

UM/UIIM UPDATE

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ISSUES TO ADDRESS

1. Are attorney fees recoverable?
2. Is there extra-contractual exposure prior to judicial determination of fault and damages?
3. Severance and Abatement
4. Scope of Corporate Representative's Depo

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.”

***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?

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.

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

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

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.*”

Attorney Fees

In federal court, the insured cannot recover attorney fees in a declaratory judgment action seeking a determination of fault and damages in connection with a UM/UIM claim. The reason for the difference is that the Federal Declaratory Judgment Act applies in federal court, not the Texas Declaratory Judgment Act and the federal act does not allow recovery of attorney fees. *Utica Lloyd's of Texas v. Mitchell*, 138 F.3d 208 (5th Cir. 1998); *Kroger Texas, LP v. Gator Harwood Partners, LLLP*, 2024 WL 191190 (N.D. Tex. January 17, 2024); *Lewis v. Citadel Servicing Corp.*, 2023 WL 7926809 (S.D. Tex. November 16, 2023); *Piazzo v. Allstate Indem. Co.*, 601 F.Supp.3d 189 (S.D. Tex. 2022).

EC Claims

Prompt Payment of Claims Act-No Exposure

The law is basically clear that there is no exposure because, under *Brainard*, the insurance company has no contractual obligation until fault and damages have been judicially determined. *State Farm Mut. Auto. Assoc. v. Cook*, 591 S.W.3d 677 (Tex. App.-San Antonio 2019, no. pet); *Bryant v. Progressive County Mut. Ins. Co.*, 2018 WL 6521853 (Tex. App.-Dallas December 12, 2018, no pet.); *DeLagarza v. State Farm Mut. Auto. Ins. Co.*, 175 S.W.3d 29 (Tex. App-Dallas), *supplemental opinion on reh'g*, 181 S.W.3d 755 (Tex. App.—Dallas 2005, pet. denied), *Mid-Century Ins. Co. of Tex. v. Daniel*, 233 S.W.3d 586 (Tex. App-Amarillo 2007, pet, denied); *Menix v. Allstate Indem. Co.*, 82 S.W.3d 877 (Tex. App-Eastland 2002, pet. denied).

EC CLAIMS

Duty of Good Faith and Fair Dealing, Section 541 Tex. Ins. Code and DTPA

The law is not clear. There are decisions which support such claims prior to the judicial determination and others that do not allow such claims. Compare *Burgess v. Allstate Fire and Cas. Ins. Co.*, 641 S.W.3d 474 (Tex. App-Austin 2021, no pet.); *Cook*; *Piazza v. Allstate Ind. Co.*, 601 F.Supp.3d 189 (S.D. Tex. 2022) with *State Farm Mut. Auto. Assoc. v. Cook*, 591 S.W.3d 677 (Tex. App.-San Antonio 2019, no. pet); *Bryant v. Progressive County Mut. Ins. Co.*, 2018 WL 6521853 (Tex. App.-Dallas December 12, 2018, no pet.)

POLL QUESTION

Where is the best place to cruise?

1. Alaska
2. Mediterranean
3. Mexico
4. Antarctic
5. Neighborhood

EC DAMAGES

USAA Lloyds Company v. Menchaca
(Tex. 2018)

FACTS: Hurricane Ike Claim
Claimed damage to home
USAA found little storm damage and made no payment
Insured sued for contractual and extra-contractual damages
Jury found no breach of contract but violation of Ins. Code and awarded policy benefits (insured's repair estimate)

EC DAMAGES

HOLDING:

Insured can recover policy benefits as measure of damages for violation of Ins. Code if entitled to policy benefits and violation caused loss of benefits.

In reaching decision, Court addressed when recovery of benefits and other damages is generally available for statutory violation. It set forth 5 rules:

EC DAMAGES

1. An insured cannot recover policy benefits for statutory violation if not entitled to policy benefits
2. Insured can recover policy benefits for statutory violation if entitled to policy benefits and violation caused loss of benefits

EC DAMAGES

3. Insured can recover policy benefits even if not entitled to benefits if statutory violation caused loss of benefit entitlement.
(misrepresentation regarding coverage)
4. Insured can recover damages other than policy benefits if statutory violation causes independent injury.
(must not flow from loss of policy benefits)
(would be rare and Court has yet to see one)

EC DAMAGES

5. No recovery unless insured can establish a right to the benefits or independent injury

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)

Houston v. United Financial Cas. Co., 2023 WL 4198872(S.D. Tex. June 27, 2023)(even abated contract claim)

CORPORATE DEPOSITIONS

Can the carrier avoid putting up a corporate representative for deposition?

**In Re USAA GENERAL INDEM. CO.
624 S.W.3d 782 (Tex. 2021)**

Facts:

UM/UIM case

USAA does not dispute existence of policy or um/uim coverage under the policy

Provides only copy of accident report

Depo Notice for corporate representative seeking testimony on numerous subjects

USAA moves to quash

Argues irrelevant because no personal knowledge and not proportionate

**In Re USAA GENERAL INDEM. CO.
624 S.W.3d 782 (Tex. 2021)**

Holding: Limited Deposition scope is permissible

Lack of personal knowledge is insufficient
Proportionality is a fact specific inquiry

USAA's failure to provide more than accident
report defeats its proportionality agreement

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**In Re Home State County Mutual
Tex-App-Dallas May 10, 2022**

Similar facts to USAA but Home State provided entire claim file.

Court prohibited Corporate Representative's deposition

**In Re Hartford Cas. Ins. Co.
Tex.-App Houston [1st Dist.] July 18, 2023**

Similar facts to USAA but Hartford provided entire claim file.

Court prohibited Corporate Representative's deposition

Thank You for Your Time

Any questions?

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