

Presented:

2014 University of Texas Car Crash Seminar

July 31, 2014 – August 1, 2014
Austin, Texas

**HANDLING UNINSURED/UNDERINSURED MOTORIST CLAIMS
OUTLINE AND UPDATE OF RECENT CASES**

Thomas A. Herald

Thomas A. Herald
Noteboom – The Law Firm
669 Airport Freeway, Suite 100
Hurst, TX 76053

Herald@Noteboom.com
817-282-9700
817-282-8703 Fax

I. RULES OF CONSTRUCTION FOR CONSTRUING INSURANCE POLICIES..... 9

A. General Rules

B. Ambiguity

C. Interpretations of Exclusionary Clauses

II. COVERAGE ISSUES 10

A. EIGHT CORNERS RULE

B. EXCEPTIONS TO THE EIGHT CORNERS RULE

C. MEMBER OF THE HOUSEHOLD

D. DEFINITION OF UNINSURED VEHICLE: OWNED BY OR FURNISHED TO OR AVAILABLE FOR USE OF THE POLICYHOLDER

E. WHO IS AN UNINSURED MOTORIST?

F. DEFINITION OF “AUTO ACCIDENT”

G. TYPES OF ACCIDENTS

H. INJURIES OCCURRED WHILE USING A MOTOR VEHICLE

1. While Exiting or Entering a Vehicle

2. UM/UIM INJURIES SUSTAINED WHILE LOADING AND UNLOADING A VEHICLE

3. “WHILE OCCUPYING”

I. PHYSICAL CONTACT

1. WHAT CONSTITUTES PHYSICAL CONTACT?

2. INDIRECT CONTACT RULE

3. FALLING OBJECTS & DEBRIS CASES

J. Bodily Injury

1. WHAT CONSTITUTES “BODILY INJURY”

2. Emotional distress as “bodily injury”

3. Wrongful Death Mental Anguish Claims

4. Bystander Claims

5. Loss of consortium and loss of household services claims

K. Property Damage

III. EXCLUSIONS 27

A. VEHICLES THAT DO NOT QUALIFY AS AN UNINSURED VEHICLES

B. VEHICLES FURNISHED FOR THE REGULAR USE

C. EXCLUDED DRIVERS

D. FAMILY MEMBER EXCLUSION

E. PERMISSIVE DRIVERS AND OMNIBUS INSUREDS

F. FELLOW EMPLOYEE EXCLUSION

IV. DUTIES OF THE INSURED 29

A. DUTY TO LIST VEHICLES

B. DUTY TO COOPERATE

C. DUTY TO GIVE NOTICE OF NEW VEHICLE

D. DUTY TO GIVE NOTICE OF CLAIM

E. DUTY TO OBTAIN CONSENT TO SETTLE

1. EXCEPTIONS TO CONSENT TO SETTLE

F. DUTY TO SUBMIT TO MEDICAL EXAMINATIONS

G. DUTY TO SUBMIT TO EXAMINATIONS UNDER OATH (EUO's)

V. COVERAGES REQUIRED 34

A. UM/UIM COVERAGE REQUIRED

B. PIP COVERAGE

VI. PIP & UM/UIM REJECTIONS 35

A. Liberal Construction

B. The PIP and UM/UIM rejections must be in writing

C. UM/UIM rejections

D. Form of the PIP and UM/UIM Rejections

<i>E. Burden of Proof</i>	
<i>F. Perpetual renewals</i>	
VII. CANCELLATION OF THE POLICY	38
VIII. STACKING COVERAGES	38
<i>A. General Rule</i>	
<i>B. Exceptions</i>	
<i>C. Company Cars: Coverage While Occupying a Vehicle Supplied for Regular Use</i>	
IX. OTHER INSURANCE CLAUSE: PRIORITIES OF COVERAGE WHEN THERE ARE MULTIPLE POLICIES	40
<i>A. Offsets& Credits for Other Insurance</i>	
<i>B. Non-owned Vehicles</i>	
<i>C. Cases Involving Non-Standard Insurance Policies</i>	
D. OFFSETS & CREDITS FOR UM/UIM CLAIMS	
1. UM/UIM OFFSET FOR PIP AND MED-PAY PAYMENTS	
2. SETTLEMENTS WITH PERSONS WHO ARE NOT “LEGALLY LIABLE”	
<i>E. Workers’ Comp Benefits</i>	
<i>F. Tortfeasors not entitled to credit for UM/UIM payments</i>	
<i>G. Settlements for less than policy limits</i>	
X. DAMAGES RECOVERABLE ON UM/UIM CLAIMS	45
A. PURE UM/UIM CLAIMS	
1. Bodily injury damages	
a) Medical Expenses	
2. Property damages	
3. Punitive Damages	
4. Pre-judgment and Post Judgment Interest	
5. Court Costs	

6. Attorney's Fees

- a) **THE HISTORICAL FIGHT FOR ATTORNEY'S FEES**
- b) **Cases Permitting The Recovery of Attorney's Fees**
- c) **Cases Disallowing The Recovery of Attorney's Fees**
- d) **Defenses to Attorney's Fees**

XI. BRAINARD, NORRIS & NICKERSON TRILOGY OF CASES 59

A. Brainard v. Trinity Universal Insurance Company, 216 S.W.3d 809 (Tex. 2006).

B. State Farm Mut. Ins. Co. v. Norris, 216 S.W.3d 819 (Tex.2006).

C. State Farm Mut. Ins. Co. v. Nickerson, 216 S.W.3d 823 (Tex. 2006)

XII. MAKING A CLAIM 61

XIII. BAD FAITH. WHAT IS IT? 62

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

B. Scope of the Duty of Good Faith and Fair Dealing

- 1. **When is Liability Reasonably Clear**
- 2. **During Litigation**
- 3. **Post- Judgment**

C. EXAMPLES OF BAD FAITH CONDUCT

D. EXAMPLES OF CONDUCT THAT ARE NOT BAD FAITH

E. UNRESOLVED ISSUES

XIV. DAMAGES RECOVERABLE ON BAD FAITH CLAIMS 72

A. Actual Damages, up to the policy limits

B. Consequential damages

C. Mental Anguish

D. Attorney's fees

E. Punitive Damages if the claimant can prove

XV. STATUTORY BAD FAITH CLAIMS	75
<i>A. INSURANCE CODE CLAIMS UNDER §541.060 Tex.Ins.Code</i>	
1. Unfair Settlement Practices	
2. Damages Recoverable for violations (§541.152 Tex.Ins.Code)	
3. PENALTIES PURSUANT TO §541.151	
4. BURDEN OF PROOF	
<i>B. PROMPT PAYMENT OF CLAIMS VIOLATIONS UNDER CHAPTER 542</i>	
1. Right to Settle Underlying Claims and to Reserve Extra-Contractual Claims	
2. Insured Must Obtain a Finding that the Insured was Legally Obligated To Pay	
3. Impact of <u>Brainard</u> on Prompt Payment Claims	
4. 18% Penalty Applies Even in the Absence of Bad Faith	
5. Reasonable attorney's fees	
6. Failure to Settle or to Defend	
XVI. STATUTE OF LIMITATIONS ON FIRST PARTY CLAIMS	86
<i>A. Post Brainard Statutes of Limitations on claims</i>	
1. PURE UM/UIM CLAIMS	
2. COMMON LAW BAD FAITH CLAIMS	
3. DTPA CLAIMS	
4. INS. CODE CLAIMS	
XVII. UNIFORM DECLARATORY JUDGMENTS ACT	87
<i>A. The Statute</i>	
<i>B. Cases Addressing the Use of Declaratory Judgments for UM/UIM Claims</i>	
<i>C. PLEADING REQUIREMENTS FOR UM/UIM CASES</i>	
1. Invoking the Statute	
2. Requesting Declaratory Determinations	

3. Recovery of Attorneys' Fees under the Statute	
XVIII. LAWSUITS AGAINST THE ADJUSTER	89
A. CASE LAW	
B. EXCEPTIONS	
C. OTHER CAUSES OF ACTION AGAINST THE ADJUSTER	
1. Intentional Torts	
D. PROHIBITED CAUSES OF ACTION AGAINST THE ADJUSTER	
1. Negligence	
2. Breach Of The Duty Of Good Faith and Fair Dealing	
XIX. PLEADING REQUIREMENTS	91
A. <i>Res Judicata and Collateral Estoppel</i>	
B. <i>"Bodily injury" Must Be Pled and Proven and Cannot be Inferred</i>	
XX. PRE-TRIAL ISSUES	93
A. SEVERANCE/SEPARATE TRIALS & ABATEMENT	
1. General Rule	
2. Exception	
B. SUFFICIENCY OF PLEADINGS	
C. REMOVAL	
XXI. DISCOVERY	101
A. Severance and Abatement	
B. Deposing the EUO Attorney	
C. Claims of Trade Secret	
XXII. TRIAL ISSUES	102
A. NOT NECESSARY TO SUE THE TORTFEASOR	
B. TRIAL AMENDMENT SHOULD BE PERMITTED TO ASSERT OFFSET/CREDIT	
C. CORRECT PARTIES TO A UM/UIM TRIAL	

<i>D. Admissibility of Intoxication of Uninsured/Under-Insured Driver</i>	
XXIII.ASSIGNMENT OF BENEFITS	104
<i>A. Notice of Assignment of Rights</i>	
<i>B. APPLICATION OF PAID OR INCURRED TO PIP CLAIMS</i>	
XXIV.LIENS & SUBROGATION CLAIMS ON PIP AND UM/UIM CLAIMS	104
<i>A. Equitable Subrogation</i>	
<i>B. Common Fund Doctrine</i>	
<i>C. Medicare/Medicaid Liens</i>	
<i>D. Health Insurance</i>	
<i>E. Workers Compensation Liens</i>	
<i>F. Employer Purchased Policies: Comp Carrier Is Entitled to Subrogate</i>	
<i>G. Made Whole Doctrine Does Not Apply to Employer Purchased UM/UIM Policies</i>	
<i>H. Hospital Liens</i>	
XXV. LIST OF RECENT CASES	111

I. RULES OF CONSTRUCTION FOR CONSTRUING INSURANCE POLICIES

A. General Rules:

1. Same Rules of Construction as Any Contract.
2. Insurance policies are construed according to the same rules of construction that apply to contracts generally. **Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.**, 267 S.W.3d 20, 23 (Tex. 2008). Interpretation or construction of an unambiguous contract is a matter of law to be determined by the court. **Coats v. Farmers Ins. Exch.**, 230 S.W.3d 215, 217 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

B. Plain Language:

1. **Security Mut. Cas. Co. v. Johnson**, 584 SW 2d 703, 704 (Tex. 1979). Words in an insurance policy are to be given their plain, ordinary meaning unless the policy gives them a different meaning.
2. **Fiess v. State Farm Lloyds**, 202 SW 3d 744, 751 and n.30 (Tex. 2006) To determine the plain and ordinary meaning of the words of an insurance policy, Courts routinely turn to dictionary definitions.

C. Ambiguity:

1. **National Union Fire Ins. vs. Hudson Energy Co.**, 811 S.W.2d 552, 555 (Tex. 1991). Here the Supreme Court held: "Generally, a contract of insurance is subject to the same rules of construction as other contracts. If the written instrument is worded so that it can be given only one reasonable construction, it will be enforced as written. However, if a contract of insurance is susceptible of more than one reasonable interpretation, we must resolve the uncertainty by adopting the construction that most favors the insured. The Court must adopt the construction of an exclusionary clause urged by the insured as long as that construction is not unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties' intent. In particular, exceptions or limitations on liability are strictly construed against the insurer and in favor of the insured."

D. Interpretations of Exclusionary Clauses:

1. If the language of an exclusionary clause in an insurance policy is clear and unambiguous, the well established rule of construction directing adoption of that construction most favorable to the insured, is not applicable. Consequently, absent ambiguity, neither party can be favored by its construction. **Maryland Casualty Co. v. State Bank & Trust Co.**, 425 F.2d 979 (5th Cir. 1970) *cert. denied*, 400 U.S. 828, 27 L. Ed. 2d 57, 91 S. Ct. 55 (1970). **Monte Christo Drilling Corp. v. Byron-Jackson Tools, Inc.**, 266 F. Supp. 123 (S.D. Tex. 1966).

2. The court must adopt the construction of an exclusionary clause urged by the insured as long as that construction is not unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties' intent." **Nat'l Union Fire Ins. Co. v. Hudson Energy Co.**, 811 S.W.2d 552, 555, (Tex. 1991).

II. COVERAGE ISSUES

A. *Eight Corners Rule*

1. The duty to defend is determined, regardless of the of the truth or falseness of the allegations, by reviewing the facts alleged within the four corners of the petition and the coverages and exclusions contained within the four corners of the policy. **Heyden Newport Chemical Corp. v. Southern General Ins. Co.**, 387 SW 22 (Tex. 1965).

B. *Exceptions to the Eight Corners Rule:*

1. **Weingarten Realty Management Co. v. Liberty Mut. Fire Ins. Co.**, __ S.W.3d __ (Tex. App.—Houston [14th Dist.] (2011)). After acknowledging that the Supreme Court has never expressly recognized an exception to the eight corners rule, the Houston Court noted that other courts has recognized a “very narrow exception” allowing extrinsic evidence “only when relevant to an independent and discrete coverage issue, not touching on the merits of the underlying third-party claim.” **GuideOne Elite Ins. Co. v. Fielder Road Baptist Church**, 197 S.W.3d 305, 308 (Tex.2006); *see also* **Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co.**, 279 S.W.3d 650, 654 (Tex.2009). The Houston 14th Court of Appeals recognized an exception to the eight-corners rule for the first time. In the underlying case, Connie Johnson sued her employer Norstan Apparel Shops, Inc., d/b/a Fashion Cents, and the entity she alleged leased the space, Weingarten Realty Management Company, after she was assaulted by an unknown person while working as a manager for Fashion Cents. Johnson misnamed the Weingarten defendant, which should have been named as Weingarten Realty Investors, which the court noted was a “separate and distinct” entity from the named defendant. Weingarten Management never challenged the error and Johnson never fixed it.

Weingarten Management’s carrier defended. Shortly before trial, Weingarten Management made a demand upon Norstan’s carrier, Liberty Mutual, for a defense as an additional insured under its policy. But, Weingarten Investors was the proper entity, through its lease contract with Nostan, due additional insured status under the Liberty Mutual policy. Liberty Mutual rejected the claim for a defense. Weingarten Management and its insurer sued Liberty Mutual for coverage.

In recognizing an exception to the eight-corners rule, the court noted that Liberty Mutual was asking the court to assume that the alleged facts were true. In doing so, Liberty Mutual argued that a complete stranger to the policy – as evidenced by the pleadings and the policy’s reference to the lease – was asking for a defense to which it was not entitled. Here, the extrinsic evidence at issue was the policy’s reference to parties to lease agreements, requiring the court to consider lease agreements to determine insured status under the policy.

The court distinguished other eight-corners cases by noting that Liberty Mutual was not challenging the merits of the underlying claim. The court noted that “[i]n light of the

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Handling Uninsured/Underinsured Motorist Claims: Outline and Update of Recent Cases

Also available as part of the eCourse

[Auto Insurance: The Texas Standard Auto Policy; the Under-Insured/Uninsured Motorist; plus Negotiating with the Insurance Adjuster](#)

First appeared as part of the conference materials for the
2014 The Car Crash Seminar session
"The Under-insured/Uninsured Motorist"