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## *FYI* January 2008

### **HAPPY NEW YEAR!**

**Auto Theft Fee May Be Collected By Insurer As A Fee Without Including It With Rate Filing.** *Mid-Century Insurance Company of Texas v. Ademaj.* Texas Revised Civil Statute Article 4413(37), § 10(b), funds the Texas Automobile Theft Prevention Authority's automobile theft prevention programs by requiring each automobile insurer to pay a fee of \$1 per policy year for each insured automobile. The Commissioner of the Texas Department of Insurance authorizes automobile carriers to collect this fee from insureds as long as the carriers provided the insureds notice that, as part of the policy, they are being charged the fee "in addition to the premium due under this policy." Article 21.35B applies to all insurers, and outlines payments insurers may collect from policyholders. Ademaj brought a class action suit against Mid-Century Insurance Company of Texas, seeking a declaratory judgment regarding the manner in which Mid-Century could lawfully collect the legislatively imposed Authority fee. Plaintiffs in the class action alleged, in a motion for summary judgment, that Mid-Century illegally collected the Authority fee, because the fee was not included in Mid-Century's Article 5.101 rate-filing. Mid-Century's competing motion for summary judgment maintained that Article 21.35B(a) authorized it to charge the Authority fee as an

expense, and that it was not required to include the fee in its Article 5.101 rate-filing. The trial court ruled in Plaintiffs' favor, and the Court of Appeals affirmed. The Supreme Court reversed, rendering a take-nothing judgment in Mid-Century's favor, stating that Article 21.35B authorizes all insurers to solicit and collect both premiums and taxes. The Article 5.101 rate-making process produces auto insurance premiums, and in the process gives the Commissioner the discretion to determine whether payments should be considered as part of the Article 5.101 rate (and, thus, Article 21.35B premium). However, the Commissioner may also determine if payments should be considered as another Article 21.35B payment. Because the Commissioner made a reasonable determination that the Authority fee should be charged directly, and not as part of the Article 5.101 premium, Mid-Century properly collected the fee from Plaintiffs. The application of the filed rate doctrine, in this case, is necessarily circumscribed by the legislative grant of authority to the Commissioner to regulate premiums and cannot be applied to overrule the Commissioner's exercise of discretion not to include the Authority fee in the premium regulated under Article 5.101.

**Rule 11 is a “Statute Of Frauds” For Settlement Agreements.** *Knapp Medical Center v. De La Garza.* Texas Rule of Civil Procedure 11 states that any agreement between attorneys or parties “touching any suit pending”, including a settlement agreement, must be in writing, or made in open court, to be enforceable. Plaintiff, a physician, agreed to settle claim against hospital for \$1,000,000 policy limits, with mere “understanding” that hospital would contribute an additional \$200,000 over its limits to the settlement. The Texas Supreme Court ruled that the doctor could not recover the additional \$200,000, as that settlement term was neither reduced to writing nor placed on the record in open court, despite his allegation that the extra \$200,000 was fraudulently offered to entice him into settling for the policy limits.

**No Duty Owed to Insurer Who Pays More Than Its Proportionate Share.** *Liberty Mutual Insurance Co. v. Mid-Continent Insurance Co.* Following the response to its certified questions to the Texas Supreme Court, the Court of Appeals held that no actionable duty is owed (directly or by subrogation to the insured's rights) by an underpaying insurer to an insurer that paid more than its proportionate share in settlement of the underlying suit.

**Qualifications for the Reliability of Expert Testimony with Regard to Auto Cases.** *Ford Motor Company, Petitioner v. Tiburcio Ledesma, Jr.* The Supreme Court of Texas reiterated factors to be considered in determining the reliability of expert testimony and other issues to be considered in automobile cases. In *E.I. du Pont de Nemours & Co. v. Robinson*, the Court set out six factors that courts may consider in deciding whether expert testimony is reliable:

1. the extent to which the theory has been or can be tested;
2. the extent to which the technique relies on the subjective interpretation of the expert;
3. whether the theory has been subjected to peer review and/or publication;
4. the technique’s potential rate of error;
5. whether the underlying theory or technique generally has been accepted as valid by the relevant scientific community; and
6. the non-judicial uses which have been made of the theory or technique.<sup>[7]</sup>

However, the Court has recognized that the *Robinson* factors are nonexclusive and has specifically noted that “the *Robinson* factors are not always useful in evaluating expert testimony in automobile accident cases.” As in *Gammill v. Jack Williams Chevrolet, Inc.*, another automobile accident case, the *Robinson* factors do not readily lend themselves to a review of the expert testimony in the pending case, but “there must be some basis for the opinion offered to show its reliability.” And as in *Volkswagen of America, Inc. v. Ramirez*, yet another automobile accident case, “[a]n expert’s bare opinion will not suffice” and is unreliable if “based solely upon his subjective interpretation of the facts.”

Now, for a little New Year’s levity, it’s again that magical time of the year for the Darwin Awards, which honor the least evolved among us. The top 10, in no particular order, are:

1. When his 38 caliber revolver failed to fire at his intended victim during a hold-up in Long Beach, California, the would-be robber peered down the barrel and tried the trigger again. This time it worked.

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2. The chef at a hotel in Switzerland lost a finger in a meat cutting machine and submitted a claim to his insurance company. The company, expecting negligence, sent out one of its men to have a look for himself. He tried the machine and he also lost a finger. The chef's claim was approved.

3. A man who shoveled snow for an hour to clear a space for his car during a blizzard in Chicago returned with his vehicle to find a woman had taken the space. Understandably, he shot her.

4. After stopping for drinks at an illegal bar, a Zimbabwean bus driver found that the 20 mental patients he was supposed to be transporting had escaped. Not wanting to admit his incompetence, the driver went to a nearby bus stop and offered everyone waiting there a free ride. He then delivered the passengers to the mental hospital, telling the staff that the patients were very excitable and prone to bizarre fantasies. The deception wasn't discovered for 3 days.

5. A Texas teenager was in the hospital recovering from serious head wounds received from an oncoming train. When asked how he received the injuries, the lad told police that he was simply trying to see how close he could get his head to a moving train before he was hit.

6. A man walked into a Louisiana Circle-K, put a \$20 bill on the counter, and asked for change. When the clerk opened the cash drawer, the man pulled a gun and asked for all the cash in the register, which the clerk promptly provided. The man took the cash from the clerk and fled, leaving the \$20 bill on the counter. The total cash he got from the drawer? \$15.

7. An Arkansas man wanted some beer badly. He decided that he'd just throw a cinderblock through a liquor store window, grab some booze, and run. So he lifted the cinderblock and heaved it over his head at the window. The cinderblock bounced back and hit the would-be thief on the head, knocking him unconscious. The liquor store window was made of Plexiglas. The entire event was caught on videotape.

8. As a female shopper exited a New York convenience store, a man grabbed her purse and ran. A clerk immediately called "911", and the woman was able to give the dispatcher a detailed description of the purse snatcher. Within minutes, the police apprehended the thief, put him in the police car, and drove back to the store. The thief was then removed from the car, and told to stand there for a positive ID, to which he replied, "Yes, officer, that's her. That's the lady I stole the purse from."

9. A Michigan man walked into a Burger King in at 5 a.m., flashed a gun, and demanded cash. The clerk turned him down because he said he couldn't open the cash register without a food order. When the man ordered onion rings, the clerk said they weren't available for breakfast. The man, frustrated, walked away.

10. When a man attempted to siphon gasoline from a motor home parked on a Seattle street, he got much more than he bargained for. Police arrived at the scene to find a very sick man curled up next to a motor home near spilled sewage. A police spokesman said that the man admitted to trying to steal gasoline and plugged his siphon hose into the motor home's sewage tank by mistake. The owner of the vehicle declined to press charges, saying that it was the best laugh he'd had in a very long time.

SEE YOU NEXT MONTH!