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I. INTRODUCTION

It is ironic that insurance lawyers spend enormous amounts of time on discovery issues that rarely impact the ultimate resolution of a case and, at the same time, lawyers spend very little time on those things that directly impact the resolution of the case – the jury charge. Because the answers to the questions in the jury charge determine which parties win and lose, it is shocking that more lawyers do not spend more time mastering the nuances of Texas law regarding jury charges. The reality that most cases settle and few cases are actually tried unquestionably creates fewer opportunities and fewer motivations for lawyers to master the details of Texas jury charge law. It is therefore not surprising that so many mistakes are made by practitioners when submitting and objecting to the questions, instructions and definitions in jury charges.

This subject is daunting. As the Texas Supreme Court has acknowledged, the “rules governing charge procedures are difficult enough; the case law applying them has made compliance a labyrinth daunting to the most experienced trial lawyer.” State Dept. Highrise & Public Transp. v. Payne, 838 S.W.2d 235, 240 (Tex. 1992). Lawyers were promised, more than a decade ago, that jury charge practice would be simplified when the high court stated: “we can, however, begin to reduce the complexity that case law has contributed to charge procedures.” Id. at 241. Despite the promise of our high court, in the past decade the situation has not improved. In fact, it has worsened. “The process of telling the jury the applicable law and inquiring of them their verdict [remains] a risky gambit in which counsel has less reason to know that he or she has protected a client’s rights than at any other time in the trial.” Id. at 240. Within the last four years, the Texas Legislature added its own layer of complexity to this labyrinth with passage of “House Bill 4” and the corresponding change to both questions and instructions now required by the “new” law.

The purpose of this article is to discuss the applicability of the Texas Pattern Jury Charge to insurance cases asserting contractual and extra-contractual causes of action against an insurance company. The purpose of this article is not to educate the practitioner on the mechanics of how to preserve error in the jury charge, the procedural nuances of the charge conference, or the appellate interplay between evidentiary review and the charge. Those topics are adequately covered in dozens of wonderful articles available through Texas Bar CLE and other law review articles and CLE papers.

II. GENERAL OBSERVATIONS REGARDING BROAD FORM SUBMISSIONS

The most important question in any insurance case is whether or the jury questions must be submitted in a broad form submission. Although the answer to this question should be very simple, it is one of the most complicated in Texas Jurisprudence thanks to the reluctance of the Texas Supreme Court to resolve the issue once and for all.
As of January 1, 1988, Rule 277 of the Texas Rules of Civil Procedure was amended to require broad form submission in all jury chases “whenever feasible.” The move to broad form submission occurred incrementally over several decades. The development of Texas law resembles more of a swinging pendulum than a linear progression of rational thought. Before analyzing the current status of broad form submissions in Texas insurance cases, a brief history lesson is warranted.

A. The Historical Development of the Broad Form Submission in Texas

To understand today’s charge in insurance cases one must understand the historical context within which we now practice.

1. 1913 – 2000: Transition to broad form

From 1913 to 1973, Texas Rule of Civil Procedure 277 required that issues be submitted “distinctly and separately.” In the 1922 case of *Fox v. Dallas Hotel Co.*, 240 S.W. 517, 522 (Tex. 1922), trial courts were instructed to “submit each issue distinctly and separately, avoiding all intermingling.” In *Fox*, the court held that each of the defendant’s contributory negligence allegations had to be submitted separately. *Id.* at 521-22.

In 1973, Rule 277 was amended to provide trial courts with discretion in submitting jury charges:

> It shall be discretionary with the court whether to submit separate questions with respect to each element of a case or to submit the issues broadly. It shall not be objectionable that a question is general or includes a combination of elements or issues.

TEX. R. CIV. P. 277 (superceded). In *Mobil Chemical v. Bell*, 517 S.W.2d 245, 255 (Tex. 1974), the court held that the new rule meant that the jury could simply be asked whether a party was negligent. In 1980, the Texas Supreme Court stated that the 1973 amendment to Rule 277 was designed to abolish the “distinctly and separately requirement.” *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 937 (Tex. 1980).

During the 1980s, simplicity was the goal in charge practice. The Supreme Court indicated its intent to move toward broad-form submissions in *Burk Royalty Co. v. Walls*, 616 S.W.2d 911 (Tex. 1981) and *Lemos v. Montez*, 680 S.W.2d 798, 801 (Tex. 1984), when it stated that “a workable jury system demands strict adherence to simplicity in jury charges” and overruled all cases construing Rule 277 prior to the 1973 revisions.

The transition from distinct and separate issues to broad-form questions was furthered with the 1988 amendment to Rule 277. As the rule reads today, “broad-form questions” shall be submitted “whenever feasible.” Whenever feasible means “in any or every instance in which it is capable of being accomplished.” *Tex. Dept. of Human Res. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990); *Hyundai Motor Co. v. Chandler*, 882 S.W.2d 606, 616-17 (Tex. App. —Corpus
But even after the broad-form mandate in 1988, courts continued to give great deference to a trial court’s decision to submit a granulated charge. Thus, even with adequate preservation of error in the failure to submit a broad-form charge, courts frequently found no error or harmless error. See H.E. Butt Gro. Co. v. Warner, 845 S.W.2d 258, 259-60 (Tex. 1992) (granulated submission not harmful); Rosell v. Central West Motor States, Inc., 89 S.W.3d 643, 653-55 (Tex. App. —Dallas 2002, pet. denied) (granulated submission of negligent hiring, negligent training and negligent entrustment within court’s discretion to ensure needed answers without confusing jury); Isern v. Watson, 942 S.W.2d 186, 191 (Tex. App. —Beaumont 1997, writ denied) (citing Warner and holding that trial court had discretion to submit granulated factual bases in negligence theory); Miller v. Wal-Mart Stores, Inc., 918 S.W.2d 658, 663-64 (Tex. App. —Amarillo 1996, writ denied) (trial court had discretion to submit separate question to resolve predicate factual dispute and condition liability question on affirmative finding to predicate issue); Sanchez v. Excelo Bldg. Maintenance, 780 S.W.2d 851, 853-54 (Tex. App. —San Antonio 1989, no writ) (court had discretion to submit four elements in two questions when charge was not overly complex or granulated); see also Diamond Offshore Mgmt. Co. v. Guidry, 84 S.W.3d 256, 263-64 (Tex. App. —Beaumont 2002, pet. filed) (refusal to use granulated submission of “course and scope” and “in the service of the vessel” not improper particularly when issues represent inferential rebuttal issues).

However, in Exxon Pipeline Co. v. Zwahr, 35 S.W.3d 705, 713 (Tex. App. —Houston [1st Dist.] 2000), rev’d on other grounds, 88 S.W.3d 623 (Tex. 2002), the Court of Appeals found that the failure to submit the charge in broad form was harmful error; i.e., an otherwise error-free submission of separate and distinct special issues was reversed solely because of the failure to comply with Rule 277’s mandate to use broad-form questions. Id. (holding that the trial court failed to comply with Rule 277’s broad-form mandate by submitting two separate damage questions on fair market value).

2. **2000 – Present: Retreat from pure broad form**

In the now-famous Casteel decision, the Texas Supreme Court held that when both valid and invalid theories of liability were included in a single broad-form question, thus making it impossible to determine which the jury based its finding on, the error was harmful. Moreover, the court held that broad-form submission may not be feasible when there are alternative liability standards and the governing law is unsettled or when the trial court is unsure whether it should submit a particular theory of liability. Casteel, 22 S.W.3d at 390; Excel Corp. v. Apodaca, 51 S.W.3d 686 (Tex. App. —Amarillo 2001), rev’d on other grounds, 81 S.W.3d 817 (Tex. 2002). Thus, a mere possibility that the jury got it right despite the error is no longer a viable appellate analytical standard applicable to charge error involving improper theories of liability. Wal-Mart Stores, Inc. v. Redding, 56 S.W.3d 141, 152-53 (Tex. App. —Houston [14th Dist.] 2001, pet. denied).2

The charge in Casteel included a single liability question that could have been based on any of thirteen independent grounds – the first five of which were taken from the DTPA’s
“laundry list” in section 17.46(b). The plaintiff, Crown Life, did not have the requisite consumer status for four of those “laundry list” grounds. The liability question called for a single answer, which the jury answered affirmatively. The Court ruled that, as a result, the jury could have based its affirmative answer solely on one or more the erroneously submitted theories. The Court concluded that “when a trial court submits a single broad-form liability question incorporating multiple theories of liability, the error is harmful and a new trial is required when the appellate court cannot determine whether the jury based its verdict on an improperly submitted invalid theory.” Casteel at 388.3

III. THE SUBMISSION OF CONTRACTUAL COVERAGE CLAIMS, BREACH OF CONTRACT QUESTIONS, AND CONDITION PRECEDENT ISSUES.

A. Contractual Coverage Questions

The pattern jury charge is of little use for practitioners or courts required to charge a jury in a case involving contractual coverage questions. The standard breach of contract questions is grossly inadequate to deal with the complexities of modern insurance policies. The primary reason why the standard breach of contract question in the PJC does not work is the amount of instructions that such a question would typically require even when dealing with the most simple of insurance policies. Such an instruction would involve dozens of paragraphs from the policy setting forth the insuring agreement, exclusions, limitations, endorsements, the terms of coverage and other applicable limitations. Such an instruction would hopelessly confuse any juror.

As such, the trend in recent years has been to submit contractual coverage questions with very specific questions taken from the insurance agreement itself. A good illustration of this trend can be seen in International Ins. Co. v. RSR Corp., 426 F.3d 281 (5th Cir. 2005). In RSR, an environmental coverage case involving a claims-made Environmental Impairment Liability (EIL) insurance policy, the court framed the jury charge around the particular language in the policy. The jury in this case was asked whether the Environmental Protection Agency it made a “claim” against the insured, RSR, concerning a particular site where the insured had discharged waste. The district court instructed the jury regarding the definition of the term “claim,” which was defined as:

The term “claim” means an assertion by a third party, that in the opinion of the third party, the insured is liable to it for damages within the risks covered by the policy, whether or not there is reason to believe that there actually is liability. An insured’s mere awareness of a potential claim is not a claim. A claim does not require the institution of formal proceedings.

Id. at 290. The district court arrived at the definition of “claim” it presented to the jury by noting that the insurance policy failed to define the term. The court was further guided by its legal determination that the policy term “claim” was ambiguous and thus must be construed strictly against the insurer because it had more than one reasonable meaning.
On appeal, the Fifth Circuit agreed with the district court that the term “claim” is susceptible of more than one reasonable interpretation. The Fifth Circuit held:

Accordingly, we construe the ambiguous noun “claim” using its ordinary meaning that is most favorable to the insured in this case, that is, as the “assertion of a right” to hold the insured liable. This is essentially the meaning that the district court adopted when it defined “claim” in the jury charge as “an assertion by a third party, that in the opinion of the third party, the insured is liable to it for damages within the risks covered by the policy.”

Id. at 292. As such, the Fifth Circuit rejected the insurer’s argument that this instruction was legally erroneous because it did not require the jury to find that the EPA had made a “demand” of some kind on the insured.

It is interesting to note that the Fifth Circuit also approved of a separate instruction informing a jury of its ability to consider extrinsic evidence due to the court’s prior determination of ambiguity. Following the aforementioned definition of a “claim,” the jury was instructed:

In ascertaining the answer to this question, you are instructed to consider all the facts and circumstances surrounding the EIL Policy, as well as the conduct of the parties. I have defined “claim” for you above in the definitions section of this Charge. I further instruct you that the meaning of “claim” derives its scope from the use to which it is put by the parties involved in this case. In other words, the meaning of “claim” must be considered in the context of the EIL Policy itself and as applied in the context of this environmental litigation. Evidence of the parties (or their predecessors) and/or the EPA considered there to be a claim, while by no mean determinative, is probative of the definition of claim contemplated by the parties.

Id. at 295. The Fifth Circuit found “the supplemental instruction properly guided the jury in the appropriate use of the evidence for those purposes.” Id. Because the Fifth Circuit found Texas law permitted the insured to have the jury consider the “surrounding circumstances” in evaluating the applicability of the policy language, it found the extrinsic evidence supplemental jury instruction to be appropriate.

B. Breach of Contract Questions

Because the submission of the PJC’s standard breach of contract question would typically require an outrageously burdensome jury instruction regarding the terms, limitations, exclusions, endorsements and other relevant provisions of a policy, most breach of contract questions are submitted with regard to the existence of factual issues resulting in the existence of coverage. In other words, the appropriate submission of a breach of contract question in a first-party insurance case should not ask directly whether or not a contract has been breached but, instead, should ask
whether factual circumstances exist the affirmative answer to which results in coverage under the
terms of the insurance policy.

For example, in *Hill v. State Farm Lloyds*, 79 Fed. Appx. 644 (5th Cir. 2003), the district
court submitted the following liability question:

Did a plumbing leak or leaks cause any or all of the damage plaintiff Junior Hill’s
home?

*Id.* at 646. In this foundation case, that question, while far from perfect, was the general type of
question submitted in this type of insurance case. Instead of inquiring whether the contract was
breached and then instructing the jury with a lengthy, convoluted, and confusing instruction as to
all of the relevant terms, limitations and exclusions of policy, the submission in *Hill* narrowed
the inquiry to a factual determination of whether or not plumbing leaks, which was a covered
cause of loss under the homeowner’s policy in question, resulted in damage to the insured’s
home. Such a submission is significantly more beneficial than the alternative under the PJC
because the factually based question requires minimal, if any, instructions. If the jury finds
plumbing leaks caused damage to the insured’s residential foundation or the structure of the
dwelling, then there is coverage under the version of the homeowner’s policy at issue in *Hill.*

(It should be noted that the aforementioned contractual liability question is technically
erroneous because of its use of the “any or all” language. In *Hill*, State Farm introduced
evidence of conditions causing damage to plaintiff’s foundation and dwelling due to conditions
other than plumbing leaks. As such, the “any or all” language was inappropriate. The Fifth
Circuit failed to address this particular issue and, as such, the precise question used is of limited
utility in other cases. The nature of the question submitted in *Hill* was appropriate but the “any
or all” language was inappropriate under the circumstances.)

It is also interesting to note that the court in *Hill* also approved several instructions
informing the jury of the parameters of the insurance coverage. The district court instructed the
jury:

You are hereby instructed the damages which result from plumbing leaks
are covered by the insurance policy issued by State Farm Lloyds.

*Id.* at 647. Curiously, the policyholder objected on appeal to this particular instruction. The
Fifth Circuit disagreed finding that it was an appropriate statement of the applicable policy
language.

C. Condition Precedent Questions

The PJC lacks any meaningful questions or instructions regarding the common conditions
precedent in insurance policies. Condition precedent questions should be submitted prior to the
liability question and in the same general format discussed above. In other words, it is
inappropriate to ask whether or not “condition precedence” were complied with in the policy
because, if a single breach of contract question were asked, the resulting instructions would be lengthy and confusing in most circumstances. Instead, factually specific inquiry should be made on those topics for which evidence supports the submission of such a question. In other words, almost all policies contain condition precedents regarding the submission of the claim to the insurer and the insured’s duty to cooperate with the investigation or handling of the claim. As such, a proper jury question regarding the condition precedent will involve a specific factual inquiry about whether the policyholder gave timely notice, properly responded to the insurer’s request for information and documentation, whether the insured cooperated with the insurer’s investigation, or whatever the applicable condition is. Most conditions precedent will require some additional instruction. For example, a late notice question will require some effort to instruct the jury on what is meant by “late notice” or “timely notice.” Likewise, a question regarding the duty to cooperate will inevitably require an instruction regarding the meaning of “cooperation” and the minimum level legally required. To the extent these are not defined in the policy, the litigants and the court will have to look to case law or common and ordinary definitions of the relevant terms.

Although not required, it makes logical sense to put condition precedent questions prior to contractual liability questions. To the extent a negative answer to a condition precedent question precludes the ability to breach the contract (or excuses the insurer’s conduct) then the contractual liability question can be predicated upon the answer to the condition precedent question. Such an order is not mandatory in this instance but it frequently is appropriate because conditions precedent are, as the term implies, predicate requirements before contractual liability can be imposed.

D. Unique Issues in Liability Insurance Coverage Cases

Perhaps the most perplexing problem in the submission of insurance-related cases involves the determination of a liability insurer’s obligation to pay in circumstances where the insurer’s coverage issues differs from the third party’s submitted basis for insured liability.

This issue was addressed in Swicegood v. Medical Protective, 2003 WL 22234928 (N.D. Tex) by Judge Fitzwater with somewhat remarkable observations. After rejecting several summary judgments connected with a coverage case that proceeded after trial of the underlying liability issue against the insured, the Court ultimately held:

The court predicts that the Texas Supreme Court will hold that new evidence can be introduced at a coverage trial when the proof is necessary to resolve a controlling coverage question that was not conclusively decided in the indemnity suit. By “not conclusively decided” the court means the issue was not determined in a way that binds all affected parties in the coverage case (e.g., via collateral estoppel). An undecided issue could include one that the parties in the indemnity case had no reason to litigate, e.g., an exclusion from coverage, where the burden of proof would be on a non-party insurer.
2003 WL 22234928 at pp. 12, 13-14: The court also held that if the coverage question is one of law that can be decided on the record of the underlying suit, no new evidence is admissible.

Apply the court’s *Erie*-guess to the present case, it holds that the proof to be admitted at trial will consist of historical evidence from the Underlying Lawsuit and expert testimony to assist the jury in allocating or apportioning covered and non-covered damages. In other words, the evidence to be admitted will be limited to historical documents such as the Swicegood and Clinic Policies, the court’s opinion in *Swicegood I*, the pleadings, trial transcript, jury charge, verdict, and judgment in the Underlying Lawsuit, the briefs and opinion in *Swicegood II*, and the expert testimony to help the jury understand this evidence and decide whether the damages in the Underlying Lawsuit should be allocated between covered and non-covered conduct and, if so, how. For example, Dean may call expert witnesses to opine that no allocation is necessary because, based on their review of the proceedings in the Underlying Lawsuit, the damages awarded were necessarily limited to covered acts of medical malpractice. Medical Protective’s experts may testify, for example that some or all of the damages were necessarily awarded based on the romantic/sexual relationship between Dean and Dr. Swicegood and not covered.

*Id.* A review of it suggests that a more carefully crafted charge in the underlying case might have prevented the rather serpentine approach taken after verdict.

**IV. EXTRA-CONTRACTUAL SUBMISSIONS (INCLUDING INSURANCE CODE, DTPA AND COMMON LAW BAD FAITH QUESTIONS)**

**A. General Observations**

The primary impact of *Casteel* is a proliferation in the number of blanks which a jury will be required to answer regarding the extra-contractual claims against an insurance company. Prior to *Casteel*, a DTPA question typically involved one single liability question, an Insurance Code violation typically involved one liability question and a common law bad faith claim involved one liability question. Depending upon the number of statutory violations alleged, it is now possible to submit one or two dozen liability questions based on each of the subsections of the DTPA and Article 541 (formerly Article 21.21). Any defense lawyer who fears a multitude of liability questions should be horrified at this prospect. It is, however, the law.

One initial observation is appropriate regarding creative efforts to define the statutory exposure under wither the DTPA or the Insurance Code. Counsel (and courts) should be very hesitant to apply definitions or instructions to the liability elements of the DTPA or the Insurance Code because of the ease with which such definitions or instructions can result in reversible error.

For example, in *Spencer v. Eagle Star Ins. Co. of America*, 876 S.W.2d 154 (Tex. 1994), the charge contained a definition to the liability question which asked whether or not the
defendant engaged in an “unfair practice in the business of insurance.” The trial court defined this phrase as:

Any act or series of acts which is arbitrary, without justification, would take advantage of a person to the extent that an unjust or inequitable result is obtained.

*Id.* at 156. The Texas Supreme Court found this instruction to be erroneous: “when liability is asserted based on a provision of a statue or regulation, a jury charge should track the language of the provision as closely as possible. The charge here fails the test.” *Id.* at 157. While the definition was based on some statutory language, the Supreme Court found it objectionable because “it allowed the jury to find an unfair insurance practiced based upon any action by Eagle Star that took advantage of the Spencers or resulted in an inequitable result.” *Id.* The court further held: “liability cannot be imposed on any of the claims asserted by the Spencers on so broad and ill-defined a finding.” *Id.*

B. Insurance Code Claims

Insurance Code claims are set forth in the PJC at PJC 102.14 through PJC 102.24. As stated earlier, *Casteel* will require a separate liability answer for each statutory subsection pled as a separate improper act by the insurer. The potential submission of so many liability questions increases the importance of counsel for the insurer to consider efforts to reduce or eliminate such causes of action prior to the submission of the jury charge. Negotiated withdrawals, motions for summary judgment, special exceptions, or motions for directed verdict should always be considered to eliminate any extraneous or unsupported statutory violations.

With respect to liability cases, PJC 102.18 contains a very interesting comment. The PJC Committee stated:

In *Rocor Int’l. v. National Union Fire Ins. Co.*, 77 S.W.3d 253, 260 (Tex. 2002), the supreme court held that a liability insurer may be liable to an insured under Texas Insurance Code Article 21.21 (now codified as Texas Insurance Code ch. 541) for failing to settle when the insurer’s liability becomes reasonably clear. The court held that the insurer’s liability becomes reasonably clear when (1) the policy covers the claim, (2) the insured’s liability is reasonably clear, (3) the claimant has made a settlement demand within policy limits, and (4) the demand’s terms are such than an ordinarily prudent insurer would accept it. *Rocor* at 262. Element 1, in most cases, will be a question of law or require a resolution of a separate fact question. Element 3, in most cases, will involve a question of law. The following instruction would be appropriate to submit [for] Elements 2 and 4: “you are instructed that an ‘insurer’s liability has become reasonably clear’ when the insured’s liability to the claimant in the underlying case is reasonably clear and the claimant’s settlement demand to the insured is such that an ordinarily prudent insurer would accept it.”

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C. DTPA Claims

As before, Casteel requires the submission of all independent liability allegations. The DTPA questions are contained in PJC 102.1 through 101.24.

D. Common Law Bad Faith Claims

The proposed charge for common law bad faith claims are set forth in the PJC at PJC 103.1 through 103.3. The Pattern Jury Charge, however, fails to include any definition of the defenses consistently recognized by the Texas Supreme Court applicable to this cause of action. The Texas Supreme Court has recognized the inapplicability of this tort in the absence of a covered contract claim. Likewise, the High Court has recognized the existence of a bona fide controversy defense. Likewise, the Texas Supreme Court has recognized a defense based upon an insurance company’s reasonable reliance upon an expert report. Any and all of the defenses recognized by Texas courts to an allegation of common law bad faith are appropriate instructions to accompany a PJC liability question.

V. ACTUAL AND EXEMPLARY DAMAGE QUESTIONS

A. Actual Damages

1. Harris County v. Smith

Prior to Casteel, courts regularly upheld damage questions with a lump-sum answer, if the evidence supported that amount for any sub-part (or element) of the damages. Citing to its rationale in Casteel, however, the Supreme Court clarified in 2002 that a broad-form (or lump-sum or non-segregated) damage finding may cause reversible error when there is no evidence supporting one or more of those elements. Harris County v. Smith, 96 S.W.3d 230 (Tex. 2002).

In Harris County, the trial court submitted two broad-form damages questions, each of which instructed the jury to consider several elements and award a single lump-sum amount. See question in Appendix. Harris County objected to the questions and asked the trial court to submit each element separately. Id. at 231. After the court denied the request for separate submissions, Harris County objected on the ground that one listed element in each question was supported by no evidence. Id. at 231-32. The trial court overruled the objections.

On appeal, the Court of Appeals concluded there was no evidence of the challenged elements, but the submission error was harmless. The Texas Supreme Court reversed, holding that: “Casteel’s reasoning applies equally to broad-form damage questions” id at 236 and that “the trial court erred in overruling [the defendant’s] timely and specific objection to the charge, which mixed valid and invalid elements of damages in a single broad-form submission, and that such error was harmful because it prevented the appellate court from determining ‘whether the jury based its verdict on an improperly submitted invalid’ element of damage.” Id. at 234.

Significantly, the Court stated that its decisions in Casteel and Harris County did not represent a significant change in its preference for broad-form submissions: “Neither our
decision today nor Casteel is a retrenchment from our fundamental commitment to broad-form submission.” Id. at 235. The court continued: “When properly utilized, broad-form submission can simplify charge conferences and provide more comprehensible questions for the jury. See Hyundai Motor Co. v. Rodriguez, 995 S.W.2d 661, 664 (Tex. 1999). 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.” Id. (quoting Muldrow & Underwood, Application of the Harmless Error Standard to Errors in the Charge, 48 BAYLOR L. REV. 815, 853 (1996)).

2. Golden Eagle Archery, Inc. v. Jackson

While the no-evidence problem of Harris County argues for separate damages blanks, the factual sufficiency standard of review announced in Golden Eagle Archery, Inc. v. Jackson, 116 S.W.3d 757 (Tex. 2003), seems to argue for broad-form submission of damages elements. Golden Eagle is a products liability case in which the jury found liability and awarded damages in five separate categories, including (1) medical care, (2) physical pain and mental anguish, (3) physical impairment of loss of vision, (4) disfigurement, and (5) loss of earnings in the past. Id. at 760. In answer to a sixth category—physical impairment other than the loss of vision—the jury awarded $0 damages. Id. The trial court did not define physical impairment. And, instead of defining the six damage categories such that they did not overlap, the court, following PJC 8.2, instructed the jury to “[c]onsider the elements of damages listed below and none other. Consider each element separately. Do not include damages for one element in any other element.” Id. at 770.

The Court of Appeals agreed with plaintiff’s argument on appeal that the $0 finding on physical impairment other than the loss of vision was against the great weight of the evidence. The Supreme Court reversed and announced a new standard for conducting a factual sufficiency review when some of the categories of damages are not defined and are not cleanly and clearly segregated. Id. at 770-73.

The court ruled that when only one category of damages is challenged on the basis that the award in that category was zero or was too low, a court should consider only whether the evidence unique to that category is so against the great weight and preponderance of the evidence as to be manifestly unjust, shock the conscience, or clearly demonstrate bias. When the jury’s failure to find greater damages in more than one overlapping category is challenged, the Court of Appeals should first determine if the evidence unique to each category is factually sufficient. If it is not, the court of appeals should then consider all the overlapping evidence, together with the evidence unique to each category, to determine if the total amount awarded in the overlapping categories is factually sufficient. Id. at 773.

The Supreme Court rejected Golden Eagle’s argument that the splitting of physical impairment into two separate elements (“physical impairment of loss of vision” and “physical impairment other than loss of vision”) violated the broad-form mandate of Rule 277. The court stated that “[a]lthough the trial court granulated physical impairment into two separate categories, Golden Eagle did not explain how it was harmed by this submission, particularly in light of the jury’s award of ‘$0’ for physical impairment other than loss of vision.” Id. at 776.
B. Exemplary Damages

Three years ago, the Texas Supreme Court amended Rule 226a to implement the requirement for juror unanimity for exemplary damages in compliance with House Bill 4, the omnibus tort-reform legislation enacted in 2003. Acts 2003, 78th Leg., ch. 204, § 13.04, eff. Sept. 1, 2003. House Bill 4 amended Texas Civil Practice and Remedies Code § 41.003 to require unanimous jury findings on “liability for and the amount of exemplary damages” and a jury instruction that “the moment of such damages must be unanimous,” making it harder for a claimant to recover punitive damages. TEX. CIV. PRAC. & REM. CODE § 41.003(d), (e).

Before the amendments to Chapter 41, at least ten jurors (in district court) could agree to the jury’s answer to a question, whether that answer was affirmative or negative. TEX. CIV. P. 292 (a verdict may be rendered “by the occurrence, as to each and all answers made, of the same ten members of an original jury of twelve.”) Stated differently, ten votes were required for either a “yes” or “no” answer. If ten votes could not be obtained, the jury was hung.

Under the House Bill 4 amendments, it is clear that the jury must be instructed that its finding on the amount of punitive damages must be unanimous. But, until the Supreme Court changed Rule 226a, it was arguably unclear whether the jury should be instructed that its answers to the underlying liability question (e.g. negligence or breach of fiduciary duty) and for the exemplary predicate question (i.e., malice, gross negligence or fraud) must also be unanimous to avoid conflicts in the jury’s findings. Stated differently, is it inconsistent for a juror to take the position, for example, that the defendant was not negligent but then, when answer the exemplary damages question, take the position that the defendant was grossly negligent? If it is inconsistent for an individual juror to take those two positions, does that mean that the jury must be unanimous on all underlying liability questions in order to award exemplary damages?

The Texas Supreme Court answered that question affirmatively when it interpreted the statute to implicitly require unanimity for the exemplary damages question as well as the underlying tort liability and predicate questions and amended Texas Rule of Civil Procedure 226a accordingly. The amendment to Rule 226a took effect February 1, 2005 in cases filed on or after September 1, 2003. Under the rule, unanimity is required for the following jury questions.

- Tort liability question serving as the predicate for exemplary damages: Unanimous
- Tort actual damages question: NOT unanimous
- Exemplary liability question: Unanimous and expressly conditioned on a
unanimous tort liability finding.

- Exemplary damages question: Unanimous

VI. PREJUDGMENT INTEREST

House Bill 4 added Section 304.1045 to the Finance Code which provides that prejudgment interest may not be assessed or recovered on an award of future damages. This has important implications for the court’s charge. As under Cavnar, a plaintiff may have the burden to request a damage question that segregates between past and future damages. If the plaintiff does not segregate past losses from future losses, he may not be entitled to recover prejudgment interest on those non-segregated elements of damages. Cavnar, 696 S.W.2d 549 (Tex. 1985); Domingues v. City of San Antonio, 985 S.W.2d 505, 511 (Tex. App. –San Antonio 1998, pet. denied); Cresthaven Nursing Residence v. Freeman, 134 S.W.3d 214, 223 (Tex. App. –2003, no pet.).

Cavnar, which was a pre-statute common law case, did not allow interest on future damages, holding that, unless statutorily or contractually provided, prejudgment interest was not available on actual damages that have accrued by the time of judgment. See Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549, 555-56 (Tex. 1985). Thus, to recover prejudgment interest on accrued damages under Cavnar, the plaintiff had to segregate accrued damages from future damages. Id. at 556; see also Benavidez v. Isles Constr. Co., 726 S.W.2d 23, 24-25 (Tex. 1987) (although jury awarded lump sum combining past and future damages, stipulation on past medical expenses and separate finding on property damage sufficiently segregated past and future damages to allow prejudgment interest on past damages); Yowell v. Piper Aircraft Corp., 703 S.W.2d 630, 636 (Tex. 1986) (plaintiffs were not entitled to prejudgment interest on wrongful death claims because they failed to segregate past damages from future, unaccrued damages such as loss of inheritance); Loyd Elec. Co., Inc. v. Millett, 767 S.W.2d 476, 484 (Tex. App. –San Antonio 1989, no writ) (court correctly calculated prejudgment interest on damages accruing before trial).

Article 5069-1.05, (the predecessor to sections 304.101-.108 of the Texas Finance Code), enacted in 1987, modified Cavnar, in “wrongful death, personal injury, and property damage” cases. In C&H Nationwide, Inc. v. Thompson, the Texas Supreme Court held that this statute allowed recovery of prejudgment interest in such cases not only on past damages, but also on future damages included in the judgment. C&H Nationwide, Inc. v. Thompson, 903 S.W.2d 315, 324-25 (Tex. 1994). But see Columbia Hosp. Corp. v. Moore, 92 S.W.3d 470, 474-75 (Tex. 2002) (prohibiting the award of prejudgment interest on future damages in health care liability claims). The court reasoned that the phrase “amount of the judgment” in article 5069-1.05, section 6(a) made no distinction between past and future damages and thus entitled the plaintiffs to prejudgment interest on the entire judgment. C&D Robotics, Inc. v. Mann, 47 S.W.3d 194, 202 (Tex. App. –Texarkana 2001, no pet.); Reliable Consultants, Inc. v. Jaquez, 25 S.W.3d 336, 347 (Tex. App. –Austin 2000, pet. denied); Weidner v. Sanchez, 14 S.W.3d 353, 372 (Tex. App.
C&H Nationwide, 903 S.W.2d at 325. Based on C&H Nationwide, several appellate courts upheld awards of prejudgment interest on future damages. C&D Robotics, Inc. v. Mann, 47 S.W.3d 194-202 (Tex. App. –Texarkana 2001, no pet.); Reliable Consultants Inc v. Jaquez, 25 S.W.3d 336-347 (Tex. App. –Austin 2000, pet. denied); Weidner v. Sanchez, 14 S.W.3d 353, 372 (Tex. App. –Houston [14th Dist.] 2000, no pet.); Jamar v. Patterson, 910 S.W.2d 118, 124 (Tex. App. –Houston [14th Dist.] 1995, writ denied). In this context, where prejudgment interest was allowed on both past and future damages, no segregation of damages was necessary. However, those authorities are now superseded by the House Bill 4 amendments.

VII. THE JURY CHARGE AND REVERSIBLE ERROR

A. Strategy decisions based on open questions left by Casteel and Harris County

1. Drafting the proposed charge

In light of the developing law on when broad form submissions are feasible, practical considerations or matters of strategy will dictate the requested form of submission. The variations for a multi-theory case are too numerous to outline. Indeed, the combinations will vary depending upon, among other things: (1) how many plaintiffs and defendants the charge will submit, (2) how many theories of liability and/or defense the charge will submit, (3) the strengths and weaknesses of a case—on evidentiary, legal and jury appeal grounds, (4) what relief or combinations of relief a party will seek in formation of the judgment, and (5) the risk of reversal that a party can tolerate to achieve a “winning” verdict. These various influences will affect the ultimate submission choices.

For example, a plaintiff might prefer that the trial court not submit multiple defenses in separate questions because (1) the jury receives more than one opportunity to thwart the plaintiff’s recovery, (2) the opportunity for multiple defensive answers might create an overall perception against liability, (3) the possibility of conflicts increases with the number of questions submitted, and (4) a defendant can more easily challenge the evidentiary support of the jury’s findings. On the other hand, if the jury answers a multi-theory question adverse to the plaintiff, the plaintiff will face a difficult task in attacking the jury’s finding.

But one cannot wait to see what the jury answers before deciding to object to the form of the question or the underlying reasons it will fail. Instead, assuming a litigant decides after consideration of strategic points to raise Casteel, the “broad-form” error must have been preserved prior to submission to the jury. Molina v. Moore, 33 S.W.3d 323,328 (Tex. App. —Amarillo 2000, no pet.) (even if Casteel extended to require separate answers to elements of damage, party waived error by failing to object to the form). But cf. Iron Mountain Bison Ranch, Inc. v. Easley Trailee Mfg., Inc., 42 S.W.3d 149, 156-57 (Tex. App. —Amarillo 2000, no pet.) (despite lack of objection on broad form format, court found objection as to lack of evidentiary support sufficient to preserve Casteel error).11
As a further example, in the context of segregated damages, submission of multiple damage blanks may make a defendant queasy. They may ask whether separate blanks are the best choice. Instead, as a defendant, do you want to allow a non-segregated damage finding without objection? What challenge do you face to gain review and reversal on the sufficiency of the evidence of any one or more damage element? Is that one of the main issues in the case or a lesser issue? The answers to those questions will help balance the need to win at trial with the risks of reversal on appeal.

2. **To object or not to object**

Whether the form of the broad form question creates a risk of reversal depends upon how many theories of liability and defense a single question combines, how the jury answered the question, and what part of the question fails on what grounds on appeal. For example, except perhaps for omission of a theory of liability, the risk of reversal (or harmful error) generally arises with a question that submits multiple liability or defensive theories in a single question only when the jury returns an *affirmative* finding to any question that contains multiple liability or defensive theories. When one of the multiple theories in a single question fails, a reviewing court cannot determine on what part of the question the jury relied to return an affirmative finding allowing recovery (liability) or on what part the jury relied to disallow recovery (defenses).

On the other hand, a *negative* finding to those same questions would not have the same effect. In that situation, the jury relied upon none of the theories. The form of the question itself caused no error; no question exists as to which part of multi-theory question the jury relied upon to reach its finding. Thus, no risk exists of an improper recovery based on an invalid liability theory or a denial of recovery based on an invalid defensive theory.

However, if the broad-form question submitted both liability and defensive theories, and when one of those theories fails, even with a negative finding, the reviewing court cannot determine whether the jury answered “no” on liability or “yes” on a proper or improper defensive theory. Without knowing on what basis the jury answered in the negative, it may be difficult to hold that the question can stand after the failure of a defensive issue.

Assuming the combination presents potential error, how serious the risk of reversal is should be assessed. Is there some evidence of every theory subsumed in the questions and instructions? How clear and strong is the law for or against the submission you seek? As the volume of evidence and strength of the law increases, the risk of reversal may decrease.

Thus, strategic options will play an important role in deciding how to proceed. If faced with an objection to a submission that is clearly erroneous, modifications to the charge may represent the best strategic choice. But, if faced with objections on potential or unknown errors, the choices become more difficult. An accurate assessment of the record, the law, and the jury’s possible answers becomes critical to making the strategic choices raised in that context.
B. Inferential Rebuttal Instructions


For example, the PJC contains five instructions presenting inferential rebuttal defenses when the defendants blame an occurrence on someone or something other than themselves: (1) sole proximate cause (the occurrence is caused by a person not party to the suit), (2) unavoidable accident (the negligence is not caused by the negligence of any party to it), (3) new and independent cause (the occurrence is caused by someone else later), (4) sudden emergency (the occurrence is caused by something other than the defendant’s negligence and arises suddenly, and (5) act of God (the occurrence is caused by the violence of nature). *Id.*; Texas Pattern Jury Charges – General Negligence & Intentional Personal Torts PJC 3.1-3.5 (2003).

In two recent Texas Supreme Court cases, the high court has taken opposing views on whether a more granulated charge should have been submitted and whether the issue presented was an inferential rebuttal defense in the first place. *See Dillard v. Tex. Elec. Coop*, 157 S.W.3d 429 (Tex. 2005); *Diamond Offshore Mgmt. Co. v. Guidry*, 2005 WL 784265 (Tex. Apr. 8, 2005).


In *Dillard v. Tex. Elec. Coop*, 157 S.W.3d 429 (Tex. 2005), the Texas Supreme Court disapproved of the PJC’s granulated instruction for inferential rebults. At issue was the cause of a fatal car accident that occurred when a truck driver employed by the defendant hit a cow and a subsequent motorist lost control of his car when he struck the dead cow in the roadway and collided with another car, killing the passenger of the second car.

The plaintiff requested two separate inferential rebuttal instructions because the accident could have been caused by a condition beyond the truck driver’s control—the cattle on the roadway—or by someone not a party to the litigation—the unknown cattle owner or the motorist who struck the cow and the plaintiff’s car. The trial court’s charge included only one—the unavoidable accident instruction—and not the sole proximate cause instruction.

The court of appeals concluded that both should have been submitted, but the Texas Supreme Court reversed, holding that the trial court’s charge adequately informed the jury about the defendant’s inferential rebuttal defenses, and the court of appeals erred in holding that the case be retried under a more elaborate and granulated charge.

The Texas Supreme Court was concerned that giving both instructions might improperly nudge the jury. It explained that many of the instructions overlap to create redundancies that are contrary to the spirit of broad-form submission. *Id.* at 433-34. “Under broad-form submission rules, jurors need not agree on every detail of what occurred so long as they agree on the legally relevant result.” *Id.* at 434. The Texas Supreme Court then concluded:
[T]he jurors here could have unanimously found [the defendant truck driver] negligent, even if half believed the negligent act was overloading his truck and half believed it was failing to warn oncoming traffic—acts that preceded two different collisions.

With respect to inferential rebuttal issues, jurors need not agree on what person or thing caused an occurrence, so long as they agree it was not the defendant. If some jurors here blamed the cattle (unavoidable accident or sudden emergency) and the rest blamed the unknown cow owner (sole proximate cause), their differences would be irrelevant—they would properly return a unanimous defense verdict. Just as jurors may find against a defendant without agreeing on which precise acts were negligent, they should be able to find the opposite without agreeing on the precise reason.

*Id.* at 434.

2. **Diamond Offshore Mgmt. Co. v. Guidry**

On the other hand, in *Diamond Offshore Mgmt. Co. v. Guidry*, 2005 WL 784265 (Tex. Apr. 8, 2005), the Texas Supreme Court favored a more granulated charge that would have specifically asked the jury, in a Jones Act wrongful death action, whether a seaman, who was killed ashore in a one-vehicle accident, and whether second seaman, who had been driving the pickup, had been ashore in course of employment. The trial court’s charge instructed the jury on course of employment, but the question submitted to jury asked only about negligence and causation.

The Texas Supreme Court held that “[t]he basic characteristic of an improper inferential rebuttal question to a jury is that it presents a contrary or inconsistent theory from the claim relied upon for recovery.” The defendant’s course and scope questions “did not present a theory inconsistent with the plaintiff’s claim; they asked about elements of the plaintiff’s claim.” *Id.* at *3.

The Texas Supreme Court rejected plaintiff’s argument that submitting separate questions on the course of employment would have been inconsistent with the broad-form mandate of Rule 277. It explained: “Broad-form submission does not entail omitting elements of proof from the charge. While the trial court could certainly have inquired about the separate issues of negligence, causation, and course of employment in a single question with proper instructions, Diamond was not obligated to request such a question. It was required only to object to the absence of any inquiry, which the trial court acknowledged Diamond had done with its requested questions.” *Id.* at *3.

C. **Sufficiency of Evidence Review and the Jury Charge**

The Texas Supreme Court held in *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 7575 (Tex. 2003) at 762:
Before a court can properly conduct a factual sufficiency review it must first have a clear understanding of the evidence that is pertinent to its inquiry. The starting point generally is the charge and instructions to the jury.

The genesis of this modern view that a review of factual and legal sufficiency challenges to a jury’s verdict must be viewed through the prism of the Court’s charge was articulated in Osterberg v. Peca, 12 S.W.3d 31 (Tex. 2000) cert. denied 120 Sup.Ct. 2690 (2000). Osterberg and its progeny recognized that an unobjected-to question, even if perhaps legally erroneous in some regards, still supplies the sole basis for a legal or factual sufficiency review based on established precedent. The basic notion is that a litigant may not sandbag his opponent by standing quiet while the charge is prepared on the assumption that the issues are in fact the material and controlling issues between the parties and then spring up afterwards and claim that the submission was erroneous in some regard. Thus, it is imperative for the practitioner to be aware of the necessity to make a proper legal and evidentiary objection to aspects of the charge that he intends to complain about in terms of an absence of probative support or substantive deficiency.

Since the Court’s opinion in Spencer v. Eagle Star Ins. Co., 876 S.W.2d 154 (Tex. 1994), it had been assumed that a complaint directed at the charge, if sustained, would only result in a remand of the case for retrial as a result of an erroneous submission. That was the precise holding of the Court in Spencer. Not significantly, however, the Texas Supreme Court determined in St. Joseph Hosp. v. Wolff, 94 S.W. 3d 513 (Tex. 2002) the following:

Before we can measure the sufficiency of the evidence we must first identify the standard against which the evidence is to be measured.

In Ostenberg v. Peca, we considered whether we should measure the sufficiency of the evidence against the jury charge that was actually submitted, which the appellants claimed was defective, or against the charge that the trial court should have submitted, and we concluded that “it is the court’s charge, not some other unidentified law, that measures the sufficiency of the evidence when the opposing party fails to object to the charge.”

But this case is different from Osterberg because St. Joseph properly preserved error by objecting to the joint enterprise definition used in the charge. Because the trial court submitted an erroneous definition of joint enterprise over a proper objection, we measure the legal sufficiency of the evidence supporting the jury’s finding of joint enterprise against the Restatement’s definition of joint enterprise as adopted in Shoemaker.

Thus, the actual result of the opinion in St. Joseph Hosp. v. Wolff was to reverse and render based on the absence of evidence of an element of the charge that should have been submitted, but wasn’t. The opinion in St. Joseph Hosp. v. Wolff is actually only a four judge plurality, but there is a concurring opinion by two judges who concur in the rendition of the
judgment. Thus, this procedural basis for rendition based on charge error coupled with a legal sufficiency complaint warrants practitioners being very wary of whether to submit a question or instruction in the face of a specific objection to the non-inclusion or wording of a particular element of the claim or defense.

D. The Liberalization of Preservation of Error

There is a litany of articles in virtually every trial or appellate seminar stressing the myriad ways in which a charge complaint might be waived and suggesting that preservation of error is a highly technical and difficult task. While there are ample cases acknowledging various hyper-technical rules enforcing waiver as to charge complaints, the genuine issues presented is one identified by the Texas Supreme Court in 1995 as a follow-up to its earlier liberalized procedure recognized in State Dept. of Highways v. Payne, 838 S.W.2d 235 (Tex. 1992). This pronouncement is contained by the Supreme Court in a per curiam opinion in Alaniz v. Neuse, 907 S.W.2d 450 Tex. 1995), wherein the Court held:

As trial began, Alaniz submitted to the trial court a complete requested charge which contained on one page a question concerning various elements of damages, including future lost profits. The trial court included that very page in the jury charge, with the references to future lost profits simply redacted. Alaniz objected on the record to the omission, and this was the only objection he made to the charge. The trial court overruled the objection.

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Specifically, the appeals court faulted Alaniz in three respects: for including his request in a complete charge; for submitting his request before trial and not “after the charge [was] given to the parties;” and for not making his request “separate and apart from [his] objection.” 878 S.W.2d at 245.

In each respect the court of appeals erred. First, Alaniz’ request was “written” as Rule 273 requires. The rule does not prohibit including the request in a complete charge as long as it is not obscured. Second, to say that a party does not present a request after the charge is given to the parties simply because he first submitted it earlier, when the trial court was clearly aware of the request, is too strained a reading go of Rule 273. Alaniz raised the issue after the charge was prepared and should not be penalized for also raising it earlier. Third, Alaniz’ written request was plainly separate from his oral objection, and the appeals court’s view that the two were “improperly entwined,” 878 S.W. 2d at 245, was incorrect. The court of appeals also erred in concluding that Payne conflicts with Rule 273. In Payne we held that a party has preserved error in the jury charge when he has made the trial court reasonably aware of the complaint, timely and plainly, and obtained a ruling. 838 S.W.2d at 241.
While *Payne* does not revise the requirements of the rules of procedure regarding the jury charge, it does mandate that those requirements be applied in a common sense manner to serve the purpose of the rules, rather than in a technical manner which defeats them. Under the reading of Rule 273 *Payne* requires, Alaniz preserved his jury charge complaint.

*Id.* at 451.

In both *Payne* and *Alaniz* the question arises, in part, as to when it is the duty of the complaining party to object as distinguished from tendering a written request and whether such tenders need to be separate and so on. It’s apparent that the Texas Supreme Court, at least, is willing to apply a more liberal notion of preservation so long as the trial court is fully aware of the nature of the complaint and acted upon it.

**E. The Improper Comment on the Weight of the Evidence**

A principal distinction between state and federal courts is the ability of a federal judge to comment to the jury on the weight of the evidence and the absolute prohibition of the state trial judge from doing so. Texas courts have frequently held that a general objection that something is a comment on the weight may be too general an objection to be sustained. The thrust of what constitutes an improper comment on the weight of the evidence is perhaps best demonstrated in *First Nat’l. Bank of Amarillo v. Jarnigan*, 794 S.W.2d 54 (Tex. App. –Amarillo 1990, writ den.). That court observed:

> An impermissible comment on the weight of the evidence occurs, when after examining the entire charge it is determined that the judge assumed the truth of a material controverted fact, or exaggerates, minimizes, or withdraws some pertinent evidence from the jury’s consideration. *Lively Exploration v. Valero Transmission*, 751 S.W.2d 649, 653 (Tex. App. –San Antonio 1988, writ denied), *appeal dismissed*, 493 U.S. 1065, 110 S.Ct. 1104, 107 L.Ed.2d 1013 (1990).

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We conclude therefore, that a jury instruction under Rule 201(g) must not amount to a direct comment on the weight of the evidence nor may such an instruction be of such a nature as to advise the jury of the effect of their answers unless it is properly a part of an instruction or definition. It is in this light that we examine the trial court’s recitation of adjudicative facts it had judicially noticed and its instruction that the jury must accept them as conclusively established.

*Id.* at 62. In this case, the court instructed the jury on the facts of which it had taken judicial notice and the court of appeals was deservedly critical of the trial judge having included those conclusively established facts that were judicially noticed as they did not have any bearing on an issue in the charge and clearly constituted the court’s opinion favoring one of the litigants. A
similar result was reached in *Redwine v. AAA Life Ins. Co.*, 852 S.W.2d 10 (Tex. App. -Dallas 1993, no writ).

The danger of improper comments on the weight of the evidence is heightened when a partial summary judgment is rendered in some respect by the trial judge. Summary judgments are more prevalent and partial summary judgments are likewise more prevalent in today’s practice. But the instruction to the jury on what the judge had determined to be the case favoring one of the litigants generally should have no place in the charge or even be presented to the jury. Otherwise, an improper and direct comment on the weight of the evidence may reasonably be inferred from such action. Today, litigants must be extremely cautious in this procedural context.

**VIII. CONCLUSION**

In any civil litigation, the jury charge is frequently the most misunderstood and mistreated “tool” in the entire case. This is particularly true in insurance coverage and bad faith cases where the PJC is of limited utility. There is no substitute for counsel devoting substantial time early in the case to the development of a proper jury charge based on the policy and Texas law. Unfortunately, the manner in which insurance coverage and bad faith cases have to be submitted “cuts against the grain” with which most trial court judges are used to submitting jury charges in other civil cases. As such, litigants should consider the use of trial briefs and carefully documented proposed submission in order to fully inform the trial court of the reversible error implications of failing to submit the charge desired by counsel. It is no wonder that so many insurance cases settle so that lawyers do not have to deal with the myriad of landmines created by the jury charge in coverage and bad faith lawsuits in Texas.
A distinct body of case law has developed in the context of parental rights termination cases regarding whether, after *Casteel*, the Supreme Court’s previous approval of broad-form submission in termination cases remains good law. *Texas Dept. of Human Servs. v. E.B.*, 802 S.W.2d 647 (Tex. 1990) (approving broad-form submission in termination cases). In a number of cases, courts of appeals (with Waco leading the way) have held that a broad-form disjunctive submission of the grounds for termination allows for the possibility of termination based on a statutory ground not found by the required ten jurors and violates *Casteel* (although the supreme court reversed a number of those cases because error was not preserved). *In re J.M.M.*, 80 S.W.3d 232, 246 (Tex. App. —Fort Worth, Jun. 13, 2002, pet. denied); *In re A.F.*, 91 S.W.3d 410, 412 (Tex. App. —Waco 2002), rev’d, 113 S.W.3d 363 (Tex. 2003); *In re A.V.*, 57 S.W.3d 51 (Tex. App. —Waco 2001), rev’d, 113 S.W.3d 355 (Tex. 2003); *In re M.C.M.*, 57 S.W.3d 27, 31 (Tex. App. —Houston [1st Dist.] 2001, pet. denied); *In re B.L.D.*, 56 S.W.3d 203 (Tex. App. —Waco 2001), rev’d, 113 S.W.3d 340 (Tex. 2003); *In re J.F.C.*, 57 S.W.3d 66 (Tex. App. —Waco 2001), rev’d, 96 S.W.3d 256 (Tex. 2002). Other courts of appeals have reached the opposite conclusion. *Thornton v. Texas Dept. of Protective and Regulatory Servs.*, No. 03-01-00317-CV, 2002 WL 246408, *3* (Tex. App.—Austin Feb. 22, 2002, pet. denied) (n.d.p.) (refusing to follow the Waco court of appeals and holding that *Casteel* did not overturn *E.B.*); *In re K.S.*, 76 S.W.3d 36, 42, 48-49 (Tex. App. —Amarillo 2002, no pet.) (holding that *Casteel* was not implicated because no ground submitted for termination was improper; broad-form submission was permitted by *E.B.*).

3 If, on the other hand, other findings can support the jury’s verdict or the court’s judgment, the error may be harmless.

4 *See Thomas v. Oldham*, 895 S.W.2d 352, 359-60 (Tex. 1995); *Provident Am. Ins. Co. v. Castaneda*, 914 S.W.2d 273, 282 (Tex. App. —El Paso 1996) (“so long as the aggregate evidence for all elements of damage supports the entire award, [court] must uphold the verdict”); *rev’d on other grounds*, 988 S.W.2d 189 (Tex. 1998); *Dodge v. Watts*, 876 S.W.2d 542, 545 (Tex. App. —Amarillo 2002) (evidence of pain, mental anguish, and other elements supported aggregate award); *Baylor Medical Plaza Servs. Corp. v. Kidd*, 834 S.W.2d 69, 79 (Tex. App. —Texarkana 1992, writ denied) (mental anguish could support finding by jury even in absence of evidence of other elements); *see also Wal-Mart Stores, Inc. v. Garcia*, 974 S.W.2d 83, 87-88 (Tex. App. —San Antonio 1998, no pet) (without attack of sufficiency of evidence as to entire amount, no point raised for review). Prior to Harris County, only a few courts held that *Casteel* applied to lump-sum damages questions. *See Iron Mountain Bison Ranch, Inc. v. Easley Trailer Mfg., Inc.*, 42 S.W.3d 149, 156-57 (Tex. App. —Amarillo 2000, no pet.) (finding *Casteel* applicable to a damage question that submitted two measures of damage, one of which had no support in the evidence); *City of Garland v. Dallas Morning News*, 2002 WL 31662724 at *3 (Tex. App. —Dallas 2002, no pet.) (n.d.p.) (although prior to Harris County, reversing when trial court submitted non-segregated fee finding over objection when a portion of fees were not recoverable and could be segregated).

5 The court of appeals had refused to extend the rule in *Casteel* to the broad-form damages question, instead applying traditional harm analysis, for three reasons. *See Harris County v. Smith*, 66 S.W.3d 326 (Tex. App. —Houston [1st Dist.] 2001), rev’d, 96 S.W.3d 230 (Tex. 2002). *First*, the court reasoned that *Casteel* is primarily concerned with the “key issue” of liability, and was intended to “preclude” even the possibility that a party might be found liable on a completely invalid theory.” A damage question, however, could not present such, possible constitutional issues, because the “key, primary, and ultimate issue of liability” was already answered. *Second*, the court reasoned that challenging the validity of only one of the elements of damage would be the equivalent of challenging the sufficiency of the evidence for only one element of damage — when, under *Thomas v. Oldham*, 895 S.W.2d 352, 359 (Tex. 1995), the evidence must be considered as a whole. The court held that a party “should not be permitted to accomplish, by challenging the jury charge, what it cannot accomplish by challenging the legal sufficiency of the evidence.” The court added that “[i]n neither case should we presume error based on the possibility of error.” *Third*, the court adopted the reasoning of Professor Dorsaneo, who was also relied upon, in part, by the Texas Supreme Court in *Casteel*, that “there is a principled and sensible basis for concluding there is no reversible error’ when it is reasonable to presume that the jury awarded damages for elements that had support in the
evidence, rather than those that lacked evidentiary support” (citing William V. Dorsaneo, Broad-Form Submission of Jury Questions and the Standard of Review, 46 SMU L. REV. 601 630 (1992)). The court reasoned that this approach represented the “well-settled” rule of harmless error.

6 In addition to the failure of evidence, refusal to segregate damages over objection could cause error in the context of legal theories as well. See TEX. CIV. PRAC. & REM. CODE § 41.008 (calculating cap with economic and noneconomic damages); TEX. FIN. CODE § 304.1045 (applies to final judgments signed or subject to appeal on or after Sept. 1, 2003, and precludes prejudgment interest on future damages); Roberts v. Williamson, 111 S.W.3d 113 (Tex. 2003) (holding Texas does not recognize action for parent’s loss of consortium for non-fatal injury to child).

7 The Court suggested that the limiting instruction of PJC 8.2 (and the similar instruction in PJC 110.27) may need to be refined to comport with the “clearer” instruction from French v. Grigsby:

In answering this special issue you shall not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss, that is, do not compensate twice for the same loss, if any.

Id. (citing French v. Grigsby, 567 S.W.2d 604, 608 (Tex. Civ. App. —Beaumont, writ ref’d n.r.e., approved, 571 S.W.2d 867 (Tex. 1978)).

8 The issue had been debated at length by the Supreme Court Advisory Committee. Some members took the position that the charge should not require unanimity on all underlying liability questions and that such a requirement would impose obligations on a plaintiff that are greater than what is mandated by statute. Those members argued that there are many instances where a jury could vote 10-2 on the one tort liability question and 12-0 on another tort liability question and the exemplary predicate question, in which case the verdict would not be in conflict. For example, a jury could vote 10-2 finding negligence and vote 12-0 finding breach of fiduciary duty, and 12-0 on a malice question. Another possible scenario might arise in which a juror finds that the defendant was negligent, but that such negligence was not the proximate cause of the injury and thus answer the negligence question “No.” In that scenario, the juror could still find that the conduct was grossly negligent. In other words, they argued, it is possible that a juror could vote “No” on the negligence and “Yes” on gross negligence without creating a conflict in the jury findings. Moreover, they argued, if a juror votes “No” on negligence because he or she does not believe that the defendant’s conduct rises to the level of negligence, it is a virtual certainty that the juror will vote “No” on the question of gross negligence--meaning there is no need for additional conditioning. http://www.supreme.courts.state.tx.us/advisory/Overview-226a.pdf.

9 Joint and several liability (or several liability only) for actual or punitive damages also presents an array of issues in submission of a multi-party charge. Those issues are beyond the scope of this paper.

10 Some damage-related issues to consider in how broadly a court can combine theories conclude (1) whether claims have different measures of damages, (2) whether a party seeks tort based damages for recovery of punitive damages, (3) whether a party can seek both punitive and trebled damages, (4) whether attorney fees are at issue on a particular claim, and (5) the type of relief sought for various claims or conduct (e.g., forfeiture of different property, etc.).

11 Moreover, as Casteel recognized, the existence of one broad form error does not necessarily result in reversal. For example, other findings may support the judgment. See Valdez, 30 S.W.3d at 518-19 (although DTPA question defectively included improper theories and created harm under Casteel, Insurance Code question tied to same damage question supported judgment and rendered DTPA error harmless).