By Stephen Gibson[1]

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This Edition's Epigram:

Ring the bells that still can ring
Forget your perfect offering
There is a crack in everything
That's how the light gets in.

Leonard Norman Cohen, 1934- 2016,
"Anthem" from The Essential Leonard Cohen

Since the last edition of *The* Update, the court issued two *per curiam* opinions and granted two petitions for review.

Insurance Claim Discovery Is Limited to "Only You, You, You, Only You." [2]

In re National Lloyds Ins. Co. was a petition for writ of mandamus from a trial court's discovery order. The petition re-visited the court's decision in *In re National Lloyds Insurance Co*., 449 S.W.3d 486, 489–90 (Tex. 2014) (orig. proceeding), deeming an abuse of discretion a trial court's order that an insurer to produce documents related to any but the plaintiff's claim. In the current case, the plaintiffs alleged that they were underpaid for claims arising from two hailstorms in Hidalgo County. They sought damages for alleged breach of contract, breach of the duty of good faith, fraud, conspiracy and insurance code violations. The respondent approved a special master's discovery plan that propounded a single set of institutional discovery requests directed to each insurer that included "all documents regarding … [the insurer's] handling of claims" arising out of the hail storms and "any document general in nature which applies to more than one claim … relating to" the hail storm claims."

The insurer ultimately withdrew its objections and answered these requests. In its response, the insurer produced emails that referred to "system-generated management reports." No good deed goes unpunished. Plaintiffs sought to obtain these reports. The insurer resisted, claiming that these reports did not contain "historical" information, were not limited to the geographic region at issue, and were not readily available for reproduction. In other words, the

[1] The opinions expressed are solely those of the author. They do not necessarily represent the views of Munsch, Hardt Kopf & Harr, P.C. or its clients.
[2] Think of it as the "Sting" Rule. *See* Sting & Dennis Potter, "Only You" from *Brimstone & Treacle* (1982)

insurer maintained that the reports sought exceeded the scope of the prior requests for production and that all reports regarding the Hidalgo County hail storms had already been produced.

The trial court ordered the insurer to produce the reports and awarded the plaintiffs more than $15,000 in attorney's fees as a discovery sanction. The court of appeals held that the insurer waived its objections that these reports were not responsive or that the request was overly broad and, even had it not waived its objections, there was conflicting evidence about overbreadth which meant that the rulings of the trial court could not be overturned. The Texas Supreme Court disagreed. Although the insurer withdrew its objections to the discovery request, the Texas Supreme Court concluded that it was enough that
the insurer timely objected to the initial discovery request and re-asserted its objections in its motion for reconsideration.

The court did not attempt to explain its conclusion beyond saying that the insurer had not waived its discovery request. This practice is, to say the least, unhelpful. It forces practitioners to guess at the court's thinking and when it might apply. What happened to using the high court's jurisdiction to improving Texas jurisprudence?

Here's *The Update's* guess as to a possible basis for the court's conclusion. Under TRCP 193.2(c) & (d), objections may be amended or supplemented to add objections that were did not appear to be reasonably applicable when the initial response was made. Here, the information sought was, at least arguably, beyond the scope of the request because it did not relate to the hail storms in question or to the location in question. Whatever the reasoning, the insurer clears the procedural "waiver" hurdle.

On the substance, the court condemned as overly broad the order directing the insurer to "produce all emails, reports, attached to emails, and any follow-up correspondence and information related to those reports which
were sent or received by [the insurer's] employee or any affiliated adjusting company employees." It analogized the order to the request deemed too sweeping the 2014 *National Lloyds* case. There the insured argued that it needed information that would show whether there had been a pattern or practice of not sufficiently investigating or ignoring unfavorable data in resolving an insured's claim. In the 2014 case, the court reasoned that there were so many variables in adjusting a particular loss that the payments in other claims were simply not relevant to the contractual and extra-contractual claims of another insured and that "scouring" claim files in hopes of finding inconsistent resolutions was simply an impermissible fishing expedition. Not surprisingly, the court ruled that even though the requests in the 2016 were limited to particular events and a particular geographic area, the information about the resolution of other claims was not probative of the claim of a particular plaintiff and ordering its production was an abuse of discretion. The court also directed the trial court to reconsider its imposition of sanctions.

For your consideration: How delighted would Wells Fargo be if it could designate the Texas Supreme Court to supervise discovery in the litigation against it?

Wagons ho.

Oil & Gas Option Contracts: When It Comes to Describing The Tract, "Say What You Mean, Mean What You Say."[3]

North Shore Energy, L.L.C. v. Harkins arose from a dispute between landowners and an oil and gas company over whether an option contract was ambiguous about whether it included a 400-acre tract. The North Shore option contract applied to a tract described as "[b]eing 1,210.8224 acres of land, more or less, out of the 1673.69 acres out of … the same land described in that certain Memorandum of Oil and Gas Lease dated March 14, 1996 …." The referenced Memorandum in turn described the land as "1273.54 acres situated in Goliad County, Texas, and being all of the 1673.69 acre tract described on EXHIBIT "A" attached hereto, SAVE AND EXCEPT a 400.15 acre tract described in a[nother] Memorandum of Oil and Gas Lease … dated 1995.

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3 Justin Hayward, "Say What You Mean" from *Keys of the Kingdom*, The Moody Blues (1991).

North Shore exercised its option on selected acreage and drilled a well. Unfortunately for North Shore, it selected land that was in the 400.15 acres tract. North Shore argued, however, that the option contract was actually a selection agreement that gave it the right to lease up to 1210 acres out of the 1673-acre tract. The grantors and their successors argued that the option unambiguously reserved the 400-acre tract.

The Texas Supreme Court resorted to surrounding circumstances to resolve the dispute. It calculated the number of acres for which North Shore paid a $50 per acre option and determined that North Shore did not pay for an option on all 1673 acres. North Shore argued that payment for an option on only 1210 acres was consistent with its contention that the contract was a selection agreement. The court agreed that the option was a selection agreement but rejected the argument that it gave North Shore the right to the 400-acre tract under the proper rules of construction. It agreed with the grantors that "[b]eing 1,210.8224 acres of land, more or less … and being all of the 1673.69 acre tract described on EXHIBIT 'A'" referred to the *same* tract of land because of their joinder by the conjunction "and." The court was untroubled by the discrepancy in the acreage described the memoranda because the option described the acreage description as being "more or less." Finally, it reasoned that the language of the option itself was sufficient to explicitly and unambiguously exclude the 400-acre tract.

Legal Malpractice: Court to Hear Case Involving Legally Sufficient Evidence of Causation and the Tolling of Limitations for Transactional and Litigation Malpractice.

The petition granted in *Rogers v. Zanetti* arises from legal malpractice claims against the transactional attorney and trial attorneys who represented the clients in the suit resulting from the transaction. Both attorneys were with the same law firm.

The transactional attorney drafted an agreement under which the clients were to acquire an 80% interest in a business. After the deal closed, a dispute arose and the clients were sued for misallocating funds. The litigation could not have gone much worse for the clients. They were found liable for fraud and breach of fiduciary duty. The sales agreement was also declared illusory and void. The judgment against the clients was for $6 million judgment.

The clients sued the transactional attorney for drafting an agreement that was deemed void and illusory and failing to disclose an alleged conflict of interest in referring the litigation over the agreement to another partner in his firm. The transactional attorney was also accused of misrepresenting facts to opposing counsel and concealing that certain documents did not exist until they were created at the lawyer's direction for purposes of the litigation.

The litigation attorney was sued for failing to communicate a settlement offer for less than $1/12^{th}$ of the ultimate judgment, for being sanctioned for directing the preparation of false evidence and failing to designate rebuttal experts on the valuation of the business.

The client received a take-nothing summary judgment on its malpractice and breach of fiduciary duty claims after the trial court struck the affidavit of one its legal experts on causation.

The clients' petition urges that the client need not prove cause in fact or but-for causation when the evidence conclusively established that the lawyers did not communicate a settlement offer. Also at issue is whether the proof of causation in a transactional malpractice case should be the same as that for litigation malpractice and, if so, whether limitations is tolled on the transactional malpractice until all appeals in the resulting litigation has concluded.

This case is chock-a-block with implications for legal malpractice liability and should be on every attorney's radar screen. If nothing else, it is a one-case instruction manual on what not to do if you don't think concentric red and white circles are the fashion statement you'd like to make for your clients.

Jones Act Liability: Does a Ship Lose Its Status as a Vessel in Navigation During a Major Overhaul?
At issue in *Helix Energy Solutions Group, Inc. v. Gold* is whether Jones Act liability can apply to a ship undergoing a major overhaul when the Jones Act is limited to a "vessel in navigation." In *Gold*, the worker was injured while

the vessel was docked, but argued that the vessel was "in navigation" so long as it was expected to sail again in the future even though it was not in actual navigation at the time the injury occurred.

That's it for this edition of *The Update*.