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UNINSURED AND UNDER-INSURED MOTORIST CLAIMS

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I. VALUING THE CLAIM QUICKLY AND ACCURATELY

A. Covering the Basics

1. Confirm there was a motor vehicle accident

a. **Texas Farm Bureau Mut. Ins. Co. vs. Sturrock,** 146 SW3d 123 (Tex. 2004) The Court announced a new definition of the term "auto accident." An auto accident occurs where one is involved with another vehicle, an object or a person. The court held that because Sturrock was injured when he became entangled in a portion of his vehicle, the vehicle played the necessary causative role in producing his injuries, thereby entitling him to PIP coverage. Further, because the policy specifically mandated that a covered person is one that is entering or exiting a covered vehicle, the insurer's position would render the definition of "covered person" meaningless. This position was also supported by briefs from the Texas Department of Insurance.

b. **Mid Century v. Lindsey,** 997 S.W.2d 153 (Tex. 1999). A small child was injured as a result of an "automobile accident." Actually the child was injured due to accidental shotgun blast that occurred while the child was climbing into the truck because of the manner in which the shotgun was stored.

c. **Farmers Tex. County Mut. Ins. Co. v. Griffin,** 955 S.W.2d 81, 83 (Tex.1997). The court re-iterated the importance of promoting the purpose of the PIP statute. The Court agreed with the Texas Department of Insurance that the carrier's cramped interpretation of its holding, in which the court stated that the " 'words [motor vehicle accident] evoke an image of one or more vehicles in forceful contact with another vehicle or a person causing physical injury.' " ... in **Griffin and Lindsey** would severely limit an insured's no-fault coverage in a manner that would contravene its purpose and lead to absurd results. Holding: While a collision or near collision are not required to invoke coverage, the vehicle must be more than the mere situs of the accident or injury producing event.

d. **King v. Dallas Fire Ins. Co.,** 85 S.W.3d 185 (Tex. 2002) What constitutes an "auto accident" is determined from the point of view of the insured, not a third party.

B. Get a copy of the policy report
C. Take property damage photographs to confirm there was physical contact
D. Clear evidence of the negligence of the tortfeasor
E. Clear evidence of damages

II. **INVESTIGATING COVERAGE AND FINDING POLICY LIMITS**

A. Verifying Coverage

1. Get a Copy of coverage sheet
2. Verify your client is covered under the policy
   a. **Snyder v. Allstate,** 485 SW2d 769 (Tex. 1972). Father purchased a vehicle for his daughter to drive as she saw fit, but told her "do not let every Tom, Dick and Harry drive the vehicle." She allowed her boyfriend to drive her home late one night. Allstate claimed that the daughter was not named on the title and therefore was not the legal or true owner of the vehicle and therefore did not have authority to give permission to a third party to drive the vehicle. The court found that there was coverage and that the daughter had authority to give such permission, and that having her name on the title or the policy was not a prerequisite to coverage.
   b. United States Fire Ins. Co. v. United Service Automobile Assn., 772 S.W.2d 218 (Tex. App. – Dallas, 1989, writ denied). Permissive use is determined from the point of view of the driver. See **Transportation Code §601.072**. This case can be used to overcome claim of carrier that an unlicensed driver is not a permissive user.
3. If there is no coverage, there is no claim
4. Contact the insurance agent
5. Written rejections of coverage for PIP and UM/UIM coverage
6. Perpetual Renewals
7. Using the UIM adjuster to find out the liability limits

B. Rule 202 Petitions

C. Depositions on Written Questions

1. To prove up the policy limits were exhausted
2. To confirm there are no other available policy limits
3. To obtain property damage photographs
4. To obtain copies of recorded statements and loss reports

III. TOP REASONS FOR DENIALS OF UM CLAIMS

A. The tortfeasor is actually insured

B. The vehicle does not qualify as an uninsured motor vehicle

1. **GOVERNMENT-OWNED VEHICLES**

a. **Foster v. Truck Ins. Exchange**, 933 SW2d 207 (Tex.App.—Dallas 1996). Plaintiff was injured in an accident with a City of Dallas bus. Following a settlement with the City for its limit of liability under the Tort Claims Act, Plaintiff made a UIM claim. The insurer argued that the City bus was not an uninsured motor vehicle because the definition of an "uninsured motor vehicle" specifically excludes government-owned vehicles unless two conditions are met. First, the operator of the government-owned vehicle must be uninsured. Second, there must be no statute imposing liability on the governmental body for an amount equal to or greater than the UM/UIM coverage limits. It is ;2957;2957not the purpose of the UIM statute, however, to protect the insured from all underinsured motor vehicles. See **Francis v. International Serv. Ins. Co.**, 546 S.W.2d 57, 61 (Tex.1976). The purpose is to provide protection only from those motorists who are financially irresponsible. Id. In **Francis**, the supreme court held that the government was not a "financially irresponsible" party for the purposes of UM/UIM protection simply because it was shielded from liability by sovereign immunity. Id. Likewise, the fact that DART's liability is limited by statute does not make it financially irresponsible for the purposes of the UIM statute.

2. **COMPANY CARS: COVERAGE WHILE OCCUPYING A VEHICLE SUPPLIED FOR REGULAR USE**

a. **Briones v. State Farm,** 790 S.W.2d 70 (Tex. App. – San Antonio 1990, writ denied) expressly disapproved of this exclusion when applied to a vehicle that was not actually owned by the insured or family member (i.e. a company car) but occupied by the insured at the time of the collision. See also **Verhoev v. Progressive County Mut. Ins. Co.,** 2009 WL 2357004 (Tex. App. – Fort Worth 2009, no writ). **Briones** was a departure from earlier cases that held the opposite, but those case are pre-**Stracenor** and are acknowledged in this opinion, and disapproved.

C. No Physical Contact with the Unidentified Uninsured Motorist

D. No Police Report

E. No Liability

F. Other Causes of the Injuries and Damages

G. Minor Impact

H. **THE CLAIM IS BARRED BY THE TEXAS WORKERS COMP ACT**

1. **FELLOW EMPLOYEE EXCLUSION**

a. **Truck Ins. Exchange v. Musick**, 902 SW2d 68 (Tex.Civ.App.--Ft. Worth, 1995, writ denied) The fellow employee exclusion in auto insurance policies does not thwart the legislative goal of mandatory insurance, nor does it leave the party seeking redress in this case without a remedy.

b. **Valentine v. Safeco Lloyds Ins. Co.,** 928 S.W.2d 639 (Tex.App.--Houston [1st Dist.] 1996, writ denied). An employee who was injured through the negligence of her employer while occupying the employer's vehicle in the course and scope of her employment and who collected worker's comp benefits brought an action against the

employer's auto liability insurer and her own uninsured motorist carrier. Both insurers were granted summary judgment. Employee could not recover UM/UIM benefits under her own policy which provided that the insurer will pay damages which a covered person is "legally entitled to recover" from owner of uninsured motor vehicle because employee was not "legally entitled to recover" from the employer. The insurer argued successfully that (1) the employer was insured and (2) the employee's exclusive remedy was worker's comp. The majority of courts in other states have precluded such coverage as well.

c. **Soledad v. Texas Farm Bureau Mut. Ins. Co.,** 506 S.W.3d 600 (Tex.App.—Austin, 2017) Soledad was a passenger who was injured while riding in a vehicle driven by a fellow employee. There was no dispute that (1) the fellow employee was negligent and caused the collision; (2) both Soledad and the fellow employee were in the course and scope of their employment at the time of the wreck; and (3) Soledad and the fellow employee were employed with a company that carried worker's comp insurance. The Court affirmed summary judgment for Texas Farm Bureau holding that because workers comp is the exclusive remedy, Soledad is not "legally entitled" to recover from the fellow employee. Therefore, the claim is barred.

I. COVERAGE DEFENSES

1. VEHICLES OWNED BY THE INSURED ARE NOT UNINSURED MOTOR VEHICLES

A. **Upson v. Allstate Indemnity Co.,** 2008 WL 302088 (S.D. Tex. Aug. 5, 2008). Vehicles owned by the insured cannot be underinsured.

b. **Charida v. Allstate Indemn. Co.,** 259 SW3d 870 (Tex.App. – Houston [1st Dist.] 2008, no pet.) Charida was injured while riding in a car owned and driven by her father. She settled her third party claim against her father for his policy limits, and then presented a UIM claim. The Court granted summary judgment in favor of Allstate holding that the vehicle does not meet the definition of an uninsured vehicle because the definition does not include any vehicle or equipment owned by or furnished to or available for the use of the policyholder. The purpose of UM/UIM coverage is to protect insureds from the negligence of strangers to the policy, not family members.

2. VEHICLES SUPPLIED FOR THE REGULAR USE

a. Johnson v. State Farm, 2017 WL 1315379, -- S.W.3d – (Tex.Civ.App. – Austin, 2017). **T**he Court ruled that the determination of the claimant's status as a "family member" is made at the time of the accident rather than at the time the claim is made; and UIM coverage is excluded because the policy exclusion for any vehicle owned by, furnished or available for the regular use of you or any family member includes rental cars. In a case of first impression, the Court also agreed with State Farm that there was no coverage because the rental car vehicle the insured's son was driving at the time of the accident was supplied for the "regular use."

3. WHILE OCCUPYING

A. **Briones v. State Farm,** 790 S.W.2d 70 (Tex. App. – San Antonio 1990, writ denied) expressly disapproved of this exclusion when applied to a vehicle that was not actually owned by the insured or family member (i.e. a company car) but occupied by the insured at the time of the collision. See also **Verhoev v. Progressive County Mut. Ins. Co.,** 2009 WL 2357004 (Tex. App. – Fort Worth 2009, no writ). **Briones** was a departure from earlier cases that held the opposite, but those case are pre-**Stracenor** and are acknowledged in this opinion, and disapproved.

B. **United States Fidelity and Guar. Co. v. Goudeau,** 272 S.W.3d 603 (Tex. 2008). While driving his employer's car, the motorist stopped his car on a freeway to render assistance. After leaving his car to approach the disabled one, the motorist was severely injured when a third driver smashed into both cars and pinned him between them and a retaining wall. Issue: Whether the motorist could recover under his employer's underinsured motorist policy, which applied only if the motorist was "occupying" his car at the time of the accident. The motorist conceded that he was not "in" his car when the accident occurred, and he was not in the process of getting in, on, out, or, off of it. The Texas Supreme Court determined that under the policy, the motorist was not "occupying" the car. Alternatively, the motorist argued that the insurer admitted coverage in response to a request for admission; however, the insurer admitted coverage in its capacity as a worker's compensation carrier, not as an underinsured carrier. Under Tex. R. Civ. P. 198.3, any admission by a party under the rule could be used solely in the pending action, not any other proceeding. Under a standard Texas auto policy, the condition of “while occupying” only applies if the beneficiary is neither the named insured nor a family member.

IV. TOP REASONS FOR DENIALS OF UIM CLAIMS

A. The Insured Has Been Fully Compensated

1. **OFFSETS & CREDITS FOR UM/UIM CLAIMS**

a. **VALID OFFSETS & CREDITS FOR THE FOLLOWING CLAIMS**

(1) **Burden of Proof**

(a) **Farmers Texas County Mutual Insurance Company v. Okelberry**, 2017 WL 2292536(Tex.App.—Houston [14th Dist.] 2017). In this UIM case, the appellate court concluded that the trial court erred by failing to offset the full amount of Mr. Okelberry's settlement with the tortfeasor. The Court held that under the common law, a defendant seeking a settlement credit has the initial burden of proving its right to a credit. This burden may be satisfied by placing the settlement agreement or some evidence of the settlement amount in the record. Once the non-settling defendant demonstrated a right to a settlement credit, the burden then shifts to the plaintiff to show that certain amounts should not be credited because of the settlement agreement's allocation. If the plaintiff failed to provide an allocation, then the non-settling party was entitled to a credit equaling the entire settlement amount. The trial court shall presume the settlement credit applies unless the non-settling plaintiff presents evidence to overcome this presumption.

2. **UM/UIM Offset For PIP and Med Pay Payments**

a. Offsets are permitted so long as the offset does not reduce the amount of policy limits available under the policy:

(1) **James v. Nationwide Property & Casualty Ins.**, 786 S.W.2d 91 (Tex.App.–Houston[14th Dist.] 1990, no writ). This case entitles UM/UIM insurer to take an offset for PIP payments made to persons who are not named insureds under the policy so long as the same does not have the effect of reducing the amount of available policy limits.

3. **Settlements With Persons Who Are Not "Legally Liable"**

a. **Melancon v. State Farm Mut. Automobile Ins. Co.**, 343 SW3d 567 (Tex.App-Houston [14th Dist.] 2011). This case involves the question of whether the UIM carrier is entitled to assert a credit for settlements an insured obtains with persons who are not "legally liable" to the insured for her injuries. In this case the Insured motorist brought a UIM claim against State Farm following a 3 car accident. Prior to trial, the Insured settled with Driver 1: Sholes for $20,012; and the Insured settled with Driver 2 and Driver 2's employer (a trucking company) for $170,000. In addition, State Farm paid $5,000 in PIP benefits. As a result, State Farm claims it was entitled to credit of $195,012. At trial, the jury found that the negligence of Driver 1 was the sole proximate cause of the insured's damages in the amount of $168,800.

The insured appealed the take nothing judgment claiming that since Driver 2 and Driver 2's employer were not found to be negligent that these persons were not Uninsured/Underinsured Motorists because they are not "legally liable" for the damages, and therefore the UM/UIM carrier should not be entitled to a settlement credit of $170,000 with non-liable defendants. The appellate court disagreed, and

held that the UIM carrier is entitled to take into account all settlements the same way that Sholes would have been entitled to do in order to determine Sholes' legal liability. Because the Court found in favor of State Farm, the court did not address State Farm's one satisfaction argument.

4. **MED PAY CLAIMS.**
   a. **Westchester Fire Ins. vs. Tucker**, 512 S.W.2d 679 (Tex. 1974)
      (1) PIP Offsets permitted to prevent a double recovery.
   b. **Mid Century Ins. Co. of Texas v. Kidd**, 997 S.W.2d 265 (Tex. 1999);
   c. Nationwide Mutual Ins. Co. v. Gerlich, 982 S.W.2d 456 (Tex. 1999) A plurality of the Court concludes that the PIP offset provision is not invalid and therefore the UM/UIM carrier is entitled to offset PIP payments in situations where failure to do so would result in a double recovery.
   d. State Farm Mutual Automobile Ins. Co. v. Brown, 984 SW2d 695 (Tex.App.--Houston [1st Dist.] 1998, pet. denied). An insurer is entitled to offset PIP payments made under a UM/UIM claim. Here, the insured's total actual bodily injury damages were $7,500 and $4,500 was paid under PIP.
   e. Kim v. State Farm Mut. Automobile Ins. Co., 966 S.W.2d 776 (Tex.App.--Dallas 1998, no pet.) An insurer is entitled to offset PIP payments made under a UM/UIM claim. Insurance is not designed to allow a double recovery. Thus, the offset is allowed.

5. **WORKERS' COMP OFFSET**
   a. Despite policy language which permits the offset, the Courts have held this offset to be invalid.
      (1) **Hamaker v. American States Ins. Co.**, 493 S.W.2d 893 (Tex.App.--Houston [1st Dist.] 1973, writ ref'd n.r.e.)
      (2) Fidelity and Casualty Co. v. McMahon, 487 S.W.2d 371, 372 (Tex. Civ. App. – Beaumont. 1972, writ ref'd n.r.e.).
      (3) Employers Casualty Co. v. Dyess, 957 S.W.2d 884 (Tex.App.--Amarillo 1997, writ denied). Workers' comp carrier brought an action against employee seeking subrogation rights on uninsured motorist benefits. Court grant the comp carrier's motion for summary judgment holding that the insurer's statutory right of subrogation applied to UM benefits; and the exclusion of UM benefits for injuries covered by workers' compensation was invalid.
      (4) **Elwess v. Farm Bureau County Mut. Ins. Co.**, Not Reported in – SW3d – WL 2014675562 (Tex.App.—Eastland, 2014). The appellate court reversed the trial court's granting of the UIM carriers' motion for summary judgment because the carrier was not entitled to claim that the loss was payable under workers comp because it was undisputed that the insured could not have recovered under workers' compensation coverage since his employer did not have such coverage. The insured apparently did not challenge this workers' compensation offset as being void under **Hamaker v. American States Ins. Co.**, 493 S.W.2d 893 (Tex.App.--Houston [1st Dist.] 1973, writ ref'd n.r.e.).

6. **LIABILITY CARRIER IS NOT ENTITLED TO TAKE A SETTLEMENT CREDIT FOR UM/UIM BENEFITS PAID**.

a. **Bartley v. Guillot,** 990 S.W.2d 481 (Tex.App.--Houston [14th Dist.] 1999, pet. denied) In a case of first impression, after a $30,000 plaintiff's verdict against an insured Defendant in a car accident case. The insured Defendant was denied the ability to claim a $20,000 credit for a settlement the Plaintiff reached with his uninsured motorist carrier. The Court concluded that the uninsured motorist carrier's liability arose out of contract, not from an action in negligence, products liability grounded in negligence, or strict liability under §33.001.

7. **SETTLEMENTS FOR LESS THAN POLICY LIMITS**:
   a. The insured is entitled to settle with the tortfeasor for less than policy limits and still make a valid UIM claim. However, the UIM carrier is entitled to a credit for the full amount of the liability limits of the tortfeasor. **Leal v. Northwestern Nat'l County Mut. Ins. Co.**, 846 SW2d 576 (Tex.App.– Austin 1993, no writ); and **Olivas v. State Farm Automobile Ins. Co.**, 850 SW2d 564 (Tex.App.–El Paso 1993, writ denied).

B. **Comparative Negligence Considerations**

C. **Failure to Obtain Consent to Settle**

1. Validity of the Clause:

a. **State Farm Mutual Automobile Ins. Co. v. Azima,** 896 S.W.2d 177 (Tex. 1995). Insurer was held not to have given its consent to insured to sue an uninsured motorist simply because it sent a subrogation letter to the insured.

b. PREJUDICE REQUIRED:

(1) Davis v. Allstate Ins. Co., 945 S.W.2d 844 (Tex.Civ.App.--Houston [1st Dist.] 1997, pet. withdrawn). The insured settled with tortfeasor without the consent of the insurer. Insurer claimed prejudice and breach of contract because tortfeasor supposedly had substantial assets. Insured countered showing that most of the assets are not subject to collection. Therefore, summary judgment for the carrier was reversed and remanded for a new trial.

(2) **Lennar Corp. v. Markel Am. Ins. Co.**, 11-0394, 2013 WL 4492800 (Tex. 2013), The Court determined the "consent to settle" provision of Markel's construction liability policy was subject to a requirement that the insurer show material prejudice from its breach stating that the consent to settle provision was no different than any other condition of the policy – similar to late notice – that requires a showing of material prejudice to the insurer before the clause can be invoked.

(3) **Elwess v. Farm Bureau County Mutual Insurance Company,** Not Reported in -- S.W.3D – WL 2014675562 (Tex.App.—Eastland, 2014). The appellate court reversed the trial court's granting of the UIM carriers' motion for summary judgment because (1) the carriers were unable to show that they were actually prejudiced by the failure to obtain consent to settle because the carriers failed to produce evidence of the existence of additional insurance policies that were in effect at the time of the loss that would have been available to cover the claims.

2. **EXCEPTIONS TO THE CONSENT TO SETTLE CLAUSE:**

a. Insurer Must Show Prejudice to Enforce the Clause

(1) **Hernandez v. Gulf Group Lloyds,** 874 S.W.2d 691 (Tex. 1994). Consent to settle with the tortfeasor is required unless there would be no prejudice to the insurer's subrogation rights.

(2) **Lennar Corp. v. Markel Am. Ins. Co.**, 11-0394, 2013 WL 4492800 (Tex. Aug. 23, 2013), The Texas Supreme Court determined the "consent to settle" provision of Markel's construction liability policy was subject to a requirement that the insurer show material prejudice from its breach stating that the consent to settle provision was no different than any other condition of the policy – similar to late notice – that requires a showing of material prejudice to the insurer before the clause can be invoked.

(3) **Gonzalez v. Philadelphia Indemnity Ins. Co.**, 2015 WL 12550934 (S.D. Texas 2015). Summary judgment for the carrier was affirmed because the carrier claimed that it was prejudiced by the insured's failure to obtain consent to settle. The carrier alleged that it was prejudiced because it lost the right to investigate the claim, to participate in the settlement, or to "advance payment to [the insured to] preserve its rights." In contrast, the insured alleged the carrier was not prejudiced because the at-fault driver was a "young, low wage earning driver working at a grocery store with future plans to work as a telemarketer. The opinion does not explain how the carrier was prejudiced by such settlement. This case is a significant departure from the holding in **Lennar Corp. v. Markel Am. Ins. Co.,** 11-0394, 2013 WL 4492800 (Tex. Aug. 23, 2013) which imposed a burden on the carrier to show that it was materially prejudiced

b. **Settlement with a Non-Liable person.**

(1) **Travelers Indem. v. Lucas,** 678 S.W.2d 732 (Tex.App.--Texarkana 1984, no writ). Because a settlement with a non-liable person would not prejudice the subrogation rights of the insurer, an insured is not required to get consent to settle with a non-liable person.

c. **UM/UIM carrier denies coverage on the claim.**

(1) **Ford v. State Farm,** 550 S.W.2d 663 (Tex. 1977). Once the UM/UIM carrier denies coverage on the claim, the claimant is no longer required to get consent from the UM/UIM carrier to settle with the tortfeasor. When a carrier unreasonably refuses to grant the insured consent to settle with the tortfeasor, such as not based solely on the collectability of a judgment for the excess of the underlying settlement or failure to respond in a reasonable amount of time, is a waiver of the consent to settle clause.

d. **Settlement with a "Non-Motorist"**

(1) **Simpson v. GEICO,** 907 S.W.2d 942 (Tex.App–Houston [1st Dist.] 1995, no writ). A Claimant is not required to get consent to settle with parties who are not "uninsured or underinsured motorists." Here, the claimant settled with a construction company who failed to put up road signs or barricades. The construction company is not a motorist. Therefore, consent was not required.

D. **OTHER AVAILABLE INSURANCE TO SATISFY THE CLAIMS**

1. **OTHER INSURANCE CLAUSE: PRIORITIES OF COVERAGE WHEN THERE ARE MULTIPLE POLICIES**

a. POLICY LANGUAGE
   (1) "However any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance."
b. There is debate on the issue of whether UM/UIM policies can take an offset for payments made by another UM/UIM policy because of the "Other Insurance" clause.
c. Cases Where the Credit Was Permitted.
   (1) **Synder v. Allstate**, 485 S.W.2d 769 (Tex. 1972);
   (2) **USF&G v. USAA**, 772 S.W.2d 218 (Tex. App. – Dallas 1989, writ denied).
d. Cases Where the Credit Was Not Permitted:
   (1) **American Motorists Ins. Co. v. Briggs**, 514 S.W.2d 233 (Tex. 1974). "Other insurance" clauses cannot be used to deny coverage that would otherwise be available.
   (2) United Services Automobile Ass'n. v. Hestilow, 754 S.W.2d 754, 758-59 (Tex. App.—San Antonio 1988), aff'd, 777 S.W.2d 378 (Tex. 1989);
   (3) Stracener v. United Servs. Auto. Asso., 777 S.W.2d 378, 382-83 (Tex. 1989).
e. Most likely result:
   (1) Most likely the Courts will construe the policies and coverages to avoid a double recovery.
   (2) However, preventing a double recovery does not decide the issue of primary versus excess or pro-rata coverage or what occurs when an excess carrier makes payment before the primary UM/UIM and whether the primary may claim a credit in that event. In this scenario, Briggs should operate to prevent the credit.
f. **NON-OWNED VEHICLES**
   (1) Policy language: The standard personal auto policy states that if the insured is in a "non-owned" vehicle, the non-owned vehicle's policy is primary.
      (a) If both policies state the other is primary then they are joint and several, but on a pro-rata basis. Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Co., 444 S.W.2d 583 (Tex. 1969).
g. Rental Cars
h. Company Cars with UM/UIM Coverage
   (1) Must look at the specific language to determine the priorities.

2. **CASES INVOLVING NON-STANDARD INSURANCE POLICIES**
   a. **Safeco Lloyds Insurance Company v. Allstate Insurance Company**, 308 SW3d 49, (Tex.App. San Antonio 2009, no pet. history). This is a declaratory judgment action involving a coverage dispute that arose because there were two separate liability policies in place at the time of the wreck. The driver was operating a non-owned auto which was insured by Safeco. In addition, the driver was insured under her own policy with Allstate. Allstate contended the Safeco policy was primary and that the Allstate policy was excess because coverage followed the vehicle. Safeco claimed that the liability coverage was pro-rata because its non-standard policy approved by the Texas Department of Insurance. The two insurers filed competing MSJs. The Court analyzed the issues and found in favor of Safeco and held there was pro-rata coverage.

b. **Hardware Dealers Mut. Fire Ins. v. Farmers Ins. Exch.,** 444 SW2d 583 (Tex. 1969). The Court recognized that with regard to automobile insurance, 3 kinds of "other insurance" clauses have developed as devices to limit coverage or liability: (1) a pro rata clause, which restricts liability upon concurring insurers to an apportionment basis, (2) an excess clause, which restricts liability upon an insurer to excess coverage after another insurer has paid up to its policy limits, and (3) an escape clause, which avoids all liability if other insurance exists. 444 S.W.2d 583, 586 (Tex. 1969). The Court held the conflict in **Hardware Dealers** was best decided by giving "dominant consideration to the rights of the insured." Id. at 589. Given the insurers' usual concession that whatever the result, the insured's coverage must be no less than if she had been protected by but one policy, the court reasoned that insurers implicitly concede policies should be construed liberally in favor of the insured and strictly against the insurer. When "resolving issues between double insurers," the court must determine whether from the view point of the insured "she has coverage from either one of two policies but for the other, and each contains a provision which is reasonably subject to a construction that it conflicts with a provision in the other concurrent insurance." When such a conflict exists, the conflicting provisions must be ignored, and the court must look to the remaining policy provisions to determine coverage. **Id.** at 589.

Accordingly, we will apply the test set forth in Hardware Dealers to determine proper liability in this case. The Court held that to determine if there was a conflict, we should, from the point of view of the insured, first determine if the insured has coverage from either one of the two policies, but for the other. **Hardware Dealers.** If the insured is covered by each policy but for the existence of the other, the Supreme Court requires that we then determine if each policy contains a provision "which is reasonably subject to a construction that it conflicts with a provision in the other concurrent insurance." **Id**. A "reasonable interpretation" does not have to be the "'more likely reflection of the intent of the parties,'" but need be "'no more than one which is not itself unreasonable.'" **Id.**

The Court rejected Allstate's claim that the "other insurance" language in the Safeco policy is against public policy. The Court also rejected Allstate's claim that by changing the language in its policy from the standard language in an effort to "shelter under **Hardware Dealers"** Safeco has engaged in the sort of drafting contest rejected by the supreme court in Hardware Dealers. Allstate also claimed Safeco violated public policy by changing the wording in its policy in an attempt to turn every other insurer's excess coverage into primary coverage, resulting in pro rata apportionment. The Court disagreed with Allstate. Safeco's policy, including the "other insurance" provision, was approved by the insurance commissioner as required by law. See Tex. Ins. Code Ann. § 2301.006(a) (Vernon 2009)(stating that unless otherwise provided, insurer may not use insurance form unless form has been filed with and approved by commissioner.

The commissioner could have disapproved the form if it violated public policy, but did not. Moreover, the deviation is of no moment because the Court itself has encouraged insurers to draft policy language to reflect their interpretation of policy provisions and then seek TDI approval. See **Don's Bldg. Supply, Inc.,** 267 S.W.3d at 29 (explaining that if insurer intends certain interpretation of a policy provision it should make such intent explicit in policy and seek approval by TDI). Safeco acted as suggested by the supreme court, and obtained the necessary approval. Accordingly, we hold it would be unfair to denounce Safeco's "other insurance" provision based on public policy.

V. **DOES YOUR CLAIM INVOLVE A MOTOR VEHICLE ACCIDENT?**

A. Definition of an Uninsured Motor Vehicle Accident

B. Vehicles that Do Not Qualify as Uninsured Motor Vehicles

C. Types of Accidents that Qualify as a "Motor Vehicle Accident"

1. **WHILE EXITING OR ENTERING A VEHICLE.**

a. In **Berry v. Dairyland County Mut. Ins. Co.,** 534 S.W.2d 428 (Tex. App.--Ft. Worth 1976, no writ) the Court addressed whether an incident in which the insured injured his knee while exiting his vehicle was covered under the PIP portion of the policy. However, to insure uniformity in its decisions, the **Sturrock** Court overruled **Berry v. Dairyland County Mut. Ins. Co.** 534 S.W.2d 428 (Tex. App.--Ft. Worth 1976, no writ) only to the extent that its decision is inconsistent with the holding in Sturrock.

2. **INJURIES SUSTAINED WHILE LOADING AND UNLOADING**

a. **Statute**:

(1) **Tex.Ins. Code** §1952.101 mandates coverage for "injury¼.resulting from the ownership, maintenance, or use of any motor vehicle."

b. **Standard Texas Auto Policies**:

(1) The standard Texas auto policy echo's the statutory language at the beginning of Part C. Definition of "uninsured motor vehicle" under Part C, includes a trailer.

c. **Non-standard Policies**:

(1) Several nonstandard policies are being issued that may not cover this type of incident. You must check the language of your policy to determine if it is excluded.

d. **Case Law**:

(1) "Loading and Unloading" is part of the covered accident**. See Travelers Insurance Co. v. Employers Casualty Co.,** 380 S.W.2d 610 (Tex. 1965).

(2) **Farmers Ins. Exch. v. Rodriguez**, 366 SW3d 216 (Tex. App.—Houston [14th Dist.] Feb. 16, 2012), Plaintiff filed both an UIM claim against Allstate and a homeowner's claim against Farmers as a result of an accident that occurred when he was helping his neighbor unload a deer stand from the neighbor's trailer on the neighbor's property. The Plaintiff and his neighbor were trying to manually lift the deer stand off of the neighbor's trailer, and when the neighbor realized the 350-pound stand was too heavy, he jumped out of the way leaving the Plaintiff to hold the stand on his own. The stand fell and injured the Plaintiff. Holding: The auto policy covered the Plaintiff's claims, but that the suit against the homeowners carrier was premature.

At the summary judgment stage, Farmers, the homeowners insurer, argued that the trial court lacked jurisdiction over the Plaintiff's claims against Farmers because the claims were not yet ripe. The Court of Appeals agreed with Farmers that because coverage was uncertain without a judgment against the Plaintiff's neighbor, the court lacked jurisdiction on the homeowner's claim even though the circumstances of the Plaintiff's injuries were undisputed. The Court of Appeals found that the jury was required to decide and apportion liability before coverage under the homeowners policy could be determined.

The Court of Appeals affirmed the judgment against Allstate under the UM/UIM claim. The Court held that loading and unloading a trailer was an "auto accident" and constituted "use" of the trailer even if loading and unloading was not specifically mentioned in the policy. Applying a three-factor test to determine use, the Court concluded that (1) it was in the inherent nature of a trailer to haul materials, and that these functions include loading and unloading; (2) the accident was in the natural territorial limits of the trailer, because even though Plaintiff was not in the trailer, loading and unloading includes "moving … goods to their final physical destination"; and (3) the trailer was a cause of the accident in that the accident could not have occurred if the Plaintiff were not helping his neighbor unload the deer stand from the trailer.

D. **Types of Accidents that Do Not Qualify as a "Motor Vehicle Accident**"

1. **ATV Accidents**
   a. **Western Ins. Co. vs. Vaughn Andrus,** 694 S.W.2d 657 (Tex.App.– Fort Worth 1985, writ ref'd n.r.e.) Insured made a claim for theft of his ATV. Insurer said the bikes were excluded from coverage under a policy exception for motor vehicle. Court found the ATV was a "Motor vehicle" and therefore was not covered under the homeowner's insurance policy.
   b. **Gomez v. Allstate Tex. Lloyds Ins. Co.**, 24 S.W.3d 196 (Tex.App.—Fort Worth, 2007). The parties agreed that the motor vehicle exclusion within the homeowner's policy was applicable to the use of the ATV, but the insured argued coverage available under the homeowner's policy through the recreational vehicle exception. The Court agreed with Allstate that liability coverage afforded for the ATV owned by the insured under the recreational vehicle exclusion of homeowner's insurance policy extended only to bodily injuries arising out of the use of such vehicle while it was on the insured's premises.
2. **Forklift Accidents**
   a. **International Insurance Co. In New York v. Hensley Electric Steel Co, Inc.,** 497 S.W.2d 64 (Tex.App.- Waco 1973, no writ). Court held that a forklift was not a motor vehicle for purposes of the insurance policy. The decision focused on the issue that the policy did not define "motor vehicle."
3. **Handling of Property**
   a. The Exclusion:
      (1) This insurance does not apply to any Bodily injury or property damage resulting from the handling of property after it is moved from the covered auto to the place where it is finally delivered by insured.
   b. **Home State County Mut. Ins. Co. v. Acceptance Ins. Co.**, 958 SW 2d 263 (Tex.App.--Amarillo 1997, no writ). A collision with cargo that has been completely unloaded and left at a job site, the auto liability carrier for the delivery truck has no duty to defend because there was no auto accident as defined in the policy. The proper application to be given a "loading and unloading" clause in the "use" provision of a standard automobile liability policy was first decided in Texas in **American Employers' Ins. Co. v. Brock,** 215 S.W.2d 370 (Tex. Civ. App.--Dallas 1948, writ ref'd n.r.e.). The court alluded to the two rules applied in construing the

clause: (1) the "coming to rest" rule and (2) the "complete operation" rule. A more detailed explanation of these two rules was later discussed in **Travelers Insurance Co. v. Employers Casualty Co.,** 380 S.W.2d 610, 612 (Tex. 1964). The "coming to rest" rule is the minority view. If loading begins when the transported object has been brought into the immediate vicinity of and is being physically carried or lifted into the vehicle, and unloading ends when the cargo reaches a place of rest, and is no longer being carried or lifted off the vehicle. The majority view, which was adopted in **Travelers,** embraces the "complete operation" rule which holds that loading and unloading not only includes the immediate transport of goods to or from the vehicle, but the complete operation of transporting the cargo between the vehicle and the place to or from which the cargo is being delivered. **Travelers,** 380 S.W.2d at 612. The majority view equates unloading with delivery. When transportation is contemplated, one expects the goods to be picked up from their present location and moved to a new location. When delivery is contemplated, one expects the goods to be placed at a location desired by the recipient. Unloading is not complete until the goods reach the final destination contemplated when the transportation began.

c. **Commercial Standard Ins. Co. v. American Gen. Ins. Co.**, 455 S.W.2d 714 (Tex. 1970). An accident occurred after some, but not all, of the truckload of cement had been transferred from the truck into a bucket and then into forms. Following Travelers and held that the pertinent inquiry was not whether the contract had been completed, but whether the unloading operation under the terms of the policy had been completed. The Court held the "unloading" of the concrete had not been completed at the time of the accident.

d. **Farmers Ins. Exch. v. Rodriguez**, 366 SW3d 216 (Tex. App.—Houston [14th Dist.] Feb. 16, 2012), Plaintiff filed both an UIM claim against Allstate and a homeowner's claim against Farmers as a result of an accident that occurred when he was helping his neighbor unload a deer stand from the neighbor's trailer on the neighbor's property. The Plaintiff and his neighbor were trying to manually lift the deer stand off of the neighbor's trailer, and when the neighbor realized the 350-pound stand was too heavy, he jumped out of the way leaving the Plaintiff to hold the stand on his own. The stand fell and injured the Plaintiff. Holding: The auto policy covered the Plaintiff's claims, but that the suit against the homeowners carrier was premature.
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4. **Dog Bites**
   a. **State Farm Mut. Ins. Co. v. Peck**, 900 S.W.2d 910 (Tex.App.--Amarillo 1995, no writ) There is no coverage under an auto policy to defend or pay for damages to a passenger in the car who was bitten by the car owner's dog. While there are no Texas cases interpreting the term "auto accident," other states generally refer to situations where one or more vehicles is involved in a collision or near collision with someone or something. It is not enough for an injury to occur in or near an auto to be covered under an "auto accident" provision.
5. **Drive-by Shootings, Car-Jacking & Assaults:**
   a. Generally not covered because there is no "physical contact" between the motor vehicles. **Collier v. Employer's National Ins. Co.,** 861 S.W.2d 286 (Tex.App-Houston [14th Dist.] 1993, writ denied).
   b. **Misle v. State Farm Mutual Automobile Insurance Company**, 908 SW2d 289 (Tex.App–Austin, 1995, no writ). Insurance carrier's motion for summary judgment was granted holding that an insurer does not owe a duty to defend a person who fired an air rifle into a crowd from a passing car. The person who intentionally shot the rifle even though he claims he did not intend to hurt anyone is not covered because if he intends the consequences of his act or believes the consequences are substantially certain to follow, the event is not an accident even though the particular injury may have been unexpected, unforeseen and unintended.
   c. **Le v. Farmers Texas County Mutual Insurance Company**, 936 S.W.2d 317 (Tex.App–Houston 1995, writ denied). The procedural history on this case can be confusing. First, the passenger won because the court found that there was coverage. Then the court withdrew its opinion granting summary judgment for the insurer. Then the Appeals court has affirmed summary judgment in favor of the insurer finding that this incident was not covered.

      In Le, the insurer moved for summary judgment that (1) passenger's injuries did not arise from the "use" of an automobile so passenger was not entitled to uninsured motorists benefits; (2) impact of bullets from drive-by shooting did not satisfy the physical contact requirements for UM coverage; and (3) Insurance Code provision concerning PIP coverage in motor vehicle liability policy limits coverage to motor vehicle accidents rather than all accidents that occur in motor vehicles such as drive by shootings. Summary judgment was affirmed.

      A passenger in a car who is injured as a result of a drive-by shooting where there is no contact between 2 vehicles may recover PIP benefits but not UM/UIM benefits. Unlike UM/UIM requirements, the Insurance Code does not limit PIP recovery to

automobile accidents. PIP coverage may be extended where injuries were sustained while occupying a vehicle.

The court subsequently withdrew the above opinion and imposed a requirement that a UM claim arise out of the "use" of an insured vehicle. Further the court required that the injury sustained be as a result of a "motor vehicle" accident in order for there to be PIP coverage. Merely occupying the vehicle was not sufficient for PIP benefits.

d. **Merchants Fast Motor Lines, Inc. v. National Union Fire Ins.,** 939 S.W.2d 139 (Tex. 1996) See lower court opinion at 919 S.W.2d 903 (Tex.App.-Eastland 1996). The Court held the petition did not assert facts sufficient to create a duty to defend or to indemnify the insured because the petition did not assert any facts suggesting a even a remote causal relationship between the operation of the truck and Plaintiff's injury. The only facts the petition alleged were that "the truck driver's negligent discharge of a gun while operating the truck injured Plaintiff.

e. **Schulz v. State Farm Mutual**, 930 SW2d 832 (Tex.App.--Houston [1st Dist.] 1996, no pet.). PIP does not provide coverage where a driver is fatally shot while either seated in a covered vehicle or while kneeling outside the vehicle because there was no motor vehicle accident.

f. **Farmers Texas County Mutual Insurance Company v. Griffin**, 868 SW2d 861 (Tex.App–Dallas 1996, writ denied). An insurer does not have a duty to defend its insured or to indemnify the insured where the injured party seeks damages arising from a "drive-by" shooting incident involving the insured where the petition does not allege that the injuries are the result of an auto accident. Plaintiff's definition of the term auto accident is beyond any reasonable meaning of the term. Further, the Court discussed that the injuries were the result of intentional conduct which is excluded under the policy.

g. **St. Farm v. Whitehead**, 988 S.W.2d 744 (Tex. 1999). Estate of driver brought a UM claim which arose from drive-by shooting. The carrier said there was no coverage for a drive by shooting. The insurer has appealed based on a no accident and intentional act theory. Supreme Court agreed with the insurer and reversed and rendered because there was no coverage since the damages do not arise out of the "use" of a motor vehicle.

h. **Home State County Mutual Ins. Co. v. Binning**, 390 SW 3d 696 (Tex.App.—Dallas 2012). This uninsured motorist case arises from an incident in a parking lot where the insured was rear-ended, then attacked and beaten on the head with a pistol by a passenger in the other vehicle as the insured was exiting his car. Following the incident, the attacker fled the scene. Coverage was the sole issue on appeal. The court was tasked with determining whether the injuries the insured suffered bore a causal connection with the use of the motor vehicle. The three factors to consider are (1) whether the accident arose out of the inherent nature of the automobile, (2) whether the accident arose with "the natural territorial limits of the automobile," and (3) whether the automobile did not merely contribute to cause the condition that produced the injury, but itself produced the injury." The court disagreed with the insured's contention that his injuries arose out of the use of a

motor vehicle because this was an attempted car jacking. Further, the Court found there were insufficient facts to establish conclusively that the events constituted a car jacking. Finally, the automobile itself did not produce the damages.

i. **Exceptions Regarding Drive-By Shootings:**

(1) **Mid-Century Insurance Company of Texas v. Lindsey,** 997 SW2d 153 (Tex. 1999) Issue: Whether the accidental discharge of a shotgun that occurred when a child accidentally hit the trigger of the shotgun as he was trying to enter the cab of the pickup through the rear sliding window of the pickup constitutes an "accident" covered under the policy. The Supreme Court says this was an "auto accident" for which there is coverage because, unlike a drive-by shooting, there was a causal connection between the use of the vehicle and the injury.

6. **Other Cases Which are Not an Auto Accident.**

a. **Lancer Ins. Co. v. Garcia Holiday Tours, et al.,** 345 S.W.3d 50, (Tex. 2011). In a case of first impression, the Texas Supreme Court determined that a business auto policy does not cover a claim by passengers on a commercial bus who contracted tuberculosis (TB) after a bus trip with a coughing driver, who was hospitalized for active TB. Lancer denied a claim for defense and indemnity by its insured, Garcia, after several passengers sued Garcia for contracting TB during a bus trip with an infected driver. Garcia defended itself and proceeded to trial. A jury found the company and its driver liable and awarded over $5 million in damages, collectively, to the passengers who contracted the disease. The company and the driver then sued Lancer for breach of contract and extra-contractual damages. The passengers, as judgment-creditors, intervened in the suit.

The Court began its review with the policy language at issue which provided coverage for claims for bodily injury caused by an accident "resulting from the ownership, maintenance or use of a covered auto." Lancer argued that the infection was not "resulting from" the use of the bus, contending that "resulting from" had to be construed more narrowly than "arising out of" as found in an earlier opinion of the court in **Mid-Century Ins. Co. of Texas v. Lindsey,** 997 S.W.2d 153 (Tex. 1999). The court rejected that argument, finding "no significant distinction between the two phrases" at issue. Lancer next argued that there was not a sufficient factual nexus between the use of the bus and the transmission of the disease. After reviewing cases involving assaults in vehicle, drive-by shootings, and other torts involving vehicles - but not traditional car "accidents" – the court held that the use of the vehicle must be "instrumental in producing the passengers' injuries" and the bus here "did not produce, and was not a substantial factor in producing, the passengers' injuries." The Court reversed and rendered judgment for Lancer, declaring that Lancer had no duty to indemnify the passengers' claims.

E. While Occupying Requirement for Persons who are not Named Insureds or Members of the Household

1. United States Fidelity and Guar. Co. v. Goudeau, 272 S.W.3d 603 (Tex. 2008). While driving his employer's car, the motorist stopped his car on a freeway to render assistance. After leaving his car to approach the disabled one, the motorist was severely injured when a third driver smashed into both cars and pinned him between them and a

retaining wall. Issue: Whether the motorist could recover under his employer's underinsured motorist policy, which applied only if the motorist was "occupying" his car at the time of the accident. The motorist conceded that he was not "in" his car when the accident occurred, and he was not in the process of getting in, on, out, or, off of it. The Texas Supreme Court determined that under the policy, the motorist was not "occupying" the car. Alternatively, the motorist argued that the insurer admitted coverage in response to a request for admission; however, the insurer admitted coverage in its capacity as a worker's compensation carrier, not as an underinsured carrier. Under Tex. R. Civ. P. 198.3, any admission by a party under the rule could be used solely in the pending action, not any other proceeding. Under a standard Texas auto policy, the condition of “while occupying” only applies if the beneficiary is neither the named insured nor a family member.

VI. HIT & RUN ACCIDENTS

A. REQUIREMENT TO FILE A POLICE REPORT

1. Statutory Definition of an Uninsured Motorist
   a. Statute: §1952.109 Tex. Ins. Code - For purposes of the coverage required by this subchapter, "uninsured motor vehicle," subject to the terms of the coverage, is considered to include an insured motor vehicle as to which the insurer providing liability insurance is unable because of insolvency to make payment with respect to the legal liability of the insured within the limits specified in the insurance.
2. **Standard policy language –** "Uninsured motor vehicle" means a land motor vehicle or trailer of any type,
   a. to which no bodily injury liability bond or policy applies at the time of the accident.
   b. Which is a hit and run vehicle whose operator or owner cannot be identified and which hits:
      (1) you or any family member;
      (2) a vehicle which you or any family member are occupying; or
      (3) your covered auto
   c. To which a liability bond or policy applies at the time of the accident but the bonding or insuring company:
      (1) denies coverage; or
      (2) is or becomes insolvent.
   d. Which is an underinsured motor vehicle. An underinsured motor vehicle is one to which a liability bond or policy applies at the time of the accident but its limit of liability either:
      (1) is not enough to pay the full amount the covered person is legally entitled to recover as damages; or
      (2) has been reduced by payment of claims to an amount which is not enough to pay the full amount the covered person is legally entitled to recover as damages.

B. WHO IS AN UNINSURED MOTORIST?

1. Burden of Proof:
   a. Statute:
      (1) §1952.109 Tex. Ins. Code: BURDEN OF PROOF IN DISPUTE. The insurer has the burden of proof in a dispute as to whether a motor vehicle is uninsured.
   b. Cases:
   c. **State Farm v. Matlock**, 462 S.W.2d 277 (Tex. 1970) which put the burden on the claimant was legislatively overruled by the enactment of §1952.109 **Tex. Ins. Code** in 2005.
2. Denial of Coverage Makes a Person an Uninsured Motorist
   a. **Milton v. Preferred Risk Ins. Co.**, 511 S.W.2d 83 (Tex.Civ.App. – Houston [14th Dist.] 1974, writ ref'd n.r.e.) One is an uninsured motorist in Texas, under standard contracts, when (1) his insurer becomes insolvent or denies liability; (2) he is a hit and run driver; (3) he has less coverage than the legally required minimum or (4) he has no insurance. **Note**: This case predates the enactment of §1952.109 Tex. Ins. Code.
3. Expired Statute of Limitations Does Not Make a Driver an Uninsured Motorist

a. **State Farm Mutual Auto. Ins. Co. v. Bowen**, 406 S.W.3d 182 (Tex. App.—2013, no pet.). The inability to pursue a claim due to expiration of the statute of limitations is not a denial of coverage. Therefore, a driver does not become "uninsured" simply because the claimant is unable to pursue a claim against that driver due to the expiration of the statute of limitations.

4. **NAMED DRIVER POLICIES**
   a. Although there is no statutory definition of "auto accident" and no case law definition of what constitutes an "auto accident," Courts have concluded the term is not ambiguous and is to be construed as a matter of law. See **Texas Farm Bureau Mut. Ins. Co. vs. Sturrock,** 146 S.W.3d 123, 126 (Tex. 2004); See also **Farmers Tex. County Mut. Ins. Co. v. Griffin,** 955 S.W.2d 81, 83 (Tex.1997). The fact that the parties have two conflicting interpretations of the term does not make the term ambiguous.

C. **REQUIREMENT OF PHYSICAL CONTACT ON UM CLAIMS**
   1. **WHEN IS CONTACT REQUIRED?**
      a. Contact is required only on UM/UIM claims where the identity of the tortfeasor is unknown.
      b. Statute: §1952.104 **Texas Insurance Code**
      c. Case Law:
         (1) **Y Ngoc Mai v. Farmers Texas County Mut. Ins. Co.,** 2009 WL 1311848 (Tex.App.—Houston [14th Dist.] 2009, pet. ref'd). The Court of appeals affirmed a jury finding that there was no contact with the insured's vehicle despite testimony that a passenger heard something hit the car, therefore there was no UM coverage. The police report showed that there was no contact, and the recorded statements of the occupants of the vehicle were not clear if there was physical contact.
         (2) **Walker v. Presidium, Inc.**, 296 SW3d 687 (Tex.App.—El Paso 2009, no pet.) Summary judgment was granted for the rental car company on UM claims because the unidentified hit and run vehicle did not contact the rental car in which the Plaintiffs were occupying.
   2. **CONTACT IS NOT REQUIRED**:
      a. On any LIABILITY or UM/UIM claim if the tortfeasor's identity is known.
      b. The Supreme Court has unequivocally held a collision with another vehicle, person or object is not required for an incident to be a motor vehicle accident. See **Mid Century Ins. Co. of Texas v. Lindsey,** 997 SW2d 153 (Tex. 1999).
   3. **WHAT CONSTITUTES PHYSICAL CONTACT?**
      a. **INDIRECT CONTACT RULE: COVERED**
         (1) **Williams v. Allstate**, 849 S.W.2d 859 (Tex.App.--Beaumont 1993, no writ)Vehicle 1 hits Vehicle 2 and pushes Vehicle 2 into Vehicle 3. Although there is no direct contact between Vehicle 1 and Vehicle 3, the indirect contact rule construes this scenario as physical contact.

   4. **FALLING OBJECTS & DEBRIS CASES: NOT COVERED.**

a. **Republic Ins. v. Stoker**, 867 S.W.2d 74 (Tex.App.--El Paso 1993, rev'd on other grounds 903 S.W.2d 338 (Tex. 1995). Absent physical contact between the vehicles, a UM/UIM claim made following an accident caused because a vehicle contacts furniture or other debris that fell off of an unidentified vehicle is not covered because of a lack of physical contact.

b. **Hernandez v. Allstate County Mut. Ins. Co.,** 2010 WL 454949 (Tex.App. – San Antonio February 10, 2010, pet. ref'd). Summary judgment in favor of the insurer was affirmed holding that ice which fell off of an unknown vehicle and which contacted the insured's vehicle does not satisfy the physical contact requirement within the policy because no part of the vehicle physically touched the insured's vehicle**.**

c. **Texas Farmers Ins. Co. v. Deville,** 988 SW2d 331 (Tex.App.--Houston [1st Dist.]1999, no pet.). A UM/UIM policy requires actual physical contact with the vehicle, and where the only contact was from a water pump that bounced out of the back of an unknown pick-up truck and strikes the insured, there is no coverage.

d. **Nationwide v. Elchehimi,** 249 SW3d 430 (Tex.2008)

5. **ACCIDENTS CAUSED BY BRIGHT LIGHTS: NOT COVERED**

a. Accidents caused by bright headlights are not covered because light particles do not constitute "physical contact." **Guzman v. Allstate,** 802 S.W.2d 877 (Tex.App.--Eastland 1991, no writ).

VII. DAMAGES RECOVERABLE ON UM/UIM CLAIMS

A. BODILY INJURY DAMAGES UP TO POLICY LIMITS

1. WHAT CONSTITUTES "BODILY INJURY"

a. **Trinity Universal Ins. Co. v. Cowan**, 945 S.W.2d 819 (Tex. 1997). An H.E.B. photo lab clerk Gage made extra prints of four revealing pictures of Cowan, an HEB customer, who took film to HEB for developing. The employee later showed the prints to some friends who then showed the pictures to someone else. Cowan then sued HEB and the photo lab clerk alleging, among other things, negligence and gross negligence. Cowan alleged that she had suffered "severe mental pain, a loss of privacy, humiliation, embarrassment, fear, frustration, mental anguish, and [would] continue to do so in the future." Cowan notified Trinity, his parents' homeowners' insurance carrier and requested a defense. Trinity initially defended Gage under a reservation of rights, but later denied coverage and withdrew its defense.

During the ensuing non-jury trial against Gage, Cowan testified she suffered mental anguish, along with headaches, stomachaches, and sleeplessness as a result of clerk's actions. The trial court found Gage negligent and grossly negligent, and awarded Cowan $250,000.

Cowan alleged the claims were covered under the Trinity policy because either (1) her claim for mental anguish implicitly raised a claim for associated physical manifestations, or (2) a claim for pure mental anguish, even absent any physical manifestations, is a "bodily injury" as defined by the policy. Because Cowan did not plead any physical manifestations of her alleged mental injuries, she did not plead a "bodily injury" such that Trinity's duty to defend was triggered.

We hold that "bodily injury," as defined in the Trinity policy, does not include purely emotional injuries, such as those alleged by Cowan, and unambiguously requires an injury to the physical structure of the human body. Our decision comports with the commonly understood meaning of "bodily," which implies a physical, and not purely mental, emotional, or spiritual harm. See **Aim Ins. Co. v. Culcasi,** 229 Cal. App. 3d 209, 280 Cal. Rptr. 766, 772 (Cal. Ct. App. 1991, review denied); **Cotton States Mut. Ins. Co. v. Crosby,** 244 Ga. 456, 260 S.E.2d 860, 862 (Ga. 1979) (use of the term "bodily" in the definition of "bodily injury" is "a genuine attempt to explain words which need no explanation");o physical injury to the body. It does not include non-physical, emotional or mental harm."); **State Farm Mut. Auto. Ins. Co. v. Descheemaeker,** 178 Mich. App. 729, 444 N.W.2d 153, 154 (Mich. Ct. App. 1989) (per curiam) ("bodily injury" unambiguously contemplates actual physical harm or damage to body); **E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.,** 106 Wash. 2d 901, 726 P.2d 439, 443 (Wash. 1986) ("Sickness" and "disease" are modified by "bodily"); **Knapp v. Eagle Property Management Corp.,** 54 F.3d 1272, 1284 (7th Cir. 1995) (natural reading of "bodily injury, sickness, or disease" indicates that "bodily" modifies all three terms thereby covering only injuries with some physical component). **WEBSTER'S THIRD NEW INTERNATIONAL**

DICTIONARY 245 (1966) also defines "bodily" as "having a body or a material form: physical, corporeal." Likewise, **BLACK'S LAW DICTIONARY 175** (6th ed. 1990) defines "bodily" as "pertaining to or concerning the body; of or belonging to the body or the physical constitution; not mental, but corporeal."

We have since held that mental anguish is only an element of recoverable damages when some otherwise cognizable legal duty is breached. See **Boyles v. Kerr,** 855 S.W.2d 593, 597-598 (Tex. 1993).

That Texas tort law allows for recovery of mental anguish damages unaccompanied by physical manifestations in some circumstances, see **Boyles v. Kerr,** 855 S.W.2d 593, 597-598 (Tex. 1993), does not mean that insurance coverage for bodily injury necessarily encompasses purely emotional injuries. Interpretation of insurance contracts in Texas is governed by the same rules as interpretation of other contracts. **Forbau v. Aetna Life Ins. Co.,** 876 S.W.2d 132, 133 (Tex. 1994); **Upshaw v. Trinity Cos.,** 842 S.W.2d 631, 633 (Tex. 1992). And when terms are defined in an insurance policy, those definitions control. See, e.g., **Ramsay v. Maryland Am. Gen. Ins. Co.,** 533 S.W.2d 344, 346 (Tex. 1976); see also **SL Indus., Inc. v. American Motorists Ins. Co.,** 128 N.J. 188, 607 A.2d 1266, 1274-75 (N.J. 1992) (rejecting argument that coverage should exist because tort law allows recovery for emotional distress without bodily injury); **Gonzales v. Allstate Ins. Co.,** 122 N.M. 137, 921 P.2d 944, 947 (N.M. 1996); **Aetna Cas. & Sur. Co. v. First Sec. Bank,** 662 F. Supp. 1126, 1128 (D. Mont. 1987) (drawing distinction under Montana law between physical injury and mental distress); **West Am. Ins. Co. v. Bank of Isle of Wight,** 673 F. Supp. 760, 764 (E.D. Va. 1987) (pointing out that "The great weight of . . . authority points in one direction; . . . that 'bodily injury' does not encompass emotional distress, but is limited to physical injury. Indeed, the . . . policy definition itself also points powerfully in this direction."). "Tort law and insurance law are not coextensive." **SL Indus.,** 607 A.2d at 1275.

2. Medical Expenses

a. **In Haygood v. De Escabedo,** 356 SW3d 390 (Tex. 2011) the Texas Supreme Court affirmed the appellate court's holding that Section 41.0105 limits a Plaintiff's recovery and therefore the evidence. To enable a Plaintiff to recover the full amount of the expenses would give Plaintiff a windfall.

b. **Progressive County Mutual Ins. Co. v. Delgado,** 335 SW3d 689, (Tex.App.—Amarillo, 2011 no pet.h.). On a UIM Claim, the Court held that the claimant was not entitled to recover portion of damages for past medical expenses that were written off by health care provider, over and above amounts actually paid or incurred by or on motorist's behalf. Prior to trial, the tortfeasor's carrier settled for policy limits of $25,000. At trial, counsel for both parties stipulated that: (1) the policy limits for Progressive's underinsured motorist benefits were $25,055.00; (2) Delgado settled the claims against Bailey for his policy limits of $25,000.00; and (3) Delgado collected $2,525.00 in Personal Injury Protection ("PIP") benefits from Progressive prior to filing suit.

In Delgado's motion for entry of judgment, he calculated his recovery as follows:

(1) First, Delgado deducted the PIP benefits paid by Progressive, $2,525.00, from the total jury award ($72,426.39 – $2,525.00 = $69,901.36).

(2) Delgado then calculated prejudgment interest on $69,901.36 from the date suit was filed until his settlement with Bailey.

(3) Delgado then added the prejudgment interest of $3,351.44 to $69,901.36 for a total of $73,252.80.

(4) Delgado then deducted the Bailey settlement, $25,000.00, arriving at $48,252.80.

(5) Next, Delgado calculated prejudgment interest from the date of the Bailey settlement until the date of entry of judgment, $1,612.83, and added that amount to $48,252.80 for a total of $49,865.63.

Because the stipulated policy limits were $25,055.00, Delgado asked the court for judgment awarding the policy limits plus court costs, $793.30, for a total of $25,848.30.

Progressive argued that under §41.0105, the trial court should enter a take nothing judgment. Progressive asserted that:

1. Of the $72,426.39 jury verdict, $52,968.39 represented an award of past expenses for medical care while $19,458.00 represented awards for past physical pain, physical impairment, and loss of earning capacity**.**
2. Progressive next asserted that, under section 41.0105, the past medical expenses actually paid or incurred on behalf of Delgado were $4,763.77. After adding this amount, $4,763.77, to the jury's awards for past physical pain, physical impairment, and loss of earning capacity, $19,458.00;
3. Progressive calculated Delgado's total collectible damages at $24,221.77. Progressive then asserted that $24,221.77 was less than its offsets and/or credits, $27,525.00 ($25,000.00 settlement with Bailey + $2,525.00 in PIP expenses). Progressive concluded that Delgado was entitled to a take nothing judgment.
4. Accordingly, Delgado's collectible damages total $24,221.77 ($4,763.77 in medical expenses plus $19,458.00 awarded by the jury for past physical pain, physical impairment, and loss of earning capacity). Because Progressive's offsets and/or credits, $27,525.00 subsume Delgado's **collectible damages,** the trial court should have granted Progressive's motion for entry of judgment and entered a take nothing judgment. Note: The opinion does not address whether §541.060(a)(5) or (8) of **Tex.Ins.Code** bars the application of the §41.0105 CPRC on UM/UIM claims**.**

c. **Allstate Indem. Co. v. Forth,** 204 S.W.3d 795 (Tex. 2006). Allstate settled Forth's medical bills for less than the actual amount billed. Forth sued Allstate alleging it arbitrarily reduced her bills without using an independent and fair evaluation to determine what amount of her medical expenses were reasonable. According to Forth, Allstate routinely discounts medical expenses by comparing those charges to a third-party contractor's computerized database. Allstate then offers about 85% of the medical expenses reflected in that database for the same treatment or procedure. Forth did not claim that Allstate's conduct had caused her any damage.

Under Texas law, to have standing a party must have suffered a threatened or actual injury. Forth does not claim that she has any un-reimbursed, out-of-pocket medical expenses. She does not assert that these providers withheld medical treatment as a result of Allstate reducing their bills, or threatened to sue her for any deficiency, or harassed her in any other manner. Moreover, Forth has no exposure in the future because limitations has now run on the medical claims. Forth's medical providers apparently accepted the amount Allstate paid them without complaint, thereby satisfying Allstate's obligation under the policy.

Because Forth does not claim that the manner in which Allstate settled her claim caused her any injury, we conclude that she does not have standing in this case. Accordingly, we reverse the court of appeals' judgment and, without hearing oral argument, render judgment dismissing Forth's claims against Allstate

B. **BYSTANDER CLAIMS**

1. Cases claiming bystander claims are covered:
   a. If the insured can show a physical manifestation of injury, the bystander claim is covered. **State Farm Lloyds v. C.M.W.,** 53 S.W.3d 877 (Tex. App. – Dallas 2001, no pet.)
   b. **Haralson v. State Farm Insurance Company**, 564 F.Supp. 2d 616 (N.D. Dallas, 2008). Bystander's testimony that she had physical manifestations of emotional distress such as migraines, stomach aches and nausea from witnessing an accident constituted a "bodily injury" sufficient to trigger UIM coverage. However, damages for loss of consortium and loss of household services were not "bodily injury" damages under the UIM policy.

C. **WRONGFUL DEATH CLAIMS**

1. **WRONGFUL DEATH MENTAL ANGUISH CLAIMS ARE NOT A SEPARATE BODILY INJURY.**

   a. **Miller v. Windsor Ins. Co.**, 923 S.W.2d 91 (Tex.App.-Fort Worth 1996, writ denied); and **Christian v. Charter Oak Fire Ins.,** 847 S.W.2d 458 (Tex.App.--Tyler 1993, writ denied).

2. **WRONGFUL DEATH CLAIMS ARE A BODILY INJURY CLAIM**
   a. **Bulger v. GEICO**, 2010 WL 11531245 (E.D. Texas, Sherman Division 2017). In this wrongful death UIM claim, the Court rejected GEICO's allegations that claims for loss of consortium, and mental anguish sustained by the wrongful death beneficiaries did not constitute a "bodily injury" under the policy in order to trigger coverage. The Court rejected GEICO's argument that the "covered person" must be the same "covered person" who sustained the bodily injury in order to recover UIM benefits. The Court noted that there is nothing in the policy language to suggest such a limitation, and the Fifth Circuit has previously rejected this argument in ***Amica Ins. Co. v. Moak***, 55 F.3d 1093 (5th Cir. 1995).

D. **LOSS OF SOCIETY AND SUPPORT**

1. **Bulger v. GEICO**, 2010 WL 11531245 (E.D. Texas, Sherman Division 2017). In this wrongful death UIM claim, the Court rejected GEICO's allegations that claims for loss

of consortium, and mental anguish sustained by the wrongful death beneficiaries did not constitute a "bodily injury" under the policy in order to trigger coverage. The Court rejected GEICO's argument that the "covered person" must be the same "covered person" who sustained the bodily injury in order to recover UIM benefits. The Court noted that there is nothing in the policy language to suggest such a limitation, and the Fifth Circuit has previously rejected this argument in ***Amica Ins. Co. v. Moak***, 55 F.3d 1093 (5th Cir. 1995).

E. **PROPERTY DAMAGES RECOVERABLE**

1. **COST OF REPAIRS OR LOSS OF THE FAIR MARKET VALUE**

a. On a collision claim (as opposed to a UM/UIM claim), the insured may recover either the cost of repairs or the loss in the fair market value of the vehicle, but not both. American Manufacturers Mutual Ins. Co. v. Schafer, 124 S.W.3d 154 (Tex. 2003).

b. Noteboom v. Farmers Texas County Mut. Ins.Co., 406 SW3d 381 (Tex.App.—Fort Worth 2013). Insured appealed a take nothing judgment in favor of the insurer. On appeal, the court concluded the uninsured motorist (UM) coverage obligated insurer to pay for insured's damages for the cost of repairs, loss of use, and diminished value as calculated based on a comparison of the car's value before the accident in addition to the costs of repairs because the insured chose to proceed on the claim as a UM claim and because the damages did not result in a double recovery. The Court noted that the unambiguous policy allows for recovery of damages where the he insured could have sued the uninsured motorist for those damages. Further, the Texas Department of Insurance has concluded that UM coverage could allow an insured to recover for diminished value: "Further, an insurer may be obligated to pay a first party claimant under the uninsured/underinsured motorist coverage provisions of the policy, for any loss of market value of the first party claimant's automobile, regardless of the completeness of the repair." **Tex. Dep't of Ins. Comm'r Bulletin,** No. B–0027–00 (Apr. 6, 2000).

2. REPLACEMENT PARTS

a. Dudney v. State Farm Ins. Co., 9 SW3d 884 (Tex.App.--Austin 2000, no pet.) Texas Ins. Code Article 5.7-1 does not abrogate the like kind and quality obligation under the standard Texas personal automobile insurance policy and does not require insurance companies to pay for new OEM parts in the satisfaction of all legitimate claims. Thus, while insurers are prohibited from forcing policyholders to accept non-OEM parts, the amount of money that insurers must provide as compensation for the parts that policyholders ultimately choose may still be limited to the cost of parts of like kind and quality.

b. Tex. Ins. Code. §1952.301(a) states,

(1) "Except as provided by rules adopted by the commissioner, under an automobile insurance policy that is delivered, issued for delivery, or renewed in this state, an insurer may not directly or indirectly limit the insurer's coverage under a policy covering damage to a motor vehicle by:

(2) Specifying the brand, type, kind, age, vendor, supplier, or condition of parts or products that may be used to repair the vehicle."

3. **LOSS OF USE:**
   a. **American Alternative Ins. Corp. v. Davis,** 446 SW3d 41, (Tex.App.—Waco 2014, Writ granted). , Held that chattel owner (a tow truck operator) cannot recover loss-of-use damages suffered when the owner's chattel is totally destroyed even if the owner is unable to replace the chattel or obtain a substitute immediately and sustains losses as a result. Citing numerous cases, the Appellate Court notes that Texas courts have held that, in a suit for damages for personal property that has been totally destroyed, the proper measure of damages is the fair market value of the property at the time it was destroyed**. Thomas v. Oldham, 895 S.W.2d 352, 359 (Tex.1995)**. The Court noted that the reason for not allowing damages for loss of use when the chattel is totally destroyed is because such damages are included as part of the award for total loss.
   b. **J&D Towing, LLC v. American Alternative Ins. Corp.,** 478 S.W.3d 649 (Tex. 2016). The Texas Supreme Court reverse the appellate court's decision and held that an insured is entitled to recover loss of use damages for the reasonable amount of time necessary to replace that property even when the vehicle is a total loss as long as those damages are foreseeable and directly traceable to the tortious act, are not speculative, and not for an unreasonably long period of lost use. That period of time may not be longer than just the period of time to replace the vehicle.
4. **DIMINUTION IN VALUE:**
   a. **Carlton v. Trinity Universal Ins. Co.,** 32 S.W.3d 454 (Tex.App.– Houston [14th Dist.] 2000, pet. denied) On first party collision claims, the insured is not entitled to recover damages for both costs of repairs and damages for diminution in value (loss of the fair market value). If an insurer is fully, completely, and adequately repaired or replaced the property with other of like kind and quality, any reduction in market value of the vehicle due to factors that are not subject to repair or replacement cannot be deemed a component part of the cost of repair or replacement. Under the collision coverage, the policy limits the insurer's liability to the amount necessary to repair or replace the property with other of like kind and quality. The insurer has no obligation to pay the diminution in value.
   b. **Noteboom v. Farmers Texas County Mut.Ins.Co.,** 406 SW3d 381 (Tex.App.—Fort Worth 2013). Insured appealed a take nothing judgment in favor of the insurer. On appeal, the court concluded the uninsured motorist (UM) coverage obligated insurer to pay for insured's damages for the cost of repairs, loss of use, and diminished value as calculated based on a comparison of the car's value before the accident in addition to the costs of repairs because the insured chose to proceed on the claim as a UM claim and because the damages did not result in a double recovery. The Court noted that the unambiguous policy allows for recovery of damages where the he insured could have sued the uninsured motorist for those damages. Further, the Texas Department of Insurance has concluded that UM coverage could allow an insured to recover for diminished value: "Further, an insurer may be obligated to pay a first party claimant under the uninsured/underinsured motorist coverage provisions of the policy, for any loss of market value of the first

party claimant's automobile, regardless of the completeness of the repair." **Tex. Dep't of Ins. Comm'r Bulletin**, No. B–0027–00 (Apr. 6, 2000).

5. **RESTORED TO ITS PRE-ACCIDENT CONDITION:**
   - **a.** The vehicle has to be restored to "useful " pre-accident condition). See **Dudney v. State Farm,** 9 S.W.3d 884 (Tex. App. –Austin 2000, no pet.) and **Great Texas County Mutual v. Lewis,** 979 S.W.2d 72 (Tex. App. – Austin 1998, no pet.).
   - **b.** **State & County Mut. Fire Ins. Co. v. Macias**, 83 S.W.3d 304 (Tex.App.–Corpus Christi 2002)rev'd 133 S.W.3d 271 (Tex. 2004). The words "repair" and "replace," in an auto insurance policy, mean the "restoration of the automobile to substantially the same condition in which it was immediately prior to the collision; and it would not be restored to the same condition if the repairs left the market value of the automobile substantially less than the value immediately before the collision." Id.; see, e.g., **Schaefer v. Am. Mfrs. Mut. Ins**. Co., 65 S.W.3d 806, 808 (Tex. App.-Beaumont 2002, no pet. h.) (citing **Smith v. Am. Fire & Cas. Co.**, 242 S.W.2d 448, 453 (Tex. Civ. App.-Beaumont 1951, no writ)). Thus, by electing to repair or replace a vehicle, the insurer is required not only to repair and replace any physical parts of the vehicle damaged, but also to restore the vehicle to "substantially the same value as that of the vehicle prior to the loss." See **Bailey**, 2002 Tex. App. LEXIS 4105, at 5 **Fid. & Cas. Co. of New York v. Underwood**, 791 S.W.2d 635, 641 (Tex. App.-Dallas 1990, no writ).

     We are not persuaded by the Carlton court's analysis and subsequent holding that "if the market value of the vehicle, after full, adequate, and complete repair or replacement, is diminished as a result of factors that are not subject to 'repair' or 'replacement,' the insurer has no obligation to pay the diminution in value." If, after repairs, the vehicle's value is diminished, we conclude the insurer must somehow restore the vehicle to substantially the same value as it was prior to the loss. See **Bailey,** 2002 Tex. App. LEXIS 4105, at 6; Schaefer, 65 S.W.3d at 810. Obviously, this can be done in any number of ways, including further repairs or by tendering an amount that equates to the difference in value. See **Schaefer,** 65 S.W.3d at 810; Cope, 448 S.W.2d at 719.

     Having found the language in appellant's insurance policy ambiguous, and therefore, interpreting the policy in favor of the insured, see Hudson Energy Co., 811 S.W.2d at 555, we conclude appellees are covered for diminished value under appellant's automobile policy. Accordingly, the trial court's judgment is affirmed."
   - **c.** **State & County Mut. Fire Ins. Co. v. Macias**, 133 S.W.3d 271 (Tex. 2004). The Court reversed the appellate court and rendered in favor of the insurance carrier finding the insured cannot recover both costs of repair and diminished value. The Court stated, "In **American Manufacturers Mutual Insurance Co. v. Schaefer**, 124 S.W.3d 154, we held that the Texas Standard Personal Auto Policy, under which the Maciases are insured, does not obligate an insurer to compensate a policyholder for a vehicle's diminished market value when the car has been damaged but adequately repaired. The Court then reversed the court of appeals' judgment and render judgment in favor of State and County Mutual finding that the insurer does not have to pay both cost of repairs and diminished market value.

F. **PUNITIVE DAMAGES**

1. **PUNITIVE DAMAGES ARE NOT RECOVERABLE:**
2. A claimant is not entitled to recover punitive damages for the malicious conduct of the tortfeasor such as drunk driver that caused an accident and the claimant's damages.
   a. **Morgan v. State Farm**, 940 S.W.2d 228 (Tex.App.--Houston [14th Dist.] 1997, writ denied).
   b. **Vanderlinden v. United States Automobile Association**, 885 S.W.2d 239 (Tex. App. – Texarkana 1994, writ denied). Punitive damages not recoverable on UM/UIM claim.
   c. **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)), the Texas Supreme Court expressly reserved judgment on this issue.
   d. **Milligan v. State Farm Mutual Automobile Insurance Co.**, 940 S.W.2d 228 (Tex.App.--Houston [14th Dist.] 1997, writ denied) The Court held that the UM/UIM carrier was not obligated to pay for exemplary damages.
   e. **Laine v. Farmers Ins. Exchange**, 325 SW 3d 661 (Tex.App. – Houston [1st Dist.] 2010, pet. ref'd). Court affirmed a judgment n.o.v. that public policy precluded uninsured and underinsured coverage available under an umbrella from extending to exemplary damages assessed against the tortfeasor even though the umbrella policy contained no exclusionary language or limit to the damages it covered and was silent as to exemplary damages.
   f. **Fairfield Ins. Co. v. Stephens Martin Paving, LP** 246 SW3d 653, 668 (Tex.2008). Texas appellate courts have uniformly rejected as being against public policy requests for coverage of punitive damages under UM/UIM policies.

G. **ATTORNEY'S FEES**

1. **THE HISTORICAL FIGHT FOR ATTORNEY'S FEES**
2. For years, there was a fight over the issue of whether insureds were entitled to attorneys fees on UM/UIM claims because those claims were founded in contract. Primarily, the fight has centered around the carrier's claims that the insured has not shown he or she is **"legally entitled"** to recover damages until after the insured obtains a judicial determination against the insurer. Therefore, as a condition precedent to the recovery of attorneys fees, there must be a judicial finding for such damages. The fight started with **Sikes v. Zoloaga,** 830 SW2d 752, (Tex.App–Austin 1992, no writ). After **Sikes,** several courts tried to chip away at that opinion until the Texas Supreme Court issued its ruling in Henson v. Southern Farm Bureau Cas. Ins., 17 S.W.3d 652 (Tex. 2000).
3. **CASES PERMITTING THE RECOVERY OF ATTORNEY'S FEES:**
   a. **Novosad v. Mid-Century Ins.Co**., 881 S.W.2d 546, 552 (Tex.App.-San Antonio 1994, no writ). This case involved a uninsured motorist claim in which the court refused to award attorney's fees even though the court entered a judgment for the insured awarded among other damages, $7,600 for past and future medical care in her action. Mid Century relied on **Sikes v. Zoloaga** to claim that attorney's fees were not recoverable. However, the court noted that the **Sikes** case was distinguishable from **Novosad** because: (a) Mid-Century consented to settlement for the insurance policy limits of the underinsured driver; (b) The tortfeasor was never made a party

to the underinsured motorist suit; (c) and liability was judicially established by virtue of Mid-Century's stipulation to the underinsured driver's negligence prior to the presentation of evidence. Thus, unlike the plaintiff in **Sikes,** Novosad established by "judgment or agreement" that the underinsured motorist was liable and legally obligated to compensate Novosad and because Mid-Century stipulated that the money paid to Novosad by the underinsured driver was only "partial payment" of Novosad's damages.

The only cause of action tried in this case was that a claim for breach of contract. Novosad established that she had a valid claim, she was represented by an attorney, and she sent a timely presentment letter, yet received no timely settlement offer. Novosad properly preserved her right to attorney's fees in her suit on the contract. The judgment of the trial court was affirmed.

b. **Allstate Ins. Co. v. Lincoln,** 976 S.W.2d 873, 876 (Tex.App.-Waco 1998, no pet.); The insured was involved in an automobile accident with tortfeasor who had struck the rear of appellee's vehicle. The tortfeasor had insurance coverage of $20,000, and her company paid the policy limits before trial. The insured sued the tortfeasor for additional damages and joined Allstate on an underinsured motorist claim. The jury found for the insured and awarded damages of $44,073.33. The insured was also awarded a judgment against Allstate (the UIM carrier) for $ 24,073.33, which was paid. The insured was also awarded $20,000 in attorney's fees based on the UIM contract plus additional attorney's fees for appeal. The court affirmed the attorney fees award holding that the decision to grant or deny attorney's fees was within the trial court's sound discretion.

c. **Whitehead v. State Farm Mut. Auto. Ins. Co.**, 952 S.W.2d 79, 88-89 (Tex.App.-Texarkana 1997), rev'd on other grounds, 988 S.W.2d 744 (Tex.1998) and criticized in **Brainard v Trinity Universal Ins. Co**., 216 SW3d 809, 818 (Tex. 2006). In Whitehead, the insureds made a claim for breach of contract under Tex. Civ. Prac. & Rem. Code Ann. § 38.001(8), which provided that attorney's fees were recoverable for a suit on breach of contract. Prior to filing suit, the Whiteheads had previously made demand upon State Farm for policy limits. State Farm argued that attorney's fees were available in a suit against an insurer only in certain specifically enumerated instances, and not in a straight suit on contract, as was the case here. The trial court denied the insured's request for attorney's fees and appeal was taken. The court affirmed the judgment of the trial court except its failure to award reasonable attorney's fees to appellants. Appellants were entitled to recover under Civ. Prac. & Rem. Code Ann. §38.002 because the claim was under a contract, the claimant was represented by an attorney, the claim was presented to the opposing party, and payment for the just amount owed was not tendered before the expiration of the 30th day after the claim was presented. An award of attorney's fees to a party recovering on a valid claim founded on a written or oral contract, preceded by proper presentment, was mandatory.

d. **In re Ruby Britt**, 2016 WL 9175819, (Tex.App. – Texarkana 2016, orig. proceeding). Insured's petition for mandamus to order the judge to vacate an order granting a new trial and reinstate the default judgment on her UIM claim for policy

limits plus an award of $5,000 in attorney's fees was conditionally granted because State Farm failed to establish a meritorious defense. In reaching this conclusion, the Court rejected State Farm's argument that the petition had to be verified and that the insured's claims were barred by the statute of limitations. Further, State Farm failed to provide even a prima facie case that its denial of coverage was meritorious.

4. **CASES DISALLOWING THE RECOVERY OF ATTORNEY'S FEES**:

   a. **Sikes v. Zoloaga**, 830 SW2d 752, (Tex.App–Austin 1992, no writ). Mary Ellen Sikes appealed a denial of her claim for attorney's fees against from Allstate Indemnity Company (Allstate), based on an automobile insurance policy providing uninsured-motorist coverage. The jury found Zoloaga at fault and determined damages at $ 15,944.08, for which the court rendered judgment against Allstate. Sikes also requested attorney's fees from Allstate based on its failure to meet a contractual obligation. The attorney's fees issue was tried to the court, which found no basis for an award under **Tex. Civ. Prac. & Rem. Code Ann. §38.001** (1986). The appellate court affirmed the decision of the district court.

   Prior to filing suit, Sikes sent Allstate a formal demand letter on November 27, 1991, requesting $50,000 in damages. Allstate responded with a telephone offer of $10,000 to $15,000 in settlement, which all parties understood to be an offer of $15,000. Sikes rejected the Allstate offer in strong terms and eventually filed and tried this lawsuit, but obtained a verdict that essentially was no greater than the pre-litigation offer.

   The **Sikes**' Court noted requisites to recover for attorney's fees under the statute, as applicable to this case, are: (a)recovery of a valid claim in a suit on an oral or written contract; (b) representation by an attorney; (c) presentment of the claim to the opposing party or a representative of the opposing party; and (d) failure of the opposing party to tender payment of the just amount owed before the expiration of thirty days from the day of presentment. **Tex. Civ. Prac. & Rem. Code Ann. §§ 38.001-.002 (1986).** All of these requisites must be met to recover attorney's fees under the statute. See **New Amsterdam Casualty Co. v. Texas Indus. Inc.,** 414 S.W.2d 914 (Tex. 1967); **Davidson v. Suber,** 553 S.W.2d 430, 432 (Tex. Civ. App. 1977, no writ).

   In Sikes, the Court held there has been neither proper presentment of a claim to the opposing party nor failure of the opposing party to tender payment of the just amount owed. "An essential element to recovery of attorney fees under article 2226 is the existence of a duty or obligation which the opposing party has failed to meet;" **Ellis v. Waldrop,** 656 S.W.2d 902, 905 (Tex. 1983).

   The Sikes' Court focused on the language in the standard Texas auto insurance policy that the insurance will pay for only those damages which a covered person is "legally entitled to recover" from the owner/operator of an uninsured vehicle. Allstate contended that this clause created a condition precedent to any duty to pay under the policy, and the Court in Sikes agreed.

   b. **Sprague v. State Farm Mut. Auto. Ins. Co.**, 880 SW.2d 415, 416 (Tex.App.-Houston [14th Dist.] 1993, writ denied). In **Sprague**, the insured sued the tortfeasor and joined State Farm on an underinsured motorist claims. At trial, the jury returned

a verdict for the insured and awarded medical and exemplary damages and attorney's fees. The trial court set aside that portion of the jury's verdict awarding appellant his attorney's fees, and ruled that appellant take nothing on that issue finding that there was no failure on State Farm's part to tender payment of the just amount owed. The Supreme Court in **Franco v. Allstate Insurance Co.**, 505 S.W.2d 789 (Tex. 1974), determined that to be legally entitled to recover under the uninsured motorist provision of an insurance contract, "the insured must be able to show fault on the part of the uninsured motorist and the extent of the resulting damages¼." 505 S.W.2d at 792; See also **State Farm Mutual Automobile Insurance Co. v. Matlock**, 446 S.W.2d 81 (Tex. Civ. App.--Texarkana 1969, aff'd in part, rev'd in part, 462 S.W.2d 277, 278 (Tex. 1970). There must be a determination of the amount the claimant is legally entitled to recover if the claim is unliquidated. This claim was made on unliquidated damages and there was no agreement as to an amount due. Until the jury in the instant case determined liability and the extent of damages due appellant as a result of his injuries, appellee as ultimate insurer, was not obligated to accept the demand as the amount appellant was legally entitled to recover, or the just amount owed the claimant. As a result, there has been no failure on the part of State Farm to tender payment of the just amount owed. Therefore, the trial court acted properly in disregarding the jury's findings on attorney's fees since one of the statutory prerequisites had not been met.

c. **Henson v. Southern Farm Bureau Cas. Ins.**, 17 S.W.3d 652 (Tex. 2000) A unanimous Court held that because a UM/UIM carrier does not breach its contract to pay until tort liability is established, we conclude that prejudgment interest begins running from the date liability of the uninsured/underinsured motorist is established. Therefore the UM/UIM carrier does not owe prejudgment interest on top of the UM/UIM benefits.

   The insured settled with D1 for limits of $20,000. The insured went to trial against D2. The jury found D1 was 100% negligent and awarded $133,842.13 in damages against the settling D1. However, because the insured settled with D1, the Court appropriately entered a take nothing judgment against D2. (e.g. no damages and no pre-judgment interest was awarded).

   Within 30 days of the judgment, the UM/UIM tendered its limits to the insured. When the insured refused the tender because it did not include prejudgment interest, the UM/UIM carrier paid the money into the court's registry.

   In its answer to the insured's petition which alleged all conditions precedent had occurred, the UM/UIM carrier filed a verified answer denying the insured's right to prejudgment interest. The UM/UIM carrier did not dispute that if the Court had awarded damages and interest against the tortfeasors, then the UM/UIM carrier would be obligated to pay pre-judgment interest to the extent of policy limits. However, in this case, the insured could only recover pre-judgment interest from the UM/UIM carrier if it breached its contract because the insured had not established liability and damages against the tortfeasor.

   Despite the Henson decision, the common practice on UM/UIM claims remained to file the action as claim for breach of contract. As a result, it is not surprising to

see that **Brainard** was brought up to the Supreme Court as a breach of contract claim.

H. **PRE-JUDGMENT INTEREST AND POST-JUDGMENT INTEREST**

1. **State Farm Mutual Automobile Ins. Co. v Nickerson**. 216 SW3d 823 (Tex. 2006);
2. **Brainard v. Trinity Universal Ins. Co.** 216 SW3d 809 (Tex. 2006);
3. **State Farm Mutual Automobile Ins. Co. v. Norris**, 216 SW3d 819 (Tex. 2006).
   a. In the **Brainard** trilogy of cases, the Texas Supreme Court ruled, "We recently touched on this issue in **Battaglia v. Alexander**, 177 S.W.3d 893, 908-09, 48 Tex. Sup. Ct. J. 720 (Tex. 2005), in which we held that the trial court erred in calculating prejudgment interest on total damages before deducting payments that the plaintiff received from settling defendants. To satisfy the purpose of prejudgment interest, settlements must be credited periodically, according to the date they are received. Id. at 907-08. This approach, known as the "declining principal" formula, is the proper way to apply credits in the calculation of prejudgment interest. Id. at 909 (overruling in part **C & H Nationwide, Inc. v. Thompson**, 903 S.W.2d 315, 327, 37 Tex. Sup. Ct. J. 1059 (Tex. 1994)). In **Battaglia**, we concluded that "[a] settlement payment should be credited first to accrued prejudgment interest as of the date the settlement payment was made, then to 'principal,' thereby reducing or perhaps eliminating prejudgment interest from that point in time forward." Id. at 908. Thus, as we explain below, each credit applies first to the accrued interest and then to the principal, with each credit establishing a new interval. At each new interval, interest continues to accrue only on the remaining principal because under the general prejudgment interest provisions, "interest is computed as simple interest and does not compound." TEX. FIN. CODE § 304.104.

      Trinity, argues that a UIM policy is different because the insurer's duty to pay does not arise until the underinsured motorist's liability, and the insured's damages, are legally determined. we have determined that this language means the UIM insurer is under no contractual duty to pay benefits until the insured obtains a judgment establishing the liability and underinsured status of the other motorist. **Henson**, 17 S.W.3d at 653-54. Neither requesting UIM benefits nor filing suit against the insurer triggers a contractual duty to pay. **Id.** Where there is no contractual duty to pay, there is no just amount owed. Thus, under Chapter 38, a claim for UIM benefits is not presented until [*25] the trial court signs a judgment establishing the negligence and underinsured status of the other motorist. Because the contract did not require Trinity to pay UIM benefits before Premier's negligence and underinsured status were determined, Brainard did not present a contract claim before the trial court rendered its judgment, and the court of appeals correctly concluded that Brainard is not entitled to recover attorney's fees under Chapter 38.

   b. **Embrey v. Royal Ins. Company of America**, 22 SW3d 414 (Tex. 2000). Once policy limits have been exhausted, the carrier does not owe additional sums for pre-judgment interest.

   c. **Henson v. Southern Farm Bureau Casualty Ins. Company**; 17 SW3d 652 (Tex. 2000) A UM/UIM carrier is not obligated to pay pre-judgment interest over and above the policy limits of coverages provided by the policy.

d. **Guideone Lloyds Insurance Company v. First Baptist Church of Bedford**, 268 SW3d 822 (Tex.App.– 2nd Dist. 2008, no pet.). The trial court erred by calculating pre-judgment interest and penalties on the full amount of the claim for the entire period of the claim because neither interest nor penalties accrue on amounts where the insurer tenders an unconditional tender of $ 155,000 on July 7, 2005. However, the interest penalty may be assessed against the insurer on the full amount of the claim if an insurer's partial payment to the insured was not unconditional. Thus, the insured should demand an unequivocal statement in writing from the insurer as to whether an offer of settlement is unconditional or conditional.

The insured is entitled to recover both prejudgment interest on the claim as well as statutory penalties of 18% interest when the insurer violated the Prompt Payment of Claims Act.

Under **Brainard,** Courts are to apply the declining principal formula to calculate pre-judgment interest. Under this formula, "a settlement payment should be accredited first to accrued prejudgment interest as of the date the settlement payment was made, then to 'principal,' thereby reducing or perhaps eliminating prejudgment interest from that point in time forward.

In calculating the amount of article 21.55 interest to be awarded to an insured, we must:

(1) determine the amount of prejudgment interest that had accrued on the breach of contract damages as of the date of insurer's unconditional tender, if any;
(2) then apply the insurer's tender first to the amount of prejudgment interest that had accrued as of the date of judgment.
(3) Then, the Court is to apply any remaining balance to the principal (the amount of the claim), and
(4) finally, utilize the revised principal figure to calculate the post-tender amount of the article 21.55 interest penalty.
(5) Courts are not to apply the "declining principal" formula to calculations for determining the 18% interest allowed under the Prompt Payment of Claims Act.

4. **Barclay v. Mid Century**, 880 S.W.2d 807 (Tex.App.--Austin 1994, writ denied). "Amount of the claim" as referred to in Article 21.55 §6 is limited to the amount of policy limits, and does mean the true value of the amount of the claim. Subsequent decisions of the Texas Supreme Court including **Brainard** and **Arthur Andersen v. Perry Equipment Co.** have directly impacted the significance of this decision. In this case, the insured sought damages and attorney fees for failure of insurer to meet the prompt pay provisions of **Article 21.55** of the **Texas Insurance Code.** Held: Insurance company failed to comply with the statute and was forced to pay the claim, 18% in damages plus a one-third contingency fee in attorney's fees. The purpose of the article is to ensure that the insurance company will pay claims in a prompt manner.

I. **COURT COSTS**

1. **State Farm Mutual Automobile Insurance Co. v. Grayson**, 983 S.W.2d 769 (Tex.App.--San Antonio 1998, no pet.). Court costs must be assessed against the insured where the insured's settlement with the original tortfeasor was greater than the amount of damages awarded to the insured in an underinsured motorist lawsuit.

2. **Haralson v. State Farm Mut. Auto Ins. Co.**, 2009 WL 111590 (N.D. Tex.). State Farm sought to tax court costs against the Plaintiff, including the costs of oral depositions and depositions upon written questions. The Plaintiff contended that the oral depositions were not taken for use in his case. Because the Plaintiff failed to attach copies of the depositions to the Motion for the court's consideration and because the Plaintiff failed to direct the court to any questions that were asked of the witnesses that do not pertain to the case, the court had to tax the cost of the oral depositions against the Plaintiff. As for the depositions on written questions, those were clearly unrelated to the claims of Plaintiff, and therefore were not taxable against the Plaintiff.

VIII. PLAYING THE STACKING AND OFFSETS GAME

A. General Rule

1. Usually is permitted if the stacking occurs between two different policies:
   a. Separate UM policies: PERMITTED
   b. Separate UIM policies: PERMITTED
   c. Usually prohibited if stacking coverages within the same policy
   d. UM and UIM claims under the same policy: NOT PERMITTED
   e. Usually prohibited to stack the LIABILITY and UM or UIM coverage under the same policy: **Hanson v. Republic Ins. Co.,** 5 S.W.3d 324 (Tex. App. - Houston [1st dist.] 1999, pet. denied), and **Jankowiak v. Allstate**, 201 S.W.3d 200 (Tex. App. - Houston [14th Dist] 2006, no pet.)

B. Exception to the Rule

1. **Jankowiak v. Allstate Prop. & Cas. Ins. Co,** 201 SW3d 200 (Tex.App.–Houston [14th Dist.] 2006). The Court held that the claimant could recover policy limits on the liability claim against the driver of the vehicle she occupied for his negligence, and policy limits under the same policy for the negligence of the uninsured driver that struck their vehicle. Allstate's position that payment of the policy limits of one coverage exhausted the limits and their duty to pay on the other claim was found to be against public policy. Allstate relied upon the decision in **Hanson** (5 S.W.3d 324).
   a. 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.

C. Negotiating With UIM Carriers vs. Liability Carriers

1. Negotiating With Liability Carriers
   a. Liability Carriers Owe Your Client No Duties
   b. Liability Carrier is Concerned About Stowers Liability Beyond Policy Limits
2. Negotiating With UM/UIM Carriers
   a. UM/UIM Carriers Owe the Insured both a common law and Statutory Duty of Good Faith
   b. UM/UIM Carriers could be liability for Penalties and fees for violations of The Insurance Code
   c. UM/UIM Carriers Owe Duties to Promptly Pay a Valid Claim
   d. UM/UIM Carriers see Policy Limits as Maximum Expose
   e. UM/UIM Carriers Often Claim They Cannot Be in Bad Faith Because of Brainard
   f. Insured's Failure to Timely Respond to Communications Could Provide a Defense to Bad Faith Claims

IX. **CREATEIVE NEGOTIATION TECHNIQUES ON UM/UIM CLAIMS**

A. **GETTING A SWORN STATEMENT FROM THE TORTFEASOR**

B. **SUING THE TORTFEASOR AND THE UM/UIM CARRIER IN THE SAME LAWSUIT**

C. **CONSENT TO BE BOUND**

1. **Cantu v. State Farm Mut. Automobile Ins. Co.,** 2017 WL 243628 (S.D. 2017). Summary Judgment for State Farm was affirmed in this UM case because the Court held that State Farm did not consent to be bound by a default judgment against the tortfeasor. Further, the mere fact that State Farm was a party to the case at the time the default judgment was entered does not constitute waiver or collateral estoppel. If a policyholder chooses to proceed without the insurer's consent, "any judgment obtained against the uninsured motorist will not be binding on the insurance carrier. Liability and damages will have to be re-litigated.

D. **JURISDICTION CONSIDERATIONS:**

1. Using the Tortfeasor as a Basis to Avoid Diversity

E. **VENUE CONSIDERATIONS:**

1. Using the UM/UIM Carrier to Get a More Favorable Venue on Claims Against the Tortfeasor
2. Using the Tortfeasor to get a More Favorable Venue on the UM/UIM Claim
3. **Statute: §1952.110 Tex.Ins. Code:**
   a. Notwithstanding §15.032 CPRC, an action against an insurer in relation to the coverage provided under this subchapter, including an action to enforce that coverage, may be brought only in the county in which:
      (1) the policyholder or beneficiary instituting the action resided at the time of the accident involving the uninsured or underinsured motor vehicle; or
      (2) the accident occurred.
4. **Case Law**:
   a. **CMH Set & Finish, Inc. v. Taylor**, not reported in – S.W.3d --, 2015 WL 1254063 (Tex.App. --- Dallas 2015,) The appellate court held that the tortfeasor waived the right to challenge venue by failing to timely request a hearing and because the tortfeasor had submitted himself to the jurisdiction of the court by signing an agreed scheduling order without making it subject to the Motion to Transfer Venue, and because the scheduling order was more than merely ancillary to the proceeding. In this case, Plaintiff sued both the tortfeasor and the UIM carrier and used §1952.110 of the Texas Ins. Code to get venue in the county of Plaintiff's residence rather than rely on §15.15.002 of Tex. CPRC for venue which would have mandated venue in Collin County, the county where the collision occurred and the county where the tortfeasor resided. The Court held that the tortfeasor waived the venue challenge because (1) for 18 months after filing the motion to transfer venue, the tortfeasor did not set the motion to transfer venue for hearing; (2) the tortfeasor signed an agreed scheduling order five months prior to the hearing on the motion to transfer venue that was not signed subject to the motion to transfer venue. In addition, as a matter of first impression, the court determined the scheduling order addressed the main action and was not merely addressing an ancillary or preliminary matters. Further, since the scheduling order did not reference a deadline for pending motions such as the motion

to transfer venue, the court saw this as an indication that the tortfeasor did not consider the venue issue as a live issue at the time the scheduling order was signed.

b. **Spencer v. Allstate Ins. Co.,** 2016 WL 6879598 (E.D. Texas 2016). In this federal court case, the Court denied Allstate's Motion to Transfer Venue of the UIM case based on non-convenience §1404(a). The Court noted that the first inquiry it must address is whether the judicial district to which transfer is sought would have been a district in which the claim could have been filed. Then, the court must analyze both public and private factors relating to the convenience of the parties and witnesses as well as the interests of particular venues. The Private factors are: (1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws or in the application of foreign law. This is not an exhaustive list of factors and no single factor is dispositive. A defendant seeking transfer bears this "significant burden" of proof to show good cause to show that the proposed venue is "clearly more convenient" than the chosen forum.

F. **BRINGING THE CLAIM AS AN EXPEDITED CASE TO LIMIT THE CARRIER'S TIME AND ABILITY TO ENGAGE IN DISCOVERY**

G. **ADDING IN THE UIM CARRIER AS A PARTY AFTER DEPOSITIONS OF THE PARTIES ARE TAKEN**

H. **GETTING THE DEPOSITION OF THE CORPORATE REPRESENTATIVE**

1. **In re Garcia**, 04-07-00173-CV (Tex.App.- San Antonio, 2007) (mem. op). The insured may depose the adjuster on the underlying "contract."

2. **In re Luna**, 2016 WL 657879 (Tex.App.—Corpus Christi 2016, orig. proceeding). In this UM case, the Court conditionally granted the insured's petition for mandamus to obtain the deposition of State Farm's corporate representative. The Court rejected State Farm's claims that (1) The insured waived the right to depose State Farm; (2) the request was improper, and harassing; (3) the burden and expense of the deposition outweighs its likely benefits; (4) the information sought was not relevant to the issues and (5) State Farm has no personal knowledge of the matters requested. The Court noted a litigant generally has a right to depose the opposing party, and that in the case of **In re Garcia**, it was held to be an abuse of discretion to quash the deposition of a State Farm representative during a UM/UIM case. The Plaintiff has the burden of proof in this UM case, and State Farm had not stipulated to liability and damages. Considering the importance of the issues at stake in the litigation and the importance of the proposed discovery in resolving the issues, the burden on State Farm is outweighed by Luna's interests in obtaining relevant discovery.

3. **In re Safeco Ins. Co. of Am.**, No. 13-17-00264-CV, 2017 WL 2443082 (Tex. App.—Corpus Christi, June 6, 2017 not designated for publication, mandamus denied). Based on ***In re Luna***, No. 13-16-00467-CV, 2016 WL 6576879, at 6-7 (Tex. App.-Corpus Christi Nov. 7, 2016, orig. proceeding) (mem. op.); and **In re Garcia, No. 04-07-00173-CV, 2007 WL 1481897,** at 2-3 (Tex. App.-San Antonio May 23, 2007, orig. proceeding) (per curiam mem. op.), the Court denied Safeco's mandamus to overturn the

trial court's order granting a motion to compel the deposition of its corporate representative in this UIM case.

I. TIMING CONSIDERATIONS AND SEQUENCING OF SETTLEMENTS

1. Settling with the UIM Carrier First to Maximize Stowers Recovery
2. Settling With the Tortfeasor, Especially Shortly Before Trial, To Force The UIM Carrier To Defend The Case by Itself
3. The Impact of an Effective Voir Dire

J. **ARBITRATION**

K. **HIGH-LOW AGREEMENTS**

L. **MOVING FOR PARTIAL SUMMARY JUDGMENT TO ELIMINATE DEFENSES**

M. **SUING THE ADJUSTER**

N. **SUING THE AGENT**

X. Pushing Past Stalemate

A. Being Ready for Trial
B. Securing the Evidence Necessary to Prevail
C. Statements from Third Parties
D. Focus Groups
E. Jury Verdicts
F. The Prepared Client
G. Good Facts, Good Clients, Good Damages

XI. SPOTTING BAD FAITH PRACTICES BY UM/UIM INSURERS

A. WHAT IS BAD FAITH?

1. EVOLVING STANDARDS FOR BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING

a. **Arnold v. National County Mutual Fire Ins.,** 75 S.W.2d 165 (Tex. 1987).
- (1) No reasonable basis for denial or delay of payment; or
- (2) Failure to determine if there was a reasonable basis to deny or to delay payment of the claim.

b. **Aranda v. Ins. Co. Of N. America,** 748 S.W.2d 210 (Tex. 1988)
- (1) In the absence of a reasonable basis to deny or delay payment; and
- (2) Insurance company knew or should have known there was no reasonable basis to deny or to delay payment of the claim**.**

c. **Transportation Ins. Co. v. Moriel,** 879 S.W.2d 10 (Tex. 1994).
- (1) If there is a bona fide dispute, there is no bad faith.

d. **Universal Life Ins. Co. v. Giles,** 950 S.W. 48 (Tex. 1997)
- (1) Failing to attempt in good faith to effectuate a prompt, fair and equitable settlement of a claim when insurer's liability become "reasonably clear";
- (2) Essentially a negligence standard where the insured must prove the insurance company knew or should have known it needed to pay this covered claim.

e. **Menchaca v. USAA Texas Lloyds Co.,** -- S.W.3d – (Tex. 2017)

In evaluating the bad faith claims brought by the insured against USAA, the Supreme Court acknowledges that some of its previous decisions have created uncertainty in the law. As a result, this opinion is designed to put that uncertainty to rest as nearly as possible. The primary issue in Menchaca is whether the insured can recover policy benefits based on jury findings that the insurer violated the **Texas Insurance Code** and that the violation resulted in the insured's loss of benefits the insurer "should have paid" under the policy despite a jury finding that the insurer did not breach the contract. The Court re-affirmed its holding in Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129, 136 (Tex. 1988) where the Court held that an insurer's "unfair refusal to pay the insured's claim causes damages as a matter of law in at least the amount of the policy benefits wrongfully withheld" even in the absence of a breach of the contract.

As part of its review of Texas law, the Court conducted a review of some basic insurance principles such as: "An insurance policy is a contract." The policy sets forth the respective rights and obligations to which an insurer and its insured have mutually agreed. The **Texas Insurance Code** supplements the parties' contractual rights and obligations by imposing procedural requirements that govern the manner in which insurers review and resolve an insured's claim for policy benefits. The Code grants insureds a private action against insurers that engage in certain discriminatory, unfair, deceptive, or bad-faith practices, and it permits insureds to recover "actual damages . . . caused by" those practices, plus court costs, attorney's fees, and treble damages if the insurer "knowingly" commits the prohibited act. "Actual damages" under the **Insurance Code** "are those damages recoverable at

common law." An insured's claim for breach of an insurance contract is "distinct" and "independent" from claims that the insurer violated its extra-contractual common-law and statutory duties. A claim for breach of the policy is a "contract cause of action" while a common-law or statutory bad-faith claim "is a cause of action that sounds in tort."

In deciding this opinion, the Court announced 5 Rules that address the relationship between contract claims under an insurance policy and tort claims under the Insurance Code.

(1) General Rule:

Generally, an insured cannot recover policy benefits as damages for an insurer's statutory violation if the policy does not provide the insured a right to receive those benefits.

As a general rule, there can be no claim for bad faith [denial of an insured's claim for policy benefits] when an insurer has promptly denied a claim that is in fact not covered. When the issue of coverage is resolved in the insurer's favor, extra-contractual claims do not survive, and there is no liability under [the Insurance Code] if there is no coverage under the policy.

However, in **Menchaca,** the jury found USAA violated the Code by denying a covered claim without conducting a reasonable investigation. Further, Menchaca argued that the since there was coverage for the claim, the failure to reasonably investigate the claim is an independent claim from any claim for breach of contract.

The Court noted that some acts of bad faith, such as a failure to properly investigate a claim or an unjustified delay in processing a claim, do not necessarily relate to the insurer's breach of its contractual duties to pay covered claims, and may give rise to different damages. Failure to investigate a claim, in the absence of coverage, does not give rise to a basis for obtaining policy benefits.

While the Court agreed that USAA could have complied with the policy, such compliance does not relieve USAA of liability for the failure to reasonably investigate the claim.

The Court makes clear that the Code only allows an insured to recover actual damages "caused by" the insurer's statutory violation. If the insurer violates the **Code,** generally, that violation cannot cause damages in the form of policy benefits which the insured has no right to receive under the policy. There can be no liability under the **Insurance Code** if there is no coverage under the policy. "There can be no claim for bad faith when an insurer has promptly denied a claim that is in fact not covered." No breach can occur unless coverage exists,

and if there is coverage, there is necessarily a breach if the insurer fails to pay the amount covered.

The Court also disagreed with USAA's contention that an insured can never recover policy benefits as damages for a statutory violation. What matters for purposes of causation under the statute is whether the insured was entitled to receive benefits under the policy. While an insured cannot recover policy benefits for a statutory violation unless the jury finds that the insured had a right to the benefits under the policy, the insured does not also have to establish that the insurer breach the policy by refusing to pay those benefits. If the jury finds that the policy entitles the insured to receive the benefits and that the insurer's statutory violation caused the insured to not receive those benefits, the insured can recover the benefits as "actual damages . . . caused by" the statutory violation.

"Because an insurer's statutory violation permits an insured to receive only those "actual damages" that are "caused by" the violation, we clarify and affirm the general rule that an insured cannot recover policy benefits as actual damages for an insurer's statutory violation if the insured has not right to those benefits under the policy."

(2) The Entitled-to-Benefits Rule:
As recognized in **Vail**, an insured who establishes a right to receive benefits under an insurance policy can recover those benefits as "actual damages" under the statute if the insurer's statutory violation causes the loss of the benefits. The Court rejected USAA's contention that the insured could not recover policy benefits as damages for statutory violations because "the amount due under the policy solely represents damages for breach of contract and does not constitute actual damages in relation to a claim of unfair claims settlement practices." Further, the Court held that "an insurer's unfair refusal to pay the insured's claim causes damages as a matter of law in at least the amount of the policy benefits wrongfully withheld." When an insured suffers a loss that is covered under the policy, that loss was "transformed into a legal damage" when the insurer "wrongfully denied the claim." That "damage is, at a minimum, the amount of policy proceeds wrongfully withheld by the insurer." If an insurer's "wrongful" denial of a "valid" claim for benefits results from or constitutes a statutory violation, the resulting damages will necessarily include "at least the amount of the policy benefits wrongfully withheld."

(3) THE BENEFITS-LOST RULE: "An insured can recover benefits as actual damages under the Insurance Code even if the insured has no right to those benefits under the policy, if the insurer's conduct caused the insured to lose that contractual right."

In the context of an insurer's misrepresentation of a policy's coverage by wrongfully advising the insured that the policy contains coverage which in fact it does not contain, an insured may recover such benefits if the insured is "adversely affected" or injured by reliance on the misrepresentation. This principal has been recognized in the context that the insurer waives its right to deny coverage, is estopped from doing so, or commits a violation that causes the insured to lose a contractual right to benefits that the insured otherwise would have had. As the Court notes, a misrepresentation claim is independent, and may exist in the absence of coverage.

(4) **THE INDEPENDENT-INJURY RULE**:
An insurer's extra-contractual liability is "distinct" from its liability for benefits under the insurance policy. There are 2 aspects to this Rule.

If an insurer's statutory violation causes an injury independent of the insured's right to recover policy benefits, the insured may recover damages for that injury even if the policy does not entitle the insured to receive benefits. Thus, an insured can recover actual damages caused by the insurer's bad-faith conduct if the damages are "separate from and . . . differ from benefits under the contract." This aspect of the independent-injury rule applies only if the damages are truly independent of the insured's right to receive policy benefits. It does not apply if the insured's statutory or extra-contractual claims "are predicated on [the loss] being covered by the insurance policy."

An insurer's statutory violation does not permit the insured to recover any damages beyond policy benefits unless the violation causes an injury that is independent from the loss of the benefits. Thus, an insured who prevails on a statutory claim cannot recover punitive damages for bad-faith conduct in the absence of independent actual damages arising from that conduct. Thus, while the Court re-affirms its holding in **Republic Ins. Co. v. Stoker**, 903 S.W.2d 338, 341 (Tex. 1995), where the Court remains open to "the possibility that in deny the claim, the insurer may commit some act, so extreme, that would cause injury independent of the policy claim", the Court acknowledges that such independent injury would be "rare" and no Texas Court has found an instance where the insured was entitled to recover for an independent injury as a result of an insurer's extreme act. As a result, the Court declined to speculate what would constitute a recoverable independent injury.

(5) THE NO-RECOVERY RULE:
An insured cannot recover any damages based on an insurer's statutory violation unless the insured establishes:
(a) a right to receive benefits under the policy; or

(b) an injury independent of a right to benefits.

B. **VALUE DISPUTES**

1. **Accardo v. America First Lloyds Insurance Company**, 2013 WL 4829252 (S.D.Tex. 2013) The Court rejected the insurer's motions for summary judgment seeking a ruling that Brainard precluded a cause of action for common law bad faith noting that the court rejected this argument in **Hamburger v. State Farm Mut. Auto. Ins. Co.,** 361 F.3d 875, 880 (5th Cir.2004). The Court noted there are no Texas cases which have squarely held that liability can never be reasonably clear before there is a court determination of proximately caused damages, and that there may be cases where a carrier's liability to pay UM/UIM benefits is reasonably clear despite the fact that there has been no judicial determination of liability that the carrier may have breached its duties of good faith and fair dealing. The court opines that when a reasonable investigation reveals overwhelming evidence of the UM/UIM carrier's fault, the judicial determination that triggers the insurer's obligation to pay is no more than a mere formality. The Accardo Court relied heavily on the Fifth Circuit's opinion in **Hamburger v. State Farm Mut. Auto. Ins. Co., 361 F.3d 875, 880 (5th Cir.2004)** and rejected the holding in **Weir v. Twin City**. In rejecting the carrier's position, the Accardo court pointed out that, under Texas law, "[w]hen a reasonable investigation reveals overwhelming evidence of the UM/UIM's fault, the judicial determination that triggers the insurer's obligation to pay is no more than a mere formality." To read the statements as broadly as America First argues would effectively eliminate the cause of action, with no indication that such a result was intended. "[W]ithout [a bad faith] cause of action insurers can arbitrarily deny coverage and delay payment of a claim with no more penalty than interest on the amount owed."). Neither the Fifth Circuit nor Texas courts have established a safe harbor from extra-contractual claims in this context.

   The Court held the record established as a matter of law that the carrier was entitled to summary judgment on allegations of common law bad faith. The carrier argued that it acted in good faith because (1) it had a reasonable basis to question whether Carl Accardo's own negligence may have contributed to the cause of the collision; (2) whether back surgery for Carl Accardo was needed, and (3) the amounts of the damages for each Plaintiff, particularly for pain and suffering are highly subjective; and (4) considering the offers and demands, it did not breach its duties to the insureds; (5) the carrier had expert testimony challenging the reasonableness and necessity of the care.

C. **SCOPE OF THE DUTY OF GOOD FAITH AND FAIR DEALING**

1. **When is Liability Reasonably Clear**

   a. **Hamburger v. State Farm Mut. Auto. Ins. Co., 361 F.3d 875, 880 (5th Cir.2004)**, Insurer argued that "coverage of [the plaintiff's] UIM claim was not reasonably clear until the jury determined the extent of [the plaintiff's] damages caused by the [underinsured] driver," and therefore no bad faith liability could attach for the insurer's failure to settle the claim prior to the jury's determination of damages caused by the accident." The Fifth Circuit rejected the insurer's argument. The court observed that "There are no Texas cases which have squarely held that liability can never be reasonably clear before there is a court determination of proximately caused damages."

2. **During Litigation**
   a. **Mid-Century Insurance Company of Texas v. Boyte**, 49 S.W.3d 408, 413 (Tex.App.–Fort Worth 2001). See also Stewart Title Guarantee Co. vs. Aiello, 941 S.W.2d 68, 70-71 (Tex. 1997). These cases hold that the duty of good faith and fair dealing continues throughout litigation.
3. **Post- Judgment**
   a. **Stewart Title Guaranty Co. v. Aiello**, 941 SW2d 68 (Tex. 1997) Held: an insurer no longer owes an insured a duty of good faith and fair dealing after the entry of an agreed judgment because the Plaintiff's status changed from that of an insured to that of a judgment creditor. The Plaintiff may still have a valid contract claim but no DTPA or Insurance Code claims.
   b. **Mid Century Ins. Co. of Texas v. Boyte,** 49 S.W.2d 408 (Tex. App.- - Fort Worth 2001) rev'd 80 S.W.3D 546 (Tex. 2002). The duty of good faith extended to conduct occurring after initiation of coverage litigation between the carrier and the insured. The carrier may be liable for a breach of the duty of good faith and fair dealing based on its decision to appeal the contract case brought against it by the insured. The duty of good faith extended "beyond the judgment." Here Mid Century appealed a decision excluding evidence Mid Century previously considered irrelevant.
   The Texas Supreme Court reversed holding no duty of good faith after the judgment is entered. The only issue presented was whether or not there was a duty of good faith and fair dealing post judgment. The issues of bad faith prior to and during trial were not included and court granted Mid Century a directed verdict on those issues.
4. **STATUTORY BAD FAITH CLAIMS UNDER §541.060 Tex.Ins.Code**
   a. **UNFAIR SETTLEMENT PRACTICES**
   b. Standing to sue:
      (1) **Reule v. Colony Insurance Co**, 14-11-00602-CV, (Tex. App—Houston [14th Dist.] 2013). The Court, based in part on its decision in **Rumley v. Allstate Indemnity Co.,** 924 S.W.2d 448 (Tex. App.—Beaumont 1996, no writ), concluded that a third party plaintiff making liability homeowners claim does not have standing to sue for breach of the duty of good faith and fair dealing or alleged violations of Chapter 541 and 542 Tex.Ins.Code, and that there insurer does not owe the third party claimant any duties even if the claimant paid a portion of the premiums for the policy.
   c. **VIOLATIONS OF THE ACT**
      (a) It is an unfair method of competition or an unfair or deceptive act or practice in the business of insurance to engage in the following unfair settlement practices with respect to a claim by an insured or beneficiary:
         i) misrepresenting to a claimant a material fact or policy provision relating to coverage at issue;
         ii) failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of:
         iii) a claim with respect to which the insurer's liability has become reasonably clear; or

iv) a claim under one portion of a policy with respect to which the insurer's liability has become reasonably clear to influence the claimant to settle another claim under another portion of the coverage unless payment under one portion of the coverage constitutes evidence of liability under another portion;

v) failing to promptly provide to a policyholder a reasonable explanation of the basis in the policy, in relation to the facts or applicable law, for the insurer's denial of a claim or offer of a compromise settlement of a claim;

vi) failing within a reasonable time to:
   a) affirm or deny coverage of a claim to a policyholder; or
   b) submit a reservation of rights to a policyholder;

vii) refusing, failing, or unreasonably delaying a settlement offer under applicable first-party coverage on the basis that other coverage may be available or that third parties are responsible for the damages suffered, except as may be specifically provided in the policy;

viii) undertaking to enforce a full and final release of a claim from a policyholder when only a partial payment has been made, unless the payment is a compromise settlement of a doubtful or disputed claim;

ix) refusing to pay a claim without conducting a reasonable investigation with respect to the claim;

x) with respect to a Texas personal automobile insurance policy, delaying or refusing settlement of a claim solely because there is other insurance of a different kind available to satisfy all or part of the loss forming the basis of that claim; or

xi) requiring a claimant as a condition of settling a claim to produce the claimant's federal income tax returns for examination or investigation by the person unless:
   a) a court orders the claimant to produce those tax returns;
   b) the claim involves a fire loss; or
   c) the claim involves lost profits or income.

xii) Subsection (a) does not provide a cause of action to a third party asserting one or more claims against an insured covered under a liability insurance policy.

d. **DAMAGES RECOVERABLE FOR VIOLATIONS (§541.152 TEX.INS.CODE)**

(1) A plaintiff who prevails in an action under this subchapter may obtain:
   (a) the amount of actual damages, plus court costs and reasonable and necessary attorney's fees;
   (b) an order enjoining the act or failure to act complained of;
   (c) any other relief the court determines is proper.

(2) On a finding by the trier of fact that the defendant knowingly committed the act complained of, the trier of fact may award an amount not to exceed three times the amount of actual damages.

e. **PENALTIES PURSUANT TO §541.151**

(1) Private Cause of Action Authorized:

(a) A person who sustains actual damages may bring an action against another person for those damages caused by the other person engaging in an act or practice:
i) defined by Subchapter B to be an unfair method of competition or an unfair or deceptive act or practice in the business of insurance; or
ii) Specifically enumerated in Section 17.46(b), Business & Commerce Code, as an unlawful deceptive trade practice if the person bringing the action shows that the person relied on the act or practice to the person's detriment.

f. **BURDEN OF PROOF**

(1) **Wellisch v. United Servs. Auto. Ass'n**, 75 S.W.3d 53 (Tex.App. – San Antonio, 2002, pet. denied). To recover damages under either the common law or the Insurance Code and DTPA, the violations must be a "producing cause" of the insured's damages. See **Castaneda,** 988 S.W.2d 189, 198 (manner in which claim is investigated must be proximate cause of damages); see also **MacIntire v. Armed Forces Benefit Ass'n,** 27 S.W.3d 85, 92 (Tex. App.--San Antonio 2000, no pet.) (conduct prohibited by Insurance Code actionable only if plaintiff's actual damages result from that conduct); The Wellisches' testimony raises the possibility that their mental anguish stemmed from the denial of their claim, but not from USAA's failure to properly investigate the claim. See **Castaneda,** 988 S.W.2d at 199 (holding that any loss of credit reputation resulted from denial of benefits, not from any failure to communicate with insured or properly investigate her claim); **MacIntire,** 27 S.W.3d at 92 (plaintiff did not produce evidence of damages beyond denial of benefits). Therefore, the Wellisches did not raise a fact issue sufficient to defeat USAA's entitlement to summary judgment on their mental anguish claim.

5. **PROMPT PAYMENT OF CLAIMS VIOLATIONS UNDER CHAPTER 542**
6. **NOTICE OF CLAIM**:
   a. Statute: §542.055(a) (1) Tex. Ins. Code
      (1) Not later than the 15th day or, if the insurer is an eligible surplus lines insurer, the 30th business day after the date an insurer receives notice of a claim, the insurer shall:
         (a) Acknowledge receipt of the claim
7. **FORM OF ACKNOWLEDGMENT**:
   a. Written or oral. **Mid Century v. Barclay**, 880 S.W.2d 807 (Tex.App.--Austin, 1994, writ denied).
   b. PIP Claims Require Separate Acknowledgment from UM/UIM Claims.
      (1) **Dunn v. Southern Farm Bureau Casualty Ins. Co.**, 991 S.W.2d 467 (Tex.App.--Tyler 1999) In a case of first impression, the court held that the statutory requirements of acknowledging, investigating, and accepting or rejecting the claim applied to a claim for UIM benefits regardless of whether the claimant is represented by an attorney. Further, compliance with these requirements on a PIP claim did not equate to compliance on the UIM claim since the claims are different coverages.

8. **ACCEPTANCE OR REJECTION OF THE CLAIM IN WRITING**
   a. STATUTE: §542.056(a) Tex.Ins.Code
      (1) Except as provided by Subsection (b) or (d), an insurer shall notify a claimant in writing of the acceptance or rejection of a claim not later than the 15th business day after the date the insurer receives all items, statements, and forms required by the insurer to secure final proof of loss.
   b. Case Law:
      (1) **Guideone Lloyds Insurance Company v. First Baptist Church of Bedford**, 268 SW3d 822 (Tex.App.– 2nd Dist. 2008, no pet.). Not every request for information will qualify as a request for items, statements and forms necessary to accept or to reject a claim. Here, the insurer had already made a decision to pay the claim, and therefore its request for core samples of the roof might be helpful to prove the extent of the loss, but such a request was not required the insurer to make its decision to accept or reject the claim. See **Colonial County Mut. Ins. Co. v. Valdez,** 30 S.W.3d 514, 523 (Tex. App.--Corpus Christi 2000, no pet.) (holding that items requested by insurer were not required to secure final proof of loss).
9. **PAYMENT OF A CLAIM**
   a. STATUTE: §542.057 Tex.Ins. Code
      (1) Except as otherwise provided by this section, if an insurer notifies a claimant under Section 542.056 that the insurer will pay a claim or part of a claim, the insurer shall pay the claim not later than the fifth business day after the date notice is made
      (2) If payment of the claim or part of the claim is conditioned on the performance of an act by the claimant, the insurer shall pay the claim not later than the fifth business day after the date the act is performed.
      (3) If the insurer is an eligible surplus lines insurer, the insurer shall pay the claim not later than the 20th business day after the notice or the date the act is performed, as applicable.
   b. Case Law:
      (1) **Terry v. Safeco Ins. Co. of Am**., CIV.A. H-10-0340, 2013 WL 5214315 (S.D. Tex. Sept. 17, 2013) The Court granted Safeco's Motion for Summary Judgment on Plaintiff's Chapter 542 (Prompt Payment) causes of actions finding that the insurer's settlement offers do not constitute a partial acceptance of claim and do not trigger the 5 day deadline to pay under the prompt-payment statute.
      (2) **Quintana v State Farm**, 2013 WL 5495827 (S.D. Tex. 2013). The Court granted State Farm's motion for summary judgment on Plaintiff's claims of (1) State Farm unreasonably denied or delayed payment of the claim because Plaintiff argued that State Farm should be required to pay the amount it offered to settle the case even though the demand was rejected; and (2) State Farm was acting in bad faith by failing to offer the maximum amount of its evaluation of the claim. Plaintiffs' argument that State Farm was in bad faith centers on the adjuster's estimate of Plaintiff's past and future pain and suffering damages as

being in a range of from $42,000 up to $57,000, and that she used the low estimate instead of the high estimate in making her initial settlement offer.

The reason for estimating a range of damages for past and future physical pain, mental anguish, and physical impairment, is because these losses-unlike lost wages and medical expenses-are inherently subjective. See Gen. Motors Corp. v. Burry, 203 S.W.3d 514, 551 (Tex.App.-Fort Worth 2006, no pet.) ("The process of awarding damages for amorphous, discretionary injuries such as mental anguish or pain and suffering is inherently difficult because the alleged injury is a subjective, unliquidated, non-pecuniary loss. The presence or absence of pain, either physical or mental, is an inherently subjective question. No objective measures exist for analyzing pain and suffering damages. The Court also focused on the fact that the Jury returned a verdict that was consistent with the adjuster's evaluation and that the Plaintiff's demand was "vastly exaggerated" and that Plaintiff failed to respond to State Farm's reasonable requests to advise if Plaintiff was "still being treated or [was] otherwise not ready to negotiate a final settlement of her claim at this time." The summary judgment evidence in this case shows nothing more than a bona fide dispute about the amount of UIM benefits that the insured should receive for her subjective pain and suffering, which is insufficient on this summary judgment record even to raise a fact issue on bad faith. See Hamburger, 361 F.3d at 881.

10. **PENALTIES FOR DELAYING PAYMENT FOR MORE THAN 60 DAYS:**

a. **STATUTE: §542.058 Tex.Ins. Code**

(1) Except as otherwise provided, if an insurer, after receiving all items, statements, and forms reasonably requested and required under Section 542.055, delays payment of the claim for a period exceeding the period specified by other applicable statutes or, if other statutes do not specify a period, for more than 60 days, the insurer shall pay damages and other items as provided by Section 542.060.

(2) This section does not apply in a case in which it is found as a result of arbitration or litigation that a claim received by an insurer is invalid and should not be paid by the insurer.

b. Case Law:

(1) Brainard v. Trinity Universal Insurance Company, 216 S.W.3d 809 (Tex. 2006). While the Brainard decision did not specifically address violations of Article 21.55, the language in the Brainard opinion is a clear warning that the calculation of penalties for delaying payment for more than 60 days in violation of §542.057 Tex.Ins.Code are probably only applicable after the insured obtains a judicial determination of the claim against the uninsured/underinsured motorist carrier, and the carrier delays payment for more than 60 days from that point. The specific language of the opinion makes it clear that in Henson, the Court determined that the UIM insurer is under no contractual duty to pay benefits until the insured obtains a judgment establishing the liability and underinsured status of the other motorist.

However, the **Brainard** opinion should not affect the application of the penalty for other violations of **Chapter 542** as specified by **§542.059 Tex.Ins.Code** because this subsection of the statute focuses on whether or not the insurer was "in compliance with this subchapter."

(2) **Mid-Century v. Daniel,** 223 S.W.3d 586 (Tex. App. – Amarillo 2007, pet. denied). **Daniels** is a post-**Brainard** case that addressed whether and when an insured is entitled to recover penalties for violations of the Prompt Payment of Claims Act under former article 21.55 for failing to pay a valid claim before the insured obtains a judgment against the UIM carrier. Referencing the decision in Brainard, the Amarillo Court held that Mid-Century's payment of $50,562.55 within two days of the judgment against the third party precludes the award of attorney's fees under the prompt payment provisions of article 21.55, §§ 4 and §38.002(3) of the Texas Civil Practice & Remedies Code.

In the concurring opinion, the Court references that the insured was asserting other violations for failing to meet deadlines under 21.55, and yet Justice Campbell dismisses those violations as non-events without any consequence despite the clear language of 542.060(a) saying, "the asserted violations occurred before the determination that Mid-Century had UIM coverage liability." Despite the express legislative intent of the statute to promote the prompt payment of claims, there is a loophole in the wording of the statute to support this result. However, the other violations at issue are almost always pre-litigation issues that, by definition, always occur prior to the entry of judgment. Under this opinion, Justice Campbell concludes that until there is a judgment the carrier doesn't have a duty to acknowledge the claim or to commence an investigation appears contrary to the plain language of the Act and cannot be reconciled with the purpose of the statute. Even the opinion in **Brainard** was carefully crafted to limit is application to prompt payment of the claim as opposed to the statutory deadlines for claims handling under the Act.

In the concurring opinion, Justice Campbell wrote, "The record shows the Daniels brought suit against the tortfeasor Melvin Bray and Mid-Century in April 2001. Because, under the circumstances presented here, the asserted violations of section 3 occurred before the determination that Mid-Century had UIM coverage liability, I conclude the asserted violations could not entitle the Daniels to the interest penalty and attorney's fees under section 6 of article 21.55. Brainard, 216 S.W.3d 809, (Tex. 2006); **Allstate Ins. Co. v. Bonner,** 51 S.W.3d 289 (Tex. 2001); **Menix,** 83 S.W.3d 877. On that basis, I concur in the court's judgment."

11. LIABILITY FOR VIOLATIONS OF CHAPTER 542

a. STATUTE: §542.059 Tex.Ins.Code

(1) If an insurer that is liable for a claim under an insurance policy is not in compliance with this subchapter, the insurer is liable to pay the holder of the

policy or the beneficiary making the claim under the policy, in addition to the amount of the claim, interest on the amount of the claim at the rate of 18 percent a year as damages, together with reasonable attorney's fees.

(2) If a suit is filed, the attorney's fees shall be taxed as part of the costs in the case.

b. Case Law:

(1) **Delagarza v. State Farm Mut. Auto. Ins. Co.,** 175 S.W.3d 29, (Tex. App. Dallas 2005) supp opinion 181 SW3d 755 (Tex. App.– Dallas, 2005). This is a pre-Brainard case in which the Court held The court concluded that State Farm Mutual Automobile Insurance Company did not violate the prompt payment deadlines set by article 21.55 of the Texas Insurance Code because the deadline to send payment was never triggered. In this case, the insurance company accepted part of the insured's claim based on the information the insured provided the company. The insurance company offered to pay the insured the portion of the claim it had accepted within five days of receiving notice that the insured was willing to settle for the undisputed amount. The court held that the insurance company's obligation to send the money never arose because the insured never notified the insurance company that he was willing to accept the amount offered by the company. Although the insurance company ultimately paid the insured the full amount of his claim to settle the dispute, the insured never established that the insurance company was legally obligated under the terms of his policy to pay him the full amount he claimed**.**

Because DeLaGarza never notified State Farm that he was willing to accept the amount offered by the company, State Farm's obligation to send the money never arose. The Court opined in **Republic Underwriters Ins. Co. v. Mex-Tex, Inc.,** that an insurance company could not delay making a payment under **article 21.55** by insisting on a release "to which it is not ultimately entitled . . . ." See **Republic Underwriters,** 150 S.W.3d at 426 (emphasis added). Central to the Supreme Court's analysis was the idea that an insurance company could not force an insured to settle for less than he was legally entitled to receive by conditioning prompt payment on a release of the insurer's liability for further payment.

(2) **Guideone Lloyds Insurance Company v. First Baptist Church of Bedford,** 268 SW3d 822 (Tex.App.– 2nd Dist. 2008, no pet.). This is a post-**Brainard** and post-**Mid Century v. Daniel** case which in contrast to the opinion in **Mid-Century v. Daniel** held:

(a) Contrary to the holding in Daniel, the insurer's pre-litigation violations of article 21.55 by not accepting or rejecting the claim within 15 business days of its receipt of all items necessary to evaluate the claim and for failing to promptly pay the claim required the imposition of penalties against the insurer

(b) The insured's failure to obtain a jury finding determining the penalty's accrual date did not preclude the insured's right recover penalty interest because the facts were undisputed and conclusively established the date of such violation. However, a better practice would be to either get summary

judgment or a directed verdict or obtain a jury finding. Because the evidence is undisputed that GuideOne failed to comply with section 2(a)'s information request requirement, FBCB was not required to obtain a jury finding determining when GuideOne, in compliance with section 2(a), received all items, statements, and forms reasonably requested and required pursuant to section 3(f).

(c) Not every request for information will qualify as a request for items, statements and forms necessary to accept or to reject a claim. Here, the insurer had already made a decision to pay the claim, and therefore its request for core samples of the roof might be helpful to prove the extent of the loss, but such a request was not required the insurer to make its decision to accept or reject the claim. Restated, the statutory requirement for an insurer to accept or to reject the claim involves whether or not the claim is payable, not how much the insurer is going to be pay on the claim. See **Colonial County Mut. Ins. Co. v. Valdez,** 30 S.W.3d 514, 523 (Tex. App.--Corpus Christi 2000, no pet.) (holding that items requested by insurer were not required to secure final proof of loss).

(d) The trial court erred by calculating pre-judgment interest and penalties on the full amount of the claim for the entire period of the claim because neither interest nor penalties accrue on amounts where the insurer tenders an unconditional tender of $ 155,000 on July 7, 2005. However, the interest penalty may be assessed against the insurer on the full amount of the claim if an insurer's partial payment to the insured was not unconditional. Thus, the insured should demand an unequivocal statement in writing from the insurer as to whether an offer of settlement is unconditional or conditional.

(e) The insured is entitled to recover both prejudgment interest on the claim as well as statutory penalties of 18% interest when the insurer violated the Prompt Payment of Claims Act.

(f) Under **Brainard**, Courts are to apply the declining principal formula to calculate pre-judgment interest. Under this formula, "a settlement payment should be accredited first to accrued prejudgment interest as of the date the settlement payment was made, then to 'principal,' thereby reducing or perhaps eliminating prejudgment interest from that point in time forward.

(g) In calculating the amount of article 21.55 interest to be awarded to an insured, we must:

  i) determine the amount of prejudgment interest that had accrued on the breach of contract damages as of the date of insurer's unconditonal tender, if any;

  ii) then apply the insurer's tender first to the amount of prejudgment interest that had accrued as of the date of judgment.

  iii) Then, the Court is to apply any remaining balance to the principal (the amount of the claim), and

  iv) Finally utilize the revised principal figure to calculate the post-tender amount of the article 21.55 interest penalty.

(h) Courts are not to apply the "declining principal" formula to calculations for determining the 18% interest allowed under the Prompt Payment of Claims Act.

(i) The trial court did not err in submitting a jury instruction defining "unfair or deceptive act or practice "as" failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim when the insurer's liability has become reasonably clear" because the evidence showed that while GuideOne refused to pay for an upgrade in insulation, GuideOne became aware of the legal requirement to include the upgraded insulation on repairs but failed to pay for such upgrade. In addition, the evidence showed that the adjuster testified that the claim should "have been paid a long time ago." The insurer's claim that this instruction was error because it never "denied" the claim is without merit because although it never denied the claim as a whole, but it contested the need to upgrade the insulation after the insured notified it that the City imposed a legal requirement for the upgrade.

(j) Any error the court may have committed by submitting certain jury questions was harmless. The insurer argued that the jury's finding in response to question number ten irreconcilably conflicts with its finding in response to question number six. Question numbers ten, eleven, and twelve covered FBCB's breach of good faith and fair dealing claim. The jury found in response to question nine that GuideOne had failed to comply with its duty of good faith and fair dealing to FBCB, found in response to question 10 and that $30,000 would fairly and reasonably compensate FBCB for its damages proximately caused by the breach, found in response to question eleven that GuideOne was actually aware that its actions involved a high degree of probability of financial ruin to FBCB, and found in response to question twelve that $55,000 should be awarded to as exemplary damages for GuideOne's conduct found in question eleven.

(3) **Barclay v. Mid Century,** 880 S.W.2d 807 (Tex.App.--Austin 1994, writ denied). "Amount of the claim" as referred to in Article 21.55 §6 is limited to the amount of policy limits, and does mean the true value of the amount of the claim. Subsequent decisions of the Texas Supreme Court including **Brainard** and **Arthur Andersen v. Perry Equipment Co.** have directly impacted the significance of this decision. In this case, the insured sought damages and attorney fees for failure of insurer to meet the prompt pay provisions of Article 21.55 of the Texas Insurance Code.

(a) Held: Insurance company failed to comply with the statute and was forced to pay the claim, 18% in damages plus a one-third contingency fee in attorney's fees. The purpose of the article is to ensure that the insurance company will pay claims in a prompt manner.

12. **18% PENALTY PER ANNUM;**

a. **Cater v. USAA**, 27 S.W.3d 81 (Tex.App.--San Antonio, 2000, pet. denied). USAA claimed that the 18% penalty under Article 21.55 does not apply even if an insurer delays payment more than 60 days if the delay was due to a good faith denial of the

claim. The Court disagrees. Even good faith delays will result in a penalty. The penalty is to be calculated based on 18% "per annum." Per annum refers to simple interest from the date of the denial of the claim until the date it is paid.

13. **REASONABLE ATTORNEY'S FEES**.
    a. **Republic Underwriter's Ins. Co. vs. Mex-Tex, Inc.**, 150 SW3d 423 (Tex. 2004) The court held that the insurer should have paid the cost to replace the insured's roof with one of the same kind and affixed mechanically as the insured had requested, and awarded the insured damages under article 21.55 of the Tex.Ins.Code. The damages were limited to the difference in the actual cost less the amount unconditionally tendered by the insurer. The court reasoned that the definition of a "claim" in article 21.55 "that must be paid" should be construed to allow reduction by any partial payments to "encourage insurers to pay the undisputed portions of the claim early, consistent with the statute's purpose to "obtain prompt payment of claims."
    b. **Nagel v. Kentucky Central Ins. Co.**, 894 S.W.2d 19 (Tex.App.--Austin, 1994, writ denied) Insurance company had an obligation to pay for insured's personal attorney after refusal to defend.
    c. **Grapevine Excavation, Inc. v. Maryland Lloyd**, 35 SW3d 1 (Tex. 2000) The Court accepted writ on a certified question. "In a policyholder's successful suit for breach of contract against an insurance company that is subject to one or more of the provisions listed in §38.006, is the carrier liable to its policyholder for reasonable attorneys fees incurred in pursuing the breach of contract action, either listed in §38.006 or under §36.001 if application of one or more of those sections does not result in the award of attorney's fees?" Answer: Yes. While the court agreed with the carrier that §38.006 CPRC could support the position that the insurer may have been exempt under Chapter 38, the Court found that the insurer who had breached its contract was liable for attorney's fees.
    d. **Lamar Homes, Inc. vs. Mid-Continent Casualty Company,** 335 F. Supp 2nd 754 (W.D. (Tex.2007) This case involved 3 Certified questions: (1) Allegations of unintended construction defects in a home may constitute an "accident" or "occurrence" in a CGL policy. (2) Allegations of damage to or loss of use of the home itself may constitute "property damage" sufficient to trigger the duty to defend under a CGL policy. (3) Whether the Prompt Payment Status" applies when an insurer wrongfully refuses to promptly provide a defense to an insured because defense costs are a first party loss. The Court held it does.

14. **FAILURE TO SETTLE OR TO DEFEND**
    a. **Rocor International, Inc. f/k/a Donco Carriers Inc. v. National Union Fire Ins. Co of Pittsburgh**, 77 SW3d 253 (Tex.2002). An insurer assumes the duty to fairly settle the claims against an insured when it takes over negotiations, including negotiations involving funds that it did not control. Further the insurer may not take exclusive control of the handling of claims against its insured and then claim in court that it cannot be held liable for mishandling claims because it had no contractual duty to defend.
    b. **Evanston Insurance Co. v. ATOFINA Petrochemicals, Inc.** No. 03–0647, 2006 WL 1195330 (Tex.Sup.Ct. 2006). **Article 21.55** of the **Texas Insurance Code,** the

"Prompt Payment of Claims" statute, did not authorize the imposition of penalties and attorney's fees for the insurer's failure to pay the settlement claim timely. Though the statute does not define first-party claims, first-party and third-party claims are distinguished based on the claimant's relationship to the loss. A first-party claim is stated when an insured seeks recovery for the insured's own loss, whereas a third-party claim is stated when an insured seeks coverage for injuries to a third party. A loss incurred in satisfaction of a settlement belongs to the third party and is not suffered directly by the insured. This case, in which ATOFINA seeks coverage for injuries sustained by a third party, presents a classic third-party claim. Because the Legislature intended that article 21.55 apply to claims personal to the insured, ATOFINA is not entitled to the article 21.55 damages or attorney's fees.

D. EXAMPLES OF BAD FAITH CONDUCT

1. CANCELLATION OF A POLICY WITHOUT A REASONABLE BASIS

a. The Supreme Court extended the bad faith cause of action to situations in which an insurance company cancels a policy without a reasonable basis in **Union Bankers Insurance Co. v. Shelton,** 889 S.W.2d 278, 283 (Tex. 1994) "A cause of action is stated by alleging that the insurer had no reasonable basis for the cancellation of the policy and that the insurer knew or should have known of that fact."

2. UNREASONABLE OR UNRELIABLE EXPERT OPINIONS

a. State Farm Lloyds v. Nicolau, 951 SW2d 444 (Tex. 1997). This case involves the necessary elements to prove Insurance Code tort damages, "bad faith" damages, DTPA damages, and punitive damages. An insurer's reliance upon an expert's report standing alone, will not necessarily shield the carrier if there is evidence that the report was not objectively prepared or the insurer's reliance upon the report was unreasonable. Because there was no evidence of malice. Punitive damages can be awarded for bad faith only when an insurer was actually aware that its actions involved an extreme risk-that is, a high probability of serious harm, such as death grievous physical injury, or financial ruin - to its insured and was nevertheless consciously indifferent to its insured's rights, safety or welfare. Further there was no evidence of unconscionable conduct by State Farm. This case was decided the same day as **The Universe Life Ins. Co. v. Giles** and cites it for authority.

3. **FAILURE TO SETTLE A CLAIM WHEN LIABILITY IS REASONABLY CLEAR**

a. **The Universe Life Ins. Co. v. Giles**, 950 SW2d 48 (Tex. 1997). An insurer breaches its duty when the insurer fails to settle a claim if the insurer knew or should have known that it was reasonably clear that the claim was covered. However, whether an insurer acts in "bad faith" because it denied or delayed payment of a claim after its liability became reasonably clear is a question for the fact-finder. Punitive damages can be awarded for bad faith only when an insurer was actually aware that its actions involved an extreme risk-that is, a high probability of serious harm, such as death grievous physical injury, or financial ruin - to its insured and was nevertheless consciously indifferent to its insured's rights, safety or welfare.

4. **UNREASONABLE DELAY AND KNOWINGLY FAILING TO ATTEMPT TO EFFECT A PROMPT, FAIR AND EQUITABLE SETTLEMENT OF CLAIM WHEN LIABILITY IS REASONABLY CLEAR**

a. **Provident American Insurance Co. v. Castaneda**, 914 SW2d 273 (Tex.App.--El Paso, 1996) rev'd on other grounds 988 SW2d 189 (Tex. 1998), overruled **Crowne Life Ins. Co. v. Casteel,** 22 SW3d 378 (Tex. 2000). An insurer's failure to act over an 8 month period from the date of loss supports a finding that the company knowingly failed to attempt in good faith to effect a prompt, fair and equitable settlement of the claim after liability became reasonably clear.

5. **FAILING TO PURSUE A THOROUGH, SYSTEMATIC, OBJECTIVE, FAIR AND HONEST INVESTIGATION OF A CLAIM**

a. **State Farm Fire & Casualty Co. v. Simmons**, 963 S.W.2D 42 (Tex. 1998). An insurer cannot avoid bad faith liability by refusing to investigate a claim. The standard in bad faith cases is whether the carrier reasonably investigated the claim. The Court held that the proper standard is whether the insurer fulfilled its duty to its insured by pursuing a thorough, systematic, objective, fair and honest investigation of the claim prior to denying such a claim.

The Supreme Court upheld the Court of Appeals decision to affirm the jury's finding of bad faith because State Farm failed to investigate the possibility that other potential suspects might have started the fire when the Plaintiffs identified 5 such potential suspects and the fire marshal testified that revenge is a leading motivation in house fires. Further, State Farm's explanation for its failure to investigate other potential causes of the fire was contradictory. At one point the adjuster said he could not locate the suspects, at another time, the adjuster said it was not important to him. Moreover, State Farm admitted that 6 of its 8 factors that indicate potential arson were not met. The testimony on the other 2 points was potentially in favor of the insureds as well. In dissent, Justice Spector appropriately states that the opinion would not impose bad faith where the evidence overlooked by the insurer or reviewed, even in a biased manner, if the evidence is irrelevant to its decisions.

Nevertheless, there was insufficient evidence to support a punitive damages award against State Farm. Further, since Plaintiffs elected punitive damages over DTPA damages, the appeal issues re DTPA claims is moot. This case is important because although the justices say there is no change in the standard for bad faith, the new standard, as worded, is almost a negligence standard, and is definitely more Plaintiff oriented.

6. **EXTREME CONDUCT – INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**

a. **Aleman v. Zenith Ins. Co.**, 343 S.W.3d 817 (Tex.App.—El Paso 2011, no pet.h). Texas courts do not "exclude the possibility that in denying the claim, an insurer may commit some act, so extreme, that it would cause injury independent of the policy claim." However, generally, when there is no coverage and the bad faith claim is limited "to an assertion that liability was reasonably clear under the policy", the bad faith claim fails as a matter of law.

E. EXAMPLES OF CONDUCT THAT ARE NOT BAD FAITH

1. **EXAMPLES OF CONDUCT THAT ARE NOT BAD FAITH**

2. AN INSURER MAY SETTLE WITH ONE PARTY

a. **Lane v. State Farm Mutual Automobile Ins. Co.**, 992 S.W.2d 545 (Tex.App.--Texarkana 1999, pet. denied) As a matter of first impression, the court found that

an insurer could settle with the insured's father without reaching a settlement with the mother as the other claimant and that the insurer properly paid benefits equally between the parents and was not acting in bad faith. Here, the son of these divorced parents was killed. The father accepted a settlement of ½ of the policy limits with the other half going to the mother of the deceased. The father requested that his ½ be given to a third party who raised the boy and stated that he would assign his interest to them. State Farm agreed and made the father's settlement check out to the father and to the third party.

3. **IF THERE IS NO COVERAGE, THERE IS NO BAD FAITH**
   a. **Republic Ins. Co. v. Stoker,** 903 S.W.2d 339 (Tex. 1995) An insured rear-ended another vehicle after an unidentified truck that did not come in contact with the insured's car or the other car dropped a load of furniture which caused a chain reaction collision. The insureds did not have collision coverage so they filed a claim with their comprehensive coverage carrier for UM/UIM benefits. The insurance company denied the claim based on the insured's negligence, not the lack of contact. The insured sued for bad faith. Held: An insurer has a duty to deal fairly and in good faith with its insured in the processing and payment of claims. To establish a bad faith claim a Plaintiff must show: 1. an absence of a reasonable basis for denying benefits under the policy; and 2. knowledge on the part of the carrier that there was not a reasonable basis for denying coverage. Whether there is a reasonable basis for denial must be judged by the facts before the insurer at the time the claim was denied. However, a carrier does not breach its duty of good faith and fair dealing if it denies a claim for an invalid reason when there was, at the time, a valid reason for denial. Here the insured were never covered under the terms of the policy.
   b. **POSSIBLE EXCEPTION:**
      (1) Aleman v. Zenith Ins. Co., 343 S.W.3d 817 (Tex.App.—El Paso 2011, no pet.h). See above: Extreme Conduct
4. **THE ABSENCE OF BAD FAITH PRECLUDES LIABILITY FOR EXTRA CONTRACTUAL DAMAGES.**
   a. **Commonwealth County Mutual Insurance Company v. Moctezuma**, 900 S.W.2d 798 (Tex.App.--San Antonio, 1995) Plaintiff sued the tortfeasor's insurance company after entering into an agreed judgment and taking an assignment of rights from the tortfeasor. The failure to find bad faith on the part of the insurer precluded insurer's liability for extra-contractual damages, but the evidence did support an award of policy limit damages to cover for the Plaintiff's damages claimed in the agreed judgment.

      The Insurer's Failure to Contact the Potential Insured To Question The Validity of Statements In the Application for Insurance is Not Evidence of Bad Faith.
   b. **Columbia Universal Life Ins. Co. v. Miles**, 923 SW2d 803 (Tex.App.--El Paso 1996, writ denied). An insurer's failure to contact the applicant prior to asserting its right to question the validity of statements made on the application does not constitute evidence of bad faith. Evidence showing that the insured signed the application knowing the application did not contain complete answers, and knowing it contained false representations about prior medical treatment and that another

insurance company had refused coverage because of the pre-existing conditions constitutes a reasonable basis for its cancellation.

5. **THERE IS NO DUTY OF GOOD FAITH IN SETTLING THIRD PARTY CLAIMS**
   a. **Maryland Ins. Co. v. Head Industrial Coatings & Services Inc**., 938 SW2d 27 (Tex. 1996). See lower court opinion at 906 S.W.2d 218. The Court held that an insurer does not owe its insured a duty of good faith and fair dealing in its attempts to settle the claims of a third party. The only duty that Texas recognizes is the duty stated in **Stowers Furniture Co. v. American Indem. Co.** An additional duty is unnecessary and inappropriate. The insured can sue for breach of contract damages equal to the policy limits, the defense costs, attorney fees, and interest. Those damages are not trebled under Article 21.55 of the Insurance Code.
6. **THIRD PARTY CLAIMANTS HAVE NO STANDING TO ASSERT EXTRA-CONTRACTUAL CLAIMS.**
   a. **Rumley v. Allstate Indemnity Co.**, 924 S.W.2d 448 (Tex.Civ.App.--Beaumont, 1996) Third party claimants have no standing to assert extra-contractual and statutory claims against a carrier for the denial and delay in the payment of their claims even if the third party is the spouse of the first party and is making a claim under her policy of insurance. Where a husband and wife, who are insured under the same policy, are involved in a one-car accident and the wife asserts a liability claim based on the husband's negligent driving, the wife is a third party claimant. The wife assumed the posture of a third party claimant.
7. **A GOOD FAITH MISINTERPRETATION OF THE LAW IS NOT BAD FAITH**.
   a. **United States Fire Ins. Co. v. Williams**, 955 S.W.2d 267 (Tex. 1997). This case addresses whether a worker's comp carrier breached its duty of good faith and fair dealing when it denied a surviving spouses claim for death benefits by misinterpreting a Worker's Comp. Rule. The court says an insurer cannot be liable for bad faith simply because it misinterprets a rule. While the carrier may have been wrong, its decision was not groundless.
8. **DELAYING PAYMENT UNTIL A JUDGMENT ESTABLISHES LEGAL LIABILITY TO PAY A CLAIM IS NOT BAD FAITH**.
   a. **Wellisch v. United Servs. Auto. Ass'n**, 75 S.W.3d 53 (Tex.App. – San Antonio, 2002, pet. denied). The parents' 15-year-old daughter died shortly after she was involved in a single-vehicle auto accident in which she was a passenger. The vehicle was insured. The parents settled with the driver's estate. They then sought recovery of insurance policy limits under their own UM/UIM coverage.
   The insurance company involved was the same one that had paid benefits on behalf of the driver's estate. It denied the parents' claim. The parents sued and received a verdict exceeding the amount they previously recovered from the driver's estate and the uninsured motorist limits combined. On the same day judgment was entered, the insurance company paid to the parents the limit available under their underinsured motorist policy. The parents made extra-contractual claims against the insurance company for the alleged breach of the duty of good faith and fair dealing, statutory violations, and mental anguish. After the claims were dismissed, the appellate court found no improper payment delay as the insurance company only waited to pay until

the parents established they had a right to the money. Accordingly, the parents also were not entitled to mental anguish damages.

An insurer is not obligated to pay underinsured (UIM) benefits until the insured becomes legally entitled to those benefits. That situation will generally require a settlement with the tortfeasor or a judicial determination following trial on the issue of the tortfeasor's liability. Thus, an insurer has the right to withhold payment of UIM benefits until the insured's legal entitlement is established.

To recover damages under either the common law or the Insurance Code and DTPA, the violations must be a "producing cause" of the insured's damages. See **Castaneda,** 988 S.W.2d 189, 198 (manner in which claim is investigated must be proximate cause of damages); see also **MacIntire v. Armed Forces Benefit Ass'n,** 27 S.W.3d 85, 92 (Tex. App.--San Antonio 2000, no pet.) (conduct prohibited by Insurance Code actionable only if plaintiff's actual damages result from that conduct); Izaguirre, 749 S.W.2d at 55 (a bad faith recovery is for damages arising from the bad faith act; for additional costs, hardship, or losses due to nonpayment of amounts owed); **TEX. INS. CODE ANN. art. 21.21 § 16(a)** (Vernon Supp. 2001); **TEX. BUS. & COM. CODE ANN. § 17.50(a)** (Vernon 1987). The Wellisches' testimony raises the possibility that their mental anguish stemmed from the denial of their claim, but not from USAA's failure to properly investigate the claim. See **Castaneda,** 988 S.W.2d at 199 (holding that any loss of credit reputation resulted from denial of benefits, not from any failure to communicate with insured or properly investigate her claim); **MacIntire,** 27 S.W.3d at 92 (plaintiff did not produce evidence of damages beyond denial of benefits). Therefore, the Wellisches did not raise a fact issue sufficient to defeat USAA's entitlement to summary judgment on their mental anguish claim.

b. **Accardo v. America First Lloyds Insurance Company**, 2013 WL 4829252 (S.D.Tex. 2013). However, There may be cases where an carrier's liability to pay UM/UIM benefits is reasonably clear despite the fact that there has been no judicial determination of liability that the carrier may have breached its duties of good faith and fair dealing. The court opines that when a reasonable investigation reveals overwhelming evidence of the UM/UIM carrier's fault, the judicial determination that triggers the insurer's obligation to pay is no more than a mere formality.

9. **FAILURE TO DISCLOSE INFORMATION REGARDING CLAIMS HANDLING PRACTICES WHEN SELLING INSURANCE (IN THE ABSENCE OF ACTUAL ECONOMIC DAMAGES TIED TO THE PRACTICE)**.

a. **Juan M. Espinosa v. Allstate Ins. Co.,** No. 13-12-00509-CV (Tex. App.—Corpus Christi Feb. 14, 2013) (mem. op.), Without addressing the merits of the petition, the Court granted Allstate's Motion for Summary Judgment challenging a claim by the insured that Allstate was acting in bad faith because Allstate had a business practice of treating its insureds less favorably if they retained legal counsel, but paying less on average to policyholders who did not retain attorneys. The insured alleged that, if he had known about this practice, it would have caused him not to purchase his Allstate policies. The court of appeals quoted the plaintiff's petition as claiming that Allstate's claims handling put the plaintiff "in a 'damned if you do and damned if

you don’t’ position, with respect to employing legal counsel in connection with obtaining policy benefits.” The plaintiff sought restitution of his premiums and exemplary damages.

The Court granted summary judgment because it found that plaintiff failed to demonstrate any economic loss based on the alleged fraud. The plaintiff had received the benefit of coverage, and did not show that he had suffered “a distinct tortuous injury with actual damages.” This opinion leaves open the possibility of a claim if it could be shown that the practice caused actual harm to the insured.