

ORAL ARGUMENT – 2/19/03

02-0295

AMERICAN MANUFACTURERS V. SCHAEFER

LAWYER: This is a case that is going to attack the coverage of every personal automobile policy issued in the state of Texas. This policy was written by the State of Texas. It's on a form approved by the Texas Dept. of Ins. It asserts its authority from the legislature. It's a policy form that all the insurers use. The rates are set. Taking into account what the Texas Dept. of Ins says this policy means. And what they say it means is that diminution of value is not covered, and, therefore, the rates which are set take into account the assumption that it is not covered.

PHILLIPS: Is this in the record or can we take judicial notice of it that there's a long line of cases saying that loss of value is covered but today no carrier in Texas when they pay a loss is paying that? So we have a disconnect between some 30 year old cases and between the current practice _____.

LAWYER: Two points. One, a long line of cases does not say that. There is a split in the old cases. And to the extent the old cases go that way, or argued to go that way, a careful examination shows that they are either wrong in that they apply tort values, tort issues that ___ analysis as opposed to contract analysis. Although they have dicta about value they are not talking about a loss in value. They are cases where the automobile was a total loss and therefore the value concept comes in.

PHILLIPS: But today in Texas insurers are following the Dept. of Ins standard?

LAWYER: Yes. As is in the record there are two bulletins which will speak to this. One is the TDI bulletin saying diminution of value is not covered; the other is the Mirror as reflected in the Lewis opinion from the Austin court that is the betterment(?), the insurers don't get the advantage of betterment. They don't have to pay diminution of value.

When one looks at those opinions and looks at the recent opinions it is clear that the recent trend is to not include diminution of value. And the courts that specifically are looking at it includes supreme courts of several states which have adopted the same reasoning as Carlton and have cited Carlton as being correct. That is interpreting the policy based upon the language of the policy and injecting these concepts. In each of those cases in fact where the SC of Delaware, Maine and Florida have looked at it they have had old cases as Texas has old cases which go the other way. Those SC's rejected that and went with the Carlton view that you interpret policy.

There are a number of cases in Texas which go the other way. In 1927 there's a case that goes one way. A 1927 case that goes the other way. And those cases that go against us simply insert the words "value" without reference to any precedent, prior cases and...

SCHNEIDER: That's not true. Dallas court doesn't do that. A Dallas court gave a pretty good analysis of it in Bailey wouldn't it?

LAWYER: In Bailey with respect they looked at the value issue. They inserted value and they did a tort analysis. They looked at the word quality and assumed that it meant value. Those other states I talked about do not insert it. Of course they are just the opposite view that the Houston court had. But secondly, when one inserts that value in there, then there is no way to reconcile the clear limitations of liability provision and the payment of loss provision, which says that the insurer may pay for loss in money or may repair the car.

SCHNEIDER: Well let's just look at the words. It says, a like kind and quality. Would you think that those two words mean the same thing?

LAWYER: Those two words being quality and value?

SCHNEIDER: No. Kind and quality. Do you agree those mean the same thing?

LAWYER: Not necessarily.

SCHNEIDER: How would you distinguish them?

LAWYER: One of the things that we have to remember is that this provision of the policy covers more than just a wrecked automobile. It can cover, for example, a stolen stereo from an automobile. And what the carrier is given the option of doing is to repair or in that case to replace the property with other of like kind, if it was a Boise stereo, and of the same quality as the Boise stereo which was stolen.

SCHNEIDER: So don't you think though the legislature meant by kind and quality a distinction by using those two words. You don't read them synonymously do you?

LAWYER: Actually we know exactly what the legislature meant because the way the legislature wrote those words was to tell the TDI to write whatever words they thought were appropriate and TDI has told us what they meant. And what they meant is that diminution of value is not covered and then like kind and quality does not include value.

JEFFERSON: What deference does this court have to give or should we give to the TDI authority?

LAWYER: The court traditionally has looked to administrative agencies to interpret their own rules and regulations. It makes sense that this court would look also to an administrative agency which writes a contract to interpret...

JEFFERSON: Do we need to do that if the policy itself is as you contend unambiguous? Does it matter what they say?

LAWYER: I certainly don't want to argue that it's ambiguous because then we fall into the issue of whether if you have an insurance policy it's ambiguous then you defer to the insured. But only to the insured if this other interpretation is reasonable. I think that by seeing what the TDI says, and this court has said that in essence the TDI is stating what the intent of the parties is, that to give an interpretation which is contrary to the intent of the parties is not a reasonable interpretation.

ENOCH: Is it the insurance company's option whether to pay market value or to repair?

LAWYER: Yes.

ENOCH: Assuming that you are correct, that the choice to repair does not require indemnification for the loss of value, does that necessarily under value the repair for the purposes of determining whether the accident is a total loss? If the insurance company does not have to consider the market value of the car after the repair, it would seem to me there is a disconnect in this determination. What is the insurer's view in evaluating whether this is a total loss or a repairable loss when the insurer does not have to consider the after market value of the car when it's repaired?

LAWYER: The option of the insurer, a cap that is put on the insurer's liability, is the limit of what it's going to take to bring the car back to where it is at its pre-accident function and appearance. If it can be brought back to its pre-accident function and appearance then it has been repaired as that word is interpreted by court after court. And if you look in the dictionary that's what it means. And so if it's repaired thus ends the insurer's obligation even though there has been a psychological market value diminution in value.

HECHT: Is it fair to say that most insurers wouldn't care one way or the other whether this was covered or not as long as everybody knows going in it is and the premium is based on it?

LAWYER: No. It brings more problems than just needing to adjust the rates. First of all, it means that in every case where there's an accident you have to assess the psychological loss to the car's market value. And so the cost of investigation goes way up. Secondly, you're opening the door to a lot of litigation when the insurance company determines that we've got \$300 loss of value because it's been decided we have to cover that. And the insured says no. It's \$500. If we look at what the TDI's thinking is it's saying we're not going to make the insurer's right of contract that puts them in that position. TDI knows it could cover it but has chosen not to do so.

HECHT: In the other states there's a lot of listing of cases by both sides and assertions of overwhelming majorities in both briefs. In the respondent's brief there's an assertion that the Insurance Services office has recommended clarifying this to say, we don't cover this. And that that has "received approval from at least 29 states." Is there any counting of states as to - after all the smoke clears and the court decisions are over with and the agencies have come back in and the policies have been rewritten - how many states cover diminished value and how many don't?

LAWYER: By our count it is far more which do not cover it. First of all, the cases are clear that merely clarifying something which is, a contractor George goes in a direction, doesn't mean a concession that it doesn't go your way. Secondly, state after state the SC's and AC's are saying no on this. The modern decisions.

HECHT: But even if the court said, Yes we think it's covered under this language, have the states come back in after that and said well no, we want to clarify that it's not covered. Has that happened?

LAWYER: The only recent state which I'm aware of where the SC has gone the other direction is Georgia. I do not know if in Georgia they have modified the policy.

PHILLIPS: The last time I bought a car the dealer whisked out a form that showed the vehicle had been in a wreck some years earlier, and that it had been totally repaired. He said he was required by law to disclose that which didn't happen the time before last I bought a car. I assume he wasn't doing that out of the goodness of his heart. It was a law. And so when you're in a wreck and you ever want to sell that car you're going to have to fill this paperwork out and that at least the purchaser is going to try to offer you less money because of that.

LAWYER: Correct. That is certainly possible. Courts have looked at that and said, yes

that's correct. But the issue we have is whether that loss is covered by the contract. Or another way of looking at it has the contract capped the liability so that loss isn't covered.

One example of a cap on the amount owed is on a declaration page. A homeowner's policy or on many policies where it says we will pay no more than \$100,000. There may be a lot of things that are covered in the word "loss" but you capped your liability. And one of the ways that the state of Texas has capped liability for these losses, including diminution in value is saying that you can either repair it or pay money. And that the limited liability is a lesser of two things. Liability is therefore capped. It is the way they figure the rates. In their administrative capacity deciding what the best approach is to the relationship between insured and insurers, the state of Texas has decided that diminution value should not be covered.

WAINWRIGHT: What we're dealing with here is a matter of contract interpretation, not writing on a blank slate or setting a policy. Although there are policy implications of the decision we are going to make. Correct?

LAWYER: Yes.

WAINWRIGHT: Let's assume then that the CJ buys a car and the market value is \$10,000. Let's assume I buy the same car and at the time I buy it the market value is \$10,000. The chief totals his car and gets a check for \$10,000 from his insurer. I wreck my car, it gets repaired, and after the repair it's worth \$9,000. Respond to the argument that that shouldn't be the way that this contract is applied.

LAWYER: That is an argument that it's not fair that the state of Texas has decided that the insurance policy you bought would not cover that loss in value. And the fact is as a consumer what you've done by being a little bit better driver than the CJ, and not totaling your car is that you're in a position where the contract you bought, in that contract you did not pay to have that \$1,000 covered. Theoretically one could buy it, try to find supplemental insurance or something else if one wanted to cover that. But that is simply not the contract you entered with the insurer to cover you in that instance.

JEFFERSON: In those states where there is no coverage is there coverage available for diminution?

LAWYER: I do not know the answer.

O'NEILL: If the driver hits a tree, that's a first party claim. And your argument is there's no value increment to that payment. But if the driver gets hit by an under/uninsured driver then the driver would get value. And I don't

understand the reason for that.

LAWYER: It's the difference in the sections of the policy.

O'NEILL: I understand that. Just conceptionally why should that be any different?

LAWYER: Because in the under insured motorist section what the policy and the state have agreed that should happen is that you will be covered for the liability that person would have to you in tort if that person had the money to pay you. And the insurance company is stepping into the shoes of the other uninsured motorist and he/she would owe you the tort value. That is what they did to you. But in §D, we have a different contract provision. Section D says, there's a limit of liability and we have options on which loss we pay: repair or replace.

SCHNEIDER: If the word "quality" means value, then diminished value is covered under this contract. Is that right?

LAWYER: I don't think so because we also have the payment of loss section, which allows us to either pay in money or repair the vehicle.

SCHNEIDER: I'm talking about this one phrase. That's the only phrase in issue here isn't it?

LAWYER: I think the entire contract has to be read as a whole.

SCHNEIDER: Sure the whole contract is an issue. But that's basically the issue that's being argued about diminished value.

LAWYER: It is where Schaefer has chosen to focus, to not look at all the other words that surround it. But I think that if all the words are looked at that surround it in the entire policy that it does not decide the issue.

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RESPONDENT

LAWYER: I think you hit it right on the head. Direct and accidental loss in the scenarios that the courts have already given us includes diminished value. Nobody disputes it. Part A, you recover: a third party as you've talked about J. O'Neill in the tort issue; Part D is what is at issue here; but under Part C of the policy "uninsured motorist" provision which is contractual they acknowledge diminished value as a loss.

There is no dispute before this court that diminished value is a loss under an insurance policy. The only point they make here is that the limitation of liability, the words “repair and replace” of like kind and quality means something different.

O’NEILL: It’s repair or replace. So when I read subsection 2, I really want to put a comma after repair. We seem to be saying those are synonymous. But it seems to me they can either 1) pay actual cash value; 2) amount to repair; or 3) they can replace this. And the clause before it says the lesser of. So why isn’t amount necessary to repair just - why doesn’t it stand alone because it is an or?

LAWYER: They are talking about what the cost of repair is in trying to separate it from the issue of returning the vehicle to the same value that it was pre-accident.

OWEN: I’ve got her same question. It does same the lesser of actual cash value or. And it seems to me that recognizes that inherently sometimes a cash value may be more than or less than the amount necessary to repair. They have their choice. So sometimes they repair it and it’s going to be worth more than the cash value. Sometimes they repair it and it’s going to be less but that’s the insurance company’s choice.

LAWYER: Absolutely correct. But you’re talking about the actual cash value of the vehicle pre-accident. What we’re talking about is the cost of repair plus post-repair value.

OWEN: I’m saying the policy seems to recognize that the value of the automobile pre-crash could be more than the value of the automobile after repair. The lesser seems to recognize that and gives the insurance company the option under the express language.

LAWYER: Absolutely. No one’s saying that they cannot exercise that option.

OWEN: Then where’s the obligation to then pay on top of that?

LAWYER: You start first with the fact that loss includes diminished value. Nobody disputes that. Then you go to the issue of limitation of liability. And then you get into the question: is the contract limitation unambiguous, such that you can say absolutely it’s excluded, diminished value at best because of the terms of the policy such as J. Schneider referenced, quality and kind they are two different terms. Kind talks about function and quality talks about value. That is not the distinction that Schaefer makes. That’s the distinction that many courts that have looked at this issue makes.

O'NEILL: If you did a hard return, and made No.3 replace the property with other of like kind and quality. And so you just had amount necessary to repair standing alone. Wouldn't the clear language just say amount necessary to repair? We seem to be importing the like kind and quality into the repair piece.

LAWYER: But it's all part of the same language. It includes that provision of like kind and quality. And it's not just limited to amount of repair. The policy was not that clear. So what in fact is being argued by the insurance company is we will say it is clear to us based on a TDI bulletin that doesn't have any import in this setting.

O'NEILL: Even if you say like kind and quality is synonymous with value, there's still an or between repair or replace with like kind and quality. So it seems like the latter piece of 2 incorporates value, but the first part does not.

LAWYER: You've got to read the whole sentence together. I don't think you can truncate it and just only reference repair and say that just means the amount of repair. I think the whole sentence has meaning in the context of the case law in Texas, which said you must consider returning the car to substantially the same value it was pre-accident.

ENOCH: Let's assume that under that policy you're correct that diminished value is also included in the cost of repair and replacement of like kind and quality. How does an insurance company assess this difference to determine whether the car is a total loss or should be repaired? How do they make that determination if in evaluating the cost to repair they've got to include this diminished value?

LAWYER: The truth is they already do it. When appraisers go out and look at a car and inspect a car, they make an estimate of not only the cost to repair but value of this car in the marketplace because there are markets out there for damaged and repaired automobiles that they in fact index and are able to determine valuation. That's the reality. They are able to determine based on resale of cars both through auction results, through general secondary markets, both through used car markets, what the value of automobiles are based on severity of damage, based on the mileage of the automobile, based on all the particulars of that car. That's what appraisers do everyday.

J. Phillips mentioned this point. There seems to be a disconnect between the case law and what's happening out in the real world. Let me tell you out in the real world before Carlton they paid diminished value. They paid it in a third party case. They paid it in an uninsured motorist case.

PHILLIPS: Do we have that in the record anywhere?

LAWYER: I don't know that it's actually in your record.

HECHT: Does the insurance commissioner's bulletin indicate that that's the basis for the premiums that they calculate? That's argued here.

LAWYER: Well that's argued here. But the truth of the matter is that bulletin for many reasons doesn't apply in a contract instruction case, which is what we have here. The policy is to favor the insured.

HECHT: Is that what the insurance commissioner thought when he was writing the policy and setting the premiums?

LAWYER: I don't know. The TDI according to your precedent in Veladron(?) and National Union says it applies in statutory construction cases. It doesn't apply in a contract instruction case. That the TDI bulletin shouldn't have any weight unless it's been submitted for public comment. There's no evidence that has been done in this case. And third, it is unreasonable on its face. There was no distinction as to why may pay Part A, and Part C and for some reason mysteriously don't think they owe it on Part D.

HECHT: But the troublesome thing particularly here. Lots of times you wonder as a court how much deference to give an agency because of how much leeway they have to set policies. But if the department actually had a hand in writing this policy, then it seems to me it's sort of indicative of what they thought it meant.

PHILLIPS: Plus when they set the rate.

LAWYER: They didn't write the policy to the extent they write all insurance policies in the state of Texas. You don't get insurance policies in the state without the regulatory authority of proving it. But let's not create another fiction that it's now being written by the State of Texas. We all know it's written by the insurance companies.

O'NEILL: I don't understand why this argument comes in. Because to me you don't look at what TDI does once you find it's ambiguous. And if it's ambiguous you go for the insured. So it's hard for me to see that it's a relevant inquiry.

LAWYER: You are absolutely correct. In Carlton that's what the court said. Carlton is the decision they hang their hat on. But in Carlton the 14th CA said we're not going to decide that the TDI has any relevance, because we think it's unambiguous. Of course in the insurance company's favor. If it's ambiguous

maybe they have an argument it comes in. But even then the case law says, No. It doesn't come in in a contract construction case anyway.

ENOCH: On your question about they pay it under the third party coverage and they pay it under the uninsured motorist coverage, but don't they assess premiums for each of those categories, and they set a different premium for the collision?

LAWYER: I don't know. I understand your point. I don't think anyone here in this record has developed on what basis those premiums are established.

ENOCH: But the fact that those are separate insuring agreements doesn't that support their position that just because a loss is covered one way on the one part doesn't necessarily mean it's covered under the second part. Because don't they treat those a separate insuring obligation?

LAWYER: I understand your point. And it's a good point. If we knew that in fact policies are set, and rates are established based on different losses and they are understanding what that loss will be. There's no evidence before us. That would be an assumption to support an argument.

See this case is going to turn very simply on an issue of contract construction.

HECHT: What is the basis of the difficulty of counting what the other states do?

LAWYER: I looked at this issue because I knew it would come up and I even did an analysis based on electoral votes. Who had more states? The fact of the matter is if you want to do it by what other jurisdictions do, we probably would win that battle. Your point earlier about policy exclusion. What's going on out there in the real world? The SC of Minnesota has recognized diminished value. And so some insurance companies have adopted a policy exclusion.

HECHT: Some have adopted policy excluding coverage of this?

LAWYER: That's correct. Diminished value. That of course goes through the regulatory process. It has to be approved by the state commissioner.

HECHT: This seems to me to go to the issue of is this something as a state, or a regulatory body, or a legislature do we want this to be covered? Just make that choice. And at the end of the day after you count up all the decisions and you see what insurers have come in behind and done is there any sense of how many states actually cover this and how many don't?

LAWYER: About 14 in favor and somewhere 6-8 looks like don't. Where it's been decided. Not every state of course has a SC opinion on this issue.

HECHT: When you say the ISO language was "approved" in 29 states what does that mean?

LAWYER: That refers to the policy exclusion language that an insurance company can adopt if it wants to. Diminished values become a big issue obviously for auto insureds.

HECHT: So twenty nine states say if you don't want to cover this you don't have to?

LAWYER: No. They say here is the language of exclusion you can use. And in some states people have used the exclusion.

HECHT: Is it 29?

LAWYER: Yes. I'm not saying that in each of those states that DV is excluded. I'm simply saying that the language of exclusion has been adopted or approved by commissioners of insurance for use in the state if an insurance company elects to do so. And that that language for exclusion has been approved as opposed to 29 states excluded by claims of contract. That's the distinction there.

Now I don't see it as a policy decision. I see it as a contract issue. The policy decision is you have states that go for it and some that don't.

HECHT: All I'm saying is if the insurance commission said you have to write this policy and you can't write anything else, that would be a policy decision.

LAWYER: Well that's absolutely clear. But that's not where it's headed. What happens in different jurisdictions, say up in Georgia. The SC of Georgia decided diminished value was covered. The commissioner of insurance then issues a bulletin that told all insurance carriers in the State of Georgia that have these policies that they must include diminished value. It's then incumbent on insurance companies because it doesn't want to do business in that state issuing that kind of policy to say we want to adopt an exclusion and to ask the commissioner to approve that. Much like we see ongoing in the State of Texas with mold currently. Some companies don't want to have a policy that covers mold, and, therefore, there's a great deal of time and effort put in to language of exclusion to make sure it's not covered.

HECHT: But even if you were going to cover it you would want the premium to reflect

that.

LAWYER: That's true. There's nothing in this record for us to know that if you in this case recognize as a contract issue that they have a duty of diminished value can you say well we're raising the premiums of insurers around Texas and we're changing policy. That's not how this will be determined or should not be determined. It's not a policy issue in that sense.

HECHT: It seems to me if you're paying - I mean the diminished value hypotheticals in the briefs are substantial. Like 50, 60, 80 100% of the rest of the claim. So if the claims paid were going to go up that much it looks to me like there would have to be a reflection in the premiums.

LAWYER: No doubt that it is going to affect how they both adjust it and no doubt that it will involve some additional or potential adjustment of claims. I think that's common sense.

HECHT: Then it would go up?

LAWYER: Yes.

ENOCH: Using the mold as an example. The dept. of insurance says these policies include mold. The policy comes up for renewal and you get notified by your insurance company that we're renewing your policy but you can exclude mold coverage. To exclude mold coverage this is your premium, but if you continue with mold coverage your premium is 4 times as high. So as a practical matter everybody is going to exclude the mold unless you're wealthy and you don't care what the price of your insurance is. Well the transaction cost of rewriting all those policies, making those decisions are pretty significant. Should this court be concerned about those 29 states that now permit insurance companies to exclude that in terms of the transaction cost when it decides what its policy will be here? When you look at this policy, well it's not really clear but we think probably it ought to be excluded. Is it proper for us to consider that that's probably what the outcome will be with this case? No matter how we decide it ultimately all the insurance policies will be written to exclude this unless there's an increase in premiums? Should we be concerned about that in deciding the outcome of this case that we know ultimately how it's going to come out anyway?

LAWYER: No. I don't think it's a matter of setting policy. Because the flip side of that coin is that the consumer - everyone who owns an automobile is entitled to a return of that vehicle after an accident to the value that it was in substantially before the accident. That's what the law has been in this state.

So to take the one sided approach that well you know rates might be reflected. They may go up. It seems to me the consumer has a side to this equation. The consumer has a right to get that coverage or elect not to get that coverage because they think they want that part of it to be covered when they are in an accident.

HECHT: But if you wanted the coverage you would have to pay more.

LAWYER: That may be. Absolutely. We know there's no free lunches. We absolutely know that if they think it's not covered now that they are going to have some additional premium. Our rates rise when we get into a car accident. It has nothing to do with diminished value.

SCHNEIDER: The counter argument to what they are saying is, isn't there an expectation on the part of the secured creditor that the value of the collaterals not diminish?

LAWYER: Absolutely. And that's footnoted as part of the...

SCHNEIDER: And further you said that this was a construction issue. Are you contending that this is ambiguous?

LAWYER: No. I'm contending it's unambiguous. That the whole body of Texas law has supported that the issue of value is an integral part of repair of a vehicle. Absolutely unambiguous. But it is strange for us to see that a 14th CA thinks it's unambiguous the other way. So push come to shove if it's ambiguous all the construction is in our favor. But make no mistake about it. We believe that the issue of kind and quality includes both function, physical characteristics of the vehicle, returning it to its pre-accident condition, and value. That there is no metaphysical disconnect between a physical repair of a car and its value.

WAINWRIGHT: Let's get back to my example. The Chief's car is worth \$10,000, my car worth \$10,000. His car gets totaled and gets a check for \$10,000. My car gets wrecked, gets repaired, after the repair it's only worth \$9,000. In the real world how would you see me getting back to the \$10,000 value for my car so I would be in a similar situation with the Chief? Do I get a check for the \$1,000 on top of the repair? Do you add some options to the car? What do you do in that situation?

LAWYER: You would get the cost of the repair plus the diminution in the market value of your car post repair. So if the appraisal is that your vehicle now after repair is \$9,000, and you've essentially lost \$1,000 of value based on an appraisal, then you would get both cost of repair plus value. Then the

insurance company can make some collection...

WAINWRIGHT: And what does the secured creditor have to say about that \$1,000?

LAWYER: The secured creditor is going to be happy that the value of his collateral is protected. Which is J. Schneider's point. Isn't there a reasonable expectation...

WAINWRIGHT: Well the \$1,000 check was written to me as I understand it not to the secured creditor.

LAWYER: Not if they've got a lien on the vehicle. We know what happens when a secured creditor has a lien on a vehicle and you get a cost to repair check. You don't get that cost to repair check. That vehicle is repaired. If there is any additional amounts, that is an issue that the bank is very certain to be concerned about to protect its collateral.

O'NEILL: That leads you then to a jury trial on every case as to what the diminished value is.

LAWYER: And that's what the law has been in Texas. That's what's been going on in the real world is that the issue of how much diminution in value occurs in any given factual situation is a function of the circumstances of that case. Now does it necessarily result in a trial in each case? No. Anymore than any dispute under an insurance policy third party contract case necessarily results in a trial. Because there are formulas based on severity, based on market value. There's a car sold every day in America. There are millions of cars sold from which data can be arrived to determine diminution in value for cars based on style, model, color, based on all the characteristics.

JEFFERSON: In a trial what would the evidence be? You're saying it would be the style of the car or what?

LAWYER: What you're talking about here are all the characteristics that go into market value. That is the province of experts like appraisers. We're not talking about a person getting up and talking in terms, well I don't think I can sell my car for as much as I could because it was in an accident, because it's got something on there about the repair. We're talking about expert testimony of appraisers who come in everyday, in both third party cases as well as uninsured motorist cases, they give a number and the consumer gives a number, it's usually negotiated and/or litigated.

JEFFERSON: How do you quantify what the psychological impact is in the market of a car

that's been in an accident? What would it look like?

LAWYER: Cars are sold at auctions everyday that have been damaged. Is it structural? Is it cosmetic? Is the car red? Is it blue? Is it a model X? Is it a model Y? There are a whole variety of characteristics that go into an appraiser's valuation of any car at any given point of time. This is well known to appraisers in the field.

The reason this has bubbled to the surface in many places is because lawyers have tried to present these cases as class actions. I personally don't find that offensive that consumers of various states are being represented by lawyers in a class action context. But that's a different issue. Is DV certifiable as a class? That's another day. There may be some that say predominance is too much of an issue in a class case and you couldn't do it that way.

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REBUTTAL

LAWYER: I don't want there to be a misimpression that the body of law in Texas that every case leading up to the recent cases that there is coverage for diminished value. The first case going the other way was in 1927. In 1927, the same year in the Rathford(?) case the Dallas court said that you have to return it to the substantially good condition without putting the value term in. And then as we cite in our brief, there are a series of cases that go the other direction. So the authority is split in Texas and this court has never looked at the issue.

There was a comment about the transaction cost of this change. One of the cost of going the other way is the class action issue. There are 15-18 pending. There are 4 or 5 up for review on this same issue before this court. And if the court goes with Schaefer then that opens the door on those transactions, or a bunch of individual actions.

Secured creditors are not parties to this contract. They may be a beneficiary of it, but they are not a party. And if they desire more coverage than they find under their insurance policy, then they can certainly insure themselves...

SCHNEIDER: Nor are the rest of the people of Texas as far as policyholders. But we were looking at it from a policy standpoint. Is there a societal policy for continuing or paying diminished value or not paying?

LAWYER: And what I'm saying is if the secured creditor community feels that these policies do not adequately cover them, then they can separately acquire coverage. And this coverage I do know is available to cover them for their potential additional loss for any transactions they do.

SCHNEIDER: How do you account for this sudden interest in this clause? Was the industry paying diminished values in individual cases?

LAWYER: In some cases it was paid. Sometimes to settle a lawsuit insurance companies would settle the lawsuit by paying it rather than going to court over \$300 or \$1000 difference. As a policy matter they were not in general especially in light of what the TDI has been telling them. So it has not in general been paying.

There was a question about the Bailey decision and a reference to Underwood. Bailey in Dallas simply relied on Underwood, which was a case really misinterpreted by the Bailey court. In Underwood, there was a theft of a car. It sat in a lake for 3 days to 1 week. There was a dispute about that and the jury finding in essence was that you could not repair this car after it sits in a lake. The other difficulty with that case as you see in J. Enoch's discussion of it is that when the insurance company argued that case, the insurance company argued in terms of, we returned it to its previous value. And so the issue was never presented as to whether they had an obligation to return it to the previous value. In that case they simply chose to argue it that way and argued that they had. But the specific finding was that it could not be repaired, that it was a total loss and therefore the value had to be paid.