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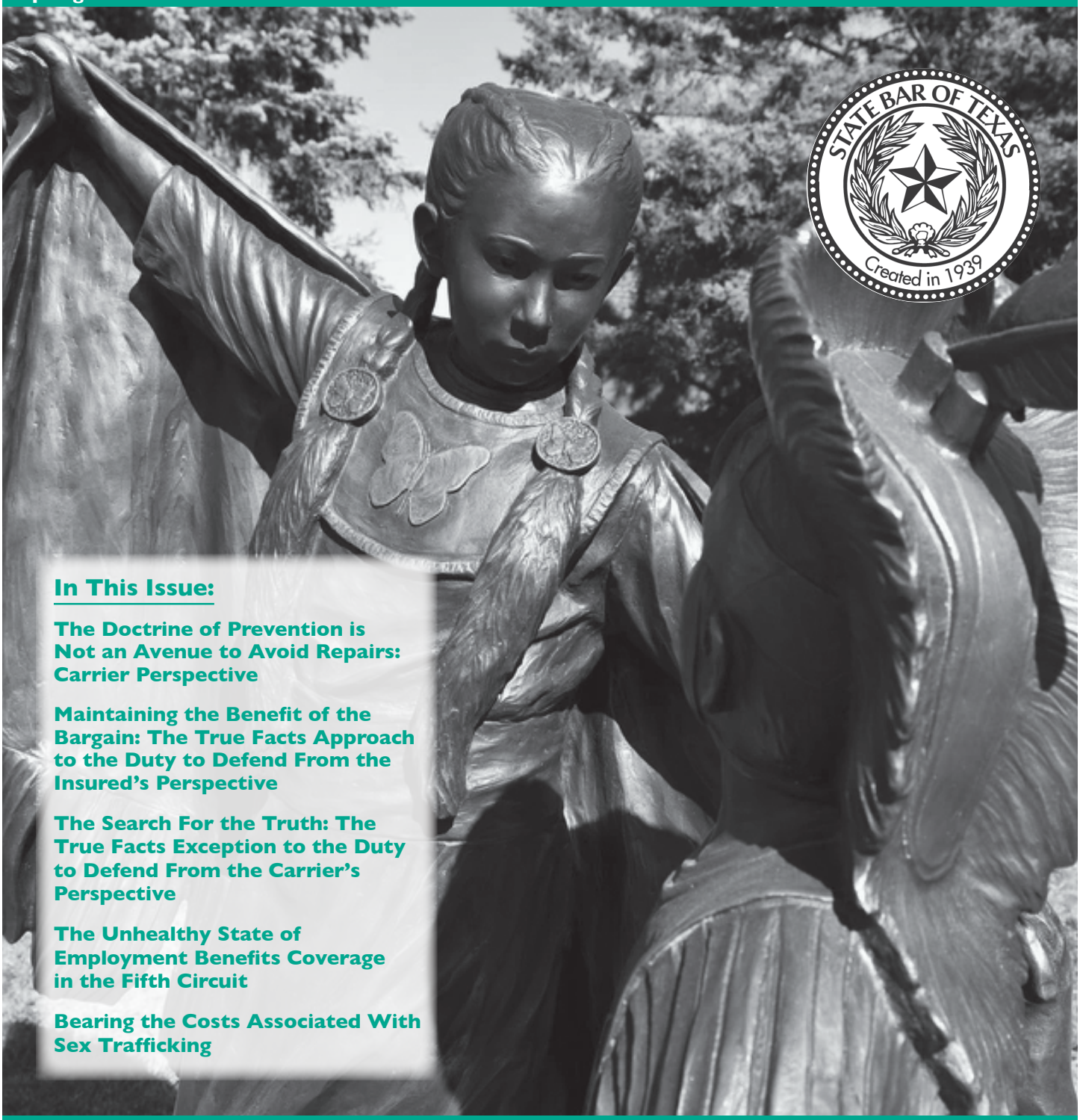

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By Christopher "Kipper" Burke

THE SEARCH FOR THE TRUTH: THE TRUE FACTS EXCEPTION TO THE DUTY TO DEFEND FROM THE CARRIER'S PERSPECTIVE

Several hundred years ago, Lord Chief Justice Coke observed that "truth is the mother of justice."

Courts across the United States universally agree that litigation should be a search for the truth. Texas courts and the Fifth Circuit are no different. Even in cases where an insurance company is paying for the defense of its insured, the Supreme Court of Texas understands that the search for truth is paramount. In fact, the court stated that the profession needs to guard against giving prominence or substance to the "image that lawyers will take any position, depending upon where the money lies, and that litigation is a mere game and not a search for truth."

But what happens if neither the plaintiff nor the defendant pursue the truth? And, what if the refusal to seek the truth is because it would take the matter out of coverage under the defendant's insurance policy? Should an insurer be required to defend a case where neither party seeks the truth?

Under Texas law, insurance companies defending their insureds under a reservation of rights are limited in their options to ensure that the underlying lawsuit is a search for the truth. Texas courts should permit insurance companies the opportunity to establish the true facts when the underlying parties lack the incentive to do so. Rather than wait for a trial based on a fiction designed to benefit both the plaintiff and the insured defendant at the expense of the insurance company, Texas law should permit insurance companies to establish the coverage issue at the duty-to-defend stage when neither party in the underlying lawsuit has the incentive to litigate the true facts.

Gamesmanship is common in cases involving people injured while working. Injured workers who may be employees of the defendant under Texas law often allege that, at the time of the injury, they were (1) an independent contractor of the defendant; or (2) either an employee or independent contractor of the defendant. Alleging that the injured worker was an independent contractor is likely sufficient to trigger a duty to defend under standard commercial general liability or commercial auto policies. In this situation, or where the insurer's investigation determines that the plaintiff may be the insured's employee, the insurer accepts the defense while reserving the right to disclaim under the employee injury exclusion.

Whether the worker is an independent contractor or employee significantly affects the trial. If the worker is an employee, then the defendant loses all common law defenses like contributory negligence. If the worker is an independent contractor, then the defendant can submit the plaintiff's comparative fault to the jury.

If the availability of insurance coverage was not an issue, the plaintiff would almost certainly argue that he or she is an employee to maximize the employer's liability. However, because this would trigger the employee injury exclusion, plaintiffs often ignore the worker's status and proceed to trial as if the injured employe were an independent contractor. The defendant, even knowing that the worker is an employee, lacks incentive to prove it. The parties submit the case to the fact finder with negligence questions as to the plaintiff and defendant, as well as the comparative liability question. They do so despite the fact that whether the injured worker was an employee or an independent contractor affects liability and the availability of insurance coverage.

Under the current guidance from the Supreme Court of Texas, the insurance company has no viable option to address this fiction until a final judgment is entered. Because it is defending under a reservation of rights where a true conflict between it and the insured exists, the insurance company lacks the ability to control the defense. The insurance company has no means to ensure that the true facts are tried, as neither underlying party has the incentive to argue the truth—that the worker was an employee.

Texas courts have long held that the insurer's duty to defend is analyzed under the eight-corners rule. The rule is well established: the duty to defend is determined by comparing the factual "allegations of the complainant . . . in the light of the policy provisions without reference to the truth or falsity of such allegations and without reference to what the parties know or believe the true facts to be, or without reference to a legal determination thereof."

The duty to indemnify, however, is determined by the actual facts established in the underlying litigation. Texas courts treat the duty to indemnify separately from the duty to defend. And, Texas law provides that "a claim based on a contract that provides indemnification from liability does not accrue until the indemnitee's liability becomes fixed

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and certain." Thus, if an insurer has a duty to defend, any attempt to determine the duty to indemnify prior to a final judgment in the underlying action is deemed "premature."

1. Courts should adopt a true-facts exception to the duty to indemnify when trier of fact will not decide the coverage issue in the underlying case.

A true-facts exception, permitted where the underlying litigation will not establish coverage-determinative facts, is the only mechanism by which justice can be efficiently achieved for all the parties. While this approach may, at first blush, appear to violate well-established Texas law, it reflects the rationale behind virtually all of the Supreme Court of Texas opinions on the issue. Each of these opinions is addressed below.

a. *GuideOne*

In *GuideOne*, the Supreme Court of Texas declined to adopt a "true facts" exception to the eight-corners rule in a suit involving sexual assault. The insurer argued that it knew the allegations could not be true because the individual defendant was not an employee of the church during at the time of the alleged assaults. The Court held that if an insurer "knows [the] allegations to be untrue, **its duty is to establish such facts in defense of its insured, rather than as an adversary in a declaratory judgment action.**" The Court determined that public policy did not support a "true-facts exception" because "the record before us [did] not suggest collusion or the existence of a pervasive problem in Texas with fraudulent allegations designed solely to create a duty to defend." *Id*.

The Court explained:

> Moreover, were we to recognize the exception urged here, we would by necessity conflate the insurer's defense and indemnity duties without regard for the policy's express terms. . . .
>
> The policy thus defined the duty to defend more broadly than the duty to indemnify. This is often the case in this type of liability policy and is, in fact, the circumstances assumed to exist under the eight-corners rule. Because the respective duties differ in scope, they are invoked under different circumstances. A plaintiff's factual allegations that potentially support a covered claim is all that is needed to invoke the insured's duty to defend, whereas, the facts actually established in the underlying suit control the duty to indemnify.

The *GuideOne* decision is premised on the fact that the coverage issue will be resolved in the underlying lawsuit. But, in the injured-worker scenario, the true facts will not be litigated in the underlying case, leaving coverage unresolved. Thus, the Court's premise for rejecting a true-facts exception is lacking where the facts will not be established in the underlying lawsuit.

b. *Avalos*

In *Loya Insurance Company v. Avalos*, the Court adopted an insurer's right use a true-facts exception to the eight-corners rule. In *Avalos*, the insurance company sold an automobile liability policy to Guevara. Guevara's husband, Flores, was explicitly excluded from the policy's coverage. While moving Guevara's car, Flores collided with another car carrying Avalos and Hurtado. Avalos, Hurtado, Guevara, and Flores agreed to tell both the responding police officer and the insurer that Guevara was driving the car, rather than Flores.

Avalos and Hurtado sued Guevara for damages. Guevara sought coverage from her insurer, which retained defense counsel. Guevara disclosed the lie to her attorney and identified Flores as the driver. The attorney reported this information to the insurer. The insurer withdrew the defense and denied coverage for the accident. Avalos and Hurtado obtained summary judgment, and the trial court entered a judgment against Guevara for $450,343.34.

Guevara assigned her rights against the insurer to Avalos and Hurtado, who sued the insurer for payment of the judgment. The trial court entered summary judgment in favor of the insurer, finding there was no factual issue that Flores, the excluded driver, was driving the at fault vehicle. The appellate court reversed, relying on the longstanding eight-corners rule, stating that "as logically contrary as it may seem," the insurer owed a duty to defend.

The Supreme Court of Texas reversed. The Court found no dispute that the parties agreed to lie in order to trigger insurance coverage. Finding this sufficient evidence of collusive fraud, which the Court identified as a key distinction justifying departure from the eight-corners rule, the Court concluded, "an insurer owes no duty to defend when there is conclusive evidence that groundless, false, or fraudulent claims against the insured have been *manipulated by the insured's own hands* in order to secure a defense and coverage where they would not otherwise exist."

In the injured-worker scenario, the insured does not affirmatively manipulate the claim into coverage. Thus, *Avalos* is not controlling. But, *Avalos*' statement that there was no factual dispute regarding who was driving is, in application, a "true facts" exception to the eight-corners rule. Because the Supreme Court of Texas would not allow a fiction to trigger the insurer's obligation, it found that the insurer could rely on the true facts to establish that it had no duty to defend the insured. While collusion is one reason to apply such a true-facts exception, other reasons also support the exception. That a case will proceed to judgment based upon a fictional set of facts should, alone, be sufficient. Thus, when the underlying lawsuit will not establish the facts necessary to determine coverage, the insurer should be able to negate the duty to defend by looking to the true facts.

Monroe Guaranty

Of course, the above approach directly conflicts with the Supreme Court of Texas' most recent opinion regarding extrinsic evidence in determining the duty to defend. In *Monroe Guaranty Insurance Company v. BITCO General Insurance Corporation*, the Court determine whether two insurance companies owed a duty to defend a suit where the insured defendant drilled an irrigation well that damaged the plaintiff's land. The Court considered whether Texas law permits consideration of stipulated extrinsic evidence to determine the duty to defend when the plaintiff's pleading is silent about a potentially dispositive coverage fact. The plaintiff's pleading was silent on when any "property damage" may have occurred within the meaning of the commercial general liability policies.

The Court determined that extrinsic evidence could be considered only "if the evidence (1) goes solely to an issue of coverage and does not overlap with the merits of liability, (2) does not contradict facts alleged in the pleading, and (3) conclusively establishes the coverage fact to be proved." The Court ultimately decided that the stipulated extrinsic evidence did not satisfy the newly-articulated standard; *when* the property damage occurred overlapped with the merits of liability because that issue necessarily implicates *whether* property damage occurred. In other words, the insured would be forced to confess damage at a particular date to invoke coverage, when its position may be that no damage occurred at all.

Turning to the injured-worker scenario, suppose the plaintiff alleges that the worker is an independent contractor, which contradicts the true fact that the worker is an employee. Extrinsic evidence would not be permitted under *Monroe* because it violates the second prong of the test. Importantly, however, the *Monroe* standard does not address a scenario where the true facts are not litigated in the underlying lawsuit. The *Monroe* decision was based on the premise that the underlying parties would eventually litigate the true facts. In the injured-worker scenario, that will not occur.

The Texas Supreme Court previously observed that the "varied circumstances under which . . . consideration of extrinsic evidence may arise are beyond imagination." Thus, an insurer should be permitted to consider extrinsic evidence regarding the duty to defend when the underlying litigation will not establish coverage dispositive facts.

2. Such an exception is based on sound public policy.

The search for truth is sound public policy. In discussing a case involving an insurer's refusal to defend, the Texas Supreme Court stated "[t]he defendant's insurer is often the plaintiff's only real source of recovery, but without the insurer's involvement in the lawsuit the likelihood of a fully adversarial trial diminishes substantially." In the injured-worker example, however, the *presence* of insurance increases the likelihood that the case will not be litigated based upon the true facts. The presence or absence of insurance should not impact the search for truth.

A "true-facts" exception is also supported by sound public policy because it promotes an efficient resolution of the disputed issues. Under the current Texas law, the parties must participate in lengthy litigation in the underlying lawsuit, where they submit the case to the fact finder based upon incomplete facts regarding the insured's employment status. Then, they must litigate the true facts in the subsequent coverage action involving the insurance company. This scheme of double litigation is inefficient.

In *Great Am. Ins. Co. v. Hamel*, the insurer declined to defend based on an erroneous interpretation of the trigger of coverage. The Court examined whether the underlying trial was "adversarial," which depended on the insured defendant's incentive, or lack or incentive, to defend. The Court concluded that, because the underlying judgment was not the result of a fully adversarial trial, the "judgment that followed was not enforceable or admissible as evidence in the subsequent [coverage lawsuit]." And, the parties to the coverage action would be able to "litigate any disputed underlying issues with the benefit of full adversity."

Under *Hamel's* reasoning, the failure to address the worker's status results in a non-adversarial trial as it relates to the insurance company. Because neither the plaintiff nor the defendant have an incentive to raise the issue, the judgment should not be "enforceable or admissible" in the coverage action. The logical end result is that the judgment is meaningless in every case where (1) whether the worker was an employee or an independent contractor is not submitted to the fact finder; and (2) the carrier defends under a reservation of rights on the employee injury exclusion. In this scenario, the insurance company has paid to defend its insured in a lawsuit that could never be used to collect under the policy. And the parties will be forced to litigate all the "disputed underlying issues" in the coverage action. Essentially, the parties will be required to retry the entire underlying case.

A true-facts exception would cause no harm to the plaintiff or the defendant. If the plaintiff is an employee, he or she can pursue the defendant under that theory and obtain a judgment against that defendant. The defendant could defend the suit and make settlement decisions. If the true facts establish that the plaintiff is an independent contractor, the insurer will provide a defense to the insured without reservation on that issue, have the right and duty to defend, and have the exclusive right to settle the lawsuit. That is exactly what the defendant purchased from the insurance company.

A true-facts exception would also help the parties more efficiently seek a negotiated resolution, as it would clarify the rights and responsibilities of all parties. The parties will have

fewer issues that impact the decisions on whether to settle or not. It would alleviate uncertainty for all the parties.

Such a rule supports the Supreme Court of Texas' pronouncement that the duty to indemnify is separate from the duty to defend. When insurers are forced to defend uncovered claims, the duty to defend has an undue impact on the duty to indemnify. Insurance companies, like other businesses, make decisions based upon financial implications. The costs to defend a lawsuit—whether frivolous or not covered—are often considered when deciding how much to pay to settle a claim. When there is no duty to indemnify, the duty to defend swallows the duty to indemnify analysis. And, particularly where the insured controls of the defense, the insurer's decision to use the duty to defend as the primary driver of its duty to indemnify is amplified.

3. The Texas Rules of Professional Conduct may not protect the integrity of the courts in this scenario.

Opponents of a "true-facts" exception, may argue that the State Bar's ethical rules prevent the plaintiff's counsel from knowingly pleading the plaintiff's employment status incorrectly. However, the Texas Rules of Professional Conduct are not so limiting in this scenario. Rule 3.01 states that a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous. A filing or assertion is frivolous if it is made primarily for the purpose of harassing or maliciously injuring a person. A filing or contention is frivolous if it contains knowingly false statements of fact. It is not frivolous, however, merely because the facts have not been first substantiated fully or because the lawyer expects to develop vital evidence only by discovery. Neither is it frivolous even though the lawyer believes that the client's position ultimately may not prevail.

Many workers, even those who qualify as employees under the common law definition, are reported as 1099 contractors to the IRS or paid in cash. Because they are not paid as employees that receive a W-2, an attorney can, without any additional investigation, argue that their client *might* be an independent contractor without violating Rule 3.01. Thus, Rule 3.01 may not prevent an attorney from making such an allegation.

An analysis of an attorney's ethical obligations to the court fares no differently. Under Rule 3.03(a) of the Texas Rules of Professional Conduct, "a lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal; . . . or (5) offer or use evidence that the lawyer knows to be false." Because the defendant will not argue that the worker was an employee or an independent contractor, the plaintiff never need offer any evidence of the worker's status at the time of the injury. Thus, Rule 3.03 does not ensure the true facts are presented either.

4. Insurers should be permitted to intervene or file a separate declaratory judgment action.

While the Supreme Court of Texas considered an extrinsic-evidence exception sound public policy, the question of how an insurer may establish the extrinsic facts remains. Normally, an insurer files a declaratory judgment action to raise a coverage issue. And, while that should still be a viable approach, the insurer should also have the option to intervene in the underlying lawsuit to promote judicial efficiency.

Intervention would permit the trial court to resolve the issue, just as it would if the underlying matter were tried on the true facts. The court could also question counsel for both the plaintiff and the defendant about the true facts to ensure that the litigation is not solely a search for money rather than the truth. The trial court is in the best position to ensure the integrity of the process.

Texas Rule of Civil Procedure 60 states that "any party may intervene by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party." Rule 60 authorizes a party with a justiciable interest in a pending lawsuit to intervene in the suit as a matter of right, subject to a trial court's finding of "sufficient cause" to strike the intervention. Under Rule 60, a person or entity has a justiciable interest "if the intervenor could have brought the same action, or any part thereof, in his own name, or, if the action had been brought against him, he would be able to defeat recovery, or some part thereof." Intervention by an insurer does not fit into this definition of a justiciable interest on its face.

Both the Supreme Court of Texas and the Fifth Circuit, however, have permitted insurers to intervene even where the insurer lacked such a justiciable interest. In both cases, the insured attempted to abandon a substantive issue on appeal. The Supreme Court of Texas permitted an insurer to intervene on appeal when the insured abandoned a defense in order to resolve uninsured claims. The Court ruled that the insurer had a right to intervene because "our procedural rules favor the resolution of cases based upon substantive principles." The Fifth Circuit also permitted an insurer to intervene when the insured attempted to abandon its appeal because the victims agreed to not execute on the insured's property in exchange for an assignment of rights against the insurer. In both of those cases, the insured would not argue the true facts of the case.

The reasoning of Rule 60 supports the right of an insurer to intervene to raise the true facts that neither underlying party will. Intervention is necessary to promote the orderly administration of justice and avoid a sham trial. As the only party with an incentive to promote the truth, the insurer has a justiciable interest in the outcome. In addition, allowing an insurer to intervene would promote the resolution of the case based upon substantive issues at an early stage.

Courts in other jurisdictions routinely permit insurers to resolve coverage issues early in the underlying litigation. For example, in Florida, insurers may litigate duty-to-defend and -indemnify issues prior to the resolution of the underlying case. The Florida Supreme Court has noted the substantial policy factors that favor resolving coverage issues early. In discussing whether a declaratory judgment action would be appropriate, the Court stated:

> We conclude that it is illogical and unfair to not allow insureds and insurers to have a determination as to whether coverage exists on the basis of the facts underlying a claim against an insurance policy. Why should an insured be placed in a position of having to have a substantial judgment against the insured without knowing whether there is coverage from a policy? Why should an insurer be placed in a position of either paying what it believes to be an uncovered claim or being in jeopardy of a bad faith judgment for failure to pay a claim? These are precisely the issues recognized by this Court in other contexts that are intended to come within the purpose of the declaratory judgment statute's "relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations."

Wisconsin also permits an insurer to litigate the insurance coverage issues prior to resolution of the underlying case. Wisconsin identifies four judicially-preferred procedures:

1. Defend under a reservation of rights;
2. Defend under a reservation of rights but seek a declaratory judgment on coverage;
3. Enter into a nonwaiver agreement under which the insurer defends the insured but the insured acknowledges that the insurer has the right to contest coverage;
4. File a motion with the circuit court requesting a bifurcated trial on coverage and liability and a stay of the proceedings on liability until coverage is determined.

Intervention under Rule 60 would ensure that the underlying case is, in fact, a search for the truth. Timely addressing the duty to defend and the duty to indemnify, whether by intervention or a declaratory judgment action, will promote efficiency. It would be the most effective method to guard against giving prominence or substance to the "image that lawyers will take any position, depending upon where the money lies, and that litigation is a mere game and not a search for truth."

1 Sir Edward Coke, *The Second Part of the Institutes of the Laws of England* 524 (1642).

2 *See Hickman v. Taylor*, 329 U.S. 495, 507, 67 S. Ct. 385, 91 L.Ed. 451 (1947) (decrying rule that would make litigation "more of a battle of deception than a search for truth"); *Chicago, B. & Q. R. Co. v. Dey*, 38 F. 656, 661 (C.C.S.D. Iowa 1889) ("we . . . are simply searching after the truth."); *Watts v. Newport*, 149 Fla. 181, 187, 6 So. 2d 829 (1941) ("the search for truth . . . is the only purpose of a lawsuit."); *Greyhound Corp. v. Superior Court of Merced Cnty.*, 56 Cal. 2d 355, 376-77, 15 Cal. Rptr. 90, 364 P.2d 266 (1961) (quoting Professor David W. Louisell, "* * * a law suit should be an intensive search for the truth, not a game to be determined in outcome by considerations of tactics and surprise."); *State v. Stump*, 119 N.W.2d 210, 218 (Iowa 1963) (. . . "a lawsuit whether it be civil or criminal is essentially a search for the truth."); *State ex rel. Evertson v. Cornett*, 1964 OK 83, ¶ 34, 391 P.2d 277 (". . . the trial of a lawsuit is essentially a search for the truth and not a mere sporting proposition or game."); *Fitzgerald v. Westland Marine Corp.*, 369 F.2d 499, 500 (2d Cir. 1966) (quoting Justice Warren, "a law suit is a search for the truth and the tools are provided for finding out the facts before the curtain goes up on trial."); *Groff v. State Indus. Acc. Comm'n.*, 246 Or. 557, 565, 426 P.2d 738 (1967) ("Litigation is deeply involved in the search for truth."); *Anderson v. Florence*, 288 Minn. 351, 356, 181 N.W.2d 873 (1970) (quoting Professor David W. Louisell, "a lawsuit should be an intensive search for the truth, not a game to be determined in outcome by considerations of tactics and surprise."); *Ark. State Highway Comm'n. v. Phillips*, 252 Ark. 206, 209, 478 S.W.2d 27 (1972) ("[t]he trial of any lawsuit, fundamentally, should be a search for truth."); *State v. Merski*, 437 A.2d 710, 715 (N.H. 1981) ("the litigation process which is, after all, a search for the truth." (quoting McNamara, *The Hierarchy of Evidentiary Privilege in New Hampshire*, 20 N.H.B.J. 1, 27 (1978))); *Cates v. Wilson*, 321 N.C. 1, 18, 361 S.E.2d 734 (1987) (Mitchel, J., concurring) ("[a] lawsuit is not a parlor game; it is a solemn search for truth conducted by a court of law."); *Shoney's, Inc. v. Lewis*, 875 S.W.2d 514, 517 (Ky. 1994) (Leibson, J., dissenting) ("lawsuit is a search for the truth.").

3 *See State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 708 (Tex. 1996); *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313 (Tex. App. —San Antonio 1994, writ ref'd); *Walker v. Packer*, 827 S.W.2d 833, 857 (Tex. 1992); (Doggett, J., dissenting); *Elbaor v. Smith*, 845 S.W.2d 240, 252 (Tex. 1992) (Doggett, J., dissenting).

4 *See Sims v. ANR*, 77 F.3d 846, 849 (5th Cir. 1996); *Hall v. Freese*, 735 F.2d 956, 961-62 (5th Cir. 1984).

5 *Gandy*, 925 S.W.2d at 708 (Tex. 1996); *Loya Ins. Co. v. Avalos*, 610 S.W.3d 878 (Tex. 2020).

6 *Gandy*, 925 S.W.2d at 708 (internal citation omitted).

7 While by no means is this issue unique to Texas, the fact that an employer may opt out of providing worker's compensation coverage for injuries to employees results in this issue arising

more frequently in Texas than in other states that legislate compulsory worker's compensation coverage.

8 Both the ISO Commercial General Liability Coverage Form and the and the ISO Commercial Auto Coverage Form exclude "bodily injury" to "employees" of the "insured" arising out of and in the course of (1) employment by the "insured", or (2) performing the duties related to the conduct of the "insured's" business.

9 *See* Tex. Lab. Code § 406.033 (abolishing defenses of contributory negligence, assumption of the risk, and negligence of a fellow employee);*see also Schneider Elec. USA, Inc. v. Ramirez*, 657 S.W.3d 157, 161 (Tex. App.—El Paso 2022, no pet.) (noting § 406.33 abolishes certain common law defenses for defendants who do not purchase worker's compensation insurance).

10 *See* Tex. Civ. Prac. & Rem. Code § 33.001, *et. seq.*

11 *See Northern County Mut. Ins. Co. v. Davalos*, 140 S.W.3d 685, 689 (Tex. 2004) (declaring that a conflict of interest will prevent an insurer from conducting the defense when the facts to be adjudicated in the liability lawsuit are the same facts upon which coverage depends); *see also State Farm Mut. Auto. Ins. Co. v. Traver*, 980 S.W.2d 625, 627 (Tex. 1998) (stating insurer has right to control the defense unless there is a conflict of interest).

12 *Heyden Newport Chem. Corp. v. Southern Gen. Ins. Co.*, 387 S.W.2d 22, 24 (Tex. 1965).

13 *Heyden Newport Chem. Corp.*, 387 S.W.2d at 25; *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 821 (Tex. 1997); *D.R. Horton-Texas, Ltd. v. Markel Int'l Ins. Co.*, 300 S.W.3d 740, 744 (Tex. 2009); *Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, 279 S.W.3d 650, 656 (Tex. 2009).

14 *Cowan*, 945 S.W.2d at 821-22.

15 *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 134 (Tex. 2010) (citations omitted).

16 *See Hartrick v. Great Am. Lloyds Ins. Co.*, 62 S.W.3d 270, 275 (Tex. App. – Houston [1st Dist.] 2001, no pet.).

17 While this article addresses the employee/independent contractor scenario, such an exception would also be warranted in any matter where the coverage fact will not be decided by the trier of fact in the underlying lawsuit.

18 *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305, 310-11 (Tex. 2006).

19 *Id.* at 311 (emphasis added).

20 *Id.* at 310 (internal citations omitted).

21 The Texas Supreme Court's rationale in *GuideOne* fails to account for the fact that the insurer loses the right to control the defense where there is a true conflict of interest. In *GuideOne*, it just so happens that the coverage fact and the liability fact were the same: the insurer and the insured would both argue the individual worker-defendant was not an employee of the church at the time any assaults occurred. As a result, there was no conflict between the insured and the insurer.

22 610 S.W.3d 878 (Tex. 2020).

23 *Id.* at 882 (emphasis added).

24 640 S.W.3d 195 (Tex. 2022).

25 *Id.* at 202.

26 While the two insurers may have intended to stipulate to the coverage issue, they did not do so. The parties' stipulation only mentioned when the drill bit became stuck. The stipulation stated:

> While 5D Drilling and Pump Service, Inc. fka Davenport Drilling and Pump Service, Inc. ("5D") was performing its contract to drill a commercial irrigation water well for David Jones dba J & B Farms of Texas, during drilling, the drill bit stuck in the bore hole (the "Incident"). The date of the Incident was in or around November 2014.

Appellant's Brief On The Merits, Tab G, *Monroe Guar. Ins. Co.*, 640 S.W.3d 195 (No. 21-0232). They did not stipulate to the two coverage issues: (1) when any "property damage" occurred, or (2) when the insured became aware of when any "property damage" occurred. *See id.* at 46 (describing coverage issues).

27 *Id.* at 204.

28 *Richards v. State Farm Lloyds*, 597 S.W.3d 492, 500 (Tex. 2020).

29 *Great Am. Ins. Co. v. Hamel*, 525 S.W.3d 655, 669 (Tex. 2017).

30 This is effectively the approach the Texas Supreme Court addressed in *Hamel*, 525 S.W.3d at 658-59, where an insurer does not defend. The *Hamel* Court noted that the scope of *Gandy* was unclear, and the Court remanded to re-litigate the damages case. *See Hamel*, 525 S.W.3d at 670 & n.12 (remanding to re-litigate the underlying action as well as the coverage issues).

31 525 S.W.3d at 658-59.

32 *Id.* at 666–67.

33 *Id.* at 671.

34 *Id.*

35 *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 821-22.

36 Tex. Disciplinary Rules Prof'l Conduct R. 3.01 cmt. 2, *reprinted in* Tex. Gov't Code, tit. 2, subtit. G app. A (State Bar Rules art. X, § 9).

37 *Id.* cmt. 3.

38 *Id.*

39 *Id.*

40 *See, e.g., Nghiem v. Sajib*, 567 S.W.3d 718, 721 n.14 (Tex. 2019) (citing *In re Union Carbide Corp.*, 273 S.W.3d 152, 154 (Tex. 2008) (*per curiam*) (orig. proceeding)).

41 *Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 1990).

42 *See In re Lumbermens Mut. Cas. Co.*, 184 S.W.3d 718, 720

(Tex. 2006).

43 *Id*. at 728.

44 *See Ross v. Marshall*, 426 F.3d 745 (5th Cir. 2005).

45 *See Higgins v. State Farm Fire & Cas. Co.*, 894 So. 2d 5, 15 (Fla. 2004).

46 *See id*.

47 *Id.* (citing *Coalition for Adequacy & Fairness in School Funding, Inc. v. Chiles*, 680 So.2d 400, 404 (Fla.1996)).

48 *See Choinsky v. Emp'rs Ins. Co.*, 390 Wis. 2d 209, 225, 938 N.W.2d 548 (Wis. 2020).

49 *Id*.

50 *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 708 (Tex. 1996) (internal citation omitted).