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Texas Auto Coverage In a Nutshell

We run into each other a lot, and most of us have insurance. Consequently, there is a lot of litigation over auto policies – who they cover, what they cover, which policy is primary, what subrogation interests will be enforced and which ones will be ignored. In recent years, things have only gotten more complicated with the introduction of non-standard policies. At last count, the Texas Department of Insurance had approved over 200 of these new hybrids.

I. Statutory and Regulatory Basics

There is interplay between the Insurance Code, the Safety Responsibility Act ("SRA") and the Texas Department of Insurance ("TDI") regulations. While, strictly speaking, the SRA does not regulate insurance policies, the TDI guidelines seem to require compliance. Also, it is a rare Texas policy that does not certify the policy complies with SRA. So here is an outline of the statutes and regulations that form the bedrock of the Texas personal auto policies.

A. Statutory Requirements for Auto Insurance

The SRA and the Texas Insurance Code mandate the inclusion of certain coverage provisions in the auto policy and prohibit others. These statutes form the foundation of auto coverage in Texas. The TDI has no authority to act outside the perimeters that the Insurance Code establishes. This is a brief summary:

1. Texas Transportation Code (for those policies that certify compliance)

Texas Transportation Code section 601.072 minimum limits

$25,000.00 for injuries per person per accident for policies written after April 1, 2008. (changes to $30,000.00 January 1, 2011.)

$50,000.00 for injuries per accident, if more than one person injured, for policies written after April 1, 2008 (changed to $60,000.00 January 1, 2011)

$25,000.00 property damage per accident for policies written after April 1, 2008.

Allows deductibles of $250 per person injured or for property damage and $500 per accident under the liability coverage[1]

Texas Transportation Code section 601.073 policy must contain

Name and address of the insured;

Coverage provided by the policy;

Premium charged;

Limits of policy;

Policy must state that it provides the coverage required by this section and that it is subject to this law;

Policy cannot be cancelled after a collision as to that collision;

Policy cannot require that the insured first pay the liability damages before the policy pays;

The policy, the application for the policy and any riders or endorsements consistent with this law constitute the entire policy. [2]

Texas Transportation Code section 601.074 allowable terms

Policy may contain a provision that allows the insurance company to be reimbursed by the insured for payments that are required by this law, but not required by the policy,

Allows prorating of insurance provided with other collectable insurance. [3]

Texas Transportation Code section 601.075 prohibited terms

Policy may not insure against liability that worker's compensation is designed to cover.

Excludes domestic employees from exclusion unless covered, or could be covered, under worker's compensation.

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Excludes liability for injury to or destruction of, insured's own property[4]

Texas Transportation Code section 601.076 permissive users

Owner's policy must provide coverage for permissive users in the United States and Canada.[5]

Texas Transportation Code section 601.078 additional coverage

Excess coverage beyond the statutory minimum is not regulated by this act.[6]

2. Texas Insurance Code (applicable to all personal auto policies)

Texas Insurance Code section 1952.051 policy forms

Policy forms for auto insurance are now regulated by Texas Insurance Code section 2301 (which permits insurers to draft their own forms, subject to the approval of the TDI.)[7]

Texas Insurance Code section 1952.052 standard policy

The older standard form is still approved. Insurance company must notify TDI that it intends to continue its use.[8]

Texas Insurance Code section 1952.054 short term coverage

Prohibits the use of policies with less than 30 day coverage to renew driver's licenses or vehicle inspections. Policy must disclose this restriction.[9]

Texas Insurance Code section 1952.056 effect of divorce

If a spouse is covered under the policy, the policy must continue coverage for that spouse during "a period of separation in contemplation of divorce."[10]

Texas Insurance Code section 1952.057 drug forfeiture

Prohibits coverage for vehicles lost through forfeiture for a drug conviction.[11]

Texas Insurance Code section 1952.101 Uninsured Motorist Coverage

Re-codification of 5.06-1 uninsured motorist coverage.

Requires uninsured/underinsured motorist coverage on any policy, but allows coverage to be waived.[12]

Texas Insurance Code section 1952.102 definition of uninsured

Allows the TDI to define "uninsured motor vehicle" to exclude certain vehicles which are, in fact, uninsured.[13]

Texas Insurance Code section 1952.103 underinsured

Defines underinsured vehicle.[14]

Texas Insurance Code section 1952.104 UM limits

Requires 1) UM limits may not exceed liability limits; 2) UM coverage cannot cover intentional acts; and 3) if the owner or operator of the vehicle is unknown, then actual contact between the vehicles is required.[15]

Texas Insurance Code section 1952.105 UM limits and deductible

1) UM limits, including property damage, must be offered up to the amount of the liability limits; 2) specifies a $250.00 deductible for property damage; and 3) UM limits must at least equal Safety Responsibility limit.[16]

Texas Insurance Code section 1952.106 defines UM coverage

UM coverage must provide payment for "all amounts the insured is legally entitled to recover as damages" from the uninsured vehicle up to the limits of the policy "because of bodily injury or property damage."[17]

Texas Insurance Code section 1952.107 may stack UM and collision coverage

For property damage, insured can elect to claim under his collision coverage or his UM coverage and choose the lesser deductible. May also stack collision and UM property damage coverage and pay only the lesser deductible. Cannot recover more than actual damages.[18]

Texas Insurance Code section 1952.108 UM subrogation

Grants subrogation rights to the UM carrier against any person or organization legally responsible "for the loss, subject to the terms of the policy."[19]

Texas Insurance Code section 1952.109 burden of proof, UM

Places the burden of proof on the UM carrier if there is a dispute over the insured status of the other vehicle.[20]

Texas Insurance Code section 1952.110 UM venue

Mandates venue in either the county of the collision

or the insured's county of residence at the time of the collision.[21]

Texas Insurance Code section 1952.151 personal injury protection

Defines personal injury protection coverage as providing payment to the named insured, members of the insured's household, and "any authorized operator or passenger of the named insured's motor vehicle:

(1) arising from an accident,

(2) incurred within three years of accident

(3) for necessary medical or funeral expenses, as well as income or household services lost."[22]

Texas Insurance Code section 1952.152 PIP required unless waived

Rejection must be in writing and continues through renewals of the policy.[23]

Texas Insurance Code section 1952.153 PIP minimum coverage

$2500 per person.[24]

Texas Insurance Code section 1952.154 lost income under PIP

Insurer may require medical proof before paying lost income.[25]

Texas Insurance Code section 1952.155 collateral source irrelevant to PIP

Benefits are paid regardless of fault, or other coverage. PIP carrier has no right of subrogation.[26]

Texas Insurance Code section 1952.156 payments under PIP

Carrier must pay within 30 days of proof of claim.

Policy **may** require:

1. original proof of loss within six months of accident;

2. reasonable medical proof of an "alleged recurrence of injury" if there is a lapse in treatment.[27]

Texas Insurance Code section 1952.157 Penalty for failure to pay PIP

Provides 12% penalty, attorney's fees, and interest at the legal rate if payments are not made when due.[28]

Texas Insurance Code section 1952.158 Exclusions

Intentional injuries or those received while committing a felony are not covered.[29]

Texas Insurance Code section 1952.159 Offset against liability claim

Provides for an offset in the amount of PIP benefits paid, if a liability claim is made against the driver/operator covered by the policy. (Note case law modifications of this rule.) [30]

B. Agency Approval of Auto Insurance Policies (Texas Dept. Of Insurance)

No personal auto insurance form may be issued in this State unless it has been approved by the TDI. In days gone by, with rare exception, there was only one form. The Insurance Code now allows for carriers to submit their own forms for approval, and many are doing so. The carrier submits the proposed form and the TDI then has 60 days to approve or disapprove the form. If no action is taken within 60 days, the form is deemed approved. The only baseline is the statutory requirements found in Texas Insurance Code section 1952 and the Safety Responsibility Act. There are now numerous and significant variations within policies - all of which are on file with the TDI.

The carrier submits the proposed form and the TDI then has 60 days to approve or disapprove the form. If no action is taken within 60 days, the form is deemed approved.

1. <u>The TDI (State Board of Ins.) can only act consistent with the statutes.</u>[31]

State Board of Insurance's (now Texas Department of Insurance) regulatory authority does not allow it to "act contrary to but only consistent with, and in furtherance of, the expressed statutory purposes."[32] **This is the sentinel case on this issue.**

2. <u>A policy that is not approved by the Texas Department of Insurance is voidable by the insured until benefits are accepted under the policy.</u>[33]

A policy that is not approved by the State Board of Insurance is voidable, not void, once the insured learns that it is not approved. Insurer may then be unable to enforce particular exclusions in the unapproved policy. But once benefits are accepted under the policy, the policy terms will be enforced against the beneficiary.

3. Reliance on an opinion from the State Board of Insurance regarding policy interpretation may negate a finding of bad faith or tort damages.[34]

Emert is a summary judgment case where the carrier won on the bad faith claims. However, reliance on the State Board opinion did not absolve the company on the contract claim.

4. The policy must be written in "plain English."[35]

Policy must be in plain English.[36]

The policy has to have a Flesch score of no less than 40. The Flesch scale is determined by a ratio of the number of words in the sentence and the number of syllables in the words. The higher the number, the easier it is to read. 90-100 is comprehensible to an average Fifth Grader. Reader's Digest averages about 65.

II. Content of Texas Auto Policies

As noted above, there are many nonstandard forms in use today. Some of the forms are copyrighted and copies of these forms cannot be obtained from the TDI. These policies can, however, still be viewed there. There are significant variations among the forms. For example, one of the Safeco policies **excludes punitive damages** from liability coverage. This same policy though, includes "domestic partners" as family members. While the TDI maintains that it does not concern itself with the Safety Responsibility Act, its guidelines seem to indicate that the approved forms are subject to the statutory minimums required by the SRA.[37] There are also requirements dictated by the Insurance Code.[38] The published guidelines can be found online.[39]

The standard form, still widely in use, is divided into parts A (liability), part B1 and 2 (med pay and PIP), part C (uninsured motorist), part D (property damage), part E (duties after loss), and part F (general provisions). Most of the nonstandard forms follow this outline as well.

A. Liability Coverage

The liability portion of the policy begins with who and what is covered by the policy. All policies will list a covered vehicle or vehicles, and an insured person or persons. The SRA is focused on the vehicle. "A person may not operate a motor vehicle in this State unless financial responsibility is established **for that vehicle."**[40] The Code further requires coverage for permissive users of the vehicle as well as the insured.[41] Still, Texas courts have allowed insurers to exclude certain, named drivers from liability coverage despite the statutory mandate. In recent times, the Texas Department of Insurance has approved policies that do not come close to complying with the mandatory coverage dictated by the SRA, even though these policies certify compliance with the SRA. It remains to be seen what the courts will do with coverage issues on these "unique" policies. In discussing liability coverage, references will be made to the SRA since nearly every policy certifies compliance with the Act, and the courts seem to assume it applies to any personal auto policy.

1. Who is covered?

a. Under the standard liability policy the insured is "you" (which includes your spouse), any family member, and anyone using the covered vehicle with permission.

i. Family member is one who resides in the household and is related by blood, marriage or adoption. Read the policy though, because the definition varies with non-standard policies.

ii. Temporary absence with intention to return qualifies as family member.[42]

iii. A person, especially a minor, can have more than one residence.[43]

iv. Three factors that are relevant in determining residence: 1) living under the same roof, 2) close, intimate and informal relationship; and 3) when the intended duration is likely to be substantial. No one element controls, but all must be considered.[44]

v. The burden is on the insured to show residency.[45]

vi. If a spouse is covered, the policy must provide coverage to the other spouse during a period of separation in contemplation of divorce. (effectively overrules several older Texas cases holding otherwise.)[46]

b. The policy may exclude specific drivers from liability coverage.[47]

Named driver exclusions are valid against arguments that the SRA prevents exclusion. The Court in *Zamora* distinguished *National County Mutual Fire Insurance Company v. Johnson.*[48] The exclusion has been held to extend to a negligent entrustment cause of action against the named insured if the excluded driver was the tortfeasor.[49]

Note however that there are some cases that reject "excluded driver" endorsements as sufficient to reject PIP coverage.[50]

c. The SRA does not regulate insurance.[51]

"The primary purpose of the Act is the regulation of owners and operators of motor vehicles for the protection of the public, not the regulation of insurance companies."[52]

d. For policies in compliance with the SRA, anyone using the insured vehicle is covered assuming they haven't stolen it.)

i. "An owner's motor vehicle liability insurance policy must:

(1) cover each motor vehicle for which coverage is to be granted under the policy; and

(2) pay, on behalf of the named insured or another person who, as insured, ***uses a covered motor vehicle with the express or implied permission of the named insured***, amounts the insured becomes obligated to pay as damages arising out of the ownership, maintenance, or use of the motor vehicle in the United States or Canada, subject to the amounts, excluding interest and costs, and exclusions of Texas Transportation Code section 601.072."[53]

ii. Permissive use is determined from the point of view of the user, not the owner or named insured. If the user reasonably believed he or she had permission to use the vehicle, he or she is covered.[54] In the *US Fire* case, the passenger grabbed the wheel of the car and caused a collision. The Court held that if passenger believed she had permission to do so, she was a covered person.

iii. Finally, the permissive use provision is written into the standard policy as an **exclusion** which does not apply to "**you or any family member while using your covered auto"** (So if your 16 year old sneaks out of the house, takes the car and has a wreck, he's covered).

iv. Under some of the newer policies that exclude whole classes of people, or which restrict coverage to only the named insured, it is possible that the carrier may still have to provide coverage to permissive users, then go after their insureds for reimbursement. The Transportation Code seems to contemplate this scenario under Texas Transportation Code section 601.074.[55] Although this language is explicit in some policies, to date, there is no case law on this issue.

2. What is covered?

An "***insured vehicle***" that is involved in an "***accident***" is covered for certain "***damages***". Obviously, the listed vehicles are covered, as well as any temporary substitute vehicles (under most, but not all, policies). Vehicles that are owned by the insured or other family members, but not listed, are not covered. Vehicles that are available for the regular use of the insured are not covered. Finally, the insured must have an "insurable interest" in the vehicle for there to be coverage.

a. Insured Vehicle

i. A father bought a car for his minor daughter who did not live with the father. The father retained legal title and listed the car on his insurance policy, but the car was considered his daughter's. After a collision, the carrier denied coverage. The Court held that paying a premium and listing a vehicle on the policy met the definition of "owned automobile."[56]

ii. A van was dropped from the policy and then involved in an accident while being driven by a listed driver. The Court upheld the "owned but not listed" exclusion from coverage in spite of the SRA .[57]

iii. An Insured sold a car to another, who in turn, sold it to a third person. The third person wrecked the car. The car was still listed on the insured's policy. The Court found no coverage because there was no relationship between the insured and the owner had no right of possession or control.[58]

iv. An insured sold a car to his adult son who left for Mexico, but left the car with the insured. The car was listed on the policy. The carrier had notice of the new lien holder, but not the change of title. The insured wrecked the car, and the carrier denied the claim based on the lack of ownership. The Court found for the insured. Listing the car on the policy satisfied *Snyder* and retaining exclusive possession and control of car satisfied *Black*.[59]

A carrier also argued that the insured had no insurable interest in car. The Court rejected that argument holding that an insurable interest is all that is required to collect under an auto policy and that an insurable interest exists when the insured "derives pecuniary benefit or advantage by the preservation and continued existence of the property or would sustain pecuniary loss from its destruction."[60]

v. One Court read into the definition of "temporary substitute vehicle" a requirement that the insured believe that he had permission to use the vehicle. The dissent pointed out that the majority is adding language to the policy that is not there. The majority relied in part, on a statement from the State Board of Insurance that the new policy should be interpreted similarly to the old policy which required permission for a temporary vehicle.[61]

vi. Also note, that a "temporary substitute vehicle" must meet certain requirements under the policy to qualify. It must, in essence, be a replacement vehicle for the insured vehicle, because the insured vehicle is unavailable because of "breakdown, repair, servicing, loss or destruction."[62] The rationale is that the carrier is not liable for more than one vehicle at a time.

b. What's an accident?

i. Texas Transportation Code section 601.076 mandates that an owner's policy must "pay on behalf of the named insured [or permissive user] amounts the insured becomes obligated to pay as damages arising out of the **ownership, maintenance, or use of the motor vehicle…"**[63]

The standard policy states:

"We will pay damages … for which any covered person becomes legally responsible because of an **auto accident."**

ii. Auto policies cover auto accidents under the liability coverage. Texas courts have held that there must be a causal connection between the damage and the vehicle. In other words, the vehicle cannot merely be the site of the occurrence.[64]

iii. Naturally, intentional conduct is excluded from liability coverage. However, the Supreme Court recently held that intent goes to the damages, not the conduct that caused the damages.[65]

The *Tanner* case involved an insured driver who was evading the police, driving at high rates of speed, and violating most of the traffic laws contained in the Transportation Code, when he collided with the plaintiff. This case involved an Ohio policy with somewhat more restrictive language than the standard Texas auto policy. "Property damage or bodily injury caused intentionally by or at the direction of an insured, including willful acts the result of which the insured knows or ought to know will follow from the insured's conduct."[66] The court held there was coverage in this case, since the insured did not intend the harm.

c. Damages Covered

i. The policy must provide coverage for the amounts the insured, or permissive user, becomes liable to pay as damages arising from motor vehicle use.[67]

Texas Transportation Code section 601.076:

"An owners' motor vehicle liability insurance policy must:

(1) cover each motor vehicle for which coverage is to be granted under the policy; and

(2) pay, on behalf of the named insured or another person who, as insured, uses a covered motor vehicle with the express or implied permission of the named insured, amounts the insured becomes obligated to pay as damages arising out of the ownership, maintenance, or use of the motor vehicle in the United States or Canada, subject to the amounts, excluding interest and cost, and exclusions of Texas Transportation Code section 601.072 (which sets out limits).[68]

i. Note that there are older Texas cases that exclude liability for "maintenance" for a permissive user, but they pre-date the above statutory language, and are probably no longer applicable.[69]

ii. As a general rule, the coverage is often broader for the named insured than for permissive users. An analysis must be made, not only of the policy language, but of the statutory requirements in the Transportation Code.[70]

iii. Punitive damages are covered under the liability portion of the policy.

a. "We will pay damages for bodily injury" has been found to include coverage for punitive damages.[71]

The "[a]verage insured would assume the term damages would include all damages except those intentionally caused."[72] Furthermore, the policy could have been drafted to make clear that no punitive damages were covered.

b. Texas law has traditionally allowed punitive damages to be insurable.[73] *Westchester Fire* was a nursing home case. Following an adverse verdict, the insured sued the primary carrier and the defense firm. The Court spent much of the opinion discussing the insurability of punitive damages, questioning the public policy of allowing same, but finally deciding punitive damages are insurable.[74] The Court also acknowledged that a primary carrier has a duty to the excess carrier to reasonably settle a claim within its limits if it can.

c. Texas public policy allows a liability insurance provider to indemnify an insured against an award of punitive damages imposed on its insured because of gross negligence.[75]

Although there are now approved personal auto policies that exclude exemplary damages, the Texas Department of Insurance website suggests that when an insurance carrier attempts to limit these damages, they must justify the rate charged by the change, and adjust it according to actuarial data. There are also some recent opinions, citing *Fairfield*, that question coverage for punitive damages in certain contexts as a matter of public policy.

3. Policy Limits[76]

As one might guess, there has been considerable litigation over policy limits. What injuries qualify to trigger an additional limit? When a carrier divides up policy limits between multiple injuries, what duties are imposed upon them? If they fail to pay policy limits, when is the ***Stowers*** doctrine applicable? Not all of these questions have definitive answers, but some do.

a. What Injuries Qualify to Trigger Additional Limits?

i. Loss of consortium claims do not trigger a second "per person" limit.[77]

A loss of consortium claim is derivative of the underlying bodily injury claim and does not trigger a second "per person" limit in the policy. The *McGovern* case holds that a loss of consortium claim is still viable under the policy. It will "merely make a consortium claim and the bodily injury claim subject to the "per person" limit."[78]

ii. Purely emotional damages do not trigger coverage under "bodily injury" definitions in the policy. (Homeowner's policy).[79]

iii. Having an additional insured on the policy does not create an additional limit.[80]

The per person liability limit is per person injured regardless of the number of insureds covered. It is not expanded simply because the injured person could have sued an additional insured.

iv. Bystander claims, at least in the Tort Claims context, have been held to be independent claims and not derivative of the injury claim, but this concept has been steadily eroded in the case of auto claims.[81]

To prevail on a claim, a bystander must show that the defendant was negligent and: 1) the bystander was located near the scene of the accident, 2) the shock resulted from the sensory and contemporaneous observance of the accident, and 3) the bystander and the victim were closely related.

In *Hermann Hospital v. Martinez*, a tort claims case, the Court held that a bystander claim is not derivative of the victim's claim, and thus a separate "per person" recovery is allowed for the bystander claim.[82] The Court looked at the language of the Tort Claims Act that states that liability "is limited to money damages in the maximum amount of $250,000 for each person for bodily injury or death."[83]

In contrast, *Christian v. Charter Oak Fire Insurance Company,* held that a single per person limit cannot be expanded by a bystander claim after wrongful death payment under the UM portion of the policy.[84] The wrongful death payment included mental anguish also asserted in bystander claim.

Still further eroding the argument for an extra limit, in a memorandum opinion, the Amarillo court has held that bystander's mental anguish claims are **not covered** as a "bodily injury" under the UM portion of the policy. The decision based its rationale on *Cowan.*[85] **However, if the claimant can demonstrate a physical manifestation because of the mental or emotional injury, there may be coverage.**[86] A recent federal district court case makes an *Erie* guess that Texas would allow a separate limit where the bystander suffers a substantial physical manifestation from the event.[87]

b. When a carrier divides up policy limits between multiple injuries, what duties are imposed upon them?

i. Carrier has broad discretion in allocating damages among multiple claimants.[88]

ii. This same discretion has been given to carriers on UM claims.[89]

c. If carrier fails to pay policy limits, when is the *Stowers* doctrine applicable?

i. The *Stowers* doctrine may expose a carrier to liability beyond its policy limit.[90]

"...the indemnity company was in duty bound to exercise ordinary care to protect the interest of the insured up to the amount of the policy, for the reason that it had contracted to act as his agent, and assumed full and absolute control over the litigation..." If the carrier breaches this duty, it is liable for damages.[91]

ii. The *Stowers* doctrine creates liability only if: 1) the carrier negligently rejected a demand within policy limits, or 2) the settlement itself was unreasonable.[92]

The *Soriano* case involved multiple plaintiffs with severe injuries and two deaths. The carrier paid out its limits, divided between the claimants. The Court held that the *Stowers* doctrine created liability only if 1) the carrier negligently rejected a demand within policy limits, **or** 2) the settlement itself was unreasonable. The Court found no evidence of either.[93]

iii. The Settlement offer must offer a full release in exchange for the payment of the policy limits.[94]

In the *Bleeker* case, a hospital lien had attached to the proceeds, and the *Stowers* demand did not include a release of the hospital lien claim.[95] The Court held that the offer of settlement was insufficient to satisfy *Stowers*.

iv. The Stowers doctrine applies only to covered claims. A policy that does not cover punitive damages has no liability under Stowers for those claims.[96]

v. It is critical to accurately identify the party to whom the release is offered. Where the "insured" was offered release, but the permissive driver was not offered a release in the ***Stowers*** **letter, no Stowers duty was created.[97]**

vi. An excess carrier may also claim a quasi-*Stowers* duty when it is exposed because of the primary carrier's failure to settle within the primary limits.[98]

vii. Since the *Stowers* action belongs to the insured, and is predicated on the insured's exposure to an excess judgment, the bankruptcy of the insured effectively destroys any *Stowers* action.[99]

d. What constitutes separate "occurrences?"

Two collisions separated by 2 to 5 seconds, and 30 to 300 feet, have been found to constitute two separate occurrences, and required the payment of two separate policy limits.[100]

The *Rawls* opinion notes that there was no evidence the defendant's car lost control between the two collisions. The Court held, as a matter of law, there were two accidents, "determining the event from the standpoint of conduct forming the causative act, or the 'effect theory'...when an event is judged from the point of view of a person sustaining injury."[101]

4. Additional third party rights under liability coverage.

a. The Claimant in a liability claim has third party beneficiary status as to the insurance contract. The action is not ripe, however, until after judgment is entered against insured.[102]

b. A third-party claimant does not have Insurance Code or consumer status in an action against a liability carrier. Third-party beneficiary status allows only contract damages after judgment.[103] This rule holds true even if the third party claimant is also a named insured under the policy (wife suing a husband).[104] Hint: get an assignment from the insured, or, better still, a turnover order from the court. This will open the door to all of the first party claims.

c. A carrier may create liability under the DTPA by its actions toward a third party claimant.[105]

A carrier that authorized repairs, told the third-party claimant where to take the truck, and promised to have it fixed. By doing so, carrier incurred liability under the DTPA, despite the lack of the claimant's consumer status, under section prohibiting one from representing that an agreement has certain rights, remedies or obligations that it does not have. This section does not require consumer status. The Court distinguished the case from *Allstate v. Watson* in that the liability did not arise from settlement negotiations.

5. First party rights under liability policy.

a. A liability carrier is not liable for the acts of the defense counsel it hires to defend the insured.[106]

The *Traver* Case reaffirms a carrier's *Stowers* obligation and suggests that there may be broader liability when a defense is undertaken, but done so in a way that undermines their insured.

b. Older case law has held that when a liability carrier simply refuses to defend, the insured's remedy is contractual and *Stowers*, only.[107] However, in *Rocor International, Incorporated v. National Union Fire Insurance,* the Texas Supreme Court held that a carrier can be liable under Texas Insurance Code section 21.21 for unfair practices in defending a third party claim.[108] The *Rocor* Case imposed *Stowers* elements in triggering liability, including a demand within policy limits. The even more recent case of *Lamar Homes, Incorporated v. Mid-Continent Casualty Company*, re-enforces this liability.[109] *Rocor* also gives more latitude to the undefended insured in making deals with the plaintiff to protect himself. In *State Farm Fire and Casualty Company v. Gandy*, the court disallowed a collusive deal where the carrier was still providing a defense under a reservation of rights.[110] If you encounter this situation read *Rocor* and *Gandy* to see where the boundaries are placed.[111]

c. When a carrier pays a non-covered claim, it will be very difficult, if not impossible, for them to get their money back.[112]

See also, Excess Underwriters of Lloyd's, London v. Frank's Casing Tool and Rental Tools, Incorporated,[113]

d. When a carrier pays its limits the duty to defend ends.[114]

Once a carrier's policy limits are paid the duty to defend ends. This case follows clear policy language. "Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted."

B. Personal Injury Protection ("PIP")

PIP is required by statute to be part of any auto policy written in this state, unless it is waived in writing. Normally, a client goes to his insurance agent, tells him what he wants, and the agent hands him a form. Sign here, initial here, here, and here. One of the boxes the client often initials is a waiver of PIP. Still, if your client's policy doesn't show PIP coverage it is worth looking at the application to make sure PIP has been waived. If it has not been waived, the carrier has to provide the coverage (the statutory minimum of $2,500.00). Finally, the waiver extends to any renewal of the policy.

PIP covers everyone in the insured vehicle up to the PIP limits. PIP also covers every insured no matter what vehicle they are in. The triggering event for PIP coverage is a "motor vehicle accident" under the standard policy.

The statute says that when a passenger sues the driver for liability and recovers PIP from the driver's policy, the PIP is a credit on the liability claim. However, if the person's damages exceed both the PIP and the liability limits, there is a strong argument that the offset would reduce the liability limits (assuming a minimum limits policy) beyond that authorized by the Safety Responsibility Act, and should not be allowed. This rationale has been accepted when considering the PIP offset for UM benefits.[115] The court in *Kidd* held that the offset provisions of the policy and the Code were simply a prohibition on double recovery.

The payments under a PIP policy are applicable to any covered losses that are incurred within three years of the date of the accident.[116] The benefits must be paid within 30 days of the receipt of the claim.[117]

1. Waiver of PIP

a. Texas Insurance Code section 1952.152[118]

(a) An insurer may not deliver or issue for delivery in this state an automobile liability insurance policy, including a policy provided through the Texas Automobile Insurance Plan Association under Texas Insurance Code section 2151 (high risk), that covers liability arising out of the ownership, maintenance, or use of any motor vehicle unless the insurer provides personal injury protection coverage in the policy or supplemental policy.[119]

(b) The coverage required by this subchapter does not apply if any insured named in the insurance policy ***rejects the coverage in writing.*** Unless the named insured requests in writing the coverage required by this subchapter, the insurer is not required to provide that coverage in or supplemental to a renewal insurance policy if the named insured rejected the coverage in connection with an insurance policy previously issued to the insured by the same insurer or by an affiliated insurer. (emphasis added.)

b. Spouse's waiver extends to the spouse that did not sign the waiver.[120]

The *Sanchez* opinion reaches its conclusion by

determining that a spouse, not named in the policy, is a "named insured," at least for the purposes of waiving coverage.

c. "Excluded driver" endorsement is not sufficient to reject PIP coverage.[121]

2. An "accident" triggers obligation to pay PIP

The statute states that PIP benefits are due if they arise from an "accident".[122] The statutory wording is different from the language in the Transportation Code that mandates liability coverage if the damage arises from "ownership, maintenance, or use of the motor vehicle."

"A motor vehicle accident occurs when (1) one or more vehicles are involved with another vehicle, an object or a person, (2) the vehicle is being used, including exit or entry, as a motor vehicle, and (3) a causal connection exists between the motor vehicle's use and the injury-producing event."[123]

Sturrock involved a man injured when his foot caught on the door of the truck he was exiting. The majority (5-4) of the court held that he was entitled to PIP benefits. This case rejects the holdings in several earlier Courts of Appeal decisions involving causation.

3. PIP limits

a. Two separate PIP policies can be stacked to fully compensate damages.[124]

b. Within one policy PIP limits cannot be stacked (multiple vehicles on one policy).[125]

c. Even if multiple policies are available, PIP payments cannot exceed actual damages.[126]

4. Benefits payable

a. Texas Insurance Code section 1952.151[127]

"Personal Injury Protection ...provides payment for... (A) necessary medical, surgical, x-ray, or dental services... (B) ...replacement of lost income... (C) ..in the case of a person ...who is not a...wage producer... reimbursement of necessary and reasonable expenses incurred for essential services ordinarily performed by the injured person for care and maintenance of the family or family household."

b. Texas Insurance Code section 1952.155[128]

Payment is required regardless of fault or other available benefits (except for an offset against a liability claim made on the same policy).[129]

c. Texas Insurance Code section 1952.157[130]

Provides attorney's fees, 12% penalty and interest if benefits are not timely paid. (30 days allowed for payment.)[131]

d. Loss of a prospective job may qualify for PIP benefits.[132]

Make sure the healthcare providers realize that they have a right to full payment of their reasonable and necessary charges when they are looking to a PIP policy for payment. Most of them are used to having their bills cut, so they don't know they can protest the discounted PIP payments.

e. PIP payments must be made to the beneficiary, not to the healthcare provider, absent a valid assignment signed by the insured.[133]

Medicare is an exception to this rule, but the amounts due Medicare must be specific. The PIP carrier cannot simply add Medicare to every payment check.

f. Can the PIP carrier pretend that it is a health insurance company and discount its payments?

The statute says the carrier must pay "reasonable expenses that…are for necessary" medical services.[134] We now have a case on this issue and it favors the carrier.[135] In *Forth,* the court held that the insured did not have standing to challenge the discounted payment when the insured's healthcare providers accepted the discounted payment in full satisfaction of the debt. Setting aside the question of how a party to a contract does not have standing to challenge the other parties performance under that contract, the case provides a road map to fight these, all too common, discounts. Make sure the healthcare providers realize that they have a right to full payment of their reasonable and necessary charges when they are looking to a PIP policy for payment. Most of them are used to having their bills cut, so they don't know they can protest the discounted PIP payments. If you represent the claimant, you may want to inform them.

C. Medical Payments Coverage

This coverage is often sold in lieu of PIP. Always buy the PIP. PIP covers 80% of lost income (or household

expenses for a non-income producer) as well as medical expenses. Further, you don't have to pay it back out of your third party recovery. Med Pay covers only medical expenses and you may have to pay it back. Importantly, it has no statutory basis and consequently, no legal restrictions on its terms.

The catch-all subrogation clause in the standard policy under Part F - General Provisions provide that if "the person to or for whom payment was made has a right to recover damages from another we shall be subrogated to that right." This clause does not apply to the PIP coverage, but it does to the Med Pay. Never let your client agree to this sorry substitution.

1. Med-Pay Benefits

The Texas Supreme Court has held that policy provision which gave credit for med pay against UM benefits was ineffective to the extent it reduced benefits below the statutory minimum limits.[136]

2. Reimbursement/Offset

PIP and UM offset provisions within one policy are effective to the extent of actual damages. Both policies must be paid if the damages reach that amount.[137]

3. Settlement with third party

Settlement with the third party liability carrier destroys the subrogation rights of the Med Pay carrier. It has been held that the settlement constitutes a material breach of the contract by the insured, and allows the carrier to deny Med Pay benefits.[138]

D. Uninsured/underinsured coverage

Like PIP, UM coverage is mandated by statute. (5.06-1 old code, Tex. Ins. Code §1952.101 new code). Still, like PIP, it can be waived. Generally, the rules governing waiver of PIP apply to UM coverage.[139]

Uninsured motorist coverage is also underinsured motorist coverage. If the at-fault third party driver has either no insurance, or insufficient insurance, the UM carrier steps in and acts as that third party's carrier. Most of the defenses available to the third party are available to the UM carrier.[140] One important difference, however, is that a UM claim is a first party claim and is subject to the Ins. Code, DTPA and common law duties that apply to all first party claims. In light of recent Supreme Court opinions, these rights may be more theoretical than real at the moment.[141]

Like PIP, UM benefits everyone in the insured vehicle up to the amount of the limits. Also, like PIP, UM coverage generally extends to all of the insureds under the policy, no matter which vehicle they are in, or if they are in any vehicle at all. Exceptions to the general rule, are exceptions that generally apply throughout the policy, i.e., using the vehicle without permission, use of an owned, but unscheduled vehicle, intentional conduct, commission of a felony, etc.

1. Vehicles covered by UM

a. The exclusion for "vehicles available for regular use" does not apply to UM because applying it would defeat the purpose of the UM statute.[142]

In *Briones,* the insured was injured in a vehicle that was available for his regular use at work. Neither the employer nor the driver had liability coverage. Relying on *Stracener*, the Court held that to enforce the "vehicles available for regular use" exclusion in this instance would defeat the purpose of the UM statute. The court expressed disagreement with earlier pre-*Stracener* opinions such as *Hall v. Southern Farm Bureau Casualty Insurance Company.*[143]

b. The exclusion of vehicle "owned by or furnished or available for the regular use of you or any family member" approved when applied to an owned vehicle driven by a family member.[144]

Such exclusion does not violate the Insurance Code or the rationale of *Stracener.* The *Bergensen* case does not mention *Briones*, but applies a different rationale to different facts. The claim by Ms. Bergensen was against her husband, involving the family vehicle in which she was a passenger. The Court's finding essentially mirrors that of *Rosales v. State Farm Mutual Automobile Insurance Company.*[145]

c. The definition of uninsured vehicle does not include government vehicles.[146]

The *Francis case* approves the exclusion of government vehicles from the definition of uninsured vehicle. Three judges dissent, arguing it is beyond the authority of the State Board of Insurance to approve such an exclusion.

2. Persons covered under UM

a. Everyone in the insured vehicle is covered if they are occupying the covered vehicle when the accident occurs. This language is in the policies, but not mandated by statute. A question often arises if the occupants of the car were "occupying" the vehicle at the time of their injury.

The Texas courts traditionally consider 1) the physical proximity between the injured person and the insured vehicle, 2) the amount of time the person was outside the vehicle, 3) whether the purpose for being outside of the vehicle related to the use of the vehicle, and 4) whether an impact with the covered vehicle caused the injury.[147]

However, in reversing the Court of Appeals decision, the Texas Supreme Court limited the definition of occupying considerably in *Goudeau v. United States Fidelity and Guaranty Company*.[148] Without articulating a bright line, the court simply held that the passenger who was struck while outside of the vehicle was not "occupying" the vehicle, and consequently, not covered (though Justice Brister did express sympathy for his plight.)

b. However, the named insured (including family members) under a UM policy is covered regardless of the circumstances as long as an uninsured motor vehicle caused the injury.

Coverage is unaffected by the location of the insured when an uninsured motor vehicle strikes him. "There is no requirement that the insured have any relation, at the time of the accident, with any vehicle he owns and that is insured with the insurer. The uninsured motorists protection covers the insured and the family members while riding in uninsured vehicles, while riding in commercial vehicles, while pedestrians, or while rocking on the front porch. The only relation that the insured must have to automobiles at the time of the accident is that he be injured by an automobile driven by an uninsured motorist."[149]

3. <u>Benefits payable under UM</u>

a. A passenger who collected the full liability limits against the driver, could not also collect UIM benefits against the driver on the same policy.[150]

The court in *Rosales* reasoned that such would add an additional layer of liability coverage that the parties did not contemplate. In other words, the insured vehicle cannot be "underinsured" under the same policy.

b. Some third party defenses are not available to the UM carrier.[151]

The *Franco* case holds that a four year statute of limitations applies to UM claims, even if the two year statute of limitations would bar an action against the uninsured motorist. The court held that the phrase "legally entitled to recover" simply requires that the uninsured motorist was at fault and the extent of the plaintiff's damages.

c. Punitive damages are likely not recoverable under UM policy.[152]

The *Vanderlinden* case notes the split in Texas, as well as U.S. authority on the issue, recognizing a different holding in *Home Indemnity Company v. Tyler*.[153] The case notes the change in policy language from "all sums which insured...shall be legally entitled to recover" to "legally entitled to recover...because of bodily injury."[154] The Texas Supreme Court has expressly reserved this question.[155]

d. The burden is on the insured to show the uninsured driver was negligent. The burden then shifts to the insurance company to show contributory negligence.[156]

4. <u>Policy limits under UM</u>

a. An insured cannot stack UM limits within one policy, even for separately listed vehicles.[157]

In *Monroe,* the insureds' daughter was killed as a pedestrian. The insureds argued that, since they had two vehicles listed in the policy, they had two separate limits for their UM coverage. The definition of "uninsured vehicle" was not an issue as it was in *Bergensen*, since none of the insured vehicles were involved. Still, the court held that there was only one limit under the policy. Having two vehicles listed "widened the coverage but did not deepen it."[158]

b. Insureds cannot stack UM limits within multi-vehicle policy when one vehicle is involved in a collision.[159]

The holding in *Upshaw* is similar to the holding in *Monroe*, only one of the cars in a multi-vehicle policy was involved in the collision. The insured's made the same argument for stacking UM coverage within the policy. The court rejected this argument. The Court construed "Limit of Liability" language in the UM coverage to dictate the result. "Maximum limit of liability for all damages for bodily injury sustained by any one person in any one accident." Mauzy and Gammage dissented.[160]

c. Only one per person limit is available even with a loss of consortium claim in the UM policy.[161]

d. Plaintiff's claim for mental anguish for the death of her husband was not covered under

their UM policy because she had not been injured in the accident. (policy did pay one limit for husband's "injuries and death")[162]

e. A single per person limit cannot be expanded by a bystander claim after a wrongful death payment under the UM portion of the policy. The wrongful death payment included mental anguish also asserted in the bystander claim.[163]

f. Naturally, if more than one policy covers the accident, the UM policy limits can be stacked to the extent of damages.[164]

g. With multiple claimants and low policy limits, the *Soriano* standard applies to UM. In other words, if there is not enough money to go around, the carrier has wide latitude on who to pay and how much.[165]

5. <u>UM and Subrogation</u>

The Insurance Code says that if the UM carrier pays a claim, it has a right to get paid back from the at-fault entity that caused the loss "for which payment is made."[166] Since a settlement with an underinsured driver's liability carrier will release the driver, and consequently destroy the UM carrier's subrogation rights, the UM carrier must give a claimant permission to settle with the liable driver or the insured risks losing their UM benefits. UM carriers routinely give this consent and it is a simple step to include. If the insured inadvertently skips this step, however, most carriers would have trouble showing the prejudice they must show. Since Texas was founded by folks running from sheriffs and creditors, we have generous homestead laws, and most of us are judgment proof, so prejudice may be hard to show. Finally, the courts have held that this right of subrogation extends only to an uninsured/underinsured vehicle - not a non-vehicular tortfeasor.

A carrier must give permission before an insured can settle with an underinsured defendant because settlement destroys its subrogation right.

a. Neither statute nor the policy gives the carrier any subrogation rights against a non-motorist defendant.[167]

In *GEICO,* the carrier denied UM payments because the insured had settled with the 3rd party defendant (a construction and barricade company). The UM carrier wanted to subrogate against the 3rd party defendant. The court held that there was no subrogation right against a non-motorist defendant. The court also held that the broader, general, catch all "right of recovery" language at the end of the policy (General Provisions- Part F) did not apply since GEICO had made no payments to the insured.

b. A carrier must give permission before an insured can settle with an underinsured defendant because settlement destroys its subrogation right.[168]

In *Cascade,* the Court found that since the carrier has a subrogation right against an underinsured motorist, the policy requires that the carrier give permission before the insured can settle with the underinsured defendant. The rationale for this provision is that the liability carrier for the underinsured motorist is going to require a release before they pay. This release will also destroy the UM carrier's subrogation claim. **But,** the carrier must show it is prejudiced before it can enforce this provision of the policy.[169]

c. However, a carrier may also waive the permission requirement by its actions.[170]

In The *Ford* case, State Farm denied liability under the UM coverage prior to settlement. The court held that the denial of coverage constituted a waiver of the permission requirement.

6. <u>Liability/UM offsets</u>

There are several offset (other insurance) clauses that relate to the payments within policies and between policies. If you read the standard policy, it is replete with such clauses. For example, both the liability (part A) and the UM (part C) state that if a claimant collects under one coverage, it will reduce the amount available under the other. Also, both coverages state they are excess over any collectable insurance from a non-owned vehicle. In general, the courts have not shown favor to these clauses.

a. A UM policy cannot take a policy limit credit for liability payment if damages exceed both.[171]

b. A UM carrier does get full credit for the liability limits, even if the insured settled for less than the limits.[172]

c. A liability carrier does not get credit for earlier payments by a UM carrier.[173]

In *Bartley,* the plaintiff settled with her UM carrier prior to trial and dismissed the uninsured driver from the case. The case proceeded to trial against the insured driver and the plaintiff was

awarded $30,000 (UM settlement was 20K). The defendant asked for a credit under section 33.014.[174] The Court found he was not entitled to a credit. It noted the Code addresses negligence while the UM payment was made pursuant to the contract. The Court also rejected the common law argument of double recovery. The UM carrier's right of subrogation was against the uninsured driver, not the insured defendant.

However, a UM carrier can claim reimbursement from a subsequent liability settlement, even if it is from the same carrier.[175]

d. For a UM carrier to receive credit for a liability payment, it must plead and prove the liability payment as an offset.[176]

e. *Hanson v. Jankowiak*

This is not really the style of a case. It combines the names of two separate cases wherein Houston Courts reached opposite conclusions on an important issue.[177]

This is the scenario. A person is a passenger injured in an accident in which both the driver of his car and the other driver are at fault. He collects against his driver's liability policy and the other driver's too. But there is not enough coverage to take care of his damages. Can he also collect against his driver's UIM policy? After all he is a "covered person" under that policy.

He clearly cannot collect against this UIM policy for his own driver's underinsured condition.[178] But can he collect for the other driver's underinsured status? *Jankowiak* says yes, *Hanson* says no. Just in case anyone doubts that these opinions are irreconcilable look at what the 14th Court says in *Jankowiak*, "In short, we find the *Hanson* opinion wrongly decided, and we decline to follow it."[179]

Jankowiak is the more recent opinion. It seems that most Texas trial courts are following it on summary judgment.

One final note, in *Hanson* the carrier paid the UIM benefits and refused to pay the liability limits. In *Jankowiak*, it was the other way around. This distinction does not reconcile the opinions as noted by the language quoted above.

f. In the standard policy, there is also a credit or offset for worker's compensation benefits. As with other "other insurance" clauses, this offset has been held invalid by the courts.[180] Also, it works the other way as well. The worker's compensation carrier does not have a subrogation claim against UM benefits paid under the injured worker's policy, though it does against the employer's UM coverage.[181]

7. <u>Hit and run</u>

UM policies have special provisions for hit and run collisions. The general rule is there must be contact between the insured vehicle and the disappearing vehicle. This rule is in the statute and in the policies.[182] The first inquiry though, is whether the miscreant driver or vehicle can be identified? If a vehicle license number is obtained and the owner can be identified, it is not a "hit and run" under the policy and the contact rule does not apply.

If contact is required, sometimes indirect contact will suffice. If car A hits car B which hits the insured, and car A takes off, the contact rule is satisfied.[183] This rule was reaffirmed by the Texas Supreme Court in *Sanchez*.[184]

Blinding lights that run the insured off the road or loads falling off a vehicle have been held to be insufficient contact to satisfy the requirement.[185] In a recent Supreme Court opinion, even part of the vehicle (axle) falling off and striking the insured vehicle was held to not satisfy the contact requirement.[186]

8. <u>Bad faith? Insurance Code Penalties? (In UM coverage)</u>

In Lloyd Doggett's words, "this majority [of the Supreme Court] never met an insurance company it didn't like."[187] Justice Doggett's observation was given emphasis in the *Brainard, Norris,* and *Nickerson* opinions cited above. The Court, in these three pro-insurer opinions, held that before an uninsured/underinsured claim is ripe, there must be a judicial determination that the uninsured/underinsured driver was at fault and the extent of the damages. In other words, "Sue us. We don't have to pay until you win." There is considerable debate over whether bad faith, insurance code violations and DTPA claims survive after *Brainard*. The Northern District Court in *Schober v. State Farm Mutual Automobile Insurance Company*, reserved judgment on the plaintiff's extra contractual claims, pending the outcome of the underlying liability and damage issues.[188] The clear implication in the *Schober* opinion is that these actions survive *Brainard.* However, the Amarillo Court of Appeals has held that the delay in payment penalties under section 542 do not come into play until the underlying judgment against the uninsured tortfeasor is final.[189]

The issue is raised in *Brainard, Norris,* and *Nickerson* was attorney's fees under the code.[190] If these opinions are read more broadly, as to eliminate penalties under the Ins. Code, then the high Court has essentially gutted a statute by judicial fiat. The Court has repeatedly declared that they will not engage in such judicial activism. Further,

such a reading of these opinions would dictate a trial in every UM case, thereby encouraging litigation and discouraging settlement. Again, this result would be contrary to the Court's stated public policy.

E. Property Damage

Third party liability for property damage is determined by the common law. The liability carrier owes what the common law says their insured owes. First party payment is determined exclusively by the terms of the policy.

1. Common law damages (third party)

a. When a vehicle is repairable, the "at fault" driver (and his carrier) owes the cost of repairs and the loss of use of the repaired vehicle while it is disabled.[191]

The *Mondragon* case affirms this measure of damages, even if the total exceeds the value of the car. The case discusses the duty to mitigate and the limitations of that duty. It rejects an absolute time limit on loss of use.

b. It is not a prerequisite that the plaintiff actually rent a substitute vehicle in order to recover for loss of use.[192]

c. Even in a third party claim, if the carrier authorizes repairs, it may incur extra contractual liability."[193]

d. Diminished value after repair is recoverable against the third party carrier under the tort measure of damages.[194]

2. First Party property damage claims

a. A carrier is not required to use OME parts, but must use those of "like kind and quality."[195]

b. If a vehicle is repairable, it must be repaired to its "useful" pre-accident condition. A carrier cannot simply depreciate the value of the parts replaced based on the age of the vehicle.[196]

c. Diminished value after repair is not recoverable under first party property damage claims.[197]

d. Property is a total loss if a reasonably prudent uninsured owner, desiring to restore the property, would not do so considering the post-accident condition of the property.[198] Whether property is a total loss or not, is a fact question.

e. An insurance company that pays a total loss on a vehicle which is in a storage facility is also liable to the owner of the facility for towing and storage costs.[199]

3. Insurance Code provisions that apply to both First and Third Party Property Damage Claims

a. Texas Insurance Code section 1952.301

The insurer cannot specify "the brand, type, kind, age, vendor, supplier, or condition of parts or products that may be used to repair the vehicle" or limit the selection of the repair person or facility."[200]

b. Texas Insurance Code section 1952.302

The insurer cannot solicit or accept a referral fee from a repair facility.[201]

c. Texas Insurance Code section 1952.303

No agreement between an insurer and a repair shop may result in a reduction of coverage.[202]

d. Texas Insurance Code section 1952.305

The carrier must provide the beneficiary or third party claimant with notice of their rights under this section.[203]

III. Miscellaneous Coverage Issues

A. Misrepresentation on the policy application

1. Material misrepresentations that effect risk may void policy.

"...where false statements and representations, which are warranted to be true, are written into an application for insurance by the agent, and the applicant knows or has the means of knowing that such statements are contained in the application, and are not true, the insurance company is not precluded from avoiding the policy where it has been conditioned upon such false representations."[204]

In Odom, the agent knew of the insured's bad driving record, but denied such in the application. The insured had a copy of the application and knew it was false. The application formed part of the policy. The carrier filed a declaratory judgment action. The Court granted summary judgment for the carrier. The Texas Supreme Court affirmed the summary judgment.

2. However, note Chapter 705 of the Texas Insurance Code:

The misrepresentation must be material to the risk and contribute to the contingency or event on which the policy became due and payable.[205]

Defense of misrepresentation available only if the

insurer can show that it gave notice to the insured by the 91st day that it learned of the misrepresentation.[206]

A misrepresentation does not defeat recovery unless it is a material fact and affects the risk the insurer assumed.[207]

3. Misrepresentation must be material to the risk and contribute to the loss.[208]

B. Primary/Excess

1. Generally, the vehicle coverage is primary and the driver's is excess

Both policies (owner and driver) have "other insurance" clauses which state that liability coverage for non-owned vehicles is excess. The owner's policy is primary and driver's policy is excess. [209]

"It is undisputed and uncontested...that under Texas law....U.S. Fire policy (on the car) would be primary, and the United Service automobile policy (on the driver) would be the excess policy."[210]

Although the author of this paper believes that the above is an accurate statement of the law on excess/primary coverage, there are those learned colleagues who disagree and cite *Briggs* as authority.[211] *Briggs* presented a unique set of circumstances where two UM policies were at issue. The claimant settled with one carrier for less than the limits and went to trial against the other. The non- settling carrier argued for a full credit of the settling carrier's policy limit against the judgment. The court in *Briggs* refused to grant credit for more than the actual settlement (rather than the policy limit), holding that to do otherwise would allow the plaintiffs less than their actual damages. However, the policy language generally states that the primary coverage is the vehicle coverage, and the opinions cited above honor that language except as follows:

2. A policy that claims to be excess under an "other insurance" clause may be jointly and severally liable.

An "other insurance" clause is invalid to the extent it precludes recovery of actual damages within the combined policy limits.[212]

Again, in *Briggs* the carrier argued that the "other insurance" clause in its UM coverage precludes recovery if "other insurance" is available in the same amount under another policy, and that its limit is **only** excess. To prevent this shortfall the court held that the two carriers are **jointly and severally liable.** (See above.)

3. Where both policies claim to be excess they will be held jointly and severally liable. The insured will not be afforded less coverage with two policies than they would have had with one.[213]

4. Finally, with the variations in policy language that has proliferated since 2003, the language of each policy is critical.

Safeco v. Allstate, holds that where one policy says it is secondary on non-owned vehicles (Allstate, standard policy) and the other does not, then both are joint and several.[214]

C. Cancellation

1. **Texas Insurance Code section 551.101, governs cancellation of auto policies.**[215] This section lists the various grounds for cancellation, and prohibits cancellation for any other reason. There are also notice requirements in this statute. Finally, the statute requires notice for a "nonrenewal" of an existing policy.

2. **Texas Transportation Code section 601.073 prohibits a carrier from cancelling a policy retroactive to an existing claim, even in the unlikely event the insured consents.**[216]

3. **A carrier may be estopped from cancelling a policy if they continue coverage with full knowledge of grounds to cancel. If the coverage is not timely renewed, however, a late payment will not necessarily reinstate the policy back to its expiration date.**[217]

1 Tex. Transp. Code § 601.072.

2 Tex. Transp. Code § 601.073.

3 Tex. Transp. Code § 601.074.

4 Tex. Transp. Code § 601.075.

5 Tex. Transp. Code § 601.076.

6 Tex. Transp. Code § 601.078.

7 Tex. Ins. Code § 1952.051.

8 Tex. Ins. Code § 1952.052.

9 Tex. Ins. Code § 1952.054.

10 Tex. Ins. Code § 1952.056.

11 Tex. Ins. Code § 1952.057.

12 Tex. Ins. Code § 1952.101.

13 Tex. Ins. Code § 1952.102.

14 Tex. Ins. Code § 1952.103.

15 Tex. Ins. Code § 1952.104.

16 Tex. Ins. Code § 1952.105.

17 Tex. Ins. Code § 1952.106.

18 Tex. Ins. Code § 1952.107.

19 Tex. Ins. Code § 1952.108.

20 Tex. Ins. Code § 1952.109.

21 Tex. Ins. Code § 1952.110.

22 Tex. Ins. Code § 1952.151.

23 Tex. Ins. Code § 1952.152.

24 Tex. Ins. Code § 1952.153.

25 Tex. Ins. Code § 1952.154.

26 Tex. Ins. Code § 1952.155.

27 Tex. Ins. Code § 1952.156.

28 Tex. Ins. Code § 1952.157.

29 Tex. Ins. Code § 1952.158.

30 Tex. Ins. Code § 1952.159.

31 Am. Liberty Ins. Co. v. Ranzau, 481 S.W.2d 793 (Tex. 1972).

32 *Id.* at 796-7.

33 Urrutia v. Decker, 992 S.W.2d 440 (Tex. 1999).

34 Emert v. Progressive Cnty. Mut. Ins. Co., 882 S.W.2d 32 (Tex. App.—Tyler, 1996, writ denied).

35 Tex. Ins. Code § 2301.053.

36 *Commissioner Order* 92-0573.

37 Tex. Transp. Code § 601.

38 Tex. Ins. Code §1952.

39 *Available at:* http://www.tdi.state.tx.us/commercial/pcck-autp.html.

40 Tex. Transp. Code § 601.051.

41 Tex. Transp. Code § 601.076.

42 S. Farm Bureau Cas. Ins. Co. v. Kimball, 552 S.W.2d 207 (Tex. App.—Waco 1977, writ ref'd n.r.e.).

43 Hartford Cas. Ins. Co. v. Phillips, 575 S.W.2d 62 (Tex. App.—Texarkana 1978, no writ.).

44 State Farm Mut. Auto. Ins. Co. v. Nguyen, 920 S.W.2d 409 (Tex. App.—Houston [1st Dist.] 1996, no pet.).

45 Arellano v. Md. Cas. Co. 31 S.W.2d 701 (Tex. App.—El Paso 1958, no writ).

46 Tex. Ins. Code §1952.056.

47 Zamora v. Dairyland Cnty. Mut. Ins. Co., 930 S.W.2d 739 (Tex. App.—Corpus Christi 1996, writ denied).

48 879 S.W.2d 1 (Tex. 1993).

49 *Id.*

50 Unigard Sec. Ins. Co. v. Shaefer, 572 S.W.2d 303 (Tex. 1978).

51 W. Alliance Ins. Co. v. Alberez, 380 S.W.2d 710 (Tex. App.—Austin 1964, writ ref'd n.r.e.)

52 *Id.* at 715.

53 Tex. Transp. Code § 601.076. (Emphasis added).

54 U.S. Fire Ins. Co. v. United Serv. Auto. Ass'n., 772 S.W.2d 218 (Tex. App.—Dallas 1989, writ denied).

55 Tex. Transp. Code § 601.074.

56 Snyder v. Allstate Ins. Co., 485 S.W.2d 769 (Tex. 1972).

57 Armendariz v. Progressive Cnty. Mut. Ins. Co., 112 S.W.3d 736 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

58 Black v. BLC, Ins. Co., 725 S.W. 2d 286 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.)

59 Valdez v. Colonial Cnty. Mut. Ins. Co., 994 S.W.2d 910 (Tex. App.—Austin 1999, pet. denied).

60 *Id.* at 914 (citing Smith v. Eagle Star Ins. Co., 370 S.W.2d 448, 450 (Tex. 1963)).

61 Progressive Cnty. Mut. Ins. Co. v. Sink, 107 S.W.3d 547 (Tex. 2003).

62 Villegas v. Nationwide Mut. Ins. Co., 10 S.W.3d 380 (Tex. App.—Austin 1999, pet. denied).

63 Tex. Ins. Code § 601.076.

64 Mid-Century Ins. Co. of Tex. v. Lindsey, 997 S.W.2d 153, 157 (Tex. 1999).

65 Tanner v. Nationwide Mut. Fire Ins. Co., 289 S.W.3d 828 (Tex. 2009).

66 *Id.* at 831 n. 11.

67 Tex. Transp. Code § 601.076.

68 *Id.*

69 *See* State Farm Mut. Auto. Ins. Co. v. Pan Am Ins. Co., 437 S.W.2d 542, 545 (Tex. 1969).

70 *See* Universal Underwriters Ins. Co. v. Hartford Acc. & Indem. Co., 487 S.W.2d 152 (Tex. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.).

71 Manriquez v. Mid-Century Ins. Co. of Tex., 779 S.W.2d 482, (Tex. App.—El Paso, 1989, writ denied).

72 *Id.* at 484.

73 Westchester Fire Ins. Co. v. Admiral Ins. Co., 152 S.W.3d 172 (Tex. App.—Ft. Worth 2004, pet. denied).

74 *Id.* at 183-189.

75 Fairfield Ins. Co. v. Stephens Martin Paving, LP, 246 S.W.3d 653 (Tex. 2008).

76 *See* Stowers Furniture Co. v. Am. Indem. Co., 15 S.W.2d 544 (Tex. Comm'n App. 1929, holding approved).

77 McGovern v. Williams, 741 S.W.2d 373 (Tex. 1988).

78 *Id*. at 376.

79 Trinity Universal Ins. Co. v. Cowan, 945 S.W.2d 819 (Tex. 1997) (cited in several auto policy cases to support single limit per injury).

80 Am. States Ins. Co. of Tex. v. Arnold, 930 S.W.2d 196 (Tex. App.—Dallas 1996, writ denied).

81 Hermann Hosp. v. Martinez, 990 S.W.2d 476 (Tex. App.—Houston [14th Dist.] 1999, pet. denied).

82 *Id.*

83 Tex. Civ. Prac. & Rem. Code § 101.023e; The Court relied on *City of Austin v. Davis*, 693 S.W.2d 31 (Tex. App.—Austin 1985, writ ref'd n.r.e.) in making its decision. ; Genzer v. City of Mission, 666 S.W.2d 116 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.); Harris Cnty. v. White, 823 S.W.2d 385 (Tex. App.—Texarkana 1992, no writ).

84 847 S.W.2d 458 (Tex. App.—Tyler, 1993, writ denied).

85 *Cowan*, 945 S.W.2d 819; S. Farm Bureau Cas. Ins. Co. v. Franklin *ex rel.* Walker, 2006 WL 1373359 (Tex. App.—Amarillo May 19, 2006, memorandum opinion).

86 State Farm Lloyds v. C.M.W., 53 S.W.3d 877, 884-5 (Tex. App.—Dallas 2001, no pet.).

87 Haralson v. State Farm, 564 F. Supp. 616 (N.D. Tex. July 2008).

88 Tex. Farmers Ins. Co. v. Soriano, 881 S.W.2d 312, 315 (Tex. 1994).

89 Lane v. State Farm Mut. Auto Ins. Co., 992 S.W.2d 545 (Tex. App.—Texarkana 1999, pet. denied).

90 *Stowers*, 15 S.W.2d at 547.

91 *Id.* at 547.

92 *Soriano*, 881 S.W.2d 312.

93 *Id.* at 315.

94 Trinity Universal Ins. Co. v. Bleeker, 966 S.W.2d 489 (Tex. 1998).

95 *Id.*; Tex. Prop. Code § 55.007.

96 St. Paul Fire & Marine Ins. Co. v. Convalescent Servs., Inc., 193 F.3d 340 (5th Cir. 1999).

97 Home State Cnty. Mut. Inc. Co. v. Horn, 2008 WL 2514332 (Tex. App.—Tyler June 25, 2008, memorandum opinion).

98 Am. Centennial Ins. Co. v. Canal Ins. Co., 843 S.W.2d 480 (Tex. 1992).

99 *In re* Davis, 253 F. 3d 807 (5th Cir. 2001).

100 Liberty Mut. Ins. Co. v. Rawls, 404 F.2d 880 (5th Cir. 1968).

101 *Id.* at 881.

102 Dairyland Cnty. Mut. Ins. Co. v. Childress, 650 S.W.2d 770 (Tex. 1983).

103 Allstate v. Watson, 876 S.W.2d 145 (Tex. 1994).

104 Rumley v. Allstate Indem. Co., 924 S.W.2d 448 (Tex. App.—Beaumont 1996).

105 Webb v. Int'l Trucking Co., Inc., 909 S.W.2d 220 (Tex. App.—San Antonio 1995, no writ).

106 State Farm Mut. Auto. Ins. Co. v. Traver, 980 S.W.2d 625 (Tex. 1998).

107 Md. Ins. Co. v. Head Indus. Coatings & Serv., Inc., 938 S.W.2d 27 (Tex. 1996).

108 77 S.W.3d 253 (Tex. 2002).

109 242 S.W.3d 1 (Tex. 2007).

110 925 S.W.2d 696 (Tex. 1996).

111 *See also,* Evanston Ins. Co. v. Atofina Petrochemicals, 256 S.W.3d 660 (Tex. 2008).

112 Tex. Ass'n of Cntys. Cnty. Gov't Risk Mgmt. Pool v. Matagorda Cnty., 53 S.W.3d 128 (Tex. 2000).

113 243 S.W.3d 42 (Tex. 2008).

114 Mid-Century Ins. Co. v. Childs, 15 S.W.3d 187 (Tex. App.—Texarkana 2000, no pet.).

115 Mid-Century Ins. Co. of Tex. v. Kidd, 997 S.W.2d 265, 271 (Tex. 1999).

116 Tex. Ins. Code §1952.151 (2).

117 Tex. Ins. Code § 1952.156.

118 Tex. Ins. Code § 1952.152.

119 Tex. Ins. Code § 2151.

120 Old Am. Mut. Fire Ins. Co. v. Sanchez, 149 S.W.3d 111 (Tex. 2004).

121 *Shaefer*, 572 S.W.2d 303.

122 Tex. Ins. Code § 1952.151 (the standard policy duplicates this language).

123 Tex. Farm Bureau Mut. Ins. Co. v. Sturrock, 146 S.W.3d 123, 134 (Tex. 2004).

124 Travelers Indem. Co. of Rhode Island v. Lucas, 678 S.W.2 732 (Tex. App.—Texarkana 1984, no writ).

125 Guerrerro v. Aetna Cas. & Surety Co., 575 S.W.2d 323 (Tex. App.—San Antonio 1978, no writ).

126 U.S. Auto. Ass'n v. DiCarlo, 670 S.W.2d 756 (Tex. App.—El Paso 1984, writ ref'd n.r.e.).

127 Tex. Ins. Code § 1952.151.

128 Tex. Ins. Code § 1952.155.

129 Tex. Ins. Code § 1952.159.

130 Tex. Ins. Code § 1952.157.

131 Tex. Ins. Code § 1952.156.

132 Slocum v. United Pac. Ins. Co., 577 S.W.2d 805 (Tex. App.—Houston [14th Dist.] 1979, appeal after remand, 615 S.W.2d 807 (Tex. App.—Houston [1st Dist.] 1981).

133 Tex. Farmers Ins. Co. v. Fruge, 13 S.W.3d 509 (Tex. App.—Beaumont 2000, pet. denied).

134 Tex. Ins. Code § 1952.151.

135 Allstate Indem. Co. v. Forth, 204 S.W.3d 795 (Tex. 2006).

136 Westchester Fire Ins. Co. v. Tucker, 512 S.W.2d 679 (Tex. 1974).

137 *Kidd*, 997 S.W.2d 265 (Tex. 1999) (cites State Board of Ins. rate setting as one justification).

138 Mendez v. Allstate Prop. & Cas. Ins. Co., 231 S.W.3d 581 (Tex. App.—Dallas 2007).

139 *Kidd*, 997 S.W.2d 265.

140 Valentine v. Safeco Lloyds Ins. Co., 928 S.W.2d 639 (Tex. App.—Houston [1st Dist] 1996, writ denied).

141 Brainard v. Trinity Universal Ins. Co., 216 S.W.3d 809 (Tex. 2006); State Farm Mut. Auto Ins. v Nickerson, 216 S.W.3d 823 (Tex. 2006); State Farm Mut. Auto. Ins. v Norris, 216 S.W.3d 819 (Tex. 2006).

142 Briones v. State Farm Mut. Auto. Ins. Co. 790 S.W.2d 70 (Tex. App.—San Antonio 1990, writ denied).

143 670 S.W.2d 775 (Tex. App.—Fort Worth 1984, no writ).

144 Bergensen v. Hartford Ins. Co., 845 S.W.2d 374 (Tex. App.—Houston [1st Dist.] 1993, writ ref'd).

145 835 S.W.2d 804 (Tex. App.—Austin 1992, writ denied).

146 Francis v. Int'l Serv. Ins. Co., 546 S.W.2d 57 (Tex. 1976).

147 McDonald v. S. Cnty. Mut. Ins. Co., 176 S.W.3d 464 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

148 272 S.W.3d 603 (Tex. 2008).

149 Greene v. Great Am. Ins. Co., 516 S.W.2d 739, 744-5 dissenting on other issues (Tex. App.—Beaumont 1974, writ ref'd n.r.e.).

150 *Rosales*, 835 S.W.2d 804.

151 Franco v. Allstate Ins. Co., 505 S.W.2d 789 (Tex. 1974).

152 Vanderlinden v. U.S. Auto. Ass'n, 885 S.W.2d 239 (Tex. App.—Texarkana 1994, writ denied).

153 522 S.W.2d 594 (Tex. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.).

154 *Id.* at 241.

155 Gov't Employees Ins. Co. v. Lichte, 792 S.W.2d 546 (Tex. App.–El Paso 1990), *writ denied*, 825 S.W.2d 431 (Tex. 1991) (per curiam).

156 Continental Cas. Co. v. Thomas, 463 S.W.2d 501, 504-05 (Tex. Civ. App.—Beaumont 1971, no writ).

157 Monroe v. Gov't Emps. Ins. Co., 845 S.W.2d 394 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

158 *Id.*

159 Upshaw v. Trinity Co., 842 S.W.2d 631 (Tex. 1992); *see also Tucker*, 512 S.W.2d 679 (Tex. 1974).

160 *Id.*

161 Miller v. Windsor Ins. Co., 923 S.W.2d 91 (Tex. App.—Fort Worth, 1996, writ denied) (follows *McGovern*, 741 S.W.2d 373).

162 Eshtary v. Allstate Ins. Co., 767 S.W.2d 291 (Tex. App.—Fort Worth, 1989, writ denied) (cites *McGovern*, 741 S.W.2d 373).

163 *Christian*, 847 S.W.2d 458.

164 Am. Motorists Ins. Co. v. Briggs, 514 S.W.2d 233 (Tex. 1974).

165 Carter v. State Farm Mut. Auto. Ins. Co., 33 S.W.3d 369 (Tex. App.—Fort Worth 2000, no pet.).

166 Tex. Ins. Code §1952.108.

167 Simpson v. GEICO Gen. Ins. Co., 907 S.W.2d 942 (Tex. App.—Houston [1st Dist.] 1995, no writ).

168 Traylor v. Cascade Ins. Co., 836 S.W.2d 292 (Tex. App.—Dallas 1992, no writ).

169 Hernandez v. Gulf Group Lloyds, 875 S.W.2d 691 (Tex. 1994).

170 Ford v. State Farm Mut. Auto. Ins. Co., 550 S.W.2d 663 (Tex. 1977).

171 Stracener v. United Servs. Auto. Ass'n, 777 S.W.2d 378 (Tex. 1989).

172 Olivas v. State Farm Mut. Auto. Ins. Co., 850 S.W.2d 564 (Tex. App.—El Paso, 1993, writ denied).

173 Bartley v. Guillot, 990 S.W.2d 481 (Tex. App.—Houston [1st Dist.] 1999, pet. denied).

174 Tex. Civ. Prac. & Rem. Code § 33.014.

175 State Farm Mut. Auto. Ins. Co. v. Perkins, 216 S.W.3d 396 (Tex. App.—Eastland 2006, no pet.).

176 Hampton v. State Farm Mut. Ins. Co., 778 S.W.2d 476 (Tex. App.—Corpus Christi, 1989, no writ) (Case recognizes bystander damages under UM coverage.)

177 Hanson v. Republic Ins. Co., 5 S.W.3d 324 (Tex. App.—Houston [1st Dist.] 1999, pet. denied), Jankowiak v. Allstate, 201 S.W.3d 200 (Tex. App.—Houston [14th Dist] 2006, no pet.).

178 *Rosales*, 835 S.W.2d 804.

179 *Id.* at 209.

180 Hamaker v. Am. State Ins. Co., 493 S.W.2d 893, 898 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.), Fid. & Cas. Co. v. McMahon, 487 S.W.2d 371, 372 (Tex. Civ. App.—Beaumont 1972, writ ref'd n.r.e.).

181 *See* Erivas v. State Farm Mut. Auto. Ins. Co., 141 S.W.3d 671 (Tex. App.—El Paso, 2004).

182 Tex. Ins. Code § 1952.104.

183 Latham v. Mountain States Mut. Cas. Co., 482 S.W.2d 655 (Tex. App.—Houston [1st Dist.] 1972, writ ref'd n.r.e.).

184 *Sanchez*, 149 S.W.3d 111 (Tex. 2004).

185 Goen v. Trinity Universal Ins. Co., 715 S.W.2d 124 (Tex. App.—Texarkana 1986, no writ), Williams v. Allstate Ins. Co., 849 S.W.2d 859 (Tex. App.—Beaumont 1993, no writ), Tex. Farmers Ins. Co. v. Deville, 988 S.W.2d 331 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

186 Nationwide Ins. Co. v. Elchehimi, 249 S.W.3d. 430 (Tex. 2008).

187 Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 33 (Tex. 1994).

188 2007 WL 2089435 (N.D. Tex., July 18, 2007).

189 Tex. Ins. Code § 542; Mid-Century Ins. Co. of Tex. v. Daniel, 223 S.W.3d 586 (Tex. App.—Amarillo 2007, pet. denied).

190 Tex. Civ. Prac. & Rem. Code § 38.

191 Mondragon v. Austin, 954 S.W.2d 191 (Tex. App.—Austin 1997, pet. denied).

192 Chem. Express Carriers, Inc. v. French, 759 S.W.2d 683 (Tex. App.—Corpus Christi 1988, writ denied).

193 *See Webb*, 909 S.W.2d 220.

194 Higgins v. Standard Lloyds, 149 S.W.2d 143 (Tex. App.—Galveston 1941, writ dism'd).

195 Berry v. State Farm Mut. Auto. Ins. Co., 9 S.W.3d 884 (Tex. App.—Austin 2000, no pet.) (citing Tex. Ins. Code 5.07-1 (now §1952).

196 Great Tex. Cnty. Mut. Ins. Co. v. Lewis, 979 S.W.2d 72 (Tex. App.—Austin 1998, no pet.).

197 Am. Mfrs. Mut. Ins. Co. v. Schaefer, 124 S.W.3d 154 (Tex. 2003).

198 Canal Ins. Co. v. Hopkins Towing, 238 S.W.3d 549 (Tex. App.—Tyler, 2007) (citing State Farm Fire & Cas. v. Mower, 917 S.W.2d 2, 4 (Tex. 1995)).

199 Tex. Occ. Code § 2303.156(b).

200 Tex. Ins. Code § 1952.301.

201 Tex. Ins. Code § 1952.302.

202 Tex. Ins. Code § 1952.303.

203 Tex. Ins. Code § 1952.305.

204 Odom v. Ins. Co. of State of Penn., 455 S.W.2d 195, 198 (Tex 1970).

205 Tex. Ins. Code § 705.004.

206 Tex. Ins. Code § 705.005 (Section applies after June 29, 1903).

207 Tex. Ins. Code § 705.051.

208 Harrington v. Aetna Cas. & Surety Co., 489 S.W.2d 171 (Tex. App.—Waco, writ ref'd n.r.e.) (follows Tex. Ins. Code § 705.004 (old 21.16)).

209 *Snyder*, 485 S.W.2d 769.

210 *U.S. Fire Ins.*, 772 S.W.2d 218 (passenger grabs the wheel case).

211 *Briggs*, 514 S.W.2d 233.

212 *Id.*

213 Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Co., 444 S.W.2d 583 (Tex. 1969).

214 308 S.W.3d 49 (Tex. App.—San Antonio, 2009, no pet.).

215 Tex. Ins. Code § 551.101, et seq.

216 Tex. Transp. Code § 601.073.

217 Hartland v. Progressive, 290 S.W.3d 318 (Tex. App.—Houston [14th Dist.] 2009, no pet.).