TEXAS COURT UPDATE REGARDING RECENT OPINIONS DEALING WITH PERSONAL AUTOMOBILE INSURANCE POLICIES 2006-07

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MISCELLANEOUS

Few areas of insurance law affect as wide a contingent as personal automobile insurance policies and in particular uninsured and underinsured motorist coverage. However, due to the unique nature of personal automobile line policies, it seems that every year, new and different issues arise. This article will address such recent developments, including recent decisions by the Texas Supreme Court, various Courts of Appeal, as well as recent legislative initiatives.

***Brainard v. Trinity Universal Insurance Co.*, 50 Tex.Sup.Ct.J. 271, 2006 WL 3751572 (Tex. Dec. 22, 2006)**

In *Brainard*, the plaintiff, Brainard, brought a wrongful death action against the owner of a rig which collided head-on with the vehicle her husband was driving, killing him.[1] Brainard and her five children also sought UIM benefits from Trinity, the insurer of the family business. Trinity initially paid $5,000 in PIP benefits, but was later joined by Brainard in the action, alleging Trinity to have committed breach of contract and the duty of good faith and DTPA and Insurance Code violations.[2] After Brainard and the rig owner settled the claim for the owner's policy limits of $1,000,000, Brainard demanded that Trinity tender the UIM limits of $1,000,000, and Trinity countered with an offer of $50,000.[3] The trial court severed the claims and proceeded to trial on the UIM issue, and found that the negligence of the rig owner caused the accident, and awarded Brainard $1,010,000 for pecuniary and nonpecuniary losses, and $100,000 in attorney's fees.[4] The court applied a credit for the received $1,000,000 from the settlement and $5,000 for already-received PIP benefits. Trinity appealed, challenging the award of attorney's fees, while Brainard appealed, arguing that the trial court erred in failing to award prejudgment interest on the amount originally awarded for actual damages. The Texas Supreme Court granted review after finding disagreement among the appellate courts, and addressed three issues: (1) whether UM/UIM motorist coverage covers prejudgment interest which an underinsured motorist would owe the insured under tort liability; (2) if such prejudgment interest is covered, how would any settlement or PIP credits be applied to the interest calculation; and (3) whether an insured may recover attorney's fees from the UIM insurer under TEX.CIV.PRAC. & REM.CODE Chapter 38.[5]

The court first addressed the issue of whether UIM coverage also includes any prejudgment interest an underinsured motorist would owe an insured. The court observed that while the trial court correctly applied the received $1,000,000 and $5,000 as offsets to the plaintiffs' actual damages, the real issue was, in addition to the $5,000 difference, which Trinity agreed would be covered under the plaintiffs' UIM policy, whether the UIM policy would also cover the prejudgment interest the driver would, under tort liability, owe to the plaintiffs on the entire $1,010,000 in actual damages.[6] The court pointed out that prejudgment interest is awarded to fully compensate injured parties rather than to punish defendants, and that prejudgment interest is mandated by statute in wrongful death cases, among others.[7] The court found that if a plaintiff obtains a judgment against a tortfeasor for past damages resulting from a collision, prejudgment interest would be owed by the tortfeasor, and the plaintiff's UIM contract would govern whether this interest is recoverable from the plaintiff's insurer.[8] In examination of the Trinity UIM policy, the court found that Trinity was to pay Brainard "damages which [Brainard] is legally entitled to recover from [a tortfeasor]."[9] The court observed that two appellate courts had previously considered prejudgment interest to be included in those

[1] 2006 WL 3751572 at *1.
[2] *Id*.
[3] *Id*.
[4] *Id*.
[5] *Id*.
[6] *Id*. at *2
[7] *Id*.
[8] *Id*.
[9] *Id*.

damages an insured is "legally entitled to recover" from the UIM insurer.[10] The court considered Trinity's argument that the UIM policy required only payment of damages which the insured would be legally entitled to recover "because of bodily injury or property damage," as set forth by TEX.INS.CODE art. 5.06-1(5), and that this condition prevented prejudgment interest from being recoverable since prejudgment interest is essentially compensation for lost use of money by the plaintiff, and not actual damages from bodily injury.[11] Trinity also argued that allowing prejudgment interest to be covered would essentially require a UIM insurer to cover all damages assessed against an underinsured motorist, thereby running contradictory to previous appellate courts' decisions that exemplary damages are not covered under UIM policies.[12]

The court found that Trinity's narrow interpretation of damages "because of bodily injury" was not accurate, and that while it is true that courts have found UIM coverage to not include exemplary damages, the narrow interpretation of Trinity's was not utilized.[13] The court observed that most UIM provisions incorporate the exact text of art. 5.06-1(5), and that the court had previously inquired into the legislative intent behind the statute, finding that the primary purpose of UIM insurance to be compensatory for financial loss.[14] The court held that the requirement of art. 5.06-1(5) of recovery of damages "because of bodily injury or property damage" underscores the goal of UIM insurance of being compensatory to the policy holder, and clarifies that only injuries and damages caused by the motor vehicle accident are covered.[15] The court concluded that while prejudgment interest does accrue because of lost use of money, it also constitutes additional compensatory damages for the insured's bodily injury and property damage.[16]

The court addressed the alternative argument of Trinity, that the relationship between Brainard and Trinity is one of contractual parties, and that as such, TEX.FIN.CODE art. 304.102, authorizing prejudgment interest in wrongful death and personal injury cases, would not apply.[17] The Court of Appeals, in addressing this argument of Trinity's, cited the Texas Supreme Court's reasoning from *Henson v. Southern Farm Bureau Cas. Ins. Co.*, 17 S.W.3d 652, 653-54 (Tex.2000), where it held that, pursuant to a UIM policy, there is no contractual duty on an insurer to pay benefits until the liability of the other motorist and amount of damages the insured suffered are determined, and as such, a UIM claim earns no prejudgment interest until the insurer breaches that contract by failing to release benefits after an insured has procured such a judgment setting those items forth.[18] The Texas Supreme Court, however, distinguished that case from the one at bar. Even if Brainard's suit against Trinity was founded in contract, this would not change the fact that Brainard would be entitled to prejudgment interest on damages suffered at the hands of the tortfeasor, and actually, the Trinity UIM policy, by binding Trinity to pay damages Brainard was "legally entitled to recover" from the tortfeasor effectively incorporated the TEX.FIN.CODE art. 304.102 and the prejudgment interest in wrongful death actions.[19] Because, as in the *Henson* case, Brainard obtained a judgment establishing the negligence and underinsured status of the tortfeasor, the court held, the UIM policy forced Trinity to pay UIM benefits.[20]

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[10] *Id*. (citing *Norris v. State Farm Mut. Auto Ins. Co.*, 2004 WL 811722 (Tex.App.—Waco 2004); *Menix v. Allstate Indem. Co.*, 83 S.W.3d 877, 880 (Tex.App.—Eastland 2002, pet. denied); *Allstate Indem. Co. v. Collier*, 983 S.W.2d 342, 343 (Tex.App.—Waco 1998, pet. dism'd by agr.).
[11] *Id*. at *3.
[12] *Id*.
[13] *Id*.
[14] *Id*. (quoting *State Farm Mut. Auto. Ins. Co. v. Shaffer*, 888 S.W.2d 146, 148-49 (Tex.App.—Houston [1st Dist.] 1994, writ denied) (citing *Stracener v. United States Auto. Ass'n*, 777 S.W.2d 378 (Tex.1989)).
[15] *Id*. at *4.
[16] *Id*.
[17] *Id*.
[18] *Id*.
[19] *Id*. at *5.
[20] *Id*.

The second issue presented to court was how any settlement credits or PIP benefits an insured would receive would be applied to any prejudgment interest calculation. Brainard's suit was a wrongful death, a claim for which prejudgment interest begins accruing on the 180th day after a defendant receives written notice of the claim or the suit is filed, whichever is earlier; prejudgment interest ends on the day preceding the date a judgment on the claim is rendered.[21] Brainard filed suit on 1/19/00, and the trial court signed its judgment on 1/15/03, so the dates of prejudgment interest accrual ran from 1/19/00 to 1/14/03.[22] Brainard argued that prejudgment interest would be properly calculated on the $1,010,000 in damages awarded by the jury before application of any settlement or PIP credits, so the interest would be added on top of the jury award before any reduction by credits.[23] Trinity, on the other hand, argued that such a calculation would allow a plaintiff to earn interest on an entire award after receipt of almost that entire award in settlement.[24]

The court revisited its reasoning from *Battaglia v. Alexander*, 177 S.W.3d 893, 908-09 (Tex.2005), where it examined a similar situation regarding calculation of prejudgment interest. The court found that there, they held that prejudgment interest was compensation for lost use of money due as damages during the lapse of time between the accrual of a claim and date of judgment.[25] The court stated again that its "declining principal" formula, where in order to satisfy the purpose of prejudgment interest, settlements and credits received must be applied periodically, at the time they are received, first to any accrued prejudgment interest, and then to the principal.[26] Because prejudgment interest is computed as simple interest and not compound, after each application of settlement credits, prejudgment interest would only continue to accrue on remaining principal.[27]

Applying the "declining principal" formula to the case at bar, the court found that, again, prejudgment interest began to run on 1/19/00, the day Brainard filed her claim. The principal in the calculation was the $1,010,000 the jury awarded. However, Brainard received the $5,000 in PIP benefits approximately six months prior to the filing of her claim, so the $5,000 was to be applied to reduce the principal before prejudgment interest began to accrue. On 12/7/00, Brainard received $1,000,000 in a settlement with the tortfeasor driver's vehicle's owner. From the date of the filing of the suit to the date of the receipt of the $1,000,000 settlement, the court held, interest would run on the principal amount of $1,005,000. On 3/9/01, Trinity offered to settle the claim with Brainard for $50,000. Because Brainard's net $5,000 recovery from the jury did not exceed the $50,000 settlement offer from Trinity, pursuant to TEX.FIN.CODE art. 304.105(a), prejudgment interest would not accrue on the principal past the date of Trinity's settlement offer.[28] So, the court held, from the date Brainard received the $1,000,000 settlement from the vehicle's owner to the date Trinity made the $50,000 settlement offer, interest accrued on the principal remaining after the application of the $1,000,000 to the outstanding prejudgment interest and $1,005,000 principal. Because Brainard could have accepted Trinity's settlement offer, interest did not accrue past that date. The court held that Trinity was liable for the remainder of the $1,005,000 and prejudgment interest having run from 1/19/00 to 3/9/01, after application on 12/7/00 of the $1,000,000 settlement credit, up to the limits of Brainard's UIM policy. [29]

The final issue with which the Texas Supreme Court was faced was whether Brainard was able to recover attorney's fees on her breach of contract claim. The trial court had originally denied her request; the appellate court reversed,

[21] *Id*. at *6.
[22] *Id*.
[23] *Id*.
[24] *Id*.
[25] *Id*. (quoting *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 552 (Tex.1985)).
[26] *Id*.
[27] *Id*. at *7.
[28] *Id*.
[29] *Id*.

awarding $100,000.[30] Brainard sought attorney fees under TEX.CIV.PRAC.&REM.CODE section 38.002, which required proof she was represented by counsel, she presented her claim to her insurer, and that the insurer failed to pay the just amount owed within thirty days of the claim's presentment.[31] Brainard argued that her claim was the same as any other breach of contract claim, and as such, the presentment of her claim to Trinity occurred on 2/15/00, the day she actually submitted a claim to Trinity for UIM benefits.[32] Trinity argued that an insurer's duty to pay pursuant to UIM policies does not arise until a legal determination of the tortfeasor driver's liability and the actual amount of the insured's damages.[33]

The court stated that presentment is required to allow an opposing party the chance to pay without incurring any liability for attorney's fees, and thus, a crucial element to recovery of attorney's fees under Chapter 38 of the TEX.CIV.PRAC.&REM.CODE is the existence of a duty of obligation one party fails to meet.[34] The court reiterated its determination that the language in TEX.INS.CODE art. 5.06-1(5) requiring insurers to pay damages the insured is "legally entitled to recover" from an underinsured motorist actually means the insurer owes no duty to pay until an insured obtains a judgment establishing the liability and underinsured status of the other driver, and that the mere request of UIM benefits, or even filing suit against the insurer, initiates or creates such a duty on the part of the insurer to pay.[35] As such, the court held, without the existence of such a judgment, no duty to pay exists, and no claim for UIM benefits is presented for purposes of triggering liability for attorney's fees under Chapter 38.[36] The court continued that even in the case of a settlement or admission of liability by the tortfeasor driver, such a presentment has not occurred, because these settlements or admissions fail to have the same effect here as a judgment: "a jury could find that the other motorist was not at fault or award damages that do not exceed the tortfeasor's liability insurance."[37] A UIM policy, the court held, is unique in that benefits are conditioned upon the existence of an insured's legal prerogative to receive damages from that underinsured motorist, and until liability and damages are set forth by a legal determination, the insurer's contractual responsibility to pay benefits does not arise.[38]

***State Farm Mut. Auto. Ins. Co. v. Nickerson*, 50 Tex.Sup.Ct.J. 268, 2006 WL 3754824 (Tex. Dec. 22, 2006)**

In *State Farm Mut. Auto. Ins. Co. v. Nickerson*, the plaintiff was involved in a car accident, but released her claims against the tortfeasor driver after accepting the $25,000 limits of the opposing driver's policy limits, as well as $10,000 PIP benefits from State Farm, her insurer.[39] Plaintiff then filed suit against State Farm to recover the UIM provision of her policy, which possessed a $300,000 limit. She also sought to recover attorney's fees under TEX.CIV.PRAC.&REM.CODE articles 38.001 and 38.002.[40] A jury found the tortfeasor driver's negligence to be the proximate cause of the plaintiff's injuries, and awarded $225,000 in actual damages and $46,500 in attorney's fees.[41] Three weeks later, State farm paid the plaintiff $191,294.52, which represented the trial court's actual damages award minus the offsets of the tortfeasor driver's policy limits of $25,000 and the received PIP benefits of $10,000, plus interest. At entry of final judgment, the trial court found that plaintiff was entitled to actual damages of $225,000 as well as over $181,000 prejudgment interest, and as such, awarded the plaintiff the limit of her UIM policy, $300,000, plus the $46,500 in attorney's fees.[42]

[30] *Id*. at *8.
[31] *Id*.
[32] *Id*.
[33] *Id*.
[34] *Id*.
[35] *Id*.
[36] *Id*.
[37] *Id*. at *9.
[38] *Id*.
[39] 2006 WL 3754824 at *1.
[40] *Id*.
[41] *Id*.
[42] *Id*.

State Farm initially challenged the attorney's fees award and the prejudgment interest award, but later withdrew the challenge to prejudgment interest and paid the remainder of the policy limits, and subsequently, the Texarkana Court of Appeals affirmed the trial court's judgment.[43] The Texas Supreme Court was faced with the issue of attorney's fees. Released the same day as the *Brainard v. Trinity Universal Insurance Company* decision, the court held that an insured may recover attorney's fees pursuant to Chapter 38 only if an insurer fails or refuses to tender the UIM benefits within 30 days of a court-signed judgment which establishes the liability and underinsured status of a tortfeasor driver.[44] Here, State Farm had no contractual duty to pay any benefits until the trial court rendered such a judgment for the plaintiff and against the tortfeasor driver, and no attorney's fees could be awarded as there was no "just amount" which State Farm would owe as set forth by TEX.CIV.PRAC.&REM.CODE article 38.002(3).[45]

***State Farm Mut. Auto Ins. Co. v. Norris*, 50 Tex. Sup. Ct. J. 269, 2006 WL 3751580 (Tex. Dec. 22, 2006)**

In *State Farm Mut. Auto. Ins. Co. v. Norris*, the Texas Supreme Court was faced with another variation on the *Brainard* situation, released on the same day as *Brainard*. Norris, injured in a car accident with Johnston, filed suit against him and settled for $40,000, which was $10,000 less than Johnston's policy limits.[46] The day Norris dismissed his claims against Johnston, he amended his petition to include State Farm, his own insurer, as another defendant, seeking recovery of UIM benefits.[47] While State Farm paid Norris $5,000 in PIP benefits, it never offered to settle with Norris, and no date was ever cited in the case record for the payment of Johnston's settlement or the PIP benefits from State Farm.[48] At trial, the jury found Norris having suffered damages in $51,200, and having incurred $11,500 in trial attorney fees and $12,500 in possible future attorney fees (for appeal). However, the court applied the $55,000 credit to these damages (the $55,000 representing the total amount of Johnston's $50,000 policy limits and the PIP benefits paid), and signed a take-nothing judgment for State Farm, and denying Norris attorney's fees.[49] On appeal, the Waco Court of Appeals reversed, holding Norris was entitled to both prejudgment interest and attorney's fees.[50]

The Texas Supreme Court first held that the proper method for calculating any prejudgment interest on Norris' suffered damages was the "declining principal" formula it stated in *Brainard*.[51] The court held that State Farm would be entitled to the $50,000 credit representing Johnston's policy limit as of the date such amount was paid, ad an additional $5,000 credit for the PIP benefits as of the date such benefits were tendered by State Farm.[52] In keeping with the "declining principal" method, such credits which were paid before accrual of prejudgment interest will reduce the principal, and afterwards, each credit will apply to the accrued interest, then to the principal.[53] The court found that because the record did not indicate when such payments were made, prejudgment interest cannot be calculated until the dates could be established, so the case was remanded to trial court for such purpose, and application to the formula.[54] The court also pointed out that Norris argued that he was entitled to prejudgment interest calculated on the entire $50,000 amount of policy limits from Johnston, since pursuant to the jury's verdict on damages, he would have been "legally entitled to recover" more than such amount from the tortfeasor.[55] The court disagreed, citing that UIM policies, pursuant to TEX.INS.CODE art. 5.06-1(5), are to compensate the insured "up to

[43] *Id*.
[44] *Id*.
[45] *Id*.
[46] 2006 WL 3751580 at *1.
[47] *Id*.
[48] *Id*.
[49] *Id*.
[50] *Id*.
[51] *Id*.
[52] *Id*. at *2.
[53] *Id*.
[54] *Id*. at *1.
[55] *Id*. at *2.

the limit specified in the policy, reduced by the amount recovered or *recoverable* from the insurer of the underinsured motor vehicle."[56](emphasis added). When Norris settled for less than Johnston's policy limits, he also released any interest in the difference between the settlement amount and the actual limits, and because Norris did not lose the use of that $10,000 difference, he could only have prejudgment interest calculated on the amount of the settlement plus the amount of awarded damages that exceeded Johnston's policy limits, or $1,200.[57] The court concluded by holding, as it held in *Brainard*, that Norris was not entitled to attorney's fees under TEX.CIV.PRAC. & REM. CODE § 38.002.[58] As it stated in *Brainard*, the court reiterated that an insured may only recover attorney's fees under Chapter 38 if an insurer fails to tender UIM benefits within 30 days after the trial court signs a judgment legally determining the liability and underinsured status of the opposite driver, and the insured must present a claim to the insurer, who then must pay the "just amount owed" within those 30 days subsequent to presentment.[59] Because there cannot be a "just amount owed" until such a legal determination of liability and damages is made, the court held, Norris could not seek attorney's fees until, at the earliest, 30 days after the trial court's judgment, assuming that State Farm then refused to pay the "just amount owed."[60] The court held that the court of appeals erred in reversing the judgment of the trial court regarding attorney's fees, and rendered a take-nothing judgment in favor of State Farm on the issue.[61]

***Mid-Century Ins. Co. of Texas v. Daniel*, No. 07-05-0014-CV, 2007 WL 414330 (Tex.App.—Amarillo Feb. 7, 2007, no pet. h.)**

In *Mid-Century Ins. Co. of Texas v. Danie*l, the Amarillo Court of Appeals was also faced with a similar situation as *Brainard*. Daniel was injured in a car accident with Melvin Bray in 1999. In 2001, Daniel and her husband filed suit against Bray and joined Mid-Century as a defendant. The claims against Mid-Century were severed and abated, and 18 months later, Daniel amended the claims, alleging violations of two Texas Insurance Code provisions against Mid-Century.[62] At trial of the claims against Bray, the trial court awarded the Daniels $75,562.55 for the 80% negligence attributed to Bray. Mid-Century, after reducing that amount by the $25,000 paid by State Farm, then tendered $50,562.55 out of the UIM limits contained in the Daniels' policy, which the Daniels accepted.[63] Mid-Century moved for summary judgment on the Insurance Code claims, and while the trial court granted the summary judgment on the article 21.21 claim, finding that Mid-Century did not violate the duty it owed to the Daniels of good faith and fair dealing, it denied the no-evidence motion for summary judgment on the article 21.55 claims.[64] Mid-Century filed a second motion for summary judgment on the 21.55 claim, and this time, the Daniels filed a cross-motion for summary judgment. The trial court denied Mid-Century's motion and granted the Daniels' cross-motion, awarding the Daniels damages and attorney's fees.[65]

Mid-Century appealed, arguing that the UIM motorist claim the Daniels sued over did not arise until judgment was rendered against a tortfeasor, and that because a legal determination regarding tortfeasor liability had not been rendered, it was under no duty to pay UIM benefits, and the Daniels were not entitled to recover UIM benefits.[66] Further, Mid-Century argued, when the determination was made, it made prompt payment within two days of the date of that determination. The court examined the Texas Supreme Court's reasoning in *Brainard*, and held that the UIM contract conditions the receipt of benefits upon the

[56] *Id*.
[57] *Id*.
[58] *Id*. at *3.
[59] *Id*.
[60] *Id*.
[61] *Id*.

[62] 2007 WL 414330 at *1.
[63] *Id*.
[64] *Id*.
[65] *Id*.
[66] *Id*. at *2.

determination of an insured's legal entitlement to receive damages from a third-party.[67] The court found that, as in *Brainard*, payment of the remaining $50,562.55 within two days after the determination of legal obligation by the court satisfied the duty of Mid-Century to pay, and therefore, precluded award of attorney's fees against Mid-Century under TEX.CIV.PRAC.&REM.CODE section 38.002 or under INSURANCE CODE article 21.55.[68] Further, the court held, the trial court erred in awarding the 18% prejudgment interest pursuant to the Prompt Payment of Claims Act of article 21.55.[69] Because the payment by Mid-Century was made within the required 15 business days after the insurer received the information necessary to secure final proof of loss, the court held, the payment was timely and the Daniels were not entitled to the interest set forth under article 21.55.[70] The court reversed the trial court's judgment and rendered judgment that the Daniels take nothing.[71]

Response to Brainard: House Bill 2013

In response to the *Brainard* case and its progeny, Representative John Smithee introduced HB 2013 on February 26, 2007. The bill's terms include providing that a claimant has provided an insurer notice of a claim for UM/UIM coverage by submitting written notification to the insurer which "reasonably informs" the insurer of the facts of the claim, but in its most important aspect, it would prohibit insurers from requiring a judgment or legal determination of liability or underinsured motorist status of the opposing motorist, or of extent of damages of the insured, as a prerequisite for presenting a claim or for payment of benefits. Additionally, the bill holds that an insurer must attempt in good faith to effectuate a prompt, fair and equitable settlement of a claim once liability and damages have become reasonably clear. The bill also would establish that prejudgment interest accrues on the earlier of the 180th day after the claimant notifies insurer of the claim (now by submission of written notice "reasonably informing" the insurer of the claim's facts, or the date suit is filed against the insurer, and that for purposes of recovery of attorney's fees under TEX.CIV.PRAC. & REM.CODE § 38.002, the claim for UM/UIM benefits is presented when the insurer receives the written notice of the claim, thereby speeding up the start of the 30 days within which an insurer has to pay the "just amount owed" in order to avoid liability for attorney's fees. The bill was left pending in the House's Insurance Committee, of which Smithee is Chairman, on March 12, 2007.

***Lopez v. Farmers Texas County Mut. Ins. Co.*, No. 06-06-00024-CV, 2007 WL 703496 (Tex.App.—Texarkana Mar. 9, 2007, no pet.) (mem. op.) (not designated for publication)**

In *Lopez v. Farmers Texas County Mut. Ins. Co.*, Santos Lopez had filed a suit for breach of contract, bad faith settlement practices as violations of the Insurance Code, and a DTPA action pursuant to his insurer's denial of UIM benefits. Lopez had signed four separate waivers rejecting UIM coverage under his policy through 1998-1999.[72] However, Lopez argued that because the waivers were in English, and because he does not speak or understand English, the waivers were inapplicable, and thus not in conformity with the requirements of TEX.INS.CODE art. 5.06-1(1), requiring that UIM coverage automatically be included in each Texas auto liability policy unless a named insured rejects such coverage in writing. Farmers moved for summary judgment on both no-evidence and traditional grounds, and the trial court granted the motion without specifying the grounds of its grant of summary judgment.[73]

Lopez based his argument on the Texas Supreme Court's analysis of language of waivers of personal injury protection under TEX. INS. CODE art. 5.06-3 in *Unigard Sec. Ins. Co. v. Schaefer*, 572 S.W.2d 303 (Tex.1978). There,

[67] *Id*.
[68] *Id*.
[69] *Id*. at *3.
[70] *Id*.
[71] *Id*.

[72] 2007 WL 703496 at *1.
[73] *Id*.

the Court found that the required written rejections of the PIP coverage meant an "express written rejection in language demonstrating that the insured has some knowledge of what he is rejecting."[74] This reasoning, Lopez argued, when applied to the requirements of written waivers of UIM coverage, would hold that because he did not have some knowledge of what he was rejecting, due to its being in English, the waiver was not valid. The Texarkana Court of Appeals rejected this argument, finding that Article 5.06-1(1) required only a rejection in writing, rather than a qualitative comprehension on the part of the insured.[75] The court stated that the reasoning of the Texas Supreme Court in *Schaefer* and the statute did not require proof that the insured actually understood the effect of the waiver, and that the requirements dealt with the clear "language" of the waiver itself, meaning the diction of the form and whether the form adequately and sufficiently explained the terms of the waiver to a reader.[76] The court held that the *Schaefer* rationale and analysis did not require proof that the insured actually understood the language and effect of the form, as in proof that the form had been translated into a different language the insured could or would understand.[77] The court held that such an interpretation would be an extension of the statutes, one that the court was not prepared to provide.[78]

***Perez v. Kleinert*, 211 S.W.3d 468 (Tex.App.—Corpus Christi 2006, no pet.)**

In *Perez v. Kleinert*, the Corpus Christi Court of Appeals was faced with a situation involving the question of whether an attorney would be forced to show proper authority to represent a client in a matter, and for which client the attorney truly works, as well as whether an attorney's representation of a party at trial under false or questionable pretenses constitutes reversible error. Perez was injured in a car accident between Alexandria Garza and Aaron Kleinert; Perez was the passenger in the car being driven by Garza, which was owned by the Spaceks and had been loaned to Garza. The Spaceks had recently purchased a State Farm policy over the vehicle.[79] Perez claimed benefits under the Spaceks' State Farm policy, and when State Farm allegedly refused to pay, he named State Farm as a defendant in the suit, alleging claims for UM/UIM benefits and Texas Insurance Code violations.[80] This suit was filed in the 24th JDC of Victoria County.[81]

State Farm initially took the position that Garza was insured under the Spacek policy, and so it provided her with a defense and representation, which appeared before the court as Garza's representative and filed her answer to the suit.[82] This answer denied liability and alleged that the negligence of Perez was the sole proximate cause of the accident.[83] Subsequently, the relationship between State Farm and Garza apparently "soured," and State Farm filed a suit for declaratory judgment against Garza in the 377th JDC, alleging that Garza had not been cooperating in her defense and seeking a declaration that State Farm had no duty to defend or indemnify Garza.[84] The same judge presiding over the Perez suit in the 24th JDC also presided over the declaratory judgment action in the 377th, and entered an order stating that "no coverage applied to [Garza} under the Policy for the June 9, 2000 accident," and that "State Farm has no duty to defend or indemnify [Garza] for the June 9, 2000 accident and resulting lawsuit styled *Michael A. Perez v. Aaron Kleinert, et al*… in the 24th District Court of Victoria County."[85]

In the *Perez* lawsuit in the 24th JDC, Garza's attorney then filed a motion to withdraw referencing the recently entered declaratory judgment against Garza, and that State Farm had

[74] *Id*. at *2.
[75] *Id*.
[76] *Id*.
[77] *Id*.
[78] *Id*.

[79] 211 S.W.3d at 470.
[80] *Id*.
[81] *Id*.
[82] *Id*.
[83] *Id*.
[84] *Id*.
[85] *Id*.

"terminated" the attorney's services for Garza.[86] From this point on, no attorney of record was designated for Garza.[87] State Farm then filed a second amended answer, including several additional defenses and affirmative defenses to the Perez claims, including assertions that the accident was not caused by the negligence of any party to the accident, but rather, by a malfunctioning traffic light.[88] The parties agreed that the personal injury and UM claims of Perez would be tried separately from the Insurance Code claims.[89] On the eve of trial, attorneys for Perez and State Farm submitted a set of joint stipulations to the court, indicating that Perez was a "covered person" under the Spaceks' policy, and that the UM/UIM limits of the policy were $25,000. Signing this agreement for State Farm was attorney Isidro Castanon.[90]

While Garza never appeared in person nor through counsel at trial, Castanon appeared on the first day of the Perez personal injury trial and addressed the jury as Garza's attorney, yet never informed the jury that he was actually counsel for State Farm and not Garza.[91] Perez' attorney objected to Castanon's actions, but the trial court overruled them, allowing Castanon to put forth the impression to the jury that he was representing Garza.[92] Although Garza's live pleading included a cross-claim against Kleinert for negligence per se, Castanon changed the direction of Garza's defense, colluding with Kleinert's counsel and arguing that a malfunctioning traffic light caused the accident, and the allegations of negligence per se were not raised.[93] After the jury returned a finding of no liability on the parts of Kleinert and Garza, Perez filed a motion for new trial based on the trial court having committed reversible error by allowing Castanon to misrepresent his role before the jury.[94]

The Court of Appeals found that a fatal conflict of interest had existed.[95] The court found that while Castanon's client remained State Farm throughout the litigation, and there was no question that Garza, after the default declaratory judgment and the order of withdrawal of counsel in the case, was pro se at the Perez personal injury trial, Castanon had never been designated attorney of record for Garza.[96] The court found that the trial court allowed Castanon to purposely conceal his identity from the jury, violating TEX.R.CIV.P.10, holding that any substituted attorney be designated of record with notice to all other parties.[97] Additionally, the court found, even if Castanon did have consent of Garza to represent her at trial, there would have been a fatal conflict of interest which would have rendered the trial court's ruling erroneous.[98] Based on reasoning of the Texas Supreme Court in *Allstate Ins. Co. v. Hunt*, 469 S.W.2d 151 (Tex.1971), the court reiterated that a trial court has discretion to allow a co-defendant insurance company to defend an uninsured motorist against its insured to limit or reduce recovery where a separate trial on the matter has been requested, but the trial court must place the burden upon the insurance company to show that no substantial conflict of interest exists.[99] Here, the court stated, the uninsured and insured motorists were clearly at odds, and to defend Garza, State Farm was forced to oppose its insured in the suit, Perez.[100] In Castanon's changing of the pursuit of defenses on behalf of Garza, and steering clear of the allegations of negligence per se against Kleinert, Castanon clearly went against the interests of State Farm's insured, and he made no attempt to meet the burden of proof of showing no conflict of interest or even to justify his actions when challenged at trial.[101] The court found that even if State Farm's antagonism toward Garza were discounted, and the court were to believe that

[86] *Id*. at 471.
[87] *Id*.
[88] *Id*.
[89] *Id*.
[90] *Id*.
[91] *Id*.
[92] *Id*.
[93] *Id*.
[94] *Id*.
[95] *Id*. at 473.
[96] *Id*.
[97] *Id*. at 474.
[98] *Id*.
[99] *Id*.
[100] *Id*.
[101] *Id*. at 475.

State Farm and Garza had actually aligned, it still would not validate the trial court's actions, but rather, would instead further underscore the conflict of interest, since it would mean that State Farm had directly aligned itself with an uninsured motorist in order to defeat it's insured's claims.[102] Further, because the UM/UIM claims were severed from the Insurance Code claims, the court concluded, the only legitimate basis for State Farm to even participate in the personal injury trial would have been to defend against Perez' claims for UM/UIM benefits, and since the UM/UIM claim was never tried to the jury, State Farm had no basis for participation, since the only issues at trial involved the "determination of liability for the accident" and "bodily injury damages the Plaintiff sustained as a result of the accident."[103] The court reversed the judgment and remanded the case for new trial.[104]

***Jankowiak v. Allstate Property & Casualty Insurance Company*, 201 S.W.3d 200 (Tex. App.—Houston [14th Dist.] 2006, no pet.)**

Laci Jankowiak was a passenger in a car being driven by Daniel Dellasala, Jr. which was involved in a car accident with Alejandra Salas, an uninsured motorist. Jankowiak sued (1) the driver of the car she was riding in; (2) the driver's insurer, Allstate; (3) the other uninsured driver; and (4) her own insurer. Jankowiak settled with her own insurer for the policy's $20,000 maximum UM coverage, and settled with the driver's insurer, Allstate, for $25,000, the limit for liability coverage. Despite these recoveries, Jankowiak alleged the payments fell short of her actual damages. Thus, Jankowiak sought an additional $25,000 from her driver's insurer, Allstate, under the policy's limits of liability for UM coverage. Allstate moved for summary judgment arguing that the policy allowed only one recover of $25,000 for each person injured in one accident. The summary judgment was granted by the trial court. On appeal, Jankowiak claimed that the court misconstrued the policy, or, alternatively, that the proper construction violated public policy. The 14th Court of Appeals in Houston agreed with Jankowiak and reversed the trial court's decision.

The first issue the appellate court dealt with was whether Jankowiak could recover ***both*** (1) $25,000 under Allstate's policy's liability coverage based on the allegation that Allstate's insured driver was allegedly negligent, and (2) an additional $25,000 under the policy's UM coverage because the other driver was uninsured an allegedly negligent as well. Allstate argued that Jankowiak was entitled to recovery under liability coverage ***or*** UM coverage, but not both because of the following policy language:

> The limit of liability shown in the Declarations for "each person" for bodily injury liability is our maximum limit of liability for all damages for bodily injury sustained by any one person in any one motor vehicle accident.... This is the most we will pay regardless of the number of ... [c]laims made ... [or] [v]ehicles involved in the accident.

However, Houston's 14th Court of Appeals concluded that this language did not limit coverage under the policy globally, but only limited coverage under each section of the policy. The court reasoned that the policy contained six different types of coverage: (1) liability coverage, (2) uninsured/underinsured motorist coverage, (3) collision coverage, (4) other than collision coverage, (5) towing and labor costs coverage, and (6) rental reimbursement coverage; and that each coverage specified its own policy limit. Further, the policy language upon which Allstate relied was repeated in particular reference to numerous coverages. Thus, because the "maximum limit of liability" language is repeated for each coverage, the appellate court interpreted it not as a maximum, policy-wide, or absolute global limit, but rather as a maximum limit of recovery for each specific coverage. That is, the language limits one person's receipt of coverage benefits for bodily injury to $25,000 and, in a separate section of the policy, operates again to limit one

[102] *Id*.
[103] *Id*. at 476.
[104] *Id*.

person's recovery of UM benefits to $25,000 for bodily injuries sustained in one accident.

Allstate next attempted to bolster its position by relying upon an offset provision in the general liability coverage portion of the policy:

> Any payment under the Uninsured/Underinsured Motorists Coverage or the Personal Injury Protection Coverage of this policy to or for a covered person will reduce any amount that person is entitled to recover under this coverage.

Allstate claimed this provision required Jankowiak receive no more than $25,000. However, according to the Appellate Court, the provision only, arguably, mandated that UM payments be applied to offset liability coverage payments and not vice-versa. Allstate had paid $25,000 under liability coverage and not under UM coverage, therefore the offset provision's wording did not apply to offset such a payment. Thus, even Allstate's arguable interpretation, when applied to the facts of the case, did not offset coverage.

In addition, the Appellate Court held that a more reasonable construction of the offset provision was that it simply prevents an insured from recovering in excess of his or her actual damages. In other words, UM payments for bodily injury and/or PIP payments will reduce the amount the insured is entitled to recover under the policy's bodily injury liability coverage in the sense that an insured cannot obtain a windfall "double recovery." For example, if the insured's actual damages were $35,000, and the insurer paid $5,000 in PIP coverage and $25,000 in UM bodily injury coverage, the most the insured could recover under his or her bodily injury liability coverage would be $5,000.

Thus, the Appellate Court concluded that the proper interpretation of Allstate's policy allowed Jankowiak to recover $25,000 under liability coverage as well as $25,000 under UM coverage. The Appellate Court's opinion did not stop there though, and it went on to address whether Allstate's proposed interpretation was also against public policy. Under Texas law, if an insurance policy provision contravenes a statute it is deemed against public policy. The appellate court analyzed certain Texas state statutes and concluded that they reveal a clear mandate favoring the protection of conscientious motorists from financial loss caused by negligent ***and*** financially irresponsible motorists. Allstate's proposed policy interpretation would allow Jankowiak to only recover one or the other, i.e. policy proceeds because of (1) her driver's negligence, or (2) the other driver's negligence (and lack of insurance). The Appellate Court held that Texas public policy mandates that both coverages be available independently to qualifying insureds.

Allstate v. Hyman, No. 06-05-00064-CV, 2006 WL 694014 (Tex. App.—Texarkana March 21, 2006, no pet.) (mem. op., order designating opinion as such at 2006 WL 1229089)

Mary Hyman, an insured of Allstate Indemnity Company, was involved in an automobile accident on July 26, 2000. Hyman made a claim for her severely damaged Ford Explorer, but thought Allstate's offer was inadequate. After several months of unfruitful negotiation, which included letters and telephone calls, a lawsuit was filed just over a year later. Six months after that, in February 2002, the storage facility demanded that Hyman pay the storage fees on the vehicle or relinquish her claim to the vehicle in exchange for cancellation of the debt. She relinquished the vehicle.

Hyman also sued the driver of the other car, Marilyn Baker. On September 25, 2003, Hyman settled her claims against Ms. Baker.

Hyman's lawsuit against Allstate went to trial October 11, 2004. Hyman claimed Allstate breached its contract with her. A jury agreed, and it also found a knowing violation of Article 21.21 of the TEXAS INSURANCE CODE. The jury awarded her actual damages of $21,600.00 ($18,000.00 for the vehicle and $3,600.00 for a

rental vehicle for a reasonable period of time), enhanced damages of $54,000.00, and $25,000.00 in attorney's fees. The trial court ordered an offset in the amount of Hyman's settlement with Baker. Both Parties appealed.

First Issue: Breach of Contract by Allstate. On appeal, Allstate first argued that it never breached its contract with Hyman because Hyman didn't comply with the contract, i.e. Hyman breached the contract first. Allstate claims that it sent Hyman a letter with a list of information it needed, but that Hyman failed to provide any of the information. Specifically, Allstate's letter asked Hyman to provide information and authorizations regarding the lienholder on the vehicle, authorization to speak to the lienholder about her account, possession of the vehicle, and a power of attorney to permit Allstate to sell the vehicle. Allstate claims that Hyman's failure to provide the requested information prevented it from fulfilling its obligations under the contract. However, the Appellate Court concluded that the information requested in the letter had nothing to do with Allstate's duty to investigate the claim, determine whether it was liable to pay the claim, or to determine the proper value of the totaled vehicle. The information requested by Allstate merely related to procedures that would take place ***after*** Allstate's investigation was complete. Thus, Allstate's investigation was not inhibited by Hyman's lack of response.

Second Issue: Breach of Contract by Hyman. Similarly, the Appellate Court held that Hyman didn't breach its contractually duty to cooperate by not providing the items requested in Allstate's letter. Hyman's noncompliance did not inhibit Allstate's ability to investigate, it only inhibited Allstate's ability to dispose of the vehicle after its investigation was concluded and a settlement was had been agreed upon between Allstate and Hyman. In essence, the Appellate Court held that Allstate was putting the cart before the horse. The investigation needs to be done first, then settlement, then the logistics of transferring ownership of the car etc.

Third and Fourth Issues: Subrogation and the Proper Offset. In the underlying trial Hyman was awarded the value of the vehicle in the amount of $18,000. Because Hyman had previously settled with the negligent driver for the value of the vehicle, the trial court offset the $18,000 by this amount. However, on appeal, Allstate contended that Hyman's settlement with the negligent driver's insurance company, without Allstate's consent, violated Allstate's contractual right of subrogation and thus the contract should be void. The Appellate Court first concluded that a subrogation clause in a contract does not act as a covenant that would void the entirety of a contract. Second, the Appellate Court agreed with Allstate and concluded that the subrogation amount that Allstate was entitled to attempt to recover was not the amount that Hyman settled for, but the amount that the jury determined to be the value of the vehicle. Thus, the jury's determination of value should offset the judgment against Allstate, and not the amount Hyman settled for.

Fifth Issue: 21.21. Violation. Lastly, the Appellate Court ruled that the evidence at trial supported the jury's finding that Allstate had violated article 21.21 of the Texas Insurance Code. First, the evidence showed that Allstate failed to determine the value of the vehicle in the local where the damage was occasioned, though it represented to Hyman that it had used comparable vehicles to determine value. Further, the amount offered by Allstate as the value of the vehicle was $14,425.00, while the jury determined its value to be $18,000 (this in and of itself was evidence of an improper valuation). Further, Allstate told Hyman that is had to protect the lienholder when settling; however this was not the case. The Court of Appeals stated that Allstate could have paid Hyman the amount without involving the lienholder.

***Lewis v. Allstate Ins. Co.*, No. 09-05-225-CV, 2006 WL 665790 (Tex. App.—Beaumont, March 16, 2006, no pet.) (mem. op.)**

Lewis, who was insured under an automobile liability policy issued by Allstate, made a claim for uninsured motorist benefits after being injured in an automobile accident. After corresponding for several months with

Allstate about his claim, Lewis retained counsel. Lewis's counsel sent a demand letter to Allstate for the full amount of uninsured motorist benefits under the policy. Allstate proposed to pay $20,000 to settle Lewis's claim and forwarded a check for that amount naming Lewis, Lewis's counsel, and Medicare as co-payees. Lewis's counsel rejected the check, and Lewis subsequently sued Allstate. In his lawsuit, Lewis alleged Allstate breached its contract by naming Medicare as a co-payee on the settlement check. Lewis's case was dismissed via summary judgment.

On appeal Lewis asserted that summary judgment was improper because Allstate breached its insurance contract with Lewis by (1) including Medicare as a co-payee on the settlement check issued to Lewis, and (2) not investigating the amount of Medicare's interest. The appellate court affirmed the summary judgment based on the following. It is well known that Medicare may seek reimbursement from an insurance company if the insurer ***knew*** or ***should have known*** about payments made by Medicare but failed to protect Medicare's rights. However, it is a breach of contract for an insurer to include Medicare on a benefit check where the insurer had no reason to suspect that Medicare had any entitlement to a portion of the benefits paid. In the case at hand the fact that the insured had received Medicare benefits had been discussed by the parties during mediation, though no specific amounts were discussed. Thus, Allstate properly added Medicare as a payee. Lastly, regarding Lewis's contention that an insurer must independently investigate the amount of Medicare benefits, the Appellate Court stated that it was aware of no case precedent holding such, and that without such precedent, the Appellate Court would not impose such a duty.