

DIGEST OF INSURANCE LAW

TEXAS

Courtesy of

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Dallas, Texas

CIVIL JUDICIAL SYSTEM

Courts of Original Jurisdiction

Justice Courts have original jurisdiction of civil matters in which exclusive jurisdiction is not in the district or county court and in which the amount in controversy is not more than \$10,000, exclusive of interest. T.G.C. § 27.031. Justice courts have exclusive original jurisdiction over civil cases in which the amount in controversy is \$200 or less.

County Courts (Constitutional) have concurrent jurisdiction with Justice Courts in civil cases in which the amount in controversy exceeds \$200 but does not exceed \$10,000 excluding interest. T.G.C. § 26.042(a). County Courts have concurrent jurisdiction with District Courts in civil matters in which the amount in controversy exceeds \$500 but does not exceed \$5,000 exclusive of interest. T.G.C. § 26.042(d).

Statutory County Courts (County Courts at Law) have jurisdiction in civil cases where the amount in controversy exceeds \$200, but the upper limit is decided by the legislature and varies from county to county. Currently, a Statutory County Court is empowered to exercise general civil jurisdiction in cases with an amount in controversy up to \$100,000. T.G.C. § 25.003(c)(1). Thus, a Statutory County Court's concurrent jurisdiction with District Courts varies generally from \$500.01 to \$100,000, excluding mandatory damage, penalties, attorneys' fees, interest and costs, depending on the county. In addition, Statutory County Courts have concurrent jurisdiction with the District Courts over appeals of final rulings and decisions of the division of workers' compensation of the Texas Department of Insurance, regardless of the amount in controversy. T.G.C. § 25.003(c)(2).

District courts are the primary trial courts of Texas and have exclusive appellate, and original jurisdiction over all actions, proceedings, and remedies, except in cases where jurisdiction is conferred by the Texas Constitution or other law on some other court, tribunal, or administrative body. *Dubai Pet. Co. v. Kazi*, 12 S.W.3d 71, 75 (Tex. 2000). Tex. Const. art. 5, § 8. District courts have no upper limit to their amount-in-controversy juris-

diction. *See Id.*; T.G.C. §§ 24.007, 24.008. The minimum limit appears to be \$200.01. *See Peek v. Equipment Serv.*, 779 S.W.2d 802, 803 n. 4 (Tex. 1989) (discussing constitutional and statutory amendments that deleted reference to \$500 minimum jurisdiction of district courts); *Arteaga v. Jackson*, 994 S.W.2d 342 (Tex. App.—Texarkana 1999, pet. denied) (explaining that district courts minimum amount-in-controversy jurisdiction is now \$200.01 because justice courts have exclusive jurisdiction in matters involving \$200 or less); *Arnold v. West Bend Co.*, 983 S.W.2d 365, 366 n. 1 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (same).

Unless appointed to fill a vacancy, all state court judges are elected at general elections.

Appellate Courts

County Courts. Suits involving more than \$250 generally may be appealed from Justice Court to County Court for trial de novo.

Courts of Appeals. State is divided into fourteen appellate districts with each district having a Court of Appeals. T.G.C. § 22.201(a). Cases appealed from County Courts and District Courts when the amount in controversy or judgment rendered exceeds \$250.00, exclusive of interest and costs, are reviewed in a Court of Appeals. T.G.C. § 22.220(a). A petition for writ of mandamus to a Court of Appeals or Texas Supreme Court is an "original proceeding."

Commission of Appeals (dissolved 1945). From 1881 to 1945, Texas Supreme Court could transfer cases to Commission of Appeals to aid Supreme Court in handling its docket of cases. From 1818 to 1918, decisions by Commission of Appeals were regarded with same effect as those of Supreme Court. After 1918, those decisions were given the same effect only when approved by Supreme Court.

Texas Supreme Court. By virtue of Constitutional Amendment, Supreme Court is now composed of 9 elected members who hold office for term of 6 years. Cases may be taken by petition for review from a Court of Appeals to Supreme Court, jurisdiction of that Court being fixed both by statute and Texas Constitution. Its



decisions are final, except in cases involving Federal Constitution. T.G.C. § 22.001.

(Note: Civil Courts of original jurisdiction have jurisdiction over other matters which are not explained here, this outline being limited to insurance matters.)

LAW

Abbreviations

- D.T.P.A. – Texas Deceptive Trade Practices and Consumer Protection Act.
 F. Supp. – Federal Supplement.
 F.2d – Federal Reporter, Second Series.
 S.B.I. – State Board of Insurance, now Texas Department of Insurance.
 S.W. – South Western Reporter.
 S.W.2d – South Western Reporter, Second Series.
 S.W.3d – South Western Reporter, Third Series.
 T.A.C. – Texas Administrative Code.
 T.C.P.R.C. – Texas Civil Practice and Remedies Code.
 Tex. Const. – Texas Constitution.
 T. Fam. – Texas Family Code.
 T.F.C. – Texas Finance Code.
 T.G.C. – Texas Government Code.
 Tex. Ins. Code – Texas Insurance Code.
 T.H.&S.C. – Texas Health and Safety Code.
 T.L.C. – Texas Labor Code.
 T.P.C. – Texas Penal Code.
 T. Prob. – Texas Probate Code.
 T. Prop. – Texas Property Code.
 Tex. R. Civ. P. – Texas Rules of Civil Procedure.
 T.R.E. – Texas Rules of Evidence.
 T.R.S. – Texas Revised Statutes.
 T.T.C. – Texas Transportation Code.
 Tex. – Texas Reports.
 Tex. Civ. App.—Texas Court of Civil Appeals.
 Tex. Comm'n App.—Texas Commission of Appeals.
 Tex. Jur. – Texas Jurisprudence.
 V.A.T.S. – Vernon's Annotated Texas Statutes.

ACCIDENT AND HEALTH INSURANCE

Accident Independent of All Other Causes. Accident policy limiting coverage to death or disability from accidental injury resulting "independently from all other causes" does not cover situations where previously existing condition contributed to death, but would allow recovery where accidental injury was sole cause. Although, recovery under accident policy covering death from accidental injury is not defeated when pre-existing condition or disorder is so remote in scale of causation,

so dormant and insubstantial, or so temporary and transient that it does not materially contribute to death or injury. *Mutual Benefit Health & Acc. Ass'n v. Hudman*, 398 S.W.2d 110, 114 (Tex. 1965). Moreover, clause in accident policy excluding loss caused by or resulting from disease operates to exclude liability only when such risks are proximate as distinguished from indirect or remote cause of loss. *Stroburg v. Insurance Co. of North Am.*, 464 S.W.2d 827, 831-32 (Tex. 1971); see also *J.C. Penney Life Ins. v. Baker*, 33 S.W.3d 417, 421-23 (Tex. App.—Fort Worth 2000, no pet.). Not every pre-existing bodily condition will defeat recovery under accidental death policy requiring that death be caused solely by accident; only such pre-existing bodily conditions that are proximate cause or concurrent cause of death. *Combined Am. Ins. Co. v. McCall*, 497 S.W.2d 350, 357-58 (Tex. Civ. App.—Amarillo 1973, writ ref'd n.r.e.). Disability due partly to disease is not covered under policy covering disability resulting exclusively from injury through external, violent and accidental means. *American Nat'l Ins. Co. v. Briggs*, 90 S.W.2d 602, 604 (Tex. Civ. App.—Beaumont 1936, writ dismissed).

Where term "accidental death" was not defined in hospitalization policy, beneficiary was required to prove only that insured's death was proximately caused by accident and not that accident was sole cause of death. *Community Life & Health Ins. Co. v. McCall*, 497 S.W.2d 358, 366 (Tex. Civ. App.—Amarillo 1973, writ ref'd n.r.e.).

In suit to recover benefits under life insurance policy for accidental death, plaintiff-beneficiary has burden of proving that insured's death was caused by accident. *Republic Nat'l Life Ins. Co. v. Heyward*, 536 S.W.2d 549, 558 (Tex. 1976). Proof that insured died by violent and external means raises a rebuttable presumption that death was no suicide. *Id.*; *Freeman v. Crown Life Ins. Co.*, 580 S.W.2d 897, 899 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.).

Test of whether death of insured is accidental within terms of accidental death insurance policy is determined from viewpoint of insured; if his conduct was such that he should have anticipated that in all reasonable probability his death would result, then death was not accidental. *Republic Nat'l Life Ins. Co. v. Heyward*, 536 S.W.2d 549, 558 (Tex. 1976); *Releford v. Reserve Life Ins. Co.*, 154 Tex. 228, 231, 276 S.W.2d 517, 518 (1955); see also *Great Am. Reserve Ins. Co. v. Sumner*, 464 S.W.2d 212, 214 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.). This is known as the "Hutcherson Test." *Id.*; see also *Hutcherson v. Sovereign Camp. W.O.W.*, 112 Tex. 551, 251 S.W. 491 (1923).



Although driving while intoxicated was serious violation of law, it was not an act which deceased insured could have reasonably known would result in his death. *Freeman v. Crown Life Ins. Co.*, 580 S.W.2d 897, 900 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.).

Jury finding that death from gunshot wounds was accidental, as assailant intended to shoot another, justified recovery under double indemnity provision of policy. *Texas Prudential Ins. Co. v. Knighten*, 186 S.W.2d 843, 844-45 (Tex. Civ. App.—Fort Worth 1945, no writ).

Aircraft. "Powered Aircraft" in policy does not include glider. *Hall v. Mutual Benefit Health & Acc. Ass'n*, 220 S.W.2d 934, 936 (Tex. Civ. App.—Amarillo 1949, writ ref'd). Words "aeronautic flight" will include passenger as well as pilot. *Aetna Life Ins. Co. v. Reed*, 151 Tex. 396, 400-01, 251 S.W.2d 150, 152 (1952); see also *Continental Cas. Co. v. Warren*, 152 Tex. 164, 168-72, 254 S.W.2d 762, 764-67 (1953). However, student pilot is not "licensed or certified pilot" within meaning of that policy provision. *Mang v. Travelers Ins. Co.*, 412 S.W.2d 672, 675 (Tex. Civ. App.—San Antonio 1967, writ ref'd).

See "CANCELLATION," "CONSTRUCTION OF POLICY."

Creditors. Personal property listed in statute (not to exceed aggregate fair market value of \$30,000 for each single adult, not constituent of family, or \$60,000 for family) is except from satisfaction of liabilities. T. Prop. § 42.001. Current wages for personal service are generally not subject to garnishment. T.C.P.R.C. § 63.004.

Pledgee or assignee of life policy in which insured reserved right to change beneficiary has right to proceeds superior to that of beneficiary to the extent of insured's debt. *McAllen State Bank v. Texas Bank & Trust Co.*, 433 S.W.2d 167, 170-71 (Tex. 1968).

Payment of actual cost of hospital bills must be proved where policy pays actual cost not to exceed amount stated in policy. *Mercury Life & Health Co. v. Morales*, 325 S.W.2d 459, 461 (Tex. Civ. App.—San Antonio 1959, no writ).

See "DAMAGES," "DISABILITY".

Disease Induced by Accident. If death results from disease which is attributable to injury, death is solely by external, violent and accidental means; as where death results from rheumatism which is caused by accident. *Travelers' Ins. Co. v. Hunter*, 30 Tex. Civ. App. 489, 491, 70 S.W. 798, 799 (1902, writ ref'd); *Robinson v. Aetna Life Ins. Co.*, 276 S.W. 900, 902-03 (Tex. Comm'n App. 1925, judgment adopted) (held that injury

was produced by accidental means though caused by fainting spell).

Excepted Risks. Where policy provision excluded "disease or medical or surgical treatment," death resulting from administration of anesthetic, preparatory to tonsillectomy, was held to be within such exclusion. *Int'l Travelers' Ass'n v. Yates*, 29 S.W.2d 980, 981 (Tex. Comm'n App. 1930). Insured, who was struck by propeller after completing flight, held killed while participating in "aeronautical activity" within policy provision limiting liability to premiums paid. *Pittman v. Lamar Life Ins. Co.*, 17 F.2d 370, 371 (5th Cir. 1927). Insured, who was either thrown or leapt from an airplane which was about to crash "descended" from the plane for the purposes of aviation exclusion, and was not entitled to life or accidental death insurance proceeds. *Willingham v. Life & Cas. Ins. Co. of Tenn.*, 216 F.2d 226 (5th Cir. 1954). Insured's death, which was caused by injuries sustained after landing his plane, fell within policy's aviation exclusion as injury sustained during travel or flight because insured had not yet disembarked. *Bd. of Trustees v. Benge*, 942 S.W.2d 742, 745 (Tex. App.—Austin 1997, writ denied).

Where policy contained exception for injuries received by insured while hunting, insurer held liable for injury received while helping build fire on hunting expedition. *Wilkinson v. Travelers' Ins. Co.*, 72 S.W. 1016, 1017-18 (Tex. Civ. App. 1903, no writ). Where nurse suffered rupture of lumbo-sacro intervertebral disc while helping lift patient, such was held to be compensable injury under policy insuring against accidental bodily injuries. *Inter-Ocean Cas. Co. v. Brockman*, 123 F.2d 1006, 1007 (5th Cir. 1941). Derrick on detached rollers being moved by tractor held to be "vehicle" within policy provision insuring against injuries from being struck by vehicles. *Davis v. Nat'l Cas. Co.*, 142 Tex. 29, 34, 175 S.W.2d 957, 959 (1943).

Loss Due Partly to Prior Condition. See *supra* "Accident Independent of All Other Causes."

Notice and Proof of Loss. Until recently, Texas courts have held that presentment of notice of injury and proof of loss were conditions precedent to insurer's liability and demanded strict compliance. See, e.g., *Am. Teachers Life Ins. Co. v. Brugette*, 728 S.W.2d 763, 764 (Tex. 1987). However, the Supreme Court recently held an immaterial breach by insured of policy provision does not deprive insurer of benefit of bargain and cannot relieve insurer of contractual coverage obligation in an occurrence-based policy. *PAJ, Inc. v. Hanover Ins. Co.*, 243 S.W.3d 630, 631 (Tex. 2008). Insured's failure to timely notify insurer of claim or suit does not defeat coverage under occurrence-based policy if insurer was not prejudiced by delay. *Id.* at 636-37. When notice is

wholly lacking, as opposed to merely being late, it supports a finding of prejudice as a matter of law. *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Crocker*, 246 S.W.3d 603 (Tex. 2008); *Maryland Cas. Co. v. Amer. Home Assur. Co.*, 277 S.W.3d 107, 118-19 (Tex. App.—Houston [1st Dist.] 2009, pet granted). In a claims-made policy, when an insured gives notice of a claim within the policy period or other specified reporting period, the insurer must show that the insured's noncompliance with the policy's "as soon as practicable" notice provision prejudiced the insurer before it may deny coverage, *Prodigy Comm's Corp. v. Agricultural Excess & Surplus Ins. Co.*, 288 S.W.3d 374 (Tex. 2009).

Policy provisions requiring presentment of notice of claim for damages in less than 90 days are void under T.C.P.R.C. § 16.071, formerly T.R.S. art. 5546. See *Bankers' Reserve Life Ins. Co. v. Springer*, 81 S.W.2d 756, 760 (Tex. Civ. App.—El Paso 1935, writ ref'd) (disability policy). But see *St. Paul Mercury Ins. Co. v. Tri-State Cattle Feeders, Inc.*, 638 S.W.2d 868, 869 (Tex. 1982) (ninety-day minimum notice requirement in § 16.071 does not apply to theft policies); *Komatsu v. U.S. Fire Ins. Co.*, 806 S.W.2d 603, 604, 607 (Tex. App.—Fort Worth 1991, writ denied) (ninety-day requirement in § 16.071 does not apply to claims-made policies; § 16.071 only applies to notice of claim for damages against insurer, not notice of claim made against insured).

Where insurer denies liability under policy before proof of loss is submitted, presentment of proofs is waived. *Federal Sur. Co. v. Smith*, 41 S.W.2d 210, 213 (Tex. Comm'n App. 1931, holding approved); *United States Fidelity & Cas. Co. v. Bimco Iron & Metal Corp.*, 464 S.W.2d 353, 357 (Tex. 1971). However, insurer's insistence on court order before payment of policy proceeds is not denial of liability, such as when insurer requires court order appointing executor of insured's estate before payment where policy was expressly made payable to executors of insured. *Whittet v. Reliance Life Ins. Co.*, 213 S.W.2d 164, 166 (Tex. Civ. App.—San Antonio 1948, no writ).

Insured's breach of settlement-without-consent provision does not preclude coverage unless insurer is prejudiced by settlement; breach is immaterial absent showing of prejudice. *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691, 693-94 (Tex. 1994).

Proof of brain damage resulting in insured's mental infirmity furnished legal excuse for insured's failure to file proof of loss sooner than such proof was filed. *Proctor v. Southland Life Ins. Co.*, 522 S.W.2d 261, 265 (Tex. Civ. App.—Fort Worth 1975, writ ref'd n.r.e.).

Renewal. Under Tex. Ins. Code Ch. 551, depending on policy type, insurers may cancel or not renew policies for: fraud; failure to pay premiums; increase in hazard; insurer's loss of reinsurance; or insurer being placed in supervision, receivership, or conservatorship. Insurer's right to cancel under statutes cited is regulated by certain time deadlines in the statutes cited.

See also "REPRESENTATIONS AND WARRANTIES," and "SUICIDE."

Time of Loss. Where illness first manifested itself more than six months after issuance of surgical and medical policy which provided that no indemnity would be payable for any loss or disability unless cause originated after policy had been in force for six months, recovery could be had under policy even if medical cause of illness antedated inception of policy. *Republic Bankers Life Ins. Co. v. Morrison*, 487 S.W.2d 373, 376 (Tex. Civ. App.—Texarkana 1972, no writ).

Treatment by Doctor. Exclusion requiring attendance by licensed doctor is condition precedent, not evidentiary. *United Am. Ins. Co. v. Selby*, 161 Tex. 162, 167-69, 338 S.W.2d 160, 163-65 (1960).

See also "WAIVER AND ESTOPPEL."

ACCIDENTAL MEANS

Term "accidental death" and "death by accidental means," as used in policies, are legally synonymous unless policy contains definition requiring different construction; injuries are accidental under either term if, from viewpoint of insured, injuries are not natural and probable consequence of action that produced injury. *Republic Nat'l Life Ins. Co. v. Heyward*, 536 S.W.2d 549, 557 (Tex. 1976).

ADJUSTERS

Definition. Any person who investigates or adjusts losses on behalf of either an insurer or a self insured, or who supervises the handling of claims, regardless of whether they are an independent contractor or an employee, is an adjuster. Tex. Ins. Code § 4101.001. Excluded are: an attorney at law who "adjusts insurance losses periodically and incidentally to the practice of law"; salaried employees of an insurer who are not regularly engaged in adjustment, investigation, or supervision of claims; technical people hired to assist the licensed adjuster; licensed agents processing uncontested claims; clericals; persons handling claims under life, accident and health policies; a person employed principally as a right-of-way agent; and, "an individual who is employed to investigate suspected fraudulent insurance claims but who does not adjust losses or determine claims payments." Tex. Ins. Code § 4101.002.

Requirements. 18 years of age; Texas resident; if nonresident of United States, compliance with Federal work requirements; trustworthy; special education or training for competence; pass examination or obtain waiver or exemption. Tex. Ins. Code § 4101.053.

To maintain licenses, adjusters must participate in continuing education relating to consumer protection laws. Tex. Ins. Code § 4101.059.

Adjuster of insurer made agent under Tex. Ins. Code § 4001.051.

Insurance adjusters and supervisors may be subject to D.T.P.A. causes of action, and a court has upheld recovery to third party claimant for post-loss misrepresentations. *Webb v. Inter. Trucking Co., Inc.*, 909 S.W.2d 220, 228-29 (Tex. App.—San Antonio 1995, no writ). Insurance adjusters and adjusting firms do not owe insureds the duty of good faith and fair dealing due to adjuster's contractual privity being only with adjuster's employer and insurer. *Natividad v. Alexis, Inc.*, 875 S.W.2d 695, 698 (Tex. 1994).

Public adjusters may advise clients to seek legal counsel, measure and document first-party claims, present claims to insurer on behalf of clients, discuss claims with insurance company representatives, and advise clients concerning accuracy of valuations placed on property damage claims by insurance companies, all without engaging in unauthorized practice of law. *Unauthorized Practice of Law Comm. v. Jansen*, 816 S.W.2d 813, 816-17 (Tex. App.—Houston [14th Dist.] 1991, writ denied). However, this does not extend to holding discussions or negotiations with insurers into coverage matters, interpreting an insurance contract, or negotiating a settlement. *Id.* at 816. *But see Unauthorized Practice of Law Comm. v. American Home Assur. Co.*, 261 S.W.3d 24 (Tex. 2008) (insurer does not engage in authorized practice of law by using staff attorneys to defend claims against insured provided that interest of insurer and insured are congruent, which occurs only when insurer and insured are aligned in defeating the claim and there is no conflict of interest between insurer and insured).

AGE

Age of Majority. The age of majority in Texas is eighteen years. T.C.P.R.C. § 129.001.

See "AUTOMOBILES"; "NEGLIGENCE."

AGENTS AND BROKERS

In General – Definition. An agent for an insurance company who must obtain a license is any person who: solicits insurance on behalf of any insurance company; takes or transmits any applications or policies; advertises

or otherwise gives notice that he will do so; examines or inspects risk; receives, collects or transmits an insurance premium; forwards a diagram of a building; does anything in the making of a contract of insurance; or examines or adjusts a loss for an insurer. Tex. Ins. Code §§ 4001.051, 4001.101.

Soliciting agent for fire insurance company held to have acted for other company to which application was made for further insurance and for applicants therefore in making such application. *Home Ins. v. Lake Dallas Gin Co.*, 93 S.W.2d 388, 393 (Tex. 1936). (Tex. Ins. Code § 4051.001, formerly Art. 21.14 now eliminates the distinction between soliciting agents and local recording agents for property and casualty agents.)

Soliciting agent of life insurer has no power or authority to make contract on behalf of insurer or to waive terms of policy. *International Security Life Ins. v. Finck*, 496 S.W.2d 544, 546 (Tex. 1973). Group sales representative was neither soliciting nor local recording agent, but was agent of company under Tex. Ins. Code § 4001.052. *Maccabees Mut. Life Ins. v. McNiel*, 836 S.W.2d 229, 231 (Tex. App.—Dallas 1992, no writ).

Agent cannot act for both insured and insurer where duties and interests conflict. *Lincoln Fire v. Taylor*, 81 S.W.2d 1059, 1060 (Tex. Civ. App.—Fort Worth 1935, writ dismissed). But, agent can act for both insured and insurer where there is no conflict; in such case, agent usually acts for insurer in delivering policy and collecting premiums, and for insured in making application and processing policy. *Guthrie v. Republic Nat'l Ins.*, 682 S.W.2d 634, 637 (Tex. App.—Houston [1st Dist.] 1984, writ refused n.r.e.). Agent authorized to sell without home office approval can bind company on risks outside his instructions. *Shaller v. Commercial Standard*, 309 S.W.2d 59, 63-64 (Tex. 1958), *rev'g*, 302 S.W.2d 258.

When insured signed blank application, later filled in by soliciting agent fraudulently, agent held to be agent for insurer not insured. *Hassell v. Commonwealth Cas. Ins.*, 184 S.W.2d 917, 919 (Tex. 1944).

Fraud of Agent. Insurer liable for fraudulent acts of soliciting agent if within apparent scope of authority. *Mutual Reserve Life Ins. v. Seidel*, 113 S.W. 945, 279-80 (Tex. Civ. App. 1908, no writ). Collusive information between agent of insurer and insured as to true state of insured's health, held not imputable to insurer. *San Angelo Life & Acc. Ass'n v. Haynes*, 106 S.W.2d 363, 367 (Tex. Civ. App.—Austin 1937, writ dismissed). Fraud and collusion between insured and insurer's agent as to insured's bad health, constituted legal fraud and was not imputable to insurer. *Judd v. Lubbock Mut. Aid Ass'n*, 269 S.W. 284, 286 (Tex. Civ. App.—Amarillo 1925, no writ). Principal is liable for exemplary or punitive dam-

ages because of wrongful acts of his agent only if misconduct of principal in connection with agent's wrong is shown, such as authorizing agent's wrongful act or subsequent ratification of those acts. *International Security Life v. Finck*, 496 S.W.2d 544, 546 (Tex. 1973).

Knowledge of Agent. It is a general rule that knowledge of facts obtained by agent in discharge of his duties is imputed to insurer. *Southern Underwriters v. Mahan*, 126 S.W.2d 802, 804-805 (Tex. Civ. App.—Texarkana 1939, writ dismissed judgment corrected). It has been held that knowledge acquired by agent in performance of his official duties is, as matter of law, imputed to insurer. *Adams v. LaSalle Life*, 99 S.W.2d 386, 388 (Tex. Civ. App.—Waco 1936, writ dismissed). See also "Fraud of Agent" under this heading.

Liability of Agent. Agents are liable to insured for breach of contract to insure unless it is proven that there could have been no recovery had policy been issued. *Stevens v. Wafer*, 14 S.W.2d 295, 296 (Tex. Civ. App.—El Paso 1929, no writ); *Dargan v. Robinson*, 140 S.W.2d 561, 563 (Tex. Civ. App.—Austin 1940, writ dismissed).

Agent and insurer may be liable under D.T.P.A. and Tex. Ins. Code without the necessity of plaintiff proving that promised coverage could have been obtained from another source. *State Farm Fire & Cas. v. Gros*, 818 S.W.2d 908, 913-14 (Tex. App.—Austin 1991, no writ), *superseded by statute*, see *Southland Lloyd's Ins. Co. v. Tomberlain*, 919 S.W.2d 822, 829 (Tex. App.—Texarkana 1996, writ denied); *Parkins v. Texas Farmers Ins. Co.*, 645 S.W.2d 775, 776 (Tex. 1983). Statute makes agent personally liable for actions on behalf of any insurance company which has not complied with laws of this state to transact business here. Tex. Ins. Code § 4001.053. Defenses open to company are also available to agent. *Drummond v. White-Swearingen*, 165 S.W. 20, 27-28 (Tex. Civ. App.—Amarillo 1914, writ dismissed). Agent can be subject to individual liability under Tex. Ins. Code § 541.151 if he engages in the business of insurance. *Liberty Mut. Ins. v. Garrison Contractors Inc.*, 966 S.W.2d 482, 486-88 (Tex. 1998); see also *Blanchard v. State Farm Lloyds*, 206 F. Supp. 2d 840, 845-46 (S.D. Tex. 2001). Detrimental reliance on agent's misrepresentations is required under D.T.P.A. T.B.C. § 17.50. Agreement by chief adjuster of insurance company to pay auto loss if taken to particular garage held enforceable as act of company and not oral promise of personal indemnity by adjuster within Statute of Frauds, where damages to auto were result of negligent acts of adjuster's wife while driving company car. *Kell Cleaners v. Commercial Standard Ins.*, 199 S.W.2d 673, 676-77 (Tex. Civ. App.—Fort Worth 1947, writ refused n.r.e.). Managing general agent of insurer liable for failing to attempt in good faith to effectuate

a prompt, fair and equitable settlement of claims for which liability is reasonably clear. *McGee Co. v. Schick*, 792 S.W.2d 513, 522 (Tex. App.—Eastland 1990), *judgment vacated, cause dismissed by J.H. Schick v. Wm. H. McGee & Co. Inc.*, 843 S.W.2d 473 (Tex. 1992).

Insurance agent is not entitled to complete indemnity (only contribution) from insurer-principal even where the agent's actions are not morally wrong. *Aviation Office of Am. v. Alexander & Alexander*, 751 S.W.2d 179, 180 (Tex. 1988), *rev'g*, 742 S.W.2d 835, 836-37. On the other hand, agents have standing to sue or cross-claim their insurer-principal under Tex. Ins. Code, § 541 and the non-consumer provisions of D.T.P.A. *Crown Life Ins. v. Casteel*, 22 S.W.3d 378, 383 (Tex. 2000).

Insurance agency employees have no authority to bind insurer by post-loss misrepresentations. *Royal Globe Ins. Co. v. Bar Consultants, Inc.*, 577 S.W.2d 688, 694-95 (Tex. 1979); *Mid-Century Ins. v. H&H Meat Products*, 822 S.W.2d 747, 749-50 (Tex. App.—Corpus Christi 1992, no writ).

License and Regulation. As insurance is affected with public interest, it is subject to state regulation through state's police powers. *Commercial Standard v. Board of Ins. Comm'rs*, 34 S.W.2d 343, 344 (Tex. Civ. App.—Austin 1930, writ refused). Statute makes it unlawful for any agent to solicit or receive applications for insurance without first procuring certificate of authority from the Department. Tex. Ins. Code § 4001.101.

ARBITRATION

Texas has enacted the Texas General Arbitration Act, which purports to be the Uniform Arbitration Act. T.C.P.R.C. § 171.001, *et seq.* It abrogates the common law rule prohibiting specific enforcement of executory agreements. Since 1979, insurance contracts are no longer excluded.

Compelling Arbitration. A trial court cannot compel arbitration where there is no enforceable agreement to arbitrate, nor can a non-party to a contract be forced to arbitrate. *X.L. Insurance v. Hartford*, 918 S.W.2d 687, 689 (Tex. App.—Beaumont 1996, writ dismissed w.o.j.).

ATTORNEYS

Appointment and Authority. Admission to practice is solely governed by the rules of the Supreme Court. T.G.C. § 81.061. The rules governing admission require: good moral character; United States citizenship or special exemption; an age of 18 years; satisfactory completion of the Texas Bar examination and the Multi-State Professional Responsibility Exam; completion of J.D. requirements within 2 years of exam; oath; enrollment in

the State Bar of Texas; and payment of licensing fees. Rules Governing Admission to the Bar of Texas, Rules I-IV.

Membership in the State Bar is required. T.G.C. § 81.051. The lawyer is subject to the Texas Rules of Disciplinary Procedure, Art. X State Bar Rules, and the Texas Disciplinary Rules of Professional Conduct. T.G.C. § 81.071.

Conflict of Interest. Texas Disciplinary Rules of Professional Conduct, Rules 1.06-1.13, have comprehensive and detailed requirements as to former clients, opposing parties, and adjudicatory officials – generally prohibit: relationship where prior knowledge of facts at issue; business transactions with clients; financial assistance, special gifts or bequests; proprietary interest in litigation; and requiring remedial actions where violations of legal obligations exist. T.G.C. tit. 2, sub. G, app. A, art. 10, § 9. Whenever underlying lawsuit involves conflict between attorney and former client, the attorney can only reveal privileged and unprivileged confidential information to the limited extent reasonably necessary to resolve the conflict between attorney and client. Art. 10 State Bar Rule 1.05(c)(5); *Potash Corp. v. Mancias*, 942 S.W.2d 61, 66 (Tex. App.—Corpus Christi 1997, no pet.).

Fees. Unconscionable fees – fees a competent lawyer could not find reasonable are prohibited. Contingent criminal fees prohibited. All contingent fees in writing and signed by attorney and client. T.G.C. § 82.065. Division of fees not to be made unless in proportion to services, made with forwarding lawyer, or made with clients' agreement with lawyer of joint responsibility. However, in a D.T.P.A. action, attorneys' fees must be awarded in a specific dollar amount, segregated from claim for damages as a whole, and not as a percentage of judgment. *Arthur Andersen v. Perry Equip. Corp.*, 945 S.W.2d 812, 819 (Tex. 1997).

Malpractice. Governed by law of negligence. *Fireman's Fund v. Patterson & Lamberty, Inc.*, 528 S.W.2d 67, 69 (Tex. Civ. App.—Tyler 1995, writ ref'd n.r.e.). Legal malpractice claims may not be assigned. *Izen v. Nichols*, 944 S.W.2d 683, 684-85 (Tex. App.—Houston [14th Dist.] 1997, no writ). Claims against a law firm for conspiracy and D.T.P.A. are not assignable. *Vinson & Elkins v. Moran*, 946 S.W.2d 381, 396 (Tex. App.—Houston [14th Dist.] 1997, no writ). Client cannot prevail on legal malpractice claim where he cannot show he would have prevailed on the underlying medical malpractice claim. *Day v. Harkins & Munoz*, 961 S.W.2d 278, 280 (Tex. App.—Houston [1st Dist.] 1997, no writ). An insurer is not vicariously liable for the legal malpractice of an independent attorney it selects to de-

pend an insured. *State Farm Mut. Auto. Ins. v. Traver*, 980 S.W.2d 625, 626-27 (Tex. 1998).

Statute of limitations on attorney malpractice claim is tolled until appeals on underlying claims are exhausted. *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 157 (Tex. 1991).

Attorneys hired by primary carrier to defend insured may owe duties to excess carrier. *Stonewall Surplus Lines Ins. v. Drabek*, 835 S.W.2d 708, 711-12 (Tex. App.—Corpus Christi 1992, writ denied).

AUTOMOBILES

See Law Digest Tables.

“CONTRIBUTION,” “LIABILITY INSURANCE”; “NEGLIGENCE”; “NO FAULT.” See, generally, T.T.C.

Age. T.T.C. § 521.021, provides that a person except those exempt under this Act shall not drive car in Texas without driver's license. License will not be granted to any person under 16 years of age, unless the Department of Public Safety issues a hardship license. T.T.C. § 521.223. Policy provisions with reference thereto are enforceable. T.T.C. §§ 521.204, 521.201, 521.223.

Alcohol/DWI. No cases as to violation of standards in criminal statute as negligence per se. Prior convictions potentially admissible for impeachment. *Harris Co., Tex. V. Jenkins*, 678 S.W.2d 639, 641-42 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.). Misdemeanor driving while intoxicated conviction not an offense involving moral turpitude for purposes of impeachment, *Lopez v. State*, 990 S.W.2d 770, 778 (Tex. App.—Austin 1999, no pet). Deliberate unexcused violation of any statute can constitute negligence or negligence per se, *Parrott v. Garcia*, 436 S.W.2d 897, 900-901 (Tex. 1969).

Agency. Owner may be held liable for operation of his automobile by third parties if there is showing of agency, *English v. Blackwood*, 128 S.W.2d 895, 897-98 (Tex. Civ. App.—Galveston 1939, writ dism'd judgm't cor.) or consent of owner where owner had knowledge of driver's unfitness or incompetency. *Seinsheimer v. Burkhart*, 122 S.W.2d 1063, 1067 (Tex. 1939).

Assumption of Risk Affirmative Defense. See “NEGLIGENCE.”

Borrower of vehicle under policy provision. Right to remove goods from truck was held not to establish or to be evidence of possession. Possession in context of borrower requires more complete right to exercise do-

minion and control over vehicle. *Liberty Mut. Ins. v. Am. Employers Ins.*, 556 S.W.2d 242, 245 (Tex. 1977).

Comparative/Contributory Negligence. See "NEG-LIGENCE."

Compulsory Insurance Coverage. Required to drive—but limited exemptions. T.T.C. § 601.072. Proof of financial responsibility required in amounts of \$30,000 for bodily injury to or death of one person in one accident, \$60,000 for bodily injury to or death of more than one person in one accident, and \$25,000 for damage to or destruction of property of others in one accident. *Id.*

See "DAMAGES."

Exclusions. A named driver exclusion is valid under Texas law. *Zamora v. Dairyland County Mut. Ins.*, 930 S.W.2d 739, 740-41 (Tex. App.—Corpus Christi 1996, writ denied).

Family Purpose Doctrine. Doctrine has been rejected by Texas Courts. *Trice v. Bridgewater*, 81 S.W.2d 63, 67 (Tex. 1935); *Ener v. Gandy*, 158 S.W.2d 989, 991 (Tex. 1942). Family member exclusion in auto policy contravenes public policy of Safety Responsibility Act, but only to the extent it conflicts with minimum limit of automobile liability insurance, *i.e.*, family member exclusion may validly limit liability to the minimum amount mandated by Safety Responsibility Act. *Liberty Mutual Ins. v. Sanford*, 879 S.W.2d 9, 10 (Tex. 1994).

Personal auto policy or similar form that provides liability insurance coverage for a spouse must contain a provision to continue coverage for the spouse during a period of separation in contemplation of divorce. Tex. Ins. Code § 1952.056.

Firearms. No coverage under an auto policy for driver's alleged negligent discharge of a gun which killed a passenger in another vehicle when no allegation that injury resulted from the use of the covered auto. *National Union Fire Ins. v. Merchants Fast Motor Lines*, 939 S.W.2d 139, 1401-42 (Tex. 1997). Nor for injuries to a pedestrian struck by bullets intentionally fired from a motor vehicle. *Farmers Texas County Mut. v. Griffin*, 955 S.W.2d 81, 82-83 (Tex. 1997).

Guest Cases. Texas Guest Statute held unconstitutional. *Whitworth v. Bynum*, 699 S.W.2d 194, 197 (Tex. 1985).

Ordinarily, guest not required to keep constant lookout, may reasonably rely on driver. *San Antonio Transit v. McCurry*, 212 S.W.2d 645, 648 (Tex. Civ. App.—San Antonio 1948, writ ref'd n.r.e.).

Joint Enterprise. Where two or more persons occupy automobile, each having equal right to control of

such vehicle, courts have held, with respect to acts or omissions which may contribute to injury of one of them, that such negligence is imputed to each of others. *El Paso Elec. v. Leeper*, 60 S.W.2d 187, 188-89 (Tex. Comm'n App. 1933). Comparative negligence—contributory negligence not imputed against husband-wife and parent-child unless agency present or personal gain at issue as to contributorily negligent party. *Southwestern Bell v. Thomas*, 554 S.W.2d 672, 674-75 (Tex. 1977). Spouses. *Missouri-Kansas-Texas R.R. v. Hamilton*, 314 S.W.2d 114, 117-18 (Tex. Civ. App.—Dallas 1958, writ ref'd n.r.e.). Parent-child. *Anderson v. Tex. & N. Orleans R.R.*, 63 S.W.2d 1079, 1080 (Tex. Civ. App.—Beaumont 1933, no writ). Employer-employee. No cases.

Juvenile. An automobile insurance company that insures a car, which was stolen by a juvenile, is an indirect victim of juvenile's delinquent conduct and suffers a pecuniary loss; therefore, the court does not err in ordering the juvenile's parent to make restitution payments to the insurance company. *In re M.S.*, 985 S.W.2d 278, 280-81 (Tex. App.—Corpus Christi 1999, no pet).

Last Clear Chance Doctrine. Abolished. *French v. Grigsby*, 571 S.W.2d 867 (Tex. 1978).

Master and Servant. Master liable for negligence of servant acting within scope of employment and on master's business. *Wilhoit v. Iverson Tool*, 119 S.W.2d 709, 711-12 (Tex. Civ. App.—Beaumont 1938, writ dism'd by agr). However, servant who departs from his master's business and is negligent in operation of master's vehicle during return to his employment, imposes no liability upon master for such negligence. *Southwest Dairy v. DeFrates*, 125 S.W.2d 282, 284, 560 (Tex. 1939).

No-Fault. Not applicable.

Offsets. An insurer is entitled to offset payments owed under a UM/UIM clause with payments made to the insured under a personal injury protection clause pursuant to a policy offset provision. *State Farm Mut. Auto Ins. v. Brown*, 984 S.W.2d 695, 696 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). An uninsured motorist policy provision does not cover damages sustained by the insured's survivors when a car passenger in another vehicle shot and killed the insured while he was driving his vehicle. *State Farm Mut. Auto Ins. v. Whitehead*, 988 S.W.2d 744 (Tex. 1999).

Pedestrians. Rights and duties governed by T.T.C. § 552.001, *et seq.*

Seat Belts. Use or non-use of seat belts is admissible evidence in civil trial. T.T.C. § 545.413.

Service of Process upon Non-Resident Motorists. Service of process may be had upon Chairman of Texas

Transportation Commission as agent of non-resident motorist, defendant in suit arising from accident on highways of this State. Return of service in such case shall be filled out and endorsed as in other cases of service of process. Chairman of Texas Transportation Commission is required, upon being served with process as provided in this Act, immediately to enclose copy of process served upon him in letter properly addressed to defendant, his agent, servant or employee, and shall forward same by registered mail postage prepaid. Chairman shall, upon request of party, certify to the court that service was had on him, out of which said process was issued. No judgment by default shall be taken in any such case until after expiration of at least twenty days after such process shall have been served upon Chairman, and presumption shall obtain, unless rebutted, that such process was transmitted by Chairman and received by defendant after being deposited in mail. Court in which such action is pending shall have right to continue or postpone any action or proceeding as may be necessary to afford defendant reasonable opportunity to defend suit. T.C.P.R.C. §§ 17.062-17.069.

Speed Limits. Unlawful to drive certain motor vehicles upon public highways of Texas in excess of 70 miles per hour in daytime and 65 miles per hour in nighttime, or to drive through urban districts at speed greater than 30 miles per hour. T.T.C. § 545.352.

Texas Transportation Commission granted authority on basis of engineering and traffic investigation to determine and fix maximum prima facie speed limit on highways at less than maximum where conditions so warrant. T.T.C. § 545.353. Counties and municipalities have same right to increase or reduce maximum speeds within their boundaries. T.T.C. §§ 545.355-356.

Uninsured/Underinsured Motorists. Recovery under UM/UIM policy precluded absent actual physical contact between insured's person or property and the motor vehicle owned or operated by the unknown person. Tex. Ins. Code § 1952.104. Negligent party underinsured where proceeds of his liability policy insufficient for claimant's actual damages. *Stracener v. United Services Auto Ass'n*, 777 S.W.2d 378, 379-80 (Tex. 1989). *Stracener* applies retroactively. *Bowen v. Aetna Cas. & Sur.*, 837 S.W.2d 99, 100 (Tex. 1992). An auto insurance policy, which contains a clause allowing it to offset personal injury protection against UM/UIM benefits to prevent a double recovery, does not violate the Insurance Code or Texas public policy. *Laurence v. State Farm Mut. Auto Ins.*, 984 S.W.2d 351, 356 (Tex. App.—Austin 1999, pet. denied). Courts must determine validity of exclusions relating to UIM coverage on case-by-case basis. *Fontanez v. Texas Farm Bureau Ins.*, 840 S.W.2d 647, 650 (Tex. App.—Tyler 1992, no writ). In-

trapolicy stacking disallowed by policy. *Upshaw v. Trinity Cos.*, 842 S.W.2d 631, 633 (Tex. 1992). On proper motion, court must sever and abate UIM contract claims from bad faith claims. *United States Fire Ins. v. Millard*, 847 S.W.2d 668, 675 (Tex. App.—Houston [1st Dist.] 1993, no writ); *State Farm v. Wilborn*, 835 S.W.2d 260, 261-62 (Tex. App.—Houston [14th Dist.] 1992, no writ). However, another court rejects this presumption and requires movant to demonstrate prejudice. *Allstate v. Hunter*, 865 S.W.2d 189, 192-93 (Tex. App.—Corpus Christi 1993, no writ). An insured may not recover UM benefits for insurers beyond the workers' compensation coverage. *Valentine v. Safeco Lloyds Ins.*, 928 S.W.2d 639, 644 (Tex. App.—Houston [1st Dist.] 1996, writ denied). Parties' intent may not be considered in determining whether insured validly rejected UM coverage under Insurance Code § 1952.101(c) which requires written rejection, nor can rejection be retroactive. *Howard v. INA County Mut.*, 933 S.W.2d 212, 219-20 (Tex. App.—Dallas 1996, writ denied). Pre-judgment interest recoverable on UIM claims but attorney fees are not. *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809, 817 (Tex. 2006).

Umbrella policy does not cover damages caused by uninsured motorists. *Sidelnik v. Am. States Ins.*, 914 S.W.2d 689, 694 (Tex. App.—Austin 1996, writ denied).

AVIATION

Limits to Liability, 49 U.S.C.A. § 44112.

See generally, T.T.C. § 21 *et seq.* – § 26 *et seq.*

Service of Process. Not applicable.

Uniform Act. Not adopted.

Wrongful Death. Governed by general law of tort and negligence. *United States v. Schultetus*, 277 F.2d 322, 325-26 (5th Cir. 1960), *cert. denied*, 364 U.S. 828.

BROKERS

See "AGENTS AND BROKERS."

BURGLARY INSURANCE

No recovery may be had on burglary policy for loss sustained in different manner than is specified in policy. *Fidelity & Deposit v. B. & J. Sales*, 298 S.W. 459, 460 (Tex. Civ. App.—Eastland 1927, no writ); *National Surety v. First State Bank of Hawley*, 272 S.W. 442, 443-44 (Tex. Comm'n App. 1925). Clothing intentionally destroyed by burglar held covered under burglary policy. *Camden v. Moore*, 206 S.W.2d 104, 106 (Tex. Civ. App.—Galveston 1947, writ ref'd n.r.e.). Loss of rented air compressor covered by contract which had

waiver clause for loss by “theft or mysterious disappearance.” *General Corrosion Servs. Corp. v. K Way*, 631 S.W.2d 578, 579-80 (Tex. App.—Tyler 1982, no writ).

CANCELLATION

Provisions relating to revision or cancellation by either party enforceable in property and liability insurance policies, but not in life policies. Policy cancellation after loss has occurred cannot affect existing right to coverage. *Great Nat'l Life v. Harrell*, 157 S.W.2d 427, 428 (Tex. Civ. App.—Waco 1941, writ dismissed). Cancellation after loss must be without prejudice to any claim originating prior to effective date of cancellation. *Washer v. Continental Cas.*, 418 S.W.2d 900, 903 (Tex. Civ. App.—Houston [14th Dist.] 1967, writ refused n.r.e.). To effect cancellation, policy provisions must be strictly followed. *Anchor Cas. v. Crisp*, 346 S.W.2d 364, 366 (Tex. Civ. App.—Amarillo 1961, no writ).

Under Tex. Ins. Code § 551.052 and § 551.104 insurers may cancel policies at any time for: fraud; failure to pay premiums; increase in hazard within control of insured that would produce rate increases; insurer's loss of reinsurance; or insurer being placed in supervision, receivership or conservatorship and cancellation or non-renewal is approved or directed by supervisor, conservator or receiver. Otherwise, insurer's right to cancel is strictly controlled by the statutes cited and T.A.C., tit. 28, part 1, ch. 5. sub. ch. H, § 5.7001 *et seq.*

CHATTEL MORTGAGE

See “FIRE INSURANCE.”

CONSTRUCTION OF POLICY

Rule that insurance contract will be construed most favorably for insured only applies where there are ambiguous provisions in policy. Such “rule furnishes no warrant for importing unusual or unnatural meanings into plain words of contract.” *General American Life Ins. v. Rios*, 164 S.W.2d 521, 523 (Tex. 1942). Where ambiguous, policy interpreted to give greater indemnity. *Ferris v. Southern Underwriters*, 109 S.W.2d 223, 225-26 (Tex. Civ. App.—Austin 1937, writ refused). Construction will also be given which permits recovery as against denying recovery. *American Nat'l Ins. v. Jones*, 83 S.W.2d 428, 432-33 (Tex. Civ. App.—Texarkana 1935, writ refused); *Gonzales v. Mission American Ins.*, 795 S.W.2d 734, 737 (Tex. 1990). Intent of Insurance Commission which prescribes wording of policy, as practical matter, is actual intent. *U.S. Insurance v. Boyer*, 269 S.W.2d 340, 341 (Tex. 1954); *Progressive County Mut. Ins. Co. v. Sink*, 107 S.W.3d 547, 551-52 (Tex. 2003). An insurance contract does not exist until the applicant pays the first full premium. *English v. Prudential Ins.*,

928 S.W.2d 702, 706 (Tex. App.—Houston [1st Dist.] 1996, writ denied).

CONTRIBUTION

Contribution between joint tort-feasors: a defendant, jointly and severally liable, who pays more than his percent of Plaintiff's recovery, may recover from other defendants to the extent they have not paid their percentage of responsibility. T.C.P.R.C. § 33.015. Recovery against settling party prohibited. T.C.P.R.C. § 33.015(d).

“[C]laimant may not recover if his percentage of responsibility is greater than 50 percent.” T.C.P.R.C. § 33.001. The trier of fact, for each cause of action asserted, must determine the percentage of responsibility for 1) each claimant; 2) each defendant; 3) each settling person; and 4) each responsible third party designated by a defendant under T.C.P.R.C., §§ 33.004 In suits filed after 07/01/2003, a defendant may designate a responsible third party without actually joining that person to the lawsuit; however, a plaintiff may not recover against the responsible third party unless the responsible third party is actually joined to the lawsuit. *Id.* However, for suits filed after 9/1/2011 a defendant can no longer designate a responsible third party after the applicable limitations period on the cause of action has expired (regarding that third party) if the defendant knew of the party during the limitations period. T.C.P.R.C. §33. The proportionate responsibility statute, T.C.P.R.C. Ch. 33, abolished the common law doctrine of indemnity between joint tort-feasors. *Cypress Creek Utility v. Muller*, 640 S.W.2d 860, 864 (Tex. 1982).

Under prior authority, settling defendants only settle their own liability, not the liability of other non-settling defendants. *Duncan v. Cessna Aircraft*, 665 S.W.2d 414, 419-20 (Tex. 1984). That settlement agreement discharges that defendant's right of contribution against other joint tort-feasors. *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 819 (Tex. 1984), *overruled on other grounds by Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 630-31 (Tex. 1992). Such settling defendant may not preserve a right of contribution by attempting to settle plaintiff's entire claim or by taking an assignment of an entire claim, *i.e.*, defendant may not buy plaintiff's claim to prosecute other defendants. *Beech Aircraft Corp. v. Jenkins*, 739 S.W.2d 19, 22 (Tex. 1987).

In all cases filed after 07/01/2003, except medical malpractice cases, plaintiff's damages are reduced by a percentage equal to each settling person's percentage of responsibility, as found by finder of fact. T.C.P.R.C. § 33.012(b).

DAMAGES

See “DEATH “ and “ NEGLIGENCE.”

Appellate Review. Excessive verdict - remittitur upheld only where evidence is factually insufficient to support verdict; *i.e.* verdict so against the great weight and preponderance of the evidence as to be manifestly unjust. *In re King’s Estate*, 244 S.W.2d 660, 664-65 (Tex. 1951); *Larson v. Cactus Utility Co.*, 730 S.W.2d 640, 641 (Tex. 1987).

Arbitration Awards Courts apply collateral estoppel principles to arbitration awards. *Continental Holdings, Ltd. v. Leahy*, 132 S.W.3d 471, 474 (Tex. App.—Eastland 2003, no pet.); *Drago Daic, Trustee v. Nauru Phosphate Royalties, Inc.*, 27 S.W.3d 695, 701 (Tex. App.—Beaumont 2000, pet. denied); *Fluor Daniel, Inc. v. H.B. Zachry Co., Inc.*, 1 S.W.3d 166, 169 (Tex. App.—Corpus Christi 1999, pet. denied). If an issue was not actually decided in a prior arbitration proceeding or if its resolution was not necessary to the arbitration award, its litigation in a subsequent proceeding is not barred by collateral estoppel. *Leahy*, 132 S.W.3d at 474-75.

Collateral Source Rule. Payments from collateral sources independently procured by the insured (*i.e.*, workers’ compensation benefits, other insurance payments, retirement benefits, etc.) not applicable to offset wrongdoer’s liability. *Brown v. Am. Transfer & Storage*, 601 S.W.2d 931, 934-36 (Tex. 1980).

Comparative Negligence. See “CONTRIBUTION” and “NEGLIGENCE.”

Consumer Protection Act Cases. Misrepresentations of coverage and benefits, before or after the contract is issued, are actionable for multiple damages under D.T.P.A. T.B.C. § 17.46, Tex. Ins. Code § 541.001; *Metro Allied Ins. Agency, Inc. v. Lin*, 304 S.W.3d 830, 835 (Tex. 2009); *Aetna Cas. & Sur. Co. v. Marshall*, 724 S.W.2d 770-72 (Tex. 1987); *Cf. Royal Globe Ins. v. Bar Consultants*, 577 S.W.2d 688, 694 (Tex. 1979). Refusing to pay claims without a reasonable investigation based upon all available information is also a violation of Tex. Ins. Code § 541.151, as well as the D.T.P.A. § 17.46, if done with such frequency to indicate a business practice. D.T.P.A. § 17.46; *Chiitsey v. Nat’l Lloyds Ins. Co.*, 738 S.W.2d 641, 643 (Tex. 1987); *but see, Vail v. Texas Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129, 134 (Tex. 1988) (failure to exercise good faith in the settlement of claims was actionable regardless of frequency, and damages to be trebled were at least the amount withheld). But court refused to recognize a private cause of action by a third party against insurer for unfair settlement practices. See *Allstate Ins. Co. v. Watson*, 876 S.W.2d 145, 147-150 (Tex. 1994) (duty owed by insurer to its

insured, not third party). Mental anguish damages under Tex. Ins. Code § 541.001 not awardable absent a finding of knowing conduct. *State Farm Life Ins. Co. v. Beaton*, 907 S.W.2d 430, 436 (Tex. 1995).

Contract Cases. Breach of contract will not permit exemplary damages unless accompanied by a separate tort involving fraud or malice. *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 17-18 (Tex. 1994); *Tashnek v Tashnek*, 630 S.W.2d 653, 655 (Tex. App.—Houston [1st Dist.] 1981, no writ). Failure to pay on an insurance contract, or denial of a claim with no reasonable basis, or failure to determine whether there is any reasonable bases for denial, are all separate torts allowing compensatory damages. *Viles v. Sec. Nat’l Ins. Co.*, 788 S.W.2d 566, 567 (Tex. 1990); but not exemplary/punitive damages, *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 18-19 (Tex. 1994).

Indemnification. See “CONTRIBUTION.”

ERISA Preemption. Employees’ state law claims including breach of contract, negligence, gross negligence, and bad faith preempted by ERISA for certain group insurance or other benefit plans, 29 U.S.C.A. 1144.

Insurance Coverage. Punitive damages are insurable under liability policies. *American Home Assur. v. Safway Steel Prods.*, 743 S.W.2d 693, 702 (Tex. App.—Austin 1987, writ denied); see *Westchester Fire Ins. Co. v. Admiral Ins. Co.*, 152 S.W.3d 172 (Tex. App.—Fort Worth 2004, pet. Denied). Any coverage provided by commercial auto policy for punitive damages for gross negligence is void and unenforceable under Texas public policy, *Hartford Cas. Ins. v. Powell*, 19 F. Supp. 2d 678 (N.D. Tex. 1998). Punitive damage award upheld where carrier lacked reasonable basis for stopping payment of compensation benefits. *Texas Employers Ins. Ass’n v. Puckett*, 822 S.W.2d 133, 142-43 (Tex. App.—Houston [1st Dist.] 1991, writ denied). Not recoverable for ERISA actions. *Forbau v. Aetna Life Ins.*, 876 S.W.2d 132, 133 (Tex. 1994).

Loser Pays. Misleading title of bill passed 5/25/2011. This is effective for all lawsuits filed after 9/1/2011. House Bill 274, was referred to as “loser pays” bill, but there was no “loser pays” provision in the final bill. There will be a “dismissal cause of action” similar to federal court allowing the dismissal of a claim for failing to state a claim upon which relief can be granted and the losing party must pay the prevailing parties’ fees. There will be rules that allows for an expedited and cost-effective trial process where the amount in controversy is less than \$100,000.

Misrepresentations by Insurance Agents. Even though breach of contract claim could not be maintained,

misrepresentations committed by insurance agent caused claimant to sustain damages and gave rise to D.T.P.A. and Tex. Ins. Code causes of action. *Maccabees Mut. Life Ins. v. McNeil*, 836 S.W.2d 229, 235 (Tex. App.—Dallas 1992, no writ).

Negligent Failure to Settle within Policy Limits. When reasonable offer by plaintiff within policy limits not accepted, insured may seek damages for excess over the policy limits. *G.A. Stowers Furniture Co. v. Am. Indem. Co.* 15 S.W.2d 544 (Tex. Comm'n App. 1929, holding approved). Reasonableness standard that of an ordinary prudent person managing his business. A *Stowers* claim is not a bad faith claim. *American Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 847 (Tex. 1999). Insurer's failure to tender settlement offer, where there was no offer by plaintiff to settle within policy limits, does not breach duty. *Id.* at 848. In multiple claimant situations, carrier's duty to settle in good faith based upon *Stowers* prerequisites. *Texas Farmers Ins. Co. v. Soriano*, 881 S.W.2d 312, 315 (Tex. 1994). Insurer is not obligated to accept settlement offer that does not fully release insured from liability. *Id.* at 314. Insurance company does not have a *Stower's* duty to settle where an attorney never offers a full release of his client's claims. *Trinity Universal Ins. Co. v. Bleeker*, 966 S.W.2d 489, 491 (Tex. 1998). Insurer may settle with one claimant even though that reduces or exhausts proceeds available to satisfy other claims. *Soriano*, 881 S.W.2d at 315 (Tex. 1994). Insurers owe a duty to their insureds to exercise reasonable care in attempting to settle a claim. *Id.*

Prejudgment Interest. All judgments in wrongful death, personal injury, and property damage actions earn statutory prejudgment interest. T.F.C. § 304.102. Under prejudgment statutes, prejudgment interest begins to accrue on the earlier of: 1) 180 days after date the defendant receives the written notice of claim; or 2) the date suit is filed. T.F.C. § 304.104. Prejudgment interest shall be calculated as simple interest, not as compound interest. *Id.* Rate of prejudgment interest is equal to rate of post-judgment interest at the time of judgment, which is the prime rate as published by the Federal Reserve Bank of New York on the date of computation. Rate is subject to a minimum rate of 5% and maximum rate of 15%. T.F.C. § 304.003.

Psychic Injuries. There is no general duty in Texas which requires that individuals do not negligently inflict emotional distress. Claimant may recover mental anguish damages only in connection with a defendant's breach of some other legal duty. *Boyles v. Kerr*, 855 S.W.2d 593, 594 (Tex. 1993); for recovery of mental anguish damages under wrongful death statute for loss of a child. *Sanchez v. Schindler*, 651 S.W.2d 249, 253 (Tex.

1983); for disability from observing fellow employee fall to his death under Workers' Compensation Act, *Bailey v. Am. General Ins. Co.*, 279 S.W.2d 315, 321-22 (Tex. 1955); for misrepresenting medical benefits an insurer would pay under Tex. Ins. Code § 541.001 and D.T.P.A. § 17.46, *Aetna Cas. & Sur. Co. v. Marshall*, 724 S.W.2d 770, 772 (Tex. 1987); for insurer's failure "to deal fairly and in good faith" with its insured, *Arnold v. Nat'l County Mut. Fire Ins.*, 725 S.W.2d 165, 167 (Tex. 1987); *Aranda v. Insurance Co. of N. Am.*, 748 S.W.2d 210, 213 (Tex. 1988); for failure to pay a fire claim where the insured fails to provide timely proof of loss form, *Viles v. Sec. Nat'l Ins. Co.*, 788 S.W.2d 566, 567-68 (Tex. 1990); for intentional infliction of emotional distress, *Twyman v. Twyman*, 855 S.W.2d 619, 621-24 (Tex. 1993), but not for negligent infliction. *Boyles v. Kerr*, 855 S.W.2d 593, 594 (Tex. 1993).

Punitive Damages. Tort cases. Punitive damages are available if plaintiff can prove gross negligence by showing defendant acted with conscious indifference and created an extreme degree of risk. *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10 (Tex. 1994) (denoting this standard as the "hybrid test"). Section 41 of the T.C.P.R.C. incorporates the language of *Moriel's* hybrid test into its definition of "gross negligence." T.C.P.R.C. § 41.001. It also utilizes *Moriel* to define "exemplary damages" as a form of penalty or punishment. *Id.* Additionally, it provides some exceptions and limitations to recovery. T.C.P.R.C. § 41.008 (e.g. limited to greater of two times the amount of economic damages plus non-economic damages (not to exceed \$750,000) or \$200,000). Although *Moriel* rejected a clear and convincing standard for punitive damages, Section 41 establishes a clear and convincing standard of proof for punitive awards. T.C.P.R.C. § 41.003. Punitive awards are restricted to four situations: fraud, malice, gross negligence, and where allowed by statute. *Id.* Treble damages are allowed for violations of Sections 541 and 542 (formally articles 21.21 and 21.55) of the Texas Insurance Code if insurer is found to have acted knowingly. Tex. Ins. Code §§ 541 & 542.

Standing. Texas Ins. Code § 541.151 grants standing to any person who has sustained actual damages as a result of another's engaging in an act or practice declared to be unfair or deceptive. *Twedell v. Hochheim Prairie Farm Mut. Ins. Ass'n*, 1 S.W.3d 304, 307-08 (Tex. App.—Corpus Christi 1999, no pet.).

Statutory Caps on Awards. Medical malpractice caps constitutional as applied to common-law negligence claims. T.C.P.R.C. § 74.301. Damage limitation provisions of Texas Medical Liability Act are constitutional as applied to survival and wrongful death actions. *Rose*

v. Doctors Hosp., 801 S.W.2d 841, 845 (Tex. 1990); T.C.P.R.C. § 74.303.

DEATH

See Law Digest Tables.

Abatement and Survival. Cause of action for personal injury survives the injured person in favor of heirs, legal representatives and estate, against the liable person and such person's legal representatives, T.C.P.R.C. § 71.021.

Action for Wrongful Death. May only be brought by or on behalf of the surviving spouse, children and parents of the deceased. T.C.P.R.C. § 71.004. Damages. "Jury may award damages in an amount proportionate to the injury resulting from death" T.C.P.R.C. § 71.010. Loss of support, loss of society, companionship and affection, mental anguish and loss of inheritance are recoverable - with interest on accrued damages. *Yowell v. Piper Aircraft Co.*, 703 S.W.2d 630, 633-37 (Tex. 1986).

Death of Fetus. Wrongful death and survival actions exist for loss of fetus. T.C.P.R.C. § 71.001(3)-(4).

Statute of Limitations. Two years from date of death. T.C.P.R.C. § 16.003(b). Survival and wrongful death actions are derivative of decedent's action, and are subject to limitations. *Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343, 345-46 (Tex. 1992). Cannot be revived after limitations runs on decedent's claim. *Id.*; *Davenport v. Phillip Morris, Inc.*, 761 S.W.2d 70, 71-72 (Tex. App.—Houston [14th Dist.] 1988, no writ). The discovery rule does not apply. *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 354 (Tex. 1990).

Time of Death. Determining beneficiary in common disaster requires "direct evidence," higher degree of proof than "sufficient evidence" that death was other than simultaneous. Requires evidence of death itself: lack of pulse, heartbeat, eye reaction to light or other medically accepted tests that show death, not merely evidence from which inference could be drawn. *Glover v. Davis*, 366 S.W.2d 227, 232 (Tex. 1963).

Unexplained Absence. An individual absent seven successive years without being heard from is presumed to be dead. T.C.P.R.C. § 133.001; *French v. McGinnis*, 9 S.W. 323, 324 (Tex. 1887). Circumstantial evidence can rebut statutory presumption of death. *Southland Life Ins. v. Norwood*, 76 S.W.2d 166, 167 (Tex. Civ. App.—Fort Worth 1934, writ dismissed).

DISABILITY

Partial Disability. Workers' Compensation. Commission to use "Guides to the Evaluation of Permanent Impairment," February 1989, third edition, second print-

ing, published by American Medical Association. T.L.C. § 408.124.

Proof of Condition. Accident and health policies. Jury question as to whether or not successful merchant, who by reason of injury was unable to continue his business, but had been elected justice of peace, was totally disabled. *Great Southern Life Ins. v. Johnson*, 25 S.W.2d 1093, 1097 (Tex. Comm'n App. 1939, holding approved); see *Amarillo Mut. Benev. Ass'n v. Franklin*, 50 S.W.2d 264, 268 (Tex. Comm'n App. 1932). Even though insured continues his work, if in exercising ordinary care, he would desist, he is totally disabled. *Kemper v. Police & Firemen's Ins. Ass'n*, 44 S.W.2d 978, 981 (Tex. Comm'n App. 1932, holding approved), modified by 48 S.W.2d 254 (Tex. Comm'n App. 1932). Head injury was total disability because it prevented insured from doing any work requiring physical activity, which he had been accustomed to do, though he worked as night watchman. *American Cas. Co. v. Horton*, 152 S.W.2d 395, 399-400 (Tex. Civ. App.—Dallas 1941, writ dismissed). Insured's ability to perform some work for profit does not necessarily mean he is pursuing "gainful occupation" under policy provision; such term is relative to comparison between present and prior occupations and earnings. *Aetna Life Ins. Co. v. Motheral*, 183 S.W.2d 677, 678-79 (Tex. Civ. App.—Fort Worth 1944, no writ). Total disability policy ordinarily is not one of indemnity against loss of income, but against loss of capacity to work. *Continental Cas. Co. v. Carlisle*, 391 S.W.2d 98, 102 (Tex. Civ. App.—Amarillo 1965, writ refused n.r.e.).

Total Disability. Accident and Health Policies. Total disability is necessarily relative term, depending chiefly on peculiar circumstances, on nature of occupation or employment and capabilities of person injured. *Metropolitan Life Ins. Co. v. Wann*, 109 S.W.2d 470, 474 (Tex. 1937); see *American Cas. Co. v. Horton*, 152 S.W.2d 395, 398 (Tex. Civ. App.—Dallas 1941, writ dismissed). Term "gainful occupation" also relative.

Disability. "The inability because of a compensable injury to obtain and retain employment at wages equivalent to the pre-injury wage." T.L.C. § 401.011(16).

FINANCIAL RESPONSIBILITY LAW

See Law Digest Tables. Generally, see T.T.C., Chapter 601.

FIRE INSURANCE

Appraisal. Policies providing for appraisal or arbitration, as manner of ascertaining loss, are lawful. *Home Ins. Co. v. Walter*, 230 S.W. 723, 726 (Tex. Civ. App.—Dallas 1921, no writ).

Arson. One co-insured's illegal destruction of jointly owned property does not bar recovery under insurance policy by innocent co-insured, where co-insureds each owned undivided one-half interest in destroyed property. *Kulubis v. Texas Farm Bureau Underwriters Ins. Co.*, 706 S.W.2d 953, 955 (Tex. 1986). Nor does such illegal destruction bar recovery by innocent co-insured where co-insureds owned the destroyed property as community property. *Texas Farmers Ins. Co. v. Murphy*, 996 S.W.2d 873, 876-77 (Tex. 1999).

Assignment. Following loss, beneficiary under fire policy may assign whole or part of his benefits under such policy. The assignee can then sue in his own right or under assignor's name. *American Ins. Union v. Allen*, 192 S.W. 1087 (Tex. Civ. App.—Texarkana 1917, no writ); *Camden Fire Ins. Ass'n v. Eckel*, 14 S.W.2d 1020, 1022 (Tex. Comm'n App. 1929, judgm't adopted). Provision of Texas Standard Form of Fire Insurance Policy, stating that assignment of interest before loss voids coverage, held valid. *Continental Ins. Co. v. Michaels*, 13 S.W.2d 465 (Tex. Civ. App.—Texarkana 1929, no writ). Fire insurance policy may be conditionally transferred to creditor or pledged as collateral before loss. *Scottish-Union & Nat'l Ins. Co. of Edinburgh v. Andrews & Matthews*, 89 S.W. 419, 422 (Tex. Civ. App. 1905, writ ref'd); *Fireman's Fund Ins. v. Galloway*, 281 S.W. 283, 285 (Tex. Civ. App.—San Antonio 1926, no writ). Fire insurance policy and proceeds are assignable. *Prentice v. Sec. Ins. Co.*, 153 S.W. 925, 927 (Tex. Civ. App.—Austin 1912, no writ).

Cancellation. Cancellation may be effected by full compliance with such provisions in policy. *Treadwell v. Int'l Travelers Assur. Co.*, 60 S.W.2d 536, 537 (Tex. Civ. App.—El Paso 1933, writ ref'd). Where policy provides for cancellation by notice, notice alone, expressed in clear, unequivocal terms, is sufficient to cancel policy. *Frontier-Pontiac Inc. v. Dubuque Fire & Marine Ins. Co.*, 166 S.W.2d 746, 747 (Tex. Civ. App.—Fort Worth 1942, no writ). However, mortgagee of fire policy is without authority to cancel until there is consent by mortgagor. *Feldman v. Costa*, 171 S.W.2d 200, 202 (Tex. Civ. App.—Dallas 1943, writ ref'd w.o.m.). See also "CANCELLATION."

Chattel Mortgage. Any provision rendering fire policy void if property is encumbered by any lien, or becomes encumbered by any lien after issuance of such policy shall be null and void. Tex. Ins. Code 2002.002

Concurrent or Co-Insurance Clauses. Prohibited, except on policies written on cotton and grain; or on properties other than private dwellings and stocks of merchandise for sale at retail when value is less than \$10,000, and reduction in premium made. Tex. Ins. Code §2002.001

Contract-Policy. Binder. Such contracts are valid, and subject to conditions of the standard form of policy in use by insurer at time. *Dalton v. Norwich Union Fire Ins. Soc.*, 213 S.W. 230, 231-32 (Tex. Comm'n App. 1919, judgm't adopted). Oral contract to insure against fire is valid and enforceable. *Pacific Fire Ins. Co. v. Donald*, 224 S.W.2d 204, 207 (Tex. 1949); *Export Ins. Co. v. Herrera*, 426 S.W.2d 895, 898 (Tex. Civ. App.—Corpus Christi 1968, writ ref'd n.r.e.).

Contribution. Co-insurers are only liable to insured for their proportional part of the loss. *Connecticut Fire Ins. Co. v. Fields*, 236 S.W. 790, 794 (Tex. Civ. App.—Amarillo 1922, no writ). Payment in excess of proper amount gives no right of contribution between insurers, but right to equitable subrogation may exist. *Employers Cas. Co. v. Transport Ins. Co.*, 444 S.W.2d 606, 610 (Tex. 1969). Application of "gradual reduction" rule proper in apportionment between specific and blanket coverage. *Republic Ins. Co. v. Am. Ice Co.*, 2 S.W.2d 329, 331 (Tex. Civ. App.—Dallas 1928, writ dism'd w.o.j.).

Damages. Excepted Risks. Explosion. Covered under fire policy where direct result of antecedent fire. *Liverpool & London & Globe Ins. Co. v. Currie*, 234 S.W. 232 (Tex. Civ. App.—El Paso 1921, writ ref'd); *North British & Mercantile Ins. Co. v. Arnold*, 171 S.W.2d 215 (Tex. Civ. App.—Galveston 1943, no writ). Total Loss. Property is not total loss when a reasonably prudent owner would use the remnants of the home to rebuild it. *State Farm Fire & Cas. Co. v. Mower*, 917 S.W.2d 2, 3-4 (Tex. 1995).

Friendly Fires. Insurer not liable for damage by friendly fire. Fire damage to jewelry inadvertently placed in furnace, not covered by fire insurance policy. *Reliance Ins. Co. v. Naman*, 6 S.W.2d 743 (Tex. 1928). Fire in boiler tubes held friendly until the tubes melted, allowing the fire to escape into compartment intended for water, it became hostile and insurer liable for damage accruing thereafter. *Progress Laundry & Cleaning Co. v. Reciprocal Exch.*, 109 S.W.2d 226, 227 (Tex. Civ. App.—Dallas 1937, writ dism'd).

Insurable Interest. Exists when insured derives pecuniary benefit or advantage by the preservation and continued existence of property or would sustain pecuniary loss from its destruction. *Smith v. Eagle Star Ins. Co.*, 370 S.W.2d 448, 450 (Tex. 1963). Partner may separately insure his interest in partnership property. *American Cent. Ins. Co. v. Harrison*, 205 S.W.2d 417, 420 (Tex. Civ. App.—Eastland 1947, writ ref'd n.r.e.). Community survivor not barred from recovery by "fee simple" type clause. *State & County Mut. Fire Ins. Co. v. Kinner*, 319 S.W.2d 297 (Tex. 1958).

Mortgage Clause. Existence of lien, either before or after policy issued, shall not void policy, whether existence of lien contributed to or brought about loss. *Hartford Fire Ins. Co. v. Owens*, 272 S.W. 611, 613-14 (Tex. Civ. App.—Fort Worth 1925, writ ref'd); *Potomac Fire Ins. Co. v. Turner*, 67 S.W.2d 1080 (Tex. Civ. App.—San Antonio 1934, no writ).

Multiple Policies. Concurrent Insurance. Where one fire policy covered dwelling and garage and another covered garage alone, second insurer liable to insured for garage loss not already covered; concurrent insurance does not void policy in absence of fraud. *Employers Cas. Co. v. Ragley*, 197 S.W.2d 536, 539 (Tex. Civ. App.—Waco 1946, writ dism'd). With specific provision on preexisting insurance, second policy of Texas Standard Form Fire Insurance was void and first policy continued valid. *American Ins. Co. v. Kelley*, 325 S.W.2d 370, 371 (Tex. 1959).

Proceeds. On community home, loss payable exclusively to husband who alone contracted with insurers. *Grogan v. Henderson*, 313 S.W.2d 315, 323 (Tex. Civ. App.—Texarkana 1958, writ ref'd n.r.e.).

Proof of Loss. Insured must plead and prove compliance with requirements of policy as to proof of loss. *McPherson v. Camden Fire Ins. Co.*, 222 S.W. 211 (Tex. Comm'n App. 1920, judgment adopted); exception - total loss. Policy that requires notification of loss in less than 90 days is void. T.C.P.R.C. § 16.071. Substantial compliance with proof of loss requirements of policy sufficient. *Universal Auto. Ins. v. Morris Finance Corp.*, 16 S.W.2d 360, 362 (Tex. Civ. App.—Eastland 1929, writ dism'd w.o.j.). Must substantially comply with provision of policy requiring written proof of loss within 91 days. *Provident Fire Ins. v. Ashy*, 162 S.W.2d 684 (Tex. 1942). This provision may be waived. *Fidelity & Guar. Ins. Corp. v. Super-Cold Southwest Co.*, 225 S.W.2d 924, 927 (Tex. Civ. App.—Amarillo 1949, writ ref'd n.r.e.). Insurer investigation of loss, conducted under non-waiver agreement, does not relieve insured of obligation to give notice of loss. *Commercial Standard Ins. Co. v. Harper*, 103 S.W.2d 143, 147 (Tex. 1937).

Reformation. Permitted unless evidence proves that policy contains all terms and provisions agreed upon. *Fire Ass'n of Philadelphia v. Hinton*, 298 S.W. 178, 179 (Tex. Civ. App.—Eastland 1927, writ dism'd w.o.j.). Policy contained misdescription of building where insured's property was located and evidence to show mistake was admissible. *Aetna Ins. Co. v. Brannon*, 89 S.W. 1057 (Tex. 1905). Permitted where policy mistakenly named different owner from one intended. See *Camden Fire Ins. Ass'n v. Wandell*, 195 S.W. 289, 291 (Tex. Civ. App.—Galveston 1917, no writ).

Repair. Where city ordinance prevents repair because more than 50% destroyed, property a total loss. *Scanlan v. Home Ins. Co.*, 79 S.W.2d 186, 188 (Tex. Civ. App.—Beaumont 1935, writ ref'd).

Replacement Value. Property, such as household goods, clothing, and personal effects, has no market value; actual damages measured by value to owner, not market value. *Crisp v. Sec. Nat'l Ins. Co.*, 369 S.W.2d 326, 328 (Tex. 1963).

Severable Contracts. Policy covering realty and personalty in separate amounts is a divisible contract, and sale and assignment of policy as to realty does not affect insurance on personalty. *Yeager v. St. Paul Fire & Marine Ins. Co.*, 166 S.W.2d 939, 941 (Tex. Civ. App.—Waco 1942, writ dism'd).

Smoke and Soot. Fire insurance policy covers all damages caused by hostile fire, including smoke, soot or heat damage. *City of New York Ins. Co. v. Gugenheim*, 7 S.W.2d 588, 589 (Tex. Civ. App.—Waco 1928, no writ).

Standard Provisions. The commissioner shall adopt policy forms and endorsements for each insurance subject except those addressed by Tex. Ins. Code § 5.13-2. The commissioner may also adopt policy forms and endorsements of national insurers or those adopted by national organization of insurance companies, if they are filed with the commissioner. Tex. Ins. Code § 5.35. A comparison form must be promulgated for all policy forms and endorsements approved by the commissioner. The commissioner may require an insurer using the policy to develop the comparison form. Tex. Ins. Code § 5.35(k). Insurer's use of any form or endorsement that is not authorized or approved by the commissioner is void. Tex. Ins. Code §§ 5.13-2, 5.35; *Commercial Union Assur. Co. v. Preston*, 282 S.W. 563, 565 (Tex. 1926). Insurer may not use endorsement that reduces coverage otherwise provided under the policy unless provided policyholder with written explanation of the change before its effective date. Tex. Ins. Code §2002.001. Insured's failure to submit to examination under oath as required by policy, results in abatement of insured's suit to collect on policy. *State Farm General Ins. Co. v. Lawlis*, 773 S.W.2d 948 (Tex. App.—Beaumont 1989, no writ). Mandamus will issue to enforce right to abatement. *In re Foremost*, 172 S.W.3d 128, 134 (Tex. App.—Beaumont 2005, mand. denied).

FRAUD

See "AGENTS AND BROKERS"; "REPRESENTATIONS AND WARRANTIES."

GUEST CASES

See "AUTOMOBILES."



HOSPITAL

Assignment of Rights. Although ERISA does not pre-empt when state law claim is brought by independent third-party hospital against insurer for negligent misrepresentation regarding coverage, such claims are pre-empted when hospital seeks to recover benefits owed under plan to plan participant who has assigned his rights to benefits to hospital. *Transitional Hosps. v. Blue Cross & Blue Shield of Tex.*, 164 F.3d 952, 954-55 (5th Cir. 1999).

Duty of Care. In absence of special contract, health practitioner does not warrant favorable results or a cure, and the absence of favorable results or a cure is not alone evidence of a practitioner's negligence. *Hunter v. Robison*, 488 S.W.2d 555, 560 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.). A hospital owes duties directly to its patients to provide appropriate and usable medical equipment, to keep its premises in a reasonably safe condition, to not negligently allow termination of medical care. To use reasonable care in formulating the policies and procedures that govern its medical staff and non-physician personnel, to exercise reasonable care in the selection of its medical staff, and to periodically monitor and review the medical staff's competence, *Tenet Health v. Zamora*, 13 S.W.3d 464 (Tex. App.—Corpus Christi, 2000, pet. dismissed w.o.j.). To establish a hospital's liability for an independent contractor/emergency room physician's medical malpractice based on agency, a plaintiff must show: 1) a reasonable belief that the physician was an agent or employee of the hospital; 2) that such belief was generated by the hospital affirmatively holding out the physician as its agent or employee or knowingly permitting the physician to hold himself out as the hospital's agent or employee; and 3) that the plaintiff justifiably relied on that representation of authority. *Baptist Mem. Hosp. Sys. v. Sampson*, 969 S.W.2d 945 (Tex. 1998). Hospital had no duty to warn wife of patient that it may have infected patient/husband with AIDS virus. *Santa Rosa Health Care v. Garcia*, 964 S.W.2d 940 (Tex. 1998).

Evidence-Records. In a suit alleging physical or mental injury and damages, a party may request disclosure of all relevant medical records and bills or, in lieu thereof, an authorization Tex. R. Civ. P. 194.2(j), (k). Discovery for a Level 1 suit is conducted until 30 days prior to trial. Tex. R. Civ. P. 190.2(c)(1). Discovery for a Level 2 suit is conducted until earlier of 30 days prior to trial or nine months after first discovery responses, whether oral deposition or written discovery. Tex. R. Civ. P. 190.3(b)(1). Discovery for a Level 3 suit is conducted according to deadlines set by the court. Tex. R. Civ. P. 190.4(b). Foundation for admission of business records may be established by testimony or affidavit of

custodian. T.R.E. 902(10). Proceedings of any hospital committee, medical organization committee or extended care facility committee are not public records or subject to subpoena unless made or kept in regular course of business by institution. T.H.&S.C. § 161.032. "Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed." T.R.E. 509(c)(2).

Immunity. Governmental immunity partially waived by Texas Tort Claims Act, T.C.P.R.C. § 101.001 *et seq.*, for liability for use of motor vehicle, if employee would be personally liable, and personal injury or death caused by condition or use of tangible personal or real property if liability would exist for private person under Texas law. T.C.P.R.C. § 101.021; *Overton Memorial Hosp. v. McGuire*, 518 S.W.2d 528 (Tex. 1975). For charitable immunity, see T.C.P.R.C. § 84.001, *et seq.*

Lien. See T. Prop. § 55.001, *et seq.* Hospitals have liens on all causes of action, claims of persons receiving hospital services for injuries due to alleged negligence of another, provided injured person is admitted to the hospital within 72 hours of accident which caused injury. T. Prop. § 55.002(a). Emergency medical services providers likewise have liens on causes of action, or claims of persons receiving emergency medical services for injuries due to the alleged negligence of another, provided the services are rendered within 72 hours, within counties with populations of 575,000 or less. T. Prop. § 55.002(c). Liens attach to any decision, decree, award or judgment of any court or board, excepting workers' compensation awards and insurance policy proceeds in favor of injured party. T. Prop. § 55.003. Release by injured party does not bind hospital or emergency medical services provider hospital unless its fees have been paid or it signed release. Each lien to be filed with County Clerk. T. Prop. § 55.007.

HUSBAND AND WIFE

See Law Digest Tables.

Community Property Rights. Community property system exists in Texas. Community property consists of the property, other than separate property, acquired by either spouse during marriage. T. Fam. § 3.002. Property possessed by either spouse during or on dissolution of marriage is presumed to be community property unless otherwise established by clear and convincing evidence, T. Fam. § 3.003.

See "FIRE INSURANCE," Proceeds.

Immunity. Governmental immunity partially waived by Texas Tort Claims Act, T.C.P.R.C. § 101.001 *et seq.*, for liability for use of motor vehicle, if employee



would be personally liable, and personal injury or death caused by condition or use of tangible personal or real property if liability would exist for private person under Texas law. T.C.P.R.C. § 101.021; *Overton Memorial Hosp. v. McGuire*, 518 S.W.2d 528 (Tex. 1975). For charitable immunity, see T.C.P.R.C. § 84.001, *et. seq.*

Joinder of Spouse. Spouse may sue or be sued without joinder of other spouse, except when claims or liabilities are joint and several and would require joinder under rules relating to joinder generally. T. Fam. § 1.105.

Separate Property. A spouse's separate property consists of: 1) the property owned or claimed by the spouse before marriage; 2) the property acquired by the spouse during marriage by gift, devise, or descent; and 3) the recovery for personal injuries sustained by the spouse during marriage, except any recovery for loss of earning capacity during marriage. T. Fam. § 3.001.

Other Considerations. Where wife entered into ceremonial marriage in good faith, not knowing until after her husband's death that he was married to another woman, their continued cohabitation as husband and wife after husband's divorce from first wife established relation of husband and wife, so that wife would be entitled to workmen's compensation upon husband's death. *Consolidated Underwriters v. Taylor*, 197 S.W.2d 216, 217-18 (Tex. Civ. App.—Beaumont 1946, writ ref'd n.r.e.).

The entire amount of an insurance policy made payable to husband's estate should be included in the husband's gross estate for federal estate tax purposes where the beneficiary designation was not made in fraud of wife's interests. *Estate of Street v. Commissioner of Internal Revenue*, 152 F.3d 482 (5th Cir. 1998).

Absent an existing community property right under state law, ERISA's qualified-domestic-relations-order (QDRO) provision does not create community property interest. ERISA does not confer community or other beneficial interest to non-participating spouse solely by reason of marriage. *Lipsey v. Lipsey*, 983 S.W.2d 345, 349 (Tex. App.—Fort Worth 1998, no pet).

INFANTS

See "AUTOMOBILES, Age"; "NEGLIGENCE, Age."

INLAND MARINE

Inland marine insurance in Texas includes: 1) imports, when property is not subject to import risk under marine policies; 2) exports, when property is not subject to export risk under marine policies; 3) domestic ship-

ments; 4) bridges, tunnels and other instrumentalities of transportation and communication; and 5) other inland marine risk. (These other risks can include everything from accounts receivable to stamp collections.) See 28 T.A.C. § 5.5002.

Construction of Policy. The commissioner of the Texas Department of Insurance is responsible for adopting rules governing the manner in which forms for the various classifications of risks insured under inland marine insurance are regulated. Tex. Ins. Code § 2301.005.

Duty to Defend. In action to determine duty to defend, courts can only construe insurance contracts as made and are not authorized to make new contracts for parties. *Westchester Fire Ins. v. Rhoades*, 405 S.W.2d 812, 816 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.). The absence of "defense of suits" provision in inland marine policy, insuring against all risks of physical loss, relieved primary insurer from any obligation to defend insured in suit brought for damage to transported property. *Id.*

Exclusions. Printed exclusions in inland marine insurance policy concerning various types of water damage loss, including damage caused by "backing up of drains," were not in conflict with typewritten provisions found under heading "Deductible." *Dallas Handbag v. Royal Indem.*, 390 S.W.2d 863 (Tex. Civ. App.—Dallas 1965, no writ). Such heading simply provided for separate adjustment of each claim for water damage and for separate deduction from amount of adjusted claims, so that typewritten provision did not grant type of coverage excluded elsewhere in policy. *Id.* Therefore, water damage loss due to heavy rains that caused water drains to fill basement was excluded from coverage. *Id.*

In Transit. Where goods were stolen from insured's truck parked overnight in motel parking lot, goods were considered "in transit" within meaning of policy as long as property was in course of being delivered to place of shipment. *Pennsylvania Nat'l Mut. Cas. Ins. v. Murphy*, 579 S.W.2d 58 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.).

However, where transport of goods was accomplished by private transport and had reached point of final destination before they were stolen, although they had not been unloaded from trailer and placed in insured's warehouse, goods were no longer "in due course of transit" or "in transit" within meaning of inland floater policy. *Haggard Co. v. United States Fire Ins.*, 497 S.W.2d 61 (Tex. Civ. App.—Texarkana 1973, no writ).

Language. Exclusionary language for "incidental loss or damage due to operation of equipment" held ambiguous. *Shillings v. Michigan Millers Mut. Ins.*, 536 S.W.2d 627 (Tex. Civ. App.—Tyler 1976, writ ref'd



n.r.e.). Court held language of policy did not clearly express whether damage to tractor, used for clearing trees, caused by falling tree was “incidental.” *Id.*

Regulatory Classes. Inland marine insurance is divided into two regulatory classes: filed and non-regulated. Filed indicates those classes or subclasses for which rules, rates, and forms must be filed with State Board of Insurance for approval. Non-regulated indicates those classes or subclasses for which rules, rates, and forms are not subject to filing requirements or uniform standards of application. 28 T.A.C. § 5.5001.

Venue. In addition to the general venue rules, suit against a fire, marine, or inland marine insurance company may also be brought in the county and precinct in which all or part of insured property was located. T.C.P.R.C. §15.032, § 15.097(a).

LIABILITY INSURANCE

Assignment. Defendant’s assignment of claim against his insurer to plaintiff is invalid if 1) the assignment is made prior to an adversarial trial, 2) the defendant’s insurer has tendered defense, 3) and either the defendant’s insurer accepted coverage or made good faith effort to adjudicate coverage issues prior to trial of the plaintiff’s claim. *State Farm Ins. v. Gandy*, 925 S.W.2d 696, 712 (Tex. 1996).

Cancellation. Cancellation effective on written notice on date of cancellation mailed, if policy so provides, but requirement is strictly construed. *Shaller v. Commercial Standard Ins.*, 309 S.W.2d 59 (Tex. 1958). Under Tex. Ins. Code § 551.052, (a), insurers are generally prohibited from cancelling a liability insurance policy that is a renewal or continuation policy. Furthermore, insurers are generally prohibited from cancelling a liability insurance policy during the initial policy term after the 60th day following the date on which the policy was issued. Tex. Ins. Code § 551.052(b). However, insurers are permitted to cancel or non-renew a liability insurance policy at any time for; 1) fraud in obtaining coverage; 2) failure to pay premiums when due; 3) an increase in hazard within control of the insured that would produce a rate increase; or 4) loss of the insurer’s reinsurance covering all or part of the risk covered by the policy. Tex. Ins. Code § 551.052(c). An insurer may also cancel a liability insurance policy at any time if the insurer is placed in supervision, receivership, or conservatorship and the cancellation or non-renewal is approved or directed by supervisor, conservator, or receiver.

Compromise of Claims. Insurer has right to control compromise of claims, but in defending suit against insured must exercise ordinary care in considering offer of settlement. *G.A. Stowers Furniture v. Am. Indem.*, 15

S.W.2d 544 (Tex. Comm’n App. 1929, holding approved). Insurer is not obligated to accept settlement offer that does not fully release insured from liability, including liability for hospital liens. *Trinity Universal v. Bleeker*, 966 S.W.2d 489, 491 (Tex. 1998).

Insured allowed to recover excess paid by him over policy limits where court held insurer did not use due care in refusal to settle within policy limits. It is no defense that insured failed to demand that insurer settle within policy limits. *Highway Ins. Underwriters v. Luffkin-Beaumont Motor Coaches*, 215 S.W.2d 904, 929 (Tex. Civ. App.—Beaumont 1948, writ ref’d n.r.e.). Insurer’s negligent failure to settle can be deceptive trade practice rendering insurer liable for treble damages. *Allstate Ins. v. Kelly*, 680 S.W.2d 595, 608 (Tex. App.—Tyler 1984, writ ref’d n.r.e.).

In establishing liability in subrogation suit, compromise is not admissible on issue of liability. *American Gen. Ins. v. Fort Worth Transit*, 201 S.W.2d 869, 872 (Tex. Civ. App.—Fort Worth 1947, no writ).

Cooperation of Assured. Under liability policy requiring cooperation, failure of insured to cooperate held to be proper defense. *Frazier v. Glens Falls Indem. Co.*, 278 S.W.2d 388 (Tex. Civ. App.—Fort Worth 1955, writ ref’d n.r.e.). Insured’s failure to advise insurer of suit filed against her or forward suit papers relieves insurer of duty to defend. Insurer must show prejudice, not substantial prejudice, to prevail on its defense arising from insured’s lack of cooperation. *Members Ins. v. Branscum*, 803 S.W.2d 462 (Tex. App.—Dallas 1991, no writ); see *Klein v. Century Lloyds*, 275 S.W.2d 95 (Tex. 1955) (regarding time to give notice of accident coverage).

Coverage Scope. Where a liability policy provides that the insurer would indemnify the insured against loss by reason of liability imposed for bodily injuries or death “accidentally sustained,” the insured was not protected from the consequences of its own willful and intentional wrongs, not against the willful and intentional wrongs of its agents, committed with intent to inflict injury. *Travelers v. Reed Co.*, 135 S.W.2d 611, 616 (Tex. Civ. App.—Beaumont 1939, writ dism’d judgm’t cor.); *County Gas Co. v. Gen. Accident Fire & Life*, 56 S.W.2d 1088 (Tex. Civ. App.—El Paso 1933, writ ref’d). But Texas automobile liability policy covers exemplary damages for gross negligence. *Dairyland County Mut. v. Wallgren*, 477 S.W.2d 341 (Tex. Civ. App.—Fort Worth 1972, writ ref’d n.r.e.).

An insurer was held not liable under automobile liability policy for injuries resulting from unauthorized operation of truck by employee, who was also on personal mission at time of accident. *Columbia Cas. v. Lyle*,



81 F.2d 281 (5th Cir. 1936). An insurer was held not liable during the entire journey of an insured vehicle with a trailer attached, whether stopped or in transit, where policy excluded coverage when the vehicle was used for towing. *Maryland Cas. v. Cross*, 112 F.2d 58, 59 (5th Cir. 1940).

A policy covering damages for injuries arising out of or in connection with work done in widening a railway underpass was held inapplicable to an accident involving a train and a vehicle which was required to detour due to the work being done on the underpass. The fact that the driver's detour ultimately led to the accident was too remote to establish legal causation and liability. *Standard Accident Ins. v. Thompson*, 161 S.W.2d 786 (Tex. 1942).

Secret agreement between real employer and third party that workman was employee of latter was not binding on employee. *Employers Mut. Liab. Ins. v. Norman*, 201 S.W.2d 620, 621-22 (Tex. Civ. App.—Eastland 1947, writ ref'd n.r.e.). No liability for loss in Dallas County where policy excluded coverage there. *Wheeler v. Am. Fid. & Cas.*, 164 F.2d 590 (5th Cir. 1947). Employer's accident policy insuring passengers covered employee pilot. *Continental Cas. v. Warren*, 254 S.W.2d 762 (Tex. 1953).

Coverage-Standard Provisions. A claim of mental anguish does not constitute "bodily injury" absent an allegation of physical manifestation of mental anguish. *Trinity Universal v. Cowan*, 945 S.W.2d 819 (Tex. 1997).

Duty to Defend. Insurer's duty is determined by allegations in petition against insured (without reference to truth or falsity of allegation) as compared with policy provisions. *Argonaut Southwest Ins. v. Maupin*, 500 S.W.2d 633, 635 (Tex. 1973). Facts giving rise to claim, rather than legal theory, determine duty to defend. *Adamo v. State Farm Lloyds*, 853 S.W.2d 673, 676-77 (Tex. App.—Houston [14th Dist.] 1993, writ denied). Temporary injunction prohibiting insurer from withdrawing defense of insured proper where insured has shown probable right of recovery and irreparable harm. *Liberty Mut. Ins. v. Mustang Tractor & Equip.*, 812 S.W.2d 663, 665 (Tex. App.—Houston [14th Dist.] 1991, no writ). No duty to defend existed since allegations of investment loss did not constitute property damage. *Terra Int'l, Inc. v. Commonwealth Lloyd's Ins.*, 829 S.W.2d 270 (Tex. App.—Dallas 1992, writ denied). Where policy language clearly and unambiguously states that insurer's duty to defend terminates when the policy limits are exhausted, settlement for policy limits terminates the insurer's defense obligations. *American States Ins. v. Arnold*, 930 S.W.2d 196 (Tex. App.—Dallas 1996, writ denied).

Insured cannot sue to recover on policy where carrier agrees to defend insured under reservation of rights and insured fails to satisfy condition precedent of insurance policy. Third-party beneficiary is also bound by conditions precedent in policy. *State Farm Lloyds Ins. v. Maldonado*, 935 S.W.2d 805 (Tex. App.—San Antonio 1996), *aff'd in part, rev'd in part*, 963 S.W.2d 38 (Tex. 1998).

An insurance carrier cannot avoid bad faith liability by refusing to investigate claim. The insurer, not insured, has the duty to reasonably investigate claim. *State Farm Fire & Cas. v. Simmons*, 857 S.W.2d 126, 136-37 (Tex. App.—Beaumont 1993), *aff'd in part, rev'd in part*, 963 S.W.2d 42 (Tex. 1998).

Denial of coverage by insurer constituted waiver by insurer of duty of any future compliance with policy provisions such as those requiring notice or delivery of suit papers. *Womack v. Allstate Ins.*, 296 S.W.2d 233, 236-37 (Tex. 1956); *Liberty Ins. of Tex. v. Rawls*, 358 S.W.2d 920 (Tex. Civ. App.—Fort Worth 1962, no writ).

Where insurer chooses to reject claim, it risks incurring 18 percent statutory fee and reasonable attorneys' fees under Texas Ins. Code § 542.060. *Oram v. State Farm Lloyds*, 977 S.W.2d 163, 167 (Tex. App.—Austin 1998, no pet.).

Reimbursement for Defense. Absent an insurer's specific notice to its insured that he may later be charged for cost of defense, an insurer has no right to reimbursement. *Matagorda County v. Tex. Ass'n of Counties City Gov't Risk Mgmt. Pool*, 975 S.W.2d 782 (Tex. App.—Corpus Christi 1998), *aff'd*, 52 S.W.3d 128 (Tex. 2000);

A liability insurer that settles a claim against its insured when coverage is disputed may seek reimbursement from the insured should coverage later be determined not to exist if the policy specifically provides for reimbursement or the insurer obtains the insured's clear and unequivocal consent to the settlement and the insurer's right to seek reimbursement. *Excess Underwriters at Lloyd's v. Frank's Casing Crew & Rental Tools, Inc.* 246 S.W.3d 42 (Tex. 2008).

Duty to Indemnify. Facts established in the underlying suit control the insurer's duty to defend. The failure of an insurer's duty to defend to arise from the pleadings in the underlying action does necessarily preclude a duty to indemnify from arising from proof of the allegations in the petition in the underlying action. *D.R. Horton-Texas, Ltd. v. Markel Intern. Ins. Co., Ltd.*, 300 S.W.3d 740 (Tex. 2009).

In co-insurance situations involving insurance policies each containing “pro rata” clauses, and where one insurer voluntarily indemnifies the insured for an amount greater than its independent contractual obligation, there is no direct action for reimbursement between co-insurers. *Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 236 S.W.3d 765, 772 (Tex. 2007).

Joinder of Insurer. Regardless of insolvency of insured, insurer cannot be joined in original action against insured. Policies generally provide that no action may be maintained against insurer before judgment is rendered against insured. *Bluth v. Neeson*, 94 S.W.2d 407 (Tex. 1936). But where policy so provides, suit may be brought directly against insurer where insured’s insolvency is established after judgment has been rendered against insured. *Traders & Gen. v. Davis*, 142 S.W.2d 826, 832 (Tex. Civ. App.—Texarkana 1940, writ dismissed cor.).

Jury. Disclosure to jury that defendant carries liability insurance, when insurer not a party to suit, is reversible error. *Coble v. Phillips Petroleum*, 30 F. Supp. 39 (N.D. Tex. 1939); *Moncada v. Snyder*, 152 S.W.2d 1077 (Tex. 1941).

Injured third-party beneficiary of auto liability policy may not sue insurance company for D.T.P.A. and Tex. Ins. Code claims without first proceeding against named insured tort-feasor. *Allstate Ins. v. Watson*, 876 S.W.2d 145 (Tex. 1994).

Liability between Insurers. When primary carrier makes supplemental payments related to judgment against its insured, excess carrier is not obligated to return payment if it settles claim for amount less than judgment. *Birmingham Fire Ins. v. Am. Nat’l Fire Ins.*, 947 S.W.2d 592 (Tex. App.—Texarkana 1997, writ denied).

Limit of Liability. Insurer liable only for amount stipulated in policy, notwithstanding fact that judgment was rendered in greater amount. *Universal Auto. Ins. v. Culberson*, 87 S.W.2d 475 (Tex. 1935). But, insurer must exercise ordinary care in settling claims, otherwise insurer may be held liable for excess judgment against its insured. *G.A. Stowers Furniture v. Am. Indem.*, 15 S.W.2d 544, 547 (Tex. Comm’n App. 1929, holding approved). Excess carrier may pursue action against primary carrier and its attorney for mishandling claims. *American Centennial Ins. v. Canal Ins.*, 843 S.W.2d 480 (Tex. 1992).

See “Malpractice – Medical” and “Malpractice – Other.”

Non-waiver Agreements. Non-waiver agreements are valid, but are construed strictly against insurer. But,

insurer is estopped from raising timely notice where attorney hired to defend insured sent information of occurrence to insurer. Strong opinion on conflict of interest, insurance defense counsel’s primary duty is to insured. *Employers Cas. v. Tilley*, 496 S.W.2d 552 (Tex. 1973).

Notice. Notice provisions in policy are conditions precedent to right of recovery. *New Amsterdam Cas. v. Hamblen*, 190 S.W.2d 56 (Tex. 1945). Insured’s failure to forward suit papers to insurer relieves insurer of liability to third persons if prejudice to insurer results. *Members Ins. v. Branscum*, 803 S.W.2d 462, 466-67 (Tex. App.—Dallas 1991, no writ). A surplus lines insurer must show prejudice where insured has failed to provide prompt notice of claim under liability policy. *Hanson Prod. Co. v. Americas Ins.*, 108 F.3d 627 (5th Cir. 1997).

Rights of Injured Party against Insurer. Liability policy constitutes indemnity obligation rather than liability contract, and no cause of action arises in favor of injured party against insurer until rendition of judgment against insured. *Seaton v. Pickens*, 87 S.W.2d 709 (Tex. 1935); *Bluth v. Neeson*, 94 S.W.2d 407 (Tex. 1936).

Violation of Law. See “AUTOMOBILES, Age.” Liability insurer held liable on policy issued to liquor store operator covering truck that was registered in name of third party and illegally used to deliver liquor, where the truck struck and killed a child. The court found that imposing liability on the insurer was not void under public policy, because the obligation of the insurer was not to indemnify the insured for damages resulting from the violation of any law, but was to indemnify the insured from civil liability on account of the operation of the truck. *Pioneer Mut. Comp. v. Diaz*, 177 S.W.2d 202, 204 (Tex. 1944).

Public policy prohibits insured from benefiting from own wrongdoing and intentional acts. *Decorative Center of Houston v. Employers Cas.*, 833 S.W.2d 257 (Tex. App.—Corpus Christi 1992, writ denied).

LIMITATION OF TIME FOR COMMENCEMENT OF ACTION

See Law Digest Tables.

Actions which must be commenced within 2 years: trespass; conversion; forcible entry/detainer; and, damages for personal injuries and for wrongful death. T.C.P.R.C. § 16.003.

Actions which must be commenced within 4 years: debt; specific performance of a contract for conveyance of real property; fraud, or breach of fiduciary duty (T.C.P.R.C. § 16.004). Suits on administrator’s, execu-

tor's and guardian's bonds; and will contests (§93 Tex. Prob.).

Actions on judgments must be brought within 10 years. Period may be extended by issuance of writ of execution. T.C.P.R.C. § 34.001. Ten year statute of repose for architects, interior designers, landscape architects, and building engineers, (T.C.P.R.C. § 16.008) and for medical malpractice claims (T.C.P.R.C. § 74.251(b)).

Asbestos or Silica Related Injuries. In an action for personal injury or death resulting from an asbestos or silica related injury, as defined by T.C.P.R.C. § 90.001, the cause of action accrues for purpose of T.C.P.R.C. § 16.003 on the earlier of the following dates: 1) the date of the exposed person's death; or 2) the date claimant serves on defendant a report complying with T.C.P.R.C. §§ 90.003 (90.004 for silica injuries) or 90.010(f).

Discovery Rule/Accrual. Generally, cause of action accrues when wrongful act causes injury, regardless of when plaintiff learned of such injury. *Robinson v. Weaver*, 550 S.W.2d 18 (Tex. 1977). A health care liability claim must be filed within two years from occurrence of the breach or tort, or from the date medical treatment or hospitalization was completed. T.C.P.R.C. § 74.251. Discovery rule is abolished for health care liability claims. *Diaz v. Westphal*, 941 S.W.2d 96, 99 (Tex. 1997) (interpreting § 10.01 now § 74.251). Cause of action for death from aspirin, Reyes Syndrome case, accrued on death and not on date of discovery of cause. *Moreno v. Sterling Drug*, 787 S.W.2d 348 (Tex. 1990), answer to certified question conformed to, 899 F.2d 389 (5th Cir. 1990). Manufacturer does not owe duty to consumer to disclose every cause of action consumer may have. *Seibert v. GM Corp.*, 853 S.W.2d 773, 778 (Tex. App.—Houston [14th Dist.] 1993, no writ).

Fraud. Action for damages accrues when fraud is discovered or should have been discovered. *Wise v. Anderson*, 359 S.W.2d 876, 879 (Tex. 1962).

Limitations in Contract. Policy requiring suit to be brought within period less than two years is void. Tex. Ins. Code § 1101.053, T.C.P.R.C. § 16.070; *American Surety Co. of N.Y. v. Martinez*, 73 S.W.2d 109, 112 (Tex. Civ. App.—El Paso 1934, writ ref'd). *Benefit Ass'n of Ry. Employees v. O'Gorman*, 195 S.W.2d 215 (Tex. Civ. App.—Fort Worth 1946, writ ref'd n.r.e.). The four year period of general limitations statute pertaining to written instruments held applicable. *Id.*, see T.C.P.R.C. § 16.004.

Contract provision requiring notice of claim for damages to be given in less than 90 days is void. T.C.P.R.C. § 16.071(a).

Tolling. Operation of the statute of limitations is suspended if a person is younger than 18 years of age or is of unsound mind at the time the cause of action accrues. T.C.P.R.C. § 16.001. Such suspension has the effect of tolling the statute of limitations for the length of the disability. *Id.* Death of a person entitled to maintain suit suspends running of the statute of limitation for one year, or until administrator or executor qualifies prior to one year from date of the person's death. T.C.P.R.C. § 16.062. Absence from the state of Texas of a person against whom a cause of action may be maintained suspends the running of the applicable statute of limitations for the period of the person's absence, T.C.P.R.C. § 16.063.

Waiver. Limitations defense may be waived by failure to plead and prove. *Jenn v. Spencer*, 32 Tex. 657 (1870). Insurance company may waive policy provision limiting time of suit by failing to furnish forms for proofs, *Simmons v. Western Indem.*, 210 S.W. 713 (Tex. Civ. App.—Fort Worth 1919, no writ), or, by continuing to recognize liability after period expired. *Horst v. London Fire Ins. Co.*, 11 S.W. 148 (Tex. 1889). Insurer and insured may agree to a different limitations period. *Stevens v. State Farm*, 929 S.W.2d 665 (Tex. App.—Texarkana 1996, writ denied).

MALPRACTICE – MEDICAL

Statutory requirements and limitations. Former T.R.S. 4590i, Medical Liability and Insurance Improvement Act was recodified in Ch. 74 of T.C.P.R.C., effective September 1, 2003.

Bystander Recovery. Mental anguish bystander damage not allowed in medical malpractice cases. *Edinburg Hosp. Auth. v. Trevino*, 941 S.W.2d 76, 80-81 (Tex. 1997).

Fraud. A doctor who conspires with his patient to submit fraudulent bills to insurance companies for medical services that were never rendered is subject to a two-level sentence enhancement under Sentencing Guidelines § 3B1.3 for abusing position of trust. *U.S. v. Iloani*, 143 F.3d 921, 923 (5th Cir. 1998).

Damage Cap. Limit of civil liability for non-economic damages for physician or health care provider other than health care institution, inclusive of all persons and entities for which vicarious liability theories may apply, is limited to \$250,000 for each claimant, regardless of number of defendants or number of separate causes of action on which claim is based. T.C.P.R.C. § 74.301(a).

In action on health care liability claim against a single health care institution, limit of civil liability for non-economic damages, inclusive of all persons and en-

ties for which vicarious liabilities may apply, is limited to \$250,000 per each claimant. T.C.P.R.C. § 74.301(b).

In action against more than one health care institution, liability for non-economic damages for each health care institution, inclusive of all persons and entities for which vicarious liability theories may apply, is limited to \$250,000 for each claimant and limit of civil liability for non-economic damages for all health care institutions, inclusive of all persons and entities for which vicarious liabilities may apply, is limited to \$500,000 for each claimant. T.C.P.R.C. § 74.301(c).

In wrongful death or survival actions against physician or health care provider, limitation of damages including exemplary damages is limited to \$500,000 for each claimant, regardless of number of defendants or number of separate causes of action filed. T.C.P.R.C. § 74.303(a). When there is increase or decrease in consumer price index with respect to this amount, limitation on damages shall be increased or decreased by changes in consumer price index. T.C.P.R.C. § 74.303(b). Liability of any insurer under common law theory of recovery commonly known in Texas as “*Stowers Doctrine*” shall not exceed liability of insured. T.C.P.R.C. § 74.303(d). Scope of subchapter 74.502 applies only to claim in which present value of award of future damages equals or exceeds \$100,000. T.C.P.R.C. § 74.502.

Damages – periodic payments. At request of defendant, court shall order that medical, health care, or custodial services awarded in a health care liability claim be paid in whole or in part in periodic payments rather than by lump-sum payment. T.C.P.R.C. § 74.503(a). At request of defendant, court may order that future damages other than medical, health care, or custodial services be paid in whole or in part in periodic payments rather than by lump-sum payment. T.C.P.R.C. § 74.503(b). Judge shall specify in order recipient of payments, dollar amount of payments, interval between payments, and number of payments or period of time within which payments made. T.C.P.R.C. § 74.503(d). Periodic payments, other than future loss of earnings, terminate on death of recipient. T.C.P.R.C. § 74.506(b). Upon death of recipient, money damages awarded for loss of future earnings continue to be paid to estate of recipient. T.C.P.R.C. § 74.506(a). If recipient of periodic payments dies before all payments are paid, court may modify judgment to award and apportion unpaid damages for future loss of earnings in an appropriate manner. T.C.P.R.C. § 74.506(c).

Deceptive Trade Practices. Physicians and other health care providers are exempt from liability under the D.T.P.A. pursuant to T.C.P.R.C. § 74.004. Exemption applies only to claims of negligent patient care, and not to claims of intentional misrepresentation. *Sorokolit v.*

Rhodes, 889 S.W.2d 239, 243 (Tex. 1994). Thus, health care providers can be liable under D.T.P.A., but claimant may not recast negligence claim as misrepresentation claim in attempt to circumvent exemption provided by statute. *Id.* at 242-43.

Expert Qualifications on Causation. Person may qualify as expert witness on issue of causal relationship between alleged departure from accepted standards of care and injury claimed only if person is a physician and is otherwise qualified to render opinions on that causal relationship. T.C.P.R.C. § 74.403(a). In suit involving claim against dentist, a person may qualify as expert witness on causation if person is a dentist or physician and is otherwise qualified to render opinions on that causal relationship. T.C.P.R.C. § 74.403(b). In suit involving claim against podiatrist, a person may qualify as expert witness on issue of causation if the person is a podiatrist or physician and is otherwise qualified to render opinions on that causal relationship. T.C.P.R.C. § 74.403(c).

Expert Report. Within 120 days after suit filed, claimant must file expert report and curriculum vitae for each physician or health care provider against whom claim is asserted. T.C.P.R.C. § 74.351(a). Each defendant whose conduct is implicated in report must file and serve any objection to sufficiency of report no later than 21 days after date report was served. *Id.* Otherwise, all objections are waived. *Id.* Under § 74.351, claimants no longer have cost bond or cash in escrow options. Until claimant has served expert report and curriculum vitae as required by this section, all discovery is stayed except for acquisition by claimant of information, including medical or hospital records, related to patient’s health care through: 1) written discovery; 2) depositions on written questions; and 3) discovery from non-parties. T.C.P.R.C. § 74.351(s). Only exception is that, after claim is filed, all claimants may not take more than 2 depositions before expert report is served. T.C.P.R.C. § 74.351(u). Normally, expert report under this section is not admissible in evidence by any party, cannot be used in deposition, trial or other proceeding, and shall not be referred to by any party during course of action. T.C.P.R.C. § 74.351(k). However, if expert report is used by claimant any time during course of action for any purpose other than to meet expert report requirement in this section, restrictions imposed by subsection (k) are waived. T.C.P.R.C. § 74.351(t).

Expert Testimony. Act requires qualification by medical practice at time claim arose or at time testimony given, and knowledge of accepted standards of medical care or treatment involved and is qualified on basis of training or experience regarding those standards. T.C.P.R.C. § 74.401(a). Expert’s qualifications to be

determined outside presence of jury. "Practice" includes training residents at accredited school of medicine or osteopathy or practicing as consultant to other physicians.

Informed Consent. Act sets up Texas Medical Disclosure Panel to determine risks and hazards to be disclosed. T.C.P.R.C. § 74.102(a). Disclosure must be in writing signed by patient or his agent and competent witness. T.C.P.R.C. § 74.105. Failure to disclose creates rebuttable presumption of negligence. T.C.P.R.C. § 74.106(a)(2). No determination by panel leaves duty otherwise imposed by law. T.C.P.R.C. § 74.106(b). Specific informed consent procedures established for hysterectomies. T.C.P.R.C. § 74.107.

Pre-approval of medical procedures does not subject an insurance company to liability under the D.T.P.A. or Tex. Ins. Code, currently codified at Tex. Ins. Code § 542.003, where neither the insureds nor their physicians imparted key facts before the pre-approval was given and where the pre-approval at most amounted to an uninformed conclusion on the part of the insurance company. *Provident Am. Ins. v. Castaneda*, 988 S.W.2d 189, 200 (Tex. 1998).

Notice. Claimant must give notice to each physician or health care provider 60 days before filing suit, and notice must be accompanied by specified authorization form for release of protected health information as required under § 74.052. T.C.P.R.C. § 74.051(a). Purpose of § 4.01 [now § 74.051] is to provide potential defendants 60-day pre-suit period in which to gather information and determine whether claims have merit and should be resolved without litigation. *In re Fontenot*, 13 S.W.3d 111, 114 (Tex. App.—Fort Worth 2000, no pet.).

Failure to provide authorization along with notice of health care claim shall abate all further proceedings against defendant receiving notice until 60 days following receipt by physician of required authorization. T.C.P.R.C. § 74.052(a). Medical authorization shall be construed in accordance with "standards for privacy of individually identifiable health information." 45 C.F.R. parts 160 and 164. Notice sent to any one health care provider extends limitations 75 days for all defendants and potential defendants. T.C.P.R.C. § 74.052(c); *Thompson v. Cmty. Health Inv. Corp.*, 923 S.W.2d 569, 571 (Tex. 1996).

Proximate Cause-Medical. No recovery allowed if patient had 50% or less chance of survival without the defendant's negligence. *Park Place Hosp. v. Estate of Milo*, 909 S.W.2d 508, 511 (Tex. 1995).

Res Ipsa Loquitur. Not applicable, unless want of skill is within comprehension of laymen, such as leaving sponges or forceps in body. *Hunter v. Robison*, 488

S.W.2d 555, 560 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.). Statute provides res ipsa loquitur shall only apply to claims in which it has been applied by appellate courts as of August 29, 1977. T.C.P.R.C. § 74.201.

Standard of Care. Jury charge under Act: "A finding of negligence may not be based solely on evidence of a bad result to the claimant in question, but a bad result may be considered by you, along with other evidence, in determining the issue of negligence" T.C.P.R.C. § 74.303(e)(2) (formerly T.R.S. § 202(c)). "Did the physician undertake a mode or form of treatment which a reasonable and prudent member of the medical profession would undertake under the same or similar circumstances." *Hood v. Phillips*, 554 S.W.2d 160, 165 (Tex. 1977). The jury may find that the diagnosis or treatment was negligent which proximately caused the injury. *Bowles v. Bourdon*, 219 S.W.2d 779, 782 (Tex. 1949).

Statute of Limitations. Action must be brought within 2 years of occurrence of breach, tort, or from date of medical treatment, health care treatment, or hospitalization is completed. T.C.P.R.C. § 74.251(a). Question of when claim accrues is one of law, not fact. *Chambers v. Conaway*, 883 S.W.2d 156, 159 (Tex. 1993). Claimant may not choose most favorable date that falls within statute's three categories. *Shah v. Moss*, 67 S.W.3d 836, 841 (Tex. 2001). If date of tort is ascertainable, further inquiry into date of treatment or date of hospitalization is unnecessary. *Id.*

Evidence of continuing course of treatment may toll the limitations period. *Morin v. Helfrick*, 930 S.W.2d 733, 738 (Tex. App.—Houston [1st Dist.] 1996, no writ), *overruled on other grounds*, *Rizkallah v. Conner*, 952 S.W.2d 580, 585, n. 4 (Tex. App.—Houston [1st Dist.] 1997, no writ).

An open courts challenge can be made to § 74.251. *O'Reilly v. Wiseman*, 107 S.W.3d 699, 707 (Tex. App.—Austin 2003, pet. denied). However, the discovery rule has been abolished for health care liability claims under § 10.01 [now § 74.251]. *Diaz v. Westphal*, 941 S.W.2d 96, 99 (Tex. 1997).

Section 10.01 [now § 74.251] does not abolish fraudulent concealment as equitable estoppel to affirmative defense of limitations. *Earle v. Ratliff*, 998 S.W.2d 882, 887-88 (Tex. 1999). Proof of fraudulent concealment suspends running of limitations until claimant learned of, or should have discovered, deceitful conduct or facts giving rise to cause of action. *Id.*

Minors under age 12 have until their 14th birthday to file, or have filed on their behalf, a claim. T.C.P.R.C. § 74.251(a). Section 10.01 [now § 74.251] is unconstitutional as applied to minors. *Weiner v. Wasson*, 900

S.W.2d 316, 318-19 (Tex. 1995). Statute of limitations unconstitutional because it purports to cut off minor's cause of action before he reaches age of majority. *Id* at 319. Minors have until 2 years after their 18th birthday in which to file suit. *Id* at 321.

Statute of limitations found in § 10.01 [now § 74.251] held to be unconstitutional as applied to mentally incompetent persons. *Felan v. Ramos*, 857 S.W.2d 113, 117 (Tex. App.—Corpus Christi 1993, writ denied).

Ten year statute of repose enacted. T.C.P.R.C. § 74.251(b).

Warning Duty. A health care provider has a duty to warn identifiable, intended victims that a patient poses a serious danger of violence to them. *Limon v. Gonzaba*, 940 S.W.2d 236, 240 (Tex. App.—San Antonio 1997, writ denied).

Wrongful Birth / Wrongful Life. Cost of rearing healthy child born after negligent performance of sterilization not available. *Sutkin v. Beck*, 629 S.W.2d 131, 132 (Tex. App.—Dallas 1982, writ ref'd n.r.e.). But, cost of treating impairment of child born defective after doctor failed to inform mother of consequences of rubella and treatment, recoverable. *Jacobs v. Theimer*, 519 S.W.2d 846, 849-50 (Tex. 1975). In failed sterilization case, parents of healthy child may only recover actual medical expenses of mother. *Crawford v. Kirk*, 929 S.W.2d 633, 637 (Tex. App.—Texarkana 1996, writ denied). However, mother has valid malpractice claim for negligent treatment to herself and may recover mental anguish damages resulting from the loss of her fetus. *Krishnan v. Sepulveda*, 916 S.W.2d 478, 482 (Tex. 1995). But, if fetus is not born alive, no wrongful death or survival action permitted. *Pietila v. Crites*, 851 S.W.2d 185, 186 (Tex. 1993).

MALPRACTICE – OTHER

Hospital. *See* “HOSPITAL.”

Legal. *See* “ATTORNEYS.”

Other Professionals. Failure to exercise degree of care that reasonably competent members of their profession would exercise under similar circumstances makes certified public accountants liable for damages proximately caused by their negligence just like other skilled professionals. *Greenstein, Logan & Co. v. Burgess Mktg., Inc.*, 744 S.W.2d 170, 185 (Tex. App.—Waco 1987, writ denied). Veterinary negligence claims are governed by same standards applicable to physicians and surgeons. *Downing v. Gully*, 915 S.W.2d 181, 183 (Tex. App.—Fort Worth 1996, writ denied).

MEDIATION

Chapter 154 establishes procedures for mediation, mini-trial, moderated settlement conference, summary jury trial and arbitration. T.C.P.R.C. 154. All procedures are non-binding and informal, unless binding arbitration is agreed upon, and are conducted under strict rules of ethics. The court may require referral to impartial third parties with statutory training, after conference.

Enforcement. Any mediated settlement is enforceable as a contract. *Hardman v. Dault*, 2 S.W.3d 378, 380 (Tex. App.—San Antonio 1999, no pet.) (citing T.C.P.R.C. § 154.071(a)).

MOTOR CARRIERS

See, generally, T.T.C.

Commercial Motor Vehicles. For requirements, see T.T.C., Chapter 642.

Driver Regulation. No person may drive motor vehicle on highways of this State, subject to some exceptions, without first obtaining valid driver's license as operator, commercial operator or chauffeur. T.T.C. § 521.021. Any person over 16 years of age may be licensed as class C operator on application to Department of Public Safety of State of Texas if he has passed a driver's training course, has obtained a high school diploma or its equivalent, or is a student, and has passed a written exam. T.T.C. § 521.204(a). Applications of minors under 18 years of age must be signed by parent or guardian if applicant has parent or guardian. T.T.C. § 521.145(a). Reciprocity extended to nonresidents over 16 years of age under certain circumstances. T.T.C. § 521.027-521.029. Full reciprocity extended if person's state or county of residence recognizes Texas driver's license. T.T.C. § 521.030.

Department may impose restrictions in certain cases respecting mechanical control devices, or may require mechanical attachments (artificial limbs, glasses, etc.) of licensee, and may also restrict areas, locations and roads and time of day or night licensee may operate motor vehicle. T.T.C. § 521.221(a).

Vehicle Equipment. *See* T.T.C., Chapter 547.

Vehicle Size and Weight. *See* T.T.C., Chapters 621-623.

NEGLIGENCE

See Law Digest Tables.

Negligence means failure to use ordinary care, that is, failing to do that which a person of ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary pru-

dence would not have done under the same or similar circumstances. *See Tri v. J.T.T.*, 162 S.W.3d 552, 558 (Tex. 2005).

Age. Child under 18 years cannot sue in own name, but must appear by guardian or next friend and cannot recover loss of earnings in his own right, whether suit is against parent or third party. *Gulf, Colo. & Santa Fe Ry. v. Johnson*, 44 S.W. 1067, 1068 (Tex. 1898). Age of majority 18 years. T.C.P.R.C. § 129.001. No statutory prohibition on suits against children, but when there is no regular guardian, court shall appoint guardian ad litem for such minor. Tex. R. Civ. P. 173. Marriage emancipates male and female child. *See, e.g.*, T. Fam. § 101.003(a). Texas does not recognize a cause of action against parents for the negligent control of an adult child. *Providence Health Ctr. v. Dowell*, 262 S.W.3d 324, 336 (Tex. 2008).

Assumption of Risk. Abolished as affirmative defense by comparative negligence statutes. *Farley v. M.M. Cattle Co.* 529 S.W.2d 751, 758 (Tex. 1975).

Attractive Nuisance. Doctrine recognized. *McCoy v. Tex. Power & Light*, 239 S.W. 1105, 1108 (Tex. Comm'n App. 1922).

See "AUTOMOBILES."

Comparative/Contributory Negligence. Claimant fifty percent or less responsible may recover. T.C.P.R.C. § 33.001. If claimant is not barred, the court shall reduce claimant's damages by claimant's percent of responsibility. T.C.P.R.C. § 33.012. If claimant has settled with one or more persons, the court shall further reduce the amount of damages by the sum of the dollar amounts of all settlements. T.C.P.R.C. § 33.012.

For railroad employees, contributory negligence of the employee shall diminish damages recoverable in proportion to the amount of negligence attributable to each employee, article 6440 V.A.T.S., and contributory negligence does not bar recovery. *Mexican Central Ry. v. Rodriguez*, 133 S.W. 690, 691 (Tex. Civ. App. 1911, writ ref'd). The defense is not recognized as to children five years and under, unless there is testimony of such intelligence and realization of danger as would indicate that the child was conscious of consequences of conduct. *Id.* at 692.

Contribution among Tort-feasors. *See* "CONTRIBUTION."

Damages. Compensatory damages include economic and noneconomic damages, not exemplary damages. T.C.P.R.C. § 41.001(8). Economic damages are compensatory damages intended to compensate for actual economic or pecuniary losses. T.C.P.R.C. § 41.001(4). Noneconomic damages compensate for

physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, injury to reputation, and all other nonpecuniary losses of any kind, other than exemplary damages. T.C.P.R.C. § 41.001(12).

Punitive/Exemplary and limitations on awards. *See* "DAMAGES."

Experts. Expert testimony is necessary when the alleged negligence is of such a nature as not to be within the experience of the layman. *Roark v. Allen*, 633 S.W.2d 804, 809 (Tex. 1982). Reliability requirements. *See* "PUNITIVE DAMAGES, Experts."

Guest Statute. Texas Guest Statute ruled unconstitutional. *Whitworth v. Bynum*, 699 S.W.2d 194, 197 (Tex. 1985).

Governmental Immunity. Governmental immunity partially waived by Texas Tort Claims Act, T.C.P.R.C. § 101.001, *et seq.*, for liability for use of motor vehicle, if employee would be personally liable, and personal injury or death caused by condition or use of tangible personal or real property, if liability would exist for private person under Texas Law. T.C.P.R.C. § 101.021.

Imputed Negligence. Doctrine permits recovery where venture was "joint enterprise," *i.e.*, where each party had express or implied authority to act for all, or control a means to accomplish common purpose. *Hines v. Welch*, 229 S.W. 681, 683 (Tex. Civ. App.—Texarkana 1921, no writ). Theory applicable to husband and wife ventures. *Shoemaker v. Whistler's Estate*, 513 S.W.2d 10 (Tex. 1974). Doctrine of parental immunity bars negligence actions unless parent intentionally injured child or negligently operated a car. *Hall v. Martin*, 851 S.W.2d 905, 910 (Tex. App.—Beaumont 1993, writ denied).

Independent Contractor. Party liable for intentional acts of employee of independent contractor. *Taylor v. Sunbelt*, 905 S.W.2d 743, 744 (Tex. App.—Houston [14th Dist.] 1995, no writ); *see Exxon Corp. v. Quinn*, 726 S.W.2d 17, 20 (Tex. 1987). General rule is that owner is not liable for negligence of independent contractor. *Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex. 1985). Exception applies when owner retains some control over manner in which work is performed. *Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d 354, 356 (Tex. 1998). Control may be proven by contractual agreement or the actual exercise of control. *Dow Chem. v. Bright*, 89 S.W.3d 602, 606 (Tex. 2002).

Joint and Several Liability. Joint and several liability applies if defendant's responsibility: 1) is greater than fifty percent, or 2) defendant, with specific intent to do

harm to others, acted in concert with another person to engage in the conduct described in various provisions of the Penal Code. T.C.P.R.C. § 33.013.

Last Clear Chance and Discovered Peril. No longer viable in Texas in comparative negligence cases arising after comparative negligence statute. *French v. Grigsby*, 567 S.W.2d 604, 605 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.).

Liquor Liability. Knowingly serving liquor to obviously intoxicated person is negligence as a matter of law. Tex. Alco. Bev. Code Ann. § 2.02, *et seq.* (Vernon 2007). Commercial providers of alcohol to intoxicated persons may be liable to injured third persons, and to intoxicated patrons, subject to Comparative Responsibility Act, *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 684 (Tex. 2007), but social hosts are not. *Graff v. Beard*, 858 S.W.2d 918, 918 (Tex. 1993). A social host is not liable for subsequent motor vehicle accident injuries resulting from the host's provision of alcohol to a 19-year old guest driver. *Smith v. Merritt*, 940 S.W.2d 602, 605 (Tex. 1997). A convenience store may be liable for injuries to a third party where it sells alcohol to an obviously intoxicated driver and the driver's intoxication proximately caused injuries, *Southland Corp. v. Lewis*, 940 S.W.2d 83, 85 (Tex. 1997).

"Mary Carter" agreements violate public policy. *Elbaor v. Smith*, 845 S.W.2d 240, 250 (Tex. 1992).

Mental Anguish. Negligent infliction of mental anguish is not recognized in Texas. *Boyles v. Kerr*, 855 S.W.2d 593, 594 (Tex. 1993).

Negligence Per Se. Violation of statute, ordinance, or administrative rule or regulation may be negligence per se. *Mundy v. Pirie-Slaughter Motor Co.*, 206 S.W.2d 587, 590-91 (Tex. 1947).

Owner Occupier of Land. Liability now decided on basis of comparative negligence as to tenants and invitees. *Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 521 (Tex. 1978).

Premises Liability. There are two types of premises liability cases: 1) those arising from a premises defect and 2) those arising from a negligent activity on the premise. *See Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 527 (Tex. 1997). In either instance the right of control is key. The duties differ based on whether the injured party is an invitee, licensee, or trespasser. An invitee must prove that 1) a condition of the premises created an unreasonable risk of harm; 2) the owner knew or reasonably should have known of the condition; 3) the owner failed to exercise ordinary care to protect from the danger; and 4) the owner's failure was a proximate cause of injury to the invitee. *State Dep't of Highways & Pub-*

lic Transp. v. Payne, 838 S.W.2d 235, 237 (Tex. 1992). As a general rule, no duty to protect from the criminal acts of a third person. *Trammel Crow Central Texas, Ltd. v. Gutierrez*, 267 S.W.3d 9, 12 (Tex. 2008). To determine whether a crime was foreseeable, evidence of prior crimes must be evaluated for the following: 1) proximity – whether any criminal conduct previously occurred on or near the property; 2) recency – how recently the criminal conduct occurred; 3) frequency – how often the criminal conduct occurred; 4) publicity – what publicity was given the occurrences to indicate that the landowner knew or should have known about them; and 5) similarity – how similar the previous criminal conduct was to the conduct at issue. *Timberwalk Apts., Partners, Inc. v. Cain*, 972 S.W.2d 749, 757 (Tex. 1998). Landlord must have actual or constructive knowledge of a dangerous condition before liability for negligent maintenance; failure to warn or the absence of safety devices will apply. *CMH Homes, Inc. v. Daenen*, 15 S.W.3d 97, 101 (Tex. 2000). Even though he may not be in control of the premises when the injury actually occurs, one who creates a dangerous condition owes a duty of care to third parties. *Science Spectrum v. Martinez*, 941 S.W.2d 910, 912 (Tex. 1997). Duty of employer to use ordinary care in providing a safe workplace does not arise in the absence of a foreseeable risk of harm to the employees. *Guerrero v. Mem'l Med. Ctr.*, 938 S.W.2d 789, 791-92 (Tex. App.—Beaumont 1997, no writ).

Privacy. There is no cause of action for negligent invasion of privacy or interference with familial relationships. *Childers v. A.S.*, 909 S.W.2d 282, 291 (Tex. App.—Fort Worth 1995, no writ).

Proximate Cause Doctrine. A cause that was a substantial factor in bringing about an event, and without which cause such event would not have occurred. *Transcontinental Ins. Co. v. Crump*, 330 S.W.3d 211, 223-24 (Tex. 2010). In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonable result therefrom. *Rudes v. Gottschalk*, 324 S.W.2d 201, 207 (Tex. 1959). There may be more than one proximate cause of an event. *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 784 (Tex. 2001).

Res Ipsa Loquitur. Liability where accident does not ordinarily happen in absence of negligence, and instrument of injury is controlled by defendant. *Bond v. Otis Elevator*, 388 S.W.2d 681, 685 (Tex. 1965).

Sudden Emergency. Standard of care is that of ordinary prudent person confronted by the same emergency. *Ft. Worth & D.C. Ry. v. Kimbrow*, 112 S.W.2d 712, 714 (Tex. 1938); *Mrs. Baird's Bakeries v. Roberts*,

360 S.W.2d 850, 854 (Tex. Civ. App.—Eastland 1962, writ ref'd n.r.e.).

NO-FAULT

To date, no-fault legislation has not been enacted.

PENALTIES AND ATTORNEYS' FEES

Penalty of 12% damages and reasonable attorneys' fees invoked where fraternal benefit society fails to pay loss within 61 days after demand. Tex. Ins. Code § 885.315.

Penalty collectible regardless of justifiability of unsuccessful defense. *First Nat'l Life v. Vititow*, 323 S.W.2d 313, 315-16 (Tex. Civ. App.—Texarkana 1959, writ dism'd).

Treble damages under D.T.P.A. allowed against agent for misrepresentation of coverage when in fact there was no coverage. *Metro Allied Ins. Agency, Inc. v. Lin*, 304 S.W.3d 830, 836-37 (Tex. 2009).

PRIVILEGED COMMUNICATIONS

Attorney/Client. Communications privileged if made to facilitate rendition of professional legal services, with exceptions. T.R.E. 503. However, attorney statements made in contemplation of or prefatory to judicial proceedings are absolutely privileged. *Thomas v. Bracey*, 940 S.W.2d 340, 342-343 (Tex. App.—San Antonio 1997, no writ).

Clergy/Penitent. Privileged if made privately to clergyman as spiritual advisor, with exceptions. T.R.E. 505.

Doctor/Patient. Privileged if confidential. Medical records may not be disclosed, both with exceptions. T.R.E. 509.

Evidence. Comment on claim of privilege prohibited in court. T.R.E. 513(a).

Informer. The United States or a state or subdivision thereof may refuse to disclose identity of person furnishing information or assisting in investigation of possible violation of the law to a law enforcement officer or legislative committee or staff. T.R.E. 508(a).

Insurer/Insured. None found.

Mental Health. Communication between professional and patient, and records, privileged, with exceptions. T.R.E. 510.

Spousal. Privileged if confidentially made to spouse and not intended for disclosure to any other person, with exceptions, T.R.E. 504.

Waiver. By voluntary disclosure, or at trial calling person as character witness to whom privileged communications have been made. T.R.E. 511.

PRODUCTS LIABILITY

Texas products liability law encompasses five basic theories: 1) strict liability, 2) negligence, 3) warranty, 4) statutory D.T.P.A. and 5) misrepresentation. Chapter 82 of the T.C.P.R.C. discusses the following topics: (§82.002) Manufacturer's Duty to Indemnify; (§82.004) Inherently Unsafe Products; (§82.005) Design Defects; (§82.006) Firearms and Ammunition.

Experts. Expert testimony is necessary when the alleged negligence is of such a nature as not to be within the experience of the layman. *Roark v. Allen*, 633 S.W.2d 804, 809 (Tex. 1982). A person may be deemed an expert by his knowledge, skill, experience, training or education. T.R.E. 702. Trial court must make a preliminary determination whether scientific testimony is sufficiently reliable to be admitted into evidence. *E.I. DuPont de Neumours & Co., Inc. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995). Each opinion must be reliable, which is judged by the following factors: 1) the extent to which the expert's theory has been or can be tested, 2) the extent to which the technique relies upon the subjective interpretation of the expert, 3) whether the theory has been subjected to peer review and/or publication, 4) the technique's potential rate of error, 5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community, and 6) the non-judicial uses which have been made of the theory or technique. *Id.* Not all experts fit the *Robinson* factors. Sometimes reliability is based on whether there are analytical gaps between the facts of a case and the expert's opinions. *Gammill v. Jack Williams Chevrolet*, 972 S.W.2d 713, 720 (Tex. 1998).

Misrepresentation. Cause of action recognized in *Crocker v. Winthrop Labs.*, 514 S.W.2d 429, 431 (Tex. 1974) relying on Restatement of Torts (Second), § 402B.

Negligence. Generally, see *Gonzales v. Caterpillar Tractor Co.*, 571 S.W.2d 867 (Tex. 1978); *Caterpillar, Inc. v. Shears*, 911 S.W.2d 379 (Tex. 1995). *Res Ipsa Loquitur*. See *Bradshaw v. Freightliner Corp.*, 937 F.2d 197, 201 (5th Cir. 1991), for general requirements and ruling that claimant must show that defendant had exclusive control of the product at the time of the negligence.

Non-Manufacturing Seller. A manufacturer must indemnify a seller, except for any loss caused by the seller's negligence, intentional misconduct, or other act or omission. T.C.P.R.C. §82.002. Seller can be strictly liable if the seller participated in the design of the product, actually knew of a defect or if the manufacturer is insol-



vent or the manufacturer is not subject to the jurisdiction of the court. T.C.P.R.C. §82.003.

Strict Liability. First recognized in *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 790 (Tex. 1967). Strict liability not recognized where the loss is only “economic.” *Arkwright-Boston Mfg Mut. v. Westinghouse Elec.*, 844 F.2d 1174, 1177 (5th Cir. 1998). Restaurants are subject to strict liability for the sale of food. *Ayala v. Bartolome*, 940 S.W.2d 727, 730-33 (Tex. App.—Eastland 1997, no writ).

Warning. Not required if dangers are commonly known in the community or are obvious to an ordinary user. *Caterpillar Inc. v. Shears*, 911 S.W.2d 379, 382 (Tex. 1995). The mere fact that a product bears an adequate warning does not conclusively establish that the product is not defective. *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 336-37 (Tex. 1998).

Miscellaneous. Original designer of a product concept, which is copied or modified by another manufacturer, is not liable for injuries resulting from use of manufacturer’s product. *Firestone Steel Prods. Co. v. Barajas*, 927 S.W.2d 608, 613 (Tex. 1996).

RELEASE

See Law Digest Tables.

In General. Releases to be binding need be in no technical form, but merely set forth clearly intentions of parties. 50 Tex. Jur. 2d 10. Valid release becomes absolute bar to further liability growing out of obligation discharged. A released tort-feasor’s insurer cannot later be sued if the tort-feasor cannot be sued. *Angus Chem. Co. v. IMC Fertilizer, Inc.*, 939 S.W.2d 138 (Tex. 1997). A release does not have to specifically enumerate every claim, including gross negligence. *Mem. Med. Ctr. v. Keszler*, 943 S.W.2d 433 (Tex. 1997).

Covenant Not to Sue. Though not strictly a release, has been held to have this effect, to avoid circuitry of action. *Bradshaw v. Baylor Univ.*, 84 S.W.2d 703, 705 (Tex. 1935) (overruled on other grounds). However, covenant not to sue one or more joint tort-feasors will not release all others. *Id.*

Effect on Right of Subrogation. Full release signed by insured before loss is paid by insurer will extinguish insurer’s right of subrogation. *Maryland Motor Car Ins. Co. v. Haggard*, 168 S.W. 1011 (Tex. Civ. App.—1914, no writ).

Fraud, Misrepresentation, and Mistake. Fraud on part of releasee or his agent in misrepresenting material fact will void release. *Bond v. Ft. Worth & Rio Grande Ry. Co.*, 71 S.W.2d 571 (Tex. Civ. App.—1934, writ dismissed). Furthermore, innocent misrepresentation of a

material fact by releasee or his agent, made to induce settlement, will invalidate such release. *Missouri, Kentucky & Texas Ry. v. Reno*, 146 S.W. 207 (Tex. Civ. App.—1912, no writ). Statement by insurance adjuster to claimant that doctor reported no permanent eye injury, when claimant had equal opportunity to consult doctor, held, under circumstances, not fraudulent. *Davis v. Commercial Standard Ins. Co.*, 194 S.W.2d 599 (Tex. Civ. App.—1946, writ ref’d n.r.e.). In case of mutual mistake, court must determine whether release itself is valid. Law of mutual mistake applies to personal injury releases the same as other contracts. *Williams v. Glash*, 789 S.W.2d 261 (Tex. 1990).

Infant’s Claims. Since release is contract, general rule that minors’ contracts are voidable is applicable. 30 Tex. Jur. 2d 682. It is necessary to file friendly suit to secure binding release from minor.

Joint Obligors. Rule that release of one maker of joint obligation discharges all, has been abrogated by statute and no longer prevails in Texas. *Shield v. First Coleman Nat’l Bank of Coleman*, 166 S.W.2d 688, 691 (Tex. 1942).

Joint Tort-feasors. Release of parties named or otherwise specifically identified fully releases only parties so named or identified but not others; this does not affect existing releases where it appears from language of release and other circumstances that it was intention of releasor to release named parties and other persons generally. *McMillen v. Klingensmith*, 467 S.W.2d 193 (Tex. 1971). See “CONTRIBUTION.”

REPRESENTATIONS AND WARRANTIES

For life insurance policies, statute provides “a statement made by the insured is considered a representation and not a warranty.” Tex. Ins. Code § 1101.007.

Tex. Ins. Code § 862.054 provides that no breach or violation by insured of any promissory warranties in any contract of fire insurance shall render policy void, or constitute defense to suit for loss thereon, unless such breach or violation contributed to bring about destruction of property.

Tex. Ins. Code § 705.004 provides that any provision in any contract or policy of insurance which provides that answers and statements made in application for such contract or in contract, if untrue or false, shall render contract or policy void, or voidable, shall be of no effect, and shall not constitute any defense to any suit brought upon such contract. However, if it is shown upon trial that the matter or thing misrepresented was material to risk or actually contributed to contingency on which policy became due and payable, and whether it was material and so contributed in any case shall be a



question of fact to be governed by court or jury trying case.

Under Tex. Ins. Code § 705.004, materiality of risk must be viewed as of time of issuance of policy rather than at time loss occurred; principal inquiry in determining materiality is whether insurer would have accepted risk if true facts had been disclosed. *Robinson v. Reliable Life Ins.*, 569 S.W.2d 28 (Tex. 1978).

Tex. Ins. Code § 705.005 provides that in all suits brought upon insurance contracts or policies issued or contracted for in this State, no defense based upon misrepresentation made in application for or in obtaining or securing contract shall be valid, unless defendant shall show at trial that within reasonable time after discovering falsity or misrepresentations it gave notice to insured, if living, or, if dead, to owners or beneficiaries in contract, that it refuses to be bound by contract. Ninety days is fixed as reasonable time.

Tex. Ins. Code § 705.051 provides that no recovery upon any life, accident, or health insurance shall ever be defeated because of any misrepresentation in application which is of immaterial fact, and which does not affect risk assumed.

Tex. Ins. Code § 705.003 provides that any provision in any contract or policy of insurance which provides that same shall be void if any misrepresentation or false statement be made in proof of loss or death shall be of no effect and shall not constitute defense to any suit brought upon contract or policy unless it be shown upon trial that false statement made in proof of loss was fraudulently made and misrepresented fact material to question of liability of insurance company, and that insurance company was thereby misled and caused to waive or lose some valid defense to policy.

Agent of insurance company filled in application misrepresenting facts received from insured, who had signed application in blank. After fire loss occurred, company estopped to assert breach of warranty by insured. *Boston Ins. Co. v. Rainwater*, 197 S.W.2d 118, 123 (Tex. Civ. App.—1946, no writ).

Misrepresentations in applications for life policy as to heart disease, intentionally made, were material to risk and defeated recovery on death by myocardial infarction. *Allen v. Am. Nat'l*, 380 S.W.2d 604 (Tex. 1964).

Bad faith does not exist where an insurer fails to contact the applicant prior to asserting its right to question statements made in the application. *Columbia Universal Life Ins. Co. v. Miles*, 923 S.W.2d 803 (Tex. App.—El Paso 1996, writ denied).

Where application for insurance is attached to and made part of policy and insured accepts and retains pol-

icy, insured is conclusively presumed to have ratified any false statements contained in application. *Odom v. Insurance Co. of State of PA*, 455 S.W.2d 195 (Tex. 1970).

Life insurance policy requiring insured to be in “good health” to take effect does not mean perfect health and except in extreme cases, question of good health and whether health of insured materially increased risk of insurer, being relative matters, should be left to jury determination. *Great Am. Reserve Ins. Co. v. Britton*, 406 S.W.2d 901 (Tex. 1966).

SERVICE OF PROCESS

In any civil suit against domestic life, casualty, accident, life and accident, health and accident, or life, health and accident insurance company, process may be served only on president, active vice president, secretary or attorney-in-fact at the home office or by leaving copy at home office during business hours. Tex. Ins. Code § 804.101(b).

Upon Non-Resident Motorists. See “AUTOMOBILES.”

SUBROGATION

Collision Insurance. Generally, insurer paying losses is subrogated to any rights of insured against wrongdoer. *Sims v. Woods*, 130 S.W.2d 424, 425 (Tex. App.—El Paso 1939, no writ). Furthermore, right of subrogation after payment by insurer to insured takes place by operation of law, irrespective of any express stipulation to that effect in policy. *Johnson v. Henderson*, 132 S.W.2d 458, 462 (Tex. App.—Eastland 1939, no writ). See also “RELEASE, Effect on Right of Subrogation.”

Fire Insurance. Fire insurer is subrogated to rights of mortgagee on policy taken out in name of mortgagor with loss payable clause to mortgagee, or with Union Mortgage Clause in favor of mortgagee, in event that company has defense as to mortgagor, when policy so provides. *British American Assur. v. Mid-Continent Life*, 37 S.W.2d 742, 744 (Tex. Com. App. 1931); but only in such event, as otherwise such policy would be considered as taken for joint benefit of mortgagor and mortgagee and any payment to mortgagee would discharge mortgagor's notes pro tanto. *Hall v. Miller*, 268 S.W. 268 (Tex. Civ. App.—Houston 1925, writ dism'd w.o.j.). Where policy contains independent or separable contracts as to mortgagor and mortgagee, insurer would be subrogated to the mortgagee. *Home Ins. v. Boatner*, 239 S.W. 928, 930 (Tex. Com. App. 1920, judgment adopted). Insurance company's right of subrogation held inferior and subject to right of mortgagee of property.

Union Assur. v. Equitable, 127 Tex. 618, 94 S.W.2d 1151, 1153 (1936).

Parties to Action. Surety may not be sued unless principal is joined or unless judgment has previously been rendered against his principal. Tex. R. Civ. P. 31. Though insured's separate action was properly dismissed as a sanction for discovery abuses, insurer's subrogated action should not have been dismissed where insurer did not engage in discovery abuses. *Cox v. Realty Development Corp.*, 748 S.W.2d 492, 494 (Tex. App.—Dallas 1988, no writ).

Recovery. Absent consent of the insured, an insurer does not have a right of subrogation against its own insured to recover for sums paid out under the insurance policy in a settlement. *Matagorda County v. Texas Ass'n of Counties City Gov't Risk Mgmt. Pool*, 975 S.W.2d 782, 786 (Tex. App.—Corpus Christi 1998, no pet.).

Surety. Surety company paying loss to city, caused by forgery on part of city's agent, is subrogated to rights of city against bank cashing forged warrants. *National Sur. v. State Trust & Sav. Bank*, 17 S.W.2d 499 (Tex. App.—Dallas 1929, no writ).

Workers' Compensation. Only statutory provision with reference to subrogation is in Labor Code, subrogating insurer to employee's right of action against any third party, to extent of the amount of compensation paid to employee. V.T.C.A., Labor Code § 417.001(b). A workers' compensation carrier owns the first monies received in a third-party settlement and has a conversion claim against a party who accepts such benefits with actual knowledge of the carrier's subrogation rights. *Autry v. Dearman*, 933 S.W.2d 182, 188-89 (Tex. App.—Houston [14th Dist.] 1996, writ denied). A workers' compensation carrier's right of subrogation can apply to any parties' liability for the employee's injury. *Employers Cas. v. Dyess*, 957 S.W.2d 884, 891 (Tex. App.—Amarillo 1997, no pet.).

For limitation purposes, workers' compensation carrier's claim accrues at time employee's action accrues. *Guillot v. Hix*, 838 S.W.2d 230, 233 (Tex. 1992).

Labor Code Section 417.003(c) allows a trial court to apportion part of an insurance carrier's subrogation recovery as attorney's fees for the employee's attorney and attorney's fees for the insurance carrier's attorney if the carrier's attorney has actively participated in obtaining the subrogation recovery. *Texas Dept. of Trans. v. Wilson*, 980 S.W.2d 939, 941 (Tex. App.—Fort Worth 1998, no pet.).

SUICIDE

See "INSANITY."

Presumption Against. Presumption is in favor of accidental death and against theory of suicide. *United Fidelity Life Ins. v. Adair*, 29 S.W.2d 944, 945 (Tex. Comm'n App.—1930, no writ).

However, even in face of presumption against suicide, where only reasonable inference that can be drawn from evidence is that death resulted from suicide, then presumption is rebutted and cannot prevail against positive evidence to contrary. *Combined American Ins. v. Blanton*, 353 S.W.2d 847, 848 (Tex. 1962).

Burden is on plaintiff to show that accidental death was not suicide in action to recover double indemnity under policy provision placing burden on beneficiary. *Great American Life v. Dearing*, 193 S.W.2d 250, 253 (Tex. Civ. App.—Galveston 1946, writ ref'd n.r.e.).

THEFT

Liability of insurer in theft policy is limited to particular place named. *U.S. Fidelity & Guar. v. Taylor*, 253 S.W. 1109 (Tex. App.—Amarillo 1923, no writ). Policy insuring against theft held to cover loss of property by false pretext. *Automobile Underwriters v. Rhinehold*, 255 S.W. 1116 (Tex. App.—San Antonio 1924, no writ); notwithstanding both title and possession passed. *Bomar v. Insurers Indem.*, 242 S.W.2d 160, 163-64 (Tex. 1951).

Automobile delivered to service station manager under storage contract and for minor repairs. Unauthorized use of automobile by manager and employee to attend dance during which trip automobile was damaged in collision, held not caused by "theft, larceny, robbery or pilferage" within insurance policy. *Royal Ins. v. Wm. Cameron & Co.*, 184 S.W.2d 936 (Tex. App.—Waco 1945, writ ref'd). See also, *Hall v. Great Nat'l Lloyds*, 275 S.W.2d 88 (Tex. 1955).

Theft policy construed by popular meaning of words. *Hall v. Great Nat'l Lloyd's*, 275 S.W.2d 88, 89 (Tex. 1955).

WAIVER AND ESTOPPEL

Doctrines cannot be used to create coverage where none exists. *Pennsylvania Nat'l Mut. Cas. Ins. v. Kitty Hawk Airways*, 964 F.2d 478, 480-481 (5th Cir. 1992) (quoting *State Farm Lloyds, Inc. v. Williams*, 791 S.W.2d 542, 550 (Tex. App.—Dallas 1990, writ denied)). Exception where an insurer assumes the insured's defense without obtaining a reservation of rights or a non-waiver agreement and with knowledge of the facts indicating non-coverage, may be waived, or the insurer may be estopped from raising them. *Williams*, 601 S.W.2d at 550. But insured must show it was prejudiced. *Id.* at 552; see also *Pacific Indem. v. Acel Delivery Serv.*,



485 F.2d 1169, 1173 (5th Cir. 1973), *cert. denied*, 415 U.S. 921 (1973).

Accident Insurance. Denial of liability by local agent relieves beneficiary of necessity for furnishing proofs. *American Nat'l Ins. v. Smith*, 97 S.W.2d 963 (Tex. App.—El Paso 1936, no writ). Insured having submitted proof of injury not required to give additional proof after insurer denied liability. *Federal Surety v. Smith*, 41 S.W.2d 210, 213 (Tex. Com. App. 1931, holding approved).

Fire Insurance. Demanding, receiving and retaining premiums, held waiver of defenses under fire policy. *American Central v. Robinson*, 219 S.W. 277, 280 (Tex. App.—Dallas 1920, writ *dism'd w.o.j.*). Any provision of standard fire policy may be waived. *Central States Fire Ins. Co. v. Wright*, 273 S.W. 629 (Tex. App.—El Paso 1925, writ *ref'd*).

Liability Insurance. Assumption of control of action against insured by indemnity company held to waive insurer's defenses of no coverage. *American Indem. v. Fellbaum*, 263 S.W. 908, 909-10 (Tex. 1924). Compensation insurer held to have waived defenses by furnishing employee medical attention and beginning payment of compensation once apprised of facts. *Southern Underwriters v. Mahan*, 126 S.W.2d 802, 804-805 (Tex. App.—Texarkana 1939, writ *dism'd*, *judg. corr.*).

Refusal of insurer to pay loss on one specific ground is bar to assertion of another ground if it had full knowledge and insured has been prejudiced by acting upon insurer's original position. *American Employers' Ins. v. Brock*, 215 S.W.2d 370, 375 (Tex. App.—Dallas 1948, writ *ref'd n.r.e.*). *But see Republic Ins. Co. v. Stoker*, 903 S.W.2d 338 (Tex. 1995) (in bad faith case the insured cannot preclude the insurer from relying on a reason for denying the claim that existed at the time, even if it was not the reason the insurer gave at the time of denial).

Non-waiver Agreements. Executed prior to investigation by which parties may proceed without waiving their rights are binding on both parties. *Provident Fire Ins. Co. v. Ashy*, 162 S.W.2d 684, 686 (Tex. 1942).

Proof of Loss. False statement in proof of loss or death no ground for forfeiture unless insurer misled thereby and caused to waive or lose some valid defense to policy. Tex. Ins. Code § 705.003. Execution of non-waiver agreement held not waiver of insurer's right to require proof of loss. *Provident Fire v. Ashy*, 162 S.W.2d 684, 686 (Tex. 1942). Failure of insured to give notice of theft of automobile required by policy, not waived by insurer's investigation under non-waiver agreement. *Commercial Standard Ins. v. Harper*, 103 S.W.2d 143, 147 (Tex. 1937). Proper submission of

proof of loss waived when local agent of insurer refused to accept such proofs. *Franklin Fire Ins. Co. v. Britt*, 254 S.W. 215, 217 (Tex. App.—Texarkana 1923, writ *ref'd n.r.e.*).

Acceptance of proofs of loss where such proofs not demanded does not by itself constitute waiver of other stipulations in policy which may have been violated. *Webber v. Fidelity Lloyds of Am.*, 271 S.W. 118, 119 (Tex. App.—Texarkana 1925, writ *dism'd*).

Where insurance company denies liability under terms of its policy, proper compliance with policy provision to furnish proofs of loss is waived. *Federal Surety v. Smith*, 41 S.W.2d 210, 212 (Tex. Com. App.—1931, holding approved). However, this rule does not apply unless denial is made during period within which proofs may be made. *Lone Star Finance v. Universal Auto Ins.*, 28 S.W.2d 573, 577 (Tex. App.—Galveston 1930, no writ). But it is noted in another case that even though denial of liability is made after time for submission of proofs of loss has expired, if denial is not predicated on the failure to furnish proofs, it is a waiver of any objection on that ground. *Alamo v. Cardwell*, 67 S.W.2d 337, 338-39 (Tex. App.—El Paso 1934, writ *dism'd*).

Waiver by agent. General agent may waive policy exclusions by later representations at variance with policy. *Black v. Victoria Lloyds Ins.*, 797 S.W.2d 20, 26 (Tex. 1990).

WARRANTIES

See "REPRESENTATIONS AND WARRANTIES."

WORKERS' COMPENSATION

Statutory Reference. T.L.C. Chapter 401.

Attorney's Fee. Attorney's fee, including contingency fee, for representing claimant before division or court must be approved by commissioner or court. T.L.C. § 408.221. Amount is based on attorney's time and expenses according to written evidence presented to division or court. *Id.* Attorney's fee paid from claimant's recovery. *Id.* For exceptions, see T.L.C. § 408.221(c) and T.L.C. § 408.147(c). Attorney's fee may not be allowed in case involving fatal injury or lifetime income benefit if carrier admits liability on all issues and tenders payment of maximum benefits in writing while claim is pending before division. T.L.C. § 408.221(g). Fee paid to attorney by separate draft. T.L.C. § 408.221(h). Amount of attorney's fee for defending insurance carrier must be approved by division or court and determined by division or court to be reasonable and necessary. T.L.C. § 408.222.

Benefits. Wages. Temporary income benefits paid until maximum medical improvement is attained. T.L.C. § 408.101-102. Injured worker entitled to impairment income benefits after maximum medical improvement is attained and when objective clinical findings of impairment exist. T.L.C. §§ 408.121-122. Impairment income benefits are awarded on basis of employee's impairment rating as assigned by physician using American Medical Assoc. standards. T.L.C. §§ 408.123-124. Employee is entitled to supplemental income benefits if, on expiration of impairment income benefit, employee 1) has impairment rating of 15% or more, 2) has not returned to work or has returned to work earning less than 80% of employee's average weekly wage as a direct result of employee's impairment, 3) has not elected to commute a portion of impairment income benefits, and 4) has complied with the requirements for work search adopted under Section 408.1415. T.L.C. § 408.142. Worker receiving compensation under compromise settlement agreement may not claim additional benefits under Workers' Compensation Act when injuries are aggravated during treatment. *CIGNA v. Rubalcada*, 960 S.W.2d 408, 412-13 (Tex. App.—Houston [1st Dist.] 1998, no pet.). Employee's receipt of workers' compensation cannot be considered in determining whether insurer owes duty to defend. *Tri-Coastal Contractors v. Hartford Underwriters Ins.*, 981 S.W.2d 861, 863 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).

Workers' compensation carrier is entitled to reimbursement out of any third-party recovery for all benefits paid for compensable injury. *Texas Mutual Ins. v. Ledbetter*, 251 S.W.3d 31, 35 (Tex. 2008). Workers' compensation carrier does not need to prove that amount of benefits paid was reasonable and necessary in order to recover those benefits. *Texas Workers' Comp. Ins. Fund v. Serrano*, 962 S.W.2d 536, 538 (Tex. 1998). See also T.L.C. § 417.002.

Course and Scope of Employment. To be compensable under workers' compensation statute, employee's injury must arise out of and occur within course and scope of worker's employment. T.L.C. § 406.031(a)(2). "Course and scope of employment" includes any activity that has to do with and originates in the work, business, trade, or profession of employer and is performed by employee while engaged in or about the furtherance of affairs or business of employer. T.L.C. § 401.011(12). Term includes activity conducted on premises of employer or at other locations. *Id.* Term does not include transportation to and from place of employment unless 1) transportation is furnished as part of contract of employment or is paid for by employer, 2) means of transportation are under control of employer, or 3) employee is directed in employee's employment to proceed from one place to another. *Id.* Term

also does not include travel by employee in furtherance of affairs or business of employer if travel is also in furtherance of personal or private affairs of employee unless 1) travel to place of occurrence of injury would have been made even had there been no personal or private affairs of employee to be furthered by the travel, and 2) travel would not have been made had there been no affairs or business of the employer to be furthered by the travel. *Id.*

Death. Death benefits begin to accrue on day after date of employee's death. T.L.C. § 408.183(a). Weekly amount of death benefits paid is generally equal to 75% of deceased employee's pre-injury average weekly wage. T.L.C. § 408.181(b). However, amount of weekly death benefits may not exceed 100% of state average weekly wage as determined by division. T.L.C. § 408.061(d) and (f).

Disability. Injured employee who has a disability is entitled to temporary income benefits until employee reaches maximum medical improvement. T.L.C. §§ 408.101-102. Claimant who has reached maximum medical improvement and is found to have impairment is entitled to impairment income benefits. T.L.C. §§ 408.121-122. Impairment means anatomic or functional abnormality or loss existing after maximum medical improvement that results from a compensable injury and is reasonably presumed to be permanent. T.L.C. § 401.011(23).

Employee. Employee means each person in service of another under a contract of hire, whether express or implied, oral or written. T.L.C. § 401.012. Includes an employee employed in usual course and scope of employer's business who is directed by employer temporarily to perform services outside usual course and scope of employer's business, a person, other than independent contractor or employee of independent contractor, engaged in construction, remodeling, or repair work for employer at premises of employer, and a person who is a trainee under the Texas Work Program established under Chapter 308. *Id.*

Exclusive Remedy. Recovery of workers' compensation benefits is exclusive remedy of employee covered by workers' compensation insurance coverage or legal beneficiary against employer or agent or employee of employer for death or work-related injuries. T.L.C. § 408.001(a). However, surviving spouse or heirs of deceased employee may recover exemplary damage if death was caused by intentional act or omission of employer or by employer's gross negligence. T.L.C. § 408.001(b). Employee who elects workers' compensation remedy and accepts benefits is barred from suing at common law for intentional tort damages. *Medina v. Herrera*, 927 S.W.2d 597, 598-99 (Tex. 1996).

Fellow Employee Rule. Employee of subscribing employer has no right of action against agent or employee of employer for death of or work-related injury sustained by employee. T.L.C. § 408.001. Agent or employee can be any person for whose conduct employer would be legally responsible under doctrine of respondeat superior in absence of workers' compensation statutes. *McKinney v. Air Venture*, 578 S.W.2d 849, 863 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.). A co-worker who causes injury to fellow employee may be liable independently when injury does not arise out of course and scope of employer's business. *Ward v. Wright*, 490 S.W.2d 223, 225-26 (Tex. Civ. App.—Fort Worth 1973, no writ).

Jurisdiction. Party must first exhaust its administrative remedies and be aggrieved by final decision of appeals panel before seeking judicial review. T.L.C. § 410.251. Such party may seek judicial review by filing suit not later than 40th day after date decision of appeals panel was filed with division. T.L.C. § 410.252. Petition must be filed in 1) county where employee resided at time of injury or death or 2) in case of occupational disease, in county where employee resided on date disability began or any county agreed to by parties. *Id.*

Liens. Income or death benefit is subject only to following lien or claim, to extent benefit is unpaid on date carrier receives written notice of lien or claim, in following order of priority: 1) attorney's fee for representing employee or legal beneficiary; 2) court-ordered child support; 3) subrogation interest. T.L.C. § 408.203.

Medical. Carrier has sole responsibility to pay medical fees and charges resulting from compensable injury. *Smith v. Stephenson*, 641 S.W.2d 900, 901 (Tex. 1982). Health care providers are required to submit their bills only to carrier, and not to injured employee unless employee requests copies. 28 T.A.C. § 42.30(a), (b). Employee is liable for medical bills only if there is a finding by commission or courts that carrier is not obligated for them. *Smith v. Stephenson*, 641 S.W.2d 900, 901 (Tex. 1982).

If employee's compensable work site injury is exacerbated by medical malpractice during treatment, workers' compensation carrier is entitled to recover its costs from a settlement employee receives from health care provider whose malpractice aggravated a compensable injury. *Houston Gen. Ins. v. Campbell*, 964 S.W.2d 691, 695 (Tex. App.—Corpus Christi 1998, pet. denied).

Mental Injury. Mental and emotional illnesses resulting from physical injuries may be compensable to extent they affect physical structure of body. *Clayton v. Employers Mut. Liab.*, 480 S.W.2d 487, 490 (Tex. Civ. App.—Waco 1972, no writ). Compensation also allowed for mental and emotional illnesses absent physical trauma, if mental or emotional condition results from sudden, unexpected, job-related event that produces mental trauma. *Bailey v. Am. Gen.*, 279 S.W.2d 315, 321 (Tex. 1955). Mental or emotional injury arising principally from legitimate personnel action such as transfer, promotion, demotion, or termination, is not compensable. T.L.C. § 408.006(b).

Occupational Disease. Occupational disease is compensable under workers' compensation insurance and included in the definition of "injury." T.L.C. §§ 401.011(26), 406.031. "Occupational disease" is any disease arising out of and in course and scope of employment and that causes damage or harm to physical structure of body, and includes disease or infection that naturally results from such work-related disease. T.L.C. § 401.011(34). In "latent-occupational-disease" cases, cause of action accrues whenever plaintiff's symptoms manifest themselves to degree or for duration that would put reasonable person on notice that he or she suffers from some injury and he or she knows, or in exercise of reasonable diligence should have known, that injury is likely work-related (*i.e.* discovery rule). *Childs v. Haussecker*, 974 S.W.2d 31, 40-41 (Tex. 1998).

Pre-Existing Injury. It is no defense to claim for compensation that injury would not have been as great if employee had been in more perfect physical condition. *Gill v. Transamerica*, 417 S.W.2d 720, 723 (Tex. Civ. App.—Dallas 1967, no writ). Carrier may defend on grounds that pre-existing injury is sole cause of claimant's current incapacity. *Texas Employers v. Page*, 553 S.W.2d 98, 100 (Tex. 1977). "Injury" as used in Texas Workers' Compensation Act includes aggravation of pre-existing injuries or conditions. *State Office of Risk Mgmt. v. Escalante*, 162 S.W.3d 619, 624-25 (Tex. App.—El Paso 2005, pet. dism'd).

Punitive Damages. Recovery not allowed unless claimant recovers on compensation claim, proves an independent tort and obtains jury findings entitling claimant to actual damages. *Twin City Fire Ins. v. Davis*, 904 S.W.2d 663, 665 (Tex. 1995).