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**Attorney's Fees after *Allstate v. Irwin*:  
The Defense Perspective**

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### Introduction

*Allstate v. Irwin*<sup>1</sup> is a significant case for those who prosecute or defend uninsured or underinsured motorist (UM / UIM) cases. *Irwin* was an underinsured motorist case. It stands for the proposition that an insured may recover attorney's fees in a suit against his or her UM/ UIM insurer by virtue of the Texas Declaratory Judgment Act.<sup>2</sup> My colleague on this dais on the plaintiffs' side of the docket, Tom Crosley, successfully prosecuted the *Irwin* case. Prior to that case, the conventional wisdom was that attorney's fees were not recoverable in UM / UIM cases since "legal entitlement" to a recovery was not established prior to a judgment (or settlement of the UIM claim).<sup>3</sup> The basis for

the recovery of attorney's fees in *Irwin*, however, lies in the pronouncement that recovery of fee must be "just and equitable."<sup>4</sup> *Irwin* involved a familiar fact pattern in UIM cases. The court succinctly set out the underlying facts as follows:

On April 5, 2016, Daniel Irwin was injured in a vehicular accident with an underinsured motorist. At the time of the accident, Allstate Insurance Company insured Irwin's truck. Irwin's policy included UIM coverage up to \$50,000. Irwin settled with the other driver for her \$30,000 policy limits, and followed the settlement with a letter to Allstate, seeking his UIM policy limits of \$50,000. Allstate offered to settle for \$500. Believing Allstate's offer inadequate, Irwin sued. In this direct action against his UIM carrier, Irwin sought a determination of his damages from the accident, a declaratory judgment that he was entitled to recover under his UIM policy, and attorney's fees. Irwin's pleadings invoked the Uniform Declaratory

*Because the contract did not require Trinity to pay UIM benefits before [the tortfeasor'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.*

*Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809, 819 (Tex. 2006)

<sup>1</sup> 627 S.W.3d 263 (Tex. 2021).

<sup>2</sup> Tex. Civ. Prac. Rem. Code § 37.001, et. seq.

<sup>3</sup> See *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809 (Tex. 2006). The basis for the claim for attorney's fees in *Brainard* was contract; that is, Tex. Civ. Prac. Rem. Code § 38.002. The court reasoned that the claim was not "presented" under the statute until such time as plaintiff obtained a judgment establishing legal entitlement to benefits under the policy. Consequently, plaintiff could not recover attorney's fees. See *Brainard* at 818-19.

<sup>4</sup> See *Allstate Ins. Co. v. Irwin*, 627 S.W.3d 263, 271 (Tex. 2021)(noting that the Uniform Declaratory Judgment Act allows the recovery of fees that are equitable and just and "does not require an award of attorney's fees to anyone"; rather, it "entrusts attorney fee awards to the trial court's sound discretion.")

Judgments Act (UDJA) for all relief.

*Allstate Ins. Co. v. Irwin*, 627 S.W.3d 263, 266 (Tex. 2021).

For our purpose here, we need not engage in an academic debate whether 1) the resolution of legal entitlement under a UIM policy may be accomplished through the (Texas) Declaratory Judgment Act (UDJA)—it can,<sup>5</sup> or 2) whether attorney’s fees are properly recoverable under the Act—they *may be*.<sup>6</sup> Our purpose is to deal with those holdings from the defense side of such litigation.

The guiding principle of the UDJA, as illuminated by *Irwin*, is that the “the court may award costs and reasonable and necessary attorney’s fees as are equitable and just.”<sup>7</sup> The court also noted that either side (i.e., insured or insurer) may seek fees.<sup>8</sup> So, let me offer a few thoughts on how to evaluate and defend a claim for attorney’s fees under *Irwin*.

**1. Pick the battlefield.** Simply put: Texas state courts will allow the recovery of attorney’s fees under the Texas UDJA. Federal courts will *not* allow recovery of attorney’s fees in UIM cases under the federal declaratory judgment act.<sup>9</sup> While the

<sup>5</sup> See *Allstate Ins. Co. v. Irwin*, 627 S.W.3d at 266.

<sup>6</sup> See *id.* at 271-72.

<sup>7</sup> See *id.* at 270.

<sup>8</sup> See *id.* at 269 (noting that either party to a written contract may seek declaratory relief if there is a question regarding rights, status, or other legal relations arising under it).

<sup>9</sup> *Utica Lloyds of Texas v. Mitchell*, 138 F.3d 208, 210 (5<sup>th</sup> Cir. 1998)(noting that § 37.009 of the Texas Declaratory Judgment Act is procedural only and does not allow for the award of attorney’s fees in a diversity action); see also *Camacho v. Texas Workforce Comm’n*, 445 F.3d 407, 412-13 (5<sup>th</sup> Cir. 200)(stating that *Utica* is “good law” and that the

procedural and substantive law regarding the proper removal of a UIM case is outside the scope of this particular paper, in those case in which there is complete diversity of citizenship between the parties and the amount in controversy exceeds \$75,000, the insurer’s lawyer is well advised to look into removal of the action.

## **2. Basis for fees under declaratory judgment act.**

The supreme court has given us some guidance in this area. The court must examine four factors:

1) The fees must be reasonable. This is a question of fact.<sup>10</sup>

2) The fees must be necessary. This is also a question of fact.<sup>11</sup>

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Texas Declaratory Judgment Act is procedural and not substantive law).

<sup>10</sup> *Bocquet v. Herring*, 972 S.W.2d 19, 21(Tex. 1998). The supreme court also has explained that a “reasonable” fee is “is one that is not excessive or extreme, but rather moderate or fair.” *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016), *citing*, *Garcia v. Gomez*, 319 S.W.3d 638, 642 (Tex.2010). Since the reasonableness of fees is a question of fact, absent the agreement of the parties, may the court rule on attorney’s fees without jury findings?

<sup>11</sup> See *Bouquet v. Herring*, 972 S.W.2d at 21. The court also noted that there are factors prescribed by law that guide the determination of whether attorney fees are reasonable and necessary. See *id.* at 21, *citing*, *Arthur Andersen v. PECO*, 945 S.W.2d 812, 818 (Tex. 1997). Those factors include:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;

(2) the likelihood ... that the acceptance of the particular

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