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# Attorney's Fees after *Allstate v. Irwin*: The Defense Perspective

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## Table of Contents

Table of Authorities .......... i

Introduction .......... 1

Pick the Battlefield .......... 2

Basis for fees under declaratory judgment act .......... 2

The fees must be "reasonable" .......... 3

The fees must be "necessary" .......... 5

The fees must be "equitable and just" .......... 6

Bifurcation of Attorney's Fees Issues .......... 7

Agreement to be Bound by Underlying Judgment .......... 8

Recap after *Irwin* .......... 8

Conclusion .......... 9

## Table of Authorities

### Cases


*Allstate v. Irwin*, 627 S.W.3d 263 (Tex. 2021) .................... 1, 2, 6

*Blevins v. State Farm Mutual Automobile Ins. Co.*, 2018 WL 5993445 (Tex. App.—Fort Worth, no pet.) .................... 9

*Arthur Andersen v. PECO*, 945 S.W.2d 812 (Tex. 1997).................... 2

*Bocquet v. Herring*, 972 S.W.2d 19 (Tex. 1998). .................... 2, 3, 6

*Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809 (Tex. 2006) ....................1

*Camacho v. Texas Workforce Comm'n*, 445 F.3d 407 (5th Cir. 200) .................... 2

*Findlay v. Cave*, 611 S.W.2d 57 (Tex. 1981) .................... 4

*Garcia v. Gomez*, 319 S.W.3d 638 (Tex.2010) .................... 4

*HSAM Inc. v. Gatter*, 814 S.W.2d 887 (Tex. App.—San Antonio 1991, writ dismissed by agr.) 6

*In re Liberty Cnty. Mut. Ins. Co.*, 606 S.W.3d 866 (Tex. App.—Houston [14th] 2020, orig. proceeding) ....................9

*In re National Lloyds Ins. Co.*, 532 S.W.3d 794 (Tex. 2017) .................... 4, 6

*In re United Fire Lloyds*, 327 S.W.3d 250 (Tex. App.—San Antonio 2010, orig. proceeding). .. 8

*In re USAA Gen. Indem. Co.*, 624 S.W.3d 782 (Tex. 2021) .................... 6

*Oyster Creek Financial Corp. v. Richwood Investments III Inc.*, 176 S.W.3d 307, 317 (Tex. App.—Houston [1st Dist.] 2004, pet. denied), *abrogated on other grounds*, *Sky View at Las Palmas, LLC, et al. v. Mendez, et al.*, 555 S.W.3d 101 (Tex. 2018) .................... 4

*Rohromoos Venture v. UTSW DVA Heatlthcare, LLP*, 578 S.W.3d 469 (Tex. 2019) .................... 3

*State Farm Mut. Auto. Ins. Co. v. Azima*, 896 S.W.2d 177, 178 (Tex. 1995) .................... 3

*Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016) .................... 2

*Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299 (Tex. 2006) .................... 5

*Utica Lloyds of Texas v. Mitchell*, 138 F.3d 208 (5th Cir. 1998) .................... 2


### Statutes


Tex. Civ. Prac. Rem. Code § 37.001, et. seq. .................... 1

Tex. Civ. Prac. Rem. Code § 38.002 .................... 1


### Secondary Sources


Cliff Harrison, *Texas Hold 'Em: Offer of Settlement under Rule 167*, 70 Tex. B. J. 936 (2007).. 7

Kenny Rogers, *The Gambler* ........................................................................................ 6, 7

Stephanie M. Green, *Texas Excessive Demand Doctrine Impacts Recoveries in Litigation*, 47 ST. MARY'S L. J. 889 (2016) ........................................................................................ 4

4 Tex. Prac. Guide Bus. & Com. Litig. § 21:121 ........................................................................ 5

Attorney's Fees after *Allstate v. Irwin*: The Defense Perspective

## *Introduction*

*Allstate v. Irwin*[1] is a significant case for those who prosecute or defend uninsured or underinsured motorist (UM / UIM) cases. *Irwin* was an underinsured motorist case. It stands for the proposition that an insured may recover attorney's fees in a suit against his or her UM/ UIM insurer by virtue of the Texas Declaratory Judgment Act.[2] My colleague on this dais on the plaintiffs' side of the docket, Tom Crosley, successfully prosecuted the *Irwin* case. Prior to that case, the conventional wisdom was that attorney's fees were not recoverable in UM / UIM cases since "legal entitlement" to a recovery was not established prior to a judgment (or settlement of the UIM claim).[3] The basis for the recovery of attorney's fees in *Irwin,* however, lies in the pronouncement that recovery of fee must be "just and equitable."[4] *Irwin* involved a familiar fact pattern in UIM cases. The court succinctly set out the underlying facts as follows:

> On April 5, 2016, Daniel Irwin was injured in a vehicular accident with an underinsured motorist. At the time of the accident, Allstate Insurance Company insured Irwin's truck. Irwin's policy included UIM coverage up to $50,000. Irwin settled with the other driver for her $30,000 policy limits, and followed the settlement with a letter to Allstate, seeking his UIM policy limits of $50,000. Allstate offered to settle for $500. Believing Allstate's offer inadequate, Irwin sued. In this direct action against his UIM carrier, Irwin sought a determination of his damages from the accident, a declaratory judgment that he was entitled to recover under his UIM policy, and attorney's fees. Irwin's pleadings invoked the Uniform Declaratory

> *Because the contract did not require Trinity to pay UIM benefits before [the tortfeasor's] negligence and underinsured status were determined, Brainard did not present a contract claim before the trial court rendered its judgment, and the court of appeals correctly concluded that Brainard is not entitled to recover attorney's fees under Chapter 38.*
>
> *Brainard v. Trinity Universal Ins. Co., 216 S.W.3d 809, 819 (Tex. 2006)*

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[1] 627 S.W.3d 263 (Tex. 2021).

[2] Tex. Civ. Prac. Rem. Code § 37.001, et. seq.

[3] *See Brainard v. Trinity Universal Ins. Co*., 216 S.W.3d 809 (Tex. 2006). The basis for the claim for attorney's fees in *Brainard* was contract; that is, Tex. Civ. Prac. Rem. Code § 38.002. The court reasoned that the claim was not "presented" under the statute until such time as plaintiff obtained a judgment establishing legal entitlement to benefits under the policy. Consequently, plaintiff could not recover attorney's fees. *See Brainard* at 818-19.

[4] *See Allstate Ins. Co. v. Irwin*, 627 S.W.3d 263, 271 (Tex. 2021)(noting that he Uniform Declaratory Judgment Act allows the recovery of fees that are equitable and just and "does not require an award of attorney's fees to anyone"; rather, it 'entrusts attorney fee awards to the trial court's sound discretion.'")

> Judgments Act (UDJA) for all relief.

*Allstate Ins. Co. v. Irwin*, 627 S.W.3d 263, 266 (Tex. 2021).

For our purpose here, we need not engage in an academic debate whether 1) the resolution of legal entitlement under a UIM policy may be accomplished through the (Texas) Declaratory Judgment Act (UDJA)—it can;[5] or 2) whether attorney's fees are properly recoverable under the Act—they *may be*.[6] Our purpose is to deal with those holdings from the defense side of such litigation.

The guiding principle of the UDJA, as illuminated by *Irwin*, is that the "the court may award costs and reasonable and necessary attorney's fees as are equitable and just."[7] The court also noted that either side (i.e., insured or insurer) may seek fees.[8] So, let me offer a few thoughts on how to evaluate and defend a claim for attorney's fees under *Irwin*.

**1**. **<u>Pick the battlefield</u>.** Simply put: Texas state courts will allow the recovery of attorney's fees under the Texas UDJA. Federal courts will *not* allow recovery of attorney's fees in UIM cases under the federal declaratory judgment act.[9] While the procedural and substantive law regarding the proper removal of a UIM case is outside the scope of this particular paper, in those case in which there is complete diversity of citizenship between the parties and the amount in controversy exceeds $75,000, the insurer's lawyer is well advised to look into removal of the action.

**2. <u>Basis for fees under declaratory judgment act.</u>**

The supreme court has given us some guidance in this area. The court must examine four factors:

> 1) The fees must be reasonable. This is a question of fact.[10]
>
> 2) The fees must be necessary. This is also a question of fact.[11]

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[5] *See Allstate Ins. Co. v. Irwin*, 627 S.W.3d at 266.
[6] *See id*. at 271-72.
[7] *See id.* at 270.
[8] *See id*. at 269 (noting that either party to a written contract may seek declaratory relief if there is a question regarding rights, status, or other legal relations arising under it).
[9] *Utica Lloyds of Texas v. Mitchell,* 138 F.3d 208, 210 (5th Cir. 1998)(noting that § 37.009 of the Texas Declaratory Judgment Act is procedural only and does not allow for the award of attorney's fees in a diversity action); *see also Camacho v. Texas Workforce Comm'n*, 445 F.3d 407, 412-13 (5th Cir. 200)(stating that *Utica* is "good law" and that the Texas Declaratory Judgment Act is procedural and not substantive law).
[10] *Bocquet v. Herring*, 972 S.W.2d 19, 21(Tex. 1998). The supreme court also has explained that a "reasonable" fee is "is one that is not excessive or extreme, but rather moderate or fair." *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016), *citing*, *Garcia v. Gomez*, 319 S.W.3d 638, 642 (Tex.2010). Since the reasonableness of fees is a question of fact, absent the agreement of the parties, may the court rule on attorney's fees without jury findings?
[11] *See Bouquet v. Herring, 972* S.W.2d at 21. The court also noted that there are factors prescribed by law that guide the determination of whether attorney fees are reasonable and necessary. *See id.* at 21, *citing*, *Arthur Andersen v. PECO*, 945 S.W.2d 812, 818 (Tex. 1997). Those factors include:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
>
> (2) the likelihood ... that the acceptance of the particular

3) The award must be "equitable." This is a matter of equity addressed to the trial court's discretion.[12]

4) The award must be "just." Likewise, this is an equitable consideration for the court.[13]

***The fees must be "reasonable".***

- What does plaintiff's attorney's fee contract contemplate?
- Is it purely a contingent fee recovery?
- What representations have been made regarding the recovery of attorney's fees (who gets to keep them)?

employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

[12] *See Bocquet v. Herring*, 972 S.W.2d at 21. Once again, in a jury trial, may such findings of fact be made, absent agreement, by the trial court?

[13] *See Bocquet v. Herring*, 972 S.W.2d at 21.

*Considerations for Attorney's Fees under Irwin*

*1. Fees must be reasonable;*
*2. Fees must be necessary;*
*3. Award must be equitable; and*
*4. Award must be just.*

- Are hourly-based charges contemplated in the contract?[14]
- Does the excessive demand doctrine apply?[15] This is a question of fact.[16]

[14]*See Rohromoos Venture v. UTSW DVA Heatlthcare, LLP*, 578 S.W.3d 469 (Tex. 2019)(generalities about attorney's experience, the total amount of fees, and the reasonableness of fees are not sufficient to support award under "lodestar" method of fee calculation). While the case involved the computation of fees under a written contract, the language concerning the sufficiency of evidence for "reasonable and necessary fees" is instructive. The court stated:

> Sufficient evidence includes, at a minimum, 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. . . . [.] This base lodestar figure should approximate the reasonable value of legal services provided in prosecuting or defending the prevailing party's claim through the litigation process.

*Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d at 498. The court then enhances or reduces the amount of fees under the facts of a particular case.

- Who is proving up the fees? If plaintiff's attorney is designated as an expert for proving up his / her own fees—issues regarding the waiver of privilege may arise.[17]

- Motivation for testimony regarding unusually high hourly rates, etc.

**EXCESSIVE DEMAND DOCTRINE**

- *MAY HAVE APPLICATION TO UNLIQUIDATED DEMANDS;*
- *AFFIRMATIVE DEFENSE—PLEAD AND PROVE;*
- *FACT ISSUES PRESENTED;*
- *DOLLAR AMOUNT NOT NECESSARILY INDICATIVE;*
- *DISPOSITIVE ISSUE:*
- *DID THE CLAIMANT ACT UNREASONABLY OR IN BAD FAITH?*

*SEE 47 ST. MARY'S L.J. 889 (2016)*

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[15] See generally, Stephanie M. Green, *Texas Excessive Demand Doctrine Impacts Recoveries in Litigation*, 47 ST. MARY'S L. J. 889 (2016). The author notes that while the excessive demand doctrine arises out of an unreasonable claim for the recovery of a liquidated amount, *see id.*, *citing Findlay v. Cave*, 611 S.W.2d 57 (Tex. 1981), another commentator has urged "insurance carriers to remember to assert excessive demand claims against inordinate policyholder claims." *See* 47 ST. MARY'S L. J. at 891, n. 11. This law review article is one to put on the "required reading" list.

[16] One court noted that determining whether a demand was excessive was a matter for the jury. *See Oyster Creek Financial Corp. v. Richwood Investments III Inc.*, 176 S.W.3d 307, 317 (Tex. App.—Houston [1st Dist.] 2004, pet. denied), *abrogated on other grounds*, *Sky View at Las Palmas, LLC, et al. v. Mendez, et al.*, 555 S.W.3d 101 (Tex. 2018). The court explained:

> Generally, a creditor who makes an excessive claim upon a debtor is not entitled to attorneys' fees for subsequent litigation required to recover the debt. . . A demand is not excessive, however, simply because it is greater than that which a jury later determines is actually due. . . . Although this may be some evidence of an excessive demand, it is not the only factor to consider, particularly if the amount due is unliquidated. . . [.] Thus, a claimant is not required to present the exact amount it is entitled to recover at trial. . . ***The dispositive question in determining whether a demand is excessive is whether the claimant acted unreasonably or in bad faith.***

*Oyster Creek Fin. Corp. v. Richwood Invs. II, Inc.*, 176 S.W.3d at 318 (internal citations omitted).

[17] *See In re National Lloyds Ins. Co.*, 532 S.W.3d 794 (Tex. 2017). The court stated:

> **Making a claim** for attorney fees or using attorney fees as a **comparator** in challenging an opponent's fee request puts a party's attorney fees at issue in the litigation. In addition, **designating counsel as an expert opens the door to expert-witness discovery** as provided and limited by the Texas Rules of Civil Procedure. Outside of these scenarios and absent unusual circumstances, information about an opposing party's attorney fees and expenses is, in the ordinary case, privileged or irrelevant and, thus, not discoverable.

*In re Nat'l Lloyds Ins. Co*., 532 S.W.3d at 816 (emphasis supplied).

***The fees must be "necessary".***

- What does plaintiff's documentation reveal regarding the recovery of fees demonstrate?
- Contemporaneous time entries with timekeeper, service description, time expended? Be prepared for line-by-line audit.[18]
- Are time entries properly segregated between causes of action for which fees are recoverable and not.[19]
- Were activities truly necessary—e.g., Was there a prolonged battle over a motion to sever contract from extra-contractual causes of action and abate the extra-contractual action when Texas law is clear on the issue?[20] Or, was there a battle over a corporate representative deposition when no real dispute about contract (coverage) issues; deposition of adjuster or other insurer representatives when only real issue is "legal entitlement" (i.e., negligence, causation, and damages caused by tortfeasor)?[21]

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[18] See Note 14, *infra*.

[19] One commentator has explained:

> When a claim in which attorney's fees are recoverable is joined with another claim in which attorney's fees are not recoverable, a party must segregate the attorney's fees that are recoverable from those that are not. In *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299 (Tex. 2006), the Texas Supreme Court clarified that '[i]ntertwined facts do not make tort [attorneys'] fees recoverable; it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated." Id. at 313-14.

4 Tex. Prac. Guide Bus. & Com. Litig. § 21:121. For example, fees generated for the recovery of an action brought only against the tortfeasor are not binding on the insurer and are subject to being relitigated in the UIM case. *See State Farm Mut. Auto. Ins. Co. v. Azima*, 896 S.W.2d 177, 178 (Tex. 1995) (per curiam). Under such circumstances they should not be included in recoverable fees since they were not necessary for the UIM action.

[20] The San Antonio court of appeals, following *Brainard*, has held that a trial court abuses its discretion when it refuses to sever and abate the UIM contract case from any bad faith causes of action:

> As a result of the foregoing, we are constrained by the clear holding in Brainard, and hold that United Fire is under no contractual duty to pay UIM benefits until Garcia establishes the liability and underinsured status of the other motorist. See Brainard, 216 S.W.3d at 818. Therefore, ***United Fire should not be required to put forth the effort and expense of conducting discovery, preparing for a trial, and conducting voir dire on bad faith claims that could be rendered moot by the portion of the trial relating to UIM benefits.*** To require such would not do justice, avoid prejudice, and further convenience. See Guar. Fed. Sav. Bank, 793 S.W.2d at 658. Under these circumstances, we conclude the trial court abused its discretion in bifurcating the case instead of severing and abating the UIM claim from the bad faith claims.

*In re United Fire Lloyds*, 327 S.W.3d 250, 256 (Tex. App.—San Antonio 2010, orig. proceeding).

[21] Did the insured insist on attempting (or doing) discovery on bad faith issues prematurely? The supreme court has stated:

> **A Plaintiff may not obtain discovery on an unasserted, abated, or unripe bad faith claim under the guise of investigating a claim for benefits.** See Liberty I, 537 S.W.3d at 221 (holding that the requested deposition of the UIM carrier's claims adjuster as to the carrier's "claim-handling activities or its general policies and procedures" pertained to abated

d) Research any attorney's fee expert designated by plaintiff and get file evaluated by that expert. Be cognizant of attorney-client wavier issues that may be presented.[22] In this regard, the case of *In re National Lloyds Ins. Co.*, 532 S.W.3d 794 (Tex. 2017) is another one for required reading. The scholarly discussion of the relevance of file material from one's opponent as well as the issue of waiver of attorney client privilege is interesting. The word to the wise for those practicing in this area, however: *be aware of what you are doing when you designate your (or your law partner's) comparable fees as evidence of the reasonableness of your "opponent's fees.*

***The fees must be "equitable" and "just".***

As noted earlier, the supreme court stated that the determination of "reasonableness" and "necessity" are matters of fact. The trial court determines whether fees are "equitable or just" as a matter of law.[23] The court also has noted:

> 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***

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

If we return the fact situation in *Irwin*, note that Plaintiff obtained a settlement from the underlying tortfeasor for policy limits ($30,000), Plaintiff offered to settle for UIM policy limits of $50,000, Allstate offered $500, and the jury in the UIM case found and the trial court awarded some $498,000.[24] The optics are not good for an argument that an award of attorney's fees to Plaintiff is not equitable or just. One can imagine the argument: *"Judge, they offered only one percent of what the jury ultimately found as damages. Of course, we had to expend this effort to get a just and equitable recovery in this case!"*

So, the defense attorney must, early in the case, decide to change these optics:

- Was plaintiff's recovery *de minimis*[25] considering the amount in controversy and the disputed issues involved in the case? Remember discussion of the Excessive Demand Doctrine (page 4, *infra*).

> "Every hand's a winner and every hand's a loser."
>
> *Kenny Rogers, "The Gambler"*

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> extracontractual claims and did not seek information relevant to the disputed issues).

*In re USAA Gen. Indem. Co.*, 624 S.W.3d 782, 791 (Tex. 2021)(emphasis supplied).

[22] See Note 15, *infra*.

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

[24] *Allstate Ins. Co. v. Irwin*, 627 S.W.3d at 266.

[25] For those who still love a Latin phrase, recall the equitable principle of *de minimis non curat lex.* As Judge Biery once wrote: "A fundamental teaching of those common law principles of reasonableness, wisdom, and common sense is the doctrine of *de minimus non curat lex*. The doctrine advocates the proposition that the law does not care for, or take notice of, very small or trifling matters." *HSAM Inc. v. Gatter*, 814 S.W.2d 887, 892 (Tex. App.—San Antonio 1991, writ dismissed by agr.) (applying equitable doctrine to Consumer Code violation).

- Is a Rule 167 offer appropriate—and will this shift the equitable optics?[26]

- These optics may be shifted in cases in which there is the potential for clear liability. One commentator explained:

  Perhaps the only scenario in which a defendant should trigger Rule and make an offer is in a case *where there is potential or even clear liability*. In such a case, where there is strong likelihood of a plaintiff recovery, there is an opportunity to increase the plaintiff's risk of reducing that potential recovery by making a reasonable offer. If the plaintiff rejects the offer, his or her ultimate recovery will be reduced by the defendant's litigation costs, assuming that the defense is able to hold the plaintiff's recovery to less than 80 percent of the offer.

  Cliff Harrison, *Texas Hold'em: Offer of Settlement Under Rule 167*, 70 Tex. B.J. 936, 938 (2007)(emphasis supplied).[27]

- Have other offers been made and rejected by plaintiff that will shift the optics? Remember to make these offers outside the mediation arena.

*OTHER CONSIDERATIONS:*

*"DE MINIMIS" RECOVERY—THE LAW DOES NOT CARE FOR A SMALL OR TRIFLING MATTER.*

*RULE 167 OFFER: LETS THE DEFENDANT SET THE FLOOR AND SHIFT BURDEN OF RECOVERY OF FEES.*

**BIFURCATION OF ATTORNEY'S FEES ISSUES**

Federal courts routinely bifurcate attorney's fee issues from the case in chief. In my experience, many federal courts even require that such issues be submitted by affidavit and briefs. Since there are fact issues surrounding the "equitable and just" elements for obtaining attorney's fees under the Texas Declaratory Judgment Act, I am not certain that one party may waive, unilaterally, a jury's determination of those fact issues (where a jury has been demanded).

One certainly may ask a judge to bifurcate the attorney's fee issues to avoid confusion and the unnecessary insertion of irrelevant issues into the "car wreck" portion of the case.

[26] See generally, Harrison, Cliff, *Texas Hold 'Em: Offer of Settlement under Rule 167*, 70 Tex. B. J. 936 (2007). The author explains, "In its simplest terms, an 'offer of settlement' under Rule 167 is a procedure whereby one party makes a settlement offer to another. If the offer is rejected and the party that made the offer ultimately wins the case at trial, then the winner recovers its litigation costs, including reasonable attorney's fees. *See id*. at 937.

[27] The author of this article cleverly analogizes the moves available under the rule to moves in poker—particularly—Texas Hold 'Em. In that vein, I would offer words of wisdom from the philosopher (and singer), Kenny Rogers: "Every hand's a winner, and every hand's a loser." The more cases I handle and try, the more I see just how profound this statement is.

Recall that "bifurcation" and "severance" are two very different concepts. As the San Antonio Court of Appeals 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), *citing*, *Hall v. City of Austin*, 450 S.W.2d 836, 837–38 (Tex.1970).

The insurer's case defending against attorney's fees may necessarily rely upon the reasonableness of certain actions taken by the defense or the plaintiff in the underlying tort action. This, in turn, may involve the introduction of evidence otherwise privileged (e.g., case evaluations, settlement offers, Rule 167 offers, matters regarding the attorney fee contract). While not ideal, bifurcation may keep the car wreck case, a car wreck case and allow for the orderly (and relevant) presentation of matters concerning attorney's fees after the car wreck case is decided.

## AGREEMENT TO BE BOUND BY THE UNDERLYING JUDGMENT AGAINST TORTFEASOR

Back in the old days (remember . . . walking to school over a mile with a rock in your shoe), the UIM carrier used to agree to be bound by the judgment arising out of any trial against the insured tortfeasor. This was advantageous to the plaintiff—he or she did not have to try the case all over against the UIM carrier. But it was also an advantage to the UIM insurer. First, the UIM insurer did not have to fund the defense against the tortfeasor. Second, once a judgment was taken against the tortfeasor, the liability of the UIM carrier was set—it was either the UIM policy limit or some amount, if any, less than the policy limit. But probably the best benefit to this now is that the entire issue of attorney's fees for the UIM case is avoided entirely.

I am not sure why I see so little of this defense strategy in practice today. Perhaps it has to do with the fact that the local insurance defense bar (once a rather small and tight-knit group) no longer knows the attorneys called upon to defend the underlying action against the tortfeasor (i.e., staff counsel, out-of-town counsel, etc.). Whatever the reason, UIM carriers may now have a very real reason to consider agreeing to the underlying judgment: it can save considerable attorney's fees in the long run.

## THE RECAP AFTER *IRWIN*

1. Get over it—attorney's fees are recoverable in a UIM (state court) case *via* the "equitable and just" considerations of the Texas Declaratory Judgment Act.

2. If possible (i.e., proper diversity jurisdiction), run—don't walk—to federal court.

3. Under the TUDJA fees must be reasonable, necessary, just, and equitable.

4. Narrow the issues in the UIM case: file stipulations on coverage issues not in dispute. Most UIM cases will boil down to

a fight over "legal entitlement"—and this makes it a standard car-wreck case.

5. Consider pleading "excessive demand" doctrine in your answer; consider *de minimis non curat lex* in situations of small or minimal damages; also consider a Rule 167 offer in cases of liability.

6. Pick a suitable attorney's fee expert to testify (either for or against) on the issue of attorney's fees. Make certain that expert is familiar with the attorney's fee contract in issue, any billing memos generated, and important case law (*Arthur Andersen*, *Tony Guillo*, *Rohrmoos*) and their holdings.

7. Do not unwittingly inject you (or your firm's) billing practices and records into the litigation.

8. Recall that even under *Irwin*, at least two of the four factors for award of attorney's fees involve questions of fact—make certain you have prepared your case for such a fact submission (do not waive submission of fact issues unless this is what you really want to do).

9. Consider bifurcating the attorney's fee issues from the car-wreck issues in the UIM case. The trial of the attorney's fees issue in the main case may unnecessarily inject otherwise inadmissible issues (insurance coverage limits, advice of counsel regarding defenses and trial strategy).

10. Consider consenting to be bound by the judgment in the trial of any underlying case against the tortfeasor.

## CONCLUSION

A UIM case can be narrowed to a simple auto accident case. The collateral issues involved in UIM litigation dealing with the first party coverage issues usually can be handled by stipulation or simple written discovery.[28] This should reduce the attorney's fees sought in a "just and equitable" analysis. I hope that this outline is helpful for those of you on the defense side of the docket who may be called upon to defend attorney's fees issues in a UIM case.

[28] One court put it this way:

> A stipulation by the insurer that (1) the plaintiff was insured for UIM benefits under its policy; and (2) the underlying accident was a covered occurrence under the policy's provisions ***narrows the relevant issues in the breach-of-contract suit to those in a "typical car wreck" case***—namely, (1) the uninsured/underinsured driver's liability for the underlying accident; (2) the claimed uninsured/underinsured driver's status; and (3) the existence and amount of the plaintiff's damages.

*In re Liberty Cnty. Mut. Ins. Co*., 606 S.W.3d 866, 872 (Tex. App.—Houston [14th] 2020, orig. proceeding); see also, *Blevins v. State Farm Mutual Automobile Ins. Co.*, 2018 WL 5993445 at *14 (Tex. App.—Fort Worth, no pet.)