1996

Race, Gender, "Redlining," and the Discriminatory Access to Loans, Credit, and Insurance: An Historical and Empirical Analysis of Consumers Who Sued Lenders and Insurers in Federal and State Courts, 1950-1995

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QUESTIONABLE SUMMARY JUDGMENTS, APPEARANCES OF JUDICIAL BIAS, AND INSURANCE DEFENSE IN TEXAS DECLARATORY-JUDGMENT TRIALS: A PROPOSAL AND ARGUMENTS FOR REVISING TEXAS RULES OF CIVIL PROCEDURE 166A(A), 166A(B), AND 166A(I)

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I. INTRODUCTION

Summary proceedings have an exceptionally long history in England. During Antiquity, a disgruntled complainant could file a writ of *audita querela*[1] and petition a court of equity for summary relief. Put simply, the plaintiff had to affirm he was experiencing or about to experience some "legal oppression."[2] In

1. *See* Turner v. Davies, 2 Wms. Saund. 137, 148, 85 Eng. Rep. 871, 878-79 n.1 (K.B. 1670) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *405) (defining *audita querela* as "an equitable action . . . [it] is . . . remedial").

2. *Id.*

> An *audita querela* . . . lies for a person who either is in execution, or in danger of being so, upon a judgment, statute-merchant, statute-staple, or recognisance, when he has matter to shew that such execution ought not to have issued, or should not issue . . . [and it appears] to have been invented, lest in any case there would be an oppressive defect of justice, where the party has a good defence, but had not, nor has any other means to take advantage of it.

addition, the petitioner had to prove he had no other recourse at law.[3]

Without doubt, an *audita querela* hearing was a full-blown trial on the merits rather than just a procedural maneuver.[4] And under favorable circumstances,[5] a court would award both summary and equitable relief. Courts of equity, however, had no authority "to extend the ground of equitable relief beyond that, which [could] be obtained by *audita querela*."[6] Furthermore, judges were highly unlikely to award summary relief if there were disputed facts.[7]

By the late 1660s, the ancient and remedial *audita querela* proceeding had fallen into disrepute as a way to secure summary relief, in part because it was too burdensome, inefficient, and expensive. To repeat, a writ of *audita querela* actually petitioned a court to conduct a complete trial on the merits. But fairly often, a plaintiff only wanted a summary remedy. Perhaps that reason more than any other provides the best explanation of the *audita querela*'s demise.[8] In addition, over the centuries, English courts of

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Id.

3. *See id.* at 879 (reporting that "[a]n *audita querela* is a commission to the Judges to examine the cause . . . . And it does not lie where there is any other remedy at law either by plea, or otherwise.").

4. *See* Supposed Doctrine of Lord Hardwicke and Lord Eldon, C.P. Cooper 507, 638, 47 Eng. Rep. 624, 693 (Ch. 1839) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *406) (finding that "[when a petitioner] hath [a] good matter to plead, but hath had no opportunity of pleading it . . . , an *audita querela* lies in the nature of a bill in equity, to be relieved against the oppression").

5. *See* Boyton's Case, 3 Co. Rep. 43a, 43b, 76 Eng. Rep. 733, 735 (K.B. 1592) (stating: "In general, [a court] will not put the [petitioner through] the trouble and expense of [a full-blown] *audita querela*; but will relieve him in a summary way on motion . . . but where the ground of his application for relief is a release, the execution of which, or some other matter of fact, cannot be clearly ascertained without a trial, the [c]ourt will leave him to his *audita querela*.").

6. *See* Supposed Doctrine of Lord Hardwicke and Lord Eldon, C.P. Cooper 507, 638, 47 Eng. Rep. 624, 691 (Ch. 1839) (commenting: "[Courts could only] substitute for that proceeding [a remedy] of a more summary and less expensive nature").

7. *See* Underhill v. Devereux, 2 Wms. Saund. 71, 72, 85 Eng. Rep. 715, 739 (K.B. 1670) (observing that courts "will relieve the party upon motion, without putting him to an *audita querela*; . . . but they will never interfere in a summary way, where the fact is disputed").

8. *See* Supposed Doctrine of Lord Hardwicke and Lord Eldon, C.P. Cooper 507, 639, 47 Eng. Rep. 624, 693 (Ch. 1839) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *406) (observing that the writ of *audita querela* "is a writ of a most remedial nature, and [was apparently] invented [to remove the] oppressive defect of justice, where a party who hath a good defence is too late to make it in the ordinary forms of law. But the indulgence now shewn by the Courts in granting a summary relief upon motion in cases of such evident

law became increasingly indulgent and more willing to entertain a simple motion for summary relief.[9]

During the 1800s, the popularity of summary-judgment practice increased substantially. Consequently, Parliament enacted statutes allowing plaintiffs to file simple affidavits in *ex parte* proceedings to secure summary relief.[10] Two statutes are fairly renowned and worth mentioning. First, England enacted the Charities Procedure Act of 1812, also known as Sir Samuel Romilly's Act.[11] That act allowed multiple divisions[12] of England's judiciary to review affidavits and award summary relief, even if only a smidgen of uncontroverted evidence suggested a breach of trust or irregularities in charitable trusts.[13]

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oppression, has almost rendered useless the writ of *audita querela*, and driven it quite out of practice.").

9. *See* Turner v. Davies, 2 Wms. Saund., 137, 148, 85 Eng. Rep 871, 880 (K.B. 1670) (analyzing that "the indulgence which of late has been shewn by Courts of law in granting a summary relief upon motion in most cases of evident oppression, for which the only remedy formerly was by *audita querela*, has [caused] this remedy . . . to be seldom [used]. It is however sometimes adopted at present.").

10. *Cf.* Angus v. Montgomery, 3 Bligh 98, 107-08, 4 Eng. Rep. 541, 545 (H.L. 1821) (stating that "[t]his is a summary proceeding under the statute not according to the ordinary course of the Court. The proceeding intended by the Legislature is not one for determining a question of right. In such a case the party must be left to his remedy by the common course of the law . . . ."). This was a case in which a movant filed a summary complaint under the Act of 16 Geo. II c. 11, s. 24. The movant alleged that irregularities occurred during the election of magistrates and councillors of a Scotch burgh. *Id.* There was a question of whether, under the provisions of the Act, all the magistrates and councillors should be parties in the proceedings. *Id.* at 544-45.

11. Charities Procedure Act, 52 Geo. 3, c. 101 (1812) (Eng.); *see also* Bignold v. Springfield, 7 Clark & Finnelly 71, 73-74, 7 Eng. Rep. 992, 993 (H.L. 1837) (reporting that under the Charities Procedure Act—the so-called Sir Samuel Romilly's Act, 52 Geo. 3, c. 101—the court has authority "to give summary relief by petition").

12. Charities Procedure Act, 52 Geo. 3, c. 101 (1812) (Eng.).

> [I]t shall be lawful for the Lord Chancellor, Lord Keeper and Commissioners for the custody of the great seal, . . . the Master of the Rolls and the Court of Exchequer—and they are hereby required—to hear such petition in a summary way[.] [A]nd upon affidavits or such other evidence as shall be produced . . . , [these judges may] determine the same, and . . . make such order therein and with respect to the costs of such applications as to him or them shall seem just.

Id.

13. *See* Bignold v. Springfield, 7 Clark & Finnelly 71, 73-74, 7 Eng. Rep. 992, 993 (H.L. 1837-39) (reporting that under Sir Samuel Romilly's Act, 52 Geo. 3, c. 101, a court has authority "to give summary relief by petition in cases of abuses of charitable trusts").

Nearly forty years later, Parliament enacted the Summary Procedure on Bills of Exchange Act of 1855.[14] Under this statute, an aggrieved party holding a promissory note[15] or an endorsed bill of exchange[16] could commence an *ex parte* proceeding[17] and petition a court for summary relief. The plaintiff only had to file a simple affidavit.[18] However, to ensure adverse rulings were not arbitrary or capricious, the Bills of Exchange Act required several judges to

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14. Summary Procedure on Bills of Exchange Act, 1855, 18 & 19 Vict., c. 67 (Eng.).

15. *See* Maltby v. Murrells, 5 H. & N. 813, 813, 157 Eng. Rep. 1405, 1406 (Exch. Div. 1860) (describing applicability of the Act to a case involving suit on a promissory note).

> The affidavits [supporting] the application stated, that in the month of December, 1858, the defendant purchased . . . his stock and business of a stationer [from the plaintiff], and [gave the plaintiff a promissory note] dated the 13th January, 1859, for 1240l. [and] payable on demand. On the 15th March, 1836, the note [was still] unpaid, [therefore, plaintiff served] the defendant . . . with a writ of summons . . . in the form provided by "The Summary Procedure on Bills of Exchange Act, 1855," [along] with a copy of the promissory note, including the date, indorsed thereon. On the 27th of the same month, [the court signed the judgment and issued the execution], of which the defendant had notice . . . , and on the 28th the sheriff seized [defendant's property].

Id.

16. *See* Travis Bank & Trust v. State, 660 S.W.2d 851, 854-55 (Tex. App.—Austin 1983, no writ) (discussing bills of exchange).

> The word "draft" is a common synonym for "bill of exchange." In the law merchant, the term "bill of exchange" was defined . . . as a requirement or request in writing for the payment of a specified sum of money to a third person or the drawer himself, at a stated time, absolutely and at all events, directed by the drawer of the writing to the one of whom payment was required.

Id. (citations omitted); *see also* Temple-Eastex Inc. v. Addison Bank, 672 S.W.2d 793, 797-98 (Tex. 1984) (finding the reasoning of the *Travis Bank & Trust* court persuasive).

17. *See* West v. Farlar, 1 El. & El. 179, 180, 120 Eng. Rep. 876, 876 (K.B. 1858) (describing an *ex parte* proceeding under the Act).

> [T]he plaintiff . . . brought an action, under sect. 6 of The Summary Procedure on Bills of Exchange Act, 1855, 18 & 19 Vict. c. 67, against the defendant, as drawer, and John E. Reading, as acceptor, of [an indorsed] bill of exchange for [fifteen pounds] . . . . No appearance was entered to the action . . . , [so the court signed a judgment] against the defendant for 15l. 4s. 6d. debt and interest, and 5l. 16s. costs . . . .

Id.

18. *See* Hall v. Coates, 11 Ex. 480, 481, 156 Eng. Rep. 920, 920 (Exch. Div. 1855) (considering whether an endorsement on a writ under the Act is in proper form).

> The question [is] . . . whether the indorsement on a writ under the Summary Procedure on Bills of Exchange Act, 18 & 19 Vict c. 67, . . . is in a proper form. . . . "The plaintiff claims pounds, principal, and interest due to him as the payee of a bill of exchange or promissory note . . . . And if the amount thereof be paid to the plaintiff, or his attorney, within days from the service hereof, [he asks whether] further proceedings will be stayed."

Id.

review the evidence supporting the justification for summary relief.[19] To be sure, petitioning courts for summary relief became even more popular after England enacted the Sir Romilly's and Bills of Exchange Acts, expanding rapidly and widely to resolve other types of controversies.[20]

Texas, however, did not embrace summary-judgment practice as quickly. In fact, when England enacted the Summary Procedure Act in 1855, the Supreme Court of Texas had been functioning for at least ten years under the State Constitution of 1845.[21] Yet the Texas Supreme Court did not adopt the summary-judgment rule

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19. *See* Healey v. Johns, 8 El. & Bl. 946, 946-47, 120 Eng. Rep. 353, 353 (K.B. 1858) (describing the procedure for review under the Act).

> [Plaintiff filed this] application [under] sect. 1 of The Summary Procedure on Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67). That section [states that] unless defendant obtains leave to appear, and does appear, the plaintiff may sign [the] final judgment for any sum not exceeding the sum indorsed, with interest, [and that] "the Masters of the Superior Courts or any three of them [may set a sum for costs], subject to the approval of the Judges . . . or any eight of them (of whom the Lord Chief Justices and the Lord Chief Baron shall be three), unless the plaintiff claim[s] more than such fixed sum, . . . the costs shall be taxed in the ordinary way."

Id.

20. *See* Forte v. Beete, 9 Moore 336, 337, 14 Eng. Rep. 324, 325 (P.C. 1854) (discussing the summary procedure for levying and executing on property for enforcement of unpaid taxes).

> An action at law [can commence] against the proprietor or representative of the plantation [for a debt of unpaid taxes]. . . . [However,] there is a more summary method of procedure. Without going through the form of an action at law, the Receiver-General causes a "summary summons" to be affixed to the principal building on the plantation, requiring "the proprietor or representative" to pay the taxes due within twenty-four hours. In default of payment, an order from a Judge [may be] obtained, declaring the plantation executable for the amount due; [then] the Marshal proceeds to levy on and take in execution the plantation, . . . as if it had been made executable by a sentence pronounced in an ordinary suit . . . .

Id.

21. *See* Angela Allen, Note, *The Judicial Election Gag Is Removed—Now Texas Should Remove Its Gag and Respond*, 10 TEX. WESLEYAN L. REV. 201, 208 (2003) (noting that the question of how judges were chosen in early Texas history was "in a great state of turmoil").

> Beginning with the Constitution of the Republic, judicial positions in the Texas Supreme Court were filled by a joint-ballot election of the House of Representatives and Senate. The Texas Constitution of 1845, following the United States Constitution, changed the process by providing that the governor, with the advice and consent of the Senate, would appoint the justices who would serve a six-year term. It was not until 1850, with an amendment to the Constitution of 1845, that Texas began using the general election system to select its judges.

Id.

until 1949.[22] Interestingly, as of that year, the supreme court had been reviewing various appeals and deciding all types of cases for more than one hundred years; and England had codified the right to obtain summary relief under the Summary Procedure Act nearly one hundred years earlier.[23]

Without doubt, summary-judgment proceedings were and are enormously controversial among jurists and commentators in both England and Texas. Efficient,[24] expeditious,[25] and economical[26] are the most celebratory and frequently used terms that many jurists use to describe summary relief. A significant number of dissenters, however, assert that all too often summary-judgment practice is highly unwarranted,[27] unfair,[28] and unconstitutional.[29]

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22. *See* Roy W. McDonald, *Summary Judgments*, 30 TEX. L. REV. 285, 285-86 (1952) (recognizing the influence of English and other states' summary-judgment procedures on Texas's rules of civil procedure).

> [W]hen the Advisory Committee of the Supreme Court of Texas began its labors in 1940 on the Texas Rules of Civil Procedure, there was ample experience to warrant the recommendation of a summary judgment rule for the state. . . . During the following years there was persuasive advocacy of a rule authorizing summary judgment. This was rewarded in the amendments of 1949, which became effective March 1, 1950.

Id.

23. *See* Summary Procedure on Bills of Exchange Act, 1855, 18 & 19 Vict., c. 67 (Eng.) (giving a party holding a promissory note or endorsed bill of exchange the ability to petition a court for summary relief).

24. *See* Melinda Harmon & Gerri M. Fore, *Summary Judgment in Complex Antitrust Cases*, 31 S. TEX. L. REV. 381, 388 (1990) (citing evidence of an "apparent shift towards acceptance of summary judgment as a means of efficiently disposing of non-meritorious suits").

25. *See* Jeff Rambin, *Attacking Errors in Affidavits Used As Summary Judgment Proof*, 46 BAYLOR L. REV. 789, 789 (1994) (arguing that summary judgment "allows an expedited resolution of a case"); Sheila A. Leute, Comment, *The Effective Use of Summary Judgment: A Comparison of Federal and Texas Standards*, 40 BAYLOR L. REV. 617, 639 (1988) (arguing that time and expense of litigation are other factors to consider when advocating a more pervasive use of the summary judgment, and suggesting that the selective use of summary judgment in proper cases can reduce time and costs); *see also* 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 (3d ed. 2004) (stating that "the motion for summary judgment provides a more expeditious and effective procedure than the Rule 12(b)(6) motion for quickly terminating an action that does not appear to [merit] relief on its substantive merits").

26. *See* David F. Johnson, *Employers' Liability for Independent Contractors' Injuries*, 52 BAYLOR L. REV. 1, 2 (2000) (observing that "a summary judgment is a quick and economical way of determining what duty, if any, an employer owes an independent contractor").

27. *See* Sims v. Davis, 388 S.W.2d 752, 756 (Tex. Civ. App.—Houston 1965, no writ) (noting that the party opposing the motion should be given the benefit of every reasonable inference).

Perhaps the worst that has been said about the summary-judgment rule originated centuries ago in England. During the 1800s, learned jurists strongly asserted that summary proceedings were dangerous or, certainly, potentially dangerous.[30]

Consider, for example, the heated debate among Lords Hart and Redesdale, and Sir Samuel Romilly—the author of the Charities Procedure Act of 1812—and others in a string of decisions involving a single dispute. In *Ex parte Greenhouse*,[31] a group of interested persons filed a summary-judgment motion under the Charities Procedure Act.[32] They asked the court to revoke Ludlow

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> The law is well settled that in passing upon a motion for summary judgment, all doubts as to the existence of a genuine issue of fact must be resolved against the moving party, and the opposite party is entitled to the benefit of every reasonable inference which can properly be drawn in his favor. Since there were issues of fact raised in the instant case, the granting of the summary judgment was unwarranted.

Id. (citations omitted).

28. *See, e.g.*, Ginsburg v. Chernoff/Silver & Assocs., Inc., 137 S.W.3d 231, 237-38 (Tex. App.—Houston [1st Dist.] 2004, no pet.) ("As grounds for its motion, Chernoff argued that Dr. Ginsburg [filed his third amended petition] fewer than seven days before the summary judgment hearing and [that] constituted unfair surprise and prejudice."); Gibson v. Ellis, 126 S.W.3d 324, 332 (Tex. App.—Dallas 2004, no pet.) ("In support of the motion, counsel indicated he needed additional time to prepare for trial and to prepare a defense to Ellis's amended counterclaim . . . . The attorney claimed Ellis's last-minute motion for summary judgment created an additional unfair burden upon Gibson's ability to address Ellis's counterclaim.").

29. *See generally* Robert W. Clore, Comment, *Texas Rule of Civil Procedure 166a(i): A New Weapon for Texas Defendants*, 29 ST. MARY'S L.J. 813, 852 (1998) (observing that because of "the uncertain 'adequate time for discovery' standard and the omission of procedural safeguards to deter parties from filing frivolous [summary judgment] motions, plaintiffs may be further denied their day in court"). *But see* Gulbenkian v. Penn, 252 S.W.2d 929, 931 (Tex. 1952) (holding that summary judgments are designed to eliminate unmeritorious claims or defenses and are not "intended to deprive litigants of their right to a full hearing on the merits of any real issue of fact" (quoting Kaufman v. Blackman, 239 S.W.2d 422, 428 (Tex. Civ. App.—Dallas 1951, writ ref'd n.r.e.))); Carrabba v. Employers Cas. Co., 742 S.W.2d 709, 717 (Tex. App.—Houston [14th Dist.] 1987, no writ) (restating the principle that, absent "controverted material issues, the grant of summary judgment does not deny the losing party its constitutional rights to a jury trial").

30. *See, e.g.*, *Ex parte* Greenhouse, 1 Wils. Ch. 18, 20, 26 Eng. Rep. 9, 9 (Ch. 1818) (containing commentary from Lord Hart about "[t]he danger of proceeding on affidavits" without the benefit of cross-examination); *In re* Parish of Upton Warren, 1 My. & K. 410, 412-13, 39 Eng. Rep. 736, 738 (Ch. 1833) (indicating that the summary remedy provided for by the Charities Procedure Act should be given very narrow limits).

31. 1 Swans. 60, 36 Eng. Rep. 297 (Ch. 1818).

32. *See Ex parte* Greenhouse, 1 Swans. 60, 60, 36 Eng. Rep. 297, 297 (Ch. 1818) (indicating that a "petition [was] presented under the act providing a summary remedy in cases of abuses of trusts created for charitable purposes"); *see also Ex parte* Greenhouse, 1

Corporation's right to serve as trustee of a charitable estate. According to the affidavit, the corporation breached a sacred trust when it demolished a historical chapel and sold the materials.[33] The court awarded summary relief.[34]

Sir Romilly supported the lower court's award of summary relief and observed,

> [Neither the court] nor the Master acting as its organ, has any authority to proceed otherwise than as directed by the act. The express direction is to proceed in a summary way, and by affidavit. It is vain to insist on the conveyance of cross-examination; the Court has no power to exhibit interrogatories. It has been argued on the other side that no evidence can be good against a person who has [no] opportunity of cross-examination; but that argument is confronted by whole classes of cases [suggesting otherwise].[35]

Of course, Lord Hart thought differently and asserted:

Madd. 92, 103-05, 56 Eng. Rep. 36, 37 (1815) (noting that the petitioners wanted to preserve the charity).

33. *Ex parte* Greenhouse, 1 Madd. 92, 103-05, 56 Eng. Rep. 36, 40 (V.C. 1815).

> Petitioners [wanted to preserve the charity and obtain] the directions of the Court[;] [they also wanted to restore the] chapel-yard [for] the purposes of burial, and [wanted] the funds of the said charity, and the materials of the said chapel, duly accounted for, and the produce thereof accumulated for the purposes of rebuilding the said chapel.
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> The prayer of the petition [asked] . . . one of the masters of the Court to inquire into the [charity's] trusts . . . and . . . approve a proper scheme for the due regulation and management thereof . . . .
>
> *Affidavits were filed*, verifying the statements made in the petition. On the part of the corporation, *affidavits were adduced* to shew the ruinous state of the chapel, when the same was pulled down.

Id. (emphasis added).

34. *Ex parte* Greenhouse, 1 Wils. Ch. 18, 19, 37 Eng. Rep. 9, 9 (Ch. 1818). "[A]n order was made . . . , *declaring that the corporation of* Ludlow *had been guilty of a breach of trust* in pulling down *St. Leonard's* chapel, and converting and disposing of the materials, and that they should be discharged from being feoffees or trustees of the charity estate . . . ." *Id.* at 18-19 (emphasis added).

35. *Ex parte* Greenhouse, 1 Swans. at 61-62, 36 Eng. Rep. at 298.

> In bankruptcy, in lunacy, on interlocutory applications in courts of law as well as [in] equity, on motions to set aside judgments, and for delivery of annuity deeds; in all these instances, evidence is taken on affidavit. . . . The examination of the party on interrogatories, proceeds on very different principles, from the examination of a witness; and is only a mode of compelling that discovery to which his opponent is entitled. Under this statute neither the Court nor the Master has any authority to enforce the attendance of witnesses.

Id.

> [T]he purposes of justice are better attained by [examining] interrogatories, with the opportunity of cross-examination, than by affidavits . . . a deponent, instead of being sworn to divulge the whole truth, swears only to the truth of what he states . . . [and he carefully inserts] nothing unfavourable to his case. . . . [This is a] dangerous . . . innovation in the rules of evidence.[36]

Lord Redesdale was even more cynical and emphatic about the pitfalls of summary-judgment practice. He argued:

> [T]his Act ought to be construed . . . merely . . . for the purpose of saving either time or expense. Unquestionably, [the Charities Procedure Act is] loosely and incorrectly worded. . . . It was not intended to alter the law . . . .
>
> I conceive that the [intent] of this Act . . . was simply . . . to substitute a summary proceeding [for] a more regular proceeding. [Still,] I have an objection, a fixed and rooted objection, to any rash alterations of established laws, because I am thoroughly persuaded that, generally speaking, such alterations lead to mischief. [Acts of Parliament] are generally ill understood, . . . precipitately undertaken, . . . loosely expressed . . . [and] often extremely difficult to interpret.[37]

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36. *Ex parte* Greenhouse, 1 Swans. at 61, 36 Eng. Rep. at 298; *see also Ex parte* Greenhouse, 1 Wils. Ch. 18, 20-22, 37 Eng. Rep. 9, 10 (Ch. 1818) (noting Lord Hart's comments on the dangers of proceeding on affidavits alone).

> [Sir Samuel Romilly's Act] was intended merely to facilitate the proceedings as in a cause [of action]. If this had been a reference in a cause instituted by information, the [master] must have proceeded on interrogatories in the usual way, and we should have been entitled to the benefit of cross-examination. There can be no difference in principle between the proceedings instituted under the summary mode, authorised by the act, and those under an information. The act only provides what shall be the proceedings in court on the petition . . . it cannot be considered as taking away the ordinary mode of [a] proceeding. *The danger of proceeding on affidavits* is strongly evinced in the present case . . . .

Ex parte Greenhouse, 1 Wils. Ch. at 20, 36 Eng. Rep. at 9 (emphasis added). "It is a first principle of evidence that a party is not to be bound by the testimony of a witness whom he has not an opportunity of cross-examining." *Ex parte* Greenhouse, 1 Wils. Ch. at 22, 36 Eng. Rep. at 10.

37. Corp. of Ludlow v. Greenhouse, 1 Bligh N.S. 17, 47-50, 4 Eng. Rep. 780, 791-92 (H.L. 1827); *see also In re* Parish of Upton Warren, 1 My. & K. 410, 412-13, 39 Eng. Rep. 736, 738 (1833) (recalling the decree from *Ludlow*).

> [Sir Samuel Romilly's Act] applied exclusively to cases of a simple kind, where the nature of the trust was clear and undisputed, and the charity merely required regulation or the appointment of new trustees; but it could not be extended to cases in which the facts were complicated or doubtful, [where parties allegedly breached a trust], or

Early on, Texas jurists and commentators voiced similar alarms about the real and potential dangers associated with summary-judgment motions. For example, three years after the Texas Supreme Court approved summary proceedings, Roy McDonald—the renowned commentator on Texas Civil Procedure—warned: "[S]ummary judgment practice is not without its dangers."[38] To prove his point, he cited trial judges' comments, rulings, and experiences.[39] McDonald suggested, however, that the fear of *audita-querela*-like summary judgments in Texas—based solely on the evidence in the petitioners' affidavits—was probably premature.[40] At that time, he correctly observed that the newly adopted rule "[did] not envisage a trial on affidavits stripped of the benefit of oral cross-examination."[41]

[where] grave questions of law were to be litigated and determined. . . . [I]n *The Corporation of Ludlow v. Greenhouse* in the House of Lords, . . . Lord Eldon and Lord Redesdale . . . entered into a critical examination of the statute, and came to the conclusion that the summary remedy thereby given ought to be confined within very narrow limits. [A previous court had declared that a charity could not receive summary relief respecting] an adverse claim to property, or . . . a breach of trust [that a constructive trustee had allegedly committed].

Id. (citation omitted).

38. Roy W. McDonald, *Summary Judgments*, 30 TEX. L. REV. 285, 287 (1952).

39. *Id.* at 287-88 nn.6-9.

40. *Id.* at 290.

Although the court may believe that the weight of the evidence clearly favors the movant, that does not justify sustaining the motion. . . . These motions require the exercise of similar judicial talents, and their effectiveness as procedural techniques depends in no small measure on the ability and conscientiousness of the judge.

. . . Though the affidavits appear ever so positive, the court may well determine that the interests of justice require that the statements be tested by oral cross-examination.

Id.

41. *Id.* at 288. Fifty years ago, McDonald also stated that "summary judgment may well be denied in cases of particular types . . . where the controversy involves important elements of public policy." *Id.* at 290. Of course, nearly fifty years later, the converse is true. Texas's judges often award summary relief to one party or the other in heated controversies involving serious issues of public policy. *Compare* Dover v. Baker, Brown, Sharman & Parker, 859 S.W.2d 441, 451 (Tex. App.—Houston [1st Dist.] 1993, no writ) (noting that Dover's claims for damages resulted from illegal business transactions in which Dover knowingly and willingly participated; thus "[h]is illegal conduct is not incidental to his claims; it is inextricably intertwined with those claims. Because Dover's illegal act contributed to his injury, the trial court correctly granted appellees' summary judgment on the grounds of public policy."), *with* Lehmann v. Har-Con Corp., 76 S.W.3d 555, 564 (Tex. App.—Houston [14th Dist.] 2002, no pet.) ("[The Lehmanns also claimed] that the trial court erred [by] granting Har-Con's motion for summary judgment and [by] denying their

Still, more than fifty years later, a significant number of highly talented jurists in Texas continue to proclaim that summary-judgment practice is inherently or potentially dangerous for a variety of reasons. Just two years after the supreme court approved the rule, the Beaumont Court of Appeals stated that permitting a motion for summary judgment was potentially dangerous. And the Beaumont Court of Appeals concluded that the rule could encourage "sham"[42] proceedings, thereby causing "grave injustice"[43] in Texas. Fifteen years later, Justice Massey, the Chief Justice of the Fort Worth Court of Appeals, suggested that summary proceedings were dangerous.[44] From his viewpoint, there was little to prevent lower courts from granting summary relief to less-than-credible petitioners, or on the basis of less-than-credible evidence appearing in petitioners' affidavits.[45]

An examination of commentators' research in Texas law journals also reveals genuine concerns about summary-judgment practice in

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motion for summary judgment because the indemnity violates public policy. . . . We reject the Lehmanns' conclusion . . . .").

42. *Cf.* Dunn v. Tillman, 255 S.W.2d 933, 937-38 (Tex. Civ. App.—Beaumont 1953, no writ) (commenting about the dangers of improvident use of summary judgments).

> [Where a defendant's] credibility . . . is crucial, summary judgment becomes improper and a trial indispensible. . . . We think that Rule 56 was not designed . . . to foreclose plaintiff's privilege of examining defendant at a trial, especially [regarding] matters peculiarly within defendant's knowledge. [A recent case in the court below illustrates] *the dangers . . . of summary judgments*, if not cautiously employed . . . . There the judge refused to grant summary judgment for defendants, despite a mass of impressive affidavits . . . which on their face made plaintiffs' case seem nothing but *a sham* . . . .

Id. (emphasis added).

43. *Cf.* Dunn v. Tillman, 255 S.W.2d 933, 938 (Tex. Civ. App.—Beaumont 1953, no writ) (illustrating how "[g]rave injustice might easily result" from use of summary judgments).

> [During the trial], cross examination of the defendants revealed facts . . . unknown by plaintiffs, that so riddled the defendants' case . . . that the judge entered judgment against them for several million dollars . . . .
>
> "We do not believe that [where a] decision must turn on the reliability of witnesses, the Supreme Court, by authorizing summary judgments, intended to permit a 'trial by affidavits,' if either party objects. That procedure . . . began to be outmoded at common law in the 16th century, [and, if now revived, it would] often favor unduly the party with the more ingenious and better paid lawyer. *Grave injustice* might easily result."

Id. (emphasis added).

44. Hardy v. Johnson, 434 S.W.2d 932, 937 (Tex. Civ. App.—Fort Worth 1968, no writ) (Massey, C.J., dissenting).

45. *See id.* at 937-38 (explaining why the court should reverse and remand).

Texas as well as in the federal circuits. To illustrate, Judge Patricia Wald, the former Chief Judge for the United States Court of Appeals for the District of Columbia, produced this conclusion in her research: "[A] sample of summary judgments suggests that, at the very least, there is a real danger of summary judgment being stretched far beyond its originally intended or proper limits."[46]

Another commentator even suggested that courts' willingness to accelerate and expedite summary judgments is dangerous for two additional reasons. First, such tolerance for expediency will deter truly aggrieved parties from filing legitimate suits and asking for a trial by jury.[47] Second, courts' eagerness to award summary relief will decrease legitimate plaintiffs' access to court.[48] Finally, in re-

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> Certainly it must be conceded that in the form in which Exhibit D appears as a part of Mr. Jones' affidavit it could not constitute evidence of any [cancellation notice for] any insurance policy. . . .
>
> Furthermore I am of the opinion that his credibility would have been [an issue] even if Mr. Jones' affidavit had been sufficient[.] [W]here such is the case[,] summary judgment is improper. . . . A fact finder presented [with] such testimony could accept such evidence as positive proof. . . . [I]t would be a *dangerous practice in summary judgment proceedings* to found a judgment upon [an assertion in one's] affidavit that he had performed the duty when evidence to the contrary . . . would be completely unavailable to the respondent party and impossible for him to attack in any manner other than by cross-examination.

Id. (emphasis added).

46. *See* Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1917 (1998) (commenting on the results of a summary-judgment survey).

> [The D.C. Circuit] is very friendly to summary judgment, and while we often reverse summary judgments on the merits of a legal question involved (nine times in my six-month survey), we send them back because of the existence of genuine issues of material fact far less frequently (three times).

Id.; *see also* Gallagher v. Delaney, 139 F.3d 338, 343 (2d Cir. 1998) ("The dangers of robust use of summary judgment to clear trial dockets are particularly acute in current sex discrimination cases.").

47. J.P. Kumar, *"Fair Game": Leveling the Playing Field in Scientology Litigation*, 16 REV. LITIG. 747, 763 (1997).

48. *See* J.P. Kumar, *"Fair Game": Leveling the Playing Field in Scientology Litigation*, 16 REV. LITIG. 747, 763 (1997) (observing that "[s]ummary judgment is generally inappropriate until sufficient discovery has been conducted, but discovery alone may present enough trauma and expense to eliminate the ill-equipped plaintiff"). "While accelerating and expediting summary judgment proceedings may partly address this concern, the dangers of deterring legitimate suits and infringing on plaintiffs' access to court rise accordingly." *Id.*; *see also* Conley v. Bd. of Trs. of Gren. County Hosp., 707 F.2d 175, 178 n.2 (5th Cir. 1983) (declining "to review the procedural propriety of the *sua sponte* grant of summary judgment"). The court concluded "that the entry of summary judgment on the property interest question without a cross-motion by plaintiffs was not procedurally erroneous,"

cent years, summary-judgment practice in Texas has become arguably more dangerous for reasons that have very little to do with its legal complexities or technicalities.[49] An examination of those concerns appears shortly.

But first, consider this general observation: Many Texans have negative views about the state's judiciary and its judges. Even a cursory reading of Texas's newspapers reveals a disturbing truth. Fairly large portions of various groups in Texas—the public at large, consumers, small businesses, professionals, corporations, and partnerships—believe intensely that the judiciary branch of government is as corrupt[50] and partisan[51] as the legislative and execu-

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recognized "that the *sua sponte* grant of summary judgment is a dangerous practice," but concluded that those dangers were not present in the controversy. *Id.*; *see also* Capital Films Corp. v. Charles Fries Prods., 628 F.2d 387, 391 (5th Cir. 1980) (declaring that the lower court's *sua sponte* grant of summary judgment that was adverse to Capital's causes of action was improper and a deviation from the court's duty to strictly comply with procedural safeguards).

49. *Cf.* David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 54 BAYLOR L. REV. 1, 131 (2002) (explaining that successful summary-judgment practice depends on both technical and non-technical factors).

> While following the technically complex summary judgment procedures detailed in this article is fundamental, it does not ensure successful prosecution of, or defense against, a motion for summary judgment. Effective advocacy in summary judgment practice depends on strategic timing decisions, development and use of evidence, written persuasion, and knowledge of the judge. These factors, combined with technical correctness, ultimately determine success in summary judgment practice.

Id.; *cf. also* Lynne Liberato & Kent Rutter, *Evaluating Appeals by the Numbers*, 66 TEX. B.J. 768, 771-72 (2003) ("At the trial court level, summary judgment practice remains highly technical. . . . [And] [s]ummary judgment practice deserves its reputation for being complex and technical.").

50. *See* Editorial, *Texas Judges: Give Texans a Vote on Appointment-Retention Elections*, HOUS. CHRON., May 9, 2003, at A46 (arguing for a new method of choosing judges).

> Money and politics play too great a role today in the way Texans choose their judges. The current system of electing judges is haphazard in the quality of jurists it produces and too open to corruptive influences.
>
> Texans deserve better.
>
> Campaign contributions to judicial candidates from well-heeled lawyers and big law firms—whether the candidates are running for state district benches, lower appellate positions or the Texas Supreme Court—raise questions about fairness and impartiality when those same lawyers appear before judges to whom they've given money.
>
> As for politics, the law is neither Republican nor Democrat. It should be blind.

Id.; *see also* Richard A. Roman, Editorial, *Texas Must Review How It Picks Judges*, EL PASO TIMES, Apr. 27, 2003, at B9 (suggesting "[t]here is a crises within the Texas judicial system").

tive branches. In fact, given that the public's perception of judges is so negative, many Texans want a system that appoints judges initially; and, if judges "[are] fit to remain on the bench," voters would return them to office.[52]

The "Justice at Stake Campaign" is a national partnership that seeks to keep courts fair and impartial. Recently it commissioned a poll among judges and registered voters.

Results of the poll "are both alarming and encouraging," according to the American Bar Association . . . .

. . . .

Many state judges are deeply concerned about how much influence campaign contributions have in judicial elections.

Judges are concerned about the public's view that money, privilege and power have more influence on our legal system than fairness and impartiality.

Id.

51. *See* Linda Campbell, *Merit Selection a Win, Not a Loss, for Voters*, FT. WORTH STAR-TELEGRAM, May 1, 2003, at B13 (advocating merit selection of judges).

Plenty of fallacies were tossed about [during a recent debate on the subject] . . . , most of them trashing a bill that proposes a system of gubernatorial appointments with retention elections.

The biggest misimplication may have been that it threatens the very foundations of democracy.

SJR 33 . . . calls for a constitutional amendment to switch the way that Texas selects its judges.

If voters approved the amendment, the governor would appoint judges to the Texas Supreme Court, Court of Criminal Appeals, intermediate appellate courts and state district courts.

. . . .

This debate shouldn't center on whether left-wing social engineers or right-wing troglodytes are gaining control of our state benches.

It's about whether a judge can judge impartially, independent of party agendas, uninfluenced by high-faluting contributors, unimpeded by eroding public trust, beholden only to the law and the public interest.

Id.

52. *See* Editorial, *Texas Judges: Give Texans a Vote on Appointment-Retention Elections*, HOUS. CHRON., May 9, 2003, at A46 (commenting on the movement to revamp the way Texas's judges are selected).

Reformers like Supreme Court Chief Justice Tom Phillips, a Republican, and former Chief Justice John Hill, a Democrat, have long sought to overhaul the way Texans select their judges, yet haven't gotten much traction. [They] believe the public would be better served if there were a system in which judges were first appointed and then faced retention elections allowing voters to determine if they were fit to remain on the bench.

Fortunately, the momentum may be shifting in the reformers' favor.

There is more. Many Texans believe adamantly that the Texas Supreme Court and lower courts are particularly biased against powerless plaintiffs.[53] In addition, consumers believe Texas's judges systematically ignore consumers' concerns and deliver biased pro-business decisions.[54] More specifically, insurance consumers think the Texas Supreme Court's decisions are generally biased in favor of powerful insurance companies, because insureds are significantly less likely to receive favorable rulings.[55] Further-

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. . . .

. . . Texas' system has been in place since 1850. It's about time Texans had a vote on whether . . . they want to reform a 19th-century judicial selection process.

Id.

53. *See* Walter Borges, Editorial, *Rule Puts Plaintiffs in Tougher Spot*, SAN ANTONIO EXPRESS-NEWS, May 22, 1997, at 9B ("Anyone who has found it necessary to sue someone in the Texas courts in the last five years knows that the legal system is badly skewed in favor of defendants. Since 1990, the Texas Supreme Court has made it increasingly difficult for plaintiffs to prove their cases and collect damages.").

54. *See, e.g.*, Editorial, *Avoid This Crash: Tort Reform Would Protect Negligent Doctors, Businesses*, HOUS. CHRON., Apr. 2, 2003, at 24 ("In Harris County, every civil court judge above justice of the peace is a conservative Republican. Most are impartial, a few are openly biased in favor of business, and none is unfairly sympathetic to personal injury lawyers."); *Texas Justices Alter Burden for Some Trials*, AUSTIN AM.-STATESMAN, Aug. 20, 1997, at B5 (noting Texas Citizen Action's warning that current Texas Supreme Court rulings favor defendants); Walter Borges, *Rule Puts Plaintiffs in Tougher Spot*, SAN ANTONIO EXPRESS-NEWS, May 22, 1997, at 9B (reporting the conflict of recent decisions with the goals of the Deceptive Trade Practices Act).

> [The Texas Supreme Court's decisions] have gutted the Deceptive Trade Practices Act—the most important state consumer law statute—limited the ability of Texas consumers to sue doctors and lawyers for malpractice and repeatedly overruled juries on whim to ambiguously redefine what constitutes evidence.
>
> Now the court is proposing a procedural change that will limit plaintiffs' rights even more.

Id. But see David Pasztor, *Insurance Lawsuit Shadows State Race: Cornyn's Attack on Farmers May Hurt Republican Candidate for Attorney General*, AUSTIN AM.-STATESMAN, Aug. 8, 2002, at A1 ("[Austin Mayor Kirk Watson] harshly criticized [Justice Greg] Abbott's record on the [Texas] Supreme Court, saying [that] Abbott often favored insurance companies over consumers when he was on the bench. [Jason] Johnson said Abbott's judicial record demonstrates a mixed bag of rulings sometimes favoring businesses, sometimes consumers.").

55. *See Mental Anguish Isn't 'Bodily Injury,' State's Supreme Court Rules*, DALLAS MORNING NEWS, May 17, 1997, at 40A (quoting a plaintiff's attorney, who was frustrated with the court's recent decisions and the apparent correlation with the court's political makeup).

> A woman who alleged mental anguish after revealing photos of her were duplicated and passed around by a supermarket photo lab technician has lost a battle in the Texas Supreme Court.

more, a significant number of Texans believe the Texas Supreme Court and appellate courts generate unduly tortuous and complex analyses to justify arguably extremely biased, highly questionable, and wildly unwarranted decisions.[56]

. . . .

"In insurance cases and in personal injury cases, it seems like the defense is winning 95 percent of those over the last few years in the Texas Supreme Court," Mr. Chester said. "So, given the political bent of the court, it's not surprising."

Id.; *see also* Bruce Hight, *Court Limits Liabilities of Truck Manufacturers, Insurance Companies*, AUSTIN AM.-STATESMAN, Nov. 25, 1993, at G1 (citing the mixed emotion of corporate and consumer advocacy groups in response to the court's current trend ostensibly favoring manufacturers and insurers).

The Texas Supreme Court awarded the business community two victories . . . in rulings that limit the liability of manufacturers and insurance companies.

Ted Roberts, a spokesman for the Texas Association of Business [praised the ruling and stated that this is a good thing] . . . .

But the two rulings drew criticism from [the] executive director of Consumer Union's southwest regional office in Austin.

"This is a continuation of a trend on the court's part to consistently find in favor of manufacturers and insurers and against the interests of individual consumers who have been injured, killed or maimed as the result of corporate irresponsibility," [the executive director] said.

Id.

56. *See* Editorial, *An Activist: Owen's Record Gives Reason for Pause on Judicial Post*, HOUS. CHRON., May 12, 2003, at A18 (referring to the filibuster of United States Senators that prevented the appointment of Texas Supreme Court Justice Priscilla Owen on grounds that her decisions parallel her personal political agenda).

[Forty-four] U.S. senators refused to [end] a filibuster on the nomination of Priscilla Owen to the [Fifth] Circuit Court of Appeals. Good. Owen's judicial record shows less interest in impartially interpreting the law than in pushing an agenda.

The problem is not that Owen is "too conservative," as some of her critics complain, but that she too often contorts rulings to conform to her particular conservative outlook. It's saying something that Owen is a regular dissenter on a Texas Supreme Court made up mostly of other conservative Republicans.

On cases that have reached the [Texas] Supreme Court in which minor girls have tried to get a judge's permission to avoid having to tell their parents they want to have an abortion, Owen and fellow-Justice Nathan Hecht have tried to set up legal hurdles so high hardly any girl in Texas could qualify.

The complaints against Owen's conduct on the bench run from a penchant for overturning jury verdicts on tortuous readings of the law to a distinct bias against consumers and in favor of large corporations. Some detractors find her demeanor unbecoming of a judge . . . .

Id.

Undeniably, these perceptions are exceedingly unsettling and potentially dangerous, for they could seriously erode the public's confidence in judges and respect for judicial decisions.[57] Arguably, some corrosive effects of such negative sentiments have occurred already. A critical review of what plaintiffs think about summary-judgment practice in Texas reveals widespread hostility, bitterness, and anger toward judges.[58] Often, when trial courts grant defendants' motions for summary relief, those decisions affect an extremely large number of plaintiffs. Very possibly, plaintiffs as well as the public at large find it dreadfully disconcerting that trial judges, rather than juries, are deciding so many enormously personal and controversial issues.

To illuminate the degree and severity of the frustration, consider a few widely circulated reports that appeared in several major

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57. *Judge Rejects Complaints About Air Force Noise*, HOUS. CHRON., Mar. 28, 2003, at A36.

58. *Cf. Texas Justices Alter Burden for Some Trials*, AUSTIN AM.-STATESMAN, Aug. 20, 1997, at B5 (noting Justice Spector's opinion that frivolous cases are rare under existing rules).

> [The Texas Supreme Court approved a "no-evidence" summary judgment rule that] will make lawsuits in Texas more expensive and could keep legitimate cases from going to trial [according to Texas Citizen Action's director].
>
> . . . .
>
> Supreme Court Justice Rose Spector . . . agreed. "Truly frivolous cases are relatively rare and are readily disposed of under the existing rule," Spector wrote in a dissenting opinion.

Id.; *cf.* Zeke MacCormack, *Court Permits Lawsuit Against 3 Police Officers: Fredericksburg Man Claims Dispute About a Softball Led to Assault*, SAN ANTONIO EXPRESS-NEWS, Nov. 2, 2002, at 5B (noting the frustration of the plaintiff's attorney regarding repeated summary judgments against his clients).

> An appeals court has cleared the way for a Fredericksburg man to pursue a civil rights lawsuit against three police officers he says assaulted him over a wayward softball.
>
> [The court] upheld a district court judge's dismissal of Vern Hallmark's claims against the city of Fredericksburg . . . .
>
> . . . .
>
> Hallmark's attorney, Harry Skeins . . . expressed frustration at the protracted litigation in the case . . . .
>
> Three summary judgments issued by State District Judge Steve Ables have stalled justice, he said.
>
> "Every time I get close to trial, I get a summary judgment slapped in my face," Skeins said . . . .

Id.

Texas newspapers over an eighteen-month period. In 2001, claimants who represented arguably thousands of homeowners and residents sued the City of San Antonio and developers.[59] The complaint alleged that the city did not follow its own subdivision rules and regulations and that the developers' implemented plan deviated substantially from the original plan.[60] San Antonio filed a summary-judgment motion in a state district court.[61] The city argued that the implemented plan conformed to the platting rules.[62] San Antonio also asserted that the residents had no standing to sue because only the city could enforce its rules and regulations.[63] In May 2003, the trial judge accepted San Antonio's argument, awarded summary relief, and "[threw] out the suit before it could go to trial."[64]

In January 2003, a state district judge "derailed a longstanding claim by hundreds of descendants of Jose Manuel Balli Villarreal who [argued] that decades ago they were cheated out of 83,000 acres in Kenedy County. . . . The case was set [for trial, but the judge granted the defendant's motion for summary judgment]."[65]

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59. *See, e.g.*, Gleason v. Isbeld, 145 S.W.3d 354, 361 (Tex. App.—Houston [14th Dist.] 2004, pet. filed) ("Inappropriate conduct and incivility threaten the pursuit and administration of justice in that they damage the public's perception of our legal system, [and] undermine the credulity and authority of the courts . . . ."); *In re* Lowery, 999 S.W.2d 639, 647 (Tex. Rev. Trib. 1998, rev. denied) (noting Texas's "scheme of judicial accountability arises in part from a justifiable concern for the relationship between judicial conduct and public perception").

60. Fernandez v. City of San Antonio, No. 04-03-00512, 2004 WL 2997712, at *1 (Tex. App.—San Antonio Dec. 29, 2004, no pet. h.); *see also* Lety Laurel, *Alamo Farmsteads Suit Thrown Out*, SAN ANTONIO EXPRESS-NEWS, Jun. 11, 2002, at 1H ("Residents Fernando Fernandez and AJ Imad, along with the Alamo Farmsteads Babcock Road Homeowners Association, . . . [claimed that the originally adopted neighborhood plan did not] allow for [a] 66-home community that [developers had] planned to develop on a 15-acre tract in Alamo Farmsteads.").

61. *Fernandez*, 2004 WL 2997712, at *1 (noting that "[t]he City . . . sought summary judgment on numerous grounds").

62. Lety Laurel, *Alamo Farmsteads Suit Thrown Out*, SAN ANTONIO EXPRESS-NEWS, June 11, 2002, at 1H.

63. *Id.*

64. *Id.* ("Judge John Gabriel in the 285th District Court granted the city's motion for summary judgment . . . ruling [that] there were no genuine issues [of fact] to take before a jury. . . . Kitchener Land Development and [developer Bill] Jackson are expecting the judge soon to rule in their favor as well.").

65. Kate Hunger, *Judge Hobbles Ballis' Claim to Land: Descendants' Papers Are Not Persuasive in Kenedy County Dispute*, SAN ANTONIO EXPRESS-NEWS, Jan. 8, 2003, at 1B. "[Senior District Judge Pat] McDowell ruled that two key pieces of evidence for the de-

In May of that year, the same newspaper revealed that a "lengthy legal battle . . . over property valuations in an upscale Kendall County subdivision stalled . . . when [the] judge ruled that property owners [were ineligible] for wildlife management exemptions."[66] The date for the jury trial had been set, but the district judge granted Kendall Appraisal District's motion for summary judgment.[67]

And in March of 2003, a different newspaper reported that landowners in sixteen Texas counties commenced a nuisance action against the United States Air Force.[68] Quite simply, the landowners argued that jet noise and exhaust pollution reduced the property value.[69] In addition, they complained that the pollution produced physical and mental distress.[70] Still, a federal district judge in West Texas awarded summary relief to the Air Force,

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scendants, an 1804 title transfer document and a 1949 lease, were unreliable and therefore inadmissible." *Id.*

66. Kate Hunger, *Judge Kills Subdivision's Wildlife Tax Break Claim: Residents of Upscale Cordillera Ranch Must Pay 1998-2000 Taxes*, SAN ANTONIO EXPRESS-NEWS, May 21, 2003, at 5B.

> Cordillera Ranch Ltd. and hundreds of property owners have filed five lawsuits—one each year from 1998 through 2002—seeking a refund of about $3 million in taxes paid to Kendall County and the Boerne School District. [The latest] ruling applies to the first three lawsuits—1998, 1999 and 2000—which had been consolidated into one case.

Id.

67. *Id.*

68. *Judge Rejects Complaints About Air Force Noise*, HOUS. CHRON., Mar. 28, 2003, at A36. *See generally* Davis Mountains Trans-Pecos Heritage Ass'n v. United States Air Force, 249 F. Supp. 2d 763 (N.D. Tex. 2003) (mem. op.) (providing a factual background on the suit and summary-judgment motions), *vacated sub nom.* Davis Mountains Trans-Pecos Heritage Ass'n v. F.A.A., No. 02-60288, 2004 WL 2295986, at *1 (5th Cir. Oct. 12, 2004); Welch v. United States Air Force, 249 F. Supp. 2d 797 (N.D. Tex. 2003) (mem. op.) (providing a factual background on the suit and summary-judgment motion by the West Texas landowners), *vacated sub nom.* Davis Mountains Trans-Pecos Heritage Ass'n v. F.A.A., No. 02-60288, 2004 WL 2295986, at *1 (5th Cir. Oct. 12, 2004).

69. *See Judge Rejects Complaints About Air Force Noise*, HOUS. CHRON., Mar. 28, 2003, at A36 (stating that the plaintiffs said the noise from the daily training flights of U.S. Air Force bombers was a nuisance and infringed on the use and enjoyment of the plaintiffs' property).

70. *See* Welch v. United States Air Force, 249 F. Supp. 2d 797, 804 (N.D. Tex. 2003) (mem. op.) (complaining that the defendants "failed to take a hard look at the environmental impacts of the [flights] on noise levels; human safety and health; . . . human and livestock annoyance; air quality; . . . private property values; local customs and cultures . . . and the overall human environment and human condition").

thereby effectively blocking a trial by jury.[71] For sure, the landowners in this case—like the residents and property owners in the other illustrated cases—were outraged.[72] And to a great extent, their extreme disgust evolved from the rule that judges have power to decide such personal and important issues summarily without the aid of or input from a jury of peers.

Certainly, Texas's courts have awarded summary relief to large classes of plaintiffs.[73] But all too often judges do not explain their summary rulings or why they blocked trials by jury. Yet efforts to

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71. *See Judge Rejects Complaints About Air Force Noise*, HOUS. CHRON., Mar. 28, 2003, at A36 (noting that Judge Sam Cummings signed the summary-judgment order).

> The Air Force can continue its low-level bomber training flights over West Texas, a federal judge has ruled, rejecting arguments from landowners that the daily flights would create a nuisance and infringe on the use and enjoyment of their property.
>
> . . . .
>
> U.S. District Judge Sam R. Cummings signed a summary judgment . . . in the lawsuit that 28 plaintiffs in 16 counties had brought against the government in November 2000. The plaintiffs own 530,000 acres. . . .
>
> He granted a summary judgment for the Air Force in a similar lawsuit filed by landowners in the Davis Mountains area.

Id.

72. *See Judge Rejects Complaints About Air Force Noise*, HOUS. CHRON., Mar. 28, 2003, at A36 ("'This is obviously disappointing to my clients because the long-term effects . . . of this program [on them] are rather severe,' lead plaintiff's attorney Frank M. Bond . . . told the Lubbock Avalanche-Journal.").

73. *See* Peggy Fikac, *Order Sets Stage for Appeal in USAA Case: Judge Verbally Rejected Company's Tax Refund Request in May*, SAN ANTONIO EXPRESS-NEWS, Sept. 5, 2002, at 1E (providing an example of a summary-judgment ruling).

> State District Judge Margaret Cooper of Travis County, in a final summary judgment . . . , declared insurance companies' payment of gross premium taxes "does not exempt them from paying all other types of taxes, such as the motor vehicle tax, the motor fuel tax, and the sales and use tax."
>
> Cooper initially sided with the state in a verbal ruling from the bench in May.

Id.; *see also* Robert W. Gee, *Judge Will Support Church in Parking Garage Dispute: Hyde Park Residents Had Fought Five-Story Project for 13 Years*, AUSTIN AM.-STATESMAN, Feb. 13, 2003, at A1 (noting a summary judgment in favor of a large church).

> A state district judge said . . . that he will rule in favor of Hyde Park Baptist Church in its bid to build a five-story parking garage, ending, for now, a 13-year feud between the church and its neighbors.
>
> . . . Judge Pete Lowry said he would grant the church's motion for summary judgment in its lawsuit against the city, effectively allowing a parking garage project to go forward at the corner of 39th Street and Speedway. . . .
>
> The dispute between the church and Hyde Park residents over the garage, perhaps the most contentious chapter in a history of sour relations dating to the 1970s, ended up in

force courts to state explicitly and intelligibly their reasons for granting or denying summary relief have been ineffective.[74] Arguably, this omission—more than any other reason—explains why there is so much anger and frustration among a wide spectrum of Texans and why so many Texans have negative attitudes toward judges and summary-judgment practice.

At this point, it is worth stating that the Texas Supreme Court adopted the summary-judgment rule primarily to prevent juries from considering arguably groundless causes, to reduce costs, and to increase "the efficient administration of justice."[75] And by all objective measures, the rule has achieved the intended goals.

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court after the City Council backed a neighborhood appeal to the project and blocked the garage from being built as planned.

Id. But see Jessica Deleon, *Court to Consider Election Dispute*, FT. WORTH STAR-TELEGRAM, Mar. 8, 2003, at B6 (reporting the denial of a neighborhood association's motion for summary judgment).

> Judge Dana Womack of the 348th state District Court set a trial date . . . to determine whether the association had a right to cancel its Sept. 12 election of officers. The scheduling decision . . . came after she denied a motion from the association's attorneys for a summary judgment, which equates to a dismissal, on the case.
>
> The controversy began when the scheduled Sept. 12 election was canceled because the newsletter containing the ballot was not distributed to all houses.

Id.

74. *See generally* John Williams & Janet Elliott, *Top Donor Spends Big, Stays in Background*, HOUS. CHRON., Dec. 22, 2002, at A1 (discussing legislation that would have required judges to state why they granted motions for summary judgment).

> To some, Houston homebuilder Bob Perry is a well-intentioned man of legendary largesse who wants to shape Texas and the nation by chunking giant doses of money to Republicans and their efforts.
>
> . . . .
>
> But Perry has expressed his opinion about issues being debated at the Capitol. In May 1999 he wrote to [Lieutenant Governor Rick Perry], opposing a bill by Rep. Harold Dutton, D-Houston.
>
> The bill would have required judges to state the grounds when they grant a summary judgment dismissing a lawsuit. Proponents of lawsuit limitations feared it would lead to fewer dismissals.
>
> "Please do what you can to make sure HB 2186 does not pass the Senate," Perry wrote to the lieutenant governor.
>
> The bill passed the Senate but was vetoed by then-Gov. George W. Bush.

Id.

75. *See* Roy W. McDonald, *Summary Judgments*, 30 TEX. L. REV. 285, 286 (1952) (noting that "[t]he rule is intended to eliminate the delay and expense which result from paper issues which in truth are not factual issues").

Therefore, it should not be surprising that summary proceedings have generated extensive hostility among the general public. Even some "trial and appellate courts [view] summary judgment practice with hostility."[76] The latter find the practice to be a harsh[77] and drastic[78] procedure. Without doubt, it is a rule that demands strict application and every indulgence for the nonmovant.[79]

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76. William V. Dorsaneo, III, *Judges, Juries, and Reviewing Courts*, 53 SMU L. REV. 1497, 1516 (2000); *see also* Roy W. McDonald, *The Effective Use of Summary Judgment*, 15 Sw. L.J. 365, 373 (1961) (remarking that "[s]ome trial judges come to a motion for summary judgment reluctantly, predisposed to its denial"); Patrick K. Sheehan, *Summary Judgment: Let the Movant Beware*, 8 ST. MARY'S L.J. 253, 254-55 (1976) (suggesting "Texas courts tenaciously cling to the historical principle that the right to a trial should be jealously safeguarded").

77. *See* Torres v. Caterpillar, Inc., 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996, writ denied) (stating that "Texas law recognizes summary judgment to be a harsh remedy requiring strict construction"). "The reason for applying such a strict standard is because a summary proceeding is 'not a conventional trial, but an exception to the usual and traditional formal procedure whereby witnesses are heard in open court and documentary proof is offered and received into evidence.'" *Id.* (quoting Garcia v. John Hancock Variable Life Ins. Co., 859 S.W.2d 427, 435 (Tex. App.—San Antonio 1993, writ denied)). A summary judgment is not intended to permit a trial by deposition or affidavit and should not be resolved by weighing the relative strength of the conflicting facts and inferences. *Id.*

78. *See* Robinson v. Warner-Lambert, 998 S.W.2d 407, 410 (Tex. App.—Waco 1999, no pet.) (commenting on the drastic nature of the remedy).

> Robinson asserts that the court erred in granting summary judgment "as such a drastic remedy is not appropriate where good-faith disagreements exist as to the type and level of evidence required." . . . We have already detailed the standard of review to be used in a no-evidence summary judgment. This is a significant change in summary judgment practice in Texas. The court did not abuse its discretion in granting "such a drastic remedy."

Id.

79. *See generally* Gaines v. Hamman, 163 Tex. 618, 358 S.W.2d 557, 562-63 (1962) (commenting on the appropriate use of summary judgments).

> Obviously mere conclusions will not suffice and cases so holding do not support the thesis that in cases of inconsistency or conflict, the deposition prevails over the affidavit. . . . It is not the purpose of the summary judgment rule to provide either a trial by deposition or a trial by affidavit, but rather to provide a method of summarily terminating a case when it clearly appears that only a question of law is involved and that there is no genuine issue of fact.

Id. See generally Garcia v. John Hancock Variable Life Ins. Co., 859 S.W.2d 427, 435 (Tex. App.—San Antonio 1993, writ denied) (discussing summary judgment use).

> The law in Texas is well settled that summary judgment is a harsh remedy which must be strictly construed. This is because a summary proceeding is "not a conventional trial, but an exception to the usual and traditional formal procedure whereby witnesses are heard in open court and documentary proof is offered and received into evidence."

Id. (quoting Richards v. Allen, 402, S.W.2d 158 (Tex. 1966)) (citation omitted).

But this commentary does not concern whether the Texas Supreme Court should abolish the summary-judgment rule altogether, even though it is a drastic and harsh rule that generates widespread anger and hostility. Bluntly put, courts should never permit juries to decide controversies where plaintiffs' claims are indeed frivolous. Or stated more elegantly, all too often plaintiffs simply cannot amass enough credible evidence to support a *prima facie* case. Therefore, under those circumstances, trial judges should perform a thorough good-faith analysis of affidavits and other evidence, and dismiss clearly frivolous causes immediately.[80]

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80. *Cf.* Jeff Caplan, *Baylor Ruled Not Liable for Player's Death*, FT. WORTH STAR-TELEGRAM, Feb. 7, 2004, at B5 (describing Baylor University's successful motion for summary judgment).

> A state judge threw out six of seven counts of the wrongful death lawsuit filed against Baylor University by the biological father of slain basketball player Patrick Dennehy.
>
> . . . .
>
> Judge Ralph Strother of the 19th District Court . . . ruled that Baylor was not liable for the younger Dennehy's death because the university could not have foreseen the slaying and because it could not control the behavior of an adult student-athlete off the Baylor campus.
>
> "Essentially our motion for summary http://web2.westlaw.com/result/ - Ijudgment http://web2.westlaw.com/result/ - Iwas granted in entirety," said attorney Wayne Fisher, who represents Baylor . . . .
>
> . . . .
>
> The lawsuit named Baylor and eight individual defendants . . . .
>
> . . . [Athletics booster William F. Stevens, who attended the hearing,] called the lawsuit "a prototype of a frivolous http://web2.westlaw.com/result/ - Ilawsuithttp://web2.westlaw.com/result/ - I."

Id.; *cf. also* Chuck McCollough, *Losers Told to Pay City for Lawsuit: Dispute Over 2000 Council Elections Ends with Selma's Court Victory*, SAN ANTONIO EXPRESS-NEWS, Feb. 19, 2003, at 1H (describing a summary-judgment order involving city elections).

> The City Council election of 2000 finally is over [after] three losing candidates lost a lawsuit and have been ordered to pay the city more than $86,000.
>
> . . . .
>
> The lawsuit . . . alleged voter irregularities and sought to invalidate the election and keep winners from being seated.
>
> . . . .
>
> . . . [A] three-judge panel issued a summary http://web2.westlaw.com/result/ - Ijudgment http://web2.westlaw.com/result/ - Ifor the city [and settled the lawsuit]. . . .
>
> [Mayor Jim Parma asserted that] "the plaintiffs . . . missed an opportunity to file an appeal of the three-judge panel ruling . . . and Selma wins" . . . .
>
> . . . .

On the other hand, however, we know the Supreme Court of Texas approved summary-judgment practice to reduce costs and to increase the efficient administration of justice. And under Rule 166a of the Texas Rules of Civil Procedure, a claimant or a defending party may petition a court for summary relief in a declaratory-judgment action.[81] But it appears that the 1949 Texas Supreme Court embraced the use of summary-judgment motions in declaratory-judgment trials without carefully or seriously weighing the negative consequences of its decision.[82] This Article, therefore, reviews the practice and strongly recommends that the current supreme court prevent summary-judgment practice in declaratory-judgment trials. Even a cursory review of declaratory-judgment trials shows lower courts have great difficulty trying to harmonize the legal requirements and expectations under Rule 166a and Texas's Uniform Declaratory Judgments Act (UDJA).[83]

To repeat, the Texas Supreme Court approved the summary-judgment rule to terminate legal controversies quickly, economically, and efficiently "when it clearly appears that *only questions of law are involved* and . . . there *are no genuine issues of fact*."[84] But the Texas Legislature also adopted the UDJA "to diminish the delay and expense of proceedings in court."[85] Unlike the summary-

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[But, he added that] the city has a responsibility to recoup the money because taxpayer funds were spent on "a frivolous http://web2.westlaw.com/result/ - llawsuithttp://web2.westlaw.com/result/ - l."

Id.

81. *See* TEX. R. CIV. P. 166a(a) (stating in pertinent part that "[a] party seeking . . . to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof"); TEX. R. CIV. P. 166a(b) (stating in pertinent part that "[a] party against whom . . . a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof").

82. *See generally* Roy W. McDonald, *Summary Judgments*, 30 TEX. L. REV. 285, 285-86 (1952) (discussing the general background behind the Texas Supreme Court's adoption of the summary-judgment rule).

83. TEX. CIV. PRAC. & REM. CODE ANN. § 37.002 (Vernon 1997).

84. Marts *ex rel.* Marts v. Transp. Ins. Co., 11 S.W.3d 699, 706 (Tex. App.—Fort Worth 2003, pet. denied) (emphasis added).

85. Henry W. Simon, *Declaratory Judgments—Questions of Fact*, 11 TEX. L. REV. 351, 354 (1933); *see also* Martin v. Amerman, 133 S.W.3d 262, 265 (Tex. 2004) ("The Declaratory Judgments Act provides an efficient vehicle for parties to seek a declaration of rights under certain instruments . . . ."); Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 472 (Tex. 1993) ("In enacting the Uniform Declaratory Judgments Act, the Texas Leg-

judgment rule, however, the UDJA gives Texas's courts the power *to resolve questions of fact* and *questions of law.*[86] Moreover, the legislature enacted the UDJA to encourage courts to settle disputes and provide relief "from uncertainty and insecurity with respect to rights, status and other legal relations."[87] And unlike the requirements under Rule 166a, the UDJA requires courts to construe and administer the act very liberally to achieve the act's stated goals.[88]

Therefore, at this juncture, the following question begs for an answer: What are the real benefits of allowing or encouraging summary-judgment practice in declaratory-judgment trials? Clearly, the UDJA gives courts considerable discretion and power to settle disputes without entertaining a motion for summary judgment. Furthermore, as discussed more thoroughly in later sections, a critical examination of Texas's case law over the last fifty-five years discloses surprisingly that summary-judgment practice actually increases litigation costs and substantially decreases the efficient administration of justice in declaratory-judgment trials.

But more important, those same analyses also show that summary-judgment practice in declaratory-judgment trials has produced several unintended and undesirable consequences. First, the summary-judgment rule promotes highly superficial, unintelligible, and convoluted rulings. Second, trial judges rarely mention or discuss intelligibly plaintiffs' petitions for declaratory judgment when

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islature has granted a broad right of standing: any person 'whose rights, status or other legal relations *are affected by* a statute' may seek a declaration of those rights."); *infra* Parts III and III(A).

86. *See, e.g., In re* K.T., 107 S.W.3d 65, 73 (Tex. App.—San Antonio 2003, no pet.) ("For instance, if a trial court makes an award of attorney's fees under the Declaratory Judgment Act, it resolves both questions of fact (whether the fees sought are reasonable and necessary), as well as questions of law (whether an award of fees is equitable and just) . . . ."); Henry W. Simon, *Declaratory Judgments—Questions of Fact*, 11 TEX. L. REV. 351, 354 (1933) ("There is no reason [to believe that a desire to diminish court delays and expenses cannot] be accomplished as fully by allowing courts to enter declaratory judgments on questions of fact as [well as] on questions of law.").

87. TEX. CIV. PRAC. & REM. CODE ANN. § 37.002(b) (Vernon 1997); *see also* City of Waco v. Tex. Natural Res. Conservation Comm'n, 83 S.W.3d 169, 177 (Tex. App.—Austin 2002, pet. denied) (concluding that the Uniform Declaratory Judgments Act (UDJA) "provides a basis by which a claimant can obtain a declaration of rights, status, or other legal relations under a writing or a statute. . . . The legislature intended the UDJA to be remedial, to settle and afford relief from uncertainty and insecurity with respect to rights, and to be liberally construed.").

88. TEX. CIV. PRAC. & REM. CODE ANN. § 37.002(b) (Vernon 1997).

opposing parties file motions for summary judgment. Also, allowing trial judges to apply this "harsh" and "drastic" procedural rule in declaratory-judgment trials—without compelling judges to explain intelligibly their reasons for awarding or denying summary relief—lends credence to the argument: Texas judges are biased.

Finally, summary-judgment practice encourages judges to ignore their duty and authority under the UDJA. Again, lower courts have authority to construe and administer the UDJA liberally as well as power to decide both questions of law and questions of fact. However, a motion for summary judgment typically forces trial judges to focus on a single issue—to determine *whether a genuine issue of fact exists.* Arguably, such narrow concentration causes judges to waste an enormous amount of precious resources.

Instead of weighing whether to grant or deny a motion for summary relief, it would be exceedingly more economical and efficient if judges invested time and limited resources deciding whether to award declaratory relief. Focusing solely on the latter would allow and force Texas's judges to perform a proposed two-step analysis, one that would address both questions of fact and questions of law. After all, when declaratory-judgment petitioners ask courts of appeals to review adverse summary rulings, many appellate courts perform a two-step analysis to determine whether petitioners should receive a declaratory judgment.

To help illustrate this and related points, consider the brief facts and the extraordinarily simple controversy in *Gray v. Town of Westlake.*[89] Gray owned a boarding business for dogs located in a residential neighborhood.[90] Gray's neighbors complained about the level of noise and accused Gray of violating Westlake's noise ordinances.[91] Gray insisted, however, that her property was located beyond Westlake's city limits.[92] Out of frustration, the neighbors and Gray sued each other.[93] To help settle the dispute, Westlake intervened and filed a declaratory-judgment action.[94] In

89. No. 2-02-173-CV, 2003 WL 22351652 (Tex. App.—Fort Worth Oct. 16, 2003, pet. denied) (mem. op.).

90. Gray v. Town of Westlake, No. 2-02-173-CV, 2003 WL 22351652, at *1 (Tex. App.—Fort Worth Oct. 16, 2003, pet. denied) (mem. op.).

91. *See id.* (noting that Gray's neighbors filed suit to reduce the noise level).

92. *Id.* at *1.

93. *Id.*

94. *Id.*

the petition, the town asked the court to declare (1) that Gray's property was indeed located within city limits, and (2) that Gray's conduct violated the city's noise ordinances.[95]

Gray and Westlake filed competing motions for partial summary judgment regarding a question of fact—whether Gray's property was actually within Westlake's jurisdiction.[96] Collectively, both parties submitted an abundance of summary-judgment evidence—a residency affidavit, a plethora of paid utility bills, police reports, zoning applications, ordinance applications, sales tax receipts, and maps.[97] By the way, it is important to note that those proffered legal documents would certainly comprise the entire body of evidence that the trial court would have used to help decide whether to award declaratory relief.

Ultimately, the trial court denied Gray's summary-judgment motion, but the judge granted Westlake's motion for partial summary-judgment.[98] Gray then filed a motion for severance, asking the court to sever the city's declaratory-judgment action from her lawsuit.[99] She also asked the judge to finalize the summary judgment order so she could file an appeal.[100] The trial court granted the severance.[101] Shortly thereafter, Gray appealed her adverse summary-judgment ruling and Westlake appealed the trial court's decision to sever its declaratory-judgment action from the remainder of the actions in Gray's lawsuit.[102]

The Fort Worth Court of Appeals quickly concluded: "[T]he trial court did not abuse its discretion [by] severing the declaratory judgment action."[103] But after affirming the severance, the appellate court—like the trial court below—never examined or dis-

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95. *Gray*, 2003 WL 22351652, at *1.

96. *Id.*

97. *Id.* at *1-2.

98. *Id.* at *2.

99. *Id.* at *5. "Gray's suit involves more than one cause of action (*e.g.*, malicious prosecution, abuse of process, civil conspiracy, violation of an ordinance, and declaratory judgment) . . . ." *Id.*

100. Gray v. Town of Westlake, No. 2-02-173-CV, 2003 WL 22351652, at *5 (Tex. App.—Fort Worth Oct. 16, 2003, pet. denied) (mem. op.)

101. *Id.*

102. *See id.* at *4 ("Westlake [argued] that the trial court erred by severing the declaratory judgment actions from the suit . . . because the requirements for severance were not met.").

103. *Id.* at *5.

cussed the merits of Westlake's action for declaratory relief.[104] Incredibly, the appellate court simply ignored that equitable action altogether.[105] It did not cite or discuss a single rule or standard outlining the proper conditions under which a court should grant or deny declaratory relief.[106] Instead, the Fort Worth Court of Appeals—like the trial judge—discussed only the respective motions for partial summary judgment.[107]

Of course, the court of appeals quoted Texas's summary-judgment rules extensively, including the incessantly quoted rule: Summary judgment is proper when "no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law."[108] Finally, to resolve the conflict, the Fort Worth Court of Appeals reversed the trial court's decisions to grant and deny, respectively, Westlake's and Gray's motions for partial summary judgment.[109] Then, in the opinion's very last sentence, the court of appeals actually declared "that Gray's Property [was] not located within the town limits of Westlake."[110]

But again, it is important to repeat: This was an extremely simple case involving a minor conflict among neighbors. In addition, Westlake's petition for declaratory relief was not a monumental request involving complicated facts. So, we must ask, were the trial and appellate courts' deliberations stellar examples of prompt, efficient, and inexpensive justice? Arguably, they were not. Actually, the trial court could have reached the same result that the appellate court issued in a single sentence if the lower court had spent more effort addressing the merits of Westlake's declaratory relief petition. More important, the trial court could have reached that conclusion more quickly, inexpensively, and efficiently than the court of appeals if the trial court had invested less precious time

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104. *See id.* at *4-5 (noting only that "the claims against Westlake would be the proper subject of a suit if independently asserted; and the declaratory judgment actions are not so interwoven with the remaining actions that they involve the same facts and issues").

105. *See Gray*, 2003 WL 22351652, at *4-5 (holding simply that "the trial court did not abuse its discretion in severing the declaratory judgment actions").

106. *Id.*

107. *See id.* (discussing the validity of a Westlake ordinance that purported to include Gray's property within the town).

108. *Id.* at *2.

109. *Id.* at *5.

110. Gray v. Town of Westlake, No. 2-02-173-CV, 2003 WL 22351652, at *5 (Tex. App.—Fort Worth Oct. 16, 2003, pet. denied) (mem. op.).

and resources deciding whether to grant competing summary motions.

Perhaps the most egregious use of the summary-judgment rule occurs when petitioners commence an action for declaratory judgment and only ask a court to interpret allegedly ambiguous language in a contract. In those instances, the court sitting in equity has a relatively simple task: Examine the contract and declare the extent of the parties' rights and obligations. Yet all too often, trial judges waste resources considering the parties' motions for summary relief. Consider, for example, the all-too-familiar controversy in *DDD Energy, Inc. v. Veritas DGC Land, Inc.*[111] Playa Exploration, Inc. and Michael L. Vickers—a landowner—consummated an oil and gas lease agreement.[112] Then Playa assigned its undivided interest in the lease to several other companies, including DDD Energy, Inc.[113]

Shortly thereafter, DDD and Veritas DGC Land, Inc. formed a geophysical services agreement.[114] Under that contract, Veritas agreed to conduct surveys and perform related services on Vickers's land.[115] Additionally, the service agreement contained a clause that required Veritas to defend and indemnify DDD under certain conditions.[116] Veritas had to defend DDD against all third-party claims and legal actions stemming from property damage.[117] And Veritas had to reimburse DDD when DDD paid expenses and settlement costs associated with property damage and various third-party claims and causes.[118]

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111. 60 S.W.3d 880 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

112. DDD Energy, Inc. v. Veritas DGC Land, Inc., 60 S.W.3d 880, 882 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. DDD Energy, Inc. v. Veritas DGC Land, Inc., 60 S.W.3d 880, 882 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

118. *Id.* The agreement stated in pertinent part:

> Veritas shall protect, indemnify, defend and save [DDD], . . . harmless from and against all claims, . . . and causes of actions . . . asserted by third parties on account of . . . damage to property of such third parties, which . . . damage is the result of the negligent act or omission, breach of this Basic Agreement or the Supplemental Agreement, or willful misconduct of Veritas . . . .

Id. (alteration and omissions in original).

During the course of the DDD-Veritas agreement, Brush Cutters—one of Veritas's subcontractors—cleared Vickers's land. But in the process, the subcontractor allegedly destroyed numerous oak and mesquite trees.[119] In an underlying lawsuit, Vickers sued DDD for damages, citing several tort and contract-based causes of action in the complaint.[120] To secure a clear determination of Veritas's obligations under the DDD-Veritas agreement upfront, DDD filed a completely separate declaratory-judgment action, naming Veritas as the defendant. Quite simply, DDD wanted the court sitting in equity to declare (1) that Veritas had a contractual obligation to defend DDD against the underlying lawsuit, and (2) that Veritas would have a duty to indemnify DDD in the event DDD paid sums to settle or defend itself against the underlying lawsuit.[121]

Again, because Rule 166a permits and encourages the practice, both parties immediately filed motions for summary judgment. More disquieting, given that DDD's declaratory-judgment petition only asked the court to interpret words and phrases in the contract, Veritas and DDD's proffered grounds to justify their requests for summary relief were highly unwarranted and superfluous. Specifically, Veritas argued that it should receive summary relief because (1) DDD's breach of contract claim did not present a justiciable issue; (2) DDD's reliance on the indemnity provision in the contract was unenforceable as a matter of law; and (3) Veritas was not liable for the subcontractor's negligence and other torts in the underlying lawsuit.[122] On the other hand, DDD claimed that it should receive partial summary relief because the contract clearly required Veritas "to defend and indemnify DDD from [all] claims asserted in the [underlying] suit."[123]

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119. *Id.*

120. *Id.* The landowner sued DDD for (1) a breach of contract; (2) negligently breaching a duty to manage and administer the lease; (3) simple negligence; (4) negligent misrepresentation; (5) breaching a fiduciary duty; (6) gross negligence; (7) malicious trespass; and (8) for committing other intentional torts. *Id.*

121. *Id.* "DDD [commenced a] suit against Veritas in Harris County seeking a declaratory judgment that Veritas [was] obligated to defend and indemnify DDD, under the terms of the parties' agreement, against claims based on damage to [Vickers's land]." *Id.*

122. *Id.* at 882-83.

123. DDD Energy, Inc. v. Veritas DGC Land, Inc., 60 S.W.3d 880, 882 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

Veritas received only partial summary relief; the trial judge held that the broad "liability indemnity" clause was unenforceable.[124] But DDD asserted that Veritas had two clearly separate contractual duties under that clause—a duty to defend and a duty to indemnify.[125] However, when the trial court awarded partial summary relief to Veritas, it did so without distinguishing those separate contractual obligations and without providing a full, intelligible explanation of its summary ruling. Similarly, the trial judge denied DDD's motion for partial summary judgment outright without an explanation. Veritas appealed its adverse ruling; DDD did not.[126]

The Fourteenth District Court of Appeals affirmed the lower court's summary-judgment ruling in part, finding that Veritas had no duty to defend DDD against or reimburse DDD for the cost associated with third-party negligence claims appearing in the underlying lawsuit.[127] But the appellate court reversed the judgment and remanded the case for further proceedings.[128] It instructed the trial judge to decide whether Veritas had an obligation to defend DDD against non-negligence based actions in the underlying case.[129] The court of appeals also told the lower court to determine whether Veritas must reimburse DDD for settling any non-negligence based claims in the underlying lawsuit.[130]

Clearly, the trial court should have addressed those questions right away. Even more relevant, the trial judge could have decided those questions quicker, more efficiently, and less expensively if those multi-pronged and competing motions for summary relief

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124. *Id.*

125. *Id.* at 882.

126. *Id.* at 883.

> On appeal, DDD [argued] the trial court incorrectly held [that] the indemnity clause [was] unenforceable and assert[ed] three separate arguments: the express negligence rule [did] not govern this case because only Veritas was negligent; the fair notice requirements [were] not applicable . . . because Veritas had actual notice of the indemnity provision; and, even if the express negligence rule [was] applicable, it [did] not bar DDD's request for indemnification [regarding] the non-negligence claims [appearing in the underlying lawsuit].

Id.

127. *DDD Energy*, 60 S.W.3d at 885.

128. *Id.*

129. *Id.*

130. *Id.*

had not distracted the trial court and demanded greater attention. Once more, a full-blown declaratory-judgment hearing—on the merits—would have allowed the trial court to carefully consider and decide both questions of fact and questions of law surrounding whether Veritas had a duty to defend and a duty to indemnity.

Without a doubt, illustrating two cases to prove a point will not convince a skeptical audience that summary-judgment practice is a major problem in Texas's declaratory-judgment trials. That awareness, therefore, explains the impetus behind this Article. Briefly, here is the essence of the problem. Generally, in ever-increasing numbers, alleged third-party victims are suing insured Texans in "underlying" personal injury lawsuits.[131] And just as frequently,

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131. *See, e.g.*, David Pasztor, *Second Death for Asbestos Proposal*, AUSTIN AM.-STATESMAN, July 26, 2003, at B3 ("[The] insurance companies http://web2.westlaw.com/result/ - Iand business lobbyists have invested significant time and effort seeking legislation to cut the number http://web2.westlaw.com/result/ - Iof asbestos lawsuits http://web2.westlaw.com/result/ - Iin Texas. They say frivolous and inconsequential asbestos lawsuits http://web2.westlaw.com/result/ - Iare clogging courts and bankrupting companies."); *Premium Importance*, FT. WORTH STAR-TELEGRAM, Mar. 24, 2003, at B12 (considering reasons for the rise in liability insurance premiums).

> Gov. Rick Perry said "in many parts of the state, access to quality care is increasingly threatened by a medical lawsuit abuse crisis."
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> . . . .
>
> But evidence doesn't support the conclusion that frivolous suits and runaway juries are driving medical malpractice insurance rates through the roof.
>
> For instance, the Office of Court Administration has recorded a steady drop in the number http://web2.westlaw.com/result/ - Iof personal http://web2.westlaw.com/result/ - Iinjury http://web2.westlaw.com/result/ - Ilawsuits http://web2.westlaw.com/result/ - Inot involving a motor vehicle, the category that would include medical malpractice: from 31,050 suits http://web2.westlaw.com/result/ - Iin 1994-95 to 19,590 in 2000-2001.
>
> . . . .
>
> [But the] Texas Department of Insurance showed *a 4 percent increase in claims since 1996* . . . , far short of the surge in insurance rates.
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> . . . .
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> *Litigation costs have, indeed, gone up.* But at least one study shows that they directly follow medical inflation.
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> . . . .
>
> A bigger culprit appears to be business practices by the insurance industry.
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> . . . .
>
> [W]hen investments faltered, and companies found themselves financially strapped, rates started rising and some companies cratered.

Id. (emphasis added).

insureds are asking insurers to defend them against third-party suits and to make reimbursements for out-of-pocket and settlement expenses in those underlying suits. But significant numbers of insurers refuse to defend or indemnify, causing both insurers and insureds to commence declaratory-judgment actions.

Ostensibly, insurers and insureds petition Texas's courts to declare rights and obligations under various liability and indemnity insurance contracts. But in the process, both parties frequently file thousands of remarkably unnecessary, burdensome, and expensive motions for summary judgment. Therefore, the limited purpose of this Article is to highlight and discuss summary-judgment abuses and misapplications in Texas's declaratory-judgment trials within these vast and important areas of litigation.

Part II presents a fairly brief overview of the evolution, scope, and purpose of summary-judgment practice in Texas. In the process, we compare the similarities and differences between Texas's and federal summary-judgment rules. In Part II, the important distinctions between Texas's "traditional" and "no-evidence" summary-judgment rules appear.

Part III presents a review of Texas's Uniform Declaratory Judgments Act and the act's stated purpose. Additionally, a careful review of Texas's cases reveals that confusion exists over whether an action for a declaratory judgment is a "lawsuit," "trial," or "trial by judge," because a petition for declaratory relief is an equitable action. In addition, serious debate exists over whether a petition for declaratory judgment is a cause of action—one that requires a plaintiff to prove a *prima facie* case. Therefore, Part III addresses those questions, for they have contributed to awkward and unintelligible rulings involving summary-judgment motions in declaratory-judgment proceedings.

Part IV highlights trial courts' mandatory duties and their level of discretion when deciding whether to grant summary judgment in Texas. Part IV also discusses trial judges' duties and discretionary powers under Texas Uniform Declaratory Judgments Act. Evidence appearing in Part IV shows unequivocally that Texas's judges have the power to decide questions of fact and law when considering whether to award declaratory relief, which negates the perceived need to entertain motions for summary relief.

As mentioned earlier, collectively Texas's insurers and disgruntled insureds commence an inordinate number of declaratory-judg-

ment actions each year. They ask courts to declare whether insurers have a contractual duty to defend insureds against third-party underlying lawsuit claims. They also petition trial judges to declare whether insurers have a duty to indemnify insureds after insureds pay out-of-pocket expenses for first-party injuries and after insureds pay money to settle third-party claims. Insurers are significantly more likely to commence declaratory actions to defend themselves; therefore, the insurance industry, practitioners, and others called such filings a form of "insurance defense."

Part V, therefore, outlines (1) the important distinction between liability and indemnity (reimbursement) insurance contracts, and (2) the difference between first-party and third-party claims and causes of action. In addition, Part V highlights and reviews several settled doctrines for construing and interpreting insurance contracts in Texas. Put simply, trial judges must employ those doctrines to interpret insureds' and insurers' duties and rights under liability and indemnity insurance contracts.

Part VI presents a careful analysis of judges' *mandatory duties* when they agree to declare rights and obligations under insurance contracts. To repeat, they must use settled principles of contract construction and interpretation. And of course, those settled doctrines allow courts to entertain and resolve *both questions of fact and questions of law*. But Texas currently allows litigants to file summary-judgment motions in declaratory-judgment trials. Theoretically, under settled summary-judgment doctrine, judges may consider only questions of law. In addition when evidence suggests there are no genuine issues of fact, judges must grant the motion and render judgment in the action—including declaratory-judgment actions.

Clearly, these competing sets of legal doctrines can generate and have generated extremely inconsistent rulings, very bad law, and highly unintelligible decisions where insurers and insureds simply asked courts to declare legal rights and obligations under liability and indemnity insurance contracts. More worrisome, Part VI reveals that an exceedingly large number of trial judges do not even mention, discuss, appreciate, or understand the magnitude of this problem. Instead, courts cavalierly or intentionally apply summary-judgment rules automatically and quite inappropriately to achieve an outcome.

Texas's appellate courts, therefore, often inherit the expensive and hefty burden of trying to decipher trial courts' unduly superficial, unintelligible, and unwarranted rulings. However, Part VI also reveals that Texas's courts of appeals' interventions often make matters worse. Several examples of appellate courts' highly questionable summary-judgment rulings appear in Part VI. Those duty-to-defend and duty-to-indemnify decisions contribute to the notion that Texas's declaratory-judgment trials are unfair. Even more disturbing, those opinions support the view that Texas's appellate courts—either consciously or unconsciously—support lower courts' allegedly biased, convoluted, and unwarranted declaratory-judgment rulings.

Finally, the Conclusion invites the Texas Supreme Court to weigh critically the summary-judgment problems outlined in this Article. It asks the supreme court to consider former Texas Supreme Court justices' arguments about the pitfalls, dangers, and cavalier use of summary-judgment practice generally. And more important, the Article calls for the abolishment of summary-judgment practice from declaratory-judgment trials in Texas.

II. BRIEF OVERVIEW—FEDERAL AND TEXAS'S SUMMARY-JUDGMENT RULES

A. *Federal Motions for Summary Judgment*

Over the years, federal courts have listed several reasons for supporting a summary-judgment rule: (1) to "facilitate litigation,"[132] (2) "to expedite trial procedure,"[133] (3) "to assess whether trial is necessary,"[134] and (4) to allow courts to award summary relief where evidence on file reveals there are no genuine questions of fact remaining for a trier of facts.[135] Thus, Rule 56(a) of the

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132. Barkhausen v. Cont'l Ill. Nat'l Bank & Trust Co. of Chicago, 115 N.E.2d 640, 645 (Ill. App. Ct. 1953) ("The purpose of the statute is to facilitate litigation and to expedite trial procedure . . . .").

133. *Id.*

134. Halprin v. Equitable Life Assurance Soc'y of the U.S., 267 F. Supp. 2d 1030, 1034 (D. Colo. 2003) (declaring that "[t]he purpose of a summary judgment motion is to assess whether trial is necessary").

135. *See* Engl v. Aetna Life Ins. Co., 139 F.2d 469, 472 (2d Cir. 1943) (discussing the appropriateness of summary judgments).

> [W]e should go beyond the bare words of the summary-judgment rule to the reasons behind it. . . . [T]he history . . . of this procedure shows that it is intended to permit "a

Federal Rules of Civil Procedure permits a claimant to "move with or without supporting affidavits for a summary judgment" in an action at law or in a declaratory-judgment action.[136] And under Rule 56(b), a defendant may move for summary relief—with or without supporting affidavits—in the same suit.[137]

Unquestionably, federal courts may grant a motion for summary judgment in actions at law or in equity, including an action for declaratory judgment.[138] But a close reading of many federal cases strongly suggests a pending trial by jury or a request for a jury trial is a necessary condition before a party can petition a court for summary relief. Consider, for example, the Supreme Court's language in *Anderson v. Liberty Lobby, Inc.*,[139] arguably the seminal summary-judgment case. In *Anderson*, the Court stated: "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[140] Similar language also appears frequently in federal appellate courts' decisions.[141]

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party to pierce the allegations of fact in the pleadings and to obtain relief by summary judgment where [detailed] facts . . . in affidavits, depositions, and admissions on file show that there are no genuine issues of fact to be tried."

Id. (quoting 3 MOORE'S FEDERAL PRACTICE 3175).

136. FED. R. CIV. P. 56(a).

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

Id.

137. FED. R. CIV. P. 56(b). "A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof." *Id.*; *see also* Engl v. Aetna Life Ins. Co., 139 F.2d 469, 472 (2d Cir. 1943) (explaining that "[t]he federal summary judgment proceeding is the most extensive of any jurisdiction in that it is equally available to plaintiffs and defendants and in all forms and kinds of civil actions").

138. *Cf.* Barkhausen v. Cont'l Ill. Nat'l Bank & Trust Co. of Chicago, 115 N.E.2d 640, 645 (Ill. App. Ct. 1953) (noting that "summary judgment may be entered 'in any action . . . at law or in equity, . . . upon a contract, express or implied' "). "The purpose of the statute is to . . . expedite trial procedure, an end as desirable in a suit for a declaratory judgment as in any other proceeding based on a contract." *Id.* (citation omitted).

139. 477 U.S. 242 (1986).

140. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

141. *See, e.g.*, Roberts v. State Farm Mut. Auto. Ins. Co., 61 Fed. Appx. 587, 590 (10th Cir. 2003) (holding "that summary judgment was proper because no reasonable jury could

Moreover, federal summary-judgment cases are replete with another arguably misleading or narrow rule: A plaintiff who moves for summary judgment must prove all *elements of a cause of action*.[142] Among other implications, this suggests that federal judges will consider a motion for summary judgment and award relief only in those instances where plaintiffs have presented *prima facie* evidence[143] to prove *previously enumerated* elements of a *prima facie* case involving a tort, a breach of contract, or some statutory violation.[144]

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have concluded that State Farm's investigation and evaluation of his claim was unreasonable"); Loral Fairchild Corp. v. Matsushita Elec., 266 F.3d 1358, 1361 (2d Cir. 2001) (citing *Anderson* and embracing the view that "[s]ummary judgment is proper only when no reasonable jury could return a verdict for the nonmoving party"); Bell Atl. Network Servs., Inc. v. Covad Communications Group, 262 F.3d 1258, 1267 (4th Cir. 2001) (quoting *Anderson* and adopting the view that summary judgment is proper only when "no reasonable jury could return a verdict for the nonmoving party"); Telemac Cellular Corp. v. Topp Telecom, Inc., 247 F.3d 1316, 1327 (Fed. Cir. 2001) ("Summary judgment is proper if no reasonable jury could find that the patent is not anticipated."); Halperin v. Kissinger, 807 F.2d 180, 189 (D.C. Cir. 1986) (commenting on application of the rule).

> A straightforward application of [the summary-judgment rule] . . . requires . . . that defendants adduce sufficient facts that no reasonable jury, looking at the evidence in the light most favorable to, and drawing all inferences most favorable to, the plaintiffs, could conclude that it was objectively unreasonable for the defendants to be acting for national security reasons.

Id.

142. *See, e.g.*, Lowe v. Aldridge, 958 F.2d 1565, 1569 (11th Cir. 1992) (concluding that "[t]o survive a motion for summary judgment, a plaintiff must at least establish the necessary elements of his or her cause of action"); MacCormack v. City of Prairie Vill., No. 00-2405-CM, 2001 WL 309412, at *1 (D. Kan. Mar. 12, 2001) (granting defendant's motion because the plaintiff did not meet "his burden on summary judgment to establish essential elements of his causes of action against defendant"); *In re* McKenzie, 225 B.R. 377, 379 (N.D. Ohio 1998) (concluding that a plaintiff who moves for summary judgment "must demonstrate all elements of the cause of action").

143. *See* Virginia v. Black, 538 U.S. 343, 369 (2003) (Stevens, J., concurring) (defining *prima facie* evidence).

> Typically, "prima facie evidence" is defined as: "Such evidence as, in the judgment of the law, is sufficient to establish a given fact . . . and which if not rebutted or contradicted, will remain sufficient. [Such evidence], if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports, but [it] may be contradicted by other evidence."

Id. (quoting BLACK'S LAW DICTIONARY 1190 (6th ed. 1990)) (alterations and omission in original).

144. *See* Pace v. S. Ry. Sys., 701 F.2d 1383, 1391 (11th Cir. 1983) ("By definition, failure to establish a prima facie case means that the plaintiff has failed to proffer proof sufficient to impose even a burden of rebuttal on the defendant."). "While establishing a prima facie case in and of itself does not always suffice . . . to survive a motion for summary judgment, [a] failure to establish a prima facie case warrants summary judgment." *Id.* (ci-

It is exceedingly clear, however, that plaintiffs petition federal courts for declaratory relief all the time; they ask district court judges—rather than juries—to interpret the language in, say, contracts; and they ask federal district judges to declare rights and obligations under those contractual agreements. Yet it is equally clear that plaintiffs do not have to prove *specific, identifiable elements* to establish a *prima facie* case to receive declaratory relief.[145] On the other hand, plaintiffs certainly have to present some *prima facie* evidence before federal courts award declaratory relief.[146]

Additionally, federal district courts often award summary relief to movants—who might be plaintiffs, defendants, or both. Of course, under Rule 56, the party requesting a summary judgment has an initial burden.[147] The movant must explain to the court the basis for the motion; and the movant must identify "those portions of the pleadings, depositions, interrogatories, and admissions . . . that . . . demonstrate the absence of genuine issues for trial."[148] After the movant properly presents evidence supporting a summary-judgment motion, the opposing party "must respond with

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tation omitted); *see also In re* Grand Jury Proceedings in Matter of Fine, 641 F.2d 199, 203 (5th Cir. 1981) (adopting the definition of a *prima facie* case appearing in Black's Law Dictionary: "[A] case which has proceeded upon sufficient proof to that stage where it will support [a] finding if evidence to [the] contrary is disregarded").

145. Unlike the requirements involving an action for negligence where the plaintiff has asked for a trial by jury, a petitioner for declaratory relief has no duty to present *prima facie* evidence that will support specific elements. Quite simply, the petitioner need only produce the contract or instrument that contains the controversial language. And unlike trials on the merits involving various causes of action, declaratory-judgment actions rarely involve genuine issues or questions of fact. Instead, the petitioner wants the court to declare *as a matter of law* that a clause means this or that. And like Texas's courts, federal district courts increasingly entertained motions for summary judgment in declaratory-judgment trials.

146. *Cf.* United States v. Stephens, 445 F.2d 192, 198 (3d Cir. 1971) ("By definition, a *prima facie* case entails a quantum of facts supporting a given legal proposition. Without facts, the case is simply not made. Conclusory averments are insufficient, and a statement of the ultimate legal principle is no substitute for the necessary specifics to support it."); Allied Princess Bay Co. No. 2 v. Atochem N. Am., Inc., 855 F. Supp. 595, 605 (E.D.N.Y. 1993) (declaring that "[a]fter a plaintiff has established its prima facie case, the plaintiff is entitled to a declaratory judgment unless the defendant establishes one of three statutory affirmative defenses").

147. FED. R. CIV. P. 56.

148. Halprin v. Equitable Life Assurance Soc'y of the U.S., 267 F. Supp. 2d 1030, 1034 (D. Colo. 2003); *see also* Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (noting that "a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion").

specific facts showing the existence of a genuine factual issue to be tried."[149] These facts may be established "by any of the kinds of evidentiary materials listed in Rule 56(c),[150] except the mere pleadings themselves."[151]

B. *Texas's "Traditional" Summary-Judgment Motion—Texas Rules of Civil Procedure 166a(a) and 166a(b)*

Two fairly important points should be mentioned at this juncture. First, once the Texas Supreme Court decided to allow summary-judgment practice in Texas, it did not follow the federal model completely. Although the court embraced the original version of Federal Rule 56,[152] it refused to adopt later amendments to that rule.[153] Furthermore, in fairly recent years, commentators and others have encouraged the supreme court to harmonize summary-

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149. *Halprin*, 267 F. Supp. 2d at 1034; *see also* Otteson v. United States, 622 F.2d 516, 519 (10th Cir. 1980) (quoting Coleman v. Darden, 595 F.2d 533, 536 (10th Cir. 1979)); FED. R. CIV. P. 56(e) (setting the requirements for the adverse party to respond).

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Id.

150. FED. R. CIV. P. 56(c).

> The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Id.

151. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

152. *See* Roy W. McDonald, *Summary Judgments*, 30 TEX. L. REV. 285, 286 (1952) ("In accepting the practice, the supreme court elected to adopt, with minor textual changes, the language of Federal Rule 56 as promulgated in 1938.").

153. Roy W. McDonald, *Summary Judgments*, 30 TEX. L. REV. 285, 286 (1952) ("[T]he court ignored the amendments to the federal rule which became effective March 19, 1948.").

judgment practice in Texas with that found in federal courts.[154] But, as of this writing, the Texas Supreme Court continues to ignore those suggestions.[155]

Second, although Texas summary-judgment practice differs significantly from federal practice,[156] both jurisdictions approved the use of summary-judgment motions for similar reasons. In particular, Texas selected the procedural rule "to eliminate the delay and expense which result from paper issues [rather than from] factual issues."[157] Also, summary relief allows the trial judge "to brush aside groundless allegations in the pleadings and to [dispose of an action promptly] where a trial would be an empty formality."[158] However, there are two types of summary-judgment motions in Texas—the traditional and the no-evidence motions.

Under Texas Rules of Civil Procedure 166a(a)[159] and 166a(b)[160] respectively, plaintiffs and defendants may file and seek relief under a traditional summary-judgment motion. And whether the

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154. *See* Casso v. Brand, 776 S.W.2d 551, 556-57 (Tex. 1989) ("[S]ome commentators have urged us to adopt the current federal approach to summary judgments generally . . . .").

155. *See id.* ("[W]e believe our own procedure eliminates patently unmeritorious cases while giving due regard for the right to a jury determination of disputed fact questions.").

156. *See generally* Sheila A. Leute, Comment, *The Effective Use of Summary Judgment: A Comparison of Federal and Texas Standards*, 40 BAYLOR L. REV. 617, 619-22 (1988) (outlining major differences between summary-judgment practice in Texas and in federal courts).

157. Roy W. McDonald, *Summary Judgments*, 30 TEX. L. REV. 285, 286 (1952); *see also* Cluett v. Med. Protective Co., 829 S.W.2d 822, 825 (Tex. App.—Dallas 1992, writ denied) (concluding that summary relief to provide a procedure to terminate a controversy summarily when it clearly appears that only a question of law is present and genuine issues of fact are not).

158. Roy W. McDonald, *Summary Judgments*, 30 TEX. L. REV. 285, 286 (1952); *see also* Gulbenkian v. Penn, 151 Tex. 412, 416, 252 S.W.2d 929, 931 (1952) (embracing the view that the purpose of summary judgment is to eliminate "patently unmeritorious claims or untenable defenses; not . . . to deprive litigants of their right to a full hearing on the merits of any real issue of fact" (quoting Kaufman v. Blackman, 239 S.W.2d 422, 428 (Tex. Civ. App.—Dallas 1951, writ ref'd n.r.e.))).

159. TEX. R. CIV. P. 166a(a).

> A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to amount of damages.

Id.

movant is a plaintiff or defendant, the movant's burden of proof does not vary.[161] First, a movant must state specific grounds to justify relief under a traditional summary-judgment motion.[162] Second, where a plaintiff has filed an action and asked for a trial by jury or judge, the defendant or nonmoving party must overcome a specific burden to prevail. The defendant must either (1) disprove at least one element of the plaintiff's theories of recovery,[163] or (2) plead and conclusively establish each element of an affirmative defense,[164] thereby rebutting the plaintiff's cause of action.[165]

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160. TEX. R. CIV. P. 166a(b). "A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." *Id.*

161. *See* Pa. Pulp & Paper Co. v. Nationwide Mut. Ins. Co., 100 S.W.3d 566, 569 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (holding that "[w]hen both parties move for summary judgment, each party must carry its own burden, and neither can prevail because of the failure of the other to discharge its burden" (quoting *INAC*, 56 S.W.3d at 247)); INAC Corp. v. Underwriters at Lloyd's, 56 S.W.3d 242, 247 (Tex. App.—Houston [14th Dist.] 2001, pet. dism'd) (concluding that because "[e]ach [party was] a movant, the burden is the same for both parties: to establish entitlement to a summary judgment by conclusively proving all the elements of the claim or defense *as a matter of law*" (emphasis added)).

162. TEX. R. CIV. P. 166a(c) (stating, in relevant part, that the "motion for summary judgment shall state the specific grounds [for summary relief]"); *see also* Nixon v. Mr. Prop. Mgmt., Inc., 690 S.W.2d 546, 548 (Tex. 1985) (adopting the position that a "movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law").

163. *See* Havlen v. McDougall, 22 S.W.3d 343, 345 (Tex. 2000) (concluding that "[a] party moving for summary judgment must establish its right to summary judgment on the issues expressly presented to the trial court by conclusively proving all elements of the movant's cause of action or defense *as a matter of law*" (emphasis added)); Cathey v. Booth, 900 S.W.2d 339, 341 (Tex. 1995) (ruling that "[a] defendant who conclusively negates at least one of the essential elements of each of the plaintiff's causes of action or who conclusively establishes all of the elements of an affirmative defense is entitled to summary judgment").

164. *See* Pustejovsky v. Rapid-Am. Corp., 35 S.W.3d 643, 646 (Tex. 2000) (declaring that a defendant must establish each element of an affirmative defense when it moves for summary judgment based on that affirmative defense); Montgomery v. Kennedy, 669 S.W.2d 309, 310-11 (Tex. 1984) (articulating that defendants moving for summary judgment must conclusively prove all the elements of the defense).

165. *See* City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 (Tex. 1979) (declaring that a "trial court may not grant a summary judgment by default for lack of an answer or response [from] the non-movant when the movant's summary judgment proof is legally insufficient"). "[T]he non-movant's failure to answer or respond cannot supply by default the summary judgment proof necessary to establish the movant's right." *Id.* "[T]he non-movant must expressly present to the trial court any reasons [that attempt] to *avoid* [a] movant's entitlement . . . ." *Id.*

Finally, an earlier observation involving federal cases needs repeating here. A close reading of Texas's cases suggests that movants must establish two conditions before a court will consider a request for summary relief: (1) a trial is pending,[166] and (2) evidence that the movant intends to raise a particular theory of recovery in a court of law and establish a *prima facie* case or a legal defense by proving specific elements.[167] However, the traditional summary-judgment rule permits a court to award summary relief in every civil action[168]—at law and in equity, including actions for declaratory judgment[169]—as long as the court finds a "meritorious ground."[170]

C. *Texas's "No-Evidence" Summary-Judgment Motion—Texas Rule of Civil Procedure 166a(i)*

In 1997, the Texas Supreme Court approved an addition to Texas Rule of Civil Procedure 166a.[171] Under the then-new paragraph

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166. *See* Roy W. McDonald, *Summary Judgments*, 30 TEX. L. REV. 285, 288-89 (1952) (noting that "[a] summary judgment disposing of the entire action is proper when the trial court . . . is satisfied that 'there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law'"). "The court's problem on such a motion is whether the evidence . . . would compel the submission of issues of fact to the jury . . . . So applied, the rule does not violate the constitutional right to a jury trial . . . ." *Id.*; *see also* Investors Ins. Co. of Am. v. Breck Operating Corp., No. Civ.A. 1:02-CV-122-C, 2003 WL 21056849, at *2 (N.D. Tex. May 8, 2003) ("To defeat a properly supported motion for summary judgment, the non-movant must present more than a mere scintilla of evidence. Rather, the non-movant must present sufficient evidence upon which a jury could reasonably find in the non-movant's favor." (citation omitted)).

167. *See* Holy Cross Church of God in Christ v. Wolf, 44 S.W.3d 562, 566 (Tex. 2001) (citing TEX. R. CIV. P. 166a(c) and concluding that "[a] party moving for summary judgment must conclusively prove all elements of its cause of action or defense as a matter of law").

168. *See* Roy W. McDonald, *Summary Judgments*, 30 TEX. L. REV. 285, 286 (1952) (indicating that the summary-judgment rule applies to all types of civil actions).

169. *See* Pan Am. Petroleum Corp. v. Tex. Pac. Coal & Oil Co., 320 S.W.2d 915, 916 (Tex. Civ. App.—El Paso 1959, writ ref'd n.r.e.) (stressing that "Rule 166-A of the Texas Rules of Civil Procedure provides that a summary judgment may be granted in favor of the movant upon all or any part of the law suit where plaintiff is seeking a declaratory judgment [and noting that this] rule has been followed and upheld many times").

170. *See* Phillips Petroleum Co. v. St. Paul Fire & Marine Ins. Co., 113 S.W.3d 37, 39 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (concluding that "[w]hen a motion for summary judgment raises multiple grounds, [an appellate court] may affirm to the extent that any ground is meritorious").

171. The Texas Supreme Court amended Texas Rule of Civil Procedure 166a on August 15, 1997, by including a new subsection (i). That section became effective on September 1, 1997. TEX. R. CIV. P. 166a, 948-49 S.W.2d (Tex. Cases) XXXV, XXXV-XLI (1997).

(i), a party may petition a court for summary relief by filing a no-evidence summary-judgment motion.[172] Put simply, "[t]he purpose of a no-evidence summary judgment motion is to pierce the pleadings and to assess the proof [for determining] whether there is a genuine need for trial."[173] Certainly, this goal comports with the stated purpose of the traditional summary-judgment rule.[174]

Under the no-evidence rule, however, the movant and nonmovant have different rights and burdens. Rule 166a(i) permits a movant to petition a court for summary judgment after an "adequate opportunity for discovery."[175] Furthermore, to receive relief, the movant must establish that no evidence exists to support an essential element of a nonmovant's claim or defense.[176] It must be stressed, however, that the no-evidence motion "must specifically state the elements for which there is no evidence."[177] But there appears to be a paradox: A movant does not have to present any

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172. TEX. R. CIV. P. 166a(i).

> No-Evidence Motion. After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.

Id.

173. Benitz v. Gould Group, 27 S.W.3d 109, 112 (Tex. App.—San Antonio 2000, no pet.).

174. *See* Marts *ex rel.* Marts v. Transp. Ins. Co,. 111 S.W.3d 699, 706 (Tex. App.—Fort Worth 2003, pet. denied) (concluding that "[t]he purpose of the summary judgment rule is to provide a method of summarily terminating a case when it clearly appears that only questions of law are involved and that there are no genuine issues of fact").

175. TEX. R. CIV. P. 166a cmt. (1997) ("A discovery period set by pretrial order should be adequate opportunity for discovery unless there is a showing to the contrary, and ordinarily a motion under paragraph (i) would be permitted after the period but not before."). The Texas Supreme Court's August 15, 1997, order approving subsection (i) stated: "The comment appended to these changes, unlike other notes and comments in the rules, is intended to inform the construction and application of the rule . . . ." TEX. R. CIV. P. 166a, 948-49 S.W.2d (Tex. Cases) XXXV (1997).

176. TEX. R. CIV. P. 166a(i) (stating that a movant's claim must establish that there is no evidence for one or more essential elements of a claim or defense).

177. Springer v. Am. Zurich Ins. Co., 115 S.W.3d 582, 584 (Tex. App.—Waco 2003, pet. denied); TEX. R. CIV. P. 166a cmt. (1997) ("The motion must be specific in challenging the evidentiary support for an element of a claim or defense; paragraph (i) does not authorize conclusory motions or general no-evidence challenges to an opponent's case.").

evidence to support the motion.[178] To be sure, the movant's arguably light burden[179] has generated a substantial amount of controversy.[180] Very likely, it will continue to do so.

On the other hand, the no-evidence rule puts the greater burden on the nonmovant to garner sufficient evidence to go to trial.[181] Rule 166a(i) does not require the nonmovant "to marshal its proof." Instead, the nonmovant "need[s] only [to] point out evidence that raises a fact issue on the challenged elements."[182] If the nonmovant does not produce evidence on one or more essential elements of his claim, the court must grant the summary judgment.[183] Conversely, a no-evidence summary judgment is not proper if the nonmovant presents "more than a scintilla of probative evidence to raise a genuine issue of material fact."[184]

Finally, unlike a traditional motion for summary relief, "[a] no-evidence summary judgment is essentially a pretrial directed verdict."[185] Stated simply, "the party with the burden of proof at trial will have the same burden of proof in a [no-evidence] summary

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178. TEX. R. CIV. P. 166a cmt. (1997) ("Paragraph (i) authorizes a motion for summary judgment *based on the assertion* that . . . there is no evidence to support one or more specified elements of an adverse party's claim or defense." (emphasis added)).

179. *See* TEX. R. CIV. P. 166a cmt. (1997) (contrasting 166a(i) with 166a(a) and 166a(b)). "Paragraph (i) does not apply to ordinary motions for summary judgment under paragraphs (a) or (b), in which the movant must prove it is entitled to judgment by establishing each element of its own claim or defense as a matter of law or by negating an element of the respondent's claim or defense as a matter of law." *Id.*

180. *Cf.* Robert W. Clore, Comment, *Texas Rule of Civil Procedure 166a(i): A New Weapon for Texas Defendants*, 29 ST. MARY'S L.J. 813, 816-17 (1998) (noting that "[p]roponents laud the no-evidence motion for its capacity to relieve an overburdened state judiciary and reduce exorbitant litigation expenses by allowing judges to remove unmeritorious cases from their dockets"). "By contrast, those opposed to the no-evidence motion contend that it . . . further shifts the balance of power in Texas courts to defendants. Notwithstanding the controversy surrounding the rule, summary judgments in Texas are now more likely to be granted under the amended rule than under the old rule . . . ." *Id.*

181. *See* Lampasas v. Spring Ctr., Inc., 988 S.W.2d 428, 432 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (explaining that "[t]he new no evidence summary judgment shifts the burden of proof to the nonmovant to present enough evidence to be entitled to a trial").

182. TEX. R. CIV. P. 166a cmt. (1997).

183. TEX. R. CIV. P. 166a(i).

184. Moore v. K Mart Corp., 981 S.W.2d 266, 269 (Tex. App.—San Antonio 1998, pet. denied).

185. King Ranch, Inc. v. Chapman, 118 S.W.3d 742, 750 (Tex. 2003); *see also* Taylor-Made Hose, Inc. v. Wilkerson, 21 S.W.3d 484, 490 (Tex. App.—San Antonio 1999, pet. denied) (op. on reh'g) ("'A no-evidence summary judgment is essentially a pretrial directed verdict,' and we apply the same legal sufficiency standard in reviewing a no-evi-

judgment proceeding."[186] In addition, "[t]he amount of evidence required to defeat a no-evidence motion for summary judgment parallels the directed verdict and the no-evidence standard on appeal of jury trials."[187] This raises, therefore, a fairly interesting question: May litigants file a no-evidence summary-judgment motion in a declaratory-judgment hearing?

Clearly, Rules 166a(a) and 166a(b) permit litigants to file a traditional motion for summary judgment in a declaratory-judgment action. Rule 166a(i), however, does not state explicitly that a movant has a right to file a no-evidence motion in such a proceeding, and the 1997 comments do not discuss the issue. Arguably, granting a no-evidence motion in a declaratory-judgment hearing is highly improper when petitioners only ask the judge to interpret rights and obligations under, say, a disputed contract. And the reasons for this position are not terribly complicated.

First, unlike their burden in a court of law before a jury, petitioners do not have to produce *prima facie* evidence in a declaratory judgment before the judge interprets the contract. Second, if a no-evidence summary judgment is indeed a pretrial directed verdict, it is hard to see its relevance in a declaratory-judgment proceeding where complainants simply ask a court for an interpretation of rights and obligations. Yet some of Texas's trial courts have entertained no-evidence summary-judgment motions in a declaratory-judgment action.[188] And they have done so without clearly ex-

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dence summary judgment as we apply in reviewing a directed verdict." (quoting *Moore*, 981 S.W.2d at 269)).

186. Barraza v. Eureka Co., 25 S.W.3d 225, 231 (Tex. App.—El Paso 2000, pet. denied).

187. David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 54 BAYLOR L. REV. 1, 66 (2000); *see also* Jackson v. Fiesta Mart, Inc., 979 S.W.2d 68, 70 (Tex. App.—Austin 1998, no pet.) ("Like a directed verdict, then, the task of the appellate court is to determine whether the plaintiff has produced any evidence of probative force to raise fact issues on the material questions presented."). "The appellate court must consider all of the evidence in the light most favorable to the party against whom the no-evidence summary judgment was rendered; every reasonable inference must be indulged in favor of the nonmovant, and any doubts resolved in its favor." *Id.*

188. *See, e.g.*, Sunnyside Feedyard, L.C. v. Metro. Life Ins. Co., 106 S.W.3d 169, 171 (Tex. App.—Amarillo 2003, no pet.) (permitting Metropolitan Life to file a no-evidence summary-judgment motion in a declaratory-judgment action and awarding both summary relief under the motion and declaratory relief); Pace Concerts, Ltd. v. Resendez, 72 S.W.3d 700, 701-02 (Tex. App.—San Antonio 2002, pet. denied) (allowing a no-evidence motion where the complainant filed a declaratory-judgment action as an affirmative defense to a breach-of-contract lawsuit); Law Offices of Lin & Assocs. v. Ho, No. 14-01-01265-CV, 2002

plaining how a no-evidence summary-judgment motion contributes to the inexpensive, efficient, and timely administration of justice in a declaratory-judgment hearing when petitioners only want a court to interpret rights and obligations under arguably ambiguous contracts.

To help illustrate the problem, consider the litigants' and courts' actions in *Chickasha Cotton Oil Co. v. Houston General Insurance Co.*[189] Chickasha owned and operated an electric cotton gin in Commerce, Texas.[190] The gin was located next to a chemical company that manufactured and distributed arsenic-laced pesticides.[191] Chickasha used arsenic acid as a defoliant to treat its cotton fields before harvesting the cotton.[192] In an underlying suit, third-party complainants sued Chickasha for polluting the atmosphere and nearby land with arsenic.[193] Shortly thereafter, Chickasha filed a declaratory-judgment action.[194] The alleged polluter asked the trial judge to determine whether Chickasha's primary and secondary liability insurers had a contractual duty to defend Chickasha against the third-party pollution lawsuit under pre- and post-1972 liability and indemnity insurance contracts.[195]

Immediately after filing the declaratory-judgment action, Chickasha filed a traditional motion for partial summary judgment asserting that the insurer had a duty to defend Chickasha in the underlying litigation under both pre- and post-1972 liability and indemnity insurance contracts.[196] The trial court, however, denied that motion.[197] In their original and supplemental motions, the insurers moved for a no-evidence summary judgment under Rule

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WL 31319191, at *1 (Tex. App.—Houston [14th Dist.] Oct. 17, 2002, pet. denied) (not designated for publication) (allowing a party to file a no-evidence motion for summary judgment in a declaratory-judgment action where the parties wanted the trial court to declare the rights and duties of the parties under a contingency-fee contract).

189. No. 05-00-01789-CV, 2002 WL 1792467 (Tex. App.—Dallas Aug. 6, 2002, no pet.) (not designated for publication).

190. Chickasha Cotton Oil Co. v. Houston Gen. Ins. Co., No. 05-00-01789-CV, 2002 WL 1792467, at *1 (Tex. App.—Dallas Aug. 6, 2002, no pet.) (not designated for publication).

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Chickasha Cotton Oil Co.*, 2002 WL 1792467, at *1.

196. *Id.* at *2.

197. *Id.*

166a(i), arguing that Chickasha could not produce evidence of insurability under the pre-1972 policies.[198] The trial court entered a no-evidence summary judgment in favor of the insurers, and Chickasha appealed.[199]

The Dallas Court of Appeals found that the trial court erred when the latter court granted the insurers' no-evidence motion.[200] The appeals court found that Chickasha had presented some evidence of insurability under the pre-1972 policies.[201] Those liability contracts, therefore, required the insurers to defend Chickasha where the covered claims generated the third-party lawsuit.[202] But the court of appeals declared that Chickasha failed to present any evidence showing that the indemnity contracts covered the third-party pollution claims.[203] Therefore, the trial court's decision to grant the no-evidence motion regarding this latter issue was proper.[204] Of course, as discussed earlier, the trial and appellate courts could have decided these questions of fact and reached the same conclusions without wasting time and precious resources deciding whether to grant or deny the no-evidence motion. After all, this was an action for a declaratory judgment.

III. Brief Overview—Texas's Uniform Declaratory Judgments Act

A. *The Purpose and Subject Matter of Declaratory Relief*

At the outset, it is worth noting that declaratory judgments have a relatively long history throughout western jurisprudence. The practice of awarding declaratory relief dates from Roman law during the pre-classical period[205] and matured during the Middle

198. *Id.*

199. *Id.*

200. Chickasha Cotton Oil Co., 2002 WL 1792467, at *5.

201. *Id.* at *4.

202. *See id.* at *5 (holding that the trial court erred when it granted the no-evidence portion of the insurers' motion for summary judgment, which addressed whether the insurers had a duty to defend Chickasha under the pre-1972 policies).

203. *Id.* at *4.

204. *See id.* at *5 ("However, we also hold the trial court did not err in granting the no-evidence motion for summary judgment concerning [the insurers'] duty under the pre 1972 policies to indemnify Chickasha in the underlying litigation.").

205. *See* Edwin M. Borchard, Declaratory Judgments 92 (1934) (tracing the origins of declaratory judgments).

Ages.[206] For centuries, Scottish courts had power to award declaratory relief.[207] In the mid-nineteenth century, the English Parliament embraced Scotland's model and enacted a statute[208] that gave the Chancery authority to award declaratory judgments.[209] Of course, most of the declaratory-judgment statutes in this country are more or less derivatives of the English statute.[210]

In 1943, the Texas Legislature gave Texas's courts the authority to award declaratory relief when it enacted a slightly modified version[211] of the Uniform Declaratory Judgments Act (UDJA).[212] The

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206. *See* Edwin M. Borchard, *Judicial Relief for Peril and Insecurity*, 45 HARV. L. REV. 793, 799 (1932) (reporting that by the middle of the nineteenth century many countries had codified the action for a declaration of rights and the resulting declaratory judgment).

207. *See* EDWIN M. BORCHARD, DECLARATORY JUDGMENTS 237-40 (1934) (tracing the Scottish history of the action back nearly 400 years); Robert W. Calvert, *Declaratory Judgments in Texas—Mandatory or Discretionary?*, 14 ST. MARY'S L.J. 1, 2 (1982) ("[I]n Scotland [the history of declaratory judgment] runs back several hundred years.").

208. 13 & 14 Vict., c. 35 (1850) (Eng.); *see also* Schick Inc. v. Amalgamated Clothing & Textile Workers Union, 533 A.2d 1235, 1237 n.1 (Del. Ch. 1987) (noting that the declaratory judgment is relatively new to Anglo-American law).

> While continental systems have long recognized a form of legal action for the non-executory declaration of lawful status or legal rights, the declaratory judgment action as a distinct form of action under Anglo-American law finds its genesis no earlier than a series of three English acts passed in the 1850s which were narrowly construed. The form of action received its first full expression in English Supreme Court Rules adopted in 1883.

Id.; *see also* EDWIN M. BORCHARD, DECLARATORY JUDGMENTS 132-35, 237-43 (1934) (discussing the English and Scottish origins of the action).

209. *See* Henry W. Simon, *Declaratory Judgments—Questions of Fact*, 11 TEX. L. REV. 351, 352 (1933) ("[An 1850 English statute gave Chancery] the power to enter declaratory judgment on the construction of any act of Parliament, will, deed, . . . or any contract, or . . . any other matter falling within the original jurisdiction of a court of equity.").

210. Henry W. Simon, *Declaratory Judgments—Questions of Fact*, 11 TEX. L. REV. 351, 352 (1933); *see also* George W. Pugh, *The Federal Declaratory Remedy: Justiciability, Jurisdiction and Related Problems*, 6 VAND. L. REV. 79, 79-80 (1952) (observing "that from time immemorial Anglo-American courts of equity [awarded] declaratory relief in narrowly restricted areas (such as the action to quiet title)," but stressing that "there was no concept, even in equity, of a *general* declaratory action").

211. *See generally* TEX. CIV. PRAC. & REM. CODE ANN. §§ 37.001-37.011 (Vernon 1997) (codifying the Uniform Declaratory Judgments Act).

212. *See* Schick Inc. v. Amalgamated Clothing & Textile Workers Union, 533 A.2d 1235, 1237-38 n.1 (Del. Ch. 1987) (commenting on the origins of declaratory judgments).

> In the U.S., recognition of such an action started in a few jurisdictions in the late 19th century, but the development of the form of action is largely a twentieth century phenomenon spurred on by influential academic writing. In 1922, the Conference of Commissioners on Uniform State Laws adopted the first Uniform Declaratory Judgment Act and, by 1939, some forty American states and territories had adopted a

stated purpose of the remedy is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations."[213] The Texas Supreme Court, however, has embraced the view that declaratory relief "is an alternative or additional remedy to facilitate the administration of justice more readily."[214]

Therefore, the remedy has multiple intended goals, which are: (1) to ensure "preventative justice";[215] (2) to serve as "a speedy and effective remedy for the determination of [parties' rights] when a real controversy has arisen and . . . before the wrong has actually been committed";[216] and (3) to make the declaratory judgment "a useful tool in the solution of legal problems."[217] More rel-

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statute providing for declaratory relief. In 1934 the federal act, 28 U.S.C. § 2201, was signed into law.

Id. (citations omitted).

213. TEX. CIV. PRAC. & REM. CODE ANN. § 37.002(b) (Vernon 1997); *see also* Edwin M. Borchard, *Judicial Relief for Peril and Insecurity*, 45 HARV. L. REV. 793, 806-07 (1932) (reflecting on the rationale for declaratory judgments).

> The effort to avoid a threatened or impending danger or risk may involve contractual or non-contractual legal relations. Equity is already familiar with numerous types of actions [where litigants seek] the aid of a court . . . to remove, by mere declaration, a cloud from the title and to quiet the title to property. The practice of instituting an action for a declaratory judgment has identical purposes in a wider field by quieting challenged and doubtful rights with respect to property or other relations . . . .

Id. at 807.

214. *See* Cobb v. Harrington, 144 Tex. 360, 367, 190 S.W.2d 709, 713 (1945) (quoting WALTER H. ANDERSON, ACTIONS FOR DECLARATORY JUDGMENTS § 3, at 11-12 (1940)).

215. *Id.* (embracing the view that "the action for declaratory judgment 'is an instrumentality to be wielded in the interest of preventative justice'" (quoting WALTER H. ANDERSON, ACTIONS FOR DECLARATORY JUDGMENTS § 3, at 11-12 (1940))).

216. *Id.*; *see also* Sylvester v. Watkins, 538 S.W.2d 827, 831 (Tex. Civ. App.—Amarillo 1976, writ ref'd n.r.e.) (citing *Cobb* and noting that "[a]lthough the existence of another adequate remedy does not necessarily deprive the court of jurisdiction to grant declaratory relief, the office of a declaratory judgment is the speedy determination of the rights of the parties when a real controversy has arisen and even before the wrong has actually been committed" (citation omitted)); R.R. Comm'n v. Hous. Natural Gas Corp., 186 S.W.2d 117, 122 (Tex. Civ. App.—Austin 1945, writ ref'd w.o.m.) ("[T]he declaratory judgments proceeding is an effective and speedy remedy provided by the Legislature to adjudicate or declare whether the power or authority sought to be exercised by the Commission come within the provisions of the statutes under which it acts in the premises.").

217. Robert W. Calvert, *Declaratory Judgments in Texas—Mandatory or Discretionary?*, 14 ST. MARY'S L.J. 1, 12 (1982).

> The rules laid down in *Cobb v. Harrington* marked out very clearly the duty of Texas courts to make the Declaratory Judgments Act a useful tool in the solution of legal problems and controversies, either before or after a legal wrong has been committed. It was not contrived as a tool for use solely by the advocate to get a favorable declara-

evant, "[a]s applied to contracts, the purpose of declaratory relief is to obtain an interpretation of the contract, and [secure] a determination of the [intended purposes under] the instrument."[218]

B. *Whether a Declaratory-Judgment Proceeding Is a "Lawsuit" or a Trial*

Texas's UDJA permits any interested person to obtain "a declaration of rights, status, or other legal relations."[219] But here are some relevant questions: What is the nature of the action when a litigant petitions a court for declaratory relief? Is the proceeding an action in law or an equitable action? Several jurisdictions view a declaratory-judgment action as either an action in law[220] or an action in equity.[221] In Texas, however, a declaratory-judgment hearing is "neither legal nor equitable, but sui generis."[222] And, as

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tion; rather, it was intended as a tool for use by the courts to make a correct declaration of the matters at issue, once jurisdiction has attached, whether the particular declaration is sought by several or none of the parties to the litigation.

Id.

218. Emmco Ins. Co. v Burrows, 419 S.W.2d 665, 670 (Tex. Civ. App.—Tyler 1967, no writ).

219. TEX. CIV. PRAC. & REM. CODE ANN. § 37.004(a) (Vernon 1997).

A person interested under a . . . written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a . . . contract, . . . may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status, or other legal relations thereunder.

Id.

220. *See, e.g.*, United Nat'l Indem. Co. v. Zullo, 120 A.2d 73, 76 (Conn. 1956) (reaffirming that "[an] action for a declaratory judgment is an action at law and not in equity, at least when . . . the rights or immunities to be declared are such as would normally be decided in an action at law"); Hobgood v. Black, 241 S.E.2d 60, 62 (Ga. App. 1978) (reaffirming that "[a] petition for declaratory judgment is an action at law, and it is not converted into an equitable action simply because a temporary restraining order is granted in order to maintain the status quo pending adjudication").

221. *See, e.g.*, Lake Arrowhead, Inc. v. Jolliffe, 639 N.W.2d 905, 910 (Neb. 2002) (declaring that "[i]n reviewing an equity action for a declaratory judgment, an appellate court tries factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court"); White v. Keystone Ins. Co., 775 A.2d 812, 813 (Pa. Super. 2001) (concluding that "[d]eclaratory judgment actions follow the practice and procedure of an action in equity"); Town of Manchester v. Town of Townshend, 192 A. 22, 23 (Vt. 1937) (declaring that "[a]n action under the [declaratory judgment] statute is equitable in its nature"); Baxter v. Wis. Dep't of Natural Res., 477 N.W.2d 648, 650 n.5 (Wis. App. 1991) (describing a declaratory judgment as an equitable remedy).

222. Cobb v. Harrington, 144 Tex. 360, 367, 190 S.W.2d 709, 713 (1945); *see also* Tex. Liquor Control Bd. v. Canyon Creek Land Corp., 456 S.W.2d 891, 895 (Tex. 1970) (reaf-

it is "the only one of its kind,"[223] the legislature adopted the remedy to "fill the gap between law and equity."[224]

There are, however, several additional questions: (1) whether it is proper to call a declaratory-judgment action a "lawsuit"; (2) whether it is appropriate to label a declaratory proceeding a "trial"; and (3) whether a declaratory-relief petition in Texas is a cause of action, which requires the petitioner to establish a traditional *prima facie* case by proving all pertinent elements of the cause. The answers to the first two questions are clear. Texas's courts have repeatedly stated that an action for declaratory relief is a lawsuit.[225] And, of course, under the Texas Civil Practices and Remedies Code, a declaratory hearing is a trial.[226]

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firming the ruling in *Cobb* that "an action for declaratory judgment is neither legal nor equitable but is sui generis").

223. *See* Beadle v. Bonham State Bank, 880 S.W.2d 160, 162 (Tex. App.—Texarkana 1994) (concluding that "[a]n action for declaratory judgment is neither legal nor equitable, but is *sui generis*, i.e., the only one of its kind, peculiar"), *aff'd in part and rev'd in part*, 907 S.W.2d 465 (Tex. 1995).

224. *See Cobb*, 190 S.W.2d at 713 (quoting Schaefer v. First Nat'l Bank of Findlay, 18 N.E.2d 263, 267 (Ohio 1938)) (embracing the position that "[i]f [a declaratory judgment remedy] does not at least in part fill the gap between law and equity there would be little purpose in enacting [a statute] providing for such procedure").

225. *See, e.g.*, Serna v. Cochrum, 290 S.W.2d 383, 385 (Tex. Civ. App.—San Antonio 1956, writ ref'd n.r.e.) (reporting that "[t]his suit was instituted under the Declaratory Judgments Act . . . [to determine whether the court should relieve plaintiffs from] all liability"); Trinity Universal Ins. Co. v. Rogers, 215 S.W.2d 349, 350 (Tex. Civ. App.—Dallas 1948, no writ) (reporting that "a corporation engaged in the insurance business, brought this suit under the Declaratory Judgments Act . . . seeking [a] judgment declaring that [a certain insurance contract] was not in force and [had no] effect"); Dial v. Fisk, 197 S.W.2d 598, 598-99 (Tex. Civ. App.—Amarillo 1946, writ ref'd n.r.e.) (describing the action as "a suit for a declaratory judgment under the Texas Uniform Declaratory Judgments Act" that concerned the interpretation of an insurance contract and entitlement "to the proceeds under the policy").

226. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 37.007 (Vernon 1997) (noting that, under the UDJA, fact questions are to be tried in the same manner as they would in other civil actions); Dep't of Protective & Regulatory Servs. v. Schutz, 101 S.W.3d 512, 514 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (reporting that "[t]his is an appeal from a bench trial in a declaratory-judgment action"); Mack v. Landry, 22 S.W.3d 524, 526 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (reporting that this was an "appeal from a declaratory judgment in a bench trial"). *But see* TEX. R. CIV. P. 296 (stating, in pertinent part, that "[i]n any case tried in the district or county court without a jury, any party may request the court to state in writing its findings of fact and conclusions of law"); Appraisal Review Bd. of the El Paso County Cent. Appraisal Dist. v. Fisher, 88 S.W.3d 807, 815 (Tex. App.—El Paso 2002, pet. denied) (concluding that "[i]n a bench trial, the trial court's findings of fact and conclusions of law have the same effect as a jury verdict on special issues").

On the other hand, neither the Texas Legislature nor the Texas Supreme Court has presented a definitive answer to the third question. Eleven years before Texas adopted the UDJA, Edwin Borchard—the renowned jurist of equity law—observed, "Much has been written [about] the nature of the cause of action [in a declaratory-judgment trial], especially since [civil procedure codes] have abolished the distinction between actions at law and in equity."[227] To be sure, Texas has abolished the distinction between courts of law and courts of equity.[228] Of course, the Texas Supreme Court has been exceedingly clear about a related matter: "In spite of [the] blended system of law and equity the distinction between them is as absolute as ever . . . ."[229]

But there is widespread confusion among Texas's courts regarding what is or is not a cause of action.[230] There are "equitable cause[s] of action."[231] Also, there are many types of common-law

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227. Edwin M. Borchard, *Judicial Relief for Peril and Insecurity*, 45 HARV. L. REV. 793, 802 (1932).

228. *See* Rogers v. Daniel Oil & Royalty Co., 130 Tex. 386, 392, 110 S.W.2d 891, 894 (1937) (declaring "that under our system law and equity are so blended as to remove all distinctions, procedural or otherwise, as between courts of law and court[s] of equity"); Weaver v. Head, 984 S.W.2d 744, 745 (Tex. App.—Texarkana 1999, no pet.) ("There is no distinction in Texas jurisprudence between courts of equity and courts of law. District courts in Texas are no longer limited to specialized areas of jurisdiction. All district courts in Texas are empowered with general jurisdiction, although some are designated with primary responsibility in certain fields.").

229. *Rogers*, 110 S.W.2d at 894; *see also* Storey v. Cent. Hide & Rendering Co., 148 Tex. 504, 515, 226 S.W.2d 615, 619 (1950) (reaffirming that the Texas Supreme Court never intended "to abrogate the distinction between law and equity in the application of . . . remedies").

230. 1 ROY W. MCDONALD & ELAINE GRAFTON CARLSON, TEXAS CIVIL PRACTICE § 4:3, at 401-07 (West 1992).

> Courts . . . have not always consciously considered the impact of their language when applied to the same term in another aspect. The result was unavoidable: A cause of action may mean one thing for one purpose and something different for another. Failure to recognize that the term has different meanings in different contexts produces, on occasion, marked confusion.

Id. at 404 (internal quotation marks omitted).

231. *See* Doyle v. Allstate Ins. Co., 1 N.Y.2d 439, 442-43 (N.Y. 1956) (citing 1 POMEROY ON EQUITY JURISPRUDENCE § 237(d) (5th ed. 1929) and reaffirming "that when the plaintiff pleads an equitable cause of action only and *fails to prove* the facts relied on to sustain the equity jurisdiction, equity will not retain the cause for the purpose of awarding him damages"). *But see* 1 ROY W. MCDONALD & ELAINE GRAFTON CARLSON, TEXAS CIVIL PRACTICE § 4:3, at 405 (West 1992) (discussing Pomeroy's assertions about what constitutes a cause of action).

and statutory causes of action.[232] Arguably, a petition for declaratory relief falls into the latter category. Still, the Texas Supreme Court and lower courts repeatedly declare that a declaratory-judgment action is neither legal nor equitable, but *sui generis*. So the question remains: Is a declaratory-judgment petition in Texas comparable to a traditional, statutory cause of action? The general consensus in Texas's lower courts is yes.[233] Unlike the requirement in some states,[234] however, a petitioner in Texas does not have to

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> Pomeroy asserts that every judicial action involves the following elements: a primary right possessed by the plaintiff, and a corresponding duty devolving upon the defendant; a delict or wrong done by the defendant which consisted in a breach of such primary right and duty; a remedial right in favor of the plaintiff, and a remedial duty resting on the defendant springing from this delict, and finally the remedy itself.
>
> Of these elements, the facts showing the primary right and duty and the delict or wrong, combined, constitute the cause of action. The remedy which is sought, under this definition, has no relation to the cause of action but constitutes the object of the suit. The difficulty here lies in determining just what Pomeroy meant by a primary right.

Id.; *see also* JOHN NORTON POMEROY, REMEDIES AND REMEDIAL RIGHTS BY THE CIVIL ACTION §§ 413-414 (5th ed. 1929) (theorizing that the elements of a "cause of action" comprise precise articulation of legal rules, rights, and duties underlying the action); W. Page Keeton, *Action, Cause of Action, and Theory of the Action in Texas*, 11 TEX. L. REV. 145, 286 (1933) (considering "[t]he concept 'cause of action' as it exist[ed] in the Texas law").

232. *See* 1 ROY W. MCDONALD & ELAINE GRAFTON CARLSON, TEXAS CIVIL PRACTICE § 4:3, at 402 n.21 (West 1992) (observing that "a cause of action exists pursuant to common law [or] statute" and listing actions for declaratory judgments as "[e]xamples of statutory causes of action").

233. *See, e.g.*, Tex. A & M Univ.-Kingsville v. Lawson, 127 S.W.3d 866, 875 (Tex. App.—Austin 2004, pet. filed) (declaring that "[a]lthough a breach-of-contract cause of action can provide actual damages, only a declaratory-judgment cause of action can prospectively enforce the breached agreement"); City of Houston v. Texan Land & Cattle Co., 138 S.W.3d 382, 392 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (reaffirming that "a party may not use a declaratory judgment [cause of] action to seek the same relief afforded under another of its causes of action in an effort to obtain otherwise impermissible attorney fees"); Double Diamond, Inc. v. Van Tyne, 109 S.W.3d 848, 852 (Tex. App.—Dallas 2003, no pet.) (concluding that "the trial court erred in granting a take-nothing summary judgment in favor of Van Tyne when his motion for summary judgment failed to address appellants' declaratory judgment cause of action"); *In re* Estate of Judd, 8 S.W.3d 436, 439 (Tex. App.—El Paso 1999, no writ) (reporting that "[this appeal arose] out of an unsuccessful challenge to personal jurisdiction in a declaratory judgment cause of action"), *overruled on other grounds*, Toscano v. Osterberg, 82 S.W.3d 457 (Tex. App.—El Paso 2002, no pet.); Tucker v. Atl. Richfield Co., 787 S.W.2d 555, 559 (Tex. App.—Corpus Christi 1990, writ denied) (declaring that "[a] cause of action for a declaratory judgment does not accrue until a justiciable controversy exists between the parties").

234. *See* AG Farms, Inc. v. Am. Premier Underwriters, Inc., 695 N.E.2d 882, 887 (Ill. App. Ct. 1998) (noting the elements for a declaratory-judgment action in Illinois).

prove specific elements or establish a traditional *prima facie* case to receive declaratory relief.[235]

IV. TEXAS COURTS' MANDATORY DUTIES AND DISCRETIONARY POWERS WHEN DECIDING WHETHER TO AWARD SUMMARY AND DECLARATORY JUDGMENTS

At this juncture, the central theme in this Article is worth repeating: The Texas Supreme Court should remove summary-judgment practice from declaratory-judgment trials. To repeat, among other reasons, the procedure decreases rather than increases the

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> This court has previously identified the elements of an action for declaratory judgment: (1) a plaintiff with a tangible legal interest, (2) a defendant with an adverse interest, and (3) an actual controversy regarding that interest. The first element addresses the standing of the plaintiff to bring an action for declaratory relief. The [Illinois] supreme court has articulated a two-part test for standing: (1) there must be an actual controversy and (2) the plaintiff must be "interested in the controversy." The supreme court defined "actual controversy" as "a concrete dispute admitting of an immediate and definitive determination of the parties' rights, the resolution of which will aid in the termination of the controversy or some part thereof."

Id. (citations omitted).

235. See R.R. Comm'n v. Houston Natural Gas Corp., 186 S.W.2d 117, 122-23 (Tex. Civ. App.—Austin 1945, writ ref'd w.o.m.) (commenting on the Texas Legislature's intent when passing the UDJA).

> [T]he old rule that the essential elements of a cause of action were a right, a violation of such right or a wrong, and a remedy are not applicable to the declaratory judgment proceeding. The act particularly eliminates the old essential element of wrong. It clearly provides or empowers the court to adjudicate or declare the rights of the parties where there has arisen a real controversy before the wrong actually takes place, and "whether or not further relief is or could be claimed." In so providing the Legislature necessarily intended [for the court to] adjudge or declare the business or statutory relations between parties with requisite interest, and inform them as to their duties, rights, status, or obligations with respect to the justiciable issue or controversy presented. This additional remedy does not supplant any existing remedy to right a wrong actually committed, but affords a speedy and effective remedy against threatened wrong.

Id.; *see also* Emmco Ins. Co. v. Burrows, 419 S.W.2d 665, 670 (Tex. Civ. App.—Tyler 1967, no writ) (discussing the purpose of the statute).

> The purpose of the [declaratory judgment] statute . . . is to declare *existing* rights, status, or other legal relations. The statute cannot be invoked as an affirmative ground of recovery to revise, alter, or reform such rights, status or legal relations. As applied to contracts, the purpose of declaratory relief is to obtain an interpretation of the contract, and a decree in such a case may provide "only for a determination of the purposes intended by the instrument, and not a modification of its terms."

Id.

efficient administration of justice generally, and it prevents Texas's trial courts from delivering speedy and well-reasoned declarations in particular. In addition, a careful analysis of courts' relative discretionary powers and responsibilities under the Texas Uniform Declaratory Judgments Act (UDJA) and under Texas's summary-judgment rule reveals significant conflicts between the act and the rule. And that disharmony has generated exceedingly strained, highly cursory, unintelligible, and very unfair results where litigants have petitioned courts for declaratory relief.

More relevant, the UDJA and the summary-judgment rule are redundant in a significant way: Along with specific mandatory duties, the Texas Supreme Court gave judges considerable discretionary powers under the summary-judgment rule to quickly assess whether a trial on the merits is necessary.[236] However, in a summary-judgment hearing, judges can only entertain and resolve a question of law. On the other hand, the Texas Legislature gave trial judges substantially more discretionary authority to reach even quicker and fairer outcomes on the merits in declaratory-judgment trials. And as discussed more carefully below,[237] Texas's trial courts have even broader power to resolve both questions of law and fact under the UDJA.

Therefore, this Part discusses Texas's trial judges' respective discretionary powers and duties—under the UDJA and Rule 166a(a), (b), and (i)—during declaratory-judgment trials. And because courts' discretionary powers under the two bodies of law are arguably redundant in major respects, this discussion should help to answer two important questions: (1) whether the judicially-mandated summary-judgment rules in Texas are superior to the legislatively enacted UDJA rules; and (2) whether the UDJA gives Texas trial judges authority to completely remove traditional and no-evidence summary-judgment practice from declaratory-judgment trials.

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236. See infra note 238 and accompanying text.
237. See Part III(C).

A. *Texas's Trial Judges' Duties and Discretionary Powers When Deciding Whether to Award Summary Judgment in Trials Generally*

Texas's trial judges must perform certain mandatory duties after a movant files a motion for summary judgment. And whether a lawsuit involves an action for a declaratory judgment or some other statutory or common-law action, a trial court's overarching responsibility is to determine whether there is a need for a trial.[238] More specifically, the court must "determine if there are any issues of fact to be tried, and not to weigh the evidence or determine its credibility, and thus try the case on the affidavits."[239] And if the court finds no genuine issue regarding any material fact, the trial court must award summary relief *as a matter of law*.[240]

Without doubt, a trial judge must carefully examine a movant's affidavits, transcripts, and other relevant documents for evidence and to determine whether the movant is a proper party. For another rule is clear: A court has no authority to grant summary relief if the movant is not a party to the lawsuit.[241] In addition, it is

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238. *See* Channel 4, KGBT v. Briggs, 759 S.W.2d 939, 944-45 (Tex. 1988) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 333-34 (1986), and adopting the view that "one of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims . . . and . . . it should be interpreted in a way that allows it to accomplish this purpose"). "The inquiry is one of determining whether there is a need for a trial and that determination depends on whether 'a reasonable jury could return a verdict for the nonmoving party.'" *Id.* at 945 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986)); *see also* Lampasas v. Spring Ctr., Inc., 988 S.W.2d 428, 436 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (concluding that a movant files a summary-judgment motion to encourage a court "to 'pierce the pleadings and . . . assess the proof in order to see whether there is a genuine need for a trial'" (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 524, 587 (1986))).

239. Gulbenkian v. Penn, 151 Tex. 412, 416, 252 S.W.2d 929, 931 (1952).

240. TEX. R. CIV. P. 166a(c).

> The judgment sought shall be rendered forthwith if (i) the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, and (ii) the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records . . . show that . . . there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response.

Id.

241. *See* Teer v. Duddlesten, 664 S.W.2d 702, 703 (Tex. 1984) (holding that "[a] summary judgment may only be granted in favor of [a] movant whose evidence offered in support of the motion establishes the movant's right to judgment as a matter of law"); Williams v. Bank One, Tex., N.A., 15 S.W.3d 110, 116 (Tex. App.—Waco 1999, no pet.)

impermissible for a court to grant summary relief on a cause of action that does not appear in the summary-judgment motion.[242] Or stated slightly differently, a trial court cannot award more summary relief than that requested in the movant's motion.[243] And to stress a previous observation, a trial court must grant a motion for a traditional summary judgment if a defendant conclusively negates at least one element of the plaintiff's claim.[244] But Texas's trial judges' other duties vary a bit depending on whether a movant files a traditional or a no-evidence summary-judgment motion. For example, when the moving party is a plaintiff and presents a traditional summary-judgment motion, the movant has the burden to prove he is "entitled to judgment *as a matter of law* on the issues expressly set out in the motion."[245] Contrarily, if the movant for a traditional summary judgment is a defendant, the movant must either (1) negate at least one of the elements of the nonmovant's cause of action, or (2) conclusively establish each element of an affirmative defense.[246]

(concluding that "[a] trial court cannot grant summary judgment for a party which has not filed a motion therefor").

242. *See, e.g.*, Stiles v. Resolution Trust Corp., 867 S.W.2d 24, 26 (Tex. 1993) (concluding that "summary judgment cannot be affirmed on grounds not expressly set out in the motion or response"); McConnell v. Southside Indep. Sch. Dist., 858 S.W.2d 337, 341 (Tex. 1993) (concluding that a summary-judgment motion must "stand or fall on the grounds expressly presented in the motion"); Chessher v. Southwestern Bell Tel. Co., 658 S.W.2d 563, 564 (Tex. 1983) (per curiam) (deciding that summary judgment may not be granted on issues not "expressly presented" to the trial court).

243. *See, e.g.*, Lehmann v. Har-Con Corp., 39 S.W.3d 191, 200 (Tex. 2001) (declaring that a summary judgment is subject to reversal if it grants more relief than requested); Science Spectrum, Inc. v. Martinez, 941 S.W.2d 910, 912 (Tex. 1997) (concluding that a trial court cannot grant more relief than that requested in a motion for summary judgment); Walton v. City of Midland, 24 S.W.3d 853, 856 (Tex. App.—El Paso 2000, no pet.) (accepting the appellants' argument "that the trial court granted more relief than was requested [in the Appellees'] summary judgment motions").

244. *See* Am. Tobacco Co. v. Grinnell, 951 S.W.2d 420, 425 (Tex. 1997) (reaffirming that "[s]ummary judgment is proper if the defendant disproves at least one element of each of the plaintiff's claims . . . or establishes all elements of an affirmative defense to each claim").

245. TEX. R. CIV. P. 166a(c) (emphasis added); *see also* Rhone-Poulenc, Inc. v. Steel, 997 S.W.2d 217, 222 (Tex. 1999) (stating that the movant for summary judgment shoulders the burden of proof).

246. *See* Randall's Food Mkts., Inc. v. Johnson, 891 S.W.2d 640, 644 (Tex. 1995) (declaring that a defendant is entitled to summary judgment if she can negate an essential element of a cause of action or conclusively establish the elements of an affirmative defense).

Unquestionably, both movants and nonmovants have additional burdens[247] after filing a traditional motion for summary relief. But trial courts also have additional duties. After a movant files a traditional motion, a court must accept as true all evidence favoring the nonmovant.[248] Furthermore, when deciding whether there is a genuine issue of fact, a court must resolve all doubts in favor of the nonmovant.[249] Similarly, the trial judge must indulge every reasonable inference to support the nonmovant's position.[250] And finally, a trial court may not grant a traditional summary-judgment motion by default when a movant's summary-judgment proof is legally insufficient or the nonmovant does not respond to the motion.[251]

When weighing whether to award a no-evidence motion, a trial judge must review the record for evidence supporting the assertion that the nonmovant presents "no evidence" to prove the essential elements of the nonmovant's cause of action or defense.[252] Of course, the trial court also must determine whether the nonmovant presented sufficient evidence to prove the existence of each ele-

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247. *See Rhone-Poulenc*, 997 S.W.2d at 222-23 (holding that the non-movant need not respond to the motion for summary judgment unless the movant meets its burden of proof). *But see* Centeq Realty, Inc. v. Siegler, 899 S.W.2d 195, 197 (Tex. 1995) (concluding that if the movant meets its burden of proof, the non-movant must present summary-judgment evidence to raise a fact issue).

248. *See* Science Spectrum, Inc. v. Martinez, 941 S.W.2d 910, 911 (Tex. 1997) (stressing that courts must accept all of the nonmovant's proof as true when reviewing a summary-judgment motion).

249. *See* Johnson County Sheriff's Posse, Inc. v. Endsley, 926 S.W.2d 284, 285 (Tex. 1996) (declaring that trial courts must resolve all doubts about the existence of a genuine issue of a material fact against the movant).

250. *See* Limestone Prods. Distribution, Inc. v. McNamara, 71 S.W.3d 308, 311 (Tex. 2002) (reaffirming that trial courts must indulge every reasonable inference in favor of the nonmovant); Nixon v. Mr. Prop. Mgmt. Co., 690 S.W.2d 546, 549 (Tex. 1985) (concluding that "[e]very reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor").

251. *See* City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 (Tex. 1979) (holding that a "trial court may not grant a summary judgment by default for lack of an answer or response to the motion by the non-movant when the movant's summary judgment proof is legally insufficient").

252. *See* TEX. R. CIV. P. 166a(i) (permitting a party to move for a no-evidence summary judgment if "there is no evidence of one or more essential elements of a claim or defense on which [the nonmovant] would have the burden of proof at trial" after adequate time for discovery).

ment.[253] More important, the trial judge must consider all evidence in favor of the nonmovant and totally discount any evidence that may weaken or discolor the nonmovant's position.[254]

And the law is equally clear regarding another matter: A court may not grant a no-evidence summary judgment if the nonmovant produces "more than a scintilla" of probative evidence that raises a genuine issue of material fact regarding the disputed elements of a cause of action or defense.[255] "More than a scintilla of evidence exists when the evidence 'rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.'"[256] But, evidence that does no more than create a mere surmise or suspicion of a fact is weak; therefore, it is "legally insufficient and constitutes no evidence."[257]

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253. *See* Kelly v. Demoss Owners Ass'n, 71 S.W.3d 419, 423 (Tex. App.—Amarillo 2002, no pet.) (declaring that an appellate court's duty "is to ascertain whether the nonmovant produced any evidence of probative force to raise a fact issue on the material questions presented"); *see also* Weiss v. Mech. Associated Servs., Inc., 989 S.W.2d 120, 123-24 (Tex. App.—San Antonio 1999, pet. denied) (holding that "the non-movant need not 'marshal its proof,'" but "need[s] only [to] point out evidence that raises a fact issue on the challenged elements" (quoting TEX. R. CIV P. 166a(i))).

254. *See* Morgan v. Anthony, 27 S.W.3d 928, 929 (Tex. 2000) (concluding that "[when] reviewing the summary judgment record to determine if there [is] legally sufficient evidence to raise a fact question on the three elements of intentional infliction of emotional distress . . . raised in [the] motion, we consider the evidence in the light most favorable to . . . the nonmovant"); Kelly v. Demoss Owners Ass'n, 71 S.W.3d 419, 423 (Tex. App.—Amarillo 2002, no pet.) (stating that courts must "consider all the evidence in the light most favorable to the party against whom the no-evidence summary judgment was rendered, disregarding all contrary evidence and inferences"); *see also* TEX. R. CIV. P. 166a(i) cmt. (1997) (noting that "[t]o defeat a motion made under paragraph (i), the respondent . . . need only point out evidence that raises a fact issue").

255. *See, e.g.*, Oasis Oil Corp. v. Koch Ref. Co., 60 S.W.3d 248, 252 (Tex. App.—Corpus Christi 2001, pet. denied) (quoting Zapata v. Children's Clinic, 997 S.W.2d 745, 747 (Tex. App.—Corpus Christi 1999, no pet.)) (ruling that "[t]he trial court may not grant a no-evidence summary judgment if the respondent brings forth more than a scintilla of probative evidence to raise a genuine issue of material fact"); Flameout Design & Fabrication Inc. v. Pennzoil Caspian Corp., 994 S.W.2d 830, 834 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (holding that "[a] trial court must grant [a no-evidence] motion unless the nonmovant produces more than a scintilla of evidence raising a genuine issue of material fact on the challenged elements").

256. Moore v. K Mart Corp., 981 S.W.2d 266, 269 (Tex. App.—San Antonio 1998, pet. denied) (quoting Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 711 (Tex. 1997)).

257. Allen v. W.A. Virnau & Sons, Inc., 28 S.W.3d 226, 231 (Tex. App.—Beaumont 2000, pet. denied) (quoting Vallance v. Irving C.A.R.E.S., Inc., 14 S.W.3d 833, 836 (Tex. App.—Dallas 2000, no pet.)).

On appellate review, Texas's courts of appeals also have certain prescribed duties when reviewing lower courts' decisions to award or deny a no-evidence summary judgment. First, when reviewing a trial court's award, an appellate court must determine the disputed elements of the movant's claim and then ascertain whether the nonmovant presented sufficient evidence to prove the existence of each element. Once more, the quantum of evidence must be more than a scintilla, and it must rise to a level that permits reasonable and fair-minded people to disagree about whether the nonmovant proved the disputed element.[258]

Finally, appellate courts must:

> determine whether the plaintiff has produced any evidence of probative force to raise fact issues on the material questions presented. The appellate court must consider all of the evidence in the light most favorable to the party against whom the no-evidence summary judgment was rendered, every reasonable inference must be indulged in favor of the nonmovant, and any doubts resolved in its favor.[259]

B. *Texas's Trial Judges' Discretionary Powers and Duties—Whether to Award a Declaratory Judgment*

Put simply, Texas's trial courts have broad discretionary powers under the Uniform Declaratory Judgments Act. They have power

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258. *See* Garrett v. Great W. Distrib. Co. of Amarillo, 129 S.W.3d 797, 799 (Tex. App.—Amarillo 2004, pet. denied) (concluding that a court of appeals must "assess the legitimacy of the trial court's decision via the standard of review described in *Kelly v. Demoss Owners [Ass'n]*, 71 S.W.3d 419, 423 (Tex. App.—Amarillo 2002, no pet.)," and observing that the *Kelly* "standard obligates [the court of appeals] to first determine the elements of the claim placed in issue by the movant"); *see also* TEX. R. CIV. P. 166a(i) (requiring the movant to specify the elements of the claim as to which there is no evidence).

259. Green v. Gemini Exploration Co., No. 03-02-00334-CV, 2003 WL 1986859, at *3 (Tex. App.—Austin May 1, 2003, pet. denied) (mem. op.) (reaffirming the view that "a no-evidence summary judgment is essentially a pretrial directed verdict, and we apply the same legal sufficiency standard in reviewing a no-evidence summary judgment as we apply in reviewing a directed verdict" (quoting Jackson v. Fiesta Mart, 979 S.W.2d 68, 70 (Tex. App.—Austin 1998, no pet.))); *see also* Flameout Design & Fabrication Inc. v. Pennzoil Caspian Corp., 994 S.W.2d 830, 834 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (stressing that when reviewing a summary judgment "[the court] must indulge every reasonable inference in favor of the nonmovant and resolve any doubts in its favor").

"to declare rights, status, and other legal relations."[260] Also, trial courts have sound discretion to entertain an action for a declaratory judgment[261] as well as sound discretion to award or deny declaratory relief.[262] But a trial court's discretion to award relief rests on several conditions. First, declaratory relief is appropriate only if a justiciable controversy exists regarding the parties' rights and status and a declaration will resolve that controversy.[263] "To constitute a justiciable controversy, there must exist a real and substantial controversy involving genuine conflict of tangible interests and not merely a theoretical dispute."[264]

In addition, trial courts may not consider or attempt to resolve hypothetical or contingent controversies[265] in declaratory-judgment trials. Also, judges may not use a declaratory-judgment hearing to address moot controversies[266] or to deliver an advisory

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260. Cobb v. Harrington, 144 Tex. 360, 369, 190 S.W.2d 709, 714 (1945) (quoting language appearing in the UDJA); *see also* Bonham State Bank v. Beadle, 907 S.W.2d 465, 468 (Tex. 1995) (declaring that "[t]he authority to grant a declaratory judgment . . . flows from the 'general powers' of the courts to enter a declaratory judgment given under the Declaratory Judgments Act"); *accord* Adams v. Cook, 101 P.2d 484, 489 (Cal. 1940) (stressing that "[t]he powers of a court [under the UDJA to a grant] declaratory relief are as broad and extensive as those exercised by [a] court in any ordinary suit in equity").

261. *See* K.M.S. Research Labs., Inc. v. Willingham, 629 S.W.2d 173, 174 (Tex. App.—Dallas 1982, no writ) (reaffirming the view that "the entertaining of a declaratory judgment rests with the sound discretion of the trial court").

262. *See* Bonham State Bank v. Beadle, 907 S.W.2d 465, 468 (Tex. 1995) (declaring that "[a] trial court has discretion to enter a declaratory judgment"); United Interests, Inc. v. Brewington, Inc., 729 S.W.2d 897, 905 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.) (holding that the decision to award "a declaratory judgment rests within the discretion of the trial judge").

263. *See* Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 446 (Tex. 1993) (indicating that the general test for the granting of a declaratory judgment is whether a real controversy exists between the parties); *see also* Hays County v. Hays County Water Planning P'ship, 106 S.W.3d 349, 358 (Tex. App.—Austin 2003, no pet.) (adopting the principle that a declaratory judgment "plaintiff must allege *facts that demonstrate a real dispute* involving an immediate, concrete outcome—that is, a justiciable controversy must exist as to the rights and status of the parties and the controversy must be resolved by the declaration sought" (emphasis added)).

264. Bonham State Bank v. Beadle, 907 S.W.2d 465, 467 (Tex. 1995) (quoting Bexar-Medina-Atascosa Counties Water Control & Improvement Dist. No. 1 v. Medina Lake Protection Ass'n, 640 S.W.2d 778, 779-80 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.)).

265. *See* Firemen's Ins. Co. of Newark, N.J., v. Burch, 442 S.W.2d 331, 333 (Tex. 1968) (stating that "the Declaratory Judgments Act [does not give a court] power to pass upon hypothetical or contingent situations, or [to] determine questions [that are not part] of an actual controversy, although such questions may in the future require adjudication").

266. *See* Nat'l Collegiate Athletic Ass'n v. Jones, 1 S.W.3d 83, 86 (Tex. 1999) (embracing the view that "[a]ppellate courts are prohibited from deciding moot controversies"); *see*

opinion.[267] Although there is no universal definition, some courts embrace the view that an advisory opinion "decides an abstract question of law without binding the parties."[268] Therefore, "[t]o avoid rendering advisory opinions, a court should only decide cases in which a live controversy exists at the time of the decision."[269]

Without doubt, the majority of trial judges' responsibilities are fairly clear when they contemplate whether to award declaratory relief. There is, however, a serious conflict over whether Texas's trial judges must always issue a declaration of rights—either granting or denying relief—after agreeing to try a declaratory-judgment action. Stated more succinctly, the question is whether trial courts must *always* enter a decree and declare rights formally during a declaratory-judgment trial, even if (1) an opposing party files a mo-

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also S.E.C. v. Med. Comm. for Human Rights, 404 U.S. 403, 406 (1972) (holding that a case is moot when the allegedly wrongful behavior has passed and cannot be expected to recur); Campus Communications, Inc. v. Tex. A & M Univ. Sys., No. 01-02-00378-CV, 2003 WL 21027936, at *1 (Tex. App.—Houston [1st Dist.] May 8, 2003, pet. denied) (mem. op.) (declaring that "[a] case is moot when (1) a party seeks a judgment to resolve a controversy, but no controversy exists, or (2) judgment is sought on a matter which . . . cannot have a practical legal effect on an existing controversy" after a court issues the declaration).

267. *See, e.g.*, Coalson v. City Council of Victoria, 610 S.W.2d 744, 747 (Tex. 1980) (ruling that courts may not give advisory opinions or decide cases upon speculative, hypothetical, or contingent situations); *Hays County Water Planning P'ship*, 106 S.W.3d at 358 (citing Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 444 (Tex. 1993), and declaring that "[t]he separation-of-powers doctrine prohibits courts from issuing advisory opinions").

268. *See Hays County Water Planning P'ship*, 106 S.W.3d at 358 (describing how an advisory opinion determines "an abstract question of law without binding the parties"); *see also* Ala. State Fed'n of Labor, Local Union No. 103, United Bhd. of Carpenters v. McAdory, 325 U.S. 450, 461 (1945) (holding that "[t]he requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit. This Court is without power to give advisory opinions."); Laborers' Int'l of N. Am., Constr. & Mun. Workers Local Union No. 1253 v. Blackwell, 482 S.W.2d 327, 329 (Tex. Civ. App.—Amarillo 1972, no writ) (declaring that a "court in an action for declaratory judgment will not declare rights on facts which are uncertain, contingent and which facts or events may never happen").

269. Campus Communications, Inc. v. Tex. A & M Univ. Sys., 2003 WL 21027936, at *1 (Tex. App.—Houston [1st Dist.] May 8, 2003, pet. denied) (mem. op.) (citing Camarena v. Tex. Employment Comm'n, 754 S.W.2d 149, 151 (Tex. 1988)); *see also* Camarena v. Tex. Employment Comm'n, 754 S.W.2d 149, 151 (Tex. 1988) (embracing the view that "a case is . . . moot 'when the issues presented are no longer "live" or [when] the parties lack a legally cognizable interest in the outcome'" (quoting Murphy v. Hunt, 455 U.S. 478, 481 (1982))).

tion to dismiss the action, or (2) one of the parties files a traditional or a no-evidence motion for summary judgment during the trial.

To help illustrate the essence of the controversy, consider the facts in *Juliff Gardens, L.L.C. v. Texas Commission on Environmental Quality*.[270] Juliff applied to the Texas Commission on Environmental Quality for a permit to build and operate a landfill in Brazoria County.[271] While the application was pending, the Texas Legislature enacted a bill that forced the commission to deny Juliff's application.[272] Shortly thereafter, Juliff commenced a declaratory-judgment action, asking the court to declare that the new statute was an unconstitutional local or special law.[273]

The commission filed a motion to dismiss the action and, alternatively, a traditional motion for summary judgment.[274] The commission argued that it "had exclusive or primary jurisdiction to determine the applicability of the statute before Juliff could challenge its constitutionality."[275] The trial court granted the motion to dismiss the declaratory-judgment action.[276] In the alternative, the district court awarded the summary judgment, ruling that the newly-enacted statute was not a local or special law.[277] Juliff appealed. The Austin Court of Appeals ruled that the trial court improperly dismissed Juliff's action for declaratory relief.[278] But the

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270. 131 S.W.3d 271 (Tex. App.—Austin 2004, no pet.).

271. Juliff Gardens, L.L.C. v. Tex. Comm'n on Envtl. Quality, 131 S.W.3d 271, 275 (Tex. App.—Austin 2004, no pet.).

272. *Id.* at 274 (citing H.B. 2912 and the codified portion of that bill, Section 361.122 of the Texas Health and Safety Code, applicable to the circumstances of the case); *see also* TEX. HEALTH & SAFETY CODE ANN. § 131.122 (Vernon 2004) (giving the conditions under which the Texas Commission on Environmental Quality cannot grant a permit to build the type of landfill that the plaintiff hoped to construct). Under Juliff's original plans, the landfill met all three statutory conditions, mandating that the building permit be denied. *Juliff Gardens*, 131 S.W.3d at 275. As a result, Juliff moved the proposed site of the landfill to avoid locating it within one hundred feet of a canal used as a drinking water source for the public, thus eliminating one of the statutory requirements. *Id.* Presumably, Juliff thought this would clear the way for approval, but the issue became whether another water-holding topographical feature, located within one hundred feet of the changed site, should be characterized as a canal for the purposes of the statute. *Id.* At the time Juliff filed the declaratory-judgment action, the characterization of the land had not been decided and its application for the permit was still pending. *Id.* at 276.

273. *Juliff Gardens*, 131 S.W.3d. at 274.

274. *Id.* at 276.

275. *Id.* at 275.

276. *Id.* at 274-75.

277. *Id.* at 275.

278. *Juliff Gardens*, 131 S.W.3d at 279-80.

appellate court affirmed the lower court's decision to grant summary relief to the commission.[279]

But consider the facts and the outcome in *Zable v. Henry*.[280] J.I. and Edith Zable, husband and wife, conveyed certain real property to the Henrys.[281] The deed to the property gave the Henrys an option to purchase other real property that the Zables owned.[282] Edith Zable, however, neither signed nor participated in the execution of the deed.[283] Shortly thereafter, Mr. Zable discovered he made a mistake: He gave the Henrys an option to purchase the Zables' homestead.[284]

Attempting to correct the blunder, the Zables filed a declaratory-judgment action; they asked the trial court to declare the option void *as a matter of law*.[285] In addition, both the Zables and the Henrys filed a traditional summary-judgment motion.[286] Like the trial judge in *Juliff*, the judge in *Zable* dismissed the Zables' declaratory-judgment action.[287] The trial court also denied the Zables' motion for summary relief, but granted the Henrys' motion.[288] To

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> We find that the Commission has neither exclusive nor primary jurisdiction to determine the constitutionality of section 361.122 and that Juliff was not required to allow the Commission to ultimately determine the applicability of section 361.122 before challenging the statute's constitutionality. We therefore hold that the district court erred in granting the Commission's motion to dismiss.

Id.

279. *Id.* at 281. Like the commission, Juliff filed its own motion for summary judgment. *Id.* at 276. On appeal, Juliff argued that because the district court decided it did not have proper jurisdiction to issue a holding on Juliff's declaratory-judgment action, the trial court also did not have jurisdiction to hear the competing motions for summary judgment. *Id.* at 280. Juliff asserted that the district court's ruling on the competing motions for summary judgment amounted to an advisory opinion. *Id.* The appellate court disagreed and affirmed the district court's holding on the merits of the summary-judgment motions. *Id.* at 285.

280. 649 S.W.2d 136 (Tex. App.—Dallas 1983, no writ).

281. Zable v. Henry, 649 S.W.2d 136, 136-37 (Tex. App.—Dallas 1983, no writ).

282. *Id.* at 137.

283. *Id.*

284. *Id.*

285. *Id.* at 137-38. "[T]he Henrys conceded that the option property was the Zables' homestead both at the time the deed was signed and as of the date of hearing . . . ." *Id.* at 137. "The only issue presented by this action is whether the option is presently void, and not whether it is enforceable now or at some future time." *Id.* At oral argument, the Zables argued that TEX. FAM. CODE ANN. § 5.81 (Vernon 1975) required that the option be judicially voided. *Id.* at 138.

286. *Zable*, 649 S.W.2d at 136.

287. *Id.*

288. *Id.*

justify its rulings, the trial court found: (1) the dispute did not involve a forced sale of a homestead; (2) it was not an action to enforce the specific performance of an option; and (3) there was no evidence suggesting that the Henrys would enforce the option while Mrs. Zable continued to occupy the homestead.[289]

The Zables appealed their adverse rulings to the Dallas Court of Appeals. Like the Austin Court of Appeals in *Juliff*, the court of appeals in Dallas affirmed the trial judge's refusal to grant the Zables' motion for summary judgment.[290] But unlike the Austin Court of Appeals in *Juliff*, the Dallas Court of Appeals refused to reverse the lower court's decision to dismiss the Zables' declaratory-judgment action.[291] In fact, the Dallas Court of Appeals did not even address the dismissal.[292] More disquieting, even a cursory discussion of the Zables' petition for declaratory relief does not appear anywhere in the appellate court's opinion.[293]

So, we return to the question: Do Texas's trial courts have a mandatory duty to enter a decree and declare rights—favorably or unfavorably—in a declaratory-judgment trial? On one side of this debate, several of Texas's appellate courts adopt the view that a trial judge has no mandatory duty to issue a favorable or an unfavorable declaration; therefore, the judge may dismiss a declaratory-judgment action outright without issuing a formal decree. For example, as early as the mid-twentieth century, the San Antonio Appellate Court concluded that a trial judge has discretion to enter a decree in a declaratory-judgment hearing.[294]

More recently, the Eastland Court of Appeals embraced the position that whether a trial court will dismiss a declaratory-judgment suit outright rests within the sound discretion of that court.[295] Sim-

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289. *Id.* at 137.

290. *See id.* at 139 (concluding "that the trial court did not err in holding that the grant of an option to purchase property at some future time is valid, despite the fact that the property is currently homestead and the grant was executed only by the husband").

291. *See Zable*, 649 S.W.2d at 139 (affirming the trial court).

292. *See id.* at 136-39 (omitting discussion of the dismissal).

293. *See id.* (neglecting a discussion of Zable's petition).

294. *See* Town of Santa Rosa v. Johnson, 184 S.W.2d 340, 340-41 (Tex. Civ. App.—San Antonio 1944, no writ) ("Under the terms of section 6 of the Uniform Declaratory Judgment Act, the entry of a declaratory judgment is discretionary with the trial court.").

295. Harding Bros. Oil & Gas Co. v. Jim Ned Indep. Sch. Dist., 457 S.W.2d 102, 105-06 (Tex. Civ. App.—Eastland 1970, no writ). "The general rule is that the trial court has discretion concerning a declaratory judgment. In *Town of Santa Rosa v. Johnson* [the San

ilarly, the Tyler Court of Appeals adopted the principle that a court "*may* refuse to render or enter a declaratory judgment or decree."[296] The Fourteenth District Court of Appeals also ruled emphatically that a trial court has discretion to dismiss a declaratory-judgment action.[297] Finally, in *K.M.S. Research Laboratories, Inc. v. Willingham*,[298] the Dallas Court of Appeals ruled as it did in *Zable* and upheld the trial court's decision to dismiss the declaratory-judgment action without issuing a formal decree.[299] Unlike its omission in *Zable*, however, the Dallas Appellate Court explained its decision in *K.M.S.*—concluding "that [a refusal] to enter a declaratory decree is discretionary with the trial court."[300]

Antonio Appellate Court] held that the entry of a declaratory judgment is discretionary with the trial court." *Id.* at 105 (italics added). "In our opinion the [trial court in the present case] exercised sound discretion and properly dismissed this suit for a declaratory judgment and for an injunction." *Id.* at 106.

296. S. Nat'l Bank of Houston v. City of Austin, 582 S.W.2d 229, 237 (Tex. Civ. App.—Tyler 1979, writ ref'd n.r.e.) (quoting Section 6 of the Declaratory Judgments Act).

> Once jurisdiction of the subject matter has been established under the Declaratory Judgments Act, however, it is discretionary with the trial court whether the declaratory relief prayed for is granted. Section 6 of that Act provides, "The Court *may* refuse to render or enter a declaratory judgment or decree . . . [which] would not terminate the uncertainty or controversy giving rise to the proceeding."

Id. (alteration in original).

297. *See* United Interests, Inc. v. Brewington, Inc., 729 S.W.2d 897, 906 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.) ("Entry of a declaratory judgment is discretionary . . . ."); Standard Fire Ins. Co. v. Fraiman, 514 S.W.2d 343, 346 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ) (observing that "[t]he Texas cases dealing with the propriety of the trial court granting a declaratory judgment are well settled that the court *may* do so where the judgment would serve a useful, beneficial purpose").

298. 629 S.W.2d 173 (Tex. App.—Dallas 1982, no writ).

299. K.M.S. Research Labs., Inc. v. Willingham, 629 S.W.2d 173, 173 (Tex. App.—Dallas 1982, no writ).

> Nancy P. Willingham filed a personal injury suit in Dallas County against The Hair Jammer and KMS Research Laboratories, Inc. alleging she had been harmed by a certain hair product. . . . KMS, being held to answer in Dallas, filed a counterclaim under the Uniform Declaratory Judgments Act, Tex. Rev. Civ. Stat. Ann. art. 2524-1 (Vernon 1965), asking for a determination as to whether it was liable to Willingham. Willingham then took a non-suit against KMS and filed a "Motion to Dismiss" KMS'[s] counterclaim on the ground that KMS failed to state a cause of action. The motion to dismiss was granted and KMS appeal[ed].

Id.; *see also* Zable v. Henry, 649 S.W.2d 136, 139 (Tex. App.—Dallas 1983, no writ) (refusing to grant declaratory judgment).

300. *K.M.S. Research Labs.*, 629 S.W.2d at 174.

> [B]y express legislative intent, our decision must be made in conformity with other jurisdictions.

Of course, jurists on the other side of this debate take a markedly different view. First, there are jurists who argue strongly that trial judges in Texas have a statutory duty to construe the UDJA liberally[301] and to make the act a useful tool for solving legal problems and controversies.[302] For example, nearly a quarter century ago, Robert Calvert—the learned jurist and former Chief Justice of the Texas Supreme Court—argued that trial judges always have a mandatory duty under the UDJA to interpret, say, a contract and issue a formal declaration of rights.[303] According to Justice Calvert, "[Texas trial courts may] refuse to render a declaratory judgment . . . [only] where the judgment 'would not terminate the uncertainty or controversy giving rise to the proceeding.'"[304]

. . . .

Thus, following the express intention of the Act to harmonize the laws of Texas with those other States and the federal laws, we hold that KMS improperly attempted to litigate its liability to Willingham by seeking a declaratory judgment. Therefore it could not have stated a cause of action under the Act and Willingham's motion to dismiss was properly denied.

Furthermore, the entertaining of a declaratory judgment rests with the sound discretion of the trial court.

Id.

301. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 37.002(a)-(b) (Vernon 1997) ("This chapter may be cited as the Uniform Declaratory Judgments Act. . . . [It] is remedial . . . and [must] be liberally construed and administered."); Cobb v. Harrington, 144 Tex. 360, 190 S.W.2d 709, 713 (1945) (adopting the position that the Declaratory Judgments Act's "scope should be kept wide and liberal, and should not be hedged about by technicalities" (quoting WALTER H. ANDERSON, ACTIONS FOR DECLARATORY JUDGMENTS § 3, at 11-12 (1940))); *see also* Georgiades v. Di Ferrante, 871 S.W.2d 878, 880 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (reaffirming that the Act "[must] be liberally construed and administered").

302. *See* Robert W. Calvert, *Declaratory Judgments in Texas—Mandatory or Discretionary?*, 14 ST. MARY'S L.J. 1, 12 (1982) (arguing that the Texas Supreme Court announced rules in *Cobb v. Harrington*, 144 Tex. 360, 190 S.W.2d 709 (1945), that "marked out very clearly the duty of Texas courts to make the Declaratory Judgments Act a useful tool in the solution of legal problems and controversies, either before or after a legal wrong has been committed"). Calvert further states that the act "was intended [to be a tool for] courts to make a correct declaration of the matters at issue, once jurisdiction has attached." *Id.*

303. *See id.* at 8 ("There are other sections of the [UDJA] which confer discretionary powers, thus indicating that the general power to grant declaratory relief is mandatory and not discretionary.").

304. *Id.* at 17.

Some courts have appropriated the language . . . in *Town of Santa Rosa v. Johnson* . . . that "the entry of a declaratory judgment is discretionary with the trial court" as au-

Several of Texas's appellate courts have adopted Chief Justice Calvert's argument. For example, in *Public Utility Commission of Texas v. City of Austin*,[305] the Austin Court of Appeals adamantly reaffirmed one of its prior declarations: "[I]t is the duty of the trial courts to make the Uniform Declaratory Judgment Act . . . [a] useful tool[ ] in the resolution of legal problems and controversies."[306] "[And] if a declaratory judgment will terminate the uncertainty or controversy [that produced] the lawsuit, the trial court is duty-bound to declare the rights of the parties . . . ."[307] The Beaumont, Dallas, Houston, and Texarkana Courts of Appeals also have embraced[308] and reaffirmed[309] the principle that trial courts have a

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thorizing a trial court, which has accepted jurisdiction, to decline to grant declaratory relief in other than section 6 situations. The increasing tendency to do so is best illustrated in *K.M.S. Research Laboratories, Inc. v. Willingham* . . . .

Id. at 15 (quoting Town of Santa Rosa v. Johnson, 184 S.W.2d 340, 340-41 (Tex. Civ. App.—San Antonio 1944, no writ)).

305. 728 S.W.2d 907 (Tex. App.—Austin 1987, writ ref'd n.r.e.).

306. Pub. Util. Comm'n of Tex. v. City of Austin, 728 S.W.2d 907, 910 (Tex. App.—Austin 1987, writ ref'd n.r.e.) (citing Bellegie v. Tex. Bd. of Nurse Examiners, 685 S.W.2d 431, 434 (Tex. App.—Austin 1985, no writ)); *see also* Vista Health Plan, Inc. v. Tex. Health & Human Servs. Comm'n, No. 03-03-00216-CV, 2004 WL 1114551, at *6 (Tex. App.—Austin May 20, 2004, pet. denied) (mem. op.) (reaffirming the view that "if a declaratory judgment will terminate the uncertainty or controversy giving rise to a lawsuit, the trial court is duty-bound to declare the rights of the parties as to those matters upon which the parties join issue").

307. *Pub. Util. Comm'n of Tex.*, 728 S.W.2d at 910.

308. *See* SpawGlass Constr. Corp. v. City of Houston, 974 S.W.2d 876, 878 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) (adopting the position "that if a declaratory judgment will terminate the uncertainty or controversy giving rise to the lawsuit, the trial court is duty-bound to declare the rights of the parties as to those matters upon which the parties join issue"); Beadle v. Bonham State Bank, 880 S.W.2d 160, 162 (Tex. App.—Texarkana 1994) (adopting the principle that "[i]f a declaratory judgment will terminate the uncertainty or controversy giving rise to the lawsuit, the trial court is duty-bound to declare the rights of the parties as to those matters upon which the parties join issue"), *aff'd in part and rev'd in part*, 907 S.W.2d 465 (Tex. 1995); Tex. Water Comm'n v. Lindsey, 850 S.W.2d 183, 186 (Tex. App.—Beaumont 1992, no writ) (adopting the rule that "if a declaratory judgment will terminate the uncertainty or controversy giving rise to the law suit, the trial court is duty-bound to declare the rights of the parties as to those matters upon which the parties join issue" (quoting Bellegie v. Tex. Bd. of Nurse Examiners, 685 S.W.2d 431, 434 (Tex. App.—Austin 1995, writ ref'd n.r.e.))); Heineken USA, Inc. v. Willow Distribs., Inc., No. 05-00-01519-CV, 2001 WL 1205340, at *1 (Tex. App.—Dallas Oct. 12, 2001, no pet.) (not designated for publication) (embracing the rule that "if a declaratory judgment will terminate the uncertainty or controversy giving rise to the law suit, the trial court is duty-bound to declare the rights of the parties as to those matters upon which the parties join issue").

309. *See* Securtec, Inc. v. County of Gregg, 106 S.W.3d 803, 809 (Tex. App.—Texarkana 2003, pet. denied) (reaffirming the view that "[i]f a declaratory judgment will termi-

mandatory duty to enter a formal decree in a declaratory-judgment trial.

Without doubt, the issue of whether trial judges have a mandatory duty to enter a declaratory-judgment decree has received serious analysis in other large states and, arguably, influential jurisdictions that have adopted the UDJA. For example, consider the facts in *Maurizzio v. Lumbermens Mutual Casualty Co.*[310] Lumbermens insured Maurizzio under an automobile insurance contract that had an underinsured motorist endorsement.[311] During the policy period, Maurizzio's vehicle collided with a third party's vehicle.[312] The accident caused injuries and generated damages exceeding the policy limits of the third party's insurance contract.[313] Maurizzio filed a claim, citing the underinsured motorist provision and demanding that Lumbermens cover the financial losses.[314]

The insurer denied the claim and filed a declaratory-judgment action, asking the court to declare that Lumbermens had a contractual duty to pay under the endorsement.[315] During the trial, the insurer filed a motion to dismiss and the trial court granted that motion.[316] Maurizzio appealed the adverse ruling to a New York intermediate appellate court, which affirmed the lower court's dis-

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nate the uncertainty or controversy giving rise to the lawsuit, the trial court is duty bound to declare the rights of the parties as to those matters on which the parties join issue"); Continental Cas. Co. v. Major Constructors, No. 14-49-0244-CV, 2000 WL 991601, at *1 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (re-emphasizing that "if a declaratory judgment will terminate the uncertainty or controversy giving rise to the lawsuit, the trial court is duty-bound to declare the rights of the parties as to those matters upon which the parties join issue").

310. 538 N.E.2d 334 (N.Y. 1989).

311. Maurizzio v. Lumbermens Mut. Cas. Co., 538 N.E.2d 334, 335 (N.Y. 1989).

312. *Id.* at 335.

313. *Id.*

314. *Id.* "[The insured] filed a claim under this underinsured motorist endorsement after having allegedly sustained injuries in excess of $20,000 in an accident with another vehicle, which had an insurance policy with a $10,000 limit for bodily injury." *Id.*

315. *Id.* "When defendant insurance company denied the claim, plaintiff commenced the present lawsuit for a judgment declaring him entitled to coverage." *Id.*

316. *Maurizzio*, 538 N.E.2d at 335.

> [The] [s]upreme [c]ourt dismissed the complaint [because the insured failed] to state a cause of action . . . [U]nder the plain terms of plaintiff's policy, the underinsured motorist coverage was unavailable where the . . . policy limits of the offending vehicle were not less than the limits of [Maurizzio's] own [policy].

Id.

missal. Then the insured asked New York's highest court—the court of appeals—to hear the case and reverse the lower courts' rulings. The New York Court of Appeals agreed to review the case.[317]

In a fairly intelligible and thoughtful opinion, the court of appeals embraced the lower courts' general conclusion that Lumbermens had no contractual duty to reimburse Maurizzio under the underinsured motorist endorsement.[318] But the New York Court of Appeals also declared:

> [A]lthough the courts below correctly disposed of the merits of plaintiff's claim, they erred in the form of the remedy they selected. . . . [W]hen a court resolves the merits of a declaratory judgment action against the plaintiff, the proper course is not to dismiss the complaint, but rather to issue a declaration in favor of the defendants . . . . Accordingly, the order from which plaintiff appeals must be modified to include a declaration that plaintiff is not entitled to recover on his underinsured motorist claim.[319]

The Ohio Supreme Court and the Maryland Court of Appeals also have embraced the doctrine that courts must issue a formal decree—whether that decree is favorable or unfavorable—after accepting a complainant's invitation to try a declaratory-judgment

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317. *Id.* "The Appellate Division affirmed, and plaintiff now appeals by permission of this court." *Id.* (citation omitted).

318. *Id.*

> We agree that plaintiff is not entitled to recover under the terms of his underinsured motorist endorsement. The coverage provided by that endorsement is definitionally not available where, as here, the policy limits of the insured's vehicle do not exceed the policy limits of the other vehicle or vehicles involved in the injury-causing accident. While it is true that a person who has purchased a policy with a $10,000 limit for bodily injury may never have occasion to recover under an underinsured motorist endorsement such as the one at issue here, that circumstance alone does not justify an interpretation of the underinsurance clause that would create an entirely different form of supplementary coverage than that defined by the Legislature in the State's Insurance Law.

Maurizzio v. Lumbermens Mut. Cas. Co., 538 N.E.2d 334, 335 (N.Y. 1989) (citations omitted).

319. *Id.* at 336. The court concluded that it was erroneous for the trial court to dismiss the declaratory-judgment action merely because the plaintiffs were not entitled to the declaration that they sought. *Id.*; *see also* Bresky v. Ace Ina Holdings Inc., 731 N.Y.S.2d 791, 793 (N.Y. App. Div. 2001) (citing Maurizzio v. Lumbermens Mut. Cas. Co., 538 N.E.2d 334, 335-36 (N.Y. 1989)) ("We note, however, that since plaintiff sought a declaratory judgment in this action, the proper remedy should have been a declaration in favor of defendant rather than the dismissal of the complaint." (citation omitted)).

case.[320] But to repeat, Justice Calvert—the former Chief Justice of the Texas Supreme Court—has highlighted the unfairness of this practice in Texas where trial courts summarily dismiss a "justiciable controversy" without issuing a decree.[321] Definitely, the same un-

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320. *See* Walker v. Walker, 5 N.E.2d 405, 406 (Ohio 1936) (concluding that "[t]he declaratory judgment act is a salutary, remedial measure [that] should be liberally construed" and ruling indirectly that the act requires a court "to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would . . . terminate the uncertainty or controversy giving rise to the proceeding"); Weyandt v. Davis, 679 N.E.2d 1191, 1194 (Ohio Ct. App. 1996) (declaring that "[a declaratory judgment] complaint may be dismissed for failure to state a claim upon which relief can be granted *only if* (1) no real controversy or justiciable issue exists between the parties, or (2) the declaratory judgment will not terminate the uncertainty or controversy" (emphasis added)); Fioresi v. State Farm Mut. Auto. Ins. Co., 499 N.E.2d 5, 6 (Ohio Ct. App. 1985) (citing *Walker v. Walker* and reaffirming the view that "[t]here are only two reasons for dismissing a complaint for declaratory judgment before the court addresses the merits of the case: (1) where there is no real controversy or justiciable issue between the parties, . . . or (2) when the declaratory judgment will not terminate the uncertainty or controversy"); Robert T. Foley Co. v. Wash. Suburban Sanitary Comm'n, 389 A.2d 350, 354-55, 359 (Md. 1978) (vacating the circuit court's judgment). In *Robert T. Foley Co.*, the plaintiffs wanted the court to declare that certain sewerage charges were unconstitutional and declare that the resolutions imposing the charges were invalid as violating contractual rights. *Id.* at 354. On appeal, the plaintiffs complained that the trial court failed to issue a declaration of rights vis-à-vis the latter question. *Id.* at 355. The Maryland Court of Appeals concluded that the appellate court did not deal with this question and added that the circuit court's decree recited "only that the defendant's motion for summary judgment was granted and the plaintiffs' motion was denied. . . . [I]t is clear that the circuit court erred by failing to set forth in its judgment a declaration of the parties' rights with regard to the issues raised." *Id.* at 359. Therefore, the court of appeals vacated the circuit court's judgment and remanded the cause for the entry of a new judgment, which would "include a declaration of the rights of the parties." *Id.*; *see also* Dart Drug Corp. v. Hechinger Co., 320 A.2d 266, 274 (Md. 1974) ("While a declaratory decree need not be in any particular form, it must pass upon and adjudicate the issues raised in the proceeding, to the end that the rights of the parties are clearly delineated and the controversy terminated." (citations omitted)).

321. *See* Robert W. Calvert, *Declaratory Judgments in Texas—Mandatory or Discretionary?*, 14 ST. MARY'S L.J. 1, 8-9 (1982) (observing that courts interpreting the UDJA in other jurisdictions "have recognized and enforced the requirement of a duty to act"); *see also* K.M.S. Research Labs., Inc. v. Willingham, 629 S.W.2d 173, 175-76 (Tex. App.—Dallas 1982, no writ) (Carver, J., dissenting) (concluding that the UDJA "is a proper vehicle for a defendant's *counterclaim* seeking a declaration of non-liability to a particular tort claim as asserted in a plaintiff's suit on file"). Justice Carver would have held "that the trial court erred in dismissing the counterclaim on the ground that it failed to state a cause of action." *Id.* "[T]here is no danger, as seen in the authorities relied upon by the majority, of depriving the injured party of the right to choose the time and forum to litigate one's claim." *Id.* at 176. "To affirm this case is to nullify [KMS's] plain right [under] the Declaratory Judgment Act . . . ." *Id.* "In view of the legislative expression contained within the Declaratory Judgment Act that the act be liberally construed to serve its remedial purpose, the dismissal should be reversed and KMS'[s] counterclaim tried." *Id.*

fairness appears in declaratory-judgment hearings when trial courts cursorily grant summary-judgment motions without carefully addressing the declaration-of-rights controversy. Perhaps it is time for the Texas Supreme Court to address the conflicting rulings among Texas's courts regarding this issue and, in the process, address the concerns that Justice Calvert has documented and discussed so scholarly and thoroughly.

C. *A Critique—Whether Texas's Courts Have Power to Decide Both Questions of Fact and Law in a Declaratory-Judgment Trial*

Even if the Texas Supreme Court were to decide decisively whether trial courts have a mandatory duty to enter formal decrees in declaratory-judgment trials, another controversy still remains. Once more, this Article advocates removing summary-judgment practice from declaratory-judgment trials altogether. Allowing a summary-judgment motion in such proceedings—where a court only decides a question of law—is redundant. Moreover, the practice increases costs and significantly undermines the speedy and efficient administration of justice.

Categorically, disgruntled litigants may use a declaratory-judgment trial to decide many, and a variety of, questions.[322] And Texas's trial judges have the necessary experience, temperament, and expertise to decide both questions of law and fact in a declaratory-judgment trial. Certainly, the UDJA gives courts the clout to decide questions of law. But, among Texas's courts, the debate persists over whether trial judges have the authority to decide questions of fact in a declaratory-judgment proceeding, notwithstanding the Supreme Court of Texas's ruling in *United Services Life Insurance Co. v. Delaney*[323] and the language appearing in the Texas Civil Practice and Remedies Code Section 37.007.[324]

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322. *See* City of Beaumont v. West, 484 S.W.2d 789, 794 (Tex. Civ. App.—Beaumont 1972, writ ref'd n.r.e.) (Stephenson, J., dissenting) ("To state my position as simply as possible, this is an action under [the UDJA] to have the court construe a new statute .... It is agreed that the interpretation of a statute is one of the many questions that may be raised in an action brought under [the Act].").

323. 396 S.W.2d 855 (Tex. 1965).

324. TEX. CIV. PRAC. & REM. CODE ANN. § 37.007 (Vernon 1997).

Two years after the Texas Legislature enacted the UDJA, the Dallas Court of Appeals declared in *Lincoln v. Harvey*:[325] "A declaratory judgment on purely fact questions cannot be the basis for [an] action . . . [to determine] the rights of the parties."[326] Absolutely, the questions-of-fact ruling in *Lincoln* was remarkable for one important reason: The court did not cite any legal authority in Texas or from any other jurisdiction to justify the ruling. If the Dallas Appellate Court had examined cases thoroughly from other jurisdictions, however, it would have found only minimal support for its ruling.[327]

First, the court of appeals would have discovered that English courts have a long tradition of deciding questions of fact in declaratory-judgment trials.[328] One commentator has observed correctly: "[There is a general perception] that the English courts will not make a declaration of fact but only of a legal relation [or] that they will determine facts incidental to legal results . . . ."[329] However, "[t]here are many cases in England where . . . courts have entered declaratory judgments upon disputed questions of fact [and those facts] were incidental to legal relations."[330]

Second, during the early-to-mid-twentieth century a number of states gave trial courts the power to decide both questions of law and questions of fact in a declaratory-judgment forum. For exam-

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325. 191 S.W.2d 764 (Tex. Civ. App.—Dallas 1945, no writ).

326. Lincoln v. Harvey, 191 S.W.2d 764, 766 (Tex. Civ. App.—Dallas 1945, no writ).

327. See Prudential Ins. Co. of Am. v. Powell, 8 S.E.2d 619, 622 (N.C. 1940) (acknowledging that necessity may force trial judges in some instances "to hear evidence in order to determine . . . legal questions" in a declaratory-judgment proceeding, but ruling that a litigant may not commence a proceeding under the Declaratory Judgments Act solely to decide questions of fact); Ladner v. Siegel, 144 A. 274, 275-76 (Pa. 1928) (observing that the Declaratory Judgments Act of 1923 gives courts the "power to declare rights, status, and other legal relations between parties, where there is a real matter in controversy," and holding that ordinarily a court "will not act where there [are disputed] facts, or such controversy may arise" (internal quotation marks omitted)).

328. *See* Henry W. Simon, *Declaratory Judgments—Questions of Fact*, 11 TEX. L. REV. 351, 352 (1933) (recognizing that "[d]eclaratory judgments have long been used in England and most of the statutes in this country [were] copied in part, if not wholly, from the English statute, passed in 1850"). "[T]he statute is silent on the question of the power of Chancery to enter a declaratory judgment [on] a question of fact . . . ." *Id.*

329. *Id.* The article lists and discusses an array of English cases in which early English courts decided purely questions of fact in declaratory-judgment proceedings.

330. *Id.* at 353. "In each of [those] cases the question was worded so that a legal relation of the parties was placed in issue and then the operative facts determining that legal relation were decided by the court." *Id.*

ple, four years before Texas enacted the UDJA, the Supreme Court of New Hampshire decided *Malloy v. Head*[331] and held that a court could decide a question of fact in an insurance-defense controversy.[332] One year after the *Malloy* decision, the Supreme Court of Virginia decided *Yukon Pocahontas Coal Co. v. Ratliff*.[333] In *Yukon*, the Virginia Supreme Court concluded that determining whether "a justiciable controversy" exists in a declaratory-judgment suit is in itself a question of fact; therefore, a trial court has authority to decide that and other fact questions after examining pleadings or other evidence.[334]

And just one year before Texas adopted the UDJA, the New York Court of Appeals decided *Rockland Power & Light Co. v. City of New York*[335] and held: "A declaratory judgment is ex vi termini a judgment on the merits. [If a trial court does not settle or determine] disputed questions of fact . . . , it is plain that rights and legal relations cannot be determined, defined and declared."[336] Still, in light of these authorities, the Dallas Court of Appeals declared in *Lincoln*: Texas's trial courts have no authority to decide purely questions of fact in a declaratory-judgment trial.[337]

Twenty years after the *Lincoln* ruling, the Texas Supreme Court decided *Delaney*.[338] Without citing English law or other state supreme courts' decisions and without presenting a sound legal analysis, the *Delaney* court simply stated: "The Uniform Declaratory

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331. 4 A.2d 875 (N.H. 1939).

332. Malloy v. Head, 4 A.2d 875, 877 (N.H. 1939), *overruled in part*, Am. Employers Ins. Co. v. Town of Swanzey, 237 A.2d 681, 682 (N.H. 1968). Whether an insured gave an insurer written notice of an accident as soon as reasonably possible was a fact question for the trial court in a proceeding for declaratory judgment. *Id.*

333. 8 S.E.2d 303 (Va. 1940).

334. Yukon Pocahontas Coal Co. v. Ratliff, 8 S.E.2d 303, 304 (Va. 1940).

> In view of the pleadings and upon the record, [we must consider] whether . . . the facts alleged in the bill are sufficient to sustain this [declaratory-judgment] action. We are here concerned with the *right* to the interpretation, rather than the *interpretation* of the deed. The test of the *right* to an interpretation is the existence of an "actual controversy". The *interpretation* is the solution of the controversy. It follows as the result of the controversy. Whether . . . there is a controversy is a question of fact, and may be shown by the pleadings or by the evidence.

Id. (emphasis added).

335. 43 N.E.2d 803 (N.Y. 1942).

336. Rockland Power & Light Co. v. City of New York, 43 N.E.2d 803, 806 (N.Y. 1942) (internal quotation marks omitted).

337. Lincoln v. Harvey, 191 S.W.2d 764, 766 (Tex. Civ. App.—Dallas 1945, no writ).

338. United Servs. Life Ins. Co. v. Delaney, 396 S.W.2d 855 (Tex. 1965).

Judgments Act . . . provides a plenary remedy. A court having jurisdiction to render a declaratory judgment has power to determine issues of fact . . . ."[339] At first glance, it would appear that *Delaney* soundly and unmistakably overruled *Lincoln*. But that conclusion would be premature. To repeat, a careful analysis of Texas's case law reveals appellate courts still cite *Lincoln* as controlling authority. Even more significant, the ruling in *Delaney* has generated arguably more confusion among Texas's courts.

To help illustrate the point, consider the Tyler Court of Appeals's ruling in *Emmco Insurance Co. v. Burrows*[340]—just two years after the Texas Supreme Court decided *Delaney*. Citing *Lincoln* rather than *Delaney*, the court held:

> [D]eclaratory relief is further inappropriate in this case because the only issue involved is purely a question of fact. . . . [T]here is no real dispute [about] the existence or meaning of the contract. [We only must resolve a] purely factual question of whether . . . the defendants acted in "consort" . . . . If a factual dispute is the only issue to be resolved, a declaratory judgment is not the proper remedy.[341]

Now consider the El Paso appellate court's bewildering 1997 ruling in *Hill v. Heritage Resources, Inc.*[342] Embracing *Delaney*, the court decided in *Hill*: "[A] trial [court with] jurisdiction to render a declaratory judgment has the power to determine issues of fact."[343] Citing *Lincoln* and *Emmco*, however, the appellate court of El Paso held:

> [T]he power to determine an issue of fact does not concomitantly carry with it the power to render such a finding of fact as a declaratory judgment. The determination of whether a party . . . breached a

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339. *Id.* at 858; *see also* Cal. Prods., Inc. v. Puretex Lemon Juice, Inc., 334 S.W.2d 780, 783 (Tex. 1960) (adopting the principle that "a declaratory judgment should not be based upon facts which are particularly subject to mutation and change" (quoting S. Traffic Bureau v. Thompson, 232 S.W.2d 742, 751 (Tex. Civ. App.—San Antonio 1950, writ ref'd n.r.e.))).

340. 419 S.W.2d 665 (Tex. Civ. App.—Tyler 1967, no writ).

341. Emmco Ins. Co. v. Burrows, 419 S.W.2d 665, 671 (Tex. Civ. App.—Tyler 1967, no writ).

342. 964 S.W.2d 89 (Tex. App.—El Paso 1997, pet. denied).

343. Hill v. Heritage Res., Inc. 964 S.W.2d 89, 140 (Tex. App.—El Paso 1997, pet. denied) (citing Bexar-Medina-Atascosa Counties Water Control & Improvement Dist. No. 1 v. Medina Lake Protection Ass'n, 640 S.W.2d 778, 780 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.)). "[A] court [that has] jurisdiction to render a declaratory judgment has the power to determine issues of fact." *Id.*

> contract, while affecting a party's rights or status, is not a declaration of a right or status and therefore, is not the proper subject of a declaratory judgment. [Here, the trial court only had to resolve whether a breach occurred]. If a factual dispute is the only issue to be resolved, a declaratory judgment is not the proper remedy.[344]

It has been forty years since the Texas Supreme Court decided *Delaney*. Yet, as we have seen, some appellate courts still embrace the position that trial courts may not award declaratory relief where the only controversy involves a question of fact.[345] On the other hand, Houston's District Court of Appeals has read *Delaney* literally and concluded, "[A court with] jurisdiction to render a declaratory judgment has power to determine issues of fact, issues of state law, and issues of federal law if such questions be involved in the particular case."[346] Furthermore, in *Bexar-Medina-Atascosa Counties Water Control & Improvement District No. 1 v. Medina Lake Protection Ass'n*,[347] the San Antonio Court of Appeals cited and embraced *Delaney* without qualification.[348] This latter appellate court ruled that trial courts have power to decide purely questions of fact in a declaratory-judgment trial—without simultaneously deciding other issues or questions of law.[349]

Moreover, the UDJA gives trial judges the authority to award attorneys' fees.[350] Therefore, in 1998, the Texas Supreme Court

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344. *Id.*

345. *See* City of Watauga v. Taylor, 752 S.W.2d 199, 205 (Tex. App.—Fort Worth 1988, no writ) (citing Emmco Ins. Co. v. Burrows, 419 S.W.2d 665, 671 (Tex. Civ. App.—Tyler 1967, no writ)) ("Declaratory relief is inappropriate where the only issue involved is a question of fact. . . . This is clearly not a declaratory judgment case. This is a suit for damages arising out of alleged negligence and an alleged unconstitutional taking, both questions of facts.").

346. Chapman v. Marathon Mfg. Co., 590 S.W.2d 549, 552 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ) (citing United Servs. Life Ins. Co. v. Delaney, 896 S.W.2d 855 (Tex. 1965)).

347. 640 S.W.2d 778 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.).

348. *See* Bexar-Medina-Atascosa Counties Water Control & Improvement Dist. No. 1 v. Medina Lake Protection Ass'n, 640 S.W.2d 778, 780 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.) (citing *Delaney*).

349. *See id.* at 780 (citing *Delaney* and embracing the view that "a court having jurisdiction to render a declaratory judgment has the power to determine issues of fact").

350. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (Vernon 1997) (giving courts the authority to award reasonable and necessary attorney's fees); *see also* Welder v. Green, 985 S.W.2d 170, 180 (Tex. App.—Corpus Christi 1998, pet. denied) ("The Declaratory Judgments Act provides that in any proceeding under the Act 'the court may award costs

reached the following conclusion in *Bocquet v. Herring*:[351] "[T]he Declaratory Judgments Act entrusts attorney fee awards to the trial court's sound discretion, subject to the requirements that any fees awarded [must] be reasonable and necessary, which are matters of fact, and to the additional requirements that fees be equitable and just, which are matters of law."[352] Because the San Antonio Court of Appeals has cited *Bocquet*'s narrow ruling in a juvenile-delinquency controversy,[353] arguably that appellate court would use the ruling in *Bocquet* to accentuate or augment its broader questions-of-fact holding in *Bexar-Medina-Atascosa Counties.*

There is one final point. Courts that adopt the view that trial judges may decide questions of fact in a declaratory-judgment proceeding cite the plain language appearing in Texas Civil Practice and Remedies Code Section 37.007. That section reads: "If a proceeding under this chapter involves the determination of an issue of fact, the issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending."[354]

In *Aledo Independent School District v. Choctaw Properties, L.L.C.*,[355] the Waco Court of Appeals cited Section 37.007 and held:

> The purpose of the Uniform Declaratory Judgments Act is to settle and afford relief from uncertainty and insecurity with respect to

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and reasonable and necessary attorney's fees as are equitable and just.'" (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (Vernon 1997))).

351. 972 S.W.2d 19 (Tex. 1998).

352. Bocquet v. Herring, 972 S.W.2d 19, 21 (Tex. 1998). "This multi-faceted review involving both evidentiary and discretionary matters is required by the language of the Act." *Id.*; *see also* Stewart Title Guar. Co. v. Aiello, 941 S.W.2d 68, 73 (Tex. 1997) (holding that "[t]he award of appellate fees is a question of fact for the jury").

353. *See In re* K.T., 107 S.W.3d 65, 73 (Tex. App.—San Antonio 2003, no pet.) (using the *Bocquet* holding as an example of an appropriate "legal and factual sufficiency review of the fact findings").

> [I]f a trial court makes an award of attorney's fees under the Declaratory Judgment Act, it resolves both questions of fact (whether the fees sought are reasonable and necessary), as well as questions of law (whether an award of fees is equitable and just); and, while the trial court's award is subject to an abuse of discretion standard, its resolution of the fact questions is subject to sufficiency review.

Id.

354. TEX. CIV. PRAC. & REM. CODE ANN. § 37.007 (Vernon 1997).

355. 17 S.W.3d 260 (Tex. App.—Waco 2000, no pet.).

> rights, status, and other legal relations. It [must] be liberally construed and administered. There is no provision in this act which forbids a determination of a fact question by declaratory judgment. In actuality, the act contemplates the resolution of factual questions by declaratory judgment. Specifically, Section 37.007 provides [for such relief]. . . . Whether the determination of a pure fact question may or may not be a proper remedy from a declaratory judgment, is not jurisdictionally dispositive of the cause of action.[356]

Perhaps the Waco Court of Appeals's analysis is the correct one, reflecting the majority view among Texas's courts. But to repeat: There is serious debate surrounding this issue, and the Texas Supreme Court's decision in *Delaney* is sufficiently void of any significant direction. To be sure, it is time for the Texas Supreme Court to revisit this question and issue a more definitive ruling.

V. INSURANCE DEFENSE AND THE ROLE OF DECLARATORY JUDGMENTS IN TEXAS

A. *Personal Injury Claims and the Scope of Insurers' Obligations Under Liability and Indemnity Insurance Contracts in Texas*

Even a cursory search of various legal electronic databases reveals that insureds and insurers file an inordinate number of declaratory-judgment actions in Texas's courts on a yearly basis. Quite simply, those litigants ask courts to determine their respective rights and obligations under an assortment of first- and third-party insurance contracts, such as automobile, health, homeowners', commercial-liability, life, marine, professional liability, property, and title insurance policies.

Put simply, first-party insurance covers an insured's person as well as the insured's personal and real property.[357] But the defini-

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356. Aledo Indep. Sch. Dist. v. Choctaw Props., L.L.C., 17 S.W.3d 260, 265 (Tex. App.—Waco 2000, no pet.) (citations omitted). "[On appellate review,] Aledo [argued that] the trial court ha[d] no jurisdiction over the third party action because Choctaw improperly [petitioned] the trial court to resolve issues of fact in its request for a declaratory judgment." *Id.*

357. *See* Great Am. Ins. Co. v. Jim Stephenson Motor Co., No. 05-94-00858-CV, 1996 WL 135688, at *5 (Tex. App.—Dallas Mar. 26, 1996, writ denied) (not designated for publication) (reporting that commentators define first-party insurance as coverage for "the insured's own property or person" and quoting various insurance dictionaries and glossaries).

tion of coverage under a first-party insurance contract differs significantly from what an ordinary and reasonable insured might define as coverage. For instance, under a property insurance contract, an insurer covers losses only if clearly identified perils listed in the insurance policy caused the losses.[358] On the other hand, if an "excluded peril" caused the loss, there is no coverage under the property insurance policy.[359] Of course, these principles also apply if the coverage controversies involve life, health, or title insurance contracts.

Theoretically, third-party or liability insurance covers all damages for which the insured becomes legally obligated to pay for injuring a third party's person or property.[360] Without doubt, when an insurer agrees to cover third-party injuries, the insurer agrees to cover a broader spectrum of risks. However, the insured's negligence—rather than some covered peril—must be the cause in fact and proximate cause of the third-party injuries.[361] Contrarily, a liability contract typically does not cover a third-party loss if an insured's intentional act was the cause in fact of the injury, proximate cause of the injury, or both.[362]

More relevant, when insurers in Texas agree to cover a variety of risks under first- and third-party insurance contracts, they also ac-

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358. *See* Warrilow v. Norrell, 791 S.W.2d 515, 527 (Tex. App.—Corpus Christi 1989, writ denied) (explaining that coverage analysis of a property insurance claim examines the relationship between covered perils and excluded ones). "Property insurance, unlike liability insurance, is unconcerned with establishing negligence or otherwise assessing tort liability." *Id.* (quoting Garvey v. State Farm Fire & Cas. Co., 770 P.2d 704, 710 (Cal. 1989)). "Coverage in a property policy is commonly provided by reference to causation, such as 'loss caused by . . .' certain enumerated forces . . . . It is precisely these physical forces that bring about the loss." *Id.* (citing *Garvey*, 770 P.2d at 710). "In Texas, if one force is covered and one force is excluded, the insured must show that the property damage was caused solely by the insured force, or he must separate the damage caused by the insured peril from that caused by the excluded peril." *Warrilow*, 791 S.W.2d at 527 (citing Travelers Indem. Co. v. McKillip, 469 S.W.2d 160, 162 (Tex. 1971)).

359. *See McKillip*, 469 S.W.2d at 162 (embracing the view that coverage analysis surrounding property insurance examines the relationship between covered and excluded perils).

360. *See Warrilow*, 791 S.W.2d at 527 (distinguishing liability insurance from property insurance).

361. *See Great Am. Ins. Co.*, 1996 WL 135688, at *5 (reviewing definitions of third-party insurance from statutes, insurance dictionaries, and other sources).

362. *See* Superior Ins. Co. v. Jenkins, 358 S.W.2d 243, 244 (Tex. Civ. App.—Eastland 1962, writ ref'd) (observing that the liability insurance contract clearly stated its inapplicability "[t]o bodily injury or property damage caused intentionally by or at the direction of the insured").

cept a variety of contractual and statutory obligations. For sure, those obligations are too numerous to list and discuss here. But three broad categories of duties warrant a brief discussion in this part: (1) the insurers' duty to settle a claim, (2) the carriers' duty to indemnify, and (3) the insurers' duty to defend insureds against third-party claims. By all objective measures, conflicts regarding the extent to which insurers must perform these duties comprise the overwhelming majority of insurance-related declaratory-judgment actions and summary-judgment motions in Texas's courts.

First, Texas's law has long recognized a common-law duty of good faith and fair dealing[363] to process and pay claims under first-party insurance contracts.[364] That same common-law duty also requires insurers to settle first-party claims in a timely manner.[365] Similarly, under Texas's *Stowers* doctrine, an insurer must behave like an ordinary and prudent insurer and timely settle a third-party claim against the insured.[366] The test, however, is specific: The insurer must settle the claim when the third-party victim offers to resolve the controversy for an amount of money that equals or is less than the policy limits.[367]

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363. *See* State Farm Fire & Cas. Co. v. Simmons, 963 S.W.2d 42, 44 (Tex. 1998) (citing *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48 (Tex. 1997), and reaffirming *Giles*'s holding that "an insurer breaches its duty of good faith and fair dealing by denying [or delaying payment of] a claim when the insurer's liability has become reasonably clear"); *Giles*, 950 S.W.2d at 56 (holding that "an insurer will be liable if the insurer knew or should have known that it was reasonably clear that the claim was covered"); *see also* Republic Ins. Co. v. Stoker, 903 S.W.2d 338, 340 (Tex. 1995) (declaring that an insurer breaches the duty of good faith and fair dealing when the insured establishes that "(1) there [was no] reasonable basis for denying or delaying payment of benefits under the policy and (2) the carrier knew or should have known that there was not a reasonable basis for denying the claim or delaying payment of the claim" (citing Aranda v. Ins. Co. of N. Am., 748 S.W.2d 210, 213 (Tex. 1988))).

364. *See* Arnold v. Nat'l County Mut. Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987) (holding that an insurer has a duty to deal fairly and in good faith with its insured in the processing and payment of claims).

365. *See* Minn. Life Ins. Co. v. Vasquez, 133 S.W.3d 320, 330 (Tex. App.—Corpus Christi 2004, pet. filed) (concluding that the first-party insurer had a duty to make a good faith effort to complete its investigation and settle the health-insurance claim promptly, although the insurer was waiting for the insured's hospital records).

366. G.A. Stowers Furniture Co. v. Am. Indem. Co., 15 S.W.2d 544, 547 (Tex. Comm'n App. 1929, holding approved).

367. *See id.* (holding that an insurer must conform to that degree of care and diligence which an ordinary prudent person would exercise in the management of his own business). If an insurer refuses a settlement offer when it appears that an ordinary prudent person in the insured's situation would have settled, the insurer will be held liable for damages. *Id.*;

Moreover, under the Texas Insurance Code, insurers have a statutory duty to settle both first- and third-party claims in a reasonable manner.[368] Texas's Unfair Competition and Unfair Practices Act[369] and Unfair Claim Settlement Practices Act[370] allow insureds to sue insurers when the latter refuse to make a good-faith effort to settle first- and third-party claims promptly and equitably. Under both statutes, the tests are identical: Insurers have a legislative duty to settle claims when liability has "become reasonably clear."[371] But more important, both statutes permit insureds to commence a cause of action against insurers under Texas's Deceptive Trade Practices Act (DTPA).[372]

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see also Ranger County Mut. Ins. Co. v. Guin, 723 S.W.2d 656, 659 (Tex. 1987) (embracing the *Stowers* doctrine and the view that an insurance carrier must exercise ordinary care when considering whether to accept a third-party victim's settlement offer and whether to offer the policy limits under the insurance contract).

368. *See* Rocor Int'l, Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 77 S.W.3d 253, 260 (Tex. 2002) (explaining that a cause of action for failing to settle a third party claim exists under Article 21.21 of the Texas Insurance Code (citing Am. Physician Ins. Exch. v. Garcia, 876 S.W.2d 842, 847 n.10 (Tex. 1994), and Vail v. Tex. Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 133-34 (Tex. 1988))).

369. TEX. INS. CODE ANN. art 21.21 (Vernon Supp. 2004). According to Article 21.21, unfair settlement practices "with respect to a claim by an insured or beneficiary" include "failing to attempt, in good faith, to effectuate a prompt, fair, and equitable settlement of a claim with respect to which the insurer's liability has become reasonably clear." *Id.* § 4(10)(iii).

370. TEX. INS. CODE ANN. art. 21.21-2, § 2(b) (Vernon Supp. 2004). The article states, in pertinent part, that:

> Any of the following acts . . . shall constitute unfair claim settlement practices:
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> . . . .
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> (2) Failing to acknowledge with reasonable promptness pertinent communications with respect to claims arising under its policies . . . .
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> . . . .
>
> (4) Not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims submitted in which liability has become reasonably clear . . . .

Id.

371. TEX. INS. CODE ANN. art. 21.21, § 4(10)(ii) (Vernon Supp. 2004); *id.* at 21.21-2, § 2(b)(4).

372. TEX. INS. CODE ANN. art. 21.21, § 16(a) (Vernon Supp. 2004).

> Any person who has sustained actual damages caused by another's engaging in an act or practice declared . . . to be unfair methods of competition or unfair or deceptive acts or practices in the business of insurance or in any practice specifically enumerated in a subdivision of Section 17.46(b), Business & Commerce Code, as an unlawful deceptive trade practice may maintain an action against the person or persons engaging in such acts or practices. To maintain an action for a deceptive act or practice enumer-

Second, insurers often agree to indemnify insureds when the latter use out-of-pocket dollars to cover expenses associated with first- and third-party losses. Certainly, the duty to indemnify appears in "true," or in first-party, indemnity contracts, but many third-party liability insurance contracts also contain the insurer's express promise to reimburse insureds. For example, a property insurance contract provides first-party coverage. Therefore, under Texas's law, a property insurer has a contractual duty to indemnify the insured if a covered peril destroys[373] or if thieves steal the insured's property.[374] Similarly, title insurance provides first-party coverage; a title insurer has a contractual obligation to reimburse the insured if a defect in title generates financial losses.[375]

An insurer's duty to indemnify under a third-party liability contract is slightly different than its obligation under a true indemnity contract.[376] Under a first-party personal or property insurance

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ated in Section 17.46(b), Business & Commerce Code, a person must show that the person has relied on the act or practice to the person's detriment.

Id.; *see also* TEX. INS. CODE ANN. art. 21.21-2, § 2(c) (Vernon Supp. 2004) (stating, in pertinent part, that "an insurer who violates this subsection commits a deceptive trade practice under Subchapter E., Chapter 17, Business & Commerce Code, and an affected claimant is entitled to remedies under that subchapter").

373. *See, e.g.*, Stillwagoner v. Travelers Ins. Co., 979 S.W.2d 354, 360 (Tex. App.—Tyler 1998, no pet.) (declaring that "[p]roperty insurance is based on the principle of indemnity"); Cumis Ins. Soc'y, Inc. v. Republic Nat'l Bank of Dallas, 480 S.W.2d 762, 765 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.) (declaring that "[a] contract provides property insurance if it binds the insurer to indemnify the insured for loss of identifiable property described either specifically or by general language, such as property in a certain place or within the possession of the insured").

374. *See* Camden Fire Ins. Ass'n v. Moore, 206 S.W.2d 104, 108 (Tex. Civ. App.—Galveston 1947, writ ref'd) (discussing policies that insure against burglary). The *Camden* court observed:

> [T]hieves and burglars do not commit their crimes merely for the sake of defying the law, but to deprive the owners of property. The provision in a policy insuring property, located in a house, against direct loss or damage caused by the peril of burglary, is intended to indemnify the owner against the loss or damage to the insured property perpetrated by a burglar after he gets to the property, which is in the house.

Id.

375. *See, e.g.*, Chicago Title Ins. Co. v. McDaniel, 875 S.W.2d 310, 311 (Tex. 1994) (commenting that "the only duty imposed by a title insurance policy is the duty to indemnify the insured against losses caused by defects in title"); S. Title Guar. Co. v. Prendergast, 494 S.W.2d 154, 158 (Tex. 1973) (embracing the view that "[t]itle insurance is a contract of indemnity and the insured is limited to recovery for actual damages sustained").

376. *See* Willy E. Rice, *Insurance Contracts and Judicial Discord over Whether Liability Insurers Must Defend Insureds' Allegedly Intentional and Immoral Conduct: A Historical and Empirical Review of Federal and State Courts' Declaratory Judgments—1900-1997*,

contract, an insurer has a duty to indemnify when the insured files a claim "as soon as practicable" and presents proof of a covered loss.[377] However, only the underlying adjudicated facts can trigger an insurer's duty to indemnify in third-party cases.[378] In fact, even the insured's or the third-party victim's proffer of some legal theory of recovery will not activate an insurer's duty to indemnify.[379] Simply put, unless the underlying litigation establishes that the insured is liable for third-party damages, a liability insurer has no duty to indemnify the insured.[380]

Finally, whether liability insurers have a duty to defend insureds against third-party lawsuits also generates an excessive number of declaratory-judgment trials and summary-judgment motions in Texas's courts. The typical title insurance contract, for example, requires an insurer in Texas to defend its insured when a third-party sues the insured to resolve a title dispute involving real property.[381] And occasionally insurers and insureds ask courts to declare whether a title insurer has a duty to defend.

However, the overwhelming majority of duty-to-defend controversies concern whether liability insurers are liable for failing to

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47 AM. U. L. REV. 1131, 1145-46 (1998) (comparing the significant distinction between "true" indemnity insurance contracts and indemnity provisions under liability contracts).

377. *See* Dairyland County Mut. Ins. Co. of Tex. v. Roman, 498 S.W.2d 154, 157 (Tex. 1973) (interpreting, under the policy at hand, that the insured give notice to the insurer). Also, the court qualified that notice "be given . . . as soon as practicable [as] a condition precedent to liability" and that "[i]n the absence of waiver or other special circumstances, failure to perform the condition constitutes an absolute defense to liability on the policy." *Id.* "This is so even though the insurer had actual notice of the accident and was not prejudiced by the lack of formal written notice from the insured." *Id.*

378. *See* Trinity Universal Ins. Co. v. Cowan, 945 S.W.2d 819, 821 (Tex. 1997) (declaring that "[t]he duty to indemnify is triggered by the actual facts establishing liability in the underlying suit").

379. *See* Ins. Co. of N. Am. v. McCarthy Bros. Co., 123 F. Supp. 2d 373, 377 (S.D. Tex. 2000) (stating that "[i]n Texas, the underlying liability facts, rather than the legal theory of liability, trigger the duty to indemnify").

380. *See* Employers Cas. Co. v. Block, 744 S.W.2d 940, 944 (Tex. 1988) (holding that "[a]n insured cannot recover under an insurance policy unless facts are pleaded and proved showing that damages are covered by his policy"), *disapproved on other grounds by* State Farm Fire & Cas. Co. v. Gandy, 925 S.W.2d 696, 714 (Tex. 1996).

381. *See* S. Title Guar. Co. v. Prendergast, 494 S.W.2d 154, 156 (Tex. 1973) (holding that the title insurer had a contractual duty to defend the insured against claimants who present adverse claims regarding the title to property); Martinka v. Commonwealth Land Title Ins. Co., 836 S.W.2d 773, 776 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (declaring that the title insurer "was obligated to defend [the insured's] title against adverse claims, and . . . to indemnify [the insured] for his property loss").

provide a legal defense. Under the standard boilerplate liability insurance contract, an insurer has a duty to defend the insured in an underlying third-party lawsuit.[382] But in Texas, a liability insurer is not strictly liable for failing or refusing to defend its insured. Instead, to decide whether an insurer has a contractual duty to defend its insured, the Texas Supreme Court has embraced and repeatedly instructed[383] lower courts to apply the so-called "eight-corners" rule.[384]

Under the eight-corners doctrine, courts must compare the third party's allegations in the underlying pleadings with the coverage provision in the liability insurance contract.[385] And courts must examine and consider those allegations without attempting to ascertain whether those allegations are true or false.[386] "If a petition

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382. *See* Utica Nat'l Ins. Co. of Tex. v. Am. Indem. Co., 141 S.W.3d 198, 205 (Tex. 2004) (embracing the court of appeals's conclusion and declaring that Utica had a duty to defend its insured). *But see* N. County Mut. Ins. Co. v. Davalos, 140 S.W.3d 685, 690 (Tex. 2004) (reversing the lower court's ruling and declaring that the insurer did not breach its duty to defend its insured).

383. *See* Fid. & Guar. Ins. Underwriters, Inc. v. McManus, 633 S.W.2d 787, 788 (Tex. 1982) (declaring that "[a]n insurer [must] defend only those cases within the policy coverage"). "Furthermore, the insurer is entitled to rely on the plaintiff's allegations in determining whether the facts are within the coverage." *Id.*; *see also* Am. Physicians Ins. Exch. v. Garcia, 876 S.W.2d 842, 847-48 (Tex. 1994) (stating that "APIE's duty to defend Garcia is determined solely by the allegations in the pleadings filed against him" (citing Heyden Newport Chem. Corp. v. S. Gen. Ins. Co., 387 S.W.2d 22, 24 (Tex. 1965))); Argonaut Southwest Ins. Co. v. Maupin, 500 S.W.2d 633, 635 (Tex. 1973) (declaring that "[t]he [insurer's] duty to defend is determined by the allegations of the petition when considered in the light of the policy provisions without reference to the truth or falsity of such allegations" (citing *Heyden Newport*, 387 S.W.2d at 24)); Heyden Newport Chem. Corp. v. S. Gen. Ins. Co., 387 S.W.2d 22, 24 (Tex. 1965) (proclaiming that when determining "[an insurer's] duty to defend a lawsuit[,] the allegations of the complainant should be considered in the light of the policy provisions without reference to the truth or falsity of such allegations").

384. *See* Nat'l Union Fire Ins. Co. v. Merchants Fast Motor Lines, Inc., 939 S.W.2d 139, 141 (Tex. 1997) (announcing the application of the eight-corners rule to an insurer's duty to defend its insured). The court stated that "[i]f a [third-party] petition does not allege facts within the scope of coverage, an insurer is not legally required to defend a suit against its insured." *Id.* "An insurer's duty to defend is determined by the allegations in the pleadings and the language of the insurance policy." *Id.* "This is sometimes referred to as the 'eight corners' rule." *Id.*

385. *See* King v. Dallas Fire Ins. Co., 85 S.W.3d 185, 187 (Tex. 2002) (discussing the duty of the insurer under the eight-corners rule).

386. *Id.* at 191.

does not allege facts within the scope of coverage, an insurer [has no duty] to defend a suit against its insured."[387]

On the other hand, if the facts in the third-party complaint do not clearly establish whether the liability policy covers the claim, the insurer must defend the insured if the contract potentially covers the third-party allegation.[388] Stated differently, Texas's courts must (1) interpret the meaning of the allegations in the underlying complaint very liberally,[389] (2) resolve all doubt regarding whether an insurer has a duty to defend in favor of the insured, and (3) compel the insurer to provide a legal defense.[390] Finally, after a court applies the eight-corners doctrine and finds a duty to defend, that obligation requires the insurer to defend the entire suit, including mixed allegations[391] and "causes of action that would not alone trigger the duty to defend."[392]

B. *Texas's Declaratory-Judgment Trials: Insurance Contracts and Rules of Construction and Interpretation*

To repeat, the Texas Supreme Court fashioned the *Stowers* and eight-corners doctrines for two purposes: (1) to determine whether insurers have a duty to settle third-party claims, and (2) to decide

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387. *Id.* at 187 (quoting Trinity Universal Ins. Co. v. Cowan, 945 S.W.2d 819, 821 (Tex. 1997)).

388. *See Merchants Fast Motor Lines, Inc.*, 939 S.W.2d at 141 (reviewing the eight-corners rule and quoting *Heyden* in its explanation).

389. Heyden Newport Chem. Corp. v. S. Gen. Ins. Co., 387 S.W.2d 22, 26 (Tex. 1965) (declaring that "a liberal interpretation" of allegations in the pleading is required).

390. *See Merchants Fast Motor Lines, Inc.*, 939 S.W.2d at 141 (discussing the liberal interpretation of allegations in the petition under the eight-corners rule and explaining that, "[s]tated differently, [if there is doubt regarding whether] the allegations of a complaint against the insured state a cause of action within the coverage of a liability policy sufficient to compel the insurer to defend the action, such doubt will be resolved in [the] insured's favor" (quoting *Heyden*, 387 S.W.2d at 26)).

391. *See* Investors Ins. Co. of Am. v. Breck Operating Corp, No. Civ.A.1:02-CV-122-C, 2003 WL 21056849, at *7 (N.D. Tex. May 8, 2003) ("That the Underlying Complaint also alleges reckless, wilful, wanton, or knowing actions does not preclude the policy's potential coverage of the claimed property damage."). "If an insurer has a duty to defend any portion of a suit, the insurer must defend the entire suit." *Id.* (quoting Harken Exploration Co. v. Sphere Drake Ins. PLC, 261 F.3d 466, 474 (5th Cir. 2001)).

392. Harken Exploration Co. v. Sphere Drake Ins. PLC, 261 F.3d 466, 474 (5th Cir. 2001). *Harken* held that the insurer "must defend [the insured] against the entire suit including causes of action that would not alone trigger the duty to defend, regardless whether the complaint is pled in the alternative or not because the [underlying plaintiffs'] factual allegations of negligence are sufficient to trigger the duty to defend." *Id.*

whether insurers have a duty to defend its insureds against third-party lawsuits. But insurance contracts appear in many forms. Therefore, one can find a large diversity of coverage, exclusion, condition, and warranty provisions, along with duty-to-settle and duty-to-defend clauses. To help lower courts interpret disputed language in any provision of an insurance contract, the Texas Supreme Court has embraced five doctrines.

First, under the traditional doctrine of contract construction and interpretation, a court must evaluate an insurance contract as a whole, giving effect and meaning to each part of the contract as the parties intended.[393] Second, under Texas's law, the terms in an insurance policy are unambiguous as a matter of law if a court can give disputed words and phrases a definite legal meaning.[394] Therefore, under the plain meaning doctrine, a court must enforce an insurance contract according to the plain and ordinary meaning of the language if the court finds no ambiguity in the policy.[395]

On the other hand, the doctrine of ambiguity requires Texas's courts to construe ambiguous language in an insurance contract in favor of the insured.[396] However, a disagreement between an insurer and its insured over the meaning of words and phrases in a *coverage clause* does not necessarily create an ambiguity, and courts must not consider "[p]arole evidence . . . for the purpose of creating an ambiguity."[397] More relevant, if a court finds ambiguity in an insurance contract's *exclusion clause*, Texas's law requires the

393. *See, e.g.*, Balandran v. Safeco Ins. Co. of Am., 972 S.W.2d 738, 740-41 (Tex. 1998) (reiterating that "insurance contracts are subject to the same rules of construction as other contracts"); Nat'l Union Fire Ins. Co. v. CBI Indus., Inc., 907 S.W.2d 517, 520 (Tex. 1995) (noting that "[i]nsurance policies are controlled by rules of interpretation and construction which are applicable to contracts generally" and that "[t]he primary concern of a court in construing a written contract is to ascertain the true intent of the parties as expressed in the instrument").

394. *See CBI Indus.*, 907 S.W.2d at 520 (citing Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983)).

395. *See* Puckett v. U.S. Fire Ins. Co., 678 S.W.2d 936, 938 (Tex. 1984) (asserting that the court has a duty to give unambiguous words their plain meaning).

396. *Compare* Nat'l Union Fire Ins. Co. v. Hudson Energy Co., 811 S.W.2d 552, 555 (Tex. 1991) (re-emphasizing that ambiguous language in an insurance contract must be construed in favor of the insured), *with CBI Indus.*, 907 S.W.2d at 520 (declaring that an insurance contract is ambiguous if language in a policy or contract generates "two or more reasonable interpretations").

397. *CBI Indus.*, 907 S.W.2d at 520.

court to construe the ambiguous language strictly against the insurer.[398]

Finally, under the adhesion rule, a court must interpret disputed insurance contract language in favor of the insured if the court finds a severe disparity between the insured and insurer's bargaining power.[399] And under the doctrine of reasonable expectation, a court must give an ordinary or a commonsensical meaning to disputed or undefined terms, considering those terms as a reasonable person in the position of the insured might view them.[400] Therefore, to fulfill the expectations of the insured and irrespective of the insurer's understanding, a court must declare that an insurance contract provides coverage.[401]

VI. INSURANCE DEFENSE AND THE ABUSE OF SUMMARY-JUDGMENT MOTIONS IN TEXAS'S DECLARATORY-JUDGMENT TRIALS

A. *Texas's Trial Courts' Questionable Summary-Judgment Rulings in Declaratory-Judgment Suits*

As discussed at the outset, Texas's trial courts have a mandatory duty under Texas's Uniform Declaratory Judgments Act to either grant or deny relief in a declaratory-judgment trial. Also, the Texas Supreme Court has adopted five doctrines to help courts interpret disputed language within various insurance contracts. Put

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398. *See Balandran*, 972 S.W.2d at 741 (Tex. 1998) (emphasizing that courts should adopt the insured's interpretation of ambiguous language in an exclusionary provision as long as the insured's interpretation is reasonable and despite the insurer presenting an even more reasonable interpretation).

399. *See* Arnold v. Nat'l County Mut. Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987) (concluding, without deciding definitively, that insurance contracts are adhesion contracts because they "arise[ ] out of the parties' unequal bargaining power" and they "allow unscrupulous insurers to take advantage of their insureds' misfortunes" during the bargaining process).

400. *See* Kulubis v. Tex. Farm Bureau Underwriters Ins. Co., 706 S.W.2d 953, 954-55 (Tex. 1986) (permitting an innocent victim whose property had been destroyed to collect under an insurance contract for loss reasonably expected to be covered). *But see* Forbau v. Aetna Life Ins. Co., 876 S.W.2d 132, 134 (Tex. 1994) (refusing to accept a "reasonable expectations" argument). In *Forbau*, the court would not address the "conflicting expectations" between insurer and insured. *Id.*

401. *See Hudson Energy Co.*, 811 S.W.2d at 555 (declaring that a "court must adopt the construction of an exclusionary clause urged by the insured as long as that construction is not unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties' intent").

simply, trial courts must employ those five doctrines before granting or denying declaratory relief. In addition, courts must apply the eight-corners rule and *Stowers* doctrine in a declaratory-judgment trial when the facts require such application.

But a careful review of Texas's reported cases reveals a disturbing practice. Both insurers and insureds regularly commence declaratory-judgment actions in Texas's trial courts, and the litigants ask judges to declare whether insurers have a duty to defend or a duty to indemnify insureds. An unacceptably large number of Texas's trial judges, however, do not apply the eight-corners doctrine, and they do not apply the five settled doctrines for interpreting insurance contracts. Instead, Texas's trial judges are significantly more likely to issue extremely undecipherable and poorly written summary-judgment motions in those declaratory-judgment trials.

To illustrate the point, consider the facts and ruling in *Cluett v. Medical Protective Co.*[402] Rose and Walter Cluett selected Dr. Antonia Capino to be their children's pediatrician.[403] During the professional relationship, Antonia Capino and Rose Cluett became sexually involved.[404] Thereafter, Walter Cluett sued Antonia Capino for alienation of affection.[405] When the third-party suit commenced, Medical Protective Company insured Capino under a medical-malpractice insurance contract.[406] Dr. Capino contacted the insurer, demanding that Medical Protective defend her and pay

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402. 829 S.W.2d 822 (Tex. Civ. App.—Dallas 1992, writ denied).

403. Cluett v. Med. Protective Co., 829 S.W.2d 822, 824 (Tex. App.—Dallas 1992, writ denied).

404. *Id.*

405. *Id.* (reviewing the petitioner's underlying cause of action). "In his second amended original petition, [Walter] Cluett alleged [that] Dr. Capino consciously and knowingly gained the affections of [his wife], Rose Cluett, to the detriment of [Walter Cluett] and the family interests . . . ." *Id.* at 830. "Alienation of affection is an intentional tort arising out of the impairment of consortium between the spouses of a marriage." *Id.* This cause of action, however, is no longer viable in Texas. *See id.* at 824 n.1 ("Although section 4.06 of the Texas Family Code abolish[ed] the cause of action for alienation of affection, that statute did not affect claims for alienation of affection filed before its effective date, September 1, 1987.") "Because [Walter] Cluett filed his claim for alienation of affection against [Dr.] Capino in 1984, his claim was not affected by the family code's abolition of that cause of action." *Id.*

406. Cluett v. Med. Protective Co., 829 S.W.2d 822, 824 (Tex. App.—Dallas 1992, writ denied).

all damages, up to the policy limits, that might be assessed against her in the underlying lawsuit.[407]

Medical Protective agreed to defend Antonia Capino against Cluett's action.[408] The malpractice insurer, however, refused to indemnify Capino for any potential damages.[409] From the insurer's perspective, the alienation-of-affection claim fell outside the policy's coverage clause.[410] Alternatively, Medical Protective argued that the insurance contract's various exclusion provisions excluded indemnification for this type of third-party claim.[411] After considering the malpractice insurer's offer, Capino rejected it outright and obtained independent legal counsel.[412]

Medical Protective then commenced a declaratory-judgment action to determine whether it had a duty to defend and indemnify Dr. Capino, and Cluett intervened in the declaratory-judgment suit.[413] Along the way, Capino assigned her contractual rights under the medical-malpractice insurance contract to Cluett.[414] All parties filed respective motions for summary judgment.[415]

Ostensibly, Medical Protective only wanted the trial court to interpret the disputed duty-to-defend and duty-to-indemnify language in the contract and deliver a favorable declaration. The relevant provision stated:

> [T]he Company hereby agrees to DEFEND and PAY DAMAGES, in the name and on behalf of the INSURED or his Estate (a) in any claim for damages at any time filed, based on professional services rendered or which should have been rendered by the insured, . . . in the practice of the insured's profession during the term of this policy.[416]

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407. *Id.*

408. *Id.*

409. *Id.*

410. *Id.*

411. Cluett v. Med. Protective Co., 829 S.W.2d 822, 824 (Tex. App.—Dallas 1992, writ denied).

412. *Id.*

413. *Id.*

414. *Id.* "While the declaratory judgment action was pending, Cluett and Capino entered into an agreed judgment rendering [Dr. Antonia] Capino liable to [Walter] Cluett for $875,000. Capino then assigned her policy rights to Cluett, and Cluett intervened in the declaratory judgment action." *Id.*

415. *Id.*

416. *Cluett*, 829 S.W.2d at 827 (brackets in original).

Without doubt, the medical-malpractice insurer did not present the court with any unduly burdensome requests. After applying the eight-corners rule, the trial court only had to examine the facts in Cluett's pleadings and the duty-to-defend language to determine whether Medical Protective had a duty to defend Dr. Capino. And if Cluett's allegation reasonably fell within the scope of that provision, the insurer had a duty to defend.[417]

Yet the trial court refused to perform a thorough eight-corners analysis. Moreover, the trial judge did not cite a single settled doctrine of contract interpretation to reach a conclusion. Very likely, Medical Protective would have prevailed if the trial court had applied the doctrine of plain meaning or the traditional rules of contract interpretation, and Dr. Capino probably would have prevailed if the court had applied the doctrines of ambiguity and reasonable expectation. Instead, the trial court cavalierly granted the insurer's summary-judgment motion without giving any explanation for its ruling.

But there is more. Again, the law in Texas is clear: The duty to defend and the duty to indemnify "are distinct and separate duties."[418] An insurer's duty to defend arises when an alleged third-party victim's petition alleges facts that a liability insurance contract could potentially cover. Conversely, an insurer's duty to indemnify generally arises after a trial on the merits and proven and adjudicated facts have established the insured's liability in the underlying suit.[419] Also, under certain circumstances, an insurer's

417. *See* Feed Store, Inc. v. Reliance Ins. Co., 774 S.W.2d 73, 74-75 (Tex. App.—Houston [14th Dist.] 1989, writ denied) (embracing the view that the eight-corners rule only requires a court to look at the pleadings and the insurance policy to determine whether the duty to defend exists).

418. *See* Utica Nat'l Ins. Co. of Tex. v. Am. Indem. Co., 141 S.W.3d 198, 203 (Tex. 2004) (citing King v. Dallas Fire Ins. Co., 85 S.W.3d 185, 187 (Tex. 2002)); *see also* Trinity Universal Ins. Co. v. Cowan, 945 S.W.2d 819, 821-22 (Tex. 1997) (citing Am. Alliance Ins. Co. v. Frito-Lay, Inc., 788 S.W.2d 152, 153 (Tex. App.—Dallas 1990, writ dism'd)).

419. *See* Farmers Tex. County Mut. Ins. Co. v. Griffin, 955 S.W.2d 81, 84 (Tex. 1997) (declaring that "sometimes [it might] be necessary to defer resolution of indemnity issues until the liability litigation is resolved" and that "[i]n some cases, coverage may turn on facts actually proven in the underlying lawsuit"); Heyden Newport Chem. Corp. v. S. Gen. Ins. Co., 387 S.W.2d 22, 25 (Tex. 1965) (declaring that actual facts establishing liability in the underlying suit trigger the duty to indemnify).

duty to indemnify may arise before a trial court or a jury tries the underlying, third-party lawsuit.[420]

In *Cluett*, Dr. Capino gave Cluett $875,000 to settle the alienation-of-affection suit,[421] and she asked the insurer to reimburse her for that amount. Therefore, Medical Protective's petition for declaratory relief also asked the trial court to declare whether Medical Protective had a duty to indemnify. But the trial court neither discussed nor addressed this question.[422] In fact, the case does not present any evidence establishing, or even suggesting, that the trial judge addressed the duty-to-indemnify issue. Nevertheless, the trial court issued a broad summary-judgment ruling that covered this issue.[423]

More disquietingly, on appeal, the Dallas Court of Appeals did not directly address the duty-to-indemnify question, and certainly did not present a thorough, careful, intelligible, and independent analysis of the declaration-of-rights issue: Did the insurer have a duty to indemnify?[424] In its conclusion, the appellate court simply embraced the trial court's summary-judgment ruling and stated: "Medical Protective did not owe Capino . . . a duty to indemnify."[425]

Occasionally, some of Texas's trial courts genuinely try to explain their summary-judgment rulings, even though it would be considerably easier to apply a settled legal doctrine and issue intel-

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420. *See Griffin*, 955 S.W.2d at 84 (observing that the scope of district court jurisdiction was significantly broadened by Article V, Section 8 of the Texas Constitution). "The language of the amended version is broad enough to allow district courts jurisdiction to resolve declaratory judgment actions on the duty to indemnify." *Id.* The *Gandy* decision handed down after the amendment "hinted that indemnity issues are not always nonjusticiable before liability is resolved." *Id.* (citing State Farm Fire & Cas. Co. v. Gandy, 925 S.W.2d 696, 714 (Tex. 1996)); *see also* Roman Catholic Diocese of Dallas *ex rel.* Grahmann v. Interstate Fire & Cas. Co. 133 S.W.3d 887, 890 (Tex. App.—Dallas 2004, pet. denied) ("Although litigation on the duty to indemnify is often pursued after liability against the insured has been established in the underlying case, the insurer can resolve the indemnity issue before the establishment of liability in the underlying case by proving coverage is impossible in the underlying case." (citing *Griffin*, 955 S.W.2d at 84)).

421. Cluett v. Med. Protective Co., 829 S.W.2d 822, 824 (Tex. App.—Dallas 1992, writ denied).

422. *Id.*

423. *Id.*

424. *See id.* (noting that the court, on appeal, would only review and decide (1) whether Cluett's suit for alienation of affection fell within the policy coverage, (2) whether the insurer had a duty to defend Capino, and (3) whether the insurer acted in bad faith).

425. *Id.* at 830.

ligible declarations regarding whether an insurer has a duty to defend or indemnify an insured. But even then, those summary-judgment explanations are highly suspect and less than sound because trial courts often misapply common-law or statutory rules. In other instances, trial courts cite the absence of a genuine issue of fact to justify an adverse summary judgment in declaratory-judgment trials. After a careful analysis, however, one discovers that explanation is flaccid because the trial court simply ignored or refused to consider probative summary-judgment evidence.

To help support this point of view, consider the facts and disputes in *Julian v. Mid-Century Insurance Co. of Texas*.[426] On October 21, 1995, Omar Escamilla and several other young men murdered Darlene Julian's son. Two years later, Julian filed a lawsuit against Margarito and Amalia Escamilla, Omar's parents. In Julian's complaint, she alleged that the Escamillas's negligent parenting was the cause in fact and proximate cause of her son's murder.[427]

When Julian commenced her lawsuit, Farmers Insurance Exchange (Farmers) insured the Escamillas under a homeowners' insurance contract.[428] Mid-Century Insurance Company of Texas (Mid-Century) insured the same allegedly negligent parents under an auto insurance policy.[429] Curiously, and without explanation, Farmers and Mid-Century waited until July 6, 2000—nearly three years after Julian commenced her action—to file a combined declaratory-judgment action against the Escamillas.[430] The insurers asked the trial judge to declare that they had no duty to defend or indemnify the Escamillas in the underlying lawsuit.[431]

The Escamillas answered and Julian intervened in the declaratory-judgment action, maintaining that both insurance contracts

426. No. 05-01-00613, 2002 WL 1870441 (Tex. App.—Dallas Apr. 15, 2002, no pet.) (not designated for publication).

427. Julian v. Mid-Century Ins. Co. of Tex., No. 05-01-00613, 2002 WL 1870441, at *1 (Tex. App.—Dallas Apr. 15, 2002, no pet.) (not designated for publication). Julian argued that the parents' negligence "included (i) [a] failure to properly supervise, monitor, control, discipline, and raise Omar; (ii) [a] failure to secure, lock, remove, or limit access to firearms in their home; and (iii) negligently entrusting one of their vehicles to Omar." *Id.*

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.*

covered her negligence claim against the Escamillas.[432] Shortly thereafter, Farmers and Mid-Century filed a joint motion for summary judgment against the Escamillas and against Julian.[433] The trial judge granted the insurers' motion for summary judgment, ruling "that neither Farmers or Mid-Century [had] a duty to defend or indemnify the Escamillas in the underlying lawsuit."[434]

The Escamillas did not appeal any of the trial court's summary-judgment rulings, and Julian did not contest the trial court's decision to award summary relief to Mid-Century. In addition, she did not protest against the trial court's award of summary relief to Farmers with respect to the duty-to-defend issue. However, on appellate review, Julian challenged the trial judge's decision to grant Farmers's summary-judgment motion regarding whether the homeowners' policy required Farmers to indemnify the Escamillas when the latter became liable.[435]

Undeniably, the trial court did not explain its duty-to-defend summary-judgment rulings. In fact, the trial court did not even mention or employ the "eight corners" rule or any of the other doctrines that courts should use to interpret disputed language in homeowners' and automobile insurance contracts.[436] Also, evidence proving or suggesting that the trial court carefully read and deciphered the duty-to-defend language in both insurance contracts is painfully absent.[437] On the other hand, the trial court attempted to present a cogent analysis and explanation of its summary-judgment ruling regarding whether Farmers had a duty to indemnify the Escamillas.[438]

First, the trial court reviewed the pertinent provision in the homeowners' policy, which stated:

> If a claim is made or a suit is brought against an *insured* for damages because of *bodily injury* or *property damage* caused by an *occurrence* [to] which this coverage applies, we will . . . pay up to our limit of liability for the damages for which the *insured* is legally liable. Dam-

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432. *Julian*, 2002 WL 1870441, at *1.

433. *Id.*

434. *Id.*

435. *Id.*

436. *See Julian*, 2002 WL 1870441, at *2-4 (noting the absence of justification or reliance on any standard doctrine of an insurer's duty to defend or indemnify).

437. *Id.*

438. *Id.* at *2.

> ages include prejudgment interest awarded against the *insured* . . . .[439]

Second, the trial court observed that the homeowners' contract defined an "occurrence" as "an accident, including exposure to conditions, which results in *bodily injury* or *property damage* during the policy period."[440] On its face, this language would arguably cover Julian's deceased son's bodily injuries. Still, Farmers moved for summary relief, asserting that Julian's lawsuit against the Escamillas did not arise out of an "occurrence."[441] More specifically, Farmers argued that an occurrence must be accidental, not intentional.[442] The insurer cited the Fifth Circuit's precedent and several intermediate state appellate courts' rulings, arguing that Texas's "related and interdependent" doctrine outlaws coverage when an alleged third-party victim claims that the insured is liable for engaging in intentional conduct.[443]

Put simply, the "related and interdependent" doctrine states that an insurer has no duty to defend or indemnify an insured if the third party's claims are related to or depend on the insured's and another's intentional acts—those which are not covered under the insurance contract.[444] But the trial court could have easily applied the doctrine of ambiguity, concluded that the "occurrence" language was ambiguous, construed the ambiguity against Farmers, and declared that the insurer had a duty to indemnify. Alternatively, the trial court could have cited the doctrine of plain meaning and declared that Farmers had no duty to indemnify because the language in the clause was extremely clear and the Escamillas had not become "legally liable" for any damages.

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439. *Id.*

440. *Id.* (quoting the policy).

441. Julian v. Mid-Century Ins. Co. of Tex., No. 05-01-00613, 2002 WL 1870441, at *2 (Tex. App.—Dallas Apr. 15, 2002, no pet.) (not designated for publication).

442. *Id.*

443. *See* Folsom Invs., Inc. v. Am. Motorists Ins. Co., 26 S.W.3d 556, 561 (Tex. App.—Dallas 2000, no pet.) (embracing the view that where negligence claims against an employer and the employee's intentional conduct are related and interdependent, the employee's intentional misconduct does not fall within the definition of an "occurrence"); Thornhill v. Houston Gen. Lloyds, 802 S.W.2d 127, 130 (Tex. App.—Fort Worth 1991, no writ) (holding that the supervising employees were not covered under an insurance policy that contained a liquor liability exclusion where allegations of negligence concerning the sale of alcohol were related and interdependent).

444. *Julian*, 2002 WL 1870441, at *2.

Instead, the trial court decided to award summary judgment. In the process, the court embraced and applied the highly dubious "related and interdependent" doctrine and issued a poorly reasoned and highly questionable analysis, thereby causing the disgruntled party to appeal the adverse ruling.[445] Clearly, that conduct was an unnecessary waste of limited judicial resources. But more important, when the trial court applied the "related and interdependent" doctrine, the Texas Supreme Court had neither embraced nor reviewed that doctrine.

More interestingly, the supreme court decided to review the merit and applicability of the doctrine right after Julian appealed the trial court's summary-judgment ruling.[446] And after a thoughtful and an intelligible analysis, the Supreme Court of Texas resoundingly rejected the "related and interdependent" doctrine.[447] Therefore, in light of the supreme court's decision, the Dallas

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445. *Id.*

> Farmers argued that although the claims against the Escamillas [concerned] negligent parenting, the injury for which Julian sought recovery would not have occurred but for the intentional conduct of Omar, [namely] Shawn's murder. The trial judge concluded that the related and interdependent doctrine applied to the facts of this case and granted the motion for summary judgment.

Id.; *see also* Am. States Ins. Co. v. Bailey, 133 F.3d 363, 371-73 (5th Cir. 1998) (declaring that "[u]nder Texas law, where a third-party's liability is related to and interdependent on other tortious activities, the ultimate issue is whether the underlying tortious activities are encompassed within the definition of 'occurrence'"). The court then decided that "[a]n insurer has no duty to defend or to indemnify its insured against claims that could not be brought absent the underlying and excluded tortious activities." *Bailey*, 133 F.3d at 371-73.

446. *See Julian*, 2002 WL 1870441, at *3 ("After submission of this appeal, the Texas Supreme Court issued an opinion rejecting the application of the related and interdependent doctrine in Texas.").

447. *See* King v. Dallas Fire Ins. Co., 85 S.W.3d 185, 190-91 (Tex. 2002) (explaining the Texas Supreme Court's rejection of the doctrine). "The Fifth Circuit holds there is no duty to defend, using a 'related to and interdependent' rule." *Id.* "[It] reasons that the claims against the employer are wholly derivative from the underlying intentional conduct." *Id.* "Essentially, the Fifth Circuit's position is that negligent actions derived from an intentional incident do not exist in the abstract and would not exist but for the intentional conduct." *Id.* "[The Fifth Circuit's] decisions . . . have relied on the district court's 'related and interdependent rule,' erroneously presuming this reflects Texas law." *Id.*

> Texas law requires us to look at the pleadings' allegations and the insurance policy's language from the separate insured's standpoint to determine the duty to defend. Those allegations are to be considered "without reference to the truth or falsity of such allegations." And, when we do, we conclude the Fifth Circuit's rule improperly imputes the actor's intent to the insured.

Id.

Court of Appeals declared that the trial court erred when it granted Farmers's motion for summary judgment.[448]

The appellate court remanded the case to the trial court for further proceedings and ordered the lower court to apply any one of the settled principles of law and declare whether Farmers had a duty to indemnify under the insurance contract.[449] Without doubt, *Julian* presents an excellent example of an extraordinarily inefficient, litigious, lengthy, and costly summary-judgment process. The ordinary insured or insurer files a declaratory-judgment action, only asking the trial judge to issue a simple declaration of rights or obligations under an insurance contract. By any objective measure, that request requires—but it should not—a party's investing an inordinate amount of time and resources to achieve that end.

Finally, along with being highly inefficient, burdensome, and costly, summary-judgment proceedings lend themselves to abuse, either wittingly or unwittingly. And when abuse occurs, one is likely to find litigants employing some very unsavory litigation tactics and trial judges granting decidedly unwarranted summary judgments. To help prove the point, consider the facts and conclusion in *Armendariz v. Progressive County Mutual Insurance Co.*[450] Arguably, *Armendariz* represents one of the most egregious examples of a Texas trial court's abusing its discretion and awarding a highly questionable summary judgment.

The facts in *Armendariz* are not complicated. Alejandro and Alma Armendariz, brother and sister, each owned an automobile.[451] Progressive sold an automobile insurance contract to Alejandro and listed Alejandro as "the named insured on the policy."[452] In addition, the insurance contract identified Alma as one of two "listed drivers."[453] And although Alma was not a "named insured" under the automobile policy, the policy covered

448. *Julian*, 2002 WL 1870441, at *3. "In light of the supreme court's discussion in *King*, we conclude the trial judge erred in granting Farmers's motion for summary judgment on the sole ground that the underlying lawsuit did not give rise to a duty to indemnify based on application of the related and interdependent doctrine." *Id.*

449. *Id.*

450. 112 S.W.3d 736 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

451. Armendariz v. Progressive County Mut. Ins. Co., 112 S.W.3d 736, 737 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

452. *Armendariz*, 112 S.W.3d at 737.

453. *Id.* "Additionally, Alejandro's parents, who lived with him, and Alma were named as 'listed drivers' on the policy." *Id.*

both Alejandro and Alma—the "named insured" and a "listed driver," respectively.[454] Also, Progressive's "automobile insurance policy . . . covered two vehicles"—both Alejandro's and Alma's car.[455]

Four months after Alejandro purchased the insurance contract, Alma was involved in an extremely serious and heart-wrenching accident.[456] While driving her parents' uninsured van, Alma put the van in reverse and accidentally drove the van over her father.[457] Given his severe injuries, Alma's father died.[458] Later, Alma's mother filed a wrongful-death action against Alma, claiming that her daughter's negligence was the proximate cause of the father's death.[459]

After discovering the wrongful-death lawsuit, Progressive dashed to the courthouse and filed a declaratory-judgment action, ostensibly to determine whether the insurer had a contractual duty to defend and indemnify Alma in the underlying wrongful death suit.[460] Yet, after a careful reading of the reported facts, one quickly realizes that Progressive was not really interested in securing a declaratory judgment. The insurer did not cite any disputed or ambiguous language in the insurance contract's duty-to-defend and duty-to-indemnify clauses. In fact, there is no evidence of Progressive even mentioning those clauses in its petition for declaratory relief.[461]

Instead, facts abound indicating that Progressive commenced the declaratory-judgment action so that it could file a traditional summary-judgment motion and secure relief regarding another issue: whether the insurance contract covered Alma and her parents' van. In its motion for summary relief, Progressive argued that no genuine issue regarding a material fact existed to justify a declaratory-judgment hearing. From the insurer's perspective, "Alma was not

454. *Id.* at 738.
455. *Id.* at 737.
456. *Id.*
457. *Armendariz*, 112 S.W.3d at 737.
458. *Id.*
459. *Id.*
460. *Id.*
461. *Id.*

an insured" under the insurance contract and the contract did not cover the van.[462]

To further support its summary-judgment argument, Progressive cited language in the policy's exclusion clause, which stated in relevant part: "We do not provide Liability Coverage for the ownership, maintenance or use of [a]ny vehicle, other than your covered auto, which is . . . owned by any . . . family member, or . . . furnished or available for the regular use of any family member."[463] To counter Progressive's arguably abusive tactic, both Alejandro and Alma Armendariz argued "that Alma was clearly a 'covered person' [under] the Progressive policy, although she was not the named insured."[464] After considering both summary-judgment motions and evidence, the trial court granted Progressive's motion for summary relief.[465]

But the trial court's award of summary relief is problematical for two important reasons. First, let us assume that Alma was indeed an absolute stranger and that she and Progressive *did not have* an insurer-insured contractual relationship. Still, the record is completely void of any evidence demonstrating that the trial judge and appellate court were curious enough to explain why Progressive—a highly efficient[466] and thoroughly sophisticated[467] insurer—would

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462. Armendariz v. Progressive County Mut. Ins. Co. 112 S.W.3d 736, 737 (Tex. App.—Houston [14th Dist.] 2003, no pet.)

463. *Id.* at 738.

464. *Id.* at 738 n.1.

465. *Id.* at 737.

466. *See* Joan E. Rigdon, *Retooling Lives: Technological Gains Are Cutting Costs, and Jobs, in Services—Employment Starts to Plunge As Productivity Increases; Good News for Consumers*, WALL ST. J., Feb. 24, 1994, at A1, *available at* 1994 WL-WSJ 303592 (describing the efficiency of Progressive).

> [M]ore and more companies are learning to use computer networks to cut out work altogether instead of simply doing it faster—the basic idea of the much-discussed corporate re-engineering. For example, an innovation as simple as a call-switching system, among other efficiencies, enabled Progressive Corp., a Mayfield Heights, Ohio, insurance company, to eliminate 1,000 workers, 17% of its work force, last year. Out went entire groups of workers who wrote, designed, folded, stuffed and mailed lists of phone numbers of various claims offices for customers to call in case of an accident. Now, customers call a single toll-free number and are automatically routed by MCI Communications Corp. computers to the nearest open claims office.

Id.

467. *See* Christopher Oster, *Auto Insurers Cut Rates—for Some: After Years of Increases, New Pricing Tools Let Carriers Tailor Premiums to Individuals' Risks*, WALL. ST. J., Apr. 22, 2004, at D1, *available at* 2004 WL-WSJ 56926763 (illustrating the relative so-

spend and waste shareholders' funds[468] to determine whether it had a contractual duty to defend or indemnify a complete stranger.

To repeat, Progressive filed the declaratory-judgment action to determine its obligations as well as Alma's rights under the automobile insurance contract. Therefore, assuming that Alma was indeed a total stranger, the insurer had no justifiable reason to petition the court for declaratory relief, because Texas's law is painfully clear: A complete stranger to an insurance contract may not collect any proceeds under the contract.[469]

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phistication of Progressive and the insurance industry). "The current upswing in auto-insurance profits is the first since the companies developed highly sophisticated pricing tools, led by Progressive Corp." *Id.* "[A Progressive product development manager] says that as the company became more sophisticated, it was able to offer more appropriate prices to its customers." *Id.*

468. *See* Robert McGough, *Sequoia Fund Warns Holders About Speculation in Stock Market*, WALL ST. J., Dec. 19, 1997, at C1, *available at* 1997 WL-WSJ 14178070 (warning of stock market speculation and corporate responsibility). "One of the great stock mutual funds of the past quarter century is loudly warning its shareholders that stock-market speculation has reached such a frenzy that it 'could eventually lead to a disruptive effect on' the U.S. economy." *Id.* "[M]anagers at Sequoia revere the 'value' school of investing in inexpensive stocks . . . ." *Id.* "Sequoia managers have also invested in high-quality companies at not-so-cheap prices . . . ." *Id.* "The fund's second-largest holding, at 14.2% of assets, was Progressive Corp., an auto-insurance company." *Id.*; *see also* Christopher Oster, *After Reg FD, Progressive Sets Bold Move*, WALL ST. J., May 11, 2001, at C1, *available at* 2001 WL-WSJ 2863250 (discussing Progressive's new approach to divulging information to Wall Street). "In one of the boldest moves of the post-Regulation FD era, Progressive . . . plans to begin reporting a slew of detailed financial data on a monthly, instead of quarterly, basis. The fast-growing Cleveland auto insurer will hand out the information to Wall Street . . . ." *Id.* "[I]t will reveal premium volumes and ratios of underwriting profitability, among other details of its operations." *Id.* "Progressive's more frequent reporting, meanwhile, may pose a problem for its rivals. If Progressive's numbers look bad, analysts say, other auto insurers . . . may see their stock prices sink, on the assumption the same trends apply." *Id.* "'Clearly, whatever trends you glean from Progressive, every comparable company will have investors going to them and asking whether they had similar issues,' says Alice Schroeder, a property-casualty insurance analyst at Morgan Stanley." *Id.* "Unquestionably, the decision to go with monthly updates 'is vintage Progressive' behavior . . . ." *Id.* "This, after all, is a company that uses a satellite tracking system to determine how often some of its Texas customers drive, when they drive and whether this driving is in the city or the country, as a way to help determine their premium payments." *Id.*

469. *See* Duren v. U.S. Fire Ins. Co., 579 S.W.2d 32, 36 (Tex. Civ. App.—Tyler 1979, no writ) (declaring that "a party who is a complete stranger to the contract is not in a legal position to recover any interest in the policy proceeds"); Travelers Fire Ins. Co. v. Steinmann, 276 S.W.2d 849, 851 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.) (holding that "the insurer [was not liable] beyond the interest of the insured in the property, [and that] a stranger to the contract cannot collect [proceeds]").

Additionally, under settled law in Texas, an insurance contract is a personal contract between the insurer and the named insured.[470] Consequently, a stranger may not routinely sue the insurer under any theory of recovery[471] unless the stranger is an assignee[472] or a third-party beneficiary.[473] Furthermore, a contractual relationship between two parties does not create any duty or obligation for another who is not a party to the contract.[474] Therefore, any suggestion that these settled principles were foreign to Progressive's defense attorneys before they filed the declaratory-judgment lawsuit is unfounded.

Second, in its motion for summary judgment, Progressive admitted that Alma was a "listed driver" on the automobile insurance contract.[475] That fact alone should have compelled the trial court to dismiss Progressive's motion for summary relief. To be sure, determining whether the insurer had a duty to defend and indemnify involved genuine, disputed issues of material fact, requiring a full declaratory-judgment trial. But Texas's law is exceptionally clear regarding the legal rights of "listed drivers" under an automobile insurance contract. In fact, on several occasions, litigants have asked Texas's courts of appeals to determine whether an automobile policy covers the "listed drivers" whose names appear on the policy even though the drivers are not the "named insured." And

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470. *See* Farmers Ins. Exch. v. Nelson, 479 S.W.2d 717, 720 (Tex. Civ. App.—Waco 1972, writ ref'd n.r.e.) (recognizing "the general rule that a fire insurance policy is a personal contract between the insurer and the insured").

471. *See id.* (addressing Farmers's points of error). "Farmers assails the judgment . . . asserting . . . that plaintiff has no right to recover directly from Farmers since he is . . . a complete stranger to the policy in question . . . ." *Id.* (internal quotation marks omitted). "In their briefs, the parties recognize the general rule that a fire insurance policy is a personal contract between the insurer and the insured named in the policy, and that a stranger to the policy may not ordinarily maintain a suit on it." *Id.* (citing *Steinmann*, 276 S.W.2d at 851).

472. *See* State Farm County Mut. Ins. Co. of Tex. v. Ollis, 768 S.W.2d 722, 723 (Tex. 1989) (per curiam) (reaffirming that an injured assignee has a right to sue a liability insurer under an assignment contract).

473. *See* Dairyland Mut. Ins. Co. of Tex. v. Childress, 650 S.W.2d 770, 775 (Tex. 1983) (reasserting that, under Texas law, "a third person not a party to a contract will still have a cause of action to enforce the contract if the contract was made for that person's benefit").

474. *See* City of Beaumont v. Excavators & Constructors, 870 S.W.2d 123, 129 (Tex. App.—Beaumont 1993, writ denied) (confirming that "a contract between other parties cannot create an obligation or duty on a non-contracting party" (emphasis omitted)).

475. Armendariz v. Progressive County Mut. Ins. Co., 112 S.W.3d 736, 737 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

the decisions have been unanimous among courts that consider this question: An automobile insurance contract covers "listed drivers" if the contract, an endorsement to the contract, or the insurance contract's declarations page identifies persons as "listed drivers." The Amarillo,[476] Dallas,[477] and El Paso[478] Courts of Appeals have embraced this principle.

In addition, when appellate courts in other jurisdictions have considered this coverage question, they reached the same conclusion. For example, courts in Delaware,[479] Louisiana,[480] New Jersey,[481] and Ohio[482] have ruled that vehicle liability insurance

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476. *See* Kain v. Northland Ins. Co., 472 S.W.2d 304, 306 (Tex. Civ. App.—Amarillo 1971, no writ) (determining that the policy did not extend coverage to drivers not listed in the endorsement, but the policy did allow newly hired drivers to be added if certain procedural requirements were followed).

477. *See* Farmer Enters., Inc. v. Gulf States Ins. Co., 940 S.W.2d 103, 110 (Tex. App.—Dallas 1996, no writ) (considering a similar clause).

478. *See* Hopkins v. Highlands Ins. Co., 838 S.W.2d 819, 824 (Tex. App.—El Paso 1992, writ denied) (stating that Magnolia's insurance policy defined "insured" as those drivers that Magnolia employed).

> [T]he insurance policy define[d] "insured" to include those truck drivers employed by Magnolia. The truck drivers are *listed individually* and, thus, have individual coverage for bodily injury and property damage caused by the individual driver [and] for expenses in defending any claims .... Although [one trucker] *was not a named insured*, there is evidence that the names of all drivers were submitted to [the insurer] along with the application for insurance. Consequently, at the time the liability policy was issued, *all drivers were covered.*

Id. (emphasis added).

479. *See* Reese v. Wheeler, No. Civ.A.99C04002RFS, 2003 WL 22787629, at *5 (Del. Super. Ct. Nov. 4, 2003) ("Given that a Schedule of Drivers was included with the policy documents, the insured reasonably expected the . . . coverage to extend to those listed drivers.... [W]here language in a policy is ambiguous, an interpretation finding coverage will be applied given the sound public interest for UM/UIM coverage ....").

480. *See* Smith v. Terrebonne Parish Consol. Gov't, 858 So. 2d 671, 674 (La. Ct. App. 2003) (dealing with similar facts).

481. *See* Lehrhoff v. Aetna Cas. & Sur. Co., 638 A.2d 889, 894 (N.J. Super. Ct. App. Div. 1994) (permitting the listed driver to recover in order to protect the insured's reasonable expectations of coverage). The court questioned "whether the typical automobile policyholder would understand and expect from the declarations page of [the] policy that each of the listed drivers was entitled to all of the coverages and all of the protections afforded by the policy." *Id.* at 893.

482. *See* Roelle v. Coffman, No. 13-97-17, 1997 WL 722775, at *3 (Ohio Ct. App. Nov. 17, 1997) (suggesting that, although the insurance company claims that a named driver's coverage is limited compared to a named insured's coverage, because the insurance company drafts the policy, it has the opportunity to distinguish the coverage given to named drivers, and therefore any failure that results in confusion should be held against the insurer).

contracts cover both "named insureds" and "listed drivers." Therefore, in light of this settled legal principle, the trial court's decision in *Progressive* to grant the insurer's summary judgment on the ground that the contract did not cover Alma is extremely bewildering and legally incorrect.

Again, the trial court should have denied Progressive's motion for summary judgment and issued instead a formal declaration outlining both Progressive's and Alma's rights and duties. And the trial judge should have conducted a declaratory-judgment hearing, even though Progressive argued that the uninsured van, an "excluded peril" under the contract, was the proximate cause[483] of the father's death.[484]

Arguably, there were two concurrent causes of the father's allegedly wrongful death: The van was the "excluded peril" and Alma's negligence was the "covered peril." Texas's doctrine of concurrent causation[485] is clear regarding one matter: "[W]hen . . . covered and non-covered perils combine to create a loss, the insured is entitled to recover only that portion of the damage caused solely by the covered peril(s)."[486] Without question, this doctrine does not prevent a trial court from declaring whether Progressive or any insurer has a duty to indemnify an insured.

More important, even if the uninsured van was a concurrent proximate cause of the wrongful death, that does not address

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483. *See, e.g.*, Stroburg v. Ins. Co. of N. Am., 464 S.W.2d 827, 831 (Tex. 1971) (asserting that the term "proximate cause" in insurance cases carries essentially the same meaning as in negligence cases, except in the case of insurance, the foreseeability of the injury as a reasonable result of the risk insured against is not necessary, and therefore a remote cause does not equate to proximate cause); Fed. Life Ins. Co. v. Raley, 130 Tex. 408, 411-12, 109 S.W.2d 972, 974 (1937) (expressing that if the insurance policy does not expressly state terms of liability, liability arises when the loss results from the risk insured against, creating proximate causation). "Moreover, . . . the term 'proximate cause' as applied in insurance cases has essentially the same meaning as that applied by *our own courts in negligence cases, except that in the former the element of foreseeableness or anticipation of the injury as a probable result of the peril insured against is not required.*" *Id.* (emphasis added).

484. *See* Armendariz v. Progressive County Mut. Ins. Co., 112 S.W.3d 736, 738 (Tex. App.—Houston [14th Dist.] 2003, no pet.) ("Because Alma caused the accident while driving her father's uninsured van, the exclusion, if valid, precludes liability coverage."). "[E]ven if she were a covered person, the exclusion would still preclude liability coverage because the uninsured van belonged to a family member." *Id.* at 738 n.1.

485. *See* Wallis v. United Servs. Auto. Ass'n, 2 S.W.3d 300, 302 (Tex. App.—San Antonio 1999, pet. denied) ("Texas recognizes the doctrine of concurrent causes.").

486. *Wallis*, 2 S.W.3d at 302-03 (citing Travelers Indem. Co. v. McKillip, 469 S.W.2d 160, 163 (Tex. 1971), and Paulson v. Fire Ins. Exch., 393 S.W.2d 316, 319 (Tex. 1965)).

whether Progressive had a duty to defend Alma in the underlying lawsuit. Once more, the policy covered Alma, and presumably the policy contained a duty-to-defend clause. Certainly, Progressive could avoid defending Alma, but Texas's law requires a trial judge to apply the eight-corners doctrine to reach that conclusion. Sadly, in *Progressive*, the trial judge decided to ignore the eight-corners rule altogether. Instead, the judge awarded an exceptionally unwarranted and unfair summary judgment in favor of Progressive.

B. *Declaratory-Judgment Disputes and Texas Courts of Appeals' Questionable Summary-Judgment Decisions*

To further complicate matters, Texas's trial judges participate in another unsettling practice. Instead of conducting full-blown declaratory-judgment trials, trial judges regularly grant or deny summary-judgment motions without giving intelligible, meticulous, or studious explanations of their rulings.[487] As a consequence, Texas's appellate courts must spend an enormous amount of time and limited judicial resources exploring various plausible theories to determine whether an unexplained summary-judgment ruling was sound or erroneous.

Texas's courts of appeals must engage in such costly, wasteful, and unnecessary conduct whenever a party challenges any unfavorable summary-judgment ruling because the Texas Supreme Court has been consistently clear regarding one particular summary-judgment issue: When a trial court does not specify the ground for a summary judgment, the appealing party may proffer multiple theories to establish that the judgment was erroneous.[488] In other words, to generate more costs and ensure that appellate courts con-

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487. *See, e.g.*, Carr v. Brasher, 776 S.W.2d 567, 569 (Tex. 1989) (observing that the "trial court granted summary judgment for the defendants without specifying the ground or grounds on which it relied"); Simmons v. Healthcare Ctrs. of Tex., Inc., 55 S.W.3d 674, 680 (Tex. App.—Texarkana 2001, no pet.) (observing that "the trial court [did] not specify on what ground it granted summary judgment"); Robles v. NME Hosps., Inc., No. 05-93-01721-CV, 1994 WL 679315, at *3 (Tex. App.—Dallas Dec. 6, 1994, no writ) (not designated for publication) (observing that the "trial court's order granting summary judgment [did] not indicate the reasons for the court's decision").

488. *See* Star-Telegram, Inc. v. Doe, 915 S.W.2d 471, 473 (Tex. 1995) (citing Malooly Bros., Inc. v. Napier, 461 S.W.2d 119, 121 (Tex. 1970)) ("In challenging a summary judgment, it is sufficient that an appellant broadly assert the trial court erred in granting summary judgment. . . . Under this point of error, the appellant may argue all the reasons the trial court erred in granting the summary judgment.").

sume even more judicial resources, an appellant may present an assortment of reasons to explain why a summary judgment was unwarranted.

But there is more. The practice of appealing adverse summary-judgment rulings to Texas's courts of appeals does not necessarily increase insurers' and insureds' likelihood of receiving a thorough, thoughtful, and formal declaration of their rights and duties under an insurance contract. More specifically, there is no guarantee that appellate courts will apply settled rules of contract interpretation and issue a quick, scholarly, and comprehensible declaration of rights and obligations, particularly in duty-to-defend and duty-to-indemnify cases.

To support this point, one needs only to review the widespread evidence appearing in reported cases. For example, consider the facts and controversy in *Hartford Casualty Insurance Co. v. Executive Risk Specialty Insurance Co.*[489] Briefly put, Provider sells various services to an array of managed-care administrators and professionals.[490] Unexpectedly, one of Provider's customers, a physician, filed a lawsuit against Provider, listing several causes of action including defamation, fraud, and breach of contract.[491]

When the underlying lawsuit arose, Provider was the "named insured" under two insurance contracts.[492] Hartford Casualty Insurance (Hartford) insured Provider under a general liability policy, while Executive Risk Specialty Insurance Company (Executive) insured Provider under an errors and omissions insurance contract.[493] After learning about the physician's plight, Hartford contacted Executive and urged the "errors and omissions" insurer to help defend Provider against the physician's lawsuit.[494] Executive refused.[495]

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489. No. 05-03-00546-CV, 2004 WL 2404382 (Tex. App.—Dallas Oct. 28, 2004, no pet.) (mem.).

490. Hartford Cas. Ins. Co. v. Executive Risk Specialty Ins. Co., No. 05-03-00546-CV, 2004 WL 2404382, at *1 (Tex. App.—Dallas Oct. 28, 2004, no pet.) (mem.).

491. *Id.*

492. *Id.*

493. *Id.*

494. *Id.*

495. *Hartford*, 2004 WL 2404382, at *1.

Executive argued that it was the excess insurer and asserted that Hartford was the primary carrier.[496] Consequently, from Executive's perspective, only the primary liability insurer was responsible for defending Provider.[497] Responding to Executive's intransigence, Hartford filed a declaratory-judgment suit.[498] The liability insurer asked the trial court to declare whether Executive and Hartford had a joint duty to defend Provider under their respective insurance contracts.[499]

Predictably, Hartford filed a summary-judgment motion.[500] The liability insurer argued that a genuine question of fact did not exist because Executive was clearly responsible for defending Provider and paying a part of the defense costs.[501] Equally predictably, Executive also sought summary relief, claiming there was no genuine issue of fact regarding its legal status.[502] From Executive's viewpoint, the "other insurance" language in its errors and omissions contract clearly proved Hartford and Executive were the primary and excess insurers, respectively.[503] The trial court granted and denied, respectively, Executive's and Hartford's motions for summary judgment, and the insurers appealed.[504]

Again, unsurprisingly, the trial judge issued a summary-judgment order in favor of Executive, without stating the basis for the order.[505] Of course, when this happens, the parties that challenge the order on appeal must prove that each independent argument outlined in the movant's motion does not sufficiently support the

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496. *Id.*

497. *Id.* "Executive refused to share in the cost of defending Provider Network based on the wording of the 'other insurance' clauses in the Hartford and Executive policies. Executive claimed the 'other insurance' clause in its policy made Hartford the primary insurer and Executive an excess insurer." *Id.*

498. *Id.*

499. *Hartford*, 2004 WL 2404382, at *1.

500. *Id.*

501. Hartford Cas. Ins. Co. v. Executive Risk Specialty Ins. Co., No. 05-03-00546-CV, 2004 WL 2404382, at *1 (Tex. App.—Dallas Oct. 28, 2004, no pet.) (mem.) ("Hartford [claimed that the facts clearly indicated that it] was entitled to be reimbursed by Executive on a pro-rata basis.").

502. *Id.* at * 2.

503. *Id.* "Executive argues the 'other insurance' clause makes it an excess insurer and confirms Hartford's status as the primary insurer." *Id.*

504. *Id.* at *1.

505. *Id.*

order.[506] Therefore, at the outset, the court of appeals reviewed the "other insurance" language in Executive's errors and omissions policy. The relevant clause stated:

> Other Insurance; Other Indemnification: (1) This Policy shall be excess of and shall not contribute with: (a) any other existing insurance or self-insurance (whether collectible or not), unless such other insurance or self-insurance is specifically stated to be in excess of this Policy; and (b) any indemnification to which an Insured is entitled from any entity other than another insured.[507]

After reviewing this language, the appellate court simply accepted Hartford's argument and issued a less than ideal memorandum opinion, concluding that "the 'other insurance' clause in Executive's policy was . . . inapplicable."[508] To repeat an earlier observation, the Texas Supreme Court has embraced five doctrines to interpret disputed words and phrases in all sorts of insurance contracts.[509] More important, the Dallas Court of Appeals is exceedingly familiar with these settled rules.[510] Yet, inexcusably, this

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506. *See Hartford*, 2004 WL 2404381, at *1 (citing Jones v. Hyman, 107 S.W.3d 830, 832 (Tex. App.—Dallas 2003, no pet.), and Williams v. City of Dallas, 53 S.W.3d 780, 784 (Tex. App.—Dallas 2001, no pet.)) (declaring that when no grounds for summary judgment are given, the challenging party "must show that each of the independent arguments alleged in the motion is insufficient to support the order").

507. *Id.* at *2.

508. *Id.* "Hartford argues, the 'other insurance' clause is inapplicable to the situation at hand in which Executive's policy and Hartford's policy cover completely different risks. For the reasons that follow, we agree with Hartford." *Id.*

509. *See supra* Part IV(B) and accompanying notes. Again, these settled doctrines are the adhesion, ambiguity, and reasonable expectation doctrines, plus the plain meaning rule and the traditional rule of contract interpretation.

510. *See, e.g.*, Vest v. Gulf Ins. Co., 809 S.W.2d 531, 533 (Tex. App.—Dallas 1991, writ denied) (citing Kelly Assoc. v. Aetna Cas. & Sur. Co., 681 S.W.2d 593, 596 (Tex. 1984)) (embracing the rule that "[a] court will interpret and liberally construe insurance policies in favor of the insured and strictly against the insurer, especially when dealing with exceptions and words of limitation," but "this rule applies only when an ambiguity exists in the policy"); Maxus Exploration Co. v. Moran Bros., Inc., 773 S.W.2d 358, 364 (Tex. App.—Dallas 1989) (stressing that "the trial court could have, just as we, used the traditional rules of contract interpretation [to interpret the insurance contract] without resorting to [a party's] affidavit"), *aff'd*, 817 S.W.2d 50 (Tex. 1991); Baldwin v. New, 736 S.W.2d 148, (Tex. App.—Dallas 1987, writ denied) (embracing and applying the plain meaning rule, and citing *Sun Oil Co. (Del.) v. Madeley*, 626 S.W.2d 726, 732 (Tex. 1981), which held that surrounding circumstances may be considered to determine the meaning of ambiguous terms in contracts, but if the contract is not ambiguous, a party's construction is immaterial); *see also* Cent. Sav. & Loan Ass'n v. Stemmons Northwest Bank, N.A., 848 S.W.2d 232, 240 (Tex. App.—Dallas 1992, no writ) (embracing the view that under certain circumstances insurance policies are adhesion contracts); Allen v. Brewster, 172 S.W.2d 192, 193 (Tex.

appellate court did not cite, apply, or even mention a single doctrine to interpret the "other insurance" provision and reach its conclusion.

Perhaps the most egregious outcome in *Hartford* involves the manner in which the Dallas Court of Appeals addressed the central question appearing in Hartford's declaratory-judgment complaint. Again, the liability insurer asked the trial court to determine whether Executive also had a contractual duty under Executive's errors and omissions policy to defend Provider. The duty-to-defend language in Executive's insurance contract stated in relevant part: "[Executive has] the right and duty to defend any Claim made against any Insured which is covered by this Policy, even if the allegations of such Claim are groundless, false or fraudulent."[511]

Here, the Dallas Court of Appeals's interpretation of Texas's "eight corners" doctrine is warranted and instructive. In *Gehan Homes, Ltd. v. Employers Mutual Casualty Co.*,[512] that tribunal outlined the following rules and instructions for a lower court:

> The insurer's duty to defend arises when a third party sues the insured on allegations that, if taken as true, potentially state a cause of action within the terms of the policy. . . . This standard is referred to as the "eight corners" rule. . . . The court may not read facts into the pleadings, look outside the pleadings, *or "imagine factual scenarios which might trigger coverage."* . . . If the *pleadings do not state facts* sufficient to bring the case clearly within or without the coverage, the general rule is that the insurer is obligated to defend if *potentially* there is a case *under the pleadings* within the coverage of the pol-

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Civ. App.—Dallas 1943) (embracing one version of the doctrine of reasonable expectation), *rev'd*, 142 Tex. 127, 176 S.W.2d 311 (1943). *But see* Mary Kay Cosmetics, Inc. v. N. River Ins. Co., 739 S.W.2d 608, 613 (Tex. App.—Dallas 1987, writ denied) ("[A]ppellants assert that they should have been granted a partial summary judgment based upon J & J Pump's 'reasonable expectation' that they were covered under the terms of the policy.") The appellants asked the court "to adopt the doctrine of reasonable expectations in order to impose coverage under the insurance policy based upon the *reasonable* expectations of coverage," but that was not the question before the court. *Id.*

511. Hartford Cas. Ins. Co. v. Executive Risk Specialty Ins. Co., No. 05-03-00546-CV, 2004 WL 2404382, at *2 (Tex. App.—Dallas Oct. 28, 2004, no pet.) (mem.) (quoting the policy).

512. 146 S.W.3d 833 (Tex. App.—Dallas 2004, pet. filed).

> icy. . . . A duty to defend any of the claims against an insured requires the insurer to defend the entire suit.[513]

However, when one carefully reviews the Dallas Court of Appeals's duty-to-defend ruling in *Hartford*, one point becomes readily and painfully obvious: The appellate court did not even cite any of the rules highlighted in *Gehan Homes*. But more important, the court did not perform the same kind of rigorous duty-to-defend analysis that it demands from "inferior" trial court judges. In fact, like the trial court in *Hartford*, the Dallas Appellate Court behaved arguably inappropriately. Specifically, the court of appeals did not even attempt to perform a proper declaratory-judgment analysis using the "eight corners" doctrine to resolve the duty-to-defend question.

Instead, the Dallas Court of Appeals simply concluded "the trial court erred in granting summary judgment in favor of Executive."[514] Then, the appellate court stated, without presenting an intelligible analysis or explanation, that "both Executive and Hartford have the duty to defend" the underlying claims, and that "Executive and Hartford . . . must bear a pro rata share of the costs of [defending against] the underlying suit."[515] After presenting these conclusions, the Dallas Court of Appeals remanded the case to the trial court with further instructions.[516] To repeat, if Texas had outlawed summary-judgment motions in declaratory-judgment trials and required a full-blown hearing on the merits, it is very unlikely that the waste and superficial analyses appearing in *Hartford* would have materialized.

Finally, it is fitting to highlight the general conflict and ancillary legal issues appearing in *Duke Energy Field Services Assets v. National Union Fire Insurance Co. of Pittsburgh, Pa.*[517] *Duke* illus-

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513. Gehan Homes, Ltd. v. Employers Mut. Cas. Co., 146 S.W.3d 833, 838 (Tex. App.—Dallas 2004, pet. filed) (most emphasis added) (citation omitted).

514. *Hartford*, 2004 WL 2404382, at *2.

515. *Id.* (citing Utica Nat'l Ins. Co. v. Tex. Prop. & Cas. Ins. Guar. Ass'n, 110 S.W.3d 450, 458 (Tex. App.—Austin 2001), *rev'd on other grounds*, 141 S.W.3d 198 (Tex. 2004)) (concluding that "[w]here multiple insurers have a duty to provide a complete defense, neither must pay all of the defense costs because they share the duty until one has either exhausted its policy limits or is declared impaired").

516. *See id.* at *3 ("We reverse the trial court's summary judgment in favor of Executive, render judgment in favor of Hartford, and remand for the trial court to determine the amount of attorney's fees incurred by Hartford in prosecuting the underlying action.").

517. 68 S.W.3d 848 (Tex. App.—Texarkana 2002, pet. denied).

trates two unsettling practices: (1) a trial judge's grant of a questionable summary judgment in a declaratory-judgment hearing, and (2) an appellate court's failure to rectify the harm by awarding declaratory relief in a timely manner when the opportunity clearly presented itself.[518]

Briefly, Zaval-Tex is a pipeline construction and maintenance company with its principal place of business in Beaumont, Texas.[519] During the 1990s, Centana Intrastate Pipeline Company was a subsidiary[520] of PanEnergy Corporation, a Texas corporation.[521] At that time, Centana owned and operated a gas plant in Port Arthur, Texas.[522] Centana later sold the plant to PanEnergy Field Services, Inc., another PanEnergy subsidiary.[523]

Duke is one of the nation's largest gatherers, producers, and marketers of natural gas liquids, and has its principal place of business in Denver, Colorado.[524] In the late 1990s, Duke purchased PanEnergy Corporation—including Centana—and changed the name to Duke Energy Field Services, Inc.[525]

After acquiring Centana, Duke neither terminated nor amended the construction services contract between Zaval-Tex and Centana.[526] In fact, Zaval-Tex continued to provide workers and deliver identical services to Duke, the gas plant's new owner.[527] Even more relevant, the construction agreement between Zaval-Tex and Centana—the former owner of the Port Arthur gas plant—required Zaval-Tex to purchase insurance and list Centana as an "additional insured."[528] To comply, Zaval-Tex purchased a liability insurance policy from National Union Fire Insurance Com-

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518. Duke Energy Field Servs. Assets v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 68 S.W.3d 848, 848 (Tex. App.—Texarkana 2002, pet. denied).

519. http://www.zavaltex.com/ (last visited Feb. 6, 2005).

520. Duke Energy Field Servs. Assets, L.L.C. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 68 S.W.3d 848, 850 (Tex. App.—Texarkana 2002, pet. denied) ("At that time, Centana was a corporate subsidiary of PanEnergy Corporation.").

521. http://www.business.com/directory/energy_and_environment/natural_gas_utilities/panenergy_corp/profile/.

522. *Duke*, 68 S.W.3d at 849.

523. *Id.* at 850.

524. *See* http://www.defieldservices.com/about.html (giving background on Duke Energy).

525. *Duke*, 68 S.W.3d at 850.

526. *Id.*

527. *Duke*, 68 S.W.3d at 849-50.

528. *Id.* at 850-51.

pany.[529] Perhaps sooner than Duke expected, the company found itself needing National's assistance.

One of Zaval-Tex's employees, Rafael Chavez, was injured while working at the Port Arthur gas plant.[530] Shortly thereafter, Chavez commenced a personal injury lawsuit against Duke, the undisputed owner of the plant.[531] Duke asked National to provide a legal defense against the underlying claims, but National Union refused.[532]

Duke filed a declaratory-judgment action, asking the trial judge to declare that National had an obligation to defend Duke in Chavez's underlying lawsuit. Immediately thereafter, both Duke and National engaged in the all-too-frequent and highly unnecessary legal ritual: Each filed a traditional motion for summary judgment. Uncharacteristically, the lower court gave a sentence-long explanation for awarding National's motion for summary relief. The trial judge found no disputed fact, concluding that Zaval-Tex's liability insurance contract required a "written contract" between Duke and Zaval-Tex. But Duke could not produce an original "written contract." Therefore, the trial judge granted National's summary-judgment motion, concluding that the liability insurance contract did not cover Duke, Centana's successor-owner.[533] Duke appealed.

Again, Duke petitioned the trial court for a timely and a relatively inexpensive declaratory judgment and lost. On appeal, the Texarkana Court of Appeals also had the same excellent opportunity to perform a decidedly warranted, comprehensible, and timely eight-corners analysis and then declare whether National had a contractual duty to defend Duke. But the court of appeals did not want to address that declaratory-judgment issue. Instead, the Texarkana Court of Appeals only wanted to address the summary-

529. *Id.* at 849.

530. *Duke*, 68 S.W.3d at 849.

531. *Id.* at 850.

532. *Id.* at 849.

533. Duke Energy Field Servs. Assets, L.L.C. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 68 S.W.3d 848, 850 (Tex. App.—Texarkana 2002, pet. denied) ("The trial court based its summary judgment on its conclusion that Duke was not an additional insured within the terms of Zaval-Tex's policy because there was no 'written contract' between Duke and Zaval-Tex as required by National Union's policy.").

judgment issue—whether Duke was an "additional insured" under the Zaval-Tex's liability insurance contract.[534]

To help accomplish that end, the court of appeals reviewed the coverage provision in National's insurance policy. In pertinent part, that clause stated: "It is agreed that Additional Insureds are covered under this policy as required by *written contract,* but only with respect to liabilities arising out of the operations performed by the Named Insured."[535]

Undeniably, rather than spending an inordinate amount of time writing a long summary-judgment opinion, the court of appeals could have written a one-paragraph response and reversed the trial court's ruling, for Texas's predecessor-successor principles are incredibly clear: Generally, a successor corporation assumes the predecessor corporation's rights and burdens.[536] Similarly, when a subsidiary forms a contractual relationship with a third party and that subsidiary merges into a parent corporation, the parent—by operation of law—forms a contractual agreement with the third party.[537]

Actually, when any Texas business acquires another business entity in its entirety, the acquisition transfers the predecessor's rights and liabilities to the successor unless specific terms or exceptions state otherwise.[538] But there is more. Texas's law also is exception-

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534. *Id.* at 849-50.

535. *Id.* at 850.

536. *See, e.g.*, Volvo Petroleum, Inc. v. Getty Oil Co., 717 S.W.2d 134, 139 (Tex. App.—Houston [14th Dist.] 1986, no writ) (embracing the view that a "successor" corporation assumes the liabilities and obligations of its predecessor); N. Am. Land Corp. v. Boutte, 604 S.W.2d 245, 246 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.) (embracing the principle that a surviving or new corporation is liable for the merged or consolidated corporation's liabilities and receives all the latter's benefits.); *see also* TEX. BUS. CORP. ACT ANN. art. 5.06(A)(3) (Vernon 2004) (providing that merging companies' liabilities and obligations will be distributed to the surviving or new entities of the merger).

537. *See* TXO Prod. Co. v. M.D. Mark, Inc., 999 S.W.2d 137, 140 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (supporting the principle that "the merger of a wholly-owned subsidiary into its parent does not constitute a sale of the subsidiary," and therefore does not terminate the parent's affirmative duty to honor the subsidiary's contractual obligations under outstanding contracts).

538. *See, e.g.*, Procter v. Foxmeyer Drug Co., 884 S.W.2d 853, 861 (Tex. App.—Dallas 1994, no writ) (observing and embracing the principle that "'[s]uccessor' does not ordinarily mean an assignee, but is normally used in respect to corporate entities, including corporations becoming invested with the rights and assuming the burdens of another corporation by amalgamation, consolidation, or duly authorized legal succession"); Enchanted Estates Cmty. Ass'n Inc. v. Timberlake Improvement Dist., 832 S.W.2d 800, 802

ally clear regarding another matter: Liability or title insurers—primary, excess, and reinsurers—have a common-law duty to extend coverage to a purchaser-successor if a third-party contractor complied with its contractual duty[539] and purchased insurance for the sole benefit of the insured-predecessor.[540]

Therefore, in light of these fairly well-known and settled principles, it is rather disconcerting that the Texarkana Court of Appeals invested so much time, ink, and paper addressing the "coverage" issue. Once more, National argued and the trial court agreed that Duke was not an "insured successor" under the liability insurance contract because a "written contract" did not bind Duke and Zaval-Tex. Clearly, the lower court's ruling was erroneous. The court of appeals should have acknowledged the same quickly and adamantly, and then spent the bulk of its analysis addressing the central question: Did National have a contractual duty to defend Duke, the successor-purchaser and the additional insured under the insurance policy?

But to repeat, the Texarkana Appellate Court decided not to perform an "eight corners" analysis or any other analysis that uses

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(Tex. App.—Houston [1st Dist.] 1992, no writ) (finding that "[the successor] assumed the rights and obligations of [the predecessor] under the contract"); Thompson v. N. Tex. Nat'l Bank, 37 S.W.2d 735, 739 (Tex. Comm'n App. 1931, holding approved) (declaring that the guaranty contract was a continuing contract that gave the successor and assign exactly the same rights that were given to the predecessor).

539. *See Duke*, 68 S.W.3d at 850 (noting that "if Zaval-Tex had a written contract to provide construction work for another company, and . . . that company required Zaval-Tex to obtain insurance, National Union's policy would provide that coverage"). Importantly, "National Union [did not deny that the] written contract sufficed to make Centana an additional insured [under] the policy. At that time, Centana was a corporate subsidiary of PanEnergy Corporation." *Id.*

540. *See* FDIC v. Am. Home Assurance Co., 585 S.W.2d 756, 760 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.) (declaring that the successor-receiver or "the insureds' successor in interest had a legal right to renew the policy," the same legal right that the insured predecessor-bank could have exercised under the insurance contract); Commercial Standard Ins. Co. v. Freeman, 100 S.W.2d 145, 146-47 (Tex. Civ. App.—Beaumont 1936, writ dism'd w.o.j.) (finding that a reinsurer reinsured a primary carrier's title insurance policies, and concluding that (1) the reinsurer, *as successor to the primary insurer*, assumed the primary carrier's liabilities and (2) the reinsurer also had an obligation *to cover the successor to the insured* under one of the primary insurer's original title insurance contracts); *see also* P.G. Bell Co. v. U.S. Fid. & Guar. Co., 853 S.W.2d 187, 190 (Tex. App.—Corpus Christi 1993, no writ) (embracing the settled principal, by implication, that a subcontractor's insurance company has a "special relationship" with the contractor when the subcontractor's liability policy "lists" the contractor "as a named insured on the policy, . . . an additional insured or [an intended] beneficiary" under the insurance contract).

settled rules to interpret insurance contracts. Instead, the court of appeals took the remarkably inefficient, costly, and litigious route: The court simply reversed the trial judge's erroneous summary-judgment ruling and cavalierly "remand[ed] the cause to the trial court" for a non-jury declaratory-judgment trial.[541]

VII. CONCLUSION

At this point, some earlier observations are worth repeating. First, among Texas's judges and practitioners, there is general consensus: When used properly, a declaratory-judgment trial is an efficient way to interpret and declare rights and obligations under statutes, ordinances, and contracts, including insurance contracts. Recognizing and embracing this truth, the Texas Legislature adopted the Uniform Declaratory Judgments Act (UDJA) to ensure that Texans receive relatively swift and conclusive "relief from uncertainty and insecurity [regarding Texans'] rights, status, and other legal relations."[542]

To help courts to reach that end, the legislature encouraged trial judges to construe and administer the UDJA "liberally."[543] Among other liberties, trial courts may consider and resolve both questions of fact and questions of law during the process. But more important, a declaratory-judgment hearing allows judges to consider those questions considerably more attentively, soundly, and less expensively. Therefore, in light of these positive attributes, the proffered reasons for allowing and encouraging summary-judgment motions in Texas's declaratory-judgment trials is painfully difficult to comprehend and even harder to justify.

In fact, as discussed and documented throughout this Article, summary-judgment motions severely undermine the purported reasons for enacting the UDJA: "to facilitate the administration of justice more readily,"[544] to foster timely "preventative justice" long before a wrong has occurred,[545] and to serve as a "speedy and effective remedy for the determination of rights."[546]

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541. *Duke*, 68 S.W.3d at 853.

542. TEX. CIV. PRAC. & REM. CODE ANN. § 37.002(b) (Vernon 1997).

543. *Id.*

544. Cobb v. Harrington, 144 Tex. 360, 367-68, 190 S.W.2d 709, 713 (1945) (quoting WALTER H. ANDERSON, ACTIONS FOR DECLARATORY JUDGMENTS § 3, at 11-12 (1940)).

545. *Id.*

546. *Id.*

Furthermore, when trial judges award or deny summary relief in a declaratory-judgment suit, they often do not explain their rulings. Very likely, this outmoded or questionable judicial practice produces some unwarranted consequence: Judges that fail to explain their rulings cause Texans generally, as well as insurers and insureds in particular, to believe that Texas's courts are biased in favor of one party or the other. Arguably, such perceptions of judicial bias would be considerably less if trial courts would conduct full-blown declaratory-judgment hearings, perform a sound legal analysis of both questions of fact and law, and issue more well-reasoned declarations.

Second, as we discovered, even when trial judges issue summary-judgment explanations rather than learned declaratory-judgment rulings, many of the former are completely strained and poorly written. More important, large numbers of those summary-judgment explanations are stripped disappointingly of any evidence suggesting that trial judges have a real understanding of settled substantive laws. Also, an unacceptable number of summary-judgment explanations present little evidence suggesting that trial judges apply settled principles soundly and consistently. Undeniably, these substantive omissions are excruciatingly conspicuous in cases where insurance litigants compete for declaratory relief in duty-to-defend, duty-to-indemnity, and duty-to-settle—the *Stowers* doctrine—controversies.

Assuredly and expectedly, many jurists—judges and practitioners—will question the wisdom of removing the summary-judgment procedure from Texas's declaratory-judgment trials. And such skepticism or reservation is very healthy and warranted, even though this Article has highlighted and documented major summary-judgment limitations. Therefore, the commentator invites the reader to consider the following closing arguments in favor of the proposition.

First, as mentioned earlier, summary-judgment rulings in declaratory-judgment suits produce more—not less—litigation. Why? Presently, one finds that both parties in declaratory-judgment controversies have an equal probability of petitioning a trial judge for summary relief when a formal declaration is all that each one wants. More unsettling, even a cursory examination of Texas's re-

ported cases involving just insurance law disputes supports this assertion.[547]

But even more unsettling, the same evidence reveals that "movants" and "nonmovants" are equally likely to appeal adverse summary judgments.[548] Obviously, such a constant flood of appeals involving arguably minor declarations of rights and obligations comes with a hefty price. In many instances, Texas's courts of appeals spend or waste an undue amount of precious judicial resources attempting to find reasons for trial courts' decisions to award or deny summary relief.

To repeat an earlier observation, Texas's trial judges do not have to give summary-judgment explanations, and an excessive number do not. However, when trial judges provide explanations for denying or awarding summary relief in a declaratory-judgment trial, appellate courts still must invest a considerable amount of effort trying to deconstruct many nearly indecipherable rulings. Either way, courts of appeals must invest multiple hours to justify affirming or reversing trial courts' allegedly "erroneous summary judgments." But even after investing those resources, appellate courts simply remand the cases to the same judges and instruct them to conduct a full-blown declaratory-judgment trial.

Second, even a cursory examination of reported cases reveals that a good number of Texas's trial judges have considered and decided both highly contentious *questions of fact* as well as *questions of law* in declaratory-judgment trials without finding a concomitant need to review, award, or deny a motion for summary judgment.[549] To illustrate, consider the duty-to-defend controversy

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547. To reach this conclusion, the author searched Westlaw's TXIN-CS database, using the following query: (DECL! /3 RELIEF JUDG!) DECL! /120 (BOTH /9 "SUM! JUDG!") (last visited Nov. 24, 2004).

548. *Id.*

549. *See, e.g.*, Liberty Mut. Ins. Co. v. Am. Employers Ins. Co., 556 S.W.2d 242, 243 (Tex. 1977) (recognizing the trial court's finding that "a truck and flatbed trailer were 'borrowed' . . . under the provisions of a comprehensive automobile liability insurance policy"—a question of fact—and the trial court's judgment that "Liberty's policy created a duty to defend"—a question of law); Mid-Continent Cas. Co. v. Safe Tire Disposal Corp., 16 S.W.3d 418, 422-24 (Tex. App.—Waco 2000, no pet.) (commenting about the trial judge's finding that a "hostile fire" was the efficient proximate cause of the bodily injury—a question of fact—and the lower court's declaration that the insurer had a contractual duty to defend under the eight-corners doctrine—a question of law); Mid-Century Ins. Co. of Tex. v. Childs, 15 S.W.3d 187, 188 (Tex. App.—Texarkana 2000, no pet.) (recalling the trial court's finding that the insurer failed to include all potential claimants in the settle-

in *Heyden Newport Chemical Corp. v. Southern General Insurance Co.*[550]

In *Heyden*, Newport Chemical employed a hauling company to collect and transport tree stumps to Newport's plant—an operation that made turpentine.[551] Newport supplied the trucks and drivers.[552] Southern General insured Raymond Pickering, one of the drivers, under an automobile liability insurance contract.[553]

Briefly put, Pickering's truck collided with a third party's pickup truck, killing the third party.[554] The deceased's survivors commenced a wrongful-death action against Newport and the haulers.[555] The turpentine maker asked Southern General for a legal

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ment, thereby creating a conflict of interest—a question of fact—and the trial court's declaration that the insurer had a duty to defend under the eight-corners doctrine—a question of law); Safeway Managing Gen. Agency for State & County Mut. Fire Ins. Co. v. Cooper, 952 S.W.2d 861, 866-68 (Tex. App.—Amarillo 1997, no writ) (noting the trial court's finding that "the application form [did] not 'accompan[y]' the policy [thereby rendering] the named driver exclusion on the form . . . ineffective"—a question of fact—and that court's conclusion that the insurer had a duty to pay reasonable and equitable attorneys' fees—a question of law); Hofland v. Fireman's Fund Ins. Co., 907 S.W.2d 597, 600 (Tex. App.—Corpus Christi 1995, no writ) (noting the trial judge's finding that the insured's act of attaching a trailer to his truck, which came loose and caused severe bodily injury, was negligence under the policy—a question of fact—and the judge's declaration that the insurer had no duty to defend or indemnify—questions of law); Hartford Fire Ins. Co. v. Rainbow Drilling Co., 748 S.W.2d 262, 263-64 (Tex. App.—Houston [14th Dist.] 1988, no writ) (noting the trial court's finding that "Rainbow was 'using' the vehicle in question so as to make Rainbow an 'insured' under the policy"—a question of fact—and the court's declaration that the insurer had a duty to defend—a question of law); Aetna Cas. & Sur. Co. v. Protective Ins. Co., 661 S.W.2d 291, 292 (Tex. App.—Houston [1st Dist.] 1983, no writ) (commenting about the trial judge's erroneous finding that "Atlas was an omnibus insured under Walker's insurance policy"—a question of fact—and the lower court's holding that the insurer had a duty to defend and indemnify Atlas in the underlying third-party lawsuit—a question of law); Gonzales v. Am. States Ins. Co. of Tex., 628 S.W.2d 184, 186 (Tex. App.—Corpus Christi 1982, no writ) (noting the trial judge's finding that "the evidence . . . conclusively show[ed] that the 'completed operations hazard' exclusion [applied to the facts of this case]"—a question of fact—and the judge's declaration that the insurer had a duty to provide a legal defense—a question of law); Evans v. Gen. Ins. Co. of Am., 390 S.W.2d 818, 820-21 (Tex. Civ. App.—Dallas 1965, no writ) (noting the trial judge's finding that "[Evans's injury] arose from his employment within the meaning of the policy"—a question of fact—and the judge's declaration "that General Insurance [did] not owe a duty to defend the damage suit"—a question of law).

550. 387 S.W.2d 22 (Tex. 1965).

551. Heyden Newport Chem. Corp. v. S. Gen. Ins. Co., 387 S.W.2d 22, 23 (Tex. 1965).

552. *Id.*

553. *Id.* "The defendant, Raymond Pickering, carried an automobile liability insurance policy with the Southern General Insurance Company . . . ." *Id.*

554. *Id.*

555. *Id.*

defense, claiming that Newport was an additional insured under Pickering's policy.[556] The insurer refused, asserting that a "covered vehicle," as required under Pickering's liability contract, was not involved in the accident.[557]

To get satisfaction, Newport filed a declaratory-judgment action.[558] During the deliberations, the judge decided a *question of fact*—whether the truck involved in the accident was a "covered vehicle" under Pickering's automobile policy.[559] The trial judge concluded that the truck was not covered.[560] The lower court then turned to the disputed *question of law*—whether Southern General had a duty to defend Newport in the underlying wrongful death lawsuit because Pickering was Newport's agent "at all material times."[561]

Ultimately, the insurer had to defend Newport.[562] That revelation, however, is not the purpose of this illustration. More significant, the trial court considered and decided *both questions of fact and law*. But even more important, the trial judge awarded substantive relief—a declaratory judgment—for one of the parties, rather than some tentative procedural relief following a motion for summary judgment.

Finally, at the very outset, this Article observed that the Texas Supreme Court refused to adopt entirely the federal summary-

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556. *Heyden*, 387 S.W.2d at 23. "Newport Industries demanded that Southern General furnish it a defense in such prior suit, claiming to be an additional insured under the omnibus provision of the policy covering Pickering." *Id.*

557. *See id.* at 26 ("[Southern General] contends further that [Southern General] is not liable in any event because the trial court found that the truck involved was not covered by the policy of insurance . . . . It is true the trial court made such finding . . . .").

558. *Id.*

559. *Id.* at 26.

560. Heyden Newport Chem. Corp. v. s. Gen. Ins. Co., 387 S.W.2d 22, 26 (Tex. 1965). But the Texas Supreme Court reversed, stating: "We think these pleadings are sufficient to permit proof on a trial that Marks was hauling stumps to Newport Industries in a truck belonging to Pickering at the time of the collision." *Id.*

561. *See id.* at 24 (noting the petitioners' claim that they were entitled to a defense under their insurance policy).

> The petitioners contend that Newport Industries was entitled to be defended under respondent's policy [because] the allegations in the [underlying] suit [stated] that Pickering was an agent of Newport Industries at all material times, and that therefore Newport Industries was legally responsible for the use of the automobile involved in the collision causing the death of Sam Traylor.

Id.

562. *See id.* (reversing and remanding to the trial court).

judgment rule.[563] Although embracing the 1938 version of Federal Rule of Civil Procedure 56, the Supreme Court of Texas "ignored the [1948] amendments to the federal rule."[564] Consequently, Texas Rule of Civil Procedure 166a(a) does not mirror either the original or the amended version of Federal Rule 56, and the differences are significant.[565] Also, in fairly recent years, some jurists and commentators have encouraged the Texas Supreme Court to adopt "current" federal summary-judgment procedures. But the supreme court has declined to do so.[566]

In light of these disclosures, one point becomes unquestionably clear: Federal Rule 56[567] is not sacrosanct or unalterable in any respect, and there is little credible evidence suggesting the Supreme Court of Texas has adopted a contrary position. Therefore,

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563. *See supra* Part II(B) (illustrating Texas's traditional summary-judgment motion and Rule 166a of the Texas Rules of Civil Procedure).

564. Roy W. McDonald, *Summary Judgments*, 30 TEX. L. REV. 285, 286 (1952). McDonald explained that "the supreme court elected to adopt, with minor textual changes, the language of Federal Rule 56 as promulgated in 1938." *Id.*

565. *See* David Hittner, *Summary Judgments in Texas*, 22 HOUS. L. REV. 1109, 1133 (1985) (observing differences between summary-judgment practice in Texas and in the federal system); Sheila A. Leute, Comment, *The Effective Use of Summary Judgment: A Comparison of Federal and Texas Standards*, 40 BAYLOR L. REV. 617, 619, 635-37 (1988) (outlining major differences between summary-judgment practice in Texas's and federal courts); *see also* Roy W. McDonald, *Summary Judgments*, 30 TEX. L. REV. 285, 293-94 n.40 (1952) (illustrating the difference between the Texas and federal rules). "Rule 166-A, subdivision (a) provides that 'a party seeking . . . to obtain a declaratory judgment may' move for summary judgment 'at any time after the adverse party has appeared or answered.'" *Id.* at 293.

> While a motion for summary judgment is not a pleading, the filing by the defendant of a motion . . . presumably will be held to be an appearance. Hence the plaintiff apparently may move for summary judgment at any time after the defendant has so moved or after the defendant has taken any other step which constitutes an appearance, even though he has not answered. This was not allowed under the federal rule as originally promulgated. . . .
>
> Rule 166-A, subdivision (b) [is] unchanged from the federal rule, [permitting] "a party against whom . . . a declaratory judgment is sought" to move for summary judgment "at any time."

Id. at 294.

566. *See* Casso v. Brand, 776 S.W.2d 551, 556 (Tex. 1989) (finding no overriding policy reason "to adopt the current federal approach to summary judgments generally").

567. FED. R. CIV. P. 56. The pertinent language in paragraphs (a) and (b) of the rule reads:

> (a) For Claimant. A party seeking . . . to obtain a *declaratory judgment* may . . . move with or without supporting affidavits for *a summary judgment* in the party's favor upon all or any part thereof.

given the highlighted abuses, problems, costs, waste, and inefficiency associated with summary-judgment practice in Texas declaratory-judgment trials, this commentator invites the supreme court to weigh seriously the evidence and arguments outlined in this Article. And after a careful examination, the Article encourages the Supreme Court of Texas to abandon the federal practice of allowing summary judgments in declaratory-judgment proceedings.[568]

Irrefutably, the Texas Supreme Court's decision to delete the declaratory-judgment language from the relevant sections of Texas Rule 166a would be a relatively bold move.[569] But more important, the supreme court's decision would be extremely fitting because it would remove an extraordinary amount of waste and inefficiency from declaratory-judgment trials. But assuming the supreme court adopted this recommendation, that decision and the accompanying justifications certainly would not be novel.

As recently as 1993, the Texas Supreme Court discarded a widely recognized independent cause of action—a *prima facie* case for the negligent infliction of emotional distress.[570] In *Boyles v. Kerr*,[571] the supreme court held that an aggrieved victim may recover mental-anguish damages under other recognized theories of recovery,[572] but abandoned the negligent-infliction cause of action by de-

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(b) For Defending Party. A party against whom . . . a *declaratory judgment is sought* may, at any time, move with or without supporting affidavits for *a summary judgment* in the party's favor as to all or any part thereof.

FED. R. CIV. P. 56(a), (b) (emphasis added).

568. *Id.*

569. The commentator respectfully and strongly encourages the Texas Supreme Court to delete or seriously consider deleting the phrases "or to obtain a declaratory judgment" and "or a declaratory judgment is sought" from TEX. R. CIV. P. 166a(a) and 166a(b), respectively.

570. *See* Boyles v. Kerr, 855 S.W.2d 593, 597 (Tex. 1993) (refusing to recognize a right to recover for negligently inflicted emotional distress); *see also* Wilson v. Norfolk & W. Ry. Co., 718 N.E.2d 172, 176 (Ill. 1999) (observing that "a right to recover for negligently inflicted emotional distress . . . is nearly universally recognized among the states today").

571. 855 S.W.2d 593 (Tex. 1993).

572. *See* Boyles v. Kerr, 855 S.W.2d 593, 595-96 (Tex. 1993) (overruling "the language of *Garrard* to the extent that it recognizes an independent right to recover for negligently inflicted emotional distress" and stating that "mental anguish damages should be compensated only in connection with [the] defendant's breach of some other duty imposed by law"); Segura v. Home Depot USA, Inc., No. 04-99-00876-CV, 2001 WL 387995, at *3 (Tex. App.—San Antonio Apr. 18, 2001, no pet.) ("Home Depot moved for summary judgment on Segura's negligent infliction of emotional distress claim on the ground that there is

claring that a separate mental-distress cause of action was too broad in its scope and wholly unnecessary.[573]

Or stated differently, the negligent-infliction-of-emotional-distress action was too inefficient, consuming unacceptable levels of "judicial resources" and generating excessive waste to achieve its intended purpose.[574] Without doubt, summary-judgment practice in Texas's declaratory-judgment trials is producing identical results. Therefore, economic necessity and expanding dockets, as well as the need to reduce any appearance of judicial bias or unfairness, argue for removing summary-judgment practice—specifically from declaratory-judgment trials in Texas.

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no cause of action in Texas for negligent infliction of emotional distress. We agree."); *see also* Charles E. Cantu, *An Essay on the Tort of Negligent Infliction of Emotional Distress In Texas: Stop Saying It Does Not Exist*, 33 ST. MARY'S L.J. 455, 467-68 (2002) (emphasizing the serious legal distinction between commencing and proving a prima facie case—the independent cause of action for the negligent infliction of emotional distress—and recovering damages for emotional-distress (tort) claims under other causes of action; *Boyles* outlaws the former, but not the latter.).

573. *See Boyles*, 855 S.W.2d at 601-02 (commenting on its rejection of the cause of action).

> In rejecting negligent infliction of emotional distress as an independent cause of action, we stated in the original opinion that "[t]ort law cannot and should not attempt to provide redress for every instance of rude, insensitive or distasteful behavior, even though it may result in hurt feelings, embarrassment, or even humiliation." . . .
>
> The tort system can and does provide a remedy against those who engage in such conduct. But an independent cause of action for negligent infliction of emotional distress would encompass conduct far less outrageous than that involved here, and such a broad tort is not necessary to allow compensation in a *truly egregious case* such as this.

Id. (quoting the court's original opinion) (brackets in original).

574. *See id.* at 612-13 (Doggett, J., dissenting) (questioning the court's opinion).

> And why the rush to retreat? The majority declares with vigor that "judicial resources" would be "strained" . . . with the insignificant, the trivial, with other mere "intimate" affairs of the heart. How can anyone view what happened here as just another "instance of rude, insensitive or distasteful behavior"? When a surreptitiously produced videotape of a woman participating in sexual intercourse makes her the focus of public discussion, how can her injury be dismissed as unworthy of protection? How can the majority's purported difficulty in "distinguish[ing] severe from nonsevere emotional harm . . . justify denying relief to Susan Kerr for the humiliation and lifelong disabling psychological disorder she suffered? How can Boyles' conduct be so callously condoned by the majority's announcement that they and other judges are just too busy to handle such matters?

Id. (citations omitted) (brackets in original).