

demand's terms are such that an ordinarily prudent insurer would accept it.<sup>164</sup> In establishing these guidelines for liability in this context, the Texas Supreme Court linked to, and borrowed from, the common law requirements to establish a Stowers claim, which is discussed later in this publication.<sup>165</sup>

- 9 **EXTRA-CONTRACTUAL CLAIMS AGAINST THE INSURER.** Over the last decade the Texas Supreme Court has made a concerted effort to level the playing field for insurance carriers in litigation with policy holders. Insurers have always had to contend with anti-insurer bias at the trial court level which often times results in a lopsided judgment for the policy holder awarding extra-contractual damages for what was a simple breach of contract. Recent decisions have made clear that something more than a breach of contract is necessary to recover extra-contractual damages from an insurer. Two Texas Supreme Court decisions mark this trend.
- A. **Where there is no Coverage** - Lack of coverage precludes extra contractual claims, i.e. breach of duty of good faith, insurance code violations.<sup>166</sup> The one possible exception left open by the Court is where an insurer's denial of a claim it was not obliged to pay might nevertheless be in bad faith if its conduct was extreme and produced damages unrelated to and independent of the policy claim.<sup>167</sup> It is unclear from any case just exactly what conduct would fit under this exception, but it has been identified and left open by the Court.
  - B. **Where there is Coverage** – Conduct showing only negligence or breach of contract by insurer is not grounds for extra-contractual damages. Extra-contractual damages are only applicable in cases where the insurer knew its actions were false, deceptive, or unfair.<sup>168</sup>
  - C. **No Claim for Negligent Claims Handling.** Texas does not recognize a claim for negligent claims handling.<sup>169</sup> Claims handling liability is based on the contract of insurance, the Texas Insurance Code, and the limited cases establishing a common law duty.
  - D. **No Duty to Notify Additional Insured of Coverage or Defend without a Request for Coverage.** Mere awareness of a claim or suit against an insured does not impose a duty on the insurer to defend the insured and there is no unilateral duty to act unless and until an additional insured first requests a defense.<sup>170</sup> Regardless of whether the insured is ignorant of any rights or obligations under the policy, notice is a threshold duty that the insured must fulfill by notifying the insurer that the insured has been served

<sup>164</sup> *Rocor Int'l Inc. v. Nat'l Union Fire Ins. Co.*, 77 S.W.3d 253, 261, 262 (Tex. 2002).

<sup>165</sup> *Id.*

<sup>166</sup> *Chrysler Ins. Co v. Greenspoint Dodge of Houston, Inc.*, 297 S.W3d 248, 254-255; *Progressive County Mut. Ins. Co. v. Boyd*, 177 S.W.3d 919, 922-923 (Tex. 2005).

<sup>167</sup> *Id.*

<sup>168</sup> *Minnesota Life Ins. Co. v. Vasquez*, 192 S.W.3d 774, 780 (Tex. 2006).

<sup>169</sup> *Northwinds Abatement, Inc. v. Employers Insurance of Wausau*, 258 F.3d 345, 352 (5th Cir. 2001).

<sup>170</sup> *Nat'l Union Fire Ins. Co. of Pittsburgh, P.A. v. Crocker*, 246 S.W.3d 603, 607-608 (Tex. 2008).

with process and the insurer is expected to answer on its behalf.<sup>171</sup> An insurer, even with knowledge of the suit, does not have a duty to inject itself gratuitously into a lawsuit by defending an additional insured who has not requested coverage and has not forwarded complied with the policies forwarding conditions.<sup>172</sup> An insurer that has not been notified that a defense is expected bears no extra-contractual duty to provide notice that defense is available to an additional insured who has not requested one.<sup>173</sup>

10 **PRESCRIBED CONDUCT UNDER THE TEXAS INSURANCE CODE.** This section discusses conduct relating to claims handling that is specifically required of insurers by Texas Statute.

A. **Records of Complaints.** An insurer is required to maintain a complete record of all complaints received by the insurer during the preceding three years or since the date of the insurer's last examination by the department, whichever period is shorter. The record must indicate: 1) the total number of complaints; 2) the classification of complaints by line of insurance; 3) the nature of each complaint; 4) the disposition of the complaints; and 5) the time spent processing each complaint.<sup>174</sup> A "complaint" means any written communication primarily expressing a grievance.<sup>175</sup>

B. **Providing Claim Information on Request.**

1) **Providing Liability Claim Information on Request.** On the written request, within six months of date of disposition of claim, by a named insured under a liability insurance policy, the insurer that wrote the policy shall provide to the insured information relating to the disposition of a claim filed under the policy. The information must include: 1) the name of each claimant; 2) details relating to the amount paid on the claim; settlement of the claim; or judgment on the claim; 3) details as to how the claim, settlement, or judgment is to be paid; and 4) any other information required by rule of the commissioner that the commissioner considers necessary to adequately inform an insured with regard to any claim under a liability insurance policy.<sup>176</sup> "Liability insurance" means general liability insurance, professional liability insurance including medical professional liability insurance, commercial automobile liability insurance, and the liability portion of commercial multi-peril insurance.<sup>177</sup>

<sup>171</sup> *Id.*

<sup>172</sup> *Weaver v. Hartford Accident & Indem. Co.*, 570 S.W.2d 367, 370 (Tex 1978).

<sup>173</sup> *Nat'l Union*, 246 S.W.3d at 608.

<sup>174</sup> TEX. INS. CODE ANN. § 542.005 (formerly TEX. INS. CODE ANN. Art. 21.21-2 § 2(b)).

<sup>175</sup> *Id.*

<sup>176</sup> TEX. INS. CODE ANN. § 542.101 (formerly TEX. INS. CODE ANN. Art. 21.59).

<sup>177</sup> *Id.*