

15 business days, after receipt of all requested information, the company must approve or deny your claim in writing. The law allows the insurance company to extend this deadline up to 45 days if it notifies you that more time is needed and tells you why.

After notifying you that your claim is approved, your insurance company must pay the claim within 5 business days.

If your claim results from a weather-related catastrophe or other major natural disaster as defined by TDI, your insurance company may take 45 additional days to approve or deny your claim and 15 additional days to pay your claim.

23. You have the right to choose the repair shop and replacement parts for your vehicle. An insurance company may not specify the brand, type, kind, age, vendor, supplier, or condition of parts or products used to repair your automobile.

The insurance company must provide you notice of the above requirements as follows:

- claims submitted by telephone - written notice within 3 business days or immediate verbal notice, followed by written notice within 15 days;
- claims submitted in person - immediate written notice at the time you present your vehicle to an insurer or an insurance adjuster or other person in connection with a claim for damage repair;
- claims submitted in writing - written notice must be provided within 3 business days.

24. If another person is liable for damage to your auto and you filed a claim and paid a deductible on your own policy, your insurance company must make a reasonable and diligent effort to recover the deductible from that person within twelve months from the date your claim is paid. If not, your company must:

- authorize you, at least 90 days prior to the expiration of the statute of limitations, to pursue your own collection efforts, or
- refund your deductible.

25. Your insurance company must notify you if it intends to pay a liability claim against your policy. The company must notify you in writing of an initial offer to compromise or settle a claim against you no later than the 10th day after the date the offer is made. The company must notify you in writing of any settlement of a claim against you no later than the 30th day after the date of the settlement.

26. You have the right to refuse to provide your insurance company with information that does not relate to your claim. In addition, you may refuse to provide your federal income tax records unless your insurer gets a court order or your claim involves lost income or a fire loss.

B. Duties set out within the Insurance Contract. Many of the duties relating to the claims process are now also a part of the insurance contract. Please refer to the Appendix B for provisions on “Duties after Loss” from standard personal lines policies regarding loss and claim adjustment.

5 **COMMON LAW CONFLICT OF INTEREST.** While conflict of interest is more commonly thought of in the context of an attorney-client or a fiduciary relationship, there are a few situations where Texas courts have applied the concept to an insurance company

in the claims handling context. First, it has been applied in the context of a carrier's duty to defend an insured against third-party claims when the carrier issues a reservation of rights. This will be more closely examined later in this publication. Second, it has been applied in the context of an uninsured motorist claim where the carrier seeks to defend the uninsured motorist in direct opposition to the claim being advanced by the carrier's insured. This conflict has been referred to by one Texas court as the "Hunt Presumption."⁸ Finally, while not always specifically couched in terms of conflict of interest, conflict of interest is cited as a reason why a carrier can not subrogate against its insured.

- A. **THE HUNT PRESUMPTION.** The *Hunt* case refers to an uninsured motorist case decided in 1970, *Allstate Ins. Co. v. Hunt*,⁹ in which Allstate, the plaintiff/insured's auto insurance carrier, wanted to participate in the tort action between the insured and uninsured driver, i.e. defend uninsured driver. In a case of first impression the Houston's 14th Court of Appeals considered whether an insurance company should be permitted to participate in the defense of an uninsured motorist in a suit brought by its own insured.¹⁰ The Court noted that:

Serious ethical problems arise when an insurance company seeks to participate in the defense of an uninsured motorist. There may be (1) a potential or actual conflict of interest between the insurance company and its own insured and (2) there may be a potential or actual conflict of interest between the insurance company and the uninsured motorist. As the representative of the uninsured motorist the company stands in a fiduciary relationship to him. As the insurer of one suing the uninsured motorist it has, contractually, not only the right but also the duty to represent its insured in defense of any claim that may be asserted against him as a result of the collision in question, and thus stands in a fiduciary relationship to him. Thus to permit the insurance company to defend the uninsured motorist is to permit it to assume a fiduciary relationship to two parties having conflicting interests in the subject matter of the trust.¹¹ ... Of immediate concern is the conflict of interest between the company and its own insured. If the insured brings suit against the uninsured motorist and the company is permitted to defend such uninsured motorist, the company would attempt to prove either the negligence of its own insured, or the uninsured motorist's freedom from negligence. Either determination would inure to the benefit of the insurance company. The company interests are therefore opposed to those of its own insured.¹² ... *We are of the opinion, ... that the conflict of interest that is in every case potentially present compels a determination that the insurance company must refrain from representing the uninsured motorist or from intervening in an*

⁸ See *Nationwide Mut. Ins. Co. v. Patterson*, 962 S.W.2d 714,716 (Tex. App.--Austin 1998, writ denied).

⁹ 450 S.W.2d 668 (Tex. Civ. App.-- Houston [14th Dist.] 1970, *aff'd* 469 S.W.2d 151 (Tex.1971)).

¹⁰ See *id* at 671.

¹¹ See *id* at 671-672.

¹² See *id* at 672.

uninsured motorist case such as the one here presented. Only such determination will eliminate the possibility of the conflict of interest arising."¹³

- 1) Interestingly, since uninsured motorist coverage was still relatively new, the Court also relied on the traditional auto insurance concept that the primary obligation of the company issuing automobile liability coverage is to defend the insured against suits alleging damages within the terms of the policy, and not ancillary coverage such as this.¹⁴ Accordingly, the *Hunt* Court also concluded that an insurance company should not be permitted to voluntarily place itself in a position under an ancillary policy provision where it cannot ethically fulfill its basic contractual obligation to defend its insured.¹⁵

- 2) **The *Hunt* Presumption and the Consent Clause.** While *Hunt* seemed to cast a bright line rule, essentially followed for thirty years, that carriers cannot participate in an insured's suit against an uninsured motorist, a little noticed case in 1998, cracked the door open a bit for carriers on this particular conflict of interest issue.¹⁶ In the *Patterson* case, Nationwide issued an automobile policy in North Carolina for a vehicle that was involved in an accident in Texas.¹⁷ The policy did not contain a consent to sue clause and the insured brought suit in Texas against the uninsured tortfeasor and Nationwide, the plaintiff's carrier. The parties agreed that Texas law applied. The Plaintiff took a no-answer default judgment against the uninsured driver, and summary judgment was rendered against Nationwide for the full amount of the judgment rendered against the uninsured driver. On appeal, Nationwide argued it should not be bound by the default judgment because it could not defend the uninsured defendant pursuant to the rule announced in *Hunt*.¹⁸ The Austin Court of Appeals disagreed and held that as a presumption, the existence of conflicting interests and fiduciary duties precludes an insurer from defending an uninsured motorist against the company's own insured.¹⁹ The prohibition, however, is not absolute and the Court noted, as did the *Hunt* court, that there may be other instances where the insured motorist is clearly at fault and the insurance company has not, in fact, obtained confidential information from its insured as it did in the *Hunt* case.²⁰ The lack of substantial conflict of interest, and the right of the insurance company to protect itself, would weigh on the side of allowing it to participate in the trial on the side of the uninsured motorist.²¹ *Hunt* creates, therefore, only a presumption that a conflict of interest precludes the

¹³ See *id.* at 672-673 (emphasis added).

¹⁴ See *id.* at 673.

¹⁵ See *id.*

¹⁶ See *Nationwide Mut. Ins. Co. v. Patterson*, 962 S.W.2d 714,716 (Tex. App.--Austin,1998, writ denied).

¹⁷ See *id.* at 714.

¹⁸ See *id.* at 716.

¹⁹ See *id.* at 716.

²⁰ See *id.* at 716.

²¹ See *id.*

insurer from acting against its insured's interest, but allows the insurer to do so on a proper showing to the Court.²²

- 3) Importantly absent from the policy in the *Patterson* case was a "Consent Clause" which is a standard provision in the Texas Automobile policy. With respect to uninsured motorist coverage it provides "Any judgment for damages arising out of a suit without our consent is not binding on us." This provision typically gives the insurer contractual protection without having the need to defend the uninsured defendant driver.

B. Subrogation

- 1) **Carrier Subrogation against own insured generally prohibited.** There is a general principle in law, recognized in Texas, that an insurer does not have a right of subrogation against its own insured to recover for sums paid out under an insurance policy.²³ The prohibition against an insurer subrogating itself against its insured is based on, among other things, the public policy considerations which are raised due to the fiduciary relationship between the two.²⁴ One Court indicated that "the situation where an insurer attempts to subrogate and sue his own insured, whom he is obligated to defend, gives rise to so many opportunities for conflict of interests or misrepresentation of the insured that public policy commands that the insurer be denied the right to do so."²⁵ Additionally, Texas courts have recognized a "special relationship" between an insurance company and its insured, giving rise to duties of good faith and fair dealing.²⁶ Allowing an insurer to unilaterally settle uncovered claims and then step into the shoes of the claimant and sue its own insured runs counter to this relationship and to public policy interests in fostering trust and eliminating conflicts of interests between the insurer and its insured.²⁷
- 2) **Equitable Subrogation.** In the context of the defense of a third-party claim, Texas courts permit, through the doctrine of equitable subrogation, an excess insurance carrier to assert a legal malpractice claim against the insured's defense attorneys, and a negligence action against the primary carrier.²⁸ But the evidentiary burden is heavy. In such a case where the defense counsel or

²² See *id.*

²³ See *Matagorda County v. Texas Ass'n of Counties Government Risk Management Pool*, 975 S.W.2d 782, 786 (Tex. App.– Corpus Christi, 1998) *aff'd*, 52 S.W.3d 128 (Tex. 2000); *AGIP Petroleum Co. v. Gulf Island Fabrication, Inc.*, 920 F.Supp. 1318, 1326 (S.D. Tex. 1996); *Stafford Metal Works, Inc. v. Cook Paint & Varnish Co.*, 418 F. Supp. 56, 58 (N.D. Tex. 1976).

²⁴ See *Stafford*, 418 F.Supp. at 58-59.

²⁵ See *Stafford*, at 62.

²⁶ See *Crim Truck & Tractor Co. v. Navistar Intern. Transp. Corp.*, 823 S.W.2d 591, 593-94 (Tex. 1992); *Aranda v. Insurance Co. of N. Am.*, 748 S.W.2d 210, 212-13 (Tex. 1988); *Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987).

²⁷ See *Matagorda County v. Texas Ass'n of Counties Government Risk Management Pool*, 975 S.W.2d 782, 786 Tex. App.– Corpus Christi, 1998 *aff'd* 52 S.W.3d 128 (Tex. 2000)

²⁸ See *American Centennial Ins. Co. V. Canal Ins. Co.*, 843 Sw2d 480 (Tex. 1992).

primary carrier cause the excess carrier to pay more than it should have to settle the case, the excess carrier has to show that the settlement was excessive in the abstract yet reasonable under the circumstances.²⁹ The excess carrier must also prove that the attorney or primary carrier mishandled the defense of the insured and that a judgment for the plaintiff against the insured in excess of case's true value resulted from the mishandling.³⁰ Accordingly, the excess carrier must show that the true value of the case was less than the amount paid to settle it, but was inflated due the attorney's malpractice.³¹ If proven, the excess carrier can recover damages against the attorney as the difference between the true and inflated values of the case, less any amount saved by the settlement.³² In such a case, evidence of the excess carrier's post-tender conduct is admissible on the affirmative defense of comparative responsibility if raised, and even evidence of pre-tender conduct might be admissible if the insured's defense was harmed by the excess carrier's interference.³³

- 3) **Multiple policies covering the same loss.** Subrogation is also permissible against third parties and against another insurance carrier of the insured that also has coverage for the same loss. When two insurers have contracted to pay a loss and each insurer's policy contains a pro rata clause, each insurer is liable to the insured only for its proportion of the loss.³⁴ In that situation, the pro rata clause implements the principle of indemnity and eliminates the potential for a double recovery that would otherwise exist.³⁵ If an insurer overpays its share of a loss, the correct manner of adjusting for that overpayment is for the insurer to assert a contractual or equitable right of subrogation.³⁶

- C. **Key Lessons.** There is a recognized special relationship between carrier and insured. Careful contemplation should be used before instituting any action against or contrary to the insured. The insurance contract should be the first thing considered to determine whether a particular action against an insured is permissible or warranted. When dealing with non-standard policies, such as in the *Patterson* case, a carrier may have to assert positions against the insured or risk waiving valuable rights to challenge the insured's claim. Accordingly, a thorough knowledge of the particular policy at issue is essential for determining if a particular action is essential or appropriate in a given claim.

²⁹ See Keck, Mahin & Cate, *Grant Cook v. Nat'l Union Fire Ins. Co.*, 20 SW3d 692, 703 (Tex. 2000)

³⁰ See *id.*

³¹ See *id.*

³² See *id.*

³³ See *id.* at 703-04.

³⁴ See *Employers Cas. v. Transp. Ins. Co.*, 444 S.W.2d 606, 608 (Tex.1969); *United States Fire Ins. Co. v. Stricklin*, 556 S.W.2d 575, 578 (Tex. Civ. App.--Dallas 1977), *writ ref'd n.r.e.*, 565 S.W.2d 43 (Tex.1978) (per curiam).

³⁵ See *State Farm Fire & Cas. Co. v. Griffin*, 888 S.W.2d 150, 156 (Tex. App.-Houston [1st Dist.] 1994, no writ).

³⁶ See *Gen. Agents Ins. Co. of Am., Inc. v. Home Ins. Co. of Ill.*, 21 S.W.3d 419, 424 (Tex. App.- San Antonio 2000, no pet.).