DECLARATORY JUDGMENTS: PLANNING THE PARTY

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I. Choosing the Court – Federal v. State

A. Advantages of Federal Court

1. Law Clerks / Motion Practice

2. Possible greater familiarity with Insurance issues

3. Possibly more receptive to out of state authorities in absence of controlling Texas insurance precedent

4. Ability to join and bind the underlying plaintiffs (see discussion below)

B. Advantages of State Court

1. Jury Voir Dire (but some federal judges will allow it more than others)

2. Recovery of attorney fees—Whereas attorney fees are generally recoverable by the prevailing party under the Texas Declaratory Judgment Act, the federal act does not provide for fees to be awarded. *Utica Lloyds of Tex. v. Mitchell*, 138 F.3d 208, 210 (5th Cir. 1998).

3. Local venue flavor/influences

II. Federal Jurisdiction Issues

A. Diversity Jurisdiction

1. Amount in Controversy

In a diversity action, the party seeking to establish federal court jurisdiction, based on the diversity of the citizenship of the parties, must establish that the amount in controversy exceeds the value of $75,000.00, exclusive of interests and costs. 28 U.S.C.A. 1332(a). A Plaintiff filing an original complaint in federal court must meet this requirement, and a defendant seeking to remove a case to federal court must also meet this requirement. The claimant, for example, a policy holder, may typically be in control of his own demand. The party has the ability, as a general matter, to set forth the sums being sought, and may even expressly provide that the amount being sought is limited to no more than a certain specified amount. If Plaintiff asserts that his claim is no more than for $50,000.00, for example, that claim cannot be removed. On the other hand, if the Plaintiff sets forth that he is seeking $50,000.00, plus other unspecified amounts, he may find that the case can be removed to federal court.

When a Plaintiff, filing an action in state court, simply says that the amount in controversy exceeds the minimum jurisdictional amounts of the state court when it is filed, a

removing defendant than has the opportunity to provide the missing information, and assert that the amount does exceed $75,000.00. See *Raymart, Inc. v. Stock Building Supply of Texas, L.P.*, 435 F. Supp. 2d 578 (S.D.Tx. 2006). If the removing Defendant specifically sets forth and describes the controversy and the amount in controversy, the case may be removed. However, in a motion to remand, the Claimant may again assert that his claim is capped at less than $75,000.00.

However, it is not enough for a removing Defendant to simply say that the Defendant does not know whether or not the amount in controversy exceeds $75,000.00, but it might. The insurance company filing a Declaratory Action, or removing an action filed in state court, must affirmatively establish that the amount in controversy exceeds $75,000.00, to establish federal court jurisdiction. If it simply says it does not know the amount, than no federal court jurisdiction is conferred. See *Ross v. Enter-Ocean Ins. Co.*, 693 F.2d 659 (7th Cir. 1982); *Burk v. Medical Savings Ins. Co.*, 348 F. Supp. 2d 1063 (D. Ariz. 2004).

Federal court jurisdiction is not conferred simply by the joinder of two smaller claims, neither of which trigger federal court jurisdiction, but which exceeds $75,000.00 in the aggregate. If several home owners band together to file a wind storm or hail claim, alleging they were all victims of the same storm and have similar issues, even with the same insurance company; to trigger federal court jurisdiction, at least one of those claims by itself, must exceed the required amount. See *Dawson v. Fidelity & Guaranty Ins. Co.*, 561 F.Supp.2d 914 (N.D. Oh. 2008).

When a claimant seeks more than simply the amount owed under the claim, the additional sums sought, if plausibly sought, will be considered. For example, when a claimant brings an insurance code violation claim, and is entitled to recover statutory attorneys' fees, those fees will also be considered in whether or not the $75,000 threshold is met. See *Louque v. Allstate Ins. Co.*, 314 F.3d 776 (5th Cir. 2002); *Hendrickson v. Xerox Corp.*, 751 F.Supp.175 (D. Ore. 1990); *Ellis v. Logan Co.*, 543 F.Supp. 583 (W.D. Ky. 1982). However, simply because a claimant asserts a right to attorneys' fees, if there is no such right recognized in law, such a claim will not be considered. See *Denbo Iron & Metal Corp. v. Transportation Ins. Co.*, 792 F.Supp.2d 1234 (E.D. Ala. 1992). In a pure tort action, such as a common law *Stowers* action, if attorneys' fees are not recoverable (as they would be under a statutory *Stowers* claim), the fact that the claimant mentions it in the Petition or Complaint does not mean that those items will be considered.

a. Determining the Amount in Controversy in a Dec Suit

Given the intangible relief typically sought in a declaratory judgment action, there can sometimes be an issue as to what the amount in controversy is for purposes of determining if the requirements for federal court jurisdiction/removal are satisfied. As a starting point, the plaintiff's allegation of the amount of damages controls, so long as the assertion is made in good faith. *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1335 (5th Cir. 1995). Thus, if the insurer initiates the declaratory action in federal court and affirmatively alleges that the amount in controversy exceeds $75,000, then that allegation, if made in good faith, will control. When the

plaintiff's complaint, however, fails to specify a damage amount in controversy and it is not otherwise facially apparent, the burden is on the party asserting jurisdiction to prove the jurisdictional amount by a preponderance of the evidence. *DeAguilar v. Boeing Co*., 11 F.3d 55, 58 (5th Cir. 1995); Marcel v. Pool Co., 5 F.3d 81, 84 (5th Cir. 1993). In making this evidentiary determination, the court may consider summary judgment type evidence. *DeAguilar v. Boeing Co.*, 47 F.3d 1404, 1409 (5th Cir. 1995). In the case of removal, this determination is made at the time of removal, not at the time the case may have been originally filed. *Cavallini v. State Farm Mut. Auto Ins. Co*., 44 F.3d 256, 264 (5th Cir. 1995).

In a case involving insurance coverage issues, the court considers the insurer's potential liability under the policy, plus potential attorney fees, penalties, statutory damages and punitive damages. *St. Paul Reinsurance Co. Ltd. v. Greenburg*, 134 F.3d 1250, 1253 (5th Cir. 1998). It has been stated differently, but to the same effect, that in a declaratory relief action, "the amount in controversy is measured by the value of the object of the litigation." *Total Environmental Solutions v. St. Paul Fire & Marine Ins.Co*., 2003 WL 715755, at *2 (E.D. La. Feb. 26, 2003); *Leininger v. Leininger*, 705 F.2d 727, 729 (5th Cir. 1983). Thus, it is measured by the "value of the right to be protected or the extent of the injury to be prevented." *Greenburg*, 134 F.3d at 1252-53.

Thus, for example, in determining the amount in controversy in a declaratory judgment action on the duty to defend, the court can consider the amount of attorney fees already incurred by the insurer, the amount of fees incurred or to be incurred by the insurer in the dec suit itself, any 18% penalties that may be owed and any potentially trebled damages under the Insurance Code or DTPA. *Etan Industries, Inc. v. Travelers Lloyds Ins. Co*., 2008 WL 1869216 (N.D. Tex. April 28, 2008).

If the issue is the validity of the insurance policy, as opposed to the insurer's actual duty to pay, the policy limits control and set the amount in controversy. *Rasberry v. Capitol County Mutual Fire Ins. Co*., 609 F.Supp.2d 594, 601 (E.D. Tex. 2009). However, in declaratory judgment actions involving the applicability of the policy to a particular occurrence or loss, the amount in controversy is measured by the value of the underlying claim rather than the face amount of the policy. *Id*.

In the case of Lloyds plans (see discussion below for special rules governing citizenship of the underwriters in a Lloyds plan), however, each individual underwriter is only severally liable, not jointly liable, on the policy; thus, the courts have held that severally liable parties may not aggregate their liabilities to satisfy the jurisdictional requirements and, instead, each of the underwriters must individually meet the amount in controversy requirement. *Etan Industries, Inc. v. Travelers Lloyds Ins. Co*., 2008 WL 1869216 (N.D. Tex. April 28, 2008).

While the federal statute conferring diversity jurisdiction, 28 U.S.C.A. 1332 speaks of the amount in controversy exclusive of "interest and costs," the terms "interest" and "costs" are construed narrowly. For example, even though a statute, such as the Insurance Code, may provide that attorneys' fees are to be awarded "as costs," those attorneys' fees may still be considered in determining the amount in controversy. See *CPFilms, Inc. v. Best Window Tinting, Inc.*, 466 F.Supp.2d 711 (W.D. Va. 2006).

Punitive damages and other extra contractual damages may also be considered, if the recovery of such damages is not considered highly speculative. *Gilmer v. Walt Disney Co.*, 915 F.Supp. 1001 (W.D. Ark. 1996). However, when the chances of recovering punitive damages, under the claims alleged, are remote, such claims will not be considered in determining the amount in controversy. *Martinez v. Kirk xpedx*, 2003 WL 21715875 (N.D. Cal. 2003). For a party seeking to avoid federal court jurisdiction, by keeping the amount in controversy, below $75,000.00, the Claimant must remember the rule to be careful for what he or she asks for.

2. Citizenship Issues

a. Lloyds Plans/Unincorporated Associations

A Lloyd's plan insurer consists of "a group of underwriters who join together to issue insurance through an attorney in fact or other representative." *Royal Ins. Co. of Am. v. Quinn-L Capital Corp*., 3 F.3d 877, 882 (5th Cir. 1993).(citing Tex. Ins. Code Ann. Arts. 18.01-.02 (West 1981)). Under a "Lloyds plan", the insured typically obtains insurance from one or more members of the Lloyd's group and each member accepts responsibility for a portion of the assumed risk and liability among the members is several and not joint. *Id*. Thus each member is responsible for only its assumed share of the insured risks. *Id*. The underwriting group then appoint an attorney in fact to act for them and issue the actual policy of insurance. *Id.* The attorney in fact, however, typically will not be one of the actual underwriters; instead, they act more as a manager or agent of the underwriters. *Id*.

Where the insurance policy at issue in the declaratory judgment action has been issued as a "Lloyd's plan", the case law is clear that in determining whether there is complete diversity of citizenship for purposes of federal court diversity jurisdiction, it is the citizenship of all of the underwriters on the policy and not the attorney in fact that matters. *Quinn-L Capital*, 3 F.3d at 883. In other words, all of the underwriters on the Lloyd's policy must be first ascertained, their citizenship determined each and every one of them must be diverse from each and every opposing party in order for diversity to exist. IN some cases, particularly in the London Lloyds market, just determining who all of the subscribing underwriters on a particular policy are can be a daunting task.

This issue is much more commonly encountered in Texas, however, where many policies, particularly homeowner policies, are issued by "Lloyd's plan" affiliates of the major domestic insurers, not just Lloyds of London. For example, "State Farm Lloyds" is such a Lloyds plan as is Texas Farmers Lloyds, Liberty Lloyds etc.

According to *Massey v. State Farm Lloyds Ins. Co.* , 993 F.Supp. 568 (S.D.Tex. 1998), here is basically how it works. State Farm Lloyds, Inc. is a Texas corporation. It acts as the attorney in fact for State Farm Lloyds, the actual insurance company that conducts business in Texas under the Lloyds plan. The Lloyd's plan underwriters, in turn, are each individuals (presumably State Farm corporate executives) living in Illinois (State Farm's home office). Thus, for purposes of diversity of citizenship, the Texas citizenship of State Farm Lloyds, Inc. , the Texas corporation is irrelevant. Instead, the citizenship of the Illinois underwriters is the

relevant citizenship and thus State Farm Lloyds, i.e. the legal entity that issued the policy, is completely diverse from its Texas policyholders. Thus, in *Massey*, State Farm Lloyds removed the insured's suit to federal court, the insured filed a motion to remand based on the Texas citizenship of State Farm Lloyds, Inc., and the court denied the remand.

For additional examples of diversity issues under Lloyds plans, see *State Farm Lloyds v. Peed*, 2001 WL 513427 (N.D. Tex. May 9, 2001); *Etan Industries, Inc. v. Travelers Lloyds Ins. Co.*, 2008 WL 1869216 (N.D. Tex. April 28, 2008);

b. Diversity "destroyers"

A Plaintiff may wish to avoid having his case removed to federal court, when the target defendant resides in another state. The Plaintiff may wish to add an additional defendant who resides in the same state as the Plaintiff. However, defendants may still remove the case to federal court, and defeat a motion to remand, by establishing that the resident defendant was fraudulently joined for the sole purpose of trying to defeat diversity jurisdiction.

Establishing fraudulent joinder requires meeting a fairly stringent requirement. The removing defendant must show that there is no basis or theory under which the Plaintiff can recover against the resident defendant, to establish fraudulent joinder. Doubts are resolved in favor of the Plaintiff being able to establish such a claim.

One popular defendant often joined to defeat diversity is the insurance agent who sold the policy. When there are allegations that some act or omission on the part of the insurance agent, or misrepresentation by the insurance agent, may be actionable; the joinder of the agent will not be held to be fraudulent. For example, see the case of *Frisby v. Lumbermen Mutual Casualty Co.*, 500 F.Supp.2d 697 (S.D. Tx. 2007); *Roby v. State Farm Fire & Casualty Co.*, 464 F. Supp.2d 572 (E.D. La. 2006); *Lawson v. American General Assurance Co.*, 455 F.Supp.2d 526 (S.D.W. Va. 2006); and *Team Industrial Services, Inc. v. American Safety Indemnity Co.*, 347 F.Supp.2d (S.D. Tx. 2004).

Joining that State's Insurance Commissioner, to establish as an additional resident defendant, is not usually successful. See *Coughlin v. Nationwide Mutual Ins. Co.*, 776 F.Supp. 626 (G. Mass. 1991).

However, where there are facts that can be pleaded to support it, suing the adjuster involved in the denial of the claim has been successful in defeating diversity jurisdiction. *Vargas v. State Farm Lloyds*, 316 F.Supp.2d 643 (S.D. Tx. 2002); *Blanchard v. State Farm Lloyds*, 2006 F.Supp.2d 840 (S.D. Tx. 2001).

Simply naming the adjuster as a defendant, however, is not enough. When the only claim being brought is for breach of the insurance policy, naming the adjuster would not prevent removal, since the adjuster was not a party to the contract and has no liability under the contract. *Iron Works Unlimited v. Purvis*, 798 F.Supp. 1261 (S.D. Miss. 1992). When, as a matter of law, the adjuster cannot be liable under the allegations made, naming the adjuster will not defeat removal. Again, the rule for Plaintiff seeking to avoid federal court, is to be careful what you

ask for and how you ask for it. In the *Vargas* case, *supra*, the Plaintiff specifically alleged that it was the adjuster who prepared and signed the denial letter, without making adequate disclosures in the denial letter. In the *Blanchard* case, supra, the adjuster was specifically alleged to have hired a biased engineer to investigate the claim, to have disregarded evidence tending to show the claim was covered, to have conducted an inadequate investigation and otherwise engaged in unfair settlement practices. Those allegations were found to be sufficient to defeat a claim of fraudulent joinder, and require remand of the case to state court.

Depending on the facts, a plaintiff may avoid removal to Federal Court by proper pleading.

B. Admiralty Jurisdiction/Maritime Insurance

Following the direction of the United States Supreme Court in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 313-14 (1995), the Fifth Circuit has ruled that "the interpretation of a contract of marine insurance is – in the absence of a specific and controlling federal rule – to be determined by reference to appropriate state law." *Ingersoll-Rand Financial Corp. v. Employers Ins. Of Wausau*, 771 F.2d 910, 912 (5th Cir. 1985). This presumption of state law is "axiomatic." *INA of Texas v. Richard*, 800 F.2d 1379, 1380 (5th Cir. 1986). However, state law will not be applied unless it bears a reasonable similarity to the federal maritime practice. *See Albany Ins. Co. v. Anh Thi Hieu*, 927 F.2d 882, 890 (5th Cir. 1991). A court should not apply state law that is inconsistent with "entrenched federal precedent." *Id.*

C. Service of Suit/Forum Selection Clauses

Some insurance policies, particularly surplus lines policies and policies issued by the London market, contain "service of suit" clauses providing that the insurer agrees to submit to any court of competent jurisdiction. A typical example of a "service of suit" clause is:

> It is agreed that in the event of the failure of the Underwriters hereon to pay any amount claimed to be due hereunder, the Underwriters hereon, at the request of the Assured, will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all the requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court. It is further agreed that service of process in such suit may be made as stated in Item 7 of the Declarations, and that in any suit instituted against any one of them upon this policy, the Company will abide by the final decision of such Court or of any Appellate Court in the event of an appeal.

See, *Columbia Casualty Co. v. Bristol-Myers Squibb Co.*, 215 A.D.2d 91 (N.Y. App. Div. 1995)). Some courts have held that this type of clause is only a "forum-selection" clause that allows the policyholder to bring a coverage action in any court of proper venue and jurisdiction.

See, e.g., International Ins. Co. v. McDermott, Inc., 956 F.2d 93, 95 (5th Cir. 1992) (holding that "service of suit" clause was a permissive forum selection clause). The majority of states have rejected the argument that a service-of-suit clause is also a choice-of-law provision. *See Chesapeake Utilities, Corp. v. American Home Assur. Co.*, 704 F.Supp. 551, 557 (D. Del. 1989) (service-of-suit clause selected procedural, not substantive law of forum); *Appachalachian Ins. Co. v. Superior Court*, 162 Cal.App.3d 427 (1984); *Hoechst Celanese Corp. v. National Union Fire Ins. Co.*, 1994 Del. Super. LEXIS 558, *3 (Del. Super. 1994). *But see Capital Bank & Trust Co. v. Associated International Ins. Co.*, 576 F.Supp. 1522, 1525 (M.D. La. 1984) (holding that a service of suit clause can represent a choice-of-law clause).

1. Texas Law

Texas has not adopted a clear rule on the issue. Some cases hold that a forum selection clause is inherently different from a choice-of-law clause. *See e.g., Phoenix Network Technologies (Europe) Ltd. V. Neon Sys., Inc.*, 177 S.W.3d 605, 617 (Tex.App.—Houston [1st Dist.] 2005, no pet.) (the parties' selection of Texas law did not affect validity of forum-selection clause); *see also* Jeffrey D. Dunn, *Texas Choice of Law Analysis for Contracts*, 40 TEX. J. BUS. L. 37, 48-49 (2004). On the other hand, some courts have held that a choice-of-law provision may indicate that a party has also submitted to personal jurisdiction of the state whose law was chose. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 482, 85 L.Ed.2d 528, 105 S.Ct. 2174 (1985); *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 792-93 (Tex. 2005).

2. London Market Service of Suit Modification

However, after 1944, Lloyd's and other London Marker Insurance Companies ("London") added to their service-of-suit clause the phrase, "[A]ll matters arising hereunder shall be determined in accordance with the law and practice of such Court [i.e., the court of competent jurisdiction where suit was brought]." [Emphasis added]. Courts construing this language have generally concluded that the intent is to select the substantive law of the chosen forum. *See, e.g., Lexington Ins. Co. v. Unionamerica Ins. Co.*, 1987 U.S.Dist. LEXIS 4358 at *5 (S.D.N.Y. 1987); *Monsanto Co. v. Aetna Casualty & Surety Co.*, 559 A.2d 1301, 1306 (D. Del. 1988); *General Phoenix Corp. v. Malyon*, 88 F.Supp. 502, 503 (S.D.N.Y. 1949). See also EUGENE R. ANDERSON ET AL., INSURANCE COVERAGE LITIGATION § 6.03[B][1], 6-25 ff. (2003 Supplement)).

3. Does the Service of Suit Clause Bar Removal to Federal Court?

Thus, the issue may arise as to whether a service of suit provision requires the insurer to accept a policyholder's selection of state court. Courts have split. *See Capital Bank & Trust Co. v. Associated International Ins. Co.*, 576 F.Supp. 1522, 1525 (M.D. La. 1984) (service of suit clause bars insurer from removing state court action to federal court.); *Accord, Rose City v. Nutmeg Ins. Co.*, 931 F.2d 13, 16 (5th Cir. 1991). *But see, McDermott Int'l, Inc. v. Lloyds Underwriters*, 944 F.2d 1199, 1204-05 (5th Cir. 1991) (service-of-suit clause did not waive reinsurer's right to remove).

4. Forum-Selection Clauses In General

"Forum-selection clauses," like service of suit provisions, are often enlisted to support the imposition of the substantive law of the selected forum. Once disfavored, after the U.S. Supreme Court recognized that parties could contractually select a forum to resolve contractual disputes,*M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9, 92 S. Ct. 1907, 1913, 32 L.Ed.2d 513 (1972), forum-selection provisions are generally upheld. In Texas, "forum-selection clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances." *Phoenix Network Technologies (Europe) Ltd. V. Neon Sys., Inc.*, 177 S.W.3d 605, 611 (Tex.App.—Houston [1st Dist.] 2005, no pet.).

D. Possible abstention issues

When a declaratory judgment action is filed or removed to federal court and there is another action pending in state court involving the same or related issues, then the issue will frequently arise as to whether the federal court should abstain from exercising jurisdiction because the matter can be better settled in the state court proceedings. In other words, there may be a "forum battle". While a full and complete treatment of all of the case law on the abstention doctrine is beyond the scope of this paper and could easily be an entire presentation by itself, the following is a brief summary of the abstention doctrine as applied to insurance declaratory actions.

In *Brillhart v. Excess Ins. Co. of Am.*, 62 S.Ct. 1173 (1942) , the United States Supreme Court identified six nonexclusive factors that a district court should consider in ascertaining "whether the questions in controversy between the parties to the federal [declaratory judgment action] ... can be better settled in the proceeding pending in the state court." The *Brillhart* factors to be considered are:

(1) the scope of the pending state court proceeding and the defenses open there;

(2) whether the claims of all parties in interest can be satisfactorily adjudicated in [the state] proceeding;

(3) whether necessary parties have been joined;

(4) whether such parties are amenable to process in [the state] proceeding;

(5) whether it would be "uneconomical or "vexatious" to proceed where an other suit was pending in state court; and

(6) whether hearing the declaratory judgment action would represent "[g]ratuitous interference with the orderly and comprehensive disposition of a state court litigation."

Sherwin-Williams Co. v. Holmes County, 343 F.3d 383, 389 (5th Cir.2003) (quoting *Brillhart*, 316 U.S. at 495).

In *Sherwin-Williams*, the court explained the relationship between the *Brillhart* factors and those identified in *St. Paul Ins. Co. v. Trejo*, 39 F.3d 585 (5th Cir. 1994). The Fifth Circuit

uses the factors identified in *Trejo* to guide a district court's discretion to accept or decline jurisdiction in a declaratory judgment action. *Sherwin-Williams*, 343 F.3d at 390. The factors identified in *Trejo* are:

(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;

(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 would serve the purposes of judicial economy; 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.

Sherwin-Williams, 343 F.3d at 388 (citing *Trejo*, 39 F.3d at 590-91. Although each circuit has its own test to express the *Brillhart* factors, each one considers the overarching questions of (1) "the proper allocation of decision-making between state and federal courts"; (2) fairness, and (3) efficiency. *Id.* at 90-91. As explained by the Fifth Circuit in *Sherwin-Williams*, the " *Trejo* factors clearly address these three categories of issues." *Id*. at 391.

Pending state action

The first *Trejo* factor asks whether there is a pending state court action in which all of the matters in controversy can be fully litigated. 39 F.3d at 590. "A district court may decline to decide 'a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties.' " *Sherwin-Williams*, 343 F.3d at 392 (quoting *Brillhart*, 316 U.S. at 495). Thus, if all necessary parties to the dispute are not or cannot be made parties in the competing state court action, this factor may favor the insurer's federal court action; conversely if all necessary parties are parties in both cases, this factor would favor the state court proceeding.

Anticipatory filing, forum shopping, and fairness

The second, third, and fourth *Trejo* factors ask whether the declaratory plaintiff filed suit in anticipation of a lawsuit filed by the declaratory defendants, whether the plaintiff engaged in forum shopping, and whether deciding the declaratory action will result in inequities in allowing the plaintiff to change forums or gain precedence in time. 39 F.3d at 590-91. These factors do not automatically weigh in favor of the defendant simply because the plaintiff chose a federal forum and filed the action in anticipation of litigation. Indeed, "[m]erely filing a declaratory judgment

action in a federal court with jurisdiction to hear it, in anticipation of state court litigation, is not in itself improper anticipatory litigation or otherwise abusive 'forum shopping'." *Sherwin-Williams*, 343 F.3d at 391. Rather, in considering these factors, the issue for the court is whether the plaintiff is attempting to "use the declaratory judgment process to gain access to a federal forum on improper or unfair grounds." *Id*. Thus, although one party (typically the insurer) may have anticipated that the other would file a state court suit, such anticipation, without more, does not constitute wrongful conduct. However, if the federal court filer induced the other side by its actions to hold off on suing and thereafter takes advantage of the inaction to win the "race to the courthouse", then the anticipatory filing factor may militate against the federal court forum proceeding.

Convenient forum

The fifth *Trejo* factor asks whether the federal court is a convenient forum to litigate for the parties and witnesses. 39 F.3d at 591. This factor should be applied not only to the policyholder but the insurer and all other necessary parties as well.

Judicial economy

The sixth *Trejo* factor asks whether judicial economy would be served by retaining the declaratory action in federal court. 39 F.3d at 591. This factor may take into account the scope of relief available in the two forums, and whether all interested parties can be bound to a result in one forum v. the other. Thus, for example, if the federal court forum allows the underlying plaintiff/potential judgment creditor to be joined and bound by the declaratory relief but the competing Texas state court action cannot bind the plaintiff. (See discussion below).

State judicial decree

The last *Trejo* factor asks whether the federal court is being asked to construe a state judicial decree involving the same parties. 39 F.3d at 5 91. If the federal court is being asked to do so, this factor clearly weighs in favor of dismissing the action for federalism concerns. *Sherwin-Williams*, 343 F.3d at 392.

III. Choosing the Parties – Joining the Underlying Injured Claimant/Plaintiff

Coverage litigation, of course, requires the participation of the policy holder seeking coverage, and the insurance carrier resisting coverage. In addition, there is often the temptation to invite others to the party. The policy holder might want to include more than one insurance carrier from whom coverage is sought, and the insurance company might seek to join the claimants who are suing the policy holder, and/or other insurance carriers which they may wish to contend are also responsible for some or all of the claims for paying some or all of the claims. There are a number of considerations with respect to these decisions.

A. Personal Jurisdiction Issues

As discussed in more detail below, insurers that file a declaratory judgment action may want to join the underlying plaintiffs suing the insured in the declaratory judgment action so that they are bound by the ruling under principles of res judicata so that the insurer is protected from a later suit by the plaintiffs to collect on the judgment that they may obtain against the insured. When the underlying liability suit, the insured and the plaintiffs are all located in Texas, then a declaratory judgment action in Texas presents no obvious jurisdictional isssues. But what if, as is not infrequently the case, the underlying suit is against a Texas insured but filed in another state by citizens of such other state who have little or no contact with Texas.? In that scenario and others similar to it, the underlying plaintiffs may assert that the Texas declaratory judgment action court has no personal jurisdiction over them and seek dismissal from the declaratory action.

Personal jurisdiction issues can also arise in other insurance declaratory judgment contexts involving jurisdictional challenges lodged by even insureds under the policy as the cases discussed below also show.

The bottom line is that personal jurisdiction issues need to be considered carefully before any declaratory judgment action is filed because jurisdictional issues may mandate that the action be filed in a particular forum that can exercise jurisdiction over all or at least most of the necessary parties as opposed to a venue where only incomplete relief as to some parties is possible. The mere fact that the insured may be located in Texas or that the policy was issued in Texas, or even that the underlying suit against the insured involved is filed in Texas, may not necessarily mean that the insurer should file the declaratory judgment action in Texas. In some cases, it may even be impossible to find a single venue where complete relief as to both the insured and all underlying plaintiffs is possible.

These caveats are especially true where the underlying suits against the insured for which coverage is in question have been filed against the insured by out of state Plaintiffs in a different state. For example, in *Illinois Union Ins. Co. v. Tri Core*, 191 F.Supp. 794 (N.D.Tex. 2002), the insured corporation was sued in several suits filed in New Jersey by New Jersey plaintiffs. The insured sought coverage from the insurer but the insurer contended that the policy was procured by fraud and sought to rescind. The insurer filed a declaratory judgment action in New Jersey federal court naming both the insureds and the underlying New Jersey plaintiffs. 53 days later, the insureds sued the insurer in Texas state court. The insureds then sought transfer of the insurer's federal court declaratory judgment action to Texas under 1404(a) principles and the New Jersey federal court granted the transfer and thus transferred the case to the Northern District of Texas. The insurer then sought retransfer back to New Jersey federal court and pointed out that for the transfer to be proper, the transferee court must be one in which the case could have been filed originally and pointed out that the insurer had named the New Jersey Plaintiffs in the New Jersey federal court whereas several of those New Jersey plaintiffs had no minimum contacts with Texas and thus could not have been sued in Texas. Judge Barbara Lynn agreed, and held that the New Jersey plaintiffs were not subject to jurisdiction in Texas and thus re-transferred the case to New Jersey.

On the other hand, if the out of state underlying plaintiffs file the underlying suit at issue against the insured in Texas (as opposed to filing in their home state as was the case in *Illinois*

Union), then the out of state plaintiff has "purposefully availed" themselves of Texas courts such that if the insurer then names them in the declaratory judgment action along with the insured, there is personal jurisdiction over them. *Cincinnatti Ins. Co. v. RBP Chemical Technology, Inc*., 2008 WL 686156 (E.D. Tex. Mar. 6, 2008). Thus, in *RBP*, the when several plaintiffs that had sued the insured in state court in Orange, Texas for alleged toxic exposure to chemicals sought to be dismissed from the insurer's declaratory judgment action filed against them and the insured for al

There may even be problems with personal jurisdiction over an insured even when the underlying suit against the insured is filed in Texas as evidenced by *Admiral Ins. Co. v. Briggs*, 2002 WL 1461911 (N.D. Tex. July 2, 2002). There, the issue was whether the insurance company could sustain personal jurisdiction over two officers/directors of the insured corporation in connection with the D & O insurer's declaratory judgment action filed in Texas federal court. The underlying suit against the insured corporation and its officers/directors was filed in Texas and the insured corporation did business in Texas. Nevertheless, the court granted one of the out of state officers/directors' motions to dismiss for lack of personal jurisdiction on the basis that while he had contacts with Texas, all such contacts were solely on behalf of the corporation and not in his personal capacity. The fact that Admiral had undertaken to defend the director/officer in the Texas underlying suit was irrelevant absent some conduct on the part of the director/officer in her personal, as opposed to corporate capacity, directed at Texas. The court, however, denied the motion to dismiss filed by the other director/officer based on the fact that he had committed a tort in Texas in his personal capacity that was the subject of the underlying suit's claims against him and for which he was seeking coverage. Thus, the court could exercise jurisdiction over one of the officers but not the other.

In *American Casualty Co. of Reading v. River's Edge Pharmaceuticals,* 2006 WL 62819 (W.D.Tex., Jan. 10, 2006) the district court considered whether an out of state product manufacturer/distributor whose only contact with Texas was that some of its products found their way to Texas in the stream of commerce resulting in a product liability suit being filed against it in Texas was subject to the insurer's declaratory judgment action in Texas. The court acknowleged that the insured had sufficient minimum contacts with Texas in order to be subject to jurisdiction in the underlying product liability suit. However, the court, citing *Briggs*, distinguished the product-related contacts with Texas from the insurance policy construction issues involved in the declaratory judgment action, and held that there was insufficient nexus between the two absent any other contacts with Texas. Thus, the fact that the underlying product suit against the insured was filed in Texas related to products used by Texas consumers, without anything more, was insufficient to subject the out of state insured to the jurisdiction of the Texas court in the insurer's declaratory judgment action.

In *State Farm Fire & Cas. Co. v. Miraglia*, 2007 WL 2963505 (N.D. Tex. , Oct. 11, 2007), however, the court held that Texas courts did have jurisdiction over an out of state insured who was being sued in underlying suits filed in Texas by Texas residents that alleged that the out of state insured had posted defamatory statements about them on a Yahoo.com bulletin board posting. The court pointed out that the underlying defamatory comments were specifically directed at the Texas plaintiffs by name and thus satisfied the minimum contacts requirements. Thus, where the underlying suit against the insured involves more than merely fortuitous

contacts with Texas and involves, instead, conduct specifically directed at Texas or Texas residents, then the fact that such conduct forms the basis of the underlying suit against the insured in Texas may also give jurisdiction over the insured in a declaratory judgment action filed in Texas.

B. Can the Plaintiff be Bound?

Typically it will be the insurer who brings the declaratory judgment action. And in those cases, the insurer, ideally wants to bind not only the insured to a finding of no coverage, but also wants to cut off any claim that the plaintiff/potential future judgment creditor may later have to sue on the policy to collect any judgment. In fact, it has been held that the third party plaintiff cannot be bound by any of the issues decided in the declaratory judgment action if it is not joined in the case. *Dairyland County Mut. Ins. Co. v. Childress*, 650 S.W.2d 770, 773-74 (Tex. 1983). That raises the question, therefore, as to whether the insurer can sue not only the insured, but also the underlying plaintiff in the coverage action before the underlying suit has been concluded so as to make sure that the plaintiff will be bound by any coverage-adverse result.

In *Gandy*, the Texas Supreme Court seems to specifically contemplate that the third party plaintiff is a proper party to the insurer's declaratory judgment action, even while the underlying suit is still pending, because the court, in extolling the virtues of an insurer attempting to resolve the coverage issues before the underlying suit goes to trial said "[a] plaintiff who thinks a defendant should be covered by insurance may be willing to . . . assist in obtaining an adjudication of the insurer's responsibililty". *State Farm Fire and Cas. Co. v. Gandy*, 925 S.W.696, 714 (Tex. 1996).

In *Farmer's Texas v. Griffin*, 955 S.W.2d 81, 84 (Tex. 1997) the Texas Supreme Court recognized, in part based upon a 1985 amendment to Article 5, Section 8 of the Texas Constitution, that it no longer ran afoul of the "case and controversy" justiciability concept for a court to issue a declaratory judgment on the duty to indemnify even before the underlying suit against the insured had been concluded. *Griffin* involved an insurer's suit against its insured and the third party plaintiff that had sued the insured seeking a declaration of no duty to defend and no duty to indemnify. And the court, picking up on the earlier suggestion of the court in *Gandy*, noted that "*Gandy* requires an insurer to either accept coverage or make a good faith effort to resolve coverage before adjudication of the plaintiff's claim, *and also suggests that the plaintiff may wish to participate in that litigation*." *Griffin*, 925 S.W.2d at 84 (emphasis added).

But what if, notwithstanding the suggestions in *Griffin* and *Gandy* to the contrary, the underlying plaintiff does not chose to file or otherwise be involved in the declaratory judgment action? Can the insurer force them to be involved and thus bound by naming them along with the insured? That issue, notwithstanding the comments made in *Griffin* and *Gandy*, was not squarely addressed in either case. And *Richardson* only held technically that the insurer could be sued by the third party in a declaratory judgment action but did not consider the converse.

Several cases illustrate the pitfalls to the insurer if it does not join the underlying plaintiff and highlight the possible significance of filing in federal court v. state court.

In the case of *Lumbermen County Mutual Ins. Co. of Texas v. Childers*, 650 S.W.2d 770 (Tex. 1983), the insurance company first obtained a judgment, by default, against the policy holder establishing no coverage. When the claimant also obtained a judgment against the policy holder, also by default, and sued the insurance company for coverage, the insurance company raised the defense of collateral estoppel. The Supreme Court held that since the claimant had not been a party to the original case, that it was not bound by the original decision, and could therefore bring the claim against the carrier.

In *El Naggar Fine Arts Furniture, Inc. v. Indian Harbor Ins. Co.*, 2007 WL624535 (Tex.App.—Houston [1st Dist.] March 1, 2007) El Naggar filed a suit against Traxel for construction defects. A jury returned a verdict in favor of El Naggar. During the pendency of the construction defect litigation, Indian Harbor filed a federal declaratory judgment action against Traxel. Indian Harbor did not name El Naggar in the declaratory judgment action nor did El Naggar intervene, even though it had actual knowledge of such action. Traxel failed to appear in the declaratory judgment action and, therefore, the court entered a default judgment against Traxel, rendering a judgment that Indian Harbor owed no duty to defend or indemnify Traxel in the construction litigation.

Thereafter, El Naggar sued Indian Harbor in a separate state court suit seeking coverage for the liability judgment. Indian Harbor asserted res judicata on the issue of coverage based on the default judgment rendered against the insured. The court of appeals examined the concept of privity.. Relying on the U.S. Supreme Court case of *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 61 S.Ct. 510, 85 L.3d 826 (1941), the court first noted that Maryland in that case had joined the plaintiff in the declaratory suit so that if Indian Harbor had joined El Naggar in its federal declaratory action, then the joinder would have been appropriate. However, in *Pacific Coal*, the Supreme Court had noted that in the absence of joinder of the plaintiff, then the plaintiff would not be bound by the result under federal privity and preclusion standards. Thus, under *Pacific Coal*, the court declined to find the requisite privity necessary to support a finding of res judicata.

The *El Naggar* court also cited *National American Ins. Co. v. Breaux*, 368 F.Supp.2d 604 (E.D. Tex. 2005). In *Breaux*, injured third parties sought a summary judgment for claims made against them by an insurer's suit seeking a declaration that it did not have a duty to defend or duty to indemnify its insured against the third parties' state court claims. *Id.* at 619-621. The injured parties claimed they had no privity of contract and were only potential judgment creditors and, thus, there was no justiciable controversy. The *Beaux* court held that the injured third parties were proper parties to the declaratory judgment action and that the court was entitled to declare the insurer's rights with regard to both its insured and the injured third parties. *Id.* at 621. Thus, Breaux shows that Indian Harbor in its federal declaratory judgement action could have joined the plaintiff and bound plaintiff to the result of that case but since it did not do so, Plaintiff was not bound and could force Indian Harbor to relitigate the issues again in El Naggar's state court proceeding.

Thus, as *El Naggar* illustrates, the resolution of this issue may, in fact, turn on whether the declaratory judgment action is filed in federal v. state court. For example, in *Northfield Insurance Company v. Loving Home Care, Inc.*, 363 F.Supp. 523 (5th Cir. 2004), the opinion

makes clear that the caimant was an active participant the dispute, and the caimant's arguments were expressly addressed and analyzed by the 5th Circuit. In contrast, at least historically, Texas state courts have been somewhat hostile to insurer's attempts to join the underlying plaintiff in the declaratory judgment action before the underlying suit has terminated.

For example, in *Nat. Savings Ins. Co. v. Gaskins*, 572 S.W.2d 573 (Tex. App.—Ft. Worth 1978, no pet.), the insurer sued both the insured and underlying plaintiff for declaratory judgment on the duty to defend and duty to indemnify. The coverage dispute was over late notice as opposed to some other kind of coverage issue that might be affected by how the underlying case was pleaded or tried. The plaintiffs moved for summary judgment asserting no justiciable controversy; the motion was granted and severed for appeal. The insurer specifically pointed out on appeal that the facts involved in the late notice defense were past facts that would not change and that if the plaintiffs recovered a judgment against the insured, they would be entitled to sue the insurer directly to recover on it and, thus, they had a justiciable interest in the proceedings. The insurer relied upon the U.S. Supreme Court's opinion in *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 61 S.Ct. 510, 85 L.3d 826 (1941) where the Court, on almost identical facts and arguments, held that there was a federally cognizable case or controversy between the plaintiff and the insurer; nevertheless, the Court of Appeals in *Gaskins* felt constrained by the Texas Supreme Court's decision in *Burch* and held that there was no justiciable case or controversy.

Likewise, in *Providence Lloyds v. Blevins*, 741 S.W.2d 604 (Tex. App.—Austin 1987, no pet.), the court held that under *Burch*, the insurer could not join the third party plaintiffs in the declaratory judgment action on duty to defend and indemnify and thus affirmed the plaintiff's special exceptions asserting no cause of action. The insured never answered the suit and a default judgment was rendered against him.

In *Safeway Managing Gen. Agency v. Cooper*, 952 S.W.2d 861 (Tex. App.—Amarillo 1997, no pet.), the insurer filed a declaratory judgment action against its insured and the underlying car wreck plaintiff asserting that a named driver exclusion in its policy negated all coverage and duty to defend. The case went to trial without any dismissal of the plaintiff who moved unsuccessfully for directed verdict and the court found the exclusion to be inapplicable and awarded fees to the plaintiff. The insurer appealed, and in a cross appeal, the plaintiff complained of the denial of her directed verdict motion. Relying on *Gaskins* and *Blevins*, the appellate court agreed that she was not a proper party and affirmed the fee award against the insurer.

In *Feria v. CU Lloyds of Tex.*, 2001 WL 1263666 (Tex. App.—Dallas 2001, no pet.)(unreported), the third party plaintiff, Feria, attempted to intervene in the insurer's declaratory judgment action against the insured but the trial court struck her intervention. The issue was the pollution exclusion as applied to Feria's suit alleging exposure to toxic fumes in the insured's building. Curiously, the insurer moved to strike Feria's intervention and the motion to strike was granted. The insurer eventually dismissed its declaratory judgment action for unknown reasons but Feria appealed the striking of her intervention. Feria specifically argued that *Griffin* contemplated and allowed her intervention but the court, in a somewhat perfunctory fashion simply held that until she acquired a judgment against the insured, she had no rights

under the policy and notes that *at the time of her intervention* the only issue to be determined was the duty to defend, an issue that she had no interest in. The court seems to have completely missed the fact that under *Griffin*, the duty to indemnify was also possibly ripe for ruling at the time of intervention.

Of course, *Griffin* specifically overruled *Burch* to the extent that the Texas Constitution now has been amended to allow for declaratory judgments on the duty to indemnify even before the underlying suit has been concluded in some circumstances. So, *Gaskin's* continued precedential value is at best questionable today.

Several fairly recent cases suggest that Texas courts might now, in fact, allow joinder of the Plaintiff in the declaratory suit.

In *Richardson v. State Farm Lloyds Ins. Co*., 2001 WL 1018651 (Tex. App.—Ft. Worth 2007, rev. denied) the court held that a declaratory judgment action could be brought by the injured third party/plaintiff against the defendant's liability insurer seeking a ruling that the insurer was obligated to defend and indemnify its insured. Significantly, the issue asserted by the claimant was not the duty to indemnify, but the duty to defend. Typically, Courts and commentators have concluded that the claimant has no real interest in the dispute over whether or not a defense is owed, only over whether or not indemnity is owed. The *Richardson* Court did not discuss this issue, but did find that the claimant had standing.

In *Richardson*, the Richardsons sued the Kays alleging that the Kays' son killed their son. In the same suit, they also sued State Farm, the Kays' carrier for declaratory judgment on duty to defend and indemnify. State Farm filed a plea to the jurisdiction asserting lack of standing and no ripe controversy, and thus no subject matter jurisdiction. The trial court granted State Farm's plea to the jurisdiction. The court of appeals, however, citing *Griffin*, held that "a declaratory judgment action is permissible when brought by a third party seeking to have the insurance company defend or indemnify for the conduct of its insured." Thus, if the underlying plaintiff can sue the defendant's liability insurer, it would seem that what is good for the goose is good for the gander as well and the insurer ought to be able to sue the underlying plaintiff and bind the plaintiff to the result.

State and County Mut. Fire Ins. Co. v. Walker, 228 S.W.3d 404 (Tex. App.—Ft. Worth 2007, no pet.), primarily concerned the trial court's fee award under the declaratory judgment statute to the underlying plaintiff that was joined by the insurer after the insurer prevailed on summary judgment against the insured and nonsuited its claims against the plaintiff. Ironically, State and County argued, in opposing the fee award to the plaintiff, that since its motion for summary judgment (that was eventually granted) only sought relief against the insured, the plaintiff should have realized this and not incurred the fees in responding to the motion. In rejecting this argument, the court notes "We agree with Walker's argument that State and County did not indicate that the motion was a motion for partial summary judgment or that the judgment it sought would be effective only against Williams and not against Walker." Id. at 411. The court then goes even further and notes that unless the third party plaintiff is joined in the declaratory action, it will not be bound by the result and then notes that "*Language from Texas Supreme Court opinions in the last decade suggests that injured parties may now be considered*

proper parties to such declaratory judgment actions, but the supreme court has not expressly so held." Id. (emphasis added)(citing *Griffin* and *Gandy*)

IV. What is to be Decided – Defense v. Indemnity

In *Griffin,* while prior law held that the duty to indemnify was never justiciable until the Claimant had recovered a judgment against the policy holder; the Supreme Court held that the duty to indemnify was justiciable if the duty to defend could be determined in favor of the insurance company, and the duty to indemnify could be resolved on the same basis. That is, in circumstances where the insurance company can establish that there was no coverage, the duty to indemnify may, sometimes, also be justiciable. Thus, according to the court in *Griffin,* the duty to indemnify can only be resolved under circumstances where there is no coverage.

The underlying Plaintiff, obviously, will generally have little interest in obtaining a judgment of no coverage, so it would appear that the claimant would almost never want to be the party initiating the lawsuit. Since the only determination of coverage available for indemnity would be a determination of no coverage, and the Plaintiff would not want to be asking for that relief. On the other hand, if, notwithstanding *Griffin*, the Texas Supreme Court were to recognize that there may be instances where there can be a duty to indemnify (because the actual facts establish coverage) even in the absence of a duty to defend (because the strict "'8 corners" rule and pleadings alone do not allege a covered claim), then it may open the door to more declaratory judgment actions being initiated by the claimants (as in *Richardson*) to try and establish not only a duty to defend but, more importantly to them, a duty to indemnify. The issue of whether there can be a duty to indemnify based on the actual facts even though there was no duty to defend based on the pleaded facts is before the Texas Supreme Court in *D.R. Horton v. Markel* which was argued on September 8, 2009 and could have a big impact on this quandry. But, on the other hand, if *Griffin* really stands for the proposition that before resolution of the underlying case the duty to indemnify can only be established adverse to the policy holder, the policy holder also may find itself in a difficult position asserting that it is a proper party to the coverage dispute any time before the underlying case has been resolved. (On the other hand, as noted above, the carrier frequently will want the claimant in the case so that the claimant will be bound by a decision of noncoverage; thus, the insurance company may not wish to assert that claimant is not a proper party.)

V. Joining Multiple Insurance Companies in the Declaratory Judgment Action

The policy holder may wish to join several insurance companies, if it wishes to assert that more than one carrier owes a defense and/or indemnity for claim. As mentioned above, if the liability case has not yet resulted in a judgment, the duty to indemnify may not be justiciable in favor of coverage. Therefore, in a suit brought by the policy holder, the policy holder may only wish to assert that the carriers owe a duty to defend. If so, carriers, such as excess carriers, who would have no duty to defend, would not generally be proper parties. Based on the language in *Griffin*, supra, that the duty to indemnify can only be resolved if the duty to defend can also be

resolved, may also prove to be a limitation on a declaratory judgment action filed, prejudgment, by an excess carrier. However, there is no authority discussing this issue.

Of course, the rights and obligations among and between multiple liability insurers requires consideration of the Texas Supreme Court's opinion in *Liberty v. Midcontinent*. A complete analysis of that case is beyond the scope of this paper and is better suited for a stand alone topic/presentation. Suffice it to say, however, that Liberty v. Midcontinent's impact must be considered when assessing what the relative rights and obligations of the policyolder and insuerers are anytime that there are multiple insurers potentially involved in the same claim.

In this connection, around the country, there have generally been two competing theories concerning the burden for joining all insurance carriers who may owe a claim. One theory allows a policy holder to pick a carrier, perhaps a carrier with the highest limits and lowest deductible, and assert that that carrier is responsible for the entire loss; thereby placing the burden on that insurance company to join any and all other carriers who may also owe. This theory shifts the burden of insolvent carriers, no coverage, or higher deductibles on to that selected insurance company. The Supreme Court of Texas appeared to adopt this view in the case of *American Physicians Insurance Exchange v. Garcia*, 876 S.W.2d 842, 855 (Tex. 1994). Therefore, a policy holder bringing suit may only wish to name one defendant.

The other approach places the burden on the insured to collect from every carrier who may respond, and shifts the burden of insolvency, noncoverage, or high deductibles, to the policy holder. In the case of *Mid-Continent Insurance Co. v. Liberty Mutual Ins. Co.*, 236 S.W.3d 762-5 (Tex. 2007), one carrier, Liberty Mutual, did pay the entire claim and then bring suit against the other insurance company that it contended was responsible for the loss. Under the facts of that case, the Supreme Court found that even though Mid-Continent had wrongfully denied coverage, that Liberty was not entitled to bring its case. In reaching its decision, the Supreme Court discussed two issues. It discussed the concept of subrogation, whereby a paying carrier stands in the shoes of its insured, giving it standing to assert its insured's rights against third parties, including their insurers. In the *Liberty Mutual* decision, the Supreme Court held that since the insured had been made whole by the payments of Liberty, the insured had no claim against anyone else, and a subrogating carrier standing in its shoes would therefore have no claim. Taking this analysis to its extreme, it would appear to abolish all insurance company subrogation actions, since the subrogating insurance company does pay the policy holder for those sums for which it later seeks to recover from someone else. Presumably, the Supreme Court may have meant to place a more limited interpretation on this concept.

The other issue discussed in the *Liberty Mutual* case by the Supreme Court involves the "other insurance" clauses. The Supreme Court noted that the "other insurance" clauses, shifting the entire loss from one carrier to another, typically provide that each carrier is responsible for no more than its share of the loss, as that share is calculated under the provisions of the policy. According to the Supreme Court, since each carrier only owes its share, and does not owe any other carrier's share, it was presumed that the payment by Liberty Mutual would only be for its share. Any payments for sums it did not owe would place it in the position of a volunteer, who would have no rights of subrogation.

The exact ramifications of the *Liberty Mutual* case have yet to be determined. Some commentators have suggested that the opinion should be construed very narrowly, and limited only to its facts. In that case, there was no dispute over the duty to defend; both carriers had agreed to split the defense 50/50. Some have inferred that if one of the carriers had wrongfully denied the defense, the outcome may be different, perhaps based on a waiver of the other insurance clause. It is also unclear whether Liberty applies only to loss or, instead, even applies to allocation of defense costs. That issue in currently before the 5th Cir. in the case of *Trinity Universal Ins. Co. v. Employers Mut. Cas. Co.*, 586 F.Supp.2d 718 (S.D. Tex. 2008) (pending on appeal at the 5th Cir.). Another fact specific to the *Liberty Mutual* case is that both Mid-Continent and Liberty Mutual owed coverage for the same policy period. There is a suggestion that if multiple carriers owe the loss, but because the progressive and continuing nature of a claim, different policy periods may be triggered, that the outcome would be different. The *APIE v. Garcia* case, supra, did involve policies from different years.

The Supreme Court has not yet resolved these issues, and is beyond the scope of this paper to predict the ultimate outcome. However, in deciding to join other carriers, consideration must be given to these issues.