

Changes in UM/UIM Litigation Post-*Irwin v. Allstate*

The Texas Supreme Court issued a trio of decisions in 2021 regarding UM/UIM litigation.¹ Although all three are significant and make appearances in this paper, the paper will focus primarily on issues arising from the Court's decision in *Allstate v. Irwin*. In *Irwin*, the Court approved an avenue for the recovery of attorney's fees in actions for UM/UIM benefits under the Uniform Declaratory Judgments Act. The decision allows UM/UIM plaintiffs (but also potentially UM/UIM insurers) to recover their "reasonable and necessary attorney's fees as are equitable and just." *Irwin* represents a significant change in UM/UIM litigation because sixteen years ago the Court held in *Brainard v. Trinity Universal* that attorney's fees were not recoverable in UM/UIM litigation under the statute governing the recovery of attorney's fees on oral or written contract actions. The Court's blessing of attorney's fees under the UDJA in UM/UIM litigation presents multiple

issues that will change the way UM/UIM litigation has proceeded since *Brainard*.

Background

To consider the ways in which *Irwin* will shake up the conventional aspects of UM/UIM litigation, some background is in order. In *Brainard v. Trinity Universal*,² the Supreme Court resolved a split³ in the intermediate appellate courts over whether a UM/UIM plaintiff could recover attorney's fees under Chapter 38 of the Civil Practices and Remedies Code, which allows for and governs the recovery of attorney's fees in breach of contract cases. The Court answered no.

The Court's holding was premised on the "unique nature" of the UIM insurance contract and the requirements of the UM/UIM statute.⁴ As the Court explained, UIM insurance is unique in using tort law to determine whether an insured is entitled to UM/UIM benefits and the amount of benefits.⁵ Oftentimes, the most efficient way for an insured to obtain the requisite judgment is to sue

¹ *Allstate Ins. Co. v. Irwin*, 627 S.W.3d 263 (Tex. 2021) (recoverability of attorney's fees under UDJA); *In re USAA Gen. Indem. Ins. Co.*, 624 S.W.3d 782 (Tex. 2021) (orig. proceeding) (scope of corporate representative deposition for UM/UIM insurer in contractual action); *In re State Farm Mut. Auto. Ins. Co.*, 629 S.W.3d 866 (Tex. 2021) (orig. proceeding) (bifurcation of tort/contract issues and extra-contractual issues in a purely extra-contractual UM/UIM cause of action).

² *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809 (Tex. 2006)

³ See *Trinity Universal Ins. Co. v. Brainard*, 153 S.W.3d 508, 511 (Tex. App.—Waco 2004) (describing the intermediate court split), *rev'd* 216 S.W.3d 809 (Tex. 2006).

⁴ Texas law requires an automobile insurance policy to provide (unless waived):

for payment to the insured of all amounts that the insured is legally entitled to recover as damages from owners or operators of underinsured motor vehicles because of bodily injury or property damage, not to exceed the limit specified in the insurance policy, and reduced by the amount recovered or recoverable from the insurer of the underinsured motor vehicle.

TEX. INS. CODE § 195.106.

⁵ *Brainard*, 216 S.W.3d at 818.

the UM/UIM carrier directly.⁶ Accordingly, a UM/UIM insurer is under no contractual duty to pay benefits until the insured obtained a judgment establishing the liability and underinsured status of the tortfeasor.⁷ The issue of when an UM/UIM insurer has an obligation to pay benefits matters under chapter 38 because a plaintiff seeking fees under a contract must have previously presented a claim to the opposing party and the opposing party must have failed to subsequently paid “the just amount owed.”⁸ Under *Brainard’s* construction of the UM/UIM statute, there was no just amount owed until there was a judgment binding the insurer.⁹ Accordingly, the UM/UIM plaintiff could not have presented a claim prior to obtaining the very judgment needed to establish the amount of benefits owed.¹⁰

Brainard’s holding set UM/UIM claims apart from most other first-party

insurance litigation, in which plaintiffs could pursue through a breach of contract action and seek attorney’s fees under chapter 38.¹¹ *Brainard’s* explication of the unique status of UM/UIM insurance also provided additional support for an almost *per se* rule among the courts of appeals that contractual and extra-contractual claims could not proceed together in UM/UIM litigation.¹² The courts of appeals generally required that extra-contractual claims must be severed and abated until the insurer’s liability in the UM/UIM contract action, if any, was determined. The requirement of severance and abatement in UM/UIM litigation further distinguished it from other first-party litigation, where additional considerations were required to mandate severance and abatement of extra-contractual claims.¹³ The Supreme Court has now approved the severance and abatement line of precedent.¹⁴

⁶ Of course, litigation is not necessary to establish entitlement to benefits if the insurer and insured settle on the amount of benefits owed. *Id.* The insured may also sue the tortfeasor directly and present the insurer with the judgment against the tortfeasor. *In re Reynolds*, 369 S.W.3d 638, 655 (Tex. App.—Tyler 2012, orig. proceeding). As a practical matter, however, UM/UIM insurers reserve the right in the policy to refuse to be bound by any judgment against the tortfeasor.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 819.

¹¹ See *Grapevine Extraction, Inc. v. Maryland Lloyds*, 35 S.W.3d 1 (Tex. 2000) (holding Chapter 38 allows the recovery of attorney’s fees by an insured against an insurer unless the insurer is liable for attorney’s fees under another statutory scheme).

¹² See *In re State Farm Mut. Auto. Ins. Co.*, 629 S.W.3d 866, 876 & n.4 (Tex. 2021) (orig. proceeding) (noting that courts of appeals routinely require bifurcation or severance and

abatement of extra-contractual claims based on breach of UM/UIM policy from contractual claims).

¹³ *Liberty Nat’l Fire Ins. Co. v. Akin*, 927 S.W.2d 627, 630–31 (orig. proceeding) (holding contractual and extra-contractual claims in first-party insurance litigation did not generally require severance and abatement, absent additional circumstances such as settlement offers).

¹⁴ *In re State Farm Mut. Auto. Ins. Co.*, 629 S.W.3d 866 (Tex. 2021) (orig. proceeding). In that case, the Court expanded the reasoning of the courts of appeals that required severance and abatement of extra-contractual claims from contractual UM/UIM claims. The insured-plaintiffs in those cases brought only extra-contractual claims, but they were still ultimately premised on the denial of UM/UIM benefits. The Court held that, even when only extra-contractual claims were brought, the trial courts were still required to bifurcate of extra-contractual issues from contractual issues and to proceed with the contractual issues first.

These developments left UM/UIM plaintiffs in the unique position in comparison to other first-party insurance plaintiffs. They could not receive attorney's fees for breach of contract because they could not present the just amount owed prior to the judgment establishing the just amount owed.¹⁵ And for practical purposes, the severance and abatement of the extra-contractual claims encouraged the settlement of contractual and extra-contractual claims together at or under the policy limits without further pursuit of the extra-contractual claims. Accordingly, UM/UIM claimants could only recover against their policy and lacked leverage available to other first-party plaintiffs.

Enterprising UM/UIM claimants' attorneys then turned to bringing UM/UIM litigation under the UDJA in an attempt to recover attorney's fees. The Texarkana court of appeals dealt an initial blow to those efforts, holding that attorney's fees were not properly recoverable under the UDJA in UM/UIM litigation.¹⁶ But three years later, the San Antonio court of appeals held to the contrary in *Allstate v. Irwin*.¹⁷ Like it did in *Brainard* over fifteen years before, the Supreme Court granted review to decide a split among the courts of appeals about the availability of attorney's fees in UM/UIM litigation. And this time it answered yes.

In *Irwin*, the Court rejected the argument that recovery of attorney's fees under the UDJA contravened *Brainard* and the Court's prior holding that a party cannot use the UDJA to recovery attorney's fees when the fees were not otherwise permitted under the specific common-law or statutory claims involved in the suit.¹⁸ The Court reasoned that its prior rulings did not match the circumstances in the UM/UIM case at issue because the plaintiff sought a declaration of rights under the policy prior to the existence of any breach or claim for attorney's fees under chapter 38.¹⁹ The Court further held the UDJA was appropriately invoked to determine the parties' status and responsibilities under the UM/UIM policy prior to its breach.²⁰ Somewhat ironically, the unique nature of UM/UIM insurance, which allows a justiciable controversy to arise as to the UM/UIM insured's rights and status under the contract prior to an actionable breach of contract, is what makes the UDJA an available method of resolution, even though Chapter 38 does not apply.²¹

Attorney's fees are now recoverable in UM/UIM litigation under the UDJA – what happens now?

What standard applies to attorney's fees under chapter 37?

The UDJA allows a trial court the discretion to award "costs and

¹⁵ *Brainard*, 216 S.W.3d at 818–19.

¹⁶ *Allstate Ins. Co. v. Jordan*, 503 S.W.3d 450, 457 (Tex. App.—Texarkana 2016, no pet.).

¹⁷ *Allstate Ins. Co. v. Irwin*, 606 S.W.3d 774 (Tex. App.—San Antonio 2019), *aff'd* 627 S.W.3d 263 (Tex. 2021).

¹⁸ *Allstate Ins. Co. v. Irwin*, 627 S.W.3d 263, 268–69 (Tex. 2021)

¹⁹ *Id.*

²⁰ *Id.* at 269–70.

²¹ *Id.* at 272.

reasonable and necessary attorney's fees as are equitable and just."²² The fee award is part of a two-step process. First, the factfinder²³ should determine whether the requested attorney's fees are reasonable and necessary.²⁴ Second, the trial court, in its discretion determines whether the award is equitable and just as a matter of law.²⁵

The trial court's award is ultimately reviewed for abuse of discretion.²⁶ "It is an abuse of discretion for a trial court to rule arbitrarily, unreasonably, or without regard to guiding legal principles or to rule without supporting evidence."²⁷ In reviewing the award, a court of appeals "must determine whether the trial court abused its discretion by awarding fees when there was insufficient evidence that the fees were reasonable and necessary, or when the award was inequitable or unjust."²⁸ Unreasonable fees cannot be awarded, even if the court believed them just, but the court may conclude that it is

not equitable or just to award even reasonable and necessary fees.²⁹

Who may recover attorney's fees under the UDJA?

In most first-party insurance cases, the insured plaintiff has the ability to seek attorney's fees, but the insurer is unable to recover fees even when completely successful in defending the claim.³⁰ But, unlike Chapter 38, the UDJA does not require an award of attorney's fees to anyone. Again, the award is entrusted to the Court's sound discretion. But under the UDJA, a trial court "may, within its discretion, award attorney's fees to the prevailing or non-prevailing party or decline to award attorney's fees to either party, regardless of which party sought the declaratory relief."³¹

Accordingly, UM/UIM plaintiffs should be aware that insurers may plead for and seek their own attorney's fees in

²² TEX. CIV. PRAC. & REM. CODE § 37.009.

²³ The factfinder may be the judge or the jury. In cases where a jury trial has been demanded, the party seeking fees should ensure reasonableness and necessity are submitted to the jury. See *Russell v. City of Brian*, 919 S.W.2d 698, 708–09 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (affirming denial of attorney's fees where requesting party failed to submit reasonableness and necessity of fees to jury before discharge).

²⁴ *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex 1998).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*; see, e.g., *Utlely v. Marathon Oil Co.*, 31 S.W.3d 274, 281 (Tex. App.—Waco 2000, no pet.) (upholding trial court's award of \$150,000 in attorney's fees under the Act after the jury found \$750,000 in reasonable and necessary fees).

³⁰ An insurer who successfully defend against a breach of contract claim cannot recover its attorney's fees under Chapter 38. *Gasparotto v.*

Gallagher Power Fence, Inc., 2004 WL 101689 (Tex. App.—Austin Jan. 23, 2004) (mem. op.) (holding chapter 38 does not entitle a party who successfully defends against a contractual lawsuit to recover its attorney's fees). An insurer may seek to recover fees for defending against certain extra-contractual claims. For instance, Chapter 541 of the Insurance Code authorizes a defendant to recover its costs and attorney's fees "if the court finds that an action under this subchapter is groundless and brought in bad faith or brought for the purpose of harassment." TEX. INS. CODE § 541.153. But this provision appears to be rarely invoked based on Westlaw only identifying 20 cases that have cited to it. But see *Knoderer v. State Farm Lloyds*, 515 S.W.3d 21 (Tex. App.—Texarkana 2017, pet. denied) (modifying judgment to remove award of fees to insurer because insurer submitted the issue to the court instead of the jury).

³¹ *HMT Tank Service, LLC v. Am. Tank & Vessel, Inc.*, 565 S.W.3d 799, 813 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

UM/UIM actions brought under the UDJA. As a practical matter, however, insurers may face hard choices about whether to counterclaim for their costs and attorney's fees.

What evidence is necessary for the recovery of damages?

Reasonableness and necessity

The first set of requirements for recovering attorney's fees under the UDJA is to prove they were reasonable and necessary. These are questions of fact.³²

The Supreme Court's preferred method for determining what is a reasonable and necessary fee is the lodestar method.³³ The starting point is to offer evidence of the reasonable hours worked multiplied by a reasonable hourly rate.³⁴ When the base lodestar calculation is used and supported by sufficient evidence, the resulting amount is presumptively reasonable and necessary.³⁵ The base lodestar calculation may be enhanced or reduced as supported by the evidence.³⁶

Importantly, the Court strongly encourages the production of billing records to prove reasonableness and necessity.

Plaintiff attorneys may be well used to preparing for discovery and presenting evidence in support of a claim for attorney's fees. Defense attorneys representing UM/UIM carriers may be less familiar with seeking such relief and the potential discovery that accompanies it. As the Supreme Court has explained billing records are generally protected work product, but that protection may be waived by counter-claiming for a party's own fees.³⁷ Further, insurance companies and their lawyers may have institutional considerations that counsel against counterclaiming for attorney's fees under these circumstances.³⁸ These considerations may vary between in-house counsel and retained outside counsel. Accordingly, carriers and their counsel should not counterclaim for attorney's fees without due consideration of what.

Equitable and Just

The determination of what fees are reasonable and necessary serves as the outer bounds of the fees that may be awarded as equitable and just.³⁹ The court has discretion to award some but not all the fees found reasonable and necessary by a jury.⁴⁰ "Whether a fee award is equitable and just is not susceptible to direct proof but is rather a

³² *Bocquet*, 972 S.W.2d at 21.

³³ *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 497–98 (Tex. 2019) ("[W]e intend[] the lodestar analysis to apply to any situation in which an objective calculation of reasonable hours worked times a reasonable rate can be employed.").

³⁴ *Id.*

³⁵ "Sufficient evidence includes evidence of (1) particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable

amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such services." *Id.*

³⁶ *Id.* at 499–501.

³⁷ *In re National Lloyds Inc. Co.*, 532 S.W.3d 794, 807 (Tex. 2017) (orig. proceeding).

³⁸ *See generally id.*

³⁹ *In re Lesikar*, 285 S.W.3d 577, 584 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding).

⁴⁰ *Ridge Oil Co., Inc. v. Guinn Invests., Inc.*, 148 S.W.3d 143, 163 (Tex. 2004).

matter of fairness in light of all the circumstances.”⁴¹

As of yet, the court of appeals have not yet begun to issue opinions applying the “equitable and just” requirement in UM/UIM cases.⁴² And there is unlikely to be much guidance in looking to other first-party litigation cases because reasonable and necessary attorney’s fees are awarded without the additional hurdle of the equitable and just elements. Accordingly, we can only hypothesize about facts and circumstances may be relevant to the determination.

The facts of *Irwin* provide a starting point for potential bases for arguments over what is equitable and just in a particular case. As the Supreme Court noted, the plaintiff obtained a settlement from the underlying tortfeasor for policy limits of \$30,000 and offered to settle for UIM policy limits of \$50,000.⁴³ Allstate offered \$500.⁴⁴ At trial, Allstate contested causation and damages.⁴⁵ The jury found plaintiff’s damages to be \$498,000.⁴⁶ The trial court awarded \$45,540 in attorney’s fees.⁴⁷

Two facts immediately stick out. First, the jury found the plaintiff’s damages exceeded the combined liability and UIM policy limits by over \$400,000. Second, Allstate’s settlement offer was only 1% of

the UIM policy limit, but the plaintiff recovered the entire limit. These facts were likely powerful considerations for the court in deciding whether to award plaintiff his attorney’s fees.

But what if the jury had found plaintiff’s damages were only \$30,500? Could the trial court nevertheless have found that \$45,000 in attorney’s fees was still equitable and just, perhaps because it thought the jury’s damages finding was sufficiently supported by the evidence, but still wrong? Or because Allstate should nevertheless have offered just a little bit more money to settle the case? Or, changing tack, perhaps the court would have found it equitable and just to award Allstate its reasonable and necessary fees because the plaintiff had only achieved a de minimis recovery within Allstate’s settlement offer? And what if the jury’s damages finding had been slightly or significantly under the \$30,000 credit?

Or what if Allstate had had a significant defense to liability based on comparative negligence? Under Texas law, a plaintiff cannot recover any damages if his liability for the accident exceeds 50%.⁴⁸ If the jury had found the plaintiff 50% liable for the accident, his recovery would still have exceeded the applicable credit

⁴¹ *Id.* at 162.

⁴² The sole apparent exception was in *Allstate v. Jordan*. The court of appeals held it was not equitable and just as a matter of law to award attorney’s fees under the UDJA in UM/UIM litigation. The Court reasoned that “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.” 503 S.W.3d at 457. *Irwin*, of course, did not accept that reasoning.

⁴³ 627 S.W.3d at 266

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Irwin*, 627 S.W.3d at 266. The court of appeals below also noted that Plaintiff’s medical bills exceeded the amount of the settlement with the tortfeasor, but did not note whether they exceeded the combined tortfeasor credit and UIM limits. 606 S.W.3d at 776.

⁴⁷ 606 S.W.3d at 776.

⁴⁸ TEX. CIV. PRAC. & REM. CODE § 33.001.

and UIM policy limit. But perhaps it would be a relevant equitable consideration that the only difference between the plaintiff busting the policy limits or receiving a take-nothing judgment was a 1% difference in the liability finding. Could Allstate have argued it would not be equitable to award the full amount or any of the plaintiff's attorney's fees? And what if jury had found the plaintiff 51% negligent? Could the trial court nevertheless decide that, in light of the claimed damages, Allstate should still have offered more than \$500 to avoid the costs of trial on such a close question?

Perhaps the timing and amount of settlement offers is significant as well. What if Allstate had re-evaluated its position months before trial and offered \$45,000 to settle, but the plaintiff rejected the offer? Would the court have considered it equitable and just to award attorney's fees for the expense of a trial where the plaintiff's damages award was contractually limited to only \$5,000 more than the amount offered by Allstate? Under those circumstances, perhaps the court would have only awarded fees up until the point of the settlement offer.

Again, the potential factual scenarios are endless based on the facts of the claim, including the applicable credits, liability issues, affirmative defenses, and ultimate

outcome of the case. But if courts consider those factors, it appears to me that the "equitable and just" analysis begin to simply resemble a common law insurance bad faith claim.⁴⁹

Should attorney's fees issues be bifurcated from the merits of the UIM benefits claim?

A trial court has discretion, in furtherance of convenience or to avoid prejudice, to order a separate trial of any separate issue.⁵⁰ Given the broad range of evidence that is potentially relevant to attorney's fees litigation, the trial court should likely bifurcate those issues from the tort issues.

Most obviously, settlement demands and offers are not admissible to prove or disprove the validity or amount of a disputed claim.⁵¹ But they may be admissible for other purposes.⁵² The Texas Supreme Court has explicitly relied on the rule to require, in a UIM case asserting only extra-contractual causes of action under the Insurance Code, the bifurcation of the tort/contract issues from the extra-contractual issues.⁵³ The Court reasoned "bifurcation of trial is proper because evidence of the insurer's settlement offer may be admissible in one phase of the trial but inadmissible in the other."⁵⁴ In fact, the potential for prejudice is so great that "[r]equiring [the insurer] to litigate its liability for

⁴⁹ See *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 55 (Tex. 1997) ("[A]n insurer will be liable [for common law bad faith] if the insurer knew or should have known that it was reasonably clear that the claim was covered"); TEX. INS. CODE § 541.060(a)(2); cf. *In re Farmers Tex. Cnty. Mut. Ins. Co.*, 621 S.W.3d 261, 267 (Tex. 2021) (orig. proceeding) ("Under the *Stowers* doctrine, an insurer has a common-law duty to settle third-

party claims against its insureds when it is reasonably prudent to do so.").

⁵⁰ TEX. R. CIV. P. 174(b).

⁵¹ TEX. R. EVID. 408.

⁵² *Id.*

⁵³ *In re State Farm Mut. Auto. Ins. Co.*, 629 S.W.3d 866 (Tex. 2021) (orig. proceeding).

⁵⁴ *Id.*

UIM policy benefits alongside its liability for extracontractual claims would unduly prejudice the insurer and amounts to an abuse of discretion by the trial court.”⁵⁵

In addition, the ultimate recovery of benefits under the policy is dependent on the trial court’s application of the policy’s limits and applicable credits to the jury’s findings. A relevant consideration to whether attorney’s fees are reasonable and necessary is “the results obtained.”⁵⁶ Thus, the tort issues must necessarily be tried first before “the results obtained” can be assessed for the fee award.

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In sum, *Irwin* has upturned the conventional wisdom that first-party UM/UIM plaintiffs cannot recover their attorney’s fees in an action to establish their right to benefits. In doing so, the Court has made UM/UIM litigation even more unique because the “equitable and just” requirement for attorney’s fees imposes a burden on the party seeking fees that does not exist in most first-party litigation. Further, the Court may have injected extra-contractual issues back into the contractual action for UM/UIM benefits, even if they must be bifurcated. Attorneys on both sides should carefully consider how their prosecution or defense of the UM/UIM litigation may appear to the judge deciding the “equitable and just” issue in light of the ultimate award of benefits under the policy.

⁵⁵ *Id.*; see also *Akin*, 927 S.W.2d at 630–31.

⁵⁶ *Rohrmoos Venture*, 578 S.W.3d at 500.