SPECIAL ADVERTISING ROUNDTABLE

SPECIAL THANKS TO

ANDROVETT LEGAL MEDIA & MARKETING

BROWN McCARROLL L.L.P.

SHANNON, GRACEY, RATCLIFF & MILLER, LLP

THOMPSON, COE, COUSINS & IRONS, L.L.P.

FOR THEIR SPONSORSHIP OF THIS ROUNDTABLE

INSURANCE LAW

THE ONLY CERTAINTY ABOUT INSURANCE THESE DAYS IS THAT EVERYTHING'S UNCERTAIN AS DEBATES OVER KEY ISSUES WORK THEIR WAY THROUGH THE COURTS. IF YOU WANT A SPIRITED DEBATE IN TEXAS, ALL YOU HAVE TO DO IS GET PEOPLE TALKING ABOUT INSURANCE. THAT'S WHAT TEXAS LAWYER'S BUSINESS DEPARTMENT DID WHEN IT HOSTED AN INSURANCE LAW ROUNDTABLE IN DALLAS. WHAT FOLLOWS IS THE DISCUSSION, EDITED FOR LENGTH AND STYLE.

MIKE ANDROVETT, moderator, attorney, journalist and owner of Androvett Legal Media & Marketing, Dallas: . . . *I've asked the panel to introduce themselves to you and tell you what the nature of their work is on a day-to-day basis. What is it that they're doing and what is it that keeps their clients awake at night. So, without further ado, Mike, perhaps I can start with you. Tell us a little bit about yourself and the nature of your work.*

MICHAEL W. HUDDLESTON, senior partner, Shannon, Gracey, Ratliff & Miller, LLP, Dallas: I primarily work with companies and professionals on big insurance messes. In fact, someone asked me the other day to describe my practice, and I said, "Well, have you seen 'Pulp Fiction' and do you remember the Harvey Keitel character, Mr. Wolf?" I think that probably has a lot to do with what I do. I clean up and deal with messes. And those messes come in a pretty wide variety. . . . One day we may be in the middle of trying to help some young man get health coverage so that he can get a liver transplant and the next day we will be working with a company on a recall policy to help them get funding to deal with a potentially catastrophic recall and product contamination problem. The more typical thing is to deal with liability insurance problems. I do a lot of appellate work outside of the insurance area, which seems to always involve coordinating both appellate issues and insurance issues in large-verdict cases. In short, it's a little bit like being a jazz musician. Improvising is something that sort of comes naturally and seems to fit both music as well as my legal practice. With the Supreme Court decisions and some of the ambiguities we have right now, it's like trying to work with a legal Rubik's Cube, if you will, but at least it's entertaining.

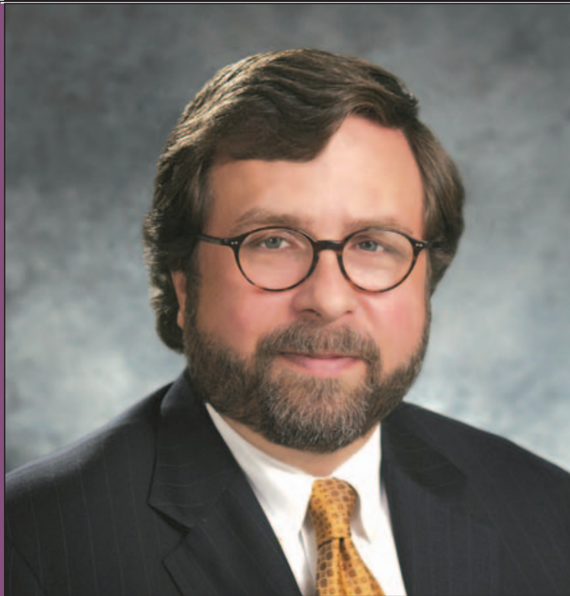
MARCY L. ROTHMAN: partner, Brown McCarroll L.L.P, Houston: I spent this week working on a RICO matter; and I recently spent a month or so on an injunction against CMS, a Medicare services agency of the federal government. Originally, I started practicing law in Beaumont and was a named partner in a firm there. I have tried over a hundred lawsuits. One of the things I've tried to do every year is ask myself how I can increase my sophistication, how can I increase the complexity of what I do and the value of what I do for my clients? So, that led me into the insurance realm. One of the things that I'm doing now on a daily basis is taking my insurance experience and starting to shift back into assisting my firm's business clients with risk management [and] risk mitigation. I've done some risk evaluation and insurance coordination for the setup of a metals mine in Indonesia and on the sale of a nursing home chain on a nationwide basis, and also [have worked] in the oil and gas industry. So, I don't try as many cases as I used to. What I try to do is take the lessons learned on complex liability and insurance, which is a nice combination, and provide the benefit of that experience to assist my clients.

BRIAN S. MARTIN, partner, Thompson, Coe, Cousins & Irons, L.L.P., Houston: We opened the Houston office of Thompson Coe in 2001. My particular practice may be a bit hard to define in some ways, because a large part of my practice is to act as national coordinating counsel for several carriers on very different books of business, mostly general liability, but also excess, commercial auto, directors and officers coverage and other insurance coverage matters; those dockets

are multi-state. We have a pretty extensive bad faith docket in a few of the southern and mid-western states. And so, a roundtable like this is really interesting, because these are two really great lawyers who know Texas. We know Texas, but a lot of what I do very often is try to figure out where different states are going, what's happening in the insurance arena in those states, and, in any given case or set of cases, decide whether we're going to try to make law in that state, whether this is a case to get resolved quickly or whether these are issues that need to be evaluated for purposes of underwriting future policies that will be issued in those states. So, sometimes it feels like I'm dealing with whatever the problem of the day is or, I guess, as Mike put it, I clean up messes. I've been doing it for 20 years and love it.

ROTHMAN: One of the things I think that business always does is it seeks to diversify its risks, seeks to diversify its portfolio. And so kind of by definition, that's what we do with exposure to messes. I think that's a nice way to put it, anyway.

ANDROVETT: *Help us out of a little bit of a conundrum. A certain segment of the Bar feels that Texas Appellate Courts have become overly pro business and overly pro insurance company. But it occurs to me that in many instances*



MICHAEL W. HUDDLESTON

is a senior partner with Shannon, Gracey, Ratliff & Miller, LLP and practices primarily in Dallas, Fort Worth, Austin and Houston. He provides counsel and litigates insurance coverage and bad faith cases involving all lines of insurance. Huddleston also handles appeals in insurance cases and other matters involving catastrophic losses, including a number of landmark appellate decisions such as *State Farm v. Gandy* (Tex. 1996); *Christophersen v. Allied-Signal* (5th Cir. 1990)(en banc); *Rose v. Doctors Hospital* (Tex. 1990); *St. Paul Fire v. Convalescent Services* (5th Cir. 1999); and *State Farm v. Williams* (Tex. App.—Dallas 1990, writ denied). Huddleston has also served as an expert witness and a mediator/arbitrator in complex insurance cases. Huddleston was recently selected as a "Top-Notch" insurance lawyer for inclusion in *Texas Lawyer*'s "Go-To Guide." He is a frequent lecturer and speaker, and has served as the course director for a number of Texas insurance law seminars.

when these cases are litigated, you have a business seeking redress through the Courts against an insurance company. So, I'm wondering if this sort of catch-phrase analysis of "pro business" and "pro insurance company" might be just a little bit too simplistic.

MARTIN: At least from my end, that's certainly the case. Not just in Texas, but in other jurisdictions we deal with, there is this reasoning that, "Oh, these are conservative judges; therefore, they're pro carrier." Well, that's not the case necessarily. Very often very conservative jurisdictions find themselves in business conflicts, and recognize that insurance carriers are writing policies within the context of protecting business interests, and you don't know which way the Court is going to come down. However, from the insurance carrier's perspective, there is a desire for stability, for law to be construed at times, simply so that we know what our own policies mean from the courts' perspective. So, to the extent that there is a dichotomy between more activist Courts and more strict constructionist Courts, my clients would usually tend to see a linkage between conservative strict construction of policies, as opposed to more liberal activist Courts that may actually strain to find a particular result. And for that reason, there is something to that reasoning of "pro-business" means "pro carrier," but it is attenuated by the facts in any given circumstance.

HUDDLESTON: I think the view I have is colored by who I represent. I work a lot with plaintiff's lawyers [and] I work with policy-holders as well as carriers. I can tell you that the view from the Plaintiffs' Bar is that the Court is pro business and that it is pro insurance. From an insurance practitioner's standpoint, I think what is clear is that the Court, at least based on *Lamar Homes*, likes big business more than it likes big insurance business; but that doesn't mean it doesn't still like big insurance business. For example, there has been a severe shrinkage of extra-contractual liability, particularly *Stowers*, with technical requirements as far as how to make the offer [and] all sorts of related requirements. We now have the *Mid-Continent* decision, which refuses to extend *Stowers* to claims between primary carriers. So, there's definitely a restriction in that area and it doesn't look like we're going to see much growth in the future. The decision in *Lamar Homes* extending the Prompt Payment of Claims statutory provisions to a liability carrier's duty to defend is a very small extra-contractual bone thrown to policy holders. Brian is right. Predictability is key. When I put on the defense hat now, it's very hard for me to have enough imagination to actually anticipate some of the things that seem to be coming out of the Court from the standpoint of just how conservative it is. From a policy holder's standpoint, though, I'll tell you, in litigating coverage issues it seems like *Lamar Homes* is a pretty good indication that there is at least a core group on the Court — Justices Wainwright, Medina and O'Neill — that really pretty much approach coverage issues from a blank-slate standpoint. They really want to look at the contract. They don't want to do things like look at these overarching principles like we had in *Lamar* that a general liability policy is not a performance bond. They're going to look at language. I think from a policy holder perspective, when you're in front of the Court, they're going to be the first three people that you're talking to or at least directing your argument to.

> **For business people, the problem with *Mid-Continent* is it stalls settlement. When you put that with the contraction of *Stowers*, and with the lack of any guidance as to what to do to *Stowerize* multiple layers of coverage, then you have gridlock. — Michael W. Huddleston**

MARTIN: Do any of you think that this Court is becoming more "outcome" oriented as opposed to strict constructionist, given the last few decisions?

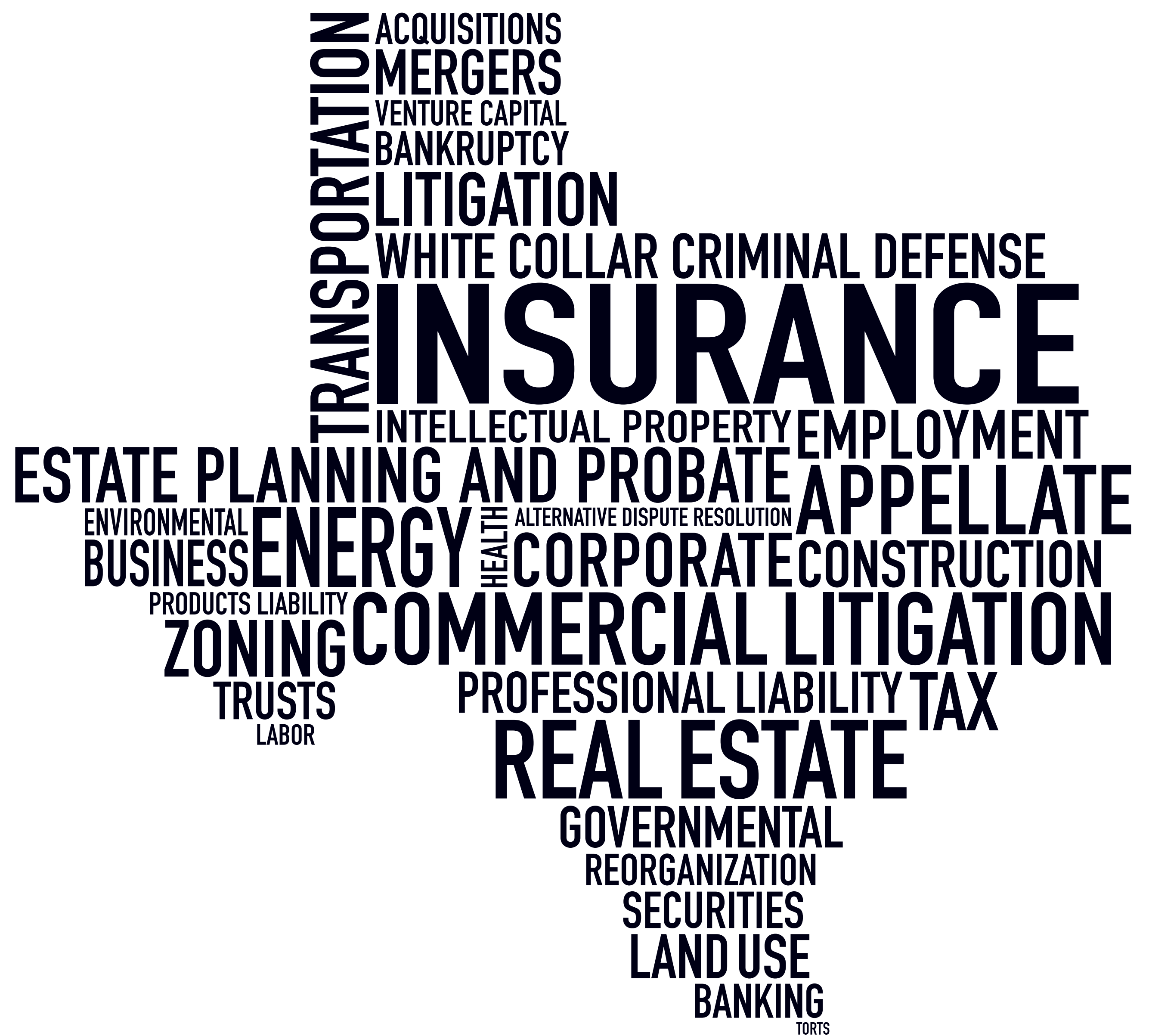
ROTHMAN: I think there are examples on both sides, pretty evenly. You've got the *Westchester* issue, where the question[s] [are] whether or not

punitive damages are insurable in Texas, whether or not punitive damages are covered, and, in one phrase, whether the coverage for punitive damages is void. You've got a holding on that. So far, it has been that punitive damages are not necessarily uninsurable in Texas, which I think came as a very big surprise to most of the Insurance Bar. Primary jurisdiction issues are starting to come front and center. I'm looking right now at a copy of the brief, and the cover of the Summer 2007 version was "Primary Jurisdiction in Insurance Litigation." Insurers are finding more respite and are finding some relief in front of the Commission. I think that we've got situations like *Lamar Homes*, where that's a pro business situation. There's one other case I wanted to mention holding that a general contractor, a premises owner, can avail himself of the Workers' Compensation Bar.

HUDDLESTON: . . . [I]f you were to do a box score, I'm not sure you could come up with much in term[s] of outcome-oriented. There are some principles, for example, *Guide One v. Fielder Road Baptist Church*. *GuideOne* to me is sort of a neutral issue, which involved the admissibility or use of extrinsic evidence to determine the duty to defend. In one case that's a rule that may favor the insured and in another case it may favor the carrier. In toxic tort cases where there's no exposure period pled, like in the *Azrock,* the Fifth Circuit said, "If it's not pled then you can't use extrinsic evidence if it's running within the policy period [and] you can't construe it in a way that's favorable to the insured to find a duty to defend." So, extrinsic evidence obviously would be helpful to an insured in that situation. There are handling issues that are somewhat neutral.

ROTHMAN: And there's some authority that indicates that the "reasonable inference" concept is being strengthened.

HUDDLESTON: Well, there is a debate. There are several cases pending before the Court right now: *Nokia*, *Samsung*, *Cellular One,* and *Gehan Homes* relating to this issue. *Gehan* is a construction defect case. The others involve whether there is a duty to defend cellphone class action litigation. The battle is how you divide and reason between the rule that you liberally construe the pleadings in favor of the insurer in determining the duty to defend versus the rule that you cannot imagine factual scenarios and basically insert them into pleadings. And the problem revolves around *Trinity v. Cowan*, where the question was whether or not there was bodily injury as a result of an allegation of severe mental

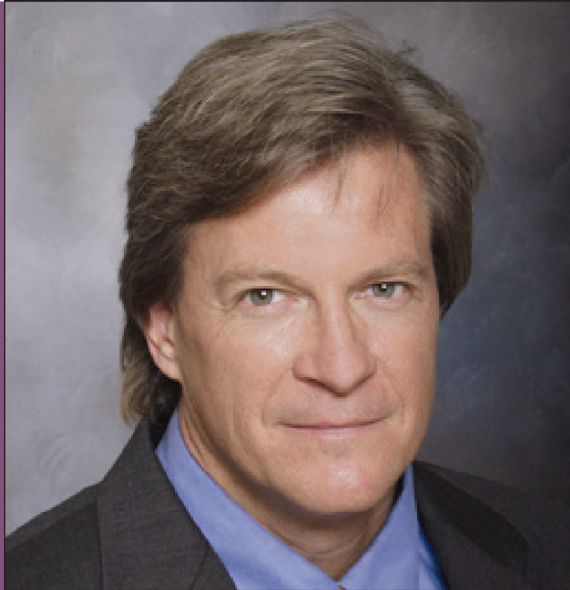


WE ARE A TEXAS-SIZED PRACTICE.

At Shannon Gracey, we handle all types of insurance claims, litigation and appeals. And that's just the beginning of all we can do for our clients. To learn more about how we can help you gain a sizable advantage, contact us today.

SHANNONGRACEY
SHANNON, GRACEY, RATLIFF & MILLER, LLP

ALLIANCE | ARLINGTON | AUSTIN | DALLAS | FORT WORTH | HOUSTON | P 817-336-9333 | SHANNONGRACEY.COM



BRIAN S. MARTIN is a partner in the insurance coverage section of Thompson, Coe, Cousins & Irons, L.L.P. in Houston, Texas. He has 20 years' experience of successfully handling complex insurance coverage matters specializing in general liability, environmental, toxic tort, construction, directors & officers, products coverage, and bad faith cases. Martin is the Chair-Elect (2007-2008) of the State Bar of Texas Insurance Section, as well as the former Chairman of the Reinsurance Committee of the Section. He is a contributing editor to the Lexis' "Texas Annotated Insurance Code," authors a column for the *Insurance Journal* magazine, and has authored over 150 papers, articles and law reviews on insurance coverage and bad faith issues. He frequently speaks at insurance conferences, such as the State Bar of Texas Advanced Insurance Course, the University of Texas Law School's Insurance Law Institute and the Texas Insurance Law Symposium. Martin, a University of Texas graduate, has been recognized by *H Town Magazine* (2007) as one of Houston's leading attorneys.

anguish. The Court in that case says there has to be a physical manifestation of mental anguish in order to find covered "bodily injury." No physical manifestation was pled there. Of course liberal constructionists who should be on the policy holder's side looked at that and said, "Why couldn't you take the pleading of mental anguish and say there's at least a potential that because evidence would be admissible of a physical manifestation on that point at the trial of the case?" If not, the tie is going to go to the insurer. But in fact, the Court went the opposite direction. Now you've got the Dallas Court of Appeals in *Gehan Homes* and in the three cell phone class action cases, *Nokia*, *Samsung*, and *Cellular One*, basically taking the liberal construction rule, to me, very, very far from what it was originally intended. [In] *Gehan*, they determined that bodily injury was triggered in that case based on the fact that a bodily injury was alleged to have occurred in the past in the pleading, and we know the pleading was filed on "X" date, and we know the policies were issued before that date; therefore, there is a potential that one of those policies was invoked by some of that past damage. I would submit that sort of strains liberal construction to the point that actually breaks it. That is a huge core issue before the Court right now.

The effect of a ruling on "trigger" will be monumental in terms of allocation in mass tort, environmental, or any type of long-tail claim.

— Brian S. Martin

ANDROVETT: *I'm positive that everybody in this room followed everything that you just said, but I have this vision of the* Texas Lawyer *reader who right now is reading this transcript and saying, "Wow!" So, if I could, let me back up a little bit to the original question about this [issue of] pro business versus pro insurance company. Do I understand the three of you to say that there's still a lot of ambiguity out there [and] there may be some conflicting signals, but if you had to keep score, it's more of a pro business as opposed to pro insurance bent?*

MARTIN: As a carrier lawyer, using the word "ambiguity" scares me to death; so, I'm going to ask you to stop that. [laughter]. But the test of this Court that we're going to be able to look at and get a sense of just how activist they are, is in several cases pending before it now; and I think the *Westchester* and *Lamar* cases which were made reference to, in many ways, are the best tests because they have a contract-construction basis the Court can rule on and also a separate public policy basis as an alternative. If they decide to apply the public policy test — in other words, is this the type of behavior we don't want insured — that's going to tell us something about how the Court wants to define or create results. If they instead focus in *Westchester* on what is the standard for gross negligence and that is the basis for why we're not going to allow punitive damages to be covered, then that will tell us a lot about the Court, too. So, I think in simple terms, the cases that involve contract construction and public policy — and there are several before the Court right now — will give us an opportunity to say, "Ah, this is the bent of this Court."

ROTHMAN: Let me suggest something. It also occurs to me that perhaps some of the coverage issues in terms of what the remedies will be seem to be pro business, but I think some of the procedural decisions, for example, pertaining to alien insurers posting cash deposits because they're not properly registered or have not properly, if you will, signed up with the regulatory agency, are going toward the insurers. So, you have procedural defenses and opportunities that the insurance company can take advantage of. Then you have coverage determinations that seem to be going a little bit toward the insureds. Let me give you an example what issues I think are going to flesh out over the coming year. In *Mid-Continent v. Liberty Mutual*, which is a Texas 2007 case, what you have is two competing primary insurance companies who were both involved and implicated in a fairly serious settlement as personal injuries claims. One of the

primary insurance companies decided that it didn't want to pay as much as the other insurance company was going to pay to settle the personal injury claims. Those sorts of things, for those of you who are not insurance practitioners, are determined by a very specific formula. One of the two insurance companies determined that it wanted to contribute a smaller amount to the settlement for personal injuries, ostensibly based on a lower evaluation of the claim. The end result was that the insurance company which evaluated the claim at a higher level paid the money, and the Texas Court said that contrary to what the practice has been for subrogation for contribution amongst insurance companies at the same level, the insurance company which had "overpaid" could not really leverage additional funds out of the insurance company which had paid the smaller amount. The effect of that for business is that there's very little leverage left, the way I read *Mid-Continent v. Liberty Mutual*, for addressing how an insured business would compel its recalcitrant insurance company to come to the table. Essentially, the case leaves the insured and the overpaying insurer without leverage against the underpaying insurer. And I haven't yet seen how that's going to flesh out. I've had an example of a settlement where a plaintiff was offered money by one insurance company and there was a recalcitrant insurer. This happened to me last month, almost exactly the same way as the *Mid-Continent* case came down. The question was, "Does the plaintiff accept the settlement from the moderately-paying insurer and let go of the other insurance policy when she may not be compensated entirely by the first settlement for her claims?" So, where you have an oil company, for example, or a technical company [or an] industrial company or a batch processor which has its insurance policy and which also has a vendor providing a subcontractor policy you have a situation where, if there's an accident, one of the insurance companies might choose not to dive in and participate fully just to see where efforts to settle the matter wind up.

MARTIN: I think the unintended consequences of that decision are far beyond anything the Texas Supreme Court could have imagined. This is a Court that has, decision after decision, talked about fostering settlements and resolution of claims but from the perspective of the carrier, *Mid-Continent* makes it very hard to settle a lot of very marginal cases, especially where there are multiple carriers and one carrier is just being unreason-

THOMPSON
COE

Efficient. Effective. Experienced.

Recognized for its concentration in insurance law and civil litigation – and for having one of the largest insurance practices of any firm in Texas – Thompson, Coe, Cousins & Irons, LLP offers a full range of legal services to the insurance industry. Services offered through specialized practice groups include:

★ Insurance Litigation and Coverage
★ Employment Law
★ Third-Party Defense
★ Construction Law
★ Insurance Regulatory Law
★ Governmental and Legislative Advocacy
★ Professional Liability
★ Appellate
★ Product Liability and Mass Tort

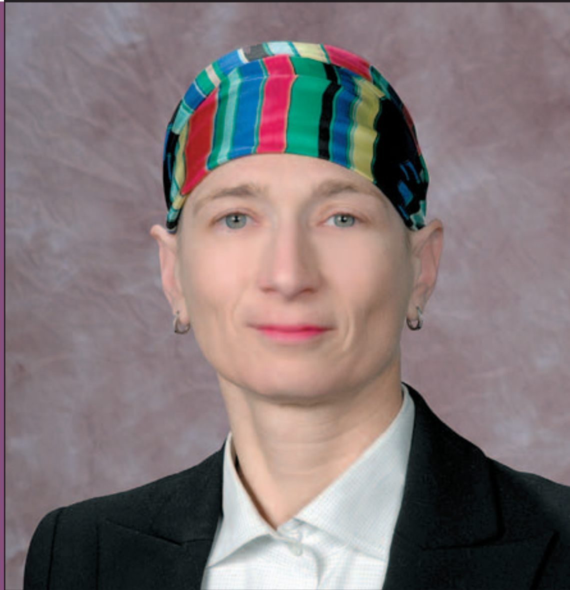
THOMPSON, COE, COUSINS & IRONS, LLP
SINCE 1951
www.thompsoncoe.com

AUSTIN
701 Brazos
Suite 1500
Austin, TX 78701
Jeff Otto
(512) 703-5036

DALLAS
700 N. Pearl Street
25th Floor
Dallas, TX 75201
Rick Harmon
(214) 871-8227

HOUSTON
One Riverway
Suite 1600
Houston, TX 77056
Brian Martin
(713) 403-8282

SAINT PAUL
The Historic Hamm Building
408 St. Peter Street, Suite 510
Saint Paul, MN 55102
Lynn Meyer
(651) 389-5001



MARCY L. ROTHMAN, partner in the Houston office of Brown McCarroll LLP, uses a significant litigation background to formulate business solutions for her clients. When favorable solutions cannot be negotiated, she applies her ability to litigate complex matters fully. Rothman has a history of favorable results in civil trials, administrative proceedings, arbitrations, appeals and negotiated resolutions, including in class actions and mass tort and commercial cases. Her extensive first chair trial experience or lead counsel experience includes complex commercial litigation, insurance, professional liability, energy and environmental, complex multiparty industrial injury and death, catastrophic losses, product liability, and many others. Rothman has participated in approximately 100 trials to verdict, two-thirds of which she has handled as first chair trial attorney. She has handled appeals and has successfully represented clients before the Texas Supreme Court and the United States Court of Appeals. A number of her cases have been reported in the federal and state court reporters or constitute "industry firsts."

able in its evaluation of the underlying claim. Now, you may be the reasonable carrier; but it makes it very, very difficult to act unilaterally to settle if there is an obstinate, unreasonable carrier also involved.

ROTHMAN: The question really is whether the Supreme Court is going to permit parties to split settlement demands, to give one settlement demand within the policy limits to one insurer and another to another insurer in an effort to *Stowerize* multiple insurers on a single claim. That potentially could undermine the entire fabric for Texas insurance settlements.

MARTIN: In addition, you're raising questions that go to other insurance policies, which raises allocation issues. One of the things that is most frightening to me about the *Mid-Continent* decision is that it seems to be utterly inconsistent with Court's one foray into allocation law, *American Physicians v. Garcia*. In *Garcia*, the Court had all primary policies and basically said, "Hey, Insured, you can pick the one policy you want to pay because they're all triggered" — "trigger" means each of the carriers has to respond to the risks; that's all that "trigger" means, which of these carriers over a period of time have to respond to this risk — but you can pick the policy, any one at a particular point in time [and] have that carrier exhaust its limits, if necessary. No carrier is unfairly treated, because, due to their subrogation and contribution rights, they can even it out in a subrogation action. With *Mid-Continent*, it's telling us we can't do that. There is no basis for the subrogation/contribution action.

ANDROVETT: *As an outsider's view, these cases, at some level sort of tickle me because they become so extreme [and] that's why they become reported decisions. But in the real world all the various parties get together, they sort of apportion their liability and then it manifests itself in the settlement. This case seems to say, "All bets are off, just come sue me."*

ROTHMAN: To finish the example I was giving, I had to come up with a real world solution. One of the things that we contemplated was that the more helpful insurer could be moved aside on the defense obligation and the insured could elect to get its defense from the recalcitrant insurer and, therefore, expose the recalcitrant insurer to a little bit of the financial risk. The question then becomes, "What do you do in order to settle?" Because, typically, the insurance company can't settle for the insured without obtaining a complete release. So, without bifurcating, or permitting each insurance company to be served with its own inside-the-policy-limit settlement demand, which the Supreme Court historically, under *Maldonado,* has not permitted, I don't see a way out. I don't see a way, other than refunding the insured's premiums on a second policy, to make it fair.

> **We see a number of cases being reconsidered. I think the lesson in this is to be as careful procuring insurance policies, if your represent business, as you possibly can be.**
>
> **— Marcy L. Rothman**

HUDDLESTON: Well, one of the things that Brian has already pointed out is that there is enormous tension between *Mid-Continent* and a number of Texas insurance law principles. For business people, the problem with *Mid-Continent* is it stalls settlement. When you put that with the contraction of *Stowers*, and with the lack of any guidance as to what to do to *Stowerize* multiple layers of coverage, then you have gridlock. There is no motivation for the multiple carriers to settle or even work together. Where the coverage is stacked, it is very difficult to get some kind of traction to encourage settlement. This forces businesses to consider a lot of worst case scenario options, whether it be bankruptcy [or] otherwise, to try to deal with the problem. The other real world part of it is that carriers don't get along well anymore. I see it as a mediator when I mediate these types of cases. I see it as an advocate. In the past, carriers worked together. Now you're not seeing that as much.

ANDROVETT: *Why is that?*

HUDDLESTON: I don't know. And

I'm not sure it's just a Texas problem. We had one national case that we mediated up in Washington, D.C., involving a bunch of toxic tort issues. It was a classic example of "if carriers work together they can solve problems" and basically benefit themselves, but also benefit the insureds. What's happening with *Mid-Continent* is you've got a decision that basically seems to say subrogation is dead, because if one carrier pays and the other one doesn't, the insured has no damages so there's nothing to be subrogated to. You step in the shoes and the shoes have holes in them. So as a result, the question is, "Is anything in *Garcia v. APIE* — particularly the ability of the insured to pick the line of coverage — still viable?" The pick-the-line rule of *Garcia* was a boon to policyholders, allowing them to select the applicable line of coverage so that they got the greatest benefit. The Supreme Court said you have the right to pick that line. That's what I think we were referring to earlier in terms of if you have two carriers fighting, why can't you pick one and let the one defend and put the tag on them. What *Garcia* seems to suggest is, "Yeah, that's the way it ought to work, because subrogation can then resolve the other problems between carriers." Now that subrogation is undermined by *Mid-Continent*, the question is, "Is there anything about that that's going to be left?" And for toxic tort cases, that is an enormous problem.

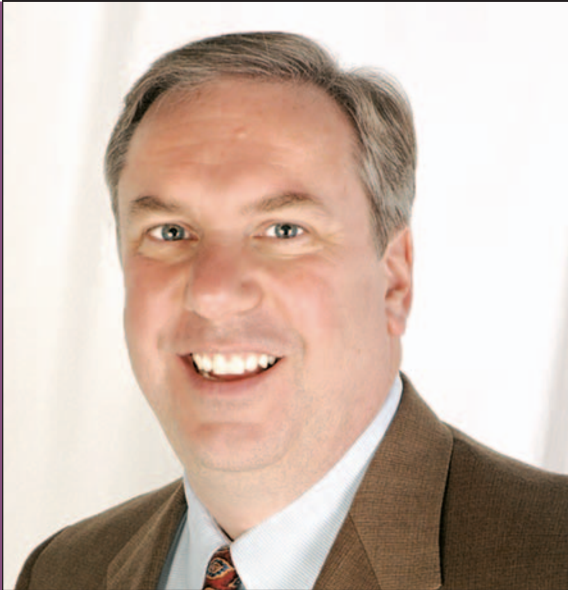
ROTHMAN: Understand that *Garcia* was a case that our leading authority in Texas on the apportionment and allocation of insurance proceeds is a case that was issued in 1994. So, there's been a fairly significant lapse of time. One of the reasons I think that the stakes are a little higher right now [is that] there was a study recently that indicated that the insurance industry has more cases in excess of $50 million under litigation at any one time than any other industry, including financial services. We see E&O [Errors & Omissions] claims that have been pretty large. There's been some shrinkage in the market. We see massive property casualties. We're seeing that companies are having to face a little less investment money on the other side and a little more concern about what the long-term ramifications of these large pieces of litigation will be.

MARTIN: With the advent of long-tail claims in the 1980s — remember, insurance policies weren't written before that time with the idea that there would be consecutive period liabilities for an occurrence stretching over time — when my policy came to an

Brown McCarroll L.L.P.

A proud participant in *Texas Lawyer*'s Insurance Law Roundtable

Marcy Rothman
1111 Bagby, 47th Floor • Houston, TX 77002
Phone: 713.525.6281 • E-mail: mrothman@mailbmc.com • www.brownmccarroll.com



MIKE ANDROVETT is in business to make sure that his lawyer clients get positive news coverage and their law firms are marketed effectively through advertising and public relations. Androvett is the founder of Androvett Legal Media & Marketing, the largest public relations and advertising firm in the Southwest exclusively devoted to lawyers and the legal profession. Established in 1995, Androvett Legal Media serves the specialized needs of law firms in communications with outside audiences, including news media coverage, brochures and Web sites, and sophisticated advertising of all kinds. Androvett's firm assists lawyers in virtually all areas of practice while observing the highest ethical standards. Lawyers and their clients who receive media training from Androvett Legal Media are much better prepared to deal with reporters and TV camera crews. And, as a former chairman of the State Bar of Texas Advertising Review Committee, his expertise and experience is essential to firms seeking to comply with the state rules governing lawyer advertising. Androvett and his team take the mystery out of public relations and advertising by recognizing law firms' true goals and providing the know-how to make them happen. Androvett can be reached at mike@legalpr.com or 214-559-4630.

end; that was basically the end of it. With the early 1980s cases from Massachusetts that then spread across the United States, you had an extreme alteration of the exposure from policies that had been written a generation before. And what has happened is that, not only is there increased competition within the insurance industry [but] you also had massive environmental claims, which were the first giant wave of lawsuits that engulfed the industry, followed then by mass torts such as asbestos in Texas. Do you need to say much more? The enormity of the new claims created great tensions among carriers. Throughout the United States, allocation is, at least in my practice, the big-dollar issue and has been the big-dollar issue for a decade. That's one of the paramount issues in $100 million and $500 million long-tail lawsuits and the $100,000 commercial auto claim. What we're looking at is the battle between the carriers as to who is paying what share. So, in Texas we had *Garcia* in 1994. But is *Garcia* truly an allocation case? I mean, it deals with *Keene* in a *Stowers* context, but it doesn't deal with other insurance clauses in policies. It doesn't deal with trigger. The parties had stipulated that the policies were all triggered. Because of that, *Garcia* actually raised more questions than it answered. And the fact of the matter is that the couple of cases that followed it, *CNA Lloyds* and *Southwest Aggregates*, leave you a big blank in Texas law, to a large degree, in terms of what is truly the standard for allocation between carriers in a wide variety of common situations. In our negotiations what we very often do, especially when we're dealing with multi-state claims, is raise the lack of clarity in the law. When they talk about Texas, there's always this, "Well, we think that trigger is probably an exposure theory, but we don't know. We think that we're probably in *Keene* long-tail allocation, but are we really?" There are aspects of other insurance clause law in this state which would imply a pro rata allocation. So, to bring it to down to Earth, you wonder why carriers are shooting each other? Very often [it is] for survival, based upon a change in the marketplace that occurred beginning in the 1980s with these unforeseen long-tail claims.

HUDDLESTON: Don't you think that this is one area, particularly these toxic tort issues with trigger with allocation, where I'm not sure knowing more from the Courts is going to help the system, because ever since *Garcia* there's at least enough ambiguity and doubt with business people and the litigants that are in these cases . . . that you can find solutions. The problem we've got now is probably the single most important development, at least in my 20 some-odd-year career, [and that is] the certification process through the 5th Circuit. Dodging issues is no longer an option. And the 5th Circuit is regularly sending these little missives to the Supreme Court saying, "Answer this, and, by the way, answer this, and answer this also."

MARTIN: But they can say no. They do not have to answer.

HUDDLESTON: I think it's politically difficult to say no when the issue is there. It is much harder to dodge the bullet now.

MARTIN: Well, wait a minute. With *Mid-Continent*, there's no longer a question of ambiguity. There's a question of whether there's a benefit to me as the carrier to be obstinate. I am rewarded if I am obstinate and somebody is less obstinate. Guess what? We're going to have more obstinance.

ROTHMAN: What this really means for business people and for us as lawyers for our clients [is that] there is an effect on the interest in settlement. The current state of the law can chill settlement discussions, number one. Also, I think we're going to see a fair bit of Medicaid and Medicare litigation, if we haven't already seen that, in terms of what the enrollees and what the service providers are able to do. We see another source of decisions all the time in Houston and in our broader bases in terms of the oil industry and in terms of the construction industry. These cases that we're talking about have practical applications in our clients' businesses. [In] *Lamar Homes*, the real central issue is: what is a "construction defect" and is it covered? We have a lot of construction here.

ANDROVETT: *Lamar Homes already has been sprinkled through the first 40 minutes or so. I think this is probably a good place to focus in on* Lamar Homes *a little bit. Reading* Lamar Homes, *I'm stunned, in a way that some of these issues haven't been resolved before now. [For example], the notion of what is an "accident" or an "occur-*

rence." Let's talk a little bit about that, what do you see as the ramifications of Lamar Homes*?*

ROTHMAN: I'll just say, historically, insurance is designed to cover accidents [and] fortuitous unexpected events. And the business risks, the subject matter of contracts, generally, although there are exceptions to everything, have not been considered insurable.

ANDROVETT: *So, someone is working on a home, kicks over a fire and a causes a fire, that's insurable?*

ROTHMAN: Well, if somebody is building your house and knocks a ladder over and it knocks somebody in the head, that is a pretty easy one. The question is —

ANDROVETT: *But here now we're talking about defects, the ongoing workmanship issue.*

ROTHMAN: We had a 10 or 12 building, 1000 individual unit condominium complex that we had to address on the shores of Lake Travis in Austin. What you had was claims that the subject matter of the contract, the buildings purchased, were defective. The question really was, for business, is it an unexpected event when parties do not perform under the contract as they say they're going to, or is it something else? Historically, the way I've always viewed it is by looking at the nature of the damages. It can either be a mixed contract in a tort case or it can be a contract case. If the damages are tort damages, the nature of the claim really is a tort claim. That's been my view of it.

ANDROVETT: *So, now* Lamar Homes *comes along and what does that case stand for?*

MARTIN: I think Marcy's position is summed up in the first sentence in the dissent by Brister: "Selling damaged property is not the same as damaging property." It's that simple.

ROTHMAN: The question really is whether business arrangements are going to be insurable or not? Is the subject matter of the contract that our business folks engage in every day going to be something that general liability is going to cover? Or is that risk going to be something that can be addressed by endorsement? Or is it even something that can be manuscripted, where, if the insured pays a little extra, it gets a little more coverage?

HUDDLESTON: . . . What is it Woody Allen said? "Sex is not the answer, but, in the meantime, it raises some interesting questions." Well, *Lamar* raises a lot of interesting questions about the future. And one of them is in terms of contract construction. This Court has made a very clear pronouncement in *Lamar Homes* that general principles or brooding themes, such as the notion a general liability policy is not a performance bond mean nothing unless the notion finds

HOW WILL YOU MAKE
YOUR MARK?

The **ONLY** Advertising and Public Relations firm in Texas working exclusively with Law Firms and Legal Professionals.

ANDROVETT
LEGAL MEDIA & MARKETING
DALLAS 214.559.4630 | HOUSTON 713.383.0090
www.androvett.com

expression in the terms of the actual policy. I think, again, you're focusing on Medina, Wainwright and O'Neill in terms of that type of analysis and the Court where it comes from. If it isn't in the contract, you don't get it. The fact of the matter is that carriers, in response to *Lamar Homes* and in response to similar decisions across the country, have been developing all sorts of forms to limit the coverage. And so, the fact of the matter is that the coverage is going to get limited in most construction contracts to defeat the result in *Lamar.* So, the long-term impact may come from the constructional approach and holdings of the Court. For those in the contract construction trenches, one of the most important holdings is that the Court used an exception to an exclusion to infer what coverage was provided by the policy. It doesn't exclude breach of contract [and] it doesn't exclude defective construction. In fact, it's got an exclusion that deals with part of that. So, obviously it wouldn't exclude a part unless you had coverage for the whole granted in the insuring agreement. You think about that reasoning and it has traction in a lot of different areas in terms of construing the policy. Of course, the other thing that's left unanswered by *Lamar* is whether or not faulty workmanship alone is going to be covered. That's not really dealt with. I think the other thing that's pretty interesting is, if you look at the pleadings in the case, the facts that were alleged were that there was a promise that there would be certain type of steel and certain amount of the steel that would be in the foundation in this area that was problematic for foundations, and, in fact it wasn't. So, it's really a misrepresentation case and there isn't any discussion about "facts alleged," other than just simply that. And so, what the Court goes off on when it says that there's coverage, it is really relying on a label — negligence — rather than pleaded fact. This is what was used to satisfy the accident/occurrence requirement of the insuring agreement. That's a significant change in approach because the Court has told us "Look at the facts, not the label." And these types of really tedious little construction issues are difficult for lay people to understand, but the reality is that they mean real dollars in terms of how these coverage fights come out.

MARTIN: Let me ask you a question, both of you. *Frank's Casing* comes out, very controversial, and it's withdrawn. What is the status of *Frank's Casing*? But given *Lamar* and given the issues that it's raised, putting aside the Ins. Code 21.55 issue which we can talk about in a minute, is it going to get withdrawn? I would frankly ask that about *Mid-Continent*, as well. I'm hoping that there is enough briefing and enough screaming about the effect of *Mid-Continent* that it ends up at least being reviewed again. *Lamar* and *Mid-Continent*, are they going to create enough of an uproar to be withdrawn and reconsidered?

HUDDLESTON: Unless somebody knows something different, my understanding is in *Mid-Continent v. Liberty Mutual, Liberty* chose not to file a motion for rehearing. So, it's done. That one is set.

ROTHMAN: We see a number of cases being reconsidered. I think the lesson in this is to be as careful procuring insurance policies, if you represent business, as you possibly can be. Tailor them. If you represent insurers, take a look at what your endorsements are [and] take a look at what your exclusions are, if you're in a position to do that. The things that I see that are sticking are choice of panel counsel, for example. One of the big questions is, "Who determines selection of counsel on your insurance policy?" One thing I see always succeeding is when the insurer puts panel counsel as a policy provision, when there's an addendum to a policy saying, "These are the people you [the insurer] are going to use." That's really when there's no question. I'll give you another example. E&O coverage — you've got very specific discussions about what kinds of lawsuits between minority shareholders and majority shareholders or on below-market transactions will be covered. The more specific and the more tailored the insurance policy is, either by the insured or the insurer, the more successful the party who has drafted or has participated in it is likely to be when a dispute is determined by the courts. So, the lesson is pretty basic, from my perspective. If you represent business, try to ascertain what's important to your client, what the risk profile is, and then try to make sure that you're advising them to buy the right insurance product. If you represent insurers, talk about the places that you see unanticipated and unconsidered risk in the underwriting process and address that through manuscripting your policies. We've been on both sides of that, and I wish I had the ability to foresee all of these issues before they come up, like choice of counsel, like how to evaluate number of occurrences. But I think it just really depends on what the policy language says, which brings us back to what Brian said about strict construction.

ANDROVETT: *As a predicate, when we had our insurance law roundtable last year,* Frank's Casing *dominated the discussion because of this right for reimbursement and some of insurance defense lawyers saying,* "Frank's Casing *really puts us between a rock and a hard place. Who are we advising?" Are we advising the insured, who then may request settlement?" And, "Uh-oh, now that they've done that, they may have triggered the insurer coming back on them for reimbursement." So, that was sort of the predicate for the discussion last year.*

HUDDLESTON: I think there are a couple of things that certainly suggest that the original decision, adopting the right of reimbursement, is not going to ultimately be the rule. I think one is that this Court has made very clear in *Mid-Continent v. Liberty Mutual* and *Gandy* and in a number of other settings that it dislikes litigation about litigation. In *Gandy*, rather than simply saying that no judgment without a fully adversarial trial is binding against the carrier, the Court noted that in California that they very often retry issues where there has been an agreed judgment; they would retry the liability of the insurer in the underlying suit. Litigation about litigation is time consuming, it's confusing, [and] it's a mess for the Courts. So, the Court said, "No." I think *Mid-Continent* is basically saying the same thing: "We don't want to put our toe in the water on that particular type of issue." Reimbursement cases involve exactly that problem, because you're basically settling the underlying suit, it doesn't go to a fully adversarial trial and then after the fact, you're re-litigating for purposes of reimbursement.

And just one other point in terms of why I think it's going to come out differently. The other [point] is: I think there is something really important percolating with respect to *Stowers*. If you look at the oral argument in the *Frank's Casing* case, I think it's very clear that the Court is sensing that where there is a coverage conflict, they can solve the carrier's predicament of having to respond to *Stowers* demands with an unclear picture on coverage by simply holding that *Stowers* does not attach if there is a good faith coverage conflict. In other words, if you show that there's a good faith coverage defense, then you cannot have *Stowers* liability, that they don't need to worry about litigation on reimbursement as the solution to the problem carriers have when they get a *Stowers* demand and they have a coverage problem. So, I think those two things certainly do not auger well for *Franks'*, besides the fact that it is big business versus insurance business. Right now, I think that nod is probably going to go to big business. Remember also that this approach, like *Mid-Continent*, will lead to the loss of *Stowers* pressure to encourage carriers to settle.

ANDROVETT: *Are you surprised that it's taken the Court so long to issue this follow-up decision in* Frank's Casing*? There was a sense, I remember, last year that, "Oh, this is just a matter of weeks or months."*

HUDDLESTON: We are in a holding pattern with at least 10 maybe 12 cases. In *Lamar Homes*, for example, attached to it you've got a large number of cases pending involving similar issues. For each of the other major insurance cases pending before the Court, there are multiple other cases pending or delayed based on the rulings in those key cases. It's the same thing all the way down the line. You've got an avalanche of case law and issues that are before the Court right now. Within the next two years I think most of us could see one of the most amazing sea-changes in insurance law, depending on whether or not the Court picks one consistent pattern or one consistent direction. There are a ton of issues out there.

ANDROVETT: *I remember from your introductions that some of you represent carriers, some policy holders. I think one of you represents both. Considering this mish-mash of cases, and I'm hearing some conflicts of opinion, let's start first with the carriers. What is your advice to them if they're doing business in Texas in terms of crafting their policies? I realize how impossible a task this is, but can you give us some basic principles that we could formulate into a checklist?*

MARTIN: I've recently dealt with carriers where we sit down with underwriters and talk about concerns for new policies forms they are preparing. In fact, one of the things that Marcy mentioned, having endorsements with panel counsel and things of that nature, is becoming more important, because the other part of *Lamar Homes* we didn't talk about, that is the article 21.55 ruling that applies the prompt payment statute if you defend under a general liability policy. As a practical matter, most of the carriers that I deal with are general liability carriers, carriers who have always operated on the assumption that when I have a duty to defend, I have a reasonable time to review, audit and determine the reasonableness of the claim. The risk was always of being estopped from raising defenses by unwarranted delays. Now all of a sudden they're sitting here confronted with a statute specifically drafted for first party policies — though the Court focuses on the fact that the language used is first party "claims" and not "policies" in the statute. Many of my clients have claim shops, where you have any number of people with dockets of "X" number of cases, and they're getting bills in from defense lawyers every single day. This statute, newly applied to them, which says that you have certain time periods to do things affects them dramatically. It affects their everyday life, at least with respect to Texas claims. Within a short time after *Lamar Homes*, I had to go up to several clients and sit in rooms with them, go through the ruling and statute and say, "Okay, here's what the statute now means as applied to you. Here are the time frames in which you need to act, and this changes how you're supposed to handle Texas claims." There are prompt payment statutes that apply to some liability claims in probably another dozen states. But as a practical matter, Texas is now on that list of, "Okay, when it comes in, what do we do?" For the carrier, the first thing you must now do is ask for all the invoices or any material necessary in order to establish what the insured is asking for. Now, the Supreme Court in *Lamar Homes* said something very curious. They asked the question of themselves, "Is it necessary to get the invoice in order to mature or ripen the claim?" And the Court said, "Apparently so." "Apparently so?" Well, I'm used to the Supreme Court interpreting a statute to tell us what it means, as opposed to what it "apparently" means. But at least at this point in time, assuming that they mean what they "apparently" say, they are saying that, "You, Mr. Carrier, have to deal with these time frames." But the salvation for the carrier to some degree is that, "Okay, if they reserve rights and the legal bills are slow in coming, guess what, you have more time to respond to those bills." It's not 15 days from the time the work was performed. The obligations are to act within a certain period after you get the legal bill. The nice thing is there's also some other aspects to that statute that say that you have to get any documentation you need in order to establish the claim before certain deadlines apply. So, you can say, "Okay, I need backup information regarding this work [and] any other invoices for costs." But as a practical matter, this new process has been the biggest concern for everyday adjusting. Now, the other part is and what Marcy referred to is, "How do you fix that problem?" And one of the easiest things to do when reserving rights is that you can appoint your own panel counsel. Because as a practical matter, if the insurance company chose the lawyer, you've got a deal with them already in place that says here's how our billing process works. We all agree to this. You're not going to complain about the timing of the bills. The interesting contest, though, is going to be when there's an antagonism between the carrier and non-panel counsel. Basically, the insurance company chooses the counsel; the insured goes, "Time out. I'm not accepting a qualified defense, so I get to choose counsel." And so you have this lawyer defending the case who may have no nexus with this insurance company at all. By the way, who gets the interest and penalty? Does it go to the insurance defense firm that's doing the

work? No. It goes to the insured. At least that's the way it appears to me.

HUDDLESTON: I've got one case where one insurer is trying to get it from the other.

MARTIN: But the bottom line is, just to tie it up, what I'm telling my clients is to work out a fee arrangement where you will agree to be prompt or work out some guidelines and then live by them. Make sure you live by them. And if you're denying coverage, [and] they continue to submit invoices to you, take that into consideration when you make your decisions on the account.

ROTHMAN: It occurs to me that the 21.55 statute dovetails very nicely into the estoppel concepts in recent opinions. A case came out recently where the decision to respect the insured's choice of counsel addressed a list of panel. The decision was based in part on dilatory conduct by the insurer in articulating its right of veto over the insured's choice of counsel. If everything works right under 21.55, the request to elect counsel is tendered to your insurer and you say, "I want my defense." The insurer's got a very short period of time in which to respond or gather additional information, and running against that is also the estoppel time period. The statute and the common law both require the same prompt conduct. The question on the other side is, if we're seeing decisions like *Mid-Continent*, what leverage is going to be left or what leverage is there to insure the client? The question arises with the prompt payment statute. Really, an insured business may have no damages if all you're doing is getting delayed. The statute and the common law seem to promote prompt payment, but we really can't tell how to be sure that runs smoothly until the new opinions mature.

HUDDLESTON: I think one of the mantras for most policy-holder lawyers is: Always demand independent counsel. Everybody does it. Some people think the more ridiculous the prices and lack of guidelines, that somehow that enhances the pressure that is put on the insurance company. I think the insurance companies are a lot more afraid of policy-holders who are reasonable about independent counsel. For example, the policy-holder should not have to accept a volume-discount rate for its counsel, but it should ask for a reasonable fee and agree to guidelines that it uses for its business in other legal matters. That being said, I'm not sure that I haven't seen more policy holders benefit where the carrier has elected counsel, because there continue to be recurrent *Tilley* problems; and there are lots of unresolved issues like those raised in *Frank's Casing* involving conflicts of interest. One of the remaining uncertainties, at least for carriers, is what's going to happen if you have *Tilley* problems. It doesn't look like it's going to come out very good for you. So, there's a lot more benefit sometimes to allow the carrier to select the counsel rather than just automatically doing a knee-jerk request for independent counsel.

ANDROVETT: *In ten minutes or less, let's talk about the big picture again for this group here and then for the readers of* Texas Lawyer. *If we come back again a year from now, what will the landscape look like?*

MARTIN: I'm hoping that one issue comes out by then, and that's the case, *One Beacon,* that deals with trigger of coverage. It is a certified question. It seems to be the weightiest issue that is before the Supreme Court right now as far as coverage. It is the first time in a generation that the Court is taking up this issue. We have a very stark contrast in the law across the state in Courts of Appeals regarding the theory of trigger. "Trigger," once again, means nothing more than identifying which policies respond to a specific loss. The effect of a ruling on trigger will be monumental in terms of allocation in mass tort, environmental, or any type of long-tail claim. And "long-tail" simply means any loss that occurs over multiple policy periods. I guess the timing of it is such that it's not likely to happen before next year, but of all the cases before the Court, I think that one could have a gigantic impact. I think that *Westchester* is going to be a very important case when it does come down, but I think it will be a tempest in a teapot, because, as a practical matter, punitive damages have not been a driving force in negotiation for a long time. We negotiate insurance claims across the country, and it is very, very seldom that the facts are such that punitive damages are really a major factor in bad faith or handling claims. These things are often talked about, they're leverage points for negotiations; but at the end of day, that's not what drives the value of a claim. So, I don't think that *Westchester* will end up being a landscape-changing case.

ROTHMAN: Over the next year I expect to see more use of procedural, administrative and regulatory relief by insurers. I expect to see a little bit more coverage expansion in terms of substantive application of policies. I'd like to see evaluation of what's going on with the fabric of the *Stowers*-based subrogation and contribution pictures. I'd like to understand what's going to happen if *Mid-Continent* stands and how that will affect the parties' rights toward each other, the insurers versus the insureds, and also the insureds with each other. We are not sure what is going to develop in terms of addressing insurers who don't want to belly up to the table. I'd like to see also what insurers are going to do with respect to tailoring their insurance policies to reflect capacity, to reflect the size of the litigation that's going on right now. What happens on the size of the claims and scope of the insurance [in future opinions by the courts] will shape what insurance companies will write when dealing with insureds in the procurement process. So, it's a little bit of practical and a little theoretical.

HUDDLESTON: . . . If *Stowers* shrinks and the ability to put pressure on carriers shrinks, there's not a lot of other places to turn. And one of the places to turn is going to be regulatory law. I'm seeing more complaints with the Texas Department of Insurance ["TDI"], more requests for additional information from the TDI [and] more fraud investigations by the TDI. I think there's a lot of activity that's going to happen there. I think within the next year we are likely to get some pretty important core rulings on duty to defend. The *Notes* case involves extrinsic evidence for the next step after *Guide One*, potentially. We are likely to see additional law regarding the use of extrinsic evidence to determine the duty to defend. *D.R. Horton v. Markell* addresses the same issue. As we have already discussed, there are a number of key duty to defend cases pending regarding the

liberal construction rule. The landscape may be clearer next year regarding who can and/or must be made parties to declaratory judgment actions. *Richardson v. State Farm*, raises this issue. You are probably going to get some explanation on some issues that have been pending for a long time, such as whether late notice will require prejudice. The *PAJ* case deals with when the policy makes notice a true condition precedent, reequiring proof of prejudice. Insurability of punitive damages is probably going to be bellwether in terms of whether the Court is going to be pragmatic, favor policy-holders or carriers. [There are] the two vehicles involving insurability of punitive damages, the *Fairfield v. Stevens* case and *Westchester v. Admiral*. *Westchester,* which is pending before the Court on petition. It's basically pending while *Fairfield* gets resolved. Those are the two worst cases for the carriers to argue that punitive damages are not insurable. Employers' liability policies were never an insurance industry target for trying to say punitives were not insurable, because if they don't cover punitives what else do they cover? It's basically completely illusory coverage. If the Court finds that that policy and the forms set forth and required by the Department of Insurance are somehow against public policy, then that will be an extraordinary move in favor of carriers, and that will tell us who they like better. In *Westchester,* you've basically got the Medical Liability Improvement Act, which barred coverage for punitives for some people [and] allowed them as for others. If they wind up being disallowed, despite the Legislature saying that they're allowed, then we've got yet another example of the Court reaching out to favor carriers. I suspect that *Fairfield*, and perhaps even *Westchester*, are going to give us guidance on one more critical jurisprudential issue, and that is separation of powers. The Prompt Payment Statute's application to liability carriers in *Lamar,* which remains an open issue on motion for rehearing, touches on separation of powers as well. This is not a Court that has really shown a great deal of deference to the legislature, especially in the insurance area. They basically, in effect, rewrote 21.21 — which is now 541 of the Insurance Code — whenever they engrafted the *Stowers* requirements on the provision dealing with whether or not a settlement for liability was reasonably clear in *Rocor*. In *Fairfield* the Court is clearly dealing with public policy and whether or not the legislature has spoken in terms of how it has set forth regulation on punitive damages. There's a constitutional issue as well, because the Texas Constitution states there is a right to seek payment from a grossly negligent wrongdoer who causes the death of another from that wrongdoer. Is allowing an insurer to pay for punitive damages contrary to this Constitutional provision? So, separation of powers is a real core, fundamental appellate and insurance issue before the Court that may be answered in some respect in the coming year. Again, if they go in a direction and provide that coverage, then we know that they're certainly more pro carrier than pro business.

ROTHMAN: On *Fairfield*, part of the dialogue on the issue on insurability of punitive damages, is whether or not the Court is going to strictly construe the contract. There is express language in the opinions that talks about it being a more important public policy in Texas to enforce contracts than it is to make piecemeal rulings on what kind of punitive damages in cases will be covered by insurance policies. My colleagues made a mention of direct action a minute ago, and my other colleague talked about his nationwide docket. There's some legislation in New York that Spitzer just vetoed that would have moved New York more toward a direct action state. It's going to come back to Spitzer's desk, and he's a proponent of expanding rights against insurance companies. There was another element that he vetoed it for, and it's going to come back to him, and I'm going to watch to see what happens there.

MARTIN: That is being watched closely by the industry and is vehemently opposed.

ROTHMAN: The other thing I wanted to mention, [that] we have not talked about, is e-discovery, the costs for that in underwriting, the costs for that in litigation, who pays for it, and if it is a cost of doing business.

HUDDLESTON: We have not talked a lot about first-party, but there is a really important appraisal case on homeowner's policies that will have an impact on homeowner's and also commercial property policies that is going to be argued in January. It's *Johnson v. State Farm* from the Dallas court. This decision is in direct conflict with the Dallas court's prior decision in *Wells.* The Court will be deciding whether to stick with the distinction between appraisal and arbitration it has followed for over a hundred years or follow the approach of the Florida Supreme Court in what appears to be a peculiar minority position regarding the appraisal of coverage issues. ❖

SPECIAL THANKS TO:

ANDROVETT LEGAL MEDIA & MARKETING

BROWN McCARROLL L.L.P.

SHANNON, GRACEY, RATCLIFF & MILLER, LLP

THOMPSON, COE, COUSINS & IRONS, L.L.P.

FOR THEIR SPONSORSHIP OF THIS ROUNDTABLE.

INSURANCE
INSURANCE
INSURANCE
INSURANCE LAW