

UM/UIM...?

IDK ☹️
DO U?

Texas UM/UIM Update 2022

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What is UM/UIM Coverage?

- ▶ First Party coverage
- ▶ UM – UNINSURED (NONE AT ALL)
- ▶ UIM – UNDERINSURED (NOT ENOUGH)
- ▶ Intended to protect responsible drivers from financial losses when other driver has none at all or not enough insurance



Insuring Agreement:

- ▶ “We will pay damages which a *covered person* is *legally entitled to recover* from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by a covered person or property damage caused by an accident.”
- ▶ Most issues pertain to *covered person* and *legally entitled to recover*

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

- ▶ Edward Brainard killed in head-on collision with 18-wheeler
- ▶ Widow and children settled with truck driver's carrier for \$1 million
- ▶ Then sought UIM benefits from Trinity, which denied coverage

Are Attorney's Fees Recoverable?

- ▶ Breach of contract – when proven insurer breached contract per Chapter 38 of Texas Civil Practices & Remedies Code
 - E.g., If carrier did not pay benefits legally obligated to pay
- ▶ Trinity argued, under UIM policy, duty to pay only arises after underinsured motorist's liability is legally determined
- ▶ Turned on whether insurer had a duty to pay and thus a breach to allow insured to receive fees

Brainard (cont.)

- ▶ Filed suit – breach of contract
 - EC claims were severed out and abated
- ▶ Jury found truck driver was negligent and awarded \$1,010,000
 - So, underinsured by \$10,000
- ▶ Awarded \$100,000 for attorney's fees, which Trinity appealed

Brainard – 16 years ago:

- ▶ “UIM contract is unique because according to its terms, benefits are conditioned upon the insured’s legal entitlement to receive damages from a third party”
- ▶ Thus, no *contractual* duty to pay benefits until insured obtains judgment establishing the liability of the underinsured.
- ▶ Simply requesting UM/UIM benefits does not trigger an obligation to pay.

Brainard (cont.)

- ▶ So, under Chapter 38, a claim for UIM benefits is not ripe until trial court signs judgment establishing negligence and underinsured status of other motorist
- ▶ Policyholder not required to obtain judgment; can settle
- ▶ “But neither a settlement nor an admission of liability from the tortfeasor establishes UIM coverage, because a jury could find that the other motorist was not a fault or award damages that do not exceed the tortfeasor’s liability insurance.”

Two items for UM/UIM Recovery:

- 1) Insured must establish fault on the part of the un- or underinsured driver
 - 2) Insured must prove the extent of their damages before becoming entitled to UM/UIM benefits
- ▶ Satisfaction of both is a condition precedent to recover attorney's fees under Chapter 38.

10 years later: *Jordan*

- ▶ Jordan sought UIM benefits from Allstate, after settling with tortfeasor's insurer; her damages were in excess of tortfeasor's policy limits. Allstate denied, Jordan sued.
- ▶ Breach of contract and sought a declaratory judgment:
 - Claim for UIM benefits covered under her policy,
 - She was injured in MVA, and
 - Her damages were in excess of tortfeasor's policy limits
- *Allstate Ins. Co. v. Jordan*, 503 S.W.3d 450 (Tex. App.—Texarkana 2016, no pet.)

Jordan declared:

- ▶ After trial, court entered DJ:
 - UIM claim was covered;
 - Tortfeasor's negligence caused accident;
 - Damages exceeded tortfeasor's limits; and
 - She was entitled to \$27,500 (offset by tortfeasor's limits);
 - Awarded *attorney's fees* under Uniform Declaratory Judgment Act, i.e., Chapter 37

Allstate Appealed *Jordan*:

- ▶ Under *Brainard*, prerequisites to recovery not established by DJ – no attorney’s fees should have been awarded
- ▶ Must establish legally entitled to recover as damages as prerequisite to proving right to recover under Allstate policy
- ▶ UIM policy is contractual in nature, so breach of contract is only proper cause of action

Court Disagreed with Allstate:

- ▶ DJ determines rights under a contract/policy
- ▶ Chapter 37 DJ permissible because Jordan had to demonstrate amount entitled to recover as a prerequisite to proving rights under policy
- ▶ *Brainard* only states UIM insured must prove existence of insurer's duty
 - Nothing in it precludes use of DJ
 - Does not say what cause of action must be brought

What about attorney's fees?

- ▶ Recovery of UIM benefits asserts a cause of action for recovery of benefits under a contract; thus recovery of attorney's fees is governed by Chapter 38.
- ▶ *Brainard* gave insurer right to make an insured prove-up liability and damages. Requiring an insurer to pay insured's attorney's fees for exercising this right "would be inequitable and unjust."

13 years post *Brainard*: *Irwin*

- ▶ Irwin was in MVA with UIM driver; settled for tortfeasor's limits of \$30,000
- ▶ Sought UIM benefits of \$50,000 limits from his UIM carrier, Allstate
- ▶ Allstate offered \$500; Irwin sued seeking a declaration entitled to his UIM benefits and attorney's fees
- ▶ Judgment for Allstate's \$50,000 limits and \$45,540.00 attorney's fees
 - *Allstate Ins. Co. v. Irwin*, 606 S.W. 3d 774 (Tex. App.—San Antonio 2019, pet. granted)

Allstate Appealed:

- ▶ Insured must *first* establish they are “legally entitled to recover” UIM benefits, so DJ is not permitted per *Brainard*;
- ▶ Irwin responded *Brainard* only concerned with Chapter 38 attorney’s fees for breach of contract; not Chapter 37 declaratory judgments and attorney’s fees
 - Further, *Brainard* said insured is not required to obtain a judgment against the tortfeasor...

Iwrin Court followed *Jordan*:

- ▶ Insured may use DJ to establish prerequisites to recover in UM/UIM claim
- ▶ Nothing in *Brainard* precludes use of a DJ to recover UIM benefits
- ▶ Otherwise, “an insured faces the unduly burdensome and inefficient task of rejecting the tortfeasor’s policy limits offer and instead participating in a full-blown adversarial trial to obtain a judgment so he can then turn around and make a claim *against his own insurer to recover benefits for which he paid.*”

What about fees (again)?

- ▶ Disagreed with *Jordan* – Nothing to prevent award of reasonable attorney's fees
- ▶ Chapter 37 permits award of equitable and just attorney's fees
- ▶ If dispute resolved under Chapter 37, may award attorney's fees
- ▶ Further, here, Irwin only plead a DJA; both *Brainard* and *Jordan* had breach of contract as a cause of action

Note: attorney's fees apply to amount in controversy

- ▶ Amount requested for attorney's fees in state court DJ is properly considered for amount in controversy for federal jurisdictional requirements in removal
 - *Issa v. Allstate County Mut. Ins. Co.*, 2021 WL 2457729 (S.D. Tex. June 6, 2021)

Shifting Away from *Brainard*

- ▶ Other courts followed *Jordan* and *Irwin*, finding DJ proper method of seeking UIM benefits and award of fees:
 - *Allstate Fire and Cas. Ins. Co. v. Inclan*, 2020 WL 373061 (Tex. App.–Corpus Christi–Edinburg Jan. 23, 2020), *rev'd on other grounds*.
 - *Allstate Fire and Cas. Ins. Co. v. Rodriguez*, 2021 WL 3777165 (Tex. App.–Corpus Christi–Edinburg Aug. 26, 2021)
 - *Allstate Co. Mut. Ins. Co. v. Hill*, 2021 WL 2978746 (Tex. App. – Fort Worth, July 15, 2021)
- ▶ *Irwin* affirmed on appeal to Texas Supreme Court: *Allstate Ins. Co. v. Irwin*, 627 S.W.3d 263 (Tex. 2021)

Legislative tries to upend *Brainard*

- ▶ HB 359 in 2021 proposed language:

Sec. 1952.1061. NOTICE OF CLAIM FOR UNFAIR SETTLEMENT PRACTICE. For the purpose of Section 541.060, an insured may provide notice of a claim for uninsured or underinsured motorist coverage by providing a written notification to the insurer that reasonably informs the insurer of the facts of the claim.

Sec. 1952.1062. LEGAL DETERMINATION NOT PREREQUISITE TO RECOVERY FOR UNFAIR SETTLEMENT PRACTICE. A judgment or other legal determination establishing the other motorist's liability or the extent of the insured's damages is not a prerequisite to recovery in an action under Section 541.151 for a violation of Section 541.060.

Sec. 1952.1063. LIMITATION ON EXTRA-CONTRACTUAL CAUSES OF ACTION. In regard to a claim for uninsured or underinsured motorist coverage, the only extra-contractual cause of action available to an insured is provided by Section 541.151 to recover damages under Section 541.152 for a violation of Section 541.060.

- ▶ Like HB 1739 in 2019, neither succeeded

Severance & Abate of EC:

- ▶ Despite attempts of trial courts to deny motions to sever and abate, writs have issued finding abuse of discretion
 - *In re GEICO Co. Mut. Ins. Co.*, 2021 WL 3754576 (Tex. App.—Dallas Aug. 25, 2021)
 - *In re Farmers Texas Co. Mutl. Ins. Co.*, 2021 WL 3889425 (Tex. App. – Corpus Christi–Edinburg Aug. 31, 2021)
 - *In re Allstate Fire and Cas. Ins. Co.*, 2022 WL 120263 (Tex. App. –Austin Jan. 12, 2022)
 - *In re Old Republic Ins. Co.*, 2022 WL 52806 (Tex. App.—Corpus Christi–Edinburg Jan. 5, 2022)

Bad Faith?

- ▶ Absent an obligation to pay, impossible to establish insurer wrongfully refused to pay, and as such, claims for breach of contract, common law bad faith, and violations of the Texas Insurance Code fail.
 - *See Love v. GEICO Indem. Co.*, 2017 WL 8181526, at *4 (W.D. Tex. Oct. 2, 2017) (dismissing breach of contract claim against UM/UIM insurer as unripe as plaintiff did not obtain a judgment establishing unknown driver's liability and resulting damages).

Bad Faith?

- ▶ “Due to the unique terms of UIM coverage, the proper vehicle to litigate a tortfeasor’s liability and any resulting damages directly against the insurer is through the ... request for declaratory relief.”
 - *Blazejewski v. Allstate Fire and Cas. Ins. Co.*, 2021 WL 4204148 (W.D. Tex. Sept. 15, 2021) (dismissing breach of contract, breach of duty of good faith and fair dealing and violations of the Texas Insurance Code for lack of subject matter jurisdiction).

But wait: *Burgess*, 15 years later

- ▶ Burgess sued her UIM carrier Allstate for common law bad faith and violations of Texas Insurance Code
- ▶ Burgess settled with tortfeasor's liability policy for \$100,000; then demanded \$50,000 limits from Allstate
- ▶ Jury found Burgess entitled to \$386,008, \$75,000 for past physical pain and \$311,009 for future medical-care expenses

Burgess (cont.)

- ▶ Allstate paid UIM limits of \$50,000, plus interest, post verdict and before court signed final judgment
- ▶ Burgess maintained Allstate acted in bad faith in necessitating trial
- ▶ Allstate argued because it timely paid UIM benefits there was no breach of contract as a matter of law, and therefore, no facts to support liability for extra-contractual claims

Burgess (cont.)

- ▶ Allstate also argued liability did not become “reasonably clear” until trial court signed the judgment and Allstate did not refuse without conducting an investigation as trial was the investigation to determine fault and liability in excess of limits
- ▶ Allstate won on MSJ, Burgess appealed

Court of Appeals held:

- ▶ Noting EC claims are typically severed and abated, handling of claim may become actionable (e.g. when a carrier unreasonably or arbitrarily denies a UIM claim)
- ▶ Not suggesting every denial of a claim prior to UIM determination is tortious and actionable
 - *Burgess v. Allstate Fire and Cas. Ins. Co.*, 2021 WL 5498758 (Tex. App.—Austin Nov. 24, 2021)

Independent Injury?

- ▶ “Because Burgess alleges that she has suffered mental anguish as a result of Allstate’s conduct in handling her UIM claim, we agree that she has sufficiently alleged an injury independent of her right to recover policy benefits. Accordingly, even if Burgess has recovered all policy benefits to which she is entitled, she has sufficiently alleged an independent injury for which she may, if proven, recover damages.” (a la *Menchaca*)

Flummoxed?

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