

A cartoon illustration of two men in suits, one on the left and one on the right, both screaming with their mouths wide open. They are standing next to a dark green car that has crashed into a large, grey, jagged rock. The man on the left is holding a knife. The man on the right is holding a briefcase. The background is a light blue sky with some clouds. The title text is overlaid on the top half of the image.

# Texas UM/UIM Law – An Update

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# Insuring What is UM/UIM Coverage?

- First party insurance coverage
- Meant to protect responsible motorists from financial loss when they are involved in car wrecks with UM/UIM motorists
- Uninsured Motorist (UM) insurance is a coverage that protects a policyholder if they are involved in an accident with someone who does not have liability insurance
- Underinsured Motorist (UIM) coverage protects a policyholder when they are involved in an accident and the other driver has insurance, but it is insufficient to cover the damages



# 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 in UM/UIM law deals with those two key phrases “covered person” or “legally entitled to recover”



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

- Edward Brainard was killed in a head-on collision with an 18-wheeler
- Widow and children settled with truck driver's carrier for \$1 million
- Sought UIM benefits from Trinity, but denied



## *Brainard cont.*

- Suit initiated
- Breach of Contract claim (others claims severed out)
- Went to jury, found truck driver was negligent, awarded \$1,010,000 so underinsured by \$10,000
- Also awarded \$100,000 in attorney's fees
- Trinity appealed the award of attorney's fees



## *Brainard cont.*

- When are attorney's fees recoverable? Only if insurer breached contract per Chapter 38 of Texas Civil Practice & Remedies Code:
  - i.e., Carrier did not pay benefits legally obligated to pay
- Trinity argued, under an UIM policy, the duty to pay does not arise until the underinsured motorist's liability, if any, is legally determined.
- The issue turned on whether the insurer had a duty to pay for there to be a breach under Chapter 38.



## *Brainard cont.*

- “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.”
- So, there is no *contractual* duty to pay benefits until insured obtains judgment establishing the liability of the underinsured.
- Requesting UIM benefits/filing suit does not trigger duty to pay.



## *Brainard cont.*

- So, under Chapter 38, a claim for UIM benefits is not ripe until the trial court signs a judgment establishing the negligence and underinsured status of the other motorist.
- Policyholder is 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 excess the tortfeasor’s liability insurance.”



# Texas Two-Step

- Two Elements 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 damages before becoming entitled to UM/UIM benefits
- Satisfaction of the two elements is a condition precedent to recovery attorney's fees under Chapter 38.



## *Brainard cont.*

- Absent an obligation to pay, it is impossible to establish that an 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 since plaintiffs had not judgment establishing unknown driver's liability and resulting damages).



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

- Jordan sought UIM benefits from her carrier, Allstate after settling with tortfeasor's insurer; damages she suffered in excess of the tortfeasor's policy limits. Allstate denied, so Jordan filed suit.
- Breach of contract and sought a declaratory judgment that:
  - Jordan's claim for UIM benefits were covered under the policy,
  - She was injured in a motor vehicle accident, and
  - Her damages were in excess of tortfeasor's policy limits



## *Jordan, cont....*

- After trial, court entered declaratory judgment that:
  - Jordan's UIM claim was covered;
  - The tortfeasor's negligence caused the accident;
  - Her damages were in excess of tortfeasor's policy limits; and
  - She was entitled to \$27,500 (offset by tortfeasor's limits) and awarded attorney's fees under the Uniform Declaratory Judgment Act, i.e., Chapter 37



## *Jordan, cont....*

- Allstate appealed, arguing that, under *Brainard*, the prerequisites to recovery UIM benefits may not be established under a declaratory judgment and no attorney's fees should have been awarded
  - Must establish that she was legally entitled to recover as damages as prerequisite to proving her right to recover under the Allstate policy.
  - UIM policy is contractual in nature, so breach of contract is the only proper cause of action



## *Jordan, cont....*

- Court disagreed:
  - DJ determines rights under a contract/policy
  - Chapter 37 DJ was permissible because Jordan had to demonstrate the amount she was entitled to recover as a prerequisite to proving rights under policy
  - *Brainard* only states that 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



## *Jordan, cont....*

### **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 the right to make an insured prove-up liability and damages. Requiring an insurer to pay the insured's attorney's fees for exercising this right "would be inequitable and unjust."



*Allstate Ins. Co. v. Irwin*, 606 S.W. 3d 774 (Tex. App.–San Antonio 2019, pet. granted)

- Irwin was in a car wreck with an underinsured motorist; settled for tortfeasor's policy limits of \$30,000
- Sought UIM benefits limits of \$50,000 from his UIM carrier, Allstate
- Allstate offered \$500, so Irwin sued seeking a declaration that he was entitled to his UIM benefits and attorney's fees
- Judgment for Allstate's \$50,000 policy limits and \$45,540.00 in attorney's fees



## *Irwin, cont...*

- Allstate appealed, arguing that an insured must first establish they are “legally entitled to recover” UIM benefits, so DJ is not permitted per *Brainard*; only
- 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...



## *Irwin, cont...*

- Court followed *Jordan* - insured may use DJ to establish prerequisites to recover in a UM/UIM claim
- Nothing in *Brainard* precludes use of a declaratory judgment 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.*”



## *Irwin, cont...*

### **What About Attorney's Fees?**

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



## Aftermath

- Other courts followed *Jordan* and *Irwin*, finding declaratory judgment is a proper method of seeking UIM benefits. See *Allstate Fire and Cas. Ins. Co. v. Inclan*, 2020 WL 373061 (Tex. App.–Corpus Christi-Edinburg Jan. 23, 2020)
- Shift away from the *Brainard* rule
- Goes both ways: if a carrier wins DJ, it may recover attorney's fees



## *Irwin Appeal*

- The Texas Supreme Court recently heard oral argument in *Allstate Insurance Co. v. Irwin*
- The Supreme Court should clarify in the *Irwin* case whether the UDJA is a proper vehicle for bringing a claim for UIM benefits against an insurer and how that may affect the current *Brainard* rule



## Texas 87<sup>th</sup> Legislature

- “No Man’s life, liberty, or property are safe while the legislature is in session.” ~ Gideon Tucker, 1866
- Under H.B. 359, no prerequisite to obtain a judgment or legal determination establishing both liability and damages prior to duty to pay UIM benefits; effective overrules *Brainard*
- Insured may provide notice of a claim for UIM coverage by providing a written notification to the insurer that informs it of the facts of the claim
- Currently pending in House Insurance Committee
- But similar HB 1739 of 2019 died in the Senate, so we will see...



## Bad Faith

- Policyholders sued State Farm for violations of Section 541 of the Texas Insurance Code without first establishing pursuant to *Brainard* that they were legally entitled to UIM benefits. The insureds did not sue for breach of the insurance policies
- Texas Supreme Court issued its decision in *In re State Farm Mut. Auto. Ins. Co.*, \_\_\_ S.W.3d \_\_\_, 2021 WL 1045651 (Mar. 19, 2021)



# Questions?

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