

## Federal Judges Visit Belo



On June 24, amid a packed audience at the Belo Pavilion, the Federal Bar Association and the DBA Judiciary Committee hosted a one-hour CLE panel discussion titled, "Practical Tips for Practicing in the Northern District of Texas." The panelists included (left to right) Hon. David C. Godbey, Hon. Sam A. Lindsay, U.S. Magistrate Judge Jeff Kaplan, Chief Bankruptcy Judge Barbara J. Houser and Chief Judge Sidney A. Fitzwater.

## Inspiring Women



For the third consecutive year, a full house came to the Belo Mansion for the "Inspiring Women" CLE event. More than 550 members of the Dallas legal community were inspired by the esteemed panel of women who relayed humorous and honest insight into their careers. In addition to the distinguished panel, the event included a fashion show, featuring Stanley Korshak designs. Those participating in the panel were Kim Askew, Regina Montoya, former Justice Harriet O'Neill, Karen Gren Johnson, Kelly McClure, Hon. Barbara M.G. Lynn and Justice Elizabeth Lang-Miers.

## Focus Tort & Insurance Law

# D&O Insurance When the Company Goes Broke

BY LYNDON BITTLE AND CAROLYN RAINES

As corporate bankruptcies loom, director and officer (D&O) insurance policies may not provide the protection on which directors and officers thought they could count. Because the D&O policy is purchased by the company, it becomes property of the bankruptcy estate. As individual insureds, however, directors and officers may have rights to at least a portion of the policy proceeds. See *Homsy v. Floyd (In re Vitek, Inc.)*, 51 F.3d 530, 535 (5th Cir. 1995); *Louisiana World Expo. v. Fed. Ins. Co. (In re La. World Expo.)*, 832 F.2d 1391, 1401 (5th Cir. 1987).

The interests of the corporate debtor and the individual insureds may collide when the debtor negotiates a "buy-back" of its insurance policies. In a buy-back, the debtor receives certain payment (generally less than policy limits, but avoiding coverage litigation) and absolves the insurers from further obligations under the policies. The outcome of these situations may turn on whether the D&O policy covers only the individuals (Side A), the company (Sides B or C) or both.

A leading case, *In re Adelphia Communications Corp.*, 364 B.R. 518 (Bankr. S.D.N.Y. 2007), involved a D&O policy covering both Adelphia and its directors and officers, who had been sued for securities violations. The company claimed covered losses exceeding the remaining policy limits. Several directors also asserted claims against the policy for defense and indemnification. Adelphia negotiated a settlement with its insurers that included a buy-back of the

D&O policies, contingent on entry of a "channeling injunction" that would "prohibit . . . directors and officers from proceeding directly against the Insurers to pursue claimed entitlements under the policies." Adelphia sought judicial approval of the agreement, and the directors and officers objected.

The court refused to approve the settlement with the injunction, holding that although the directors and officers "do not have an ownership interest in the policies themselves; [they] have contractual rights under the policies" that could not be eliminated without their consent. The policy proceeds would be paid "first-come, first-served," and the court declined to bar the individual insureds from pursuing their rights under the policies.

The Fifth Circuit has not addressed the co-insured problem presented in *Adelphia*. See *In re Vitek*, 51 F.3d at 535. The bankruptcy court in Dallas, however, has addressed the issue of co-insureds under the same D&O policy. See *CBI Eastchase, L.P. v. Farris (In re e2 Comms., Inc.)*, 2005 Bankr. LEXIS 3250, \*32-42 (Bankr. N.D. Tex. Mar. 24, 2005). The court decided that, although the process would be procedurally and substantively complex, "an allocation of proceeds among the various co-insureds, makes the most sense."

A second concern for directors and officers arising from a buy-back of a primary policy is whether it will trigger coverage under excess "Side A only" policies. Generally, a primary policy must be exhausted before an insured can reach an excess policy. See *Emscor*

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## Inside

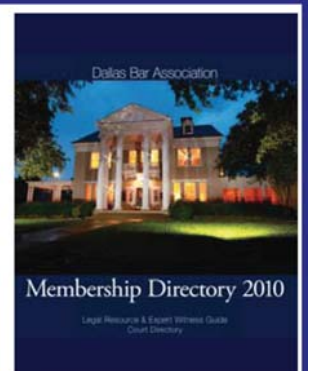
- 5 Recent Medicare Reporting & Reimbursement Requirements
- 7 Defense Costs Recoverable From Co-Insurer
- 9 Obtaining Jurisdiction Over Out-of-State Manufacturers

The 2010 DBA Membership Directory (available in print & online) is now available.

Check out the directory and legal resource guide used by Dallas attorneys!

To view the online directory go to [www.dallasbar.org/pictorial](http://www.dallasbar.org/pictorial) and login.

For the Legal Resource & Expert Witness Guide, log on to [www.dallasbar.org/pictorial/guide.asp](http://www.dallasbar.org/pictorial/guide.asp).



## Calendar

## August Events

Visit [www.dallasbar.org](http://www.dallasbar.org) for updates on Friday Clinics and other CLEs.

## FRIDAY CLINICS

## August 6 – Belo

Noon "Ethics of Advising Potential Bankruptcy Debtors after the Milavetz Case," Robert Yaquinto and Paul Keiffer. (MCLE 1.00)\*

## August 13 – North Dallas\*\*

Noon "Who, What, Where, When and How: A Practitioner's Guide to the Interpretation and Application of Texas Civil Practice & Remedies code Section 41.0105," Frank Cawley. (MCLE 1.00)\* **At Two Lincoln Centre, 5420 Lyndon B. Johnson Frwy., Dallas, TX 75240.** Parking is available in the Visitor's Lot located in front of the entrance to Two and Three Lincoln Centre. There are several delis within the building. Food is allowed inside the Conference Center. Thanks to sponsor Griffith Nixon Davison P.C.

## August 20 – Belo

Noon "Exempt Offerings of Securities to Sophisticated Investors: A Discussion of the SEC's Private Offering Regime" Roger W. Bivans, Matt Morris and Leslie Fisher. (MCLE 1.00)\*

## September 3 – Belo

Noon "Representing Unpopular Clients," Dicky Grigg. (MCLE 1.00)\*

## MONDAY, AUGUST 2

Noon **Tax Section**  
"Tax Issues Every Tax Lawyer Needs to Understand," Daniel J. Micciche. (MCLE 1.00)\*

Peer Assistance Committee

## TUESDAY, AUGUST 3

Noon **Corporate Counsel Section**  
"Solving the Puzzle: Selecting the Best Alternative Fee Arrangement with Outside Counsel," Trey Christensen, Eric Griffin, Clay Scheitzach and Robert J. Scott. (MCLE 1.00)\*

**Tort and Insurance Practice Section**  
"Insurance Litigation, Pretrial through Trial: A Judge's Perspective," Hon. Carlos Cortez, Hon. Mark Greenberg, Hon. Ken Molberg and Hon. Gena Slaughter. (MCLE 1.00)\*

5 p.m. **Public Forum Committee presents Dallas Tomorrow II, a public forum on what's happening in the city of Dallas and how it affects you.**  
Speakers: Dallas Mayor Tom Leppert; Chancellor Lee Jackson of UNT; Dr. Gail Thomas of the Trinity River Project; and Dallas Morning News Vice President Keven Ann Willey.

6 p.m. DAYL Board of Directors

## WEDNESDAY, AUGUST 4

Noon **Employee Benefits/ Executive Compensation Section**  
"Domestic Partner Benefits: Selected Issues in Design and Administration," James A. Deets. (MCLE 1.00)\*

**Government Law Section**  
"Defending Texas: The Office of the Solicitor General," Hon. James C. Ho, Solicitor General of Texas. (MCLE 1.00)\*

**Solo & Small Firm Section**  
"Securing A Temporary Restraining Order in Dallas County District Courts," David S. Vassar. (MCLE 1.00)\*

Lawyer Referral Service Committee

Legal Ethics Committee

Public Forum Committee

6 p.m. **Bankruptcy & Commercial Law Section**  
"Playing the Cards You're Dealt—52 Lessons Lawyers (Even Bankruptcy Lawyers) Can Learn at the Poker Table," Melissa Hayward and John P. Lewis. (Ethics 1.00)\*

## THURSDAY, AUGUST 5

Noon **Construction Law Section**  
"Testing the Limits of Limitations on Liability," Matthew D. Beshara. (MCLE 1.00)\*

Family Law Section Board

DAYL CLE Committee

## FRIDAY, AUGUST 6

Noon **Friday Clinic – Belo**  
"Ethics of Advising Potential Bankruptcy Debtors after the Milavetz Case," Robert Yaquinto and Paul Keiffer. (Ethics 1.00)\*

## MONDAY, AUGUST 9

No DBA meetings scheduled.

## TUESDAY, AUGUST 10

Noon **Business Litigation and Collaborative Law Sections**  
"Collaborative Law in Business Litigation: Something New and Different," Anne Shuttee. (MCLE 1.00)\*

DAYL Equal Access to Justice Committee

4 p.m. Senior Lawyers Committee

6 p.m. Home Project Committee

## WEDNESDAY, AUGUST 11

Noon CLE Committee

House Committee

Christian Lawyers Fellowship

## DAYL Lunch and Learn on Summary Judgments.

For more information, e-mail [cherieh@dayl.com](mailto:cherieh@dayl.com).

5:15 p.m.

**LegalLine—Volunteers welcome.**  
Second floor Belo.

## THURSDAY, AUGUST 12

11:30 a.m. DAYL Barristers for Babies

Noon Publications Committee

6 p.m. J.L. Turner Legal Association

## FRIDAY, AUGUST 13

Noon **Friday Clinic – North Dallas\*\***  
"Who, What, Where, When and How: A Practitioner's Guide to the Interpretation and Application of Texas Civil Practice & Remedies code Section 41.0105," Frank Cawley. (MCLE 1.00)\* **At Two Lincoln Centre, 5420 Lyndon B. Johnson Frwy., Dallas, TX 75240.** Parking is available in the Visitor's Lot located in front of the entrance to Two and Three Lincoln Centre. There are several delis within the building. Food is allowed inside the Conference Center. Thanks to sponsor Griffith Nixon Davison P.C.

## Trial Skills Section

"Top 10 Emerging Issues in Business Tort and Commercial Law," Brian Lauten. (MCLE 1.00)\*

## MONDAY, AUGUST 16

Noon **Labor & Employment Law Section**  
"E-Discovery Obligations for the Employment Lawyer: Protecting Yourself and Your Clients," Andrew M. Gould and Marcia N. Jackson. (MCLE 1.00)\*

Minority Participation Committee

## TUESDAY, AUGUST 17

Noon **Franchise & Distribution Law Section**  
"Vicarious Liability Between Franchisor & Franchisee: The Line Is Shifting," Kirte M. Kinser and Stephanie L. Russ. (MCLE 1.00)\*

DAYL Animal Welfare Committee

DAYL Elder Law Committee

## WEDNESDAY, AUGUST 18

Noon **Energy Law Section**  
"Horizontal Wells and Pooling Issues," John Hicks. (MCLE 1.00)\*

Judiciary Committee – Local Rules Working Group

Pro Bono Activities Committee

DAYL Judiciary Committee

Municipal Justice Bar Association

5:15

**LegalLine—Volunteers welcome.**  
Second floor Belo.

## THURSDAY, AUGUST 19

Noon Minority Participation Committee

UPL Subcommittee

Dallas Criminal Defense Lawyers Association

Dallas Gay & Lesbian Bar Association

## FRIDAY, AUGUST 20

Noon **Friday Clinic – Belo**  
"Exempt Offerings of Securities to Sophisticated Investors: A Discussion of the SEC's Private Offering Regime" Roger W. Bivans, Matt Morris and Leslie Fisher. (MCLE 1.00)\*

## MONDAY, AUGUST 23

Noon **Computer Law Section**  
"Current Legal Developments in Social and Online Games and Virtual Worlds," Mark Methenitis. (MCLE 1.00)\*

**Securities Law Section**  
"Dodd-Frank Act—Congress Has Passed It. Now What Is In It?," Charles T. Haag (MCLE 1.00)\*

Criminal Justice Committee

## TUESDAY, AUGUST 24

Noon Courthouse Committee

American Immigration Lawyers Association

6 p.m. Dallas Hispanic Bar Association

## WEDNESDAY, AUGUST 25

7:45 a.m. Dallas Area Real Estate Lawyers Discussion Group

8:45 a.m. **Collaborative Law Section Two-day event, 6th Annual Civil Collaborative Law Training** (MCLE 15.00, Ethics 2.00)\* For more information, [www.collaborativelaw.us](http://www.collaborativelaw.us).

Noon **Sports & Entertainment Law Section**  
"Labor Agreements in Major League Soccer," Todd Durbin. (MCLE 1.00)\*

Juvenile Justice Committee

Legal Ethics Committee

DVAP New Lawyer Luncheon

DAYL Aid to the Homeless

## THURSDAY, AUGUST 26

7:45 a.m. **Energy Law Section**  
"Review of Oil & Gas Law XXIV, two-day event sponsored by the DBA Energy Law Section. Includes federal and state legislative updates and case law updates. For more information, contact Sandra at 214-758-1583.

8:45 a.m. **Collaborative Law Section Two-day event, 6th Annual Civil Collaborative Law Training** (MCLE 15.00, Ethics 2.00)\* For more information, [www.collaborativelaw.us](http://www.collaborativelaw.us).

Noon **Criminal Law Section**  
"Electronic Evidence," Mike Gibson. (MCLE 1.00)

**Environmental Law Section**  
"Environmental Entrepreneurship: Market-Based Approaches for a Sustainable Environment," Scott Deatherage. (MCLE 1.00)\*

Mentoring Committee

## FRIDAY, AUGUST 27

7:45 a.m. **Energy Law Section**  
"Review of Oil & Gas Law XXIV, two-day event sponsored by the DBA Energy Law Section. Includes federal and state legislative updates and case law updates. For more information, contact Sandra at 214-758-1583.

8:45 a.m. **Collaborative Law Section 2nd Annual Civil Collaborative Law Symposium** (MCLE 7.25, Ethics 1.00)\* For more information, [www.collaborativelaw.us](http://www.collaborativelaw.us).

Noon **Intellectual Property Law Section**  
"Ethical Considerations in Pretext Investigations," John Cone and Ken Taylor. (MCLE 1.00)\*

Media Relations Committee

## MONDAY, AUGUST 30

No DBA meetings scheduled.

## TUESDAY, AUGUST 31

No DBA meetings scheduled.

## WEDNESDAY, SEPTEMBER 1

Noon **Employee Benefits/Executive Compensation Section**  
Topic Not Yet Available

**Solo & Small Firm Section**  
"Turnover Receiverships—The Secret Weapon Hardly Anyone Uses," Michael S. Bernstein. (MCLE 1.00)\*

Legal Ethics Committee

Public Forum Committee

5 p.m. **Bankruptcy and Commercial Law Section**  
Topic Not Yet Available

## SAVE THE DATE! DALLAS TOMORROW II

What's Happening In Dallas And What Does It Mean To You?  
Tuesday, August 3, 5:30 to 8:00 p.m. at The Belo Mansion

Speakers include:

Mayor Tom Leppert; Lee Jackson, Chancellor of UNT; Dr. Gail Thomas, president and CEO of The Trinity Trust Foundation; Keven Ann Willey, Dallas Morning News Vice President

Sponsored by the DBA Public Forum Committee



If special arrangements are required for a person with disabilities to attend a particular seminar, please contact Cathy Maher at 214/220-7401 as soon as possible and no later than two business days before the seminar.

All Continuing Legal Education Programs Co-Sponsored by the DALLAS BAR FOUNDATION.

\*For confirmation of State Bar of Texas MCLE approval, please call Teddi Rivas at the DBA office at 214/220-7447.

\*\*For information on the location of this month's North Dallas Friday Clinic, contact [KZack@dallasbar.org](mailto:KZack@dallasbar.org).

**Focus** | Tort & Insurance Law

# When is it Bad Faith to Settle for Policy Limits?

BY MICHAEL J. WATSON

Insurance carriers are often called upon to protect their insured's financial interests by paying reasonable settlement demands within the policy limit. However, when the policy limits are inadequate to obtain a release of all claims or a release on behalf of all insureds, the carrier may face a decision on whether to accept or reject a settlement demand that only partially releases the insured. This is a choice fraught with peril. The carrier must carefully balance its obligation to accept reasonable settlement demands and the consequences to the insured of reaching the policy limit for a release of less than all claims.

Unfortunately, there is no template and no single, easy answer to these difficult decisions. Courts and commentators have described these situations as "a damned-if-you-do/damned-if-you-don't dichotomy" or "a Hobson's choice."

In the case of multiple claimants vying for insufficient policy proceeds, the majority view is that the carrier is required to act reasonably under the circumstances in order to protect the best interests of the insured. Texas ascribes to this majority rule allowing the carrier to enter into reasonable settlements with less than all claimants even though such settlements may exhaust the policy limit.

Similarly, most jurisdictions hold that an insurer may settle a claim on behalf of less than all insureds where the insureds are covered under a single policy with limits that are not adequate to fully protect them all. Notably, two states, New York and California, favor the minor-

ity approach that a carrier favoring the interests of one insured over those of another violates its duty of good faith and fair dealing. An additional layer of difficulty is presented by policies that require consent of the insured for settlement. In that context, it has been held that it may be bad faith to settle on behalf of less than all insureds if any one of the multiple insureds objects to the settlement. In reviewing the carrier's actions in these cases, courts generally focus on two questions: 1) Was the partial settlement reasonable under the circumstances?; and 2) Did the carrier place its financial interests ahead of insureds?

In determining whether the settlement was reasonable, courts typically consider such factors as: 1) each insured's probable liability to each claimant; 2) the policy limits; 3) the extent of each claimant's injuries and/or damages; and, if applicable, 4) the non-settling insured's ability to satisfy an adverse judgment, whether through other available insurance or personal assets.

In judging whether or not the carrier placed its financial interests ahead of the insureds, courts typically consider such factors as the adequacy of the investigation, the quality of the defense provided by the insurer, whether the insurer heeded defense counsel and its own adjuster's advice concerning defense of the case and settlement, whether the carrier simply offered its policy limit or attempted to negotiate a lower settlement, the openness of the communications between the insurer and insured, whether the insurer kept the insured informed about settlement negotiations,

and any other conduct by the insurer reflecting greater concern for its financial interests (*i.e.* avoiding defense cost exposure) than for its insured's financial risk.

Although there is no "magic bullet" that will allow the carrier to avoid excess exposure in these difficult situations, carriers can best protect their interests and those of the insured by engaging in thorough and expedited investigation of claims, keeping the insured fully informed of the outcome of the investigation as well the proposed settlement strategy, fully discussing and exploring settlement strategies with the insureds, notifying the claimants of the limited policy proceeds, making every reasonable effort to obtain

agreement from the claimants as to the distribution of the limited proceeds, and finally, making and documenting all reasonable efforts to settle all the claims on behalf of all insureds.

The carrier should also carefully consider the requests of the insured regarding settlement. Although following the insured's wishes as to settlement will not insulate the carrier from bad faith, it is strong evidence that the carrier was attempting to further the interests of the insured rather than its own. **HN**

Michael J. Watson is a partner at Walker Sewell L.L.P. He dedicates his practice to insurance-related matters and can be reached at [mwatson@walkersewell.com](mailto:mwatson@walkersewell.com).

## NETWORKING PROFESSIONALS' HAPPY HOUR

Hosted by the DBA Entertainment Committee, the Dallas CPA Society and The American Association of Attorney-Certified Public Accountants


AT THE HARD ROCK CAFÉ, 2211 NORTH HOUSTON STREET  
THURSDAY, AUGUST 19, 6:00 TO 8:00 P.M.




Don't Miss:

- Complimentary hors d'oeuvres
- Drink specials
- Two hours complimentary parking at the Hard Rock garage (Victory Avenue behind Houston Street)
- 15% off your meal if you choose to stay for dinner

RSVP to Rhonda Thornton at [rthornton@dallasbar.org](mailto:rthornton@dallasbar.org) or (214) 220-7403.




### THE SUBRO GRAPEVINE



**Save The Date**  
Annual Conference  
Nov. 7-10, 2010  
The Gaylord Texan - Grapevine, Texas

National Association of Subrogation Professionals  
The NASP mission is to enhance the stature and effectiveness of subrogation and recovery professionals through education, training and the exchange of information.  
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The Gaylord Texan



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**SUBRO COLLEGE**



## President's Column

# The Home Team

BY IKE VANDEN EYKEL

The story of how the Dallas Bar Association came to call the Belo Mansion its home is definitely a testament to the theme of Team DBA. Numerous members and staff helped the DBA transform from a small meeting group in 1873 to the bar leader it is today—an association of more than 10,000 members who call the Belo Mansion home.

The Dallas Bar Association was founded by 40 lawyers in 1873. Its regular meetings were held in the offices of the then President and then later at the old Oriental Hotel located at the southeast corner of Commerce and Akard. In 1919, the association's meetings moved to the local courtrooms, usually the 14th or 44th. They returned again to the Oriental Hotel in 1923, where the practice of luncheon meetings was inaugurated. However, in 1924, the meetings were once again moved to the courtrooms to make way for the new Baker Hotel to be built on the site of the Oriental Hotel. The luxurious Baker Hotel opened in 1925 and was not only the meeting place for the association, but also home of WFAA Radio, the Petroleum Club, the Peacock Terrace, the Chrystal Ballroom, many debutante parties, big name swing bands and Texas OU parties.

In 1937, the Bar Association of Dallas opened its first office in a 15-foot cubicle under the stairs of the Old Red Courthouse. In 1947 the association was incorporated as the Dallas Bar Association, the state's first bar to do so. From 1955 to 1978, the DBA leased offices, dining and meeting facilities at the Adolphus Hotel and the Adolphus Tower, during which time membership grew to nearly 1,500 lawyers. Due to the continued increase in membership serious discussion to purchase space for the headquarters began in the early 1970's. DBA members then found that the Belo Mansion was vacant and began to explore the options to purchase it.

With a great show of team effort, the lawyers of Dallas, foundations and public-spirited citizens contributed more than \$1 million for purchase and restoration of the historic Belo Mansion. And on August 1, 1979, with a growing membership of 3,500, the Dallas Bar Association finally had a place to call its own.

In 2001, to meet the ever-increasing demands of a growing membership of now more than 7,000 and only 60 parking spaces, the DBA raised \$14 million and built a new addition to the Belo Mansion—the Pavilion at the Belo Mansion opened in August 2003. With this expansion came added parking,

an expanded kitchen facility and additional space for DBA meetings.

As you visit the Belo Mansion for CLEs, events and meetings, you may notice the everyday activities are flawlessly run. You are greeted by a joyful staff, a delicious lunch and a dynamic atmosphere. This could not happen without our Team DBA Belo building staff—from building maintenance and landscape, to garage personnel to catering personnel and security. And the catering staff just received the 2010 Culinaire Team Award, a nationwide award for outstanding customer service, exceptional food and staff longevity at the Belo Mansion.

This precise execution of the day-to-day operations of the Belo Mansion would not be possible without the following Team DBA members listed below,

some of whom have been at the Belo Mansion for more than 25 years. We thank you!

It has been said we must remember those who came before us and always look to those who will follow. Through Team DBA we look at our history and the efforts of those who made us great, but we also look ahead and plan for the future with those who will continue to keep us great through Vision 2020. I want to take this opportunity to thank all the Belo Mansion staff for their hard work and outstanding customer service. We couldn't ask for a better staff!



### GENERAL MANAGER:

John Daly

### CATERING SALES & ADMINISTRATION:

Maximo Aurelio, *Administration*  
Dawn Finley, *Director*  
Linda Werner, *Event Sales*  
Bryan Starnes, *Senior Event Sales*

### KITCHEN:

Elijah Coe, *Executive Chef*  
Rogelio Hernandez, *Cook*  
Natalie Hughues, *Prep Cook*  
Ramiro Lule, *Dishwasher*  
Miguel Martinez, *Cook*  
Abel Solorzano, *Prep Cook*  
Tomas Sotelo, *Dishwasher*  
Naytasha Taylor, *Prep Cook*

### RESTAURANT SERVERS:

Maria Martinez, *Restaurant Server*,  
28 years  
Juan Zermeno, *Restaurant Server*,  
30 years

### CAPTAIN, HOUSE, STEWARDS:

Carlos Cano, *Operations Manager*  
Gabriel Guzman, *Houseman*  
Maria Lule, *Steward*

Arturo Morales, *Banquet Captain*  
Nancy Pinal, *Housekeeping*  
Alejandrina Ramirez, *Steward*

### BANQUET SERVERS:

Cesar Julio Castillo, *Banquet Server*  
Victor Castellanos, *Banquet Server*  
Benito Ceresceres, *Banquet Server*  
Jose Garcia, *Banquet Server*  
Rosanna Gonzales, *Banquet Server*  
Maria Rosa Martinez, *Banquet Server*  
Teresa Martinez, *Banquet Server*  
Adela Morales, *Banquet Server*  
Bertha Orozco, *Banquet Server*  
Maria Passano, *Banquet Server*  
John Pathak, *Banquet Server*  
Jose Portillo, *Banquet Server*  
Jose Juan Rodriguez, *Banquet Server*  
Martha Ruiz, *Banquet Server*  
Myra Ruiz, *Banquet Server*  
David Ruiz, Sr., *Banquet Server*  
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Gerardo Salazar, *Banquet Server*  
Joaquin Torres, *Banquet Server*  
Norma Varela, *Banquet Server*

**BUILDING MAINTENANCE:**  
Nick LaBranche, *Engineer 32 years*

Jose Pepe Banda, *Maintenance*  
John Smith, *Maintenance, 32 years*

### LANDSCAPING:

Mark McCormack, *Property Manager*

### PARKING GARAGE:

Tom Gray, *Executive Vice-President*  
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Daniel Anthony, *Cashier*  
Ray Campbell, *Porter*  
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Dorothy Joseph, *Cashier*  
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Timothy Ervin, *Police Officer*  
Clayton Evans, *Police Officer*  
Blake Farrell, *Police Officer*  
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Kathryn Harris, *Police Officer*  
Michael Williams, *Police Officer*  
Rodney Williams, *Manager*,  
*Building Security*  
Nathan Wilson, *Police Officer*

## HEADNOTES

Published by:  
DALLAS BAR ASSOCIATION

2101 Ross Avenue  
Dallas, Texas 75201  
Phone: (214) 220-7400  
Fax: (214) 220-7465  
Website: www.dallasbar.org  
Established 1873

The DBA's purpose is to serve and support the legal profession in Dallas and to promote good relations among lawyers, the judiciary, and the community.

### OFFICERS

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## Focus | Tort & Insurance Law

# Recent Medicare Reporting & Reimbursement Requirements

BY JONATHAN M. SPIGEL

A fair amount has been written and will continue to be written on Medicare reporting and reimbursement as the United States Government—specifically Medicare, operating through the Centers for Medicare and Medicaid Services (CMS)—insurance carriers, counsel and the courts sort through various provisions of Section 111 of the Medicare, Medicaid and SCHIP Extension Act of 2007 (MMSEA). This article will provide some background context, highlight key provisions of Section 111 of the MMSEA and will close by offering some compliance tips for the practitioner and insurance carrier.

### Background

Established by Congress in 1965, Medicare provides benefits to persons at least 65 years old and, regardless of age, covers those receiving Social Security Disability benefits for at least 24 months, and those medically determined to have end-stage renal (kidney) disease. See 42 U.S.C. § 1395c. In 1980, Congress passed the Medicare Secondary Payer Act (MSPA). 42 U.S.C. § 1395y(b)(2).

As the name suggests, the MSPA was intended to make Medicare the secondary payer of health/medical-related benefits. Thus, where the beneficiary had a health insurance plan, or where the beneficiary's medical expenses should have been paid by a tortfeasor or its insurance carrier, Medicare would be reimbursed, when applicable, for payments it made on behalf of that beneficiary. Medicare's

initial payments are referred to as “conditional, primary payments.” To recoup billions of dollars in lost, unreimbursed Medicare payments made each year, Congress passed Section 111 of the MMSEA to put some real “teeth” into the MSPA. See 42 U.S.C. § 1395y(b)(7) & (8).

### Key Provisions of Section 111

CMS requires that any settlement, judgment or other award to a Medicare beneficiary be reported so that Medicare can seek reimbursement for any conditional, primary payments it has made. The reporting and reimbursement requirements apply to both current Medicare participants, as well to workers' compensation beneficiaries who have incurred at least \$250,000 in medical benefits, have a Medicare Set-Aside in place for any future medical benefits and are within 30 months of Medicare-eligibility. Those required to report required information to Medicare are referred to as “Responsible Reporting Entities,” or RREs. They include group health plans, as well as liability, no-fault, and workers' compensation insurers and self-insureds.

If an RRE fails to timely report the required information, the RRE can be fined \$1000 per claim, per day, from the date of the noncompliance. Understandably, this particular provision has been followed most closely by the insurance industry.

Legislation is currently pending in Congress to take some of the “bite” out of Section 111. See H.R. 4796 introduced in the U.S. House of Representa-

tives in March of this year. The proposed changes include softening the penalty to “up to \$1000.00” per day; creating a three-year statute of limitations for Medicare's right of reimbursement; and only allowing reimbursement for claims totaling at least \$5000.00. However, it is likely that Section 111 will survive with most of its enforcement provisions intact in light of public policy considerations.

Failure to timely reimburse Medicare for any payments it has “fronted” for the Medicare beneficiary can also have negative financial consequences. Defendants, health care providers, claimants/plaintiffs and plaintiff's counsel that have received a financial benefit as a result of Medicare having first paid otherwise reimbursable medical benefits can suffer double damages for any non-reimbursed Medicare payments. See 42 U.S.C. §1395y(b)(7) & (8).

The U.S. Department of Justice recently filed a suit on this precise issue in the United States District Court for the Northern District of Alabama. In *U.S. v. Stricker*, Civil Action No. 1:09-cv-02423-KOB, several attorneys, corporations and insurers settled a large

class action involving 907 Medicare beneficiaries, but the payments were not reimbursed. The class action was settled for approximately \$300 million and the DOJ is now seeking double damages against all parties as a result of the failure to reimburse Medicare.

### Compliance Tips

In light of the serious consequences and penalties for failure to timely report and reimburse Medicare conditional payments, counsel should contact and report to the local Regional CMS office early and as often as necessary in the claim/suit process. Moreover, because Section 111 enforcement and reporting timetables have changed several times since their original enactment in 2007, consult the CMS website ([www.cms.gov/mandatoryinsrep/04\\_whats\\_new.asp](http://www.cms.gov/mandatoryinsrep/04_whats_new.asp)) for the latest CMS missives on enforcement and reporting. This website also has many other helpful Medicare-related links and resources. **HN**

Jonathan M. Spigel is a Shareholder with the Dallas office of Cowles & Thompson, P.C. He can be reached at [jspigel@cowlest-hompson.com](mailto:jspigel@cowlest-hompson.com).



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**Focus** | Tort & Insurance Law

# Defense Costs Recoverable From Co-Insurer

BY JESSE BLAKLEY, JR.

A typical commercial general liability (CGL) policy requires that an insurer provide its insured a defense for any lawsuit covered by the policy. But what happens if one co-primary insurer agrees to provide a defense but another declines? Does the defending insurer have a right to contribution against the other insurer? The Fifth Circuit answered “yes” in its recent decision in *Trinity Universal Co. v. Employers Mutual Casualty Co.*, 592 F.3d 687 (5th Cir. 2010).

In *Trinity Universal*, Trinity, Employers Mutual, and two other insurers issued CGL policies to Lacy Masonry. The policies covered Lacy Masonry’s design, construction and renovation of a hospital in New Braunfels. Each policy obligated the insurer to defend any “suit” against Lacy Masonry. The policies also contained identical “other insurance” clauses requiring each insurer to contribute equal amounts covering “loss” until it had paid its applicable limit of insurance or none of the loss remained, whichever occurred first.

The hospital sued Lacy Masonry, alleging it was responsible for property damage

caused during the design, construction and improvement of its building. Trinity and two other insurers agreed to defend Lacy Masonry, but Employers Mutual refused to participate in or contribute to the defense. Trinity ultimately settled the hospital’s claim.

Trinity sued Employers Mutual, arguing essentially that Employers Mutual owed Lacy Masonry a defense in the Hospital suit. The district court agreed that Employers Mutual did owe Lacy Masonry a duty to defend. The court, however, relying on the Texas Supreme Court’s decision in *Mid-Continent Insurance Co. v. Liberty Mutual Insurance Co.*, 236 S.W.3d 765 (Tex. 2007), dismissed Trinity’s claims under the premise that Trinity could not recover defense costs from Employers Mutual under either contribution or subrogation theories. In *Mid-Continent*, the Texas Supreme Court held that if (1) multiple relevant policies each contain “other insurance” provisions and (2) a co-primary insurer pays more than its pro-rata portion of a settlement to indemnify an insured, the overpaying insurer may not seek reimbursement from the underpaying co-primary insurer. Trinity and Employers

Mutual both appealed to the Fifth Circuit.

After concluding that Employers Mutual did owe Lacy Masonry a defense, the Fifth Circuit turned to whether *Mid-Continent* applied to Trinity’s contribution claim for defense costs. The court stated that the district court “mischaracterized” *Mid-Continent*. *Mid-Continent*, the Fifth Circuit noted, only applies to co-insurers seeking to recover money paid to indemnify a common insured for a loss. According to the court, *Mid-Continent* left open the question of whether a co-insurer can recover defense costs. The Fifth Circuit, thus, went on to address whether a co-insurer could recover these costs under a contribution theory.

The court first noted that an insurer’s duty to defend is separate from and broader than its duty to indemnify. The court then looked to the Employers Mutual policy’s “other insurance” clause, which stated that it applied only to an insured’s “loss.” The provision’s “loss” language limited its application to Employers Mutual’s duty to indemnify and not its duty to defend.

The court analyzed the two elements that must be satisfied to prevail on a contribution claim: (1) the co-insurers share a common obligation or burden, and (2) the co-insurer seeking contribution has made a compulsory payment or other discharge of more than its fair share of the common obligation or burden. In *Mid-Conti-*

*ment*, the Texas Supreme Court had held that because an “other insurance” clause makes the duty to indemnify under each policy “several and independent,” the first requirement—that the co-insurers share a common obligation—could not be satisfied. However, the Fifth Circuit explained that the duty to defend is different because it “creates a debt which is equally and concurrently due by all of its insurers.” The court reasoned that policies do not obligate insurers to provide a pro-rata defense.

The Fifth Circuit concluded that the district court erred in finding that Trinity could not seek contribution from Employers Mutual for defense costs. Thus, the court did not reach the issue of whether Trinity had a right to subrogation.

After *Mid-Continent*, some co-primary insurers may have been hesitant to offer a complete defense to policyholders out of fear that non-defending co-primary insurers would have no obligation to contribute defense expenses. But the Fifth Circuit’s opinion in *Trinity Universal* may provide insurers comfort that if they accept their duty to defend, defense costs may be shared with other primary insurers. **HN**

Jesse Blakley, Jr. is an associate in Haynes and Boone, LLP’s Insurance Coverage Litigation group. He can be reached at [jesse.blakley@haynesboone.com](mailto:jesse.blakley@haynesboone.com).



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## Noel Chakkalal



Noel Chakkalal is a patent attorney at Research in Motion, handling complex electrical, computer and telecommunications patents, and assisting with related litigation. Noel has distinguished himself in the pro bono arena by attending nearly every weekly clinic at the Housing Crisis Center (HCC) and offering advice to applicants regarding their various landlord-tenant issues. “My time with the HCC has been one of the most rewarding experiences of my life. We see individuals and families facing difficult and often heartbreaking circumstances, and we do our best to help. Often, we provide legal advice to solve a problem, and sometimes, we help by just talking to them about their situation. Serving the Dallas community with other members and volunteers of the HCC has been educational and inspirational, and I look forward to continuing to serve,” Noel says.

Thank you, Noel!

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## Focus | Tort & Insurance Law

# Anatomy of an Insurance Coverage Dispute

BY ALAN ROSENBERG

I am often asked if insurance coverage litigation is just like any other commercial litigation matter. My response is “yes, except for the facts ... and the law.”

Insurance coverage litigation, by its nature, is a contract dispute. Unfortunately, the contract involved is often thought of as the most convoluted and confusing type of contract, which judges and juries often interpret inconsistently. As a result, verdicts and court opinions are all over the map—figuratively and literally—as it is not uncommon for a single insurance provision to have varying interpretations throughout the country. As a result, the approach to prosecuting or defending an insurance coverage dispute often differs from other commercial litigation matters.

The first question to address before filing a coverage suit is whether state or federal court is the proper venue. It is common for a United States District Court to have jurisdiction, as insurers and insureds are commonly found in different states and the amount in controversy frequently exceeds \$75,000. 28 U.S.C. §1332(a).

Because of the complexities of coverage disputes, insurance practitioners often try to trigger federal jurisdiction. However, local state court judges and juries are frequently deemed well-equipped to handle such complexities. Others believe federal jurisdiction is irrelevant so long as a jury hears (or does not hear) the case.

Another significant issue requiring consideration before filing a coverage dispute is which state’s law most favors the client’s interests and whether you can invoke

jurisdiction to trigger that state’s laws. Frequently, this becomes the biggest pre-filing research challenge for several reasons.

First, many insurance coverage disputes involve the interpretation of several different provisions. If the law in a jurisdiction is favorable to your client’s position on one provision, it may be grossly unfavorable on another. Second, it may not be possible to trigger state law that is most beneficial to your client because of the location of the parties and/or the transactions at issue. Finally, even if there is an argument that a case can be filed in a particular state, that state’s choice-of-law analysis may require the court to apply another state’s laws. The results of any given coverage dispute may hinge on which state’s law applies, so this can become the most important aspect of a coverage lawyer’s analysis.

The most common question I receive from non-insurance attorneys, or their clients, is whether attorneys’ fees are recoverable should the insured need to file suit against an insurer that has declined coverage for all or part of a given claim. The answer, like in any other commercial litigation matter, depends on the causes of action that are alleged.

In most insurance coverage disputes filed in Texas, the causes of action against an insurer are: breach of con-

tract; violation(s) of the Insurance Code; violation(s) of the DTPA; breach of the duty of good faith and fair dealing; breach of fiduciary duty; bad faith; and/or to obtain a declaratory judgment. Attorneys’ fees are recoverable for many of these causes of action, but one may be required to segregate and account for fees between claims for which attorneys’ fees are recoverable and those for which they are not.

Burden of proof issues often arise in insurance coverage disputes. Although there are exceptions to the rule, the insured has the obligation to prove that a claim falls within coverage, while the insurer has the burden to prove that an exclusion applies to preclude coverage under the subject policy. Like many other issues, however, it is rarely that simple.

This article only touches on some of the issues involved in litigating insurance coverage matters. Other issues, such as the duty to defend, subrogation, trigger and allocation of coverage, and compliance with notice requirements are also on the list of issues to consider when filing insurance coverage disputes. Due to the complexities of coverage disputes, some practitioners devote their entire practices to the nuances of insurance policy interpretation and litigating coverage disputes. It is easy to see why. **HN**

Alan Rosenberg is the head of the Insurance Coverage section at Stuber Cooper & Voge, PLLC. He can be reached at [arosenberg@scvllaw.net](mailto:arosenberg@scvllaw.net).

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# Obtaining Jurisdiction Over Out-of-State Manufacturers

BY ALEX BEARD

Businesses often structure their practices to avoid the jurisdiction of courts outside their home state. Product manufacturers must be particularly cognizant of how they market, distribute, and sell their products so as to avoid being subject to the jurisdiction of every state where their products may land. Recently, the Texas Supreme Court defined the circumstances under which a non-resident manufacturer can be subject to specific jurisdiction in Texas when it uses a Texas entity to distribute or ship its product.

In *Spir Star AG v. Kimich*, 2010 WL 850151 (Tex. Mar. 12, 2010), a foreign manufacturer sold its products in Texas through a Texas distributor. The injured plaintiff argued that the manufacturer's substantial sales in Texas plus its utilization of a Texas distributor met the constitutional requirement that there be some "additional conduct" beyond merely placing the product in the stream of commerce.

In resolving the issue, the Supreme Court made it clear that jurisdiction over the manufacturer did *not* hinge on the actions of the Texas distributor-intermediary, or whether the distributor's actions could be imputed to the manufacturer. Instead, the analysis focuses on the actions of the foreign manufacturer, and whether it markets and distributes the product so as to profit from the Texas economy. The Court ultimately held that a manufacturer is subject to specific personal jurisdiction in Texas when it intentionally targets Texas as the marketplace for its products, and that using a distributor-intermediary for that purpose provides

no safe haven from the jurisdiction of a Texas court.

Within weeks of deciding *Spir Star*, the Supreme Court addressed whether the use of a Texas third-party trucking service, alone, satisfied the requirements of due process so as to subject the non-resident manufacturer to the jurisdiction of Texas courts. In *Zinc Nacional, S.A. v. Bouche Trucking, Inc.*, 308 S.W.3d 395 (Tex. 2010), the driver of a trailer transporting paper sustained injuries when his trailer overturned in Texas.

The manufacturer of the paper, Zinc Nacional, was a Mexican company that used C.H. Robinson, another Mexican company, to transport its products. The paper product had been transported by C.H. Robinson from Mexico to Laredo, Texas, where it was picked up by Bouche Trucking, a Texas company. Bouche had subcontracted with C.H. Robinson to deliver the product to its ultimate destination in New Mexico, and it was Bouche's driver that was injured in Texas while transporting the paper. The driver sued Bouche, which in turn filed a third-party petition against Zinc.

Zinc filed a special appearance contesting jurisdiction, and lost that challenge in both the trial and appellate courts. The Supreme Court reversed, holding that the exercise of jurisdiction over a merchant requires that the merchant *actually direct sales to the forum state*, not simply *through it*. Consequently, a merchant's decision to ship its goods with a third-party shipper that will travel through Texas to a recipient outside of Texas will not, by itself, subject the manufacturer to jurisdiction in Texas.

The principles derived from *Spir Star*

and *Zinc Nacional* affect not only out-of-state manufacturers, but also Texas sellers of the manufacturers' products. In this connection, Texas Civil Practice and Remedies Code Section 82.003 affords non-manufacturing sellers with protection from product liability suits. Under Section 82.003, a non-manufacturing seller is not liable for injuries caused by the product *unless* the plaintiff shows that the defendant is subject to one of seven explicit exceptions in the statute. Under the seventh exception, a non-manufacturing seller may be held liable if the plaintiff proves that the manufacturer is insolvent or not subject to the jurisdiction of the court.

The statute clearly places the burden of proving one of the exceptions with the plaintiff. However, that does not mean a seller cannot negate all of the exceptions and thus insulate itself

from liability. In *Darley v. Daisy Mfg. Co.*, 566 F. Supp. 2d 544 (E.D. Tex. 2005), the Texas seller did just that. It obtained summary judgment on the plaintiff's claim because the plaintiff failed to come forward with sufficient evidence to create a material fact issue on whether jurisdiction did not exist over the non-resident manufacturer.

Jurisdiction over non-resident manufacturers is no longer an issue with which only plaintiffs' counsel should be concerned. Counsel for Texas sellers have an interest in the issue as well. Absent a genuine "Texas nexus," a suit cannot properly be maintained in the Lone Star State. No suit—no remedy—no recovery. **HN**

Alex Beard, a shareholder with Bishop & Hummert, P.C. in Dallas, handles personal jurisdiction matters. He can be contacted at [abeard@bishophummert.com](mailto:abeard@bishophummert.com).

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# Tips for Handling the Nonpaying Client

BY JOHN E. ROPER

There are few things more frustrating than unexpectedly working for a nonpaying client. Now, more than ever, attorneys need to devote their time to clients who pay their bills. What can you do to increase your likelihood of getting paid?

**Immediately Evaluate a Potential Client's Ability to Pay.** Avoid troublesome clients in the first place. Before agreeing to the representation, assess the potential client's credit risk. You may check Dun & Bradstreet reports, public information databases, industry trade reports, credit reporting agencies, or any combination of these resources. In some circumstances, it may even be reasonable to ask for credit references or financial statements. Although you may be hesitant to request this information, most businesses provide it when seeking credit elsewhere.

**Voice Your Expectations Up Front.** Bring up the issue of fees during the initial meeting. State your hourly rate. Explain your firm's billing process, payment terms and retainer requirements, and determine the name of the specific person to whom your statements should be addressed. Make clear that you intend to withdraw if you are not paid as agreed. Memorialize all of these items in your attorney-client fee agreement/engagement letter. If the client asks for a fee estimate, give them one with the understanding that it is just that—an estimate. Estimates themselves sometimes serve as an effective screening tool.

**Advance Fee Payments/"Retainers."** Perhaps the most effective way to ensure that you are paid is to require an advance fee payment (AFP). A retainer is a fee that is paid to secure the lawyer's avail-

ability and compensates the lawyer for the loss of the opportunity to accept other employment. In contrast, an AFP is a fee paid by a client as a payment for expected services. Make clear, both verbally and in writing, that your representation will not begin until you receive an AFP. A potential client who does not want to pay an AFP may be a client who lacks sufficient resources, will be overly critical of future legal bills, or will attempt to renegotiate bills after the fact. Is this a client you want? In the end, you are incurring greater risk if you do not require an AFP.

**Frequent & Regular Client Communication.** Frequent, regular and open communication is essential to fee collection. If you do not feel a telephone call is justified yet, consider reminding your client about outstanding fees by e-mail or by a short reference at the conclusion of a status report.

Attorneys may also increase collections through careful billing practices. In your time entries, describe in detail what you have achieved for the client or done to move the matter forward. Get your statements out timely and immediately return inquiries about bills. Clients will use any question about a bill as a reason not to pay any portion of it.

**Diligently Monitor Aging Accounts Receivable.** Be disciplined and aggressive with your accounts receivable. If your statement terms are 30 days, begin the collection process when accounts are 60 days past due. Set aside a specific day every 2-4 weeks to review your accounts. The sooner you discover a nonpaying client, the sooner you may withdraw and work on paying matters. While you should send clients reminder statements and letters that become more pointed as accounts age, there is

no substitute for a telephone call. Letters are easy to misplace or throw away. A telephone call allows a dialogue. Remember: you will catch more flies with honey than with vinegar; tact and professionalism are key.

**Create Real Consequences.** Clients should be held to their end of the fee agreement. Communicate the fact that a bill is overdue in writing and by telephone. Don't take new work from a client who is past due. Withdraw from the representation if you can't resolve the issue. And, if a careful examination of all of the circumstances, including potential counterclaims and a review of your malpractice policy, indicates a good chance of overall success, consider mediation, arbitration, or a collection lawsuit.

**Know When to Call it Quits.** At a certain point, the time and cost of collection efforts outweighs the likelihood

or amount of ultimate collection. Don't let emotion blind you; always be mindful of the bottom line.

Organization, discipline, tact, and professionalism are traits integral to the collection process. And when it comes to collections, as in other matters, attorneys are well advised to consult the Texas Disciplinary Rules of Professional Conduct and legal ethics opinions in advance.

For additional collection strategies, check out *Collecting Your Fee: Getting Paid from Intake to Invoice*, by Edward Poll (ABA Law Practice Management Section 2003) and *How to Draft Bills Clients Rush to Pay*, by J. Harris Morgan & Jay G. Foonberg (ABA Law Practice Management Section 2d ed. 2003). **HN**

John E. Roper is an associate in the trial section of the Dallas office of Thompson & Knight LLP. He can be reached at [john.ropert@tklaw.com](mailto:john.ropert@tklaw.com).

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**After Hours** | Alfonso Chan

# Running for the Law: Alfonso Chan Runs Sahara Marathon

BY HEATHER BAILEY NEW

If you think you're too busy to squeeze in a morning run, then you need to take a page out of Alfonso Chan's training plan. Chan is an avid marathon runner, competing in marathons on average every two or three months. That's a full-time job right there, but Chan has a second gig to think about: he's also a hard-working lawyer, putting in plenty of sweat equity at Shore Chan Bragalone DePumpo LLP litigating and licensing complex intellectual property cases.

In April, Chan had the opportunity to run the *Marathon des Sables*, a seven-day, 151-mile ultra marathon in the sand dunes and rocks of one of the most inhospitable places on earth—the Sahara Desert. Chan joined a fellow attorney now based in Manila, and more than 1,000 people to run the grueling race in a remote region of Morocco. Competitors hauled all their food, clothing, first-aid and emergency gear for the entire week in a backpack. They were provided with water along the route and a tarp to sleep under at night. That's it.

"The marathon organizers timed it so that the most difficult climbs were during the heat of the day, so it was particularly



brutal on those days," said Chan, whose backpack weighed around 25 pounds. "There was no heat wave, but it was plenty hot, especially on the salt flats, where the sun reflects on you." Indeed, the temperature often exceeded 120 degrees, literally melting his socks inside his shoes. Chan's biggest mistake was that he only brought three pairs of socks. Luckily, an Australian runner loaned him a pair of his used socks for the duration of the race.

Chan says that his ability to manage fluid and electrolyte intake was the key to finishing the race, and there's no doubt that the generous Australian's socks played a crucial role in his success as well.

Chan cherishes his daily runs, which he often fits in at 5:00 a.m. "Lots of people listen to an iPod," said Chan, "but I think about work. I organize, take stock of what's going on, and organize my day. It makes the rest of my day more efficient." Although he didn't say so, Chan probably had time during the *Marathon des Sables* to plan his entire year. **HN**

Heather Bailey New is a senior attorney in the appellate litigation section at Haynes and Boone, LLP and is a former Co-Chair of the DBA Publications Committee. She can be reached at Heather.New@haynesboone.com.

**Focus** | Tort & Insurance Law

# D&O Insurance When the Company Goes Broke

CONTINUED FROM PAGE 1

*Mfg., Inc. v. Alliance Ins. Group*, 879 S.W.2d 894, 903 (Tex. App.—Houston [14th Dist.] 1994, writ denied). Neither the Fifth Circuit nor Texas courts have determined whether a buy-back of a primary policy satisfies the exhaustion requirement for excess coverage. Other jurisdictions have, although they have reached conflicting results.

For instance, a California court ruled that the duties of excess carriers were not triggered after a buy-back because the primary policies were not exhausted. *Aerojet-General Corp. v. Transcontinental Ins. Co.*, 2002 Cal. App. LEXIS 1965, \*38-44 (Cal. Ct. App. June 7, 2002). And a federal court in Michigan ruled that only "actual payment" satisfied the exhaustion requirement. *Comerica, Inc. v. Zurich Am. Ins. Co.*, 498 F. Supp. 2d 1019, 1032 (E.D. Mich. 2007).

In contrast, a Delaware court ruled that settlements with underlying insurers exhausted the policies in light of a public policy encouraging settlement and avoid-

ing unfairness. *HLTH Corp. v. Agric. Excess & Surplus Ins. Co.*, 2008 Del. Super. LEXIS 280, \*46-47 (Del. Sup. Ct. July 31, 2008). And the Second Circuit concluded that interpreting an exhaustion clause to require the insured to collect full amount of primary policy was "unnecessarily stringent" and would "involve delay, promote litigation, and prevent an adjustment of disputes which is both convenient and commendable." *Zeig v. Mass. Bonding & Ins. Co.*, 23 F.2d 665, 666 (2d Cir. 1928).

If a corporation faces any risk of bankruptcy, each director and officer should consult an experienced attorney to determine how the company's bankruptcy might affect coverage under the D&O policies. It is important to monitor the bankruptcy proceedings for actions that might impinge on coverage. **HN**

Lyndon Bittle and Carolyn Raines, partners at Carrington, Coleman, Sloman, and Blumenthal, LLP, handle insurance coverage and other business litigation matters. They can be reached at lbittle@ccsb.com and craines@ccsb.com, respectively.

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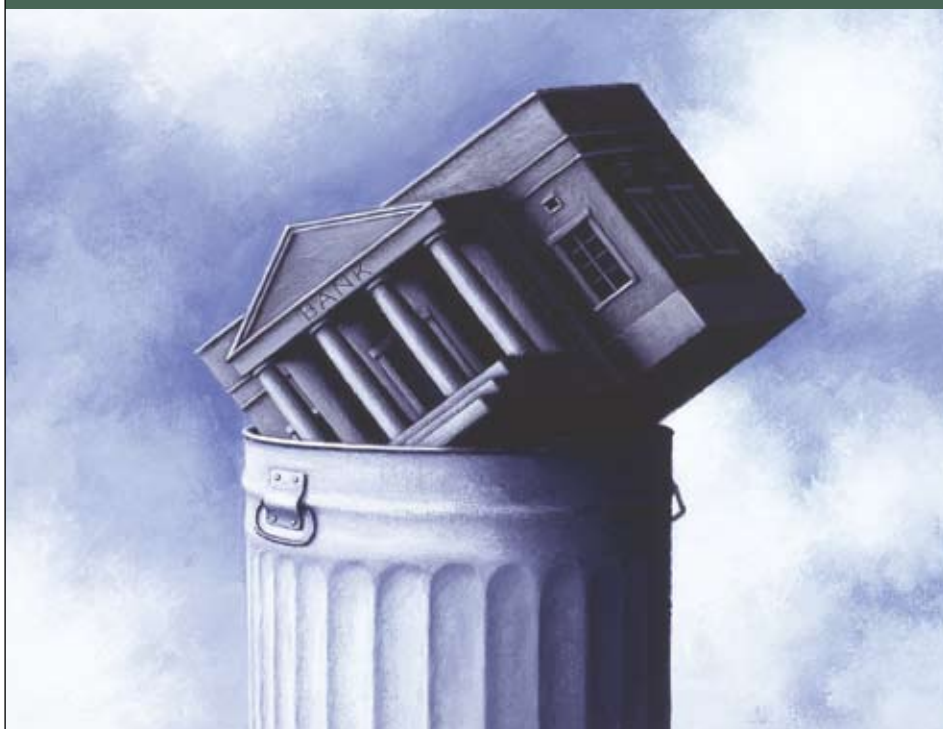
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# Limited Scope Services: Providing Value to Clients on Their Terms

BY LARRY HANCE

For a number of years, there has been a movement among some attorneys to provide something called “limited scope services.”

A limited scope service (“LSS”) is one or more discrete legal tasks that a client selects that the lawyer is willing to provide instead of providing the “full-service package” of legal services.

This article will look at why such services should be considered, how an attorney can provide them ethically, discuss some examples and offer suggestions for incorporating them into one’s practice.

Almost all clients want affordable legal services, less formality, a problem-solving approach and a feeling of control over the process and the outcome. Many potential clients who are more educated, resourceful, self-help oriented, who are able to gather and organize information and who like to do research on the Internet, are interested in becoming a larger part of the resolution of their disputes. They find the legal system impersonal, intimidating, unsympathetic, unresponsive, expensive, slow and unnecessarily adversarial. And although we are all tired of the economy being blamed for our woes, the extent of loss of asset value and the bursting of the bubble of

limitless prosperity is causing clients to re-think how they use their money.

Adding LSS to your practice may allow you to practice law in a way that is more consistent with your personal values. If you are a lawyer who feels responsible for the quality of justice in our community, enjoys focusing on specific client needs, decreasing the cost of legal services and being more of a full-time problem solver, you should like this work.

Texas Disciplinary Rules of Professional Conduct, Rule 1.02 (b), states, “A lawyer may limit the scope, objectives and general methods of the representation if the client consents after consultation.” The comments to Rule 1.02 note that the scope of the representation may exclude specific methods or means, but also warn that certain limitations—such as requiring the lawyer’s consent to settle litigation—may not be included. The lawyer must also be careful that the representation is not so limited that it violates the lawyer’s duty of competent representation.

Informed consent is the key to LSS. Any agreement for LSS should be preceded by discussion and written materials providing a comparison of full-service and LSS. Keep in mind that decisions regarding the objectives and general methods of representation are the client’s, not yours. Thus, it is the

client’s decision whether the representation will be full-service or LSS. Any agreement for LSS should be in writing, and should be very specific as to what you will do and what you will not do.

Examples of LSS that you may already be providing to clients include initial consultation, demand letters, second opinions, referrals to other attorneys, or sharing responsibility for projects with in-house counsel. Other examples include advisor or coach, ghostwriter for letters or other documents, confidential mini-evaluation, early intervention mediator, consultant during mediation, dispute resolution manager, preventive legal-wellness advisor, negotiation planner and settlement counsel.

If you would like to implement some LSS into your practice, ask yourself: how could I use my skills to do only what the client wants, and no more? Then spend some time researching, networking with others who provide a similar service, find a mentor and become excellent at it. Since you may be on untraveled ground, keep reviewing what works and

what doesn’t and improve your services, improve your fee arrangements, etc.

Fees for LSS can be traditional hourly rate, or can be based on a fixed fee. The whole point in this work is to provide value. Because there can be added value to clients in LSS, a higher hourly rate or fixed fee may be justified in some cases. Notably, collection rates are usually quite high on LSS matters.

LSS may not be for every practice, or every practitioner. There are many clients out there who need legal services and who either cannot afford, or choose not to use, traditional services. By identifying LSS that you can provide that will provide value to clients who might otherwise not be able to afford legal services, you may be able to capture a client market that might otherwise go unserved. **HN**

Larry Hance is a shareholder at Hance & Wickham, a family law firm which provides litigation and collaborative law representation, as well as limited scope services where appropriate. He can be reached at lhance@hancelaw.com.

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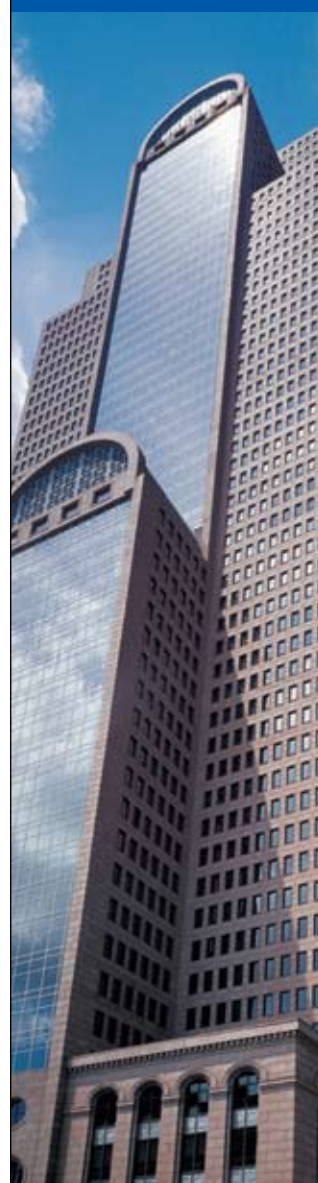
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# In the News August

## FROM THE DAIS

**Nicole Emmons**, of Baker & McKenzie LLP, spoke at the 2010 International Trademark Association's Annual Meeting in Boston.

**Larry Hance**, with Hance & Wickham, P.C., spoke at the 2010 State Bar Annual Meeting at the inauguration of the State Bar Collaborative Law Section in Fort Worth.

**John A. Zervopoulos, Ph.D., J.D.**, of Psychology Law Partners, addressed the 47th Annual Conference of the Association of Family and Conciliation Courts (AFCC) in Denver.

**Judge Roberto Cañas**, of County Criminal Court #10, spoke at the Texas Council on Family Violence judicial summit in Austin.

## KUDOS

**Thelma S. Clardy** has been appointed Chair of the General Practice, Solo & Small Firm Section.

**Cecilia H. Morgan**, of JAMS—The Resolution Experts, received the 2010 Justice Frank G. Evans Award for Outstanding Contribution to ADR.

**Talmage Boston**, of Winstead PC, has been named a recipient of a State Bar of Texas Presidential Citation.

**James C. Ho**, Texas Solicitor General, received the Best Brief Award from the National Association of Attorneys General.

**Erin Nealy Cox**, of Stroz Friedberg, LLC, has been promoted to Executive Managing Director and appointed to the firm's Executive Committee.

**Yvette Ostolaza**, of Weil, Gotshal & Manges LLP, has been appointed to serve as the State Bar liaison on the Texas Bar Foundation Board of Trustees.

**Cynthia S. Buhr**, of PrimeLending, has been appointed as Senior Vice President and General Counsel at its Dallas corporate office.

**Glenn Callison**, of Munsch Hardt Kopf & Harr, P.C., has been named Chairman of the Baylor Plano Advisory Board.

## ON THE MOVE

**Cullen Wallace** has joined Burford & Ryburn, L.L.P. as an Associate.

**Stephen R. Voelker** has joined Winstead PC.

**Kelly F. Bagnall** and **Amber T. Welock** have joined Dykema Gossett PLLC as member and Of Counsel, respectively.

**Tracey Wallace** has joined the firm of Jackson Walker L.L.P. as Partner.

**Joel D. Beus**, **William Hammel**, **Floyd R. Hartley, Jr.**, **Gavin E. Hill** and **Michelle W. MacLeod** joined God-

win Ronquillo PC. **Hartley** and **Hill** are joining as Shareholders and **Beus**, **Hammell** and **MacLeod** join as Associates.

**Catherine E. Bright** has re-joined Andrews Barth & Harrison, PC in its estate planning and probate practice.

News items regarding current members of the Dallas Bar Association are included in *Headnotes* as space permits. Please send your announcements to Judi Smalling at [jsmalling@dallasbar.org](mailto:jsmalling@dallasbar.org).

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**Dallas South News:** Habitat for Humanity

**State Bar of Texas Newspaperclips.com:** numerous events

**dBusinessNews.com:** numerous events

**North Dallas Gazette:** Bar None, DBA Community Involvement Committee's Arts & Crafts Project for at-risk children

**Focus Daily News:** Habitat for Humanity, DVAP Golf Tournament

**Daily Commercial Record:** Bar None

**Denton Record Chronicle:** Legalline

**Texas Lawyer:** numerous listings

**WFAA Our Neighbor**, on-air and online, Dallas Volunteer Attorney Program and DBA President **Ike Vanden Eykel** (<http://www.wfaa.com/news/local/Our-Neighbor-Dallas-Volunteer-Attorney-Program-97882019.html>)

**KRLD's Hero of the Week**, on-air and online: DBA's Habitat for Humanity Home Project Committee

**The Dallas Morning News**, Robert Miller's business column in print and online: Bar None, DBA Community Involvement Committee's Arts & Crafts Project for at-risk children, Legalline

# Headnotes Wins APEX Award

*Headnotes*, received an APEX Award for Publication Excellence for its October 2009 issue, which focused on Tort and Insurance Practice Law.

APEX awards are based on excellence in graphic design, editorial content and the success of the entry in achieving overall communications success and effectiveness. *Headnotes* was recognized out of 76 entries in the category of Magazines & Newspapers—Print. The APEX Awards are sponsored by Communications Concepts, the publishers of *Writing that Works: The Business Communications Report*.

The judges of this year's event said that the entries "displayed an extraordinary level of quality." They were impressed by "the quality of creative ideas and concepts shown by the entries."



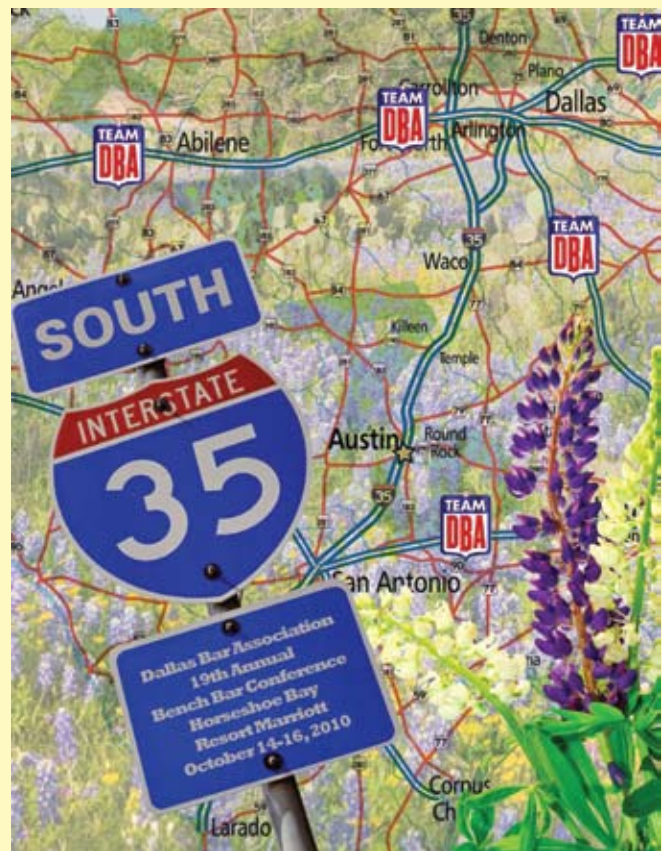
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## 19TH ANNUAL DBA BENCH BAR CONFERENCE October 14-16 at Horseshoe Bay Marriott Resort

**REGISTER BEFORE AUGUST 15 for discounted pricing!**

**Register at [www.dallasbar.org](http://www.dallasbar.org). Space is limited!**

- Approximately 50 judges attending, and about 250 lawyers.
- More than 6 hours CLE, including 1.00 hour Ethics.
- CLE topics include the online juror, voir dire, judicial updates, solo & small firm marketing, ethics Jeopardy, a judicial review and more.
- Events such as karaoke, fun run, yoga, sporting days, tennis, wine tour, golf, hangin' by the pool, zip-line/canopy tour, biking and more.

# Classifieds | August

## OFFICE SPACE

**Attorney sublease in downtown Dallas** business law firm. Easy freeway access, great views and free parking. \$16.75 sq ft (tracks primary lease). Inquiries to: Dallas Bar Association, Box 07-10A, 2101 Ross Avenue, Dallas, TX 75201.

**Four offices available for rent in our historic West End building.** Three of the offices rent at \$750 each and the fourth is \$650 per month. All offices can rent individually or as a package. Contact Craig Miley at (214) 692-8800 or [craig@mileybrown.com](mailto:craig@mileybrown.com).

**Time is Money! 3 miles from County Courthouse—2 miles to downtown!** Quality office space—off-price value. \$18/sf. Includes electricity and free garage parking. 9 miles to Love Field Airport. Minutes to DART rail, Baylor University Medical Center, Dallas Arts District, SMU, Oak Lawn, West Village. Centrally located on major thoroughfares. Uptown Tower. 4144 N. Central Expressway. (972) 490.7348.

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**Plano Law Office** is looking for other professionals to sublease a portion of our beautiful space located at Spring Creek Parkway, west of Custer. We have two window offices and an interior office available. Space includes access to conference rooms, library, kitchen, Internet, phone system and copier. Plenty of parking for tenants and visitors. E-mail [amicklaw@yahoo.com](mailto:amicklaw@yahoo.com) or call (214) 473-8383.

**West End Loft-Style Office Space** adjacent to courthouses and restaurants, 1 nice and affordable office in historical building, reception and secretarial area, office/expense sharing with 2 attorneys, conference room and workroom, copier, Internet, etc. Approx. \$715 per month. Parking available. (214) 697-1250 or [chuck@chlegal.com](mailto:chuck@chlegal.com).

**Uptown Dallas—Law firm near Katy Trail** has 8 window offices and 1 interior office for rent. Friendly office environment with unique style and great artwork throughout. Includes telephone, Internet, fax, copier and use of conference rooms and kitchen. Also includes locker room with shower. Secure, covered and free parking. 24-hour access. Great location with views of the city. All offices may be rented individually or as a package. Contact Jason at (214) 965-9300.

**Campbell Center: AV law firm** has 2 offices for sublease. New space with exceptional finish out and elevator exposure, amenities included. Law firm also has overflow business litigation work for associate level attorney. Call Joy (214) 361-1262. associate level attorney. Call Joy (214) 361-1262.

**Galleria Area: Law firm located at Lincoln Centre** has exterior window offices and interior secretarial offices available. Offices can be rented individually or as a package. Includes use of 2 conference rooms, 2 copiers/scanners, postage meter, fax, VoIP, T1 Internet phone service, 2 kitchens, reserved garage parking. On-site gym and restaurants. E-mail [bcollette@dalpat.com](mailto:bcollette@dalpat.com) for details.

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## POSITION AVAILABLE

**Midsized AV-Rated firm in Downtown Fort Worth** seeks attorney with seven or more years' experience in construction and litigation. First chair experience preferred. Submit resumes to [aflovers@deckerjones.com](mailto:aflovers@deckerjones.com).

**Litigation Boutique Immediate opening,** 4-10 year associate with 3 attorney AV-rated trial firm specializing in business litigation and plaintiffs' personal injury. Experience, strong background and credentials required. Excellent research and writing skills and ability to work closely with others a must. Located Northwest Highway & Central. Submit resume via facsimile to Heidi Tillery at (214) 468-9025 or e-mail to [pjohnson@johnsonbusinesslaw.com](mailto:pjohnson@johnsonbusinesslaw.com).

**Health Law Attorney Needed.** Experience in healthcare regulatory and payment matters—Medicare, Medicaid, licensing, transactional or criminal law services to healthcare providers. We prefer a problem solver with a disciplined work ethic, excellent writing skills, good attitude who is self-motivated and will participate in marketing & seminar presentations. Please e-mail resume to [markskennedylaw@msn.com](mailto:markskennedylaw@msn.com).

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**Partner-Level: Patent law boutique,** consisting of prep/pros lawyers with large-law firm experience, working in an "eat what you kill environment," is seeking partner-level patent attorney with prosecution experience. A self-support-

ing book of portable business is a positive, but not imperative. Please e-mail your resume to [bcollette@dalpat.com](mailto:bcollette@dalpat.com).

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**AM Law 100 law firm** seeks an attorney with 5 to 7 years of litigation experience, for a Staff Attorney position in our Dallas office. This hourly position will serve in a triage role on new file assignments and will provide research and writing assistance on large complex subrogation cases, working up to 40 hours per week on a long term assignment basis. Strong academics, writing and organizational skills are required. Specific experience evaluating property subrogation cases is a plus. Please send your resume and writing sample to [Dallasrecruiting@cozen.com](mailto:Dallasrecruiting@cozen.com) OR fax them to (214) 593-5270.

## POSITION WANTED

**Attorney experienced in oil and gas and corporate law** seeks position with energy company or law firm. Has been Board Certified in Oil, Gas and Mineral Law by the Texas Board of Legal Specialization. Excellent contract and drafting skills. Location in Dallas-Fort Worth Metroplex preferred, but not absolute with the right opportunity. Available for project assignments. Call (214) 526-6900.

## SERVICES

**Mexican Law Expert—Attorney,** former law professor testifying since 1997 in U.S. lawsuits involving Mexican law issues—forum non conveniens, Mexican claims/defenses, personal injury, moral damages, Mexican contract law. Co-author, leading treatise in field. J.D., Harvard Law. David Lopez (210) 222-9494 / [dlopez@pulmanlaw.com](mailto:dlopez@pulmanlaw.com).

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## SAVE THE DATE!

### DISTRICT ATTORNEY DEBATE

Danny Clancy | Craig Watkins

Thursday, September 23, 2010  
at The Belo Mansion

RSVP to [sevans@dallasbar.org](mailto:sevans@dallasbar.org)  
(for adequate seating).  
Sponsored by the  
DBA Public Forum Committee



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## **We would like to commend**

BLGW partner Clint Westhoff on his 13 years of practice, more than a decade of which has been dedicated solely to the practice of family law. He is well-known and respected by judges, peers and clients for his professional ability, knowledge and character.