By Roger D. Sanders with Michael W. Huddleston

REMEMBERING *VAIL* AND ONE OF ITS ARCHITECTS

Usually the story of fine legal journals unfolds with particular images or minute facts. The dark, wizened widow reached for the lawyer's hand; the police officer brushed his sandy locks back, smiling curiously.

Not here. It's been too many years to honestly relay the minute facts. But there are images, sweeping recollections of a sweaty, squeaky-voiced, bow-legged cowboy that a judge—my former partner, Ray Grisham—had sent my way. Melvin Vail was the victim, he proclaimed, of a damned insurance company's refusal to pay for his burned house. This was back in the day when all the burned, insured houses started with the company's presumption of arson. Even the ones struck by lightning.

It was early in my career, when I believed clients told all the truth. After talking to Melvin, I knew he was innocent, Texas Farm Bureau, guilty. It was simple. Except their excellent advocate, Webber Beall of Touchstone Bernays didn't see it that way, fighting me every step of the way, and then some. So, we deposed and prepared and got ready for trial. And on a hot day in 1983, we appeared before Judge R.C. Vaughn, a stately figure who looked like Texas history itself. With swept, neat white hair, he kept detailed notes in a reporter's notebook, jotting down—it seemed—every word. He rarely looked up, using his nibbed-fountain pen in a way few men did in the 1980s. The jury was friendly enough, but I was too young to really know. It was early in my career, when I believed too much and knew way too little.

Melvin was a downright picture. Squeaky voice, barrel chest, skinny legs, cowboy boots, and divorced with children *and* a sordid reputation, at least according to the credit report that inexplicably Judge Vaughn let into evidence. He publicly kicked dogs; he yelled at women, and perhaps, it was hinted, hit them; he burned his house down, even starting the fire with his ten-year-old son asleep inside. Rude, crude, and mean would be a fair assessment of the behind-the-scenes credit report the jury heard. Melvin was not moved to remorse or self-examination, at least so far as the jury could see. Of course, I can't repeat private attorney-client communications, but the report, coupled with Melvin's high-pitched voice and cocky attitude—imagine Donald Trump with little money, less hair, and no bodyguards—left me wondering how we were going to navigate the case. But, thankfully, there was the insurance company.

I had no litigation budget. Melvin was clear that he had no money to put into the case that he claimed Judge Grisham had told him wasn't to cost him a dime. And who was I to disappoint a sitting judge? So, unlike today with reams of documents and lots of experts, I managed—with my faithful paralegal, Sandi Gamblin—to put together the documents we had, along with a secret weapon. We had an expert. A real expert. He was an ex-FBI lab employee who knew arson. He went up against the insurance company's bolo-tied, turquoise-ringed expert who stopped the court reporter in front of the jury to clearly spell out his name so that the jury might properly attribute the anticipated magnificence of his courtroom performance to the right man. He was all kinds of up-to-date. He knew the rules. He knew the science. He had explanations about flash points and origins and gas chromatographs that boiled and distilled the ashes taken from four analytically significant locations around the incinerated house foundation to confirm that there was just one hot spot that he, as an expert, could opine with certainty was THE spot where Mr. Vail must have—in fact, did—pour a highly flammable accelerant out, lighting it on the way out of his house without his ten-year-old son. That's a lot of words, but it was Texas Farm Bureau's case.

It was so convincing that I wondered if we had a chance. Webber Beall was smooth as silk in defense, the expert

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flawless in experience, reputation, and logic, and my client, as the insurance company painted him, was a dog-kicking reprobate.

But we had a real expert. He had prepared me to know something no one else knew; at least not until their arson expert was on cross-examination. You see, there were four cans of ashes taken from the site. Well, actually more than that if you count the first insurance-company expert who said it wasn't arson. But the second one, this one, could find sure-fire arson in a bowl of Cheerios. He testified on direct that there were four-gallon cans that looked like paint cans, with tight lids pounded in after he had methodically taken ash samples from around the burned foundation area and then boiled each can, taking the resulting liquid from each of the four cans and burning it in the gas chromatograph to see what chemical compositions were revealed when those liquids were tested. A gas chromatograph then analyzed the liquids to show whether accelerants like kerosene or gasoline showed up chemically. The resulting graphs looked a little like a lie-detector chart: long, detailed in its markings, and providing signature findings to support the conclusions. Texas Farm Bureau's expert opined, after looking at the four charts, that they conclusively showed accelerants in one particular place, differing from linoleum or lacquers on wood flooring or drapes made of petroleum products. And he testified that process was why the sample cans contained the muddy remains of the boiling, distilling process. That's spelled gas c-h-r-o-m-a-t-o-g-r-a-p-h, as he would say it.

The expert proudly and authoritatively explained to the jury how the resulting charts were like fingerprints of the fire, with no two being alike, just like human finger prints. And when you looked at all of them, well, he just had no choice but to conclude that there was a clear pattern of accelerants present, even if his hapless insurance company predecessor arson expert couldn't find it, poor soul.

I still remember seeing him gradually grow less sure, as I asked him to humor me to open up the various cans so the jury could see better his process. Each can contained the mud left from boiling the ashes for the chemical analysis. Can 1, fine. Can 2, fine. Can 3, fine. Can 4, not so fine, for can 4 was still filled with ashes. Dry, dusty ashes filtering down though my fingers as I dipped my hand into the can. It evidently had never been boiled. But the expert, after an immodest period of sputtering, explained that while he didn't know how the mud had dried out, there were four of those gas chromatograph charts, and so surely there must have been a fifth can and somehow the other ash-mud-filled can had gotten swapped. No problem. He was still convinced that it was arson.

So I asked him to compare, in front of the jury he was impressing, the detailed "fingerprint" gas chromatograph print-outs from Can 1 and Can 4. He struggled a bit, with some quick explanations about how that might not be precise, this not being in a lab and all. So, I helped him out by holding them precisely aligned and up to the light so that the jury could see that the two charts of identical chemical fingerprints matched precisely. The jury was not amused. Webber was sputtering. The witness was sputtering. Melvin was grinning.

The last witness in the case was the Texas Farm Bureau state claims manager. He obliged by saying that, after hearing all the evidence, he'd do the same thing again, even in light of the bolo-tie, turquoise opinions of his second expert: deny the claim for arson. I thanked him, as the jury must have, for the clarity it brought to the issue. They returned a verdict for the full policy amount, $25,000 on the structure and $10,000 for contents, trebled the damages, and awarded handsome attorneys' fees of $12,640. The total judgment amounted to $140,509.84, plus interest and costs. But the jury did something else before they left the court room: they refused to shake my client's extended hand. And they refused to shake Webber's extended hand. Some came over and hugged my neck, one telling me that it was obvious I was a young lawyer and they appreciated my effort. But, one said while another nodded, "Get another suit." It seems my one navy pinstripe suit had tell-tale signs of baby spit-up over my right shoulder, which they had seen on the first day of trial, but I had not. Look, in those days an $85 Linxweiler Men's Store suit had to last.

The jury gave us damages of the sort that the DTPA and Insurance Code were intended: actual property damages set by the insurance policy, treble damages, and attorneys' fees. The appellate journey very quickly began, and it was a bumpy ride indeed.

Texas law was very much in a state of flux as *Vail* began its journey through the appellate courts. Numerous cases were working their way through the appellate courts that would eventually join with the decision in *Vail* to greatly broaden and expand the extra-contractual exposure for first-party insurance carriers.

The Dallas Court of Appeals provided the intermediate review of the *Vail* judgment. Webber deferred the handling of the appeal for the insurance company to Sid Davis, Jr., one of the best defense appellate lawyers in Dallas. Justice Keith wrote the extremely brief opinion of the court.

The Dallas court began by noting that after a barrage of special exceptions, Plaintiff was left at the time of trial with two theories:

> [1] . . . Defendant violated the TEX.BUS. and COMM.CODE, § 17.50(a)(4) by employing or using acts which violate Art. 21.21 of the Texas Insurance Code, or rules and regulations issued by the State Board of Insurance under said Art.

> 21.21, as follows: . . . (b) By engaging in practices contrary to Sec. 4 of Insurance Board Order 18663, Sec. (a), which acts were unfair or deceptive, as defined by Art. 21.21–2, Sec. 2(d) by not attempting in good faith to effectuate prompt, fair and equitable settlements of claims submitted in which liability has become reasonably clear.
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> [2] In the alternative, Defendant violated a common law duty of good faith or conscionable conduct, in investigating, processing and denying Plaintiff's claim under the insurance policy in question.[1]

The jury answered the following "Special Issue No. 3" as to the statutory theory:

> Do you find from a preponderance of the evidence that the Defendant, after it became reasonably clear that Defendant was liable under the policy in question, if you have so found, prior to the filing of this suit, *did not attempt in good faith to effectuate prompt, fair, and equitable settlement of the claim submitted by the Plaintiffs*?
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> *Answer:* They did not so attempt."[2]

The Dallas court noted that the fulcrum of the Vails' liability theory, section 4(a) of State Board of Insurance Regulation No. 18663, "has as its statutory base the provisions of article 21.21–2 of the Texas Insurance Code (Vernon 1981), but section 2 of this statute does not purport to create a private cause of action."[3] The court followed the Northern District ruling in *McKnight v. Ideal Mutual Insurance Co.*,[4] that "neither article 21.21–2 nor DTPA 'confers a private right' for unfair claims settlement cases."[5]

The Dallas court swiftly disposed of our arguments for a duty of good faith. The argued basis of the duty was the holding in *G.A. Stowers Furniture Co. v. American Indemnity Co.*,[6] that an insurer has "liability for fraudulent conduct, or *lack of good faith, in refusing to settle*."[7] The Dallas Court of Appeals held that *Stowers* was limited to third-party liability insurance carriers and thus the duty had no application to a first-party insurer such as Texas Farm Bureau.[8]

So, as of June 28, 1985, Vail's treble damages were taken away. He was left with recovery of only the contract benefits, interest, and the same monstrous award of $12,640 in attorneys' fees.

After the court of appeal's decision, we were joined by avowed DTPA master, Joe Longley, and his brilliant young partner, Mark Kincaid. In May of 1988, three long years later, the original recovery was restored and Texas law greatly expanded. That's the public picture. The less public picture during the interim had to do with family issues, Melvin and Maryann's divorce, sorting out client loyalty issues, Melvin being charged with molesting a child (for which the complaining witness did not show up when the criminal case was called for trial), and Melvin's death, all of which happened while the case was on appeal.

In fact, Melvin died before the filing of the application for writ of error on October 4, 1985. The writ was not granted until July 15, 1987, almost two years later. The application focused on the appropriateness of the statutory claims and the duty of good faith, particularly as expressed in *Stowers*. It was very clear that the only damages sought—and thus subject to trebling—were the lost contract benefits. The application addressed the carrier's argument that no damages were caused by the supposed improper or bad faith conduct. The carrier argued that lost contract benefits are not damages caused by bad faith conduct. The "Conclusion" to the application really says it all and more:

> In summary, Vail asks the Court to consider the remedial nature of the D.T.P.A., §17.44. and to, announce clearly the error of the Court of Appeals in declaring no private right of action for insured against an insurer which grossly contorts the claims process through its admitted bad faith. After six years—and the death of Mr. Vail—this case winds slowly up the appellate steps with Farm Bureau still clutching every nickel of Vail's premiums, and paying nothing. From this position of moral quicksand Farm Bureau claims there should be no consequence to its proven—and now conceded—connivance, deceit, and bad faith. With no more substance than a worn out fig leaf Farm Bureau defends itself alone on the nature of the product it sells: insurance policies. Somehow because the misrepresented service is part insurance policy, the insurer is to be immune. This rationale is unutterably repugnant. A crook can wear a cloak—including the suit of a Farm Bureau executive or agent who schemes to deny claims he (or his company) have earlier promised to pay. The nature of the product is no defense. If the D.T.P.A. and the Insurance Code are to have meaning, there must be some relief available to the Vails, and those like them who are intentionally wronged. In holding to the contrary the Court of Appeals erred.[9]

In 1986 and 1987, the tide began to turn on a number of issues involved in *Vail*, particularly as to the duty of good

faith. On January 28, 1987, the Texas Supreme Court held in *Arnold v. National County Mutual Fire Insurance Co*. that a duty of good faith did exist as to first-party insurers, citing *Stowers* and thus *sub silencio* rejecting the basis for the Dallas court's rejection of this theory in *Vail*.[10]

In July of 1987, the Texas Supreme Court issued its decision in *Chitsey v. National Lloyds Insurance Co*.[11] The statutory claims made in that case, like those in *Vail*, revolved around Section 16(a) of article 21.21, which declared that a cause of action for trebling actual damages may be brought by:

> Any person who has been injured by another's engaging in [1] any of the practices declared in Section 4 of this Article *or [2] in rules or regulations lawfully adopted by the Board under this Article* to be unfair methods of competition and unfair and deceptive acts or practices in the business of insurance or [3] in any practice defined by Section 17.46 of the Business & Commerce Code, as amended, as an unlawful deceptive trade practice . . . .[12]

The plaintiffs attempted to channel their claim through Board Order No. 41060, which provided in part: "Irrespective of the fact that the improper trade practice is not defined in any other section of these Rules and Regulations, no person shall engage in this State in any trade practice which is determined pursuant by law to be an unfair method of competition or an unfair or deceptive act or practice in the business of insurance."[13] The plaintiffs, however, pointed only to a jury finding as the "determination" of unfair methods of practice.[14]

The supreme court rejected this theory, noting: "A jury finding that one has engaged in prohibited conduct cannot be substituted for a declaration of what conduct is prohibited. A jury's role is to decide matters of fact and not matters of law."[15] The court suggested such an incorporation of another Board Order No. 41454 (Aug. 10, 1982) would have been appropriate, but it was not submitted or proven.[16] *Chitsey* certainly suggested the statutory path to treble damages in *Vail* might not be easy, or perhaps not even possible.

Vail was argued in November of 1987. Mark Kincaid opened and Joe Longley closed. The carrier was again represented by Sid Davis of the Touchstone firm. Finally, in May of 1988, the Texas Supreme Court reached a decision.

The supreme court in *Vail* held that there was in fact a right to recover under the DTPA and the Insurance Code for unfair claims settlement practices. The court noted a number of steps necessary to get to that conclusion in *Vail*. First, section 17.50(a)(4) of the DTPA makes actionable the "use or employment by any person of an act or practice in violation of Art. 21.21, Texas Insurance Code, as amended, or rules and regulations issued by the State Board of Insurance under Art. 21.21, Texas Insurance Code, as amended."[17] Second, the DTPA thus incorporates section 16 of 21.21 of the Insurance Code, which permits recovery as well for:

> [1]any of the practices declared to be unfair or deceptive by Section 4 of article 21.21;
>
> [2]conduct defined in rules or regulations lawfully adopted by the Board under article 21.21 as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance; or
>
> [3]any practice defined by Section 17.46 of the Business & Commerce Code, as amended, as an unlawful deceptive trade practice. Tex. Ins. Code Ann. art. 21.21, § 16(a) (Vernon Supp.1988).[18]

This is essentially the first step. The second comes through the incorporation of "regulations." As the court noted, the Vails argued that State Board of Insurance, Board Order 18663[19] itself had a section 4 permitting further incorporation of any practice (a) defined by the Insurance Code or regulations or rules to be unfair, and (b) any practice "determined pursuant to law" to be unfair.[20]

The court found that article 21.21-2, section 2(d) (defining as an unfair practice failing to attempt to settle when liability is reasonably clear) was in fact incorporated through 4(a) the Board Order despite the fact that that provision had been found to have not been intended to provide a private right of action.[21] The court recognized that in fact the Vails were not attempting to recover under 21.21-2. The source of the right of recovery came from section 17.50(a)(4) of the DTPA and article 21.21, § 16 of the Insurance Code.[22]

Distinguishing *Chitsey*, the supreme court stated that "[w]hile a jury finding does not constitute 'a determination of law,' this court is empowered to determine whether conduct constitutes an unfair or deceptive act."[23] Such a determination, the court held, could be incorporated through section 4(b) of Board Order 18663. Thus, the court held that its adoption of the duty of good faith in *Arnold* and *Aranda v. Insurance Co. of North America*[24] amounted to such a determination.[25] Alternatively, the court found that treble damages were also recoverable because section 16 of 21.21 itself incorporates the "laundry list" of prohibited conduct in the DTPA under section 17.46, along with "unlisted" deceptive acts noted in that provision. The jury finding that the carrier "failed to exercise good faith in the investigation, processing, and denial of the claim" supported this recovery as well.[26]

Importantly, the Texas Supreme Court directly addressed whether the loss of contract benefits could ever be a form of

actual damages recoverable for either statutory or common-law bad-faith claims practices. The court framed the argument as follows: "Texas Farm contends that the Vails cannot recover on the basis of Texas Farm's conduct after the home was destroyed by fire because the Vails only claimed damages recoverable under the insurance contract."[27] The court concluded:

> We hold that an insurer's unfair refusal to pay the insured's claim causes damages as a matter of law in at least the amount of the policy benefits wrongfully withheld. *Aetna Casualty & Surety Co. v. Marshall*, 724 S.W.2d 770, 771–72 (Tex. 1987); *Royal Ins. Globe Co. v. Bar Consultants, Inc.*, 577 S.W.2d 688, 694 (Tex.1979); *Allstate Ins. Co. v. Kelly*, 680 S.W.2d 595, 605 (Tex. App.—Tyler 1984, writ ref'd n.r.e.). The Vails suffered a loss at the time of the fire for which they were entitled to make a claim under the insurance policy. It was not until Texas Farm wrongfully denied the claim that the Vails' loss was transformed into a legal *damage*. That damage is, at minimum, the amount of policy proceeds wrongfully withheld by Texas Farm.[28]

Vail is still good law. The federal courts are simply effectively ignoring it.

The court emphasized that the fact that the denial spawned a breach-of-contract action along with extra-contractual claims did not preclude recovery of the policy benefits in an extra-contractual suit. The court reasoned:

> It would be incongruous to bar an insured—who has paid premiums and is entitled to protection under the policy—from recovering damages when the insurer wrongfully refuses to pay a valid claim. Such a result would be in contravention of the remedial purposes of the DTPA and the Insurance Code. Tex. Bus. & Comm. Code Ann. § 17.44 (Vernon 1987); Tex. Ins. Code Ann. art. 21.21, § 16 (Vernon Supp.1988). . . .
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> > The Vails offered evidence that Texas Farm had wrongfully denied the claim, resulting in a failure to pay $35,000 when due. The Vails thus sustained $35,000 as *actual damages* as a result of Texas Farm's unfair claims settlement practices.[29]

Justice Raul Gonzales, joined by Justice Culver, dissented. Justice Gonzales emphasized that the opinion created a private right of action when the legislature had intended the opposite result. The dissent argued that "the majority has had to resort to a tortured reading of the DTPA, the Insurance Code, and Vail's pleadings, and has ignored our recent opinion in *Chitsey v. National Lloyds Ins. Co*."[30]

The insurance industry and the defense bar were not happy with the decision in *Vail*. Many commentators echoed the dissent, noting several "suspect" logical leaps were necessary to cobble together the causes of action alleged.[31] One thing is relatively certain: the Texas Supreme Court clearly wanted to make a definitive statement approving these causes of action. Having approved the duty of good faith in *Arnold*, the Vails could have recovered under that theory. The key to *Vail*, however, was the path it recognized to treble damages.

Much of the statutory and regulatory framework relied upon in *Vail* is now gone. What is left is a continuing fight over whether the loss of contract benefits can serve as actual damages sufficient to allow trebling. *Vail* again came to the forefront with the certification in *In re Deepwater Horizon*.[32] The court in its certification decision observed:

> [W]e find it prudent to obtain clarity from Texas itself. The parties' arguments regarding whether Vail remains good law "illuminate the magnitude and wide ramifications . . . for insurance law" that this issue presents. *In re Deepwater Horizon*, 728 F.3d 491, 500 (5th Cir.2013), *certified question answered*, 470 S.W.3d 452 (Tex. 2015), *reh'g withdrawn* (May 29, 2015). We thus conclude that certification is appropriate here.[33]

Vail is still good law. The federal courts are simply effectively ignoring it.[34] The suggestion that it has been overruled *sub silencio* is unreasonable and simply wrong. Fortunately or unfortunately, *Deepwater* settled and the Texas Supreme Court's position on *Vail* remained an unresolved matter, at least in the Fifth Circuit and some federal courts.

Not surprisingly, Mark Kincaid, discussing the *IBEX* decision, beautifully articulated the source of the confusion over modern readings of *Vail* and the decision of the Texas Supreme Court in *Provident American Insurance Co. v. Castañeda*[35]:

> It is hard to follow the AFS/IBX court's reasoning that the attorney's fees damages were not recoverable yet could be the separate injury. What is more troubling, and clearly incorrect, is the court's conclusion that a separate injury is required for an insured to recover for unfair insurance practices. The court correctly quoted its prior holding in *Parkans*, but misapplied

it. A number of cases have stated that there must be a separate injury for an insured to recover for unfair claims handling. This statement can be true when the insurer *does not* owe the claim.

. . .

The statement that an independent injury is required is correct in that context, where the insurer *does not* owe the claim. The policy benefits cannot be damages, because the policy benefits are not owed. Thus, if there is no independent injury then there is no basis for extracontractual liability.

The Fifth Circuit's decision in *Parkans* was another example of this principle properly applied. In *Parkans*, the court first found there was no coverage for the claim and then found there could be no extracontractual recovery for bad faith, because there were no injuries independent of the contract damages. Of course, since those contract damages were not recoverable, they could not serve as damages for the unfair insurance practices.

The *Parkans* court relied on the Texas Supreme Court's decision in *Provident American Insurance Co. v. Casteneda*, 980 S.W.2d 189, 198–99 (Tex. 1998). In *Provident*, the supreme court did state that there was no evidence of an independent injury, but it did so after concluding that the insurer was not liable for unfair settlement practices. In *Provident*, the insureds did not sue for breach of contract, so the court was not considering whether they could or could not recover contract damages. What the court did consider was that the insurer had a reasonable basis to deny the claim, even if it is was wrong. Obviously, a reasonable denial of the claim could not cause any damages. The court found no evidence to support the claim for loss of credit reputation, and then concluded that there was no other independent injury. This statement regarding an independent injury made some sense in *Provident*. The policy benefits could not be damages for an unfair claim denial, when the court found there was no unfair claim denial. In other words, the insurer was not liable because it had not committed a violation—according to the court—not because the benefits wouldn't be damages if the insurer had committed a violation.[36]

Mark further explained:

> The Texas Supreme Court expressly addressed this issue in the leading case of *Vail v. Texas Farm Bureau Mutual Ins. Co.*, 754 S.W.2d 129, 136 (Tex. 1988), rejecting the insurer's argument that damages for an unfair settlement practice had to be something more than the amount due under the policy. The supreme court held that damages for a wrongful refusal to pay are at least equal to the policy benefits, as a matter of law . . . It would be exceedingly odd for the legislature to create a cause of action that says recovery of "actual damages" is allowed for failing to settle once liability is reasonably clear, but to hold that the most common damages—policy benefits—were not recoverable and the insured had to establish some other bizarre "independent injury." The legislature could have done that, but the language it chose certainly does not disclose that it did. The supreme court's analysis and holding in *Vail* do not allow such a conclusion.[37]

And so, one of the appellate wizards responsible for *Vail* has provided a great defense to its continued viability. We are all thankful he put his thoughts down in words before departing this old world much too soon. Ironically, his opposing counsel, Sid Davis, passed away a few years earlier, also much too soon. I suspect that they are now enjoying a long celestial discussion of *Vail* and other issues.

Strangely, as commentators speculated that the Texas Supreme Court was looking for a case to reverse *Vail*, my associate, Ron Huff, and I tried a case against Germania Insurance that gained a *Vail*-like recovery.[38] Whose case would be better to reverse *Vail*, than mine, a few years later? In sum, we survived the court of appeals, but the supreme court granted writ. I told my clients we were doomed. Yet, Ron and I showed up to argue to the court. I don't recall all who were there, but I do remember Justice Raul Gonzales, a *Vail* dissenter, was joined by Justice Cornyn, Justice Oscar Mauzy, and the others. It was clear from the questions that it was a bad day at consumer's Black Rock. My associate nobly argued our position, but I had the sense that if we didn't score four touchdowns in five minutes, it was over. So, when I rose to conclude, I essentially told them that I understood they had their sights set on reversing *Vail*, and certainly that was their prerogative, but in fairness to them, they needed to find a case with better facts. I referenced trial court exhibits the clerk had given me permission to fish out of the supreme court files, and showed the court the argument that had won at trial: the Germania adjuster was essentially deaf, but denied the claim over the phone. He hadn't heard a word of the claim, but denied it anyway.

Apparently that was enough for the court. The next day they dismissed the appeal as being improvidently granted. And *Vail* lived for another day.

1 *Texas Farm Bureau Mut. Ins. Co. v. Vail*, 695 S.W.2d 692, 694 (Tex. App.—Dallas 1985), *rev'd in part*, 754 S.W.2d 129 (Tex. 1988) (quoting appellant's brief).

2 *Id.* n.4 (emphasis added).

3 *Id.*

4 *McKnight v. Ideal Mut. Ins. Co.*, 534 F. Supp. 362 (N.D. Tex. 1982).

5 *Vail*, 695 S.W.2d at 694–95.

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

7 *Vail*, 695 S.W.2d at 694 (quoting *Stowers*, 15 S.W.2d at 547).

8 *Id.* at 694.

9 Application at 23.

10 *Arnold v. Nat'l County Mut. Fire Ins. Co.*, 725 S.W.2d 165 (Tex. 1987).

11 *Chitsey v. Nat'l Lloyds Ins. Co.*, 738 S.W.2d 641 (Tex. 1987).

12 *Id.* at 642 (quoting Tex. Ins. Code Ann. art. 21.21, § 16(a) (Vernon 1981) (repealed)).

13 *Id.* at 643–44.

14 *Id.* at 644.

15 *Id.* at 643.

16 *Id.*

17 *Vail*, 754 S.W.2d at 131–32.

18 *Id.* at 132–33 (quoting Tex. Ins. Code Ann. art. 21.21, § 16(a) (Vernon Supp. 1988)).

19 State Bd. of Insurance, Board Order 18663 § 4 (now 28 Tex. Admin. Code § 21.3) (Hart 1986).

20 *Vail*, 754 S.W.2d at 133.

21 *Id.* at 133–34.

22 *Id.* at 134.

23 *Id.* at 135.

24 *Aranda v. Ins. Co. of N. Am.*, 748 S.W.2d 210, 213 (Tex. 1988).

25 *Vail*, 754 S.W.2d at 135.

26 *Id.*

27 *Vail v. Texas Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129, 136 (Tex. 1988).

28 *Id.* at 136.

29 *Id.* at 136–37 (emphasis added).

30 *Id.* at 137–38.

31 *See, e.g.*, R. Brent Cooper & Michael W. Huddleston, *"Annual Survey of Texas Law—Insurance Law,"* 43 Sw. L.J. 343, 355–56 (1989).

32 *In re Deepwater Horizon*, 807 F.3d 689 (5th Cir. 2015).

33 *Id.* at 693.

34 *See, e.g.*, *Great Am. Ins. Co. v. AFS/IBEX Fin. Servs., Inc.*, 612 F.3d 800, 808 & n.1 (5th Cir.2010); *Parkans Int'l, L.L.C. v. Zurich Ins. Co.*, 299 F.3d 514, 519 (5th Cir. 2002).

35 *Provident Am. Ins. Co. v. Castañeda*, 988 S.W.2d 189, 198–99 (Tex. 1998)

36 Mark L. Kincaid et al., *Annual Survey of Texas Insurance Law 2010*, J. of Consumer & Com. L., 59, 62–64 (2010).

37 *Id.* at 64.

38 *Germania Ins. Co. v. Dicken*, No. 05-90-00325-CV (Tex. App.—Dallas filed Mar. 19, 1990); No. D-1119 (Tex. filed June 6, 1991).