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Texas Auto Policies

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Professional experience

Attorney, 1977 – present – practices in Austin and surrounding areas. Practice limited to the area of civil litigation with primary emphasis in personal injury and insurance disputes. B.A. in Psychology with honors from University of Texas in 1974 and JD from University of Texas School of Law in 1976. Board Certified in Personal Injury Trial Law since 1991 and is admitted to practice law before the Fifth Circuit Court of Appeals, the Western & Eastern Federal District Courts of Texas.

Professional associations and Awards

State Bar of Texas, Austin Bar Association, Capital Area Trial Lawyers Association (president 2014-2015), Texas Trial Lawyers Association, sustaining member and director, American Association for Justice, American Board of Trial Advocates, associate member, Texas Super Lawyers 2011 -2016, John Howie Award for mentorship-Texas Trial Lawyers Association 2011, Scott Ozmun Trial Lawyer of the Year-Capital Area Trial Lawyers Association 2012.

Seminar and publications

- *Texas Auto Policies,* University of Texas School of Law, Car Wreck Seminar-June, 2007, August, 2008, & August, 2009
- *Interpreting Auto Policies,* Texas Trial Lawyers Association, Car Wreck Seminar-November, 2007
- *Recent Developments in Insurance Law,* Capital Area Trial Lawyers Association Luncheon- March, 2008
- *Pleading Damages Within Insurance Coverage,* State Bar of Texas, Strategies for Damages and Attorney's Fees Seminar-February, 2010; Damages in Civil Litigation-February, 2011 & February, 2012
- *Summary of UM Benefits and Actions,* Texas Trial Lawyers Association, Car Wrecks Seminar, June, 2010
- *Auto Insurance Coverage* and *Summary of UM Benefits and Actions,* University of Texas School of Law, The Car Crash Seminar- August 2010, August 2012
- *Texas Auto Policies,* Texas Trial Lawyers Association, Car Wrecks Seminar- September, 2010
- *Helping Clients with their Expectations,* University of Texas School of Law, 2011 Car Crash Seminar-August, 2011
- *Texas Auto Coverage in a Nutshell,* 11:2 J. Tex. Ins. L. 20 (Summer 2011)
- *Stowers-A Modest Proposal,* 11:3 J. Tex. Ins. L. 8 (Winter 2011)
- *Deposing the Insurance Adjuster*, State Bar of Texas, Advanced Insurance Law Course, April 2012; and University of Texas School of Law, 2012 Insurance Law Conference- October, 2012
- *Auto Coverage for the Paralegal*, Texas Trial Lawyers Assn., TTLA Annual Conference, June 2012
- *Uninsured Motorist Coverage*, Texas Trial Lawyers Association, Road Rules Dallas: A Crash Course-October, 2012
- *Taking an Adjuster's Deposition*, University of Texas School of Law, 2012 Insurance Law Conf., October, 2012
- *Damages Under the Insurance Code*, State Bar of Texas, Damages in Civil Litigation 2013, March, 2013
- *Too Little Money, Too Many Claims: Ethical Issues with Multiple Claimants*, State Bar of Texas, Advanced Insurance Law Course, April, 2013
- *Insurance Policies – How to Get Paid (Finding and Understanding Coverage),* State Bar of Texas, Advanced Personal Injury Course, July, 2013
- *Auto Insurance Coverage*, University of Texas School of Law, 2014 Car Crashes Seminar, July, 2014
- *Uninsured Motorist Coverage – Surviving Post Brainard*, State Bar of Texas, Prosecuting Truck and Auto Cases, November 2014
- *Texas Auto Policies*, State Bar of Texas, Handling Your First (or Next) Auto Collision Case, December 2014
- *Uninsured Motorist Coverage-Nuts and Bolts of Trying the Case,* Texas Trial Lawyers Association, 2015 Car Wreck Seminar, February 2015, 2016 Car Wreck Seminar, March 2016
- *Uninsured Motorist Coverage-Nuts and Bolts of Trying the Case,* Hidalgo County Bar Assn., 2015 David Hockema Civil Trial Seminar, April 2015

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Introduction

This paper is a revised version of previous papers presented at this seminar. Since the law is constantly evolving in this area, some of the updates are significant. If you have earlier versions of the paper, it might be best to discard them. The paper is written in outline form and is designed to get the practitioner started on their research when an auto insurance issue arises. It is not an exhaustive list of authority, but a starting point. One important caveat … much of the case law that has developed in the last few years has been based on the standard contract. That contract was written by the Texas Department of Insurance, and it is still in wide use, but now there are others. It is more important than ever to read the actual policy in play.

Many people have contributed to this effort. My daughter and colleague, Jayme Bomben, has done exhaustive work, both on the original paper and the power point presentations that have accompanied this topic. My long time legal assistant, Peggy Rothenberger, has helped a great deal over the years. I find myself frequently referring to the written works of Mark Ticer, Mark Kincaid, Tom Herald, and Janet Colaneri for reference. Finally, my colleagues from around the State have contributed immeasurably by their questions and comments, especially on the TTLA list serve. I appreciate all of the help.

TEXAS AUTO POLICIES

Insurance is a great concept. It spreads the risk. For a certain price (premium) another accepts the risk of certain losses (coverage), for a certain amount of time (policy period) with certain limits (policy limits). Another way of looking at insurance is as a legal betting scheme. "Bet I'm going to have a wreck," says the policy holder. "Bet you're not," says the insurance company. Of course, in the auto context this wager is required in Texas. It's codified in the Transportation Code, as the Safety Responsibility Act.

Problems arise when a great concept is put into practice. Enormous amounts of money are at stake, so fights abound over when and how much of the risk is covered. In the legal context, insurance policies are contracts, and that's the way courts approach them. All of the contract elements apply. Consideration, waiver, breach, ambiguity, parole evidence - all of the terms that we see in other contract disputes, arise in the insurance context. But there are some differences. First, there are some base line statutory requirements that are unique to auto policies. Second, the auto policy is approved by a state agency, the Texas Department of Insurance. Consequently, that agency's interpretations of the provisions are sometimes considered in the dispute. Finally, there are some special rules of construction that apply to all insurance contracts, including auto.

Most of this paper discusses the personal auto policy, but some car wrecks are covered by commercial policies. Different rules apply to these policies. The basic commercial general liability (CGL) excludes auto wrecks, but a separate endorsement often adds it back. We have added a section to this paper on commercial coverage.

I. General Insurance Law and Terms

A. STATUTORY REQUIREMENTS FOR AUTO INSURANCE

The Safety Responsibility Act (found in the Transportation Code) and the Texas Insurance Code mandate certain coverage in the auto policy and prohibit some provisions. These statutes form the bedrock of auto coverage in Texas. The Texas Department of Insurance has no authority to act outside the perimeters that the Insurance Code, however it can, and at times seemingly does, ignore the Safety Responsibility Act. The Safety Responsibility Act only governs those policies that certify that they comply with the Act. As a practical matter that is nearly every personal auto policy, but this distinction can be important. When trying to decipher whether a particular policy can get by with certain exclusions, it's important to know how these statutes interplay. This is a brief summary:

1. Tex. Transportation Code (Safety Responsibility Act)

Tex. Transp. Code §601.072 minimum limits

$30,000.00 after January 1, 2011

$60,000.00 for injuries per accident, if more than one person injured, for policies written after 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

Tex. Transp. Code §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.

Tex. Transp. Code §601.074 allowable terms

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.

Tex. Transp. Code §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.

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

Tex. Transp. Code §601.076 permissive users

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

Tex. Transp. Code §601.078 additional coverage

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

Tex. Transp. Code §601.081 minimum policy requirements.

This section details certain required terms in a

policy before it can be used as proof of financial responsibility, including disclosure of "named driver" policies.

2. Tex. Insurance Code

Tex. Ins. Code §1952.051 policy forms

Policy forms for auto insurance are now regulated by Tex. Ins. Code §2301 (which permits insurers to draft their own forms, subject to the approval of the Texas Department of Insurance.)

Tex. Ins. Code §1952.052 standard policy

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

Tex. Ins. Code §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.

Tex. Ins. Code §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."

Tex. Ins. Code §1952.057 drug forfeiture

Prohibits coverage for vehicles lost through forfeiture for a drug conviction.

Tex. Ins. Code §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.

Tex. Ins. Code §1952.102 definition of uninsured

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

Tex. Ins. Code §1952.103 underinsured

Defines underinsured vehicle.

Tex. Ins. Code §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.

Tex. Ins. Code §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, 3) UM limits must at least equal Safety Responsibility limit

Tex. Ins. Code §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"

Tex. Ins. Code §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.

Tex. Ins. Code §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."

Tex. Ins. Code §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.

Tex. Ins. Code §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. There is room to argue whether this is actually a mandatory venue statute or not.

Tex. Ins. Code §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."

Tex. Ins. Code §1952.152 PIP required unless waived

Rejection must be in writing and continues through renewals of the policy

Tex. Ins. Code §1952.153 PIP minimum coverage

$2500 per person

Tex. Ins. Code §1952.154 lost income under PIP

Insurer may require medical proof before paying lost income

Tex. Ins. Code §1952.155 collateral source irrelevant to PIP

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

Tex. Ins. Code §1952.156 payments under PIP

Carrier must pay within 30 days of proof of claim

Policy **may** require original proof of loss within six months of accident and reasonable medical proof of an "alleged recurrence of injury" if there is a lapse in treatment.

Tex. Ins. Code §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.

Tex. Ins. Code §1952.158 Exclusions

Intentional injuries or those received while committing a felony are not covered

Tex. Ins. Code §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)

3. 2013 legislative changes:

SB 1567

Senator Davis sponsored this bill which is now law. It requires disclosure of "junk policy" exclusions both in the application and in the SRA proof of insurance card. What, if any, affect this change in the law will have is purely speculative at this point. One concern is that by amending the Transportation Code, it may take away some of the arguments that these policies violate the SRA and are therefore unenforceable. This is the required disclosure language:

WARNING: A NAMED DRIVER POLICY DOES NOT PROVIDE COVERAGE FOR INDIVIDUALS RESIDING IN THE INSURED'S HOUSEHOLD THAT ARE NOT NAMED ON THE POLICY.

The Texas Department of Insurance has also issued rules for these policies that add significant requirements for disclosure. A copy is attached to the appendix of to this paper. If these disclosures are not made, the excluded driver portion of the policy is likely not enforceable.

B. AGENCY APPROVAL OF AUTO INSURANCE POLICIES (TEXAS DEPT. OF INSURANCE)

No personal auto insurance form may be used in this State unless it has been approved by the Texas Department of Insurance. 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 Texas Department of Insurance 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 Tex. Ins. Code §1952 and, in most cases, the Safety Responsibility Act. There are now numerous and significant variations within policies - all of which are on file with the Texas Department of Insurance.

1. The Texas Department of Insurance (State Board of Ins.) can only act consistent with the statutes. *American Liberty Ins. Co. v. Ranzaus,* 481 S.W.2d 793 (Tex. 1972)

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." *Id.* at 796-7. **This is the sentinel case on this issue**

2. A policy that is not approved by the Texas Department of Insurance is voidable by the insured until benefits are accepted under the policy. *Urrutia v. Decker*, 992 S.W.2d 440 (Tex. 1999)

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. *Emert v. Progressive County Mutual Insurance Co.*, 882 S.W.2d 32 (Tex. App.-Tyler, 1996, writ den'd)

Summary judgment case. However, St. Bd. opinion did not absolve company on contract claim.

4. The policy has to be written in "plain English." Tex. Ins. Code §2301.053 policy must be in plain English*; Commissioner Order 92-0573*

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.

C. SPECIAL RULES OF CONSTRUCTION FOR AUTO INSURANCE

As mentioned earlier, insurance policies are contracts and subject to general contract law. However, certain special rules apply to their interpretation. If the insurance contract is ambiguous (a legal determination), then it is construed in favor of coverage. If it is not ambiguous it will be enforced as written. Generally, the insured bears the burden of proving a loss is within the coverage of the policy, but if there is an exclusion that removes the claim from coverage, the insurer bears the burden of proving that exclusion. To complicate things further, if there is an exception within the exclusion (and

there often is), the burden shifts back to the insured to prove the claim falls under the exception to the exclusion. Got it?

This is another view:

Conditions precedent - these are the starting gate. Insured must pass through before arriving at coverage

Coverage - this is the heart of the insuring agreement

Exclusions (sometimes called exceptions) - these take away what the coverage gives

Exceptions to exclusions - these give back what the exclusion took away

Like other areas of the law, the person that benefits has the burden of proof.

1. Conditions Precedent to Coverage

a. Conditions Precedent are acts or occurrences that must take place before coverage begins.

Love of God Holiness Temple Church v. Union Standard Ins. Co., 860 S.W.2d 179 (Tex. App.–Texarkana 1993, writ denied). (case offers an overall discussion of conditions precedent, coverage and pleadings.)

i. Conditions precedent "are stipulations that call for the performance of some act or the occurrence of some event before an agreement is enforceable. Examples of conditions precedent in insurance contracts are the giving of notice of claim or loss, the timely filing of proof of loss, reporting the loss to proper authorities, filing suit within a specified time, timely forwarding suit papers to liability insurer..." *Id.* at 180.

ii. Plaintiff may plead that all conditions precedent have occurred and then must only prove those conditions which the carrier specifically denies. However, insured must still prove loss is within the coverage.

b. The insurance company must prove prejudice before it can rely on certain conditions precedent. *Struna v. Concord Insurance Services, Inc., 11 S.W.3d 355* (Tex. App.–Houston [1st Dist.] 2000, no writ)

Lack of notice is a condition precedent, but insurer must still show prejudice to escape judgment. Prejudice is a fact issue. The same rule applies to an insured's failure to cooperate. If the failure to cooperate does not prejudice the carrier, it doesn't benefit from this defense.

i. Lack of notice, voluntary payment, and failure to cooperate are not defenses unless the carrier is prejudiced.

Discusses Board rules and evolution of law on this issue. Even when termed a "condition precedent" courts require prejudice. *Coastal Refining & Marketing, Inc. v. United States Fidelity and Guarantee,* 218 S.W.3d 279 (Tex. App.–Houston [14th Dist.] 2007, rev. den'd)

ii. If no notice of suit is given and carrier has no actual notice until after judgment became final, carrier is prejudiced as a matter of law. *Liberty Mutual Insurance Co. v. Cruz,* 883 S.W.2d 164 (Tex. 1993)

iii. No prejudice if carrier had actual notice of suit. *Allstate Insurance Co. v. Pare,* 688 S.W.2d 680 (Tex. App.–Beaumont 1985, writ ref'd n.r.e.)

iv. Third party beneficiary under liability policy had the burden of pleading and proving coverage for injury. If carrier had actual notice of suit, lack of notice by insured was not a defense. *Ohio Casualty Group v. Risinger,* 960 S.W.2d 708 (Tex. App.–Tyler 1997, writ denied)

c. When in doubt, the presumption is against construing a clause as a condition precedent. *Nutt v. Members Ins. Co.,* 474 S.W.2d 575 (Tex. App.–Dallas 1971, writ ref'd n.r.e.)

"Whether mutual promises are independent or dependent must be determined by the parties' intent as evidenced by the language of the contract. In case of doubt the court will presume that such promises are dependent rather than independent, since such a construction ordinarily prevents one party from having the benefits of the contract without performing his own obligation." *Id.* at 577-8.

d. Finally, this is an expanding area of the law. More recent cases, discussing commercial general liability policies, have almost obliterated the distinction between conditions precedent and general policy covenants. The analysis has focused on the "materiality" of the breach. If the risk the carrier bargained to cover is not materially affected by the insured's breach, there is no policy defense. In other words, no harm no foul. *PAJ v. Hanover Ins. Co.,* 243 S.W.3d 630 (Tex. 2008)

2. Coverage Interpretation

a. The parts of a policy are construed together and the policy is ambiguous only if it is reasonably susceptible to more than one meaning. *Simpson v. GEICO Gen. Ins. Co.* , 907 S.W.2d 942 (Tex. App.–Houston [1st Dist.] 1995, no writ).

i. "In interpreting an insurance policy, we construe all parts of the document together giving effect to the intent of the parties." *Id.* at 945 citing *Gaulden v. Johnson,* 801 S.W.2d 561, 563 (Tex. App.–Dallas 1990, no writ)

ii. "A contract is ambiguous only when its meaning is

uncertain and doubtful or it is reasonably susceptible to more than one meaning." *Id.* at 945 citing *Coker v. Coker,* 650 S.W.2d 391, 393 (Tex. 1983)

iii. "The determination of whether terms are ambiguous is a question of law." *Id.* at 945 citing *Gaulden, at 564*

iv. "Once the document is found to be ambiguous, the interpretation of the document is a question of fact." *Id.* at 945 citing *Coker* at 394-95.

v. Multiple policies. Where it is ambiguous whether two documents amount to two separate policies or one, extrinsic evidence should be considered. Court draws a different rule than "ambiguity favors insured" when the question is not over the interpretation of a particular phrase in a single policy. *Progressive County Mutual v. Kelley,* 284 S.W.3d 805 (Tex. 2009).

b. Estoppel and waiver cannot create coverage.

i. Estoppel cannot create coverage where none exists. *Texas Farmers County Mutual Insurance Company v. Wilkinson,* 601 S.W.2d 520 (Tex. App. –Austin 1980, writ ref'd n.r.e.)

Insured in employer's truck. Carrier denied coverage after two interviews with insured and a reservation of rights letter. Insured complained on appeal that carrier was estopped from denying coverage because he was misled. Court held that **estoppel cannot create coverage where none exists.** Paradoxically, the court also held that defending without a reservation of rights letter to the prejudice of the insured could waive all policy defenses **including the defense of non-coverage.** at 522.

ii. Historically, when a carrier proceeded to defend a case without a reservation of rights letter, and with knowledge of facts indicating non-coverage, the carrier might be estopped from asserting any policy defenses, including the defense of non-coverage. *Texas Farmers Ins. Co. v. McGuire,* 744 S.W.2d 601 (Tex. 1988) citing *Texas Farmers County Mutual Ins. Co. v. Wilkinson,* 601 S.W.2d 550 (Tex. App.–Austin, 1980, writ ref'd n.r.e.) **However, the *Wilkinson* exception was recently examined in the case of** *Ulico Casualty Co. v. Allied Pilots Ass.,* 262 S.W.3d 773(Tex. 2008) **– not much of it is left**. 'We do not agree with *Wilkinson's* statement to the effect that "noncoverage" of a risk is the type of right an insurer can waive and thereby effect coverage for a risk not contractually assumed." *Id.* at 781. Still, the opinion ends its discussion with this quote. "In sum, if an insurer defends its insured when no coverage for the risk exists, the insurer's policy is not expanded to cover the risk simply because the insurer assumes control of the lawsuit defense. But, if the insurer's actions prejudice the insured, the lack of coverage does not preclude the insured from asserting an estoppel theory to recover for any damages it sustains because of the insurer's actions." *Id.* at 787.

iii. Defense without a reservation of rights must prejudice the insured before estoppel applies. *State Farm Lloyds Inc. v. Williams,* 960 S.W.2d 781 (Tex. App.–Dallas 1997, review dismissed by agreement)

Here, defendant was subject to execution of the judgment for a two month period before an agreement was reached with the plaintiff to not execute the judgment. Court held that the two months the insured was subject to execution was sufficient harm.

iv. Looking at the aftermath of *Ulico Casualty Co. v. Allied Pilots Ass.,* if an insured can show separate damages (prejudice?) because the carrier defended without a reservation of rights, those separate damages can likely be recovered, but an uncovered claim will not now become a covered claim.

c. The carrier's duty to defend is based solely on the allegations in the petition (regardless of their truth) and the language of the policy. *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church,* 197 S.W.3d 305 (Tex. 2006)

Eight corners rule. To determine the duty to defend, the court will look only at the allegations in the latest petition and the insurance policy. No extrinsic evidence is considered. For the purposes of making the determination, all facts alleged in the petition are taken as true.

d. Not every policy that covers autos is "an auto policy." *Taylor v. State Farm Lloyds, Inc.*, 124 S.W.3d 665, 671 (Tex.App.-Austin 2003, pet. denied).

Hired and non-owned endorsement added to a commercial policy was not governed by the same statutes as a personal auto policy and was not required to provide PIP or UM coverage.

e. An umbrella policy, even if it is excess for a personal auto policy, is not governed by the same statutes, and does not have to provide UM coverage. *Sidelnik v. American States Ins. Co.* 914 S.W.2d 689 (Tex. App.–Austin 1996, writ denied). **Likewise, a non-owned, hired vehicle provision in a commercial policy has been held to not require UM or PIP coverage.** *Taylor v. State Farm Lloyds, Inc.*, 124 S.W.3d 665, 671 (Tex.App.-Austin 2003, pet. denied). **However, if the policy is a primary policy, then the UM and PIP requirements are likely there, even if it is a commercial policy under the analysis of the above two opinions.** See *Safeco Lloyds Ins. Co. v. Allstate Ins. Co.* 308 S.W.3d 49 (Tex. App.–San Antonio 2009, no

pet.).

3. Exclusions to Coverage

a. Exclusions to coverage are strictly construed against the insurer. *National Union v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991)

Exclusionary clauses or limitations on liability in insurance policies are strictly construed in favor of the insured and against the insurer. Court must adopt the insured's construction of an exclusionary clause as long as that construction is not unreasonable, even if the construction urged by the insurance company appears more reasonable or a more accurate reflection of the parties' intent.

b. In general, policies are construed liberally in favor of coverage, especially when interpreting exclusions to the coverage. *Ramsay v. Maryland American General Ins. Co.*, 533 W.W.2d 344 (Tex. 1976)

i. Issue over whether Navy vehicle was a "commercial automobile" which would be excluded from coverage. The court stated "[w]hen terms of an insurance policy are unambiguous, they are to be given their plain, ordinary and generally accepted meaning unless the instrument itself shows that the terms have been used in a technical or different sense." *Id.* at 346.

ii. In holding for the insured, the Court states: "It is a settled rule that policies of insurance will be interpreted and construed liberally in favor of the insured and strictly against the insurer, and especially so when dealing with exceptions and words of limitation." *Id.* at 349.

c. Tex. R. Civ. Proc. 94 Affirmative Defenses

"...Where the suit is on an insurance contract which insures against certain general hazards, but contains other provisions limiting such general liability, the party suing on such contract shall never be required to allege that the loss was not due to a risk or cause coming within any of the exceptions specified in the contract, nor shall the insurer be allowed to raise such issue unless it shall specifically allege that the loss was due to a risk or cause coming within a particular exception to the general liability..."

d. Tex. Ins. Code §554.002

"In a suit to recover under an insurance or health maintenance organization contract, the insurer or health maintenance organization has the burden of proof as to any avoidance or affirmative defense that the Texas Rules of Civil Procedure require to be affirmatively pleaded. Language of exclusion in the contract or an exception to coverage claimed by the insurer or health maintenance organization constitutes an avoidance or an affirmative defense."

4. Exception to Exclusions

The insured has the burden of proof on a policy claim to show coverage. If there is an exclusion to coverage, the insurance company must prove it. If there is an exception within the exclusion, the burden shifts back to the insured. *Venture Encoding Services, Inc. v. Atlantic Mutual Insurance Co.*, 107 S.W.3d 729 (Tex. App.–Fort Worth 2003, pet. denied)

"In general, an insured bears the initial burden of showing that there is coverage under an insurance policy and the insurance carrier bears the burden of proving the applicability of an exclusion that permits it to deny coverage. Once the insurer proves the applicability of an exclusion, the burden then shifts back to the insured to demonstrate that he or she has coverage under an exception to the exclusion." *Id.* at 733.

II. Content of Texas Auto Policies

Until recently, most policies in Texas were one standard form that was promulgated by the Texas Department of Insurance. While the standard form is still broadly used, there are now many approved forms, most of which still follow the general outline of the standard form.

All of the nonstandard forms must still be approved by the Texas Department of Insurance, but there is a default approval if actual approval is not given within 60 days of submission. Some of the forms are copyrighted and copies of these forms cannot be obtained from 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. All of the approved forms are subject to the statutory minimums required by the Insurance Code (Tex. Ins. Code §1952), and arguably, the Safety Responsibility Act if the policy certifies compliance with that Act. The lesson here is to **always** look at the policy.

The standard form 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 Safety Responsibility Act is focused on the vehicle. "A person may not operate a motor vehicle in this State unless financial responsibility is established **for that vehicle."** Tex. Transp. Code §601.051 The Code further requires coverage for permissive users of the vehicle as well as the insured. Tex. Transp. Code §601.076. 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 coverage mandated by the Safety Responsibility Act. It remains to be seen what the courts will do with coverage issues on these "unique" policies.

1. <u>Who is covered?</u>

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. *Southern Farm Bureau Casualty Ins. Co. v. Kimball,* 552 S.W.2d 207 (Tex. App.–Waco 1977, writ ref'd n.r.e.)

iii. A person, especially a minor, can have more than one residence. *Hartford Casualty Ins. Co. v. Phillips,* 575 S.W.2d 62 (Tex. App.–Texarkana 1978, no writ)

iv. Three factors as relevant in determining residence: 1) living under the same roof, 2) close, intimate and informal relationship, 3) when the intended duration is likely to be substantial. No one element controls, but all must be considered. *State Farm Mutual Auto Ins. Co. v. Nguyen,* 920 S.W.2d 409 (Tex. App.–Houston [1st Dist.] 1996, no pet.)

v. Burden is on the insured to show residency. *Arellano v. Maryland Casualty Co.,* 31 S.W.2d 701 (Tex. App.–El Paso 1958, no writ)

vi. If 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). Tex. Ins. Code §1952.056

b. The policy may exclude specific drivers from liability coverage. *Zamora v. Dairyland County Mutual Ins. Co.,* 930 S.W.2d 739 (Tex. App.–Corpus Christi 1996, writ denied).

Named driver exclusions are valid against arguments that Safety Responsibility Act prevents exclusion. Court distinguished *National County Mutual Fire Ins. Co. v. Johnson*, 879 S.W.2d 1 (Tex. 1993) rationale in approving exclusion. Exclusion extends to negligent entrustment cause of action against named insured if excluded driver was the tortfeasor. *Id.*

Note however that there are some cases that reject "excluded driver" endorsements as sufficient to reject PIP coverage. *Unigard Sec. Ins. Co. v. Shaefer*, 572 S.W.2d 303 (Tex. 1978).

c. The Safety Responsibility Act does not regulate insurance. *Western Alliance Ins. Co. v. Alberez*, 380 S.W.2d 710 (Tex. App. –Austin 1964, writ ref'd n.r.e.)

"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." at 715.

d. Anyone using the insured vehicle is covered. (Assuming they haven't stolen it). This is a requirement mandated by the Safety Responsibility Act. As noted above, TDI can approve a policy that does not comply with the SRA, but most certify that they do. Also, the TDI policy guidelines include a reference to the SRA. Things are not crystal clear at the moment. Here are the SRA requirements:

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 Tex. Transp. Code §601.072." *Tex. Transp. Code §601.076.* (Emphasis added).

ii. Permissive use is determined from the point of view of the user, not the owner or named insured. If the user reasonably believed they had permission to use the vehicle, they are covered. *United States Fire Ins. Co. v. United Serv. Automobile Assn.,* 772 S.W.2d 218 (Tex. App.–Dallas 1989, writ denied). In this 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 certify they comply with SRA yet 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 Tex. Transp. Code §601.074. To date, there is no case law on this issue.

There are now, however, certain disclosure requirements in Tex. Ins. Code §1952.0545 for these "named driver" policies. The Texas Department of Insurance has followed this requirement with rules of its own, that specify the disclosure must be made again with each renewal. Rule 5.208 (see appendix to this paper for complete rule).

2. <u>What is covered?</u>

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 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. Father bought car for minor daughter who did not live with father. Father retained legal title and listed car on insurance policy, but car was considered daughter's. After collision, carrier denied coverage. Court held that paying a premium and listing vehicle on policy met definition of "owned automobile." *Snyder v. Allstate Insurance Co.*, 485 S.W.2d 769 (Tex. 1972).

ii. Van dropped from policy, then involved in accident while being driven by a listed driver. Court upholds the "owned but not listed" exclusion from coverage in spite of Safety Responsibility Act. *Armendariz v. Progressive County Mutual Insurance Company*, 112 S.W.3d 736 (Tex. App.–Houston [14th Dist.] 2003, no pet.).

iii. Insured sold car to another who in turn, sold it to a third person. Third person wrecked car. Car was still listed on insured's policy. No coverage. No relationship between insured and owner. No right of possession or control. *Black v. BLC, Ins. Co.*, 725 S.W2d 286 (Tex. App.–Houston [1st Dist.] 1986, writ ref'd n.r.e.)

iv. Insured sold car to adult son who left for Mexico, but left car with insured. Car was listed on policy. Carrier had notice of new lien holder, but not change of title. Insured wrecked car, and carrier denied claim based on no ownership. Court found for insured. Listing the car on the policy satisfied *Snyder* and retaining exclusive possession and control of car satisfied *Black*. *Valdez v. Colonial County Mutual Ins. Co.*, 994 S.W.2d 910 (Tex. App.–Austin 1999, rev. denied).

Carrier also argued that insured had no insurable interest in car. 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." *Id.* at 914 citing *Smith v. Eagle Star Insurance Co.*, 370 S.W.2d 448, 450 (Tex. 1963)

v. Court reads into the definition of "temporary substitute vehicle" a requirement that the insured believe that he had permission to use the vehicle. Dissent points out that the majority is adding language to the policy that is not there. Majority relies in part, on 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. *Progressive County Mutual Ins. Co. v, Sink*, 107 S.W.3d 547 (Tex. 2003).

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." *Villegas v. Nationwide Mutual Ins. Co.*, 10 S.W.3d 380 (Tex. App.– Austin 1999, rev. den'd). The rationale is that the carrier is not liable for more than one vehicle at a time.

vii. Finally, it should be noted that some of the newer policies (including some USAA policies) do not cover "temporary substitute vehicles."

b. What's an accident?

i. Tex. Transp. Code §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…"

The standard policy states:

"We will pay damages … 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. *Mid-Century Ins. Co. of Texas v. Lindsey*, 997 S.W.2d 153, 157 (Tex. 1999). This holding was recently reaffirmed by the Tex. Sup. Ct. in *Lancer Ins. Co. v. Garcia Holiday Tours*, 345 S.W.3d 50 (Tex. 2011).

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

This 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 our standard 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." *Id.* at 831 n. 11. The court held there was coverage in this case, since the insured did not intend the harm.

c. Loading and unloading

5. loading and unloading is included under the definition of "use"

Collier v. Employers Nat. Ins. Co., 861 S.W.2d 286 (Tex. App.–Houston [14th Dist.] 1993, writ denied).

ii. Texas has adopted the majority definition of "unloading" as a "complete operation", that is the loading begins, and the unloading is finished when the goods have been transported to or from the vehicle to the place from or to which they are being delivered. Loading and unloading. *Travelers Insurance Co. v. Employers Casualty Co.*, 380 S.W.2d 610 (Tex. 1965). Case involved the delivery of concrete from a concrete truck to a form. Court held that delivery was still in progress while the concrete was in a bucket moving it from the truck to the form. Similar holding in *Commercial Standard Insurance Co. v. American General Insurance Co.*, 455 S.W.2d 714, 716 (Tex. 1970). Also, quoting Appleman,

iii. Court may treat each load as a separate event. *Home State County Mutual Ins. Co. v. Acceptance Insurance Co.*, 958 S.W.2d 263 (Tex. Civ. App.–Amarillo 1997, no writ) – dump truck unloaded gravel and went back for more. Gravel delivery was only part of the amount to be delivered. Court held delivery was complete hence the coverage in auto policy did not apply, nor did the "loading or unloading" exclusion in the CGL policy.

iv. Loading and unloading held to be covered under the standard UM language. *Farmers Insurance Exchange v. Rodriguez*, No. 14-10-00995-CV, February 16, 2012 (Houston [14th Dist])

v. Note, though, that the term "use of a covered auto" without more, has been held to be a more limited term and does not encompass loading and unloading. *St. Paul Fire and Marine Insurance Company v. American International Surplus Lines Insurance Company*, 1997 WL 160192 (N.D. Tex. March 31, 1997). This case involves an ambulance, and transporting a patient on a stretcher. If this holding provides any authority for Texas law it is very limited. The court in *Farmers Insurance Exchange v. Rodriguez*, noted the opinion in a footnote, but apparently did not consider it.

d. 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. Tex. Transp. Code §601.076

Tex. Transp. Code §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 Tex. Transp. Code §601.072 (which sets out limits)

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 to SRA compliant policies. *See State Farm Mutual Auto Ins. Co. v. Pan Am Ins. Co.*, 437 S.W.2d 542, 545 (Tex. 1969).

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

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

a. "We will pay damages for bodily injury" includes coverage for punitive damages. *Manriquez v. Mid-Century Ins. Co. of Texas,* 779 S.W.2d 482, (Tex. App.–El Paso 1989, writ denied)
"Average insured would assume the term damages would include all damages except those intentionally caused." *Id.* at 484. Policy could have been drafted to make clear no punitive damages were covered.

b. Texas law has traditionally allowed punitive damages to be insurable. *Westchester Fire Ins. Co. v. Admiral Ins. Co.*, 152 S.W.3d 172 (Tex. App.–Ft. Worth 2004, rev. den'd)

Nursing home case. Lawsuit follows adverse verdict. Suit against primary carrier and defense firm. Spends a lot of the opinion discussing the insurability of punitive damages, questioning the public policy of allowing same, but finally decides punitive damages are insurable. *Id.* at 183-189. Also, acknowledges that primary carrier has duty to excess carrier to reasonably settle 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. *Fairfield Insurance Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653 (Tex. 2008).

d. There is an unpublished Fifth Circuit case that made an *Erie* guess based on *Fairfield* (without much analysis) that held that with extreme enough conduct (third time DWI) punitive damages are not allowed as a matter of public policy. *Minter v. Great American Ins. Co. of NY*, 2010 W.L. 3377639, 394 Fed. Appx. 47 (5th Cir. 2010).

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. (checklist in the appendix).

3. <u>Policy Limits</u> (See *Stowers Furniture Co. v. American Indemnity Co.*, 15 S.W.2d 544 (Tex. Comm'n App. 1929, holding approved)

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

Loss of consortium claim is derivative of bodily injury claim and does not trigger a second "per person" limit in the policy. Case holds that loss of consortium claim is still viable under policy. It will "merely make a consortium claim and the bodily injury claim subject to the "per person" limit." *Id*. at 376.

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

iii. Additional insured on the policy does not create an additional limit. *American States Ins. Co. of Texas v. Arnold*, 930 S.W.2d 196 (Tex. App.– Dallas 1996, writ denied)

The per person liability limit is per person injured regardless of the number of insured's 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 *Hermann Hospital v. Martinez,* 990 S.W.2d 476 (Tex. App.–Houston [14th Dist.] 1999, rev. denied)**, but this concept has been steadily eroded in auto claims.**

Bystander claim must show that defendant was negligent and: 1) bystander was located near the scene of the accident, 2) the shock must result 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 holds that claim is not derivative of the victim's and thus allows a separate "per person" recovery for the bystander claim. Court looks at the language of the Tort Claims Act (Tex. Civ. Prac. & Rem. Code §101.023e) that states that liability "is limited to money damages in the maximum amount of $250,000 for each person for bodily injury or death."

Court relies on *City of Austin v. Davis,* 693 S.W.2d 31 (Tex. App.– Austin 1985, writ ref'd n.r.e.), *Genzer v. City of Mission*, 666 S.W.2d 116 (Tex. App.–Corpus Christi 1983, writ ref'd n.r.e.) and *Harris County v. White*, 823 S.W.2d 385 (Tex. App.– Texarkana 1992, no writ).

In contrast, *Christian v. Charter Oak Fire Ins. Co.***,** 847 S.W.2d 458 (Tex. App.–Tyler 1993, writ denied) held that single per person limit cannot be expanded by bystander claim after wrongful death payment under the UM portion of the policy. 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 *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819 (Tex. 1997). *Southern Farm Bureau Cas. Ins. Co. v. Franklin ex rel. Walker*, 2006 WL 1373359 (Tex. App.–Amarillo May 19, 2006, *memorandum opinion*.). **However, if the claimant can demonstrate a physical manifestation because of the mental or emotional injury, there may be coverage.** *State Farm Lloyds v. C.M.W.*, 53 S.W.3d 877, 884-5 (Tex. App.–Dallas 2001, no pet.). Also, look at a recent federal district court case that makes an *Erie* guess that Texas would allow a separate limit where the bystander suffers a substantial physical manifestation from the event. *Haralson v. State Farm*, 564 F. Supp. 616 (N.D. Tex. July 8, 2008).

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. *Texas Farmers Insurance Co. v. Soriano*, 881 S.W.2d 312, 315 (Tex. 1994)

ii. This same discretion has been given to carriers on UM claims. *Lane v. State Farm Mut. Auto Ins. Co.*, 992 S.W.2d 545 (Tex. App.– Texarkana 1999, rev. den'd)

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

i. *Stowers* doctrine may expose carrier to liability beyond its policy limit. *Stowers Furniture Co. v. American Indemnity Co.*, 15 S.W.2d 544, 547 (Tex. Comm'n App.1929, holding approved).

"...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. *Id.* at 547.

ii. *Stowers* doctrine creates liability only if: 1) carrier negligently rejected a demand within policy limits, or 2) the settlement demand itself was unreasonable. *Texas Farmers Insurance Co. v. Soriano*, 881 S.W.2d 312, 315 (Tex. 1994)

Case involves multiple plaintiffs with severe injuries and two deaths. Minimum limits policy. Carrier paid out its limits, divided between claimants. Court held that *Stowers* doctrine created liability only if 1) carrier negligently rejected a demand within policy limits, **or** 2) the settlement itself was unreasonable. Court found no evidence of either. *Id.* at 315.

iii. Settlement offer must offer a full release in exchange for the payment of the policy limits. *Trinity Universal Ins. Co. v. Bleeker*, 966 S.W.2d 489 (Tex. 1998)

In this case, a hospital lien had attached to the claim (Tex. Prop. Code §55.007), and the *Stowers* demand did not include a release of the hospital liens. Court held that the offer of settlement was insufficient to satisfy *Stowers*. Note, one unpublished opinion has held that the validity of the hospital lien is irrelevant in a *Stowers* action. It still has to be accounted for. *McDonald v. Home State County Mut. Ins. Co.*, No. 01-09-00838, 2011 W.L. 1103116 (Tex. App.–Houston [1st Dist.] Mar. 24, 2011, pet. denied).

iv. Stowers doctrine applies only to covered claims. A policy that does not cover punitive damages has no liability under Stowers for those claims. *St. Paul Fire & Marine Ins. Co. v. Convalescent Services, Inc.*, 193 F.3d 340 (5th Cir. 1999).

v. It is critical to accurately identify the party to whom the release is offered. Where "insured" was offered release, but the permissive driver was not offered a release in the *Stowers* letter, no *Stowers* duty was created. *Home State County Mutual Inc. Co. v. Horn*, 2008 W.L. 2514332 (Tex. App. – Tyler June 25, 2008, memorandum opinion). **This opinion seems in opposition to a recent Fifth Circuit opinion in which a settlement offer was made to only one of two insureds. The carrier paid the demand and the other insured sued. The Fifth Circuit held that by paying a reasonable demand within the policy limits for one insured, the other could not complain even though it left them without coverage.** *Pride Transportation v. Continental Casualty Co.*, 2013 W.L.586791 (5th Cir. Feb. 6, 2013, *slip copy*) **The distinction between these two case likely lies in the assignment in *Horn*. The permissive driver's estate, rather than the policy holder made the *Stowers* assignment to the injured plaintiff. The *Stowers* demand was made only to the**

"insured" not the permissive driver's estate. Consequently, Home State was able to argue that even though they had a duty to defend and indemnify the permissive driver, the *Stowers* demand was made only on the "insured" not the estate of the permissive driver.

vi. An excess carrier may also claim a *Stowers* duty when it is exposed because of the primary carrier's failure to settle within the primary limits. *American Centennial Ins. Co. v. Canal Ins. Co.*, 843 S.W.2d 480 (Tex. 1992).

vii. Finally, 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 may effectively destroy any *Stowers* action. There are devils in the details in this case, however, so the holding does not have universal application. *In re Davis*, 253 F. 3d 807 (5th Circuit, 2001).

d. What constitutes separate "occurrences?"

Two collisions separated by 2 to 5 seconds, and 30 to 300 feet, constituted two separate occurrences, and required the payment of two separate policy limits. *Liberty Mutual Ins. Co. v. Rawls*, 404 F.2d 880 (5th Cir. 1968).

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." *Id.* at 881.

4. <u>Additional third party rights under liability coverage.</u>

a. Claimant in a liability claim has third party beneficiary status as to the insurance contract. Action is not ripe until after judgment is entered against insured. *Dairyland County Mutual Insurance Co. v. Childress*, 650 S.W.2d 770 (Tex. 1983)

b. Third party claimant does not have Ins. Code, or consumer status in an action against liability carrier. His third party beneficiary status allows only contract damages after judgment. *Allstate v. Watson*, 876 S.W.2d 145 (Tex. 1994). This rule holds true even if the third party claimant is also a named insured under the policy (wife suing a husband). *Rumley v. Allstate Indemnity Co.*, 924 S.W.2d 448 (Tex. App.—Beaumont 1996, no writ). Hint: After a judgment, 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. Carrier may create liability under the DTPA by its actions toward a third party claimant. *Webb v. International Trucking Co., Inc.*, 909 S.W.2d 220 (Tex. App.– San Antonio 1995, no writ)

Carrier that authorized repairs, told third party claimant where to take the truck and promised to have it fixed. By doing so, carrier incurred liability under the DTPA, despite 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. Distinguishes case from *Allstate v. Watson* in that liability does not arise from settlement negotiations.

5. <u>First party rights under liability policy.</u>

a. Liability carrier is not liable for the acts of the defense counsel it hires to defend the insured. *State Farm Mutual Automobile Insurance Co. v. Traver*, 980 S.W.2d 625 (Tex. 1998)
Case reaffirms *Stowers* obligations, and suggests that there may be broader liability when defense is undertaken, but done so in a way that undermines their insured.

b. Older case law held that when liability carrier simply refuses to defend, the insured's remedy is contractual and *Stowers*, only. *Maryland Insurance Co. v. Head Industrial Coatings & Service, Inc.*, 938 S.W.2d 27 (Tex. 1996). **But, see** *Rocor International, Inc. v. National Union Fire Ins.*, 77 S.W.3d 253 (Tex. 2002) **which holds that a carrier can be liable under Tex. Ins. Code §21.21 for unfair practices in defending a third party claim. Case imposes *Stowers* elements in triggering liability, including a demand within policy limits. The even more recent case of** *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007), **re-enforces this liability.** *Rocor* **also gives more latitude to the undefended insured in making deals with the plaintiff to protect himself. In** *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696 (Tex. 1996) **the court disallowed a collusive deal where the carrier was still providing a defense under a reservation of rights. If you encounter this situation read** *Rocor* **and** *Gandy* **to see where the boundaries are placed. Look also at** *Evanston Insurance Co. v. ATOFINA Petrochemicals Inc.*, 256 S.W.3d 660 (Tex. 2008).

c. When a carrier pays a non-covered claim, it will be very difficult for them to get their money back. *Texas Association of Counties County Government Risk Management Pool v. Matagorda County*, 53 S.W.3d 128 (Tex. 2000). *Excess Underwriters of Lloyd's, London v. Frank's Casing Tool and Rental Tools, Inc.*, 246

S.W.3d 42 (Tex. 2008), in an earlier rendition of the opinion had held otherwise. On rehearing, the court realigned its ruling with *Texas Association of Counties County Government Risk Management Pool v. Matagorda County*.

d. When limits are paid, duty to defend ends. *Mid-Century Insurance Co. v. Childs*, 15 S.W.3d 187 (Tex. App.– Texarkana 2000, no pet.)

Once 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."

6. Out of State Policies

Which law governs an out of State policy when the wreck happens in Texas? Texas follows the most significant relationship rule articulated in *Duncan v. Cessna Aircraft Co*., 665 S.W.2d 414, 420-421 (Tex. 1984) in applying a particular State's law to the contract. However, Tex. Ins. Code. § 21.42 mandates that Texas law will apply to the contract if 1) the proceeds are payable to a Texas citizen or inhabitant, 2) the policy is issued by a carrier authorized to do business in Texas, and the 3) the policy is issued in the course of the carrier's Texas business. *Scottsdale Ins. Co. v. National Emergency Services, Inc.*, 175 S.W.3d 284 (Tex. App.– Houston [1st Dist.] 2004, rev. denied).

Finally, most liability policies will have a clause in them that provides the minimum insurance requirements of the where the vehicle is being operated.

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. *Mid-Century Insurance Company of Texas v. Kidd*, 997 S.W.2d 265 (Tex. 1999) at 271. 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. *Tex. Ins. Code* §1952.151 (2). The benefits must be paid within 30 days of the receipt of the claim. *Tex. Ins. Code* §1952.156.

1. Waiver of PIP

a. Tex. Ins. Code §1952.152

(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 Tex. Ins. Code §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.

(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. *Old American Mutual Fire Ins. Co. v. Sanchez*, 149 S.W.3d 111 (Tex. 2004).

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

d. Electronic waivers may be affective if they meet the requirements of the Uniform Electronics Transactions Act. The Texas Department of Insurance issued a bulletin in 2002 (B-0002-02) on this subject, but as of yet, there is no case law on the issue. Note the bulletin refers to Tex. Bus. & Com. Act §43.007, but this section

has been re-codified as §322.007. See also, *Cunningham v. Zurich American Ins. Co.* 352 S.W.3d 519 (Tex. App.–Fort Worth 2011, pet. filed) for a discussion of electronic signatures.

3. "Accident" triggers obligation to pay PIP

The statute states that PIP benefits are due if they arise from an "accident". Tex. Ins. Code §1952.151 (the standard policy duplicates this language). 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." *Texas Farm Bureau Mutual Ins. Co. v. Sturrock*, 146 S.W.3d 123 at 134 (Tex. 2004).

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.

3. PIP limits

a. Two separate PIP policies can be stacked to fully compensate damages. *Travelers Indemnity Co. of Rhode Island v. Lucas*, 678 S.W.2 732 (Tex. App.–Texarkana 1984, no writ).

b. Within one policy PIP limits cannot be stacked (multiple vehicles on one policy). *Guerrerro v. Aetna Casualty and Surety Co.*, 575 S.W.2d 323 (Tex. App.–San Antonio 1978, no writ)

c. Even if multiple policies are available, PIP payments cannot exceed actual damages. *United States Automobile Association v. DiCarlo*, 670 S.W.2d 756 (Tex. App.–El Paso 1984, writ ref'd n.r.e.).

4. Benefits payable

a. Tex. Ins. Code §1952.151

"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. Tex. Ins. Code §1952.155

Payment is required regardless of fault or other available benefits (except for an offset against a liability claim made on the same policy *Tex. Ins. Code §1952.159*

c. Tex. Ins. Code §1952.157

Provides attorney's fees, 12% penalty and interest if benefits are not timely paid (30 days allowed for payment *Tex. Ins. Code §1952.156*)

d. Loss of a prospective job may qualify for PIP benefits. *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).

Fact issue. First opinion reversed summary judgment in favor of insurer on this issue. Second opinion affirmed a jury verdict against the insured.

e. PIP payments must be made to the beneficiary, not to the healthcare provider, absent a valid assignment signed by the insured. *Texas Farmers Insurance Co. v. Fruge*, 13 S.W.3d 509 (Tex. App.– Beaumont 2000, rev. denied).

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 they are a health insurance company and discount their payments?

The statute says the carrier must pay "reasonable expenses that…are for necessary" medical services. *Tex. Ins. Code §1952.151*. We now have a case on this issue and it favors the carrier. *Allstate Indem. Co. v. Forth*, 204 S.W.3d 795 (Tex. 2006). Here 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

Policy provision which gave credit for med pay against UM benefits was ineffective to extent it reduced benefits below the statutory minimum limits. *Westchester Fire Ins. Co. v. Tucker,* 512 S.W.2d 679 (Tex. 1974).

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. *Mid-Century Insurance Company of Texas v. Kidd,* 997 S.W.2d 265 (Tex. 1999) (cites State Board of Ins. rate setting as one justification.)

3. Settlement with third party

Settlement with the third party liability carrier destroys the subrogation rights of the Med Pay carrier. Court holds that the settlement constitutes a material breach of the contract by the insured, and allows carrier to deny Med Pay benefits. *Mendez v. Allstate Property & Casualty Ins. Co.,* 231 S.W.3d 581 (Tex. App. Dallas 2007, no pet. hist).

4. Common fund and attorney's fees

The case law is split on this issue. *Valle v. State Farm,* 5 S.W.3d 745 (Tex. App.–San Antonio 1999, rev. denied), summary judgment in favor of State Farm affirmed, holding that St. Fm. conclusively showed that liability was uncontested and damages were liquidated, hence no common fund was created by plaintiff attorney's efforts.

Allstate v. Edminster, 224 S.W.3d 456 (Tex. App.–Dallas 2007, no pet.) held that there was a fact issue that precluded summary judgment for either party. Two cases are hard to reconcile.

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. *Mid-Century Insurance Company of Texas v. Kidd, supra.*

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. *Valentine v. Safeco Lloyds Ins. Co.,* 928 S.W.2d 639 (Tex. App.–Houston [1st Dist.] 1996, writ den'd). 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. *Brainard v. Trinity Universal Ins. Co.,* 216 S.W.3d 809, 50 Tex. Sup. Ct. J. 271, Tex. 2006), *State Farm Mutual Auto Ins. v Nickerson,* 216 S.W.3d 823 (Tex. 2006) and *State Farm Mutual Auto Ins. v Norris*, 216 S.W.3d 819 (Tex. 2006).

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. Exclusion for "vehicles available for regular use" has been disallowed in certain circumstances because applying it would defeat the purpose of the UM statute. *Briones v. State Farm Mutual Auto Ins. Co.* 790 S.W.2d 70 (Tex. App.– San Antonio 1990, writ denied)

Insured was injured in a vehicle that was available for his regular use at work. Neither it 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. Court expressed disagreement with earlier pre-*Stracener* opinions such as *Hall v. Southern Farm Bureau Casualty Ins. Co.* 670 S.W.2d 775 (Tex. App.–Fort Worth 1984, no writ).

Still, *Briones* has come under some criticism and is likely limited to its facts. *Daughter v. State Farm Mut. Auto Ins. Co.*, 31 Fed/ Appx. 839, (5th Cir. 2002). Other opinions with different circumstances have upheld the exclusion. *Verhoev v. Progressive County Mut. Ins. Co.*, 300 S.W.3d 803 (Tex.App.-Fort Worth,2009, no pet.)

b. Exclusion of a non-listed 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. *Bergensen v. Hartford Insurance Company,* 845 S.W.2d 374 (Tex. App.– Houston [1st Dist.] 1993, writ ref'd)

Such exclusion does not violate the Ins. Code or the rationale of *Stracener.* This 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 Auto. Ins. Co.,* 835 S.W.2d 804 (Tex. App.–Austin 1992, writ denied). **Note, this holding is questioned and modified somewhat by** *Verhoev v. Progressive County Mut. Ins. Co.* This case involves a divorced couple. Ex-husband was driving, ex-wife was injured because of driver's negligence. Both were named insureds under the same policy with two different vehicles. The court held that plaintiff could recover UIM benefits as an insured under the same policy, not as an occupant of the vehicle, but under her own coverage. This case presents rather unique facts and turns on the ambiguity of the word "you" in policy. at 815

c. Definition of uninsured vehicle does not include government vehicles. *Francis v. International Service Insurance Co.,* 546 S.W.2d 57 (Tex. 1976)

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

The cases addressing this issue have dealt with slightly different policy language, but under most policies there is a two prong test. Was the driver of the governmental vehicle uninsured? Second, does a statute impose liability on the governmental entity in an amount less than the UM limits? Both questions must be answered "yes" to escape the exclusion. See *Ohio Cas. Group of Ins. Cos. v. Chavez,* 942 S.W.2d 654, 658–59 (Tex.App.-Houston [14th Dist.] 1997, writ denied) and *Malham v. Governmental Employees Ins. Co.,* 2012 W.L. 412969 (Tex. App. – Austin 2012, rev. denied).

d. If the other vehicle has insurance, a potential policy defense does not make it an "uninsured vehicle." *Garcia v. Travelers Insurance Co.,* 501 S.W.2d 754 (Tex. Civ. App.–Houston [14th Dist.] 1973, no writ).

In this case the insured failed to cooperate with its liability carrier. The plaintiff's claim that this made the vehicle "uninsured" was rejected. This case should not be read too broadly. Here the appellate court simply sustained the trial court's finding that liability coverage had not been adequately refuted on the record. The opinion goes on to state, "Quite a different question would have been presented by the record had the trial judge in this case made different factual findings. The covering company may delay or avoid decision as to coverage for such a length of time and in such a manner as to constitute some evidence of denial of coverage in fact. Defending under a reservation of right, a non-waiver agreement, or institution of a suit for declaratory judgment may constitute evidence of such denial in a proper case." at 755.

e. However, if the liability carrier actually denies coverage, the vehicle is "uninsured" and the UM coverage comes into play. *Milton v. Preferred Risk Ins. Co.,* 511 S.W.2d 83, 85 (Tex. Civ. App.–Houston [14th Dist.] 1974, writ ref'd n.r.e.)

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 considered 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. *McDonald v. Southern County Mutual Ins. Co.,* 176 S.W.3d 464 (Tex. App.–Houston [1st Dist.] 2004, no pet.).

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 Co.,* 272 S.W.3d 603 (Tex. 2008). 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. Please note, 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 where the insured was when the uninsured motor vehicle struck 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." *Greene v. Great American Ins. Co.*, 516 S.W.2d 739, 744-5 *dissenting on other issues* (Tex. App.–Beaumont 1974, writ ref'd n.r.e.).

3. "Accident" under the UM policy

a. Like the liability and PIP portions of the policy, a claim under the UM portion of the policy requires an "accident." *Farmers Insurance Exchange v. Rodriguez*, 366 S.W.3 216 (Tex. App.– Houston [14th Dist.] 2012, rev. denied). Here unloading a trailer was considered "use" of a vehicle and therefore covered.

b. An intentional act by another may give rise to a covered "accident" under the UM policy. *Whitehead v. State Farm Mut. Auto Ins. Co.*, 952 S.W.2d 79 (Tex. App. –Texarkana 1997), reversed on other grounds, 988 S.W.2d 744 (Tex. 1999). In this case an insured was shot by someone in another vehicle. The case was later reversed on the "use of a vehicle" question, but the Court of Appeals opinion is undisturbed on the "intentional act" issue. The Court of Appeals held that even if the act was intentional by the shooter, it was unexpected from the point of view of the insured. See also, *Home State County Mut. Ins. Co. v. Binning*, 390 S.W.3d 696 (Tex. App.–Dallas 2012, no pet.)

4. Benefits payable under UM

a. Passenger who had collected the full liability limits against the driver, could not also collect UIM benefits against the driver on the same policy. *Rosales v. State Farm Mutual Auto. Ins. Co, supra.*

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

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. Court holds 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. Conversely, if the plaintiff allows the limitations period to run against an insured motorist, the carrier still gets the credit for the, now uncollectable, liability limits. *State Farm Mutual Automobile Ass. v. Bowen*, 2013 W.L. 1087796 (Tex. App.– Eastland 2013).

d. Punitive damages are likely not recoverable under UM policy. *Vanderlinden v. United States Automobile Association*, 885 S.W.2d 239 (Tex. App.– Texarkana 1994, writ denied)

This case notes the split in Texas, as well as U.S. authority on the issue, recognizing a different holding in *Home Indemnity Co. v. Tyler*, 522 S.W.2d 594 (Tex. App.–Houston [14th Dist.] 1975, writ ref'd n.r.e.).

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." *Id.* at 241. Note the Texas Supreme Court has expressly reserved this question. *Government Employees Ins. Co. v. Lichte*, 792 S.W.2d 546 (Tex. App.–El Paso 1990, writ denied per curium 825 S.W.2d 431 (Tex. 1991).

Finally, at least one court has held that it is against public policy to allow UM coverage for punitive damages. *Laine v. Farmers Ins. Exchange*, 325 S.W.3d 661, 666 (Tex. App.–Houston [1st Dist.] 2010, rev. denied).

e. Burden is on the insured to show the uninsured driver was negligent. Burden shifts to the insurance company to show contributory negligence. *Continental Casualty Co. v. Thomas*, 463 S.W.2d 501, 504-505 (Tex. Civ. App. Beaumont 1971, no writ).

f. The "paid/incurred" limitations on medical expenses are applicable to UM claims. *Progressive v. Delgado*, 335 S.W.3d 689 (Tex. App.–Amarillo 2011, rev. denied).

5. Policy limits under UM

a. Cannot stack UM limits within one policy, even for separately listed vehicles. *Monroe v. Government Employees Ins. Co.*, 845 S.W.2d 394 (Tex. App.– Houston [1st Dist.] 1993, writ denied)

Insureds' daughter was killed as a pedestrian. Insureds argued that since they had two vehicles listed in the policy, they had two separate limits for their UM coverage. Note that 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."

b. Cannot stack UM limits within multi-vehicle policy when one vehicle is involved in a collision. *Upshaw v. Trinity Companies*, 842 S.W.2d 631 (Tex. 1992); see also *Westchester Fire Ins. Co. v. Tucker*, 512 S.W.2d 679 (Tex. 1974). Not every state follows this rule. Some out of state policies allow a policy limit under each listed vehicle.

Same holding as *Monroe*, only one of the cars in a multi-vehicle policy was involved in the collision. Insured's made the same argument for stacking UM coverage within the policy. Argument was rejected. Court construed "Limit of Liability" language in the UM coverage to dictate result. "Maximum limit of liability for all damages for bodily injury sustained by any one person in any one accident." Mauzy and Gammage dissenting.

c. Only one per person limit available even with loss of consortium claim in UM policy. *Miller v. Windsor Insurance Co.*, 923 S.W.2d 91 (Tex. App.–Fort Worth, 1996, writ denied) (follows *McGovern v. Williams*, 741 S.W.2d 373 (Tex. 1988)).

d. Plaintiff's claim for mental anguish for the death of her husband was not covered under UM policy because she had not been injured in the accident. (policy did pay one limit for husband's "injuries and death") *Eshtary v. Allstate Insurance Co.*, 767 S.W.2d 291 (Tex. App.–Fort Worth, 1989. Writ denied) cites *McGovern v. Williams.* **Note, however, the cases that have suggested such damages may be collected if there is a physical manifestation of the mental anguish.** *State Farm Lloyds v. C.M.W.*, 53 S.W.3d 877, 884-5 (Tex. App.–Dallas 2001, no pet.)

e. Single per person limit cannot be expanded by bystander claim after wrongful death payment under the UM portion of the policy. Wrongful death payment included mental anguish also asserted in bystander claim. *Christian v. Charter Oak Fire Ins. Co.*, 847 S.W.2d 458 (Tex. App.–Tyler 1993, writ denied)

f. Naturally, if more than one policy covers the accident, the UM policy limits can be stacked to the extent of damages. *American Motorists Insurance Co. v. Briggs*, 514 S.W.2d 233 (Tex. 1974).

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. *Carter v. State Farm Mutual Auto. Ass.*, 33 S.W.3d 369 (Tex. App.–Fort Worth 2000, no pet.)

h. Finally, it should be noted Texas is an "excess" state verses a "reduction" state with UIM coverage. In other words, UIM limits are in addition to the available liability limits. *Stracener v. United Services Automobile Association*, 777 S.W.2d 378 (Tex. 1989). Again, other states differ. Many reduce the amount of UM coverage available by the amount of liability limits available. The states divide about evenly between "excess" and "reduction" for UM limits.

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

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." Tex. Ins. Code §1952.108. 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 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. Finally, the courts have held that this right of subrogation extends only to an uninsured/underinsured vehicle - not a non-vehicular tortfeasor.

a. Neither the statute nor the policy gave the carrier any subrogation rights against a non-motorist defendant. *Simpson v. GEICO Gen. Ins. Co.*, 907 S.W.2d 942 (Tex. App.–Houston [1st Dist.] 1995, no writ).

In this case the carrier denied UM payments because the insured had settled with the 3rd party defendant (a construction and barricade company). 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 end of the policy (General Provisions- Part F) did not apply since GEICO had made no payments to the insured.

b. Carrier must give permission before insured can settle with underinsured defendant because settlement destroys their subrogation right. *Traylor v. Cascade Ins. Co.*, 828 S.W.2d 292 (Tex. App. - Dallas 1992, no writ).

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

c. Carrier may also waive the permission requirement by its actions. *Ford v. State Farm Mutual Auto. Ins. Co.*, 550 S.W.2d 663 (Tex. 1977).

In this 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.

d. Looking from the other direction, some entities have a subrogation interest against UM benefits and some do not. Judy Kostura's exhaustive work on subrogation is recommended for the details. Here is a quick summary.

-Hospital Liens do not attach to UM benefits. *Members Mutual Ins. v. Hermann Hospital*, 664 S.W.2d 325, 328 (Tex. 1984).

-U.S. Army medical benefits are entitled to subrogate against UM benefits under the Federal Medical Care Recovery Act. *Warmbrod v. USAA County Mutual Ins. Co.*, 367 S.W.3d 778 (Tex. App.–El Paso 2012, rev. denied).

-ERISA subrogation interest may or may not attach, depending on the language of the plan.

-Most importantly, Tex. Civ. Prac. & Rem. Code, Chapter 140 applies to UM coverage. For state controlled plans, there may be no subrogation at all. Again, see Judy's paper.

7. <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. UM policy cannot take a policy limit credit for liability payment if damages exceed both. *Stracener v. United Services Automobile Association*, 777 S.W.2d 378 (Tex. 1989)

b. UM carrier does get full credit for the liability limits, even if insured settled for less than the limits. *Olivas v. State Farm Mutual Automobile Ins. Co.*, 850 S.W.2d 564 (Tex. App.–El Paso 1993, writ denied)

c. A liability carrier does not get credit for earlier payments by a UM carrier. *Bartley v. Guillot*, 990 S.W.2d 481 (Tex. App.–Houston [1st Dist.] 1999, rev. denied)

Plaintiff settled with her UM carrier prior to trial and dismissed the uninsured driver from the case. Case proceeded to trial against insured driver and was awarded $30,000 (UM settlement was 20K). Defendant asked for a credit under Tex. Civ. Prac. & Rem. Code §33.014. Court held not entitled to credit. Code addresses negligence. UM payment was made under contract. Court also rejected common law argument of double recovery. UM carriers' right of subrogation was against uninsured driver, not insured defendant.

…however, a UM carrier can claim reimbursement from a subsequent liability settlement, even if it's the same carrier. *State Farm Mut. Auto. Ins. Co. v. Perkins, 216 S.W.3d 396, 400 (Tex. App. – Eastland 2006, no pet.).*

d. For UM carrier to receive credit for liability payment it must plead and prove liability payment as an offset. *Hampton v. State Farm Mutual Insurance Co.*, 778 S.W.2d 476 (Tex. App.–Corpus Christi 1989, no writ) (Case recognizes bystander damages under UM coverage.)

e. *Hanson v. Jankowiak*

This is not really the style of a case. It is two separate cases that came up with opposite conclusions on an important issue. *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.)

This is the scenario. A person is a passenger injured in an accident in which the driver of his car and the other driver are both at fault. He collects against his driver's liability policy and the other driver's. 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. *Rosales v. State Farm Mutual Auto. Ins. Co., supra* 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 not reconcilable look what the 14th Court says in *Jankowiak*, "In short, we find the *Hanson* opinion wrongly decided, and we decline to follow it." *Id.* at 209.

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. That distinction does not reconcile the opinions as noted by the language quoted above.

i. 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. *Hamaker v. American State Ins. Co.*, 493 S.W.2d 893, 898 (Tex. Civ. App. –Houston [1st Dist.] 1973, writ ref'd n.r.e.), *Fidelity and Casualty Co.*

v. McMahon, 487 S.W.2d 371, 372 (Tex. Civ. App.–Beaumont. 1972, writ ref'd n.r.e.). Also, it works the other way as well. Worker's comp 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. For a discussion see, *Erivas v. State Farm Mut. Auto. Ins. Co*., 141 S.W.3d 671, 678 (Tex.App.-El Paso 2004, no pet).

ii. The UM carrier receives credit for all of the liability settlements, even if, in a subsequent trial, one of the settling defendants is exonerated from liability. *Melencon v. State Farm Mut. Auto Ins. Co.*, 343 S.W.3d 567, 570 (Tex. App.–Houston [14th Dist.] 2011, no pet.). The plaintiff settled with two defendants and went to trial against the UM carrier. As part of the UM case, the jury decided liability against the "underinsured" defendants. They found only one of the defendants liable. The plaintiff argued that the UM carrier received no credit from the defendant who was exonerated because they were not "legally responsible" for the plaintiff's damages. The court rejected that argument, holding that the UM carrier received full credit for all of the settlements.

8. Hit and run

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 (Tex. Ins. Code §1952.104) and in the policy. 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. *Latham v. Mountain States Mutual Cas. Co.,* 482 S.W.2d 655 (Tex. App.–Hous. [1st Dist.] 1972, writ ref'd n.r.e.). This rule was reaffirmed by the Texas Supreme Court in *Old American Mutual Fire Ins. Co. v. Sanchez*, 149 S.W.3d 111 (Tex. 2004).

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. *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), *Texas Farmers Ins. Co. v. Deville*, 988 S.W.2d 331 (Tex. App.–Houston [1st Dist.] 1999, no pet.). 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. *Nationwide Ins. Co. v. Elchehimi,* 249 S.W. 3d. 430 (Tex. 2008). Finally, ice falling off a passing tractor trailer did not satisfy the contact requirement. *Hernandez v. Allstate County Mut. Ins. Co.*, Not Reported in S.W.3d, 2010 WL 454949 (Tex. App.–San Antonio, 2010).

Again, the contact rule is not unique to Texas, but many states do not have the rule or have some variation of it.

9. Bad faith? Ins. Code Penalties? In UM coverage

In Lloyd Doggett's words, "this majority [of the Supreme Court] never met an insurance company it didn't like." *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 33 (Tex. 1994). Justice Doggett's observation was given emphasis in the *Brainard, Norris,* and *Nickerson* opinions cited above. The Court, in these three Christmas gifts to the insurance industry, 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 Ins. Co.*, 2007 W.L. 2089435 (N.D. Texas, July 18, 2007) reserved judgment on the plaintiff's extra contractual claims, pending the outcome of the underlying liability and damage issues. Two other Northern District opinions have followed *Schober*, *Owen v. Employers Mutual Casualty Co.*, 2008 W.L. 24893 (N.D. Tex. March 28, 2008) and *Stoyer v. State Farm Mutual Automobile Ins. Co.,* 2009 W.L. 464971 (N.D. Tex. 2009). One decision from the Southern District has disagreed with these holdings. *Weir v. Twin City Fire Ins. Co.,* 622 F. Supp. 2d 483 (S.D. Tex. March 31, 2009). The clear implication in the Northern District opinions is that these actions survive *Brainard.* The Amarillo Court of Appeals has held, however, that the delay in payment penalties under the Tex. Ins. Code §542 do not come into play until the underlying judgment against the uninsured tortfeasor is final. *Mid-Century Ins. Co. of Texas v. Daniel*, 223 S.W.3d 586 (Tex. App.– Amarillo 2007, pet. denied). Contrast this case with *Terry v. Safeco Ins. Co. of Am., 930* F. Supp. 2d 702, 714 (S.D. Tex. 2013) which held that when the carrier makes an offer on the UM claim, it must comply with the 542 deadlines in paying that amount.

The issue in *Brainard, Norris,* and *Nickerson* was attorney's fees under Tex. Civ. Prac. & Rem. Code §38.001. 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.

Perhaps the best summary of where we are on this issue is proclaimed in *Accardo v. America First Lloyds Ins. Co.*, 2013 W.L.4829252 (S.D. Tex. September 10, 2013). Here the court followed the majority of Texas Federal District courts by re-affirming that "bad faith" survived *Brainard*, but the bar is set high. In granting summary judgment for the insurance company, the court held, "*Once the insurer has met its burden of showing undisputed evidence that supports finding a reasonable basis to delay payment because there was a bona fide dispute as to the uninsured motorist's fault or the extent of the insured's damages, the insured must point to factual evidence that calls into doubt the bona fides of the dispute and the reasonableness of the insurer's actions.*" at 8. It will take a truly outrageous case to meet this standard.

10. **Trying the UM Case**

a. "An Insured Seeking The Benefits Of Uninsured/Underinsured Motorist Coverage May (1) sue the insurance company directly without suing the uninsured/underinsured motorist; (2) sue the uninsured/underinsured motorist with the written consent of the insurance company, making the judgment binding against the insurance company; or (3) sue the uninsured/underinsured motorist without the written consent of the insurance company and then relitigate the issue of liability and damages. *Millard*, 847 S.W.2d 668, at 674. *Criterion Ins. Co. v. Brown*, 469 S.W.2d 484, 485 (Tex. Civ. App. –Austin 1971, writ ref'd n.r.e.)." cited *In re Koehn*, 86 S.W.3d 363, 367 (Tex.App.-Texarkana 2002, orig. proceeding).

b. Severance and Abatement of "bad faith" issues. A UM carrier can generally sever and abate any "bad faith" claim that is plead with the underlying claim.

The rationale has been that if an offer is made on the underlying claim that evidence is relevant to the "bad faith" portion of the claim and prejudicial to the carrier on the underlying claim as an inadmissible offer of settlement. *In re United Fire Lloyds*, 327 S.W.3d 250 (Tex. App.–San Antonio 2010, no pet.) At least one court has ignored the offer of settlement element in ordering a severance and abatement. *In re Old American County Mut. Fire Ins. Co.*, 2013 WL 398866 (Tex. App.–Corpus Christi 2013, no pet.)

c. Severance and abatement without "bad faith" allegations.

Generally, the underinsured, or uninsured, driver can ask for abatement. The thinking is that this defendant is entitled to keep insurance out of his case. *In re Koehn*, 86 S.W.3d 363, 367 (Tex.App.-Texarkana 2002, orig. proceeding). However, the UM carrier does not have this argument. *In re Teachers Ins. Co.*, No. 07-03-0330-CV., 2004 WL 2413311, Tex. App.–Amarillo 2004, no pet.- not designated for publication).

d. Venue. Tex. Ins. Code § 1952.110 allows a UM suit to be brought in the county of the collision or the county where the claimant resides.

Once a suit is severed, venue can be revisited and moved out of the claimant's county for the action against the uninsured/underinsured defendant. *In re Teachers Ins. Co.*

e. Proof at trial. The plaintiff must prove liability against the uninsured/underinsured driver and the amount of their damages. They must also prove the policy and, in an underinsured case, the amount of underlying liability coverage. *Mid-Century Ins. Co. Of Texas v. McLain* No. 11-08-00097-CV., 2010 WL 851407 (Tex. App.–Eastland 2010, no pet.)

f. Declaratory judgment or breach of contract?

Brainard held there is no breach of contract until liability and damages have been judicially determined .216 S.W.3d at 819. Some courts have held that a breach of contract claim is not "ripe" as an initial action against the UM carrier. *Terry v. Safeco Ins. Co. of America, supra.* We have little guidance from the appellate courts on the application of Chapter 37 (declaratory judgment) to UM claims, to date. Two of our learned colleagues, Brooks Schuelke and Tom Herald, have both advocated this approach. An alternative is simply to bring suit for the benefits due under the UM policy without specifically naming the cause of action. At some point soon, we will likely have a more definitive answer, though in practice, it makes little difference. The jury issues are the same with either approach.

g. Conditions precedent.

The plaintiff should allege that "the plaintiff has complied with all conditions precedent." This allegation simply means that the plaintiff has done everything necessary under the policy to bring the lawsuit. (e.g. paying the premiums, notifying the carrier, calling the police in a "hit and run" case, etc.). With this allegation in the petition, the defendant must specifically deny, under oath, any condition precedent with which the plaintiff did not comply. If the defendant makes this allegation, then the burden is on the plaintiff to prove that specific condition precedent. Otherwise, the plaintiff's assertion is taken as true. *Tex. R. Civ. Proc.* 54 and 93.15, *Love of God Holiness Temple Church v. Union Standard Ins. Co.*, 860 S.W.2d 179, 181 (Tex. App.–Texarkana 1993, writ denied).

h. Insured status of at-fault driver.

Naturally, there is an issue in an uninsured motorist case over whether the at-fault driver was insured or not. The UM carrier has the burden of proof on this issue. Tex. Ins. Code §1952.109. This section was passed as a legislative overruling of *State Farm Mutual Ins. Co. v. Matlock*, 462 S.W.2d 277 (Tex. 1970) which held the opposite.

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. In other words, we will pay what we say we will pay, not necessarily what you're owed. Finally, UM property damage claims are governed by third party rules (diminished value, loss of use, etc. are recoverable). *Noteboom v. Farmers Texas County Mutual Ins.*, 406 S.W.3d 381 (Tex. App.–Ft. Worth 2013, no pet.).

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

Case affirms this measure of damages, even if the total exceeds the value of the car. Case discusses duty to mitigate and the limitations of that duty. Rejects an absolute time limit on loss of use. In a landmark decision, the Texas Supreme Court recently expanded loss of use damages to totaled vehicles if the third party carrier delays payment. *JD Towing, LLC v. American Alternative Ins. Corp.*, 478 S.W.3d 649 (Tex. 2016). This opinion affirms the earlier Fort Worth Court's holding in *Morrison v. Campbell* 431 S.W.3d 611 (Fort Worth, Jan. 16, 2014).

b. It is not a prerequisite that the plaintiff actually rent a substitute vehicle in order to recover for loss of use. *Chemical Express Carriers, Inc. v. French*, 759 S.W.2d 683 (Tex. App.–Corpus Christi 1988, writ denied)

i. Even in a third party claim, if carrier authorizes repairs, it may incur extra contractual liability. *See Webb v. International Trucking Co., Inc.*, 909 S.W.2d 220 (Tex. App.–San Antonio 1995, no writ)

ii. Diminished value after repair is recoverable against the third party under the tort measure of damages. *Higgins v. Standard Lloyds*, 149 S.W.2d 143 (Tex. App.–Galveston 1941, writ dism'd).

2. First Party property damage claims

a. Carrier is not required to use OME parts, but must use those of "like kind and quality." *Berry v. State Farm Mutual Automobile Ins. Co.*, 9 S.W.3d 884 (Tex. App.–Austin 2000, no pet.) (citing Tex. Ins. Code. 5.07-1 (now §1952).

b. If vehicle is repairable, it must be repaired to its "useful" pre-accident condition. Carrier cannot simply depreciate the value of the parts replaced based on the age of the vehicle. *Great Texas County Mutual Ins. Co. v. Lewis*, 979 S.W.2d 72 (Tex. App.–Austin 1998, no pet.)

c. Diminished value after repair is not recoverable under first party property damage claims. *American Manufacturers Mutual Ins. Co. v. Schafer*, 124 S.W.3d 154 (Tex. 2003)

Case emphasizes requirement of competent repairs and cites *Lewis* with approval.

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. *Canal Ins. Co. v. Hopkins Towing*, No. 12-06-00411 (Tex. App.– Tyler, 2007) citing *State Farm Fire and Cas. v. Mower*, 917 S.W.2d 2, 4 (Tex. 1995)

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 cost. Tex. Occ. Code. §2303.156(b).

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

a. Tex. Ins. Code §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

b. Tex. Ins. Code §1952.302

The insurer cannot solicit or accept a referral fee from a repair facility

c. Tex. Ins. Code §1952.303

No agreement between an insurer and a repair shop may result in a reduction of coverage

d. Tex. Ins. Code §1952.305

The carrier must provide the beneficiary or third

party claimant with notice of their rights under this section.

F. COMMERCIAL COVERAGE

1. Basic auto coverage under the commercial policy

The coverage under commercial general liability policies is vast and varied. If you have a claim against a commercial entity, it is likely that this type of policy is the policy you will be dealing with. Unlike, the personal auto policy, there is no "standard" policy. Most commercial general liability policies still require Texas Department of Insurance approval. However, there are certain risks that mainline, regulated carriers will not insure against. Policies that insure for these risks often trade in an international market and are not strictly regulated by TDI. It's a jungle out there.

Who is an "insured", what is covered, and under what circumstances varies quite a bit. If the caveat "get a copy of the policy" applies to personal auto coverage, it applies doubly to CGL policies.

a. General Liability

If a company that has purchased CGL coverage, does something culpable, the "general liability" section of the policy is the part of the policy that determines who pays what. These policies are generally "occurrence" based policies that cover activities related to the company's business. They provide coverage for the company and usually certain other individuals who are identified or described in this portion of the coverage.

i. Who's covered?

a. Named Insured

The company (LLC, LLP, corporation, etc.) is likely the named insured. There will be other named insureds, either listed in the declaration page of the policy, or included by definitions within the policy (officers, directors, managers, employees, etc.).

Note, there is no uniformity in who is an insured from policy to policy. Some are expansive, some are restrictive. Some are insureds only under certain circumstances. These folks are referred to as "additional" or "omnibus" insureds because they are described as a class rather than named individually. The contract language is usually given affect as to those covered and those excluded. *Amanzoui v. Universal Underwriters Ins. Co.* No. 2:09-CV-65-TJW, 2010 W.L. 1945775 (E.D. Tex. May 12, 2010).

b. Additional Insureds

An "additional" insured has standing in Texas to bring an action under the insurance contract. *Transport Intern. Pool, Inc v. Continental Ins. Co.* 166 S.W.3d 781 (Tex. App.–Ft. Worth 2005, no pet.) at 786-87.

If the policy insures others from claims that arise out of the named insured's activities, all that is required is that the claim against these "additional insureds" arise out of the activity – not that the primary insured has any direct liability for the claim. In other words, the "additional insured" can be the only one responsible and still come under the primary insured's coverage. *Evanston Insurance Co. v. ATOFINA Petrochemicals Inc.*, 256 S.W.3d 660 (Tex. 2008).

This opinion resolves a conflict between earlier Courts of Appeal decisions on the issue; consequently, any opinion on the issue that predates this opinion is suspect.

Often the policy will name as additional insured, people or companies that the named insured has a contractual obligation to provide coverage for. In these cases reference needs to be made to the contract that triggers the coverage. *Transport Intern. Pool, Inc v. Continental Ins. Co.* 166 S.W.3d 781 (Tex. App.–Ft. Worth 2005, no pet.

c. Separation of Insureds

Most CGL policies have a "separation of insureds" clause. This provision simply means that each insured's action will be looked at separate and apart from every other insureds. *King v. Dallas Fire Ins. Co.*, 85 S.W.3d 185 (Tex. 2002). Consequently, the intentional act of one insured will not relieve the carrier from covering the negligent acts of another insured for the same event. Even without the "separation of insureds" clause, common law construction generally gives a policy this effect. See *Verhoev v. Progressive County Mut. Ins. Co.*, 300 S.W.3d 803, 810 (Tex. App.–Fort Worth 2009, no pet.)

d. Demand by the insured for defense and indemnity

It is axiomatic that just because you have coverage, doesn't mean you have to use it. The insured must request from the carrier a defense and indemnity. *National Union Fire Ins. Co. v. Crocker*, 246 S.W.3d 603, 608 (Tex. 2008). In this case, the insured (an additional insured) did not even know he had coverage. The carrier knew and didn't tell him even though the guy was in the lawsuit that the carrier was defending for the named insured. The court held that the carrier not only had no duty to defend him, no duty to indemnify him after the judgment, but also the carrier did not even have a duty to let him know about the coverage.

ii. What's covered?

Under CGL policies "occurrences" are covered. What's an occurrence? It's what the policy says it is. Generally, an "occurrence" is defined as an accident - something unintentional. Much litigation has ensued from these simple definitions. What if the event occurs one year, but doesn't cause any damage until the next

year? What if no one could reasonably discover the damage until the following year? What if the occurrence could be called a breach of contract?

a. Auto Coverage

Under most CGL policies, auto liability is excluded. Often the CGL policy is delivered as a package that includes an additional commercial auto policy. Also, as part of the main CGL policy itself there may be what is called "hired and non-owned auto **e**ndorsement". As the term implies, this endorsement provides only limited coverage under limited circumstances.

Auto coverage under a CGL policy is not governed by the statutes that pertain to personal auto policies. Uninsured motorist coverage is not required even absent a waiver. *Taylor v. State Farm Lloyds, Inc.*, 124 S.W.3d 665 (Tex. App.–Austin 2003, rev. denied).

b. Garage Coverage

Garage coverage is a common provision in CGL policies that cover auto sales, repairs and related enterprises. This coverage generally applies to the operation of vehicles in and around the company's premises, or in furtherance of its business. The details of the policy language describe its scope.

The following two cases are illustrative of the extent of garage coverage. Again, they both turn on the particular language of the policy. *Farmers Enterprises, Inc. v. Gulf States Ins. Co.*, 940 S.W.2d 103 (Tex. App.–Dallas 1996, no writ) and *Continental Ins. Co. v. Colston*, 463 S.W.2d 461 (Tex. App.–Fort Worth 1971, writ ref'd n.r.e.).

c. PIP and UM coverage under a commercial policy.

There are cases noted earlier that hold some commercial policies are not bound by the rules governing personal auto policies, and do not have to include PIP and UM. These cases deal, however, with policies that are not primary for the vehicle coverage. *Taylor v. State Farm Lloyds, Inc., supra.* If the commercial policy is the primary coverage on the vehicle, the Texas Department of Insurance takes the position that PIP and UM coverage is required absent a waiver. This position is consistent with the statute and supported by case law. *Safeco Lloyds Ins. Co. v. Allstate Ins. Co., supra.*

2. Trucking coverage

Trucking companies have their own minimum insurance requirements. If they are interstate carriers, then federal law spells out the coverage requirements in 49 C.F.R. §367.7. The minimum limits range from $750,000.00 to $5,000,000.00, depending on the cargo the carrier is licensed to haul. If the carrier is intrastate only, the minimum limits are described in 43 Tex. Admin. Code §218.16 and essentially mirror the federal requirements for trucks. The Texas Code also provides limits for buses and other common carriers.

Like other Commercial General Liability policies, the devil is in the details. Who is an insured, under what conditions, and what the policy covers is dependent on the policy language. Some policies apply only when the truck is actually hauling, some cover the driver when driving without an attached trailer (bobtailing).

MCS-90 Endorsement. The federal statute cited above creates an endorsement to the interstate trucking policies that is mandatory and is triggered if for some reason the main policy does not cover the company's negligence. Separate rules govern claims under the MCS-90 endorsement and they generally favor the plaintiff. However, this endorsement is triggered only by a judgment. In most trucking cases, the primary CGL policy will be the one dealing with the claim.

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." *Odom v. Insurance Company of State of Penn.*, 455 S.W.2d 195, 198 (Tex. 1970)

Agent knew of bad driving record, but denied in application. Insured had copy of application and knew it was false. Application was part of policy. Declaratory Judgment action filed by carrier. Summary judgment for carrier. Court affirms summary judgment.

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

Tex. Ins. Code §705.004 Misrepresentation must be material to the risk and contribute to the contingency or event on which the policy became due and payable.

Tex. Ins. Code §705.005. Defense of misrepresentation is available only if insurer can show that it gave notice to the insured by the 91st day that it learned of the misrepresentation.

Tex. Ins. Code §705.051. Misrepresentation does not defeat recovery unless it is a material fact and affects the risk assumed

3. Misrepresentation must be material to the risk and contribute to the loss. *Harrington v. Aetna Casualty and 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)).

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

"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." *United States Fire Ins. Co. v. United Serv. Automobile Assn.*, 772 S.W.2d 218 (Tex. App.–Dallas 1989, writ denied) (passenger grabs the wheel case).

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 *American Motorists Insurance Co. v. Briggs*, 514 S.W.2d 233 (Tex. 1974) as authority. *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 carriers 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.

"Other insurance" clause is invalid to the extent it precludes recovery of actual damages within the combined policy limits. *American Motorists Insurance Co. v. Briggs*, *supra.*

Again, the carrier argued in this case that "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. *Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Co.*, 444 S.W.2d 583 (Tex. 1969)

4. **Finally, with the variation in policy language that has proliferated since 2003, the language of each policy is critical**. *Safeco v. Allstate*, 308 S.W.3d 49, (Tex. App.–San Antonio 2009, no pet.) holds that where one policy says it is secondary on non-owned vehicle (Allstate, standard policy) and the other does not, then both are joint and several.

C. CANCELLATION

1. Tex. Ins. Code §551.101, et seq., governs cancellation of auto policies. 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 also requires notice for a "nonrenewal" of an existing policy.

2. Texas Transp. Code §601.073 prohibits a carrier from cancelling a policy retroactive to an existing claim, even in the unlikely event the insured consents.

3. A carrier may be estopped from cancelling a policy if they continue coverage with full knowledge of grounds to cancel. *National Old Line Ins. Co. v. Garcia*, 517 S.W.2d 621, 625 (Tex. App.–Fort Worth 1975, writ ref'd n.r.e.)

4. If the coverage is not timely renewed, however, a late payment will not necessarily reinstate the policy back to its expiration date. *Hartland v. Progressive*, 290 S.W.3d 318 (Tex. App.–Houston [14th Dist.] 2009, no pet.).

IV. General Practice Tips

A. DISCOVERY OF THE POLICY

1. Get the policy from the defendant. You are entitled to it.

a. Tex. R. Civ. Proc. 192.3(f) Indemnity and insuring agreements.

"Except as otherwise provided by law, a party may obtain discovery of the existence and contents of any indemnity or insurance agreement under which any person may be liable to satisfy part or all of a judgment rendered in the action or to indemnify or reimburse for payments made to satisfy the judgment..."

b. Tex. Transp. Code §601.073 (f)

"The policy, any written application for the policy, and any rider or endorsement that does not conflict with this chapter constitutes the entire contract between the parties."

2. <u>But maybe not all of it....</u>

In re Dana Corporation, 138 S.W.2d 298 (Tex. 2004)

Discovery case. Plaintiff sought discovery of a broad range of insurance documents, including erosion information on an eroding policy. Court held that nothing more than the insurance agreement is discoverable under Tex. R. Civ. Proc. 192.3(f). Insurance information beyond that is subject to the general scope of discovery rule, "relates to the claim or defense of the party."

In re American Home Assurance Company, 88 S.W.3d 370 (Tex. App.–Texarkana 2002, orig. proceeding)

First party case. Court granted mandamus, denying production of information on reserves set by carrier. But, see *In re General Ins. Agencies of America, Inc.*, 224 S.W.3d 806 (Tex. App.–Houston [14th Dist.] 2007).

In re Madrid 242 S.W.3d 563 (Tex. App. –El Paso, 2007)

Third party case. Plaintiff sought reservation of rights letters through discovery which trial court granted. El Paso Court of Appeals granted mandamus holding that the trial court abused its discretion.

B. BALANCING COVERAGE BETWEEN THE VARIOUS TYPES OF INSURANCE

Often the plaintiff will have health insurance, PIP, UM coverage and collision. All of these coverages need to be balanced, along with the third party liability coverage, so that the plaintiff ends up with the maximum benefit from the coverages available.

1. <u>Healthcare providers - get them to take the health insurance</u>

Healthcare providers are getting squeezed right and left. Their costs are going up and their reimbursements are going down. Often they see a patient, even an established patient, who has been in a car wreck and see an opportunity to get paid retail instead of wholesale. Even if they have a contract with the health insurance carrier, they would rather submit their bill through PIP or even wait on a third party settlement. The reason is simple. They have a discount agreement with the health insurance carrier that they do not have with the auto carriers. Still, it is in the client's best interest to have their bills paid through the health insurance, even if they have to pay part of it back at settlement. They then get the benefit of the discount and can use their PIP for deductible's, co-pays, and lost wages. Unfortunately, *Fortis Benefits v. Cantu*, 234 S.W.3d 642 (Tex. 2007) obliteration of the common fund doctrine makes this approach less beneficial than it used to be.

a. If the healthcare provider is required or authorized to bill a health insurance carrier and they do not do so in a timely manner, they may waive the right to payment altogether. *See* Tex. Civ. Prac. & Rem. Code §146.001, et seq

b. Encourage your client not to give an assignment of the PIP benefits. *See Texas Farmers Insurance Co. v. Fruge*, *supra*

2. <u>Property damage</u>

There is often a dispute at the beginning of the case over property damage. There are three main sources for evaluating "fair market value" for a vehicle. Kelly Blue Book, NADA and CCC. Kelly Blue Book and NADA are available online, so you can make a pretty close evaluation of your client's vehicle from your office. NADA is the gold standard. It is the source the banks and car dealers use the most. CCC is a private company which uses market comparisons and is usually lower than the other two. Guess which source the insurance companies frequently use?

If you have difficulty getting the liability carrier to pay the property damage, go through your own carrier on the collision coverage, if it's available. Even though your client will have to eat the deductible, you at least will be dealing with a carrier who has duties under the Insurance Code and the common law to your client. The third party carrier does not. Finally, your client's carrier will subrogate against the liable carrier to get their money, and your client's deductible back. Let two insurance companies fight it out.

If your client's insurance carrier goes after the third party for their money, they have to also go after the deductible on behalf of their insured, or pay the deductible themselves. If they don't, they have to notify the insured of their inaction in writing at least 90 days before the statute of limitations runs on the negligence action. Tex. Ins. Code §542.204

Finally, if your client is upside down on their note and their car is a total loss, sometimes they can go back to the dealer, pick another car and arrange a transfer of collateral on the original note. They will still lose a little, but they will be able to get back into another car with the same payment.

3. <u>If the third party defendant ignores your lawsuit, make sure you copy his insurance carrier with the lawsuit, the returned citation, and any default judgment you get.</u>

The carrier can assert lack of notice and lack of cooperation as defenses, but they must show prejudice to benefit from these conditions precedent. *Struna v. Concord Insurance Services, Inc, supra.* The more notice they have, the more difficult it will be to show prejudice. Once you have the judgment, you become a third party beneficiary to the third party insurance policy. *Dairyland County Mutual Insurance Co. v. Childress, supra.*

C. INSURANCE COVERAGE AS EVIDENCE

Tex. R. of Evid. 411: "Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another issue, such as proof of agency, ownership, or control, if disputed, or bias or prejudice of a witness."

1. When defendant repeated references to "missing" wreckage, it was proper for plaintiff to show defendant's insurance company took control of the wreckage. *Davis v. Stallones*, 750 S.W.2d 235, 237 (Tex. App.–Houston [1st Dist] 1987, no writ)

2. Evidence of insurance certificate was proper to prove defendant's ownership of the culpable entity. *Meuth v. Hartgrove*, 811 S.W.2d 626, 628 (Tex. App.–Austin 1990, writ denied)

3. Under limited circumstances, a party may inform the jury of its own insurance status to clarify certain misconceptions that the jury might have formed. *See University of Tex. V. Hinton*, 822 S.W.2d 197. 201 (Tex. App.–Austin 1991, no writ).

In most cases, however, the general prohibition against admitting evidence of insurance operates to preclude defendants from showing that they are uninsured." *Bleeker v. Villareal*, 941 S.W.2d 163 (Tex. App.–Corpus Christi 1996, writ dismissed)

4. Insurance carrier's attorney (in UM case) cannot hide behind a *pro se* defendant and mislead the jury as to their real client in order to exclude evidence of insurance coverage. *Perez v. Kleinert*, 211 S.W.3d 468 (Tex. App.–Corpus Christi 2006, pet. filed)

D. RECOMMENDATIONS TO CLIENTS ON AUTO COVERAGE

As practitioners in this area of the law, we are sometimes asked by our clients for recommendations on their own auto policies. Here are a few:

1. Shop price through an independent agent. I know we like dealing with some carriers better than others, but the landscape is changing constantly. The carrier who settles this year, will change direction next. One carrier will buy out another and will fire all their old adjusters and replace them with neophytes. Find an agent that deals with several different carriers and get the best deal you can. (Also, look at the policy - remember there are significant differences in coverage now.) Finally, look at the TDI website for a comparison of policy prices.

2. Most of the time, we are better off with the standard policy rather than some insurance company's creative departure from the standard policy. A lot of different companies offer it at a broad range of prices. If your client departs from this coverage, make sure they read what they are getting. They may be paying a lot for very limited coverage. Finally, a lot of carriers write the standard policy then substantially amend it with endorsement. Look out for that approach.

3. To save money, get high deductibles.

4. Buy UM coverage in an amount equal to the liability coverage. Tex. Ins. Code §1952.104 says you cannot buy higher UM coverage than you have liability, but you can and should match the limits.

5. Buy PIP instead of Med Pay. If your agents suggest otherwise, get another agent.

6. Buy high limits on everything. It usually doesn't cost much more to raise liability, UM and PIP limits significantly higher than the minimum. If your client gets in a wreck, high UM and PIP limits can be a godsend.

E. THE HUMAN CONDITION

I have no legal authority for any of this, but from practicing thirty five years, mainly on the plaintiff's side, I have observed the following:

1. Keep your client's expectations in line with reality. Lawsuits are generally no fun for the client, and they seldom produce pots of gold. Let them know this from the beginning. It is an honest thing to tell them and it will make your life much easier down the road. If they balk, let some other lawyer make them unhappy.

2. Try to get along with everyone. The other side of the docket is generally not evil. They usually are just doing a difficult job the best they can. Not only will your stress level stay down, but it generally helps your

case if the other side does not have an extra motivation to fight you.

3. If you are on the plaintiff's side, try to know the other carrier and adjuster as well as you can. Talk to other attorneys, mediators and the folks themselves to learn as much as you can about their process. Some carriers will wait for mediation before they make a serious offer. Some will wait until a lawsuit is filed. With some carriers, you might as well go pick a jury.

V. Appendix

Table of Authorities

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