SO YOU'VE GOT A VERDICT . . . WHAT NOW?! POST-VERDICT PROCEDURE AND PRACTICE TIPS FOR TEXAS INSURANCE LAWYERS

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SO YOU'VE GOT A VERDICT . . . WHAT NOW?! POST-VERDICT PROCEDURE AND PRACTICE TIPS FOR TEXAS INSURANCE LAWYERS

Imagine a client retains you as coverage counsel on the eve of a trial pending in Texas state court. The plaintiffs, the families of two deceased oilfield workers, filed a lawsuit in Bexar County to recover damages after their loved ones died tragically in a fire. Each defendant has liability insurance as required under the master services agreements, but the plaintiffs insist that the reasonable damages value is higher than the current settlement offer. What is more, plaintiffs' counsel – a respected attorney with a winning history – refuses to settle with individual defendants. "If I'm trying it against one of you, I'm trying it against *all* of you," he says.

As you gather more facts, your level of concern increases. While the insurer agreed to defend the case, it issued a reservation of rights letter early in the case, noting that certain policy provisions could operate to bar coverage, depending on the jury's verdict. Additionally, defense counsel believes that the insured has strong liability defenses, but acknowledges that a jury might not believe the insured's version of the facts. She also admits there is an outside possibility for the verdict to exceed policy limits, but believes the jury verdict will likely fall within policy limits. As a result, the insurer has declined to accept offers to settle the case for policy limits.

After a hard-fought trial, the jury comes back with a verdict. It is the worst-case scenario. The insured has been found liable, and the damages the jury awarded far exceed policy limits. To make matters worse, the jury verdict includes findings of fact which, if affirmed, could result in coverage being excluded. But defense counsel insists that there is a good chance that the verdict is reversed, either during post-verdict motions or on appeal, and recommends continuing to fight.

Your client calls you and asks a simple question: "What do we do now?"

You pause and think: "Well, what *do* we do now? Does the insurer have a duty to indemnify? Is there anything that should be done before the final judgment is entered? What is a final judgment? Does the insurer still have to defend? Does the insured get new lawyers? What about an appellate lawyer? Will there be a coverage fight? If so, when? What should I say?"

* * * * *

These questions may appear straightforward, but it is surprising how rarely Texas insurance coverage practitioners deal with these issues. The reason why is obvious: very few matters go to trial anymore, and even fewer reach a jury verdict (much less final judgment). As a result, opportunities for practitioners to interact with post-verdict issues decrease yearly.

Nevertheless, such issues are persistent and will follow us as long as the right to a jury trial remains inviolate. U.S. CONST. AMEND. VII; TEX. CONST. art. I, § 15. Therefore, it is incumbent upon Texas insurance coverage practitioners to be familiar with these issues to properly advise clients if they are ever presented with scenarios like those mentioned above.

1. DOES THE RENDITION OF A JURY VERDICT TRIGGER AN INSURER'S DUTY TO INDEMNIFY?

Generally, no. The general insuring grant for the industry-standard commercial liability policy form states that an insurer "will pay those sums that the insured *becomes legally obligated to pay as damages* because of 'bodily injury' or 'property damage' to which this insurance applies." ISO Form CG 00 01 04 13 at 1. Under Texas law, a verdict does not entitle a plaintiff to recover legal damages – only entry of a final judgment does. *See In re USAA Gen. Indem. Co.*, 629 S.W.3d 878, 884-85 (Tex. 2021) ("A jury announces its decision with its verdict, but the resulting judgment, *not the verdict*, confers enforceable legal rights.") (emphasis added).

As the Texas Supreme Court noted in *In re USAA Gen. Indem. Co.*:

> Integral to the distinction [between jury verdict and final judgment] is the trial court's ability to determine whether the verdict is proper and supported by evidence before rendering judgment. In making those determinations, a trial court can render judgment notwithstanding the verdict, disregard an unsupported jury finding, or grant a new trial. Thus, to ensure the determination's finality and provide adequate procedural protections for both the insured and the insurer – the judgment – not the verdict – establishes the amount a [claimant] is 'legally entitled to recover'.

Id. (citing TEX. R. CIV. P. 301 ("[U]pon motion and reasonable notice the court may render judgment *non obstante veredicto* if a directed verdict would have been proper, and provided further that the court may, upon like motion and notice, disregard any jury finding on a question that has no support in the evidence."); TEX. R. CIV. P. 320.

For this reason, Texas law provides that an insurer's duty to indemnity generally is not triggered until after the underlying lawsuit has been resolved by the entry of a final, enforceable judgment. *See Boy Scouts of America v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 2016 WL 495599 at *3-4 (N.D. Tex. Feb. 8, 2016) (granting dismissal of declaratory judgment action because "…an insurer's duty to indemnify…present[s] an actual controversy only 'after the underlying suit has been resolved.'") (citing *Collier v. Allstate Cnty. Mut. Ins. Co.*, 64 S.W.3d 54, 62 (Tex. App.— Fort Worth 2001, no pet.)); *Coregis Ins. Co. v. Sch. Bd. of Allen Parish*, No. 07-30844, 2008 WL 2325632, at *2-3 (5th Cir. Jun. 6, 2008) (Texas law requires that after the district court concludes that…the indemnity issue is nonjusticiable pending resolution of the liability suit) (citing *Farmers Tex. Cnty. Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 84 (Tex. 1997)); *Gilbane Bldg. Co. v. Admiral Ins. Co.*, 664 F.3d 589, 601 (5th Cir. 2011) (citing *Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, 279 S.W.3d 650, 656 (Tex. 2009)) (holding that the duty to indemnify is controlled by the facts proven in underlying suit); *Northfield Ins. Co. v. Loving Home Care, Inc.*, 373 F.3d 523, 529 (5th Cir. 2004) (citing *Griffin*, 955 S.W.2d at 84).

Accordingly, the mere entry of a verdict against an insured generally does not, in and of itself, trigger an insurer's duty to indemnify. *Id*. However, as detailed further below, the fact that an insurer's duty to indemnify is not fully ripe does not shield an insurer from all consequences that proximately flow from the rendition of a verdict against its insured. *Infra*. §§ 6 – 9.

2. WHAT IS A "FINAL JUDGMENT"?

It depends, as the term "final judgment" can mean different things in different contexts.

For example, a judgment is "final" for purposes of establishing appellate jurisdiction if the judgment is "one that disposes of all parties and all issues in a lawsuit." *See Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992).

Texas courts also use the term "final judgment" when referencing the time when a court's power to alter the judgment ends, or when the judgment becomes "final" (*i.e.*, operative) for *res judicata* or collateral estoppel purposes. *See Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 6 ("[A] judgment is final for the purposes of issue and claim preclusion despite the taking of an appeal unless what is called an appeal actually consists of a trial de novo").

"Final judgment" is also used to describe when a judgment operates to finally vest rights between the parties. *Ziemian v. TX Arlington Oaks Apartments, Ltd.*, 233 S.W.3d 548, 557 (Tex. App.—Dallas 2007, pet. stricken) ("…[A] judgment can be final in the sense that execution will issue in the absence of a supersedeas bond.") (citing *Smith v. Tex. Farmers Ins. Co.*, 82 S.W.3d 580, 585 (Tex. App.—San Antonio 2002, pet. denied)). For example, if a trial court's judgment is appealed, and its execution is stayed by the posting of a supersedeas bond (or other instrument), then the judgment does not become a "final judgment" for execution purposes until the case is disposed of on appeal, even though it may otherwise be a "final judgment" for the purposes of establishing appellate jurisdiction or preclusive effect. *Id*.; *Street v. Honorable Second Court of Appeals*, 756 S.W.2d 299, 301 (Tex. 1988) (discussing Texas law's use of "final judgment" in different contexts as outlined above) (citing *McWilliams v. McWilliams*, 531 S.W.2d 392, 393-94 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ); *cf.* TEX. R. APP. P. 24.1(f) ("Enforcement of a judgment must be suspended if the judgment is superseded").

Texas law generally applies the *third* use of the term "final judgment" when analyzing whether an insurer's duty to indemnify has been triggered. *Supra*. This is because, as noted above, liability insurance policies generally condition an insurer's duty to indemnify upon the insured bearing a legal obligation to pay damages to a claimant. ISO Form CG 00 01 04 13 at 1 (conditioning insurer's duty to pay "sums" on an insured's behalf – *i.e.*, indemnify – on the insured "becom[ing] legally obligated to pay…damages."). As such, if the insured does not have a present obligation to pay damages, then the insurer's obligation to indemnify generally is not yet triggered. *Infra*; *see also Ziemian*, 233 S.W.3d at 557; *Street*, 756 S.W.2d at 301. Conversely, if judgment is entered against an insured, and that judgment is not superseded, then the judgment is a "final judgment" for purposes of triggering an insurer's duty to indemnify, even though the judgment may be reversed, modified, or vacated on appeal. *Id*.

This is not to say that an insured cannot file suit against its insurer prior to the rendition of a final, enforceable judgment. *Infra* § 9. But given the frequent misuse or confusion regarding the term "final judgment," Texas insurance practitioners must know and understand its different meanings, and be able to articulate such to state and federal courts alike. Such may be the difference in your client prevailing in the early stages of a coverage action following a verdict.

3. WHAT HAPPENS BETWEEN THE TIME VERDICT IS RENDERED AND FINAL JUDGMENT IS ENTERED?

Several different procedural rules govern the process for entering a judgment on a verdict, as well as for challenging a verdict to avoid the entry of judgment

thereon. Admittedly, post-verdict motion practice is a highly technical and nuanced area of law that requires a more comprehensive discussion than this article can provide.[1] However, insurance practitioners must be aware of the general landscape of Texas post-verdict procedure to advise clients effectively.

A. Motion for Entry of Judgment.

While the Texas Rules of Civil Procedure do not mention a specific process for presenting a final judgment to the Court for entry, Rule 305 states that "[a]ny party may prepare and submit a proposed judgment for the court for signature." TEX. R. CIV. P. 305. As such, most Texas courts will require that a motion for entry of judgment be filed before they fulfill their procedural mandate to render judgment on the jury's verdict. TEX. R. CIV. P. 300.

Although motions for entry of judgment are insufficient to preserve error, the filing of a motion for judgment may waive the right to complain of error on appeal in some circumstances. For example, the Texas Supreme Court has held that a losing party's filing of a motion for judgment may be an affirmation of the jury's verdict and waive any right to argue that the verdict is not supported by the evidence. *See Litton Indus. Prods., Inc. v. Gammage*, 668 S.W.2d 319, 322 (Tex. 1984); *but see also First National Bank of Beeville v. Fotjik*, 775 S.W.2d 632, 633 (Tex. 1989) (party did not waive error when it stated in its motion for entry of judgment that it did not disagree with jury's verdict and alerted court that it felt verdict contained fatal defect that required new trial). The Texas Courts of Appeals are also split on the extent of the waiver that the filing of a motion for judgment may cause. *See Stewart & Stevenson Servs., Inc. v. Enserve, Inc.*, 719 S.W.2d 337 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.) (ruling that sufficient challenges are waived by filing of a motion for entry, but that charge error was not); *cf. Casu v. Marathon Ref. Co.*, 896 S.W.2d 388, 389-91 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (ruling that filing motion for entry preserves nothing for further appellate review). Accordingly, in cases where an insured is not the prevailing party, lawyers representing the insured should generally refrain from filing a motion for entry of judgment, even if the opposing party refuses to do so, to avoid the risk of waiving the insured's right to challenge the judgment.

B. Motion for JNOV/JMOL + Motion to Disregard Jury Findings.

Texas Rule of Civil Procedure 301 states that, upon "reasonable motion and reasonable notice," a trial court "may render judgment non obstante veredicto if a directed verdict would have been proper," or "disregard any jury finding on a question that has no support in the evidence." TEX. R. CIV. P. 301. However, Rule 301 does not outline any specific procedure for filing such a motion. *Id*. What is more, the Texas Courts of Appeals historically disagreed on the deadline to file a motion for JNOV. *Spiller v. Lyons*, 737 S.W.2d 29 (Tex. App.—Houston [14th Dist.] 1987, no writ) (motion for JNOV may be filed any time after judgment as long as trial court still has plenary power); *but see Commonwealth Lloyd's Ins. Co. v. Thomas*, 825 S.W.2d 135, 141 (Tex. App.—Dallas 1992, judgment vacated by agr., 843 S.W.2d 486 (Tex. 1993) (motion for JNOV must be filed within the deadline outlined in Rule 329(b)). Accordingly, motions for JNOV should be filed within thirty days of when the judgment is signed. *Id*.

There are several reasons to file a motion for JNOV: (1) there is no evidence to support a jury finding; (2) a factual issue was established as a matter of law that is contrary to a jury finding; (3) a legal principle prevents a party from prevailing on its claim or defense; or (4) a jury finding is immaterial. *Tiller v. McLure*, 121 S.W.3d 709, 713 (Tex. 2003); *John Masek Corp. v. Davis*, 848 S.W.2d 170, 173-74 (Tex. App.— Houston [1st Dist.] 1992, writ denied); *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 752 (Tex. 1995). But a motion for JNOV is not always the proper means to challenge a verdict. A motion for JNOV is only proper if "a directed verdict would have been proper" (*i.e.*, the evidence conclusively demonstrates that no other verdict could be rendered). TEX. R. CIV. P. 301; *Dodd v. Tex. Farm Prods. Co.*, 576 S.W.2d 812, 815 (Tex. 1979); *Bywaters v. Gannon*, 686 S.W.2d 593, 595 (Tex. 1985).

By filing a motion for JNOV, a party preserves its right to make a legal sufficiency challenge to the verdict later on appeal. *See Aero Energy, Inc. v. Circle C. Drilling Co.*, 699 S.W.2d 821, 822-23 (Tex. 1985); *Tiller*, 121 S.W.3d at 713; *John Masek*, 848 S.W.2d at

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[1] The Author readily acknowledges that many Texas lawyers are far more skilled in this area of the law than he is, and refers the readers of this article to other published works discussing post-trial motion practice and error preservation. Indeed, the Author relied on several such works in preparing this paper and incorporated their analysis herein for the reader's benefit (in some cases, verbatim), including:

* K. Keller, "After the Verdict: What Do I Do Now," 28th Annual Labor and Employment Law Institute CLE (Aug. 25-26, 2017).

* R. Roach, "Post-Verdict Motions" (Sept. 18, 2003).

* K. Dubose, "Preservation of Error and Avoidance of Waiver in Post-Trial Motions," 2nd Annual Conference on Techniques for Handling Civil Appeals in State and Federal Court (Jun. 4-5, 1992).

173-74; *City of Brownsville*, 897 S.W.2d at 752; *Holland v. Wal-Mart Stores, Inc.*, 1 S.W.3d 91, 94-95 (Tex. 1999). When a motion for JNOV addresses the sufficiency of the evidence to support an element of a claim or defense, an appellate court will review the granting or denial of the motion under a legal sufficiency standard of review (*i.e.*, whether the evidence at trial could enable reasonable and fair-minded people to reach the verdict). *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). However, when the JNOV raises a non-evidentiary claim, the appellate court reviews the granting or denial of the motion *de novo*. *ARCO v. Misty Prods., Inc.*, 820 S.W.2d 414, 420-21 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

C. Motion for New Trial.

Under Rule 320, a trial court may set aside a judgment and grant a new trial for good cause, whether on the motion of a party *or* the court's own motion. TEX. R. CIV. P. 320. The purpose of a motion for new trial is to give the trial court an opportunity to correct any mistakes, to preserve error, and to extend appellate deadlines. *See Mushinski v. Mushinski*, 621 S.W.2d 669, 670-71 (Tex. Civ. App.—Waco 1981, no writ). Indeed, such motions are intended to allow trial courts to review the verdict "with more deliberate consideration than is practicable during trial" so that the court can have a "fair opportunity to correct the errors or grant a new trial if need be." *Smith v. Brock*, 514 S.W.2d 140, 142 (Tex. Civ. App.—Texarkana 1974, no writ).

The Texas Rules of Civil Procedure require that parties assert specific grounds for a new trial, and prohibit generalized motions. Tex. R. Civ. P. 321, 322; *Ramey v. Collagen Corp.*, 821 S.W.2d 208, 210-11(Tex. Civ. App.—Houston [14th Dist.] 1991, writ denied); *D/FW Commercial Roofing Co. v. Mehra*, 854 S.W.2d 182, 189 (Tex. App.—Dallas 1993, no writ). In other words, a litigant cannot move for new trial based upon mere dissatisfaction with the verdict, or with the outcome of trial. That said, nearly any complaint that would justify an appellate court's reversal of judgment is sufficient reason for a trial court to grant a new trial.

While motions for new trial are not always necessary to preserve error, they are a prerequisite to asserting the following complaints on appeal: (1) a complaint on which evidence must be heard, such as one of jury misconduct or newly discovered evidence or failure to set aside a default judgment; (2) a complaint of factual insufficiency of the evidence to support a jury finding; (3) a complaint that a jury finding is against the overwhelming weight of the evidence; (4) a complaint of inadequacy or excessiveness of the damages found by the jury; and (5) incurable jury argument if not otherwise ruled on by the trial court. TEX. R. CIV. P. 324(b). Filing of a motion for new trial, however, does not alleviate litigants from the requirement of also objecting during trial to preserve error. *Id*.

Litigants must file motions for new trial within thirty days after final judgment is signed. TEX. R. CIV. P. 329(a). Such motion extends the trial court's plenary power to grant a new trial until thirty days after such motion has been overruled, whether by written order or by operation of law. TEX. R. CIV. P. 324. The filing of a motion for new trial also extends the deadline to file a notice of appeal to ninety days after the judgment is signed. TEX. R. APP. P. 26.1.

Any order granting a motion for new trial must clearly state the reasons for the new trial, as it is no longer sufficient for a trial court to grant a new trial "in thee interest of justice." *In re Columbia Med. Ctr. Of Las Colinas*, 290 S.W.3d 204, 213 (Tex. 2009). In setting forth the specific reasons, trial courts may not use "and/or" prior to each stated reason as such can create ambiguity. *In re United Scaffolding, Inc.*, 377 S.W.3d 685, 688-89 (Tex. 2012). Failure to request that a trial court clarify the reasons for granting a motion for a new trial may risk waiver of any objections to such an order. *In re Salinas*, 2010 WL 196887 (Tex. App.—Corpus Christi Jan. 20, 2010, no pet.).

D. Motion for Remittutur.

A motion for remittitur is a request that the trial court suggest remittitur to the prevailing party and condition a new trial on rejection thereof. TEX. R. CIV. P. 315; *Snoke v. Republic Underwriters Ins. Co.*, 770 S.W.2d 777 (Tex. 1989). In other words, it is a request that the trial court give a prevailing party an option of voluntarily reducing the amount of damages that it can recover against a defendant, or risk the trial court ordering a new trial on its own motion. *Id*.

Ordinarily, the reason for filing a motion for remittitur is that the prevailing party realizes that it may not be entitled to the full amount of the judgment that has been entered, but would prefer to voluntarily reduce the amount of the judgment to avoid the time and expense of an appeal, or otherwise avoid the possibility of reversal. If a party makes the remittitur at the trial court's suggestion, and the other party appeals, the remitting party is not barred from arguing on appeal that all or party of the remittitur should not have been required. *See* TEX. R. APP. P. 46.2.

E. Motion for Judgment Nunc Pro Tunc.

Under Texas Rule of Civil Procedure 316, the trial court may correct a clerical mistake in the record of a judgment, in open court, after notice to all parties. TEX. R. CIV. P. 316. Examples of clerical errors that

may be corrected by a motion for judgment nunc pro tunc include:

- Incorrect spelling of a party's name. *Cockrell v. Estevez*, 737 S.W.2d 138, 140 (Tex. App.—San Antonio 1987, no writ).
- Failing to award attorneys' fees in a judgment, where the judge had announced his judgment by letter, and that judgment awarded attorney's fees, but the judgment prepared by counsel inadvertently omitted attorneys' fees. *Hutcherson v. Lawrence*, 673 S.W.2d 947, 948-49 (Tex. App.—Tyler 1984, no writ).
- Judgment for defendant on a promissory note secured by a ring, which inadvertently awarded possession of the right to the plaintiff, when the balance of the judgment clearly indicated that the court intended to award possession of the ring to the defendant. *Mathes v. Kelton*, 565 S.W.2d 78, 81 (Tex. Civ. App.—Amarillo 1977), *aff'd* 569 S.W.2d 876 (1978).

F. Motion to Vacate, Modify, Correct, or Reform the Judgment.

Motions to vacate, modify, correct, or reform the judgment are not discussed in detail in the Texas Rules of Appellate Procedure, and there is not an extensive body of case law pertaining to these motions. However, Texas Rule of Civil Procedure 306a makes specific reference to a trial court's broad plenary power to vacate, modify, correct, or reform a judgment. *See* TEX. R. CIV. P. 301a(1), 329b. Additionally, the Texas Rules require that such a motion must "specify the respects in which the judgment should be modified, corrected, or reformed." Tex. R. Civ. P. 329b(g). Such motions are appropriate in cases where the mistakes are judicial, rather than clerical, such that a motion for judgment nunc pro tunc is inappropriate, but the errors do not require further litigation.

Motion to vacate, modify, correct, or reform a judgment must be filed during the time that the trial court has plenary power over a case (*i.e.*, originally, thirty days). TEX. R. CIV. P. 329b. However, the filing of such a motion extends the trial court's plenary power "until thirty days after all such timely-filed motions are overruled, either by a written or signed order or by operation of law, whichever occurs first." *Id*. If the trial court does not overrule the motion, then it is overruled by operation of law after seventy-five days after the date of final judgment. *Id*.

If a judgment is modified, corrected, or reformed, then the previous judgment should be vacated in its entirety, and an entirely new judgment should be submitted to the court for signature, rather than an order specifying the changes in the prior judgment, or an attempt to strike out erroneous information in the prior judgment. *See Garza v. Serrato*, 671 S.W.2d 713, 714 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.); *P.V. Intern. V. Turner, Mason, and Solomon*, 700 S.W.2d 21, 22-23 (Tex. App.—Dallas 1985, no writ).

4. IS THE INSURED ENTITLED TO INDEPENDENT COUNSEL AFTER THE RENDITION OF A VERDICT?

Maybe. As noted above, liability insurance policies generally impose a duty on insurers to defend their insureds, but allow the insurer the right to conduct the defense. In Texas, the right to conduct the defense includes the authority to select the attorney who will defend the claim and the authority to make other decisions that normally would be vested in the insured as the named party in the case. *See N. Cnty. Mut. Ins. Co. v. Davalos*, 140 S.W.3d 685, 688 (Tex. 2004).

Under certain circumstances, however, an insurer may not insist upon its contractual right to control the defense. *Id*. In *Davalos*, the Texas Supreme Court concluded that an insurer may not control the defense if the insurer is burdened by an actual conflict of interest with its insured. *Id*. at 688-89. The potential conflict of interest becomes an actual conflict of interest that prevents the insurer from controlling the defense when "the facts to be adjudicated in the liability lawsuit are the same facts upon which coverage depends." *Id*. Where such a conflict exists, insureds are entitled to select independent counsel, thereby protecting them from "an insurer-hired attorney who may be tempted to develop facts or legal strategy that could ultimately support the insurer's position that the underlying lawsuit fits within a policy exclusion." *Partain v. Mid-Continent Specialty Ins. Servs., Inc.*, 838 F. Supp.2d 547, 566-67 (S.D. Tex. 2012); *RX.com v. Hartford Fire Ins. Co.*, 426 F. Supp.2d 546, 559-60 (S.D. Tex. 2006); *Hous. Auth. Of the City of Dallas, Tex. v. Northland Ins. Co.*, 333 F. Supp.2d 595, 601 (N.D. Tex. 2004).

Texas courts have yet to fully analyze how the rendition of a verdict impacts an insured's right to independent counsel, as the cases analyzing such issues do so in the pre-verdict context. But given the authority above, certain scenarios *ma*y entitle an insured to independent counsel.

Imagine a lawsuit alleging intentional torts and negligence-based torts for the same conduct (*e.g.*, employee driver strikes pedestrian while operating company vehicle; a bar fight, etc.). While most liability insurance policies exclude coverage for intentional conduct, the Texas Supreme Court has made clear that an insurer's issuing a reservation of rights letter does not – by itself – create a conflict of interest sufficient to justify independent counsel. *Davalos*, 140 S.W. at 689; *Unauthorized Practice of Law Comm. v. Am. Home*

Assur. Co., 261 S.W.3d 24, 40 (Tex. 2008). As such, insurers often defend such cases, subject to a reservation of rights.

But imagine if the jury verdict answers "YES" on the intentional conduct question. Were the court to enter judgment on that verdict, and were such verdict affirmed on appeal, such would eliminate the insurer's obligation to indemnify the loss. But if there are meritorious grounds for an appeal, then it is in the insured's best interest to work to overturn the judgment. Under these circumstances, there is a direct conflict of interest for the insurer: does the insurer continue to prosecute an appeal, and, in doing so, ensure its potential liability for the verdict? Or does the insurer stop defending the insured, accept the verdict, and eliminate its liability exposure?

Davalos – and the general balance of equities – appear to suggest that independent counsel should be appointed to represent the insured's interests under the circumstances. *Supra*. After all, the "facts [that have been adjudicated]" would be the same as the "facts upon which coverage depends." *Id*. But given that the Texas courts have yet to issue an opinion directly on point, future cases may contradict or conflict with the analysis above. Therefore, insurance law practitioners should keep a watchful eye for cases that allow courts to clarify these issues.

5. IS THE INSURED ENTITLED TO APPELLATE COUNSEL AFTER THE RENDITION OF A VERDICT?

Likely, yes. Under Texas law, an insurer's duty to defend an insured against third-party liability claims is generally determined by the "four corners" of the factual allegations in the underlying petition and the "four corners" of the insurance policy, without regard to the truth or falsity of those allegations and without reference to facts otherwise known or ultimately proven. *Monroe Guar. Ins. Co. v. BITCO Gen. Ins. Co.*, 640 S.W.3d 195, 199 (Tex. 2022) (citing *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305, 308 (Tex. 2006)). Texas courts are required to "resolve all doubts regarding the duty to defend in favor of the duty" and to "construe the pleadings liberally." *Zurich Am. Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487, 491 (Tex. 2008); *see also Monroe Guar. Ins. Co.*, 640 S.W.3d at 203 (citing *Heyden Newport Chem Corp. v. S. Gen. Ins. Co.*, 387 S.W.2d 22, 24 (Tex. 1965)) (when ultimately deciding whether an insurer owed a duty to defend, doubts should be resolved in the insured's favor).

No Texas state court has addressed this issue in substantive detail. *See Associated Auto. Inc. v. Acceptance Indem. Ins. Co.*, 705 F. Supp.2d 714, 723-24 (S.D. Tex. 2010) ("Neither party located any Texas case law that addresses this issue. Nor has the Court's own research revealed any such authority."). The standard ISO liability coverage form is likewise silent as to whether an insurer must prosecute an appeal. *See* ISO CG 00 01 04 13 at 1 ("Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments…").

That said, when an insurance policy is capable of more than one interpretation, Texas law requires that the policy must be construed in favor of the insured. *See Nat'l Union Fire Ins. Co. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991). Accordingly, federal courts applying Texas law consistently hold that "Texas courts would likely interpret Texas law to be that, in the absence of an express policy provision to the contrary, an insurer's duty to defend includes a duty to appeal an adverse judgment against its insured if there are reasonable grounds for appeal. *Associated Auto. Inc.*, 705 F. Supp.2d at 725 (citing *Gibbons-Markey v. Tex. Med. Liab. Tr.*, 163 Fed. App'x 342, 346 (5th Cir. 2006)); *see also WFG Nat'l Title Ins. Co. v. Pinnacle Premier Prop., Inc.*, 2014 WL 12537168, at *7 (S.D. Tex. Jul. 11, 2014) (citing *Associated Auto. Inc.*) (holding same); *R.M. Personnel v. Liberty Mutal Fire Ins. Co.*, 2018 WL 935397, at *5 (W.D. Tex. Feb. 16, 2018) (same).[2] Therefore, Texas insureds are likely

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[2] Similarly, courts in jurisdictions across the country have held that, absent an express provision in the policy to the contrary, an insurer's duty to defend encompasses a duty to appeal an adverse judgment as long as there are reasonable grounds to believe that the insured's interest would be furthered by the appeal. *See Associated Automotive Inc.*, 705 F. Supp.2d at 724 (citing *Chrestman v. U.S. Fidelity & Guar. Co.*, 511 F.2d 129, 130 (5th Cir.1975) (Mississippi law) (stating that a plaintiff insured raising a duty to appeal claim against an insurer would have to show, at the very least, that there were reasonable grounds for the appeal); *Cathay Mortuary (Wah Sang) Inc. v. United Pacific Ins. Co.*, 582 F.Supp. 650, 657 (N.D. Cal.1984) (California law) (recognizing "a general consensus that an insurer is obliged to pursue an appeal on behalf of its insured where there are reasonable grounds for appeal."); *MedMarc Cas. Ins. Co. v. Forest Healthcare, Inc.*, 359 Ark. 495, 199 S.W.3d 58, 62 (2004) (citing ALLAN D. WINDT, INSURANCE CLAIMS & DISPUTES § 4:17 (4th ed. 2001) (stating that an insurer is obligated to appeal a judgment against its insured only when there are reasonable grounds to believe that insured's interest would be furthered by the appeal, and collecting cases)); *Sanchez ex rel. Sanchez v. Kirby*, 131 N.M. 565, 40 P.3d 1009, 1011–12 (N.M. Ct. App.2001) ("The general rule appears to be that an insurer has a fiduciary duty to file and prosecute an appeal, absent a policy provision to the contrary, where there are reasonable grounds to believe substantial interests of the insured may be served or protected thereby.")); *Davis v. Allstate Ins. Co.*, 434 Mass. 174, 747 N.E.2d 141, 146 (2001) (recognizing the

entitled to the appointment of appellate counsel to prosecute any meritorious argument on appeal.

6. WHAT IS A SUPERSEDEAS BOND? WHAT DUTY DO INSURERS HAVE TO SUPERSEDE A JUDGMENT?

A supersedeas bond is one that prevents execution on a judgment pending appeal. After a trial court enters a final judgment, Texas law provides that the clerk of the court "shall issue the execution upon such judgment" after thirty days thereof, or otherwise after thirty days from the time that any motion for new trial is overruled. *See* TEX. R. CIV. P. 627. This rule applies even when a party is appealing a final judgment. *Id*. As such, even if an insurer complies with its duty to defend and timely appeals a final judgment entered against its insured, the insured will still be liable to pay damages if the claimant executes on the judgment in the interim.

The only exception to this general rule is when a party seeking to avoid execution on the judgment *supersedes* the judgment by posting security to ensure the judgment creditor of its ability to collect after the appeal. *Id*.; TEX. R. APP. P. 24.1 ("Enforcement of a judgment must be suspended if the judgment is superseded.") Under the Texas Rule of Appellate Procedure, the four means of superseding a judgment are (1) supersedeas bond; (2) deposit in lieu of bond; (3) written agreement with a judgment creditor to suspend execution; or (4) alternative security. *Id.*

Texas law does not impose a general duty on insurers to supersede a judgment, much less to post a supersedeas bond (although policy terms may require an insurer to do so). But given that an insurer's duty to indemnify is contingent upon its insured bearing a legal obligation to pay damages, failure to supersede a judgment will likely trigger an insurer's duty to indemnify. *Supra*. Moreover, any subsequent failure to indemnify an insured, even while an appeal is pending, may expose insurers to additional contractual or extra-contractual liability. *Id*.

Issues with superseded bonds usually arise when determining what amount the insurer must contribute toward a bond if the amount of the judgment exceeds policy limits (*e.g.*, payment of bond for policy limits vs. the full amount of the judgment, etc.). Admittedly, no Texas court has directly answered this question, leaving room for fights about the "right answer" in the context of the facts of a particular case. However, as detailed above and below, an insurer's failure to post a bond that satisfies the full judgment may give rise to extracontractual liability. *Infra* § 8. As such, it is recommended that insurers *always* pay to supersede the full amount of a judgment, lest parties suffer consequences that can be easily mitigated.

7. WHAT HAPPENS IF THE JURY VERDICT EXCEEDS POLICY LIMITS?

It depends. It is axiomatic that liability insurers owe their insureds a common law and statutory duty to accept settlement offers when liability is reasonably clear, and damages are reasonably likely to exceed policy limits. TEX. INS. CODE § 541.060(a); *G.A. Stowers Furniture Co. v. Am. Indem. Co.*, 15 S.W.2d 544 (Tex. 1929); *Am. Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 849 (Tex. 1994); *Rocor Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 77 S.W.3d 253, 262 (Tex. 2002). Additionally, Texas law requires insurers to conduct reasonable investigations of all claims, to not misrepresent facts or policy provisions when communicating with insureds, and to not deny or delay payment or settlement without a reasonable basis. TEX. INS. CODE § 541.060(a); *Universal Life Ins. Co. v. Giles*, 950 S.W.2d 48, 50-51 (Tex. 1997) ("An insurer breaches its duty of good faith and fair dealing when the insurer had no reasonable basis for denying or delaying payment of [a] claim, and [it] knew or should have known that fact."). Accordingly, if the jury returns an excess verdict, and the excess verdict is the proximate result of an insurer's breach of common law or statutory duties owed to its insured, then such verdict could give rise to extra-contractual liability exposure. *Supra*; *infra* § 8.

This is not to say, however, that an excess verdict – in and of itself – automatically creates extra-contractual liability for an insurer. As noted above, it is the entry of a judgment – not a verdict – that triggers an insured's legal duty to pay damages. *Supra* § 1. Indeed, an excess verdict could be set aside by the trial court, or a motion for JNOV could be granted, or the trial court might otherwise grant a new trial, thereby nullifying the excess verdict altogether. *Supra* § 3.

"established rule that an insurer's duty to defend generally encompasses an obligation to appeal from an adverse judgment against its insured, but only if reasonable grounds exist to believe that the insured's interest might be served by the appeal."); *Chatoney v. Safeway Ins. Co.*, 801 So.2d 448, 450–51 (La. Ct. App. 2001) ("[An] insurer's obligation to defend includes the duty to appeal judgment adverse to the insured where there appears reasonable grounds for taking an appeal."); *Delmonte v. State Farm Fire and Cas. Co.*, 90 Hawai'i 39, 975 P.2d 1159, 1168–69 (1999) (duty to defend includes a duty to appeal where there are reasonable grounds for the appeal unless the insurance contract expressly provides to the contrary); *Ursprung v. Safeco Ins. Co. of Am.*, 497 S.W.2d 726, 730–31 (Ky. 1973) ("…[W]e have concluded that the contractual obligation to defend carries with it an obligation to prosecute an appeal from a judgment against an insured where there are reasonable grounds for appeal.")

Alternatively, even if an excess verdict is reduced to final judgment at the trial court, the insurer could pay to supersede the full amount of the judgment, and the judgment then can be reversed, vacated, or modified on appeal. *Id*. §§ 3 – 5. As such, it is possible for an insured to suffer no damages from the rendition of an excess verdict or judgment.

But as noted further below, some Texas courts have recognized that an insured can suffer damages from the rendition of an excess judgment, or from insurer conduct that contributed to causing an excess judgment, even if the judgment is ultimately reversed, vacated, or modified, *Infra* § 8. Moreover, Texas law has left open the possibility that an insurer's conduct may result in independent tort liability. *See Republic Ins. Co. v. Stoker*, 903 S.W.2d 338, 341 (Tex. 1995). Therefore, even if an excess judgment does not ultimately stand on appeal, the mere fact of an excess verdict or judgment can expose insurers to extracontractual liability.

Whether an insured has a cognizable claim for damages is highly dependent on the facts of the case. Texas insurance lawyers must take care to advise their clients to proceed with caution and prudence under such circumstances. Rushing to action may result in your client exposing itself to significantly greater extracontractual liability, or in your client failing to assert the strongest potential claim for extracontractual damages. Alternatively, waiting to assess the facts giving rise to the rendition of the excess verdict may allow your client to insulate itself from exposure, or enable it to develop a devastating extracontractual damages case.

8. CAN AN INSURED SUFFER DAMAGES WHILE THE APPEAL IS PENDING?

Potentially, yes. As noted above, if an insurer fails to supersede a judgment, then the insured's legal obligation to pay damages is triggered by the execution of the judgment, even if the insured appeals that judgment. *Supra* §§ 1, 2, 6. Therefore, if the insurer fails to supersede the judgment, then the insured will be forced to pay out-of-pocket to either (a) supersede the judgment; or (b) pay the judgment outright. Depending on the policy language, failure to indemnify such costs may entitle the insured to sue for contractual and extracontractual damages.

Additionally, an insured may suffer damages from an insurer's breach of common law and statutory duties that proximately caused an excess judgment, even if the judgment has been superseded, and even, in certain cases, when the judgment is reversed. Traditionally, Texas courts have held that "[t]he injury producing event [for claims against insurers] is the underlying judgment in excess of policy limits." *Murray v. San Jacinto Agency*, 800 S.W.2d 826, 829 (Tex. 1991); *see also Linkenhoger v. Am. Fidelity & Cas. Co.*, 260 S.W.2d 884, 887 (Tex. 1953) (concluding the insured "could not have maintained this present suit until such time as his liability and the extent thereof had been determined by a final judgment in the former case. Until then…the tort was not complete."). Thus, most courts applying Texas law hold "[a] *Stowers* cause of action does not accrue until judgment in the underlying case becomes final." *Street*, 756 S.W.2d at 301; *see also*, *e.g.*, *In re Davis*, 253 F.3d 807, 809 (5th Cir. 2001); *One Beacon Ins. Co. v. T. Wade Welch & Assoc*. 2012WL 2403500, at *5 (S.D. Tex. Jun. 25, 2012).

But since the Texas Supreme Court's opinion in *Menchaca*, some Texas courts have recognize that an insurer's liability for breach of common law and statutory duties is independent of its *Stowers* liability, and, as such, have allowed insureds to prosecute claims for independent damages, even when there is not an excess judgment pending against the insured. *See*, *e.g.*, *Medallion Transp. & Logistics, LLC v. Granite State Ins. Co.*, 2018 WL 3249708, at *4 (E.D. Tex. Jun. 27, 2018) (allowing insured to prosecute extracontractual claims against insurer even though the insurer had bonded excess judgment, reversed on appeal, and then settled the case); *Liberty Ins. Underwriters, Inc. v. Pay & Save, Inc.*, 2020 WL 6122551, at *5 (N.D. Tex. Sept. 8, 2020) (finding insured could assert ripe extracontractual claims, even though the insurer had superseded the excess judgment and was prosecuting appeal to overturn the verdict) (citing *Medallion Transp.*); *see also USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479 (Tex. 2018).

Indeed, this makes sense. Even if the judgment is superseded, the insured is still legally obligated to pay damages to the claimant – that obligation is merely stayed pending final resolution of the appeal. As such, insureds must still carry the judgment on their financial statements, or otherwise disclose the judgment to counterparties in financial transactions. To the extent that the excess verdict or judgment impairs or inhibits an insured's financial opportunities (*e.g.*, increased difficulty in obtaining loans or credit; increased interest rate; deal negotiations falling through, etc.), it could result in cognizable damages attributable to the insurer's conduct.

Accordingly, Texas insurance practitioners must pay close attention to damages claims that may arise after the entry of judgment, and scrutinize whether to assert such claims on behalf of an insured, or whether to alert an insurer that such claims could succeed under Texas law.

9. WHEN CAN AN INSURED SUE ITS INSURER(S) FOR EXTRA-CONTRACTUAL LIABILITY OR "BAD FAITH"?

As soon as a verdict is rendered. Texas courts are clear that a plaintiff "need not wait until all appeals have ended to sue" its insurer for extracontractual claims. *See Archer v. Med. Protective Co. of Ft. Wayne, Ind.*, 197 S.W.3d 422, 426 (Tex. App.—Amarillo 2006, pet. denied); *see also Bramlett v. Med. Protective Co. of Ft. Wayne, Ind.*, 2013 WL 796725, at *6 (N.D. Tex. Mar. 5, 2013) (Fitzwater, C.J.) (citing *Archer*, 197 S.W.3d at 426) ("Texas law allows an insured to bring a *Stowers* action as soon as there is a jury verdict exceeding policy limits.").

This derives from basic principles underlying the ripeness doctrine. Under Texas law, a case is not ripe for adjudication if an alleged injury "depends on contingent or hypothetical facts, or upon events that have not yet come to pass." *See Arnold & Itkin, LLP v. Dominguez*, 501 S.W.3d 214, 221 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (citing *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851-52 (Tex. 2000); *Patterson v. Planned Parenthood of Houston & Se. Tex., Inc.*, 971 S.W.2d 439, 442 (Tex. 1998)); *see also Mayfield v. Tex.*, 206 F. Supp.2d 820, 823-24 (E.D. Tex. 2001) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.").

In the extracontractual liability context, once an excess verdict is rendered, the risk of injury is no longer "abstract," "contingent," or "hypothetical." *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733-35 (noting that ripeness doctrine is designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements…") (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967)). Rather, the verdict itself is sufficient evidence that there is an imminent danger that an insured will be required to pay damages (*i.e.*, suffer legal injury) attributable to the insurer's conduct.

This is not to say that a bad faith case should always proceed to trial while the underlying case remains pending on appeal. Indeed, practical difficulties may arise if the insured tries to prosecute a damages model that is subject to change once the appellate court finishes its review. It is for this reason that courts will often stay extra-contractual liability cases pending resolution of the underlying lawsuit (*i.e.*, waiting until there is a final, enforceable judgment). However, the fact that judicial economy may favor staying a bad faith case does not mean that such claims should be dismissed if asserted before a final, enforceable judgment is entered in the underlying case. Rather, the insured – as the true plaintiff – is entitled to secure its preferred jurisdiction and venue to prosecute its extracontractual claims, should it ever become necessary for it to do so.

10. WHAT HAPPENS IF A JUDGMENT IS REVERSED, VACATED, OR MODIFIED ON APPEAL?

It depends. As noted above, an insurer's general duty to indemnify is contingent upon the insured facing a legal obligation to pay damages. *Supra* § 1; *see also* CG 00 01 04 13 at 1. The corollary to this rule is if the insured no longer has a legal obligation to pay damages, then the insurer's indemnity obligation are no longer be triggered. As such, if a judgment against an insured is reversed on appeal, then the insured will no longer be responsible for paying damages, thereby eliminating the insurer's present obligation to indemnify. However, if the appellate court's ruling results in anything other than a complete reversal and rendering of judgment in the insured's favor, then the insurer's duty to defend and indemnify remains, subject to other considerations that may present, depending on how circumstances developed during the appeal.