured motorist carriers are hesitant to agree to be bound by the outcome of the trial against the alleged tortfeasor who is defended by counsel not of their selection. Thus, both defendants in such cases often move the court to order a severance or separate trials so that the claim against the alleged tortfeasor is tried first and separately from the claim against the underinsured motorist carrier. When the court grants such a motion, the plaintiff is required to suffer through two trials. Consequently, the plaintiff opposes the motion for separate trial, not only for the strategic purpose of being afforded the opportunity to inject insurance, but also for economic reasons (*i.e.*, avoiding the expense of two trials).

One solution to this dilemma is a compromise order allowing trial of both claims simultaneously without the injection of insurance but with binding effect on the uninsured motorist carrier. Appendix "A" to this Article contains a form of such an order. The order allows both claims to be tried simultaneously, but the underinsured motorist carrier is never identified and its attorney is identified only as a lawyer representing a party with an interest similar to that of the alleged tortfeasor. This allows the attorney for the underinsured motorist carrier to participate in all aspects of the trial without informing the jury of the existence of insurance. Since the carrier is bound by the results of trial, the plaintiff is not required to try his case twice. He does, however, lose the opportunity to advise the jury about insurance coverage.

III. THIRD-PARTY CLAIMS AND LIABILITY COVERAGE

A. Notice to Insurer of Lawsuit Against Its Insured Required

In Harwell v. State Farm Mutual Automobile Insurance Co., ___ *S.W.2d* ___, *38 Tex. Sup. Ct. J. 458 (Mar. 30, 1995), the Texas Supreme Court held that an insurer had no duty to defend and thus was not liable for a judgment against its insured because it had never received proper notice of the lawsuit against its insured and because the lack of notice prejudiced its defense of the suit as a matter of law.*

State Farm insured Tammy Hubbard was killed in an automobile accident with Eric Christopher Leatherman, who was seriously injured. Three days before limitations had run, Leatherman's attorney filed suit against "Tammy D. Hubbard, Deceased," but failed to identify in the petition the name or address of a temporary administrator of Hubbard's estate. On the same day, Valerie Harwell (the plaintiff's attorney's secretary) was appointed temporary administrator of Hubbard's estate.

Approximately seven months later, the plaintiff's attorney notified State Farm of the lawsuit and advised State Farm to file an answer in order to avoid a default judgment. The only mention of Harwell in the plaintiff's attorney's letter to State Farm was a notation at the end of the letter, stating: "cc: Ms. Valerie Harwell, Temporary Administrator."

After the deadline had passed for State Farm to file an answer, the plaintiff's attorney contacted State Farm's attorney and advised him that Harwell would soon be named the permanent administrator of Hubbard's estate, and that at that time he would amend the Leatherman petition, obtain new service on Harwell, and proceed with the case. State Farm's attorney responded that State Farm would not defend Harwell because limitations had run. Two months later, Harwell qualified as the permanent administrator of Hubbard's estate.

The plaintiff's attorney filed an amended petition, again failing to name Harwell or Hubbard's *estate* as a party to the suit. The petition did state, however, that Hubbard's estate could be served through Harwell. Harwell filed an answer on behalf of Hubbard's estate, and the trial court set the case for trial. Harwell did not send copies of the amended petition, the answer, or the trial notice to State Farm, nor did she ask State Farm to defend her or Hubbard's estate. Harwell appeared at trial pro se, but offered no evidence or argument in defense of Hubbard's estate. The trial court rendered judgment against "Tammy D. Hubbard, Deceased."

More than thirty days after the judgment was signed, the plaintiff's attorney sent another letter to State Farm, enclosing a copy of the judgment and demanding payment thereupon. State Farm refused to pay and filed a petition for a declaratory judgment that it was not responsible under the policy to pay the judgment because (1) Harwell failed to promptly forward notice or suit papers and thus prejudiced State Farm's defense of the case as a matter of law, and (2) the judgment did not name Harwell as a party to the suit. The trial court granted summary judgment in favor of State Farm, and the court of appeals affirmed on the first grounds.

The Texas Supreme Court affirmed, disagreeing with Harwell's argument that the plaintiff's attorney's initial letter to State Farm as well as his conversation with State Farm's attorney provided State Farm with notice of the lawsuit against Hubbard. The Court concluded that because Harwell was neither the *qualified* administrator of Hubbard's estate nor a party to the

lawsuit at the time of the plaintiff's attorney's communications with State Farm, any notice State Farm might have received was merely notice of a claim against the estate, not notice of a lawsuit against State Farm's policyholder. *Harwell*, 38 Tex. Sup. Ct. J. at 460.

The notice of suit provision of Hubbard's policy provided in pertinent part:

> We must be notified promptly of how, when and where the accident or loss happened. Notice should also include the names and addresses of any injured persons and of any witnesses. If we show that your failure to provide notice prejudices our defense, there is no liability coverage under the policy.
>
> A person seeking coverage must:
>
> 1. Cooperate with us in the investigation, settlement or defense of any claim or suit.
>
> 2. Promptly send us copies of any notices or legal papers received in connection with the accident or loss.

According to the Court, compliance with the notice of suit provision in an insurance policy is a condition precedent to the insurance company's liability on the policy. State Farm would have gratuitously subjected itself to liability, reasoned the Court, if it appeared on its policyholder's behalf prior to receiving notice that Harwell was properly served or had appeared in the lawsuit.

A policyholder's failure to provide notice to the insurer of a lawsuit against the policyholder does not relieve the insurer from liability for the underlying judgment unless the insurer is prejudiced by the lack of notice. *Id.* The Court held that Harwell's failure to notify State Farm of the lawsuit until after judgment had become final and nonappealable prejudiced State Farm as a matter of law, thus relieving State Farm from liability for the underlying judgment.

B. Substitute Vehicle, Not Furnished for Regular Use, Is Covered

In State Farm Mutual Automobile Insurance Co. v. Cobos, *No. 08-93-00375-CV, 1995 WL 234919 (Tex. App.—El Paso Apr. 20, 1995, n.w.h.), the El Paso Court of Appeals held that a driver involved in a motor vehicle accident while operating a truck owned by his father's employer was covered under the family policy because (1) the truck was not furnished for his father's "regular use," and (2) it was a "substitute" vehicle because the scheduled vehicle was out of service since the keys were not readily available at the time of the accident.*

Ismael Cobos, Sr. ("Senior") was an employee of Price Construction Company ("PCC"), which provided him with a company truck for the limited purposes of on-the-job usage and transportation to and from the workplace. Senior drove to a relative's house in the PCC truck to repair a roof, and Senior's son, Ismael Cobos, Jr. ("Junior"), drove the family car—insured under Senior's State Farm policy—to the house, where he planned to assist his father. When there developed the need for Junior to return to the family home to retrieve a roofing knife, he discovered that the family car was boxed in by a number of other vehicles. Furthermore, Junior had earlier turned the keys over to the relative and thus, though the car was there, the keys were not at that moment available. With Senior's permission, Junior took the PCC truck in order to return to the family home. During the trip home, Junior was involved in an accident.

State Farm filed a declaratory judgment action against Senior and Junior, seeking a determination of its duties under the insurance policy, and the trial court found that Junior was covered under the Cobos family policy because (1) the PCC truck was not furnished or available for Senior's regular use and (2) the PCC truck was a substitute vehicle at the time of the accident since the family car was not capable of being operated at the time of the accident.

The El Paso Court of Appeals affirmed, relying on the language of two provisions found in the family insurance policy under which Senior was insured. The first relevant clause, appearing in the "Exclusions" section, provided in pertinent part:

> We do not provide Liability Coverage for the ownership, maintenance or use of:
>
> . . .
>
> 2. Any vehicle, other than your covered auto, which is:
>
> . . .
>
> b. furnished or available for your regular use.

The second relevant clause, appearing in the "Definitions" section, provided in pertinent part:

> Your covered auto means:
>
> . . .
>
> 4. Any auto or trailer you do not own while used as a temporary substitute for any other vehicle described in this definition which is out of normal use because of its:
>
> a. breakdown;
> b. repair;
> c. servicing;
> d. loss; or
> e. destruction.

With regard to the first provision and the determination of whether the PCC truck was "furnished for regular use" to Senior, the Court focused on the scope and quality of the permitted use, rather than on the frequency of the use. Concluding that the question whether a particular vehicle was furnished for an insured's regular use is a fact question to be resolved by the factfinder, the Court held that the trial court's finding that the PCC truck was not furnished for Senior's regular use was amply supported by the evidence.

With regard to the second provision and the determination of whether the Cobos family car was not available for normal use because of its loss or breakdown (thus making the PCC truck a temporary substitute and hence a "covered auto"), the Court held that the absence of keys to the family car rendered it unavailable due to either loss or breakdown. Therefore, the PCC truck was covered as a "substitute vehicle" within the terms of the Cobos family insurance policy.

C. Insurer Had No Duty to Defend Person Engaged in Maintenance of Insured's Vehicle

In Nationwide Property & Casualty Insurance Co. v. McFarland, *887 S.W.2d 487 (Tex. App.—Dallas 1994, writ denied), the Dallas Court of Appeals held that the insurer had no duty*

vehicle moved past the van, the door of the Bodner vehicle opened and hit the van, injuring Appellants, who were not Bodner employees and not named insureds under the Transportation Insurance Company policy issued to Bodner. Summary judgment was entered in favor of Transportation Insurance Company by the trial court, and the Houston Court of Appeals affirmed, holding that Appellants could not recover medical payments benefits under Bodner's policy.

The Bodner policy set forth that Transportation Insurance Company would pay medical expenses for bodily injury caused by an accident on or adjacent to Bodner's premises, subject to the following:

> 2. Exclusions
>
> This insurance does not apply to:
>
> . . .
>
> g. "bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading and unloading."
>
> *This exclusion does not apply to:*
>
> . . .
>
> *3. Parking an "auto" on, or on the ways next to, premises you own or rent, provided the "auto" is not owned by or rented or loaned to you or the insured.*

[Emphasis in original.] The Court read the above exception to the exclusion to allow coverage for an injury that occurs when a Bodner employee parks a car not owned by Bodner on, or adjacent to, Bodner premises. The Court reasoned that in this case, there was not "use" of a vehicle by parking, and so the "parking" exception to the "use" exclusion did not apply to this set of circumstances and Appellants were not entitled to coverage under the Bodner policy. Because the accident occurred on Bodner's premises and involved the use of an "auto" owned by Bodner, the accident was excluded from coverage.

IV. VEHICULAR COLLISIONS

A. Rear-End Collision Does Not Present Evidence of Negligence as a Matter of Law

In Weaver v. United States Testing Co., *886 S.W.2d 488 (Tex. App.—Houston [1st Dist.] 1994, writ denied), the Houston Court of Appeals held that the mere occurrence of a rear-end collision does not conclusively establish negligence as a matter of law.*

Kathleen Weaver, driving south, stopped her vehicle at a red light, and Arlen Swanner stopped his vehicle behind Weaver's. As Weaver began to make a westbound right turn, Swanner looked to his left to check oncoming westbound traffic. When Swanner saw that there was no oncoming traffic, he began to move forward by removing his foot from the brake. By the time Swanner looked forward, Weaver had stopped again, and Swanner impacted Weaver's vehicle from behind. Weaver and her husband sued for her injuries and his loss of consortium,

and a jury found that Swanner was not negligent, proximately causing the accident. The trial court overruled Weaver's motion for new trial, and the Houston Court of Appeals affirmed.

The Court of Appeals held that the mere occurrence of a rear-end collision does not require a finding of negligence as a matter of law. Instead, a plaintiff must prove specific acts of negligence on the part of the following driver that proximately caused the collision. The Court held that the jury could have reasonably found that Swanner's conduct did not violate any standard of care and thus was not negligent.

B. Federal Regulations Did Not Preempt Texas Law Regarding Course and Scope of Employment

In Mata v. Andrews Transport, Inc., *No. A14-94-00259-CV, 1995 WL 225459 (Tex. App.—Houston [14th Dist.] Apr. 13, 1995, n.w.h.), the Houston Court of Appeals held that Interstate Commerce Commission regulations did not impose strict liability on a commercial carrier for the negligence of its driver, and under Texas law, employer was not liable for the negligence of its driver where driver was traveling to work at the time of the collision.*

Rudolfo Mata was injured in a motor vehicle accident with a truck bearing the insignia of Andrews Transport, a commercial carrier who leased the truck from Stephen Joe Henry, who was the lessor and owner of the truck as well as the driver of the truck at the time of the collision. Mata sued Andrews Transport and Henry for damages for his personal injuries, and Andrews Transport filed a motion for summary judgment on the grounds that as a matter of law Henry was not driving within the course and scope of his employment at the time of the collision. Mata amended his petition, asserting provisions of the Interstate Common Carrier Act and ICC regulations, and contending that these regulations preempted state law regarding course and scope of employment and imposed liability on the employer. The trial court granted Andrews Transport a summary judgment.

The Houston Court of Appeals affirmed, holding that Henry was not in the course and scope of his employment when the collision occurred. In situations where commercial carriers operate motor vehicles that they do not own, Texas law and the relevant ICC guidelines require a written lease (1) identifying the person other than the owner of the commercial vehicle under whose supervision, direction, and control the vehicle will be operated; and (2) providing that the operation of the vehicle shall be under the full and complete control and supervision of the non-owner, *i.e.*, the lessee. Mata contended that these requirements imposed strict liability on Andrews Transport, the lessee, for negligent operation of the truck causing injury to others.

According to Texas law, the "statutory employee" principle provides that a commercial carrier may be held vicariously liable for injuries resulting from a driver's negligent operation of the vehicle, even though the driver is an independent contractor, when three factors are present: (1) the carrier does not own the vehicle; (2) the carrier operates the vehicle under an "arrangement" with the owner; and (3) the carrier does not literally employ the driver. Under this principle, the driver is considered the constructive—or "statutory"—employee of the carrier, and the carrier may be vicariously liable for the employee's negligence through the doctrine of respondeat superior. However, the Court concluded, the "statutory employee" principle is not one of strict liability, and the carrier may raise any defense available to an employer under state law.

Under Texas law, employers are generally not liable for accidents involving their employees while they are traveling to and from work. According to Henry's deposition, he was commuting from his home in Austin to Andrews Transport's shipping yard in Houston at the time of the collision. Further, Henry testified that Andrews Transport did not designate a specific route for the commute, compensate him for the commute, or supply fuel for the commute. Because Mata did not present any evidence to contradict this testimony, summary judgment was properly granted.

C. Roadway Hazard Constituted "Special Defect" Because It Presented Unexpected or Unusual Danger

In Stambaugh v. City of White Oak, *894 S.W.2d 818 (Tex. App.—Tyler 1994, n.w.h.), the Tyler Court of Appeals held that motorists injured when a city roadway collapsed were "invitees" and thus were required to show merely that the city reasonably should have known of that condition, because the roadway hazard presented an unexpected or unusual danger to ordinary users of the roadway and therefore constituted a "special defect."*

Oliver Stambaugh was operating a pickup truck with his wife Marla as his passenger when Oliver drove the truck over a portion of a roadway that had collapsed due to a broken underground water main in White Oak, Texas. The Stambaughs sued the City of White Oak for personal injuries, alleging that the roadway hazard constituted a "special defect," which would require the Stambaughs to show only that the City reasonably should have known of the condition, because the Stambaughs enjoyed the status of invitees. The City filed a motion for summary judgment, asserting that the hazard was a "premise defect," which would require the Stambaughs to prove that the City had actual knowledge of the condition. The trial court held that the collapsed portion of the roadway was a premise defect, and the Tyler Court of Appeals reversed and remanded, holding that the hazard was a special defect.

The Court of Appeals noted that the relevant portion of the Texas Tort Claims Act specifically mentioned "excavations or obstructions" as examples of special defects, and that the Texas case law interpreted the statute to apply to excavations and obstructions presenting an unexpected or unusual danger to ordinary users of roadways, whether the hazard was created by the governmental unit, by third persons, or by natural forces. The Court concluded that the White Oak hazard was an obstruction presenting an unexpected and unusual danger to drivers, and remanded the case to determine whether the City reasonably should have known of the hazard.

V. SUMMARY

Thousands of automobile accident cases have been litigated in Texas each year for nearly a century, yet the substantive and procedural law governing such cases is still constantly changing. In addition to all the general tort law and civil procedure rule changes that inundate lawyers in this area, auto accident practitioners must keep track of legal developments affecting coverage, claims procedures, and policy requirements. This Article was designed to alert practitioners to some of the important developments that occurred during the past year affecting automobile accident practice.

APPENDIX A

ORDER ON DEFENDANTS' JOINT MOTION TO SEVER

Came on to be heard on this date the above-styled and numbered cause and came Plaintiff and both Defendants by and through their attorneys of record and announced ready for hearing on Defendants' Joint Motion to Sever, and the Court having heard the Motion and arguments of counsel, is of the opinion that Defendants' Joint Motion should be granted in part only, and it is therefore

ORDERED, ADJUDGED AND DECREED that Plaintiff's case against Defendant [alleged tortfeasor], the tort action, will be tried first before a jury who will not be advised concerning any automobile liability insurance coverage for said Defendant nor advised of any underinsured motorist insurance coverage available for Plaintiff, and although the jury will not be advised that [underinsured motorist carrier] is a Defendant in the case, nevertheless, its counsel will appear and can fully examine all witnesses and the jury will be advised that said counsel has the same interest in the matter as does Defendant [alleged tortfeasor]; and further, following the trial of the tort action, and depending upon its outcome, the Court shall try Plaintiff's cause of action against Defendant [underinsured motorist carrier] on any other disputed issues except cause of the accident and extent of damages, which will have been determined in the first trial and which determination will be binding on all parties.

SIGNED this the _____ day of _____, 199___.

_____
JUDGE

APPROVED AS TO SUBSTANCE
AND FORM:

_____	_____	_____
Attorneys for Plaintiff	Attorneys for Defendant [alleged tortfeasor]	Attorneys for Defendant [underinsured motorist carrier]