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How to Plead Your Claims and Defenses Based on the New Jury Charges

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I. Introduction

This paper offers forms and a practical discussion of the principles that apply when drafting questions and instructions to submit the most common issues in first party insurance cases. Topics covered include breach of contract, unfair and deceptive practices, good faith and fair dealing, fraud, and negligence, as well as agency, defenses, and damages.

II. General Principles

There really is no way to discuss Texas jury charges without at least mentioning the ongoing debate over the extent to which questions should be broadly worded – the "broad form" called for by Tex. R. Civ. P. 277 – or should be "granulated" – that is, broken down into separate elements. A full discussion is beyond the scope of this paper, but a few general comments are called for.

In an insurance case with implications for how all jury questions are submitted, the Texas Supreme Court held it was reversible error to submit a single question that included both valid and invalid legal theories. *Crown Life Insurance Co. v. Casteel*, 22 S.W.3d 378, 388 (Tex. 2000). In *Casteel* the plaintiff-insurance agent submitted one liability question with instructions taken from the DTPA, which required "consumer" status, and instructions from the Insurance Code, which do not require consumer status. The court held that the agent could sue as a "person" under the Insurance Code, but not as a "consumer" under the DTPA. The single question submitting liability under both statutes was harmful error, the court held, because there was no way to tell if the agent won on a valid or invalid theory.

Thus, *Casteel* requires a step away from broad form questions, at least to the extent of separately submitting different liability theories. Then, in *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002), the court extended the *Casteel* rationale to require separate submission of damage elements when some elements were not supported by the evidence.

While the Texas Supreme Court decisions vary in how the principle is applied, the court nevertheless continues to assert its commitment to "broad form" questions. For example, even though the majority in *Harris County v. Smith* held it was reversible error not to submit damage elements separately – requiring a step away from broader damage questions – the majority denied any "retrenchment from our fundamental commitment to broad-form submission." The court continued:

> This Court began moving toward modern broad-form practice in 1973, when we amended Texas Rule of Civil Procedure 277 to abolish the requirement that issues be submitted separately and distinctly, thereby granting trial courts the discretion to submit issues broadly. Over the years, we have repeatedly expressed our general preference for broad-form submission. . . . Our current rule, amended in

> 1988, more strongly reflects our preference for broad-form questions, mandating that the "court shall, whenever feasible, submit the cause on broad-form questions." TEX. R. CIV. P. 277.
>
> When properly utilized, broad-form submission can simplify charge conferences and provide more comprehensible questions for the jury. . . . But we recognize that it is not always practicable to submit every issue in a case broadly. As Professors Muldrow and Underwood observe, "broader is not always better." . . . For example, we have suggested that broad-form submission may not be feasible when the governing law is unsettled. . . . In such an instance, submitting alternative liability standards permits the appellate court to settle the law and render the correct judgment. Similarly, it would be contrary to judicial economy to insist on broad-form submission when a specific objection raises substantial concern that a particular theory of liability will infect the proposed broad-form question with error. . . . And in a case such as this one, asking the jury to record its verdict as to each element of damages when there is doubt as to the legal sufficiency of the evidence will permit the losing party to preserve error without complicating the charge or the jury's deliberations.
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> Whether a granulated or broad-form charge is submitted, the trial court's duty is to submit only those questions, instructions, and definitions raised by the pleadings and the evidence. . . .

96 S.W.3d at 235-36 (citations omitted).

It seems the prevailing rule is still that questions should be submitted as broadly as possible, but sometimes what is "possible" may not be very "broad."

Another principle to bear in mind is that just because something is a correct legal statement – or because it appears in a reported decision – doesn't mean it belongs in the jury charge. As Chief Justice Pope explained in *Lemos v. Montez*:

> This court's approval and adoption of the broad issue submission was not a signal to devise new or different instructions and definitions. We have learned from history that the growth and proliferation of both instructions and issues come one sentence at a time. For every thrust by the plaintiff for an instruction or an issue, there comes a parry by the defendant. Once begun, the instructive aids and balancing issues multiply. Judicial history teaches that broad issues and accepted definitions suffice and that a workable jury system demands strict adherence to simplicity in jury charges.

680 S.W.2d 798, 801 (Tex. 1984). Often, less belongs in the charge, and more should be left for arguments to the jury.[1]

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[1] For additional discussion of the history, evolution, and current status of the broad form versus granulated issue debate, see Christopher W. Martin, *Jury Charge Landmines in Insurance Cases: Beyond the PJC*, *in* STATE BAR OF TEX. 4TH ANN. ADVANCED INSURANCE LAW COURSE 22-4 TO 22-6 (2007), and Charles R. "Skip" Watson,

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