

# To Sever or Not to Sever? Is the Decision to Sever Bad Faith Claims from Contractual Claims Always within the Discretion of the Trial Court?

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## I. Introduction

The prospect of expanded recovery through the addition of extra-contractual claims to a suit on an insurance contract has led insureds to increasingly accuse defendant insurers of acting in bad faith with respect to the handling of insurance claims. In the last couple of decades, insurers in Texas have come to expect bad faith claims to accompany most insurance contract disputes. Though most insurance disputes never make it to trial, insurers tend to be understandably wary of the prospect of defending contract and bad faith claims together to a single jury. This hesitancy has resulted in a body of case law addressing the circumstances under which insurers are entitled to have contract and bad faith claims severed or tried separately. This article will examine the reasons for separation of claims, current jurisprudence on the issue and some strategies for effectuating severance.

## II. The Law of Severance

The Texas Rules of Civil Procedure expressly permit the separation of previously joined claims. Rule 41 provides that "[a]ny claim against a party may be severed and proceeded with separately." [FN1](#) Further, Rule 174 provides:

### (b) Separate Trials.

The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims or issues.

[FN2](#)

Texas courts have developed a three part test to determine when severance is proper. Courts are to consider whether: (1) the controversy involves more than one cause of action; (2) the severed cause of action is one that would be the proper subject of a lawsuit if independently asserted; and (3) the causes are not so intertwined as to involve the identical facts and issues. [FN3](#) Courts presented with motions to sever must also consider the extent to which a severance would serve Rule 174(b)'s stated goals of avoiding prejudice and promoting judicial economy. [FN4](#) The decision to sever, though, is within the discretion of the trial court and will not be overturned unless that discretion is found to have been abused. [FN5](#)

## III. Rationale for Severance and Abatement of Bad Faith Claims

### 1. Avoidance of Prejudice

The most obvious reason that an insurer might request that a bad faith claim be tried apart from a coverage claim is the potential for prejudice. An insurer defending tort and contract actions together faces possible prejudice on a

number of fronts, but the most serious potential for problems exists with regards to evidentiary and strategic matters. Anytime two or more claims are heard together, litigants face the possibility that evidence that would be inadmissible to one cause of action might be presented to advance the other claim. The Texas Rules of Evidence explicitly allow for the introduction of evidence not admissible to all parties or purposes.<sup>FN6</sup> Thus, when contract and bad faith claims are tried together, an insurer faces the specter of having a jury charged with deciding whether a claim is covered under an insurance contract hear evidence of that insurer's conduct in investigating the claim. Rule 105 does, of course, require that juries be given instructions as to the proper scope of evidence that is inadmissible on one claim.<sup>FN7</sup> But juries often become confused when faced with evidence of limited admissibility when closely related claims are involved and frequently opt to ignore limiting instructions.<sup>FN8</sup>

A second way in which an insurer can be prejudiced when contract and bad faith claims are not severed involves the availability of defensive strategies. A combined trial presents at least two potential problems on this issue. First, a strategic decision to waive certain privileges in order to defend one claim can negatively impact the ability to defend the other claim. For example, in defense of the bad faith claim, an insurer might choose to waive attorney-client or investigative privileges to show that it acted properly in investigating a claim. In many cases, waiver of those privileges will inhibit the defense of the contract claim.<sup>FN9</sup> A second situation when the joinder of claims might present strategic difficulties for a defendant-insurer is when that insurer determines that its interests would be best served by exercising its right to present defenses on the two claims that are not entirely consistent.<sup>FN10</sup>

## 2. Efficiency

TEX. R. CIV. P. 174 also establishes convenience, or efficiency, as a rationale for separation of claims. The combination of contract and bad faith claims certainly, at times, presents questions of efficiency. This is so because the outcome of the contract action determines to a large extent the viability of a bad faith claim.<sup>FN11</sup> Texas courts have found that there can generally be no cause of action for bad faith when an insurance claim that was not, in fact, covered under the insurance policy has been promptly denied by an insurer.<sup>FN12</sup> In an interesting case in 1995, the Texas Supreme Court went so far as to find that a bad faith claim predicated upon a denial of a claim for improper reasons could not be sustained as long as there was some valid reason to deny the claim, even if that reason was only later discovered.<sup>FN13</sup> Thus, a viable argument for severance is that it is a waste of time and resources for parties and courts to address a tort claim that may very well be disposed of by a defense verdict on the contract claim.

Insureds hoping to have their contract and bad faith claims tried together have successfully argued against prejudice to the insurer as grounds for severance. Courts denying severance have held that while dealing with evidence that can only be considered in one cause of action but implicates the other claim may be problematic, juries are generally trusted to do as they are told and decide according to the court's instructions.<sup>FN14</sup> In a case where it was argued that

severance was appropriate because evidence inadmissible on a contract claim was to be introduced on a bad faith claim, the Texas Supreme Court of Texas found that when evidence inadmissible on one claim is introduced in a trial for both causes of action "any prejudicial effect can be ameliorated by appropriate limiting instruction to the jury."FN15

#### **IV. Arguments Against Severance and Abatement**

##### **1. Prejudice can Generally be Avoided**

Insureds hoping to have their contract and bad faith claims tried together have successfully argued against prejudice to the insurer as grounds for severance. Courts denying severance have held that while dealing with evidence that can only be considered in one cause of action but implicates the other claim may be problematic, juries are generally trusted to do as they are told and decide according to the court's instructions.FN14 In a case where it was argued that severance was appropriate because evidence inadmissible on a contract claim was to be introduced on a bad faith claim, the Texas Supreme Court of Texas found that when evidence inadmissible on one claim is introduced in a trial for both causes of action "any prejudicial effect can be ameliorated by appropriate limiting instruction to the jury."FN15

##### **2. Efficiency**

###### *A. Lack of contract liability does not necessarily bar bad faith liability*

Those arguing against the severance of bad faith and contract claims also have compelling arguments on the efficiency of severance. The foremost of these is that a judgement in favor of the insurer on a contract claim is not an absolute bar to a bad faith liability. The Texas Supreme Court has made this clear in the *Stoker* opinion: "We do not exclude, however, the possibility that in denying the claim, the insurer may commit some act, so extreme, that would cause injury independent of the policy claim."FN16 *Standard Fire Ins. Co. v. Stephenson*FN17 serves as an example of such a situation. In *Stephenson* an insurer was held liable for intentionally handling a worker's compensation death benefit claim in an unreasonable manner by conducting the investigation with the express purpose of disproving compensability.FN18 The court of appeals upheld the bad faith finding even though there was no coverage under the insurance contract.FN19 Another Texas Supreme Court decision, *Liberty Nat'l Fire Ins. Co. v. Akin*, further developed this exception to the general rule of no bad faith liability in the absence of contract liability by construing *Stoker* to allow for liability for bad faith claims not premised on denial of the insurance claim.FN20

###### *B. Conducting discovery and trial twice is inefficient for both the court and the parties*

A second argument for the proposition that it is more efficient to keep bad faith and contract claims joined involves the logistics of conducting two separate law suits. If a defense judgment does indeed bar a particular bad faith claim, then efficiency would be served by a severance and abatement. If, on the other hand, the bad faith claim remains viable after the contract claim is litigated, severance might prove to have been highly inefficient. The court, the parties and their attorneys will have to spend additional time and money with separate discovery periods and trials even though much of the evidence introduced and many of the

issues explored in the contract action are also relevant to the bad faith claim.FN21 Further, a severance and abatement can mean that a bad faith claim is not heard for months or years. This delay can create numerous problems for the litigants and result in essentially a denial of justice. One court considering the issue found that a refusal to abate a bad faith claim was actually more judicially efficient than granting one on the chance that the bad faith claim would be disposed of in the contract case: "Witnesses may die or disappear, files may be lost, and memories will undoubtedly fade. Rather than minimizing pretrial efforts, abatement may require that discovery be conducted twice..."FN22 Another court suggested that eliminating the need for a second trial, when one is necessary, by trying bad faith and contract claims together would prove to be efficient more often than it would be wasteful.FN23

## V. Pre-Akin Jurisprudence - Circuits Split on Question of Discretion to Sever

In *State Farm Mutual Auto. Ins. Co. v. Wilborn*FN24 the Houston Fourteenth District Court of Appeals addressed the extent of a trial court's discretion when ruling on a motion to sever bad faith and contract claims. The plaintiff sued her uninsured motorist insurer after it offered \$20,000 of the \$50,000 policy limit to settle her claim, alleging contractual and extra-contractual bad faith claims, among others.FN25 When the trial court refused to sever the extra-contractual and contractual claims, the insurer sought mandamus relief, claiming that it would be unduly prejudiced in defending the contract claim if the insured introduced evidence of settlement negotiations to prove the extra-contractual claim.FN26 The court of appeals held that the prejudicial effect of introducing evidence regarding the settlement offer would be so great that a limiting instruction would be insufficient to protect the insurer's substantive rights to defend the contract claim.FN27 The court further found that the interest of justice demands that under such circumstances the trial court must sever the claims.FN28 A year after *Wilborn*, the Houston First District Court of Appeals heard a case with strikingly similar circumstances and likewise held that a trial court does not have discretion to deny a motion to sever bad faith and contract claims when settlement negotiations have taken place.FN29

While some circuits opted to follow *Wilborn* and *Millard*,FN30 others found that a trial court confronted with a motion to sever and abate a bad faith claim is under no special obligation to grant that motion. The leading case for this proposition was *Allstate Ins. Co. v. Evins*,FN31 which also involved a claim on an uninsured motorist policy. In *Evins*, the Corpus Christi Court of Appeals rejected the *Wilborn* line of cases and instead affirmed the discretion of trial courts to determine whether prejudice to a party can be overcome by instructing the jury to only consider information regarding settlement offers in connection with the bad faith claim.FN32

## VI. The Akin Decision

The Texas Supreme Court went a long way towards answering the question of how much discretion a trial court has when faced with a motion to separate bad faith and contract claims in its decision in *Akin*. In *Akin*, the insured brought suit against her homeowners insurer alleging breach of contract, violations of the Texas Insurance Code and the Texas Deceptive Trade Practices-Consumer Protection Act, and breach of the duty of good faith and fair dealing.FN33 The suit was based upon Liberty National's failure to pay a claim for damage to the foundation of Brodrick's home caused by a water leak under the slab.FN34 The insurer sought to sever the contract claim from the bad faith claim because it wanted to avoid having a jury hear evidence inadmissible on the contract claim but necessary for

defense of the bad faith claim.FN35 Specifically, Liberty National did not want the jury to hear allegations that it's adjuster did not properly investigate the claim, that the engineer the insurer hired was chosen because of a likelihood that he would 'rubber-stamp' the adjuster's position on coverage, that the insurer routinely denies this type of claim, and that the insurer had paid an undisputed part of the claim.FN36 Liberty National further feared that the jury would misinterpret evidence that it had established a reserve for the claim. While this evidence tended to dispute the bad faith contention, it would serve as an admission of liability on the contract claim.FN37 Liberty Mutual also argued that the bad faith claim should be abated pending resolution of the contract dispute in order to avoid the effort and expense of litigating an allegation that would be disposed of with a defense verdict on the contract claim.FN38 Both the trial court and the court of appeals denied relief.FN39

In the mandamus proceeding, the Supreme Court set out to decide whether the trial court's denial of Liberty National's motion to sever and abate the bad faith claim was an abuse of discretion.FN40 The court favorably reviewed those decisions that require severance of tort and contract claims when there have been settlement negotiations, but affirmed the proposition that severance of claims is within the sound discretion of the trial court.FN41 The court specifically found that the contract and bad faith claims were largely interwoven, that most evidence would be admissible on both claims and that a limiting instruction to the jury would be sufficient to overcome any prejudice caused by the presentation of evidence inadmissible on one of the claims.FN42 The court further found that abatement of the bad faith claim, until exhaustion of appeals on the contract claim, was unnecessary.FN43

The majority in *Akin* explicitly rejected dissenting Justice Abbott's invitation to carve out an exception to trial courts' discretion regarding the severance of claims for insurance cases involving both contractual and bad faith claims.FN44 Justice Abbott advocated an automatic segregation of claims whenever a party requests one, only leaving to the trial court's discretion whether to order separate trials or order an actual severance of claims.FN45 The dissent argued that because of the prospect of undue prejudice "in the vast majority of first party insurance cases, either a severance or a separate trial is required."FN46 The dissent further argued that the case by case review resulting from the majority opinion would cause an unacceptable level of uncertainty for courts and litigants.FN47 The majority, though, disagreed, finding that an exception to trial courts' discretion for insurance bad faith cases would be neither necessary, wise nor efficient.FN48 Instead, the court decided "[i]n the absence of a settlement offer on the entire contract claim, or other compelling circumstances, severance is not required."FN49

## **VII. Settlement Offers and Other Compelling Circumstances**

### **1. *Akin* suggests certain limitations on discretion**

Despite upholding the trial court's discretionary power to sever, the Supreme Court in *Akin* carved out limited exceptions to those discretionary powers. The Supreme Court recognized that trial courts are still bound by the basic principle that litigants are entitled to fair trials: "A severance may nevertheless be necessary in some bad faith cases. A trial court will undoubtedly confront instances in which evidence admissible only on the bad faith claim would prejudice the insurer to such an extent that a fair trial on the contract claim would become unlikely."FN50 This part of *Akin* is firmly in line with the basic law of severance. In 1956 the Texas Supreme Court established that even though Rule 174(b) uses the term "may" with respect to a trial court's ability to

sever, that trial court does not enjoy unlimited discretion:

The express purpose of the rule is to further convenience and avoid prejudice, and thus promote the ends of justice. When all of the facts and circumstances of the case unquestionably require a separate trial to prevent manifest injustice, and there is no fact or circumstance supporting or tending to support a contrary conclusion, and the legal rights of the parties will not be prejudiced thereby, there is no room for the exercise of discretion. The rule then is peremptory in operation and imposes upon the court a duty to order a separate trial.FN51

In the context of insurance litigation, there are compelling arguments that trying contract and bad faith claims together frequently proves inconvenient to all parties, prejudicial to the insurer, and contrary to notions of justice. The *Akin* court apparently recognized these facts and, though it refused to extinguish trial courts' discretion regarding severance, it did provide a certain amount of guidance to insurers on what arguments should be made to increase the likelihood that severance will be compelled.

## **2. Effect of Settlement Negotiations**

Most of the pre-*Akin* decisions focused on settlement offers as circumstances that would require a trial court to order a severance when one is requested. Consequently, the *Akin* decision expressly refers to the existence of a settlement offer as a circumstance that limits a trial court's discretion to refuse to grant a motion for a severance.FN52 The court made a point by concurring with the Wilborn line of cases that hold that allowing a jury to hear evidence of settlement offers unduly prejudices an insurer on a contract claim.FN53 *Akin* suggests that an insurer who moves for a severance in a case where the insured intends to offer evidence of a settlement offer in furtherance of a bad faith claim is entitled to have the claims severed. The court concluded that severance is not required in the *absence* of a settlement offer on the contract claim.FN54 Presumably, then, the presence of a settlement offer would make severance mandatory.

In a decision that preceded *Akin*, the El Paso Court of Appeals articulated why the existence of settlement negotiations should extinguish a trial court's discretion with regards to granting a motion to sever contract and bad faith claims: "It would appear that the two Houston Courts of Appeals recognized that in these types of cases, instructions can be of little effect in avoiding prejudice. If the controlling reasons for a severance are the doing of justice, the avoiding of prejudice and the furtherance of convenience, then Wilborn and Millard [sic] were correctly decided because of the adverse effect the evidence of offers of settlement would have had in each of those cases."FN55

## **3. When the Attorney-Client Privilege is Implicated**

*Akin* itself does not put forth any suggestions on what "other compelling circumstances" might be sufficient to strip a trial court of discretion to deny a

motion to sever a bad faith claim from a contract claim. At least one court of appeals, though, has suggested that attorney client privilege might be a compelling reason for severance. In *Mid-Century Ins. Co. of Tex. v. Lerner*<sup>FN56</sup> the court explored the possibility of an insurer's claim of privilege to certain communications in a bad faith claim as prejudicing that insurer's defense of the underlying contract claim:

During the trial of the bad faith claims, Mid-Century [the insurer] may wish to waive its attorney-client privilege, produce correspondence concerning settlement discussions with counsel and written evaluations of the underlying contract case. Once produced, the privilege protecting these documents will be forever waived. See Tex.R.Civ.Evid. 511. Mid-Century's other choice would be to limit its defense in the bad faith case so as to preserve its attorney-client privilege in any new breach of contract case that might arise from a successful appeal. Mid-Century should not be forced to make this decision.<sup>FN57</sup>

*Lerner* involved the re-consolidation of severed bad faith and contract claims after a trial on the contract matter had been conducted, and dealt with the propriety of the re-consolidation and the trial court's decision not to continue an abatement of the bad faith claim until the appeals process for the contract judgment had been exhausted.<sup>FN58</sup> While the case does not directly address a motion to sever a bad faith claim from a contract claim, *Lerner* applies to the issues that are material in determining whether there is room for discretion in granting or denying a motion to sever. Forcing a litigant to sacrifice privileged communications because of a fear that the defense of another claim will be compromised, when a severance and abatement would eliminate the dilemma, does not promote the ends of justice.

#### **4. Unavailability of claim file discovery as a circumstance compelling severance**

Another issue that addresses an insurer's right to properly defend itself against each claim involves the protection of the insurance claim file. Though no court has recently addressed it in the context of a motion to sever, the insurance claim file privilege arguably serves as a compelling circumstance that could strip a trial court of discretion to deny a motion to sever a bad faith claim from a contract claim. This privilege, often referred to as the *Blackmon* privilege may be utilized by insurers who do not wish to defend bad faith and breach of contract allegations to the same jury.

##### *A. Blackmon* Decision

*Maryland Am. Gen. Ins. Co. v. Blackmon*<sup>FN59</sup> involved claims against an insurer for breach of contract, tort, and for violations of the Texas Insurance Code and Texas Deceptive Trade Practices Act.<sup>FN60</sup> After the insurer refused to pay on a bankers blanket bond, the insured bank filed suit and, in discovery, requested production of materials concerning the insurers' decision to deny the claim as well as

materials regarding the filing and investigation of the claim.FN61 The Texas Supreme Court held that those materials were protected from discovery on the contract cause of action.FN62 In construing the Texas Rules of Civil Procedure setting forth certain investigative privileges., *Blackmon* announced that insurance claim files should not be subject to discovery when a dispute as to coverage exists.FN63 "The protection of a party's right to defend a suit brought against him is the essence of the proviso in Rule 186a...Regardless of other reasons which might justify the use of this information, it would be impossible to limit the prejudicial effect of disclosure on Maryland American's right to defend the contract cause of action."FN64

Apart from this important pronouncement on the discoverability of insurance claim files in contract claims, *Blackmon* also contains a second critical holding involving the effect of an inclusion of non-contract claims. The insured in *Blackmon* conceded that the insured's claim file was not discoverable in connection with the contract claim, but nonetheless argued its entitlement to discovery of the claim file because no investigative privilege attached with regards to the bad faith claim.FN65 The court soundly dismissed this conclusion on prudential grounds. "[I]f a plaintiff attempting to prove the validity of a claim against an insurer could obtain the insurer's investigative files merely by alleging the insurer acted in bad faith, all insurance claims would contain such allegations. We hold that Maryland American is entitled to assert the privilege so long as its liability on the bond remains undetermined."FN66 Thus, *Blackmon* holds that an insurer's claim file is absolutely privileged from discovery in a dispute on the insurance contract. The inclusion of extra-contractual claims does not destroy this privilege.

#### B. *Blackmon* Progeny

While *Blackmon* has not enjoyed a great deal of attention since it was decided in 1982, a handful of courts have relied upon its pronouncements. Many of these cases cite *Blackmon* as authority but distinguish themselves on various grounds. In *Service Lloyds Ins. Co. v. Clark*,FN67 for example, the Austin Court of Appeals distinguished its case, where the underlying contract action had already been settled, but repeated the *Blackmon* rule that an insurer enjoys a discovery privilege as to information regarding the filing and

investigation of the claim and the decision to pay or deny for the life of the contract claim.FN68 Other *Blackmon* progeny agree with *Blackmon* reasoning but concern themselves with issues that are related but not on point. One court of appeals, construing a procedural rule that succeeded the one examined in *Blackmon*, accepted the applicability of the privilege but was concerned with ascertaining the date from which the privilege attached.FN69 A court ruling on a mandamus proceeding also accepted the applicability of the *Blackmon* privilege, but required that some realized conflict be present before overruling the trial court's decision not to order separate trials.FN70

### C. *Blackmon* as an *Akin* Compelling Circumstance

In light of the basic proposition that severances must be granted when necessary to avoid injustice, *Blackmon* opens another door for an insurer who seeks to limit a trial court's discretion in the consideration of motions to sever. *Blackmon* creates a dual edged sword: either an insurer will be forced to relinquish an important privilege or an insured will be forced to prosecute a bad faith claim without the benefit of what is arguably the best source of evidence on that claim. The denial of the protection of discovery privileges presents obvious prejudice to the insurer. And, since insureds in these types of cases often need the insurance claim file to prove a prima facie bad faith case, the denial of discovery in a combined case suggests prejudice to the insured. While one generally associates a motion for severance with arguments of prejudice to the moving party, the rules and case law speak of promoting justice and avoiding prejudice generally. So, an insurer who can craft a *Blackmon* argument that suggests prejudice or the contravention of justice based upon the facts of the case has a chance of creating an *Akin* compelling circumstance that will strip the trial court of discretion to deny the motion to sever.

## VIII. Conclusion

Though *Akin* appears on its surface to not to be a particularly insurer-friendly case, its holding does not constitute a total defeat for insurers who prefer to try bad faith and contract claims separately. One must be mindful that four justices joined a dissent that called for a special exception to the general rule of trial court discretion for cases involving a combination of contract and bad faith claims, and that the majority made a point to highlight a specific circumstance that compels severance and also left open the possibility that other circumstances could be sufficiently compelling to strip a trial court of discretion. Litigants who seek to avoid having a single jury hear evidence on both claims can, under

*Akin*, succeed when they carefully craft arguments that emphasize efficiency associated with separation, the potential for prejudice if the claims are heard together, and, above all, the injustice that can result from a refusal to sever.

### Footnotes

1. Tex. R. Civ. P. 41. [return](#)
2. Tex R. Civ. P. 174. [return](#)
3. *Liberty Nat'l Fire Ins. Co. v. Akin*, 927 S.W.2d 627, 629 (Tex. 1996); *Guaranty Fed. Savings Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 658 (Tex.1990); *Groschke v. Gabriel*, 824 S.W.2d 607, 615 (Tex. App. - Houston [1st Dist.] 1991, writ denied); *St. Paul Ins. v. McPeak*, 641 S.W.2d 284, 289 (Tex. App. - Houston [1st Dist.] 1991, writ refused n.r.e). [return](#)
4. Tex. R. Civ. P. 174; *In Re Ethyl Corp.*, 975 S.W.2d 606, 610 (Tex. 1998). [return](#)
5. *Liberty Nat'l Fire Ins. Co. v. Akin*, 927 S.W.2d at 629; *Guaranty Fed. Savings Bank v. Horseshoe Operating Co.*, 793 S.W.2d at 658. [return](#)
6. Tex. R. Evid. 105. [return](#)
7. Id. [return](#)
8. See Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, Psychol. Pub. Pol'y & L. 589, 600-01 (1997)(reporting on studies that show that limiting instructions are among the most difficult instructions for juries to comprehend and that jurors frequently misunderstand the appropriate use of evidence of limited admissibility). See also Christopher N. May, "What Do We Do Now?": *Helping Juries Apply the Instructions*, 28 Loy. L.A. L. Rev. 869, 879 (1995)(discussing how, even with simplified instructions, juries are frequently unable to correctly apply law to facts). [return](#)
9. See *Mid-Century Ins. Co. v. Lerner*, 901 S.W.2d 749, 752 (Tex.App.--Houston [14th Dist.] 1995, orig. proceeding)(discussing the problems associated with forcing an insurer to choose between waiving attorney-client privilege to defend a bad faith claim and protecting privileged material in breach of contract cases). [return](#)
10. See *Liberty Nat'l Fire Ins. Co. v. Akin*, 927 S.W.2d at 631 (Abbott, J., joined by Gonzales, Hect & Owens, JJ., dissenting)(arguing that undue prejudice can result from the presentation of inconsistent defenses). [return](#)
11. See *United States Fire Ins. Co. v. Millard*, 847 S.W.2d 668, 673 (Tex. App. -- Houston [1st Dist.] 1993, Orig. proceeding)("If, in the underlying case, the defendant prevails on liability, or if the finder of fact concludes that the plaintiff's damages do not exceed the defendant's settlement offer, then the defendant's conduct necessarily cannot have been in bad faith. It would be a waste of the court's, the jury's, the parties', and the attorneys' time to hear evidence on the bad faith claims when a finding in the contract lawsuit could be peremptorily dispositive."). [return](#)

12. *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338, 341 (Tex. 1995). [return](#)
13. *Id.* at 341. [return](#)
14. *See Allstate Ins. Co. v. Evins*, 894 S.W.2d 847, 850 (Tex.App -- Corpus Christi 1995, orig. proceeding)("The jury is generally trusted to follow the instructions of the trial court and to disregard or limit its consideration of the evidence according to those instructions"). [return](#)
15. *Liberty Nat'l Fire Ins. Co. v. Akin*, 927 S.W.2d at 630. [return](#)
16. *Republic Ins. Co. v. Stoker*, 903 S.W.2d at 341. [return](#)
17. 963 S.W.2d 81 (Tex.App -- Beaumont 1998, no pet.). [return](#)
18. *Id.* at 85. [return](#)
19. *Id.* at 86. [return](#)
20. *Liberty Nat'l Fire Ins. Co. v. Akin*, 927 S.W.2d at 631. [return](#)
21. *See Liberty Nat'l Fire Ins. Co. v. Akin*, 927 S.W.2d at 630 (discussing how contract and bad faith claims are largely interwoven and how much of the evidence is admissible to both claims). [return](#)
22. *Texas Farmers Ins. Co. v. Cooper*, 916 S.W.2d 698, 702 (Tex.App -- El Paso 1996, orig. proceeding). [return](#)
23. *Allstate Ins. Co. v. Hunter*, 865 S.W.2d 189, 193 (Tex.App. -- Corpus Christi 1993, orig. proceeding). [return](#)
24. 835 S.W.2d 260 (Tex.App -- Houston [14th Dist.] 1992, orig. proceeding). [return](#)
25. *Id.* at 261. [return](#)
26. *Id.* [return](#)
27. *Id.* at 262. [return](#)
28. *Id.* [return](#)
29. *United States Fire Ins. Co. v. Millard*, 847 S.W.2d 688 (Tex.App -- Houston [1st Dist.] 1993, orig. proceeding). [return](#)
30. *See, e.g. Texas Farmers Ins. Co. v. Stem*, 927 S.W.2d 76, 80 (Tex.App -- Waco 1996, orig. proceeding); *Progressive County Mut. Ins. Co. v. Parks*, 856 S.W.2d 776, 780 (Tex.App -- El Paso 1993, orig. proceeding). [return](#)
31. 894 S.W.2d 847 (Tex.App -- Corpus Christi 1995, orig. proceeding). [return](#)

32. Id. at 850. [return](#)

33. *Liberty Nat'l Fire Ins. Co. v. Akin*, 927 S.W.2d at 628. [return](#)

34. Id. [return](#)

35. Id. [return](#)

36. Id. at 629. [return](#)

37. Id. [return](#)

38. Id. at 628. [return](#)

39. Id. [return](#)

40. Id. [return](#)

41. Id. at 629. [return](#)

42. Id. at 630. [return](#)

43. Id. at 631. [return](#)

44. Id. Notably, Justice Abbot was joined by three other Justices in calling for a bright line exception to a trial court's discretion to segregate bad faith and contract claims when a party requests that the claims not be heard together. [return](#)

45. Id. [return](#)

46. Id. [return](#)

47. Id. at 632. [return](#)

48. Id. at 630. [return](#)

49. Id. [return](#)

50. Id. [return](#)

51. *Womack v. Berry*, 291 S.W.2d 677, 683 (Tex. 1965); *See Also In re Ethyl Corp.*, 975 S.W.2d at 606 ("The principles we espoused in *Womack* remain sound..."). [return](#)

52. *Liberty Nat'l Fire Ins. Co. v. Akin*, 927 S.W.2d at 630. [return](#)

53. Id. [return](#)

54. Id. [return](#)

55. *Progressive County Mut. Ins. Co. v. Parks*, 856 S.W.2d at 780.

56. 901 S.W.2d 749 (Tex.App -- Houston [14th Dist.] 1995, orig. proceeding). [return](#)

57. Id. at 752. [return](#)

58. Id. at 751. [return](#)

59. 639 S.W.2d 455 (Tex. 1982). [return](#)

60. Id. at 456. [return](#)

61. Id. [return](#)

62. Id. at 457. [return](#)

63. Id. [return](#)

64. Id. at 457-58. [return](#)

65. Id. at 457. [return](#)

66. Id. at 458. [return](#)

67. 714 S.W.2d 437 (Tex.App. -- Austin 1986, orig. proceeding). [return](#)

68. Id. at 439. *See also Victoria Lloyds Ins. Co. v. Gayle*, 717 S.W.2d 166, 168 (Tex.App. -- Houston [1st Dist.] 1986, orig. proceeding)(distinguishing on the grounds that no contract claim was pending while citing *Blackmon's* holding regarding the discovery privilege in contract cases); *Eddington v. Touchy*, 793 S.W.2d 335, 337 (Tex.App. -- Houston [1st Dist.] 1990, orig. proceeding)(citing *Blackmon* as authority as to discovery privileges for insurance file, but distinguishing on the basis that the underlying claim was not on the insurance contract but rather for tortious interference). [return](#)

69. *National Surety Corp. v. Dominguez*, 715 S.W.2d 67, 68 (Tex.App. -- Corpus Christi 1986, orig. proceeding). *See also Western Cas. & Sur. Co. v. Spears*, 730 S.W.2d 821, 823 (Tex.App. -- San Antonio 1987, orig. proceeding)(agreeing with applicability of discovery privilege, but discussing requirements that parties resisting discovery produce evidence of the applicability of the privilege to their cases). [return](#)

70. *Motors Ins. Corp. V. Fashing*, 747 S.W.2d 13, 14 (Tex.App. -- El Paso 1988, orig. proceeding). *See also Allstate Ins. Co. v. Hunter*, 865 S.W.2d at 193-94 (accepting insurer's right to claim discovery privileges but discussing the necessity that the movant show evidence of prejudice or conflict). [return](#)