

Presented:  
**11<sup>th</sup> Annual Insurance Law Institute**

**December 6--8, 2006  
Austin, Texas**

**SETTING THE CHESS PIECES:  
PREPARATION AND STRATEGY CONSIDERATIONS IN  
FILING AND PROSECUTING COVERAGE LITIGATION**

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**BACKGROUND, EDUCATION AND PRACTICE:**

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Brian is a frequent author and CLE speaker on insurance topics. He is a contributing editor of Lexis' Texas Annotated Insurance Code (2006) and a columnist of the Insurance Journal (2001-2006). He has been named one of "Texas' Leading Insurance Attorneys" by Chambers USA (2003-2007), selected as one of "The Best Lawyers in America" in insurance law (2006-2007), listed in "The Guide to the World's Leading Insurance and Reinsurance Lawyers" (2006), and is AV-rated by Martindale-Hubbell.

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## I. SCOPE OF ARTICLE

This article discusses issues often faced by attorneys representing insurers in coverage litigation. Specifically, it examines declaratory judgments and the strategic advantages and disadvantages to filing them, as well as when and where to file suit should an insurer decide to do so. The related issues of the concurrent litigation rule, abstention in the federal courts, and anti-suit injunctions are also discussed. Finally, the article examines the procedural potpourri of severance, abatement and interpleader. By addressing practical coverage litigation issues, it provides a glance at key issues facing attorneys who represent insurers.

## II. THE INSURER'S DUTY TO DEFEND AND INDEMNIFY

It is helpful to first understand the two main issues that arise in coverage disputes—the scope of an insurer's duty to defend and duty to indemnify its insured under a policy. An insurer's duty to defend and duty to indemnify are distinct and separate duties.<sup>1</sup> Thus, an insurer may have a duty to defend, but, eventually, no duty to indemnify.<sup>2</sup> However, if there is no duty to defend, there is no duty to indemnify.

The duty to indemnify is based on the actual facts developed in the underlying suit against the insured.<sup>3</sup> In contrast, the duty to defend is determined by the allegations in the relevant pleadings and the language of the insurance policy.<sup>4</sup> For purposes of the duty to defend, it is inappropriate to consider “facts ascertained before the suit, developed in the process of

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<sup>1</sup> *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 821–22 (Tex. 1997).

<sup>2</sup> *Farmers Tex. County Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 82 (Tex. 1997).

<sup>3</sup> *Id.*; *GuideOne Elite Ins. Co. v. Fielder Road Baptist Church*, 197 S.W.3d 305, 310 (Tex. 2006).

<sup>4</sup> *Guide One*, 197 S.W. 3d at 310; *Nat'l Union Fire Ins. Co. v. Merch. Fast Motor Lines, Inc.*, 939 S.W.2d 139, 141 (Tex. 1997).

litigation, or by the ultimate outcome of the suit.”<sup>5</sup> An insurer is obligated to defend an insured as long as the petition alleges at least one cause of action within the policy’s coverage.<sup>6</sup>

The burden is on the insured to show that the claim potentially falls within the scope of coverage under the policy.<sup>7</sup> However, if the insurer relies on a policy exclusion in denying its duty to defend or to indemnify, the burden shifts to the insurer.<sup>8</sup>

### III. DECLARATORY JUDGMENT ACTIONS: THE BASICS

When a coverage dispute arises, the first and perhaps most important question faced by attorneys representing insurers is whether to file a declaratory judgment action and when to do so. When an insurer is faced with the dilemma of whether to defend a proffered claim, it generally has four options:

- (1) completely decline to assume the insured’s defense;
- (2) seek a declaratory judgment as to its obligations and rights;
- (3) defend under a reservation of rights or a non-waiver agreement; or
- (4) assume the insured’s unqualified defense.<sup>9</sup>

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<sup>5</sup> *Gulf Chem. & Metallurgical Corp. v. Assoc. Metals & Minerals Corp.*, 1 F. 3d 365, 369 (5th Cir. 1993) (applying Texas law).

<sup>6</sup> *American Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 848 (Tex. 1994); *Rhodes v. Chicago Ins. Co.*, 719 F.2d 116, 119 (5th Cir. 1983) (applying Texas law).

<sup>7</sup> *Federated Mut. Ins. Co. v. Grapevine Excavation, Inc.*, 197 F.3d 720, 723 (5th Cir. 1999) (applying Texas law).

<sup>8</sup> *Id.*

<sup>9</sup> *Farmers Texas County Mut. Ins. Co. v. Wilkinson*, 601 S.W.2d 520, 522 (Tex. Civ. App.—Austin 1980, writ ref’d n.r.e.).

Declining to defend the insured may open the insurer up to a subsequent breach of contract suit, as well as claims under the Deceptive Trade Practices Act and former articles 21.21 and 21.55 of the Insurance Code for bad faith and failure to promptly resolve and settle a claim.<sup>10</sup> On the other hand, if an insurer undertakes an unqualified defense of the insured, it will likely be waiving any coverage defenses under the policy and be estopped from attempting to dispute its duty to indemnify at a later date.

To avoid the potentially severe consequences associated with both of these options, insurers are wise to take a more moderate position and either defend under a reservation of rights or seek a declaratory judgment regarding the scope of coverage under a policy. In cases where coverage is relatively clear and the claim is most likely covered, defending under a reservation of rights may be the best option. However, when a legitimate question of coverage exists, it will often be to the insurer's advantage to file a declaratory judgment action. The availability of declaratory relief provides insurers with a useful tool to determine the scope of their defense and indemnity obligations prior to the resolution of the underlying case against the insured.

#### **A. Statutory Bases for Declaratory Relief**

Texas's statutory basis for such actions is contained in the Uniform Declaratory Judgments Act, found in Chapter 37 of the Civil Practice and Remedies Code. Section 37.004 of that Act provides as follows:

- (A) A person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute,

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<sup>10</sup> Former articles 21.21 and 21.55 have been re-codified at Texas Insurance Code chapters 541 and 542, respectively.

ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

- (B) A contract may be construed either before or after there has been a breach.

Section 37.002 provides that the Act is remedial: “[I]ts purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and it is to be liberally construed and administered.” The Act does not create or enlarge jurisdiction; rather, it is “a procedural device for deciding cases already within a court’s jurisdiction.”<sup>11</sup> A declaration under the Act may be either affirmative or negative in form and effect.<sup>12</sup> Thus, an insured can seek an affirmative finding of coverage, or an insurer can seek a negative determination that coverage does not exist. However, each party must still plead for relief and carry its own burden of proof.<sup>13</sup>

The federal basis for declaratory judgment actions is found in the Declaratory Judgment Act, which provides as follows:<sup>14</sup>

§ 2201. Creation of remedy

- (a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

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<sup>11</sup> *Chenault v. Phillips*, 914 S.W.2d 140, 141 (Tex. 1996) (quotations omitted).

<sup>12</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 37.003(b).

<sup>13</sup> *City of Galveston v. Giles*, 902 S.W.2d 167, 172 (Tex. App.—Houston [1st Dist.] 1995, no writ); *see also Indigo Oil, Inc. v. Wiser Oil Co.*, 1998 WL 839591, at \*16 (Tex. App.—Dallas 1998, pet. denied) (jury’s finding that party failed to satisfy its burden is not a finding that other party proved the opposite).

<sup>14</sup> 28 U.S.C. §§ 2201–2202.

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§ 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

As with the Texas act, the federal Declaratory Judgment Act creates a remedy, not a basis for jurisdiction.<sup>15</sup> Therefore, either diversity or federal question jurisdiction must still exist in order to bring a declaratory judgment action in federal court.<sup>16</sup>

Under the current federal diversity jurisdiction statute, the amount in controversy in a particular case must exceed the sum or value of \$75,000.<sup>17</sup> In an action for declaratory relief, the amount in controversy is “the value of the right to be protected or the extent of the injury to be prevented.”<sup>18</sup> When an insurer seeks a declaratory judgment regarding the scope of coverage under an insurance policy, the “value of the right to be protected” is the insurer’s potential liability under the policy, plus potential attorneys’ fees, penalties, statutory damages and punitive damages.<sup>19</sup> Under certain circumstances, the policy limits will establish the amount in controversy, such as in a declaratory judgment action regarding the validity of the entire contract

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<sup>15</sup> *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995) (“By the Declaratory Judgment Act, Congress sought to place a remedial arrow in the district court’s quiver; it created an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants.”).

<sup>16</sup> 28 U.S.C. § 2201(a); *Commercial Metals Co. v. Balfour, Guthrie & Co., Ltd.*, 577 F.2d 264, 268–69 (5th Cir. 1978).

<sup>17</sup> 28 U.S.C. § 1332.

<sup>18</sup> *Hartford Ins. Group v. Lou-Con, Inc.*, 293 F.3d 908, 910 (5th Cir. 2002).

<sup>19</sup> *Id.* at 911–12.



between the parties.<sup>20</sup> However, in cases involving the applicability of a policy to a particular occurrence, the amount in controversy is measured by the value of the underlying claim, rather than the face amount of the policy.<sup>21</sup>

## **B. Actual Case or Controversy Requirement**

Under both state and federal law, declaratory relief is only appropriate when there is an actual case or controversy.<sup>22</sup> A justiciable controversy requires a real and substantial controversy over tangibles interests, and not merely a theoretical dispute.<sup>23</sup> “A trial court has discretion to enter a declaratory judgment so long as it will serve a useful purpose or will terminate the controversy between the parties.”<sup>24</sup>

Federal courts have long held that declaratory judgment actions regarding an insurer’s duty to defend and duty to indemnify can be brought prior to the resolution of the underlying suit against the insured.<sup>25</sup> Such actions are not considered advisory opinions by federal courts, but rather consist of an actual case or controversy as required by Article III of the U.S. Constitution.

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<sup>20</sup> *Id.* at 911.

<sup>21</sup> *Id.*

<sup>22</sup> *Texas Ass’n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993); *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995); *Trinity Univ. Ins. Co. v. Sweatt*, 978 S.W.2d 267, 270 (Tex. App.—Fort Worth 1998, no pet.); *Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 272 (1941); *American States Ins. Co. v. Bailey*, 133 F.3d 363, 368 (5th Cir. 1998); *Monticello Ins. Co. v. Patriot Security, Inc.*, 926 F. Supp. 97, 99 n.10 (E.D. Tex. 1996).

<sup>23</sup> *Bonham State Bank*, 907 S.W.2d at 467.

<sup>24</sup> *Id.* at 468.

<sup>25</sup> *See generally Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270 (1941) (holding that an insurer’s federal declaratory judgment action on coverage issue was sufficiently ripe for resolution, even before the underlying suit proceeded to judgment); *Hardware Mut. Cas. Co. v. Schantz*, 178 F.2d 779 (5th Cir. 1949) (finding that question of indemnity in declaratory action was an actual controversy). *See also*

Texas courts, on the other hand, have only recently adopted this view. For years, the rule in Texas was that a declaratory judgment action could be filed regarding the duty to defend at any stage of an underlying suit. The duty to indemnify, on the other hand, could not be determined until the underlying suit was resolved because no actual controversy existed before that time. In *Firemans Fund Insurance Company v. Burch*, the Texas Supreme Court held that, while the duty to defend presents a justiciable controversy, the duty to indemnify is premature during the pendency of the underlying case because the insured might prevail in the underlying suit, thereby mooting the question of an insurer's duty to pay a judgment.<sup>26</sup> Hence, there could be no justiciable controversy as to the duty to indemnify until the underlying suit became final; a court's attempt to resolve the issue before that time was an impermissible advisory opinion, prohibited by former Article V, Section 8 of the Texas Constitution.

*Burch* remained the law in Texas for almost thirty years. The Supreme Court's change in course began in the 1996 case, *State Farm and Casualty Company v. Gandy*, in which the Court endorsed the proposition that insurers should file declaratory judgment actions before an insured incurs liability in the underlying suit, in part to defeat collusive settlements between the insured and the claimant.<sup>27</sup> *Gandy*, coupled with a revision to Article V, Section 8, led the Court to partially overrule *Burch* the next year in *Farmers Texas County Mutual Insurance Company v. Griffin*.<sup>28</sup> The Court affirmatively held in *Griffin* that, under certain circumstances, an insurer

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*Monticello Ins. Co.*, 926 F. Supp. at 100–01 (discussing federal courts' long-standing practice of deciding indemnity issues before insured's liability has been established in underlying suit).

<sup>26</sup> 442 S.W.2d 331, 332–34 (Tex. 1968).

<sup>27</sup> 925 S.W.2d 696, 714 (Tex. 1996).

<sup>28</sup> 955 S.W.2d 81, 83 (Tex. 1997).

could obtain a declaratory judgment against its insured on both the duty to defend and the duty to indemnify prior to resolution of the underlying lawsuit.<sup>29</sup>

According to the *Griffin* Court, in cases where coverage may turn on facts actually proven in the underlying suit, it may “be necessary to defer resolution of indemnity issues until the liability litigation is resolved.”<sup>30</sup> In such cases, the duty to indemnify will not become justiciable until the underlying suit is resolved. However, in cases where coverage does not hinge on facts that may be proven in the underlying suit, *Griffin* allows trial courts to decide the indemnity question before judgment is rendered in the underlying suit.<sup>31</sup> Specifically, the Court held that the duty to indemnify is justiciable before the insured’s liability is determined in the underlying suit “when the insurer has no duty to defend *and the same reasons that negate the duty to defend likewise negate any possibility the insurer will ever have a duty to indemnify.*”<sup>32</sup>

For example, in *Griffin*, the insured called on his insurer to defend him under an automobile liability policy after he was sued for his involvement in a drive-by shooting.<sup>33</sup> The Supreme Court determined that, because no set of facts could turn a drive-by shooting into an “auto accident”, the insurer did not have a duty to defend or a duty to indemnify the insured.<sup>34</sup> In other words, the same reasons negated both the duty to defend and the duty to indemnify, and the insurer did not have to wait until the insured’s liability was established in the underlying suit

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<sup>29</sup> *Id.* at 83–84.

<sup>30</sup> *Id.* at 85.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* (emphasis in original).

<sup>33</sup> *Id.* at 82.

<sup>34</sup> *Id.* at 84.

before seeking a determination of its duty to pay; no facts that could potentially have been established in the underlying suit could possibly have triggered the insurer's duty to pay.

The *Griffin* exception, although frequently mentioned in opinions, has only occasionally been relied upon by the appellate courts as a basis for decision.<sup>35</sup> One commentator, discussing the scope of the *Griffin* exception, suggests that its applicability will depend on the nature of the factual inquiry in the declaratory judgment action:

Coverage issues that involve factual questions that are material issues in the underlying suit would be deferred. The reason is logical because the evidence could potentially be used against the interests of the insured and thus alter the basis for liability in the underlying suit. Moreover, there is still the possibility that the underlying suit may resolve the common material issues and thus avoid the need for a coverage determination. Truly independent issues, such as whether someone is an insured or not, typically do not involve material issues in the underlying suit. Another example would be the issue of the number of occurrences under a general liability policy.<sup>36</sup>

### C. Additional Timing Considerations

When to file is often determined by what is at issue. Despite *Gandy*'s encouragement to file early, an insurer should not be held to have waived its right to litigate coverage by defending

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<sup>35</sup> See, e.g., *State Farm Lloyds v. C.M.W.*, 53 S.W.3d 877, 889–92 (Tex. App.—Dallas 2001, pet. denied) (holding that where insurer had no duty to defend insured against sexual abuse and battery claims alleged in petition, issue was dispositive of insurer's duty to indemnify); *Utica Lloyd's of Texas v. Sitech Eng'r Co.*, 38 S.W.3d 260, 264 (Tex. App.—Texarkana 2001, no pet.) (holding that where allegations in petition fell within policy's professional services exclusion, insurer had no duty to defend or indemnify insured); *Reser v. State Farm Fire & Cas. Co.*, 981 S.W.2d 260, 263–64 (Tex. App.—San Antonio 1998, no pet.) (holding that where claimant amended petition to remove covered claim and only alleged uncovered claims, insurer had no duty to defend or indemnify insured).

<sup>36</sup> Michael W. Huddleston, *Declaratory Judgment Action: Panacea or Pox*, State Bar of Texas First Annual Advanced Insurance Law Course (March 25–26, 2004). See also *Foust v. Ranger Ins. Co.*, 975 S.W.2d 329, 332–33 (Tex. App.—San Antonio 1998, pet. denied) (holding that number of occurrences presented a justiciable question, suitable for declaratory relief).

under a reservation of rights or by delay in filing a declaratory judgment action.<sup>37</sup> Because liability and coverage are separate and distinct issues, “trying the underlying suit before adjudicating the coverage issue does not estop an insurer from contesting coverage, assuming it properly reserved its right to do so.”<sup>38</sup>

Nor will an insurer be bound by res judicata or collateral estoppel when it defends under a reservation of rights from relitigating an issue that was determined in the underlying suit.<sup>39</sup> For example, in *State Farm Lloyds v. C.M.W.*, the Dallas court of appeals held that State Farm was not bound by the jury’s finding in the underlying suit that the negligence of its insured caused the plaintiff’s injury.<sup>40</sup> The court held that because State Farm defended under a reservation of rights, neither collateral estoppel nor res judicata barred State Farm from relitigating in the subsequent coverage suit the question of whether the conduct of its insured was negligent or intentional.<sup>41</sup> This is because both res judicata and collateral estoppel require the parties involved in the second suit be the same parties, or be in privity with the parties, involved in the first suit.<sup>42</sup> Under Texas law, when an insurer undertakes to defend its insured subject to a

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<sup>37</sup> See *C.M.W.*, 53 S.W.3d at 885–88, 892–93 (“Neither [*Gandy* nor *Griffin*] stand[] for the proposition that a sufficient reservation of rights is waived if the coverage issue is not determined prior to trial of the underlying claim.”).

<sup>38</sup> *Id.* at 893.

<sup>39</sup> *Id.* at 887–88.

<sup>40</sup> *Id.* at 885–88. See also *United States Fire Ins. Co. v. Deering Mgmt. Group, Inc.*, 946 F. Supp. 1271, 1280 (N.D. Tex. 1996) (insurer not precluded from relitigating course and scope of employment issue in coverage dispute, despite finding in underlying suit that plaintiff was acting in course and scope of employment, because issue was not actually litigated for coverage purposes).

<sup>41</sup> *C.M.W.*, 53 S.W.3d at 885–88.

<sup>42</sup> *Id.* at 886 (citing *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 628 (Tex. 1992) (collateral estoppel); *Amstadt v. United States Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996) (res judicata)).

reservation of rights, under which the insurer sufficiently notifies its insured that it maintained the right to contest coverage of the claims, a conflict of interest arises between the insurer and the insured, destroying privity between the two.<sup>43</sup>

Additionally, in cases in which indemnity is the only issue or in which abstention is likely, there may be no benefit to early filing. In such instances, resources can be wasted by filing an action which will ultimately be stayed until the resolution of the underlying suit.

However, where that is not the case, there are many strategic benefits to filing early. For instance, although an insurer's duty to indemnify can be determined after the resolution of the underlying case, questions regarding the duty to defend will be rendered moot once the judgment in the underlying suit becomes final.<sup>44</sup> Additionally, the declaratory judgment action may bring the coverage issues into focus for the underlying plaintiff and assist the insured in negotiating settlement.

It should also be noted that Texas law currently remains unsettled regarding an insurer's ability to seek reimbursement from the insured for defense and settlement costs. In *Excess Underwriters at Lloyd's London v. Frank's Casing Crew & Rental Tools, Inc.*, the Texas Supreme Court held that, under certain circumstances, a liability insurer may seek reimbursement of a settlement paid on an insured's behalf if the settled claims are not covered under the policy.<sup>45</sup> However, the court granted Frank Casing's motion for rehearing on January 6, 2006, and it remains to be seen whether the court's final decision will preserve the holding of

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<sup>43</sup> See *Employers Cas. Co. v. Block*, 744 S.W.2d 940, 943 (Tex. 1988); *C.M.W.*, 53 S.W.3d at 886.

<sup>44</sup> See *C.M.W.*, 53 S.W.3d at 883 n.2; *State Farm Mut. Auto. Ins. Co. v. Carmichael*, 1998 WL 122409, at \*2 (Tex. App.—Dallas 1998, no pet.).

<sup>45</sup> 2005 WL 1252321, at \*3 (Tex. 2005), *reh'g granted*.

its May 2005 opinion or will substantially limit, or perhaps eliminate altogether, the right of reimbursement. In the event the court limits the right, insurers would have a strong incentive to litigate coverage issues as early as possible. Even if the court preserves an insurer's right to reimbursement, many insureds are not financially capable of repayment; thus, the reimbursement issue may be rendered moot for all practical purposes by delay in determining the scope of coverage.

Further, if the underlying case is resolved by a judgment adverse to the insured before coverage has been decided, the insurer may decide to post a supersedeas bond to suspend execution of the judgment pending appeal as a practical matter to allow the ruling to be appealed.<sup>46</sup> Liability policies typically require insurers to pay premiums for bonds, but do not expressly require the insurer to furnish the bonds themselves. In Texas, subject to certain restrictions, the bond must generally equal the sum of compensatory damages awarded, interest for the estimated duration of the appeal, and costs awarded in the judgment.<sup>47</sup> By resolving coverage disputes before the underlying suit reaches judgment, insurers may be able to avoid this expense.

Finally, several courts have extended the late payment provisions of former article 21.55 of the Insurance Code (recodified at chapter 542) to an insurer's breach of the duty to defend

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<sup>46</sup> See TEX. R. CIV. P. 627 (providing for execution of a judgment to be issued thirty days after the final judgment is signed if supersedeas bond has not been filed and approved). Several courts in other jurisdictions have held that an insurer has a duty to post a supersedeas bond on behalf of its insured, rather than simply pay the premiums for the bond. See, e.g., *Bowen v. Gov't Employees Ins. Co.*, 451 So.2d 1196, 1198 (La. Ct. App. 1984); *Continental Cas. Co. v. Kinsey*, 513 N.W.2d 66, 70 (N.D. 1994). But see *United Fire & Cas. Co. v. Shelly Funeral Home, Inc.*, 642 N.W.2d 648, 658 (Iowa 2002) (insurer did not act in bad faith in declining to post supersedeas bond on behalf of insured, even though insurer elected to appeal the judgment against insured). Thankfully, Texas is not one of these jurisdictions.

<sup>47</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 52.006(a); TEX. R. APP. P. 24.2(a).

under liability policies.<sup>48</sup> Accordingly, if an insurer wrongfully refuses to defend an insured or otherwise fails to timely pay a claim, the insurer may be liable to the insured for the amount of the claim, plus interest at the rate of 18% per year as damages and reasonable attorneys' fees.<sup>49</sup> Thus, avoiding this penalty, or at least minimizing the extent of the penalty, may be the best reason to quickly provide a defense subject to a reservation of rights and file a declaratory judgment action.<sup>50</sup>

### III. WHERE TO FILE SUIT

Filing a declaratory judgment action usually involves consideration of whether suit should be filed in state or federal court. A party may also need to think about which of several states to bring the action in if more than one state is a permissible jurisdiction. This should entail consideration of the choice-of-law rules in each potential forum, as this will determine which state's substantive law will ultimately apply to the interpretation of the policy.

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<sup>48</sup> See, e.g., *Sentry Ins. Co. v. Greenleaf Software Inc.*, 91 F. Supp. 2d 920, 925 (N.D. Tex. 2000), *vacated by agreement*, 2000 WL 33254495 (N.D. Tex. 2000) (insured's claim for reimbursement after insurer refused to defend insured in underlying lawsuit was a first party claim under art. 21.55, rendering insurer liable for statutory penalties); *E & R Rubalcava Constr., Inc. v. Burlington Ins. Co.*, 148 F. Supp. 2d 746, 750–51 (N.D. Tex. 2001) (reaffirming principle articulated in *Sentry Ins. Co.* that insurer's breach of duty to defend was violation of former art. 21.55). See also *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 714 (Tex. 1996) (noting that an insured may be entitled to recover statutory penalties under art. 21.55 when its insurer breaches duty to defend).

<sup>49</sup> TEX. INS. CODE ANN. §§ 542.058, 542.060 (former art. 21.55 §§ 6, 3(f)).

<sup>50</sup> See *N. County Mut. Ins. Co. v. Davalos*, 140 S.W.3d 685, 691 (Tex. 2004) (regardless of whether art. 21.55 applies to liability insurer's duty to defend, insurer tendered defense to insured within time constraints of statute and, thus, could not be liable for statutory penalties).



### A. State v. Federal Court

Conventional wisdom has typically been that declaratory judgment actions are best pursued in federal court, at least where the insurer is the one seeking declaratory relief. Historically, the federal rules generally allowed for broader and faster relief, and summary judgments were more readily granted. However, recent Fifth Circuit opinions regarding the use of extrinsic evidence have called into question whether relief actually is broader.<sup>51</sup> Further, federal dockets are becoming more and more crowded and may not move as quickly as some state courts.<sup>52</sup> Proceeding in federal court can also be far more expensive because of the mandatory meetings and reports required by Federal Rule of Civil Procedure 26 and local rules.

### B. Venue and Removal

After the insurer decides whether to file in federal or state court, it will need to consider the appropriate venue (*i.e.*, which federal or state court to file in). Actions brought in Texas under the Texas Declaratory Judgments Act are governed by the general venue rule contained in section 15.002(a) of the Texas Civil Practices and Remedies Code.<sup>53</sup> Under that rule, venue is proper in the following counties:

- (1) the county in which all or a substantial part of the events or omissions giving rise to the claim occurred;

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<sup>51</sup> See, e.g., *Northfield Ins. Co. v. Loving Home Care, Inc.*, 363 F.3d 523, 531 (5th Cir. 2004) (refusing to allow extrinsic evidence as to insured's alleged intentional conduct when underlying suit alleged only negligence).

<sup>52</sup> See generally James P. George, *Jurisdictional Implications in the Reduced Funding of Lower Federal Courts*, 25 REV. LITIG. 1 (2006) (discussing how the funding crisis in the federal courts, coupled with Congress's continued expansion of federal jurisdiction, has led to serious docket delays, especially for civil cases).

<sup>53</sup> *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 471 (Tex. 1995); *Chiroboga v. State Farm Mut. Auto Ins. Co.*, 96 S.W.3d 673, 678 (Tex. App.—Austin 2003, no pet.).

- (2) the county of defendant's residence at the time the cause of action accrued if defendant is a natural person, or if the defendant is not a natural person, the county of the defendant's principal office in Texas; or
- (3) if venue is not proper in any other county, the county in which the plaintiff resided at the time the cause of action accrued.<sup>54</sup>

Applying this rule to coverage disputes, venue may be proper in the following locations:

(1) the county where the underlying action against the insured is pending; (2) the residence of the insured; or (3) the county in which the policy was issued.<sup>55</sup> Additionally, section 15.032 of the permissive venue statute allows suits brought against life, accident, and/or health insurance companies by a policyholder or beneficiary to be filed in the county in which the policyholder or beneficiary resided at the time the cause of action accrued, even if venue would be proper in another county.<sup>56</sup> In other words, this section does not make the county of the plaintiff's residence a venue of last resort, unlike the general venue rule. This section also allows suits against fire, marine, or inland insurance companies to be brought in any county in which the insured property was situated.<sup>57</sup>

If an insurer wishes to file a declaratory judgment action in federal court by virtue of diversity of citizenship, the action may be brought in one of the following three locations: (1) a

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<sup>54</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(a).

<sup>55</sup> See *Cigna Lloyds Ins. Co. v. Bradleys' Elec., Inc.*, 993 S.W.2d 673 (Tex. App.—Corpus Christi 1998), *rev'd on other grounds*, 995 S.W.2d 675, 677 (Tex. 1999) (county where policy was issued and county where underlying suit was pending were both proper venues for declaratory action); *S. County Mut. Ins. Co. v. Ochoa*, 19 S.W.3d 452, 461 (Tex. App.—Corpus Christi 2000, no pet.) (county in which judgment was rendered against insured in underlying suit was proper venue).

<sup>56</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 15.032.

<sup>57</sup> *Id.*

judicial district where the insured defendant resides; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no other district in which the action may be brought.<sup>58</sup> If the insured defendant is a corporation, it will be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced.<sup>59</sup>

Even when suit is filed in state court, the defendant can remove the action to federal court if it could have originally been brought there (*i.e.*, either diversity jurisdiction or federal question jurisdiction exists), provided he is not a citizen of the state in which the suit was brought.<sup>60</sup> Insureds frequently attempt to thwart an insurer's ability to remove by also naming the insurer's local agent as a defendant.<sup>61</sup> However, if the insured names the agent solely to defeat diversity of citizenship and prevent removal, the agent will likely be deemed to have been fraudulently joined and their presence in the suit will be disregarded for removal purposes.<sup>62</sup>

### C. Choice of Law

Even if a declaratory judgment action is filed in one state, that state's choice-of-law rules may cause the court to apply another state's substantive law to the coverage dispute. Therefore,

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<sup>58</sup> 28 U.S.C. § 1391(a).

<sup>59</sup> *Id.* § 1391(c).

<sup>60</sup> 28 U.S.C. § 1441(a)–(b).

<sup>61</sup> *See, e.g., Arzehgar v. Dixon*, 150 F.R.D. 92, 95 (S.D. Tex. 1993); *Ayoub v. Baggett*, 820 F. Supp. 298, 300 (S.D. Tex. 1993).

<sup>62</sup> *Arzehgar*, 150 F.R.D. at 94–95.

an initial issue in evaluating coverage is which state's law will govern the interpretation of a particular insurance policy. Each state has its own choice-of-law rules and its own jurisprudence applying those rules. Even if the action is filed in federal court based on diversity of citizenship, choice of law may still be an issue, given that federal courts must apply the conflict-of-law rules of the state in which they sit.<sup>63</sup>

Under the Texas choice-of-law analysis, when a contract does not contain an express choice-of-law provision, courts must first determine whether a relevant statute directs the court to apply the laws of a particular state.<sup>64</sup> In the insurance context, Article 21.42 of the Texas Insurance Code may provide such a directive:

Any contract of insurance payable to any citizen or inhabitant of this State by any insurance company or corporation doing business within this State shall be held to be a contract made and entered into under and by virtue of the laws of this State relating to insurance, and governed thereby, notwithstanding such policy or contract of insurance may provide that the contract was executed and the premiums and policy (in case it becomes a demand) should be payable without this State, or at the home office of the company or corporation issuing the same.<sup>65</sup>

This provision applies when three criteria are satisfied: (1) the insurance proceeds are payable to a Texas citizen or inhabitant; (2) the policy is issued by an insurer doing business in Texas; and (3) the policy is issued in the course of the insurer's business in Texas.<sup>66</sup> However, the statute is to be construed narrowly in order to avoid giving "extraterritorial effect" to its

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<sup>63</sup> *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); *Denman by Denman v. Snapper Div.*, 131 F.3d 546, 548 (5th Cir. 1998); *Mayo v. Hartford Life Ins. Co.*, 220 F. Supp. 2d 714, 728 (S.D. Tex. 2002).

<sup>64</sup> *Reddy Ice Corp. v. Travelers Lloyds Ins. Co.*, 145 S.W.3d 337, 340 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (citing *Maxus Exploration Co. v. Moran Bros., Inc.*, 817 S.W.2d 50, 53 (Tex. 1991)).

<sup>65</sup> TEX. INS. CODE art. § 21.42.

<sup>66</sup> *Reddy Ice*, 145 S.W.3d at 341.

terms; it may not be used in a way that regulates business outside the state.<sup>67</sup> For example, many courts have refused to apply article 21.42 when the policies are not actually issued in Texas or to a Texas insured.<sup>68</sup>

If article 21.42 does not apply (and there is no other statutory directive applicable to the case), Texas courts follow the approach formulated by the Restatement (Second) of Conflict of Laws when determining which state's law governs the interpretation of an insurance policy.<sup>69</sup> Under this test, courts look to which state has the most significant relationship to the issue presented for determination, taking into account the following general considerations:<sup>70</sup>

- (1) the needs of the interstate and international systems;
- (2) the relevant policies of the forum;
- (3) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;
- (4) the protection of justified expectations;
- (5) the basic policies underlying the particular field of law;
- (6) certainty, predictability, and uniformity of result; and

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<sup>67</sup> *Austin Bldg Co. v. Nat'l Union Fire Ins. Co.*, 432 S.W.2d 697, 701 (Tex. 1968); *American Home Assurance Co. v. Safway Steel Prod. Co.*, 743 S.W.2d 693, 697 (Tex. App.—Austin 1987, writ denied); *Reddy Ice*, 145 S.W.3d at 341; *see also Aetna Life Ins. Co. v. Dunken*, 266 U.S. 389, 399 (1924) (refusing to apply former art. 21.42 to particular contract because “effect of such application would be to regulate business outside the state of Texas and control contracts made by citizens of other states in disregard of their laws”).

<sup>68</sup> *See, e.g., TV-3, Inc. v. Royal Ins. Co. of Am.*, 28 F. Supp. 2d 407, 416 (E.D. Tex. 1998) (policy not issued in Texas or to a Texas insured); *W.R. Grace & Co. v. Cont'l Cas. Co.*, 896 F.2d 865, 883 (5th Cir. 1990) (proceeds not payable to Texas insured); *New York Life Ins. Co. v. Baum*, 700 F.2d 928, 933–34 (5th Cir. 1983) (not issued as part of insurer's business in Texas).

<sup>69</sup> *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984); *Reddy Ice*, 145 S.W.3d at 344.

<sup>70</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(1) [hereinafter “RESTATEMENT”].

(7) ease in the determination and application of the law to be applied.<sup>71</sup>

Additionally, when dealing with contract disputes, Texas courts also consider the following specific contacts:

- (1) the place of contracting;
- (2) the place of negotiation of the contract;
- (3) the place of performance;
- (4) the location of the subject matter of the contract; and
- (5) the domicile, residence, nationality, place of incorporation and place of business of the parties.<sup>72</sup>

These contacts are to be evaluated according to their relative importance with respect to the particular issue.<sup>73</sup> The relevant inquiry under the Texas choice-of-law analysis is “what contacts the state has with the insurance dispute, and not with the underlying lawsuit.”<sup>74</sup>

While the Restatement analysis is common, it is not universal. Other states, for example, still follow the rule of *lex loci contractus*, under which the law of the place where the contract was made will apply to its construction.<sup>75</sup>

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<sup>71</sup> *Reddy Ice*, 145 S.W.3d at 344 (citing RESTATEMENT § 6; *Duncan*, 665 S.W.2d at 420–21).

<sup>72</sup> RESTATEMENT § 188(2).

<sup>73</sup> *Id.*

<sup>74</sup> *Reddy Ice*, 145 S.W.3d at 345 (quoting *St. Paul Mercury Ins. Co. v. Lexington Ins. Co.*, 78 F.3d 202, 205 (5th Cir. 1996)).

<sup>75</sup> *See, e.g., American Family Life Assurance Co. v. United States Fire Co.*, 885 F.2d 826, 830 (11th Cir. 1989) (Georgia law).

#### IV. PARALLEL LITIGATION: SUITS IN MULTIPLE FORUMS

Even if a declaratory judgment action has been properly filed and the timing is otherwise correct, federal and state courts both have substantial discretion in deciding whether to actually proceed with the case. Courts frequently exercise this discretion when parallel proceedings are pending in another court.

##### A. Federal Abstention

The abstention doctrine actually encompasses several subsets of rules, each of which applies in a different set of circumstances.<sup>76</sup> *Colorado River* abstention, for example, allows federal courts to abstain when an action is also pending in state court only under “exceptional circumstances”.<sup>77</sup> For many years, there was a split among the federal appellate courts as to whether *Colorado River* applied in the declaratory judgment context. The United States Supreme Court resolved this issue in *Wilton v. Seven Falls Company*, and held that the distinctive features of the federal Declaratory Judgment Act warranted giving district courts significantly greater discretion than that permitted by the “exceptional circumstances” test of *Colorado River*.<sup>78</sup> “In the declaratory judgment context, the normal principle that federal courts

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<sup>76</sup> See Erwin Chemerinsky, FEDERAL JURISDICTION § 12.1, at 593 (1989) (“The term *abstention* refers to judicially created rules whereby federal courts may not decide some matters before them even though all jurisdictional and justiciability requirements are met.”).

<sup>77</sup> *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 14 (1983).

<sup>78</sup> *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995); see *American States Ins. Co. v. Bailey*, 133 F.3d 363, 368 (5th Cir. 1998). See also *Travelers Ins. Co. v. Louisiana Farm Bureau Fed’n*, 996 F.2d 774, 778 (5th Cir. 1993) (*Colorado River* factors inapplicable in declaratory judgment action); *Granite State Ins. Co. v. Tandy Corp.*, 986 F.2d 94, 95 (5th Cir. 1992); cf. *Frontier Pac. Ins. Co. v. Marathon Ashland Petrol., L.L.C.*, 87 F. Supp. 2d 719 (S.D. Tex. 2000) (staying declaratory action because of motion to join insurer in state court liability suit).

should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration.”<sup>79</sup> Thus, a court can dismiss a declaratory action even if it fails to meet the stringent standards for other types of abstention.

Although it is not an abuse of discretion to retain a suit and decide issues of indemnity, even before the underlying liability suit has reached a judgment, it may be appropriate for courts to abstain from doing so in certain circumstances.<sup>80</sup> For example, courts are particularly vigilant in exercising their discretion to abstain from hearing a declaratory judgment action in order to protect comity and prevent forum shopping. A district court’s discretion to abstain is not unfettered; the court may not dismiss the action “on the basis of whim or personal disinclination.”<sup>81</sup> In deciding whether to abstain, federal district courts must address and balance the purposes of the federal Declaratory Judgment Act and the factors relevant to the abstention doctrine on the record.<sup>82</sup> These factors include:

- (1) whether there is a pending state action in which all of the matters in controversy may be fully litigated;
- (2) whether the plaintiff filed suit in anticipation of a lawsuit filed by the defendant;
- (3) whether the plaintiff engaged in forum shopping in bringing the suit;

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<sup>79</sup> *Wilton*, 515 U.S. at 288.

<sup>80</sup> *American States Ins. Co. v. Bailey*, 133 F.3d 363, 368–69 (5th Cir. 1998); *Travelers*, 996 F.2d at 778; *Monticello Ins. Co. v. Patriot Security, Inc.*, 926 F. Supp. 97, 101–02 (E.D. Tex. 1996) (“The beauty of the federal Declaratory Judgment Act is that it affords the district courts discretion in determining whether or not to exercise jurisdiction even when it has been established.”).

<sup>81</sup> *Travelers*, 996 F.2d at 778.

<sup>82</sup> *Id.*



- (4) whether possible inequities in allowing the declaratory plaintiff to gain precedence in time or to change forums exist;
- (5) whether the federal court is a convenient forum for the parties and witnesses;
- (6) whether retaining the lawsuit in federal court would serve the purposes of judicial economy;<sup>83</sup> and
- (7) whether the federal court is being called on to construe a state judicial decree involving the same parties and entered by the court before whom the parallel state suit between the same parties is pending.<sup>84</sup>

Federal courts are especially reluctant to declare the rights of parties if there is a parallel state court proceeding that includes all necessary parties and will resolve the issues, even if the federal suit was filed first.<sup>85</sup> Indeed, this is why courts look to whether the federal action was filed in anticipation of a state court suit.<sup>86</sup> Courts have found that to be the case when, for example, the insurer has engaged in lengthy negotiations with the insured regarding an investigation of the insured's proof of loss and the insurer did not deny coverage until it filed the declaratory action.<sup>87</sup> In such circumstances, courts have concluded that the insurer expected the insured to file suit if the claim was denied and prolonged denial of the claim in order to secure a more favorable forum for the coverage dispute.<sup>88</sup> This is impermissible forum shopping and will weigh strongly in favor of abstention.

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<sup>83</sup> *Id.*

<sup>84</sup> *St. Paul Ins. Co. v. Trejo*, 39 F.3d 585, 591 (5th Cir. 1994).

<sup>85</sup> *See Wilton*, 515 U.S. at 282–83; *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 495 (1942).

<sup>86</sup> *See Granite State Ins. Co. v. Tandy Corp.*, 986 F.2d 94, 96 (5th Cir. 1992).

<sup>87</sup> *See, e.g., id.*; *Mission Ins. Co. v. Puritan Fashions, Corp.*, 706 F.2d 599, 603 (5th Cir. 1983).

<sup>88</sup> *Puritan Fashions*, 706 F.2d at 602.

## B. Abatement and Dominant Jurisdiction

Under Texas law, when suit would be proper in more than one county or in another jurisdiction, the court in which suit is first filed acquires dominant jurisdiction to the exclusion of other courts.<sup>89</sup> As long as the forum is a proper one, it is the plaintiff's privilege to choose the forum and that choice must be respected.<sup>90</sup> Thus, when an inherent interrelation of the subject matter exists in two pending lawsuits, a plea in abatement in the second action must be granted, even when the first action is pending in federal court or in another state.<sup>91</sup> Courts have also held that when a trial court has dominant jurisdiction, it abuses its discretion when it abates a case in favor of a later filed action in another county.<sup>92</sup> However, the rule of dominant jurisdiction does not apply when (1) a party's conduct estops him from asserting prior active jurisdiction, (2) the parties are lacking, or (3) there is a lack of intent to prosecute, such as when there is a significant delay in procuring citation and serving the opposing party with process.<sup>93</sup>

When the two lawsuits are not inherently interrelated, abatement is discretionary.<sup>94</sup> In deciding whether to abate under these circumstances, the second court must consider whether

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<sup>89</sup> *Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 248 (Tex. 1988); *Miles v. Ford Motor Co.*, 914 S.W.2d 135, 138 (Tex. 1995); *Bailey v. Cherokee County Appraisal Dist.*, 862 S.W.2d 581, 586 (Tex. 1993); *Mower v. Boyer*, 811 S.W.2d 560, 563 (Tex. 1991); *Curtis v. Gibbs*, 511 S.W.2d 263, 267 (Tex. 1974); *Cleveland v. Ward*, 285 S.W. 1063, 1070 (1926).

<sup>90</sup> *Id.*; *Mutual Sav. & Loan Ass'n v. Earnest*, 582 S.W.2d 534, 535 (Tex. Civ. App.—Texarkana 1979, no writ); *In Re Sims*, 88 S.W.3d 297, 303 (Tex. App.—San Antonio 2002, no pet.).

<sup>91</sup> *Id.* at 247; *Dolenz v. Cont'l Nat'l Bank*, 620 S.W.2d 572, 575 (Tex. 1981); *Leffall v. Johnson*, 2002 WL 125824, at \*2 (Tex. App.—Beaumont 2002, no pet.); *Taiwan Shrimp Farm Village Ass'n, Inc. v. U.S.A. Shrimp Farm Dev., Inc.*, 915 S.W.2d 61, 68 (Tex. App.—Corpus Christi 1996, writ denied).

<sup>92</sup> *See, e.g., In re Sims*, 88 S.W.3d 297, 303 (Tex. App.—San Antonio 2002, no pet.); *Dallas Fire Ins. Co. v. Davis*, 893 S.W.2d 288, 291 (Tex. App.—Fort Worth 1995, no writ).

<sup>93</sup> *Wyatt*, 760 S.W.2d at 248.

comity, convenience and the necessity for orderly procedure in the trial of contested issues will be furthered by abatement.<sup>95</sup> The trial court must also consider “the practical results to be obtained, dictated by a consideration of the inherent interrelation of the subject matter of the two suits.”<sup>96</sup>

### C. Anti-Suit Injunctions

Parties often ask courts to enjoin the other party from filing suit or from prosecuting a pending suit in another jurisdiction. However, principles of federalism and comity may make this a difficult task.

#### (1) Federal Anti-Injunction Act

Under the federal Anti-Injunction Act, “[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.”<sup>97</sup> The Act is “an absolute prohibition against enjoining state court proceedings unless the injunction falls

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<sup>94</sup> *Hartley v. Coker*, 843 S.W.2d 743, 747 (Tex. App.—Corpus Christi 1992, no writ).

<sup>95</sup> See *Wyatt*, 760 S.W.2d at 248; *Dolenz*, 620 S.W.2d at 575.

<sup>96</sup> *Dolenz*, 620 S.W.2d at 575 (quoting *Timon v. Dolan*, 244 S.W.2d 985, 987 (Tex. Civ. App.—San Antonio 1951, no writ)). See, e.g., *Williamson v. Tucker*, 615 S.W.2d 881, 886 (Tex. App.—Dallas 1981, writ ref’d n.r.e.) (trial court did not abuse its discretion in refusing to stay state court proceeding, filed after pending federal proceeding, especially because federal action involved numerous parties that were not parties to state court action and federal case was instituted by defendant several years before plaintiff brought state proceeding); see also *Space Master Int’l, Inc. v. Porta-Kamp Mfg. Co.*, 794 S.W.2d 944, 948 (Tex. App.—Houston [1st Dist.] 1990, no writ) (trial court did not abuse its discretion in staying declaratory judgment action where suits had already been filed in New Jersey state court and Massachusetts federal court involving the same parties and issues); *Alpine Gulf, Inc. v. Valentino*, 563 S.W.2d 358, 359 (Tex. App.—Houston [14th Dist.] 1978, writ ref’d n.r.e.) (trial court should have stayed action, as a matter of comity, pending resolution of New York action when plaintiff filed Texas action five days after filing New York action).

<sup>97</sup> 28 U.S.C. § 2283.

within one of [the] three specifically defined exceptions.”<sup>98</sup> Further, “the exceptions should not be enlarged by loose statutory construction.”<sup>99</sup>

The federal Anti-Injunction Act does not apply if a state court suit has not yet been filed; in such circumstances, a federal court may enjoin parties from ever filing suit in state court.<sup>100</sup> However, the Act does apply anytime a state suit is pending, regardless of when it was filed.<sup>101</sup> Thus, even if a party waits to file the state court suit until after the other party has filed suit in federal court, the federal court would be prohibited under the Act from enjoining the state proceeding.<sup>102</sup>

In *Texas Employers’ Association v. Jackson*, the Fifth Circuit reasoned that “when a state lawsuit is pending, more often than not, issuing a declaratory judgment will be tantamount to issuing an injunction—providing the declaratory plaintiff an end run around the requirements of the Anti-Injunction Act.”<sup>103</sup> Thus, as a general rule, federal district courts may not consider the merits of the declaratory judgment action when the following three requirements are present:

- (1) the declaratory defendant has previously filed a cause of action in state court against the declaratory plaintiff;
- (2) the state case involves the same issues as those involved in the federal case; and

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<sup>98</sup> *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng’rs*, 398 U.S. 281, 286 (1970); *Royal Ins. Co. v. Quinn-L Capital Corp.*, 3 F.3d 877, 883 (5th Cir. 1993).

<sup>99</sup> *Atlantic Coast Line R.R.*, 398 U.S. at 287; *Royal Ins. Co.*, 3 F.3d at 883.

<sup>100</sup> *Texas Employers Ass’n v. Jackson*, 862 F.2d 491, 507 (5th Cir. 1988) (en banc).

<sup>101</sup> *Royal Ins. Co.*, 3 F.3d at 885.

<sup>102</sup> *Id.*

<sup>103</sup> 862 F.2d at 506.

- (3) the district court is prohibited from enjoining the state proceedings under the Anti-Injunction Act.<sup>104</sup>

However, there is a “very small class of highly distinguishable cases” which are exceptions to the broad *Jackson* rule. For instance, in *Travelers Insurance Company v. Louisiana Farm Bureau Federation*, the Fifth Circuit found significant the fact that the insurer filed the action for declaratory relief in federal court to avoid a multiplicity of suits in various forums throughout multiple states.<sup>105</sup> According to the court, “[s]uch a goal, unlike that of changing forums or subverting the real plaintiff’s advantage in state court, is entirely consistent with the purposes of the Declaratory Judgment Act.”<sup>106</sup> Additionally, the court determined that the insured had essentially abandoned her state case “[b]y vigorously litigating the claims raised in the federal declaratory judgment action rather than advocating abstention and by exerting literally no effort whatever in her state case.”<sup>107</sup> In light of these facts, the Fifth Circuit held that the federal district court had the authority to review the merits of the declaratory action, despite the fact that it could not have enjoined the insured’s state case under the Anti-Injunction Act.<sup>108</sup>

The Fifth Circuit has also held that the *Jackson* rule does not apply in cases where the federal suit has been the subject of significant proceedings before the state suit is even filed.<sup>109</sup> As discussed above, the Anti-Injunction Act prohibits federal courts from enjoining state

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<sup>104</sup> *Travelers*, 996 F.2d at 776.

<sup>105</sup> *Id.* at 776–77.

<sup>106</sup> *Id.* at 777.

<sup>107</sup> *Id.* at 778.

<sup>108</sup> *Id.*

<sup>109</sup> *Royal Ins. Co.*, 3 F.3d at 886–87.

litigation, regardless of when the state action was filed.<sup>110</sup> Thus, *Jackson* would prohibit federal courts from issuing declaratory judgments in such circumstances as well. However, in *Royal Insurance Company v. Quinn-L Capital Corporation*, the Fifth Circuit recognized the possibility that if it were to hold *Jackson* applied in this scenario, “litigants could use *Jackson* as a sword, rather than a shield, defeating federal jurisdiction merely by filing a state court action.”<sup>111</sup> Accordingly, the court held that federal courts need not abstain from declaratory judgment actions under *Jackson* where (1) the federal suit is filed substantially prior to any state suits, (2) significant proceedings have taken place in the federal suit, and (3) the federal suit has neither the purpose nor the effect of overturning a previous state court ruling.<sup>112</sup>

## (2) Texas Anti-Suit Injunctions

Texas courts may enjoin litigants from moving forward on the same issues in any other jurisdiction.<sup>113</sup> However, principles of comity require courts to exercise this equitable power sparingly, and only in very special circumstances.<sup>114</sup> An anti-suit injunction is appropriate only in the following instances: (1) to address a threat to the court’s jurisdiction; (2) to prevent the evasion of an important public policy; (3) to prevent the multiplicity of suits; or (4) to protect a party from vexatious or harassing litigation.<sup>115</sup> The party seeking the injunction has the burden

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<sup>110</sup> *Id.* at 885.

<sup>111</sup> *Id.* at 886.

<sup>112</sup> *Id.*

<sup>113</sup> *Golden Rule Ins. Co. v. Harper*, 925 S.W.2d 649, 651 (Tex. 1996) (per curiam).

<sup>114</sup> *Christensen v. Integrity Ins. Co.*, 719 S.W.2d 161, 163 (Tex. 1986); *London Mut. Ins’rs v. American Home Assur. Co.*, 95 S.W.3d 702, 706 (Tex. App.—Corpus Christi 2003, no pet.).

<sup>115</sup> *Golden Rule Ins. Co.*, 925 S.W.2d at 651; *London Mut. Ins’rs*, 95 S.W.3d at 705–06.

of showing that clear equity demands the injunction.<sup>116</sup> Thus, in addition to showing the applicability of one of the four circumstances above, the party must also demonstrate the potential for an irreparable miscarriage of justice in order to obtain the anti-suit injunction.<sup>117</sup>

For example, in *London Mutual Insurers v. American Home Assurance Company*, London Market Insurers (“LMI”) filed a declaratory judgment action in New York five months after its insured had filed a declaratory suit in Texas state court.<sup>118</sup> Upon the insured’s motion, the Texas court enjoined LMI from prosecuting the New York action. On appeal, the court first determined that the insured had proven the applicability of one of the four circumstances in which anti-suit injunctions are appropriate. Specifically, the court found that the New York action constituted a threat to the Texas court’s jurisdiction because the allegations in the New York action arose out of the same transaction or occurrence as the allegations in the Texas action. It further concluded that the trial court did not abuse its discretion in finding an irreparable miscarriage of justice given that LMI violated a “service of suit” clause in the insurance policy by filing the action in New York after the insured had filed the declaratory action in Texas. According to the court, this clause showed that LMI had agreed to submit to the jurisdiction selected by the insured and to be bound by the final decision of the Texas court. Thus, the issuance of an anti-suit injunction was appropriate.

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<sup>116</sup> *Christensen*, 719 S.W.2d at 163; *London Mut. Ins’rs*, 95 S.W.3d at 706.

<sup>117</sup> *Golden Rule Ins. Co.*, 925 S.W.2d at 651–52.

<sup>118</sup> 95 S.W.3d at 704.

#### IV. SEVERANCE AND ABATEMENT

Often the strategic issues associated with filing a declaratory judgment action need not be addressed because the insured will have won the race to the courthouse. Insureds frequently include various extra-contractual claims along with their action on their contract, such as violations of the Deceptive Trade Practices Act and the Insurance Code. In such instances, severance may be a strategic option for insurers. The rationale justifying an order of severance is based on the desire to prevent injustice and avoid prejudicing the legal rights of the parties, which would otherwise occur without severance.<sup>119</sup>

Texas Rules of Civil Procedure 40 and 41 vest the trial court with broad discretion in granting severance of actions and ordering separate trials where necessary.<sup>120</sup> Additionally, Texas Rule of Civil Procedure 174(b) allows a court to order a separate trial of any claim or issue in furtherance of convenience or to avoid prejudice.<sup>121</sup> A trial court properly exercises its discretion in severing claims when the following requirements are met:

- (1) the controversy involves more than one cause of action;
- (2) the severed claim is one that could be asserted independently in a separate lawsuit; and
- (3) the severed actions are not so interwoven with the other claims that they involve the same facts and issues.<sup>122</sup>

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<sup>119</sup> *Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 658 (Tex. 1990); *Womack v. Berry*, 291 S.W.2d 677, 683 (Tex. 1956).

<sup>120</sup> *Liberty Nat'l Fire Ins. Co. v. Akin*, 927 S.W.2d 627, 629 (Tex. 1996); *Guar. Fed. Sav. Bank*, 793 S.W.2d 652, 658 (Tex. 1990); *Hamilton v. Hamilton*, 280 S.W.2d 588, 591 (Tex. 1955).

<sup>121</sup> TEX. R. CIV. P. 174(b); *Guar. Fed. Sav. Bank*, 793 S.W.2d at 658 (stating that the controlling reasons for a severance are to do justice, avoid prejudice, and further convenience).

<sup>122</sup> *Akin*, 927 S.W.2d at 629.



Although courts have broad discretion in determining whether or not to sever causes of action, “[w]hen all the facts and circumstances of the case unquestionably require a separate trial to prevent manifest injustice, and there is no fact or circumstance supporting or tending to support a contrary conclusion, and the legal rights of the parties will not be prejudiced thereby, there is no room for the exercise of discretion.”<sup>123</sup> Failure to order severance in such circumstances is a violation of the court’s plain legal duty.<sup>124</sup>

### A. Severance of Parties: Multiple Defendants

As a general rule, where the plaintiff has separate and distinct causes of action against multiple defendants, the cases are severable.<sup>125</sup> To be severable as to the affected parties, the causes of action must be capable of being brought as a separate suit with a separate final judgment rendered thereon.<sup>126</sup> It is not an abuse of discretion to sever causes of action that grew out of the same series of events but do not constitute a single or indivisible action.<sup>127</sup>

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<sup>123</sup> *U.S. Fire Ins. Co. v. Millard*, 847 S.W.2d 668, 671 (Tex. App.—Houston [1st Dist.] 1993, no writ). See also *Womack*, 291 S.W.2d at 683; *In re Foremost Ins. Co.*, 966 S.W.2d 770, 772 (Tex. App.—Corpus Christi 1998, no pet.).

<sup>124</sup> See *Akin*, 927 S.W.2d at 630; *Womack*, 291 S.W.2d at 683; see also *Foremost*, 966 S.W.2d at 771 (noting that failure to order severance in such situations is normally termed a clear abuse of discretion).

<sup>125</sup> See *Delaney v. Fidelity Lease Ltd.*, 517 S.W.2d 420 (Tex. Civ. App.—El Paso 1974) *aff’d in part, rev’d on other grounds*, 526 S.W.2d 543 (Tex. 1975) (causes of action against individual members of a partnership); *Urdiales v. Concord Technologies Delaware, Inc.*, 120 S.W.3d 400 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (an employee’s claim against the employer from the employee’s claims against the supervisor who assaulted him); *McInnis v. Gross*, 2003 WL 21357310 (Tex. App.—Dallas 2003, no pet.) (medical malpractice actions against two physicians, where the action against the first physician was settled and non suited, and the plaintiffs suffered no harm from the order severing the claim against the first physician); *In re Koehn*, 86 S.W.3d 363 (Tex. App.—Texarkana 2002, no pet.) (contract claims against insurers arising from an underinsured/uninsured motorist provision and a negligence claim against a motorist arising from a collision between the motorist and the insured).

<sup>126</sup> *Kansas Univ. Endowment Ass’n v. King*, 350 S.W.2d 11, 19 (Tex. 1961).

For example, in *Kirby Exploration Company v. Mitchell Energy Corporation*, the First Court of Appeals held that the trial court properly severed counterclaims and cross-claims arising from the conversion of an oilfield pipe from the original action for conversion.<sup>128</sup> The court reasoned that, although the same facts involved in the counterclaims and cross-claims were also applicable to much of the original controversy, the causes of action were not so intertwined as to involve identical facts and issues.<sup>129</sup>

### **B. Severance of Claims: Multiple Causes of Action**

As mentioned, insureds frequently include extra-contractual claims in a suit against their insurer for breach of contract. For example, an insured's complaint may include claims for (1)

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<sup>127</sup> *Simmons v. Wilson*, 216 S.W.2d 847 (Tex. Civ. App.—Waco 1949, no writ); *see also Kirby Exploration Co. v. Mitchell Energy Corp.*, 701 S.W.2d 922 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.) (holding that severance was proper where several entities are involved in litigation and different causes of action may be brought among them, even though the facts applicable to the severed cause of action are also applicable to much of the original controversy). *See, e.g., Union Gas Corp. v. Gisler*, 129 S.W.3d 145 (Tex. App.—Corpus Christi 2003, pet. denied) (multiple bad faith claims and breach of contract claims brought where the bad faith claims principally involved tort rather than contract issues and the breach of the contract claims were dependent upon the terms of separate leases; therefore the severed actions were not so interwoven with the other claims that they involved the same facts and issues); *Carruth v. Shelther Air Systems, Inc.*, 531 S.W.2d 913 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ) (a cause of action by a creditor against a corporation on an account from the creditor's cause of action against individual defendants on a guaranty agreement which did not require the creditor to first attempt collection from the corporation or to join the corporation in any suit against the guarantors); *Carter v. Skelly Oil Co.*, 317 S.W.2d 227 (Tex. Civ. App.—Waco 1958, no writ) (causes of action for injury and death against a nonsubscribing employer under the Worker's Compensation Act and under the Wrongful Death Act); *Carswell v. Southwestern Bell Tel. Co.*, 449 S.W.2d 805 (Tex. Civ. App.—Houston [1st Dist.] 1969, no writ) (an action against a telephone company for damages for recording the plaintiff's telephone calls from the plaintiff's action against another party for damages for charging the plaintiff with making the harassing calls which occasioned the telephone company's eavesdropping); *Henry v. Mr. M Convenience Stores, Inc.*, 543 S.W.2d 393 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.) (a purchaser's action for specific performance of a real estate contract from the same plaintiff's claim for damages for tortious interference with that contract).

<sup>128</sup> *See Kirby Exploration Co. v. Mitchell Energy Corp.*, 701 S.W.2d 922 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

<sup>129</sup> *See id.* at 927 (quoting *Straughan v. Houston Citizens Bank & Trust Co.*, 580 S.W.2d 29, 33 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ)).

breach of contract, (2) bad faith, (3) unfair settlement practices, in violation of former articles 21.21 and 21.21-2 of the Insurance Code and section 17.46 of the DTPA, and (4) failure to promptly resolve and settle a claim, in violation of former article 21.55 of the Insurance Code. In such instances, trial courts will often allow the extra-contractual claims to be severed from the contractual claim.

Failure to sever the bad faith and contract claims often confuses the legal issues. Rather than the dispute focusing on the insurance policy and coverage issues, evidence of mental anguish, settlement, discussions and evaluation of claims handling and timing muddy the waters. A defendant insurer may often be prejudiced if the breach of contract and extra-contractual claims are not severed and abated because:

- Evidence of evaluations, demand letters and post-litigation settlement offers necessary to defense of the breach of contract and extra-contractual claims, will be presented along with the issue of liability;
- Failure to sever will unfairly prejudice the insurer's rights to develop defenses and force it to defend its claims handling prematurely; and
- The insured would be allowed to discuss issues irrelevant to and prejudicial to coverage, such as mental anguish and physical injury.

Insurance coverage claims and bad faith claims are, by their nature, independent claims, making them appropriate for severance.<sup>130</sup> Extra-contractual claims are generally not so interwoven with the breach of contract claim that they involve the same facts and issues. An insured usually may not prevail on an extra-contractual claim without first proving that the

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<sup>130</sup> *State Farm Mut. Auto. Ins. Co. v. Wilborn*, 835 S.W.2d 260, 261 (Tex. App.—Houston [14th Dist.] 1992, no writ) (noting that a breach of insurance contract claim is separate and distinct from bad faith, Insurance Code, or DTPA causes of action and may constitute a complete lawsuit within itself, such that severance is appropriate and proper). *See also Crane Carrier Co. v. Bostrum Seating, Inc.*, 89 S.W.3d 153, 160 (Tex. App.—Corpus Christi 2002), *rev'd on other grounds*, 2004 WL 1301930 (Tex. 2004); *Weaver v. Jock*, 717 S.W.2d 654, 662 (Tex. App.—Waco 1986, writ ref'd n.r.e.); *County of Nueces v. Svajda*, 608 S.W.2d 752, 753 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.).

insurer breached the contract.<sup>131</sup> In other words, the insurer cannot be found liable under any extra-contractual cause of action if the insurance claim is not covered by the policy.<sup>132</sup>

Furthermore, even if the claims are largely interwoven, a severance may nevertheless be necessary in some bad faith cases.<sup>133</sup> The Texas Supreme Court has recognized that “[a] trial court will undoubtedly confront instances in which evidence admissible only on the bad faith claim would prejudice the insurer to such an extent that a fair trial on the contract claim would become unlikely.”<sup>134</sup> One such example is when the insurer has made a settlement offer on a disputed contract claim.<sup>135</sup>

To prevail on its extra-contractual claims, Plaintiff must prove that Defendant failed to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim after the insurer’s liability has become reasonably clear.<sup>136</sup> Thus, trial on those claims will necessarily

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<sup>131</sup> *Akin*, 927 S.W.2d at 629.

<sup>132</sup> *Progressive County Mut. Ins. Co. v. Boyd*, 177 S.W.3d 919, 922 (Tex. 2005) (holding that each of the insured’s extra-contractual claims were negated by the jury’s determination in the breach of contract claim that there was no coverage). *See also U.S. Fire Ins. Co. v. Millard*, 847 S.W.2d 668, 673 (Tex. App.—Houston [1st Dist.] 1993, no writ) (noting that judicial efficiency may be enhanced because litigation of the extra-contractual claims may never be required if there is no coverage: “[i]t would be a waste of the court’s, the jury’s, the parties’, and the attorneys’ time to hear evidence on the [extra-contractual] claims”).

<sup>133</sup> *Akin*, 927 S.W.2d at 630.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 55 (Tex. 1997); TEX. INS. CODE. ANN. §§ 541.060, 542.056, & 542.058 (Vernon 2005) (current version of former Art. 21.21 and Art. 21.55).

involve evidence of the insurer's settlement offer.<sup>137</sup> However, "[a]pplying Rule of Evidence 408, a settlement offer would be irrelevant and prejudicial regarding the insurance company's liability under the policy itself."<sup>138</sup> As the Dallas Court of Appeals has explained,

[w]hile evidence of an offer of settlement would be prejudicial to the insurer because of its implication that the insurer has admitted liability on the contract claim, the very same evidence of settlement offers may be of great benefit to the insurance company in its defense against the bad faith claims, to show that it made a reasonable attempt to pay the amount it believed it owed on its insured's claim.<sup>139</sup>

Thus, "an irreconcilable conflict arises if severance is denied in a case involving contractual and extra-contractual claims."<sup>140</sup> On one hand, the trial court could refuse to admit evidence of the settlement offer, acknowledging the insurer's right to exclude it under Rule of Evidence 408.<sup>141</sup> Doing so, however, would deny the insured its right to use that evidence to establish the elements of the bad faith claim. Alternatively, the court could admit evidence of the settlement offer, satisfying the insured's proof of their bad faith claim, but this would abrogate the insurer's right to exclude such evidence under Rule 408.<sup>142</sup> Texas law provides that defendants in this position should not be required to face this "cruel dilemma."<sup>143</sup>

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<sup>137</sup> See *In re Allstate Texas Lloyd's*, 2005 WL 2277134, at \*3 (Tex. App.—Houston [14th Dist.] 2005, no pet. h.) (explaining that "the settlement offer could be an essential element of the insured's cause of action for bad faith or of the insurance company's defense to the bad faith claim").

<sup>138</sup> *Id.* Under Texas Rule of Evidence 403, settlement offers are not admissible to prove or disprove liability for a claim.

<sup>139</sup> *Avary v. Bank of America, N.A.*, 72 S.W.3d 779, 798 (Tex. App.—Dallas 2002, pet. denied).

<sup>140</sup> *In re Allstate Texas Lloyd's*, 2005 WL 2277134, at \*3.

<sup>141</sup> *Id.* at \*4.

<sup>142</sup> *Id.*

<sup>143</sup> *Texas Farmers Ins. Co. v. Stem*, 927 S.W.2d 76, 79 (Tex. App.—Waco 1996, no writ); *Wilborn*, 835 S.W.2d at 261–62.

Texas courts have also recognized that inherent discovery conflicts can arise when lawsuits involving the validity of an insurance claim are tried together with an insured's extra-contractual claims. Indeed, as the Supreme Court has noted, "if a Plaintiff attempting to prove the validity of a claim against an insurer could obtain the insurer's investigative files merely by alleging the insurer acted in bad faith, all insurance claims would contain such allegations."<sup>144</sup>

Further, during the trial of the extra-contractual claims, the insurer may wish to waive its attorney-client privilege and produce correspondence concerning settlement discussions with counsel and written evaluations of the underlying contract case. However, "[o]nce produced, the privilege protecting these documents will be forever waived."<sup>145</sup> The insurer's other choice would be to limit its defense regarding the extra-contractual claims so as to preserve its attorney-client privilege in the breach of contract case. Texas courts have determined that defendants in such a situation should not be forced to make this decision.<sup>146</sup>

Finally, severance is also often warranted because the insured's counsel will be a material fact witness needed at trial to prove claims for breach of the duty of good faith and fair dealing, violations of the DTPA and Article 21.21 of the Insurance Code.<sup>147</sup>

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<sup>144</sup> *Maryland American Gen. Ins. Co. v. Blackmon*, 639 S.W.2d 455, 458 (Tex. 1982).

<sup>145</sup> *Mid-Century Ins. Co. of Texas v. Lerner*, 901 S.W.2d 749, 752 (Tex. App.—Houston [14th Dist.] 1995, no writ) (citing TEX. R. CIV. EVID. 511).

<sup>146</sup> *Id.*; see also *Stem*, 927 S.W.2d at 79 n.2. (describing the insurer's dilemma "of deciding whether to forgo its privilege to prevent admission of the settlement offers or to allow their admission to defend itself against the bad faith claim").

<sup>147</sup> See *Warrilow v. Norrell*, 791 S.W.2d 515 (Tex. App.—Corpus Christi 1989, writ denied); TEX. DISCIPLINARY R. PROF'L CONDUCT 3.08(a) (prohibiting an attorney who is representing a party in a proceeding from testifying in that proceeding).

### C. Abatement of Severed Claims

Inherently related to the topic of severance is the issue of abatement of the severed claims. Often, the outcome of the insured's contract claims is potentially dispositive of the extra-contractual claims. Without abatement, the insurer often suffers undue prejudice and unnecessary expense by the continuation of discovery relating to the extra-contractual claims.

In *U.S. Fire Insurance Company v. Millard*, the insured brought an action against his uninsured/underinsured motorist carrier seeking benefits under the policy and also included extra-contractual claims for "bad faith," violations of the DTPA and the Texas Insurance Code.<sup>148</sup> The insurer filed a motion to sever and abate the extra-contractual claims pending resolution of the underlying claim, but the trial judge denied the motion. On appeal, the court first ordered the trial judge to sever the extra-contractual claims from the contract action, noting that the contractual claims were separate and distinct from the extra-contractual claims, and therefore proper for severance.<sup>149</sup> The court further ordered that the extra-contractual claims be abated in the interest of judicial efficiency and economy because they hinged upon a determination of the contract action.<sup>150</sup> According to the court, "abatement of the bad faith claims must necessarily accompany severance of those claims from the contract claim. Without abatement, the parties will be put to the effort and expense of conducting discovery and preparing for trial of claims that may be disposed of in a previous trial."<sup>151</sup>

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<sup>148</sup> 847 S.W.2d 668, 673–74 (Tex. App.—Houston [14th Dist.] 1995, no writ).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 673.

## VI. INTERPLEADER

An interpleader action can be yet another useful tool for insurers because it allows the insurer to protect itself from multiple liability from conflicting claimants.<sup>152</sup> Interpleader actions are commonly seen in the context of life insurance proceeds. The purpose of the interpleader procedure is to protect an innocent stakeholder, often the insurer, from “the vexation and expense of multiple litigation and the risk of multiple liability.”<sup>153</sup>

Texas Rule of Civil Procedure 43 permits an insurer, who has reasonable doubts as to which claimant is entitled to the insurance proceeds, to file, in good faith, an interpleader action against the claimants.<sup>154</sup> Interpleader relief will be granted if the following requirements are met:

- (1) the party is either subject to, or has reasonable grounds to anticipate, rival claims to the same fund or property;
- (2) the party has not unreasonably delayed filing an action for interpleader; and
- (3) the party has unconditionally tendered the fund or property into the court's registry.<sup>155</sup>

Every reasonable doubt is resolved in favor of allowing the stakeholder to interplead.<sup>156</sup>

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<sup>152</sup> See *Davis v. East Texas S&L Ass'n*, 354 S.W.2d 926, 930 (Tex. 1962).

<sup>153</sup> *Dallas Bank & Trust Co. v. Commonwealth Dev. Corp.*, 686 S.W.2d 226, 230 (Tex. App.—Dallas 1984, writ ref'd n.r.e.); see also *Tri-State Pipe & Equip. Inc. v. S. County Mut. Ins. Co.*, 8 S.W.3d 394, 401–02 (Tex. App.—Texarkana 1999, no pet.) (stating that interpleader provides relief for a stakeholder, who without such an action, would have to act as judge and jury at his own peril when faced with conflicting claims).

<sup>154</sup> *Great Am. Reserve Ins. Co. v. Sanders*, 535 S.W.2d 956, 959 (Tex. 1975); *United States v. Ray Thomas Gravel Co.*, 380 S.W.2d 576, 580 (Tex. 1964).

<sup>155</sup> *Bryant v. United Shoreline Inc. Assurance Servs., N.A.*, 984 S.W.2d 292, 296 (Tex. App.—Fort Worth 1998, no pet.); accord *Great Am. Reserve Ins. Co. v. Sanders*, 525 S.W.2d 956, 958 (Tex. 1975); *Texas Workforce Comm'n v. Gill*, 964 S.W.2d 308, 310 (Tex. App.—Corpus Christi 1998, no pet.).



An additional benefit of interpleader is that, if the insurer declines to pay a named beneficiary because it has legitimate doubts regarding the proper claimant, but admits liability and deposits the funds into the court, the insurer will only be liable for the face amount of the policy and will not be subject to any penalties.<sup>157</sup> For example, in *Great American Reserve Insurance Company v. Sanders*, the insurer filed an interpleader action to determine whether the former wife of the insured or the insured's widow was entitled to proceeds under a life insurance policy.<sup>158</sup> The insured, Nathaniel Sanders, married his first wife, Violet, in 1960, but they divorced in 1969. Violet retained custody of their five children, and Nathaniel paid weekly child support. After months of past due child support, Violet threatened a contempt action against Nathaniel. In lieu of the contempt action, Nathaniel agreed to purchase a life insurance policy, with Violet named as the beneficiary, as well as to make regular child support payments in the future.

Nathaniel remarried in 1971 and was later separated, but he never divorced his second wife prior to his death. After Nathaniel died, Violet and Nathaniel's second wife both filed claims for the life insurance proceeds. Because of the conflicting claims, the insurer filed an interpleader action, deposited the insurance proceeds with the court, and left the decision as to whom the proceeds should go to with the court. In light of these facts, the court found that the

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<sup>156</sup> *Nixon v. Malone*, 98 S.W. 380, 385 (1906), amended by 99 S.W. 403 (1907); *Dallas Bank & Trust Co. v. Commonwealth Dev. Corp.*, 686 S.W.2d 226, 230 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

<sup>157</sup> *Murray v. Bankers Life Co.*, 299 S.W.2d 730 (Tex. Civ. App.—1957, writ ref'd); *Givens v. Girard Life Ins. Co.*, 480 S.W.2d 421, 428 (Tex. Civ. App.—1972, writ ref'd n.r.e.).

<sup>158</sup> 525 S.W.2d 956 (Tex. 1975).

insurer acted in good faith in filing the action and that a reasonable doubt did in fact exist as to which claimant was proper.<sup>159</sup>

## VII. CONCLUSION

As is clear from the discussion above, there are countless strategy-related options for attorneys representing insurers in coverage litigation. Insurance coverage litigation has its own set of procedural concerns and practical considerations that are different from any other type of contract litigation, and what makes good sense in a non-insurance case may be problematic for a carrier. In addition, many, if not all, of these procedural mechanisms have an application far beyond insurance coverage cases, so it is as important to be familiar with these litigation tools as it is to understand how to read and dissect an insurance policy or claim.

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<sup>159</sup> *Great American Reserve Life Ins. Co.*, 525 S.W.2d at 959.