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IMPORTANT CASES AFFECTING THE PROSECUTION AND DEFENSE OF UM / UIM CASES

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IMPORTANT CASES AFFECTING THE PROSECUTION AND DEFENSE OF UM / UIM CASES

There are a number of recent cases—required reading—that affect the prosecution and defense of uninsured and underinsured motorist (UM /UIM) cases. For our purposes in this article, I will use the terms UM/UIM interchangeably (most of our discussion will focus on UIM propositions). The following article, while not exhaustive, gives the practitioner a good overview of important cases in this area of the law.

The Basics: It is a Contract!

What is unique about the whole area of UM / UIM law is that fundamentally it involves a lawsuit for contract benefits the determination of which depends upon tort law. That is, legal entitlement to benefits under the insurance policy depends upon whether the plaintiff (insured) establishes a third party's liability under tort law.[1]

The Texas Supreme Court, in two important cases, has discussed the issue of "legal entitlement" to the recovery of underinsured motorist benefits. In the first case, *Henson v. S. Farm Bureau Cas. Ins. Co.*, 17 S.W.3d 652 (Tex. 2000), the court dealt with the issue of when prejudgment interest commences in an underinsured motorist case. Like most UIM litigation, the plaintiff-insured settled his liability suit against the third-party tortfeasor for policy limits (with the UIM insurer's consent) and the case against the UIM carrier proceeded. The court construed language in the UM/UIM policy (language still contained in such policies to date):

> We will pay damages which a covered person is *legally entitled to recover* from the owner or operator of an [uninsured / underinsured] motor vehicle because of bodily injury sustained by a covered person, or property damage caused by an accident.

See *id.* at 653 (emphasis supplied). The insured argued that it was entitled to prejudgment interest 180 days after he made a demand for UIM benefits (or filed suit for same). The insurance company contended that it did not owe prejudgment interest on a claim for underinsured motorist benefits until it was subject to a judgment establishing the third-party tortfeasor's negligence and the damages flowing from such negligence. *See id*. at 654:

> When the jury found Contreras [the tortfeasor] at fault for the accident and found Henson [the plaintiff-

[1] The Texas Supreme Court has explained:

> The UIM contract is unique because, according to its terms, benefits are conditioned upon the insured's legal entitlement to receive damages from a third party. Unlike many first-party insurance contracts, in which the policy alone dictates coverage, UIM insurance utilizes tort law to determine coverage. Consequently, the insurer's contractual obligation to pay benefits does not arise until liability and damages are determined.

Brainard v. Trinity Universal Ins. Co., 216 S.W.3d 809, 818 (Tex. 2006)

> insured] damaged by her negligence, Henson became legally entitled to recover from her. And because the damages exceeded Contreras' liability policy limits, Henson became entitled to the uninsured / underinsured motorist policy benefits, up to the policy limits. **By the terms of the policies, no obligation to pay the claim existed until the jury established Contreras' liability.**

Id. at 654 (emphasis supplied).

> ***Henson's* Important Points:**
>
> - The plaintiff's settlement with the third-party tortfeasor alone did not establish that the plaintiff-insured was entitled to recover from the UIM insurer.
> - There is no obligation upon the UIM insurer to pay the claim until the jury established the tortfeasor's liability—and no contractual duty is breached before that time.

The second important case is *Brainard v. Trinity Universal Ins. Co*., 216 S.W.3d 809 (Tex. 2006). Much of the discussion in the case involves the issue of the recovery of prejudgment interest in a UIM case. The holding in this regard: UIM insurance covers prejudgment interest that the underinsured motorist (i.e., the tortfeasor) would owe the plaintiff-insured. *See id.* at 813. The method by which such prejudgment interest is computed is discussed in the opinion, but I will leave that analysis to my brothers and sisters presenting the seminars in appellate law!

One of the more important issues discussed in *Brainard* involved the recovery of attorney's fees in UIM cases (discussed in more detail later). The case, however, confirmed the supreme court's earlier pronouncements in *Henson* that the UIM carrier has no contractual obligation to pay benefits under the policy until such time as there is a judgment establishing legal entitlement to such benefits.

As the court stated:

> The UIM insurer is obligated to pay damages which the insured is "legally entitled to recover" from the underinsured motorist. TEX. INS. CODE art. 5.06–1(5). As discussed above, we have determined that this language means the UIM insurer is under no contractual duty to pay benefits until the insured obtains a judgment establishing the liability and underinsured status of the other motorist. *Henson*, 17 S.W.3d at 653–54. Neither requesting UIM benefits nor filing suit against the insurer triggers a contractual duty to pay. *Id.* Where there is no contractual duty to pay, there is no just amount owed.

Brainard, 216 S.W.3d at 818.

What Must Be Done
to Recover UIM Benefits?

Brainard states it plainly: the insured must obtain a judgment establishing the *liability* and *underinsured status* of the other motorist. *See Brainard*, 216 S.W.3d at 818. How does one go about establishing legal entitlement? A settlement with the UIM insurer regarding the amount of UIM benefits owed (not to be confused with consent to settle with the third party tortfeasor) is one way—and this gives rise to very little litigation since it is fairly obvious—the insurer agrees to a settlement—the insurer does not pay—the insurer gets sued at the very least for breach of contract.

***Brainard's* Important Points:**

- The UIM insurer is under no contractual duty to pay benefits until the insured obtains a judgment establishing the liability and underinsured status of the other motorist.
- Neither requesting UIM benefits nor filing suit against the insurer triggers a contractual duty to pay.
- Without such a presentment (a judgment establishing negligence and damages), there can be no recovery of attorney's fees under Chapter 38 of Texas Civil Practices & Remedies Code.

The more common way of establishing legal entitlement, as mentioned in *Brainard*, comes through the insured obtaining a judgment establishing the negligence and status of the underinsured motorist (i.e., that damages exceed the amount of credits).

Texas courts have explained that an insured seeking UIM benefits has several options in this regard:

> An insured seeking the benefits of uninsured / underinsured motorist coverage may:
>
> (1) sue the insurance company directly without suing the uninsured / underinsured motorist;
>
> (2) sue the uninsured / underinsured motorist with the written consent of the insurance company, making the judgment binding against the insurance company; or
>
> (3) sue the uninsured / underinsured motorist without the written consent of the insurance company and then relitigate the issue of liability and damages. *Millard*, 847 S.W.2d at 674; *Criterion Ins. Co. v. Brown*, 469 S.W.2d 484, 485 (Tex. Civ. App.—Austin 1971, writ ref'd n.r.e.).

In re Koehn, 86 S.W.3d 363, 368 (Tex. App.–Texarkana 2002, orig. proceeding).

Insured's Options for Establishing Legal Entitlement—May Sue:

- the insurance company directly without suing the uninsured/underinsured motorist;
- the uninsured/underinsured motorist *with the written consent* of the insurance company, making the judgment binding against the insurance company; or
- the uninsured/underinsured motorist *without the written consent* of the insurance company and *then re-litigate* the issue of liability and damages.

Recovery of Attorney's Fees in UM / UIM Cases

The issue affecting most of us who practice in this area involves the court's discussion of the recovery of attorney's fees in UIM cases, and the fundamental principles of UIM law that underlie the court's holdings in this regard. *Brainard* very clearly held that there may be no recovery of attorney's fees in a UIM case until there has been a binding judgment against the UIM carrier that establishes the tortfeasor's negligence and status as an underinsured motorist. *See Brainard*, 216 S.W.3d at 818.

The holding: under Chapter 38 of the Texas Civil Practice and Remedies Code (allowing recovery of attorney's fee in suit upon contract), there is no *presentment* of a claim for UIM benefits until the trial court signs a judgment establishing the negligence and underinsured status of the other motorist. *See Brainard*, 216 S.W.3d at 818.

The reasoning: there is no duty to pay UIM benefits until such time as the plaintiff-insured has established legal entitlement to such benefits. *See id.* at 818.

Note that there is an important case affecting the issue of attorney's fees: *Allstate Ins. Co. v. Irwin*, 2019 WL 3937281 (Tex. App.—San Antonio, pet. filed). *Irwin* presented a common factual scenario: plaintiff sued third-party tortfeasor; tortfeasor settles for his $30,000 policy limits; plaintiff demands $50,000 UIM limits claiming that his medical bills alone exceed the tortfeasor's limits. The UIM carrier offered $500. Plaintiff sued under the Texas' Uniform Declaratory Judgment Act (UDJA). The jury awarded close to $500,000 and the court signed a judgment awarding $50,000 (the UIM policy limit), $2,000 (court costs), and $45,540 in attorney's fees. *See id.*, at *1.

The carrier appealed arguing that the UDJA is not a proper vehicle for pursuing UIM coverage and therefore the recovery of attorney's fees under the act likewise was inappropriate. First, the court held that the UDJA is a proper vehicle to determine an insured's entitlement to UIM benefits. *See id.* at *3, *citing*, *Allstate Ins. Co. v. Jordan*, 503 S.W.3d 450, 455 (Tex. App.—Texarkana 2016, no pet.) (while rejecting the cases refusal to permit attorney's fees under the UDJA).[2] Next, it rejected the argument

[2] There is some authority allowing a breach of contract case to be combined with a federal declaratory judgment action. Judge Xavier Rodriguez wrote:

that *Brainard* prohibited the award of attorney's fees in a UIM case. The court distinguished *Brainard* noting that it refused to award attorney's fees under Tex. Civ. Prac. & Rem. Code § 38.001(a)(suit on written contract). At issue in *Irwin* was a suit for a declaratory judgment under Tex. Civ. Prac. & Rem. Code § 37.009.[3] The San Antonio Court held that the trial court properly awarded attorney's fees under the UDJA since it allows the trial court the discretion to award such fees as are "equitable and just … without regard to whether the recipient is the prevailing party." *See id*., at *4. Allstate filed the petition for review in the supreme court in early December 2019, and the court has requested merits briefing on the petition.

By contrast, the court in *Allstate Ins. Co. v. Jordan*, 503 S.W.3d 450 (Tex. App.—Texarkana 2016, no pet.), refused to allow the recovery of attorney's fees under the UDJA. The court explained:

> Under the UDJA, however, "the court may award costs and reasonable and necessary attorney's fees as are equitable and just." Tex. Civ. Prac. & Rem. Code Ann. § 37.009 (West 2015). Yet, the Texas Supreme Court has explained that an insurer has no duty to pay UIM benefits until the plaintiff has established that she is legally entitled to an amount of damages that exceeds the limits of the UIM's policy. Therefore, the insurer has the right to make the plaintiff meet the liability and damages prerequisites to UIM recovery, through litigation or otherwise. **Consequently, requiring an insurer to pay attorney fees for exercising its right to require the plaintiff to establish its entitlement to recovery of UIM benefits under the policy would be inequitable and unjust under the UDJA.**

Jordan, 503 S.W.3d at 457 (emphasis supplied).

The law, at least in the 32 counties in the Fourth Supreme Judicial District, permits the recovery of attorney's fees, not under Chapter 38, but of Chapter 37, of the Texas Civil Practice and Remedies Code (Texas' Uniform Declaratory Judgment Act**)**. The law in the 19 counties comprising the Sixth Supreme Judicial District does not permit the recovery of attorney's fees under the UDJA.

Note that a federal court will use the federal Declaratory Judgment Act in place of the Texas Act. *See Martinez v. Allstate Fire*

> Thus, the prudent course at this time is to allow the Plaintiff to proceed under both the UDJA and a breach-of-contract theory while establishing the required underlying tort elements necessary for UIM coverage. Otherwise, she is at risk of losing her remedy altogether based on the unsettled state of the law.

Green v. Allstate Fire & Cas. Ins. Co., No. SA-19-CV-360-XR, 2019 WL 2744183, at *3 (W.D. Tex. 2019); Recent authority out of the Western District of Texas, however, dismisses the breach of contract claim and allows *only* the federal declaratory judgment action. *See Morgan v. Allstate Ins. Co*., No. A-20-CV-00199-JN (W.D. Tex. 2020), *citing*, *Rodriguez v. Allstate Fire & Cas. Ins. Co*., No. 5:18-CV-1096-OLG, 2019 WL 650438, at *2 (W.D. Tex. 2019); *Love v. Geico Indem. Co.*, No. 6:16-CV-354-RP, 2017 WL 8181526, at *3 (W.D. Tex. 2017).

[3] The statute states: "In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just."

Recovery of Attorney's Fees in UIM Cases:

- No recovery under Chapter 38, CPRC (suit on written contract);
- San Antonio Court of Appeals allows recovery under Chapter 37, CPRC (Texas DJA);
- Texarkana Court of Appeals does not allow recovery under Chapter 37, CPRC (Texas DJA);
- Insurer filed petition in Texas Supreme Court on issue re attorney's fees in DJ action.
- No recovery of attorney's fees in federal DJ action.

and Cas. Ins. Co., 2019 WL 5789988 at *9 (W.D. Tex. 2019). The Fifth Circuit has held that the Texas Declaratory Judgment Act is procedural and does not create a right to attorney's fees in a diversity action. *See Utica Lloyd's of Texas v. Mitchell*, 138 F.3d 208, 210 (5th Cir.1998). The federal Declaratory Judgment Act permits the recovery of attorney's fees only in limited circumstances that are not applicable in UIM cases. *See Philadelphia Indem. Ins. Co. v. Creative Young Minds, Ltd.*, 679 F. Supp. 2d 739, 745 (N.D. Tex. 2009).

Discovery Issues in Extra-Contractual Cases

There is the temptation to join in one action both a contract claim for benefits with a claim for extra-contractual damages. These extra-contractual claims include the breach of the common law duty of good faith and fair dealing in addition to violations of the Texas Insurance Code and Texas Deceptive Trade Practices Act (sometimes called "bad faith" claims). As the supreme court has noted:

> An insured's claim for breach of an insurance contract is "distinct" and "independent" from claims that the insurer violated its extra-contractual common-law and statutory duties . . . A claim for breach of the policy is a "contract cause of action," while a common-law or statutory bad-faith claim "is a cause of action that sounds in tort." . . . But the claims are often "largely interwoven," and the same evidence is often "admissible on both claims."

USAA Tex. Lloyds Ins. Co. v. Menchaca, 545 S.W.3d 479, 489 (Tex. 2018) (internal citations omitted).

It is clear that in those UIM cases in which both contract and extra-contractual claims are asserted that the insurer has the right to the sever such claims and to abate all discovery related to the extra-contractual claims. *See e.g., In re State Farm Mut. Auto. Ins. Co.*, 553 S.W.3d 557 (Tex. App.—San Antonio 2018, orig. proceeding); *In re Allstate Fire & Cas. Ins. Co.*, 2017 WL 5167350 (Tex. App.—Tyler 2017, orig. proceeding) (mem. op.); *In re Liberty Mut. Cnty. Mut. Ins. Co.*, 537 S.W.3d 214 (Tex. App.—Houston [1st Dist.] 2017, orig. proceeding).

Efforts to permit the severance of the two causes of action without the abatement of the extra-contractual cause have not been

successful. The reasoning of the San Antonio court is instructive:

> Thus, because of their unique nature, UIM extra-contractual claims can be rendered moot if the insured does not obtain a judgment against the underinsured motorist . . . Finally, because extra-contractual claims can be rendered moot, abatement is necessary to avoid litigation expenses.

In re State Farm, 553 S.W.3d at 564; s*ee also In re Farmers Tex. Cnty. Mut. Ins. Co.*, 509 S.W.3d 463, 467 (Tex. App.—Austin 2015, orig. proceeding). The court reasoned that because it is under no contractual obligation to pay a claim under a UIM policy until liability is established, an insurer should not be required to put forth the effort and expense of conducting discovery and preparing for trial on severed extra-contractual claims that could be rendered moot. *In re Farmers*, 509 S.W.3d at 467.

The San Antonio Court of Appeals was also clear concerning the impact of *USAA Tex. Lloyds v. Menchaca*, 545 S.W.3d 749 (Tex. 2018) upon the issues of severance and abatement. The appellate court stated, in its holding directing abatement of extra-contractual discovery, that *Menchaca* did not, as the plaintiffs argued, "[Change] the evidentiary landscape relied upon by insurers under *Brainard* by freeing insureds from first having to prove a breach of contract before pursuing damages for extra-contractual violations." *See In re State Farm*, 553 S.W.3d at 560.

Note that bifurcation[4] of the extra-contractual claims is no substitute, in state court, for the severance and abatement of those claims. *See In re United Fire Lloyds*, 327 S.W.3d 250, 256 (Tex. App.—San Antonio 2010, orig. proceeding).

Some federal courts are willing to sever and abate extra-contractual claims from the contract claims. *See Perez v. State Farm Mut. Auto. Ins. Co.*, 2019 WL 2075931 (S.D. Tex. 2019). Others prefer simply to abate the extra-contractual claims pending the outcome of the contract action. *See Ochoa v. Allstate Fire & Casualty Ins. Co.*, 2019 WL 5149859 (W.D. Tex. 2019); *Gomez v. Allstate Fire and Cas. Ins. Co.*, 2019 WL 5149859 (W.D. Tex. 2019).

In those situations in which a tort claim against a third party is joined with claims against a UM / UIM carrier, the third-party has the right to severance. *See In re Reynolds*, 369 S.W.3d 638, 653-54 (Tex. App.—Tyler 2012, orig. proceeding) (joinder prejudices tortfeasor by improperly injecting insurance into case); *In re Koehn*, 86 S.W.3d 363, 369 (Tex. App.—Texarkana 2002, orig. proceeding) (same); *In re Progressive Cnty. Mut. Ins. Co.*, 2017 WL 2333308 (Tex. App—Austin 2017, orig. proceeding).

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[4] The San Antonio Court has explained:

> Severance and bifurcation are distinct trial procedures. . . A severance divides the lawsuit into two or more separate and independent causes . . . However, the bifurcation of a trial leaves the lawsuit intact but enables the court to hear and determine one or more issues without trying all controverted issues at the same time.

In re United Fire Lloyds, 327 S.W.3d 250, 254 (Tex. App.—San Antonio 2010, orig. proceeding).

The court in *Reynolds* also made a strong argument for the insurer's right to sever the action against the third-party tortfeasor from the UIM carrier. An insured may not circumvent the contract requirement that it obtain the insurer's written consent to be bound by any judgment against the tortfeasor. This is true even in those situations in which the insured joins the insurer in the action against the tortfeasor. An insured that joins his UIM carrier in the third party action nonetheless will need to relitigate the case against the UIM carrier to determine legal entitlement. *See In re Reynolds*, 369 S.W.3d 638, 655 (Tex. App.—Tyler 2012, orig. proceeding).[5]

Severance and Abatement

- In state court, contract claim properly is severed from the extra-contractual claim; the extra-contractual claims properly abated;
- Bifurcation of claims in state court is no substitute for severance / abatement;
- Some federal courts more inclined to delay severance (but grant abatement);
- UM / UIM cases joined with third-party case against tortfeasor: tortfeasor may obtain severance. Same may apply to insurer.

Once the contract is severed from the extra-contractual case and the latter is abated, what discovery is proper? There is good direction on the handling of written and oral discovery from several courts of appeal. The fundamental concept one must bear in mind when propounding discovery is, as *Menchaca* noted, that the contract and extra-contractual cases are separate and distinct causes of action. *Menchaca*, 545 S.W.3d at 489. While some of the issues in both causes may overlap, this does not mean that discovery directed only to the extra-contractual case is proper when that cause has been abated.

The Oral Deposition
of the Insurer's Corporate Representative

For the purposes of this discussion, let us assume that the insurer's attorney has obtained the severance and abatement of the contract and extra-contractual issues as discussed previously. Presently there are two distinct approaches to the issues involving a deposition of the corporate representative. The San Antonio and Corpus Christi Courts of Appeal hold that such a deposition is permissible if limited to issues properly triable in the contract case. The Houston Court of Appeal (14th District) holds that when the insurer stipulates to certain contract issues arising in UIM cases, the deposition of the corporate representative is not appropriate. The supreme court has not given us direction in this regard.

[5] This means that the UIM carrier will be prejudiced by being forced to participate in the trial of the tort action even though it cannot defend the tortfeasor; *see Allstate Ins. Co. v. Hunt*, 469 S.W.2d 151 (Tex. 1971); and is not bound by any judgment. *See In re Reynolds*, 369 S.W.3d 638, 655 (Tex. App.—Tyler, 2012, orig. proceeding).

Let us begin the analysis with the case of *In re Garcia*.[6] The trial court had severed and abated the extra-contractual claims in this underinsured motorist case. As the court noted, allowing "only the breach of contract suit to go forward." *See id*. at *1. The insurer, State Farm, moved to quash plaintiff's notice of intent to take the deposition of its corporate representative on certain limited topics. State Farm argued the "matters identified in [Garcia's] deposition notice only include matters of which State Farm has stipulated, extra-contractual matters not relevant to this lawsuit, or matters discovery through other less intrusive means. After a non-evidentiary hearing, the trial court quashed the deposition in its entirety. **Held**: writ conditionally granted such that trial court ordered to withdraw its order quashing the deposition. *See id*. at *3.

The court explained that plaintiff's notice covered ten specific areas, "including *the occurrence or non-occurrence of all conditions precedent* under the contract, *any facts supporting State Farm's legal theories and defenses*, and *information regarding State Farm's experts*." *See id*., at *2. These areas of inquiry all related to issues relevant to the contract cause of action: the defenses and theories raised by State Farm or have a direct bearing on the damages in Garcia's breach of contract claim. The court found that information about State Farm's defenses was relevant and properly discoverable, absent a showing of privilege or some other exemption. *See id*. at *2 (emphasis supplied).[7]

The court, however, did not announce a rule *carte blanche* permitting a corporate representative's deposition: "Upon proper notice and hearing, the trial court may still consider and rule on State Farm's alternative request to limit the scope of the deposition. *See id*. at *3.

The Corpus Christi Court of Appeals supports the approach taken in the case of *In re Terri Garcia*. *In re Luna* is an uninsured motorist case. After the resolution of the tort case against the uninsured motorist, plaintiff sought the deposition of State Farm's corporate representative for the purposes of the developing its contract UM case. The case is noteworthy due to its detail concerning the type of topics it finds appropriate for a corporate representative:

(1) the damage sustained by all vehicles involved in the collision at issue;

(2) whether [the third-party tortfeasor] was an uninsured motorist at the time of the collision;

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[6] 2007 WL 1481897 (Tex. App.—San Antonio 2007, orig. proceeding)(mem. op.).

[7] The court also explained that despite the fact that it argued that there were less intrusive or burdensome methods by which to obtain the sought-after discovery, State Farm produced no evidence to support these claims. Also, it did not offer evidence to substantiate claims of harassment. *See id.* at *2. Regarding State Farm's proposed stipulations, the court stated:

> At the hearing, State Farm's attorney represented to the trial court that in the future it would stipulate to the policy of insurance, the facts supporting its legal theories and defenses, its limitation of liability, and any offsets or credits to which it is entitled. However, nothing in the record shows State Farm has stipulated to any of these matters. We believe State Farm's assurances that it will stipulate to these matters in the future is not a proper substitute for discovery.

Id., at *2.

(3) whether [the third-party tortfeasor] was driving an uninsured vehicle at the time of the collision;

(4) State Farm's contention that Fred Ochoa Sr. was a responsible third party with regard to this collision;

(5) State Farm's contention that Luna [the plaintiff-insured] "has failed to comply with all conditions precedent to recovery, including the failure to obtain a legal determination of the existence and amount of liability, if any, of the owner or operator of the allegedly uninsured motor vehicle";

(6) whether the term "uninsured motor vehicle" is correctly defined in the State Farm insurance policy at issue in this lawsuit;

(7) State Farm's claims and defenses regarding Luna's [the plaintiff-insured] assertions in this lawsuit;

(8) State Farm's contention that it is entitled to "credit and offset" for the personal injury protection (PIP) benefits in the amount of $5,000 paid to Luna as a result of the accident; [8]

(9) State Farm's contention that it is "entitled to offsets, including any recovery by [Luna] from other parties or their insurance carriers"; [9]

(10) State Farm's contention that Luna's "recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant";

(11) State Farm's contention that "the claim for punitive damages is subject to statutory and constitutional limitations, including, without limitation, TCPRC 41.008";

(12) State Farm's contention that it "generally denies [Luna's] allegations"; and

(13) State Farm's contention that it "does not believe [Luna] is entitled to recover damages in the amount sought."

See In re Luna, 2016 WL 6576879, at *2 (Tex. App. Nov. 7, 2016). The court allowed these topics noting, "[T]hey track the parties' pleadings and deal directly with the fundamental issues of liability and damages." *See id*. at *7. The Corpus Christi court, however, also imposes limits on such depositions.

In re Perry, 2019 WL 1723509 (Tex. App.—Corpus Christi 2019, orig. proceeding) does provide some guidance on the limitations that may be placed on the corporate representative's deposition. For instance, the notice of deposition contained in the *Perry* case includes topics "regarding the nature and causation of Perry's alleged injuries sustained in the collision and the

[8] The insurer is entitled to a credit for PIP benefits paid. *See State Farm Mut. Auto. Ins. Co. v. Norris*, 216 S.W.3d 819 (Tex. 2006).

[9] Note that the insurer is entitled to a credit for the full amount of the tortfesasor's liability limit irrespective of the amount of the settlement. *See Allstate Indem. Co. v. Collier*, 983 S.W.2d 342, 344 (Tex.App.—Waco 1998, writ dism'd) (UIM carrier entitled to $100,000 offset, the full amount of coverage available under tortfeasor's liability policy, even though injured party settled with tortfeasor for only $75,000); *Olivas*, 850 S.W.2d at 565–66 (UIM carrier entitled to offset equal to $25,000 policy limit where insured settled with tortfeasor for $15,000); *see also Haralson v. State Farm Mut. Auto. Ins. Co.*, 564 F. Supp. 2d 616, 627 (N.D. Tex. 2008). Offsets and credits are taken from the actual damages found by the jury, not from the UIM policy limits. *See Stracener v. United Servs. Auto. Ass'n.*, 777 S.W.2d 378, 383 (Tex. 1989).

damage sustained by all vehicles involved in the collision." The court declined to allow such discovery stating, "Perry has independent and superior access to his own records and deposing State Farm as to their contents would be unreasonable and unduly burdensome." *In re Perry*, at *8 ((court allowed, however, corporate representative's deposition on those issues regarding whether the tortfeasor caused the accident, the amount of Perry's damages, and whether the tortfeasor's insurance coverage is deficient.)

In re Liberty Cty. Mut. Ins. Co., 557 S.W.3d 851, 856 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding) imposes some significant restrictions on a plaintiff's ability to take a UIM insurer's corporate representative. The case involved a trial court's order compelling the deposition on topics very similar to those listed in the *Garcia*, *Luna*, and *Perry* cases. The court, in a very detailed opinion, conditionally granted the writ of mandamus, instructing the trial court to grant Liberty Mutual's motion to quash. *See id.* at 858.

Liberty Mutual filed very specific stipulations that assisted the court in making its determination. These stipulations were as follows:

(1) Liberty issued the Policy to Plaintiff;

(2) the Policy was in full force and effect on February 24, 2017;

(3) Plaintiff is an insured within the meaning of the Policy's UIM coverage provision;

(4) the Policy provided $30,000 per person in uninsured motorist coverage to Plaintiff; and

(5) the occurrence in question is a covered occurrence under the Policy's UIM coverage provisions.

In re Liberty Cty. Mut. Ins. Co., 557 S.W.3d 851, 856 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding).

The court noted that such stipulations "narrow[ed] the relevant issues in the present case to those of a typical car wreck case—namely, (1) the unidentified truck driver's liability for the underlying car accident, and (2) the existence and amount of Plaintiff's damages. It further explained that plaintiff had already obtained much of the information sought from documents or medical records already known to plaintiff. *See In re Liberty Cnty. Mut. Ins. Co*., 557 S.W.3d at 856.

In another Liberty Mutual case, the trial court, after severing the contract case from the extra-contractual case, denied the insurer's motion to quash the deposition of its claim adjuster who had signed interrogatory responses in the UIM case. *In re Liberty Cnty. Mut. Ins. Co.*, 537 S.W.3d 214, 218 (Tex. App.—Houston [1st Dist.] 2017, orig. proceeding). The discovery propounded sought:

- "[S]tate the amount of all settlement offers made by [Liberty Mutual] in an effort to resolve Plaintiff's claim prior to suit being filed and the method you used and how you calculated this amount and/or Plaintiff's damages."

- "State the procedures relied upon and the criteria utilized by [Liberty Mutual] in its investigation of Plaintiff's claim to evaluate and place a dollar value on her claim."

- "Identify every person who participated to any degree in the

investigation and adjusting of the claims, defenses, or issues involved in this case, describe the involvement of each person identified, list their qualifications, state the dates of each investigation, and whether it was reduced to writing and describe in detail the investigation and information gathering process that they utilized to assist you in your decision to deny or adjust payment of Plaintiff's claim."

- "Identify every person who has complained, within the past five (5) years in Texas, about any claim adjustment and/or denial based on any of the reasons that you contend support your adjustment and/or denial of Plaintiffs claim."

- Provide the following information for the last five years: (a) "the total number of written claims filed, including the original amount filed for by the insured and the classification by line of insurance of each individual written claim;" (b) "the total number of written claims denied," (c) "the total number of written claims settled, including the original amount filed for by the insured, the settled amount, and the classification of line of insurance of each individual settled claim;" (d) "the total number of written claims for which lawsuits were instituted against [Liberty Mutual], including the original amount filed for by the insured, the amount of final adjudication, the reason for the lawsuit, and the classification by line of insurance of each individual written claim;" and (e) "the total number of complaints, their classification by line of insurance, the nature of each complaint, the disposition of these complaints, and the time it took to process each complaint."

In re Liberty Cty. Mut. Ins. Co., 537 S.W.3d at 217–18. Liberty Mutual objected that the discovery was immaterial and irrelevant to the underlying tort lawsuit (i.e., the contract cause of action) and thus *not reasonably calculated to lead to the discovery of admissible evidence as to any viable claims or causes of action against this Defendant. See In re Liberty Cty. Mut. Ins. Co.*, 537 S.W.3d at 218 (emphasis supplied). The court agreed. *See id.*

The Deposition of the Insurer's Corporate Representative

- Clarify issues discoverable: get contract issues severed from extra-contractual issues and have extra-contractual case abated;

- Deposition is only appropriate when for limited contract issues; not appropriate on the extra-contractual issues during abatement period;

- Review discovery closely for attempts at premature discovery on extra-contractual issues when that cause is abated (i.e., discovery directed at investigation and evaluation of claim—and not directed at negligence and damages in underlying case).

The Trial

The plaintiff-insured must prove that he has UIM coverage, that the underinsured motorist (the tortfeasor) negligently caused the accident that resulted in the plaintiff-insured's covered damages, the amount of the insured's damages, and that the underinsured motorist's insurance coverage is deficient. *See In re Allstate Cnty. Mut. Ins. Co.* 447 S.W.3d 497, 501 (Tex. App—Houston [1st Dist.] 2014, orig. proceeding).

So, the plaintiff-insured must prove three basic elements to establish legal entitlement to UIM benefits:

- UM / UIM coverage (the existence, application, and limits of the policy);
- The negligence of the third-party tortfeasor; and
- That such negligence was the proximate cause of damages in excess of the tortfeasor's liability limits.

See Brainard, 216 S.W.3d at 818. Both state and federal courts allow the use of the declaratory judgment act to determine legal entitlement, but as one court succinctly observed, basically, **it is a car wreck case**. *See In re Liberty Cty. Mut. Ins. Co*., 557 S.W.3d at 856.

I believe it is a good idea to narrow the issues, pretrial, to ensure that the contract aspect of the UIM case is a car wreck case. *In re Liberty Cty. Mut. Ins. Co*., 557 S.W.3d 851, 856 (Tex. App. 2018) provides an excellent road map for the kind of stipulations that are helpful in this regard.[10]

There is an important distinction between an insurer's consent to allow its insured (the plaintiff in the UIM case) to settle with the third-party tortfeasor and an insurer's consent to be bound by any judgment against the tortfeasor in the underlying tort case. The former is simply the insurer's consent, required as a matter of contract, to the settlement with the tortfeasor. This consent does not relieve the insured from the burden of establishing legal entitlement under the policy. This consent effectively waives any subrogation rights that the insurer may have against the tortfeasor and provides the insurer with a credit for the full amount of the liability policy limits available to satisfy any judgment against the tortfeasor.[11] The latter is an agreement by the insurer to be bound by any judgment taken by

[10] See pages 10-11, *infra*.

[11] The supreme court has explained that an insured's violation of the consent to settle clause does not negate UIM coverage absent the insurer's showing of prejudice:

> In the context of an underinsured motorist claim, there may be instances when an insured's settlement without the insurer's consent prevents the insurer from receiving the anticipated benefit from the insurance contract; specifically, the settlement may extinguish a valuable subrogation right. . . In other instances, however, the insurer may not be deprived of the contract's expected benefit, because any extinguished subrogation right has no value. In the latter situation—where the insurer is not prejudiced by the settlement—the insured's breach is not material. We conclude, therefore, that an insurer who is not prejudiced by an insured's settlement may not deny coverage under an uninsured/underinsured motorist policy that contains a settlement-without-consent clause.

Hernandez v. Gulf Grp. Lloyds, 875 S.W.2d 691, 693 (Tex. 1994)(internal citations omitted).

the insured-plaintiff against the tortfeasor. Such an agreement binds the insurer and resolves the issues of negligence and the amount of actual damages.

An insurer is not bound by any judgment the insured may take against the tortfeasor with the insurer's written consent. Without such consent, the insured must relitigate the issue of negligence, damages, and coverage with the UIM insurer:

> Unless the UIM insurer has consented in writing to the suit, the usual result of a consent provision is that the insurer is not bound by a judgment entered in an action prosecuted by its insured against a UIM. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Azima*, 896 S.W.2d 177, 178 (Tex. 1995) (per curiam); *Koehn*, 86 S.W.3d at 368. To avoid this result, an insured seeking the benefits of his UIM coverage may sue his UIM insurer directly without suing the UIM; obtain written consent from his UIM insurer and then sue the UIM alone, making the judgment binding against the insurance company; or sue the UIM without the written consent of the UIM insurer and relitigate liability and damages. *See, e.g., Azima*, 896 S.W.2d at 178; *Koehn*, 86 S.W.3d at 368.

In re Reynolds, 369 S.W.3d 638, 654–55 (Tex. App.—Tyler 2012, orig. proceeding).

Note that the UIM insurer will not be bound to any judgment against the tortfeasor, even in those situations in which the plaintiff-insured sues both the tortfeasor and the UIM insurer in the same action. *In re Reynolds* explains:

> We cannot conclude that joinder of the UIM and the UIM insurer in the same action negates the consent clause. Therefore, even absent severance, [plaintiff-insured] will be required to relitigate his claim against [underlying defendants and the UIM insurer] if he obtains a judgment against [the underlying defendants] and [the UIM insurer] does not consent to be bound by the judgment. *See Koehn*, 86 S.W.3d at 368.

In re Reynolds, 369 S.W.3d at 655.

The case of *Blevins v. State Farm Mut. Ins. Co.*, 2018 WL 5993445 (Tex. App.—Fort Worth 2018, no pet.) provides a good road map for the trial of a UIM case. As the court explained:

> State Farm was the only defendant to go to trial after the two drivers whose cars each struck Blevins's settled with him. As in any underinsured-motorist case, Blevins needed to establish liability on the part of either or both of those settling drivers and to quantify his damages through a jury verdict and judgment. *Only then, after applying any offsets and credits*, might State Farm owe him money under his UIM policy. At its core, then, *this*

> *was first and foremost a tort case*.

See id. (emphasis supplied).

The procedural issues surrounding the trial of a UIM case arose in the context of the trial judge's refusal to enforce the plaintiff's subpoena for the insurer's corporate representative. Plaintiff sought to require the corporate representative to offer testimony concerning the UIM policy.[12] Blevins also argued that a corporate representative "could have confirmed that the non-economic damages he sought were of the sort covered by the UIM provision.

The court rejected plaintiff's argument and explained that the UIM policy language refers only to those damages an insured is "legally entitled to recover" and does not specify damages for pain, mental anguish, disfigurement, or physical impairment—those items the jury was asked in the verdict form. Specifically, the court held that any testimony from a State Farm representative about what damages the UIM policy covered would have been improper since it is for the trial court, not the jury, to decide what sorts of damages a litigant is legally entitled to recover. *See Blevins v. State Farm Mut. Ins. Co*., 2018 WL 5993445 at *15.

Blevins contemplates that the insurance coverage issues are undisputed and as such, may be resolved by stipulation. Another court, however, confronted the situation occurring when there are disputes concerning coverage. *Liberty Mut. Ins. Co. v. Sims*, 2015 WL 7770166 (Tex. App.—Tyler 2015, pet. denied), involved a dispute between the parties concerning the amount of UIM coverage available under a business auto policy. While the fact situation is somewhat complicated, suffice it to say for our purposes that counsel for the UIM carrier, Liberty Mutual, mistakenly forgot to amend requests for admission concerning the UIM policy limits. The request for admission admitted that the policy provided $1 million in coverage (not amended until day before trial). Mercifully, responses to interrogatories and request for production established that the true policy limit, by virtue to an amendatory endorsement to the policy, was $250,000. Before jury selection, Liberty Mutual introduced the complete policy, including amendments, before the court. The trial court allowed argument and evidence concerning the amount of the policy limits of $1 million before the jury. The court did not, however, allow Liberty Mutual to introduce the amendatory endorsement into evidence. *See id*. at *1-*2.

This case is important, in connection of the trial of a UIM case, for two reasons. First, the issue of insurance coverage,

[12] The court noted:

> His [Plaintiff's] trial subpoena contained twelve categories of information, none of which bore on the sole issues for trial: (1) the relative liability of Olivia Head and Lesley Matos, and (2) Blevins's damages. Although Blevins argues that he should have been allowed to question a State Farm representative in his "breach of contract" case, he did not (yet) have any contract claims to pursue: State Farm would have breached a contract only if it refused to pay UIM benefits after their amounts were established, such as by a favorable jury verdict in this lawsuit.

Blevins v. State Farm Mut. Ins. Co., 2018 WL 5993445 at *15.

including the applicable policy limits, is generally a matter for the trial court to determine as a matter of law. *See Sims*, 2015 WL 7770166, at *4 ("Since the language of the policy can be given a certain and definite legal meaning that the UIM coverage limits were $250,000.00, it is unambiguous as a matter of law."). The court found that the dispute regarding the applicable policy limit, arising by virtue of the response to the request for admission, in light of the other responses to discovery and the unambiguous policy language should have been resolved as a matter of law by the trial court. Consequently, there was no disputed fact issue to be resolved by the jury. And the presentation of evidence regarding the terms of the policy was error. *See Sims*, 2015 WL 7770166, at *4.

Second, the court of appeals held that the admission of evidence concerning the limits of the UIM policy was error. The court stated:

> The only issues a jury in a UIM contractual case should answer under these facts are liability and damages. Thus, it logically follows that evidence of the amount of the other motorist's automobile liability limits, as well as the plaintiff's UIM coverage limits, is immaterial to the issues for the jury, and should not be admitted over a proper objection. In this case, Liberty filed a motion in limine seeking to exclude any reference to UIM coverage limits in the [UIM] policy. It also objected to the offer of evidence of UIM coverage limits in both the [UIM] policy and in Liberty's discovery responses.
>
> But even if the existence of UIM coverage benefits was probative to establish the existence of UIM benefits available to Sims, the UIM coverage limits were not. In fact, evidence of UIM coverage limits was prejudicial to the extent it may have had a bearing on the jury's damage verdict. By allowing introduction of the UIM coverage limits, and particularly the much larger incorrect amount, the trial court abused its discretion. Accordingly, we cannot say that the trial court's error was harmless.

Bad Faith Considerations

Brainard established that there is no breach of the UIM contract until such time as there is a judgment establishing legal entitlement to such benefits. *See Brainard*, 216 S.W.3d at 818. Is there a cause of action for extra-contractual benefits in the absence of a judgment establishing legal entitlement? The San Antonio Court of Appeals has an interesting answer.

In *State Farm Mutual Auto. Assn. v. Cook*, 591 S.W.3d 677 (Tex. App.—San Antonio 2019, no pet.) involved a permissive appeal in an uninsured motorist case. The insured-plaintiff, Cook, demanded the full UM policy limits of $100,000. The insurer, State Farm, offered $15,000. Cook sued for breach of contract and asserted extra-contractual causes of action, including a claim for violation of the Prompt Payment Act. The trial court severed the contract

causes from the extra-contractual causes. At the conclusion of the trial, the jury awarded damages in excess of $280,000 and the trial court entered a judgment against State Farm for $100,000. State Farm paid the judgment within nine business days of the signing of that judgment. *See id.*

The court held that an insurer can act in bad faith by failing to reasonably investigate or delaying payment on a claim for uninsured motorist benefits until after the insured obtains a judgment establishing the liability and uninsured status of the other motorist. *Id.* at 683. The court also held, however, that an insurer's timely payment of the judgment in the contract case forecloses liability under the Prompt Payment Act. *See id.* at 683.

Drawing on the reasoning of federal courts, the San Antonio Court quoted the following:

> In *Hamburger*,[13] the Fifth Circuit implicitly recognized that there may be cases in which an insurer's liability to pay UM/UIM benefits is reasonably clear despite the fact that no judicial determination of the UM/UIM's liability has been made. When a reasonable investigation reveals overwhelming evidence of the UM/UIM's fault, the judicial determination that triggers the insurer's obligation to pay is no more than a formality. In such cases, an insurer may act in bad faith by delaying payment and insisting that the insured litigate liability and damages before paying benefits on a claim.

Cook, 591 S.W.3d at 682, *citing Accardo v. Am. First Lloyds Ins. Co.*, 2012 WL 1576022, at *5 (S.D. Tex. 2012).

Since this case arose out of certified questions to the court of appeals, all we know at present is that the San Antonio Court believes that a "bad faith" case theoretically is possible even without a judgment establishing legal entitlement to those benefits. The court did not elaborate on what kind of proof is necessary to establish such a bad faith claim; however, it did offer this observation in a footnote:

> In her brief, Cook asserts State Farm *did not audit* the medical records she provided, request a *peer review* of the documents, *ask a surgeon* to review the need for future surgery and the estimated cost of the surgery, *or conduct any medical evaluation* of Cook's condition. Cook further asserts State Farm did not "consider her disc injury, past and future impairment, past and future pain and suffering, or need for future surgery, *which itself would cost in excess of $100,000.00*." State Farm responds its settlement offer of $15,255.00 was "to cover the cost of the incurred medical expenses, but not the surgery Cook was considering," and it determined the settlement amount was appropriate "based on the medical

[13] *Hamburger v. State Farm Mut. Auto. Ins. Co*., 361 F.3d 875 (5th Cir. 2004)(a pre-*Brainard* case).

> records, medical bills, and other available documents." Because we only address the controlling question of law set forth in the trial court's order, we do not address whether evidence was or could be presented to raise a fact issue as to Cook's common law and statutory bad faith claims. *We note State Farm admitted in its interrogatory responses that it "did not rely on a medical consultant to arrive at its pre-suit evaluation."* However, we also note, "Evidence that merely shows a bona fide dispute about the insurer's liability on the contract does not rise to the level of bad faith."

Cook, 591 S.W.3d at 683 n.1 (emphasis supplied).

In the bad faith context, the practitioner must also consider the supreme court case of *USAA Tex. Lloyds v. Menchaca*, 545 S.W.3d 479 (Tex. 2018). This case arose out of the context of a property damage case—wind and hail—not a UM /UIM case. It nonetheless is important since it contains a comprehensive review of bad faith cases and presents five rules in which one may base a recovery of actual damages on contract benefits in the absence of a finding or judgment awarding contract damages.

Of import here are two of the rules stated in *Menchaca*:

- First, as a general rule, an insured cannot recover policy benefits as damages for an insurer's statutory violation if the policy does not provide the insured a right to receive those benefits. *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 489 (Tex. 2018).

- The fourth rule gleaned is the "independent injury" rule: "Thus, an insured can recover actual damages caused by the insurer's bad-faith conduct if the damages "are separate from and . . . differ from benefits under the contract." *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 499 (Tex. 2018)." This rule does not apply if the insured's statutory or extra-contractual claims are predicated on[the loss being covered under the insurance policy or if the damages "flow" or "stem" from the denial of the claim for policy benefits. When an

Bad Faith Possible Pre-Judgment?

Can a UM insured nonetheless sustain a common law or statutory bad faith claim against a UM insurer that withholds payment of UM benefits until such a judgment is obtained?

Answer: Yes (San Antonio Court).

Can a UM insured sustain a prompt payment claim against a UM insurer that timely pays UM benefits after such a judgment is obtained?

Answer: No (San Antonio Court).

Moral: Look for—or document –**reasonable basis** for UIM evaluation prejudgment.

Insurers: *Weber v. Progressive Cnty. Mut.*: No bad faith without judgment (Dallas Court, pet. denied).

> insured seeks to recover damages that "are predicated on," "flow from," or "stem from" policy benefits, the general rule applies and precludes recovery unless the policy entitles the insured to those benefits. *See USAA Texas Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 500 (Tex. 2018)

So, the answer to the question, "May one recover actual damages based upon policy benefits without a finding or judgment establishing entitlement to those benefits?" is "Yes, if one can establish a statutory violation (not Prompt Payment Act) establishing 'bad faith' liability per *Cook* [14] or an independent injury per *Menchaca*." Note, however, that the *Cook* court apparently was not presented with any argument, and thus did not consider, whether the insured had any actual damages independent from policy benefits.

Other courts have found that there can be no bad faith liability without a judgment establishing an insured's right to legal entitlement under the UIM policy. The case of *Weber v. Progressive Cnty. Mut. Ins. Co.*, 2018 WL 546001 (Tex. App.—Dallas 2018, pet. denied) is instructive. It involved an insured who settled her third-party claim for policy limits (i.e., did not obtain a judgment binding against the insurer). She then sued Progressive, her UIM carrier, and its adjuster for breach of contract and violations of the Texas Insurance Code (engaging in unfair methods of competition and unfair or deceptive acts or practices in the handling of Weber's UIM claim). *See id.* at *1.

Progressive filed special exceptions. It first argued that Weber's causes of action were barred because she failed to state a viable cause of action since her claims were premature until she obtained a judgment establishing the liability of the other driver and the amount of her damages in accordance with *Brainard v. Trinity Universal Insurance Co*., 216 S.W.3d 809 (Tex. 2006). In this regard, it also argued that Weber's reliance on the "exhaustion doctrine"[15] was misplaced since such a doctrine is not recognized in Texas. Second, Progressive asserted that Progressive's adjuster was not a proper party to the suit because he was not a party to the written contract on which Weber sued and because she failed to assert a viable cause of action for individual liability against Howard. The court granted Progressive's special exceptions and gave Weber the opportunity to amend, but she refused to amend. The trial court then dismissed her case. *See Weber v. Progressive Cty. Mut. Ins. Co.*, 2018 WL 564001, at *1.

[14] Recall that the same court of appeals that authored *Cook* previously found that *Menchaca* did not "change the evidentiary landscape relied upon by insurers under *Brainard* by freeing insureds from first having to prove a breach of contract before pursuing damages for extra-contractual violations." *See In re State Farm Mut. Auto. Ins. Co*., 553 S.W.3d at 560. It is an interesting state of affairs since the supreme court has not addressed this flux in the law.

[15] The court noted that under the exhaustion doctrine, a UIM claimant could show that he or she is legally entitled to UIM bodily injury benefits simply by showing a settlement or judgment exhausting the policy limits of all liability policies. *See Weber v. Progressive Cty. Mut. Ins. Co*., 2018 WL 564001, at *3. The court further noted that this doctrine has not been recognized in Texas and that the supreme court has already concluded that a settlement is not sufficient to impose contractual liability on a UIM insurer to pay benefits so that the adoption of urged doctrine would directly conflict with that authority. *See id*. The supreme court denied Weber's petition for review in this case.

Relying on ***Brainard***, the court held that the trial court properly dismissed Weber's suit:

> A "UIM insurer is under no contractual duty to pay benefits until the insured obtains a judgment establishing the liability and underinsured status of the other motorist." *Id.* "[N]either a settlement with nor an admission of liability from the underinsured motorist establishes UIM coverage, because a jury could find that the underinsured motorist was not at fault or award damages that do not exceed the [underinsured motorist's] liability insurance." *See id*.

Weber v. Progressive Cty. Mut. Ins. Co., 2018 WL 564001, at *2, *citing, Brainard v. Trinity Universal Insurance Co*., 216 S.W.3d 809 (Tex. 2006). Note also that under these circumstances, the court also held that neither Progressive nor its adjuster violated the Texas Insurance Code. *See id.*, 2018 WL 564001, at *3-*4.

Related Contractual Coverage Considerations

Issues often arise concerning the amount of coverage available under UM / UIM policies. The practitioner should be aware of the following rules:

- Intra-policy stacking (stacking limits by virtue of the number of vehicles listed on a single policy) is not permitted in Texas. *See Upshaw v. Trinity Cos.,* 842 S.W.2d 631, 632 (Tex. 1992).

- Inter-policy stacking (stacking several distinct policies covering the insured) is permitted in Texas. *Stracener v. United Servs. Auto. Ass'n.*, 777 S.W.2d 378, 379-380 (Tex. 1989).

- Claims for loss of consortium are derivative claims (derived from the person who suffered bodily injury) and come within a single limit (per person limit) of UIM coverage. *See McGovern v. Williams*, 741 S.W.2d 373, 374 (Tex. 1987)

- Claims for bodily injury arising out of a bystander claim (mental anguish claim *resulting in physical manifestation* of injury) constitute a separate bodily injury and come within a separate limit under the UIM policy. *See Haralson v. State Farm Mut. Auto Ins. Co.*, 564 F.Supp. 616, 625 (N.D. Tex. 2008).

- Survival / Wrongful death actions come within a single UM / UIM limit. *See Cradoct v. Employers Casualty Co.*, 733 S.W.2d 301 (Tex. App.—El Paso 1987, writ ref'd.)

- Punitive Damages: No recovery under UM / UIM policy. *See Vanderlin v. United Servs. Auto. Ass'n.*, 885 S.W.2d 239, 242 (Tex. App.—Texarkana 1994, writ denied); *Milligan v. State Farm Mut. Auto. Ins. Co.*, 940 S.W.2d 228, 231 (Tex. App.—Houston [1st Dist.] 1997, no writ).

Appellate Considerations

Recurring appellate issues invariably involve petitions for writ of mandamus arising out of discovery disputes as well as

disputes regarding severance and abatement. The mandamus standard:

> To obtain mandamus relief, a relator generally must show both that the trial court clearly abused its discretion and that relator has no adequate remedy by appeal. [Citation omitted]. A trial court clearly abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law or if it clearly fails to analyze the law correctly or apply the law correctly to the facts. [Citation omitted]. We review the trial court's legal conclusions with limited deference. [Citation omitted]. The relator must establish that the trial court could reasonably have reached only one decision. *Id.*

In re Liberty Cnty. Mutual Ins. Co., 557 S.W.3d 851, 855 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding).

Petitions for Writs of Mandamus are appropriate in the following circumstances:

- To review propriety of deposition of insurer's corporate representative: *See id.*
- To review trial court rulings on written discovery: *See In re Mid-Century Ins. Co.*, 549 S.W.3d 730 (Tex. App.—Waco 2017, orig. proceeding) (enforcing assertion of privilege to claim file); *see also In re Liberty Cty. Mut. Ins. Co.*, 537 S.W.3d 214 (Tex. App.—Houston [1st Dist.]
- To review trial court's order re severance and abatement of contract / extra-contractual claims. *See In re Am. Nat'l Cnty. Mut. Ins. Co.*, 384 S.W.3d 429 (Tex. App.—Austin 2012, orig. proceeding).
- To review trial court's order severing, but refusing to abate discovery on extra-contractual case. *See In re Farmers Tex. Cnty. Mut. Ins. Co.*, 509 S.W.3d 463 (Tex. App.—Austin 2015, orig. proceeding); *see also In re State Farm Mut. Auto. Ins. Co.*, 553 S.W.3d 557 (Tex. App.—San Antonio, orig. proceeding).

Conclusion

While this article is not exhaustive, I do hope that it assists the practitioner in this very interesting area of the law.