

KEY ISSUES IN TEXAS UM/UIM LAW

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INTRODUCTION

- Tag Team Format
- This is not a beauty contest between Elliott Cooper and Wes Johnson (although you can discuss that quietly amongst yourselves)
- Qualification: Video clips might not relate as much as you would like them to



WHAT IS UM/UIM COVERAGE?

- You probably already know what this is...
- But we have to tell you again
- First party insurance coverage
- Uninsured Motorist (UM) insurance is a coverage that protects you if you're involved in an accident with someone who does not have liability insurance
- Underinsured Motorist (UIM) coverage protects a policyholder when he/she is involved in an accident and the tortfeasor has insurance, but it is insufficient to cover the damages



INSURING AGREEMENT

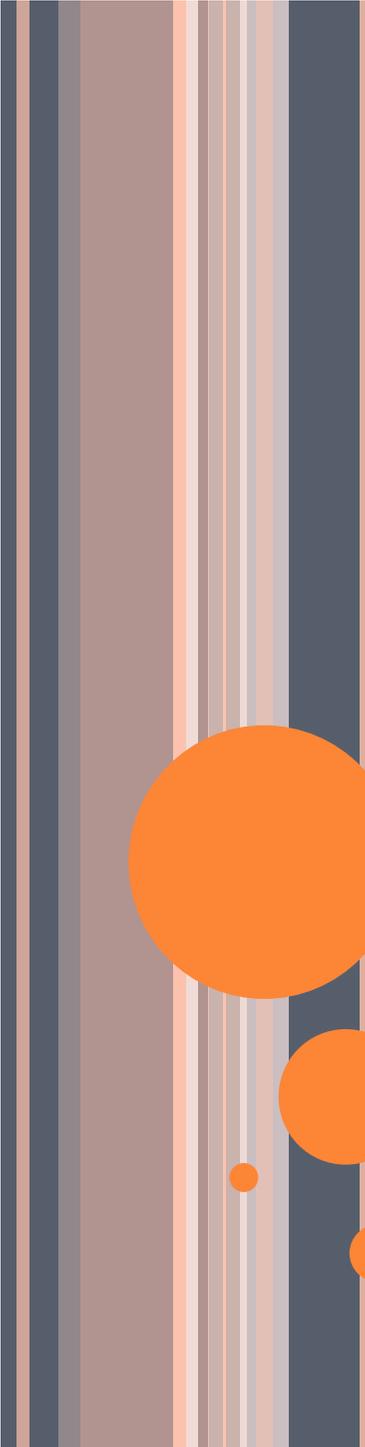
- “We will pay damages which a covered person is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by a covered person or property damage caused by an accident”
- Most issues in UM/UIM Law deal directly or indirectly with those two key phrases “covered person” or “legally entitled to recover.”



WHAT IS A “COVERED PERSON?”

- Typically defined by Policy as:
- You or any **family member** for the ownership, maintenance or use of any auto AND
- Any person using your covered auto





**KEY ISSUE #1:
THE FAMILY MEMBER
EXCLUSION**

FAMILY MEMBER EXCLUSION

- Typical exclusionary clause usually states:
- We do not provide Uninsured/Underinsured Motorists Coverage for any person:
- 1. For bodily injury sustained while occupying, or when struck by, any motor vehicle or trailer of any type *owned by you or any family member which is not insured for this coverage under this policy*



VERHOEV V. PROGRESSIVE COUNTY MUTUAL INS. CO.,
300 S.W.3D 803 (TEX. APP. – FT. WORTH 2009)

- Personal auto policy
- Glenn and Kim Verhoev both named insureds
- \$250,000 limits (UM/UIM)
- Divorced prior to issuance of policy and accident
- Kim injured severely in a single vehicle roll over as a passenger in a vehicle driven and owned by Glenn
- Kim pursued both a liability claim against Glenn and sought UIM under the Policy
- Progressive denied the UIM citing family exclusion



VERHOEV V. PROGRESSIVE COUNTY MUTUAL INS. CO.,
300 S.W.3D 803 (TEX. APP. – FT. WORTH 2009)

- Progressive argued that family exclusion applied because vehicle was owned by Glenn – who is the “you” in the Policy
- Kim argued that the “you” in the Policy was to be interpreted as her – and that since she was divorced from Glenn, the vehicle was not owned by her or a family member
- Thus, the question was – who qualified as “you.”



VERHOEV V. PROGRESSIVE COUNTY MUTUAL INS. CO.,
300 S.W.3D 803 (TEX. APP. – FT. WORTH 2009)

- Court of Appeals held that it could be interpreted both ways and that neither was “unreasonable”
- Thus, the Court held the provision was ambiguous
- Citing Don’s Building Supply, the Court noted that in cases of ambiguity, the resolution is in favor of coverage
- Thus, the family exclusion was held inapplicable in this situation



ANDERSON V. TEXAS FARM BUREAU

2014 WL 3698313 (TEX. APP. – EASTLAND 2014)

- Anderson was injured when a man started to drive a pickup off his property and in his effort to stop him was struck by the truck
- The truck was owned by Anderson's son, and the man taking it away worked at the same job as his son
- Anderson's son testified that he "co-owned" the truck with his boss (despite the fact the boss did not have possession or control of the truck)
- Farm Bureau applied the exclusion – denying on the basis that the truck was owned by Anderson's son, who resided with him at the time of the injury

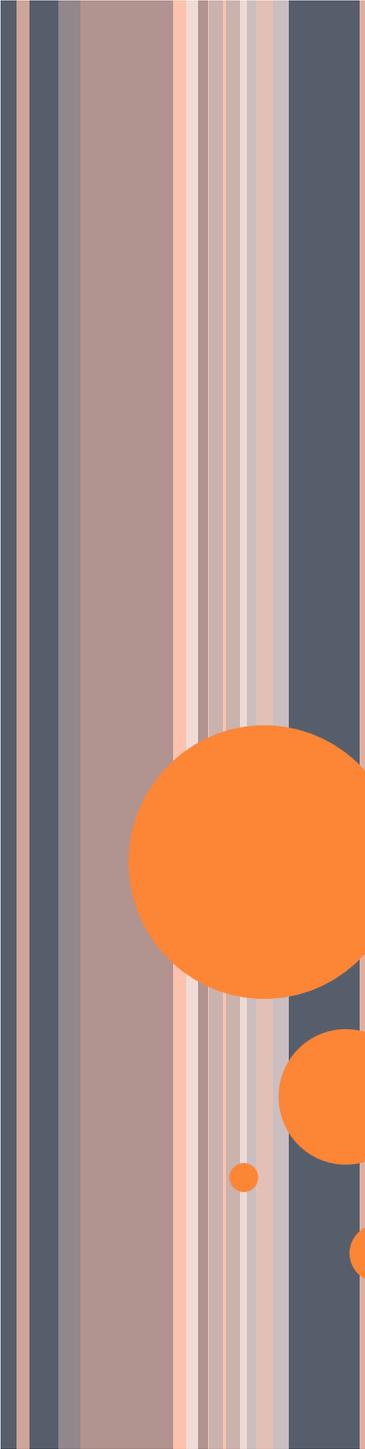


ANDERSON V. TEXAS FARM BUREAU

2014 WL 3698313 (TEX. APP. – EASTLAND 2014)

- The main issue was whether the “co-ownership” of the truck with his son’s boss brought the claim out of the scope of the exclusion
- Eastland Court of Appeals applied a more literal approach than the Fort Worth court in Verheov
- The language of the exclusion was held applicable because the truck was owned to a degree by a family member and not scheduled under the Policy
- Strict application of the language still triggered the exclusionary provision





**KEY ISSUE #2:
REJECTION OF UM/UIM
COVERAGES**

REJECTIONS OF UM/UIM COVERAGE

- Under Texas law, all policies of auto insurance written in this state carry UM/UIM coverage unless such coverage is rejected in writing
- Whether or not an insured has properly rejected UM/UIM is one of the more common areas of UM/UIM litigation



REJECTIONS OF UM/UIM COVERAGE

- Texas courts have held the written rejection exceptions should be strictly construed to protect the insured. (*Howard v. INA County Mut*, 933 S.W.2d 212 (Tex. App. – Dallas 1996))
- Thus, absent a written rejection, UM/UIM and PIP coverage exist as a matter of law. See *Howard*, 933 S.W.2d at 218
- In the absence of a complete and unambiguous rejection in writing, the policy will provide the minimum limits for UM/UIM. *Critchfield v. Smith*, 151 S.W.3d 225 (Tex. App. – Tyler 2004)



LUNA V. MENDOTA INS. Co.

2016 WL 4268400 (S.D. TEX 2016)

- Plaintiff Luna applied for insurance with Defendant Mendota
- Question centered around the contents of the application and what coverages were selected or rejected
- Rejection form was as follows:
 - ✓(1)I hereby reject Uninsured/Underinsured Motorist Coverage in its entirety;
 - ✓(2) I hereby reject Uninsured/Underinsured Motorist Coverage as respect to property damage liability coverage; and
 - (3) I hereby elect Uninsured/Underinsured Motorist Coverage and/or Uninsured Motorist Property Damage Coverage at the following limits: _____.

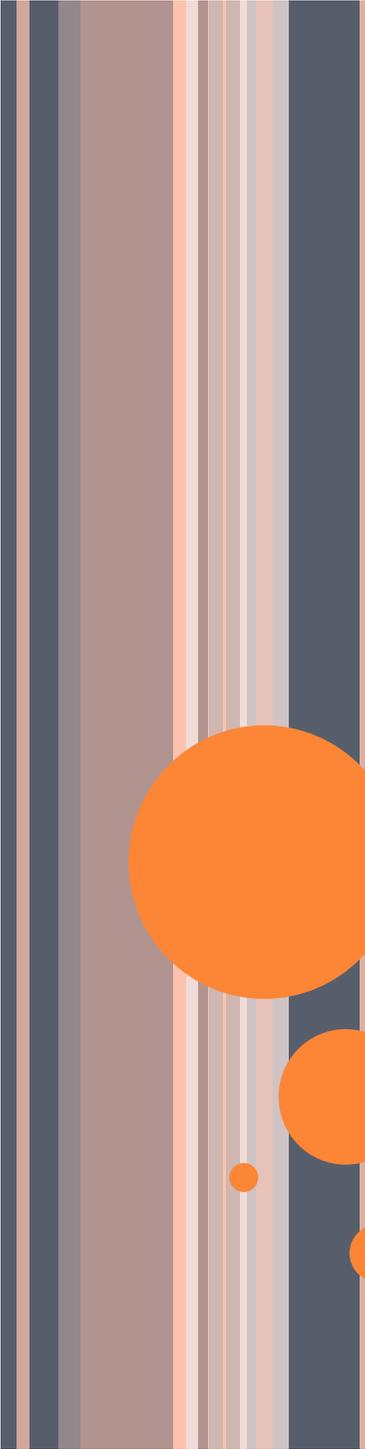


LUNA V. MENDOTA INS. CO.

2016 WL 4268400 (S.D. TEX 2016)

- Luna contended that he only intended to reject UM property damage and that a representative of Mendota actually checked the boxes
- Court granted summary judgment for Mendota
- Held that contracts cannot be challenged by arguing someone else filled out part of it
- This is a significant case in Texas as the question often comes up of whether or not an agent who translated the forms from Spanish to English or assisted with the completion of the forms can provide the intent to reject





KEY ISSUE #3 STACKING

WHAT IS STACKING?

- “Stacking” occurs when an claimant covered by more than one insurance policy, seeks to obtain benefits from the second policy arising from the same series of operative facts and damages when the available benefits from the first policy alone would be insufficient



BASIC TEXAS LAW ON STACKING

- *Stracener v. USAA*, 777 S.W.2d 378 (Tex.1989)
 - Stracener was covered by four insurance policies which when combined, exceeded the limits of the defendant's policy's liability limits.
 - Dispute was whether the amount of multi-policy insurance coverage available could be stacked to determine whether defendant was an underinsured motorist
 - Court allowed the stacking of coverage and held that “a negligent party is underinsured whenever the available proceeds of his liability insurance are insufficient to compensate for the injured party's actual damages.”



BASIC TEXAS LAW ON STACKING

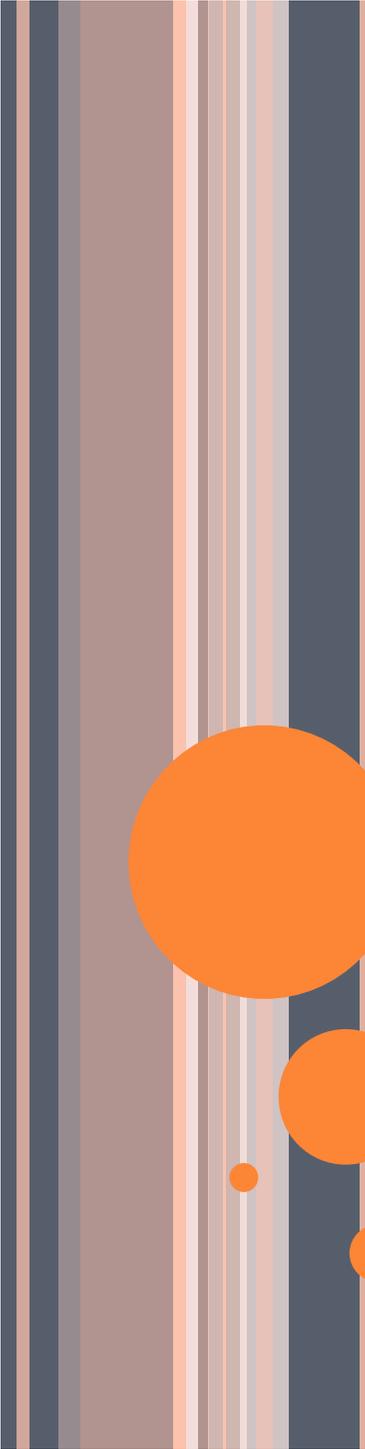
- *State Farm v. Conn*, 842 S.W.2d 350 (Tex. App. – Tyler 1992) & *Rosales v. State Farm*, 835 S.W.2d 89 (Tex. App. – Austin 1992)
 - Injured passengers attempted to recover UIM benefits from the policy of the driver in whose car they were riding, claiming that driver was an underinsured motorist
 - Courts held that the passengers could not stack under the UIM portion of the driver's policy because it would effectively create another layer of liability coverage and the policy did not anticipate the policyholder being an underinsured motorist



BASIC TEXAS LAW ON STACKING

- Reading these cases together provides a general rule on stacking:
- Stacking is permitted on inter-policy claims
- Stacking is prohibited on intra-policy claims





KEY ISSUE #4 OFFSETS

CAN AN INSURER OFFSET UM BENEFITS FOR AMOUNTS ALREADY PAID?

- Most UM/UIM policies contain language stating that the carrier can reduce the amount owed by amounts previously paid under another portion of the policy, such as PIP and MedPay
- Thus, if an insured already received \$5,000 in PIP and had a UM limit of \$30,000, can the carrier cut a check for \$25,000 if damages are above \$30,000?

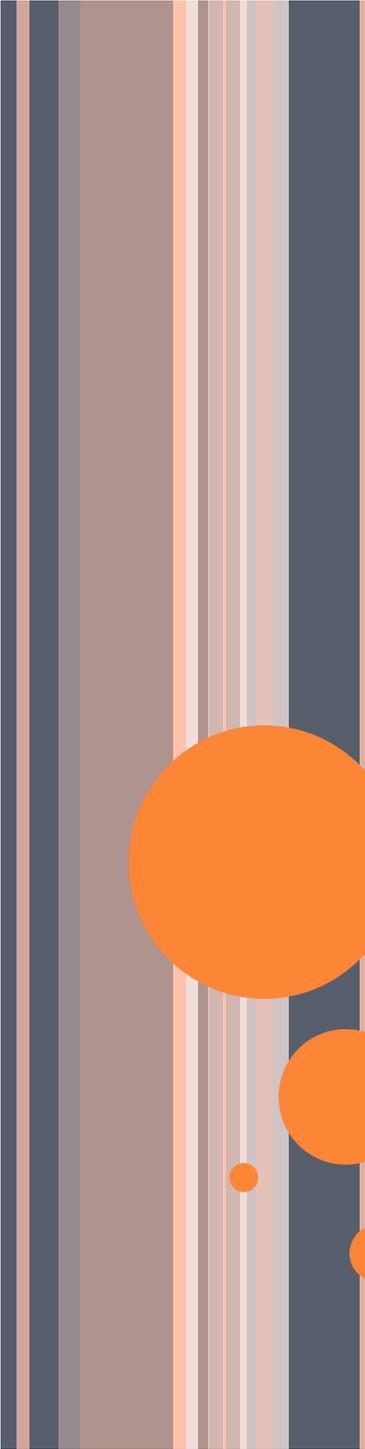


MID-CENTURY V. KIDD

997 S.W.2D 265 (TEX. APP. – EL PASO 1999)

- UM case where carrier had tendered \$10,000 in no-fault PIP benefits
- UM portion went to jury, who awarded \$13,000
- Trial court refused offset of the \$10,000 already paid against the judgment
- Court of Appeals reversed holding that failure to allow offset effectively allowed intra-policy stacking
- Distinguished other cases that held offsets based on “other insurance” clauses to be invalid – those involved inter-policy benefits





**KEY ISSUE #5
EXTRACONTRACTUAL
LIABILITY, BAD FAITH
& RIPENESS**

THE *BRAINARD* DECISION

- At what point does a UM/UIM claim become ripe?
- Seminal Case:
 - *Brainard v. Trinity Universal Ins. Co.*
216 S.W.3d 809 (Tex. 2006)
- Supreme Court recognized that UM/UIM language is unique because benefits hinge on insured's legal entitlement to recover damages from a 3rd party



THE *BRAINARD* DECISION

- Interpretation of contractual language, “legally entitled to recover”
- NOT requesting UM/UIM benefits
- NOT filing a lawsuit against insurer
- 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



THE *BRAINARD* DECISION

- Satisfaction of the two elements is a condition precedent to recovery
- Because UM/UIM insurance utilizes tort law to determine coverage, the insurer's contractual obligation to pay benefits does not arise until liability and damages are determined
- Absent an obligation to pay, it is impossible to establish that an insurer wrongfully refused to pay, and as such claims for common law bad faith and violations of the Texas Insurance Code fail
- No extracontractual liability or bad faith



ALLSTATE INS. CO. V. JORDAN

503 S.W.3D 450 (TEX. APP.-TEXARKANA 2016)

- Insured brought declaratory judgment action against automobile insurer to recover UIM benefits
- Insured sought to recover damages in excess of other driver's \$25,000 policy limits and \$2,500 PIP benefits already paid by Allstate
- Jury awarded \$30,000
- After offsets and credits, trial court held that insured was entitled to additional \$3,110.60, including prejudgment interest



ALLSTATE INS. CO. V. JORDAN

503 S.W.3D 450 (TEX. APP.-TEXARKANA 2016)

- On appeal, Allstate argued:
 - (1) Jordan's claims did not implicate the UDJA;
 - (2) under recent Texas Supreme Court precedent, the UDJA is not the proper vehicle for pursuing claims for underinsured motorists; and
 - (3) declaratory relief is inappropriate where the true cause of action lies in breach of contract.

- Appellate Court rejected all 3 arguments



ALLSTATE INS. CO. V. JORDAN

503 S.W.3D 450 (TEX. APP.-TEXARKANA 2016)

- (1) UDJA purpose is to settle and afford relief from uncertainty. Because Jordan had to demonstrate the amount that she was legally entitled to recover as damages as a prerequisite to proving her right to recover under the policy, Jordan properly invoked the UDJA to establish her rights under the Policy.
- (2) Court found nothing in Texas law that precludes the use of a declaratory judgment when establishing prerequisites to recovery in a UIM benefits case. Citing *Brainard*, Court noted that a plaintiff seeking to obtain UIM benefits must demonstrate the existence of a duty or obligation that the opposing party has failed to meet, but does not clarify what causes of action may be brought in order to settle the liability and damages issues in the UIM context.

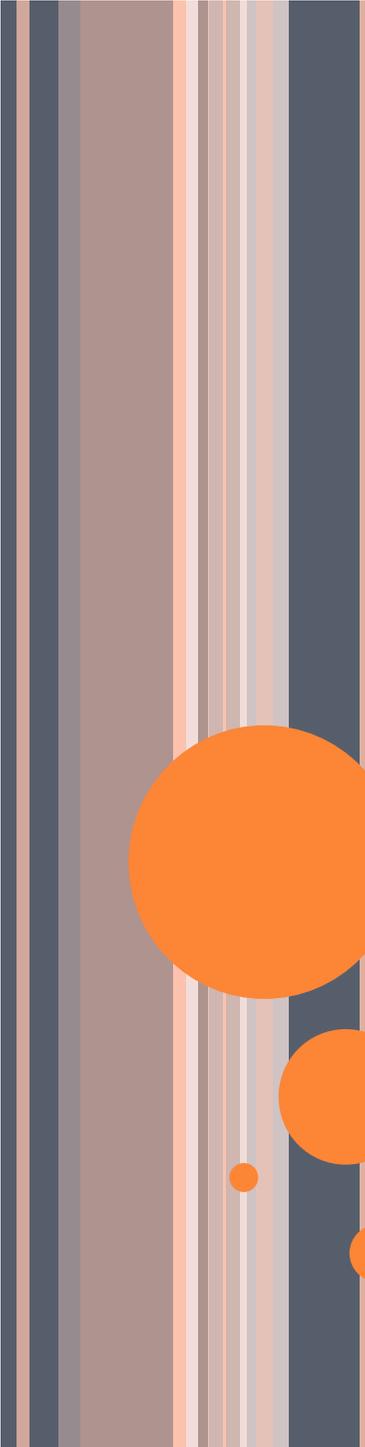


ALLSTATE INS. CO. V. JORDAN

503 S.W.3D 450 (TEX. APP.-TEXARKANA 2016)

- (3) Allstate correctly argued that the UDJA is not available to settle disputes already pending before the court.
- However, due to the unique procedure of a UIM case, the duty of an insurance company to pay UIM benefits does not arise until liability is established. Until that time, no remedy for breach of contract against the insurance company is actually enforceable.
- As such, a declaratory judgment action is an appropriate method of establishing entitlement to UIM benefits.





KEY ISSUES IN TEXAS UM/UIM LAW

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