

SELF DEFENSE LIABILITY PRODUCTS – WHAT ARE THEY, HOW DO THEY WORK, AND HOW DO I KNOW WHICH PROGRAM IS BEST FOR ME?

PAUL MARTIN

VP - State Relations

Reinsurance Association of America

(512) 267-4817

Martin@reinsurance.org

www.paultmartin.com

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Paul T. Martin

Paul T. Martin works as the Vice President – State Relations for the Reinsurance Association of America (RAA). In his role at the RAA, he monitors legislation and regulations affecting reinsurers in 27 states.

He graduated from The Webb School in Bell Buckle, Tennessee. He earned a degree in Public Policy Studies from Vanderbilt and a law degree from the University of Miami. He is admitted to practice law in Tennessee, Florida and Texas. In addition to having successfully tried a number of jury and non-jury cases to verdict, he has also worked as in house counsel for State Farm Mutual and as a Regional Vice President for the National Association of Mutual Insurance Companies (NAMIC).

Preparedness Certification and Experience

- Author of *Pivot Points: Creating A Culture Of Preparedness And Resiliency In America*, available on Amazon
- Certified Emergency Medical Technician-B by the National Registry of Emergency Medical Technicians and the Texas Department of State Health Services
- Wilderness EMT certification from the National Outdoor Leadership School (NOLS)
- Certified Range Safety Officer and Firearms Instructor by the National Rifle Association
- Certified License to Carry Instructor by the Texas Department of Public Safety, including certification to teach the School Safety Officer designation
- Former volunteer firefighter
- Licensed amateur radio operator - General Class
- Licensed private pilot with instrument rating
- Certified Storm Spotter for the National Weather Service
- Speaker on preparedness topics at various seminars and conferences
- Author of several magazine articles on preparedness issues

Preamble

Earlier in 2022, I had a decision to make. The very robust insurance product I'd purchased over the years to provide me with liability coverage as a firearms instructor was no longer being offered.

I called Jeff Tormey, a personal injury attorney and fellow firearms enthusiast in Amarillo, to get his opinions on the best self defense liability protection products currently on the market. I quickly surmised he was like me – he really didn't have an answer to the various questions I raised about the current marketplace and how these products really worked. He suggested I reach out to Sean Healy in Tyler, a seasoned attorney who regularly speaks at the annual State Bar of Texas Firearms Law Seminar.

Sean told me the most common question he gets from his clients pertaining to firearms centers around guidance on the type of self defense liability product to purchase. He then suggested I write a paper for this CLE event on what I learned in my efforts to figure out what works best for me.

What follows is that paper. I share this with the hope you find something here helpful as well.

Introduction¹

Using force – especially deadly force – to protect yourself from an imminent threat of serious bodily injury is a last resort. There are significant legal and financial ramifications for doing so, creating a market for products to help preserve a consumer's finances and freedom after a self defense incident.

Prudent consumers may wish to consider obtaining some sort of financial protection to help pay for legal expenses and civil judgments against them in this situation. As the market for these products grows, there are more options from which to choose. Consumers should spend some time researching the various options and have a full understanding of what each one offers before making a purchasing decision.

Caveats and Disclaimers

I'm writing this paper to further our understanding of these products and to give us tools to make better purchasing decisions. It's inherently difficult to provide an in-depth analysis of these products in a comparison chart or even in a CLE paper.

What follows is not meant to be a criticism of any type of product or proprietor. I do make suggestions for possible changes to enhance the utility of these products.

¹ I'd like to thank Sean Healy of the Healy Law Office, Karl Rehn of KR Training and Jeff Tormey of Tormey & McConnell for their input into the content of this paper.

I fully support the existence of these products in the marketplace – both insurance and non-insurance options. I encourage armed citizens to purchase them. I also believe public policy should be fashioned to encourage their development and improvement.

The market for these products changes regularly. Types of coverages, benefits offered, sources of capital, states in which they operate and a plethora of other factors may vary from year to year. I attribute this to the relatively nascent market for such products. Consumers must regularly review the terms and conditions of any product they purchase to ensure it provides them with the benefits they need.

These products have their critics. Gun control advocates refer to them as “murder insurance.” One gun control advocacy group claims companies selling these products “are perpetuating fear of minorities and immigrants, and by offering special protections to gun owners who shoot first and ask questions later, these insurance companies are promoting gun violence.”²

References to certain proprietors and their products are neither criticisms nor endorsements. Nor are my decisions to purchase certain products and stop using others.

In short: the market is still learning the best way to create effective products. More changes will likely be forthcoming in the years ahead as part of that process. As a result, portions of this paper may very well become stale shortly after it is published. Please do your own research when exploring this topic.

It’s insurance...or is it?

Before we delve into the particulars of how these products work, we need a very short primer on insurance law. There’s a temptation to just gloss over this part, but please bear with me as what follows is critical for consumers to understand.

Insurance Law 101

Insurance in the United States is regulated primarily at the state level. The Texas Department of Insurance (TDI) has statutory authority to oversee the business of insurance in the state.³

Insurers must submit financial documents and policy forms to the regulator for review. The regulator reviews the insurer’s financial position to determine if the insurer has sufficient funds to pay claims. It also reviews data to ensure the insurer consistently engages in fair claims practices when doing business.

Consumer protections from unscrupulous insurance trade practices can be found throughout the Texas Insurance Code as well as in the Texas Administrative Code. Policyholders have additional rights in case law to protect them from any unfair practices by the insurance company.

² <https://www.gunsdownamerica.org/campaigns/stop-murder-insurance/>

³ Texas Insurance Code section 31.002.

The liability insurance market can be segregated into two pieces: the admitted market and the non-admitted (or surplus lines) market. The admitted market provides most of the insurance products we use daily – our auto and homeowner’s insurance are typical examples of this market.

The non-admitted or surplus market exists, according to TDI, “[d]ue to market availability issues, unique risks or limits which exceed what is available in the admitted market.”⁴ Insurance products from the surplus lines market generally have less solvency and regulatory oversight and protections than those from the admitted market.

A final point to make in our very short Insurance Law 101 discussion: when an insurer in the admitted market becomes insolvent, its policyholders have certain protections provided by the Texas Property and Casualty Insurance Guaranty Fund (“guaranty fund”). Policyholders of companies in the surplus lines market do not have access to the guaranty fund protections should their insurer become insolvent.

So why do we need a primer on insurance law?

Insurers face inherent and substantial compliance costs when doing business in a state, and those compliance costs grow as insurers expand their business into multiple states. To provide consumers a more affordable option, or options that have features which insurance products might not be able to offer due to regulatory concerns, other market entrants have developed non-insurance products that provide benefits to their customers in the event of a self defense incident.

Moreover, these non-insurance products and their proprietors often have little to no regulatory oversight beyond existing consumer protection laws. The specific consumer protection provisions in the Texas Insurance Code do not apply to these non-insurance products. The proprietors in the non-insurance products space also have more flexibility to innovate and create products with a broader spectrum of benefits.

What kinds of products are currently in the marketplace?

The best way I’ve developed to understand the marketplace is to place existing products into one of three categories:

- Pure Insurance Products
- Legal Services Programs
- Membership Benefits Products

Collectively, I will refer to these categories as the “facility.”

⁴ TDI website, June 23, 2022.

Pure Insurance Products

As the name implies, the consumer purchases an insurance policy that provides benefits according to its terms and conditions. The policy could be written in the admitted or non-admitted insurance market. The insurer is required to comply with various statutory provisions protecting policyholders, including prohibitions on unfair or deceptive practices.⁵

Because this is an insurance product, the insurer has submitted to the regulatory oversight of the state's insurance regulator (in Texas, that would be TDI). The regulator has significant statutory authority to monitor the business practices, as well as the solvency, of the insurer.

These policies can provide a plethora of benefits including coverage for legal fees for both civil and criminal defense, liability insurance for any civil judgment rendered in a self defense incident, as well as liability coverage for hunting accidents and negligent discharges.

Consumers purchasing these products may be listed as the "named insured" on the policy, or they may be added onto a larger liability policy with other consumers as an "additional insured" under the policy. Because there can be different rights for named insureds and additional insureds, consumers purchasing these products should fully review the terms and conditions of such policies to determine what rights and benefits they have as additional insureds.

Legal Services Programs

A second option is the legal services program. Unlike insurance or membership benefits products, these programs only pay for attorney's fees and do not provide financial protection for any civil judgments rendered against the program member. They may also pay for bail bonds and other court related expenses.

These programs explicitly state in their marketing materials they are not insurance products. There is little to no regulation of these programs outside of traditional consumer protection laws.

In Texas, "prepaid legal services programs" and "lawyer referral services" are regulated by the State Bar of Texas.⁶ "For profit legal service contract companies" are regulated in statute by the Occupations Code as well.⁷ Some legal services programs in the self defense liability space have taken the position they are none of these. One proprietor in the facility operates in Texas under the auspices of the "for profit legal service contract companies" provision of the Occupations Code.

Membership Benefits Products

The third option is the "membership benefits" approach. Products purchased as memberships which provide financial protection from acts of self defense are not insurance policies, according to those proprietors that sell them. These programs can offer a range of benefits, including the payment of attorney's fees for both criminal and civil cases, as well as payment of any civil

⁵ Texas Insurance Code Section 541.

⁶ Occupations Code Sections 951 and 952, respectively.

⁷ Occupations Code Section 953.

judgment rendered against the member. Instead of being a pure insurance product, the proprietors selling the memberships may obtain their own insurance policies (and even reinsurance) to pay proceeds to the proprietor to fund benefits to the consumer.

The proprietors selling these memberships claim their product is not an insurance policy. Much of that is likely driven by a desire not to be subject to insurance regulation – such as contract form approval, solvency regulation and market conduct examinations. It also frees up the proprietor to offer services within their agreements outside of the traditional range of insurance benefits.

Some of the companies selling these memberships use terms like “claims,” “coverage” and “liability limits” which make them sound like insurance policies, however. Consumers should be very aware they do not have the same legal rights and protections for membership type products than they do with true insurance policies. Nor are the financial documents of the membership program subject to regulator review, meaning there’s no government oversight of the program’s financial fitness to pay member claims.

Why so many options?

With a few notable exceptions, insurance policies do not cover intentional acts, such as acts of self defense. Many insurance companies are reluctant to write such policies due to the unique nature of the peril they are insuring against, as well as the possibility of reputational harm of the insurance company for offering what many think is a controversial product. Further, among a few state regulators, there is a concern such insurance products on the grounds they are bad public policy.

These challenges have led to the growth of innovative ways to provide consumers with financial and legal protection; the program options above are the free market’s attempt to meet the needs of armed citizens after a self defense situation.

It’s important to note some proprietors offer different types of products, depending on the state in which they are doing business. It may offer a legal services program in one state while offering a pure insurance product in another.

How do they work?

The process varies among the different programs within the facility, but as a general rule, a consumer who has a policy or membership with the proprietor will contact the proprietor to report a self defense incident and seek assistance. The proprietor will make a determination of whether the act constituted lawful self defense. If it determines the act was in fact illegal, it will refuse to provide benefits to the armed citizen.

What issues should consumers keep in mind when making a purchasing decision?

In researching this topic, I've uncovered several subtopics and questions people should ask and research before deciding to rely upon a particular product sold by the facility. Below are a few the more common ones. Please note this isn't an exhaustive list, but it does capture the more important ones.

Why does the product exclude illegal activities?

Consumers should note many agreements have exclusions for illegal activities. This may seem contradictory: the consumer is purchasing a product for the express purpose of financial assistance in the event they are facing criminal charges stemming from a self defense event. The "colorable claim of self defense" provision, however it is worded in the agreement, restores benefits for those individuals who can articulate (most likely done by their attorney) that the consumer engaged in a legitimate self defense act.

Such provisions are necessary to keep the facility from having to fund cases where there is no viable self defense claims. This helps ensure there are funds available for legitimate self defense cases.

Is coverage for domestic violence incidents excluded?

The details of the exclusion varies between products offered by the facility, but we can see a common theme among many of them: self defense incidents between current or former romantic partners are not covered by many of the products on the market. There are generally no limits to the scope of these exclusions. Consumers seeking coverage or benefits from a self defense liability product concerned about this situation should spend extra time determining if a particular product is right for them.

What are the qualifications of the individual(s) deciding whether there are sufficient facts to support a colorable claim of self defense?

When an insured or member makes a call to the facility seeking assistance, someone will have to make the determination of whether there is a colorable claim of self defense. Note well the term "colorable claim of self defense" generally doesn't appear in the terms of the various agreements within the facility. The agreements instead represent the counterparty will provide the consumer with certain benefits in the event of a "lawful" or "justified" act of self defense.

With that background, consumers should have some understanding regarding the qualifications of the individual(s) applying the facts of a particular situation to the agreement terms and then making that decision. The consumer should also have an idea of the internal policy of the facility proprietor in determining whether to extend benefits. Is the individual a claims adjuster? Do they have a legal background or law enforcement background? If the merits of the self

defense claim are less than clear, what is the proprietor's default position on providing benefits (at least initially)?

In short, who is making the critical decision and what internal policies are they following to guide their analysis?

Who chooses the attorney to represent the consumer?

This will vary between proprietors within the facility. Most programs allow the consumer to choose the attorney, with some in the facility reporting certain limitations. If a consumer has a particular defense attorney in mind, they should do their research to determine whether the proprietor will allow that attorney to represent them.

Bear in mind the facility has a reputational risk as well. It has a vested interest in seeing the attorney defending the consumer is experienced and capable of doing so.

Is there coverage for church security team activities?

This can vary between products offered by the facility. Consumers who volunteer for such details - as well as paid or volunteer law enforcement and other first responders who are permitted to carry a firearm - should carefully review benefits and limitations for consumers who engage in such opportunities.

Does the product pay fees up front? Or does it only reimburse a consumer only if they are successful in their legal defense?

This is a big one, and it's one consumers really need to understand. Some products – particularly pure insurance ones – provide benefits to the consumer **only if the consumer prevails at trial or if the criminal charges are dropped**. This means the consumer must front the money for their defense, and if successful, seek reimbursement from the product.

Other products pay those fees up front, as they are incurred, alleviating the need for the consumer to front the money.

Does the consumer ever have to pay legal fees back to the facility?

Some products – mainly pure insurance products, but also some legal services programs – have a reimbursement requirement (also called a “recoupment” provision.) The public policy behind such requirements stems from the adage that someone should not be able to profit (or at least receive a benefit) for their criminal actions.

I would submit an implied agreement exists between consumers and proprietors – that funds paid by consumers to fund only legitimate claims of self defense. Money spent on frivolous self defense claims won't be available to those who truly need it in the future.

The Washington State Office of the Insurance Commissioner recently approved a pre-paid legal service agreement – offered by an insurance company - which provides “legal services to [policyholders] who legal possess a weapon....in defense of themselves” - contains the following requirement:

Furthermore, in the event that a [policyholder] is found liable and/or guilty for intentional infliction of harm on another, upon written demand by [the insurer], the [policyholder] shall fully reimburse [the insurer] for all legal fees, expenses and costs associated with the Legal Services & Benefits provided in connection with the matter. Additionally, [the insurer] will have no continued responsibility to provide Legal Services & Benefits from the date of the finding of liability and/or guilt.

I foresee significant public policy concerns with such provisions which require reimbursement in the event of a conviction or judicial determination of civil liability. Consider the situation where a drunk driver, insured by an auto insurance policy, is convicted of intoxication manslaughter as defined in the Texas Penal Code.⁸ Despite the conviction, the auto insurer is still required to provide a legal defense to the civil suit and, if the driver is found to be legally liable, pay the judgement up to the limits of the insurance policy. There is no parallel requirement in the standard auto insurance policy for the driver to refund their auto insurer in this situation.

Note well in the Washington example above, the commissioner approved a policy form that permits the insurer to recover when the policyholder “is found liable and/or guilty for **intentional** infliction of harm on another.” Arguably, this would not include convictions for involuntary manslaughter.

The Texas Penal Code does not differentiate between voluntary and involuntary manslaughter, unlike other states. Voluntary manslaughter is part of the murder statute, found in Penal Code Section 19.02.

In defining manslaughter, Section 19.04(a) simply states “A person commits an offense if he recklessly causes the death of an individual.” Section 19.05 defines criminally negligent homicide as an act “caus[ing] the death of an individual by criminal negligence.”

Note there is no element of intent in either the Texas manslaughter or criminally negligent homicide statutes. What impact would this have on a policyholder?

In the U.S. Concealed Carry Association (USCCA) insurance policy (as of the date of this paper, issued by Universal Fire and Casualty Insurance Company on behalf of Delta Defense) for its members, the reimbursement language reads as follows:

⁸ Texas Penal Code Section 49.08.

Recovery or Recoupment

We shall have the right to seek recovery or recoupment from an “insured” the amount of any payments made to, for, or on behalf of the “insured”, including payments made to third parties, if it is determined that any such payments were made for matters not covered by this Policy or are otherwise prohibited by applicable law.

The policy provides coverage for “acts of self defense” defined as:

“Act of self-defense” means the act of defending one’s person or others against an unlawful, unprovoked, and imminent threat of death or serious bodily harm by an aggressor, but only if:

1. any force used is both reasonable under the circumstances and proportionate to the threat; and
2. the act is permitted by applicable law.

Read together, a plea to or conviction of a charge of manslaughter or criminally negligent homicide under Texas law would be a judicial determination that the purported self defense act was not “an act...permitted by applicable law.” This would then trigger the “Recovery or Recoupment” clause of the contract, even though there was no judicial admission of an intentional act in this scenario.

Put another way: the lack of language limiting the reimbursement clause to intentional acts (like the language in the Washington example) would mean any plea pertaining to the self defense act would trigger the reimbursement clause in the USCCA policy.

Would USCCA/Universal Fire and Casualty Insurance Company, under a given fact pattern, elect to pursue reimbursement? I asked the company about this. They responded that coverage ends when a plea agreement is entered and that the insurer would make a decision as to whether to seek recoupment. While it does not appear recoupment efforts would be automatically initiated after a plea is entered, it is certainly a possibility.⁹

The predictable net result of this in the self defense situation: the consumer may be forced to choose between pleading to a lesser crime (perhaps one not requiring intent as an element) and being liable for the attorney’s fees paid on their behalf, or going to trial and hoping for an outright acquittal where they would not be responsible for refunding the legal fees incurred as a result of the charge.

Would such a clause be unconscionable? Texas courts have long supported the right to freedom to contract.¹⁰ Given the existence of products in the marketplace that don’t contain

⁹ Email exchange with author and USCCA between August 19-23, 2022. Email is possession of the author.

¹⁰ *Besteman v. Pitcock*, 272 S.W.3d 777 (Tex. App. 2008) “Although Merriam Webster's Collegiate Dictionary defines the term ‘unconscionable’ to mean “shockingly unfair or unjust,” MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 1362 (11th ed. 2006), Texas courts have determined that the term carries no precise legal definition.

reimbursement clauses, insurers could argue consumers have a choice in products, many of which do not have such clauses.

The better public policy, I would argue, is to refrain from enacting laws and regulations which impede access to justice. That's especially true when other insurance products pay benefits on behalf of their consumers in similar legal situations.

As an aside, some insurance policies do in fact provide coverage for intentional torts, such as libel and slander. These policies generally do not require the policyholder to refund expenses paid on their behalf if the policyholder does not prevail at trial.

Consumers of products from the facility must be crystal clear on the reimbursement issue. Does the product pay up front or on a reimbursement basis? And if the consumer is found guilty of a crime, do they have to reimburse the proprietor back?

Can a proprietor provide significant benefits to multiple consumers simultaneously?

In the defense of those regulators who mandate reimbursement clauses in pure insurance products, we should remember solvency of the proprietor is one of the reasons they cite in that decision. It's a legitimate concern.

Proprietors not offering pure insurance products are reluctant to disclose any information about their financial position, often claiming it is proprietary. While that may be true, consumers looking to buy these products cannot meaningfully discern a proprietor's ability to pay benefits in situations where the program is having to pay several large legal bills from various members simultaneously.

Consumers purchasing pure insurance products have an advantage here. The insurer's financials have been reviewed by a regulator to determine if the proprietor meets solvency requirements. As indicated earlier, consumers purchasing pure insurance products written in the admitted market have the additional benefit of the financial backing of the state guaranty fund in the event the insurer becomes insolvent.

Some proprietors in the facility have purchased insurance that inures to the benefit of the proprietor to provide sufficient funds to pay member benefits. In these situations, the consumer is not a policyholder; the proprietor is. Presumably, the consumer makes a request for benefits to the proprietor, who then in turn makes a claim on the policy to have the funds necessary to pay the benefits to the consumer.

In re Marriage of Smith, 115 S.W.3d 126, 135 (Tex.App.-Texarkana 2003, pet. denied); Arthur's Garage, Inc. v. Racial-Chubb Sec. Sys., 997 S.W.2d 803, 815 (Tex.App.-Dallas 1999, no pet.). Unconscionability must be determined on a case-by-case basis in light of a variety of factors. See Sw. Bell Tel. Co. v. DeLanney, 809 S.W.2d 493, 498 (Tex. 1991) (Gonzalez, J., concurring); Lee v. Daniels Daniels, 264 S.W.3d 273 (Tex.App.-San Antonio 2008, pet. filed)."

So is a pure insurance product better than the other products in the facility?

I hasten to add that choosing a pure insurance product over another type of product offered by the facility is not a guarantee your product of choice will be solvent. Insurance companies can and do become insolvent from time to time. Consumers should spend the time necessary determining how much confidence they have in the solvency of their proprietor of choice; for non-insurance entities, this is nearly an impossible task.

Earlier we discussed the differences between an admitted and non-admitted (surplus lines) carrier. Consumers preferring an insurance product should determine whether the product being offered is in the admitted or non-admitted market. If it's written as a surplus lines product, the insurer is subject to less regulation for both solvency and consumer protection.

Another consideration is determining the identity of the actual insurer. The proprietor offering the product may only be the broker and not the actual insurer. It's conceivable a consumer could purchase a product several years in a row with the same broker, but that the actual policy they are buying is placed with a different insurer from time to time. This will be disclosed to the consumer, but that doesn't absolve the consumer from doing their due diligence.

Once a consumer has identified the insurer in question, some simple internet searches can reveal a lot about the company. Things consumers should ask the internet about the insurer in question include:

- How are they rated by the rating agencies, such as A.M. Best, Moody's, Demotech or Standard and Poor's?
- What kind of reviews do they have?
- What complaints have been filed against them? And were they deemed justified?
- What articles have been written about them, especially in the insurance trade press?

Are "membership benefits products" acting as liability insurers?

Stated another way, does saying "*we're not insurance*" make you "not insurance?"

The arguments raised by CCW Safe in administrative proceedings with the Washington State Insurance Commissioner in 2020 provide some insights into the arguments such products are not insurance. In its demand for hearing on the subject, CCW Safe argued:

- "[a]n incidental contract provision that, for a fee, shifts a risk of loss from the consumer to the provider of the goods or services does not make the agreement an insurance contract subject to regulation under the Insurance Code."¹¹

¹¹ Demand for Hearing, OIC Order no. 19-0575, citing Heckart v. A-1 Self-Storage, Inc., 415 P.3d 286, 295 (Cal. 2018).

- CCW Safe’s Terms of Service does not insure members “in a specified amount upon a determinable contingency” as defined in section 48.01.040 of the Washington Revised Code.¹²
- CCW Safe does not engage in underwriting or the use of any rating factors in determining the membership price, unlike an insurance company calculating a premium.¹³

Reasonable minds can differ as to whether such products constitute insurance. I would submit the more a product goes beyond offering legal services and into the role of paying third parties for damages on behalf of a consumer, the more apt a regulator would be to consider that business model a form of insurance.

Are any legally possessed weapons covered by products offered by the facility?

Consumers will find this varies by product. Some do provide broad coverage for weapons beyond firearms, while others strictly limit benefits to those situations in which the consumer used a legally possessed firearm. Some products limit “other weapons” to situations where the self defense incident occurs in the residence.

Do products offered by the facility cover use of weapons in places where firearms are prohibited?

This also varies from product to product. Some have an absolute policy against providing benefits for such situations. Others have indicated they have a policy against providing benefits, but that they look at all the factors and make a decision based upon the totality of the circumstances.

One notable example for Texas residents: CCW Safe has a long explanation of when it provides benefits for situations occurring in a gun free zone. One aspect of their terms and conditions on this point reads as follows from the “FAQ” section of their website:

If you are in a state which allows the business (restaurant, etc.) to place a sign at the entrance yet a representative has to tell you to leave the premises or be arrested for trespassing (if someone identifies you have a concealed firearm) you will be covered if there is the need to respond in self defense for you or another in defense of a life threatening injury **ONLY** if you are not told to leave or if you agree to leave and have the worst-case scenario and have to defend your life or that of another, as you are leaving, you would be covered. **If you are told to leave and refuse then you are accepting the trespassing**

¹² Id.

¹³ Id.

charge and you will not be covered if an incident occurs following your refusal to leave and acceptance of the misdemeanor charge of trespassing.¹⁴

(emphasis original)

Texas Penal Code section 30.06(g) provides “it is a defense to prosecution under this section that the license holder was personally given notice by oral communication described by Subsection (b) and promptly departed from the property.” It would appear CCW Safe would provide benefits in a situation where a license to carry holder entered a premises with a posted 30.06 sign, provided the license holder a) had not been told to leave or b) had been told to leave and was in the process of doing so when the self defense incident occurred.

Consumers concerned about this particular scenario should carefully review the agreement to determine whether incidents occurring in gun free zones are covered.

Is there coverage for accidental/negligent discharges?

Consumers will find this varies by product. Some do provide broad coverage for such events.

What are some of the other benefits the facility provides?

It varies by proprietor and level of service the consumer purchases, but products currently provide such things as:

- Funds for bail
- Expert witness fees
- Wage reimbursement for days missed while in court
- Legal defense against “red flag” actions

What should we tell our legislators about these products?

From time to time, attorneys find themselves in positions to affect policy change as they have discussions with state legislators or regulators. Perhaps you are a state regulator or legislator. (If you are, and you’d like to discuss this in more detail, please feel free to reach out.)

If you’re a proponent of such products, what might we urge them to do in furtherance of the market?

- First, do no harm. Don’t pass legislation or promulgate regulations which would reduce access to or the utility of such products.

¹⁴ <https://ccwsafe.com/faq>

- Consider passing legislation prohibiting regulators from imposing reimbursement requirements, so consumers can take full advantage of the product they purchased and maximize their access to justice.
- If you're in a state that doesn't permit these programs, pass the laws necessary to allow them to come to market.
- Consider passing something akin to Tennessee Code Annotated 39-11-611(c) to protect the rights of law-abiding citizens forced to defend themselves in their homes, workplaces and vehicles. That statute provides:

(c) Any person using force intended or likely to cause death or serious bodily injury within a residence, business, dwelling or vehicle **is presumed to have held a reasonable belief of imminent death or serious bodily injury** to self, family, a member of the household or a person visiting as an invited guest, when that force is used against another person, who unlawfully and forcibly enters or has unlawfully and forcibly entered the residence, business, dwelling or vehicle, and the person using defensive force knew or had reason to believe that an unlawful and forcible entry occurred.

(emphasis added)

- Consider restricting the admissibility into evidence of the existence of a facility product. The admissibility of the existence of a liability insurance policy is already significantly restricted under both the Federal and Texas Rule of Evidence 411. Similarly, the existence of a legal services program or membership benefits program is irrelevant to prove an element of a crime or negligence.

Best practices for consumers purchasing and using these products

This brings us to the question most of you are likely asking at this point: *“how do I figure out what’s right for me?”* As more products come to market, there are more choices – and thus more decisions – to make when securing one of these products.

Traditionally, a consumer seeking liability protection for a particular situation would visit with their insurance agent or broker. The agent or broker, using their knowledge and experience, would recommend a product or a suite of products and tailor them to fit the consumer’s situation.

There is no equivalent of an agent or broker in this market for all of the products offered by the facility; only pure insurance products are sold via insurance agents and brokers. Consumers are on their own in determining what’s right for them.

For anyone considering purchasing a product (or products), I think the following steps will help the process:

Think about your common firearm usage. Do you carry a handgun regularly and go to the range on occasion to practice? Are you a hunter who might benefit from hunting liability protection? Do you volunteer on your church's security team? What are the most likely scenarios where you would need the benefits of one of these products?

Do you live in a venue where the prosecutor is a proponent of self defense? Or in a venue where armed self defense is viewed negatively? From a civil liability standpoint, how will your fellow citizens view your use of armed self defense when a lower evidentiary standard is applied to the facts of your case?

How much quality training in defensive firearm usage have you had? Karl Rehn, a nationally recognized firearms trainer and expert witness in use of force cases, put it like this:

I've worked many cases as an expert witness. The most common factor is that someone with no formal training or only carry permit training makes a legally questionable use of deadly force decision. The Texas License to Carry course teaches the Penal Code, which is not a guide to good tactics. Students mistake the words "defense to prosecution" to mean "I won't be arrested, charged or put on trial", which is not the case. Armed citizens that seek out and attend training beyond the carry permit level, particularly courses that teach tactics, not just mechanical shooting skills, tend to make better decisions.

Over the past 30 years, none of my students that have taken beyond-LTC tactics courses that have used force or deadly force in actual situations have had cases go to trial or the plea deal level. Most were never charged or arrested, and only those that fired shots had cases that went to the grand jury and were no-billed. Having a higher level of training also provides a stronger foundation for a legal defense, when the training can be used support the reasoning behind the use of deadly force actions that were taken.¹⁵

Consumers with less training may find they need more benefits and coverages from their product of choice if they are less proficient with self defense decision making skills. They should also seek additional training.

What is your financial situation? Are you able to pay out of pocket any fees necessary to go to trial? Is your net worth insufficient to attract attention from personal injury attorneys? Or are you somewhere in between?

¹⁵ Email to author, dated August 23, 2022. Email in possession of the author.

*As you do your research, reach out to the various programs. Email them your questions. Save their responses to help make a case for detrimental reliance should it come to that later on.*¹⁶

At renewal time, review the details of the program again. What's changed? Do they provide the same benefits they did previously? Do they have the same terms and conditions?

My “most definitely not hard and fast rules” on choosing the product best for you looks something like this:

- High net worth individuals in venues where prosecutors and juries are “self defense friendly”: pure insurance product
- No to low net worth individuals who are primarily concerned with affording access to the criminal justice system: legal services programs
- Individuals who are middle net worth **and** who live in venues where they anticipate significant scrutiny by prosecutors, trial lawyers and juries: a product or combination of products that provide both significant civil and criminal defense benefits, as well as liability benefits for any civil judgments.
- Individuals with little to no quality defensive firearm training in the last year: a product or combination of products that provide both significant civil and criminal defense benefits, as well as liability benefits for any civil judgments. They should also consider products with generous expert witness benefits. And more training.

So what did I end up purchasing?

In August 2022, after extensive research into various products and the facility in general, I purchased memberships with CCW Safe and U.S. Concealed Carry Association (USCCA), while retaining my long-standing membership in the Armed Citizens Legal Defense Network (ACLDN). I had not been a member of CCW Safe or USCCA before.

¹⁶ Under Texas law the elements of promissory estoppel are: (1) a promise; (2) foreseeability of reliance thereon by the promisee; and (3) substantial reliance by the promisee to his detriment. *MetroplexCore, L.L.C. v. Parsons Transp., Inc.*, 743 F.3d 964, 977 (5th Cir. 2014) (citing *English v. Fischer*, 660 S.W.2d 521, 524 (Tex. 1983)). To show detrimental reliance, “a plaintiff must show that he materially changed his position in reliance on the promise.” *Motten v. Chase Home Fin.*, 831 F. Supp. 2d 988, 1002 (S.D. Tex. 2011).
https://www.gpo.gov/fdsys/pkg/USCOURTS-txnd-3_16-cv-02296/pdf/USCOURTS-txnd-3_16-cv-02296-0.pdf

I chose this combination of products to create a wide spectrum of available benefits, given the venue where I live and my typical firearms usage (frequent concealed carry in a city and county with an increasing violent crime rate¹⁷).

I opted for CCW Safe because it offers:

- Robust benefits; coverage for church security team work; a stated understanding of 30.06 situations; no reimbursement clauses; \$1M civil liability coverage; insurance backing (but not marketed as an insurance product).

I also opted for USCCA because it offers:

- Pure insurance product; \$2M liability coverage, but with a reimbursement clause and the potential for no coverage in prohibited areas.

I kept my ACLDN membership because it provides a cost effective benefit, directed by a board of advisors who are leaders in the defensive firearms community.

I don't know that I will keep any of these products long term. I'm paying for CCW Safe and USCCA on a monthly basis in the event I discover something about the product that doesn't work for me. I'll decide as I learn more, as the products change over time, and as new products enter the market. I encourage others to do their review and adjust their protection plans on a regular basis. As mentioned earlier, these purchases are not endorsements of the products.

In a perfect world, what would these products do/look like?

I stated at the beginning of this paper I am a strong proponent of these products. I urge concerned citizens to purchase one (or more) that fits their needs.

Having said that, I do have a wish list – things I hope the facility will consider and implement as their efforts to develop their products continue. I hasten to add these things should not be mandated by the government; think of this as a blueprint for new entrants to the market and current ones looking to grow market share. This list includes:

- *More transparency about the proprietor's ability to pay benefits.* Insurance companies routinely boast of their financial strength, with receipts to back it up. Non-insurance companies do not provide this data. Publishing an audit report from an independent firm every year would go a long way in helping consumers understand the product they need in their time of serious legal crisis will be able to provide for them. One option would be for non-insurance facility participants to provide consumers with an "Agreed Upon Procedure Engagement," which is "an attestation engagement in which a[n accountant] performs specific procedures on subject matter and reports the findings without providing an opinion or conclusion."¹⁸ Such an engagement could be tailored to provide sufficient

¹⁷ See, *inter alia*, "Travis County homicides up 120% outside of Austin City Limits," CBS News Austin, <https://bit.ly/3CA5FFK>; Austin Police Department Chief's Monthly Reports, <https://bit.ly/3ThYnO2>

¹⁸ <https://us.aicpa.org/content/dam/aicpa/research/standards/auditattest/downloadabledocuments/at-c-00215.pdf>

information to enable consumers to have a better understanding of the proprietor's financial wherewithal.

- *For insurance products, options in the admitted market.* As best I can tell, all the pure insurance products are in the surplus lines market. Admitted market products provide more protections for consumers. Ideally, as insurers writing in this market develop rate and loss history sufficient to justify an admitted market product, they will create that option for consumers.
- *Coverage for domestic violence incidents.* I understand why the facility is hesitant to provide benefits for someone accused of domestic violence. Doing so would expose the facility to an increased frequency of claims/requests for assistance. It also creates the potential for reputational harm of the proprietor. At the same time, the accused needs resources to help defend against allegations in court. As of August 2022, there seems to be a trend within the facility to start extending coverage for incidents between current and former romantic partners after some proprietors retreated from doing so. I hope this trend continues and proprietors make the details of such coverage clear to consumers.
- *Safeguards to protect sensitive communications from consumers to the proprietor.* A consumer calls their proprietor of choice after self defense incident, which may very well be the worst day of their lives. The facility should strive to create best practices by which information conveyed in that initial contact cannot be used by the proprietor to take an adverse action against the consumer to deny or restrict benefits available under the terms of the agreement. If the proprietor makes a determines the consumer has not engaged in a legitimate act of self defense, it should do so with information derived independently from any information derived from the first contact the consumer has with the proprietor after the event.
- *Clear descriptions and standards of qualifications for those making decisions about available benefits.* What do you know about the individual(s) making the decision as to whether you will be getting the benefits you need at your moment in need? Are they attorneys? Self defense experts? Licensed claims adjusters? Proprietors should tell consumers the qualifications of the individuals making these critical decisions.
- *Discounts (assuming they are justified) for those obtaining additional certifications or meeting requalification goals on a regular basis.* If a consumer agrees to requalify to DPS or a local police department's shooting standards on a regular basis, are they a better risk than someone who has never taken a handgun class in their lives? If a consumer successfully completes advanced training from a certified provider, are they a better risk for the proprietor? Providing discounts is a way to encourage consumers to take quality training on a regular basis, making them better gun owners in the process.

Final thoughts

To sum up:

- Pure insurance products are more regulated for consumer protection and solvency purposes. They are also more likely to contain reimbursement clauses.
- Facility participants claiming their products are not insurance do so in part to avoid state insurance regulation, given the compliance costs and restrictions that come with that. It also provides those proprietors with the needed flexibility to bring products to market with benefits which pure insurance products might not be able to include.
- This is a rapidly changing market. A product sold today may not have the same features – or even exist – a year from now.
- **These products promote access to justice by creating a mechanism for consumers to help secure legal counsel in the event they are charged or sued.**
- Consumers must do a thorough due diligence when selecting a product and should do so when the product comes up for renewal.
- Once you've chosen your product or products, create a plan to quickly activate the benefits after a self defense situation.

We should not lose sight of the fact the facility does something the State Bar and consumer advocates spend a lot of time talking about – **providing access to justice**. Contrary to the opinions of its critics, the facility provides significant public policy benefits beyond access to justice – such as training opportunities and educational products, bail bond assistance, and resources for post-event mental health counseling. The private sector is developing these products through free market principles and not government mandates.

Armed citizens should strongly consider purchasing a product that fits their needs, after completing a thorough review of the various options and considering the questions raised in this paper. The facility should be encouraged by consumers, attorneys and other thought leaders to continue to improve its products to create greater utility and transparency of them.