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**IMPORTANT CASES AFFECTING THE
PROSECUTION AND DEFENSE OF UM / UIM CASES**

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IMPORTANT CASES AFFECTING THE PROSECUTION AND DEFENSE OF UM / UIM CASES

There are a number of recent cases—required reading—that affect the prosecution and defense of uninsured and underinsured motorist (UM / UIM) cases. For our purposes in this article, I will use the terms UM/UIM interchangeably (most of our discussion will focus on UIM propositions). The following article, while not exhaustive, gives the practitioner a good overview of important cases in this area of the law.

The Basics: It is a Contract!

What is unique about the whole area of UM / UIM law is that fundamentally it involves a lawsuit for contract benefits the determination of which depends upon tort law. That is, legal entitlement to benefits under the insurance policy depends upon whether the plaintiff (insured) establishes a third party's liability under tort law.¹

The Texas Supreme Court, in two important cases, has discussed the issue of “legal entitlement” to the recovery of underinsured motorist benefits. In the first case, *Henson v. S. Farm Bureau Cas. Ins. Co.*, 17 S.W.3d 652 (Tex. 2000), the court dealt with the issue of when prejudgment interest commences in an underinsured motorist case. Like most UIM litigation, the plaintiff-insured settled his liability suit against the third-party tortfeasor for policy

limits (with the UIM insurer's consent) and the case against the UIM carrier proceeded. The court construed language in the UM/UIM policy (language still contained in such policies to date):

We will pay damages which a covered person is *legally entitled to recover* from the owner or operator of an [uninsured / underinsured] motor vehicle because of bodily injury sustained by a covered person, or property damage caused by an accident.

See *id.* at 653 (emphasis supplied). The insured argued that it was entitled to prejudgment interest 180 days after he made a demand for UIM benefits (or filed suit for same). The insurance company contended that it did not owe prejudgment interest on a claim for underinsured motorist benefits until it was subject to a judgment establishing the third-party tortfeasor's negligence and the damages flowing from such negligence. See *id.* at 654:

When the jury found Contreras [the tortfeasor] at fault for the accident and found Henson [the plaintiff-

¹ The Texas Supreme Court has explained:

The UIM contract is unique because, according to its terms, benefits are conditioned upon the insured's legal entitlement to receive damages from a third party. Unlike many first-party insurance contracts, in which the policy alone dictates coverage, UIM insurance

utilizes tort law to determine coverage. Consequently, the insurer's contractual obligation to pay benefits does not arise until liability and damages are determined.

Brainard v. Trinity Universal Ins. Co., 216 S.W.3d 809, 818 (Tex. 2006)

insured] damaged by her negligence, Henson became legally entitled to recover from her. And because the damages exceeded Contreras' liability policy limits, Henson became entitled to the uninsured / underinsured motorist policy benefits, up to the policy limits. **By the terms of the policies, no obligation to pay the claim existed until the jury established Contreras' liability.**

Id. at 654 (emphasis supplied).

Henson's Important Points:

- The plaintiff's settlement with the third-party tortfeasor alone did not establish that the plaintiff-insured was entitled to recover from the UIM insurer.
- There is no obligation upon the UIM insurer to pay the claim until the jury established the tortfeasor's liability—and no contractual duty is breached before that time.

The second important case is *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809 (Tex. 2006). Much of the discussion in the case involves the issue of the recovery of prejudgment interest in a UIM case. The holding in this regard: UIM insurance covers prejudgment interest that

the underinsured motorist (i.e., the tortfeasor) would owe the plaintiff-insured. *See id.* at 813. The method by which such prejudgment interest is computed is discussed in the opinion, but I will leave that analysis to my brothers and sisters presenting the seminars in appellate law!

One of the more important issues discussed in *Brainard* involved the recovery of attorney's fees in UIM cases (discussed in more detail later). The case, however, confirmed the supreme court's earlier pronouncements in *Henson* that the UIM carrier has no contractual obligation to pay benefits under the policy until such time as there is a judgment establishing legal entitlement to such benefits.

As the court stated:

The UIM insurer is obligated to pay damages which the insured is "legally entitled to recover" from the underinsured motorist. TEX. INS. CODE art. 5.06–1(5). As discussed above, 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.

Brainard, 216 S.W.3d at 818.

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