HANDLING PROPERTY DAMAGE CLAIMS

by

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I. SCOPE

We have all heard the mantra "First impressions are everything." When a client is involved in a motor vehicle collision, one of the first things they need taken care of is the property damage claim[1]. How effective the attorney is at handling or assisting in the property damage claim, will often dictate whether or not the client's initial impression of the attorney is favorable. Therefore, it is critical that attorneys who prosecute personal injury claims be familiar with the issues surrounding property damage claims.

This article will examine some of the common issues arising under third party property damage claims and first party physical damage claims. The article is not meant to be a comprehensive discussion of every possible scenario that could arise, but rather, a brief summary of the more common coverage issues regarding property damage under the standard Texas personal automobile insurance policy.[2] The article will not devote any discussion to bodily injury claims, UM/UIM claims, business automobile policies, homeowner policies or commercial general liability policies, except to the extent it is necessary to illustrate a point about property damage claims under the standard personal automobile policy.

II. THIRD PARTY PROPERTY DAMAGE CLAIMS

We will pay . . . property damage for which any covered person becomes legally responsible because of an auto accident.

A. WHAT IS COVERED?

1. "Property Damage"[3]

a. Cost of repairs.

When a person's vehicle has suffered damage due to the negligence of a third party and the vehicle is repairable, that person is entitled to compensation for the cost of the reasonable and necessary

[1] For purposes of this article, "property damage" claim will mean and refer to both third party claims for property damage as well as first party physical damage claims.

[2] Article 5.06 of the Texas Insurance Code mandates that all insurers use only a policy form adopted by the Board of Insurance. *Springfield v. Aetna Cas. & Sur. Ins. Co.*, 620 S.W.2d 557 (Tex. 1981). The Board of Insurance is now known as the Texas Department of Insurance which is composed of the Commissioner of Insurance and other officers and employees. *See* TEX. INS. CODE ANN, arts 31.003, 31.007. If an insurer's policy is different that what has been adopted by the Board of Insurance, the policy is voidable, but not void. *Urrutia v. Decker*, 992 S.W.2d 440 (Tex. 1999). Also, agreements that are on unapproved forms may be unenforceable to the extent they conflict with the approved provisions in the standard forms. *Commercial Union Assurance Co. v. Preston*, 282 S.W. 563 (Tex. 1926)

[3] "Property damage" is not defined in the standard Texas personal auto policy, however, the ISO Personal Auto Policy defines it as "a physical injury to, destruction of, or loss of use of tangible property." For a more detailed discussion of the various types of damages available in a property damage claim resulting from a motor vehicle collision, see *Damages for Injury to Personal Property – Motor Vehicle*, 18 AM JUR PROOF OF FACTS3D 239 (2003).

repairs.[4] *Pasedena State Bank v. Isaac*, 228 S.W.2d 127 (Tex. 1950). The plaintiff must prove that the cost of the repairs were reasonable and necessary. *Merchants Fast Motor Lines, Inc. v. State of Tex.*, 917 S.W.2d 518 (Tex. App. – Waco 1996, writ denied).

If such repairs exceed the market value[5] of the vehicle, then the person is only entitled to the value of the vehicle at the time of the collision.

Market value can be established by testimony from the owner of the vehicle, an expert, and/or data accumulated from third-party sources such as Kelly Blue Book, National Automobile Dealers Association (NADA), or Edmund's. *Coker v. Burghardt*, 833 S.W.2d 306 (Tex. App. – Dallas 1992, writ denied); *Fidelity & Cas. Co. of N.Y. v. A.H. Underwood*, 791 S.W.2d 635 (Tex. App. – Dallas 1990, no writ).

b. Diminution of Value.

A vehicle that has been involved in a collision is generally worth less than a vehicle that has not, in spite of the fact that the vehicle has been fully repaired. The difference in a vehicle's fair market value from before the accident to after all necessary repairs is the vehicle's "diminished value." This is an "intangible" loss that the injured person is also entitled to recover. *Ludt v. McCollum*, 762 S.W.2d 575 (Tex. 1988) (home buyer could recover diminished value from builder for foundation problems); *Terminix International, Inc. v. Lucci*, 670 S.W.2d 657 (Tex. App. - 1984) (homeowner's policy).

Recently, the Texas Supreme Court addressed the issue if diminution of value in the first-party context. *American Manufacturers Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154 (Tex. 2003). The court found that the policy did not provide for the recovery of such damages, however, acknowledged that such damages may be appropriate in a third-party context. *Schaefer*, *supra* at 157 (quoting from the Texas Department of Insurance Commissioner's Bulletin, No. B-0027-00 (Apr. 6, 2002) "An insurer also may be obligated to pay a third party claimant for any loss of market value of the claimant's automobile, regardless of the completeness of the repair, in a liability claim that the third party claimant may have against a policyholder.").

c. Loss of Use.[6]

When a person's vehicle has been damaged, there will typically be a period of time when the person will not have use of the damaged vehicle.[7] The person is entitled to be compensated for the

[4] Texas Pattern Jury Charge 11.3 states that the costs of repairs is the reasonable cost in [county] County, Texas, "to restore the vehicle to the condition it was in immediately before the occurrence in question." TEXAS PATTERN JURY CHARGES, GENERAL NEGLIGENCE, p. 151 (2002).

[5] Texas Pattern Jury Charge 11.2 defines market value as "the amount that would be paid in cash by a willing buyer who desires to buy, but is not required to buy, to a willing seller who desires to sell, but who is under no necessity of selling." TEX. PATTERN JURY CHARGES, GENERAL NEGLIGENCE, p. 150 (2002).

[6] For a more detailed discussion of loss of use damages, *see Recovery for loss of use of motor vehicle damaged or destroyed*, 18 A.L.R.3d 497 (2003).

[7] Texas Pattern Jury Charges provide for recovery of loss of use and define it as "the reasonable value of the use of a vehicle in the same class as the vehicle in question for the period of time required to repair the damage, if any, caused by the occurrence in question." TEXAS PATTERN JURY CHARGES, GENERAL NEGLIGENCE, p. 151 (2002).

value of this loss of use of the vehicle, unless the vehicle has been totally destroyed. *Hanna v. Lott*, 888 S.W.2d 132 (Tex. App. – Tyler 1994, no writ); *Mondragon v. Austin*, 954 S.W.2d 191 (Tex. App. – Austin, 1997).

If the vehicle has been totally destroyed, then the fair market value of the vehicle at the time of the collision is all that can be recovered. The assumption is that if the property is totally destroyed, plaintiff can replace it with a different vehicle and suffer no loss of use. *Mondragon*, *surpa* at 193. Whether such an assumption is realistic or not is debatable.

To prove the value of this loss of use, the plaintiff typically uses the cost of renting the same automobile in the relevant geographic area. *Luna v. North Star Dodge Sales, Inc.*, 667 S.W.2d 115 (Tex. 1984). It is not necessary, however, for plaintiff to actually rent the auto in order to recover for loss of use. *Id.*

While the purpose of loss of use damages is to compensate the plaintiff for not having use of the vehicle during its repair, the amount of time for which loss of use can be recovered is not necessarily limited to the time it would have reasonably took to repair the vehicle. *Mondragon*, *supra* at 193. For example, if the plaintiff did not have the funds to repair the vehicle and, therefore, never got it fixed, he can still recover for loss of use during the entire time he was without use of the vehicle. *Id.* The amount of damages for loss of use can, therefore, exceed the market value of the vehicle depending upon the circumstances and whether Plaintiff exercised reasonable efforts to mitigate his damages. *Id.*

d. Diminished Value and Loss of Use Together?

If a vehicle is totally destroyed, then loss of use, cost of repairs, or diminished value are not recoverable. Again, the courts limiting recovery to only the market value of the vehicle in total loss situations are making the assumption that the plaintiff is able to immediately replace the destroyed item, so no loss of use is necessary. While this assumption may not reflect reality in many cases, it protects the insurer from the risk of paying more for a destroyed item than it is worth.

If, however, a vehicle is repairable, then all those elements of damages can be submitted, possibly resulting in a recovery in excess of the market value of the vehicle. Texas Pattern Jury Charge 11.3 permits the submission of cost of repairs, loss of use, and if the repairs did not restore the vehicle to its pre-collision condition, diminished value. TEXAS PATTERN JURY CHARGES, GENERAL NEGLIGENCE, p. 151-152 (2002) *citing Hodges v. Alford*, 194 S.W.2d 293 (Tex. Civ. App. – Eastland 1946, no writ).

The total of diminution of value and cost of repairs (not including any loss of use), however, may be limited to the market value of the vehicle. *See Parkway v. Woodruff*, 901 S.W.2d 434 (Tex. 1995) (homeowner not allowed to collect cost of repairs and diminution of value in case against developer because diminution was calculated as if no repairs were made).

e. Lost profits.

Lost profits are a form of loss of use damages and are available only when the property can be repaired. *Pickett v. J.J. Willis Trucking Co.*, 624 S.W.2d 664 (Tex. App. – Houston [14th Dist.] 1982) (lessor of truck not entitled to recover lost profits when truck completely destroyed). By lost profits, the courts mean "net profit" or the difference between the gross revenues and allowable expenses. *Turner v. P.V. Internat'l Corp.*, 765 S.W.2d 455 (Tex. Civ. App. – Dallas 1988, writ denied). By their very nature, lost profits are speculative, however, the plaintiff will not lose his remedy simply because of the difficulty in proving such damages. *Pace Corp. v. Jackson*, 284 S.W.2d 340 (Tex. 1995).

Lost profits can be proven many different ways depending upon the circumstances. If the plaintiff is an established business, past record of profits may be used as evidence of lost future profits. *White v. Soutwestern Bell Telephone Co., Inc.*, 651 S.W.2d 260 (Tex. 1983). The fact that a business has operated at a loss before the incident does not preclude recovery for lost profits, just makes it more difficult. *Frank B. Hall & Co. v. Beach*, 733 S.W.2d 251 (Tex. App. – Corpus Christi 1987, writ ref'd n.r.e.).

Newly formed businesses can prove anticipated profits by proving the profits of similar businesses operating under similar market conditions. *Pena v. Ludwig*, 766 S.W.2d 298 (Tex. App. – Waco 1989, no writ).

f. Additional expenses.

Some examples of other ancillary expenses that the plaintiff may be compensated for are:

i. Towing.
ii. Storage.
iii. TT&L.

2. <u>"Auto Accident"</u>

The Texas standard personal automobile policy does not define "accident." There have been a number of decisions that have addressed the issue of what constitutes an "accident" under the policy. Usually, the courts will look to whether the injury arose from the use of the vehicle, as opposed to the vehicle simply being the location of the injury. *LeLeaux v. Hamshire-Fannett Independent School District*, 835 S.W.2d 49 (Tex. 1992) (student injured in empty school bus not using the vehicle). In 1997, the Texas Supreme Court defined auto accident as including "[S]ituations where one or more vehicles are involved with another vehicle, object, or person." *Farmers Texas County Mutual Ins. Co. v. Griffin*, 955 S.W.2d 81 (Tex. 1997) (drive by shooting not an auto accident); see also, *Mid-Cenury Ins. Co. of Texas v. Lindsey*, 997 S.W.2d 153 (Tex. 1999) (child inadvertently discharging firearm as she climbed into back window of pickup truck constituted accident); *State Farm Mut. Auto. Ins. Co. v. Peck*, 900 S.W.2d 910 (Tex. App. – Amarillo 1995, no writ) (dog biting person in car was not an auto accident under the policy).

Intentional conduct is not only specifically excluded under the policy (see below), but it also falls outside of the definition of accident and is,

therefore, not a covered event under the policy. For more discussion about intentional conduct, see *infra* under the section regarding exclusions.

3. "Your Covered Auto"[8]

The policy defines "your covered auto" as:

a. Any vehicle shown in the declarations.

b. A "private passenger auto"[9] or pickup or van weighing 10,000 lbs or less not used for the delivery or transport of goods, materials or supplies if the named insured[10] acquires the vehicle during the policy period and notifies the company within 30 days.[11] *See Guerra*

[8] Ownership of the covered auto is required in order to be covered under the policy. A person owns the vehicle when the sales contract is executed and possession is delivered. *National Auto. & Cas. Ins. Co. v. Alford*, 265 S.W.2d 862 (Tex. Civ. App. – Eastland 1954, no writ). Texas Transportation Code defines owner as, "a person who: (A) holds the legal title to the vehicle; (B) has the legal right of possession of a vehicle; or (C) has the legal right of control of a vehicle." TEX. TRANS. CODE §502.001(16) (2004). Therefore, even if one is purchasing the vehicle on a note, if the purchaser has possession of the vehicle, he will be considered the owner. *State Farm Mut. Auto. Ins. Co. v. Chatham*, 318 S.W.2d 684 (Tex. Civ. App. – Dallas 1958); *Gulf Ins. Co. v. Bobo*, 595 S.W.2d 847 (Tex. 1980) (purchaser was "owner" even though title not transferred yet); *Black v. BLC Ins. Co.*, 725 S.W.2d 286 (Tex. App. – Houston [1st Dist.] 1986, writ ref'd n.r.e.) (even if vehicle still shown on declarations, if not "owned", not covered). Even if a person does not own a vehicle, however, they can still maintain an insurable interest in the vehicle and it can be covered. *Valdez v. Colonial County Mutual Ins. Co.*, 994 S.W.2d 910 (Tex. App. – Austin 1999, rev. denied) (insured who continued to list a vehicle on the policy after he sold it to his son and retained exclusive possession and control of the vehicle had an insurable interest in the vehicle). Also, if a person unknowingly purchases a stolen vehicle that is legally owned by someone else, they are still covered. *State Farm Mut. Auto. Ins. Co. v. Kelly*, 945 S.W.2d 905 (Tex. App. – Austin 1997, no writ). For a general discussion of this issue, see *What constitutes ownership of automobile within meaning of automobile insurance policy*, 36 ALR4th 7 (2004).

[9] For further discussion of what constitutes a "private passenger vehicle," see *What constitutes "private passenger automobile" in insurance policy provisions defining risks covered or excepted*, 11 ALR4th 475 (2003).

[10] When this article uses the term "named insured" it includes the resident spouse of the named insured as well. The standard personal auto policy defines the terms "you" and "your" to include the named insured in the declarations as well as their spouse if a resident of the same household. This is important because the named insured is given broader coverage under the policy than other "insured" under the policy. For example, the named insured and their resident spouse are covered while using any automobile. On the other hand, any additional insured would only be covered if they were utilizing a covered auto.

The "named insured" can be a business as well, however, this article will not discuss the issues associated with business or commercial auto policies. If, however, the "named insured" is a business rather than an individual, coverage will not be afforded to the business's owner's family members or spouse since the "business" has no spouse or family members. *Grain Dealers Mut. Ins. Co. v. McKee*, 943 S.W.2d 455 (Tex. 1997) (business auto policy did not cover insured business's president's family members); *Castleberry v. Branscum*, 721 S.W.2d 270 (Tex. 1986); *Lucas v. Texas Industries*, 696 S.W.2d 372 (Tex. 1984); *Rapp v. Felsenthal*, 628 S.W.2d 258 (Tex. App. – Fort Worth 1982, writ ref'd n.r.e.); *Webster v. United States Fire Ins. Co.*, 882 S.W.2d 569 (Tex. App. – Houston [1st Dist.] 1994, writ denied).

[11] For a general discussion of this issue, see *Construction and application of "automatic insurance" or "newly acquired vehicle" clause ("replacement," and "blanket," or "fleet"*

v. Sentry, 927 S.W.2d 733 (Tex. App. – Eastland 1996, writ denied) (vehicle owner who failed to notify the insurer within 30 days of purchasing the vehicle was not covered for an accident that occurred within the first 30 days after purchase).

If the delivery or transport of goods, materials or supplies is not the "primary usage" of the vehicle or the vehicle is used in the business of ranching or farming, then it will still be considered a "covered auto" even if being used to deliver or transport something.

c. Any trailer[12] owned by the named insured.

d. Any non-owned auto or trailer being used as a temporary substitute for any other "covered auto" which is "out of normal use" because of its breakdown, repair, servicing, loss or destruction. What constitutes "out of normal use" has also been the subject of many decisions. *State Farm v. Cobos*, 901 S.W.2d 585 (Tex. App. – El Paso 1995, writ denied) (even if access to a vehicle is prevented by other vehicles blocking it in, the vehicle can be considered to be "out of normal use," thereby allowing an insured to use a temporary substitute and be covered); *see also, Atlantic Ins. Co. v. Gonzalez*, 358 S.W.2d 716 (Tex. Civ. App. – San Antonio 1962, no writ) (named vehicle that was able to be used on short trips around town was not "out of normal use").

To qualify as a substitute vehicle, the insured cannot own the vehicle. *John Deere Ins. Co. v. Truckin' USA*, 122 F.3d 270 (5th Cir. (Tex.) 1997) (commercial policy).

If the substitute vehicle is being used by someone other than a named insured, then coverage is not provided. *Hartford v. Commerce*, 864 S.W.2d 648 (Tex. – Houston [1st Dist.] 1993, writ den'd). This is an interesting holding considering that a named insured's policy covers all permissive drivers of his covered autos, but will not cover permissive drivers of his temporary substitute vehicles. A driver of a temporary substitute vehicle, therefore, must have permission, or a reasonable belief he has permission, from the owner of the substitute vehicle in order to be covered. *Sink v. Progressive County Mut. Ins. Co.*, 107 S.W.3d 547 (Tex. 2003).

e. Any vehicle the named insured acquires to replace one of the vehicles on the declarations. A "replacement vehicle" can include a second vehicle purchased because one of the vehicles on the declarations was inoperable. *Pioneer Cas. Co. v. Jefferson*, 456 S.W.2d 410 (Tex. Civ. App. – Houston [14th Dist.] 1970, writ ref'd n.r.e.). This vehicle will be afforded the same coverage as the vehicle it replaced. If the insured desires

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provisions) contained in automobile liability policy, 39 ALR4th 229 (2004).

[12] The standard personal auto policy defines "trailer" as "a vehicle designed to be pulled by a: 1. Private passenger auto; or 2. Pickup or van." It also means a farm wagon or farm implement while towed by a private passenger auto, pickup or van. *Hartford Accident & Indemnity Corp. v. Lowery*, 490 S.W.2d 935 (Tex. Civ. App. – Beaumont 1973, writ ref'd n.r.e.) (a gooseneck trailer was considered a trailer in spite of the fact it could not be pulled by a sedan). For a more detailed discussion on this issue, see *What constitutes "trailer" within coverage or exclusion of automobile liability coverage*, 65 ALR3d 804 (2003).

to add or continue collision coverage, he must notify the insurer within 30 days, otherwise no notice is required (unlike newly acquired autos or additional autos).

f. Any vehicle purchased in addition to the vehicles shown on the declarations. This vehicle will be afforded the broadest coverage provided for any vehicle on the declarations. *Guerra v. Sentry Ins.*, 927 S.W.2d 733 (Tex. App. – Eastland 1996, writ denied) The insurer must be given notice of additional vehicles unlike replacement vehicles. *Foust v. Old American County Mut. Fire Ins. Co.*, 977 S.W.2d 783 (Tex. App. – Fort Worth 1998).

B. WHO IS COVERED?

"Covered Person"

A covered person is defined in the policy as:

1. the named insured (which includes a spouse living in the same household) and any family member[13] for the "ownership, maintenance, or use[14] of any auto or trailer";

What constitutes "family member" or "resident spouse" has been the source of much litigation. The standard personal auto policy defines "family member" as "a person who is a resident of your household and related to you by blood, marriage or adoption. This definition includes a ward or foster child who is a resident of your household, and also includes your spouse even when not a resident of your household during a period of separation in contemplation of divorce." *See also, Easter v. Providence Lloyds Ins. Co.*, 17 S.W.3d 788 (Tex. App. – Austin 2000, pet. denied) (foster child living in foster home for at least five months is a resident of home); *Southern Farm Bureau Casualty Ins. Co. v. Kimball*, 552 S.W.2d 207 (Tex. Civ. App. – Waco 1977, writ ref'd n.r.e.) (husband and wife who were separated but considering reuniting were from the same household); *Boon v. Premier Ins. Co.*, 519 S.W.2d 703 (Tex. Civ. App. – Texarkana 1975, no writ) (separate husband and wife who had no intention of living together again were not of the same household); *Cunningham v. Members Mut. Ins. Co.*, 456 S.W.2d 216 (Tex. Civ. App. – Fort Worth 1970, no writ) (husband not covered where he had separated from wife prior to accident).

A child of a divorced couple can be a member of both parents' households. *Hartford Cas. Ins. Co. v. Phillips*, 575 S.W.2d 62 (Tex. Civ. App. – Texarkana 1978, no writ). See also, *State Farm Mutual Auto Ins. Co. v. Nguyen*, 920 S.W.2d 409 (Tex. App. – Houston [1st Dist.] 1996, no writ) (infant who spend entire six-day life in hospital was family member and resident of her parents' household); *Cicciarella v. Amica Mutual Ins. Co.*, 6 F.3d 764 (5th Cir 1995) (stating that household is not a building or residence, but rather, a set of

[13] For a more detailed discussion of the meaning of "named insured," "resident," or "family member," see *Who is "resident" or "member" of same "household" or "family" as named insured, within liability insurance provision defining additional insureds*,93 ALR3d 420 (2004); *Who is "named insured" within meaning of automobile insurance coverage*, 91 ALR3d 1280 (2004).

[14] For a general discussion of the meaning of "ownership, maintenance or use," see *Automobile liability insurance: what are accidents or injuries "arising our of ownership, maintenance, or use" of insured vehicle*, 15 ALR4th 10 (2004).

individuals who together dwell under the same roof); *Travelers Indemnity Co. v. American Indemnity Co.*, 315 S.W.2d 677 (Tex. Civ. App. – Fort Worth 1958, no writ) (grown son moving clothes to his father's home not a resident of his father's household); *Brown v. Tucker*, 652 S.W.2d 492 (Tex. App. – Houston [1st Dist.] 1983, writ ref'd n.r.e.) (son considered family member of dad even though had moved out months earlier to live with grandmother); *Allstate Ins. Co. v. Wallace*, 435 S.W.2d 537 (Tex. Civ. App. – Fort Worth 1968, no writ) (former wife not an insured under policy issued to former husband); *Arellano v. Maryland Cas. Co.*, 312 S.W.2d 701 (Tex. Civ. App. – El Paso 1958, no writ) (daughter not family member of insured where insured did not sleep or spend time at the house).

A boyfriend or girlfriend, however, is not a family member under the policy. *State Farm v. Oliver*, 406 F.2d 409 (6th Cir. 1969).

Regarding "any auto or trailer," it would include passenger autos, pickups, vans, trailers and even U-Haul trucks rented for personal use. Business use, however, is excluded for rental vehicles like U-Haul trucks and the like.

2. any person using the named insured's covered auto;

Note the different way the policy treats named insureds and family members from others. Others are covered only if they are using the covered auto whereas named insured and family members are covered for "ownership, maintenance, or use" of "any auto or trailer." Numerous cases discuss what constitutes use as opposed to maintenance. *Nationwide Property and Cas. Ins. Co. v. McFarland*, 887 S.W.2d 487 (Tex. App. – Dallas 1994, writ denied) (insured, who was neither named insured nor family member, was not covered when he was performing maintenance on vehicle causing it to fall off jack, injuring another worker); *Queen Ins. Co. of America v. Creacy*, 456 S.W.2d 538 (Tex. Civ. App. – San Antonio 1970, no writ) (insured was maintaining or using a non-owned vehicle when he jiggled the accelerator causing the vehicle to move injuring another); *State Farm Mutual Automobile Ins. Co. v. Francis*, 669 S.W.2d 424 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e.) (passenger was "using" non-owned vehicle and entitled to coverage); *Federal Ins. Co. v. Forristall*, 401 S.W.2d 285 (Tex. Civ. App. – Beaumont 1966, writ ref'd n.r.e.) (insured who entered non-owned vehicle and pushed it a short distance was not "using" the vehicle (dwelling policy)); *State Farm Mut. Auto Ins. Co. v. Pan Am Ins. Co.*, 437 S.W.2d 542 (Tex. 1969) (person filling nonowned vehicle with propane was maintaining vehicle and not "using" it so no coverage).

Regardless of whether a named insured, family member or other insured, the definition of "use" is important. In general, the courts have required that the injuries or damages "arise out of the use" of the motor vehicle. Damages suffered from drive by shootings, for example, have usually been found not to be arising out of the use of the motor vehicle. *State Farm Mut. Auto Ins. Co. v. Whitehead*, 988 S.W.2d 744 (Tex. 1999); *Collier v. Employers Nat. Ins. Co.*, 861 S.W.2d 286 (Tex. App. – Houston [14th Dist.] 1993, writ denied); *Le v. Farmers Texas County Mut. Ins.*

Co., 936 S.W.2d 317 (Tex. App. – Houston [1st Dist.] 1996, no writ).

The Texas Supreme Court has developed a three-prong test recently to determine if damages arose from the use of the vehicle:

> i. the accident must have arisen out of the inherent nature of the automobile, as such,
>
> ii. the accident must have arisen within the natural territorial limits of an automobile and the actual use must not have terminated, and
>
> iii. the automobile must not merely contribute to cause the condition which produces the injury, but must itself produce the injury.

Mid-Century Ins. Co. v. Lindsey, 997 S.W.2d 153, 157 (Tex. 1999). In the *Lindsey* case, a boy who was entering a pickup truck from the sliding glass window accidentally discharged a shotgun that was secured in a gun rack. The boy was going to retrieve clothing in the truck for his father. The court found that the boy was using the truck at the time of the incident. *But see, State and County Mut. Fire Ins. Co. v. Trinity Univ. Ins. Co.*, 35 S.W.3d 278 (Tex. App. – El Paso 2000) (driver who attempted to assault passenger, causing passenger to flee the vehicle and be killed by oncoming traffic, was not using the vehicle).

If the other person did not have permission to drive the covered auto, then they do not qualify as "using" the vehicle. Non-permissive users are also specifically excluded from coverage. For more discussion on this issue, please see below.

3. For the covered auto, any person or organization but only with respect to legal responsibility for acts or omissions of a person for whom coverage is afforded under this Part;

4. For any auto or trailer, other than the covered auto, any person or organization but only with respect to legal responsibility for acts or omissions of you or any family member for whom coverage is afforded under this Part. This provision applies only if the person or organization does not own or hire the auto or trailer.

C. WHAT IS NOT COVERED?

The standard personal auto insurance policy includes a number of exclusions from coverage under Part A, Liability section. Some of the more relevant exclusions are the following:

1. Damage to property caused by intentional conduct.

The insurer does not provide liability coverage for any person "who intentionally causes bodily injury or property damage" to another. When an insured's acts are voluntary and intentional, the resulting injuries and damage from those acts, even if not expected, are not caused by "accident" and, therefore, are not covered under the policy. *Misle v. State Farm Mutual Automobile Ins. Co.*, 908 S.W.2d 289 (Tex. App. – Austin 1995, no writ) (shooting a gun into a crowd from a vehicle is not an auto accident); *Allen v.*

Automobile Ins. Co. of Hartford, CT, 892 S.W.2d 198 (Tex. App. – Houston [14th Dist.] 1994, n.w.h.) (sexual molestation is an uncovered, intentional act); *Baldwin v. Aetna Casualty & Surety*, 750 S.W.2d 919 (Tex. App. – Amarillo 1988, writ denied) (commercial policy) (a trucking company's repeated and intentional violations of various statutes were not covered occurrences); *National Union Fire Ins. v. Bourn*, 441 S.W.2d 592 (Tex. 1969) (assault was intentional act not covered under homeowner's policy).

2. <u>Damage to property owned or being transported by that person.</u>

The insurer does not provide liability coverage for "damage to property owned or being transported by that person."

3. <u>Damage to property rented to, used by, or in the care of that person.</u>[15]

The insurer does not provide liability coverage for "damage to property rented to, used by, or in the care of that person" <u>unless</u> the damage is to a residence or private garage, or a private passenger auto, trailer, pickup or van that is <u>not</u> "owned by or furnished or available for the regular use of" the named insured or their family members. *Continental Cas. Co. v. Suttenfield*, 236 F.2d 433 (5th Cir. (Tex.) 1956) (person's personal auto liability policy was primary coverage for collision because rental car was not regularly furnished for his use). In other words, Part A Liability coverage will not pay for damage to the vehicle, its contents, or other property when the insured is the one in control of the property, unless the property is not owned by or regularly used by the insured. *See Employers Mut. Cas. Co. v. Trinity Universal Ins. Co.*, 376 S.W.2d 766 (Tex. Civ. App. – Fort Worth 1964) (insured's auto policy did not afford coverage for fire damage to employer's store caused by insured working on his vehicle); *National Emblem Ins. Co. v. McClendon*, 481 S.W.2d 186 (Tex. Civ. App. – Texarkana 1972, writ ref'd n.r.e.) (non-named vehicles furnished for an insured's regular use not covered); *International Service Ins. Co. v. Walther*, 463 S.W.2d 744 (Tex. Civ. App. – Austin 1971, no writ) (employee who regularly drove employer's truck not covered); *Hall v. Southern Farm Bureau*, 670 S.W.2d 775 (Tex. App. – Fort Worth 1984, no writ) (employee not covered by own personal auto policy when driving employer's truck even though he was driving a vehicle that was usually assigned to someone else); *Benjamin v. Plains Ins. Co.*, 650 F.2d 98 (5th Cir. (Tex.) 1981) (daughter driving nonowned vehicle regularly furnished to her father was not covered); *but see, Briones v. State Farm Mut. Auto. Ins. Co.*, 790 S.W.2d 70 (passenger was covered by personal auto policy UM coverage while riding in employer's truck); *see also, Assicurazioni Generali v. Ranger Ins. Co.*, 64 F.3d 979 (5th Cir. (Tex.) 1995) (exclusion was vague and, therefore, construed against insurer, under facts of this case).

[15] For a general discussion of this exclusion, see *Scope of provision of automobile liability insurance policy excluding liability for damage to property in charge of insured, or variation of such provision*, 10 ALR3d 515 (2004)

4. Damage to property seized by government officials.

The insurer does not provide liability coverage for "damage to property rented to, used by, or in the care of that person" "due to or as a consequence of a seizure" of an auto by law enforcement officials as evidence in a case against the named insured under the Texas Controlled Substances Act or the federal Controlled Substances Act if the named insured is convicted.[16] Repossession of a vehicle does not fall within this exclusion. *State Farm Mut. Auto. Ins. Co. v. Kelly*, 945 S.W.2d 905 (Tex. App. – Austin 1997, writ denied) (insured unknowingly purchased stolen car that was later repossessed due to defective title).

5. Damage to property arising out of the ownership or operation of a vehicle while it is carrying other persons or property for a fee or being rented or leased by another.[17]

The insurer does not provide liability coverage for any person's liability arising out of the ownership or operation of a vehicle while it is:

a. being used to carry persons for a fee. This exclusion does not apply to a share-the-expense car pool. *State Farm Mut. Auto. Ins. Co. v. Self*, 93 F.2d 139 (5th Cir. (Tex.) 1937) (person who agreed to transport in his own vehicle a number of strangers to various destinations for his travel agent was not covered).

b. being used to carry property for a fee. This exclusion does not apply to the named insured or any of their family members unless the primary usage of the vehicle is to carry property for a fee.

c. rented or leased to another. This exclusion does not apply if the named insured or any of their family members lent their covered auto to another for reimbursement of operating expenses only.

6. Business use.[18]

The insurer does not provide liability coverage for any person "employed or otherwise engaged in the business or occupation" of selling, repairing, servicing, storing, or parking of vehicles "designed for use mainly on public highways." This exclusion applies to situations such as road tests and vehicle deliveries. *See Universal Underwriters Ins. Co. v. Hartford Acc. & Indem. Co.*, 487 S.W.2d 152 (Tex. Civ. App. – Houston [14th Dist.] 1972) (owner's auto policy did not cover garage employee who got into a collision during road test after service completed). *Compare*,

[16] See TEX. CODE CRIM. PRO. ART. 59.01 (Vernon 1989, amend 1995); *1991 Nissan Pickup v. State*, 896 S.W.2d 344 (Tex. App. – Eastland 1995, no writ).

[17] For a more detailed discussion of this exclusion, see *What constitutes use of automobile "to carry persons or property for fee" within exclusion of automobile insurance policy*, 57 ALR5th 591 (2004).

[18] For a more detailed discussion of this exclusion, see *What constitutes use of vehicle "in the automobile business" within exclusionary clause of liability policy*, 56 ALR4th 300 (2004); *Who is "employed or engaged in the automobile business" within exclusionary clause of liability policy*, 55 ALR4th 261 (2004); *Construction of provision excluding automobile used in insured's "business or occupation" from nonowned automobile coverage of automobile liability policy*, 85 ALR2d 502 (1962).

Western Alliance Ins. Co. v. Cox, 394 S.W.2d 238 (Tex. Civ. App. – Waco 1965, writ ref'd n.r.e.) and *Allstate Ins. Co. v. Universal Underwriters Ins. Co.*, 439 S.W.2d 385 (Tex. Civ. App. – Houston 1969, no writ) (autos owned by the insureds that were being driven to a service station were covered and did not fall within this exclusion) *with Humble Oil & Refining Co. v. Lumbermens Mut. Cas. Co.*, 490 S.W.2d 640 (Tex. Civ. App. – Dallas 1973) and *Universal Underwriters Ins. Co. v. Pan Am. Ins. Co.*, 450 F.2d 1050 (5th Cir. (Tex.) 1971) (service station employees returning vehicle to owner after service fell within exclusion); *Tindall Pontiac, Inc. v. Liberty Mut. Ins. Co.*, 441 S.W.2d 948 (Tex. Civ. App. – San Antonio 1969) (garage employee was not covered for property damage from collision while servicing auto); *Commercial Standard Ins. Co. v. Sanders*, 326 S.W.2d 298 (Tex. Civ. App. – Waco 1959) (auto salesman who took sales agency's demo car on person errand to find housing was not within exclusion). The exclusion does not, however, apply to "the ownership, maintenance or use of" the covered auto by the named insured, any family members or any "partner, agent or employee" of the named insured or their family members.

The insurer also does not provide liability coverage for any person "maintaining or using any vehicle while that person is employed or otherwise engaged in any business or occupation" not mentioned in the above exclusion. This exclusion does not apply if the person is maintaining or using a "private passenger auto," pickup or van that is the covered auto, or a trailer used with a private passenger auto or the covered auto.

What exactly is a "private passenger auto" is not entirely clear.[19] *State Farm Mut. Auto. Ins. Co. v. Durrett*, 472 S.W.2d 214 (Tex. Civ. App. – Fort Worth 1971, no writ) (pickup truck held to be a private passenger auto); *National Life & Acc. Ins. Co. v. Martin*, 554 S.W.2d 53 (Tex. Civ. App. – Tyler 1977, writ ref'd n.r.e.) (commercial camper not covered). It seems the purpose for the exclusion is to exclude coverage for the use of non-owned pickups, vans, and other large vehicles being used for business.

7. Non-permissive use.[20]

The insurer does not provide liability coverage to any person who uses a vehicle or permits another to use a vehicle "without a reasonable belief that that person is entitled to do so." The permission can be express or implied. *Phoenix Ins. Co. v. Allstate Ins. Co.*, 412 S.W.2d 331 (Tex. Civ. App. – Corpus Christi 1967, no writ) (owner who loaned vehicle to priest implicitly also gave permission for priest to allow another to drive); *Employers Mutual Cas. Co. of Des Moines v. Mosqueda*, 317 F.2d 609 (5th Cir (Tex.) 1963) (implied permission is sufficient); *Royal Indemnity Co. v. H.E. Abbott & Sons, Inc.*, 399 S.W.2d 345 (Tex. 1966) (permission may be implied or express). The driver must reasonably believe that they have permission from the vehicle's

[19] For a more detailed discussion of this issue, see *What constitutes "private passenger automobile" insurance policy provisions defining risks covered or excepted*, 11 A.L.R.4th 475 (2003).

[20] For a general discussion of this exclusion, see *Omnibus clause as extending automobile liability coverage to third person using car with consent of permittee of named insured*, 21 ALR4th 1146 (2004).

owner, even if the permission is given by another. *Snyder v. Allstate Ins. Co.*, 485 S.W.2d 769 (Tex. 1972) (person given permission by insured's daughter was covered); *American Surety Co. v. McCarty*, 395 S.W.2d 665 (Tex. Civ. App. – Austin 1965, ref'd n.r.e.) (person reasonably believed he had permission to drive even when person granting permission was not authorized to do so). If the use of the vehicle goes beyond the permission granted, it is non-permissive. *Tristan v. GEICO*, 489 S.W.2d 365 (Tex. Civ. App. – San Antonio 1972, writ ref'd n.r.e.) (person whose actions exceeded permission was not covered). Minor deviations from permission, however, will not void it. *Coronado v. Employers Nat'l Ins. Co.*, 596 S.W.2d 502 (Tex. 1979) (employee who used company vehicle to go on 8-hour drinking spree materially deviated from employer's permission).

This exclusion does not apply to the named insured or their family members while using the covered auto, unless they are an excluded driver. *See International Service Ins. Co. v. Boll*, 392 S.W.2d 158 (Tex. Civ. App. – Houston 1965, writ ref'd n.r.e.) and *Cook v. Ohio Casualty Ins. Co.*, 418 S.W.2d 712 (Tex. Civ. App. – Texarkana 1967, no writ) (family members can be non-permissive users if excluded drivers).

8. <u>Vehicles other than covered auto.</u>

The insurer does not provide liability coverage for the "ownership, maintenance or use" of:

a. motorized vehicles having fewer than four wheels. Motorcycles and scooters are not "automobiles" within the meaning of the personal auto policy. *Agricultural Workers Mut. Auto Ins. Co. v. Baty*, 517 S.W.2d 901 (Tex. Civ. App. – Tyler 1974, writ ref'd n.r.e.) (motorcycle not an automobile under policy); *Texas Cas. Ins. Co. v. Wyble*, 333 S.W.2d 668 (Tex. Civ. App. – San Antonio 1960, non writ) (motor scooter not an auto under the policy); *Slaughter v. Abilene State School*, 561 S.W.2d 789 (Tex. 1977) (tractor was a motor vehicle as defined under TTCA); *Equitable General Ins. Co. v. Williams*, 620 S.W.2d 608 (Tex. Civ. App. – Dallas 1981, writ ref'd n.r.e.) (motorcycle was a motor vehicle under the clause in policy excluding coverage for injury to insured while occupying motor vehicle owned by insured other than covered auto); *Traveler's Ins. Co. v. Elkins*, 468 S.W.2d 487 (Tex. Civ. App. – Tyler 1971, no writ) (mini-car was not a motor vehicle under homeowner's policy exclusion). A forklift is not a motor vehicle under the policy. *International Ins. Co. v. Hensley Steel Co.*, 497 S.W.2d 64 (Tex. Civ. App. – Waco 1973, no writ); *see also, Motor scooter as within policy provisions relating to automobiles or motorcycles*, 43 ALR3d 1400 (2004).

b. any vehicle, other than the covered auto, owned by the named insured or their family members or "furnished or made available" for the named insured or the insured's family members' regular use.[21] *Benjamin v. Plains Ins.*, 650 F.2d 98 (5th Cir. (Tex.) 1981) (where daughter driving vehicle furnished for father's regular use, no

[21] For a more detailed discussion of this exclusion, see *When is automobile furnished or available for regular use within "drive other car" coverage of automobile liability policy*, 8 ALR4th 387 (2004).

coverage); *National Emblem Ins. Co. v. McClendon*, 481 S.W.2d 186 (Tex. Civ. App. – Texarkana 1972, writ ref'd n.r.e.) (resident spouse was named insured and covered even though operating a nonowned vehicle); *Commercial Standard Ins. v. Ford*, 400 S.W.2d 934 (Tex. Civ. App. – Amarillo 1966, writ ref'd n.r.e.) (insured son who was only allowed to use insured's vehicle one in a while and only with permission did not fall within this exclusion); *Childress v. Dairyland County Mut. Ins. Co.*, 636 S.W.2d 282 (Tex. App. - Eastland 1982) (person driving his girlfriend's vehicle which was regularly made available was not covered). This exclusion does not apply to the named insured's maintenance or use of vehicles owned by, furnished or made available for the regular use of any family member.

II. FIRST PARTY PHYSICAL DAMAGE CLAIMS

We will pay for direct and accidental loss to your covered auto, including its equipment, less any applicable deductible shown in the Declarations.

A. WHAT IS A COVERED?

1. Accidental loss.[22]

While the policy does not define what an accidental loss is, the courts have generally held that it is "a loss that does not ordinarily follow and cannot reasonably be anticipated from the producing act – that is, one that the actor did not intend to produce." Kincaid, et. al, *Texas Practice Guide; Insurance Litigation*, §9:37 (West 2003) *citing State Farm Mut. Ins. Co. v. Kelly*, 945 S.W.2d 905 (Tex. App. – Austin 1997, writ denied) (insured unknowingly purchased stolen vehicle that was later confiscated by authorities); *Republic Cas. Co. v. Mayfield*, 251 S.W.2d 764 (Tex. Civ. App. – Fort Worth 1952, no writ) (when arm holding front bumper broke causing bumper to drop and go under the vehicle, it was not an accident, but rather, wear and tear that is not covered); *Home Service Cas. Ins. Co. v. Barry*, 277 S.W.2d 280 (Tex. Civ. App. – Waco 1955, writ ref'd n.r.e.) (when wheels came off vehicle it was an accident and not due to mechanical breakdown); *Farmers Ins. Exch. V. Wallace*, 275 S.W.2d 864 (Tex. Civ. App. – Fort Worth 1955, writ ref'd n.r.e) (wind upset vehicle while being driven down road was an accident).

2. Your covered auto.

This term means the same as above under Part A, Liability coverage.

3. Collision.

The policy defines collision as "the upset[23] or collision with another object of your covered auto." It also lists 10 "other" perils that are not covered under "collision" coverage, but rather, only under Part D2 coverage for incidents "other than collision." (see below).

What constitutes a "collision" or not has been the source of much litigation. *See, Shillings v. Michigan Mut. Ins. Co.*,

[22] For a more detailed discussion on what constitutes an accidental loss, see *What loss of or damage to vehicle is accidental within coverage of collision policy*, 57 A.L.R.2d 1229 (1994).

[23] For a discussion as to the meaning of "upset," see *What constitutes "upset" or "overturning" within provisions of property damage policy covering losses so caused*, 8 ALR2d 1433 (1949)

536 S.W.2d 627 (Tex. Civ. App. – Tyler 1976) (where tree fell on tractor, a collision occurred under inland marine policy); *Calvert Fire Ins. Co. v. Koenig*, 259 S.W.2d 574 (Tex. Civ. App. – Galveston 1953, writ dism'd) (when auto's tire threw rock into the oil pan, it was a collision); *Nutchey v. Three R's Trucking Co., Inc.*, 674 S.W.2d 928 (Tex. App. – Amarillo 1984, writ ref'd n.r.e.) (when depression in road damaged trailer, it was a collision); *Providence Washington Ins. Co. v. Proffitt*, 239 S.W.2d 379 (Tex. 1951) (impact of flood waters against vehicle was collision, in spite of the fact that all of property damage was cause by water damage).

4. Other than Collision

Part D1, coverage for damage caused from things other than collision is a "named peril" coverage affording protection against 10 named perils:

a. missiles or flying objects.[24]

b. fire.

c. theft or larceny. Theft in policy means the same as it does in the criminal law context. *Allstate Ins. Co. v. Dykes*, 461 S.W.2d 519 (Tex. Civ. App. – Tyler 1970, writ ref'd n.r.e.). This does not include repossession. *Phil Phillips Ford, Inc. v. St. Paul Fire & Marine Ins. Co.*, 465 S.W.2d 933 (Tex. 1971). Temporarily loaning a vehicle to another who then permanently misappropriates it qualifies as theft. *Hall v. Great Nat. Lloyds*, 275 S.W.2d 88 (Tex. 1955).

d. explosion/earthquake. Implosion is not explosion. *Allen v. Manhattan Fire & Marine Ins. Co.*, 519 S.W.2d 706 (Tex. Civ. App. – El Paso 1975, no writ).

e. windstorm.

f. hail, water or flood.

g. malicious mischief or vandalism.

h. riot or civil commotion.

i. contact with bird or animals.

j. breakage of glass. If the breakage is caused by a collision or if the loss is caused by contact with a bird or animal, the insured may elect to have it considered a "collision."

If an insured has not selected Part D1 coverage, these 10 perils will not be covered, even if the insured has Part D2 collision coverage. If the insured has both Part D1 "other than collision" coverage and Part D2 "collision" coverage, then he is said to have "comprehensive" coverage.

C. WHAT IS NOT COVERED?

1. Loss while vehicle carrying other persons or property for a fee or being rented or leased by another.

The insurer will not cover a loss to the covered auto while it is:

a. being used to carry persons for a fee. This does not apply to a share-the-expense car pool; or

b. being used to carry property for a fee. This exclusion does not apply to the named insured or any family members unless the primary

[24] For a general discussion of this peril, see *Recovery under automobile property damage policy expressly including or excluding collision damage, where vehicle is struck by object falling thereon other than as result of storm or the like*, 54 ALR2d 381 (2004).

usage of the vehicle is to carry property for a fee.

c. rented or leased to another. This exclusion does not apply if the named insured or any of their family members lend their covered auto to another for reimbursement of operating expenses only.

2. <u>Loss due to wear and tear or mechanical breakdown.</u>

The insurer will not provide coverage for wear and tear, freezing, road damage to tires, or mechanical breakdown of the covered auto. This exclusion does not apply if such damage results from the total theft of the vehicle.

3. <u>Loss due to war or nuclear explosion.</u>

The insurer will not cover a loss that results from radioactive contamination, discharge of nuclear weapon, war, or insurrection.

4. <u>Loss to stereos, tapes, CDs</u>

The insurer will not cover loss of stereos, radios, CDs, tapes and other items used for the reproduction of sound unless the stereo or radio is permanently installed in the vehicle.

5. <u>Loss to nonlisted camper or trailer.</u>

The insurer will not pay for loss to a camper or trailer not listed in the Declarations unless the named insured acquires it during the policy period and notifies the insurer within 30 days.

6. <u>Loss to a temporary substitute vehicle.</u>

The insurer will not cover the loss to any vehicle being used as a temporary substitute for a vehicle that is out of normal use because of its breakdown, repair, servicing, loss, or destruction.

7. <u>Loss to equipment on trailer.</u>

The insurer will not pay for loss to antennas, awnings, cabanas or equipment designed to create additional living facilities when in or on any trailer.

8. <u>Loss to assessories.</u>

The insurer will not cover the loss of radios, telephones, scanners, or radar detectors that are not permanently installed in the vehicle in a location where the vehicle's manufacturer normally installs such equipment.

9. <u>Loss to custom furnishings.</u>

The insurer will not pay for loss to any equipment or custom furnishings in or on any pickup or van such as special carpeting, cooking or sleeping facilities, paintings, murals, extended roofs, bars or television receivers. This exclusion does not apply if the furnishings were reported to the insurer before the loss and included in the premium.

10. <u>Loss due to seizure by governmental officials.</u>

The insurer will not cover the covered auto if it is seized by government officials as evidence in a case against the named insured under the Texas Controlled Substances Act or

the federal Controlled Substances Act if the named insured is convicted.

D. WHAT IS THE LIMIT OF COVERAGE?[25]

The insurer will pay the lesser of the:

1. Actual cash value.[26] This is the value of the vehicle, less depreciation. *Superior Pontiac Co. v. Queen Ins. Co.*, 434 S.W.2d 340 (Tex. 1968). This does not include diminution of value. *American Manufacturers Mutual Ins. Co. v. Schaefer*, 124 S.W.3d 154 (Tex. 2003).

2. Cost of repair/replacement. This is the cost of repairing the vehicle with parts of like kind and quality. This refers to parts that are fit for their purpose as opposed to parts that are similar in age, condition or value as those that were damages. *Great Texas County Mut. Ins. Co. v. Lewis*, 979 S.W.2d 72 (Tex. App. – Austin, 1998, no writ). Interestingly, the insurer is allowed to deduct for betterment (if the insurer actually improves the vehicle from pre-collision condition), however, the insured is not allowed to recover for diminution in value if the value of the vehicle never reaches the same level it was prior to the collision, in spite of being repaired.

3. Amount in declarations.

If there is a disagreement between the insurer and the insured about the value of the loss, either party may demand an appraisal. Each party will select an appraiser who will appraise the loss. If they disagree, then they will submit their differences to an umpire who will decide which appraisal is correct.

REFERENCES

Two of the most useful authorities in this area are:

Kincaid, et. al, *Texas Practice Guide; Insurance Litigation*, (West 2003).

Colaneri, et. al, *Texas Personal Automobile Insurance Policy Annotated 3d*, (Texas Lawyer Publ. 2003).

[25] For a good general discussion of the damages recoverable under the typical collision policy, see *Measure of recovery by insured under automobile collision insurance policy*, 43 ALR2d 327 (2004).

[26] For a more detailed discussion of the issues surrounding what is actual cash value, see *Depreciation as factor in determining actual cash value for partial loss under insurance policy*, 8 ALR4th 533 (2004); *Test or criterion of "actual cash value" under insurance policy insuring to extent of actual cash value at time of loss*, 61 ALR2d 711 (2004).