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"THE 2007 TEXAS LEGISLATURE LEGAL STORM CLOUDS ON THE HORIZON?
WHAT'S NEXT FOR PROPERTY/CASUALTY INSURERS IN TEXAS"

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I. Introduction and Overview

It's been said in Texas that if you don't like the weather . . . well wait an hour, it will probably change. Over the years Texans have weathered many storms. The property and casualty industry has weathered many storms . . . some of them political and legal in nature. The aftermath of Hurricane Rita and Katrina created new legal issues for property insurers. There are many longstanding issues and unresolved problems with residual property markets in Texas that have been exacerbated after the last storm season. Many of the problems with the Texas Windstorm Insurance Association (TWIA) can only be solved in the political arena.

Even though storms can cause great damage and destruction, they can also be a powerful impetus for change . . . especially in the legal and political arena. Finding solutions to problems will require the input and work of a lot of people and groups including members of ICT, AFACT, agents, consumers, the Texas Department of Insurance, OPIC, and others. I hope this paper presents some issues and ideas for you to consider as you find ways to manage your risks in the upcoming year. I am optimistic that new and creative ways to "harness" the power of a storm can be found and will result in better laws for insurers and consumers.

While most of this presentation is focused on TWIA and some much needed changes in Texas law that regulates TWIA, there are also other important issues affecting property and casualty insurance that will draw attention from the legislature and the courts. These include rate regulation, rate refunds, the new Workers' Compensation system, the use of health care networks, increasing the damage caps on medical malpractice claims, legislation relating to use of staff counsel by insurers, issues affecting business practices and automobile insurance.

II. What are the Limits: Property Insurance, TWIA and the FAIR Plan

A. <u>Overview of Current Events</u>

The aftermath of Hurricane Katrina and Hurricane Rita has dramatically demonstrated to any responsible official how financially devastating losses from a hurricane can be. The sheer magnitude of the size of the losses caused by hurricanes is a reminder that policyholders, insurers and states must be better prepared to handle these catastrophic events. ICT and AFACT have worked diligently over the last several years with members of the legislature, agents, insurers and others to maintain the financial integrity not only of TWIA, but also to ensure that the property insurance industry is sound and able to maintain its financial integrity for all policyholders. These efforts have resulted in many positive changes in TWIA including new building codes, and better enforcement of building codes by the Texas Department of Insurance. More changes need to occur. It is vital that insurance be available not only to residents of the Gulf Coast but also to residents in all parts of Texas. Educating consumers and insurers on ways to mitigate loss and manage risks is an important part of this process.

Lt. Governor Dewhurst and Speaker Tom Craddick have appointed a Joint Interim Committee to study TWIA and the state's preparedness for another major storm. There seems to be a genuine desire to re-examine Texas laws relating to TWIA.

It is either the calm before the storm or the cornerstone for building a better system is being laid in place. The primary issues will be restructuring the funding mechanism for TWIA;

protecting the general revenues of the state; and finding better ways to assure rate adequacy and availability of insurance. Other legal and political issues may include assessments, limits of liability, whether losses are caused by wind or flood, additional living expense coverage, and the state's commitment to enforcement of adequate building standards.

B. TWIA

1. Overview and History

The Texas Legislature established the Texas Windstorm Insurance Association f/k/a Texas Catastrophe Property Insurance Association in 1971 as a response to the unavailability of property insurance on the Texas Gulf Coast after hurricane Celia which hit Texas on August 4, 1970.[1] One of the requirements in the initial law was that TWIA should always have adequate rates. Obviously, the hurricane exposure is a primary exposure facing TWIA. The evidence from hurricane Katrina and Rita is a sobering reminder of what happens to waterfront property when a catastrophic hurricane strikes. The need to use sound actuarial methods on its rate filing is as important today as it was when TWIA was created.

Initially, TWIA's rates were based on its proximity to water. Subsequently, the Legislature distinguished between rates located inland of intercoastal canals and rates located seaward. Property protected by a seawall constructed by the Corps of Engineers was treated as property located inland of the intercoastal canal.[2] The Legislature made changes in 1991 that eliminated this distinction. The primary impact of this change was to substantially reduce residential rates especially for risks that are located on or near the shoreline. Waterfront residential risks were reduced by as much as 75%.[3]

At the same time the Legislature was reducing rates, coverage in TWIA was increased. Prior to 1991, TWIA did not provide coverage for indirect losses such as wind–driven rain or replacement cost coverage. Sections 8A and 8B were added to Article 21.49 in 1991. Additionally, the Legislature required increasing limits through the use of the Boeckh index.[4] In 1993, the Legislature set rates for TWIA at the top of the flex band.[5] In 2001, the law changed to its current requirement that allows TWIA to file its own rates subject to approval of the Commissioner.[6] Under current law, rate increases cannot exceed 10% without prior approval of the Commissioner.[7]

The Texas windstorm policy provides coverage not only for loss to a dwelling or structure but also for coverage for contents and additional living expenses.

In 2005, the Texas Legislature enacted House Bill 3048 that requires TWIA to provide coverage to structures located wholly or partially over water, including the corporal movable property located therein. This increase in coverage could include structures not previously covered through the residual market.[8]

Licensed property insurers have always been required to provide assessments so that TWIA will have funds to pay claims in the event of a major storm. After Hurricane Alicia in 1983, the impetus for change resulted in TWIA obtaining reinsurance and ultimately starting the Catastrophe Reserve Trust Fund. In the event of a large storm such as Hurricane Katrina, licensed insurers must pay assessments without tax credits up to $300 million. Additionally, assessments after the exhaustion of reinsurance, $300 million, and the CRTF are subject to premium tax credits spread over five (5) years.[9] Assessments have been levied only twice in the history of TWIA. In 1983, insurers were assessed $157 million for Hurricane Alicia. In 2005, insurers were assessed $100 million for Hurricane Rita.

Assessments for a Hurricane Katrina-type storm could be substantial and impact the financial integrity of the entire property insurance market in Texas if changes are not made. Licensed insurers would have to provide cash to TWIA after the Catastrophe Reserve Fund and reinsurance has been exhausted. Under the existing structure this could be as much as $3 billion. Licensed insurers would also have to pay losses for voluntary business. Elected officials are now taking seriously the fact that the entire state has a compelling interest in the financial soundness of licensed insurers, TWIA and in maintaining adequate rates for TWIA.

2. **Financing for the Future**

(a). Current Method of Financing. Licensed insurers must pay the first $100 million in assessments without tax credits. After the Catastrophe Reserve Fund and reinsurance has been exhausted, insurers pay another $200 million in assessment without tax credits.[10] If TWIA still needs cash to pay for losses, insurers must pay additional assessments. Amounts paid by licensed insurers are allowed as tax credits spread over five years. Estimates of TWIA losses for a Hurricane Katrina size storm that strikes the Galveston/Houston could produce total insured losses in TWIA as high as $7-8 Billion. Under the existing structure, property insurers would have to pay as much as $5-6 billion for just TWIA losses. In addition, licensed insurers would also have to pay losses for voluntary business. This system of financing a residual market mechanism is similar to what existed in Florida after Hurricane Andrew. Numerous property insurers were rendered insolvent as a result of Hurricane Andrew and the voluntary market was shattered.

(b). Proposed New Methods to Finance TWIA

In 2005, TWIA sponsored legislation that would have allowed the state of Texas to issue revenue bonds to finance TWIA. This legislation failed because of a lack of the consensus on who should be responsible for the repayment of these bonds and issues related to TWIA rates. In 2007, the focus will again be on Revenue Bonds for TWIA. Legislation for revenue bonds is proposed at two levels:

(1) Pre-Event Bonds. Proposals for pre-event revenue bonds for TWIA would be authorized. TWIA is recommending $300 million in pre-event bonds. The legislature may determine that a higher amount may be appropriate. Bonds would be repaid from investment income and income of TWIA if a major storm did not occur. In the event of a storm, and in the event the bonds are used to pay losses, property casualty policy holders in the Catastrophe area would pay a surcharge equal to approximately 1% of their premium. Surcharges would only be made in the event it is necessary to use money from the bonds to pay claims. Surcharges would apply to all property casualty policies issued in the catastrophe area except for medical malpractice, workers compensation, and health insurance.

(2) Post-Event Bonds.

After a major storm, there could be a need to issue additional revenue bonds for TWIA to use to pay claims. Amounts ranging from $500 million to $2 billion may be considered. Repayment has been suggested by surcharges on all property casualty policies issued statewide except for medical malpractice, workers compensation and health insurance. Issues will be whether to restrict this to property insurance and what share coastal risks should pay relative to the rest of the state.

4. Building Codes and Enforcement

The property casualty industry has worked long and hard to obtain stronger building codes for structures to be built along the Texas coast. After many years of hard work, Commissioner Bomer and the Texas Department of Insurance approved a new building code for

TWIA risks. This new building code applies, however, only to structures built after Septemer 1, 1998 along the Texas sea coast and further only applies in order to determine insurability for eligibility in TWIA.[11] For property built after January 1, 1988, risks must be built in accordance with the applicable TWIA building code property must be eligible for insurance in TWIA.[12] Further, in order to demonstrate that the property has been built to code, it is required to be inspected and a certification obtained from the Texas Department of Insurance.[13]

Historically, the reason for this change was a result of experience and knowledge gained after Hurricane Alicia. Many homes sustained damage in Hurricane Alicia that there found to have suffered damage because they had not been built to applicable building codes. This demonstrated a lack of enforcement of existing building codes. Accordingly, the Legislature created the mechanism where the Texas Department of Insurance maintains a unit that conducts inspections along the Texas coast. This has proven to be a very effective way to mitigate losses, especially in storms the size of Hurricane Rita.

Recently, the Texas Department of Insurance approved a TWIA request that will allow structures built after June 1, 1988 to obtain insurance from TWIA without proof that the structure was built in accordance with the applicable building codes. A structure that did not previously obtain a certificate of inspection from the Texas Department of Insurance or a certificate from a licensed engineer that the structure was built to code will be eligible for TWIA risks by paying only a 5% surcharge. TWIA recommended a 25% surcharge. This action has been the subject of criticism from professional engineers and other coastal residents and may be the subject of litigation and legislation in 2007. If allowed to continue however, a number of new risks may come into TWIA that would not have been built to code and would likely suffer more severe losses in those structures that had been built to code.

5. **Limits of Liability**.

When TWIA was originally created, the maximum limits of liability for dwellings and corporal moveable property was $200,000. The maximum limits for commercial buildings and corporal moveable property was $1 million. In 1988, the legislature changed these limits to include limits of $500,000 for apartments, residential, condominiums and townhomes and $2 million for government buildings and corporal moveable property. In 1991, the legislature again amended the limits of liability and created an indexing system to gradually increase the limits. Limits for dwellings and individually owned townhomes were $250,000, apartments were increased to $750,000 and a $100,000 was established for individually-owned corporal moveable property.

In 2003, Commissioner Montemayor increased the limit on dwellings to $1.5 million. As a result, large waterfront property is being built due in part to the availability of inexpensive insurance through TWIA.

The Legislature may need to consider whether to set the limits in statute and limit the discretion of the regulator to drastically increase limits of liability.

6. **Rates**

There seems to be little dispute by knowledgeable insurers and reinsurers that the current TWIA rates are inadequate. This is especially true for the residential rates for TWIA. The residential rates for TWIA have been far below the actuarially indicated rates and serious questions have existed to the adequacy for residential rates for TWIA since the drastic changes in 1992. In 1992, Dr. Mark Crawshaw testified as that a reduction of beachfront homes by 75% would be confiscatory. Dr. Crawshaw was the TDI staff expert witness. Despite this testimony, the Texas Department of Insurance reduced the waterfront residential rates by 75% anyway. In the 2000 benchmark rate hearing, Dr. Mark Crawshaw again testified on behalf of TDI's staff for residential property rates. In that proceeding, Dr. Crawshaw stated that, "The current rates in the windstorm pool are substantially less the rates in the pool prior to 1992." Despite this fact, the TDI have been slow to approve needed rate increases for TWIA, especially on residential risks.

(a). Rate Standards. The standards for TWIA's rates are similar, but not identical, to standards for licensed insurers. TWIA rates must be reasonable, adequate, not unfairly discriminatory and *non-confiscatory as to any class of insurer*.[14] These standards recognize that TWIA's rates must be adequate from the standpoint of member insurers that are required to participate and pay money to TWIA to pay losses in the event of a catastrophe.

The statute also requires that due consideration shall be given to past and prospective loss experience *within and outside of the state of hazards* for which insurance is made available through the plan of operation.[15]

Despite the fact that these rate standards are consistently discussed by legislators and regulators as a means of applying fair and balanced regulation, the various orders approving or disapproving TWIA's rates fail to refer to these rate standards and make any specific findings around the rate standards.

(b). Catastrophe Factors

Some of the reasons there has been an inability to increase rates to adequate levels includes the methods and techniques used to determine a catastrophe factor for TWIA. Rates in TWIA must consider both the potential for catastrophe losses and non-catastrophe losses. Large losses, such as those caused by Hurricane Katrina, do not occur as frequently but must be considered in order to have adequate rates. In this regard, the TWIA statute requires that the catastrophe element must be developed using 90% of the monoline extended coverage experience of all insurers for property located in the seacoast territory using **not less than the most recent 30 years of experience** and 100% of the loss of experience of the association for covered property using 30 years of data.[16]

The catastrophe loading methodology has been the subject of numerous debates in benchmark rate hearings and other hearings before the TDI. Hurricane loss modeling is widely accepted in world wide insurance markets to determine the adequacy of rates for hurricane exposures in coastal areas. Unfortunately, these models have not been generally accepted by the TDI in TWIA and individual rate filings. Models have proven one thing . . . they consistently *understate* the actual losses that have occurred after a major storm.

The catastrophe methods recommended by TWIA have also considered models as well as updated actuarial techniques to project future losses. These techniques are also consistent with recommendations from leading scholars in insurance and risk management on ways to provide for adequate rates to fund for catastrophe losses over a long period of time.[17]

The actuarial standards board has developed actuarial standard of practice No. 39 on the treatment of catastrophe losses and property casualty insurance ratemaking. Actuarial standards available today to regulators and actuaries clearly reflect that:

> "Subsequent to hurricanes Hugo and Andrews, numerous enhancements and alternatives have been developed that improve on the traditional long-term catastrophe ratemaking procedure."[18]

In summary, Texas law not only requires consideration of at least 30 years of data, but specifically requires consideration of data from within and outside of the state and a longer period of time as necessary to assure that the rates in TWIA are adequate.

Despite these provisions, some legal change is needed to require an update of the methods for recognizing the catastrophe exposure in TWIA rates. It may be time for a legislative change that requires the TDI to look at more updated methods to determine a catastrophe factor in TWIA rate filings. If not, the potential that TWIA will have inadequate rates is substantially increased because additional data and methods are not used in setting rates for TWIA. Obviously, inadequate rates in TWIA will have a ripple adverse affect on insurers doing business in all parts of the state as well as having an adverse impact on the state of Texas itself.

(d). Approval by the TDI

TWIA is permitted to annually file for a rate change. The current procedure requires notice and a meeting before the Commissioner of Insurance. Rates filed by TWIA must be approved by the Commissioner. Increases in rates cannot exceed 10% unless the Commissioner finds that a catastrophic loss or series of occurrences justify a need to assure rate adequacy in the catastrophe area and also justify a need to assure availability of insurance outside of the catastrophe area.[19] In 2005, TWIA filed for a rate increase after Hurricane Katrina and before Rita struck. TWIA's rate filing using generally accepted actuarial methodologies showed an indicated increase for TWIA's residential rates ranges between 19% and 62%. Indicated increases in prior years have been as high as between 45% and 106%. In 2004, the Commissioner Montemayor granted no increase. In 2005, the TDI granted no increase in residential property rates. A new filing was made in 2006 using data from Hurricane Rita and the TDI granted a 3% increase.

Legislative Solutions. In light of the fact that the political pressure on the Texas Department of Insurance seems to outweigh its ability to approve an actuarially sound rate for TWIA, a legislative solution is important. Various proposals have included allowing rate increases around a benchmark or index to take effect without any action by the regulator. This is similar to the benchmark system that allowed rate increases of up to some percentage on the file-and-use basis. The determination of whether the flex band should be 30% or at the present 10% level will be the subject of debates and negotiations between coastal legislators and legislators in other parts of the state.

7. **Governance Issues**

In 2005, TWIA suggested a change to the governance of the TWIA board by requiring the Commissioner to appoint five company members and four public members. Under current

law, company members are elected. The reason for this recommendation was to obtain an IRS letter ruling that TWIA would be exempt from having to pay federal income taxes. While this issue seemed to be resolved in the last session, there have been suggestions that the board of directors in TWIA should be composed of five insurance members and six public members. Whether this change will materially impact insurers remains to be seen. The current system of the board of directors seems to have been workable and reasonable compromises between insurers, agents and consumers have been worked out through the TWIA board of directors.
The Joint Interim Committee is likely to recommend changes in this area including possible drastic changes that may require to have a smaller board with all members appointed by the Governor.

8. **FAIR Plan: Growth on the Horizon?**

As a result of numerous factors, including the aftermath of Hurricane Rita and Katrina, the FAIR Plan is expanding rapidly, especially in the second tier of counties along the Texas coast. Growth in the FAIR Plan is also being experienced in the Dallas area. Important legal and political questions will come up on whether to expand TWIA into the second tier of Texas counties or simply to allow the FAIR Plan to continue to grow to take these risks. Rate adequacy and similar issues will exist as the FAIR Plan expands.

C. **Residential Property Policy Coverages Issues: The Aftermath of Katrina and Rita**

1. **Additional Living Expense Coverage (ALE)**.

TDI filed a lawsuit on October 5, 2005 against three Allstate insurance companies.[20] The lawsuit arose out of Hurricane Rita and surrounded the issue of whether additional living expenses must be paid for loss of use, even when the insured dwelling is not physically damaged. The TDI took the position that the promulgated HOA policy form provides coverage for loss of use where the property is wholly a partially untenantable even though there is no physical damage to the property. The TDI further alleged that the refusal to pay for the loss of use where the property is wholly, or partially, untenantable even if there is no physical damage is an unfair claim settlement practice and a misrepresentation of the policy under the Unfair Trade Practices Act of the Texas Insurance Code.

A district judge signed a temporary restraining order restraining Allstate from denying claims for coverage which result in loss of use caused by Hurricane Rita where the property is wholly or partially untenantable regardless whether the direct physical loss or physical damage to the premises occurred.

On October 21, 2005, District Judge Stephen Yelenosky entered a temporary injunction order. The temporary injunction enjoined Allstate from denying loss of use claims based upon an absence of physical loss to the structure or absence of physical or structural damage to the residence premises.

On final trial, District Judge Darlene Byrne ruled in favor of Allstate. The TDI did not appeal this decision. However, the TDI is working on new endorsements that allow ALE coverage where the loss of utilities is involved and there is no physical damage to the property.

2. **Wind v. Flood**

In the aftermath of the widespread destruction of Hurricane Katrina and Hurricane Rita, the wind versus water damage debate has once again been brought to the forefront. Estimates predict insured losses from Hurricane Katrina as high as $60 billion and from Hurricane Rita to range from $3 billion to $6 billion. The wind versus flood determination is of great consequences because both commercial property and homeowners' insurance policies only cover water damage caused by wind not water damage caused by flood.

One important difference between litigation in Florida, Louisiana, and Mississippi is that Louisiana and Mississippi have valued policy statutes that are similar to Florida's but neither state interpreted the statute in conjunction with an anti-concurrent cause clause. Anti-concurrent clauses operate to exclude all damages caused directly or indirectly by the excluded cause, regardless of any other cause or event contributing concurrently or in sequence to the loss. A valued policy law is usually based upon a state statute that requires an insurance company to pay the face amount of a valued policy in the event of a total loss to a building regardless of the actual cash value of the property which was destroyed.

The potentially problematic issue arose in a Florida case in *Mierza v. Florida Windstorm Underwriting Association*, 877 S.2nd 144 [Florida 4th Dist.] Court of Appeals 2004, where the court had to decide between the applicability of an anti-concurrent cause clause under the Florida's valued policy law. The court determined there was a conflict between the valued policy law and the anti-concurrent cause clause because the policy was silent on whether the wind carrier's liability became merely pro rata with other coverage or whether the valued policy law takes precedent over the anti-concurrent clause. Because ambiguous insurance policies are to be construed in favor of the insured, the Florida court remanded the case for judgment in favor of the insured.

The Florida legislature subsequently revised its valued policy law but the debate between wind versus flood will continue to make headlines in the months to follow. The Mississippi Attorney General filed a civil action against the insurance industry seeking to declare the insurance contract provisions void and unenforceable.

In another action, a high profile plaintiff's lawyers sued State Farm concerning coverage after Hurricane Katrina.[21] Among the issues to be considered will be whether there was damage to the structures caused by wind before any water damage occurred. The Plaintiffs have alleged that a storm surge does not precede maximum winds during land fall of a hurricane and therefore, the property must have been damaged by wind prior to the excluded flood and storm surge issues. The Plaintiffs have also alternatively alleged that even though the policy excludes flood, they have alleged that "The Gulf of Mexico does not flood or overflow." The Plaintiffs have alleged that flood waves, tidal waters or surface waters, as those terms are commonly used in an insurance policy, did not occur during Hurricane Katrina. The Plaintiffs are arguing that the storm surge itself is the result of winds cause by a hurricane and is not specifically excluded. The Plaintiffs have alleged that a storm surge is not specifically excluded and therefore is covered under the policy. This outcome of this litigation could have a material impact on the future course of wind coverage in Texas and all other Gulf states that are prone to hurricanes.

It will be important for the members of this industry to understand and be prepared to respond to the results of this litigation.

III. Rate Regulation

A. <u>Residential Property</u>

1. <u>Overview</u>

Since the early 1900s, Texas state government has been immersed in setting insurance prices. This was largely due to concerns that insurers might cut prices to unsustainably low levels to the point where insolvencies would result. In competitive markets, government intervention may be needed to protect against "inadequate" rates and seldom, if ever, necessary to call rates "excessive." Texas has been a state that engages in "insurance reform" on a regular basis. Despite all of the political rhetoric surrounding reform, Texas has gradually been moving to adopt laws that seem to rely more on competitive markets to act as a regulator of prices in the business of insurance.

In 2003, Texas insurance reform shifted rate regulation for most lines of property casualty insurance to the "File and Use" law.[22] File and Use was applauded as a "sorely needed step forward in the direction of more competitive insurance markets."[23] The Commissioner was also given authority to order refunds of premiums determined to be excessive or unfairly discriminatory.[24]

The Texas file and use law is similar to most states where competition is a key factor in rate regulation. However, several actions by the legislature and regulators are contrary to the consideration of competition in the regulation of rates. This has been particularly true with regard to residential property insurance. The Texas Department of Insurance (TDI) often determines whether selected rates are "excessive" based upon the components in a rate filing as opposed to the actual rate being charged in a competitive market.

In 2003 and 2004, the Texas Department of Insurance took aggressive actions against insurers writing residential property insurance demanding that they reduce rates. With the exception of State Farm and Farmers, the entire industry responded by reducing rates. In 2004, the Texas Department of Insurance again demanded that the companies make new rate filings. Again, most companies presented new rate filings and many were forced to reduce rates again. One case bears mentioning. Allstate was forced by the Texas Department of Insurance to make a filing to further reduce its rates from the previously agreed consent order. In 2004, Allstate made a rate filing for a reduction of approximately 2%. The TDI and OPIC responded by demanding a 10% reduction in rates. The rate filing for a 2% rate reduction was rejected and administrative litigation ensued in which TDI alleged that Allstate's rates under the consent order were excessive. The result of that litigation was a proposed decision by the administrative law judge ultimately adopted by the Commissioner who approved an order finding Allstate's rates to be excessive and ordering them to pay refunds with interest at approximately 13%.[25] The time period for the refunds goes back to 2004.

The 2005 "insurance reform" legislation was a "painful step backward" in considering using competition as a factor in rate regulation. The Legislature amended the refund law to allow the Commissioner to order refunds plus interest. Interest is at the rate of the lesser of prime plus six percent or 18%.[26]

Despite the fact that individual consumers have many choices in buying insurance in Texas, it appears the important factor of competition is often ignored in determining whether rates are excessive even though Texas law requires the regulator to promote availability and price competition.[27]

It should be undisputed that consumers and Texas insurance markets will not be served in the long run if excessive rates are determined by regulatory fiat as opposed to the competitive market. Empirical evidence to support the use of competition as opposed to regulatory suppression is overwhelming. Over-regulation can:

1. Reduce competition;
2. Reduce availability; and,
3. Increase volatility.[28]

The current enforcement of File and Use rate laws has often ignored competition in determining whether a rate is excessive. If the TDI can substitute its judgment for insurers based on an ad hoc determination of whether a rate is excessive, then Texas' file and use law may be nothing more than strict prior approval. However, even under applicable Texas law, it is not impossible for an insurer to achieve a favorable result in either an administrative hearing or subsequent judicial review by the courts.[29] Texas courts have generally been reasonable in applying fundamental law in insurance cases.

<u>What is an Excessive Rate</u>?

The Allstate case provides an interesting example of how the new Texas law will be applied. Excessive is defined as a *rate* that is likely to produce a *long-term profit that is unreasonably high in relation to the insurance coverage provided*.[30] "Long-term profit" is not defined. "Unreasonably high" is not defined. TDI rules provide no definitions. The statute also refers to an excessive "rate" not the components that comprise a rate. A rate means *"the cost of insurance per exposure unit."*[31] The statute and TDI rules do not define excessiveness based on the components or factors used to determine a rate.

Based on recent actions, it seems that both TDI and OPIC have analyzed rate filings without specific consideration to "long-term profitability" or the existence and degree of competition in a particular rate filing. Instead, the current practice of TDI and OPIC is to review the various components in the documents furnished to support the rate filing. I sometimes refer to this approach as a "component method of analysis," which is similar to what might be used to evaluate a utility rate filing. This approach may be appropriate for a utility that has some type of monopoly power but the "component" method is not suited for regulating rates in a competitive market. Under a "component method of analysis" no attempt is made to compare the "rate per exposure unit" for the same or similar coverage in a competitive market.

Under a component method of analysis, the actuary picks out a particular component or element in the information furnished as part of a rate filing to allege that the entire rate is thus excessive. One could certainly argue that this method is inconsistent with the statute which defines excessiveness in terms of the "rate" and not the components that comprise the "rate."

Evidence on whether the rate is in fact excessive is usually offered in the form of an opinion by an actuary that the "rate" is excessive. The basis for the opinion is that a component, such as the profit factor or the loss trend factor, is too high. This method of analysis is not reflected in the statute or rules and can only be described as some type of "ad hoc" rulemaking procedure that will be applied on a case-by-case basis. The use of ad hoc rulemaking to enforce or define rate standards is highly questionable under Texas law.[32] Even more serious constitutional issues are raised if the "ad hoc" standards established through a "component analysis" are used to impose retroactive penalties through refunds or other penalties.[33] Thus, it could be argued that the "component" analysis not only fails to comply with the statute but may deprive insurers of due process of law.

A component analysis of a particular factor in a rate filing also ignores a central economic question of how a *rate*, regardless of what the components are that comprise the *rate*, can be unreasonably high in a competitive market. For example, one company with very low rates may have a higher profit component than an insurer with higher rates and a lower profit component. An example is Southwest Airlines in the airline industry. It is a very profitable carrier with perhaps the lowest rates. If their rates were regulated, using a "component" method of analysis that focuses only the profit factor, then government regulators would find the "rate" to be excessive and could require a company like Southwest Airlines with the lowest *rates* in a market to reduce *rates.* While this is a hypothetical, unfortunately this seems to be what is happening in Texas in the regulation of rates under the File and Use law.

The plain meaning of the term "long-term profit that is unreasonably high" must be construed consistent with the purposes of the statute. One purpose of the "File and Use" law is to "promote price competition among insurers to provide rates and premiums that are responsive to competitive market conditions."[34]

Competition cannot be promoted if TDI can disapprove even the lowest rates. The very essence of competition is that "unreasonable long-term profits" cannot be achieved because competitors will reduce profits to attract buyers. The problems in the current enforcement are not likely to be addressed by the legislative branch. The pending judicial review of the State Farm and Allstate litigation will be very important.

2. **Pending Litigation Judicial Review**

In 2003, State Farm sued the TDI alleging that the initial prior approval statute for approval of residential property rates was unconstitutional on its face and as applied. A district court agreed with State Farm and held the state statute unconstitutional as applied and on its face. This challenge is pending on appeal before the Austin Court of Appeals.[35]

Subsequent to the decision favorable to State Farm, the TDI brought an action against State Farm to order them to pay refunds. State Farm filed a suit seeking a temporary restraining order on the basis that the refund statute was unconstitutional on its face. A temporary restraining order and a temporary injunction was denied and an appeal of the denial of the temporary injunction is also pending in the Austin Court of Appeals.[36]

The other pending case is the Allstate residential property rate matter. Allstate has filed a Motion for Rehearing on the Commissioner's Order to Refund Premiums with interest. Surprisingly, the TDI staff agreed with part of Allstate's motion for rehearing that the interest rate was too high. If the commissioner approves the motion for rehearing, a revised order will be issued and a new motion for rehearing would have to be filed. After a motion for rehearing is overruled by operation of law or by action of the Commissioner, Allstate could seek judicial review of the issues of component regulation and retrospective application of these laws similar to State Farm.

One of the arguments presented in these pending cases is that the application of these laws has violated fundamental due process. In essence, the insurers have argued that the TDI is applying a retrospective ad hoc analysis through the "component" method discussed. Under this approach, an insurer will never know what the legal standards or proper components are until a final decision by the Commissioner. If the Commissioner's final decision requires refunds, there is simply no way an insurer could know what the standard was at the time the rate was filed and used. This raises serious and legitimate constitutional issues. Judicial review of these important constitutional issues will be important for all lines of insurance.

B. **Other Lines: File and Use - What are the Rules?**

It is interesting to note that the TDI has not vigorously used the "component" method to regulate individual company filings in other lines. The rate standards are the same for all regulated lines. Only the personal automobile and residential property lines are subject to the refund provisions of Article 5.144.

IV. Business Practices

A. **Use of Credit Scoring**

Allstate Settlement: Allstate has recently settled a class action law suit involving the use of credit scoring.[37] The plaintiffs in this case had alleged that Allstate used information from credit reports that discriminated against them in underwriting rating or pricing of insurance on the basis of race and/or national origin in violation of the Federal Civil Rights Act, 42 U.S. Code § 1981. The class action settlement applies to automobile and homeowners types of policies. As part of the settlement agreement, Allstate has agreed to implement a new settlement algorithm which will remain in effect for two years as it is rolled out on a state-by-state basis. The settlement is obviously done for purposes of settlement only and there are the typical denials of wrongdoing and liability contained in the settlement documents. The impact of the settlement, however, may require a review and analysis by carriers using credit scoring and the various algorithms that have been utilized to date. The settlement has been preliminarily approved and final approval is expected some time later this year. The rollout of the new algorithms is already completed in the state of Texas and rollout for other states will continue under the terms of the settlement agreement. Final hearing is scheduled for December 18, 2006 in the United States District Court for the Western District of Texas for the purpose of determining the fairness of the settlement and the merits of any objections to the settlement agreement.

B. **Agent Compensation and Disclosure**

Pending Settlements & Impact in Texas: Numerous states are in the process of making settlements on agent compensation and disclosures as a result of the Spitzer investigation in New York of Marsh and other large brokerage firms. Of particular interest is that some settlements with some large insurers require the insurer to include in agent contracts a requirement for the agent to disclose the agent's commission. This may be contrary to Texas law and legislation passed in 2005 when the Texas Legislature enacted H.B. 2941. This bill requires disclosure when an agent receives compensation from both the customer and from an insurer or a third party, unless the compensation from the customer is for reimbursement of expenses under § 4005.003, Tex. Ins. Code and inspection fee under § 5001.001, Tex. Ins. Code or an application fee. The settlement agreements pending in numerous states, however, require companies to go beyond this disclosure requirement and disclose the actual compensation in any particular transaction.

Both insurers and agents have reason to be concerned that this may come to Texas and result in the need for either additional legislation or additional education before entry of settlement agreements like this in Texas.

V. Workers' Compensation: Is there a Doctor Available?

A. <u>Provider Networks</u>

1. **<u>Division Rules</u>:** In November 2005, the Texas Department of Insurance adopted new rules that allows for workers' compensation healthcare networks. These rules have been codified in 28 T.A.C. §§ 10.01-10.122. Under House Bill 7, the 79th Legislature directed the Commissioner of Insurance to adopt rules as necessary to implement the act not later than December 1, 2005. The rules adopt standards and requirements relating to network certification; contracting, notice; plain language; selection of treating doctors; dispute resolution; issues related to whether an employee lives within the network service area; network operations; utilization review; retrospective reviews; and complaints. At the present time, there are three networks approved and certified in the state of Texas.

Numerous questions have arisen as a result of the networks. The department recently issued Commissioner's Bulletin: B-0021-06 concerning the use of tailored networks. This bulletin was issued in response to numerous inquiries concerning the question of whether their customized networks are sub-networks (tailored networks) may operate under the certification of a workers' compensation health network that has previously certified. The TDI responded that any network, whether tailored or otherwise, must be certified through a separate application process. It is the department's position that the scheme for certifying networks does not address nor contemplate a certified network carves out.

Networks were designed to allow insurers to control costs by contracting with healthcare providers to perform health services at pre-negotiated rates by closing supervising patient care and progress under treatment. Workers' compensation healthcare networks was also designed to incorporate the use of return-to-work guidelines to monitor an employee's medical progress and ability to return to the job, and a quality improvement program to evaluate the network's overall effectiveness.

Insurance companies may operate networks directly contract with the independent networks to provide healthcare services to their policyholder's injured workers. Each network will have its own credentialing process and set its own minimum standards for participating networks. Of particular importance, is that a network healthcare provider is required to adhere to network policies, procedures, treatment guidelines and return-to-work guidelines for all patients that are referred through the network. Healthcare providers may not legally bill an injured worker for any costs related to the treatment of compensable work-related injuries or illnesses, including co-pays or "balance billing" amounts for additional payment beyond the network's contract rate. All payment for services must come from the insurance company, a third party acting on behalf of the insurance company.

2. **Legal Hurdles Ahead:** The use of networks in Texas must be tempered by the prompt-pay provisions applicable to health insurance companies.[38] Healthcare providers have been very successful in passing laws relating to the prompt payment of the claims, restrictions on coding and bundling, and terminations of individual doctors within a network. Careful attention should be paid to these rules by any network and carrier using a network because of the penalties associated with failing to comply with them. Under House Bill 7, networks are subject to the requirements of the prompt pay laws contained in Chapter 1301 of the Insurance Code.

VI. Litigation Reform: Any Hope for Insurers and Agents?

A. 2005 Legislation on Ch. 541 Claims

BACKGROUND

Chapter 541 is the recodified section of the Insurance Code that was formerly codified in Article 21.21. Article 21.21 was amended in 1973 when the Texas Legislature adopted the Texas Deceptive Trade Practices Act (sometimes referred to as the DTPA) which is now codified in Chapter 17, Texas Business and Commerce Code. In 1973, the Legislature provided for private civil causes of action for a violation of the Insurance Code or the DTPA. In addition to the recovery of actual damages, the Legislature permitted claimants to recover "treble damages" and attorney fees. These two statutes were similar but not identical and there continues to be an overlap between these statutes. Generally, only a consumer may bring an action for a violation of the DTPA.[39] Any person can bring an action for a violation of Chapter 541 of the Insurance Code.[40] A violation of Chapter 541 of the Insurance Code can be the basis for a cause of action under the DTPA. A violation of the DTPA can be the basis for a cause of action under Chapter 541.[41]

Since 1973, there have been various changes to the DTPA and the Insurance Code provisions. Some of the changes were the result of tort reform efforts in 1987, 1995, and 2003 Business groups were able to obtain reforms to the DTPA which were not been included in Chapter 541 of the Insurance Code. The most important of these reforms included the following:

1. <u>Application of proportional responsibility.</u> The Civil Practice and Remedies Code was amended as part of the 1995 tort reforms. A specific provision was added to the Civil Practice and Remedies Code that requires proportional responsibility to apply to DTPA claims.[42] There is no mention of the applicability of proportional responsibility to claims under Chapter 541 of the Insurance Code. In many cases, judges will refuse to allow proportional responsibility to be used if a Plaintiff elects to recover under Chapter 541 of the Insurance Code.

2. <u>Professional Judgment</u>. The DTPA was amended in 1995 to provide an exemption for damages based on rendering of a profession service, the essence of which is the providing of advice, judgment, opinion or similar professional skill.[43] The exemption does not apply to express misrepresentation of certain facts, failure to disclose information, unconscionable actions, express warranties, or the sale of certain annuities to teachers. There is no similar exemption in Chapter 541 of the Insurance Code. Some, but not all, of E & O claims against agents involve professional judgment.

3. <u>Limitations on Damages</u>. In 1995, the DTPA was amended to provide limits on damages. The DTPA permits recovery of only economic damages for a violation.[44] If a violation is committed "knowingly," a consumer can recover both economic damages and mental anguish.[45] For a "knowing" violation, statutory damages are permitted up to

three times the amount of economic damages.[46] If a violation is committed "intentionally," a consumer can recover economic damages and mental anguish. For an intentional violation, statutory damages are permitted up to three times the amount of economic and mental anguish damages. The Insurance Code permits recovery of actual damages. There is no distinction between economic and non-economic damages such mental anguish. Under the Insurance Code provisions, a person can recover treble damages if a violation is committed "knowingly."[47]

In 2005, legislation was filed by Representative John T. Smithee, HB 2155, and Senator Leticia Van de Putte, SB 236, to address these concerns. Hearings were held in the Senate State Affairs Committee and the House Insurance Committee. Both bills were vigorously attacked by trial lawyer and "consumer" groups as bills that would benefit primarily "insurance companies." Neither bill was reported out of committee. This legislation was supported by agent groups because the cost of E & O claims, which drives the cost of insurance for agents, continues to escalate in Texas at an alarming rate.

While the Legislature seems to have lost a lot of its appetite for tort reform, legislative solutions to correct these imbalances could be considered in 2007.

B. ARE STATUTORY DAMAGES CONSTITUTIONAL?

This question was recently analyzed by Thompson Coe partner Kevin Risley in a law review article published in the South Texas Law Journal.[48] His conclusion is that treble damages under Chapter 541 may have some serious constitutional questions that have not been fully litigated.

Summary of the Analysis

Over the last several years, the United States Supreme Court has established that punitive damages used to punish wrongdoers in civil cases are subject to both substantive and procedural due process limitations. The central issue on a constitutional inquiry is whether there are sufficient guidelines and protections in place for a trier of fact (particularly a jury) to use in exercising its discretion on whether to impose punishment in a civil case. Limitations arise because the due process clauses of the United States Constitution and Texas Constitution limit the power of the state to deprive a person of property without due process of law. A statutory cause of action is by definition an action of the state.

There have been constitutional issues raised by various individual insurers and agents during the course of litigation involving Art. 21.21, alleging the violation of constitutional rights as the statute was being applied to them in a particular case.[49] However, the specific constitutional issue presented in this analysis does not appear to have been litigated.

1. **<u>Should Statutory Damages be considered the same as Punitive Damages?</u>**

Based on an analysis of Texas cases, the answer appears to be yes. Several Texas cases have held that a Plaintiff may not recover both common law punitive and statutory treble damages because this results in a "double recovery of punishment damages."[50] The Texas Supreme court has held that statutory damages under the DTPA are designed as punishment.[51] It is difficult, if not impossible, to believe that Texas courts would not find statutory damages under Chapter 541 to be the same as the DTPA. Based on the reasoning in these cases, treble damages are designed as form of punishment to deter and punish violators of Chapter 541 or the DTPA.

2. **<u>How does Due Process Under Federal Law Limit the State's Power to Punish in a Civil Context</u>**?

Before punishment can be imposed, there must be a rational and individualized assessment of punishment that is required by due process. *Pacific Mutual Life Ins. Co. v. Haslip,* 499 U.S. 1, 20 (1991). Due process requires both procedural and substantative due process.

Procedural due process as articulated by the courts involves procedural safeguards against an abuse of discretion by the fact finder and the right of meaningful judicial review. The mere fact that punishment in the form of statutory damages is limited to "three times" the actual damages provides no procedural safe guards against an abuse of discretion by a jury. The statute provides no guidance on how a jury should exercise its discretion on additional damages and pattern jury charges developed through Supreme Court advisory committees provide no guidance to solve the constitutional concerns. In its most recent pronouncement on the issue, the Supreme Court suggested that for large compensatory awards, an award of punitive damages equal to the actual damages "can reach the outermost limit of the due process guarantee."[52]

On the issue of excessiveness, the United States Supreme Court articulated a three-prong test in *BMW v. Gore,* 517 U.S. 599 (1996). That test is :

1. The degree of reprehensibility of the conduct

2. The ratio of actual harm inflicted on the Plaintiff

3. A comparison to civil or criminal penalties.

As stated earlier, the US Supreme Court has also indicated that in cases of large compensatory awards, a ratio of even one to one may test the limits of due process. Chapter 541 does not address any of these standards except for the fact that statutory damages cannot exceed "three times" the actual damages under Chapter 541. Statutory damages under the DTPA may be less because of the "intentional" requirements that are now in the law. Chapter 541 authorizes the Attorney General to seek civil penalties up to $10,000 per violation. This amount does not compare favorably to large treble awards where large compensatory damages are also awarded.

In conclusion, claims under Chapter 541 and the award of statutory damages under Section 541.152(b) contain no safeguards, no guidelines, and no instructions to the jury. There is limited judicial review because the award of damages appears to be a factual determination made by the trier of fact. These deficiencies appear on the face of the statute and may be ripe for challenge in a particular case or could be the subject of legislation in 2007.

C. Other Tort Reform Issues

1. Should art. 21.55 Apply to Defense Attorney Fees?

An important legal issue pending in Texas courts on whether an insured's claim for defense costs is a "first-party claim" with the meaning of Article 21.55. This statute which requires insurers to pay penalties and attorney's fees for failure to accept or reject first-party claims within certain time limits set forth in Article 21.55.[53]

Most Texas appellate courts have held that Article 21.55 does not apply to the duty to defend.[54] However, other courts have held to the contrary.[55] The Texas Supreme Court has granted a petition for review and a decision is expected on this important issue. Obviously the result of any decision could spark legislation to change the result.

The House Civil Practices Committee has an interim charge to monitor this legislation.

2. Increasing the Damage Caps in Medical Malpractice Claims

A funny thing happened on the way to the Legislative Forum . . . trial lawyers and some defense lawyers may be in agreement. In 2003, the Texas Legislature passed sweeping tort reform particularly beneficial to health care providers. One of the important reforms was an amendment to the Texas Constitution, Proposition 12, which allowed the Texas Legislature to set caps on non-economic damages without violation the open courts provision in the Texas Constitution. Now, the trial lawyers and a few defense lawyers have asserted that the impact of the caps has been to deny access to the courts for individuals injured by medical negligence because there is not enough money in those type of cases for plaintiffs to prosecute them anymore. The proposed legislative changes include:

- Raise the non-economic damage cap to $500,000 or $750,000 per defendant.
- Index the cap for inflation, and
- Carve out exceptions to the cap for severe misconduct or permanent injury.

3. Use of Staff Counsel in Defending Insureds Under Liability Policies

Again, the some elements of the defense bar have made numerous attempts to stop the use of staff counsel by insurers for the defense of insureds in third party liability lawsuits. Use of staff counsel has been utilized by some insurers with varying degrees of success for over 50 years. Legislation on this issue is a distinct possibility. Again, expect support for legislation to prohibit the use of staff counsel by certain elements of the defense bar.

` Recently, litigation has also addressed this issue. Texas courts have found that the use of staff counsel does not constitute the corporate practice of law and have not prohibited this practice. Specifically, in *American Home Assurance Co. v. Unauthorized Practice of Law Committee*, the Eastland Court of Appeals held that Texas law did not prohibit insurance companies from utilizing in-house council to defend insureds. 121, S.W.3d 831 (Tex. App.—Eastland 2003, pet. granted). The court confirmed the majority rule that insurance companies are not engaging in the unauthorized practice of law by using in-house council because (1) the agreement to defend insureds against liability is collateral to the insurers primary purpose of indemnifying the insureds, (2) the insurance company has a direct interest in the defense of its insureds, and (3) although ethical conflicts are inherent in the tripartite relationship between insurance companies, insureds, and attorneys, the conflicts are very similar with outside attorneys employed by insurers to defend insureds.[56]

However, it should be noted that the Texas Supreme Court has granted the petition for review in this case and the case was argued on September 28, 2005. Clearly, there is no way to determine how the Texas Supreme Court will rule on this issue, however, it seems likely that they will uphold the Eastland court opinion because out of the twenty state courts and one federal circuit court that have addressed this issue, only North Carolina and Kentucky have concluded that the use staff attorneys by insurers to defend insureds is impermissible.[57]

VII. Miscellaneous

A. Verification of Mandatory Auto

In 2005, the Texas Legislature passed Senate Bill 1670, which required the TDI to establish a motor vehicle financial responsibility verification program to verify compliance by owners of vehicles with the Motor Vehicle Safety Responsibility Act. The program was to have been fully implemented for non-commercial vehicles by December 31, 2006. The TDI, the Department of Public Safety, the Department of Transportation and the Department of Information Resources have spent extensive time in attempting to develop a program and specifications for an agent to handle this program. The TDI is requesting sealed, competitive offers from individuals to act as the agent. A deadline of July 18, 2006 was set for the responses but no decision has been made. The TDI has published very onerous rules and a manual requiring insurers to report information on all types of drivers and operators. The insurance industry has opposed these rules and urged that the reporting requirements not be set until an agent has been selected.

The TDI will be primarily responsible in selecting the agent that would be responsible for developing, implementing, operating and maintaining the program. The hearing on the rules was very contentious and likely to result in additional legislation in 2007.

B. Will Texas Traffic Violators continue to be Subsidized by Good Drivers?

Texas has a unique law that prohibits any regulated insurer from assigning any rate consequence to a charge or conviction because of a violation of the Uniform Act regulating traffic on highways.[58] The Uniform Act regulating traffic on highways has been recodified in the Texas Transportation Code in Chapter 545. Typically, traffic violations of the Transportation Code may be reflected in MVRs kept by the Texas Department of Transportation. Offenses under the Transportation Code that would be prohibited from use in rating under Texas Insurance

Code art. 5.01-1 includes offenses such as driving on the wrong side of the road; [59] failure to heed stop signs and turning signals,[60] right-of-way violations;[61] speeding violations;[62] and various miscellaneous rules. Miscellaneous rules include offenses such as reckless driving, riding in open truck beds, obstruction of an operator's view, racing on the highway, fleeing or attempting to elude a police officer.[63]

On the other hand, offenses that are not a violation under the Texas Transportation Code could be used. Generally, these would include criminal offenses under the Texas Penal Code and include offenses such as intoxication assault, an accident while operating a motor vehicle while intoxicated that causes serious bodily injury to another person, or intoxication death.[64] DWI is also a separate offense under the Texas Penal Code that would not be prohibited from being used for surcharges.

County mutuals are exempt from the prohibitions in Article 5.01-1. An effort will be made in 2007 for a legislative change to permit carriers to use offenses under the Texas Transportation Code to calculate points for rating. In 2005, this effort failed miserably partly, in part, due to the concerns by the members of the House that this would drastically increase rates. It is hoped that through better education the House and the Senate will better understand the need for repealing Article 5.01-1 for the good drivers in this state.

VIII. Conclusions

Storm clouds are always on the horizon as far as politics, law and insurance are concerned. However, there are many ways to weather these storms whether through the Executive, Legislative or Judicial branches. Being aware of troubled areas is the best way to be prepared for the future. I hope this paper has presented some issues that are pending in the Judicial and Legislative Branches and hope 2007 will bring new laws to find better ways to maintain a vibrant insurance industry in this great state.

ENDNOTES

[1] Acts 1971, 62nd Leg., ch. 100, eff. April 29, 1971 now codified at Tex. Ins. Code art. 21.49
[2] Acts 1973, 63rd Leg., ch. 406.
[3] Acts, 1991, 72nd Leg., ch. 242 §§ 11.34-11.45
[4] Tex. Ins. Code art. 21.49 §8D.
[5] 30%.
[6] Acts 1993, 73rd Leg., ch. 685 §§ 17.01-17.02, ¶6 Acts 2001, 77th Leg. ch. 304.
[7] Tex. Ins. Code art. 21.49 §8(h)(9).
[8] Acts 2005, 19th Leg., ch. 1153.
[9] Tex. Ins. Code art. 21.49 §19.
[10] Tex. Ins. Code art. 21.49 §19.
[11] Tex. Admin. Code § 5.4007.
[12] Tex. Ins. Code art. 21.49 §3(f).
[13] Tex. Ins. Code art. 21.49 §6A.
[14] Tex. Ins. Code art. 21.49 § 8(e)3. [Emphasis supplied.].
[15] Tex. Ins. Code art. 21.49 § 8(e)(1).
[16] Tex. Ins. Code, art. 21.49 § 8(h)(11).
[17] Supra.
[18] Actuarial Standard of Practice No. 39, Treatment of Catastrophe Losses and Ratemaking, June 2002. Appendix 1, p. 8
[19] Tex. Ins. Code art. 221.49 §8(h)(9)..
[20] *Texas Insurance Commissioner v. Allstate Insurance Company, et. al.;* Cause No. GN-503652, In the 200th Judicial District Court, Travis County, Texas.
[21] *McFarland v. State Farm, et. al.*, Cause No. 1:06CV466LTS-JMR, In the United State District Court, Southern District of Mississippi.
[22] Tex. Ins. Code art. 5.13-2
[23] Garven, James, Dec. 2004, "Enactment of Insurance Reform in Texas Good for Consumers"; http://rmi.baylor.edu/blog.
[24] Tex. Ins. Code art. 5.144.
[25] *In the Matter of Allstate Texas Lloyds,* Docket Nos. 45405-3075.F, 454-05-4051.F, and 454-06-0193.F.
[26] Supra.
[27] Tex. Ins. Code art. 5.13-2 § 1.
[28] See, Leadbetter, D., J. Voll and E. Wieder, 2004, "The Effects of Rate Regulation on the Volatility of Auto Insurance Prices: Evidence from Canada"; http://economics.ca/2004/papers/0007.pdf
Harrington, Scott, 2001, "Effects of Prior Approval Rate Regulation of Auto Insurance" AEI-Brookings; (available at http://aei-brookings.org/admin/authorpdfs/page.php?id-48);
These articles are also supported by an essay by George J. Stigler entitled, "Economic Theory: Price." Dr. Stigler's essay is consistent with his work that won him a Nobel Prize for economics in 1982. http://www.britannica.com/nobel/macro/5001_98_11.html.
[29] See Docket No. 454-04-5790.F, *In the Matter of Rates Filed by The Medical Protective Company.*
[30] Tex. Ins. Code art. 5.13-2 and art. 1.02.
[31] Tex. Ins. Code art. 5.13-2 §3 (5).
[32] See, *City of El Paso v. PUC, et. al.*, 883 S.W.2d. 179, 187 (Tex. 1993); *SEC v. Chenery*, 332 U.S. 194 (1974).
[33]Any licensee is entitled to know the legal standards before a rate is filed especially where a penalty may be imposed. The elements of meaningful notice and hearing requires previous notice and a hearing relative to the issues of fact and law which will control the result to be reached by the administrative tribunal. *Morgan v. U.S.*, 1, 18-19 (1938); *Madden v. Texas State Bd. of Chiropractic Examiners*, 663 S.W.2d 622 (Tex. Civ. App.—Austin 1983). *Seely, supra*..
[34] Tex. Ins. Code art. 5.13-2 §1(3).
[35] *Jose Montemayor, Commissioner and TDI v. State Farm Lloyds,* Cause No. 03-05-00067-CV, In the 3rd Court of Appeals, Austin, Texas.
[36] *State Farm Lloyds v. Mike Geeslin, Commissioner of Insurance*, Cause No. 03-05-0524-CV, In the 3rd Court of Appeals, Austin, Texas.

[37] *DeHoyas, et. al. v. Allstate Ins. Co., et. al*, CV-SA-01-CA-101-FB, U. S. District Court, Western District of Texas.
[38] These are now codified in Chapter 1301, Tex. Ins. Code.
[39] Tex. Bus. & Comm. Code § 17.50.
[40] Tex. Ins. Code § 541.151.
[41] Supra.
[42] Tex. Civ. Prac. & Rem. Code §33.002(h).
[43] Tex. Bus. & Comm. Code § 17.49(c).
[44] Tex. Bus. & Comm. Code § 17.50(b)(1).
[45] Supra.
[46] Supra.
[47] Tex. Ins. Code § 541.152.
[48] Risley, "The Unconstitutionality of Statutory Damages Under the Texas Insurance code," 47 S.Tex. L.Rev. 103.
[49] See, State Farm v. Price, 845 S.W.2d 427, 438 (Tex. App—Amarillo 1993, dism'd by agr); State Farm v. Guaranty Federal, 916 S.W.2d 635 (Tex. App.—Austin 1996, writ denied), and Maryland Insurance Co. v. Head Industrial Coatings & Services, Inc., 906 S.W. 2d 218 (Tex. App.—Texarkana 1995), rev'd on other grounds, 938 S.W. 2d 27 (Tex. 1996)(per curiam).
[50] Birchfield v. Texarkana Memorial Hospital, 747 SW 2d 361 (Tex. 1987); Allstate v. Kelley, 680 S.W.2d 595 (Tex. App.—Tyler, 1984, writ ref'd nre); Group Medical & Surgical Service Inc. v. Leong, 750 S.W.2d 791,798 (Tex. App.—El Paso, 1998, writ denied).
[51] *Pace v. Pace*, 650 S.W.2d 64, 65 (Tex. 1983).
[52] *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).
[53] *Service Lloyds v. J.C. Wink*, 182 S.W.3rd 19 (Tex. App.—San Antonio 2005, pet. pending) See also, *Lamar Homes v. Mid-Continent Casualty*, pending before the Texas Supreme Court on certified questions, 2006 WL 272727.
[54] *TIG v. Dallas Basketball Ltd.*, 129 S.W.3rd 232,239-241 (Texas. App.—Dallas 2004, pet den.); *Wico Cas. v. Allied Pilots*, 2005 WL 3436548 (Tex. App.—Ft. Worth 2005, no pet.).
[55] *ATOFINA Petrochemicals v. Evanston Ins.*, 104 S.W. 3rd 247, 252 (Texas. App.—Beaumont 2003, pet. granted).
[56] *American Home Assurance Co. v. Unauthorized Practice of Law Committee*, 121, S.W.3d 831 (Tex. App.—Eastland 2003, pet. granted).
[57] *Id.* at 844.
[58] Tex. Ins. Code art. 5.01-1.
[59] Tex. Transp. Code subch. B § 545.051, et. seq.
[60] Tex. Transp. Code subch. C § 545.101, et. seq.
[61] Tex. Transp. Code subch. D § 545.401, et. seq.
[62] Tex. Transp. Code subch. H § 545.351, et. seq.
[63] Tex. Transp. Code subch. I § 545.402, et. seq.
[64] Tex. Penal Code §§ 49.07-49.08.