DEBATING THIRD PARTY POLICY DEADLINES: WHY TEXAS SHOULD EQUITABLY TOLL AN INSURED'S CLAIM FOR BREACH OF THE DUTY TO DEFEND

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I. INTRODUCTION

The general counsel of a Texas based corporation is working diligently in her office when she receives her copy of a "bet the company" lawsuit—a ruinous, multi-million dollar breach of contract claim, or the first of what could become a series of products liability suits or securities class actions. Regardless of the lawsuit's merit, one of the general counsel's first thoughts is that the lawsuit could last for years, with each and every month bringing large defense bills. Her suspicions are confirmed when she retains defense counsel who estimates that the lawsuit will last at least two years and cost millions to defend.[1]

But the general counsel knows the company is protected. It is her responsibility to ensure the company has adequate insurance coverage, and at her insistence, the company pays hundreds of thousands in insurance premiums each year to protect itself from the uncertainty and expense of litigation. So she carefully reviews the applicable insurance policy and properly tenders the defense of the lawsuit to the carrier.

It is an unwelcome surprise when the carrier denies coverage. It appears from the denial letter that the carrier has either (1) badly misjudged the facts alleged in the petition, (2) not read it at all, or (3) intentionally misconstrued the coverage afforded by the policy and the applicable law. The general counsel, believing the company has both bad faith and breach of contract claims against the carrier, contacts her outside insurance counsel. She asks,

[1] Based on the most recent Federal Court Management Statistics, this is a reasonable estimate. In all U.S. district courts in 2007, the median time, from filing of a civil suit to trial, was just over two years (24.6 months). *See* FEDERAL COURT MANAGEMENT STATISTICS (2007), http://www.uscourts.gov/cgi-bin/cmsd2007.pl (accessed on Jan. 8, 2009). Although Texas district courts fare better, it is likely that a "bet the company" lawsuit is more complex than the median federal lawsuit. *Id.* (Time from filing to trial in the Northern District is 19.4 months; 20.3 months in the Southern District; 18 months in the Eastern District; and 15.4 months in the Western District). This type of complex litigation can also occasion significant gaps between filing and trial in Texas state court.

"Our company needs the insurance coverage it paid for, and this bad faith lawsuit appears too good to pass up, but I would prefer not to spend any more money on attorneys until this 'bet the company' suit is over. Can I wait to sue my carrier until after this first lawsuit is over?"

At this point, her attorney is compelled to give every client's favorite answer, "It depends." The company's breach of contract claim is unlikely to expire because Texas law provides a four-year statute of limitations for that claim,[2] but limitations for bad faith claims is only two years.[3] If the company's claims accrue when the carrier denies coverage and if defense counsel is correct that the "bet the company" lawsuit will last longer than two years, the company's bad faith claim could expire if it waits until the underlying lawsuit terminates.

Therefore, the prudent insurance attorney would answer "no" and tell the general counsel that she must bring the company's bad faith lawsuit before the "bet the company" lawsuit ends. Indeed, every lawyer knows not to advise a client to play chicken with an impending limitations deadline. And every trial lawyer knows that a bad faith claim provides the policyholder with substantial leverage in negotiations with an insurance company, because the potential for statutory damages and bad publicity that would accompany a bad faith damages award.

The prudent attorney's answer assumes, however, that the company's bad faith claim accrued when the carrier denied coverage. This Article examines whether that assumption is valid. Since 1990, the Texas Supreme Court has held that bad faith claims accrue when an insurer denies coverage.[4] Every one of those cases, however, concerned first party insurance, such as health and life insurance. The Texas Supreme Court has not yet examined whether the "accrual at denial" rule extends to third party insurance policies. But the Texas Supreme Court recently held in *Lamar Homes, Inc. v. Mid-Continent Casualty Co.* that the duty to defend is a first party claim, even though it is part of a third party policy.[5] After *Lamar Homes*, Texas courts are poised to decide whether the state should align with the majority or the minority of states that have addressed the issue of when a claim for breach of the duty to defend a third party insurance policy accrues.

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[2] Tex. Civ. Prac. & Rem. Code § 16.004(a) (Vernon 2002).

[3] *Id.* § 16.003(a).

[4] Murray v. San Jacinto Agency, Inc., 800 S.W.2d. 826, 828 (Tex. 1990).

[5] 242 S.W.3d 1, 17–18 (Tex. 2007).

The majority view holds that the breach of the duty to defend does not accrue (or is equitably tolled) until the underlying lawsuit terminates. In contrast, the minority view holds that breach of the duty to defend accrues at denial, and the risk that an insured may lose a bad faith claim to limitations is too small to justify a departure from well-established rules that dictate when a cause of action accrues.

This Article explores the arguments in favor of both views, and concludes that the Texas Supreme Court should adopt the majority view. Part II details with the history of Texas law concerning the accrual of bad faith claims. Part III sets forth the majority view, including relevant case law from states that have adopted this view as well as policy arguments in favor of delayed accrual and equitable tolling. Part IV describes the minority view and rebuts the equity arguments espoused by the majority. Part V attempts to resolve the debate between these views and urges the Texas Supreme Court to adopt the majority view.

II. A HISTORY OF TEXAS LAW ON THE ACCRUAL OF BAD FAITH CLAIMS

Texas law determining when a policyholder's bad faith claim against its carrier accrues is divided into three distinct histories: (1) the period between 1987 and 1990 (when Texas followed the accrual at underlying resolution rule adopted in *Arnold v. National County Mutual Fire Insurance Co.*);[6] (2) from 1990 to the present (when the Texas Supreme Court overturned *Arnold* in favor of the accrual at denial rule stated in *Murray v. San Jacinto Agency, Inc.*[7] and subsequent first party cases); and (3) the overlapping period from 1995 to 2008 (which saw specific, isolated developments in the treatment of third party insurance policies but has not yet culminated in a thorough analysis of when bad faith claims for breach of such policies accrue under Texas law). This Article addresses each of these histories in turn.

A. The Arnold Rule: Bad Faith Claims Accrue at Resolution of the Underlying Claim

The Texas Supreme Court answered the question of when a policyholder's bad faith claim accrues for the first time in 1987, holding

[6] 725 S.W.2d 165 (Tex. 1987).

[7] 800 S.W.2d 826 (Tex. 1990).

that the claim does not accrue until the insured's contract dispute with its carrier terminates.[8] In *Arnold v. National County Mutual Fire Insurance Co.*,[9] the plaintiff was a motorcyclist who was severely injured in a 1974 crash with an uninsured motorist.[10] The plaintiff had car insurance that included $10,000 of protection for damages caused by an uninsured motorist.[11] An independent insurance adjuster recommended that the carrier, NCM, pay the entire policy limit to the insured, but the carrier refused and denied coverage.[12]

Arnold then filed suit against both the uninsured motorist and NCM.[13] Arnold won an $18,000 judgment in December 1977, and NCM tendered its policy limits in satisfaction of the judgment.[14] Four years after Arnold's injury, in December 1978, Arnold filed a separate lawsuit alleging various statutory and common law bad faith claims against NCM.[15] The trial court granted NCM's motion for summary judgment that Arnold's bad faith claims were time-barred, and the appellate court sustained the trial court's ruling.[16]

The Texas Supreme Court reversed the appellate court, holding that Arnold correctly analogized his lawsuit to a *Stowers* suit, in which the claim against the carrier does not accrue until the underlying lawsuit terminates.[17] The court acknowledged that "Arnold's rights were invaded at the time his claim was rejected," but ultimately held that "the statute of limitations does not begin to run on a good faith and fair dealing claim until the underlying insurance contract claims are finally resolved."[18] But the accrual at resolution rule created by *Arnold* lasted just three years before being overturned.

[8] *Arnold*, 725 S.W.2d at 168.
[9] *Id.* at 166.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* at 166–67.
[16] *Id.* at 166.
[17] *Id.* at 168.
[18] *Id.*

B. Murray Overturns Arnold and Adopts the Accrual at Denial Rule

In 1990, the Texas Supreme Court overturned *Arnold* in a narrow five-to-four decision, holding that first party bad faith claims accrue on the date the insurance carrier denies coverage. [19] The plaintiff in *Murray v. San Jacinto Agency, Inc.* was a woman who developed chronic pancreatitis.[20] Mrs. Murray received the diagnosis during her divorce from her husband, under whose health insurance she was insured.[21] While the divorce was pending, Murray's husband had requested that she be removed from his health insurance.[22] The carrier, San Jacinto Agency, Inc. (SJA), complied with the husband's request, and denied Mrs. Murray's claim on September 5, 1984.[23] Discovering that the couple's divorce was not final when SJA denied coverage, SJA admitted the wrong and retroactively reinstated Mrs. Murray's coverage on March 15, 1985.[24]

Mrs. Murray sued SJA on March 27, 1986, but she did not serve SJA with citation until January 21, 1987.[25] SJA moved for summary judgment on limitations, alleging that Mrs. Murray's claims accrued on September 5, 1984, and her bad faith claims were barred by the two-year statute of limitations because Mrs. Murray did not serve SJA until January 21, 1987.[26] Mrs. Murray countered that her bad faith claim did not accrue until March 15, 1985 because, under *Arnold*, bad faith claims do not accrue until the policyholder's underlying dispute with the carrier is resolved.[27] The trial court granted SJA's summary judgment motion, and the appellate court affirmed the trial court's ruling.[28] Mrs. Murray appealed to the Texas Supreme Court, and the court granted review.[29]

In order to resolve Mrs. Murray's dispute with SJA, the court looked to its decision in *Arnold*. Describing the *Arnold* holding, the court explained "that limitations on a good faith claim does not begin to run until the

[19] Murray v. San Jacinto Agency, Inc., 800 S.W.2d. 826, 828 (Tex. 1990).
[20] *Id.* at 827.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.* at 827–28.
[27] *Id.*
[28] *Id.* at 827.
[29] *Id.*

underlying contract claims are finally resolved."[30] The court quickly reversed course, however, and ruled that "Murray's good faith claim accrued and limitations commenced on the day SJA wrongfully denied coverage."[31] The court's rationale was that the accrual at denial rule is the only rule consistent with basic limitations principles, which state that "a cause of action generally accrues at the time when facts come into existence which authorize a claimant to seek a judicial remedy."[32] In *Murray*, Mrs. Murray was injured the day SJA denied coverage because it rendered her "unable to obtain much-needed medical attention."[33] Thus, "she had sufficient facts that day to assert her good faith claim."[34]

A four justice dissent, however, strongly criticized the majority's holding in *Murray*. The dissent is primarily based on two arguments. The first was that *Arnold* was binding precedent, and there was no reason for the decision to be discarded, especially so quickly.[35] The dissent found that there was no "powerfully persuasive authority" to support the majority's "decision to reject the rule of stare decisis and to break with prior precedent."[36] Indeed, the majority in *Murray* did not cite any change in Texas statutory law, or a dispute between lower courts who had interpreted *Arnold*. Second, *Murray's* accrual at denial rule would encourage the unnecessary filing of bad faith claims in order to avoid an expiring limitations deadline.[37] Justice Spears noted:

> By forcing the insured to bring his bad faith action at the time a claim is denied, the court presents the insured with a dilemma. On the one hand, if an insured does not bring his bad faith claim within two years of the date of denial, he will face a limitations bar . . . . On the other hand, if an insured brings the bad faith claim immediately in order to avoid the limitations bar, . . . [t]his . . . will result in a proliferation of premature bad faith lawsuit as insureds attempt to avoid the possibility of a limitations

[30] *Id.* at 828.
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.* at 830 (Spears, J., dissenting).
[36] *Id.* at 832.
[37] *Id.*

> bar. It will impede the expeditious settlement of contract claims because plaintiffs will now automatically assert a bad faith claim regardless of whether there are any facts to indicate that the denial was without some reasonable basis . . . . [T]his delay will then bring about the very economic hardship that the insured sought to avoid by purchase of the policy.[38]

Of course, this is the exact scenario faced by the general counsel in the introduction. And, as Justice Spears predicted, the prudent attorney must recommend that her client bring the bad faith claim before the underlying lawsuit is resolved, or else the company risks losing its meritorious bad faith claim to limitations.

Despite the dissent's strongly worded caution, the accrual at denial rule remains the law for first party bad faith claims. The Texas Supreme Court revisited the limitations issues again in 1994 with *Celtic Life Insurance Co. v. Coats*[39] and in 2003 with *Provident Life & Accident Insurance Co. v. Knott*.[40] Both times the court unanimously held that "a first-party bad faith claim against an insurer generally accrues on the date the insurer denies coverage."[41] Therefore, it appears that Texas law is well-settled that the accrual at denial rule governs first party insurance policies.

C. Specific Developments Regarding Third Party Insurance Policies

None of the cases described above—*Arnold*, *Murray*, *Celtic Life*, or *Provident Life*—involved third party insurance policies. A third party insurance policy imposes two distinct duties on an insurer: (1) a duty to defend and (2) a duty to indemnify.[42] In a third party context, the third party sues the insured, and the insurer has a duty to defend the insured in the lawsuits and to indemnify the policyholder from a settlement or

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[38] *Id.*

[39] 885 S.W.2d 96 (Tex. 1994).

[40] 128 S.W.3d 211 (Tex. 2003).

[41] *Coats*, 885 S.W.2d at 100; *Knott*, 128 S.W.3d 211, 221 (Tex. 2003) ("Under Texas law, a plaintiff's cause of action for bad-faith breach of a first-party insurance contract accrues at the time the insurer denies the insured's claim.").

[42] *See* Farmers Tex. County Mut. Ins. Co. v. Griffin, 955 S.W.2d 81, 82 (Tex. 1997); Trinity Universal Ins. Co. v. Cowan, 945 S.W.2d 819, 821–22 (Tex. 1997); Greenberg v. Cigna Lloyds Ins. Co., No. 05-96-00952-CV, 1998 WL 269991, at *3 (Tex. App.—Dallas May 28, 1998, no pet.) (not designated for publication).

judgment.[43] If the insurer breaches either the duty to defend or the duty to indemnify, the insured will have separate causes of action against the insurance company. Examples of third party policies include comprehensive general liability (CGL) policies, errors and omissions insurance (E&O) policies, director and officer's liability (D&O) policies, and some homeowner's policies.

Since *Murray* established the accrual at denial rule, two significant cases concerning the accrual of bad faith claims by policyholders of third party insurance policies have been decided. The first, *All-Tex Roofing, Inc. v. Greenwood Insurance Group*, held that an insured's claim against a carrier for breach of the duty to indemnify can only accrue when the underlying lawsuit terminates (either by judgment, dismissal, or nonsuit).[44] The second, *Lamar Homes, Inc. v. Mid-Continent Casualty Co.*, held that breach of the duty to defend is a first party claim under one of Texas' bad faith statutes.[45]

1. All-Tex Roofing Establishes When a Third Party Policyholder's Claim for Breach of the Duty To Indemnify Accrues

All-Tex Roofing concerned an insured who filed a lawsuit under the Deceptive Trade Practices Act against his carrier only after a judgment was rendered against him in a third party personal injury suit.[46] In 1995, the plaintiff, All-Tex Roofing (All-Tex), contracted with one of the defendants, Greenwood Insurance Group (Greenwood) to obtain $2 million in CGL insurance.[47] Greenwood put up $1 million of CGL coverage itself, and asked its co-defendant, an insurance broker, to find another carrier willing to insure the remaining $1 million of risk.[48] The broker found Resure, Inc. (Resure), an Illinois insurance company, that agreed to provide the remaining $1 million of coverage, but Resure was discovered to be insolvent two years later, on March 5, 1997.[49] Greenwood notified All-Tex

[43] *See Griffin*, 955 S.W.2d at 82; *Cowan*, 945 S.W.2d at 821–22; *Greenberg*, 1998 WL 269991, at *3.

[44] 73 S.W.3d 412, 415 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).

[45] 242 S.W.3d 1, 17 (Tex. 2007).

[46] *All-Tex Roofing, Inc.*, 73 S.W.3d at 414.

[47] *Id.*

[48] *Id.*

[49] *Id.*

that Resure was insolvent and had canceled All-Tex's CGL policy on March 6, 1997, but represented that All-Tex still had $300,000 of coverage from Resure through the Illinois Insurance Guaranty Fund (Illinois Fund).[50]

Three weeks later, All-Tex answered a personal injury lawsuit in Harris County.[51] Exactly two years to the date after its answer, on March 26, 1999, a $1.3 million judgment on this personal injury claim was entered against All-Tex.[52] All-Tex collected its $1 million in CGL insurance from Greenwood and then sought to collect the remaining $300,000 from the Illinois Fund[53] or, alternatively, from either Greenwood (who had represented that these monies were available to All-Tex), or the broker (who had placed All-Tex's insurance with an insolvent carrier).[54] All-Tex sued Greenwood and the broker on June 2, 1999, for violations of the DTPA.[55]

The defendants moved for summary judgment on limitations, claiming that All-Tex's DTPA suit was untimely because it had been notified of Resure's insolvency in March 1997, but did not file his DTPA suit until June 2, 1999.[56] The defendants argued that, pursuant to the accrual at denial rule stated in *Murray*, and the reliance that the Texas Supreme Court had placed on the legal injury rule in *Murray* and its subsequent cases, All-Tex's claim accrued on March 6, 1997, when Greenwood notified All-Tex of Resure's insolvency and the cancellation of all but $300,000 of the policy.[57] All-Tex countered that it did not suffer any injury until the Harris County judgment for $1.3 million was entered on March 26, 1999.[58]

The court sided with All-Tex.[59] According to the court, the accrual analysis is simple. A third party policyholder cannot sue his carrier for breach of the duty to indemnify unless and until there is something to indemnify:

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[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] The Illinois Fund denied All-Tex's request for indemnity after All-Tex had already sued Greenwood and its broker. The court does not discuss whether All-Tex ever filed a separate suit against the Illinois fund.

[54] *All-Tex Roofing, Inc.*, 73 S.W.3d at 413–14.

[55] *Id.*

[56] *Id.* at 414.

[57] *Id.* at 414–15.

[58] *Id.* at 415–16.

[59] *Id.* at 414.

> All-Tex did not make, and could not have made, a demand in March 1997 for payment of any amount under its indemnity coverage because All-Tex was not then liable to anybody for anything. There was at that time no amount of money, known or unknown, for All-Tex to demand of its insurer under the indemnity clause and nothing for the insurer to refuse. If All-Tex had sued with no more evidence of loss than that, its case would have been vulnerable to a summary judgment motion asserting no evidence of damages, and its attorneys may have provoked a motion for sanctions for filing a frivolous lawsuit.[60]

This holding is in accord with Texas cases, such as *Murray* and its progeny, that apply the legal injury rule.[61] When the third party policyholder's claim against his carrier is only for breach of the duty to indemnify, the insured has not suffered a legal injury until there is a legal obligation to satisfy a settlement or judgment.[62] A simple hypothetical demonstrates the logic of the *All-Tex Roofing* holding: assume that All-Tex won the trial of the personal injury suit and obtained a take-nothing judgment in its favor. All-Tex would have no claim for indemnity against its carriers because there would not be anything from which to indemnify All-Tex.[63] The unassailable logic of All-Tex Roofing has settled when a third party policyholder's DTPA or bad faith claim for breach of the duty to indemnify accrues. The claim accrues only at the resolution of the underlying lawsuit, either through settlement or judgment.

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[60] *Id.* at 415–16.

[61] *Id.* (summarizing how the holding is consistent with *Murray*).

[62] *Id.*

[63] This hypothetical is consistent with the legal rule in Texas and throughout the U.S. that permits "courts [to] routinely dismiss claims as premature if the alleged injury is contingent upon the outcome of a separate, pending lawsuit." Waddell & Reed Fin., Inc. v. Torchmark Corp., 223 F.R.D. 566, 628 (D. Kan. 2004); *see also* W. Alliance Ins. Co. v. N. Ins. Co., 176 F.3d 825, 828 (5th Cir. 1999) (applying Texas law and holding that, for purposes of an insured's breach of contract claim for a duty to indemnify, "[t]hat duty was breached, if it was breached at all, when Northern declined to tender the full settlement amount to its insured Sparks on March 24, 1992 [the underlying settlement date]."); *In re* United Telecomms. Inc., Secs. Litig., No. 90-2251-EEO, 1993 WL 100202, at *3 (D. Kan. Mar. 4, 1993) (citing cases); J.E.M. v. Fid. & Cas. Co. of N.Y., 928 S.W.2d 668, 671–72 (Tex. App.—Houston [1st Dist.] 1996, no writ); 2 ALLAN D. WINDT, INSURANCE CLAIMS AND DISPUTES § 9:2 (5th ed. 2008) ("An insured's cause of action for the carrier's breach of its duty to indemnify will accrue on the entry of a judgment against the insured or the entering into of a settlement agreement.").

2. Lamar Homes Holds That the Duty To Defend Is a First Party Claim

The Texas Supreme Court decided *Lamar Homes* in 2007.[64] This decision originates with three certified questions from the Fifth Circuit Court of Appeals, only one of which is relevant to this Article:[65] "[D]oes Article 21.55 of the Texas Insurance Code apply to a CGL insurer's breach of the duty to defend?"[66] By answering "yes," the Texas Supreme Court may have inadvertently placed Texas in the minority of states holding that a third party policyholder's bad faith claim accrues on the day its carrier denies coverage.

In the underlying lawsuit that gave rise to the insurance dispute in *Lamar Homes*, the plaintiffs sued Lamar Homes for alleged defects in the foundation of a home purchased from the defendant.[67] Lamar Homes forwarded the suit to its carrier, Mid-Continent Casualty Company (Mid-Continent), and requested that Mid-Continent defend and indemnify Lamar Homes from the suit.[68] Mid-Continent refused to defend, and Lamar Homes filed a declaratory judgment action against Mid-Continent.[69] This suit also alleged that Mid-Continent failed to promptly pay Lamar Homes' claim, which violated a "prompt-payment statute [that] provides for additional damages when an insurer wrongfully refuses or delays payment of a claim."[70]

The Fifth Circuit's certified question regarding the prompt-payment statute asked the Texas Supreme Court to resolve whether the prompt-payment statute applied to a carrier's failure to pay defense costs, which was disputed by the courts of appeal.[71] The statute defined "claim" as "a first party claim made by an insured or policyholder under an insurance policy or contract . . . [that] must be paid by the insurer directly to the

[64] Lamar Homes, Inc. v. Mid-Continent Cas. Co., 242 S.W.3d 1 (Tex. 2007).

[65] The central questions in *Lamar Homes*, while significant, are of no consequence here. The primary import of *Lamar Homes* concerns the interpretation of terms frequently used in CGL policies. *See id.* at 4–16.

[66] *Id.* at 4.

[67] *Id.* at 5.

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.* at 16–18.

insured or beneficiary."[72] Insurance carriers, presumably seeking to narrow the scope of the prompt-payment statute, had argued to lower courts that "a 'first-party claim' is synonymous with a claim under a first-party insurance policy."[73] Thus, a prompt-payment claim could only be made under life, accident, or health insurance, and never under a third party policy, where the insurer owed a duty to defend the policyholder.[74]

The court rejected this argument and held that defense costs were a first party right because the attorneys' fees would either be paid directly to the insured or indirectly to his attorney.[75] The court held that this situation is indistinguishable from other first party cases, such as health benefits that were paid to a patient or his doctor, or a property claim paid to a homeowner or his contractor.[76] Accordingly, the court found that the defense costs were a first party claim, and a carrier's breach of the duty to defend is actionable under the prompt-payment statute.

However, carriers may now argue that because the duty to defend is a first party duty owed to the insured, *Murray's* accrual at denial rule should also be applied to third party bad faith claims. But just as *Murray* and the other first party cases do not resolve whether bad faith claims under third party policies accrue at denial, neither *All-Tex Roofing* nor *Lamar Homes* analyze whether the accrual at denial rule does (or should) apply to third party policies. Indeed, of the few Texas cases that have applied the accrual at denial rule to the duty to defend, none have discussed whether this rule should apply.[77]

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[72] *Id.* at 16 (citing Tex. Ins. Code § 542.051(2)).

[73] *Id.* at 17.

[74] *Id.* at 17–18.

[75] *Id.* at 18.

[76] *Id.*

[77] A few reported Texas cases have applied the accrual at denial rule to third party policies, but none of these cases have discussed whether the rule should apply or addressed the situation in which a bad faith claim expired between the date the insurer denied coverage and the date the underlying lawsuit terminated. *See, e.g.*, Greenberg v. Cigna Lloyd's Ins. Co., No. 05-96-00952-CV, 1998 WL 269991, at *3 (Tex. App.—Dallas 1998, no pet.) (citing *Murray* and *Nash* without discussion, and plaintiff had judgment over ten months before limitations expired); Abe's Colony Club, Inc. v. C&W Underwriters, Inc., 852 S.W.2d 86, 90–91 (Tex. App.—Fort Worth 1993, writ denied) (applying *Murray* without an analysis of whether it should apply to third party policies; plaintiff does not appear to have raised the issue); Whatley v. City of Dallas, 758 S.W.2d 301, 310 (Tex. App.—Dallas 1988, writ denied) (failing to address whether the accrual at denial rule should apply to third party policies, this pre-*Murray*, post-*Arnold* case gave an insured a judgment

But Texas' adoption of the minority view may already be a fait accompli. The convergence of *Lamar Homes*' holding that the duty to defend is a first party obligation and *Murray*'s unchallenged ruling that first party bad faith claims accrue at denial indicates that Texas may side with the minority of states who have held that claims for a carrier's bad faith breach of a third party insurance policy always accrue on the day the insurer denies coverage.

Before Texas reserves its spot in the minority, however, this Article argues that Texas courts should first evaluate the policy arguments supporting the majority and minority views. And because the stronger arguments support the majority view, Texas courts should hold that a policyholder's bad faith claim under a third party insurance policy does not accrue (or is equitably tolled) until the underlying litigation terminates.

III. ARGUMENTS FOR THE MAJORITY VIEW

Only a handful of states have directly addressed whether bad faith claims for breach of the duty to defend accrue at denial of the claim or at the termination of the underlying lawsuit. A majority of states that have addressed this question rejected the accrual at denial rule. These majority view states held that the claim accrues, or is equitably tolled, when the underlying suit is terminated.[78] This Part argues that Texas should adopt the majority view for two reasons. First, adopting the majority view will harmonize Texas law on the duty to defend with its law on the duty to indemnify, which minimizes both the waste of judicial resources and the prejudice to the insured caused by the accrual at denial rule. Second, the majority view comports with Texas law that a carrier's duty to defend is an ongoing duty.

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seven months before limitations expired); Nash v. Carolina Cas. Ins. Co., 741 S.W.2d 598, 600–01 (Tex. App.—Dallas 1987, writ denied) (same).

[78] *See* Jane M. Draper, Annotation, *Limitation of Action Against Insurer for Breach of Contract to Defend*, 96 A.L.R. 3D. 1193 (1979) ("Notwithstanding argument by insurers that their alleged breach of contract occurred, and the insured's cause of action therefore accrued, when the insurer rejected the tender of defense, courts have ordinarily determined the accrual of such action to be concurrent with the termination of the underlying litigation which the insurer refused to defend."); *see also* Brannon v. Cont'l Cas. Co., 137 P.3d 280, 285 (Alaska 2006); 2 WINDT, *supra* note 63, § 9:2 (5th ed. 2007) ("The majority view, however, is that the insured's cause of action does not accrue until the termination of the third-party action brought against the insured."); 17 COUCH ON INSURANCE § 236.102 (3d ed. 2000).

A. Harmonizing Texas Law Will Conserve Judicial Resources and Avoid Prejudice

Texas courts need to fall in step with the majority approach in order to bring uniformity to statute of limitations law for both the breach of the duty to defend and the duty to indemnify. Doing so will relieve litigants from entertaining multiplicity of suits, conserve judicial resources and reduce court congestion.[79]

The disconnect between the defense and indemnity duties under Texas law requires the insured to be a party in up to three separate, but overlapping, lawsuits. In the first lawsuit, a third party sues the insured. If the insurer's refusal to defend gives rise to a colorable bad faith claim, the insured must sue its carrier within two years or risk losing its bad faith claim. But the insured must also wait to file a third lawsuit (or at least amend its bad faith lawsuit) until the first lawsuit settles or reaches judgment. Under Texas law, a conscientious litigant is forced to follow this route to ensure that all claims are not time-barred.

Obviously this disconnect raises a nasty, yet avoidable, predicament for both courts and litigants. Courts are burdened by additional, unnecessary lawsuits that drain judicial time and resources,[80] while litigants, faced with the risk of losing a valuable bad faith claim to limitations, are forced to spend time and money to maintain multiple actions simultaneously.[81] The onerous burden on the insured could cause the insured to abandon valid claims against its carrier:

> It is harsh to require an insured—often a private homeowner—to defend the underlying action, at the homeowner's own expense, and simultaneously to prosecute—again at the homeowner's own expense—a separate action against the [insurance] company for failure to defend. "[T]he unexpected burden of defending an action may itself make it impractical to immediately bear

[79] Lambert v. Commonwealth Land Title Ins. Co., 811 P.2d 737, 740 (Cal. 1991); *see* Boyd Bros. Transp. Co. v. Fireman's Fund Ins. Cos., 540 F. Supp. 579, 582 (M.D. Ala. 1982); Moffat v. Metro. Cas. Ins. Co. of N.Y., 238 F. Supp. 165, 175 (M.D. Pa. 1964); Kielb v. Couch, 374 A.2d 79, 81 (N.J. Super. Ct. 1977).

[80] *Lambert*, 811 P.2d at 740; *see Boyd Bros. Transp.*, 540 F. Supp. at 582; *Moffat*, 238 F. Supp. at 175; *Kielb*, 374 A.2d at 81.

[81] *See Boyd Bros. Transp.*, 540 F. Supp. at 582; *Moffat*, 238 F. Supp. at 175; *Kielb*, 374 A.2d at 81.

> the additional cost and hardship of prosecuting a collateral action against an insurer."[82]

Courts from majority view states resolve this dilemma by equitably tolling the limitations period until the underlying third party lawsuit is resolved. These courts offer three primary arguments in support of equitable tolling. First, courts should not force insureds to bring lawsuits for breach of the duty to defend before the duty expires:

> [T]he underlying litigation may take over two years . . . [and] would allow expiration of the statute of limitations on a lawsuit to vindicate the duty to defend *even before the duty itself expires*. This grim result is untenable. The insured must be allowed the option of waiting until the duty to defend has expired before filing suit to vindicate that duty.[83]

Second, equitable tolling reduces the burden on courts by removing the incentive for multiple suits:

> The result contended for by [the insurance company] is absurd . . . it would lead to a multiplicity of suits, long in disfavor in law. There would be a suit for costs and expenses and then, after judgment against the insured, a suit for indemnity. The latter cannot be started until there is a final judgment against the insured.[84]

Third, equitable tolling permits the insured to pursue his carrier efficiently, with one lawsuit seeking damages for the entire breach:

> Faced with a refusal of the insurer to defend a claim, the insured has three possible options, other than acquiescence: he can, to the extent permitted by *Atwood*, file a declaratory judgment action, presumably at any point along the way; he can bring one or more successive actions to recover his interim and incremental costs as the case proceeds, subject to the defense against multiple, vexatious

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[82] *Lambert*, 811 P.2d at 740 (quoting Israelsky v. Title Ins. Co., 261 Cal. Rptr. 72 (1989)) (emphasis in original).

[83] *Id.* at 739–40 (emphasis added).

[84] UTI Corp. v. Fireman's Fund Ins. Co., 896 F. Supp. 362, 368 (D.N.J. 1995) (quoting *Moffat*, 238 F. Supp. at 175).

> actions; or, as here, he can wait until the end when all of his damages are ascertained and then sue for the entire breach. Of the three choices, the third, in most instances, will be the most practical and efficient.[85]

B. Texas Courts Already Recognize the Rationale for Equitable Tolling

Regardless of whether a majority view state chooses to delay the accrual of an insured's bad faith claim,[86] or equitably toll its running until the conclusion of the underlying litigation,[87] the rationale almost always begins with a fundamental tenet of insurance law: an insurance carrier's duty to defend is ongoing.[88] Texas courts also adhere to this maxim,[89] which justifies equitable tolling for two reasons.

First, the carrier's breach of the duty to defend is not complete until the insurer can no longer step in and defend the insured. As a New York court explained:

> The refusal of the defendant to step in constituted a continuous breach and a persistent omission to perform its

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[85] Luppino v. Vigilant Ins. Co., 677 A.2d 617, 622 (Md. Ct. Spec. App. 1996), *aff'd*, 723 A.2d 14 (Md. 1999).

[86] *Id.*; *Boyd Bros. Transp.*, 540 F. Supp. at 582–83; *Moffat*, 238 F. Supp. at 175–76; Com. Union Ins. Co. v. Porter Hayden Co., 698 A.2d 1167, 1191–92 (Md. Ct. Spec. App. 1997); Castle & Cooke, Inc. v. Great Am. Ins. Co., 711 P.2d 1108, 1110–11 (Wash. Ct. App. 1986); Bush v. Safeco Ins. Co., 596 P.2d 1357, 1358 (Wash. Ct. App. 1979); *Kielb*, 374 A.2d at 81–82; Cont'l Cas. Co. v. Fla. Power & Light Co., 222 So.2d 58, 59 (Fla. Dist. Ct. App. 1969). *Contra* Paul Holt Drilling, Inc. v. Liberty Mut. Ins. Co., 664 F.2d 252, 254 (10th Cir. 1981) (applying Oklahoma law and holding that "the insurer's continued refusal to defend the insureds constituted a series of breaches of its contractual obligations. As the limitations period runs with each breach, the insureds are only precluded from recovering those litigation expenses incurred prior to the statutory period.").

[87] *Lambert*, 811 P.2d at 741–42.

[88] *See* cases cited *supra* note 86; *Lambert*, 811 P.2d at 741–42.

[89] Brooks, Tarlton, Gilbert, Douglas & Kressler v. U.S. Fire Ins. Co., 832 F.2d 1358, 1367 (5th Cir. 1987); Trammell Crow Residential Co. v. Va. Sur. Co., No. 3:08-CV-0501-D, 2008 WL 5062132, at *2 (N.D. Tex. Dec. 1, 2008); Ace Am. Ins. Co. v. Huntsman Corp., No. 07-2796, 2008 WL 4453108, at *28 (S.D. Tex. Sept. 26, 2008); Sentry Ins. v. DFW Alliance Corp., No. 3:04-CV-1043-D, 2007 WL 507047, at *8 (N.D. Tex. Feb. 16, 2007); *see also* Ericsson, Inc. v. St. Paul Fire & Marine Ins. Co., 423 F. Supp. 2d 587, 590 (N.D. Tex. 2006) (holding that, because the duty to defend is ongoing, an amended pleading may trigger the limitations period for breach of said duty).

> obligation until the dismissal of the appeal sounded the final death knell to the action. The breach was not complete until final dismissal for until such event defendant could have assuaged plaintiff's grief, sealed the breach and redeemed its wrong by taking up the cudgels of the action. Although afforded the opportunity defendant did not rise to the occasion. The action therefore accrued when the breach was complete and the failure to perform was final . . . .[90]

Second, the ongoing nature of the duty to defend justifies equitable tolling, even if it does not change when the insured's claim accrues because of the burden multiple, simultaneous lawsuits place on the insured. In *Lambert*, the California Supreme Court addressed how to resolve the seemingly intractable conflict between the legal injury rule[91] and the inequities of the accrual at denial rule. The California Supreme Court resolved the issue by holding "the limitation period . . . for failure to defend accrues when the insurer refuses the insured's tender of defense, but is tolled until the underlying action is terminated by final judgment."[92]

Likewise, Texas courts should hold that the limitations period accrues when the insurer breaches its duty to defend, but the statute of limitations is equitably tolled until the underlying lawsuit is resolved. Texas has already adopted an identical equitable tolling rule for legal malpractice claims. In order to minimize prejudice to the client, Texas courts have held that the statute of limitations for legal malpractice is tolled until the conclusion of the underlying lawsuit in which the malpractice occurred.[93]

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[90] Colpan Realty Corp. v. Great Am. Ins. Co., 373 N.Y.S.2d 802, 804 (N.Y. 1975); *see also* Tibbs v. Great Am. Ins. Co., 755 F.2d 1370, 1375–76 (9th Cir. 1985) ("The insurer's duty to defend is a continuing duty that may be assumed any time before final judgment. . . . The insured may therefore elect to wait until a final judgment is entered before filing his action against the insurer."); Vigilant Ins. Co. v. Luppino, 723 A.2d 14, 18 (Md. 1999); Bush v. Safeco Ins. Co., 596 P.2d 1357, 1358 (Wash. Ct. App. 1979).

[91] *Lambert*, 811 P.2d at 741–42; *see also* Johnson & Higgins, Inc. v. Kenneco Energy, Inc., 962 S.W.2d 507, 514 (Tex. 1998); Murray v. San Jacinto Agency, Inc., 800 S.W.2d 826, 827–28 (Tex. 1990).

[92] *Lambert*, 811 P.2d at 741–42 (Cal. 1991).

[93] Hughes v. Mahaney & Higgins, 821 S.W.2d 154 (Tex. 1991) (holding that a litigation exception exists that tolls legal malpractice claims while the litigation—in which the alleged legal malpractice occurred—is pending); *see* Dodson v. Hillcrest Sec., Nos. 92-2353, 92-2381, 1996 WL 459770, at *7 (5th Cir. 1996).

In *Hughes*, the Texas Supreme Court held that equitable tolling was justified for legal malpractice claims because the viability of the client's malpractice suit depended on the outcome of the underlying case[94] and because rigid application of the legal injury rule would "force the client into adopting inherently inconsistent litigation postures in the underlying case and in the malpractice case."[95] States that have adopted the majority view apply both of these principles to third party insurance cases in order to justify equitable tolling. Texas courts should therefore recognize the need for equitable tolling of third party bad faith claims and, like the court in *Hughes*, "join other jurisdictions in adopting this well-reasoned rule."[96]

IV. ARGUMENTS FOR THE MINORITY VIEW

The minority view takes the position that the statute of limitations accrues on the date the insurer declines to provide a defense—not the uncertain later date on which the underlying claim is resolved with a judgment or settlement. The minority view has one immediate and undeniable benefit: it is easy to apply and consistent with the law in first party bad faith cases. In turn, this uniformity makes it easier for Texas courts to read and apply the law to cases it decides.

There are other benefits to the minority rule. Although the case law endorsing the minority view is not consistent, this case law reflects three primary rationales: (1) setting the statute of limitations based on the date an insurance company refuses to defend is consistent with the legal injury rule; (2) in contrast, lengthening statutes of limitations will punish insureds and insurers alike with increased costs, uncertainties, and inefficiencies; and (3) incentivizing insureds to file declaratory judgment actions seeking confirmation of the duty to defend against their insurers will cause insurers to become involved earlier and more often in third party cases.

A. The Legal Injury Rule

The minority view is anchored upon the legal injury rule. In Texas and among the states generally, "a cause of action accrues when a wrongful act causes some legal injury, even if the fact of injury is not discovered until

[94] *Hughes*, 821 S.W.2d at 157.

[95] *Id*. at 156.

[96] *Id*. at 157.

later. This is generally known as the legal injury rule."[97] "'Accrual' refers to the date when a limitations period begins to run."[98] Thus, "[u]nder the legal-injury rule, a cause of action generally accrues when a wrongful act causes some legal injury, regardless of when the plaintiff learns of the injury, and even if all resulting damages have not yet occurred."[99] In other words, "[w]hen the defendant's conduct produces a legal injury, however slight, the cause of action accrues and the statute of limitations begins to run."[100]

Applying the legal injury rule to duty to defend cases, the statute of limitations should accrue when the insurer refuses to provide a defense—not months or years later when the injury is fully realized and the insured might or might not be forced to pay a judgment or settlement.

The legal injury was an express rationale in *Cardin v. Pacific Employers Ins. Co*.[101] There, Pacific Employers argued that the plaintiff's breach of contract claim for not providing the plaintiff with personal counsel was time barred because it was not brought within three years from the date Pacific Employers refused to provide counsel. The court agreed, finding that "[t]he cause of action thus accrues, and the insured is entitled to a declaratory judgment to determine the parties' rights, when the insurer denies payment."[102] The court noted that "[i]n other contexts, Maryland courts have stated that the date a cause of action accrues is the date on which the limitations period begins to run."[103] Recognizing the general applicability of the legal injury rule, the court found no reason to create an exception in third party duty to defend cases. Instead, the court drew guidance from *American Home Assurance Co. v. Osbourn*,[104] where a Maryland court had applied the minority view and found the statute of limitations accrued upon the insurer's denial of its duty to defend.[105] The *Osbourn* court "rejected

[97] Kuzniar v. State Farm Lloyds, 52 S.W.3d 759, 760 (Tex. App.—San Antonio 2001, pet. denied) (quoting S.V. v. R.V., 933 S.W.2d 1, 4 (Tex. 1996)) (citation omitted); *see also Johnson*, 962 S.W.2d at 514 (same).

[98] Seureau v. ExxonMobil Corp., 274 S.W.3d 206, 226 (Tex. App.—Houston [14th Dist.] 2008, no pet. h.).

[99] *Id.* (citing S.V. v. R.V., 933 S.W.2d 1, 4 (Tex. 1996).

[100] *Id.* (citing Childs v. Haussecker, 974 S.W.2d 31, 41 n.7 (Tex. 1998)).

[101] 745 F. Supp. 330, 334 (D. Md. 1990) (applying Maryland law).

[102] *Id.* at 333.

[103] *Id.* at 334.

[104] 422 A.2d 8 (Md. Ct. Spec. App. 1980).

[105] *Id.* at 16.

the arguments that the cause of action did not accrue until the underlying suit was settled, and that the limitations period was extended during the pendency of a declaratory judgment action against the insurer itself."[106]

These minority view cases imposing the legal injury rule are consistent with the reality that—win or lose—the insured has to pay attorneys' fees for the underlying litigation. In other words, because the outcome of the underlying litigation does not dictate the insured's immediate obligation to pay its attorneys when the bills are received, there is no rationale to tie the accrual of the statute of limitations to the timing of the eventual outcome of the underlying litigation.[107] Instead, according to Texas law generally based on the legal injury rule, the statute of limitations should accrue upon the date the insurer refuses to provide a defense.

B. The Dangers of Unbounded Statutes of Limitations Are Real

The legal injury rule is one of several reasons for imposing a shorter statute of limitations in the third party duty to defend context. Outside this realm, the Texas Supreme Court has long recognized that:

> [L]imitations statutes afford plaintiffs what the legislature deems a reasonable time to present claims and protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence whether by dearth or disappearance of witnesses fading memories, disappearance of documents or otherwise.[108]

In addition, a statute of limitations is also imposed "to establish a point of repose and to terminate stale claims."[109]

The California Court of Appeals considered many of these concerns in *City of Palo Alto v. Pacific Indemnity Insurance Co.*, a classic third party

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[106] *Cardin*, 745 F. Supp. at 334 (citing *Osbourn*, 422 A.2d at 16).

[107] This distinction underscores the practical difference between a claim for indemnity and a claim for breach of the duty to defend. An indemnity claim, of course, would depend on the outcome of the underlying litigation, because in the absence of a judgment against the insured, the insurer has nothing to indemnify the insured against. In duty to defend cases, however, the outcome of the underlying litigation is immaterial: either way, the insured has to pay its attorneys to defend the underlying litigation.

[108] Murray v. San Jacinto Agency, Inc., 800 S.W.2d 826, 828 (Tex. 1990).

[109] *Id.*

duty to defend case where the City of Palo Alto sued its insurance carrier for not defending it in an underlying third party tort claim.[110] In addressing this case, the California appeals court exposed an extreme example that the majority view could yield in delaying the accrual of statutes of limitations:

> The facts of this case bear eloquent witness to the preferability of a rule which gives effect to the law's aversion for stale claims by setting a four year limit on the right to bring an action on an insurance policy. The Eldridge lawsuit [the underlying third party lawsuit] was commenced in 1972. It was settled eight years later while the case was on appeal. Had it run its course, including the possibility of its acceptance by our Supreme Court, another three years could well have passed. Under *Oil Base*, the insured had four years after final judgment to bring suit. It is therefore not unthinkable that the case would be tried fifteen to twenty years downstream. This is intolerable. On the other hand, we discern no prejudice to the insured in setting an ample limitation period after categorical disclaimer of responsibility by the insurance company.[111]

This observation of some of the harsh realities in modern litigation illustrates that, at least in some cases, the majority rule's delay of the accrual of statute of limitations until appeals are finalized can yield absurd results.

C. A Shorter Statute of Limitation Will Encourage Declaratory Judgment Actions Against Insurers

Beyond avoiding substantial delays, there are other benefits to the minority view. One notable benefit is encouraging insurance companies to become involved in the underlying claim. In *Paul Holt Drilling, Inc. v. Liberty Mut. Ins. Co*., for example, the Tenth Circuit Court of Appeals faced the decision of whether an insurance company breached its obligation to defend its insured either (a) at the time the insured incurred legal expenses, (b) at the time the underlying litigation was complete, or

[110] 230 Cal. Rptr. 210, 213–14 (Cal. Ct. App. 1986) (review denied and ordered not to be cited in California).

[111] *Id.*

(c) continuously or periodically during the course of that litigation.[112] The Tenth Circuit opted for (c), a modified form of the minority view that it called the "continuous breach" theory, holding that "the insurer's continued refusal to defend the insureds constituted a series of breaches of its contractual obligations."[113] "As the limitations period runs with each breach, the insureds are only precluded from recovering those litigation expenses incurred prior to the statutory period, here, five years."[114] In support of its decision to adopt the minority view, the court explained that courts "should encourage early suit to determine the parties' liabilities; if the insurer is found liable, it no doubt will quickly assume its defense obligations."[115] In the wake of *Paul Holt Drilling*, other courts have adopted this reasoning in favor of siding with the minority view.[116] In fact, the court in *City of Palo Alto*, discussed above, highlighted this same concern in wanting to encourage insureds to file suit against their insureds as soon as possible:

> The position contended for by City would have a thoroughly undesirable result. It would prevent the bringing of a declaratory relief action by an insured against his insurer at a stage of the proceedings when a court could still force the carrier to assume his obligation. We take judicial notice of the fact that in the face of "no direct action" clauses which are standard in liability policies, such declaratory relief actions are common and entirely appropriate, indeed favored, in response to anticipatory repudiation by insurance companies. We decline to hinder such actions.[117]

V. THE TEXAS SUPREME COURT SHOULD ADOPT THE MAJORITY VIEW

This Article argues that the Texas Supreme Court should adopt the majority view that a third party policyholder's bad faith claim is equitably tolled until the termination of the underlying lawsuit. A critical analysis of

[112] 664 F.2d 252, 254–56 (10th Cir. 1981).

[113] *Id.* at 256.

[114] *Id.*

[115] *Id.* at 255.

[116] *See, e.g.*, Duke Univ. v. St. Paul Mercury Ins. Co., 384 S.E.2d 36, 37–42 (N.C. App. 1989) (adopting *Paul Holt Drilling*'s reasoning and applying the "continuous breach" minority view).

[117] City of Palo Alto v. Pac. Indem. Ins. Co., 230 Cal. Rptr. 210, 214 (Cal. Ct. App. 1986).

the arguments in support of each view reveals that the majority view is preferable for at least four reasons.

First, the majority view minimizes the waste of judicial resources. It is beyond dispute that the minority view encourages multiple, overlapping lawsuits about one policy. And under *All-Tex Roofing*, insurance carriers in Texas already have extended bad faith liability that will not accrue until judgment or settlement of the underlying lawsuit. Adopting the minority view in Texas would guarantee needless and duplicative litigation by creating an unnecessary schism between the two accrual dates. Tolling limitations until resolution of the underlying lawsuit permits an insured to bring one and only one lawsuit against its carrier, which benefits both the policyholder and the courts.

Second, the majority view eliminates potential prejudice against the policyholder. Even if only a few policyholders are faced with the dilemma of filing suit against their carrier while the underlying suit is still pending, those policyholders face real prejudice in being forced to pursue both suits at once. The costs of attorneys' fees may be significant, but the larger issue is that the coverage litigation could force the insured to take a position contrary to his defense of the underlying lawsuit. Inconsistent positions harm both the policyholder and the insurance company, as they could be exploited by the plaintiff's lawyer in order to obtain a larger settlement or verdict. And the Texas Supreme Court has already identified the risk of forcing a litigant to take inconsistent positions in litigation as a justification for equitable tolling of legal malpractice claims. A policyholder should be entitled to same protection, which is only afforded by the majority view.

Third, the majority view only poses a small risk to insurance companies. Although equitable tolling leaves the window for bad faith claims open a little longer, the insurance company's position does not materially change because the company already must prepare itself for a breach of contract suit, which has a four-year statute of limitations. Also, as noted in Justice Spears' dissent in *Murray*, a delayed accrual rule benefits the insurance company by reducing the number of premature and unmeritorious bad faith claims. And, so long as one of the goals of Texas' insurance statutes remains to deter insurance companies from committing bad faith, the majority view adds to this deterrent.

Finally, the majority view best comports with Texas law. Although Texas strictly adheres to the legal injury rule, as stated in *Murray*, none of the cases applying the accrual at denial rule stated even one reason for applying this rule to third party disputes. Further, Texas law on third party

insurance—especially the ongoing nature of the duty to defend and accrual at judgment rule for indemnity claims—places Texas more firmly in line with the rationales espoused by states that have adopted the majority view. These concepts are critical to the interpretation of third party insurance policies, and are firmly entrenched in Texas law.

Equitable tolling of a third party policyholder's bad faith claim is but a small extension of these principles to resolve a question with which the Texas Supreme Court has yet to grapple. When presented with the opportunity, the Texas Supreme Court should adopt the majority view to protect Texas policyholders from the waste of valuable time and money (as well as prejudice to existing litigation), Texas courts from duplicative litigation, and its insurance carriers from unnecessary and unripe bad faith claims.