Presented:
August, 2017

UT CAR CRASH SEMINAR
Austin, Texas

UNINSURED AND UNDER-INSURED MOTORIST CLAIMS

Thomas A. Herald

Thomas A. Herald
Noteboom – The Law Firm
669 Airport Freeway, Suite 100
Hurst, TX 76053

Herald@Noteboom.com
817-282-9700
817-282-8703 Fax

I. RULES OF CONSTRUCTION FOR CONSTRUING INSURANCE POLICIES

A. ***General Rules:***

a. Same Rules of Construction as Any Contract.

b. Insurance policies are construed according to the same rules of construction that apply to contracts generally. **Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.,** 267 S.W.3d 20, 23 (Tex. 2008). Interpretation or construction of an unambiguous contract is a matter of law to be determined by the court. **Coats v. Farmers Ins. Exch.,** 230 S.W.3d 215, 217 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

B. ***Plain Language:***

a. **Security Mut. Cas. Co. v. Johnson,** 584 SW 2d 703, 704 (Tex. 1979). Words in an insurance policy are to be given their plain, ordinary meaning unless the policy gives them a different meaning.

b. **Fiess v. State Farm Lloyds,** 202 SW 3d 744, 751 and n.30 (Tex. 2006) To determine the plain and ordinary meaning of the words of an insurance policy, Courts routinely turn to dictionary definitions.

C. ***Ambiguity:***

a. **National Union Fire Ins. vs. Hudson Energy Co.,** 811 S.W.2d 552, 555 (Tex. 1991). "Generally, a contract of insurance is subject to the same rules of construction as other contracts. If the written instrument is worded so that it can be given only one reasonable construction, it will be enforced as written. However, if a contract of insurance is susceptible of more than one reasonable interpretation, we must resolve the uncertainty by adopting the construction that most favors the insured. The Court must adopt the construction of an exclusionary clause urged by the insured as long as that construction is not unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties' intent. In particular, exceptions or limitations on liability are strictly construed against the insurer and in favor of the insured."

D. ***Interpretations of Exclusionary Clauses:***

a. If the language of an exclusionary clause in an insurance policy is clear and unambiguous, the well established rule of construction directing adoption of that construction most favorable to the insured, is not applicable. Consequently, absent ambiguity, neither party can be favored by its construction. **Maryland Casualty Co. v. State Bank & Trust Co**., 425 F.2d 979 (5th Cir. 1970) *cert.* denied, 400 U.S. 828, 27 L. Ed. 2d 57, 91 S. Ct. 55 (1970). **Monte Christo Drilling Corp. v. Byron-Jackson Tools, Inc.**, 266 F. Supp. 123 (S.D. Tex. 1966).

b. The court must adopt the construction of an exclusionary clause urged by the insured as long as that construction is not unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties' intent." **Nat'l Union Fire Ins. Co. v. Hudson Energy Co**., 811 S.W.2d 552, 555, (Tex. 1991).

E. ***Severability Clauses:***

a. **Clause**: "This insurance applies separately to each insured. This condition will not increase our limit of liability for any one occurrence."

b. A severability clause generally serves to provide coverage to an "innocent" insured who did not commit the intentional conduct excluded by the policy. ***Bituminous Cas. Corp. v. Maxey***, 110 S.W.3d 203, 210 (Tex. App.—Houston [1st Dist.] 2003, pet. denied). (citing ***State Farm Fire & Cas. Ins. Co. v. Keegan***, 209 F.3d 767, 769 (5th Cir. 2000)). Each insured against whom a claim is brought is treated as if he or she is the only insured under the policy, and thus, stands alone with respect to exclusion provisions. ***Williamson v. Vanguard Underwriters Ins. Co.***, No. 14-97-00276-CV, 1998 WL 831476, at *1 (Tex. App.—Houston [14th Dist.] Dec. 3, 1998, pet denied.)

II. COVERAGE ISSUES

A. ***Eight Corners Rule***

a. The duty to defend is determined, regardless of the of the truth or falseness of the allegations, by reviewing the facts alleged within the four corners of the petition and the coverages and exclusions contained within the four corners of the policy. **Heyden Newport Chemical Corp. v. Southern General Ins. Co.,** 387 SW 22 (Tex. 1965).

B. ***Exceptions to the Eight Corners Rule:***

a. **Weingarten Realty Management Co. v. Liberty Mut. Fire Ins. Co.,** __ S.W.3d __ (Tex. App.—Houston [14th Dist.] (2011). After acknowledging that the Supreme Court has never expressly recognized an exception to the eight corners rule, the Court noted that other courts has recognized a "very narrow exception" allowing extrinsic evidence "only when relevant to an independent and discrete coverage issue, not touching on the merits of the underlying third-party claim." ***GuideOne Elite Ins. Co. v. Fielder Road Baptist Church*, 197 S.W.3d 305, 308 (Tex.2006); *see also* *Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.*, 279 S.W.3d 650, 654 (Tex.2009).** The Court recognized an exception to the eight-corners rule for the first time. In the underlying case, Johnson sued her employer and the landlord. After she was assaulted by an unknown person while working, Johnson sued the landlord, but spelled the landlord's name wrong in the petition. However, the correct defendant appeared and answered the lawsuit. The court noted the entity actually sued was a "separate and distinct" entity from the intended defendant. The correct defendant never challenged the error and Johnson never fixed it.

The landlord's carrier defended. Shortly before trial, the landlord made a demand upon Johnson's employer's carrier, Liberty Mutual, to provide a defense as an additional insured under its policy. Liberty Mutual rejected the demand to provide the defense to the landlord because the name of the defendant in the petition did not match the name on the policy. The landlord and its insurer sued Liberty Mutual for coverage.

As an exception to the eight-corners rule, the court noted that Liberty Mutual was asking the court to assume that the alleged facts were true. In doing so, Liberty Mutual argued that a complete stranger to the policy was asking for a defense to which it was not entitled. The extrinsic evidence at issue was the policy's reference to lease agreements, which required the court to consider lease agreements to determine the insured's status.

The court distinguished other eight-corners cases by noting that Liberty Mutual was not challenging the merits of the underlying claim. The court noted that "[i]n light of the facts of this case, we are persuaded of the need for a very narrow exception to the eight-corners rule. The exception applies only when an insurer establishes by extrinsic evidence that a party seeking a defense is a stranger to the policy and could not be entitled to a defense under any set of facts.

b. **GuideOne Specialty Mutual Insurance Co. v. Missionary Church of Disciples of Jesus Christ,** 2011 WL 3670009 (N.D.Tex., July 7, 2011). The Court allowed the use of extrinsic evidence in support of the insurer's motion for summary judgment when the "eight-corners rule" did not apply to the duty to defend under that policy due to revisions in the policy language. The court observed that decisions applying the eight-corners rule in Texas typically rely on policy terms providing that the insurer will defend "***even if the allegations of the suit are groundless, false or fraudulent***." The policy in this lawsuit, however, did not include that provision. To the contrary, the policy at issue stated in relevant part: "***we have no duty to defend 'suits' for 'bodily injury' or 'property damage' to which this insurance does not apply***. This is the first Texas case to recognize the right of carrier to challenge coverage on this basis even though this language is commonly found in many Texas policies.

C. WHEN COVERAGE IS DENIED

a. **Hernandez v. Gulf Group Lloyds**, 875 S.W. 2d 691, 692 (Tex. 1994)."Insurance policies are contracts, and as such are subject to rules applicable to contracts generally. *See* ***Barnett v. Aetna Life Ins. Co.,*** 723 S.W.2d 663, 665 (Tex.1987); ***First Texas Prudential Ins. Co. v. Ryan,*** 125 Tex. 377, 82 S.W.2d 635, 637 (1935). A fundamental principle of contract law is that when one party to a contract commits a material breach of that contract, the other party is discharged or excused from any obligation to perform. *See* ***Jack v. State,*** 694 S.W.2d 391, 398–99 (Tex.App.—San Antonio 1985, writ ref'd n.r.e.) (citing ***Mead v. Johnson Group, Inc.,*** 615 S.W.2d 685, 689 (Tex.1981))."

b. **J.E.M. v. Fid. & Cas. Co. of N.Y.**, 928 S.W.2d 668, 672 (Tex. App. 1996, no writ). Waiver or estoppel may preclude an insurer from forfeiting a policy because of the insured's failure to comply with a term of the policy, but these doctrines do not normally **operate to preclude the insurer's "no coverage" defense.** ***Texas*** *Farmers Ins. Co. v. McGuire,* 744 S.W.2d 601, 602–603 (Tex.1988). However, if an insurer assumes the insured's defense without obtaining a non-waiver agreement or a reservation of rights, and the insurer has knowledge of facts indicating noncoverage, the insurer waives all defenses, including the defense of "no coverage." ***Farmers Texas County Mut. Ins. Co. v. Wilkinson,*** 601 S.W.2d 520, 521–22 (Tex.Civ.App.—Austin 1980, writ ref'd n.r.e.).

D. WHO IS COVERED?

a. **Greene v. Great American Ins. Co**., 516 S.W.2d 739, 744-5 *dissenting on other issues* (Tex. App.–Beaumont 1974, writ ref'd n.r.e.). With regard to a standard Texas auto policy, "There is no requirement that the insured have any relation, at the time of the accident, with any vehicle he owns and that is insured with the insurer. The uninsured motorists protection covers the insured and the family members while riding in uninsured vehicles, while riding in commercial vehicles, while pedestrians, or while rocking on the front porch. The only relation that the insured must have to automobiles at the time of the accident is that he be injured by an automobile driven by an uninsured motorist."

E. MEMBER OF THE HOUSEHOLD

a. **Hartford Casualty Ins. Co. v. Phillips,** 575 S.W.2d 62 (Tex. App. – Texarkana 1978, no writ). This is an auto coverage case that holds a minor can have more than one residence.

b. **State Farm Mutual v. Nguyen,** 920 S.W.2d 409 (Tex. App. – Houston [1st dist.] 1996, no writ). Minor can have dual residence and outlines the factors relevant to determine residency under an auto policy.

c. **State Farm Mutual Automobile Ins. Co. v. Nguyen,** 920 S.W.2d 409 (Tex.App.--Houston(1st. Dist.) 1996, no writ) The Court held that an infant who was prematurely born in the hospital following an auto accident was a "Member of the Household." Relying on **Pamperin v. Milwaukee Mutual Ins. Co.,** 197 N.W.2d 783 (Wis. 1972), the court looked at (1) whether the persons were living under the same roof; (2) whether there was a close, intimate and informal relationship; and (3) whether the intended duration where the person was staying is likely to be substantial duration and consistent with the informality of the relationship.

d. **Easter v. Providence Lloyd Ins. Co.,** 17 S.W.3d 788 (Tex.App.--Austin, 2000, no writ). Foster child brought claims against the foster parents' homeowners insurer to recover a judgment for sexual abuse. The Court upheld the member of the household exclusion finding the child was a resident of the household and therefore was an insured. The exclusion bars the foster child's recovery because an insured cannot bring a liability claim against its own policy.

e. **Charida v. Allstate Indemn. Co.,** 259 SW3d 870 (Tex.App. – Houston [1st Dist.] 2008, no pet.). Charida was injured while riding in a car owned and driven by her father. She settled her 3rd party liability claim against her father for policy limits. She then made a UIM claim. The Court granted summary judgment in favor of Allstate holding that the vehicle does not meet the definition of an uninsured vehicle because the definition does not include any vehicle or equipment owned by or furnished to or available for the use of the policyholder. The purpose of UM/UIM coverage is to protect insureds from the negligence of strangers to the policy, not family members.

F. DEFINITION OF UNINSURED VEHICLE:

a. **Statute: §1952.109 Tex. Ins. Code - For purposes of the coverage required by this subchapter, "uninsured motor vehicle," subject to the terms of the coverage, is considered to include an insured motor vehicle as to which the insurer providing liability insurance is unable because of insolvency to make payment with respect to the legal liability of the insured within the limits specified in the insurance.**

b. **Standard policy language –** "Uninsured motor vehicle" means a land motor vehicle or trailer of any type,

a) to which no bodily injury liability bond or policy applies at the time of the accident.

b) Which is a hit and run vehicle whose operator or owner cannot be identified and which hits:

(1) you or any family member;

(2) a vehicle which you or any family member are occupying; or

(3) your covered auto

c) To which a liability bond or policy applies at the time of the accident but the bonding or insuring company:

(1) denies coverage; or

(2) is or becomes insolvent.

d) Which is an underinsured motor vehicle. An underinsured motor vehicle is one to which a liability bond or policy applies at the time of the accident but its limit of liability either:

(1) is not enough to pay the full amount the covered person is legally entitled to recover as damages; or

(2) *has been reduced by payment of claims to an amount which is not enough to pay the full amount the covered person is legally entitled to recover as damages.*

G. ***VEHICLES OWNED BY OR FURNISHED TO OR AVAILABLE FOR USE OF THE POLICYHOLDER***

a. **Charida v. Allstate Indemn. Co.,** 259 SW3d 870 (Tex.App. – Houston [1st Dist.] 2008, no pet.) Charida was injured while riding in a car owned and driven by her father. After she settled her 3rd party liability claim against her father, she made a UIM claim. The Court held that the vehicle does not meet the definition of an uninsured vehicle because the definition does not include any vehicle or equipment owned by or furnished to or available for the use of the policyholder. The purpose of UM/UIM coverage is to protect insureds from the negligence of strangers to the policy, not family members.

b. **Upson v. Allstate Indemnity Co.,** 2008 WL 302088 (S.D. Tex. Aug. 5, 2008). Vehicles owned by the insured cannot be underinsured.

c. **Hunter v. State Farm County Mut. Ins. Co. of Texas,** 2008 WL 5265189(Tex.App. – Ft. Worth Dec. 18, 2008) The Court held that the "family use" exception of the automobile insurance policy applied to exclude UIM benefits, and that such exclusion was not void against public policy. The legislature specifically authorized the Texas Department of Insurance to exclude certain vehicles from the definition of uninsured motor vehicle, including vehicles owned by or furnished for the regular use of an insured or family member.

H. WHO IS AN UNINSURED MOTORIST?

a. **Burden of Proof:**

a) **Statute:**

(1) §1952.109 Tex. Ins. Code: BURDEN OF PROOF IN DISPUTE. The insurer has the burden of proof in a dispute as to whether a motor vehicle is uninsured.

b) **Cases:**

(1) State Farm v. Matlock, 462 S.W.2d 277 (Tex. 1970) which put the burden on the claimant was legislatively overruled by the enactment of §1952.109 **Tex. Ins. Code** in 2005.

b. **Denial of Coverage Makes a Person an Uninsured Motorist**

a) **Milton v. Preferred Risk Ins. Co**., 511 S.W.2d 83 (Tex.Civ.App. – Houston [14th Dist.] 1974, writ ref'd n.r.e.) One is an uninsured motorist in Texas, under standard contracts, when (1) his insurer becomes insolvent or denies liability; (2) he is a hit and run driver; (3) he has less coverage than the legally required minimum or (4) he has no insurance. **Note**: This case predates the enactment of *§1952.109 Tex. Ins. Code.*

c. **Expired Statute of Limitations Does Not Make a Driver an Uninsured Motorist**

a) **State Farm Mutual Auto. Ins. Co. v. Bowen,** 406 S.W.3d 182 (Tex. App.—2013, no pet.). The inability to pursue a claim due to expiration of the statute of limitations is not a denial of coverage. Therefore, a driver does not become "uninsured" simply because the claimant is unable to pursue a claim against that driver due to the expiration of the statute of limitations.

I. NAMED DRIVER POLICIES

a. Statutes & Regulations:

a) Title 28 TAC §5.208, the Texas Department of Insurance

(1) §1952.0545(b) of the **Texas Insurance Code** requires that the agent or insurer make the following oral and written disclosures before accepting the initial premium or fee.

(a) Provide an oral disclosure to the applicant or insured, "**WARNING: A NAMED DRIVER POLICY DOES NOT PROVIDE COVERAGE FOR INDIVIDUALS RESIDING IN THE INSURED'S HOUSEHOLD THAT ARE NOT NAMED IN THE POLICY.**"

(b) Provide a written disclosure to the applicant or insured that is signed by the applicant or insured: "**WARNING: A**

NAMED DRIVER POLICY DOES NOT PROVIDE COVERAGE FOR INDIVIDUALS RESIDING IN THE INSURED'S HOUSEHOLD THAT ARE NOT NAMED IN THE POLICY.; and

(c) Contemporaneously to giving of the oral disclosure, confirm in writing the provision of the oral disclosure were provided.

b) Because §1952.0545(b) of the **Texas Insurance Code** includes the phrase *"**any premium or fee**,"* the requirements for oral and written disclosures also apply to all renewal and reinstated policies.

c) § 5.208(e) makes it clear that an agent or insurer cannot avoid liability or cancel a policy due to noncompliance.

d) In the event the agent or insurer fails to comply with these requirements, the policy is transformed to a standard policy.

e) Standard Policies.

(1) §601.073(b) of the **Texas Transportation Code** provides the statutory mandate for policy provisions of auto insurance issued in the State of Texas., and mandates that the policy must comply with the coverage required by this chapter.

(2) §601.073(g) of the **Texas Transportation Code**, without regard to the language and exclusions contained in the policy, the policy must provide the coverage mandated by law.

(3) Pursuant to §601.076 of the **Texas Transportation Code** an owner's motor vehicle liability insurance policy must:

(a) cover each motor vehicle for which coverage is to be granted under the policy; and

(b) pay, on behalf of the named insured or another person who, as insured, uses a covered motor vehicle with the express or implied permission of the named insured, amounts the insured becomes obligated to pay as damages arising out of the ownership, maintenance, or use of the motor vehicle in the United States or Canada, subject to the amounts, excluding interest and costs, and exclusions of §601.072.

J. DEFINITION OF "AUTO ACCIDENT"

a. Although there is no statutory definition of "auto accident" and no case law definition of what constitutes an "auto accident," Courts have concluded the term is not ambiguous and is to be construed as a matter of law. See **Texas Farm Bureau Mut. Ins. Co. vs. Sturrock,** 146 S.W.3d 123, 126 (Tex. 2004); See also **Farmers Tex. County Mut. Ins. Co. v. Griffin,** 955 S.W.2d 81, 83 (Tex.1997). The fact that the parties have two conflicting interpretations of the term does not make the term ambiguous.

b. **Texas Farm Bureau Mut. Ins. Co. vs. Sturrock,** 146 SW3d 123 (Tex. 2004) The Court announced a new definition of the term "*auto accident*." An auto accident occurs where one is involved with another vehicle, an object or a person. The court held that because Sturrock was injured when he became entangled in a portion of his vehicle, the vehicle played the necessary causative role in producing his injuries, thereby entitling him to PIP coverage. Further, because the policy specifically mandated that a covered person is one that is entering or exiting a covered vehicle, the insurer's position would render the definition of "covered person" meaningless. This position was also supported by briefs from the Texas Department of Insurance.

c. **Mid Century v. Lindsey,** 997 S.W.2d 153 (Tex. 1999). A small child was injured as a result of an "*automobile accident*." Actually the child was injured due to accidental shotgun blast that occurred while the child was climbing into the truck because of the manner in which the shotgun was stored.

d. **Farmers Tex. County Mut. Ins. Co. v. Griffin,** 955 S.W.2d 81, 83 (Tex.1997). The court re-iterated the importance of promoting the purpose of the PIP statute. The Court agreed with the Texas Department of Insurance that the carrier's cramped interpretation of its holding, in which the court stated that the " 'words [motor vehicle accident] evoke an image of one or more vehicles in forceful contact with another vehicle or a person causing physical injury.' " ... in ***Griffin*** and ***Lindsey*** would severely limit an insured's no-fault coverage in a manner that would contravene its purpose and lead to absurd results. Holding: While a collision or near collision are not required to invoke coverage, the vehicle must be more than the mere situs of the accident or injury producing event.

e. **King v. Dallas Fire Ins. Co.**, 85 S.W.3d 185 (Tex. 2002) What constitutes an "auto accident" is determined from the point of view of the insured, not a third party.

K. ***TYPES OF ACCIDENTS:***

a. **ATV Accidents**

a) **Western Ins. Co. vs. Vaughn Andrus,** 694 S.W.2d 657 (Tex.App.– Fort Worth 1985, writ ref'd n.r.e.) Insured made a claim for theft of his ATV. Insurer said the bikes were excluded from coverage under a policy exception for motor vehicle. Court found the ATV was a "Motor vehicle" and therefore was not covered under the homeowner's insurance policy.

b) **Gomez v. Allstate Tex. Lloyds Ins. Co.,** 24 S.W.3d 196 (Tex.App.—Fort Worth, 2007). The parties agreed that the motor vehicle exclusion within the homeowner's policy was applicable to the use of the ATV, but the insured argued coverage available under the homeowner's policy through the recreational vehicle exception. The Court agreed with Allstate that liability coverage afforded for the ATV owned by the insured under the recreational vehicle exclusion of homeowner's insurance policy extended only to bodily injuries arising out of the use of such vehicle while it was on the insured's premises.

b. **Forklift Accidents**

a) **International Insurance Co. In New York v. Hensley Electric Steel Co, Inc.,** 497 S.W.2d 64 (Tex.App.- Waco 1973, no writ). Court held that a forklift

was not a motor vehicle for purposes of the insurance policy. The decision focused on the issue that the policy did not define "motor vehicle."

c. **Handling of Property**

a) **The Exclusion:**

(1) This insurance does not apply to any Bodily injury or property damage resulting from the handling of property after it is moved from the covered auto to the place where it is finally delivered by insured.

b) **Home State County Mut. Ins. Co. v. Acceptance Ins. Co.,** 958 SW 2d 263 (Tex.App.--Amarillo 1997, no writ). A collision with cargo that has been completely unloaded and left at a job site, the auto liability carrier for the delivery truck has no duty to defend because there was no auto accident as defined in the policy. The proper application to be given a "loading and unloading" clause in the "use" provision of a standard automobile liability policy was first decided in Texas in **American Employers' Ins. Co. v. Brock,** 215 S.W.2d 370 (Tex. Civ. App.--Dallas 1948, writ ref'd n.r.e.). The court alluded to the two rules applied in construing the clause: (1) the "coming to rest" rule and (2) the "complete operation" rule. A more detailed explanation of these two rules was later discussed in **Travelers Insurance Co. v. Employers Casualty Co.,** 380 S.W.2d 610, 612 (Tex. 1964). The "coming to rest" rule is the minority view. If loading begins when the transported object has been brought into the immediate vicinity of and is being physically carried or lifted into the vehicle, and unloading ends when the cargo reaches a place of rest, and is no longer being carried or lifted off the vehicle. The majority view, which was adopted in ***Travelers,*** embraces the "complete operation" rule which holds that loading and unloading not only includes the immediate transport of goods to or from the vehicle, but the complete operation of transporting the cargo between the vehicle and the place to or from which the cargo is being delivered. ***Travelers,*** 380 S.W.2d at 612. The majority view equates unloading with delivery. When transportation is contemplated, one expects the goods to be picked up from their present location and moved to a new location. When delivery is contemplated, one expects the goods to be placed at a location desired by the recipient. Unloading is not complete until the goods reach the final destination contemplated when the transportation began.

c) **Commercial Standard Ins. Co. v. American Gen. Ins. Co.,** 455 S.W.2d 714 (Tex. 1970). An accident occurred after some, but not all, of the truckload of cement had been transferred from the truck into a bucket and then into forms. Following ***Travelers*** and held that the pertinent inquiry was not whether the contract had been completed, but whether the unloading operation under the terms of the policy had been completed. The Court held the "unloading" of the concrete had not been completed at the time of the accident.

Farmers Ins. Exch. v. Rodriguez, 366 SW3d 216 (Tex. App.—Houston [14th Dist.] Feb. 16, 2012), Plaintiff filed both an UIM claim against Allstate and a homeowner's claim against Farmers as a result of an accident that occurred when he was helping his neighbor unload a deer stand from the neighbor's trailer on the neighbor's property. The Plaintiff and his neighbor were trying to manually

lift the deer stand off of the neighbor's trailer, and when the neighbor realized the 350-pound stand was too heavy, he jumped out of the way leaving the Plaintiff to hold the stand on his own. The stand fell and injured the Plaintiff. Holding: The auto policy covered the Plaintiff's claims, but that the suit against the homeowners carrier was premature.

At the summary judgment stage, Farmers, the homeowners insurer, argued that the trial court lacked jurisdiction over the Plaintiff's claims against Farmers because the claims were not yet ripe. The Court of Appeals agreed with Farmers that because coverage was uncertain without a judgment against the Plaintiff's neighbor, the court lacked jurisdiction on the homeowner's claim even though the circumstances of the Plaintiff's injuries were undisputed. The Court of Appeals found that the jury was required to decide and apportion liability before coverage under the homeowners policy could be determined.

The Court of Appeals affirmed the judgment against Allstate under the UM/UIM claim. The Court held that loading and unloading a trailer was an "auto accident" and constituted "use" of the trailer even if loading and unloading was not specifically mentioned in the policy. Applying a three-factor test to determine use, the Court concluded that (1) it was in the *inherent nature* of a trailer to haul materials, and that these functions include loading and unloading; (2) the accident was in the *natural territorial limits* of the trailer, because even though Plaintiff was not in the trailer, loading and unloading includes "moving … goods to their final physical destination"; and (3) the trailer was a *cause* of the accident in that the accident could not have occurred if the Plaintiff were not helping his neighbor unload the deer stand from the trailer.

d. **Dog Bites**

a) **State Farm Mut. Ins. Co. v. Peck,** 900 S.W.2d 910 (Tex.App.--Amarillo 1995, no writ) There is no coverage under an auto policy to defend or pay for damages to a passenger in the car who was bitten by the car owner's dog. While there are no Texas cases interpreting the term "auto accident," other states generally refer to situations where one or more vehicles is involved in a collision or near collision with someone or something. It is not enough for an injury to occur in or near an auto to be covered under an "auto accident" provision.

e. **Drive-by Shootings, Car-Jacking & Assaults:**

a) **Generally not covered because:**

(1) There is no "physical contact" between the motor vehicles. **Collier v. Employer's National Ins. Co.,** 861 S.W.2d 286 (Tex.App-Houston [14th Dist.] 1993, writ denied).

(2) Misle v. State Farm Mutual Automobile Insurance Company, 908 SW2d 289 (Tex.App–Austin, 1995, no writ). Insurance carrier's motion for summary judgment was granted holding that an insurer does not owe a duty to defend a person who fired an air rifle into a crowd from a passing car. The person who intentionally shot the rifle even though he claims he did not intend to hurt anyone is not covered because if he intends the

consequences of his act or believes the consequences are substantially certain to follow, the event is not an accident even though the particular injury may have been unexpected, unforeseen and unintended.

(3) **Le v. Farmers Texas County Mutual Insurance Company,** 936 S.W.2d 317 (Tex.App–Houston 1995, writ denied). The procedural history on this case can be confusing. First, the passenger won because the court found that there was coverage. Then the court withdrew its opinion granting summary judgment for the insurer. Then the Appeals court has affirmed summary judgment in favor of the insurer finding that this incident was not covered.

In **Le,** the insurer moved for summary judgment that (1) passenger's injuries did not arise from the "use" of an automobile so passenger was not entitled to uninsured motorists benefits; (2) impact of bullets from drive-by shooting did not satisfy the physical contact requirements for UM coverage; and (3) Insurance Code provision concerning PIP coverage in motor vehicle liability policy limits coverage to motor vehicle accidents rather than all accidents that occur in motor vehicles such as drive by shootings. Summary judgment was affirmed.

A passenger in a car who is injured as a result of a drive-by shooting where there is no contact between 2 vehicles may recover PIP benefits but not UM/UIM benefits. Unlike UM/UIM requirements, the Insurance Code does not limit PIP recovery to automobile accidents. PIP coverage may be extended where injuries were sustained while occupying a vehicle.

The court subsequently withdrew the above opinion and imposed a requirement that a UM claim arise out of the "use" of an insured vehicle. Further the court required that the injury sustained be as a result of a "motor vehicle" accident in order for there to be PIP coverage. Merely occupying the vehicle was not sufficient for PIP benefits.

(4) Merchants Fast Motor Lines, Inc. v. National Union Fire Ins., 939 S.W.2d 139 (Tex. 1996) See lower court opinion at 919 S.W.2d 903 (Tex.App.-Eastland 1996). The Court held the petition did not assert facts sufficient to create a duty to defend or to indemnify the insured because the petition did not assert any facts suggesting a even a remote causal relationship between the operation of the truck and Plaintiff's injury. The only facts the petition alleged were that "the truck driver's negligent discharge of a gun while operating the truck injured Plaintiff.

(5) **Schulz v. State Farm Mutual,** 930 SW2d 832 (Tex.App.--Houston [1st Dist.] 1996, no pet.). PIP does not provide coverage where a driver is fatally shot while either seated in a covered vehicle or while kneeling outside the vehicle because there was no motor vehicle accident.

(6) **Farmers Texas County Mutual Insurance Company v. Griffin,** 868 SW2d 861 (Tex.App–Dallas 1996, writ denied). An insurer does not have a duty to defend its insured or to indemnify the insured where the

injured party seeks damages arising from a "drive-by" shooting incident involving the insured where the petition does not allege that the injuries are the result of an auto accident. Plaintiff's definition of the term auto accident is beyond any reasonable meaning of the term. Further, the Court discussed that the injuries were the result of intentional conduct which is excluded under the policy.

(7) **St. Farm v. Whitehead,** 988 S.W.2d 744 (Tex. 1999). Estate of driver brought a UM claim which arose from drive-by shooting. The carrier said there was no coverage for a drive by shooting. The insurer has appealed based on a no accident and intentional act theory. Supreme Court agreed with the insurer and reversed and rendered because there was no coverage since the damages do not arise out of the "use" of a motor vehicle.

(8) **Home State County Mutual Ins. Co. v. Binning**, 390 SW 3d 696 (Tex.App.—Dallas 2012). This uninsured motorist case arises from an incident in a parking lot where the insured was rear-ended, then attacked and beaten on the head with a pistol by a passenger in the other vehicle as the insured was exiting his car. Following the incident, the attacker fled the scene. Coverage was the sole issue on appeal. The court was tasked with determining whether the injuries the insured suffered bore a causal connection with the use of the motor vehicle. The three factors to consider are (1) whether the accident arose out of the inherent nature of the automobile, (2) whether the accident arose with "the natural territorial limits of the automobile," and (3) whether the automobile did not merely contribute to cause the condition that produced the injury, but itself produced the injury." The court disagreed with the insured's contention that his injuries arose out of the use of a motor vehicle because this was an attempted carjacking. Further, the Court found there were insufficient facts to establish conclusively that the events constituted a carjacking. Finally, the automobile itself did not produce the damages**.**

b) **Exceptions Regarding Drive-By Shootings:**

(1) **Mid-Century Insurance Company of Texas v. Lindsey,** 997 SW2d 153 (Tex. 1999) Issue: Whether the accidental discharge of a shotgun that occurred when a child accidentally hit the trigger of the shotgun as he was trying to enter the cab of the pickup through the rear sliding window of the pickup constitutes an "accident" covered under the policy. The Supreme Court says this was an "auto accident" for which there is coverage because, unlike a drive-by shooting, there was a causal connection between the use of the vehicle and the injury.

f. **Hot Coffee or Liquid Spills Inside A Car**

a) There is no case on point. Under PIP coverage a "motor vehicle accident" is not a requirement, only that the incident occurred "while occupying." For UM/UIM claims, an insured must show the incident constituted a "motor vehicle accident" for UM/UIM coverage to apply.

g. **Examples of Cases which are Not an Auto Accident.**

(1) **Lancer Ins. Co. v. Garcia Holiday Tours, et al.,** 345 S.W.3d 50, (Tex. 2011). In a case of first impression, the Texas Supreme Court determined that a business auto policy does not cover a claim by passengers on a commercial bus who contracted tuberculosis (TB) after a bus trip with a coughing driver, who was hospitalized for active TB. Lancer denied a claim for defense and indemnity by its insured, Garcia, after several passengers sued Garcia for contracting TB during a bus trip with an infected driver. Garcia defended itself and proceeded to trial. A jury found the company and its driver liable and awarded over $5 million in damages, collectively, to the passengers who contracted the disease. The company and the driver then sued Lancer for breach of contract and extra-contractual damages. The passengers, as judgment-creditors, intervened in the suit.

The Court began its review with the policy language at issue which provided coverage for claims for bodily injury caused by an accident "resulting from the ownership, maintenance or use of a covered auto." Lancer argued that the infection was not "resulting from" the use of the bus, contending that "resulting from" had to be construed more narrowly than "arising out of" as found in an earlier opinion of the court in **Mid-Century Ins. Co. of Texas v. Lindsey,** 997 S.W.2d 153 (Tex. 1999). The court rejected that argument, finding "no significant distinction between the two phrases" at issue. Lancer next argued that there was not a sufficient factual nexus between the use of the bus and the transmission of the disease. After reviewing cases involving assaults in vehicle, drive-by shootings, and other torts involving vehicles - but not traditional car "accidents" – the court held that the use of the vehicle must be "instrumental in producing the passengers' injuries" and the bus here "did not produce, and was not a substantial factor in producing, the passengers' injuries." The Court reversed and rendered judgment for Lancer, declaring that Lancer had no duty to indemnify the passengers' claims.

L. INJURIES OCCURRED WHILE USING A MOTOR VEHICLE

a. **While Exiting or Entering a Vehicle.**

a) In **Berry v. Dairyland County Mut. Ins. Co.,** 534 S.W.2d 428 (Tex. App.--Ft. Worth 1976, no writ) the Court addressed whether an incident in which the insured injured his knee while exiting his vehicle was covered under the PIP portion of the policy. However, to insure uniformity in its decisions, the ***Sturrock*** Court overruled ***Berry v. Dairyland County Mut. Ins. Co.*** 534 S.W.2d 428 (Tex. App.--Ft. Worth 1976, no writ) only to the extent that its decision is inconsistent with the holding in ***Sturrock.***

b. **UM/UIM Injuries Sustained While Loading and Unloading**

a) **Statute:**

(1) Tex.Ins. Code §1952.101 mandates coverage for "injury….resulting from the ownership, maintenance, or use of any motor vehicle."

b) **Case Law:**

(1) **"**Loading and Unloading" is part of the covered accident**.** **See** **Travelers Insurance Co. v. Employers Casualty Co.,** 380 S.W.2d 610 (Tex. 1965).

Farmers Ins. Exch. v. Rodriguez, *366 SW3d 216 (Tex. App.—Houston [14th Dist.] Feb. 16, 2012),* Plaintiff filed both an UIM claim against Allstate and a homeowner's claim against Farmers as a result of an accident that occurred when he was helping his neighbor unload a deer stand from the neighbor's trailer on the neighbor's property. The Plaintiff and his neighbor were trying to manually lift the deer stand off of the neighbor's trailer, and when the neighbor realized the 350-pound stand was too heavy, he jumped out of the way leaving the Plaintiff to hold the stand on his own. The stand fell and injured the Plaintiff. Holding: The auto policy covered the Plaintiff's claims, but that the suit against the homeowners carrier was premature.

At the summary judgment stage, Farmers, the homeowners insurer, argued that the trial court lacked jurisdiction over the Plaintiff's claims against Farmers because the claims were not yet ripe. The Court of Appeals agreed with Farmers that because coverage was uncertain without a judgment against the Plaintiff's neighbor, the court lacked jurisdiction on the homeowner's claim even though the circumstances of the Plaintiff's injuries were undisputed. The Court of Appeals found that the jury was required to decide and apportion liability before coverage under the homeowners policy could be determined.

The Court of Appeals affirmed the judgment against Allstate under the UM/UIM claim. The Court held that loading and unloading a trailer was an "auto accident" and constituted "use" of the trailer even if loading and unloading was not specifically mentioned in the policy. Applying a three-factor test to determine use, the Court concluded that (1) it was in the *inherent nature* of a trailer to haul materials, and that these functions include loading and unloading; (2) the accident was in the *natural territorial limits* of the trailer, because even though Plaintiff was not in the trailer, loading and unloading includes "moving … goods to their final physical destination"; and (3) the trailer was a *cause* of the accident in that the accident could not have occurred if the Plaintiff were not helping his neighbor unload the deer stand from the trailer.

c) **Standard Texas Auto Policies:**

(1) The standard Texas auto policy echo's the statutory language at the beginning of Part C. Definition of "uninsured motor vehicle" under Part C, includes a trailer.

d) **Non-standard Policies:**

(1) Several nonstandard policies are being issued that may not cover this type of incident. You must check the language of your policy to determine if it is excluded.

c. ***"WHILE OCCUPYING"***

a) **United States Fidelity and Guar. Co. v. Goudeau,** 272 S.W.3d 603 (Tex. 2008). While driving his employer's car, the motorist stopped his car on a freeway to render assistance. After leaving his car to approach the disabled one, the motorist was severely injured when a third driver smashed into both cars and pinned him between them and a retaining wall. Issue: Whether the motorist could recover under his employer's underinsured motorist policy, which applied only if the motorist was "occupying" his car at the time of the accident. The motorist conceded that he was not "in" his car when the accident occurred, and he was not in the process of getting in, on, out, or, off of it. The Texas Supreme Court determined that under the policy, the motorist was not "occupying" the car. Alternatively, the motorist argued that the insurer admitted coverage in response to a request for admission; however, the insurer admitted coverage in its capacity as a worker's compensation carrier, not as an underinsured carrier. Under Tex. R. Civ. P. 198.3, any admission by a party under the rule could be used solely in the pending action, not any other proceeding. Under a standard Texas auto policy, the condition of "while occupying" only applies if the beneficiary is neither the named insured nor a family member.

M. ***PHYSICAL CONTACT***

a. **WHEN IS PHYSICAL CONTACT REQUIRED?**

a) **CONTACT IS REQUIRED:**

(1) ***Contact is required only on UM/UIM claims where the identity of the tortfeasor is unknown.***

(a) Statute: §1952.104 Texas Insurance Code

(b) **Case Law:**

(i) **Y Ngoc Mai v. Farmers Texas County Mut. Ins. Co.**, 2009 WL 1311848 (Tex.App.—Houston [14th Dist.] 2009, pet. ref'd). The Court of appeals affirmed a jury finding that there was no contact with the insured's vehicle despite testimony that a passenger heard something hit the car, therefore there was no UM coverage. The police report showed that there was no contact, and the recorded statements of the occupants of the vehicle were not clear if there was physical contact.

(ii) **Walker v. Presidium, Inc.**, 296 SW3d 687 (Tex.App.—El Paso 2009, no pet.) Summary judgment was granted for the rental car company on UM claims because the unidentified hit and run vehicle did not contact the rental car in which the Plaintiffs were occupying.

b) **CONTACT IS NOT REQUIRED:**

(1) On any LIABILITY or UM/UIM claim if the tortfeasor's identity is known.

(2) The Supreme Court has unequivocally held a collision with another vehicle, person or object is not required for an incident to be a motor vehicle accident. See **Mid Century Ins. Co. of Texas v. Lindsey,** 997 SW2d 153 (Tex. 1999).

b. **WHAT CONSTITUTES PHYSICAL CONTACT?**

a) **INDIRECT CONTACT RULE: COVERED**

(1) Williams v. Allstate, 849 S.W.2d 859 (Tex.App.--Beaumont 1993, no writ)Vehicle 1 hits Vehicle 2 and pushes Vehicle 2 into Vehicle 3. Although there is no direct contact between Vehicle 1 and Vehicle 3, the indirect contact rule construes this scenario as physical contact.

b) **FALLING OBJECTS & DEBRIS CASES: NOT COVERED.**

(1) **Republic Ins. v. Stoker,** 867 S.W.2d 74 (Tex.App.--El Paso 1993, rev'd on other grounds 903 S.W.2d 338 (Tex. 1995). Absent physical contact between the vehicles, a UM/UIM claim made following an accident caused because a vehicle contacts furniture or other debris that fell off of an unidentified vehicle is not covered because of a lack of physical contact.

(2) Hernandez v. Allstate County Mut. Ins. Co., 2010 WL 454949 (Tex.App. – San Antonio February 10, 2010, pet. ref'd). Summary judgment in favor of the insurer was affirmed holding that ice which fell off of an unknown vehicle and which contacted the insured's vehicle does not satisfy the physical contact requirement within the policy because no part of the vehicle physically touched the insured's vehicle**.**

(3) Texas Farmers Ins. Co. v. Deville, 988 SW2d 331 (Tex.App.--Houston [1st Dist.]1999, no pet.). A UM/UIM policy requires actual physical contact with the vehicle, and where the only contact was from a water pump that bounced out of the back of an unknown pick-up truck and strikes the insured, there is no coverage.

(4) **Nationwide v. Elchehimi,** 249 SW3d 430 (Tex.2008)

c. **ACCIDENTS CAUSED BY BRIGHT LIGHTS: NOT COVERED**

a) Accidents caused by bright headlights are not covered because light particles do not constitute "physical contact." **Guzman v. Allstate,** 802 S.W.2d 877 (Tex.App.--Eastland 1991, no writ).

N. ***BODILY INJURY***

a. **WHAT CONSTITUTES "BODILY INJURY"**

a) **Trinity Universal Ins. Co. v. Cowan,** 945 S.W.2d 819 (Tex. 1997). An H.E.B. photo lab clerk Gage made extra prints of four revealing pictures of Cowan, an HEB customer, who took film to HEB for developing. The employee later showed the prints to some friends who then showed the pictures to someone else. Cowan then sued HEB and the photo lab clerk alleging, among other things, negligence and gross negligence. Cowan alleged that she had suffered "severe mental pain, a loss of privacy, humiliation, embarrassment, fear, frustration, mental anguish, and [would] continue to do so in the future." Cowan notified Trinity, his parents' homeowners' insurance carrier and requested a defense. Trinity initially defended Gage under a reservation of rights, but later denied coverage and withdrew its defense.

During the ensuing nonjury trial against Gage, Cowan testified she suffered mental anguish, along with headaches, stomachaches, and sleeplessness as a result of clerk's actions. The trial court found Gage negligent and grossly negligent, and awarded Cowan $250,000.

Cowan alleged the claims were covered under the Trinity policy because either (1) her claim for mental anguish implicitly raised a claim for associated physical manifestations, or (2) a claim for pure mental anguish, even absent *any* physical manifestations, is a "bodily injury" as defined by the policy. Because Cowan did not plead any physical manifestations of her alleged mental injuries, she did not plead a "bodily injury" such that Trinity's duty to defend was triggered.

We hold that "bodily injury," as defined in the Trinity policy, does not include purely emotional injuries, such as those alleged by Cowan, and unambiguously requires an injury to the physical structure of the human body. Our decision comports with the commonly understood meaning of "bodily," which implies a physical, and not purely mental, emotional, or spiritual harm. *See* ***Aim Ins. Co. v. Culcasi,*** 229 Cal. App. 3d 209, 280 Cal. Rptr. 766, 772 (Cal. Ct. App. 1991, review denied); ***Cotton States Mut. Ins. Co. v. Crosby,*** 244 Ga. 456, 260 S.E.2d 860, 862 (Ga. 1979) (use of the term "bodily" in the definition of "bodily injury" is "a genuine attempt to explain words which need no explanation");o physical injury to the body. It does not include non-physical, emotional or mental harm."); ***State Farm Mut. Auto. Ins. Co. v. Descheemaeker,*** 178 Mich. App. 729, 444 N.W.2d 153, 154 (Mich. Ct. App. 1989) (per curiam) ("bodily injury" unambiguously contemplates actual physical harm or damage to body); ***E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.,*** 106 Wash. 2d 901, 726 P.2d 439, 443 (Wash. 1986) ("Sickness" and "disease" are modified by "bodily"); ***Knapp v. Eagle Property Management Corp.,*** 54 F.3d 1272, 1284 (7th Cir. 1995) (natural reading of "bodily injury, sickness, or disease" indicates that

"bodily" modifies all three terms thereby covering only injuries with some physical component). **WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 245** (1966) also defines "bodily" as "having a body or a material form: physical, corporeal." Likewise, **BLACK'S LAW DICTIONARY 175** (6th ed. 1990) defines "bodily" as "pertaining to or concerning the body; of or belonging to the body or the physical constitution; not mental, but corporeal."

We have since held that mental anguish is only an *element* of recoverable damages when some otherwise cognizable legal duty is breached. *See* ***Boyles v. Kerr,*** 855 S.W.2d 593, 597-598 (Tex. 1993).

That Texas tort law allows for recovery of mental anguish damages unaccompanied by physical manifestations in some circumstances, *see* ***Boyles v. Kerr,*** 855 S.W.2d 593, 597-598 (Tex. 1993), does not mean that insurance coverage for bodily injury necessarily encompasses purely emotional injuries. Interpretation of insurance contracts in Texas is governed by the same rules as interpretation of other contracts. ***Forbau v. Aetna Life Ins. Co.,*** 876 S.W.2d 132, 133 (Tex. 1994); ***Upshaw v. Trinity Cos.,*** 842 S.W.2d 631, 633 (Tex. 1992). And when terms are defined in an insurance policy, those definitions control. *See, e.g.,* ***Ramsay v. Maryland Am. Gen. Ins. Co.,*** 533 S.W.2d 344, 346 (Tex. 1976); *see also* ***SL Indus., Inc. v. American Motorists Ins. Co.,*** 128 N.J. 188, 607 A.2d 1266, 1274-75 (N.J. 1992) (rejecting argument that coverage should exist because tort law allows recovery for emotional distress without bodily injury); ***Gonzales v. Allstate Ins. Co.,*** 122 N.M. 137, 921 P.2d 944, 947 (N.M. 1996); ***Aetna Cas. & Sur. Co. v. First Sec. Bank,*** 662 F. Supp. 1126, 1128 (D. Mont. 1987) (drawing distinction under Montana law between physical injury and mental distress); ***West Am. Ins. Co. v. Bank of Isle of Wight,*** 673 F. Supp. 760, 764 (E.D. Va. 1987) (pointing out that "The great weight of . . . authority points in one direction; . . . that 'bodily injury' does not encompass emotional distress, but is limited to physical injury. Indeed, the . . . policy definition itself also points powerfully in this direction."). "Tort law and insurance law are not coextensive." ***SL Indus.,*** 607 A.2d at 1275.

Physical Manifestations Are Not Implicit in a Claim for Mental Anguish. At trial, Cowan testified that she had experienced headaches, stomachaches, and sleeplessness. But it is undisputed that she never alleged these or *any* physical manifestations of her alleged mental injuries. The court of appeals held "that an allegation of mental anguish implicitly raises a claim for the resulting physical manifestations" such that evidence and damages for physical manifestations accompanying mental anguish and emotional distress will be allowed. 906 S.W.2d at 130-31. We disagree. Though we liberally construe the allegations in the petition in determining the duty to defend, resolving any doubt in favor of the insured, ***Heyden,*** 387 S.W.2d at 26, we will not read facts into the pleadings for that purpose. ***National Union Fire Ins. Co. v. Merchants Fast Motor Lines, Inc.,*** 939 S.W.2d 139 at 142. (Tex. 1997). Accordingly, *even assuming* that physical manifestations are inseparable from mental anguish in some cases, in the context of determining an insurer's duty to defend we will not presume a claim for physical manifestations when none is pleaded.

b. **Emotional distress and mental anguish as a "bodily injury"?**

a) **Cases finding against emotional distress as "bodily injury"**

(1) Ginn v. Texas Farmers Insurance Company, *No. 3-96-0264-CV, WL 717120 (Tex.App.–Austin, 1998, no writ). Sleeplessness, nightmares and nausea were not bodily injuries sufficient to trigger coverage under a standard Texas Homeowner's policy.*

b) **Cases finding emotional distress is a "bodily injury"**

(1) Trinity Universal Ins. Co. v. Cowan, *906 S.W.2d 124, 130-131 (Tex.App.–Austin 1995) rev'd on other grounds 945 SW2d 845 (Tex. 1997). Headaches, loss of sleep, and nausea resulting from mental anguish were "bodily injuries" covered by a standard Texas Homeowner's policy.*

(2) Haralson v. State Farm Insurance Company, *564 F.Supp. 2d 616 (N.D. Dallas, 2008). Emotional distress of a bystander if accompanied by physical symptoms constitute "bodily injury" sufficient to trigger coverage. However, claims for loss of consortium and loss of household services are not bodily injuries.*

(3) Hartman v. Estate of Miller, 656 N.W.2d 676 (N.D. 2003). *Physical symptoms of emotional distress constitute a "bodily injury". Bodily injury under PIP coverage includes physical manifestations for PTSD.*

c) **Emotional distress if accompanied by physical symptoms constitute "bodily injury" sufficient to trigger coverage.**

(1) **General Star Indemnity Co. v. Schools Excess Liability Fund, 888 F.Supp. 1022, 1027 (N.D. Cal. 1995); State Farm Fire & Casualty Co. v. Nikitow,** 924 P.2d 1084, 1089 (Colo.App. 1995)**; Garvis v. Employers Mutual Cas. Co.,** 497 N.W.2d 254, 257 (Minn. 1993); **Voorhees v. Preferred Mut. Ins. Co.,** 128 N.J. 165, 179, 609 A.2d 1255, 1262 (1992); **Western Cas. & Surety Co. v. Waisenan,** 653 F.Supp. 825, 832 (D.S.D. 1987); **Kufalk v. Hart,** 636 F.Supp. 309, 311-12 (N.D. Ill. 1986); **McGuire v. American States Ins. Co.,** 491 So.2d 606, 608 (Fl.Dist.Ct.App. 1986); **Holcomb v. Kinkaid,** 406 So.2d 646, 649 (La.Ct.App. 1989); **State Farm Mut. Automobile Ins. v. D.L.B. ex rel Brake,** 881 N.E.2d 665, 666 (Ind. 2008); **Dahlke v. State Farm Mut. Auto Ins. Co.,** 451 NW2d 813, 815 (Iowa 1990); **Zerr v. Erie Ins. Exchange,** 446 Pa.Super 451, 544 Pa. 613, 674 A.2d 1075 (1996).

c. **Wrongful Death Mental Anguish Claims are not a separate bodily injury.**

a) **Miller v. Windsor Ins. Co.,** 923 S.W.2d 91 (Tex.App.-Fort Worth 1996, writ denied); and **Christian v. Charter Oak Fire Ins.,** 847 S.W.2d 458 (Tex.App.--Tyler 1993, writ denied).

d. **Bystander Claims**

a) **Cases claiming bystander claims are covered:**

(1) If the insured can show a physical manifestation of injury, the bystander claim is covered. **State Farm Lloyds v. C.M.W.,** 53 S.W.3d 877 (Tex. App. – Dallas 2001, no pet.)

(2) **Haralson v. State Farm Insurance Company,** 564 F.Supp. 2d 616 (N.D. Dallas, 2008). Bystander's testimony that she had physical manifestations of emotional distress such as migraines, stomach aches and nausea from witnessing an accident constituted a "bodily injury" sufficient to trigger UIM coverage. However, damages for loss of consortium and loss of household services were not "bodily injury" damages under the UIM policy.

b) **Cases claiming bystander claims are not covered because it does not constitute a separate bodily injury.**

(1) Eshtary v. Allstate, 767 S.W.2d 291 (Tex.App.--Fort Worth, 1989, writ denied).

(2) Christian v. Charter Oak Fire Ins. Co., *847 S.W.2d 458 (Tex. App. – Tyler, 1993, writ denied);*

(3) Southern Farm Bureau v. Franklin, *2006 WL 1373359 (Tex.App.– Amarillo 2006, rehearing denied).*

e. **Loss of consortium and loss of household services are not bodily injuries.**

a) Loss of consortium is not a "bodily injury" as it involves harm to the "intangible and sentimental elements of a marriage" and is derivative claim of that arises solely as a consequence of bodily injuries to a spouse. **Haralson v. State Farm Insurance Company,** 564 F.supp 2d 616 (N.D. Dallas, 2008); **McGovern v. Williams,** 741 SW2d 373, 374-75 (Tex. 1987); **Carter v. State Farm Mut. Auto Ins. Co.,** 33 SW3d 369, 372 (Tex.App.–Fort Worth 2000, no writ); **Whittlesey v. Miller,** 572 SW2d 665, 667 (Tex. 1978). The same is true for the loss of household services. See **Rosenzweig v. Dallas Area Rapid Transit,** 841 SW2d 897, 898 (Tex.App. – Dallas 1992, writ denied); **Dougherty v. Gifford,** 826 SW2d 668, 681 (Tex.App.–Texarkana 1992, no writ).

b) Consortium Claims are not a separate bodily injury. **Manriquez v. Mid Century,** 779 S.W.2d 482 (Tex.App.--El Paso 1989, writ denied).

O. ***PROPERTY DAMAGE***

a. **Ibarra v. Progressive County Mut. Ins. Co.**, Not Reported in S.W.3d, 2012 WL 117955 (Tex. App.—Fort Worth, Jan. 12, 2012). Following an accident where a drunk driver ran his vehicle into an insured's home, the Court held that a UM/UIM policy does not cover damage to property other than an insured's automobile. The court rejected the argument that the policy covered the house after it was damaged by an underinsured

driver. The court concluded that the purpose of the UM/UIM statute is to protect motorists, and the plaintiff's contention the policy should cover all types of property damage was inconsistent with the relevant statutes and with prior court decisions.

P. "OTHER INSURANCE" CLAUSES

a. **Hardware Dealers Mut. Fire Ins. v. Farmers Ins. Exch.**, 444 SW2d 583 (Tex. 1969). The Court recognized that with regard to automobile insurance, 3 kinds of "other insurance" clauses have developed as devices to limit coverage or liability: (1) a pro rata clause, which restricts liability upon concurring insurers to an apportionment basis, (2) an excess clause, which restricts liability upon an insurer to excess coverage after another insurer has paid up to its policy limits, and (3) an escape clause, which avoids all liability if other insurance exists. 444 S.W.2d 583, 586 (Tex. 1969). The Court held the conflict in ***Hardware Dealers*** was best decided by giving "dominant consideration to the rights of the insured." *Id.* at 589. Given the insurers' usual concession that whatever the result, the insured's coverage must be no less than if she had been protected by but one policy, the court reasoned that insurers implicitly concede policies should be construed liberally in favor of the insured and strictly against the insurer. When "resolving issues between double insurers," the court must determine whether from the view point of the insured "she has coverage from either one of two policies but for the other, and each contains a provision which is *reasonably subject to a construction that it conflicts with a provision in the other concurrent insurance*." When such a conflict exists, the conflicting provisions must be ignored, and the court must look to the remaining policy provisions to determine coverage. *Id.* at 589.

Accordingly, we will apply the test set forth in ***Hardware Dealers*** to determine proper liability in this case. The Court held that to determine if there was a conflict, we should, from the point of view of the insured, first determine if the insured has coverage from either one of the two policies, but for the other. ***Hardware Dealers*****.** If the insured is covered by each policy but for the existence of the other, the Supreme Court requires that we then determine if each policy contains a provision "which is reasonably subject to a construction that it conflicts with a provision in the other concurrent insurance." ***Id***. A "reasonable interpretation" does not have to be the "'more likely reflection of the intent of the parties,'" but need be "'no more than one which is not itself unreasonable.'" ***Id.***

The Court rejected Allstate's claim that the "other insurance" language in the Safeco policy is against public policy. The Court also rejected Allstate's claim that by changing the language in its policy from the standard language in an effort to "shelter under **Hardware Dealers"** Safeco has engaged in the sort of drafting contest rejected by the supreme court in *Hardware Dealers*. Allstate also claimed Safeco violated public policy by changing the wording in its policy in an attempt to turn every other insurer's excess coverage into primary coverage, resulting in pro rata apportionment. The Court disagreed with Allstate. Safeco's policy, including the "other insurance" provision, was approved by the insurance commissioner as required by law. *See* Tex. Ins. Code Ann. § 2301.006(a) (Vernon 2009)(stating that unless otherwise provided, insurer may not use insurance form unless form has been filed with and approved by commissioner.

The commissioner could have disapproved the form if it violated public policy, but did not. Moreover, the deviation is of no moment because the Court itself has encouraged insurers to draft policy language to reflect their interpretation of policy provisions and then seek TDI approval. See **Don's Bldg. Supply, Inc.,** 267 S.W.3d at 29 (explaining

that if insurer intends certain interpretation of a policy provision it should make such intent explicit in policy and seek approval by TDI). Safeco acted as suggested by the supreme court, and obtained the necessary approval. Accordingly, we hold it would be unfair to denounce Safeco's "other insurance" provision based on public policy.

b. ***Travelers v. Lucas,*** 678 S.W.2d 732 (Tex.App.–Texarkana 1984, no writ) the Court held**:**

(1) The policy language regarding automatic termination of the policy in the event that the insured has 2 policies of insurance is ambiguous and is therefore construed in favor of the insured to avoid a forfeiture, defeasance or diminution of the contract. Therefore the policy is to be construed from the viewpoint of the insured in favor of providing coverage; and

(2) This clause was not intended to provide for automatic termination but rather to allow the company to elect not to renew the policy at the end of the policy term; and

(3) Travelers position would render meaningless other provisions in the policy such as the *Other Insurance* clause.

III. EXCLUSIONS

A. VEHICLES THAT DO NOT QUALIFY AS AN UNINSURED VEHICLES

a. Government-Owned Vehicles

a) **Foster v. Truck Ins. Exchange**, 933 SW2d 207 (Tex.App.—Dallas 1996). Plaintiff was injured in an accident with a City of Dallas bus. Following a settlement with the City for its limit of liability under the Tort Claims Act, Plaintiff made a UIM claim. The insurer argued that the City bus was not an uninsured motor vehicle because the definition of an "uninsured motor vehicle" specifically excludes government-owned vehicles unless two conditions are met. First, the operator of the government-owned vehicle must be uninsured. Second, there must be no statute imposing liability on the governmental body for an amount equal to or greater than the UM/UIM coverage limits. It is not the purpose of the UIM statute, however, to protect the insured from all underinsured motor vehicles. *See* ***Francis v. International Serv. Ins. Co.***, 546 S.W.2d 57, 61 (Tex.1976). The purpose is to provide protection only from those motorists who are financially irresponsible. *Id.* In ***Francis***, the supreme court held that the government was not a "financially irresponsible" party for the purposes of UM/UIM protection simply because it was shielded from liability by sovereign immunity. *Id.* Likewise, the fact that DART's liability is limited by statute does not make it financially irresponsible for the purposes of the UIM statute.

b) See also **Francis v. International Service Ins. Co.**, 546 SW2d 57, (Tex. 1976).

c) **Malham v. GEICO**, --- S.W.3d ----, 2012 WL 413969 (Tex.App.—Austin February 8, 2012). In a case of first impression, the Court ruled that a city-owned vehicle did not meet the definition of "uninsured motor vehicle" in the auto policy issued by GEICO. The Plaintiff was a passenger in a vehicle that

was struck by a pickup truck owned by the City of Killeen and driven by a city employee while in the course and scope of his employment. Malham settled her claims against the City and the employee in exchange for payment to her of $87,500. Thereafter, Malham filed a claim under the UM benefits under her GEICO policy and filed a declaratory judgment action to declare that the City vehicle that struck the car she was riding in was an "uninsured motor vehicle," and sought to recover $300,000 from GEICO under the UIM portion of her policy. The Court held that the City is a party to a Liability/Property Interlocal Agreement (the "Agreement"), which creates the Texas Municipal League Joint Self–Insurance Fund (the "Fund") for the purpose of "providing coverages against risks which are inherent in operating a political subdivision." This agreement is a liability policy, meaning that the vehicle was not uninsured.

b. **Vehicles Owned by Family Members:**

a) **Anderson v. Texas Farm Bureau Mut. Ins. Co.**, Not Reported in S.W.3d, 2014 WL 3698313, (Tex.App.—Eastland, 2014). The Court granted Texas Farm Bureau MSJ on this UM claim because (1) the pickup that injured insured was not a scheduled vehicle on insured's policy, and (2) the vehicle was owned by a family member who was staying in the insured's home at the time of the accident. The Court rejected the insured's contentions that the UM exclusion regarding a family members does not apply because the pickup was stolen and the thief used the pickup to injure the insured. In siding with the carrier, the court noted that UM/UIM coverage has two purposes.

B. ***VEHICLES FURNISHED FOR THE REGULAR USE***

a. **NO LIABILITY COVERAGE:**

b. **UM/UIM CLAIMS ARE COVERED:**

a) **Because the purpose of UM/UIM coverage is to protect conscientious drivers, a UM/UIM claim is covered despite the language of the policy.**

(1) Bilbrey v. American Auto Ins. Co., *495 S.W.2d 375 (Tex.Civ.App.--Eastland 1973, no writ); and*

(2) Briones v. St. Farm, 790 S.W.2d 70 (Tex.Civ.App.--San Antonio 1991, writ denied).

(3) ***Mata v. State Farm Mut. Ins. Co.,*** Not Reported in -- S.W.3d--, 2014 WL 6474223 (Tex.App.—San Antonio 2014). Summary judgment was granted for the UIM carrier because coverage was excluded since the vehicle was supplied for the regular use of an insured under the policy.

c. **RENTAL CARS SUPPLIED FOR THE REGULAR USE:**

a) Johnson v. State Farm, 2017 WL 1315379, -- S.W.3d – (Tex.Civ.App. – Austin, 2017). The Court ruled that the determination of the claimant's status as a "*family member*" is made at the time of the accident rather than at the time the claim is made; and UIM coverage is excluded because the policy exclusion for

any vehicle owned by, furnished or available for the regular use of you or any *family member* includes rental cars. In a case of first impression, the Court also agreed with State Farm that there was no coverage because the rental car vehicle the insured's son was driving at the time of the accident was supplied for the *"regular use"* and therefore did not qualify as an underinsured motor vehicle.

C. EXCLUDED DRIVERS

a. Note: It is critical to distinguish between policies in which there is an exclusion for coverage of a specifically named "excluded driver" and "Named Driver Policies" which only offer coverage to the named driver. See Named Driver Policies above.

b. **Wright v. Rodney D. Young Insurance Agency,** 905 S.W.2d 293 (Tex.App.–Ft.Worth 1995, no writ) The excluded driver endorsement is not ambiguous, and does not violate public policy or the **Texas Motor Vehicle Safety-Responsibility Act.**

c. **Amanzoui v. Universal Underwriters, Inc.,** 2009 WL 2778915 (E.D. Tex. Aug 27, 2009). The Court granted the insurer's MSJ finding that a person can be a covered person for liability coverage, but that same person may not qualify as a person for whom uninsured/underinsured motorist benefits apply under the policy.

d. **Allied North America Ins. Brokerage of Texas, L.L.C. v. Diamond Pump & Transport, LLC,** Not Reported in -- S.W.3D –, 2015 WL 5172983 (Tex.App.—Eastland 2015, **CMH Set & Finish, Inc. v. Taylor**) The Court held: (1) The insurance policy unambiguous excluded the driver. Therefore, the carrier was entitled to summary judgment on Diamond Pump's claims against the insurer; (2) The agent was negligent in securing a policy which did not provide the requested coverage because the agent admitted the insured requested that Sanchez be covered, but the agent's employees failed to notify Diamond Pump that the driver was excluded because the agent failed to notice the exclusion in the endorsement from the carrier when the agent failed to read the endorsement; and (3) The Court denied the agent's claim that the endorsement was not effective based on a claim that the endorsement was used in a manner contrary to the manner approved by the Department of Insurance.

e. **Unresolved question:**

a) Is there coverage for negligent entrustment if, under a non-standard policy, the policy limits coverage to the named insured only, and excludes coverage for all other drivers, and the named insured entrusts the vehicle to an unlicensed, reckless or incompetent driver who is neither a member of the household or family member?

b) **Options:**

(1) Sue the owner of the vehicle for negligent entrustment, and if the carrier refuses to defend and to indemnify the owner, contend that the limitation of coverage is so narrow and the exclusions are so broad, that it violates the ***Safety Responsibility Act*** §601.051 **Tex.Trans.Code. See above Name Driver Policies.**

(2) Pursue an uninsured motorist claim.

D. FAMILY MEMBER EXCLUSION

a. **Hanson v. Republic Insurance Company,** 5 S.W.3d 324 (Tex.App.--Houston [1st Dist.] 1999, writ denied). Insurer's MSJ was affirmed holding that because of the family member exclusion and **National County Mutual v. Johnson**, the insurer is not obligated to pay full policy limits, but rather only the statutory minimum.

b. **Charida v. Allstate Indemn. Co.,** 259 SW3d 870 (Tex.App. – Houston [1st Dist.] 2008, no pet.) Charida was injured while riding in a car owned and driven by her father. She settled her third party claim against her father for his policy limits, and then presented a UIM claim. The Court granted summary judgment in favor of Allstate holding that the vehicle does not meet the definition of an uninsured vehicle because the definition does not include any vehicle or equipment owned by or furnished to or available for the use of the policyholder. The purpose of UM/UIM coverage is to protect insureds from the negligence of strangers to the policy, not family members.

c. **Upson v. Allstate Indemnity Co.,** 2008 WL 302088 (S.D. Tex. Aug. 5, 2008). Vehicles owned by the insured cannot be underinsured.

d. **Hunter v. State Farm County Mut. Ins. Co. of Texas,** 2008 WL 5265189 (Tex.App. – Ft. Worth Dec. 18, 2008) The Court held that the "family use" exception of the automobile insurance policy applied to exclude UIM benefits, and that such exclusion was not void against public policy. The legislature specifically authorized the Texas Department of Insurance to exclude certain vehicles from the definition of uninsured motor vehicle, including vehicles owned by or furnished for the regular use of an insured or family member.

e. **Johnson v. State Farm**, 2017 WL 1315379, -- S.W.3d – (Tex.Civ.App. – Austin, 2017). **T**he Court ruled that the determination of the claimant's status as a "*family member*" is made at the time of the accident rather than at the time the claim is made; and UIM coverage is excluded because the policy exclusion for any vehicle owned by, furnished or available for the regular use of you or any *family member* includes rental cars. In a case of first impression, the Court also agreed with State Farm that there was no coverage because the rental car vehicle the insured's son was driving at the time of the accident was supplied for the *"regular use."*

E. PERMISSIVE DRIVERS AND OMNIBUS INSUREDS

a. **Snyder v. Allstate,** 485 SW2d 769 (Tex. 1972). Father purchased a vehicle for his daughter to drive as she saw fit, but told her "do not let every Tom, Dick and Harry drive the vehicle." She allowed her boyfriend to drive her home late one night. Allstate claimed that the daughter was not named on the title and therefore was not the legal or true owner of the vehicle and therefore did not have authority to give permission to a third party to drive the vehicle. The court found that there was coverage and that the daughter had authority to give such permission, and that having her name on the title or the policy was not a prerequisite to coverage.

b. **United States Fire Ins. Co. v. United Service Automobile Assn.,** 772 S.W.2d 218 (Tex. App. – Dallas, 1989, writ denied). Permissive use is determined from the point of view of the driver. See **Transportation Code §601.072**. This case can be used to overcome claim of carrier that an unlicensed driver is not a permissive user.

F. FELLOW EMPLOYEE EXCLUSION

a. **Truck Ins. Exchange v. Musick,** 902 SW2d 68 (Tex.Civ.App.--Ft. Worth, 1995, writ denied) The fellow employee exclusion in auto insurance policies does not thwart the legislative goal of mandatory insurance, nor does it leave the party seeking redress in this case without a remedy.

b. **Valentine v. Safeco Lloyds Ins. Co.,** 928 S.W.2d 639 (Tex.App.--Houston [1st Dist.] 1996, writ denied). An employee who was injured through the negligence of her employer while occupying the employer's vehicle in the course and scope of her employment and who collected worker's comp benefits brought an action against the employer's auto liability insurer and her own uninsured motorist carrier. Both insurers were granted summary judgment. Employee could not recover UM/UIM benefits under her own policy which provided that the insurer will pay damages which a covered person is "legally entitled to recover" from owner of uninsured motor vehicle because employee was not "legally entitled to recover" from the employer. The insurer argued successfully that (1) the employer was insured and (2) the employee's exclusive remedy was worker's comp. The majority of courts in other states have precluded such coverage as well.

c. **Soledad v. Texas Farm Bureau Mut. Ins. Co.,** 506 S.W.3d 600 (Tex.App.—Austin, 2017) Soledad was a passenger who was injured while riding in a vehicle driven by a fellow employee. There was no dispute that (1) the fellow employee was negligent and caused the collision; (2) both Soledad and the fellow employee were in the course and scope of their employment at the time of the wreck; and (3) Soledad and the fellow employee were employed with a company that carried worker's comp insurance. The Court affirmed summary judgment for Texas Farm Bureau holding that because workers comp is the exclusive remedy, Soledad is not "legally entitled" to recover from the fellow employee. Therefore, the claim is barred.

IV. DUTIES OF THE INSURED

A. DUTY TO LIST VEHICLES

a. **Equitable General Ins. Co. vs. Williams,** 620 S.W.2d 608 (Tex. App– Dallas 1981, writ ref'd n.r.e.). Auto insurance policy excluded coverage for accident in uninsured vehicles owned by the insured. Insured claimed the exclusion was inapplicable because the policy's phrase "motor vehicle" applied only to cars and did not extend to motorcycles. The Court held that the phrase motor vehicle includes motorcycles.

B. DUTY TO COOPERATE

a. **McGuire v. Commercial Union Insurance Co. of N. Y.,** 431 S.W.2d 347, 352 (Tex. 1968). Because of the provisions in the insurance policy granting Farmers the right to defend suits and requiring the Rodriquez family to cooperate with Farmers, the Rodriquez family could not make any agreement which would operate to impose liability upon Farmers or would deprive Farmers of the use of a valid defense.

b. **In Martinez v. ACCC Ins. Co.,** 343 S.W.3d 924, (Tex.App. – Dallas 2011, no pet.), Summary judgment affirmed in favor of Best Texas General Agency, State and County Mut. Fire Ins. and ACCC, finding they owed no duty to defend or indemnify the insured or to pay the default judgment due to lack of cooperation.

Romero ran a red light and caused an accident. Romero was insured under a policy issued by Best acting as the authorized managing general agent for State and County. Best provided claims servicing for this policy through ACCC. The injured parties filed a lawsuit against Romero, and their attorney forwarded a copy of the original petition to ACCC. ACCC forwarded a copy of the original petition to attorney Harlin, and requested that he confirm whether service had been effected. Over the next several months, Harlin asked Plaintiff's counsel if Romero had been served and asked that he be provided with the executed citation when Romero was served. When Romero was finally served, Plaintiff's counsel did not notify or send a copy of the executed citation to Harlin or to ACCC. A default judgment was taken against Romero. Plaintiff's counsel also did not forward a copy of the default judgment to ACCC Claims until almost five months later after it had become a final, non-appealable order.

Martinez and Davilla subsequently filed suit seeking coverage as 3rd party beneficiaries. The policy contained provisions regarding contractual duties on the part of a person seeking coverage, including: (1) the duty to provide prompt notice of how, when, and where the accident occurred; (2) the duty to cooperate in the investigation, settlement, and defense of any claim; and (3) the duty to promptly send copies of any notices or legal papers. Best Texas argued that Romero's breach of these conditions precedent prejudiced it and State & County and precluded coverage for Martinez and Davilla's claims against Romero. Martinez and Davilla addressed the conditions precedent of notice of the accident and notice of the suit, arguing that Best Texas was provided actual notice of the accident, the underlying suit, and service of citation on Romero. But Martinez and Davilla did not challenge the granting of summary judgment on the basis that Best Texas was prejudiced by Romero's failure to satisfy the condition precedent to cooperate in the investigation, defense and settlement of the claims against her. The court affirmed the summary judgment as to Best Texas and State & County.

With regard to ACCC Claims, it asserted that it was not a party to the policy made the subject of the claims alleged by Martinez and Davilla and that it could not be liable for the contractual obligations to be performed by the insurer under the policy. Because Martinez and Davilla did not claim error by the trial court in granting summary judgment in favor of ACCC Claims on that basis, summary judgment was affirmed.

*C. **DUTY TO GIVE NOTICE OF NEW VEHICLE***

a. **Guerra v. Sentry Insurance,** 927 S.W.2d 733 (Tex.App.--Eastland, 1996, writ denied). The insurer denied coverage because the insured failed to notify the insurer of the purchase of the new vehicle within 30 days of the date of purchase.

*D. **DUTY TO GIVE NOTICE OF CLAIM***

a. **Continental Savings Association v. US Fidelity and Guaranty Co.,** 752 F2d 1239 (5th Cir. 1985). When policy phrases in general liability policies require that notice be given "immediately" or "promptly", Texas cases require that notice be given to the insurer within a "reasonable time in light of the circumstances."

b. **Coverage will not be affected unless the insurer is prejudiced by untimely notice.**

a) **Hanson Production Co. v. Amercas Insurance Co.,** 108 F3d 627 (5th Cir. 1997).

E. **DUTY TO OBTAIN CONSENT TO SETTLE**

a. **Validity of the Clause:**

a) **State Farm Mutual Automobile Ins. Co. v. Azima,** 896 S.W.2d 177 (Tex. 1995). Insurer was held not to have given its consent to insured to sue an uninsured motorist simply because it sent a subrogation letter to the insured.

b. **PREJUDICE REQUIRED:**

a) **Davis v. Allstate Ins. Co.,** 945 S.W.2d 844 (Tex.Civ.App.--Houston [1st Dist.] 1997, pet. withdrawn). The insured settled with tortfeasor without the consent of the insurer. Insurer claimed prejudice and breach of contract because tortfeasor supposedly had substantial assets. Insured countered showing that most of the assets are not subject to collection. Therefore, summary judgment for the carrier was reversed and remanded for a new trial.

b) **Lennar Corp. v. Markel Am. Ins. Co.**, 11-0394, 2013 WL 4492800 (Tex. 2013), The Court determined the "consent to settle" provision of Markel's construction liability policy was subject to a requirement that the insurer show material prejudice from its breach stating that the consent to settle provision was no different than any other condition of the policy – similar to late notice – that requires a showing of material prejudice to the insurer before the clause can be invoked.

c) **Elwess v. Farm Bureau County Mutual Insurance Company**, Not Reported in -- S.W.3D – WL 2014675562 (Tex.App.—Eastland, 2014). The appellate court reversed the trial court's granting of the UIM carriers' motion for summary judgment because (1) the carriers were unable to show that they were actually prejudiced by the failure to obtain consent to settle because the carriers failed to produce evidence of the existence of additional insurance policies that were in effect at the time of the loss that would have been available to cover the claims.

c. **EXCEPTIONS TO THE CONSENT TO SETTLE CLAUSE:**

a) **Insurer Must Show Prejudice to Enforce the Clause**

(1) **Hernandez v. Gulf Group Lloyds,** 874 S.W.2d 691 (Tex. 1994). Consent to settle with the tortfeasor is required unless there would be no prejudice to the insurer's subrogation rights.

(2) **Lennar Corp. v. Markel Am. Ins. Co.**, 11-0394, 2013 WL 4492800 (Tex. Aug. 23, 2013), The Texas Supreme Court determined the "consent to settle" provision of Markel's construction liability policy was subject to a requirement that the insurer show material prejudice from its breach stating that the consent to settle provision was no different than any other condition of the policy – similar to late notice – that requires a showing of material prejudice to the insurer before the clause can be invoked.

(3) **Gonzalez v. Philadelphia Indemnity Ins. Co.**, 2015 WL 12550934 (S.D. Texas 2015). Summary judgment for the carrier was affirmed because the carrier claimed that it was prejudiced by the insured's failure to obtain consent to settle. The carrier alleged that it was prejudiced because it lost the right to investigate the claim, to participate in the settlement, or to "advance payment to [the insured to] preserve its rights." In contrast, the insured alleged the carrier was not prejudiced because the at-fault driver was a "young, low wage earning driver working at a grocery store with future plans to work as a telemarketer. The opinion does not explain how the carrier was prejudiced by such settlement. This case is a significant departure from the holding in ***Lennar Corp. v. Markel Am. Ins. Co.,*** 11-0394, 2013 WL 4492800 (Tex. Aug. 23, 2013) which imposed a burden on the carrier to show that it was materially prejudiced

b) **Settlement with a Non-Liable person.**

(1) Travelers Indem. v. Lucas, 678 S.W.2d 732 (Tex.App.--Texarkana 1984, no writ). Because a settlement with a non-liable person would not prejudice the subrogation rights of the insurer, an insured is not required to get consent to settle with a non-liable person.

c) **UM/UIM carrier denies coverage on the claim.**

(1) **Ford v. State Farm,** 550 S.W.2d 663 (Tex. 1977). Once the UM/UIM carrier denies coverage on the claim, the claimant is no longer required to get consent from the UM/UIM carrier to settle with the tortfeasor. When a carrier unreasonably refuses to grant the insured consent to settle with the tortfeasor, such as not based solely on the collectability of a judgment for the excess of the underlying settlement or failure to respond in a reasonable amount of time, is a waiver of the consent to settle clause.

d) **Settlement with a "Non-Motorist"**

(1) **Simpson v. GEICO,** 907 S.W.2d 942 (Tex.App–Houston [1st Dist.] 1995, no writ). A Claimant is not required to get consent to settle with parties who are not "uninsured or underinsured motorists." Here, the claimant settled with a construction company who failed to put up road signs or barricades. The construction company is not a motorist. Therefore, consent was not required.

F. DUTY TO SUBMIT TO MEDICAL EXAMINATIONS

a. **Injuries Caused By Doctor During Medical Examination**

a) **Ramirez v. Carreras,** 10 S.W.3d 757 (Tex.App.– Corpus Christi 2000, pet. denied). "Even though a doctor is not liable for professional negligence when examining a non-patient, the doctor remains liable for any injury he may cause during the procedure. This has been referred to as the "duty not to injure." **Johnston,** 558 S.W.2d at 137. While the scope of the duty to not injure has not

been fully explicated, it has been said that the duty not to injure is violated only by an affirmative act which causes injury. See **Johnston,** 558 S.W.2d at 137; **Penick**, supra; **Salas,** 760 S.W.2d at 840; **Lotspeich,** 369 S.W.2d at 710. Thus, when a physician examines a non-patient for the benefit of a third party, the physician is not required to use professional medical care, and thus may not be held liable for professional negligence, but is required to perform the examination in such a manner so as not to injure the examinee. Because a cause of action for breach of the duty not to injure is not a claim that the physician departed from an "accepted standard" within the health care industry, the Act is inapplicable. Moreover, the Texas Supreme Court has noted that the Act does not apply to claims where no physician-patient relationship exists. See St. John, 901 S.W.2d at 423 (citing **Lopez v. Aziz,** 852 S.W.2d 303, 305 (Tex.App.-San Antonio 1993, no writ), which holds that the Medical Liability and Insurance Improvement Act implicitly recognizes that a physician-patient relationship must exist before a "health care liability claim" may be asserted).

b) **Johnston v. Sibley, 558 S.W.2d 135 (Tex. App. – Tyler, 1977, writ ref'd, n.r.e.)** The Court held that a physician's duty for purposes of evaluating disability for an insurance carrier ran only to the workers' compensation insurance carrier. However, the physician's duty to the person examined pursuant to the physician's contract with the workmen's compensation carrier is not to cause any bodily injury or harm during the course of the physical examination.

The court indicated that an examining physician may have liability for any representations to the employee with regard to the medical findings. See **Gooden v. Tips,** 651 S.W.2d 364 (Tex. App. – Tyler, 1983, n.p.h.). Thus, the Johnston court implicitly recognized the holding in **Caldwell v. Overton,** 554 S.W.2d 832 (Tex. App. – Texarkana, 1977, n.p.h.): that the doctrine of negligent misrepresentation as announced in the **Restatement (Second) of Torts,** section 552 applies to a physician. Thus, a physician undertaking to make a medical examination at the request of a workers' compensation claimant had a duty to exercise reasonable care in examining the patient and providing medical information to the claimant. ***Id.*** at 834.

The court in **Caldwell** did not address the issues involving a lack of a physician-patient relationship. Other decisions have indicated that in certain circumstances liability may exist without a contractual relationship between the patient and physician or health care provider. See **Lunsford v. Board of Nurse Examiners,** 648 S.W.2d 391 (Tex. App. – Austin, 1983, n.p.h.).

G. DUTY TO SUBMIT TO EXAMINATIONS UNDER OATH (EUO's)

a. **In Re Texas Farmers Insurance Exchange,** 12 SW3d 807 (Tex. 2000) The Supreme Court in *Texas Farmers* affirmed the Court of Appeals holding that an attorney who investigates his client's affairs may be required to divulge his communications with his client about the results of that investigation.

b. **Procedure for Conducting an EUO:**

a) **Medical Towers, Ltd. v. St. Lukes Episcopal Hospital**, 750 S.W.2d at 820, 822-24 (Tex.App.–Houston [14th Dist.] 1988, writ denied) and see **O'Farrill v.**

Gonzalez, 974 S.W.2d 237, 244 (Tex. App.--San Antonio, 1998, pet. denied). In the absence of a contractual procedural, the Court will impose reasonable terms to effectuate the purposes of the insurance policy.

b) **Rossco Holdings, Inc. v. Lexington Insurance Company**, 2011 WL 1363799 (S.D.Tex., April 11, 2011). On this windstorm claim, the court denied an insurer's motion for summary judgment alleging that the insured breached the contract by filing the lawsuit without providing documents requested and by failing to submit to an examination under oath (EUO).

The court held the insured had not "substantially complied" with the terms of the policy but that the insurer waived its right to an EUO. The court also denied the insurer's motion for summary judgment concluding that the proper remedy is abatement until 30 days after the insured produces all documents reasonably required by the insurer and, submitting to the EUO.

c) It is reasonable for the insurance carrier to request separate, segregated EUOs of its insureds. **Lidawi v. Progressive County Mut. Ins. Co.**, 112 S.W.3d 725 (Tex.App.—Houston [14th Dist.] 2003, no pet.)

V. COVERAGES REQUIRED

A. UM/UIM COVERAGE REQUIRED

a. **Statute:**

a) **§1952.101 Tex. Ins. Code –** UM/UIM coverage is required

B. UM/UIM Coverage must offered in the amounts desired by the insured

a. **Statute:**

a) **§1952.101 Tex. Ins. Code** – UM/UIM must be offered to an insured in the amounts desired by the insured, but not in amounts greater than the limits of liability specified in the bodily injury liability provisions of the insured's policy.

b. **Cases:**

a) **Geisler v. Mid-Century Insurance Company,** 712 S.W.2d 184 (Tex.App.—Houston [14th Dist.] 1986, writ ref'd. n.r.e.). The insureds asserted that Mid-Century had a duty to disclose that higher limits were available and that in the absence of a signed, written rejection of coverage that the maximum allowable UM/UIM coverage should be read into the policy as a matter of law. The court disagreed. The stipulated facts showed: Mid-Century did not explain to the insured that higher UM/UIM limits were available, but there was no evidence to show that the insured had requested higher limits.

b) **Critchfield v. Smith**, 151 S.W.3d 225 (Tex.App.—Tyler 2004, Pet. Denied). Insured brought a breach of contract claim against the agent for failing to provide a policy with UM/UIM limits equal to the liability limits. The insured raised a fact issue to defeat summary judgment because the insured showed: there was an

oral contract to advise the insured on insurance coverages; the agent failed to advise, offer, or make the insured aware of the fact that he could purchase UM/UIM coverage as high as the limit of bodily injury liability coverage; the agent agreed he was required to ascertain and provide the appropriate automobile insurance coverages and with regard to UM/UIM coverage to provide the maximum coverage the insured was allowed under the policy; the agent testified that he gauged insured as someone who was wanted to obtain the maximum coverage he was financially capable of in order to protect his family; On more than one occasion, the insured told the agent that he wanted the "maximum coverage" for the UM/UIM portion of his automobile policy.

C. ***PIP COVERAGE***

a. **Statute:**

a) **Tex. Ins. Code §1952.152 –** PIP coverage is required.

b) **Tex. Ins. Code §1952.155**

Such benefits shall be payable without regard to:

(1) the fault or non-fault of the named insured or the recipient in causing or contributing to the accident, and

(2) any collateral source of medical, hospital or wage continuation benefits.

b. **§1952.156 Tex. Ins. Code** - to be paid within 30 days of receiving satisfactory proof of claim;

c. **Penalties for violations**

a) **Statute: Tex. Ins. Code §1952.157**

(1) In the event the insurer fails to pay such benefits when due, the person entitled to such benefits may bring an action in contract to recover the same; and in the event the insurer is required to pay such benefits, the person entitled to such benefits shall be entitled to recover reasonable attorneys fees plus 12% penalty, plus interest thereon at the legal rate from the date such sums became overdue."

d. **Case Law:**

a) **Grain Dealers Mutual Insurance Co. v. McKee,** 911 S.W.2d 775 (Tex. App.--San Antonio, 1995) rev'd on other grounds, 943 SW2d 455 (Tex. 1997). The daughter of the president of a company with a commercial auto policy was held to be an insured under the policy and was entitled to PIP and UM/UIM benefits and an award of 12% attorneys because there is no good faith exception to the statutory penalty to promptly pay a claim while the insurer litigated whether the daughter was a covered person.

D. ***Liberal Construction***

a. Under Texas law, Courts must interpret PIP insurance provisions liberally to give full effect to the public policy which led to its enactment. See **Texas Farm Bureau Mut. Ins. Co. v. Sturrock,** 146 S.W.3d at 123, 128, (Tex. 2004). Such broad and liberal interpretation of PIP coverage in favor of the beneficiary is necessary because it is the public policy of the State that automobile policies include PIP benefits without regard to fault); See ***Sturrock,*** 146 S.W.3d at 128 citing **Unigard Sec. Ins. Co.,** 572 S.W.2d at 308.

E. ***Exclusions for Fleeing the Police***

a. **Statute: §1952.158 Tex.Ins.Code**

b. **Case Law:**

a) ***Hertz Corp. v. Pap,*** 923 F. Supp. 914 (N.D. Texas 1995).

VI. PIP & UM/UIM REJECTIONS

A. ***Liberal Construction***

a. PIP insurance provisions construed liberally to give full effect to the public policy which led to its enactment. See **Texas Farm Bureau Mut. Ins. Co. v. Sturrock,** 146 S.W.3d at 128;"). Further, the **Sturrock** Court then cited **Ortiz v. State Farm Mut. Auto. Ins. Co.,** 955 S.W.2d 353, 356-57 (Tex.App.-San Antonio 1997, pet. denied) for the proposition that courts must interpret the UM/UIM and PIP coverage provisions broadly to give full effect to "the state's interest in protecting conscientious and thoughtful motorists from financial loss").

B. ***PIP and UM/UIM rejections must be in writing:***

a. **PIP REJECTIONS**

a) **The rejection cannot be inferred and must be in writing.**

b) **Statute: §1952.152(b) Texas Insurance Code for PIP.**

c) **Case Law:**

(1) **Old American v. Sanchez,** 149 S.W.3d 111 (Tex. 2004).

(2) **Unigard Sec. Ins. Co. v. Shaefer,** 572 S.W.2d 303 (Tex. 1978). The basic policy's insuring agreements, exclusions, conditions, and other terms do not apply to the Personal Injury Protection required by Article 5.06-3. This is clear from the terms of the statute and the Policy Provisions section of Endorsement 243, quoted above, which specifically provide the "None of the insuring agreements, exclusions, or conditions of the policy shall apply to the insurance afforded by this endorsement..." except premium, notice and other specified conditions which do not relate to exclusions or written rejection of the coverage. In this regard, the

statutory Personal Injury Protection coverage set forth in Endorsement 243 is like a separate policy, or a supplement to the basic policy. Exclusion 119 still applies to accidents and claims under the main provisions of the basic policy such as Bodily Injury Liability, Property Damage Liability, Comprehensive, and Collision. When the Legislature specifies a particular extent of insurance coverage, any attempt to void or narrow such coverage is improper and ineffective. **Westchester Fire Insurance Company v. Tucker,** 512 S.W.2d 679 (Tex.1974); **American Liberty Insurance Company v. Ranzau,** 481 S.W.2d 793 (Tex.1972); **American Nat. Ins. Co. v. Tabor,** 111 Tex. 155, 230 S.W. 397 (1921); **Western Alliance Insurance Co. v. Dennis,** 529 S.W.2d 838 (Tex.Civ.App.1975, no writ).A decision against partial rejection by indirection (use of Endorsement would be contrary to the holding of a divided Beaumont Court of Civil Appeals (three opinions) in **Greene v. Great American Insurance Company,** 516 S.W.2d 739 (Tex.Civ.App.1974, writ ref. n. r. e.).

b. **UM/UIM rejections:**

a) **Statute: §1952.152(c) Tex. Ins. Code**

b) **Case Law:**

(1) Allstate Ins. Co. v. Hunt, 469 SW3d 151 (Tex.1971). In the absence of a rejection, UM/UIM coverage will be implied up to the level of the statutory minimum**.**

(2) **Geisler v. Mid-Century Insurance Company,** 712 S.W.2d 184 (Tex.App.—Houston [14th Dist.] 1986, writ ref'd. n.r.e.)**.** If the insurer is unable to prove the coverage has been rejected, then the coverage applies as to the minimum amount required by statute.

(3) **Ortiz v. State Farm Mut. Automobile Ins. Co.,** 955 S.W.2d 353 (Tex.App.--San Antonio 1997, pet. denied) The question in this case is whether the insurer met its burden to prove the insured rejected UM/UIM and PIP coverage. The Court held it did because the rejection does not need to be attached to or incorporated into the policy to be valid. The rejections were in clear and express language with the insured's signature next to them.

(4) **Howard v. INA County Mutual Ins. Co.,** 933 SW2d 212 (Tex.App.-Dallas 1996, writ denied). UM/UIM coverage cannot be rejected retroactively to correct the parties' intent because the Insurance Code requires that the coverage be accepted or rejected at the time of purchase. Further, the carrier has the burden to prove that UM/UIM coverage was rejected in writing by the insured according to Article 5.06-1 of the Texas Insurance Code. If the coverage was not rejected in writing, then there is UM/UIM coverage.

C. ***Form of the PIP and UM/UIM Rejections***

a. **PIP Rejections:**

a) There is no specific form or language requirements.

b. **UM/UIM Rejections:**

a) There is no specific form or language requirements

D. ***Burden of Proof:***

a. **It is the carrier's burden to prove that the coverage was rejected.**

a) **Statute:**

(1) §1952.109 Texas Insurance Code

b) **Case Law:**

(1) **Unigard Sec. Ins. Co. v. Schaefer**, 572 S.W.2d 303 (Tex. 1978) Burden of proof is on insurer to prove that PIP coverage was rejected.

E. ***Exceptions:***

a. **Taylor v. State Farm,** 124 S.W.3d 665 (Tex. App. – Austin 2003, rev. denied) held that a commercial general liability policy was not an "auto policy" under 1952 of the Tex. Ins. Code and did not have to offer PIP or UM.

b. **Sidelnik v. American States Insurance Co.,** 914 SW2d 689 (Tex.App.– Austin, 1996 writ denied). After receiving policy limits from his uninsured motorist carrier, Plaintiff then sought to recover under his umbrella and the insurer refused. Held: Texas Insurance Code art. 5.06-1 which mandates uninsured motorist coverage for automobile liability insurance policies, does not apply to umbrella policies.

F. ***Perpetual renewals***

a. **Statutes:**

§1951.101(c) Texas Insurance Code and §1952.152(b) Texas Insurance Code

b. **Case Law**:

a) Perpetual renewals of the PIP rejection are probably valid. See **Old American Mutual v. Sanchez,** 149 S.W.3d 111 (Tex. 2004) and **Payne v. Mid-Century Ins. Co.,** 2003 WL 22024458 (memo opinion – Austin, 2003, no writ)

b) **Poteet v. State & Co. Mutual Fire Ins. Co.,** 7 SW3d 679 (Tex.App.-Eastland 1999, no writ). Because the insured rejected UM/UIM coverage in writing in connection with a policy previously issued to him by the same insurer, that rejection was effective as to a subsequent renewal of the policy.

VII. CANCELLATION OF THE POLICY

A. ***Statute:***

a. **Tex. Ins. Code §551.104 provides the reasons and conditions under which an insurer is permitted to cancel the insurance policy.**

a) **Failure to make payments;**

b) **Fraudulent claim or**

B. ***Policy violates law***

a. **Texas Transp. Code §601.073.** The policy becomes "absolute" at the time the claim arises. (otherwise there would never be any coverage).

b. **Columbia Universal Life Ins. Co. v. Miles,** 923 SW2d 803 (Tex.App.--El Paso 1996, writ denied). An insurer's failure to contact the applicant prior to asserting its right to question the validity of statements made on the application does not constitute evidence of bad faith. Evidence showing that the insured signed the application knowing it did not contain complete answers, it contained false representations about prior medical treatment and that another insurance company had refused coverage because of the pre-existing conditions constitutes a reasonable basis for its cancellation.

c. **Union Bankers Ins. Co. v. Shelton,** 889 SW2d 278 (Tex.1994). The Court found that before an insurance company may cancel a policy based on a misrepresentation in the application, the company must show an intent to deceive on the part of the insured. An intent to deceive must be proved to cancel a health insurance policy within two years of the date of its issuance when the cancellation is based on the insured's misrepresentation in the application for insurance". Failure of the insurance company to show intent to deceive makes any cancellation within two years of the policy's issuance a breach of the contract as a matter of law.

VIII. STACKING COVERAGES

A. ***General Rule:***

a. **Usually permitted if the stacking occurs between two different policies:**

a) **Separate UM policies: PERMITTED**

b) **Separate UIM policies: PERMITTED**

c) **Usually prohibited if stacking coverages within the same policy**

d) **UM and UIM claims under the same policy: NOT PERMITTED**

e) **Usually prohibited to stack the LIABILITY and UM or UIM coverage under the same policy: Hanson v. Republic Ins. Co.,** 5 S.W.3d 324 (Tex. App. - Houston [1st dist.] 1999, pet. denied), and **Jankowiak v. Allstate**, 201 S.W.3d 200 (Tex. App. - Houston [14th Dist] 2006, no pet.)

B. ***EXCEPTIONS***

a) **Jankowiak v. Allstate Prop. & Cas. Ins. Co,** 201 SW3d 200 (Tex.App.– Houston [14th Dist.] 2006). The Court held that the claimant could recover policy limits on the liability claim against the driver of the vehicle she occupied for his negligence, and policy limits under the same policy for the negligence of the uninsured driver that struck their vehicle. Allstate's position that payment of the policy limits of one coverage exhausted the limits and their duty to pay on the other claim was found to be against public policy. Allstate relied upon the decision in **Hanson** (5 S.W.3d 324).

This is the scenario. A person is a passenger injured in an accident in which the driver of his car and the other driver are both at fault. He collects against his driver's liability policy and the other driver's. But there is not enough coverage to take care of his damages. Can he also collect against his driver's UIM policy? After all he is a covered person under that policy.

C. ***COMPANY CARS: COVERAGE WHILE OCCUPYING A VEHICLE SUPPLIED FOR REGULAR USE***

a. **Briones v. State Farm,** 790 S.W.2d 70 (Tex. App. – San Antonio 1990, writ denied) expressly disapproved of this exclusion when applied to a vehicle that was not actually owned by the insured or family member (i.e. a company car) but occupied by the insured at the time of the collision. See also **Verhoev v. Progressive County Mut. Ins. Co.,** 2009 WL 2357004 (Tex. App. – Fort Worth 2009, no writ). **Briones** was a departure from earlier cases that held the opposite, but those case are pre-**Stracenor** and are acknowledged in this opinion, and disapproved.

IX. OTHER INSURANCE CLAUSE: PRIORITIES OF COVERAGE WHEN THERE ARE MULTIPLE POLICIES

A. ***POLICY LANGUAGE***

a. **"However any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance."**

a) There is debate on the issue of whether UM/UIM policies can take an offset for payments made by another UM/UIM policy because of the "Other Insurance" clause.

b. **Cases Where the Credit Was Permitted.**

a) **Synder v. Allstate, 485 S.W.2d 769 (Tex. 1972);**

b) **USF&G v. USAA, 772 S.W.2d 218 (Tex. App. – Dallas 1989, writ denied).**

c. **Cases Where the Credit Was Not Permitted:**

a) **American Motorists Ins. Co. v. Briggs, 514 S.W.2d 233 (Tex. 1974).** "Other insurance" clauses cannot be used to deny coverage that would otherwise be available.

b) **United Services Automobile Ass'n. v. Hestilow,** 754 S.W.2d 754, 758-59 (Tex. App.—San Antonio 1988), aff'd, 777 S.W.2d 378 (Tex. 1989);

c) **Stracener v. United Servs. Auto. Asso.,** 777 S.W.2d 378, 382-83 (Tex. 1989).

d. **Most likely result:**

a) Most likely the Courts will construe the policies and coverages to avoid a double recovery.

b) However, preventing a double recovery does not decide the issue of primary versus excess or pro-rata coverage or what occurs when an excess carrier makes payment before the primary UM/UIM and whether the primary may claim a credit in that event. In this scenario, Briggs should operate to prevent the credit.

B. ***NON-OWNED VEHICLES***

a. **Policy language: The standard personal auto policy states that if the insured is in a "non-owned" vehicle, the non-owned vehicle's policy is primary.**

a) **If both policies state the other is primary then they are joint and several, but on a pro-rata basis. Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Co., 444 S.W.2d 583 (Tex. 1969).**

b. **Rental Cars**

c. **Company Cars with UM/UIM Coverage**

a) **Must look at the specific language to determine the priorities.**

C. ***CASES INVOLVING NON-STANDARD INSURANCE POLICIES***

a. **Safeco Lloyds Insurance Company v. Allstate Insurance Company,** 308 SW3d 49, (Tex.App. San Antonio 2009, no pet. history). This is a declaratory judgment action involving a coverage dispute that arose because there were two separate liability policies in place at the time of the wreck. The driver was operating a non-owned auto which was insured by Safeco. In addition, the driver was insured under her own policy with Allstate. Allstate contended the Safeco policy was primary and that the Allstate policy was excess because coverage followed the vehicle. Safeco claimed that the liability coverage was pro-rata because its non-standard policy approved by the Texas Department of Insurance. The two insurers filed competing MSJs. The Court analyzed the issues and found in favor of Safeco and held there was pro-rata coverage.

b. **Hardware Dealers Mut. Fire Ins. v. Farmers Ins. Exch.,** 444 SW2d 583 (Tex. 1969). The Court recognized that with regard to automobile insurance, 3 kinds of "other insurance" clauses have developed as devices to limit coverage or liability: (1) a pro rata clause, which restricts liability upon concurring insurers to an apportionment basis, (2) an excess clause, which restricts liability upon an insurer to excess coverage after another insurer has paid up to its policy limits, and (3) an escape clause, which avoids all liability if other insurance exists. 444 S.W.2d 583, 586 (Tex. 1969). The Court held the conflict

in ***Hardware Dealers*** was best decided by giving "dominant consideration to the rights of the insured." *Id.* at 589. Given the insurers' usual concession that whatever the result, the insured's coverage must be no less than if she had been protected by but one policy, the court reasoned that insurers implicitly concede policies should be construed liberally in favor of the insured and strictly against the insurer. When "resolving issues between double insurers," the court must determine whether from the view point of the insured "she has coverage from either one of two policies but for the other, and each contains a provision which is *reasonably subject to a construction that it conflicts with a provision in the other concurrent insurance*." When such a conflict exists, the conflicting provisions must be ignored, and the court must look to the remaining policy provisions to determine coverage. ***Id.*** at 589.

Accordingly, we will apply the test set forth in ***Hardware Dealers*** to determine proper liability in this case. The Court held that to determine if there was a conflict, we should, from the point of view of the insured, first determine if the insured has coverage from either one of the two policies, but for the other. ***Hardware Dealers*****.** If the insured is covered by each policy but for the existence of the other, the Supreme Court requires that we then determine if each policy contains a provision "which is reasonably subject to a construction that it conflicts with a provision in the other concurrent insurance." ***Id***. A "reasonable interpretation" does not have to be the "'more likely reflection of the intent of the parties,'" but need be "'no more than one which is not itself unreasonable.'" ***Id.***

The Court rejected Allstate's claim that the "other insurance" language in the Safeco policy is against public policy. The Court also rejected Allstate's claim that by changing the language in its policy from the standard language in an effort to "shelter under **Hardware Dealers"** Safeco has engaged in the sort of drafting contest rejected by the supreme court in *Hardware Dealers*. Allstate also claimed Safeco violated public policy by changing the wording in its policy in an attempt to turn every other insurer's excess coverage into primary coverage, resulting in pro rata apportionment. The Court disagreed with Allstate. Safeco's policy, including the "other insurance" provision, was approved by the insurance commissioner as required by law. *See* Tex. Ins. Code Ann. § 2301.006(a) (Vernon 2009)(stating that unless otherwise provided, insurer may not use insurance form unless form has been filed with and approved by commissioner.

The commissioner could have disapproved the form if it violated public policy, but did not. Moreover, the deviation is of no moment because the Court itself has encouraged insurers to draft policy language to reflect their interpretation of policy provisions and then seek TDI approval. See **Don's Bldg. Supply, Inc.,** 267 S.W.3d at 29 (explaining that if insurer intends certain interpretation of a policy provision it should make such intent explicit in policy and seek approval by TDI). Safeco acted as suggested by the supreme court, and obtained the necessary approval. Accordingly, we hold it would be unfair to denounce Safeco's "other insurance" provision based on public policy.

D. OFFSETS & CREDITS FOR UM/UIM CLAIMS

a. VALID OFFSETS & CREDITS FOR THE FOLLOWING CLAIMS

a) Burden of Proof

(1) **Farmers Texas County Mutual Insurance Company v. Okelberry**, 2017 WL 2292536(Tex.App.—Houston [14th Dist.] 2017). In this UIM

case, the appellate court concluded that the trial court erred by failing to offset the full amount of Mr. Okelberry's settlement with the tortfeasor. The Court held that under the common law, a defendant seeking a settlement credit has the initial burden of proving its right to a credit. This burden may be satisfied by placing the settlement agreement or some evidence of the settlement amount in the record. Once the non-settling defendant demonstrated a right to a settlement credit, the burden then shifts to the plaintiff to show that certain amounts should not be credited because of the settlement agreement's allocation. If the plaintiff failed to provide an allocation, then the non-settling party was entitled to a credit equaling the entire settlement amount. The trial court shall presume the settlement credit applies unless the non-settling plaintiff presents evidence to overcome this presumption.

b) ***UM/UIM Offset For PIP and Med Pay Payments***

(1) Offsets are permitted so long as the offset does not reduce the amount of policy limits available under the policy:

(2) James v. Nationwide Property & Casualty Ins., 786 S.W.2d 91 (Tex.App.– Houston[14th Dist.] 1990, no writ). This case entitles UM/UIM insurer to take an offset for PIP payments made to persons who are not named insureds under the policy so long as the same does not have the effect of reducing the amount of available policy limits.

c) ***Settlements With Persons Who Are Not "Legally Liable"***

(1) Melancon v. State Farm Mut. Automobile Ins. Co., *343 SW3d 567 (Tex.App-Houston [14th Dist.] 2011).* This case involves the question of whether the UIM carrier is entitled to assert a credit for settlements an insured obtains with persons who are not "*legally liable*" to the insured for her injuries. In this case the Insured motorist brought a UIM claim against State Farm following a 3 car accident. Prior to trial, the Insured settled with Driver 1: Sholes for $20,012; and the Insured settled with Driver 2 and Driver 2's employer (a trucking company) for $170,000. In addition, State Farm paid $5,000 in PIP benefits. As a result, State Farm claims it was entitled to credit of $195,012. At trial, the jury found that the negligence of Driver 1 was the sole proximate cause of the insured's damages in the amount of $168,800.

The insured appealed the take nothing judgment claiming that since Driver 2 and Driver 2's employer were not found to be negligent that these persons were not Uninsured/Underinsured Motorists because they are not "legally liable" for the damages, and therefore the UM/UIM carrier should not be entitled to a settlement credit of $170,000 with non-liable defendants. The appellate court disagreed, and held that the UIM carrier is entitled to take into account all settlements the same way that Sholes would have been entitled to do in order to determine Sholes' legal liability. Because the Court found in favor of State Farm, the court did not address State Farm's one satisfaction argument.

b. **Med Pay claims.**

a) **Westchester Fire Ins. vs. Tucker,** 512 S.W.2d 679 (Tex. 1974)

c. **PIP Offsets permitted to prevent a double recovery.**

a) **Mid Century Ins. Co. of Texas v. Kidd,** 997 S.W.2d 265 (Tex. 1999);

b) **Nationwide Mutual Ins. Co. v. Gerlich, 982 S.W.2d 456 (Tex. 1999)** A plurality of the Court concludes that the PIP offset provision is not invalid and therefore the UM/UIM carrier is entitled to offset PIP payments in situations where failure to do so would result in a double recovery.

c) **State Farm Mutual Automobile Ins. Co. v. Brown,** 984 SW2d 695 (Tex.App.--Houston [1st Dist.] 1998, pet. denied). An insurer is entitled to offset PIP payments made under a UM/UIM claim. Here, the insured's total actual bodily injury damages were $7,500 and $4,500 was paid under PIP.

d) **Kim v. State Farm Mut. Automobile Ins. Co.,** 966 S.W.2d 776 (Tex.App.--Dallas 1998, no pet.) An insurer is entitled to offset PIP payments made under a UM/UIM claim. Insurance is not designed to allow a double recovery. Thus, the offset is allowed.

E. ***WORKERS' COMP BENEFITS.***

a. **Exclusive Remedy Provision of Worker's Compensation Laws Preclude UM/UIM claims in some situations.**

a) **Smith v. City of Lubbock and St. Paul Fire and Marine Insurance Company**, 351 SW3D 584 (Tex. App. – Amarillo, September 26, 2011). In a case of first impression for Texas courts, the Court considered whether the exclusive remedy provision of Texas Workers Compensation statute also served to preclude contract based claims against the employer arising under UM/UIM coverage, and concluded that it does. Here, a city employee was injured while occupying a city owned vehicle that was struck by drunk driver (underinsured motorist). The city is a subscriber with workers compensation coverage, but the City had also purchased UM/UIM coverage for its vehicles with a $500,000 self-insured retention or deductible under the UM/UIM coverage. The deductible is significant as the employee's claims in this case did not exceed the amount of the tortfeasor's policy and the self-insured retention/deductible.

The employee received workers' compensation benefits and then made a claim under the UM/UIM policy with St. Paul. Summary judgment was rendered in favor of the City that workers comp was the exclusive remedy and therefore the UIM claim was barred. The court reviewed the application of the exclusive remedy provision as applied to the city and the UM/UIM claim. Plaintiff argued that the workers' compensation exclusive remedy provision applied only to tort claims and not those arising under contract with a third party insurer.

After reviewing case law from other states applying the exclusive remedy provision, the court concluded if an employee suffers work related injuries and

seeks redress from an employer that subscribes to a workers compensation program, there is only one way to obtain a recovery. The employee's exclusive remedy is through worker's comp. It does not matter if the employer provides those benefits from its own pocket or via a contract with a third party insurer;…" To rule otherwise would provide the employee a backdoor way of recovering more from his employer than the exclusive workers' compensation remedy …." Especially when a portion of that recovery "would come out of that employer's pocket." The court limited its decision to the facts presented and offered several fact patterns to which its finding could be distinguished, but then affirmed summary judgment denying further recovery against the City.

b) **Soledad v. Texas Farm Bureau Mut. Ins. Co.**, (Tex.App.—Austin 2016). Summary judgment for Farm Bureau was affirmed. Farm Bureau argued that the insured's recovery of UM benefits is barred by the Texas Worker's Comp Act (TWCA) because TWCA is the exclusive remedy of an employee against his employer or a co-employee of the employer for injuries incurred during the course and scope of work. In this case, Soledad was a passenger in a vehicle driven by his co-worker while they were in the course and scope of their employment. Farm Bureau conceded that the result would be different if the negligent 3rd party were not a fellow worker.

b. **Despite policy language which permits the offset, the Courts have held this offset to be invalid.**

a) **Hamaker v. American States Ins. Co.,** 493 S.W.2d 893 (Tex.App.--Houston [1st Dist.] 1973, writ ref'd n.r.e.)

b) **Fidelity and Casualty Co. v. McMahon,** 487 S.W.2d 371, 372 (Tex. Civ. App. – Beaumont. 1972, writ ref'd n.r.e.).

c) **Employers Casualty Co. v. Dyess,** 957 S.W.2d 884 (Tex.App.--Amarillo 1997, writ denied). Workers' comp carrier brought an action against employee seeking subrogation rights on uninsured motorist benefits. Court grant the comp carrier's motion for summary judgment holding that the insurer's statutory right of subrogation applied to UM benefits; and the exclusion of UM benefits for injuries covered by workers' compensation was invalid.

d) **Elwess v. Farm Bureau County Mut. Ins. Co.**, Not Reported in – SW3d – WL 2014675562 (Tex.App.—Eastland, 2014). The appellate court reversed the trial court's granting of the UIM carriers' motion for summary judgment because the carrier was not entitled to claim that the loss was payable under workers comp because it was undisputed that the insured could not have recovered under workers' compensation coverage since his employer did not have such coverage. The insured apparently did not challenge this workers' compensation offset as being void under ***Hamaker v. American States Ins. Co.***, 493 S.W.2d 893 (Tex.App.--Houston [1st Dist.] 1973, writ ref'd n.r.e.).

F. ***LIABILITY CARRIER IS <u>NOT</u> ENTITLED TO TAKE A SETTLEMENT CREDIT FOR UM/UIM BENEFITS PAID.***

a. **<u>Bartley v. Guillot</u>,** 990 S.W.2d 481 (Tex.App.--Houston [14th Dist.] 1999, pet. denied) In a case of first impression, after a $30,000 plaintiff's verdict against an insured Defendant in a car accident case. The insured Defendant was denied the ability to claim a $20,000 credit for a settlement the Plaintiff reached with his uninsured motorist carrier. The Court concluded that the uninsured motorist carrier's liability arose out of contract, not from an action in negligence, products liability grounded in negligence, or strict liability under §33.001.

G. ***SETTLEMENTS FOR LESS THAN POLICY LIMITS:***

a. The insured is entitled to settle with the tortfeasor for less than policy limits and still make a valid UIM claim. However, the UIM carrier is entitled to a credit for the full amount of the liability limits of the tortfeasor. **<u>Leal v. Northwestern Nat'l County Mut. Ins. Co.</u>**, 846 SW2d 576 (Tex.App.– Austin 1993, no writ); and **<u>Olivas v. State Farm Automobile Ins. Co.</u>**, 850 SW2d 564 (Tex.App.–El Paso 1993, writ denied).

H. ***REQUIRING THE INSURED TO SIGN A RELEASE***

a. An insurance company cannot require a release in making a payment which is less than the insured is "legally entitled". **<u>Republic Underwriters Ins. Co. v. Mex–Tex, Inc.</u>**, 150 S.W.3d 423 (Tex.2004). However, a UM carrier does not violate the prompt pay statute by requiring a release in exchange for an amount that the insured is legally entitled to recover. **<u>DeLaGarza v. State Farm Mut. Auto. Ins. Co</u>**., 181 S.W.3d 755, (Tex.App.–Dallas,2005, rev. denied).

X. DAMAGES RECOVERABLE ON UM/UIM CLAIMS

A. ***PURE UM/UIM CLAIMS***

a. **Bodily injury damages up to policy limits**

b. **Medical Expenses**

a) In **<u>Haygood v. De Escabedo,</u>** 356 SW3d 390 (Tex. 2011) the Texas Supreme Court affirmed the appellate court's holding that:

(1) Section 41.0105 limits a Plaintiff's recovery and therefore the evidence. To enable a Plaintiff to recover the full amount of the expenses would give Plaintiff a windfall.

(2) The collateral source rule does not enable a Plaintiff to recover damages which a health care provider is not entitled to recover.

(3) Section 18.001 does not establish that bills are reasonable and necessary. On the contrary, it expressly contemplate that the issue can be controverted by affidavit, which could aver that only the amount actually paid was reasonable.

(4) Evidence of the total charges is not admissible to establish non-economic damages. "The relevance such evidence is substantially outweighed by the confusion it is likely to generate, and therefore the evidence must be excluded."

(5) "A fundamental rule is that to recover damages, the burden is on the plaintiff to produce evidence from which the jury may reasonably infer that the damages claimed resulted from the defendant's conduct.

(6) "We hold that only evidence of recoverable medical expenses is admissible at trial."

(7) "Of course the collateral source rule continues to apply to such expenses, and the jury should not be told that they will be covered in whole or in party by insurance. Nor should the jury be told that a health care provider adjusted its charges because of insurance."

b) **Progressive County Mutual Ins. Co. v. Delgado,** 335 SW3d 689, (Tex.App.—Amarillo, 2011 no pet.h.). On a UIM Claim, the Court held that the claimant was not entitled to recover portion of damages for past medical expenses that were written off by health care provider, over and above amounts actually paid or incurred by or on motorist's behalf. Prior to trial, the tortfeasor's carrier settled for policy limits of $25,000. At trial, counsel for both parties stipulated that: (1) the policy limits for Progressive's underinsured motorist benefits were $25,055.00; (2) Delgado settled the claims against Bailey for his policy limits of $25,000.00; and (3) Delgado collected $2,525.00 in Personal Injury Protection ("PIP") benefits from Progressive prior to filing suit.

In Delgado's motion for entry of judgment, he calculated his recovery as follows:

(1) First, Delgado deducted the PIP benefits paid by Progressive, $2,525.00, from the total jury award ($72,426.39 − $2,525.00 = $69,901.36).

(2) Delgado then calculated prejudgment interest on $69,901.36 from the date suit was filed until his settlement with Bailey.

(3) Delgado then added the prejudgment interest of $3,351.44 to $69,901.36 for a total of $73,252.80.

(4) Delgado then deducted the Bailey settlement, $25,000.00, arriving at $48,252.80.

(5) Next, Delgado calculated prejudgment interest from the date of the Bailey settlement until the date of entry of judgment, $1,612.83, and added that amount to $48,252.80 for a total of $49,865.63.

Because the stipulated policy limits were $25,055.00, Delgado asked the court for judgment awarding the policy limits plus court costs, $793.30, for a total of $25,848.30.

Progressive argued that under §41.0105, the trial court should enter a take nothing judgment. Progressive asserted that:

> (1) Of the $72,426.39 jury verdict, $52,968.39 represented an award of past expenses for medical care while $19,458.00 represented awards for past physical pain, physical impairment, and loss of earning capacity.
>
> (2) Progressive next asserted that, under section 41.0105, the past medical expenses actually paid or incurred on behalf of Delgado were $4,763.77. After adding this amount, $4,763.77, to the jury's awards for past physical pain, physical impairment, and loss of earning capacity, $19,458.00;
>
> (3) Progressive calculated Delgado's total collectible damages at $24,221.77. Progressive then asserted that $24,221.77 was less than its offsets and/or credits, $27,525.00 ($25,000.00 settlement with Bailey + $2,525.00 in PIP expenses). Progressive concluded that Delgado was entitled to a take nothing judgment.

Accordingly, Delgado's collectible damages total $24,221.77 ($4,763.77 in medical expenses plus $19,458.00 awarded by the jury for past physical pain, physical impairment, and loss of earning capacity). Because Progressive's offsets and/or credits, $27,525.00 subsume Delgado's collectible damages, the trial court should have granted Progressive's motion for entry of judgment and entered a take nothing judgment.

Note: The opinion does not address whether §541.060(a)(5) or (8) of **Tex.Ins.Code** bars the application of the §41.0105 CPRC on UM/UIM claims.

b) **Allstate Indem. Co. v. Forth,** 204 S.W.3d 795 (Tex. 2006). Allstate settled Forth's medical bills for less than the actual amount billed. Forth sued Allstate alleging it arbitrarily reduced her bills without using an independent and fair evaluation to determine what amount of her medical expenses were reasonable. According to Forth, Allstate routinely discounts medical expenses by comparing those charges to a third-party contractor's computerized database. Allstate then offers about 85% of the medical expenses reflected in that database for the same treatment or procedure. Forth did not claim that Allstate's conduct had caused her any damage.

Under Texas law, to have standing a party must have suffered a threatened or actual injury. Forth does not claim that she has any un-reimbursed, out-of-pocket medical expenses. She does not assert that these providers withheld medical treatment as a result of Allstate reducing their bills, or threatened to sue her for any deficiency, or harassed her in any other manner. Moreover, Forth has no exposure in the future because limitations has now run on the medical claims. Forth's medical providers apparently accepted the amount Allstate paid them

without complaint, thereby satisfying Allstate's obligation under the policy.

Because Forth does not claim that the manner in which Allstate settled her claim caused her any injury, we conclude that she does not have standing in this case. Accordingly, we reverse the court of appeals' judgment and, without hearing oral argument, render judgment dismissing Forth's claims against Allstate.

2. See Coverage Issues: Bodily Injury

B. Property damages

1. Cost of Repairs or Loss of the Fair Market Value

a) On a collision claim (as opposed to a UM/UIM claim), the insured may recover either the cost of repairs or the loss in the fair market value of the vehicle, but not both. **American Manufacturers Mutual Ins. Co. v. Schafer,** 124 S.W.3d 154 (Tex. 2003).

b) **Noteboom v. Farmers Texas County Mut.Ins.Co.**, 406 SW3d 381 (Tex.App.—Fort Worth 2013). Insured appealed a take nothing judgment in favor of the insurer. On appeal, the court concluded the uninsured motorist (UM) coverage obligated insurer to pay for insured's damages for the cost of repairs, loss of use, and diminished value as calculated based on a comparison of the car's value before the accident in addition to the costs of repairs because the insured chose to proceed on the claim as a UM claim and because the damages did not result in a double recovery. The Court noted that the unambiguous policy allows for recovery of damages where the he insured could have sued the uninsured motorist for those damages. Further, the Texas Department of Insurance has concluded that UM coverage could allow an insured to recover for diminished value: "Further, an insurer may be obligated to pay a first party claimant under the uninsured/underinsured motorist coverage provisions of the policy, for any loss of market value of the first party claimant's automobile, regardless of the completeness of the repair." ***Tex. Dep't of Ins. Comm'r Bulletin****,* No. B–0027–00 (Apr. 6, 2000).

2. Replacement Parts

a) **Dudney v. State Farm Ins. Co.,** 9 SW3d 884 (Tex.App.--Austin 2000, no pet.) Texas Ins. Code Article 5.7-1 does not abrogate the like kind and quality obligation under the standard Texas personal automobile insurance policy and does not require insurance companies to pay for new OEM parts in the satisfaction of all legitimate claims. Thus, while insurers are prohibited from forcing policyholders to accept non-OEM parts, the amount of money that insurers must provide as compensation for the parts that policyholders ultimately choose may still be limited to the cost of parts of like kind and quality.

b) Tex. Ins. Code. §1952.301(a) states,

> ***"Except as provided by rules adopted by the commissioner, under an automobile insurance policy that is delivered, issued for delivery, or renewed in this state, an insurer may not***

directly or indirectly limit the insurer's coverage under a policy covering damage to a motor vehicle by:

(1) ***Specifying the brand, type, kind, age, vendor, supplier, or condition of parts or products that may be used to repair the vehicle…."***

3. Loss of Use:

a) **American Alternative Ins. Corp. v. Davis,** 446 SW3d 41, (Tex.App.—Waco 2014, Writ granted). , Held that chattel owner (a tow truck operator) cannot recover loss-of-use damages suffered when the owner's chattel is totally destroyed even if the owner is unable to replace the chattel or obtain a substitute immediately and sustains losses as a result. Citing numerous cases, the Appellate Court notes that Texas courts have held that, in a suit for damages for personal property that has been totally destroyed, the proper measure of damages is the fair market value of the property at the time it was destroyed. ***Thomas v. Oldham****,* 895 S.W.2d 352, 359 (Tex.1995). The Court noted that the reason for not allowing damages for loss of use when the chattel is totally destroyed is because such damages are included as part of the award for total loss.

b) **J&D Towing, LLC v. American Alternative Ins. Corp.**, 478 S.W.3d 649 (Tex. 2016). The Texas Supreme Court reverse the appellate court's decision and held that an insured is entitled to recover loss of use damages for the reasonable amount of time necessary to replace that property even when the vehicle is a total loss as long as those damages are foreseeable and directly traceable to the tortious act, are not speculative, and not for an unreasonably long period of lost use. That period of time may not be longer than just the period of time to replace the vehicle.

4. Diminution In Value:

a) Carlton v. Trinity Universal Ins. Co., 32 S.W.3d 454 (Tex.App.– Houston [14th Dist.] 2000, pet. denied) On first party collision claims, the insured is not entitled to recover damages for both costs of repairs and damages for diminution in value (loss of the fair market value). If an insurer is fully, completely, and adequately repaired or replaced the property with other of like kind and quality, any reduction in market value of the vehicle due to factors that are not subject to repair or replacement cannot be deemed a component part of the cost of repair or replacement. Under the collision coverage, the policy limits the insurer's liability to the amount necessary to repair or replace the property with other of like kind and quality. The insurer has no obligation to pay the diminution in value.

b) Noteboom v. Farmers Texas County Mut.Ins.Co., 406 SW3d 381 (Tex.App.—Fort Worth 2013). Insured appealed a take nothing judgment in favor of the insurer. On appeal, the court concluded the uninsured motorist (UM) coverage obligated insurer to pay for insured's damages for the cost of repairs, loss of use, and diminished value as calculated based on a comparison of the car's value before the accident in addition to the costs of repairs because the insured chose to proceed on the claim as a UM claim and because the damages did not result in a double recovery. The Court noted that the unambiguious policy allows for recovery of damages where the he insured could have

sued the uninsured motorist for those damages. Further, the Texas Department of Insurance has concluded that UM coverage could allow an insured to recover for diminished value: "Further, an insurer may be obligated to pay a first party claimant under the uninsured/underinsured motorist coverage provisions of the policy, for any loss of market value of the first party claimant's automobile, regardless of the completeness of the repair." ***Tex. Dep't of Ins. Comm'r Bulletin***, No. B–0027–00 (Apr. 6, 2000).

c) Restored to its Pre-Accident Condition:

(1) The vehicle has to be restored to "useful " pre-accident condition). See **Dudney v. State Farm,** 9 S.W.3d 884 (Tex. App. – Austin 2000, no pet.) and **Great Texas County Mutual v. Lewis,** 979 S.W.2d 72 (Tex. App. – Austin 1998, no pet.).

(2) **State & County Mut. Fire Ins. Co. v. Macias,** 83 S.W.3d 304 (Tex.App.–Corpus Christi 2002)rev'd 133 S.W.3d 271 (Tex. 2004). The words "repair" and "replace," in an auto insurance policy, mean the "restoration of the automobile to substantially the same condition in which it was immediately prior to the collision; and it would not be restored to the same condition if the repairs left the market value of the automobile substantially less than the value immediately before the collision." Id.; see, e.g.**, Schaefer v. Am. Mfrs. Mut. Ins. Co.,** 65 S.W.3d 806, 808 (Tex. App.-Beaumont 2002, no pet. h.) (citing **Smith v. Am. Fire & Cas. Co.,** 242 S.W.2d 448, 453 (Tex. Civ. App.-Beaumont 1951, no writ)). Thus, by electing to repair or replace a vehicle, the insurer is required not only to repair and replace any physical parts of the vehicle damaged, but also to restore the vehicle to "substantially the same value as that of the vehicle prior to the loss." See **Bailey,** 2002 Tex. App. LEXIS 4105, at 5 **Fid. & Cas. Co. of New York v. Underwood,** 791 S.W.2d 635, 641 (Tex. App.-Dallas 1990, no writ).

We are not persuaded by the Carlton court's analysis and subsequent holding that "if the market value of the vehicle, after full, adequate, and complete repair or replacement, is diminished as a result of factors that are not subject to 'repair' or 'replacement,' the insurer has no obligation to pay the diminution in value." If, after repairs, the vehicle's value is diminished, we conclude the insurer must somehow restore the vehicle to substantially the same value as it was prior to the loss. See **Bailey,** 2002 Tex. App. LEXIS 4105, at 6; Schaefer, 65 S.W.3d at 810. Obviously, this can be done in any number of ways, including further repairs or by tendering an amount that equates to the difference in value. See **Schaefer,** 65 S.W.3d at 810; Cope, 448 S.W.2d at 719.

"Having found the language in appellant's insurance policy ambiguous, and therefore, interpreting the policy in favor of the insured, see **Hudson Energy Co.,** 811 S.W.2d at 555, we conclude appellees are covered for diminished value under appellant's automobile policy. Accordingly, the trial court's judgment is affirmed."

(3) **State & County Mut. Fire Ins. Co. v. Macias,** 133 S.W.3d 271 (Tex. 2004). The Court reversed the appellate court and rendered in favor of the insurance carrier finding the insured cannot recover both

costs of repair and diminished value. The Court stated, **"**In **American Manufacturers Mutual Insurance Co. v. Schaefer,** 124 S.W.3d 154, we held that the Texas Standard Personal Auto Policy, under which the Maciases are insured, does not obligate an insurer to compensate a policyholder for a vehicle's diminished market value when the car has been damaged but adequately repaired. The Court then reversed the court of appeals' judgment and render judgment in favor of State and County Mutual finding that the insurer does not have to pay both cost of repairs and diminished market value.

C. PUNITIVE DAMAGES ARE NOT RECOVERABLE:

1. A claimant is not entitled to recover punitive damages for the malicious conduct of the tortfeasor such as drunk driver that caused an accident and the claimant's damages.

a) Morgan v. State Farm, 940 S.W.2d 228 (Tex.App.--Houston [14th Dist.] 1997, writ denied).

b) Vanderlinden v. United States Automobile Association, 885 S.W.2d 239 (Tex. App. – Texarkana 1994, writ denied). Punitive damages not recoverable on UM/UIM claim.

c) Government Employees Ins. Co. v. Lichte, 792 S.W.2d 546 (Tex. App. – El Paso 1990, writ denied per curium 825 S.W.2d 431 (Tex. 1991)), the Texas Supreme Court expressly reserved judgment on this issue.

d) Milligan v. State Farm Mutual Automobile Insurance Co., 940 S.W.2d 228 (Tex.App.--Houston [14th Dist.] 1997, writ denied) The Court held that the UM/UIM carrier was not obligated to pay for exemplary damages.

e) Laine v. Farmers Ins. Exchange, 325 SW 3d 661 (Tex.App. – Houston [1st Dist.] 2010, pet. ref'd). Court affirmed a judgment n.o.v. that public policy precluded uninsured and underinsured coverage available under an umbrella from extending to exemplary damages assessed against the tortfeasor even though the umbrella policy contained no exclusionary language or limit to the damages it covered and was silent as to exemplary damages.

f) **Fairfield Ins. Co. v. Stephens Martin Paving, LP** 246 SW3d 653, 668 (Tex.2008). Texas appellate courts have uniformly rejected as being against public policy requests for coverage of punitive damages under UM/UIM policies.

D. PRE-JUDGMENT AND POST JUDGMENT INTEREST

1. **State Farm Mutual Automobile Ins. Co. v Nickerson.** 216 SW3d 823 (Tex. 2006);

2. **Lillith Brainard v. Trinity Universal Ins. Co.** 216 SW3d 809 (Tex. 2006);

3. **State Farm Mutual Automobile Ins. Co. v. Norris,** 216 SW3d 819 (Tex. 2006).

a) In the **Brainard** trilogy of cases, the Texas Supreme Court ruled, "We recently touched on this issue in **Battaglia v. Alexander,** 177 S.W.3d 893, 908-

09, 48 Tex. Sup. Ct. J. 720 (Tex. 2005), in which we held that the trial court erred in calculating prejudgment interest on total damages before deducting payments that the plaintiff received from settling defendants. To satisfy the purpose of prejudgment interest, settlements must be credited periodically, according to the date they are received. ***Id.*** at 907-08. This approach, known as the "declining principal" formula, is the proper way to apply credits in the calculation of prejudgment interest. *Id*. at 909 (overruling in part **C & H Nationwide, Inc. v. Thompson,** 903 S.W.2d 315, 327, 37 Tex. Sup. Ct. J. 1059 (Tex. 1994)). In **Battaglia,** we concluded that "[a] settlement payment should be credited first to accrued prejudgment interest as of the date the settlement payment was made, then to 'principal,' thereby reducing or perhaps eliminating prejudgment interest from that point in time forward." ***Id.*** **at 908.** Thus, as we explain below, each credit applies first to the accrued interest and then to the principal, with each credit establishing a new interval. At each new interval, interest continues to accrue only on the remaining principal because under the general prejudgment interest provisions, "interest is computed as simple interest and does not compound." **TEX. FIN. CODE § 304.104.**

> Trinity, argues that a UIM policy is different because the insurer's duty to pay does not arise until the underinsured motorist's liability, and the insured's damages, are legally determined. 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. Thus, under Chapter 38, a claim for UIM benefits is not presented until [*25] the trial court signs a judgment establishing the negligence and underinsured status of the other motorist. Because the contract did not require Trinity to pay UIM benefits before Premier'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.

b) **Embrey v. Royal Ins. Company of America,** 22 SW3d 414 (Tex. 2000). Once policy limits have been exhausted, the carrier does not owe additional sums for pre-judgment interest.

c) Henson v. Southern Farm Bureau Casualty Ins. Company; 17 SW3d 652 (Tex. 2000) A UM/UIM carrier is not obligated to pay pre-judgment interest over and above the policy limits of coverages provided by the policy.

d) Guideone Lloyds Insurance Company v. First Baptist Church of Bedford, 268 SW3d 822 (Tex.App.– 2nd Dist. 2008, no pet.)**.** The trial court erred by calculating pre-judgment interest and penalties on the full amount of the claim for the entire period of the claim because neither interest nor penalties accrue on amounts where the insurer tenders an unconditional tender of $ 155,000 on July 7, 2005. However, the interest penalty may be assessed against the insurer on the full amount of the claim if an insurer's partial payment to the insured was not unconditional. Thus, the insured should demand an unequivocal

statement in writing from the insurer as to whether an offer of settlement is unconditional or conditional.

> The insured is entitled to recover both prejudgment interest on the claim as well as statutory penalties of 18% interest when the insurer violated the Prompt Payment of Claims Act.
>
> Under **Brainard,** Courts are to apply the declining principal formula to calculate pre-judgment interest. Under this formula, "a settlement payment should be accredited first to accrued prejudgment interest as of the date the settlement payment was made, then to 'principal,' thereby reducing or perhaps eliminating prejudgment interest from that point in time forward
>
> In calculating the amount of article 21.55 interest to be awarded to an insured, we must:
>
> (1) determine the amount of prejudgment interest that had accrued on the breach of contract damages as of the date of insurer's unconditional tender, if any;
>
> (2) then apply the insurer's tender first to the amount of prejudgment interest that had accrued as of the date of judgment.
>
> (3) Then, the Court is to apply any remaining balance to the principal (the amount of the claim), and
>
> (4) finally, utilize the revised principal figure to calculate the post-tender amount of the article 21.55 interest penalty.
>
> Courts are not to apply the "declining principal" formula to calculations for determining the 18% interest allowed under the **Prompt Payment of Claims Act.**

e) **Barclay v. Mid Century,** 880 S.W.2d 807 (Tex.App.--Austin 1994, writ denied). "Amount of the claim" as referred to in Article 21.55 §6 is limited to the amount of policy limits, and does mean the true value of the amount of the claim. Subsequent decisions of the Texas Supreme Court including **Brainard** and **Arthur Andersen v. Perry Equipment Co.** have directly impacted the significance of this decision. In this case, the insured sought damages and attorney fees for failure of insurer to meet the prompt pay provisions of **Article 21.55** of the **Texas Insurance Code.** Held: Insurance company failed to comply with the statute and was forced to pay the claim, 18% in damages plus a one-third contingency fee in attorney's fees. The purpose of the article is to ensure that the insurance company will pay claims in a prompt manner.

E. COURT COSTS

1. State Farm Mutual Automobile Insurance Co. v. Grayson, 983 S.W.2d 769 (Tex.App.--San Antonio 1998, no pet.). Court costs must be assessed against the insured where the insured's settlement with the original tortfeasor was greater than the amount of

damages awarded to the insured in an underinsured motorist lawsuit.

2. **Haralson v. State Farm Mut. Auto Ins. Co., 2009 WL 111590 (N.D. Tex.).** State Farm sought to tax court costs against the Plaintiff, including the costs of oral depositions and depositions upon written questions. The Plaintiff contended that the oral depositions were not taken for use in his case. Because the Plaintiff failed to attach copies of the depositions to the Motion for the court's consideration and because the Plaintiff failed to direct the court to any questions that were asked of the witnesses that do not pertain to the case, the court had to tax the cost of the oral depositions against the Plaintiff. As for the depositions on written questions, those were clearly unrelated to the claims of Plaintiff, and therefore were not taxable against the Plaintiff.

F. ATTORNEY'S FEES:

1. THE HISTORICAL FIGHT FOR ATTORNEY'S FEES

a) For years, there was a fight over the issue of whether insureds were entitled to attorneys fees on UM/UIM claims because those claims were founded in contract. Primarily, the fight has centered around the carrier's claims that the insured has not shown he or she is ***"legally entitled"*** to recover damages until after the insured obtains a judicial determination against the insurer. Therefore, as a condition precedent to the recovery of attorneys fees, there must be a judicial finding for such damages. The fight started with ***Sikes v. Zoloaga*****,** 830 SW2d 752, (Tex.App–Austin 1992, no writ). After ***Sikes*****,** several courts tried to chip away at that opinion until the Texas Supreme Court issued its ruling in ***Henson v. Southern Farm Bureau Cas. Ins*****., 17 S.W.3d 652 (Tex. 2000).**

2. Cases Permitting The Recovery of Attorney's Fees:

Novosad v. Mid-Century Ins.Co., 881 S.W.2d 546, 552 (Tex.App.-San Antonio 1994, no writ). This case involved a uninsured motorist claim in which the court refused to award attorney's fees even though the court entered a judgment for the insured awarded among other damages, $7,600 for past and future medical care in her action. Mid Century relied on ***Sikes v. Zoloaga*** to claim that attorney's fees were not recoverable. However, the court noted that the ***Sikes*** case was distinguishable from ***Novosad*** because: (a) Mid-Century consented to settlement for the insurance policy limits of the underinsured driver; (b) The tortfeasor was never made a party to the underinsured motorist suit; (c) and liability was judicially established by virtue of Mid-Century's stipulation to the underinsured driver's negligence prior to the presentation of evidence. Thus, unlike the plaintiff in **Sikes,** Novosad established by "judgment or agreement" that the underinsured motorist was liable and legally obligated to compensate Novosad and because Mid-Century stipulated that the money paid to Novosad by the underinsured driver was only "partial payment" of Novosad's damages.

The only cause of action tried in this case was that a claim for breach of contract. Novosad established that she had a valid claim, she was represented by an attorney, and she sent a timely presentment letter, yet received no timely settlement offer. Novosad properly preserved her right to attorney's fees in her suit on the contract. The judgment of the trial court was affirmed.

a) **Allstate Ins. Co. v. Lincoln,** 976 S.W.2d 873, 876 (Tex.App.-Waco 1998, no pet.); The insured was involved in an automobile accident with tortfeasor who had struck the rear of appellee's vehicle. The tortfeasor had insurance coverage of $20,000, and her company paid the policy limits before trial. The insured sued the tortfeasor for additional damages and joined Allstate on an underinsured motorist claim. The jury found for the insured and awarded damages of $44,073.33. The insured was also awarded a judgment against Allstate (the UIM carrier) for $ 24,073.33, which was paid. The insured was also awarded $20,000 in attorney's fees based on the UIM contract plus additional attorney's fees for appeal. The court affirmed the attorney fees award holding that the decision to grant or deny attorney's fees was within the trial court's sound discretion.

b) **Whitehead v. State Farm Mut. Auto. Ins. Co.,** 952 S.W.2d 79, 88-89 (Tex.App.-Texarkana 1997), *rev'd on other grounds,* 988 S.W.2d 744 (Tex.1998) and criticized in ***Brainard v Trinity Universal Ins. Co.,*** 216 SW3d 809, 818 (Tex. 2006). In ***Whitehead,*** the insureds made a claim for breach of contract under **Tex. Civ. Prac. & Rem. Code Ann. § 38.001(8),** which provided that attorney's fees were recoverable for a suit on breach of contract. Prior to filing suit, the Whiteheads had previously made demand upon State Farm for policy limits. State Farm argued that attorney's fees were available in a suit against an insurer only in certain specifically enumerated instances, and not in a straight suit on contract, as was the case here. The trial court denied the insured's request for attorney's fees and appeal was taken. The court affirmed the judgment of the trial court except its failure to award reasonable attorney's fees to appellants. Appellants were entitled to recover under **Civ. Prac. & Rem. Code Ann. § 38.002** because the claim was under a contract, the claimant was represented by an attorney, the claim was presented to the opposing party, and payment for the just amount owed was not tendered before the expiration of the 30th day after the claim was presented. An award of attorney's fees to a party recovering on a valid claim founded on a written or oral contract, preceded by proper presentment, was mandatory.

c) **In re Ruby Britt**, 2016 WL 9175819, (Tex.App. – Texarkana 2016, orig. proceeding). Insured's petition for mandamus to order the judge to vacate an order granting a new trial and reinstate the default judgment on her UIM claim for policy limits plus an award of $5,000 in attorney's fees was conditionally granted because State Farm failed to establish a meritorious defense. In reaching this conclusion, the Court rejected State Farm's argument that the petition had to be verified and that the insured's claims were barred by the statute of limitations. Further, State Farm failed to provide even a prima facie case that its denial of coverage was meritorious.

3. Cases Disallowing The Recovery of Attorney's Fees:

a) **Sikes v. Zoloaga,** 830 SW2d 752, (Tex.App–Austin 1992, no writ). Mary Ellen Sikes appealed a denial of her claim for attorney's fees against from Allstate Indemnity Company (Allstate), based on an automobile insurance policy providing uninsured-motorist coverage. The jury found Zoloaga at fault and determined damages at $ 15,944.08, for which the court rendered judgment

against Allstate. Sikes also requested attorney's fees from Allstate based on its failure to meet a contractual obligation. The attorney's fees issue was tried to the court, which found no basis for an award under **Tex. Civ. Prac. & Rem. Code Ann. § 38.001** (1986). The appellate court affirmed the decision of the district court.

> Prior to filing suit, Sikes sent Allstate a formal demand letter on November 27, 1991, requesting $ 50,000 in damages. Allstate responded with a telephone offer of $ 10,000 to $ 15,000 in settlement, which all parties understood to be an offer of $ 15,000. Sikes rejected the Allstate offer in strong terms and eventually filed and tried this lawsuit, but obtained a verdict that essentially was no greater than the pre-litigation offer.
>
> The ***Sikes'*** Court noted requisites to recover for attorney's fees under the statute, as applicable to this case, are: (a)recovery of a valid claim in a suit on an oral or written contract; (b) representation by an attorney; (c) presentment of the claim to the opposing party or a representative of the opposing party; and (d) failure of the opposing party to tender payment of the just amount owed before the expiration of thirty days from the day of presentment. **Tex. Civ. Prac. & Rem. Code Ann. §§ 38.001-.002 (1986).** All of these requisites must be met to recover attorney's fees under the statute. *See* ***New Amsterdam Casualty Co. v. Texas Indus. Inc.,*** 414 S.W.2d 914 (Tex. 1967); ***Davidson v. Suber,*** 553 S.W.2d 430, 432 (Tex. Civ. App. 1977, no writ).
>
> In ***Sikes,*** the Court held there has been neither proper presentment of a claim to the opposing party nor failure of the opposing party to tender payment of the just amount owed. "An essential element to recovery of attorney fees under article 2226 is the existence of a duty or obligation which the opposing party has failed to meet;" ***Ellis v. Waldrop,*** 656 S.W.2d 902, 905 (Tex. 1983).
>
> The ***Sikes'*** Court focused on the language in the standard Texas auto insurance policy that the insurance will pay for only those damages which a covered person is "legally entitled to recover" from the owner/operator of an uninsured vehicle. Allstate contended that this clause created a condition precedent to any duty to pay under the policy, and the Court in Sikes agreed.

b) Sprague v. State Farm Mut. Auto. Ins. Co., 880 SW.2d 415, 416 (Tex.App.-Houston [14th Dist.] 1993, writ denied). In ***Sprague,*** the insured sued the tortfeasor and joined State Farm on an underinsured motorist claims. At trial, the jury returned a verdict for the insured and awarded medical and exemplary damages and attorney's fees. The trial court set aside that portion of the jury's verdict awarding appellant his attorney's fees, and ruled that appellant take nothing on that issue finding that there was no failure on State Farm's part to tender payment of the just amount owed. The Supreme Court in ***Franco v. Allstate Insurance Co.,*** 505 S.W.2d 789 (Tex. 1974), determined that to be legally entitled to recover under the uninsured motorist provision of an insurance contract, "the insured must be able to show fault on the part of the uninsured

motorist and the extent of the resulting damages…." 505 S.W.2d at 792; *See also* ***State Farm Mutual Automobile Insurance Co. v. Matlock,*** 446 S.W.2d 81 (Tex. Civ. App.--Texarkana 1969, *aff'd in part, rev'd in part,* 462 S.W.2d 277, 278 (Tex. 1970). There must be a determination of the amount the claimant is legally entitled to recover if the claim is unliquidated. This claim was made on unliquidated damages and there was no agreement as to an amount due. Until the jury in the instant case determined liability and the extent of damages due appellant as a result of his injuries, appellee as ultimate insurer, was not obligated to accept the demand as the amount appellant was legally entitled to recover, or the just amount owed the claimant. As a result, there has been no failure on the part of State Farm to tender payment of the just amount owed. Therefore, the trial court acted properly in disregarding the jury's findings on attorney's fees since one of the statutory prerequisites had not been met.

c) Henson v. Southern Farm Bureau Cas. Ins., 17 S.W.3d 652 (Tex. 2000) A unanimous Court held that because a UM/UIM carrier does not breach its contract to pay until tort liability is established, we conclude that prejudgment interest begins running from the date liability of the uninsured/underinsured motorist is established. Therefore the UM/UIM carrier does not owe prejudgment interest on top of the UM/UIM benefits.

> The insured settled with D1 for limits of $20,000. The insured went to trial against D2. The jury found D1 was 100% negligent and awarded $133,842.13 in damages against the settling D1. However, because the insured settled with D1, the Court appropriately entered a take nothing judgment against D2. (e.g. no damages and no pre-judgment interest was awarded).
>
> Within 30 days of the judgment, the UM/UIM tendered its limits to the insured. When the insured refused the tender because it did not include prejudgment interest, the UM/UIM carrier paid the money into the court's registry.
>
> In its answer to the insured's petition which alleged all conditions precedent had occurred, the UM/UIM carrier filed a verified answer denying the insured's right to prejudgment interest. The UM/UIM carrier did not dispute that if the Court had awarded damages and interest against the tortfeasors, then the UM/UIM carrier would be obligated to pay pre-judgment interest to the extent of policy limits. However, in this case, the insured could only recover pre-judgment interest from the UM/UIM carrier if it breached its contract because the insured had not established liability and damages against the tortfeasor.
>
> Despite the ***Henson*** decision, the common practice on UM/UIM claims remained to file the action as claim for breach of contract. As a result, it is not surprising to see that ***Brainard*** was brought up to the Supreme Court as a breach of contract claim.

4. Defenses to Attorney's Fees

a) **Beauty Elite Group, Inc. v. Shami,** 2008 Tex.App. Lexis 1918 (Tex.App.–Houston [14th Dist.] 2008). This is a non-UM/UIM case that references **Brainard** as support for the recovery of attorney's fees but which gives insight on the issue of appealing awards of attorney's fees and which also provides a defense to the recovery of attorney's fees even when otherwise recoverable. Here, Beauty Elite and Shami (collectively "Shami") appeal a judgment in favor of Irwin Palchick on grounds that the trial court erred in (1) denying Shami relief on claims for trademark infringement and unfair competition; and in (2) awarding attorney's fees to Palchick when Palchick pleaded and proved presentment of an amount exceeding the amount actually recovered on his contract claim; and (3) denying Shami recovery of attorney's fees under the Lanham Act. We affirm.

"Where allowed by statute, the allowance of attorney's fees is within the discretion of the trial court and will only be reversed for an abuse of that discretion." **Llanes v. Davila,** 133 S.W.3d 635, 640 (Tex. App.--Corpus Christi 2003, pet. denied) (citing **Ragsdale v. Progressive Voters League,** 801 S.W.2d 880, 881 (Tex. 1990)). Under statute, a party may recover reasonable attorney's fees on a contract claim. Tex. Civ. Prac. & Rem Code Ann. § 38.001(8) (Vernon 1997). To recover attorney's fees, a party must (1) prevail upon a cause of action for which attorney's fees are available; and (2) recover damages. **Green Int'l Inc. v. Solis,** 951 S.W.2d 384, 390 (Tex. 1997).

Additionally, before attorney's fees can be recovered, a party must plead and prove presentment of a contract claim to the opposing party, and the opposing party must fail to tender timely performance. Tex. Civ. Prac. & Rem Code Ann. § 38.002(2),(3) (Vernon 1997); **Brainard,** 216 S.W.3d at 817.

"The term 'present' has been defined to mean simply a demand or request for payment." **Llanes,** 133 S.W.3d at 641. No particular form of presentment is mandated, and this requirement may be satisfied in writing or orally**. Qaddura,** 141 S.W.3d at 892-92; **Harrison v. Gemdrill Int'l, Inc.,** 981 S.W.2d 714, 719 (Tex. App.--Houston [1st Dist.] 1998, pet. denied). The presentment requirement provides an opportunity for payment of the claimed contract amount before attorney's fees have been incurred. **Brainard,** 216 S.W.3d at 818.

A creditor who presents an excessive demand to a debtor is not entitled to attorney's fees for subsequent litigation required to recover the debt. **Findlay v. Cave,** 611 S.W.2d 57, 58 (Tex. 1981). Excessive demand is an affirmative defense that must be pleaded, and the evidence must demonstrate unreasonableness or bad faith. **Kurtz v. Kurtz,** 158 S.W.3d 12, 21 (Tex. App.--Houston [14th Dist.] 2004, pet. denied) (excessive demand is an affirmative defense that is waived if not pleaded). In **Findlay,** the Texas Supreme Court instructed that the prohibition on recovery of attorney's fees following an excessive demand applies only when (1) the claim is for a liquidated debt; and (2) the creditor refused the debtor's tender of the liquidated amount actually due or indicated that such a tender would be refused. **Findlay,** 611 S.W.2d at 58; see also **Hernandez v. Lautensack,** 201 S.W.3d 771, 777 (Tex. App.--Fort Worth 2006, pet. denied) (rule is limited to situations where the creditor refuses a tender

or indicates he will refuse a tender of what is actually owed); **Tuthill v. Sw. Pub. Serv. Co.,** 614 S.W.2d 205, 212 (Tex. App.--Amarillo 1981, writ ref'd n.r.e.) (demand is not excessive unless the creditor wrongfully demands more than the amount due and creditor refuses or indicates he will refuse tender of the amount actually due).An award of an amount less than the demand is not dispositive. See **Findlay,** 611 S.W.2d at 58; **Alford v. Johnston,** 224 S.W.3d 291, 298 (Tex. App.--El Paso 2005, pet. denied) (absent additional showing of unreasonableness or bad faith, award of attorney's fees is not precluded solely because the amount of damages awarded is less than the amount sought); **Oyster Creek Fin. Corp. v. Richwood Invs. II, Inc.,** 176 S.W.3d 307, 318 (Tex. App.--Houston [1st Dist.] 2004, pet. denied) ("The dispositive question in determining whether a demand is excessive is whether the claimant acted unreasonably or in bad faith").

b) **Crounse v. State Farm Mut. Automobile Ins. Co.,** 336 SW3d 717 (Tex.App.—Houston [1st Dist.] 2010). Insured sued for breach of contract, breach of duty of good faith and fair dealing, unfair settlement practices, and sought damages and attorneys fees in connection with insurers failure to pay towing and repair costs. Jury found the insurer "failed to comply with the policy to pay the towing fees" but did not breach its contract or its duty of good faith and fair dealing. The jury awarded $100 in damages, but awarded $0 in attorneys' fees. Insured filed a motion for new trial. In reviewing a challenge to the factual sufficiency of the evidence on a motion for new trial, the Court must consider and weigh all the evidence and should set aside the judgment only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. **Ortiz v. Jones, 917** SW 2d 770, 772 (Tex. 1996); **Arias v. Brookstone, L.P.,** 265 SW3d 459, 468 (Tex.App.—Houston [1st Dist.] 2007, pet denied. The jury is the sole judge of the witnesses' credibility. **Golden Eagle Archery v. Jackson,** 116 SW3d 757, 761 (Tex.2003).

Only a prevailing party may recover attorneys fees under Chapter 38 for breach of contract. To recover attorney fees, the party must prevail on a cause of action for which attorney's fees are recoverable, and recover actual damages. **Green Int'l, Inc. v. Solis,** 951 SW2d 384, 390 (tex. 1997); **State Farm Life Ins. Co. v. Beaston,** 907 SW2d 430, 437 (Tex. 1995) If attorney's fees are proper under 38.001 and the elements are proven, the trial court has no discretion to deny attorney's fees. **Smith v. Patrick W.Y. Tam Trust,** 296 SW3d 545, 547 (Tex.2009); **Bocquet v. Herring,** 972 SW2d 19, 20 (Tex. 1998); **Cale's Clean Scene Carwash, Inc. v. Hubbard,** 76 SW3d 784, 787 (Tex.App.—Houston [14th Dist.] 2002, no pet.)

Here, the insured prevailed on a contract claim. To warrant recovery, attorney's fees must be reasonable. Reasonableness of attorney's fees is a question of fact. **Ragsdale v. Progressive Voters League,** 801 SW2d 880, 881-882 (Tex. 1990); **Great Am. Reserve Ins. Co. v. Britton**, 406 SW2d 901, 907 (Tex. 1966). An award of attorney's fees must be supported by evidence that the fees were both reasonable and necessary. **Steward Title Guar. Co. v. Sterling,** 822 SW2d 1, 10 (Tex. 1991); *modified on other grounds by* **Tony Gullo Motors I, LP v. Chapa,** 212 SW3d 299, 313-314 (Tex. 2006) In a case where attorney's fees are recoverable, an award of no fees ($0) can only be proper if the evidence affirmatively shows that no attorney's services were needed or that such services were of no value. **Midland W. Bldg. L.L.C. v. First Serv Air Conditioning**

Contractors, Inc. 300 SW3d 738, 739 (Tex. 2009).

At trial, counsel testified that his fee of $85232.50 was reasonable and necessary for trial and that an additional $22,500 would be reasonable if appealed to the Texas Supreme Court. State Farm put on evidence that the insured never turned in a claim for towing and never submitted a towing bill, and that it would have paid it if he would have done so. The jury's award of $0 for attorney's fees was not against the great weight and preponderance of the evidence.

XI. BRAINARD, NORRIS & NICKERSON TRILOGY OF CASES

A. **Brainard v. Trinity Universal Insurance Company,** 216 S.W.3d 809 (Tex. 2006). Mr. Brainard was killed when his vehicle was involved in a head-on collision with a rig owned by Premier Well Service, Inc. His widow and their children brought a wrongful death action against Premier and sought UIM benefits from Trinity Universal Insurance Company under a policy issued to the family business, Brainard Cattle Company. Trinity paid Brainard $5,000 under the policy's PIP provision but requested further information supporting the UIM claim.

Brainard and Premier settled Brainard's claims for $1,000,000, Premier's policy limit, and Premier was subsequently dismissed from the suit. Because Brainard contended that the losses related to the death of Edward Brainard greatly exceeded $1,005,000, the Brainards made an Underinsured Motorist Claim with Trinity. Brainard alleges she submitted the information to Trinity so that it could evaluate the claim, and that the Brainards performed all conditions precedent to receiving the benefits, but Trinity refused to pay the claim.

When Brainard demanded that Trinity also pay the policy limits of $1,000,000 under the policy, Trinity refused to pay and offered only $50,000. Needless to say, the family felt that the loss was much greater and filed a lawsuit against Trinity alleging breach of contract, breach of the common law duty of good faith, violations of the **Deceptive Trade Practices-Consumer Protection Act,** and violations of **Insurance Code articles 21.21** and **21.55.**

The trial court "severed" all of Brainard's extra-contractual claims, and the parties proceeded to trial on the only remaining claim, a claim for breach of contract for UIM benefits.

At trial, the jury found that Premier's negligence caused the accident and awarded Brainard $1,010,000 for pecuniary loss, funeral expenses, loss of companionship and society, and mental anguish. The jury also awarded $100,000 for attorney's fees.

The court applied a $1,005,000 credit for Brainard's settlement and PIP benefits, and signed a judgment against Trinity awarding Brainard $5,000 in damages plus $100,000 in attorney's fees. On appeal, Trinity challenged the attorney's fees award. Brainard, alleged the trial court erred in refusing to award prejudgment interest on the $1,010,000 in actual damages.

The Texas Supreme Court pointed out that attorney's fees are recoverable from an opposing party only as authorized by statute or by contract between the parties. **Travelers Indem. Co. v. Mayfield,** 923 S.W.2d 590, 593 (Tex.1996).

Brainard contended that her suit is like any other lawsuit alleging a breach of contract suit, and therefore, presentment occurred on February 15, 2000, the day she made a claim for UIM benefits. Brainard cited three courts of appeals decisions that agreed with her position. **Allstate Ins. Co. v. Lincoln,** 976 S.W.2d 873, 876 (Tex.App.-Waco 1998, no pet.); **Whitehead v. State**

Farm Mut. Auto. Ins. Co., 952 S.W.2d 79, 88-89 (Tex.App.-Texarkana 1997), rev'd on other grounds, 988 S.W.2d 744 (Tex.1998); **Novosad v. Mid-Century Ins.Co.,** 881 S.W.2d 546, 552 (Tex.App.-San Antonio 1994, no writ).

Trinity took the position that the court should treat an insurance contract different than Texas law treats all other contracts. Trinity argued the insurer's duty to pay does not arise until the underinsured motorist's liability, and the insured's damages, are legally determined. Five courts of appeals, including the court of appeals in this case, agree. See **DeLaGarza v. State Farm Mut. Auto. Ins. Co.,**175 S.W.3d 29, 34 (Tex.App.-Dallas 2005, pet. denied); **Menix v. Allstate Indem. Co.,** 83 S.W.3d 877, 882 (Tex.App.-Eastland 2002, pet. denied); **Sprague v. State Farm Mut. Auto. Ins. Co.,** 880 SW.2d 415, 416 (Tex.App.-Houston [14th Dist.] 1993, writ denied); **Sikes v. Zuloaga,** 830 S.W.2d 752, 753 (Tex.App.-Austin 1992, no writ).

The Court determined that 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. Thus, under Chapter 38, a claim for UIM benefits is not presented until the trial court signs a judgment establishing the negligence and underinsured status of the other motorist. Of course, the insured is not required to obtain a judgment against the tortfeasor. **State Farm Mut. Auto. Ins. Co. v. Matlock,** 462 SW2d 277, 278 (Tex. 1970). The insured may settle with the tortfeasor, as Brainard did in this case, and then litigate the UIM coverage with the insurer.

B. State Farm Mut. Ins. Co. v. Norris, 216 S.W.3d 819 (Tex.2006). The Court in **Norris** addressed another underinsured motorist claim predicated upon a claim for breach of contract, and added that at least in the context of a claim for breach of contract, "Norris could not seek attorney's fees until, at the earliest, thirty days after the trial court rendered judgment—assuming that State Farm refused to pay the just amount due under the UIM contract."

C. **State Farm Mut. Ins. Co. v. Nickerson,** 216 S.W.3d 823 (Tex. 2006). In **Brainard v. Trinity Universal Insurance Company,** also issued today, we hold that an insured may recover attorney's fees under Chapter 38 only if the insurer does not tender the UIM benefits within 30 days after the trial court signs the judgment establishing liability and underinsured status of the other motorist. In this case, we hold State Farm had no contractual duty to pay benefits until the trial court rendered judgment for Nickerson. Thus, there was no "just amount" for State Farm to owe, and Nickerson had no claim to present before the trial court rendered judgment.

XII. MAKING A CLAIM

D. NOTICE OF CLAIM

1. FORM OF THE NOTICE

a) Only a "written notification provided by a claimant to an insurer that reasonably apprises the insurer of the facts relating to the claim" is required under the general prompt pay statute. §542.051.

b) The PIP statute only requires "satisfactory proof of a claim." §1952.156.

(1) *Loss of employment opportunity may qualify.*

(a) **Slocum v. United Pacific Ins. Co.,** 577 S.W.2d 805 (Tex. App. – Houston [14th dist.] 1979, no writ) Subsequent opinion at 615 SW2d 807 (Tex.Civ.App.– Houston [1st Dist.] 1981). The insured brought a PIP claim because 2 days before he was to report to work at a new job straight out of college he was in an automobile accident the prevented him from reporting to his job. The Court held that personal injury protection benefits outlined in article 5.06-3 is a type of no-fault insurance designed to provide benefits to the insured and family for injuries sustained in automobile accidents. Neither the statute nor the policy definition of income producer can be so strictly construed as to deny recovery of lost income by one who, like appellant, had accepted a firm offer of employment, was to report for work at a definite time and at a set rate of compensation, but was prevented by injuries sustained in automobile accident from enjoying the fruits of his labor. It was error for the trial court to hold, as a matter of law, that appellant, because he had not yet reported for work, was not in an "occupational status" at the time of the accident. In light of our holding that at least a fact question was presented as to whether appellant was a wage earner or income producer as defined in the policy, it is unnecessary to decide whether the policy definition of "wage earner" or "income producer" is in conflict with article 5.06-3. The judgment appealed from is reversed and the cause is remanded. However, on appeal, the jury decided in favor of the insurer.

XIII. BAD FAITH. WHAT IS IT?

A. ***EVOLVING STANDARDS FOR BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING***

a. **Arnold v. National County Mutual Fire Ins.,** 75 S.W.2d 165 (Tex. 1987).

a) No reasonable basis for denial or delay of payment; or

b) Failure to determine if there was a reasonable basis to deny or to delay payment of the claim.

b. **Aranda v. Ins. Co. Of N. America,** 748 S.W.2d 210 (Tex. 1988)

a) In the absence of a reasonable basis to deny or delay payment; and

b) Insurance company knew or should have known there was no reasonable basis to deny or to delay payment of the claim.

c. **Transportation Ins. Co. v. Moriel,** 879 S.W.2d 10 (Tex. 1994).

a) If there is a bona fide dispute, there is no bad faith.

d. **Universal Life Ins. Co. v. Giles,** 950 S.W. 48 (Tex. 1997)

a) Failing to attempt in good faith to effectuate a prompt, fair and equitable settlement of a claim when insurer's liability become "reasonably clear";

b) Essentially this is a negligence standard where the insured must prove the insurance company knew or should have known it needed to pay this covered claim.

e. **Menchaca v. USAA Texas Lloyds Co.,** -- S.W.3d – (Tex. 2017). In evaluating the bad faith claims brought by the insured against USAA, the Supreme Court acknowledges that some of its previous decisions have created uncertainty in the law. As a result, this opinion is designed to put that uncertainty to rest as nearly as possible. The primary issue in ***Menchaca*** is whether the insured can recover policy benefits based on jury findings that the insurer violated the **Texas Insurance Code** and that the violation resulted in the insured's loss of benefits the insurer "*should have paid*" under the policy despite a jury finding that that the insurer did not breach the contract. The Court re-affirmed its holding in ***Vail v. Texas Farm Bureau Mut. Ins. Co.,*** 754 S.W.2d 129, 136 (Tex. 1988) where the Court held that an insurer's "unfair refusal to pay the insured's claim causes damages as a matter of law in at least the amount of the policy benefits wrongfully withheld" even in the absence of a breach of the contract.

As part of its review of Texas law, the Court conducted a review of some basic insurance principles such as: "*An insurance policy is a contract.*" The policy sets forth the respective rights and obligations to which an insurer and its insured have mutually agreed. The **Texas Insurance Code** supplements the parties' contractual rights and obligations by imposing procedural requirements that govern the manner in which insurers review and resolve an insured's claim for policy benefits. The **Code** grants insureds a private action against insurers that engage in certain discriminatory, unfair, deceptive, or bad-faith practices, and it permits insureds to recover "actual damages . . . caused by" those practices, plus court costs, attorney's fees, and treble damages if the insurer "knowingly" commits the prohibited act. "Actual damages" under the **Insurance Code** "are those damages recoverable at common law." 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."

In deciding this opinion, the Court announced 5 Rules that address the relationship between contract claims under an insurance policy and tort claims under the Insurance Code.

1. **GENERAL RULE**: Generally, 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.

   As a general rule, there can be no claim for bad faith [denial of an insured's claim for policy benefits] when an insurer has promptly denied a claim that is in fact not covered. When the issue of coverage is resolved in the insurer's favor, extra-contractual claims do not survive, and there is no liability under [the Insurance Code] if there is no coverage under the policy.

However, in ***Menchaca***, the jury found USAA violated the Code by denying a covered claim without conducting a reasonable investigation. Further, Menchaca argued that the since there was coverage for the claim, the failure to reasonably investigate the claim is an independent claim from any claim for breach of contract.

The Court noted that some acts of bad faith, such as a ***failure to properly investigate a claim*** or ***an unjustified delay*** in processing a claim, do not *necessarily* relate to the insurer's breach of its contractual duties to pay covered claims, and may give rise to different damages. Failure to investigate a claim, in the absence of coverage, does not give rise to a basis for obtaining policy benefits.

While the Court agreed that USAA could have complied with the policy, such compliance does not relieve USAA of liability for the failure to reasonably investigate the claim.

The Court makes clear that the **Code** only allows an insured to recover actual damages "***caused by***" the insurer's statutory violation. If the insurer violates the **Code**, generally, that violation cannot cause damages in the form of policy benefits which the insured has no right to receive under the policy. There can be no liability under the **Insurance Code** if there is no coverage under the policy. "There can be no claim for bad faith when an insurer has promptly denied a claim that is in fact *not covered*." No breach can occur unless coverage exists, and if there is coverage, there is necessarily a breach if the insurer fails to pay the amount covered.

The Court also disagreed with USAA's contention that an insured can never recover policy benefits as damages for a statutory violation. What matters for purposes of causation under the statute is whether the insured was entitled to receive benefits under the policy. While an insured cannot recover policy benefits for a statutory violation unless the jury finds that the insured had a right to the benefits under the policy, the insured does not *also* have to establish that the insurer breach the policy by refusing to pay those benefits. If the jury finds that the policy entitles the insured to receive the benefits and that the insurer's statutory violation caused the insured to not receive those benefits, the insured can recover the benefits as "actual damages . . . caused by" the statutory violation.

"Because an insurer's statutory violation permits an insured to receive only those "actual damages" that are "caused by" the violation, we clarify and affirm the general rule that an insured cannot recover policy benefits as actual damages for an insurer's statutory violation if the insured has not right to those benefits under the policy."

2. **THE ENTITLED-TO-BENEFITS RULE**: As recognized in ***Vail***, an insured who establishes a right to receive benefits under an insurance policy can recover those benefits as "*actual damages*" under the statute if the insurer's statutory violation causes the loss of the benefits. The Court rejected USAA's contention that the insured could not recover policy benefits as damages for statutory violations because "the amount due under the policy solely represents damages for breach of contract and does not constitute actual damages in relation to a claim of unfair claims settlement practices." Further, the Court held that "an insurer's unfair refusal to pay the insured's claim causes damages as a matter of law in at least the amount of the policy benefits wrongfully withheld." When an insured suffers a loss that is covered under the policy, that loss was "transformed into a legal *damage*" when the insurer "wrongfully denied the claim." That "damage is, at a minimum, the amount of policy proceeds wrongfully withheld by the insurer." If an insurer's "wrongful" denial of a "valid" claim for benefits results from or constitutes a statutory violation, the resulting damages will

necessarily include "at least the amount of the policy benefits wrongfully withheld."

3. **THE BENEFITS-LOST RULE**: "An insured can recover benefits as actual damages under the Insurance Code even if the insured has no right to those benefits under the policy, *if the insurer's conduct caused the insured to lose that contractual right*."

   In the context of an insurer's misrepresentation of a policy's coverage by wrongfully advising the insured that the policy contains coverage which in fact it does not contain, an insured may recover such benefits if the insured is "adversely affected" or injured by reliance on the misrepresentation. This principal has been recognized in the context that the insurer waives its right to deny coverage, is estopped from doing so, or commits a violation that causes the insured to lose a contractual right to benefits that the insured otherwise would have had. As the Court notes, a misrepresentation claim is independent, and may exist in the absence of coverage.

4. **THE INDEPENDENT-INJURY RULE**: An insurer's extra-contractual liability is "distinct" from its liability for benefits under the insurance policy. There are 2 aspects to this Rule.

   a. **If an insurer's statutory violation causes an injury independent of the insured's right to recover policy benefits, the insured may recover damages for that injury even if the policy does not entitle the insured to receive benefits**. 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." This aspect of the independent-injury rule applies only if the damages are truly independent of the insured's right to receive policy benefits. It does not apply if the insured's statutory or extra-contractual claims "are predicated on [the loss] being covered by the insurance policy."

   b. **An insurer's statutory violation does not permit the insured to recover any damages beyond policy benefits unless the violation causes an injury that is independent from the loss of the benefits**. Thus, an insured who prevails on a statutory claim cannot recover punitive damages for bad-faith conduct in the absence of independent actual damages arising from that conduct. Thus, while the Court re-affirms its holding in ***Republic Ins. Co. v. Stoker***, 903 S.W.2d 338, 341 (Tex. 1995), where the Court remains open to "the possibility that in deny the claim, the insurer may commit some act, so extreme, that would cause injury independent of the policy claim", the Court acknowledges that such independent injury would be "rare" and no Texas Court has found an instance where the insured was entitled to recover for an independent injury as a result of an insurer's extreme act. As a result, the Court declined to speculate what would constitute a recoverable independent injury.

5. **THE NO-RECOVERY RULE**:An insured cannot recover any damages based on an insurer's statutory violation unless the insured establishes:

   a. a right to receive benefits under the policy; or

   b. an injury independent of a right to benefits.

f. **Accardo v. America First Lloyds Insurance Company**, 2013 WL 4829252 (S.D.Tex. 2013) The Court rejected the insurer's motions for summary judgment seeking a ruling that **Brainard** precluded a cause of action for common law bad faith noting that the court rejected this argument in **Hamburger v. State Farm Mut. Auto. Ins. Co.**, 361 F.3d 875, 880 (5th Cir.2004). The Court noted there are no Texas cases which have squarely held that liability can never be reasonably clear before there is a court determination of proximately caused damages, and that there may be cases where a carrier's liability to pay UM/UIM benefits is reasonably clear despite the fact that there has been no judicial determination of liability that the carrier may have breached its duties of good faith and fair dealing. The court opines that when a reasonable investigation reveals overwhelming evidence of the UM/UIM carrier's fault, the judicial determination that triggers the insurer's obligation to pay is no more than a mere formality. The **Accardo** Court relied heavily on the Fifth Circuit's opinion in **Hamburger v. State Farm Mut. Auto. Ins. Co.**, 361 F.3d 875, 880 (5th Cir.2004) and rejected the holding in **Weir v. Twin City**. In rejecting the carrier's position, the Accardo court pointed out that, under Texas law, "[w]hen 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 mere formality." To read the statements as broadly as America First argues would effectively eliminate the cause of action, with no indication that such a result was intended. "[W]ithout [a bad faith] cause of action insurers can arbitrarily deny coverage and delay payment of a claim with no more penalty than interest on the amount owed."). Neither the Fifth Circuit nor Texas courts have established a safe harbor from extra-contractual claims in this context.

The Court held the record established as a matter of law that the carrier was entitled to summary judgment on allegations of common law bad faith. The carrier argued that it acted in good faith because (1) it had a reasonable basis to question whether Carl Accardo's own negligence may have contributed to the cause of the collision; (2) whether back surgery for Carl Accardo was needed, and (3) the amounts of the damages for each Plaintiff, particularly for pain and suffering are highly subjective; and (4) considering the offers and demands, it did not breach its duties to the insureds; (5) the carrier had expert testimony challenging the reasonableness and necessity of the care.

B. SCOPE OF THE DUTY OF GOOD FAITH AND FAIR DEALING

a. When is Liability Reasonably Clear

a) In **Hamburger v. State Farm Mut. Auto. Ins. Co.**, 361 F.3d 875, 880 (5th Cir.2004), Insurer argued that "coverage of [the plaintiff's] UIM claim was not reasonably clear until the jury determined the extent of [the plaintiff's] damages caused by the [underinsured] driver," and therefore no bad faith liability could attach for the insurer's failure to settle the claim prior to the jury's determination of damages caused by the accident." The Fifth Circuit rejected the insurer's argument. The court observed that "There are no Texas cases which have squarely held that liability can never be reasonably clear before there is a court determination of proximately caused damages."

b. During Litigation

a) **Mid-Century Insurance Company of Texas v. Boyte,** 49 S.W.3d 408, 413 (Tex.App.–Fort Worth 2001). See also Stewart Title Guarantee Co. vs. Aiello,

941 S.W.2d 68, 70-71 (Tex. 1997). These cases hold that the duty of good faith and fair dealing continues throughout litigation.

c. **Post- Judgment**

a) **Stewart Title Guaranty Co. v. Aiello,** 941 SW2d 68 (Tex. 1997) Held: an insurer no longer owes an insured a duty of good faith and fair dealing after the entry of an agreed judgment because the Plaintiff's status changed from that of an insured to that of a judgment creditor. The Plaintiff may still have a valid contract claim but no DTPA or Insurance Code claims.

b) **Mid Century Ins. Co. of Texas v. Boyte,** 49 S.W.2d 408 (Tex. App.- - Fort Worth 2001) rev'd 80 S.W.3D 546 (Tex. 2002). The duty of good faith extended to conduct occurring after initiation of coverage litigation between the carrier and the insured. The carrier may be liable for a breach of the duty of good faith and fair dealing based on its decision to appeal the contract case brought against it by the insured. The duty of good faith extended "beyond the judgment." Here Mid Century appealed a decision excluding evidence Mid Century previously considered irrelevant.

The Texas Supreme Court reversed holding no duty of good faith after the judgment is entered. The only issue presented was whether or not there was a duty of good faith and fair dealing post judgment. The issues of bad faith prior to and during trial were not included and court granted Mid Century a directed verdict on those issues.

C. ***EXAMPLES OF BAD FAITH CONDUCT***

a. **Cancellation of a Policy Without a Reasonable Basis**

a) The Supreme Court extended the bad faith cause of action to situations in which an insurance company cancels a policy without a reasonable basis in **Union Bankers Insurance Co. v. Shelton,** 889 S.W.2d 278, 283 (Tex. 1994) "A cause of action is stated by alleging that the insurer had no reasonable basis for the cancellation of the policy and that the insurer knew or should have known of that fact."

b. **Unreasonable or Unreliable Expert Opinions**

a) **State Farm Lloyds v. Nicolau,** 951 SW2d 444 (Tex. 1997). This case involves the necessary elements to prove Insurance Code tort damages, "bad faith" damages, DTPA damages, and punitive damages. An insurer's reliance upon an expert's report standing alone, will not necessarily shield the carrier if there is evidence that the report was not objectively prepared or the insurer's reliance upon the report was unreasonable. Because there was no evidence of malice. Punitive damages can be awarded for bad faith only when an insurer was actually aware that its actions involved an extreme risk-that is, a high probability of serious harm, such as death grievous physical injury, or financial ruin - to its insured and was nevertheless consciously indifferent to its insured's rights, safety or welfare. Further there was no evidence of unconscionable conduct by State Farm. This case was decided the same day as **The Universe Life Ins. Co. v.**

Giles and cites it for authority.

c. **Failure to Settle A Claim When Liability Is Reasonably Clear**

a) **The Universe Life Ins. Co. v. Giles,** 950 SW2d 48 (Tex. 1997). An insurer breaches its duty when the insurer fails to settle a claim if the insurer knew or should have known that it was reasonably clear that the claim was covered. However, whether an insurer acts in "bad faith" because it denied or delayed payment of a claim after its liability became reasonably clear is a question for the fact-finder. Punitive damages can be awarded for bad faith only when an insurer was actually aware that its actions involved an extreme risk-that is, a high probability of serious harm, such as death grievous physical injury, or financial ruin - to its insured and was nevertheless consciously indifferent to its insured's rights, safety or welfare.

d. **Unreasonable Delay and Knowingly Failing to Attempt to Effect a Prompt, Fair and Equitable Settlement of Claim When Liability is Reasonably Clear**

a) **Provident American Insurance Co. v. Castaneda,** 914 SW2d 273 (Tex.App.--El Paso, 1996) rev'd on other grounds 988 SW2d 189 (Tex. 1998), overruled **Crowne Life Ins. Co. v. Casteel,** 22 SW3d 378 (Tex. 2000). An insurer's failure to act over an 8 month period from the date of loss supports a finding that the company knowingly failed to attempt in good faith to effect a prompt, fair and equitable settlement of the claim after liability became reasonably clear.

e. **Failing to Pursue A Thorough, Systematic, Objective, Fair and Honest Investigation of A Claim**

a) **State Farm Fire & Casualty Co. v. Simmons,** 963 S.W.2D 42 (Tex. 1998). An insurer cannot avoid bad faith liability by refusing to investigate a claim. The standard in bad faith cases is whether the carrier reasonably investigated the claim. The Court held that the proper standard is whether the insurer fulfilled its duty to its insured by pursuing a thorough, systematic, objective, fair and honest investigation of the claim prior to denying such a claim.

The Supreme Court upheld the Court of Appeals decision to affirm the jury's finding of bad faith because State Farm failed to investigate the possibility that other potential suspects might have started the fire when the Plaintiffs identified 5 such potential suspects and the fire marshal testified that revenge is a leading motivation in house fires. Further, State Farm's explanation for its failure to investigate other potential causes of the fire was contradictory. At one point the adjuster said he could not locate the suspects, at another time, the adjuster said it was not important to him. Moreover, State Farm admitted that 6 of its 8 factors that indicate potential arson were not met. The testimony on the other 2 points was potentially in favor of the insureds as well. In dissent, Justice Spector appropriately states that the opinion would not impose bad faith where the evidence overlooked by the insurer or reviewed, even in a biased manner, if the evidence is irrelevant to its decisions.

Nevertheless, there was insufficient evidence to support a punitive damages

award against State Farm. Further, since Plaintiffs elected punitive damages over DTPA damages, the appeal issues re DTPA claims is moot. This case is important because although the justices say there is no change in the standard for bad faith, the new standard, as worded, is almost a negligence standard, and is definitely more Plaintiff oriented.

f. **Extreme Conduct – Intentional Infliction of Emotional Distress**

a) **Aleman v. Zenith Ins. Co.,** 343 S.W.3d 817 (Tex.App.—El Paso 2011, no pet.h). Texas courts do not "exclude the possibility that in denying the claim, an insurer may commit some act, so extreme, that it would cause injury independent of the policy claim." However, generally, when there is no coverage and the bad faith claim is limited "to an assertion that liability was reasonably clear under the policy", the bad faith claim fails as a matter of law.

D. ***EXAMPLES OF CONDUCT THAT ARE NOT BAD FAITH***

a. **An Insurer May Settle With One Party**

a) **Lane v. State Farm Mutual Automobile Ins. Co.,** 992 S.W.2d 545 (Tex.App.--Texarkana 1999, pet. denied) As a matter of first impression, the court found that an insurer could settle with the insured's father without reaching a settlement with the mother as the other claimant and that the insurer properly paid benefits equally between the parents and was not acting in bad faith. Here, the son of these divorced parents was killed. The father accepted a settlement of ½ of the policy limits with the other half going to the mother of the deceased. The father requested that his ½ be given to a third party who raised the boy and stated that he would assign his interest to them. State Farm agreed and made the father's settlement check out to the father and to the third party.

b. **If There Is No Coverage, There is No Bad Faith**

a) **Republic Ins. Co. v. Stoker,** 903 S.W.2d 339 (Tex. 1995) An insured rear-ended another vehicle after an unidentified truck that did not come in contact with the insured's car or the other car dropped a load of furniture which caused a chain reaction collision. The insureds did not have collision coverage so they filed a claim with their comprehensive coverage carrier for UM/UIM benefits. The insurance company denied the claim based on the insured's negligence, not the lack of contact. The insured sued for bad faith. Held: An insurer has a duty to deal fairly and in good faith with its insured in the processing and payment of claims. To establish a bad faith claim a Plaintiff must show: 1. an absence of a reasonable basis for denying benefits under the policy; and 2. knowledge on the part of the carrier that there was not a reasonable basis for denying coverage. Whether there is a reasonable basis for denial must be judged by the facts before the insurer at the time the claim was denied. However, a carrier does not breach its duty of good faith and fair dealing if it denies a claim for an invalid reason when there was, at the time, a valid reason for denial. Here the insured were never covered under the terms of the policy.

b) **Possible Exception:**

(1) **Aleman v. Zenith Ins. Co.**, 343 S.W.3d 817 (Tex.App.—El Paso 2011, no pet.h). See above: Extreme Conduct.

c. **The Absence of Bad Faith Precludes Liability for Extra Contractual Damages.**

a) **Commonwealth County Mutual Insurance Company v. Moctezuma,** 900 S.W.2d 798 (Tex.App.--San Antonio, 1995) Plaintiff sued the tortfeasor's insurance company after entering into an agreed judgment and taking an assignment of rights from the tortfeasor. The failure to find bad faith on the part of the insurer precluded insurer's liability for extra-contractual damages, but the evidence did support an award of policy limit damages to cover for the Plaintiff's damages claimed in the agreed judgment.

d. **The Insurer's Failure to Contact the Potential Insured To Question The Validity of Statements In the Application for Insurance is Not Evidence of Bad Faith.**

a) **Columbia Universal Life Ins. Co. v. Miles,** 923 SW2d 803 (Tex.App.--El Paso 1996, writ denied). An insurer's failure to contact the applicant prior to asserting its right to question the validity of statements made on the application does not constitute evidence of bad faith. Evidence showing that the insured signed the application knowing the application did not contain complete answers, and knowing it contained false representations about prior medical treatment and that another insurance company had refused coverage because of the pre-existing conditions constitutes a reasonable basis for its cancellation.

e. **There is No Duty of Good Faith In Settling Third Party Claims**

a) **Maryland Ins. Co. v. Head Industrial Coatings & Services Inc.,** 938 SW2d 27 (Tex. 1996). See lower court opinion at 906 S.W.2d 218. The Court held that an insurer does not owe its insured a duty of good faith and fair dealing in its attempts to settle the claims of a third party. The only duty that Texas recognizes is the duty stated in **Stowers Furniture Co. v. American Indem. Co.** An additional duty is unnecessary and inappropriate. The insured can sue for breach of contract damages equal to the policy limits, the defense costs, attorney fees, and interest. Those damages are not trebled under **Article 21.55 of the Insurance Code.**

f. **Third Party Claimants Have No Standing to Assert Extra-Contractual Claims.**

a) **Rumley v. Allstate Indemnity Co.,** 924 S.W.2d 448 (Tex.Civ.App.--Beaumont, 1996) Third party claimants have no standing to assert extra-contractual and statutory claims against a carrier for the denial and delay in the payment of their claims even if the third party is the spouse of the first party and is making a claim under her policy of insurance. Where a husband and wife, who are insured under the same policy, are involved in a one-car accident and the wife asserts a liability claim based on the husband's negligent driving, the wife is a third party claimant. The wife assumed the posture of a third party claimant.

g. **A Good Faith Misinterpretation of the Law Is Not Bad Faith.**

a) **United States Fire Ins. Co. v. Williams,** 955 S.W.2d 267 (Tex. 1997). This case addresses whether a worker's comp carrier breached its duty of good faith and fair dealing when it denied a surviving spouses claim for death benefits by misinterpreting a Worker's Comp. Rule. The court says an insurer cannot be liable for bad faith simply because it misinterprets a rule. While the carrier may have been wrong, its decision was not groundless.

h. **Delaying Payment Until A Judgment Establishes Legal Liability to Pay A Claim Is Not Bad Faith.**

a) **Wellisch v. United Servs. Auto. Ass'n,** 75 S.W.3d 53 (Tex.App. – San Antonio, 2002, pet. denied). The parents' 15-year-old daughter died shortly after she was involved in a single-vehicle auto accident in which she was a passenger. The vehicle was insured. The parents settled with the driver's estate. They then sought recovery of insurance policy limits under their own UM/UIM coverage.

The insurance company involved was the same one that had paid benefits on behalf of the driver's estate. It denied the parents' claim. The parents sued and received a verdict exceeding the amount they previously recovered from the driver's estate and the uninsured motorist limits combined. On the same day judgment was entered, the insurance company paid to the parents the limit available under their underinsured motorist policy. The parents made extra-contractual claims against the insurance company for the alleged breach of the duty of good faith and fair dealing, statutory violations, and mental anguish. After the claims were dismissed, the appellate court found no improper payment delay as the insurance company only waited to pay until the parents established they had a right to the money. Accordingly, the parents also were not entitled to mental anguish damages.

An insurer is not obligated to pay underinsured (UIM) benefits until the insured becomes legally entitled to those benefits. That situation will generally require a settlement with the tortfeasor or a judicial determination following trial on the issue of the tortfeasor's liability. Thus, an insurer has the right to withhold payment of UIM benefits until the insured's legal entitlement is established.

To recover damages under either the common law or the Insurance Code and DTPA, the violations must be a "producing cause" of the insured's damages. *See* **Castaneda,** 988 S.W.2d 189, 198 (manner in which claim is investigated must be proximate cause of damages); *see also* **MacIntire v. Armed Forces Benefit Ass'n,** 27 S.W.3d 85, 92 (Tex. App.--San Antonio 2000, no pet.) (conduct prohibited by Insurance Code actionable only if plaintiff's actual damages result from that conduct); Izaguirre, 749 S.W.2d at 55 (a bad faith recovery is for damages arising from the bad faith act; for additional costs, hardship, or losses due to nonpayment of amounts owed); **TEX. INS. CODE ANN. art. 21.21 § 16(a)** (Vernon Supp. 2001); **TEX. BUS. & COM. CODE ANN. § 17.50(a)** (Vernon 1987). The Wellisches' testimony raises the possibility that their mental anguish stemmed from the denial of their claim, but not from USAA's failure to properly investigate the claim. *See* **Castaneda,** 988 S.W.2d at 199 (holding that any loss of credit reputation resulted from denial of benefits, not from any failure

to communicate with insured or properly investigate her claim); **MacIntire,** 27 S.W.3d at 92 (plaintiff did not produce evidence of damages beyond denial of benefits). Therefore, the Wellisches did not raise a fact issue sufficient to defeat USAA's entitlement to summary judgment on their mental anguish claim.

b) **Accardo v. America First Lloyds Insurance Company**, 2013 WL 4829252 (S.D.Tex. 2013). However, There may be cases where an carrier's liability to pay UM/UIM benefits is reasonably clear despite the fact that there has been no judicial determination of liability that the carrier may have breached its duties of good faith and fair dealing. The court opines that when a reasonable investigation reveals overwhelming evidence of the UM/UIM carrier's fault, the judicial determination that triggers the insurer's obligation to pay is no more than a mere formality.

i. **Failure to Disclose Information Regarding Claims Handling Practices When Selling Insurance (in the absence of actual economic damages tied to the practice).**

a) In **Juan M. Espinosa v. Allstate Ins. Co.,** No. 13-12-00509-CV (Tex. App.—Corpus Christi Feb. 14, 2013) (mem. op.), Without addressing the merits of the petition, the Court granted Allstate's Motion for Summary Judgment challenging a claim by the insured that Allstate was acting in bad faith because Allstate had a business practice of treating its insureds less favorably if they retained legal counsel, but paying less on average to policyholders who did not retain attorneys. The insured alleged that, if he had known about this practice, it would have caused him not to purchase his Allstate policies. The court of appeals quoted the plaintiff's petition as claiming that Allstate's claims handling put the plaintiff "in a 'damned if you do and damned if you don't' position, with respect to employing legal counsel in connection with obtaining policy benefits." The plaintiff sought restitution of his premiums and exemplary damages.

The Court granted summary judgment because it found that plaintiff failed to demonstrate any economic loss based on the alleged fraud. The plaintiff had received the benefit of coverage, and did not show that he had suffered "a distinct tortuous injury with actual damages." This opinion leaves open the possibility of a claim if it could be shown that the practice caused actual harm to the insured.

E. UNRESOLVED ISSUES OF BAD FAITH CONDUCT

a. Assignments of Rights That Do Not Violate The Holdings in Gandy.

a) **State Farm Fire & Casualty Co. v. Gandy,** 925 SW2d 696 (1996) Plaintiff sued insurer for alleged failure to provide a defense in a sexual abuse case. The court also addresses "covenants not to execute" and "Agreed Judgments" which are a "sham" and "perpetuate a fraud and untruth." The Supreme Court held that a defendant's assignment of his claims against his insurer to a plaintiff is invalid if (1) it is made prior to an adjudication of plaintiff's claim against defendant in a fully adversarial trial, (2) defendant's insurer has tendered a defense, and (3) either (a) defendant's insurer has accepted coverage, or (b) defendant's insurer has made a good faith effort to adjudicate coverage issues prior to the adjudication of plaintiff's claims. However, the court refused to address whether the assignment would be invalid if one or more of these elements is lacking.

XV. DAMAGES RECOVERABLE ON BAD FAITH CLAIMS

A. ACTUAL DAMAGES UP TO THE POLICY LIMITS:

a. Damages are normally measured by the terms of the policy itself. **Standard Fire Insurance Co. Frairman,** 588 SW2d 681 (Tex.App.Houston – [14th Dist.] 1979, writ ref'd n.r.e.)

b. Actual, Incidental and consequential damages beyond the contract can be recovered if they were the natural, probable and foreseeable consequence of the defendant's conduct. **Mead v. Johnson Group, Inc., 615 SW2d 685 (Tex. 1981).**

c. Loss of credit and Loss of Business damages are recoverable. **Assicurazioni Generali S.P.A. v Milsap,** 760 SW2d 314 (Tex.App.–Texarkana 1988, writ denied).

d. **In re Deepwater Horizon**, 470 S.W.3d 452 (Tex. 2015) Texas Supreme Court *previously* accepted following certified question from the United States Court of Appeals for the Fifth Circuit (question certified on November 19, 2015, USCA5 case no. 14-31321): "Whether, to maintain a cause of action under Chapter 541 of the Texas Insurance Code against an insurer that wrongfully withheld policy benefits, an insured must allege and prove an injury independent from the denied policy benefits."

e. Mental Anguish

a) Mental Anguish caused by the insurer's breach of the duty of good faith and fair dealing is recoverable. **Arnold v. National County Mutual Insurance Co.,** 725 SW2d 165, 168 (Tex. 1987).

b) **Standards of Proof for Mental Anguish Claims:**

(1) **Parkway v. Woodruff,** 901 S.W.2d 434 (Tex. 1995). Historically, the recovery for mental anguish was permitted when the mental suffering was: (1) accompanied by a physical injury resulting from a physical impact, or (2) produced by a particularly upsetting or disturbing event. At the turn of the century, we allowed recovery for mental anguish unaccompanied by physical impact injury, provided the mental anguish had a physical manifestation. See **Hill, 13 S.W. at 59; Gulf, C. & S.F. Ry. Co. v. Hayter,** 54 S.W. 944, 945 (1900). We eased the physical impact rule even further when we adopted the bystander rule from **Dillon v. Legg in Freeman v. City of Pasadena,** 744 S.W.2d 923, 923-24 (Tex.1988). The physical manifestation requirement was first excused under exceptional circumstances, and then abandoned completely in 1987. See **St. Elizabeth Hosp. v. Garrard,** 730 S.W.2d 649, 654 (Tex.1987), overruled on other grounds, **Boyles v. Kerr,** 855 S.W.2d 593 (Tex.1993). The term "mental anguish" implies a relatively high degree of mental pain and distress. It is more than mere disappointment, anger, resentment or embarrassment, although it may include all of these. It includes a mental sensation of pain resulting from such painful emotions as grief, severe disappointment, indignation, wounded pride, shame, despair and/or public humiliation. When claimants fail to present direct evidence of the nature, duration, or severity of their anguish, we apply traditional "no evidence"

standards to determine whether the record reveals any evidence of "a high degree of mental pain and distress" that is "more than mere worry, anxiety, vexation, embarrassment, or anger" to support any award of damages. These statements show that the Woodruffs felt anger, frustration, or vexation, but they do not support the conclusion that these emotions rose to a compensable level. For the most part, the quoted testimony does nothing but cite the existence of "mere emotions": "I was hot," "It was just upsetting," and "I was just upset." It does not support the conclusion that the Woodruffs suffered compensable mental anguish. Not only is the record devoid of direct evidence of the nature, duration, or severity of mental anguish, there is also no circumstantial evidence other than the fact of the flooding itself to support any award of mental anguish.

(2) Tranum v. Broadway, 283 SW3d 403 (Tex.App.–Waco 2008, pet. denied). To recover mental anguish damages, a plaintiff must produce: (1) "direct evidence of the nature, duration or severity of [plaintiffs'] anguish, establishing a substantial disruption in the plaintiffs' daily routine;" or (2) other evidence of "a high degree of mental pain and distress that is more than mere worry, anxiety, vexation, embarrassment or anger." **Parkway Co. v. Woodruff,** 901 S.W.2d 434, 444 (Tex. 1995). "Not only must there be evidence of the existence of compensable mental anguish, there must also be some evidence to just the amount awarded. **Saenz v. Fid. & Guar. Ins. Underwriters,** 925 S.W.2d 607, 614 (Tex. 1996). The jury "cannot simply pick a number and put it in the blank." **Id.** "There must be evidence that the amount found is fair and reasonable compensation." **Id.**

Here the Plaintiff testified he suffered "mental strain," "worried about it every day" was subjected to a "grand jury investigation," received harassing calls from creditors, was "scared to death" to testify before the grand jury but did so to "protect his name" He had been divorced 4 times and blames the Defendant for 2 of the divorces. He became withdrawn and distant and tries to cope and "sustain a life to support a family and pay bills, just the day-to-day pressures." He did not see a psychiatrist or psychologist, but spoke to his family doctor. He was offered but refused anti-depressants.

The Plaintiff relied on **Houston Livestock Show & Rodeo, Inc. v. Hamrick,** 125 SW3d 555 (Tex.App. – Austin 2003, no pet.) and **Valley Nissan, Inc. v. Davila,** 133 SW3d 702 (Tex.App.–Corpus Christi 2003, no pet.) and argued the evidence was sufficient to support an award of mental anguish saying "I was disturbed. It changed our lifestyle. It caused friction, anger, frustration, vexation. The Plaintiff may have proved these emotions, but failed to prove that it involved more than these emotions.

In **Plunket,** the Court found that there was testimony that the Plaintiff was "unable to sleep," "he suffered from headaches, diarrhea, vomiting, and depression," "the strain had affected his work," and "he had not been able to build any more houses since this incident" This evidence was sufficient to support a finding that the Plaintiff suffered a high degree of

mental pain and distress which caused a serious disruption in his daily routine over an extended period to time sufficient to establish the nature and duration of a compensable injury. **Plunkett** 27 SW3d 617.

(3) In **Hamrick,**125 SW3d 564-565, 3 livestock show participants and their parents provided testimony establishing the mental anguish they suffered as a result of being disqualified by the Livestock show. Each Plaintiff testified as to their physical and emotional symptoms which the Austin Court found was legally and factually sufficient evidence of compensable mental anguish. Id at 580.

B. **PUNITIVE DAMAGES:**

a. **Transportation Insurance. Co. v. Moriel,** 870 SW2d 10, 17 (Tex. 1994). A "bad faith" case can potentially result in three types of damages:

a) Benefit of the bargain damages for breach of contract;

b) Compensatory damages for the tort of bad faith; and

c) Punitive damages for intentional, malicious, fraudulent or grossly negligent conduct.

C. ***STANDARDS OF PROOF: PRODUCING CAUSE***

a. **Wellisch v. United Servs. Auto. Ass'n,** 75 S.W.3d 53 (Tex.App. – San Antonio, 2002, pet. denied). To recover damages under either the common law or the Insurance Code and DTPA, the violations must be a "producing cause" of the insured's damages. See **Castaneda,** 988 S.W.2d 189, 198 (manner in which claim is investigated must be proximate cause of damages); see also **MacIntire v. Armed Forces Benefit Ass'n,** 27 S.W.3d 85, 92 (Tex. App.--San Antonio 2000, no pet.) (conduct prohibited by Insurance Code actionable only if plaintiff's actual damages result from that conduct); **Izaguirre,** 749 S.W.2d at 55 (a bad faith recovery is for damages arising from the bad faith act; for additional costs, hardship, or losses due to nonpayment of amounts owed); **TEX. INS. CODE ANN. art. 21.21 § 16(a) (Vernon Supp. 2001); TEX. BUS. & COM. CODE ANN. § 17.50(a) (Vernon 1987).** The Wellisches' testimony raises the possibility that their mental anguish stemmed from the denial of their claim, but not from USAA's failure to properly investigate the claim. See **Castaneda,** 988 S.W.2d at 199 (holding that any loss of credit reputation resulted from denial of benefits, not from any failure to communicate with insured or properly investigate her claim); **MacIntire,** 27 S.W.3d at 92 (plaintiff did not produce evidence of damages beyond denial of benefits). Therefore, the Wellisches did not raise a fact issue sufficient to defeat USAA's entitlement to summary judgment on their mental anguish claim.

D. ***ATTORNEY'S FEES;***

a. **Attorneys fees are not recoverable on a claim for breach of the duty of good faith and fair dealing.**

a) **Marineau v. Gernal American Life Ins. Co.,** 898 S.W.2d 397 (Tex.Civ.App.--Fort Worth 1995 , writ denied). However, on other extra-

contractual claims, a finding that an insurer's evaluation is wrong, but that the insurer did not breach its duty of good faith and fair dealing does not necessarily insulate the insurer from being obligated to pay the insured's attorney's fees.

b) **Allstate Ins. Co. v. Jordan.** 53 SW3d 450 2016 WL 6693896 (Tex.App. -- Texarkana 2016). This is the first Texas appellate decision addressing the validity of a declaratory judgment action and the recovery of attorney's fees under the declaratory judgment statute. The court expressly approved the use of the declaratory judgment statute for UM/UIM claims stating "We find nothing in ***Brainard*** precludes the use of the declaratory judgment when establishing pre-requisites to a recovery in a UM benefits case." Without offering any analysis for the basis of its decision, the Court concluded it would be unequitable and unjust to the insurance company to permit the insured to recover attorney's fees.

E. ***ATTORNEY'S FEES MAY BE RECOVERABLE UNDER A DECLARATORY ACTION.***

a. **State & County Mutual Fire Ins. Co. v. Walker,** 228 S.W.3d 404 (Tex.App. - Fort Worth 2007, no pet.).

F. ***STANDARDS OF PROOF FOR ATTORNEY'S FEES:***

a. **Arthur Andersen v. Perry Equipment Co.,** 945 SW2d 812 (Tex. 1997) The Supreme Court set out 8 factors to consider in an award of attorney's fees.

G. ***DISCOVERY REGARDING ATTORNEY'S FEES:***

a. **In re National Lloyds Ins. Co.,** 2015 WL 4380929 (Corpus Christi 2015, orig. proceeding). The court denied the carrier's mandamus action to overturn an order of the trial court compelling the carrier to disclose its attorneys' fees. In discovery, the Plaintiffs sought to discover the amount of attorney's fees that the carrier had paid to defense counsel as a way to establish the reasonableness of the fees being sought by Plaintiffs. In denying the mandamus, the court noted that the factors under Rule 1.04 of the ***Tex. Disciplinary R. Prof'l Conduct*** for considering an award of attorney's fees are not an exclusive list of factors to consider. Moreover, the court declined to follow ***MCI Telecommunications Corp. v. Crowley***, 899 S.W.2d 399 (Tex.App. – Fort Worth 1995, orig. proceeding) and noted that since the time of the ***MCI*** opinion there have been extensive developments in the law which made it clear that the factors under Rule 1.04 are not exclusive. Further, the appellate court ruled that the carrier could redact information out of the billing records to protect its privileges and therefore the carrier did not meet its burden of proof to show that the requested discovery is invasive of the attorney-client or work product privileges. Therefore the mandamus was denied.

XV. STATUTORY BAD FAITH CLAIMS

A. ***INSURANCE CODE CLAIMS UNDER §541.060 Tex.Ins.Code***

a. **Unfair Settlement Practices**

a) **Standing to sue:**

(1) **Reule v. Colony Insurance Co,** *14-11-00602-CV, (Tex. App—*

Houston [14th Dist.] 2013). The Court, based in part on its decision in **Rumley v. Allstate Indemnity Co.,** 924 S.W.2d 448 (Tex. App.—Beaumont 1996, no writ), concluded that a third party plaintiff making liability homeowners claim does not have standing to sue for breach of the duty of good faith and fair dealing or alleged violations of Chapter 541 and 542 Tex.Ins.Code, and that there insurer does not owe the third party claimant any duties even if the claimant paid a portion of the premiums for the policy.

b) **It is an unfair method of competition or an unfair or deceptive act or practice in the business of insurance to engage in the following unfair settlement practices with respect to a claim by an insured or beneficiary:**

(1) misrepresenting to a claimant a material fact or policy provision relating to coverage at issue;

(2) failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of:

(3) a claim with respect to which the insurer's liability has become reasonably clear; or

(4) a claim under one portion of a policy with respect to which the insurer's liability has become reasonably clear to influence the claimant to settle another claim under another portion of the coverage unless payment under one portion of the coverage constitutes evidence of liability under another portion;

(5) failing to promptly provide to a policyholder a reasonable explanation of the basis in the policy, in relation to the facts or applicable law, for the insurer's denial of a claim or offer of a compromise settlement of a claim;

(6) failing within a reasonable time to:

(7) affirm or deny coverage of a claim to a policyholder; or

(8) submit a reservation of rights to a policyholder;

(9) refusing, failing, or unreasonably delaying a settlement offer under applicable first-party coverage on the basis that other coverage may be available or that third parties are responsible for the damages suffered, except as may be specifically provided in the policy;

(10) undertaking to enforce a full and final release of a claim from a policyholder when only a partial payment has been made, unless the payment is a compromise settlement of a doubtful or disputed claim;

(11) refusing to pay a claim without conducting a reasonable investigation with respect to the claim;

(12) with respect to a Texas personal automobile insurance policy,

delaying or refusing settlement of a claim solely because there is other insurance of a different kind available to satisfy all or part of the loss forming the basis of that claim; or

(13) requiring a claimant as a condition of settling a claim to produce the claimant's federal income tax returns for examination or investigation by the person unless:

(a) a court orders the claimant to produce those tax returns;

(b) the claim involves a fire loss; or

(c) the claim involves lost profits or income.

(14) Subsection (a) does not provide a cause of action to a third party asserting one or more claims against an insured covered under a liability insurance policy.

b. **Damages Recoverable for violations (§541.152 Tex.Ins.Code)**

a) A plaintiff who prevails in an action under this subchapter may obtain:

(1) the amount of actual damages, plus court costs and reasonable and necessary attorney's fees;

(2) an order enjoining the act or failure to act complained of; or

(3) any other relief the court determines is proper.

b) On a finding by the trier of fact that the defendant knowingly committed the act complained of, the trier of fact may award an amount not to exceed three times the amount of actual damages.

c. **PENALTIES PURSUANT TO §541.151**

a) **Private Cause of Action Authorized:**

(1) A person who sustains actual damages may bring an action against another person for those damages caused by the other person engaging in an act or practice:

(2) defined by Subchapter B to be an unfair method of competition or an unfair or deceptive act or practice in the business of insurance; or

(3) Specifically enumerated in Section 17.46(b), Business & Commerce Code, as an unlawful deceptive trade practice if the person bringing the action shows that the person relied on the act or practice to the person's detriment.

d. **BURDEN OF PROOF**

a) **Wellisch v. United Servs. Auto. Ass'n,** 75 S.W.3d 53 (Tex.App. – San

Antonio, 2002, pet. denied). To recover damages under either the common law or the Insurance Code and DTPA, the violations must be a "producing cause" of the insured's damages. *See* **Castaneda,** 988 S.W.2d 189, 198 (manner in which claim is investigated must be proximate cause of damages); *see also* **MacIntire v. Armed Forces Benefit Ass'n,** 27 S.W.3d 85, 92 (Tex. App.--San Antonio 2000, no pet.) (conduct prohibited by Insurance Code actionable only if plaintiff's actual damages result from that conduct); **Izaguirre,** 749 S.W.2d at 55 (a bad faith recovery is for damages arising from the bad faith act; for additional costs, hardship, or losses due to nonpayment of amounts owed); **TEX. INS. CODE ANN. art. 21.21 § 16(a)** (Vernon Supp. 2001); **TEX. BUS. & COM. CODE ANN. § 17.50(a)** (Vernon 1987). The Wellisches' testimony raises the possibility that their mental anguish stemmed from the denial of their claim, but not from USAA's failure to properly investigate the claim. *See* **Castaneda,** 988 S.W.2d at 199 (holding that any loss of credit reputation resulted from denial of benefits, not from any failure to communicate with insured or properly investigate her claim); **MacIntire,** 27 S.W.3d at 92 (plaintiff did not produce evidence of damages beyond denial of benefits). Therefore, the Wellisches did not raise a fact issue sufficient to defeat USAA's entitlement to summary judgment on their mental anguish claim.

B. ***PROMPT PAYMENT OF CLAIMS VIOLATIONS UNDER CHAPTER 542***

a. **NOTICE OF CLAIM:**

a) **Statute: §542.055(a) (1) Tex. Ins. Code**

(1) Not later than the 15th day or, if the insurer is an eligible surplus lines insurer, the 30th business day after the date an insurer receives notice of a claim, the insurer shall:

(2) Acknowledge receipt of the claim

(a) FORM OF ACKNOWLEDGMENT:

(i) Written or oral. **Mid Century v. Barclay**, 880 S.W.2d 807 (Tex.App.--Austin, 1994, writ denied).

(3) PIP Claims Require Separate Acknowledgment from UM/UIM Claims.

(a) Dunn v. Southern Farm Bureau Casualty Ins. Co., 991 S.W.2d 467 (Tex.App.--Tyler 1999) In a case of first impression, the court held that the statutory requirements of acknowledging, investigating, and accepting or rejecting the claim applied to a claim for UIM benefits regardless of whether the claimant is represented by an attorney. Further, compliance with these requirements on a PIP claim did not equate to compliance on the UIM claim since the claims are different coverages.

b. **ACCEPTANCE OR REJECTION OF THE CLAIM IN WRITING**

a) **STATUTE: §542.056(a) Tex.Ins.Code**

(1) Except as provided by Subsection (b) or (d), an insurer shall notify a claimant in writing of the acceptance or rejection of a claim not later than the 15th business day after the date the insurer receives all items, statements, and forms required by the insurer to secure final proof of loss.

b) **Case Law:**

(1) **Guideone Lloyds Insurance Company v. First Baptist Church of Bedford, 268 SW3d 822 (Tex.App.– 2nd Dist. 2008, no pet.).** Not every request for information will qualify as a request for items, statements and forms necessary to accept or to reject a claim. Here, the insurer had already made a decision to pay the claim, and therefore its request for core samples of the roof might be helpful to prove the extent of the loss, but such a request was not required the insurer to make its decision to accept or reject the claim. See **Colonial County Mut. Ins. Co. v. Valdez,** 30 S.W.3d 514, 523 (Tex. App.--Corpus Christi 2000, no pet.) (holding that items requested by insurer were not required to secure final proof of loss).

c. **PAYMENT OF A CLAIM**

a) **STATUTE: §542.057 Tex.Ins. Code**

(1) Except as otherwise provided by this section, if an insurer notifies a claimant under Section 542.056 that the insurer will pay a claim or part of a claim, the insurer shall pay the claim not later than the fifth business day after the date notice is made

(2) If payment of the claim or part of the claim is conditioned on the performance of an act by the claimant, the insurer shall pay the claim not later than the fifth business day after the date the act is performed.

(3) If the insurer is an eligible surplus lines insurer, the insurer shall pay the claim not later than the 20th business day after the notice or the date the act is performed, as applicable.

b) **Case Law:**

(1) ***Terry v. Safeco Ins. Co. of Am.,*** CIV.A. H-10-0340, 2013 WL 5214315 (S.D. Tex. Sept. 17, 2013) The Court granted Safeco's Motion for Summary Judgment on Plaintiff's Chapter 542 (Prompt Payment) causes of actions finding that the insurer's settlement offers do not constitute a partial acceptance of claim and do not trigger the 5 day deadline to pay under the prompt-payment statute.

(2) **Quintana v State Farm,** 2013 WL 5495827 (S.D. Tex. 2013). The Court granted State Farm's motion for summary judgment on Plaintiff's

claims of (1) State Farm unreasonably denied or delayed payment of the claim because Plaintiff argued that State Farm should be required to pay the amount it offered to settle the case even though the demand was rejected; and (2) State Farm was acting in bad faith by failing to offer the maximum amount of its evaluation of the claim. Plaintiffs' argument that State Farm was in bad faith centers on the adjuster's estimate of Plaintiff's past and future pain and suffering damages as being in a range of from $42,000 up to $57,000, and that she used the low estimate instead of the high estimate in making her initial settlement offer.

The reason for estimating a range of damages for past and future physical pain, mental anguish, and physical impairment, is because these losses-unlike lost wages and medical expenses-are inherently subjective. See **Gen. Motors Corp. v. Burry**, 203 S.W.3d 514, 551 (Tex.App.-Fort Worth 2006, no pet.) ("The process of awarding damages for amorphous, discretionary injuries such as mental anguish or pain and suffering is inherently difficult because the alleged injury is a subjective, unliquidated, non-pecuniary loss. The presence or absence of pain, either physical or mental, is an inherently subjective question. No objective measures exist for analyzing pain and suffering damages. The Court also focused on the fact that the Jury returned a verdict that was consistent with the adjuster's evaluation and that the Plaintiff's demand was "vastly exaggerated" and that Plaintiff failed to respond to State Farm's reasonable requests to advise if Plaintiff was "still being treated or [was] otherwise not ready to negotiate a final settlement of her claim at this time." The summary judgment evidence in this case shows nothing more than a bona fide dispute about the amount of UIM benefits that the insured should receive for her subjective pain and suffering, which is insufficient on this summary judgment record even to raise a fact issue on bad faith. See **Hamburger**, 361 F.3d at 881.

d. **PENALTIES FOR DELAYING PAYMENT FOR MORE THAN 60 DAYS:**

a) **STATUTE: §542.058 Tex.Ins. Code**

(1) Except as otherwise provided, if an insurer, after receiving all items, statements, and forms reasonably requested and required under Section 542.055, delays payment of the claim for a period exceeding the period specified by other applicable statutes or, if other statutes do not specify a period, for more than 60 days, the insurer shall pay damages and other items as provided by Section 542.060.

(2) This section does not apply in a case in which it is found as a result of arbitration or litigation that a claim received by an insurer is invalid and should not be paid by the insurer.

b) **Case Law:**

(1) ***Brainard v. Trinity Universal Insurance Company,*** 216 S.W.3d 809 (Tex. 2006). While the **Brainard** decision did not specifically address violations of Article 21.55, the language in the Brainard opinion is a clear

warning that the calculation of penalties for delaying payment for more than 60 days in violation of §542.057 Tex.Ins.Code are probably only applicable after the insured obtains a judicial determination of the claim against the uninsured/underinsured motorist carrier, and the carrier delays payment for more than 60 days from that point. The specific language of the opinion makes it clear that in **Henson**, the Court determined that 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.

However, the **Brainard** opinion should not affect the application of the penalty for other violations of **Chapter 542** as specified by **§542.059 Tex.Ins.Code** because this subsection of the statute focuses on whether or not the insurer was "in compliance with this subchapter."

(2) ***Mid-Century v. Daniel,*** 223 S.W.3d 586 (Tex. App. – Amarillo 2007, pet. denied). ***Daniels*** is a post-***Brainard*** case that addressed whether and when an insured is entitled to recover penalties for violations of the Prompt Payment of Claims Act under former article 21.55 for failing to pay a valid claim before the insured obtains a judgment against the UIM carrier. Referencing the decision in Brainard, the Amarillo Court held that Mid-Century's payment of $50,562.55 within two days of the judgment against the third party precludes the award of attorney's fees under the prompt payment provisions of article 21.55, §§ 4 and §38.002(3) of the Texas Civil Practice & Remedies Code.

In the concurring opinion, the Court references that the insured was asserting other violations for failing to meet deadlines under 21.55, and yet Justice Campbell dismisses those violations as non-events without any consequence despite the clear language of 542.060(a) saying, "the asserted violations occurred before the determination that Mid-Century had UIM coverage liability." Despite the express legislative intent of the statute to promote the prompt payment of claims, there is a loophole in the wording of the statute to support this result. However, the other violations at issue are almost always pre-litigation issues that, by definition, always occur prior to the entry of judgment. Under this opinion, Justice Campbell concludes that until there is a judgment the carrier doesn't have a duty to acknowledge the claim or to commence an investigation appears contrary to the plain language of the Act and cannot be reconciled with the purpose of the statute. Even the opinion in **Brainard** was carefully crafted to limit is application to prompt payment of the claim as opposed to the statutory deadlines for claims handling under the Act.

In the concurring opinion, Justice Campbell wrote, "The record shows the Daniels brought suit against the tortfeasor Melvin Bray and Mid-Century in April 2001. Because, under the circumstances presented here, the asserted violations of section 3 occurred before the determination that Mid-Century had UIM coverage liability, I conclude the asserted violations could not entitle the Daniels to the interest penalty and attorney's fees under section 6 of article 21.55. ***Brainard,*** 216 S.W.3d

809, (Tex. 2006); ***Allstate Ins. Co. v. Bonner,*** 51 S.W.3d 289 (Tex. 2001); ***Menix,*** 83 S.W.3d 877. On that basis, I concur in the court's judgment."

e. **LIABILITY FOR VIOLATIONS OF CHAPTER 542**

a) **STATUTE: §542.059 Tex.Ins.Code**

(1) If an insurer that is liable for a claim under an insurance policy is not in compliance with this subchapter, the insurer is liable to pay the holder of the policy or the beneficiary making the claim under the policy, in addition to the amount of the claim, interest on the amount of the claim at the rate of 18 percent a year as damages, together with reasonable attorney's fees.

(2) If a suit is filed, the attorney's fees shall be taxed as part of the costs in the case.

b) **Case Law:**

(1) ***Delagarza v. State Farm Mut. Auto. Ins. Co.,*** 175 S.W.3d 29, (Tex. App. Dallas 2005) supp opinion 181 SW3d 755 (Tex. App.– Dallas, 2005). This is a pre-***Brainard*** case in which the Court held The court concluded that State Farm Mutual Automobile Insurance Company did not violate the prompt payment deadlines set by article 21.55 of the Texas Insurance Code because the deadline to send payment was never triggered. In this case, the insurance company accepted part of the insured's claim based on the information the insured provided the company. The insurance company offered to pay the insured the portion of the claim it had accepted within five days of receiving notice that the insured was willing to settle for the undisputed amount. The court held that the insurance company's obligation to send the money never arose because the insured never notified the insurance company that he was willing to accept the amount offered by the company. Although the insurance company ultimately paid the insured the full amount of his claim to settle the dispute, the insured never established that the insurance company was legally obligated under the terms of his policy to pay him the full amount he claimed.

Because DeLaGarza never notified State Farm that he was willing to accept the amount offered by the company, State Farm's obligation to send the money never arose. The Court opined in **Republic Underwriters Ins. Co. v. Mex-Tex, Inc.,** that an insurance company could not delay making a payment under **article 21.55** by insisting on a release "to which it is not ultimately entitled . . . ." See **Republic Underwriters,** 150 S.W.3d at 426 (emphasis added). Central to the Supreme Court's analysis was the idea that an insurance company could not force an insured to settle for less than he was legally entitled to receive by conditioning prompt payment on a release of the insurer's liability for further payment.

(2) ***Guideone Lloyds Insurance Company v. First Baptist Church of Bedford***, 268 SW3d 822 (Tex.App.– 2nd Dist. 2008, no pet.). This is a post-***Brainard*** and post-***Mid Century v. Daniel*** case which in contrast to the opinion in ***Mid-Century v. Daniel held:***

> (a) Contrary to the holding in **Daniel**, the insurer's pre-litigation violations of article 21.55 by not accepting or rejecting the claim within 15 business days of its receipt of all items necessary to evaluate the claim and for failing to promptly pay the claim required the imposition of penalties against the insurer.
>
> (b) The insured's failure to obtain a jury finding determining the penalty's accrual date did not preclude the insured's right recover penalty interest because the facts were undisputed and conclusively established the date of such violation. However, a better practice would be to either get summary judgment or a directed verdict or obtain a jury finding. Because the evidence is undisputed that GuideOne failed to comply with section 2(a)'s information request requirement, FBCB was not required to obtain a jury finding determining when GuideOne, in compliance with section 2(a), received all items, statements, and forms reasonably requested and required pursuant to section 3(f).
>
> **(c)** Not every request for information will qualify as a request for items, statements and forms necessary to accept or to reject a claim. Here, the insurer had already made a decision to pay the claim, and therefore its request for core samples of the roof might be helpful to prove the extent of the loss, but such a request was not required the insurer to make its decision to accept or reject the claim. Restated, the statutory requirement for an insurer to accept or to reject the claim involves whether or not the claim is payable, not how much the insurer is going to be pay on the claim. See **Colonial County Mut. Ins. Co. v. Valdez**, 30 S.W.3d 514, 523 (Tex. App.--Corpus Christi 2000, no pet.) (holding that items requested by insurer were not required to secure final proof of loss).
>
> (d) The trial court erred by calculating pre-judgment interest and penalties on the full amount of the claim for the entire period of the claim because neither interest nor penalties accrue on amounts where the insurer tenders an unconditional tender of $ 155,000 on July 7, 2005. However, the interest penalty may be assessed against the insurer on the full amount of the claim if an insurer's partial payment to the insured was not unconditional. Thus, the insured should demand an unequivocal statement in writing from the insurer as to whether an offer of settlement is unconditional or conditional.
>
> (e) The insured is entitled to recover both prejudgment interest on the claim as well as statutory penalties of 18% interest when the insurer violated the Prompt Payment of Claims Act.

(f) Under **Brainard,** Courts are to apply the declining principal formula to calculate pre-judgment interest. Under this formula, "a settlement payment should be accredited first to accrued prejudgment interest as of the date the settlement payment was made, then to 'principal,' thereby reducing or perhaps eliminating prejudgment interest from that point in time forward.

(g) In calculating the amount of article 21.55 interest to be awarded to an insured, we must**:**

(i) determine the amount of prejudgment interest that had accrued on the breach of contract damages as of the date of insurer's unconditonal tender, if any;

(ii) then apply the insurer's tender first to the amount of prejudgment interest that had accrued as of the date of judgment.

(iii) Then, the Court is to apply any remaining balance to the principal (the amount of the claim), and

(iv) Finally utilize the revised principal figure to calculate the post-tender amount of the article 21.55 interest penalty.

(h) Courts are not to apply the "declining principal" formula to calculations for determining the 18% interest allowed under the Prompt Payment of Claims Act.

(i) The trial court did not err in submitting a jury instruction defining "unfair or deceptive act or practice "as" failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim when the insurer's liability has become reasonably clear" because the evidence showed that while GuideOne refused to pay for an upgrade in insulation, GuideOne became aware of the legal requirement to include the upgraded insulation on repairs but failed to pay for such upgrade. In addition, the evidence showed that the adjuster testified that the claim should "have been paid a long time ago." The insurer's claim that this instruction was error because it never "denied" the claim is without merit because although it never denied the claim as a whole, but it contested the need to upgrade the insulation after the insured notified it that the City imposed a legal requirement for the upgrade.

(j) Any error the court may have committed by submitting certain jury questions was harmless. The insurer argued that the jury's finding in response to question number ten irreconcilably conflicts with its finding in response to question number six. Question numbers ten, eleven, and twelve covered FBCB's breach of good faith and fair dealing claim. The jury found in

response to question nine that GuideOne had failed to comply with its duty of good faith and fair dealing to FBCB, found in response to question 10 and that $30,000 would fairly and reasonably compensate FBCB for its damages proximately caused by the breach, found in response to question eleven that GuideOne was actually aware that its actions involved a high degree of probability of financial ruin to FBCB, and found in response to question twelve that $55,000 should be awarded to as exemplary damages for GuideOne's conduct found in question eleven.

(3) ***Barclay v. Mid Century,*** 880 S.W.2d 807 (Tex.App.--Austin 1994, writ denied). "Amount of the claim" as referred to in Article 21.55 §6 is limited to the amount of policy limits, and does mean the true value of the amount of the claim. Subsequent decisions of the Texas Supreme Court including ***Brainard*** and ***Arthur Andersen v. Perry Equipment Co.*** have directly impacted the significance of this decision. In this case, the insured sought damages and attorney fees for failure of insurer to meet the prompt pay provisions of Article 21.55 of the Texas Insurance Code.

Held: Insurance company failed to comply with the statute and was forced to pay the claim, 18% in damages plus a one-third contingency fee in attorney's fees. The purpose of the article is to ensure that the insurance company will pay claims in a prompt manner.

f. **18% penalty per annum; plus**

a) **Cater v. USAA,** 27 S.W.3d 81 (Tex.App.--San Antonio, 2000, pet. denied). USAA claimed that the 18% penalty under Article 21.55 does not apply even if an insurer delays payment more than 60 days if the delay was due to a good faith denial of the claim. The Court disagrees. Even good faith delays will result in a penalty. The penalty is to be calculated based on 18% "per annum." Per annum refers to simple interest from the date of the denial of the claim until the date it is paid.

g. **Reasonable Attorney's Fees.**

a) **Republic Underwriter's Ins. Co. vs. Mex-Tex, Inc.,** 150 SW3d 423 (Tex. 2004) The court held that the insurer should have paid the cost to replace the insured's roof with one of the same kind and affixed mechanically as the insured had requested, and awarded the insured damages under article 21.55 of the Tex.Ins.Code. The damages were limited to the difference in the actual cost less the amount unconditionally tendered by the insurer. The court reasoned that the definition of a "claim" in article 21.55 "that must be paid" should be construed to allow reduction by any partial payments to "encourage insurers to pay the undisputed portions of the claim early, consistent with the statute's purpose to "obtain prompt payment of claims."

b) **Nagel v. Kentucky Central Ins. Co.,** 894 S.W.2d 19 (Tex.App.--Austin, 1994, writ denied) Insurance company had an obligation to pay for insured's personal attorney after refusal to defend.

c) **Grapevine Excavation, Inc. v. Maryland Lloyd,** 35 SW3d 1 (Tex. 2000) The Court accepted writ on a certified question. "In a policyholder's successful suit for breach of contract against an insurance company that is subject to one or more of the provisions listed in §38.006, is the carrier liable to its policyholder for reasonable attorneys fees incurred in pursuing the breach of contract action, either listed in §38.006 or under §36.001 if application of one or more of those sections does not result in the award of attorney's fees?" Answer: Yes. While the court agreed with the carrier that §38.006 CPRC could support the position that the insurer may have been exempt under Chapter 38, the Court found that the insurer who had breached its contract was liable for attorney's fees.

d) **Lamar Homes, Inc. vs. Mid-Continent Casualty Company,** 335 F. Supp 2nd 754 (W.D. (Tex.2007) This case involved 3 Certified questions: (1) Allegations of unintended construction defects in a home may constitute an "accident" or "occurrence" in a CGL policy. (2) Allegations of damage to or loss of use of the home itself may constitute "property damage" sufficient to trigger the duty to defend under a CGL policy. (3) Whether the Prompt Payment Status" applies when an insurer wrongfully refuses to promptly provide a defense to an insured because defense costs are a first party loss. The Court held it does.

C. FAILURE TO SETTLE OR TO DEFEND

a. **Rocor International, Inc. f/k/a Donco Carriers Inc. v. National Union Fire Ins. Co of Pittsburgh,** 77 SW3d 253 (Tex.2002). An insurer assumes the duty to fairly settle the claims against an insured when it takes over negotiations, including negotiations involving funds that it did not control. Further the insurer may not take exclusive control of the handling of claims against its insured and then claim in court that it cannot be held liable for mishandling claims because it had no contractual duty to defend.

b. **Evanston Insurance Co. v. ATOFINA Petrochemicals, Inc.** No. 03–0647, 2006 WL 1195330 (Tex.Sup.Ct. 2006). **Article 21.55** of the **Texas Insurance Code,** the **"Prompt Payment of Claims"** statute, did not authorize the imposition of penalties and attorney's fees for the insurer's failure to pay the settlement claim timely. Though the statute does not define first-party claims, first-party and third-party claims are distinguished based on the claimant's relationship to the loss. A first-party claim is stated when an insured seeks recovery for the insured's own loss, whereas a third-party claim is stated when an insured seeks coverage for injuries to a third party. A loss incurred in satisfaction of a settlement belongs to the third party and is not suffered directly by the insured. This case, in which ATOFINA seeks coverage for injuries sustained by a third party, presents a classic third-party claim. Because the Legislature intended that article 21.55 apply to claims personal to the insured, ATOFINA is not entitled to the article 21.55 damages or attorney's fees.

XVI. STATUTE OF LIMITATIONS ON FIRST PARTY CLAIMS

A. Post Brainard Statutes of Limitations on claims:

a. PURE UM/UIM CLAIMS:

a) **Franco v. Allstate**, 505 S.W.2d 789 (Tex. 1974); 4 year statute to file a UM claim.

b) **Alvarez v. American General Fire & Casualty Co.,** 757 S.W.2d 156 (Tex.App.--Corpus Christi 1988, no writ). Uninsured motorist case where the Court held "limitations began to run at the time when American denied appellant's claim for uninsured motorist coverage and not at the time of the incident giving rise to the claim."

c) **In re Ruby Britt**, 2016 WL 9175819, (Tex.App. – Texarkana 2016, orig. proceeding). Insured's petition for mandamus to order the judge to vacate an order granting a new trial and reinstate the default judgment on her UIM claim for policy limits plus an award of $5,000 in attorney's fees was conditionally granted because State Farm failed to establish a meritorious defense. In reaching this conclusion, the Court rejected State Farm's argument that the petition had to be verified and that the insured's claims were barred by the statute of limitations. Further, State Farm failed to provide even a prima facie case that its denial of coverage was meritorious.

b. **COMMON LAW BAD FAITH CLAIMS:**

a) 2 years from the date the claim is denied.

c. **DTPA CLAIMS:**

a) 2 years from the date the claim is denied.

d. **INS. CODE CLAIMS:**

a) 4 years from the date the claim is denied.

XVII. UNIFORM DECLARATORY JUDGMENTS ACT

A. ***THE STATUTE***

a. **§37.002(b)** ***This chapter is remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and it is to be liberally construed and administered.***

b. **§37.003(a)** ***A court of record within its jurisdiction has power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. An action or proceeding is not open to objection on the ground that a declaratory judgment or decree is prayed for.***

c. **§37.003(b)** ***The declaration may be either affirmative or negative in form and effect, and the declaration has the force and effect of a final judgment or decree.***

d. **§37.003(c)** ***The enumerations in Sections 37.004 and 37.005 do not limit or restrict the exercise of the general powers conferred in this section in any proceeding in which declaratory relief is sought and a judgment or decree will terminate the controversy or remove an uncertainty.***

e. **§37.004 (a)** ***A person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are***

affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

f. **§37.0034(b)** ***A contract may be construed either before or after there has been a breach.***

g. **§37.006(a)** ***When declaratory relief is sought, all persons who have or claim any interest that would be affected by the declaration must be made parties. A declaration does not prejudice the rights of a person not a party to the proceeding.***

h. **§37.0036(b)** ***In any proceeding that involves the validity of a municipal ordinance or franchise, the municipality must be made a party and is entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state must also be served with a copy of the proceeding and is entitled to be heard.***

i. **§37.007.** ***If a proceeding under this chapter involves the determination of an issue of fact, the issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.***

j. **§37.008.** ***The court may refuse to render or enter a declaratory judgment or decree if the judgment or decree would not terminate the uncertainty or controversy giving rise to the proceeding.***

k. **§37.009.** ***In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just.***

B. ATTORNEYS FEES ON DECLARATORY JUDGMENT ACTIONS

a. **Hartford Cas. Ins.Co. v. Budget Rent-A-Car Sys., Inc.,** 796 S.W.2d 763, 771 (Tex. App.—Dallas 1990, writ denied). An award of attorney's fees is not mandatory, but the prevailing party is generally entitled to those fees.

b. **El Apple I, Ltd. v. Olivas**, 370 S.W.3d 757 (Tex. 2011). Except in the most simple of cases, a party seeking to recover attorneys' fees must provide evidence of the billable hourly rate, the identity of the person performing the work, and details of the work to enable a fact find to meaningfully review the fees.

c. **United Nat. Ins. Co. v. AMJ Investments, LLC,** 447 S.W.3d 1 (Tex. App- Houston [14th Dist.] 2014, pet. Dism'd by agr.). Building owner sued property insurer for hurricane damage to a building. The Court upheld the finding that the carrier failed to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim when liability became reasonably clear, but determined that evidence of the insured's attorneys' fees was insufficient to support the award because under the lodestar method of proving attorney's fees, counsel failed to provide evidence of the time expended on specific tasks to enable the fact finder to meaningfully review the fee application." Counsel admitted that his firm does not keep billing records, but he tried to "determine how much time we spent on different aspects of the case" and how much his firm would

have billed through the end of trial. The testimony about the number of hours of work performed during certain phases of litigation either were not linked to specific tasks or lacked the specificity. The evidence identified no specific tasks that any of the firm members performed. Counsel did not identify the number or duration of the depositions. The testimony drew no distinction between the unspecified tasks performed by a paralegal and those performed by an associate. The testimony failed to identify the nature or number of motions that were filed, the number or length of the hearings, or when the motions were prepared or argued. The court remanded the case for a new trial on attorney's fees.

C. ***CASES ADDRESSING THE USE OF DECLARATORY JUDGMENTS FOR UMUIM CLAIMS.***

a. There are currently no cases that indicate that a declaratory judgment is not an appropriate vehicle for the recovery of first party benefits.

b. **Cases Supporting the Use of Declaratory Judgments**

a) In **Schober v. State Farm Mutual Automobile Ins. Co.,** No. 3:06-CV-1921-M, 2007 WL 2089435 (N.D.Tex. July 18, 2007) (Lynn, J.). the court concluded that the plaintiffs' claim of bad faith as to the defendant's contractual duty to pay on the UIM claim failed because they did not satisfy the ***Brainard*** standard of establishing their legal right. The court concluded, however, that the defendant could still be found liable under the policy for UIM damages claimed by the plaintiffs. Therefore, the court abated those bad faith and exemplary damages claims pending the determination of the defendant's liability for the UIM damages under the policy. This Court follows that reasoning in **Schrober.**. The Court held that while Stoyer may still be entitled to and recover UIM damages under the policy, State Farm's liability under the policy for UIM damages should be determined first, then the DTPA, Insurance Code and bad faith claims should be addressed-as in both **Schober** and **Owen.** Rather than dismissing the extra-contractual claims, the Court abated those claims pending resolution of the declaratory judgment action.

b) In **Owen v. Employers Mut. Cas. Co.,** 2008 U.S. Dist. LEXIS 24893 (N. D. Tex. March 28, 2008). In **Owen,** the Plaintiff started with the typical approach of suing for breach of contract and extra-contractual claims. Eventually, the Plaintiff amended the petition and added a claim for declaratory relief and sought the recovery of attorney's fees under Chapter 37. The Court reviewed **Brainard** and concluded that **Brainard** does not permit a claim for breach of contract and dismissed that claim The Court also dismissed claims under the ***Prompt Payment of Claims Act*** because the insured had not shown a legal entitlement to payment. The Court then considered a motion to dismiss the declaratory judgment action. Because the Court found that **Brainard** required the insured obtain a judgment in order to establish that the carrier is legally obligation to pay the claim, the denied the motion to dismiss the declaratory judgment.

c) In **Stoyer v. State Farm Mutual Automobile Insurance Company,** 2009 WL 464971 (N.D. Tex 2009), the Court expressly stated it was following its previous rulings in **Schober** and in **Owen.** In **Stoyer,** Plaintiff Stoyer was involved in an accident with Porto. Stoyer asserts that Porto was negligent and

that Porto was an uninsured/underinsured driver under the terms of Stoyer's policy with State Farm. State Farm counters that Stoyer has not obtained a judgment establishing her legal right to recover. Stoyer asserted causes of action for a declaratory judgment, breach of contract, violations of the Texas Insurance Code and the DTPA., and claims for bad faith. State Farm filed a Motion to Dismiss the claims for breach of contract and the extra-contractual claims. The Court granted the Motion to Dismiss the breach of contract claims and it severed and abated the extra-contractual claims against State Farm. State Farm also argued that the extra-contractual claims against State Farm for bad faith cannot survive without a finding of breach of contract. The Court declined to accept State Farm's position. Instead, the court noted in **Schober** that that the defendant could still be found liable under the policy for UIM damages claimed by the plaintiffs. *Id.* Therefore, the court abated those bad faith and exemplary damages claims pending the determination of the defendant's liability for the UIM damages under the policy. Generally, a bad faith claim cannot survive absent the insurer's liability under the policy; however, if the insurer's conduct is extreme in nature and causes injury in tort independent of the claim against the policy, the insurer's conduct may be deemed to be in bad faith. See **Progressive County Mut. Ins. Co. v. Boyd,** 177 S.W.3d 919, 922 (Tex. 2005).

d) **Accardo v. America First Lloyds Insurance Company, 2013 WL 4829252 (S.D.Tex. 2013)** The court granted the carrier's motion for summary judgment on Plaintiffs' claims for breach of contract, but denied the carrier's motion for summary judgment on Plaintiff's cause of action for a declaratory judgment. The Court rejected the carrier's claims that the declaratory judgment action was an improper attempt to pave a way to recover attorney's fees. However, the Court did not address whether attorney's fees were recovered or if evidence of attorney's fees was even admitted during the trial.

e) **Allstate Ins. Co. v. Jordan.** 53 SW3d 450 2016 WL 6693896 (Tex.App. -- Texarkana 2016). This is the first Texas appellate decision addressing the validity of a declaratory judgment action and the recovery of attorney's fees under the declaratory judgment statute. The court expressly approved the use of the declaratory judgment statute for UM/UIM claims stating "We find nothing in ***Brainard*** precludes the use of the declaratory judgment when establishing pre-requisites to a recovery in a UM benefits case." Without offering any analysis for the basis of its decision, the Court concluded it would be unequitable and unjust to the insurance company to permit the insured to recover attorney's fees.

D. ***PLEADING REQUIREMENTS FOR DECLARATORY JUDGMENTS ON UM/UIM CASES***

a. **Invoking the Statute.**

a) One of the parties must invoke the statute to recover attorney's fees. See **Knighton v. International Business Machs. Corp.,** 856 S.W.2d 206, 210 (Tex. App.--Houston [1st Dist.] 1993, writ denied). The pleadings should clearly assert claims under Texas Civil Practice and Remedies Code 37.001, et seq.. to judicially determine rights under the insurance policy.

XVIII. LAWSUITS AGAINST THE ADJUSTER

A. LEGAL AUTHORITY FOR SUING THE ADJUSTER

a. **Suing the adjuster is proper under the Texas Insurance Code is as follows:**

b. **Statutes:**

a) **§ 541.003.** ***A person may not engage in this state in a trade practice that is defined in this chapter as or determined under this chapter to be an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.***

b) **§ 541.002(2)** ***"Person" means an individual, corporation, association, partnership, reciprocal or inter-insurance exchange, Lloyd's plan, fraternal benefit society, or other legal entity engaged in the business of insurance, including an agent, broker, adjuster, or life and health insurance counselor.***

c) **§ 541.151.** ***A person who sustains actual damages may bring an action against another person for those damages caused by the other person engaging in an act or practice.***

c. **CASE LAW:**

a) **Gasch v. Hartford Acc. & Indem. Co.,** 491 F.3d 278 (5th Cir. 2007). This case distinguishes the earlier ***Navidad v. Alexis,*** **Inc.** 875 S.W.2 695 (Tex. 1994) case, and holds that an adjuster who is "responsible for servicing an insurance" policy is liable under the old **article 21.21 Tex.Ins.Code.**

b) **In Re Texas Farmers Insurance Exchange,** 12 SW3d 807 (Tex. 2000) The Supreme Court in **Texas Farmers** affirmed the Court of Appeals holding that an attorney who investigates his client's affairs may be required to divulge his communications with his client about the results of that investigation because he is acting as an investigator on the claim and not as an attorney**.**

B. **EXCEPTIONS:**

a. **Liberty Mutual Ins. Co. v. Garrison Contractors,** 966 SW2d 482 (Tex. 1998) The Supreme Court held that §16 of **Article 21.21** provides a cause of action against insurance company employees whose job duties call for them "to engage in the business of insurance." Not every employee of an insurance company is a "person" under **Article 21.21.** In this case the agent is a person because his job responsibilities included soliciting and obtaining insurance policy sales and explaining policy terms to buyers. On the other hand, an employee who has no responsibility for the sale or servicing of insurance policies and no special insurance expertise, such as clerical or janitorial staff, are not engaged in the business of insurance.

b. **Dagley v. Haag Engineering Co.,** 18 S.W.3d 787 (Tex.App.--Houston[14th Dist.] 2000, no pet.). A group of insureds asserting homeowners claims against State Farm that were denied because of the reports given to State Farm by Haag Engineering sued Haag

based on a number of theories including: negligence, DTPA, Insurance Code violations, tortious interference, and civil conspiracy. The Court granted summary judgment for Haag on all theories because (1) there was no duty owed to the insureds; (2) there was no privity between them; 3) there was no special relationship; (4) Plaintiffs were not consumers as to Haag; (5) Haag is not subject to the provisions of the insurance code; (6) the mere agreement to resist a claim is not an actionable civil conspiracy.

C. OTHER CAUSES OF ACTION AGAINST THE ADJUSTER

a. Intentional Torts

a) **Kelly v. Stone,** 898 S.W.2d 924 (Tex.1995) To impose liability on an employer for the torts of its employee, the act of the employee must fall within the general authority of the employee in the furtherance of the employer's business. Here, the manager's duties did not include the use or threat of physical force or physical conduct against employees, nor did the manager's supervisor ever direct the manager to assault or inflict emotional distress on any employees.

b) **Brewerton v. Dalrymple,** 997 SW2d 212 (Tex. 1999). Conduct that does not go beyond all possible bounds of decency and is not utterly intolerable in a civilized community does not rise to the level of intentional infliction of emotional distress.

c) **Johnson v. Standard Fruit & Vegetable Co., Inc.,** 985 S.W.2d 62 (Tex.1998). Marcher who witnessed an accident sued for negligent and intentional infliction of emotional distress because his post-traumatic stress problems he had since Vietnam were aggravated. Marcher did not come into contact with the Defendant's vehicle and failed to argue that witnessing the accident produced a physical injury because of the multitude of problems he suffered. Plaintiff unsuccessfully argued that the Defendant's negligent/reckless driving was a breach of a legal duty for which Plaintiff could then sue for emotional distress damages. The Court rejected this argument. The Court also found that an issue of fact prevented summary judgment on intentional infliction on emotional distress. Further, the Court found there was no special relationship because Plaintiff only produced evidence of one element of a special relationship. The test requires proof of (1) a contractual relationship between the parties; (2) a particular susceptibility to emotional distress on the part of the Plaintiff; and (3) the Defendant knew or should have known of the Plaintiff's particular susceptibility.

D. PROHIBITED CAUSES OF ACTION AGAINST THE ADJUSTER

a. Negligence

b. Breach Of The Duty Of Good Faith and Fair Dealing

a) Adjusters for insurance companies are not liable for bad faith to insureds. Adjusters do not owe a duty to insureds because they are not in contractual privity with them. The duty of good faith and fair dealing applies to insurance carriers; it does not extend to the company's agents or contractors. **Natividad v. Alexsis, Inc.**, 875 S.W.2d 695, 698 (Tex. 1994); *see also* **Ayoub v. Baggett**, 820

F. Supp. 298, 299 (S.D. Tex. 1993); **Arzehgar v. Dixon** 150 F.R.D. 92, 94-95 (S.D. Tex. 1993); **Hartford Cas. Ins. Co. v. Walker County Agency**, 808 S.W.2d 681, 686 (Tex. App.--Corpus Christi 1991, no writ).

XIX. PLEADING REQUIREMENTS

A. RES JUDICATA AND COLLATERAL ESTOPPEL

a. **Henry v. Chubb Lloyds Ins. Co. of Texas,** 895 S.W.2d 810 (Tex.App.--Corpus Christi 1995, writ denied) Under the doctrine of res judicata, an earlier agreed final judgment on a contractual claim for UIM benefits barred a subsequent lawsuit arising out of the same facts for additional recovery on theories of breach of good faith, DTPA violations. Further, here the prove-up hearing and the judgment became final one year before the Supreme Court decided Stracener. Thus, the insurer offset the amount to be paid to the insured ($25,000) by the amount of the tortfeasor's policy limits ($20,000) which resulted in a settlement of $5,000. The court held that there would be no retroactive application of Stracener even though the judgment may have been wrong or premised on legal principle subsequently overruled.

a) **Note:** This is a pre-**Brainard** case, and it is not clear in light of the edict in **Brainard** that such a stringent view of pleading should be applied to the pleading of extra-contractual claims.

b. **Northwestern National County Mutual Ins. Co. v. Rodriguez,** 18 S.W.3d 718 (Tex.App.--San Antonio 2000, pet. denied). The central question was whether the claimants could settle their UM/UIM claim and reserve for later determination statutory penalties and attorneys for alleged violations of the **Insurance Code.** The Court of Appeals said yes. Further, the insurance company had to make a decision to accept or reject the claim within the time frames established by the Code and could not wait until after the claimant completed an arbitrary amount of treatment before making its decision because this would frustrate the purpose and intent of the statute.

B. "BODILY INJURY" MUST BE PLED AND PROVEN AND CANNOT BE INFERRED

Trinity Universal Ins. Co. v. Cowan, 945 S.W.2d 819 (Tex. 1997). An H.E.B. photo lab clerk made extra prints of four revealing pictures of Cowan. The clerk later showed the prints to some friends who then showed the pictures to other people. Cowan then sued HEB and the photo lab clerk alleging, among other things, negligence and gross negligence. Cowan alleged that she had suffered "severe mental pain, a loss of privacy, humiliation, embarrassment, fear, frustration, mental anguish, and [would] continue to do so in the future." Cowan notified Trinity, his parents' homeowners' insurance carrier and requested a defense. Trinity initially defended Gage under a reservation of rights, but later denied coverage and withdrew its defense.

Because Cowan did not plead any physical manifestations of her alleged mental injuries, she did not plead a "bodily injury" such that Trinity's duty to defend was triggered.

Holding: We hold that "***bodily injury***," as defined in the policy, does not include purely emotional injuries, and the policy unambiguously requires an injury to the physical structure of the human body. The commonly understood meaning of "bodily" implies a physical, and not purely mental, emotional, or spiritual harm. See **Aim Ins. Co. v. Culcasi,** 229 Cal. App. 3d 209, 280 Cal. Rptr. 766, 772 (Cal. Ct. App. 1991, review denied); **Cotton States Mut. Ins. Co. v.**

Crosby, 244 Ga. 456, 260 S.E.2d 860, 862 (Ga. 1979) (use of the term "bodily" in the definition of "bodily injury" is "a genuine attempt to explain words which need no explanation"); a physical injury to the body. It does not include non-physical, emotional or mental harm."); **State Farm Mut. Auto. Ins. Co. v. Descheemaeker,** 178 Mich. App. 729, 444 N.W.2d 153, 154 (Mich. Ct. App. 1989) (per curiam) ("bodily injury" unambiguously contemplates actual physical harm or damage to body); **E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.,** 106 Wash. 2d 901, 726 P.2d 439, 443 (Wash. 1986) ("Sickness" and "disease" are modified by "bodily"); **Knapp v. Eagle Property Management Corp.,** 54 F.3d 1272, 1284 (7th Cir. 1995) (natural reading of "bodily injury, sickness, or disease" indicates that "bodily" modifies all three terms thereby covering only injuries with some physical component). **WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 245** (1966) also defines "bodily" as "having a body or a material form: physical, corporeal." Likewise, **BLACK'S LAW DICTIONARY 175** (6th ed. 1990) defines "bodily" as "pertaining to or concerning the body; of or belonging to the body or the physical constitution; not mental, but corporeal." Physical Manifestations Are Not Implicit in a Claim for Mental Anguish.

Cowan testified she had experienced headaches, stomachaches, and sleeplessness. But she never alleged any physical manifestations of her alleged mental injuries. The court of appeals held "that an allegation of mental anguish implicitly raises a claim for the resulting physical manifestations" such that evidence and damages for physical manifestations accompanying mental anguish and emotional distress will be allowed. 906 S.W.2d at 130-31. We disagree. Though we liberally construe the allegations in the petition in determining the duty to defend, resolving any doubt in favor of the insured, **Heyden,** 387 S.W.2d at 26, we will not read facts into the pleadings for that purpose. **National Union Fire Ins. Co. v. Merchants Fast Motor Lines, Inc.,** 939 S.W.2d 139 at 142. (Tex. 1997). Accordingly, even assuming that physical manifestations are inseparable from mental anguish in some cases, in the context of determining an insurer's duty to defend we will not presume a claim for physical manifestations when none is pleaded.

The Court did not rule on the issue of whether physical manifestations of an emotional injury constitute “bodily injury” sufficient to trigger coverage under a standard Texas auto policy.

C. **MOTIONS TO DISMISS FOR FAILURE TO PLEAD A CLAIM**

a. In **Button v. Chubb Lloyds Ins. Co. of Texas**, 4:11CV536, 2013 WL 440976 (E.D. Tex. Feb. 4, 2013), the Court disapproved of a “shotgun” approach to pleadings, and granted the insurer’s motion to dismiss several extra-contractual causes of actions. The Court noted that insurance policies are not subject to implied warranties and therefore rejected the insured’s claims for breach of warranty. The court also dismissed the insured’s claim for negligence and negligent misrepresentation stating: “If a defendant’s conduct is actionable only because it breaches the parties’ agreement, as is the case here, the claim is solely contractual in nature.” The court went on to dismiss the insured’s claims for misrepresentation and fraud.

XX. PRE-TRIAL ISSUES

A. **VENUE:**

a. **Statute: §1952.110 Tex.Ins. Code:**

a) Notwithstanding §15.032 CPRC, an action against an insurer in relation to the coverage provided under this subchapter, including an action to enforce that

coverage, may be brought only in the county in which:

> *(1) the policyholder or beneficiary instituting the action resided at the time of the accident involving the uninsured or underinsured motor vehicle; or*
>
> *(2) the accident occurred.*

b. **Case Law:**

a) **CMH Set & Finish, Inc. v. Taylor,** not reported in – S.W.3d --, 2015 WL 1254063 (Tex.App. --- Dallas 2015,) The appellate court held that the tortfeasor waived the right to challenge venue by failing to timely request a hearing and because the tortfeasor had submitted himself to the jurisdiction of the court by signing an agreed scheduling order without making it subject to the Motion to Transfer Venue, and because the scheduling order was more than merely ancillary to the proceeding. In this case, Plaintiff sued both the tortfeasor and the UIM carrier and used §1952.110 of the Texas Ins. Code to get venue in the county of Plaintiff's residence rather than rely on §15.15.002 of Tex. CPRC for venue which would have mandated venue in Collin County, the county where the collision occurred and the county where the tortfeasor resided. The Court held that the tortfeasor waived the venue challenge because (1) for 18 months after filing the motion to transfer venue, the tortfeasor did not set the motion to transfer venue for hearing; (2) the tortfeasor signed an agreed scheduling order five months prior to the hearing on the motion to transfer venue that was not signed subject to the motion to transfer venue. In addition, as a matter of first impression, the court determined the scheduling order addressed the main action and was not merely addressing an ancillary or preliminary matters. Further, since the scheduling order did not reference a deadline for pending motions such as the motion to transfer venue, the court saw this as an indication that that the tortfeasor did not consider the venue issue as a live issue at the time the scheduling order was signed.

b) **Spencer v. Allstate Ins. Co.,** 2016 WL 6879598 (E.D. Texas 2016). In this federal court case, the Court denied Allstate's Motion to Transfer Venue of the UIM case based on non-convenience §1404(a). The Court noted that the first inquiry it must address is whether the judicial district to which transfer is sought would have been a district in which the claim could have been filed. Then, the court must analyze both public and private factors relating to the convenience of the parties and witnesses as well as the interests of particular venues. The Private factors are: (1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws or in the application of foreign law. This is not an exhaustive list of factors and no single factor is dispositive. A defendant seeking transfer bears this "significant burden" of proof to show good cause to show that the proposed venue is "clearly more convenient" than the chosen forum.

B. **SEVERANCE/SEPARATE TRIALS & ABATEMENT**

a. **General Rule for Severance:**

a) **Texas Farmers Insurance Co. v. Cooper,** 916 SW2d 698 (Tex.App.--El Paso, 1996, orig. proceeding). There is no presumption or automatic rule where contractual claims in an insurance dispute must be severed from the extra-contractual claims or abated until the contractual claims have been resolved. However, the claims must be tried separately where there is evidence of negotiations that would be inadmissible in one case but not the other.

b) **Texas Farmers Ins. Co. v. Stem,** 927 SW2d 76 (Tex.App.--Waco, 1996, orig. proceeding) Plaintiff sued for underinsured motorists benefits and bad faith because Plaintiff felt the Defendant's offer was unreasonably low. The court held that the breach of contract claims against a party's insurer should be severed from bad faith claims. A limiting instruction is inadequate to protect a defendant against prejudice resulting from the admission of settlement offers.

c) **In Re Liu,** 290 S.W.3d 515 (Tex.App. [6th] 2009)The issue of whether a trial court should or should not grant a severance motion is ultimately a question of law. See generally **Guar. Fed. Sav. Bank,** 793 S.W.2d at 658-59. When considering whether to grant a severance motion, the trial court must generally accept the plaintiff's pleadings as true and then determine whether severance is appropriate. **Jones v. Ray,** 886 S.W.2d 817, 820 (Tex.App.-Houston [1st Dist.] 1994, orig. proceeding). "The controlling reasons for a severance are "*to do justice, avoid prejudice and further convenience*." **Guar. Fed Sav. Bank,** 793 S.W.2d at 658 (citing **St. Paul Ins. Co. v. McPeak,** 641 S.W.2d 284 (Tex.App.-Houston [14th Dist.] 1982, writ ref'd n.r.e.)). The trial court's decision to grant or deny a party's severance is within the wide zone of discretion. Given that the trial court must generally accept the plaintiff's pleadings as true, the only remaining dispute concerns the legal consequences stemming from those accepted-as-pleaded facts.

d) **In Re United Fire Lloyds,** 327 SW3d 250, (Tex.App. – San Antonio, 2010, orig. proceeding) held that in a case where the carrier made a settlement offer at mediation, the trial court's refusal to sever and its refusal to abate discovery on the extra-contractual claims was error and a bifurcated trial was not sufficient to avoid prejudice to the insurer.

In considering the issues, the Court discussed the line of cases in favor of severance. "We are only aware of a few cases in the context of a UIM claim that have considered whether severance and abatement is necessary over bifurcation. See **In re Allstate Prop, and Cas. Ins. Co.**, No. 02-07-00141-CV, 2007 Tex. App. LEXIS 4328, 2007 WL 1574964, at *1 (Tex. App.--Fort Worth May 30, 2007, orig. proceeding) (mem. op.) (holding it was an abuse of discretion to bifurcate instead of severing and abating the UIM claim from the bad faith claims); **In re Allstate County Mut. Ins. Co.**, 209 S.W.3d 742, 746-47 (Tex. App.-- Tyler 2006, orig. proceeding) (concluding it was an abuse of discretion to bifurcate instead of severing the UIM claim from the bad faith claims). However, these cases fail to discuss the necessity of severance and abatement rather than bifurcation in the context of a UIM claim. 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 SW.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.

We conclude the trial court abused its discretion in granting Juan Garcia's motion for a bifurcated trial and denying United Fire's motion to sever and abate.

e) **In re Allstate County Mut. Ins. Co.**, 352 S.W.3d 277 (Tex.App. – Houston [14th Dist.] Oct. 20, 2011), the court of appeals conditionally granted Allstate's petition for mandamus directing the trial court to sever extra-contractual claims from contractual claims for underinsured-motorist (UIM) benefits and abate the extra-contractual claims until the contractual claims are resolved. Charlotte Juneau sued Allstate for UIM benefits due to an automobile accident and also alleged a breach-of-contract claim, along with extra-contractual claims for bad faith under the insurance code and deceptive trade practices act. Allstate offered to settle the claim, but the offer was not accepted. Allstate filed a motion to sever the contractual claims and abate the extra-contractual claims. The trial court denied Allstate's motion.

f) **In re State Farm Mut. Auto. Ins. Co.,** --- S.W.3d --- 2012 WL 3195099, (Tex. App.—El Paso, August 8, 2012) (unpublished). The Court originally denied mandamus relief with respect to the portion of the trial court's order denying abatement of the extra-contractual claims in this UIM case, but conditionally granted mandamus relief with respect to the portion of the trial court's order denying severance. One month later, the Court reversed itself and granted the mandamus to require abatement of the extra-contractual claims.

The insured was injured when she was struck by an underinsured motorist. The insured settled her claim with the tortfeasor for policy limits. The insured then made a claim on two separate State Farm policies, one issued to her husband and the other to her daughter. State Farm offered the insured $7,500 to settle both claims. The settlement offer was rejected, and the insured filed suit against State Farm for breach of the insurance policies, for DTPA violations, and Chapter 542 of the Insurance Code, and for breach of the duty of good faith and fair dealing. The insured sought damages for her bodily injuries and for the spouse's claims of loss of consortium and of household services. State Farm moved to sever and to abate arguing that severance and abatement of the extra-contractual claims from their contract claim pending resolution of the contract claim was necessary to avoid the prejudice it would suffer in defending both claims in a single trial. The trial court denied State Farm's motion.

On appeal, State Farm argued that the court abused its discretion in denying the abatement because State Farm made a settlement offer to settle the entire claim. The Court of Appeals agreed that the trial court should have severed the extra-

contractual claims, stating that severance is required when an insurer offers to settle the entire contract claim so as to avoid the unfair and prejudicial dilemma an insurer faces in simultaneously defending against a contract claim and extra-contractual claims. However, the Court of Appeals declined to mandamus the trial court to order abatement quoting the opinions in discretion. **Liberty Nat'l Fire Ins. Co. v. Akin**, 927 S.W.2d 627, (Tex.1996); and in **Tex. Farmers Ins. Co. v. Cooper**, 916 S.W.2d 698, 701, 702 (Tex.App.-El Paso 1996, orig. proceeding) that " No rule of law mandates that a trial court abate extra-contractual claims when it orders severance of such claims from a contract claim." "Even where settlement evidence requires separation of contract and bad faith claims, we see no need to create an ironclad rule mandating abatement at any given time." Rather, in determining whether extra-contractual claims should be abated until a contract claim becomes final, the trial court should abate if the movant can show that abatement will: (1) promote justice; (2) avoid prejudice; and (3) promote judicial economy. **Tex. Farmers Ins. Co. v. Cooper**, 916 S.W.2d 698, 701 (Tex.App.-El Paso 1996, orig. proceeding), The Court determined that State Farm failed to carry its burden of showing that it would be prejudiced in defending against the insured's contract claim while defending against their extra-contractual claims and that abatement would promote justice, avoid prejudice, and promote judicial economy.

The Court originally disagreed with State Farm's reliance on **Brainard v. Trinity Universal Ins. Co.**, stating that **Brainard** does not address when abatement of extra-contractual claims in an uninsured/underinsured case is required as the decision relied upon a misapplication of the effect of granting consent to settle or the effect of a settlement with a tortfeasor in an underinsured motorist case. Specifically, the El Paso Court originally found that "as established by the unequivocal assertions of fact in the [insureds'] pleadings and by the acknowledgement in State Farm's pleadings, there is no dispute that the [insureds] reached a policy limits settlement with the underinsured motorist, thereby proving the negligence and underinsured status of the motorist." The Court noted that the case of **Liberty Nat'l Fire Ins. Co. v. Akin**, 927 S.W.2d 627, 631 (Tex.1996), squarely addressed the issue of abatement in the context of an uninsured/underinsured case and held that abatement of a bad faith claim until all appeals of a contract claim are exhausted was not required as a matter of law.

g) **In re Old American County Mutual Fire Insurance Company**, No. 13-12-00700-CV (Tex.App. – Corpus Christi January 30, 2013). A writ of mandamus was conditionally granted ordering the trial court to vacate its order denying the insurer's motion to sever and abate extra-contractual claims in an uninsured motorist case, even when no settlement offers had been made. The appellate court agreed with the insurer that "severance and abatement of extra-contractual claims is required in many instances in which an insured asserts a claim to uninsured or underinsured motorist benefits." The court noted that the insured must first prove that they have the coverage, that the other driver negligently caused the accident, was uninsured and, also establish the amount of their damages, and that the insurer should not be required to conduct discovery or prepare for trial on claims that could be rendered moot based on the outcome of the contract claim. The court concluded that "the facts and circumstances of the case require severance to prevent manifest injustice."

h) **In re American National County Mut. Ins. Co.,** 384 SW 3d 429 (Tex.App.—Austin 2012, orig. proc.). The court held that UIM claims were required to be severed from the contract claim and to be abated pending resolution of the contract claim because a $5,000 offer of settlement had been made.

i) **In re Old American County Mut. Fire Ins. Co**,, 2013 WL 398866 (Tex.App.—Corpus Christi 2013). Old American filed a motion to sever and to abate the plaintiffs' extra-contractual claims from the UM claim. After a non-evidentiary hearing that was not conducted on the record, the appellate court concluded that trial court abused its discretion in denying the motion to sever and to abate to prevent manifest unjustice.

j) **In re Ion at East End, Asset Campus Housing, Inc., Austin Student Venture II, L.P., Tribridge Residential, LLC.,** 2013 WL 5873365 (Tex.App.-Beaumont 2013 not reported)). The court conditionally granted a mandamus action to force the trial court to sustain Defendant's motion to sever a negligence and premises liability suit from a claim for uninsured motorist benefits and to transfer the case to the county where the accident occurred. Plaintiffs conceded that the controversy involves more than one cause of action and that the two claims could be asserted independently in separate suits. Plaintiffs contended that a single jury can apportion fault between the premises owners and the unknown motorist, avoiding the possibility of conflicting verdicts on the contract and tort claims. Citing **In re Liu**, the Palmers argue the trial court may deny severance where a plaintiff sues multiple parties for a single indivisible injury under varying causes of action. *See* 290 S.W.3d 515, 523–24 (Tex.App.-Texarkana 2009, orig. proceeding).

k) **In re ARCABABA d/b/a OK Corral,** Not Reported in S.W.3d, 2013 WL 5890109 (Tex.App.-Waco). OK Corral's filed a mandamus to force the trial court to sever the dram shop claim from the UM claim and to transfer venue in the matter. Mandamus was conditionally granted. OK Corral argued that the claims against 21st Century involve different claims and causes of action and were not ripe. The Court evaluated the severance factors and concluded that severance and a transfer of venue was necessary to protect the interests of OK Corral.

l) **In re Progressive County Mut. Ins. Co.,** 2014 WL 2618298 (not reported, Tex.App.-Houston [1st Dist.] 2014, orig. proc.). Progressive appealed the trial court's denial of a motion to sever and to abate. On appeal, the court noted, there is no evidence in the record of an offer of settlement, but noted that severance is not limited to cases where an offer has been made. The Court in Akin held that "other compelling circumstances" may also require severance. Progressive argues that "other compelling circumstances" should include the effort and cost associated with conducting discovery on extra-contractual claims that have not yet accrued because the insured's breach-of-contract claim has not yet been decided. The appellate court concluded that even in the absence of evidence of a settlement offer, severance of the extra-contractual claims from the underlying claims is required to avoid prejudice.

m) **In re Reynolds,** 369 S.W.3d 638, 365 (Tex.App. – Tyler 2012, orig. proceeding) Tortfeasor filed a motion to sever out the UIM carrier from the portion of the lawsuit against the tortfeasor. See also In re Koehn, 86 S.W.3d 363, 365 (Tex.App.—Texarkana 2002, orig. proceeding).

n) **In re Allstate County Mut. Ins. Co.**, 447 S.W.3d 497 (Tex.App.—Houston [1st Dist.] 2014). This is a mandamus action to appeal the trial court's granting of a motion to sever and abate extra-contractual claims from the UIM claim, and the trial court's denial of a motion to sever and to abate a claim that the carrier and the insurance agent misrepresented the terms of the insurance policy. Despite the lack of any evidence in the record that Allstate made a settlement offer to the Briers, the appellate court ordered that the trial court sever the extra-contractual claims from the underlying UIM claim because the Briers' unfair settlement claims would be negated by a determination that they lacked coverage under the insurance contract. However, the court agreed that the misrepresentation of insurance and DTPA claims should not be severed or abated as that claim is an alternative theory to recovery in the event it is determined that the Briers' claims were not covered under the policy.

o) **In re Farmers Texas County Mutual Insurance Company**, 509 SW.3d 463 (Tex.App. --- Austin 2015, orig. proceeding). Farmers appeals the trial courts's denial of a motion to abate Plaintiff's extra-contractual claims. On appeal, the court held that the trial court abused its discretion in denying the abatement even though there was no offer of settlement, and although it was argued that Farmers failed to meet its burden of proof for failing to put on evidence that an abatement would "promote justice," "avoid prejudice," and "promote judicial economy." The Court however disagreed and noted that the Plaintiff did not contest a severance of the extra-contractual claims, and that discovery requests issued to Farmers included discovery that tracked the language of the extra-contractual allegations in the petition.

b. **Exceptions:**

a) **Allstate Insurance Company v. Evins,** 894 S.W.2d 847 (Tex.App.--Corpus Christi, 1995, orig. proceeding) Uninsured motorist carrier was not entitled to severance of contractual and extra-contractual causes of action by insureds even though evidence of settlement offers would be highly prejudicial to the defense of the contract claims.

b) **Lusk v. Puryear,** 896 S.W.2d 377 (Tex.App.--Amarillo, 1995, orig. proceeding). Here the Court erred in severing and abating "bad faith" claims from PIP claims.

c) **Liberty Nat'l Fire Ins. Co. v. Akin,** 927 S.W.2d 627 (Tex. 1996) In the absence of a settlement offer by a carrier on an entire contract claim, or other compelling circumstances, severance of the insured's bad faith and contract claims is not required. Here, because the same evidence would have been admissible on the non-bad faith claims, the trial court did not abuse its discretion in denying the Motion to Severance.

d) **In re Farmers Tex. County Mut. Ins. Co.,** 2011 WL 4916303 (Tex.App. – Amarillo Oct. 17, 2011) (not designated for publication). Farmers filed a plea in abatement requesting the trial court abate all extra-contractual claims until after resolution of the UIM claim. After holding a hearing on Farmers' plea in abatement, the trial court denied the plea on the record. The parties subsequently mediated the case and Farmers informed the court by letter that it had made a settlement offer. On mandamus, Farmers argued Texas law establishes that, when an auto insurance carrier makes a settlement offer for a UIM claim, a trial court is without discretion and must abate extra-contractual claims until the contractual UIM claim is resolved. The court of appeals agreed with Farmers that Texas case law establishes that abatement of extra-contractual claims is required in most instances in which an insured asserts a claim to UIM benefits. However, mandamus was not warranted in this case because Farmers had not had a hearing where the Court failed to abate extra-contractual claims.

e) **In re Teachers Ins. Co.**, 2004 WL 2413311, 1 (Tex.App.—Amarillo 2004, orig. proceeding). UIM carrier's motion for severance was denied. Severance was not required because the tortfeasor did not assert a claim of prejudice.

f) **In re Allstate County Mut. Ins. Co.**, 447 S.W.3d 497 (Tex.App.—Houston [1st Dist.] 2014). Mandamus action to appeal the granting of a motion to sever and abate extra-contractual claims from the UIM claim, and the denial of a motion to sever and to abate a claim that the carrier and the insurance agent misrepresented the terms of the insurance policy. Despite the lack of any evidence in the record that Allstate made a settlement offer, the appellate court ordered that the trial court sever the extra-contractual claims from the underlying UIM claim because the Briers' unfair settlement claims would be negated by a determination that they lacked coverage under the insurance contract. However, the court agreed that the misrepresentation of insurance and DTPA claims should not be severed or abated as that claim is an alternative theory to recovery in the event it is determined that the Briers' claims were not covered under the policy.

g) **In re Farmers Texas County Mutual Insurance Company,** 2015 WL 5781170 (Tex.App. --- Austin 2015, orig. proceeding.). Farmers appealed the trial court's denial of a motion to abate discovery on Plaintiff's extra-contractual claims. On appeal, the court held that the trial court abused its discretion in denying the abatement even though (1) there was no offer of settlement, and (2) although it was argued that Farmers failed to meet its burden of proof for failing to put on evidence that an abatement would "promote justice," "avoid prejudice," and "promote judicial economy" because Farmers failed to present testimony at the hearing on the motion for severance and (3) even though Farmers had failed to include a transcript of the hearing in the Court's record on appeal. The appellate court noted that (a) the Plaintiff did not contest a severance of the extra-contractual claims, (b) the court could take notice of the court's file as a basis for granting the abatement, including the discovery requests issued to Farmers which tracked the language of the extra-contractual allegations in the petition, and (c) since no testimony was offered at the hearing Farmers' failure to include a transcript of the hearing was harmless.

c. **Waiver:**

a) **In re Farmers Texas County Mutual Insurance Company**, not reported in – S.W.3d --, 2016 WL 1211314 (Tex.App. --- Corpus Christi 2015, orig. proceeding.). Farmers filed an unsuccessful mandamus action to challenge a denial of its motion for severance and abatement of extra-contractual claims from the UIM claim. The court held that Farmers waived its right to complain by failing to timely file its petition for mandamus. Texas courts often deny mandamus relief on the basis of delay alone."); *In re Xeller,* 6 S.W.3d 618, 624 (Tex.App.–Houston [14th Dist.] 1999, orig. proceeding) ("Delay alone provides ample ground to deny mandamus relief.... Because relators waited sixteen months to seek mandamus relief from the appointment of a master, we hold that mandamus relief on that basis is barred by laches."). In this case, Farmers waived its right to complain because (1) Farmers delayed in seeking mandamus for 18 months after the trial court denied Farmers' motion for severance and abatement, and (2) Farmers also delayed in filing for mandamus for 8 months after the re-hearing on the motion**.**

d. **Separate Trials:**

a) The Rules of Civil Procedure vest the trial court with broad discretion to sever and to order separate trials. ***Guaranty Fed. Sav. Bank v. Horseshoe Operating Co.,*** 793 S.W.2d 652, 658 (Tex. 1990). Severance is appropriate if the controversy, as it does here, involves two or more separate, distinct causes of action, each of which might constitute a complete lawsuit within itself. ***Ryland Group, Inc. v. White***, 723 S.W.2d 160, 161 (Tex.App.–Houston [1st Dist. 1992, orig. proceeding). The express purpose of the Rule is to further convenience and to avoid prejudice and thus to promote justice. When the facts and circumstances of the case require a separate trial to prevent manifest injustices, and there is no fact or circumstance supporting or tending to support a contrary conclusion, the court has no discretion but to order separate trials. Since the claims can be tried separately without prejudicing the remaining claim, the court has discretion to order separate trials. ***Womack v. Berry***, 291 S.W.2d 677 (Tex. 1956).

C. ***SUFFICIENCY OF PLEADINGS***

a. **Luna v. Nationwide Property and Casualty Insurance Company,** 798 F. Supp. 821, (S.D. Tex. 2011), The Court granted Nationwide's renewed motion for partial dismissal of Plaintiff's extra-contractual claims for violations of the Texas Insurance Code, common law fraud, and breach of the duty of good faith and fair dealing due to inadequate pleadings. In this case, Plaintiff filed suit against Nationwide arising out of alleged underpayment of his insurance claims for damages to his home caused by Hurricane Ike. The Court agreed with Nationwide noting: "Plaintiff merely tracks the statutory language and insists he states claims against Nationwide and provides no particular factual support to illustrate how his claims meet those elements." And in response to Plaintiff's argument that "this is exactly the type of information that was intended to be developed through discovery," the Court explained: "Rule 8 does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." Ultimately, the Court found the Plaintiffs' complaint was "composed of vague, general

conclusions without the kind of factual support that would state a plausible complaint under Rules 8 and 12(b)(6), no less a fraud claim under Rule 9(b)." The Court then granted Nationwide's motion to dismiss Plaintiff's extra-contractual claims under the Texas Insurance Code, common law fraud claim, and—*on its own initiative*—Plaintiff's claim for breach of the duty of good faith and fair dealing.

b. **State Farm County Mut. Ins. Co. of Texas v. Diaz-Moore**, 2016 WL 624842 (Tex.App.—San Antonio 2016). State Farm filed a restricted appeal following a default judgment against it on a UIM claim and a claim for violations of the Prompt Payment of Claims Act. State Farm challenged the default judgment claiming (1) the UIM claim was not ripe and (2) because the Plaintiff failed to secure a reporter's record at the default judgment hearing there was no evidence to support the damages awarded. The Court found that the claim was ripe because the Plaintiff pled the tortfeasor was negligent and caused the collision; the tortfeasor was underinsured because his policy limits were not sufficient to cover the insured's injuries and damages; the insured had a policy with State Farm which contained UIM coverage; and State Farm failed to timely acknowledge the claim.

D. **REMOVAL**

a. **Warren v. State Farm Mut. Automobile Ins. Co,** 2008 WL 4133377 (N.D. Tex. Aug 29, 2008) The court held that Texas law clearly authorizes a cause of action against the adjuster in the adjuster's individual capacity under article 21.21 of the Texas Insurance Code. Therefore, State Farm failed to satisfy its "heavy" burden of proof to remove the case on its contention that the adjuster was improperly joined.

b. **Gebbia v. Wal-Mart Stores, Inc.**, 233 F.3d 880, 883 (5th Cir. 2000). In a removal case, "once the district court's jurisdiction is established, subsequent events that reduce the amount in controversy to less than $75,000 generally do not divest the district court of diversity jurisdiction." Post-removal affidavits, amendments, or stipulations may be considered by the district court in determining the amount in controversy "if the basis for jurisdiction is ambiguous at the time of removal." On the other hand, "if it is facially apparent from the petition that the amount in controversy exceeds $75,000 at the time of removal, post-removal affidavits, stipulations, and amendments reducing the amount do not deprive the district court of jurisdiction."

c. **Lowery v. Allstate County Mutual Insurance Company,** 2007 U.S. Dist. Lexis 30061 (N.D. Tex, April 23, 2007). A party seeking to remove an action to federal court on the basis of fraudulent or improper joinder bears a heavy burden. **Smallwood v. Illinois Cent. R.R. Co.,** 385 F.3d 568, 574 (5th Cir. 2004) (*en banc*), *cert. denied*, 544 U.S. 992 (2005). In *Smallwood*, the court "adopt[ed] the term 'improper joinder' as being more consistent with the statutory language than the term 'fraudulent joinder,' which has been used in the past. Although there is no substantive difference between the two terms, 'improper joinder' is preferred." *Id*. at 572. Accordingly, the court uses the term "improper joinder" in this opinion.

As the parties wishing to invoke federal jurisdiction by alleging improper joinder, Defendants must establish that Defendant Viohl was joined by Plaintiff Lowery to defeat diversity of citizenship and therefore subject matter jurisdiction. Subject matter jurisdiction based on diversity of citizenship exists only if each plaintiff has a different citizenship from each defendant. **Getty Oil Corp. v. Insurance Co. of N. Am.,** 841 F.2d

1254, 1258 (5th Cir. 1988). Otherwise stated, 28 U.S.C. § 1332 requires complete diversity of citizenship; that is, a district court cannot exercise jurisdiction if any plaintiff shares the same citizenship as any defendant. *See* **Corfield v. Dallas Glen Hills LP**, 355 F.3d 853, 857 (5th Cir. 2003) (citing **Strawbridge v. Curtiss,** 7 U.S. (3 Cranch) 267 (1806)), *cert. denied*, 541 U.S. 1073 (2004). In considering citizenship, however, the court considers only the citizenship of real and substantial parties to the litigation; it does not take into account nominal or formal parties that have no real interest in the litigation. **Navarro Sav. Ass'n v. Lee,** 446 U.S. 458, 460-61 (1980).

To establish improper joinder, Defendants must prove: "(1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the non-diverse party in state court." **Travis v. Irby,** 326 F.3d 644, 647 (5th Cir. 2003) (citing **Griggs v. State Farm Lloyds,** 181 F.3d 694, 698 (5th Cir. 1999)). Since Defendants do not assert fraud by Plaintiff, the test for improper joinder is "whether the defendant has demonstrated that there is no possibility of recovery by the plaintiff against an in-state defendant, which stated differently means that there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant." *Smallwood*, 385 F.3d at 573 (citing **Travis,** 326 F.3d at 648).

In addressing this issue, the district court must determine whether a plaintiff has "any possibility of recovery against the party whose joinder is questioned." **Travis,** 326 F.3d at 648 (quoting **Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co**., 313 F.3d 305, 312 (5th Cir. 2002)). "If there is arguably a reasonable basis for predicting that state law might impose liability on the facts involved, then there is no [improper] joinder." **Great Plains Trust,** 313 F.3d at 312 (internal quotations and citations omitted). "This possibility, however, must be reasonable, not merely theoretical." Id. If there is a reasonable possibility that Plaintiff can recover on any of her claims, the case must be remanded. In making this determination regarding improper joinder, a court does not "decide whether the plaintiff will actually or even probably prevail on the merits, but look[s] only for a [reasonable] possibility that [the plaintiff] may do so." **Dodson v. Spiliada Mar. Corp.,** 951 F.2d 40, 42 (5th Cir. 1992) (citations omitted).

In deciding the question of improper joinder, the court may either (1) "conduct a Rule 12(b)(6)-type analysis, looking initially at the allegations of the complaint to determine whether [it] states a claim under state law against the in-state defendant"; or (2) in limited circumstances, conduct a summary inquiry "to identify the presence of discrete and undisputed facts that would preclude plaintiff's recovery against the in-state defendant." **Smallwood,** 385 F.3d at 573-74.

"When a defendant seeks to remove a case, the question of whether jurisdiction exists is resolved by looking at the complaint at the time the petition for removal is filed." **Brown v. Southwestern Bell Tel. Co.,** 901 F.2d 1250, 1254 (5th Cir. 1990); *see also* **Metro Ford Truck Sales, Inc. v. Ford Motor Co.,** 145 F.3d 320, 326 (5th Cir. 1998), *cert. denied*, 525 U.S. 1068 (1999). Accordingly, the propriety of removing this case to federal court will turn on the allegations in Plaintiff's Original Petition ("Petition").

d. **Barton v. Allstate Insurance Company**, 729 F.Supp. 56 (United States District Court, W.D. Texas, Austin Division. 1990). Insured brought suit in state court against insurer for UM/UIM benefits. The insurer removed the case to federal court. Upon the insured's motion to remand, the District Court, Walter S. Smith, Jr., J., held that: (1) remand of insured's suit against insurer to state court was not justified on ground that

amount in controversy did not exceed jurisdictional limit where total amount sought for damages did not appear to legal certainty to be less than jurisdictional amount, and (2) action by an insured against her own insurer was not a "direct action" and consequently insurer was not deemed a citizen of state for diversity purposes; thus, diversity existed between insured and her automobile insurer.

Action by an insured against her own insurer was not a "direct action" and consequently insurer was not deemed a citizen of state for diversity purposes; thus, diversity existed between insured and her automobile insurer in insured's action to recover uninsured/underinsured motorist benefits. 28 U.S.C.A. § 1332(c)(1).

Plaintiff moves for remand on two grounds. First, because the amount in controversy does not appear to exceed $50,000, the jurisdictional hurdle of this Court; and second because diversity of citizenship does not exist in this case because this is a direct action against the insurer of a policy of liability insurance and Title 28 U.S.C. § 1332(c)(1) and 28 U.S.C. § 1441 deem the insurer a citizen of the state of which the insured is a citizen.

Plaintiff argues that Allstate must be deemed a citizen of the State of Texas because of Title 28 U.S.C. § 1332(c)(1) which provides: In any direct action against the insurer of a policy or contract of liability insurance ... such insurer shall be deemed a citizen of the State of which the insured is a citizen ... Section 1332(c)(1) and its legislative history clearly show that an action by an insured against his own insurer is not a "direct action." Adams v. State Farm Automobile Insurance Company, 313 F.Supp. 1349 N.D.Miss.1970). Plaintiff is suing her own insurance company in this case, therefore Defendant is not deemed a citizen of this state and diversity exists between the parties.

e. **Nichols v. Allstate Texas Lloyds**, 2012 WL 3780308 (S.D. Tex. 2012), a homeowner's case based on damage from a wildfire, and **Benton v. Lexington Ins. Co.**, No. 4:12-cv-01546, 2012 WL 3780312 (S.D. Tex. Aug. 31, 2012), a windstorm claim. In both of these cases, Federal Judge Kenneth Hoyt of the Southern District of Texas granted motions to remand the cases to state court based on the plaintiffs' claims against non-diverse defendant adjusters. The defendants had removed the claims to federal court based on contentions that in-state defendants were improperly joined. Both insurers filed notices of removal, asserting that the Plaintiffs' claims against the in-state defendants were "vague" or "conclusory", contained no more than verbatim recitation of statute, and that these pleading deficiencies established that the in-state defendants had been improperly joined. Judge Hoyt determined that the plaintiffs' pleadings established that the in-state adjusters could *potentially* be held personally liable, and that the insurers were under a "heavy burden to establish with certainty that the plaintiff has *no reasonable possibility* of recovery against [the adjusters] individually," and that the insurers had not provided any evidence to meet this burden.

f. **Green v. Nationwide Mutual Insurance Company and Alvarez,** No. A-12-CV-600LY, (W.D. Tex. October 17, 2012). The Court denied a motion to remand in a case despite the Plaintiff's naming the Texas adjuster as a defendant. The Court noted that Plaintiff's causes of action against Nationwide and the insurance adjuster included breach of contract, breach of duty of good faith and fair dealing, and DTPA violations, but determined the Plaintiff failed to present any reasonable basis that he could recover against the insurance adjuster. The court went on to explain that the insurance adjuster cannot be held liable for breach of contract since she was not a party to the contract, and the common law duty of good faith and fair dealing does not extend to an insurance

company's adjusters. Last, the court evaluated Plaintiff's Original Petition and effectively determined that Plaintiff's boilerplate language was not sufficient to sustain a DTPA cause of action against the insurance adjuster.

g. **Exchange Services, Inc. v. Seneca Insurance Co., Inc**., No. 3:15-CV-01873-M (N.D. Texas, October 16, 2015) Exchange Services argues that removal was procedurally deficient because at least one defendant did not timely consent to the removal within 30 days of the defendant's filing a petition for removal as required by 28 U.S.C §1446(b) and because there was diversity in light of the claims against adjuster create potential individual liability. The Court agreed with Seneca that Exchange Services waived the right to object to the procedural defect of the failure of all defendants to consent to the removal because Exchange Services had failed move to remand the case within 30 days of the date of removal as required by 48 U.S.C. §1447(c). However, the 30 day time period for a Plaintiff to move for remand does not apply to substantive defects that go to the existences of diversity of jurisdiction. Seneka argued the adjusters were "improperly joined" and therefore there is complete diversity. To establish improper joinder, a Defendant must prove (1) actual fraud in the pleading of jurisdictional facts, or (2) the inability of the plaintiff to establish a cause of action against the non-diverse party in state court. In the absence of actual fraud, the test for improper joinder is whether the defendant has demonstrated that there is "*no possibility of recovery the Plaintiff against an in-state defendant.*" **Vaillancourt v PNC Bank, Nat. Ass'n,** 771 F.3d 843 (5th Circ. 2014). The Court evaluates the pleadings using a Rule 12(b)(6) analysis. In this case, the Plaintiff alleged that the non-diverse defendants are adjusters who have liability under §541.060(a). This Court has previously held that insurance adjusters can be liable under §541.060. see **Rogers v. Allstate Indem. Co.,** 2013 WL 2182661, *2 (N.D. Tex. May 20, 2013) and **Progressive Island, LLC v. Scottsdaile Ins. Co.**, 2013 WL 6065414 at *2-3 (N.D. Tex. Nov. 18, 2013). Further, the Fifth Circuit ruled that "the evidence demonstrates that [the insurer] was acting through the [the adjuster] when it denied the [claimant's] claim for benefits" and that "Texas law clearly authorizes [Chapter 541] actions against insurance adjusters in their individual capacities." Adjusters have a role to play in "attempting in good faith to effectuate a prompt, fair and equitable settlement of the claim. Whether or not the plaintiff will ultimately prevail on this claim is irrelevant. The issue is whether the Defendant has shown there is "absolutely no possibility" that the Plaintiff could recover from the non-diverse defendant. **Gasch v. Hartford Acc. & Indem. Co.,** 491 F.3d 278, 282 (5th. Cir. 2007). Therefore, the Motion to Remand is remanded.

h. **Walters v. Metropolitan Lloyds Ins. Co**, 2016 WL 3764855 E.D. Texas, Sherman Division, 2016). The Court denied Plaintiffs' Motion to Remand because the adjuster was improperly joined. The court held that for an adjuster to be held individually liable, they have to have committed some act that is prohibited by the section, not just be connected to an insurance company's denial of coverage. General allegations that the adjuster was inadequately trained and failed to thoroughly investigate the claim, conducted an outcome-oriented investigation, made misrepresentations and omissions and unfairly investigated the claim were merely boilerplate allegations.

i. **Jackson v. Allstate Vehicle & Property Ins. Co**., 2017 WL 1327763 (N.D. Tex. – Fort Worth 2017). This wind/hail damage claim was remanded because Allstate failed to meet its burden of proof to show the amount in controversy exceeds the statutory minimum for diversity. The plaintiff's own roofer says the cost of repair is less than $15,000 and plaintiff's demand was based on that amount. Although Plaintiff also sought

to recover attorney's fees and those fees are included as part of the amount in calculating the amount in controversy, the court found that those fees in this case would not justify removal.

XXI. DISCOVERY

A. SCOPE OF DISCOVERY

a. **In re National Lloyds Ins. Co.**, 449 S.W.3d 486 (Tex. 2014). The Supreme Court held that trial court abused its discretion in ordering production of its adjusting firms' assessments of other insureds' claims arising from the storms that damaged insured's home. The insured alleged the carrier underpaid claims on two storms. Despite limiting the time period and the geographic region of the other claims sought to be discovered, the court felt claim file documents on other claims was of doubtful relevance.

a. **In re State Farm Lloyds**, 2016 WL 5234610 (Tex.App.—Corpus Christi, Orig. proceeding). State Farm's petition for mandamus was denied. State Farm sought to overturn the trial court's order compelling State Farm to produce "re-inspection files" created by the same adjuster that was named as a defendant in the lawsuit and that had inspected the insured's hail damage claim.

B. DEPOSING THE EUO ATTORNEY

a. **In Re Texas Farmers Insurance Exchange,** 12 SW3d 807 (Tex. 2000) The Supreme Court in **Texas Farmers** affirmed the Court of Appeals holding that an attorney who investigates his client's affairs may be required to divulge his communications with his client about the results of that investigation.

C. CLAIMS OF TRADE SECRET

a. **In re Bass, 113 S.W.3d 735 (Tex. 2003).** A trade secret is "any formula, pattern, device or compilation of information which is used in one's business and presents an opportunity to obtain an advantage over competitors who do not know or use it." **Computer Assocs. Intern. V. Altai,** 918 S.W.2d 453, 455 (Tex. 1994). To determine whether a trade secret exists, this Court applies the Restatement of Torts' six-factor test:

a) the extent to which the information is known outside of his business;

b) the extent to which it is known by employees and others involved in his business;

c) the extent of the measures taken by him to guard the secrecy of the information;

d) the value of the information to him and to his competitors;

e) the amount of effort or money expended by him in developing the information;

f) the ease or difficulty with which the information could be properly acquired or duplicated by others.

b. **In re Continental General Tire, Inc.,** 979 S.W.2d 609 (Tex. 1998), that a party asserting the trade secret privilege has the burden of proving that the discovery information sought qualifies as a trade secret. If met, the burden shifts to the party seeking trade secret discovery to establish that the information is necessary for a fair adjudication of its claim.

D. ***DEPOSING THE ADJUSTER ON A PURE UM/UIM CLAIM.***

a. **In re Garcia,** 04-07-00173-CV (Tex.App.- San Antonio, 2007) (mem. op). The insured may depose the adjuster on the underlying "contract."

b. **In re Luna**, 2016 WL 657879 (Tex.App.—Corpus Christi 2016, orig. proceeding). In this UM case, the Court conditionally granted the insured's petition for mandamus to obtain the deposition of State Farm's corporate representative. The Court rejected State Farm's claims that (1) The insured waived the right to depose State Farm; (2) the request was improper, and harassing; (3) the burden and expense of the deposition outweighs its likely benefits; (4) the information sought was not relevant to the issues and (5) State Farm has no personal knowledge of the matters requested. The Court noted a litigant generally has a right to depose the opposing party, and that in the case of ***In re Garcia***, it was held to be an abuse of discretion to quash the deposition of a State Farm representative during a UM/UIM case. The Plaintiff has the burden of proof in this UM case, and State Farm had not stipulated to liability and damages. Considering the importance of the issues at stake in the litigation and the importance of the proposed discovery in resolving the issues, the burden on State Farm is outweighed by Luna's interests in obtaining relevant discovery.

E. **LIMITATIONS ON DISCOVERY:**

a. **In re State Auto Property & Casualty Insurance Company,** 348 SW3d 499 (Tex. App. – Dallas, 2011). The Court held that a trial court's order limiting the questions which could be asked of the Plaintiff prior to the start of the deposition and its order granting pre-emptive sanctions in the amount of $100 for every question asked in a previous deposition by other parties was an abuse of discretion. In this case, the Plaintiff was seeking UIM benefits after settling with the tortfeasor. In the underlying lawsuit, Plaintiff had already been deposed, but the UIM carrier did not participate in the deposition, and defense counsel for the tortfeasor was not affiliated, nor did they communicate with State Auto in any way. Accordingly, the court concluded that the trial court's order denying discovery prevented State Auto from developing or presenting viable claims. This was found to be an abuse of discretion.

F. ***DISCOVERY REGARDING ATTORNEY'S FEES:***

a. **In re National Lloyds Ins. Co., 2017 WL 2492001 (Tex. 2016).** In this mandamus action, the Texas Supreme Court determined that the Defendant's attorney's fees, expenses, and billing information, are not discoverable by the Plaintiff to prove the reasonableness of the Plaintiff's attorney's fees.

XXII. TRIAL ISSUES

A. NOT NECESSARY TO SUE THE TORTFEASOR

a. **Brainard v. Trinity Universal Ins. Co.** 216 SW3d 809, 818 (Tex. 2006) In Brainard, the Court re-affirmed its previous holding that "Of course, the insured is not required to obtain a judgment against the tortfeasor. ***State Farm Mut. Auto. Ins. Co. v. Matlock,*** 462 SW2d 277, 278 (Tex. 1970). The insured may settle with the tortfeasor, as Brainard did in this case, and then litigate the UIM coverage with the insurer." However, suing the tortfeasor may:

a) encourage a liability carrier to extend coverage even if coverage was previously denied;

b) Provide you with both a more favorable venue or even prevent removal.

b. **State Farm County Mut. Ins. Co. of Texas v. Diaz-Moore**, 2016 WL 624842 (Tex.App.—San Antonio 2016). State Farm filed a restricted appeal following a default judgment against it on a UIM claim and a claim for violations of the Prompt Payment of Claims Act. State Farm challenged the default judgment claiming (1) the UIM claim was not ripe and (2) because the Plaintiff failed to secure a reporter's record at the default judgment hearing there was no evidence to support the damages awarded. The Court found that the claim was ripe because the Plaintiff pled the tortfeasor was negligent and caused the collision; the tortfeasor was underinsured because his policy limits were not sufficient to cover the insured's injuries and damages; the insured had a policy with State Farm which contained UIM coverage; and State Farm failed to timely acknowledge the claim.

B. CONSENT TO BE BOUND

a. **Cantu v. State Farm Mut. Automobile Ins. Co.,** 2017 WL 243628 (S.D. 2017). Summary Judgment for State Farm was affirmed in this UM case because the Court held that State Farm did not consent to be bound by a default judgment against the tortfeasor. Further, the mere fact that State Farm was a party to the case at the time the default judgment was entered does not constitute waiver or collateral estoppel. If a policyholder chooses to proceed without the insurer's consent, "any judgment obtained against the uninsured motorist will not be binding on the insurance carrier. Liability and damages will have to be re-litigated.

C. DEFAULT JUDGMENTS

a. **State Farm County Mut. Ins. Co. of Texas v. Diaz-Moore**, 2016 WL 624842 (Tex.App.—San Antonio 2016). State Farm filed a restricted appeal following a default judgment against it on a UIM claim and a claim for violations of the Prompt Payment of Claims Act. State Farm challenged the default judgment claiming the UIM claim was not ripe and because the Plaintiff failed to secure a reporter's record at the default judgment hearing there was no evidence to support the damages awarded. The Court found that the claim was ripe because the Plaintiff pled the tortfeasor was negligent and caused the collision; the tortfeasor was underinsured because his policy limits were not sufficient to cover the insured's injuries and damages; the insured had a policy with State Farm which contained UIM coverage; and State Farm failed to timely acknowledge the claim.

b. **In re Ruby Britt**, 2016 WL 9175819, (Tex.App. – Texarkana 2016, orig. proceeding). Insured's petition for mandamus to order the judge to vacate an order granting a new trial and reinstate the default judgment on her UIM claim for policy limits plus an award of $5,000 in attorney's fees was conditionally granted because State Farm failed to establish a meritorious defense. In reaching this conclusion, the Court rejected State Farm's argument that the petition had to be verified and that the insured's claims were barred by the statute of limitations. Further, State Farm failed to provide even a prima facie case that its denial of coverage was meritorious.

D. TRIAL AMENDMENT SHOULD BE PERMITTED TO ASSERT OFFSET/CREDIT

a. **Allstate Property & Cas. Ins. Co. v. Gutierrez,** 281 SW 3d 535 (Tex. App. – El Paso 2008, no pet.) The Court of Appeals reversed and rendered the ruling of the trial court which denied the insurer the right to a trial amendment to assert its right to an offset for the liability settlement. **Stephenson v. Leboeuf,** 16 SW 3d 829, 839 (Tex.App.—Houston [14th Dist.] 2000, pet. den.) held that a court has no discretion to refuse an amendment unless the opposing party presented evidence of surprise or prejudice or the amendment asserted a new cause of action or defense, and thus was prejudicial on its face and if the opposing party objected to the amendment.

E. CORRECT PARTIES TO A UM/UIM TRIAL & IDENTIFICATION OF COUNSEL

a. In **Perez v. Kleinert** 211 SW3d 468, (Tex.App.–Corpus Christi 2006, no. pet). The Court held it was reversible error when an attorney was allowed to participate in a trial as the attorney for an uninsured party, when actually he was the attorney for an insurer. There was no basis for the trial court to recognize the attorney in that capacity.

On rehearing, the court reversed and remanded for a new trial. There was no question that the motorist was pro se at a trial. Given that the insurer's attorney was never designated of record to be the motorist's attorney, there was no basis for invoking Tex. R. Civ. P. 12 to challenge the attorney's actions in misrepresenting his identity to the jury. The trial court thus erred in allowing the attorney to conceal and deliberately misrepresent his identity before the jury. Because there was no designation or notice of substitution in accordance with Tex. R. Civ. P. 10, there was no basis for the trial court to have recognized the attorney as the motorist's attorney. There was also a fatal conflict of interest. The attorney had no legitimate basis for participating at trial because the passenger's claim for uninsured/under-insured motorist benefits was never tried to the jury. The trial was tainted by reversible error and a new trial was ordered.

F. BURDEN OF PROOF TO PROVE THE POLICY

a. **Mid-Century Ins. Co. of Texas v. McLain,** not reported in S.W.3d, 2010 WL 851407 (Tex.App.—Eastland 2010, no pet.hist). The long established Texas law is that a plaintiff seeking recovery against an insurance company for injuries resulting from the negligence of an uninsured motorist must plead and prove that, at the time of the accident, the plaintiff was protected by uninsured motorist coverage. **Members Mut. Ins. Co. v. Olguin**, 462 S.W.2d 348, 350 (Tex.Civ.App.-El Paso 1970, no writ); **Members Mut. Ins. Co. v. Clancy**, 455 S.W.2d 447 (Tex.Civ.App.-San Antonio 1970, no writ); **Pan Am. Fire & Cas. Co. v. Loyd**, 411 S.W.2d 557, 560 (Tex.Civ.App.-Amarillo 1967, no writ). In the retrial of this case, McLain should introduce a copy of her policy and establish her UIM coverage if she continues to contend that the policy introduced by

Mid-Century was not her policy at the time.

G. ***ADMISSIBILITY OF EVIDENCE OF POLICY LIMITS***

a. **Liberty Mut. Ins. Co. v. Sims**, not reported in – S.W.3d --, 2015 WL 7770166 (Tex.App. – Tyler 2015, pet. denied) The appellate Court held that the trial court erred in (1) submitting the issue of the amount of UIM coverage to the jury for determination, (2) in not finding that the UIM policy limits were $250,000 as a matter of law despite the failures of the carrier to timely and properly supplement discovery responses and even in the absence of a motion for summary judgment, and (3) in permitting the Plaintiff to disclose the amount of UIM coverage and the amount of the tortfeasor's liability limits to the jury over Liberty Mutual's objections. The Court conceded that the evidence of insurance was unavoidable in a UIM trial, the amount of coverage under the UIM policy and even the amount of coverage under the tortfeasor's policy was not admissible.

H. ***ADMISSIBILITY OF INTOXICATION OF THE UNINSURE/UNDERINSURED DRIVER***

General rule: Even though punitive damages are not recoverable on the UM/UIM because of an intoxicated driver's gross negligence, evidence of intoxication by an uninsured/under-insured driver may be admissible if the court does not find the probative value of the evidence is outweighed by the prejudicial effect of the evidence as such evidence could establish the negligence of the uninsured/under-insured motorist.

I. ***ADMISSIBILITY OF PRIOR/SUBSEQUENTS ACCIDENTS & OTHER HEALTH CONDITIONS***

a. **Farmers Texas County Mut. Ins. Co. v. Pagan**, 453 S.W.3d 454 (Tex.App. Houston [14th Dist.] 2014, no pet.). Farmers appeals from a final judgment following a jury trial in a UIM case in which the only contested issues were the cause and extent of the personal injuries Pagan suffered in a wreck. Farmers contends the trial court abused its discretion by excluding evidence regarding a prior incident which Farmers alleged was a potential cause of the personal injuries at issue. Farmers made an offer of proof in an effort to admit five items of evidence it argued were related to the other incident.

The trial court excluded the evidence about the horse incident concluding the probative value of evidence was substantially outweighed by danger of confusion of issues and misleading jury. The also excluded the evidence holding that the insured had no burden of proving that incident involving horse was not cause of neck and shoulder injuries; and that the surgeon's opinion that it was "possible" that being trampled by horse could cause similar injuries was not reliable.

b. **JLG Trucking, LLC v Garza**, 466 S.W.3d 157 (Tex. 2015). Defendant appealed the trial court's ruling excluding evidence that the Plaintiff had been involved in a subsequent accident. The defendant alleged through its expert witness that the Plaintiff's complaints were degenerative in nature and therefore not caused by the accident with the Defendant, and alternatively, that Plaintiff's injuries were caused when the Plaintiff was involved in subsequent accident that occurred a 3 months after the first accident. The Supreme Court ruled: (1) the evidence of the second accident was relevant and therefore it was improper for the trial court to exclude such evidence, and (2) the defendant was entitled to cross examine Plaintiff's expert regarding the second accident.

J. ***MOTIONS FOR NEW TRIAL***

a. **In re State Farm Mutual Automobile Insurance Company,** 483 S.W.3d 249 (Tex.App. – Fort Worth 2016, orig. proceeding.). State Farm filed this mandamus action to appeal the trial court's decision to grant a new trial following a jury trial of a UIM case in which the jury awarded the Plaintiff only $198.00 in past medical expenses. The Court of Appeals ruled that the trial court abused its discretion in granting the motion for new trial because the jury's verdict was not so clearly against the great weight and preponderance of the evidence.

XXIII. ASSIGNMENT OF BENEFITS

A. ***SETTLEMENT CHECKS AND ASSIGNMENTS***

a. **Texas Farmers Ins. v. Fruge,** 13 S.W.3d 509 (Tex. App.--Beaumont 2000, pet. denied). It is breach of contract to put providers name on PIP check in absence of a valid assignment.

B. ***APPLICATION OF PAID OR INCURRED TO PIP CLAIMS***

a. **Allstate Indem. Co. v. Forth,** 204 S.W.3d 795 (Tex. 2006). Allstate settled Forth's medical bills for less than the actual amount billed. Forth sued Allstate alleging that it arbitrarily reduced her bills without using an independent and fair evaluation to determine what amount of her medical expenses were reasonable. According to Forth, Allstate routinely discounts medical expenses by comparing those charges to a third-party contractor's computerized database. Allstate then offers about eighty-five percent of the medical expenses reflected in that database for the same treatment or procedure. **Forth** did not claim that Allstate's conduct had caused her any damage.

Under Texas law, to have standing a party must have suffered a threatened or actual injury. Forth does not claim that she has any un-reimbursed, out-of-pocket medical expenses. She does not assert that these providers withheld medical treatment as a result of Allstate reducing their bills, or threatened to sue her for any deficiency, or harassed her in any other manner. Moreover, Forth has no exposure in the future because limitations has now run on the medical claims. From all appearances, her medical providers have accepted the amount Allstate paid them without complaint, thereby satisfying Allstate's obligation under the policy.

Because Forth does not claim that the manner in which Allstate settled her claim caused her any injury, we conclude that she does not have standing in this case. Accordingly, we reverse the court of appeals' judgment and, without hearing oral argument, render judgment dismissing Forth's claims against Allstate.

XXIV. LIENS & SUBROGATION ON PIP AND UM/UIM CLAIMS

A. ***Equitable Subrogation***

a. **Ortiz v. Great Southern Fire and Casualty Ins. Co.,** 597 S.W.2d 342 (Tex. 1980). Equitable subrogation is granted to prevent an insured from receiving a double recovery. An insurer is not entitled to subrogation if the insured's loss is in excess of the amounts recovered from the insurer and the third party causing the loss.

B. ***Common Fund Doctrine***

a. **Texas Farmers Ins. Co. v. Seals,** 948 S.W.2d 532 (Tex.Civ.App.--Fort Worth, 1997, no writ). An insurer who does not aid in the collection of damages and yet who benefits from the efforts of an insured's attorney to recover its damages is responsible to pay its pro-rata share of attorney's fees under the common fund doctrine. See also **Allstate v. Edminster**, 224 S.W.3d 456 (Tex.App.—Dallas 2007).

C. ***Medicare/Medicaid Liens***

a. **Statute:**

a) **Medicare Secondary Provider Statute (MSP): 42 U.S.C. §411.20, §411.23, §411.24, and §411.26.**

b) **Medicaid: Tex. Health & Safety Code §12.036**

b. **Case Law**:

a) Medicare and Medicaid liens attach to UM/UIM settlements. See **Texas Farmers Ins. Co. v. Fruge,** 13 S.W.3d 509 (Tex.App.-Beaumont 2000, review denied).

c. **Ark. Dep't of Human Servs. v. Ahlborn,** 547 U.S. 268 (2006). The Supreme Court of the United States limited the ability of a state agency to claim a personal injury settlement as compensation for Medicaid benefits provided for treatment of the injuries. The Court ruled unanimously that a federal statutory prohibition against liens on personal property to recover Medicaid expenditures applied to settlements, so that only the portion of the settlement that represented payment for past medical expenses could be claimed by the state. If the client's injuries are big enough to be payable under UIM, then Medicaid is probably only entitled to a pro-rata share of its damages if the coverage is limited.

D. ***Health Insurance***

a. **Statute: Chapter 140 Tex.Civ.Prac.Rem Code: Contractual Subrogation Rights of Payors of Certain Benefits**

a) The effective date of the statute is January 1, 2014,

b) The statute only applies for certain benefits and qualified plans for plans purchased in Texas.

b. **§140.008 Tex.Civ.Prac.Rem. Code**

a) A payor of benefits may not pursue a recovery against a covered individual's first-party coverage.

b) A payor of benefits may pursue recovery against uninsured/underinsured motorist coverage or medical payments coverage only if the covered individual or the covered individual's immediate family did not pay the premiums for the coverage.

c. Most current ERISA plans spell out their rights of reimbursement and subrogation against any insurance, including PIP, and UM/UIM.

The Ins. Code also mandates that ins agents offer UM/UIM (and PIP) for the benefit of the motoring public (and by implication, not for the benefit of the health insurer).

If the health plan is a premium funded health plan, its subrogation interest should not attach to the UIM proceeds. There is no case exactly on point; the subrogation provision in the Fortis case said it could take the UM/UIM proceeds, but that issue was not addressed in **Fortis**.

Be wary that a court will apply the logic of the workers' comp and hospital lien cases to an equitable subrogation interest, especially since statutory liens have even greater status than contractual subrogation interests and those liens cannot touch the recovery. However, if the health plan is both ERISA qualified and self-funded, then there is a US Supreme Court opinion saying the subrogation interest attaches to the UM/UIM recovery if the plan and SPD say it does.

d. But see **Great West Life & Annuity Ins. Co. v. Knudson,** 534 U.S. 204, 213 (S.Ct 2002) which indicates some ERISA liens do not attach.

e. **Questions to ask:**

a) Is the plan self-funded or insurance premium funded? (self-funded plans have been able to get UM money since **FMC v Holliday,** 111 S.Ct. 403, 498 U.S. 52 (1990).

b) Does the plan document clearly say it gets UM/UIM money or does it talk about subrogating to the tort recovery. If the plan is ambiguous then your chances of construing the ambiguity against it are better.

c) Does the Summary Plan Description also extend the subrogation interest to the UM/UIM money? It should if the plan is to be enforced.

d) Does the plan language clearly extend to your client? (If the injured person is the child and the plan's interest extends to the recovery of the employee, then all of the UM money should go to the child and none to the parent and then there is no employee recovery for the interest to attach to.)

E. ***Workers Compensation Liens:***

Workers Comp Carrier Has An Independent Right to Pursue Claims even if the injured employee Dismisses his claims with prejudice. In City of Lubbock v. Payne, 2011 WL 2463125 (Tex.App. – Amarillo June 17, 2011), Jarred Pierson, a Lubbock police officer, was injured on the job while chasing a suspect at an apartment complex, when he fell over a cable that had been placed there by the Ponderosa Apartments ("Ponderosa") to prevent cars from entering into a particular area. Pierson filed suit against Ponderosa to recover for his injuries. At the same time, he received workers' compensation benefits from the City of Lubbock, which intervened in his lawsuit against Ponderosa. One day before trial, Pierson non-suited his lawsuit with prejudice. Ponderosa then also obtained a dismissal with prejudice of the City's claims.

The court of appeals recognized a split of authority on the issue. Some courts of appeals hold that when an employee's cause of action is defeated, that of the carrier is defeated as well, while others hold that once compensation benefits have been paid, the right of the insurance carrier overrides that of the employee.

In agreeing with the City, the court of appeals stated that to hold otherwise would be to ignore several long established rules of subrogation. In particular, payment from a subrogee effectuates a transfer of interest in the cause of action to the subrogee. When that occurs, the subrogee assumes the status as the "real party in interest" while the subrogor's interest becomes nominal. If the subrogor enters into a settlement with and gives a release to the wrongdoer after such payment while the tortfeasor knows of the subrogee's rights of subrogation and the subrogee is not party to the settlement, then settlement does not bar the subrogee from enforcing its subrogation right. So, it does not matter that Pierson may have compromised whatever remaining claim he had against Ponderosa and dismissed his portion of the suit with prejudice. The City had compensated Pierson to some extent before then and, therefore, owned at least a part of the cause of action. Pierson also knew of the City's status as a subrogee before the non-suit. Consequently, the actions of Pierson, did not bar the City from continuing its recovery efforts against the purported tortfeasor. Accordingly, the court of appeals reversed the trial court's order dismissing the City's claims and remanded for further proceedings.

a. **Do Workers Compensation carriers have subrogation rights on UM/UIM claims?**

a) The answer depends on whether the UM/UIM policy was paid for by the injured employee or his employer.

(1) If the policy is paid for by the employee, the workers comp carrier does not have a right of subrogation.

(2) If the UM/UIM policy is paid for by the employer or some other third party, the comp carrier is entitled to subrogation.

b) **Employee Purchased Policies: No Right of Subrogation**

(1) In each case involving employee-purchased policies, however, the courts have held that the carrier does not have a subrogation interest in the benefits. See **Erivas v. State Farm,** 141 S.W.3d 671 (Tex. App. - El Paso 2004); **City of Corpus Christi v. Gomez,** 141 S.W.3d 767, 773 (Tex. App.--Corpus Christi 2004, no pet.); **Casualty Reciprocal Exch. v. Demock,** 130 S.W.3d 74, 76 (Tex. App.--El Paso 2002, no pet.); **Liberty Mut. v. Kinser,** 82 S.W.3d 71, 78 (Tex. App.--San Antonio 2002, pet. withdrawn); see also **McLennan Cmty. Coll. v. State Farm Mut. Auto. Ins. Co.,** No. 10-02-00206-CV, 2004 Tex. App. LEXIS 2332, at *2 (Tex. App.--Waco Mar. 10, 2004, pet. denied) (mem. op.). The factual distinction between these cases and those involving employer-purchased policies significant. As the **Demock** court noted, when employee-purchased plans are involved, the courts must reconcile competing public policies and determined that to allow subrogation rights against employee-purchased UIM policies would result in the injured employee subsidizing

the workers' compensation carrier, a result which the courts found untenable. Se**e Kinser,** 82 S.W.3d at 79; **Gomez,** 141 S.W.3d at 772.

c) **Liberty Mut. v. Kinser,** 82 S.W.3d 71, 72 (Tex. App.-San Antonio 2002, pet. withdrawn). The employee was injured in an automobile accident while in the course and scope of his employment. The comp carrier began paying the employee's medical bills. The driver of the other vehicle involved in the accident was at fault, but he was underinsured. The employee had personal UM/UIM coverage through his own insurer with policy limits of $ 50,000. Although the term "third party" when read in isolation is not limited to tortfeasors, the term "third party" must be read in context. Section 417.001(a) modifies or limits the "third party" to a "third party who is or becomes liable to pay damages." Therefore, a carrier is only entitled to subrogation against damages paid to an injured employee by a third party who is or becomes liable to pay damages.

We agree with **Kinser** that the term "damages" as used in section 417.001(a) does not include UIM benefits but is limited to damages recovered from a third party who is liable to the injured employee because the third party breached a contract or committed a tortious act against the injured employee. Therefore, we hold that Liberty Mutual does not have a subrogation right to benefits paid to Kinser by State Farm under Kinser's UIM coverage - a holding that is consistent with the view of a majority of other *jurisdictions*.

We have two competing public policies. The policy behind the subrogation statute, which is to prevent overcompensation to the employee and to reduce the burden of insurance to the employer and to the public, **Texas Workers' Comp. Ins. Facility v. Aetna Cas. & Sur. Co.,** 994 S.W.2d at 926, and the policy of requiring uninsured motorist coverage "to protect the conscientious and thoughtful motorist against losses caused by negligent financially irresponsible motorists." **Francis v. Int'l Serv. Ins. Co.,** 546 S.W.2d 57, 60-61 (Tex. 1976). In the absence of proof that Kinser's retention of the UIM benefits would overcompensate him, it is difficult to understand why the policy favoring his prudence should be trumped by the policy supporting the subrogation statute. Any other interpretation simply results in the injured employee subsidizing the insurance company. Neither law nor equity would be satisfied by that result.

A workers' compensation carrier does not have a subrogation right to benefits paid an injured employee under the employee's UIM coverage.

d) In **Bogart v. Twin City Fire Ins. Co.,** the Fifth Circuit considered a workers' compensation carrier's subrogation rights with respect to UIM benefits under Texas law. 473 F.2d 619 (5th Cir. 1973). The workers' compensation carrier, TransAmerica Insurance Company, argued that it had subrogation rights to the UIM benefits based on the subrogation statute "which in essence provided that a workmen's compensation carrier has a right of subrogation in any recovery the employee may obtain against the third person who, because of the circumstances under which the accident occurred, has a legal liability to pay damages." 473 F.2d at 627. The district court rejected TransAmerica's argument relying on a clause in the UIM policy stating that "nothing should inure to the benefit of any workmen's compensation carrier" and on the court's conclusion that the right of subrogation existed only against a third party who was a tortfeasor. *Id*. at 627-28.

The Fifth Circuit cited a number of Texas cases which the Fifth Circuit construed as limiting the subrogation provision to actions against the actual tortfeasor. *Id*. at 628-29. The Fifth Circuit also discounted TransAmerica's fear of a double recovery because (1) the double recovery that the subrogation statute sought to prohibit was recovery from both the workers' compensation carrier and the tortfeasor; and (2) the plaintiffs had suffered damages in excess of the sum of the compensation benefits and the uninsured policy benefits. *Id* at 629. **Texas Workers' Comp. Ins. Facility v. Aetna Cas. & Sur. Co.**

b. **Employer Purchased Policies: Comp Carrier Is Entitled to Subrogate**

a) In each case involving employer-purchased policies, the courts have held that the workers' compensation carrier has a subrogation interest in the UIM benefits. *See* **Erivas v. State Farm Mut. Auto. Ins. Co.,** 141 S.W.3d 671, 676 (Tex. App.--El Paso 2004, no pet.); **Texas Workers' Comp. Ins. Fund v. Knight,** 61 S.W.3d 91, 93 (Tex. App.--Amarillo 2001, no pet.); **Texas Workers' Comp. Ins. Facility v. Aetna,** 994 S.W.2d 923, 926 (Tex. App.--Houston [1st Dist.] 1999, no pet.); **Employers Cas. Co. v. Dyess,** 957 S.W.2d 884, 886 (Tex. App.--Amarillo 1997, pet. denied).

These cases are based on the maxim that, when statutory language is clear and unambiguous, the statute should be given its plain meaning; because the statute refers to "third parties," not "third-party tortfeasors," and to "liability," not "tort liability," the courts reasoned that a carrier's subrogation rights are not limited to claims grounded in tort law. *See* **Erivas,** 141 S.W.3d at 676 ("We find that the plain meaning of Section 417.001 creates a right of subrogation against a third party who is or becomes liable to pay damages, including an employer's UIM insurance carrier found liable to pay damages."); **Aetna,** 994 S.W.2d at 925 ("The language of the subrogation statute does not expressly limit [the carrier's] rights to claims against third-party tortfeasors. Clearly, it would have been easy to do so."); **Dyess,** 957 S.W.2d at 889 ("The statute does not limit the scope of persons with legal liability for the injury against whom a compensation carriers' subrogation interest is effective. That being true, the clear wording of the statute does not support [the UIM insurer's] position that [the carrier] is only subrogated to [the employee's] rights against third-party tortfeasors."); see also **National Liab. & Fire Ins. Co v. Allen,** 15 S.W.3d 525, 527 (Tex. 2000) ("If possible, we must ascertain the legislature's intent from the language it used in the statute and not look to extraneous matters for an intent that the statute does not state.").

b) **Employers Casualty Co. v. Dyess,** 957 S.W.2d 884 (Tex.App.--Amarillo 1997, pet. denied) Court grant the comp carrier's motion for summary judgment holding that the insurer's statutory right of subrogation applied to UM benefits on an employer purchased policy, and that a hospital lien does not attach to the UM/UIM coverage benefits.

(1) Made Whole Doctrine Does Not Apply to Employer Purchased UM/UIM Policies

(a) **See Resolution Oversight Group v. Garza,** 2009 Tex.App. Lexis 5324 (Tex.App.– Austin) address whether the employee must be made whole before comp carrier can exercise its

subrogation rights on an employer purchased policy.

The distribution of proceeds recovered from third parties is governed by section 417.002. *See* Tex. Lab. Code Ann. § 417.002 (West 2006). Under that provision, any money recovered goes first to the workers' compensation carrier, and "'until [the] carrier is reimbursed in full, the employee or his representatives have no right to any of such funds.'" **Texas Mut. Ins. Co. v. Ledbetter,** 251 S.W.3d 31, 36 (Tex. 2008) (quoting **Capitol Aggregates, Inc. v. Great Am. Ins. Co.,** 408 S.W.2d 922, 923 (Tex. 1966)); see also **Argonaut Ins. Co. v. Baker,** 87 S.W.3d 526, 530 (Tex. 2002) ("Thus, rather than the employee owning the money and being forced to disgorge it, the carrier is first entitled to the money up to the total amount of benefits it has paid . . . ."). After the carrier is fully reimbursed, then any additional money goes to the employee. *See* Tex. Lab. Code Ann. § 417.002(b). First-money reimbursement is crucial to the workers' compensation system because it reduces costs to the carrier, and thus to the employer and the public. **Ledbetter, 251 S.W.3d at 35; Performance Ins. Co. v. Frans,** 902 S.W.2d 582, 585 (Tex. App.--Houston [1st Dist.] 1995, writ denied).

F. ***Child Support Liens***

a. **Statute:**

a) **Texas Admin. Code §231.051**

b) **Texas Family Code §157.317(a)(3)** - child support liens attach to a UM/UIM claim as that would classify as a claim for "personal injury" or an "insurance settlement or award for the claim."

G. ***Hospital Liens***

a. **Hospital liens do not attach to UM/UIM coverage proceeds because these coverages are not "public liability insurance" See Members Mut. Ins. Co. v. Herman Hosp. 664 SW2d 325 (Tex. 1984);**

a) **See; Sec.55.003(b)(3) Texas Property Code. Hospital Lien Statute.**

(1) The Texas legislature, as early as 1933, passed the Hospital Lien Statute, which was designed to relieve hospitals of the financial burdens of providing care for accident victims. The statute is now codified as Chapter 55 of the Texas Property Code. The lien attaches to the cause of action, judgment, settlement proceeds, or payment of any claim owned by a plaintiff admitted to the hospital within 72 hours of the accident giving rise to the need for treatment; Sec. 55.003. For the lien to attach, the hospital must file the lien with the county clerk before the payment of the settlement is made; Sec. 55.005.

The lien extends to any hospital to which the plaintiff is transferred and

extends to subsequent hospitalizations if the first admission occurred within 72 hours of the injury; see Sec. 55.002 and **Baylor University Medical Center v. Travelers Ins. Co.,** 587 S.W.2d 501 (Tex. Civ. App. 1979 writ ref. n.r.e.)

(2) The lien does not extend to a UM/UIM recovery because such recovery is not "public liability insurance" as set out in Sec. 55.003(b)(3); see **Members Mut. Ins. Co. v. Hermann Hospital,** 664 S.W.2d 325 (Tex. 1984)

b. The hospital lien does not attach to a wrongful death recovery, see **Tarrant County Hospital District v. Jones,** 664 S.W.2d 191 (Tex. Civ. App. - Fort Worth 1984, no writ).

a) The survival cause of action is subject to the lien, see **Ohio Medical Products Inc. v. Suber,** 758 S.W.2d 870 (Tex. Civ. App. - Houston [14th Dist.] 1988 writ denied.).

c. **Statute of Limitations on Hospital Liens**

a) The statute of limitations for the hospital to sue on the lien appears to be four years from the date the plaintiff received the settlement funds, not from the date the debt was created: see **Baylor University Medical Center v. Borders**, 581 S.W.2d 731 (Tex. Civ. App. Dallas 1979, writ ref'd n.r.e.).

d. **Effect of Failure to File a Timely Hospital Lien**

a) If the hospital does not timely file the lien, then it cannot file suit against the defendant insurance carrier or plaintiff claimant to enforce the lien: **Trinity Universal Insurance Company v. Plainview Hospital,** 385 S.W.2d 732 (Tex. Civ. App. – Amarillo 1964, no writ).

H. ***Anti-Subrogation Rule***

a. **State Farm Mut. Auto Ins. Co. v. Perkins**, 216 SW3d 396 (Tex.App.—Eastland 2006) The court held that a UM carrier who has paid benefits to an insured under one policy may seek subrogation or reimbursement for those benefits from another one of its insureds who is insured under a different policy than the policy paying UM benefits to the insured. Although generally an insurer may not proceed against its own insured in a subrogation, the principles of equity underlying the "anti-subrogation rule" do not apply if the carrier is subrogating against a different insured on a different policy.

XXV.RECENT CASES

A. ***DECLARATORY JUDGMENT ACTIONS***

a. **Allstate Ins. Co. v. Jordan,** 53 SW3d 450 2016 WL 6693896 (Tex.App. -- Texarkana 2016). This is the first Texas appellate decision addressing the validity of a declaratory judgment action and the recovery of attorney's fees under the declaratory judgment statute. Under the Declaratory Judgment Act, the Court has discretion on whether or not to award fees to the prevailing party. In ***Jordan***, the Court decided in a very conclusory fashion that, in that case, it would be unequitable and unjust to the

insurance company to permit the insured to recover fees. The court did not explain what evidence it considered in reaching that decision.

The court expressly approved the use of the declaratory judgment statute for UM/UIM claims stating "We find nothing in ***Brainard*** precludes the use of the declaratory judgment when establishing pre-requisites to a recovery in a UM benefits case."

The decision focused on ***MBM Fin. Corp. v. Woodlands Operating Co., L.P.,*** 292 S.W.3d 660, 669 (Tex. 2009) as the basis for the denial of the attorney's fees. T*he key points to the decision in* ***MBM*** *in relation to a UM/UIM claim include*:

a) Suits cannot be maintained solely for attorney's fees. A client must gain something before fees can be awarded;

b) Declaratory judgment action cannot be filed solely to recover attorney's fees.

c) The declaratory judgment action to recover UM/UIM benefits is a suit to recover far more than "nominal" [more than $1,000] under the MBM analysis.

d) The Court rejected the argument that a declaratory judgment action is not a proper cause of action for a claim based on contract, whether the claim is brought before or after the breach.

e) In ***MBM,*** the Court rejected MBM's claim that Declaratory Actions are only available if there is no other adequate alternative cause of action. The Court said that this has never been the rule in Texas. The Court even noted that shortly after the legislature passed the Act in 1943, this Court adopted exactly the opposite rule. Stating that the existence of another adequate remedy does not bar the right to maintain an action for declaratory judgment. However, we agree the Act cannot be invoked when it would interfere with some other exclusive remedy.

f) There is no other exclusive remedy available for UM/UIM cases such as we see for Dram Shop and Workers Compensation cases.

B. ATTORNEY'S FEES

a. **In re National Lloyds Ins. Co., 2017 WL 2492001 (Tex. 2016).** In this mandamus action, the Texas Supreme Court determined that the Defendant's attorney's fees, expenses, and billing information, are not discoverable by the Plaintiff to prove the reasonableness of the Plaintiff's attorney's fees. Justice Johnson wrote the opinion in the form of a dissenting opinion which was joined by Justices Lehrmann and Boyd. See Scope of Discovery for a more detailed analysis of the opinion.

b. **In re Ruby Britt**, 2016 WL 9175819, (Tex.App. – Texarkana 2016, orig. proceeding). Insured's petition for mandamus to order the judge to vacate an order granting a new trial and reinstate the default judgment on her UIM claim for policy limits plus an award of $5,000 in attorney's fees was conditionally granted. However, State Farm apparently did not challenge the award of attorney's fees as the opinion did not address those claims in any detail. See below Default Judgments for a more detailed description of the case.

*C. **BAD FAITH, WHAT IS IT?***

a. **Menchaca v. USAA Texas Lloyds Co.,** -- S.W.3d – (Tex. 2017). This claim arises from an insured's claim for losses sustained during Hurricane Ike. The insured sued USAA for (1) breach of contract and for (2) Unfair Settlement Practices under the Texas Insurance Code. As damages for both claims, the insured sought only policy benefits plus court costs and attorney's fees. In evaluating the bad faith claims brought by the insured against USAA, the Supreme Court acknowledges that some of its previous decisions have created uncertainty in the law. As a result, this opinion is designed to put that uncertainty to rest as nearly as possible.

The primary issue in ***Menchaca*** is whether the insured can recover policy benefits based on jury findings that the insurer violated the **Texas Insurance Code** and that the violation resulted in the insured's loss of benefits the insurer "*should have paid*" under the policy despite a jury finding that that the insurer did not breach the contract. USAA argued that because the jury found there was no breach of contract, Menchaca could not recover for "bad faith" or extra-contractual liability as a matter of law. The Court disagreed with USAA and re-affirmed its holding in ***Vail v. Texas Farm Bureau Mut. Ins. Co.***, 754 S.W.2d 129, 136 (Tex. 1988) where the Court held that an insurer's "unfair refusal to pay the insured's claim causes damages as a matter of law in at least the amount of the policy benefits wrongfully withheld."

As part of its review of Texas law, the Court started with a review of some basic insurance principles such as: "*An insurance policy is a contract*." The policy sets forth the respective rights and obligations to which an insurer and its insured have mutually agreed. The **Texas Insurance Code** supplements the parties' contractual rights and obligations by imposing procedural requirements that govern the manner in which insurers review and resolve an insured's claim for policy benefits. The Code grants insureds a private action against insurers that engage in certain discriminatory, unfair, deceptive, or bad-faith practices, and it permits insureds to recover "actual damages . . . caused by" those practices, plus court costs, attorney's fees, and treble damages if the insurer "knowingly" commits the prohibited act. "Actual damages" under the Insurance Code "are those damages recoverable at common law." 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."

The Court then announced 5 Rules that address the relationship between contract claims under an insurance policy and tort claims under the Insurance Code.

1. **GENERAL RULE**: Generally, 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.

   As a general rule, there can be no claim for bad faith [denial of an insured's claim for policy benefits] when an insurer has promptly denied a claim that is in fact not covered. When the issue of coverage is resolved in the insurer's favor, extra-contractual claims do not survive, and there is no liability under [the Insurance Code] if there is no coverage under the policy.

However, in ***Menchaca***, the jury found USAA violated the **Code** by denying a covered claim without conducting a reasonable investigation. Further, Menchaca argued that the since there was coverage for the claim, the failure to reasonably investigate the claim is an independent claim from any claim for breach of contract.

The Court noted that some acts of bad faith, such as a ***failure to properly investigate a claim*** or ***an unjustified delay*** in processing a claim, do not *necessarily* relate to the insurer's breach of its contractual duties to pay covered claims, and may give rise to different damages. Failure to investigate a claim, in the absence of coverage, does not give rise to a basis for obtaining policy benefits.

While the Court agreed that USAA could have complied with the policy but failed to reasonably investigate the claim, the Supreme Court rejected the appellate court's and Menchaca's independent-claims argument in this case because the damages sought by Menchaca for the failure to conduct a reasonable investigation were not covered under the policy because the damages Menchaca was seeking did not exceed the amount of her deductible [See Footnote 1 of the opinion regarding the deductible] and [See also Footnote 3 of the opinion where Menchaca disclaimed any mental anguish and consequential damages].

The Court makes clear that the **Code** only allows an insured to recover actual damages "***caused by***" the insurer's statutory violation. If the insurer violates the **Code**, generally, that violation cannot cause damages in the form of policy benefits which the insured has no right to receive under the policy. There can be no liability under the **Insurance Code** if there is no coverage under the policy. "There can be no claim for bad faith when an insurer has promptly denied a claim that is in fact *not covered*." No breach can occur unless coverage exists, and if there is coverage, there is necessarily a breach if the insurer fails to pay the amount covered.

The Court disagreed with USAA's contention that an insured can never recover policy benefits as damages for a statutory violation. What matters for purposes of causation under the statute is whether the insured was entitled to receive benefits under the policy. While an insured cannot recover policy benefits for a statutory violation unless the jury finds that the insured had a right to the benefits under the policy, the insured does not *also* have to establish that the insurer breach the policy by refusing to pay those benefits. If the jury finds that the policy entitles the insured to receive the benefits and that the insurer's statutory violation caused the insured to not receive those benefits, the insured can recover the benefits as "actual damages . . . caused by" the statutory violation.

"Because an insurer's statutory violation permits an insured to receive only those "actual damages" that are "caused by" the violation, we clarify and affirm the general rule that an insured cannot recover policy benefits as actual damages for an insurer's statutory violation if the insured has not right to those benefits under the policy."

2. **THE ENTITLED-TO-BENEFITS RULE**: As recognized in ***Vail***, an insured who establishes a right to receive benefits under an insurance policy can recover those benefits as "actual damages" under the statute if the insurer's statutory violation causes the loss of the benefits. Here, the Court rejected USAA's contention that the insured could not recover policy benefits as damages for statutory violations because "the amount due under the policy solely represents damages for breach of contract

and does not constitute actual damages in relation to a claim of unfair claims settlement practices." Further, the Court held that "an insurer's unfair refusal to pay the insured's claim causes damages as a matter of law in at least the amount of the policy benefits wrongfully withheld." When an insured suffers a loss that is covered under the policy, that loss was "transformed into a legal *damage*" when the insurer "wrongfully denied the claim." That "damage is, at a minimum, the amount of policy proceeds wrongfully withheld by the insurer." If an insurer's "wrongful" denial of a "valid" claim for benefits results from or constitutes a statutory violation, the resulting damages will necessarily include "at least the amount of the policy benefits wrongfully withheld."

3. **THE BENEFITS-LOST RULE**: "An insured can recover benefits as actual damages under the **Insurance Code** even if the insured has no right to those benefits under the policy, *if the insurer's conduct caused the insured to lose that contractual right*."

   In the context of an insurer's misrepresentation of a policy's coverage by wrongfully advising the insured that the policy contains coverage which in fact it does not contain, an insured may recover such benefits if the insured is "adversely affected" or injured by reliance on the misrepresentation. This principal has been recognized in the context that the insurer waives its right to deny coverage, is estopped from doing so, or commits a violation that causes the insured to lose a contractual right to benefits that the insured otherwise would have had. As the Court notes, a misrepresentation claim is independent, and may exist in the absence of coverage.

4. **THE INDEPENDENT-INJURY RULE**: An insurer's extra-contractual liability is "distinct" from its liability for benefits under the insurance policy. There are 2 aspects to this Rule.

   a. **If an insurer's statutory violation causes an injury independent of the insured's right to recover policy benefits, the insured may recover damages for that injury even if the policy does not entitle the insured to receive benefits**. 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." This aspect of the independent-injury rule applies only if the damages are truly independent of the insured's right to receive policy benefits. It does not apply if the insured's statutory or extra-contractual claims "are predicated on [the loss] being covered by the insurance policy."

   b. **An insurer's statutory violation does not permit the insured to recover any damages beyond policy benefits unless the violation causes an injury that is independent from the loss of the benefits**. Thus, an insured who prevails on a statutory claim cannot recover punitive damages for bad-faith conduct in the absence of independent actual damages arising from that conduct. Thus, while the Court re-affirms its holding in ***Republic Ins. Co. v. Stoker***, 903 S.W.2d 338, 341 (Tex. 1995), where the Court remains open to "the possibility that in deny the claim, the insurer may commit some act, so extreme, that would cause injury independent of the policy claim", the Court acknowledges that such independent injury would be "rare" and no Texas Court has found an instance where the insured was entitled to recover for an

independent injury as a result of an insurer's extreme act. As a result, the Court declined to speculate what would constitute a recoverable independent injury.

5. **THE NO-RECOVERY RULE**:An insured cannot recover any damages based on an insurer's statutory violation unless the insured establishes:

a. a right to receive benefits under the policy; or

b. an injury independent of a right to benefits.

D. ***CONSENT TO SETTLE***

a. **Gonzalez v. Philadelphia Indemnity Ins. Co**., 2015 WL 12550934 (S.D. Texas 2015). Summary judgment for the carrier was affirmed because the carrier claimed that it was prejudiced by the insured's failure to obtain consent to settle. The carrier alleged that it was prejudiced because it lost the right to investigate the claim, to participate in the settlement, or to "advance payment to [the insured to] preserve its rights." In contrast, the insured alleged the carrier was not prejudiced because the at-fault driver was a "young, low wage earning driver working at a grocery store with future plans to work as a telemarketer. The opinion does not explain how the carrier was prejudiced by such settlement. This case is a significant departure from the holding in ***Lennar Corp. v. Markel Am. Ins. Co.***, 11-0394, 2013 WL 4492800 (Tex. Aug. 23, 2013) which imposed a burden on the carrier to show that it was materially prejudiced.

E. ***CONSENT TO BE BOUND***

a. **Cantu v. State Farm Mut. Automobile Ins. Co.,** 2017 WL 243628 (S.D. 2017). Summary Judgment for State Farm was affirmed in this UM case because the Court held that State Farm did not consent to be bound by a default judgment against the tortfeasor and the mere fact that State Farm was a party to the case at the time the default judgment was entered does not constitute waiver or collateral estoppel. In Texas, default judgments are not binding without the insurer's consent if the uninsured motorist policy requires consent. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Azima*, 896 S.W.2d 177, 178 (Tex. 1995). ***Criterion Ins. Co. v. Brown***, 469 S.W.2d 484, 484-85 (Tex. Civ. App.—Austin 1971, writ ref'd n.r.e.). Consent clauses "protect the carrier from liability arising from default judgments against an uninsured motorist or from insubstantial defense of the uninsured motorist." ***Azima***, 896 S.W.2d at 178 (citing ***Allstate Ins. Co. v. Hunt***, 469 S.W.2d 151, 153 (Tex. 1971)). If a policyholder chooses to proceed without the insurer's consent, "any judgment obtained against the uninsured motorist will not be binding on the insurance carrier. Liability and damages will have to be re-litigated." ***Lichte***, 792 S.W.2d at 548 (citing ***Criterion***, 469 S.W.2d at 485); *see also* **Soliz,** 2002 WL 821909, at *5 (the insurer "should not be estopped from re-litigating the liability determinations in the default judgments").

F. SCOPE OF DISCOVERY

a. **In re National Lloyds Ins. Co., 2017 WL 2492001 (Tex. 2016).** In this mandamus action, the Texas Supreme Court determined that the Defendant's attorney's fees, expenses, and billing information, are not discoverable by the Plaintiff to prove the reasonableness of the Plaintiff's attorney's fees. Justice Johnson wrote the opinion in the form of a dissenting opinion which was joined by Justices Lehrmann and Boyd.

A divided Court found that even permitting limited discovery on this issue was improper because (1) the homeowners used improper discovery methods by using interrogatories and requests for production of documents to see discovery from expert witnesses; (2) the discovery is improper because the information sought is not relevant because (a) National Lloyds has disavowed any intent to use its attorney's fees as a measure for challenging the plaintiffs' claims; and (b) whatever relevance the information might have is slight when compared to competing concerns such as undue prejudice, confusion of the issues, and abusive discovery practices.

The Court held that under these circumstances: (1) compelling en masse production of a party's billing records invades the attorney work-product privilege; (2) the privilege is not waived merely because the party resisting discovery has challenged the opponent's attorney-fee request; and (3) such information is ordinarily not discoverable. To the extent factual information about hourly rates and aggregate attorney fees is not privileged, that information is generally irrelevant and non-discoverable because it does not establish or tend to establish the reasonableness or necessity of the attorney fees an opposing party has incurred.

The Court gives several reasons for concluding that the requested information is not relevant including (1) An opposing party may freely choose to spend more or less than would be "reasonable" in comparison to the requesting party; (2) The Court says that comparisons between attorney's fees of plaintiffs and defendants are inapt because differing motivations of the parties impact the time spent, rate charged, and skill required; (3) The tasks and roles of counsel on opposite sides of a case vary fundamentally, so even in the same case, the legal services rendered to opposing parties are not "fairly characterized" as similar; and (4) A single law firm's fees and rates do not determine the "customary" range of fees in a general locality for similar services.

b. **In re State Farm Lloyds**, 2016 WL 5234610 (Tex.App.—Corpus Christi, Orig. proceeding). State Farm's petition for mandamus was denied. State Farm sought to overturn the trial court's order compelling State Farm to produce "re-inspection files" created by the same adjuster that was named as a defendant and who had inspected and adjusted the insured's hail damage claim. The insured alleged that the adjuster was "improperly trained and failed to perform a thorough investigation" and therefore "grossly undervalued" the damages. The Request for Production at issue sought to obtain "All documents relating to work performance, claims patterns, claims problems, commendations, claims trends, claims recognitions, and/or concerns for any person who handled the claim made the basis of this Lawsuit." The insured argued "re-inspection files" are relevant because they are essentially internal reviews of claims, conducted to ensure that claims are handled correctly, consistently, and in accordance with State Farm's customer service standards, and are therefore essential a performance evaluation of the adjuster's competence and reflect State Farm's knowledge of such competence or incompetence. State Farm asserted that the handling of other claims is generally

irrelevant. The court distinguished this case from ***In re National Lloyds Ins. Co.,*** 449 S.W.3d 486 (Tex. 2014) because that case involved a third party claim, and here the adjuster was a named defendant with allegations that the adjuster and the issues concern whether State Farm was reasonable in relying on the adjuster's investigation and evaluation.

G. DEPOSITIONS OF THE CORPORATE REPRESENTATIVE

a. **In re Luna**, 2016 WL 657879 (Tex.App.—Corpus Christi 2016, orig. proceeding). In this UM case, the Court conditionally granted the insured's petition for mandamus to obtain the deposition of State Farm's corporate representative.

Luna originally sued Armando Antunez, the intoxicated, uninsured motorist who caused Luna to sustain severe injuries. Luna also sued State Farm for UM benefits and for extra-contractual claims. The Court severed all three cases from each other. During the original case filed against Antunez, Luna requested the deposition of State Farm's corporate representative. The trial court denied that request, and Luna did not challenge the Court's decision in the case against Antunez.

Eventually, Luna took a default judgment against Antunez and began prosecuting the UM case against State Farm. During the UM case against State Farm, Luna again requested the deposition of State Farm's corporate representative. State Farm again filed a Motion to Quash claiming (1) waiver; (2) the request was improper, harassing and solely to abuse State Farm; (3) the burden and expense of the deposition outweighs its likely benefits; (4) the information sought was not relevant to the issues or (5) State Farm has no personal knowledge of the matters requested. State Farm went through a lengthy explanation to the court about why it would take days to determine who to present and that it would cost State Farm $10,000 to present a corporate representative for the deposition. The court noted that counsel for State Farm had produced corporate representatives on 2 other UM/UIM cases by agreement in cases with "very large policies with catastrophic damages." In ordering that State Farm present the corporate representative for deposition, the court noted:

a. A litigant generally has a right to depose the opposing party, and that in the case of ***In re Garcia***, it was held to be an abuse of discretion to quash the deposition of a State Farm representative during a UM/UIM case;

b. There was no waiver.

c. A party can seek discovery of unprivileged information that is relevant to the subject matter of the lawsuit including inadmissible evidence as long as it is reasonably calculated to lead to the discovery of admissible evidence. ***In re CSX Corp.***, 124 S.W.3d 149, 152 (Tex. 2003);

d. The Rules of Civil Procedure permit a party to take the deposition of "any person or entity." TRCP 200.1(a). However, the person noticed for deposition has the right to protection from "undue burden, unnecessary expense, harassment, annoyance, or invasion of personal, constitutional or property rights. See TRCP 192.6.

e. The Plaintiff has the burden of proof in this UM case, and contrary to State Farm's contentions that it had reached a stipulation on all matters. The deposition notice

requested the person who has the most knowledge of State Farm's contentions regarding liability and damages. The Court noted that State Farm did not stipulate to liability or to damages, and stated that it is abundantly clear that State Farm intends to contest both liability and damages in this case.

f. It rejected State Farm's contention that its corporate representative will not have personal knowledge of the facts at issue in this lawsuit because TRCP 192.3 provides that "a person has knowledge of relevant facts when the person has or may have knowledge of any discoverable matter. *The person need not have admissible information or personal knowledge of the facts.*"

g. It rejected State Farm's claims that the deposition notice was burdensome and harassing and that the burden of the deposition outweighs the benefits of doing the deposition, the court noted that much of costs associated with the deposition are due to State Farm's own "conscious, discretionary decisions" and that considering the amount of the default judgment $161,091.00 as compared to the costs of $10,000 to give the deposition, the cost did not outweigh the benefit. Further, there was no evidence offered regarding the resources of each party.

h. Considering the importance of the issues at stake in the litigation and the importance of the proposed discovery in resolving the issues, the burden on State Farm is outweighed by Luna's interests in obtaining relevant discovery.

H. ***WORKERS COMPENSATION BARS UM/UIM CLAIMS***

a. **Soledad v. Texas Farm Bureau Mut. Ins. Co.,** (Tex.App.—Austin 2016). Summary judgment for Farm Bureau was affirmed. Farm Bureau argued that the insured's recovery of UM benefits is barred by the Texas Worker's Comp Act (TWCA) because TWCA is the exclusive remedy of an employee against his employer or a co-employee of the employer for injuries incurred during the course and scope of work. Citing ***Valentine v Safeco Ins. Co***., 928 S.W.2d 639, 642 (Tex.App.—Houston [1st Dist.] 1996, writ denied), in which the Court held that Valentine is not "legally entitled to recover" from the fellow employee and employer and is therefore limited to making a recovery from worker's comp. In this case, Soledad was a passenger in a vehicle driven by his co-worker while they were in the course and scope of their employment. Farm Bureau conceded that the result would be different if the negligent 3rd party were not a fellow worker.

I. ***WRITTEN REJECTIONS***

a. **Luna v. Mendota Ins. Co., 2016 WL 4268400 (S.D. Texas, Houston Division 2016). Summary judgment for the carrier was affirmed.** Plaintiffs argued there was a fact issue concerning whether Luna rejected UM/UIM coverage. Specifically, Plaintiffs disputed that the insured signed a written rejection which expressly rejected the UM/UIM coverage. Plaintiffs contended Raul Luna did not check the box rejecting UM/UIM bodily injury coverage but that someone else checked off the box rejecting this coverage. As evidence for this proposition, Plaintiffs "evidence" is two-fold: (1) that Raul Luna cannot remember selecting that box; and (2) that Raul Luna's initials were not next to the checked box signifying the rejection of UM/UIM insurance. The Court found that the fact that Raul Luna, a plaintiff in this suit cannot "remember" rejecting UM/UIM is no evidence at all that he did not reject the coverage. Further, because of language barriers,

Plaintiff had a representative from the insurance company assist him in completing the insurance application. The insurance representative testified that he typically requires the party to check a box and to initial next to the box the applicant selects. However, Luna did not initial next to the box rejecting the UM/UIM bodily injury coverage, but his signature was directly below the rejection. The Court affirmed summary judgment finding that reliance on unsubstantiated assertions that Raul Luna did not check the box rejecting UM/UIM coverage, is explicitly contrary to the prevailing law. A party who signs a contract is "bound by the substance of the agreement," and may not "deny that it expresses the agreement he made."

J. DEFAULT JUDGMENTS AGAINST A UM/UIM CARRIER

a. **State Farm County Mut. Ins. Co. of Texas v. Diaz-Moore**, 2016 WL 624842 (Tex.App.—San Antonio 2016). State Farm filed a restricted appeal following a default judgment against it on a UIM claim and a claim for violations of the Prompt Payment of Claims Act. State Farm challenged the default judgment claiming (1) the UIM claim was not ripe and (2) because the Plaintiff failed to secure a reporter's record at the default judgment hearing there was no evidence to support the damages awarded. The Court found that the claim was ripe because, on appeal, the court only reviews the sufficiency of the pleadings to determine, if true, would those facts establish a claim against State Farm. Here the pleadings were sufficient because the Plaintiff pled the tortfeasor was negligent and caused the collision; the tortfeasor was underinsured because his policy limits were not sufficient to cover the insured's injuries and damages; the insured had a policy with State Farm which contained UIM coverage; and State Farm failed to timely acknowledge the claim. Therefore, the claim is ripe. However, there was no reporter's record of the default judgment hearing. Therefore, there is no presumption that the testimony presented at the hearing would support the judgment as Texas law makes clear that error is apparent on the face of the record when no reporter's record has been taken of the trial court's evidentiary hearing, resulting in a no-answer default judgment.

b. **In re Ruby Britt**, 2016 WL 9175819, (Tex.App. – Texarkana 2016, orig. proceeding). Insured's petition for mandamus to order the judge to vacate an order granting a new trial and reinstate the default judgment on her UIM claim for policy limits plus an award of $5,000 in attorney's fees was conditionally granted because State Farm failed to establish a meritorious defense and because State Farm argued that the default judgment should be set aside because Britt's pleadings were not verified. The Court rejected this argument because the petition is not required to be verified. The Court also rejected State Farm's allegations the insured's claims were barred by the statute of limitations because State Farm failed to plead or prove such allegations in its Motions before the trial court and because after analyzing the limitations issues, Court found that State Farm's argument was without merit. State Farm also argued that "a denial of coverage" was a meritorious defense raised in its motion to set aside the default judgment. However, the context of the motion makes clear that the "denial of coverage" to which State Farm refers is not truly a defense raised by State Farm, but merely a recitation of the facts as alleged by Britt. Furthermore, State Farm failed to provide even a prima facie case that its denial of coverage was meritorious. See ***Estate of Pollack v. McMurrey***, 858 S.W.2d 388, 392 (Tex.1993) (citing ***Ivy v. Carrell***, 407 S.W.2d 212, 214 (Tex. 1966)).

*K. **MOTION TO TRANSFER VENUE***

a. **Spencer v. Allstate Ins. Co.,** 2016 WL 6879598 (E.D. Texas 2016). In this federal court case, the Court denied Allstate's Motion to Transfer Venue of the UIM case based on non-convenience §1404(a).

The Court noted that the first inquiry it must address is whether the judicial district to which transfer is sought would have been a district in which the claim could have been filed. ***In re Volkswagen AG,*** 371 F.3d 203 (5th Cir. 2004). Then, the court must analyze both public and private factors relating to the convenience of the parties and witnesses as well as the interests of particular venues. See ***Humble Oil & Ref. Co. v. Bell Marine Serv., Inc.,*** 321 F.2d 53, 56 (5th Cir. 1963). The Private factors are: (1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws or in the application of foreign law. ***In re Volkswagen***. This is not an exhaustive list of factors and no single factor is dispositive. A defendant seeking transfer bears this "significant burden" of proof to show good cause to show that the proposed venue is "clearly more convenient" than the chosen forum. ***In re Radmax, Ltd****,* 720 f. 3d 285, 288 (5th Cir. 2013). Here, Allstate failed to meet its burden because the accident occurred in closer proximity to the chosen forum than the proposed forum. The Court also noted that Allstate's proposed transfer was based solely on divisional boundaries that would give effect to a "simplistic abstraction of the facts." Rather than "the realities of any actual inconveniences."

While neither side argued the private and public factors, the court addressed those private factors in its decision and noted (1) the chosen forum is closer to the accident location than the requested forum; (2) the relative ease of access to sources of proof favored denying the Motion because electronic information was equally accessible and because witnesses were located closer to the chosen forum and were within subpoena range in the chosen forum; and (3) Allstate's approach was not based on actual inconvenience but rather technical divisional boundaries; (4) In considering the cost of attendance for willing witnesses, which this court characterized as the most important factor in a transfer analysis, the fact that the requested transfer was less than 100 miles away from the chosen forum is not dispositive, but noted that Allstate failed to show that any witness would be more inconvenienced in the chosen forum than in the requested forum; and (5) neither party argued any "other practical problems" based on judicial economy favoring transfer.

The court also considered the Public factors and found (1) no evidence of any administrative difficulties of maintaining the case in the chosen forum; (2) in considering the "local interest in having localized interests decided at home" that both the accident and the Plaintiff's residence were within the geographic boundaries of chosen forum. Further, the requested forum has no greater localized interest in this case than the chosen forum; (3) Neither party argued that the chosen forum lacks familiarity with the law that governs this case; and (4) Neither party argued that there will be a conflict of laws problem or a problem with the application of foreign law to this case.

*L. **FAMILY MEMBER EXCLUSION***

a. **Johnson v. State Farm**, 2017 WL 1315379, -- S.W.3d – (Tex.Civ.App. – Austin, 2017). In this appeal, (1) the Court ruled that the determination of the claimant's status as a "family member" is made at the time of the accident rather than at the time the claim is made; and (2) the Court agreed with State Farm that UIM coverage is excluded because the policy exclusion for any vehicle owned by, furnished or available for the regular use of you or any *family member* includes rental cars.

The Court first rejected the insured's appeals that the family member exclusion was void against public policy by re-affirming the holding in **National County Mut. Fire Ins. Co. v. Johnson, 879 S.W.2d 1 (Tex. 1993)**. Likewise, the Court rejected the insured's appeal that this exclusion violated the insured's rights to equal protection or that the Texas Department of Insurance did not have authority to approve such policy language.

The Court then agreed with State Farm that the determination of the claimant's status as an insured is determined at the time of the accident rather than the time the claim is made as any other rule would lead to inconsistent results.

In a case of first impression, the Court also agreed with State Farm that there was no coverage because the rental car vehicle the insured's son was driving at the time of the accident was supplied for the "regular use." The son argued that based on ***Jankowiak*** and based on the "consensus from other jurisdictions is that a temporary rental vehicle is not one 'available for the regular use' of a named insured." The Court disagreed based on ***Parekh v. Mittadar***, 2011–1201 (La. App. 1 Cir. 6/20/12), 97 So.3d 433. In Parekh, the insured was driving in Louisiana in a car rented in Texas when he lost control of the vehicle and veered off of the highway, causing the vehicle to flip over and injuring his passengers. ***Id***. at 435. No other vehicle was involved in the accident. Id. The passengers filed a claim for liability coverage under the rental liability policy and received policy limits and then sought UM/UIM coverage under the same policy. Construing an exclusion essentially identical to the one at issue here, the court concluded that under Louisiana law, the rental vehicle was "accessible, obtainable, and ready for [the insured's] immediate use," i.e., "available for the insured's regular use," during the term of the rental agreement and therefore did not qualify as an "uninsured motor vehicle" under the terms of the policy. Therefore, the passengers were not entitled to UM coverage. We conclude that given the purpose and plain language of the UIM provision, the rental car the father was driving at the time of the accident is excluded from the definition of "underinsured motor vehicle."

*M. **VEHICLES FURNISHED FOR THE REGULAR USE***

a. **Johnson v. State Farm**, 2017 WL 1315379, -- S.W.3d – (Tex.Civ.App. – Austin, 2017). In this appeal, the Court agreed with State Farm that UIM coverage is excluded because the policy exclusion for any vehicle owned by, furnished or available for the regular use of you or any *family member* extends to rental cars.

In a case of first impression, the Court also agreed with State Farm that there was no coverage because the rental car vehicle the insured's son was driving at the time of the accident was supplied for the "regular use." The son argued that based on ***Jankowiak*** and based on the "consensus from other jurisdictions is that a temporary rental vehicle is not one 'available for the regular use' of a named insured." The Court disagreed based

on ***Parekh v. Mittadar***, 2011–1201 (La. App. 1 Cir. 6/20/12), 97 So.3d 433. In *Parekh*, the insured was driving in Louisiana in a car rented in Texas when he lost control of the vehicle and veered off of the highway, causing the vehicle to flip over and injuring his passengers. ***Id***. at 435. No other vehicle was involved in the accident. *Id.* The passengers filed a claim for liability coverage under the rental liability policy and received policy limits and then sought UM/UIM coverage under the same policy. Construing an exclusion essentially identical to the one at issue here, the court concluded that under Louisiana law, the rental vehicle was "accessible, obtainable, and ready for [the insured's] immediate use," i.e., "available for the insured's regular use," during the term of the rental agreement and therefore did not qualify as an "uninsured motor vehicle" under the terms of the policy. Therefore, the passengers were not entitled to UM coverage. We conclude that given the purpose and plain language of the UIM provision, the rental car the father was driving at the time of the accident is excluded from the definition of "underinsured motor vehicle."

N. ***FELLOW EMPLOYEE EXCLUSION***

a. **Soledad v. Texas Farm Bureau Mut. Ins. Co.,** (Tex.App.—Austin 2016). Summary judgment for Farm Bureau was affirmed. Farm Bureau argued that a recovery of UM benefits is barred by the Texas Worker's Comp Act (TWCA) because it is the exclusive remedy of an employee against his employer or a co-employee of the employer for injuries incurred during the course and scope of work. Citing ***Valentine v Safeco Ins. Co***., 928 S.W.2d 639, 642 (Tex.App.—Houston [1st Dist.] 1996, writ denied), in which the Court held that Valentine is not "legally entitled to recover" from the fellow employee and employer and is therefore limited to making a recovery from worker's comp. In this case, Soledad was a passenger in a vehicle driven by his co-worker while they were in the course and scope of their employment. Farm Bureau conceded that the result would be different if the negligent 3rd party were not a fellow worker.

O. ***OFFSETS & CREDITS ON UM/UIM CLAIMS***

a. **Farmers Texas County Mutual Insurance Company v. Okelberry**, 2017 WL 2292536(Tex.App.—Houston [14th Dist.] 2017). In this UIM case, the appellate court concluded that the trial court erred by failing to offset the full amount of Mr. Okelberry's settlement with the tortfeasor. In reaching this decision, the Court addressed the issue of who has the burden to prove what amount, if any, of the settlement was allocated to Mrs. Okelberry for her damages, including her un-asserted claim for loss of consortium. The court determined that under the common law, a defendant seeking a settlement credit has the initial burden of proving its right to such a credit. This burden may be satisfied by placing the settlement agreement or some evidence of the settlement amount in the record. The court concluded that once the non-settling defendant demonstrated a right to a settlement credit, the burden then shifts to the plaintiff to show that certain amounts should not be credited because of the settlement agreement's allocation. If the plaintiff failed to provide an allocation, then the non-settling party was entitled to a credit equaling the entire settlement amount. The trial court shall presume the settlement credit applies unless the non-settling plaintiff presents evidence to overcome this presumption. The Court found that placing the burden on the plaintiffs prevents them from unfairly denying the insurer the full benefit of the settlement credit it bargained for in its insurance contract with the insured.

P. ***REMOVAL***

a. **Walters v. Metropolitan Lloyds Ins. Co**, 2016 WL 3764855 E.D. Texas, Sherman Division, 2016). Here, the Court denied Plaintiffs' Motion to Remand. Metropolitan and its adjuster removed the case to federal court claiming the adjuster was improperly joined. The court held that for an adjuster to be held individually liable, they have to have committed some act that is prohibited by the section, not just be connected to an insurance company's denial of coverage. However, there were no such allegations in this case. Plaintiffs' Petition alleges only that the Plaintiffs were insured by Metropolitan, and that Metropolitan utilized Defendant Buchanan to investigate the claim. The court found that the general allegations that Buchanan was inadequately trained and failed to thoroughly investigate, conducted an outcome-oriented investigation, made misrepresentations and omissions and unfairly investigated the claim were merely boilerplate allegations. Plaintiffs did not specify a single alleged misrepresentation or provide specific factual allegations of misconduct on the part of the adjuster. Therefore, the court found that Plaintiffs have no possibility of establishing a valid cause of action against Buchanan. Plaintiffs simply do not have plausible claims against the adjuster.

Jackson v. Allstate Vehicle & Property Ins. Co., 2017 WL 1327763 (N.D. Tex. – Fort Worth 2017). Plaintiff sought a remand in this wind/hail damage claim. Allstate sought removal because Plaintiff's petition did not allege an amount she sought to recover, and because Plaintiff did fill out a civil case information sheet showing that the damages sought were less than $100,000, including damages of any kind, penalties, costs, expenses, prejudgment interest, and attorney's fees.

The Defendant failed to meet its burden of proof to show the amount in controversy exceeds the statutory minimum for diversity. Here, plaintiff's own roofer says the cost of repair is less than $15,000 and plaintiff's demand was based on that amount, plus interior damage and attorney's fees. Although attorney's fees are included as part of the amount in controversy those fees in this case would not justify removal.