

**Presented:**  
August, 2024

**UT CAR CRASH SEMINAR**  
Austin, Texas

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

**Thomas A. Herald**

Thomas A. Herald  
**THOMAS A. HERALD, PC**  
1038 S. Elm Street  
Carrollton, TX 75006

Tom@TAHeraldPC.com  
(214) 432-2800 Telephone  
(214) 432-2866 Fax  
Email: Tom@TAHeraldPC.com

|      |  |    |
|------|--|----|
| I.   | <b>RULES OF CONSTRUCTION FOR CONSTRUING INSURANCE POLICIES...</b>  | 1  |
| A.   | <b>GENERAL RULES</b> .....   | 1  |
| B.   | <b>PLAIN LANGUAGE</b> .....  | 1  |
| C.   | <b>AMBIGUITY</b> .....   | 1  |
| D.   | <b>INTERPRETATION OF EXCLUSIONARY CLAUSES</b> .....                | 1  |
| E.   | <b>SEVERABILITY CLAUSES</b> .....                                  | 2  |
| II.  | <b>COVERAGE ISSUES</b> .....                                       | 2  |
| A.   | <b>EIGHT CORNERS RULE</b> .....                                    | 2  |
| B.   | <b>EXCEPTIONS TO THE EIGHT CORNERS RULE</b> .....                  | 2  |
| C.   | <b>WHEN COVERAGE IS DENIED</b> .....                               | 3  |
| D.   | <b>WHO IS COVERED?</b> .....                                       | 3  |
| E.   | <b>MEMBER OF THE HOUSEHOLD</b> .....                               | 4  |
| F.   | <b>DEFINITION OF UNINSURED VEHICLE</b> .....                       | 5  |
| G.   | <b>VEHICLES OWNED BY OR FURNISHED TO OR AVAILABLE FOR USE</b> .... | 6  |
| H.   | <b>WHO IS AN UNINSURED MOTORIST?</b> .....                         | 6  |
| I.   | <b>NAMED DRIVER POLICIES</b> .....                                 | 7  |
| J.   | <b>DEFINITION OF "AUTO ACCIDENT"</b> .....                         | 8  |
| K.   | <b>TYPES OF ACCIDENTS</b> .....                                    | 9  |
| L.   | <b>INJURIES OCCURRED WHILE USING A MOTOR VEHICLE</b> .....         | 13 |
| M.   | <b>PHYSICAL CONTACT</b> .....                                      | 15 |
| N.   | <b>BODILY INJURY</b> .....   | 16 |
| O.   | <b>PROPERTY DAMAGE</b> .....                                       | 20 |
| P.   | <b>"OTHER INSURANCE" CLAUSES</b> .....                             | 20 |
| III. | <b>EXCLUSIONS &amp; CONDITIONS PRECEDENT</b> .....                 | 21 |
| A.   | <b>VEHICLES THAT DO NOT QUALIFY AS AN UNINSURED VEHICLES</b> ..... | 21 |
| B.   | <b>VEHICLES FURNISHED FOR THE REGULAR USE</b> .....                | 23 |
| C.   | <b>EXCLUDED DRIVERS</b> .....                                      | 24 |
| D.   | <b>FAMILY MEMBER EXCLUSION</b> .....                               | 24 |
| E.   | <b>PERMISSIVE DRIVERS AND OMNIBUS INSUREDS</b> .....               | 25 |
| F.   | <b>FELLOW EMPLOYEE EXCLUSION</b> .....                             | 25 |
| IV.  | <b>DUTIES OF THE INSURED</b> .....                                 | 26 |
| A.   | <b>DUTY TO LIST VEHICLES</b> .....                                 | 26 |
| B.   | <b>DUTY TO COOPERATE</b> .....                                     | 27 |
| C.   | <b>DUTY TO GIVE NOTICE OF NEW VEHICLE</b> .....                    | 27 |
| D.   | <b>DUTY TO GIVE NOTICE OF CLAIM</b> .....                          | 27 |
| E.   | <b>DUTY TO OBTAIN CONSENT TO SETTLE</b> .....                      | 27 |
| F.   | <b>DUTY TO SUBMIT TO MEDICAL EXAMINATIONS</b> .....                | 29 |
| G.   | <b>DUTY TO SUBMIT TO EXAMINATIONS UNDER OATH (EUO's)</b> .....     | 30 |
| V.   | <b>COVERAGES REQUIRED</b> .....                                    | 30 |
| A.   | <b>UM/UIM COVERAGE REQUIRED</b> .....                              | 30 |
| B.   | <b>UM/UIM COVERAGE MUST BE OFFERED IN THE AMOUNTS DESIRED</b> .... | 30 |
| C.   | <b>PIP COVERAGE</b> .....  | 31 |

|       |   |    |
|-------|---|----|
| VI.   | <b>PIP &amp; UM/UIM REJECTIONS</b>  | 32 |
| A.    | <b><i>LIBERAL CONSTRUCTION</i></b>  | 32 |
| B.    | <b><i>THE PIP AND UM/UIM REJECTIONS MUST BE IN WRITING</i></b>                                  | 33 |
| C.    | <b><i>FORM OF THE PIP AND UM/UIM REJECTIONS</i></b>   | 34 |
| D.    | <b><i>BURDEN OF PROOF</i></b>   | 34 |
| E.    | <b><i>EXCEPTIONS</i></b>  | 35 |
| F.    | <b><i>PERPETUAL RENEWALS</i></b>  | 35 |
| G.    | <b><i>NOTICE OF CLAIM REQUIREMENTS</i></b>  | 35 |
| H.    | <b><i>INSURER'S BURDEN TO SHOW PREJUDICE</i></b>  | 35 |
| I.    | <b><i>ASSIGNMENTS OF BENEFITS – PIP CLAIMS</i></b>  | 35 |
| J.    | <b><i>PIP OFFSETS PERMITTED TO PREVENT A DOUBLE RECOVERY</i></b>                                | 36 |
| K.    | <b><i>PIP OFFSETS AND COLLATERAL SOURCES</i></b>  | 36 |
| VII.  | <b>CANCELLATION OF THE POLICY</b>   | 36 |
| VIII. | <b>STACKING COVERAGES</b>   | 36 |
| A.    | <b><i>GENERAL RULE</i></b>  | 36 |
| B.    | <b><i>EXCEPTIONS</i></b>  | 37 |
| C.    | <b><i>COMPANY CARS: COVERAGE WHILE OCCUPYING A<br/>VEHICLE SUPPLIED FOR THE REGULAR USE</i></b> | 37 |
| IX.   | <b>OTHER INSURANCE CLAUSE: PRIORITIES OF COVERAGE &amp; MULTIPLE<br/>POLICIES</b>               | 37 |
| A.    | <b><i>POLICY LANGUAGE</i></b>   | 37 |
| B.    | <b><i>NON-OWNED AUTOS</i></b>   | 37 |
| C.    | <b><i>CASES INVOLVING NON-STANDARD INSURANCE POLICIES</i></b>                                   | 38 |
| D.    | <b><i>OFFSETS &amp; CREDITS ON UM/UIM CLAIMS</i></b>  | 39 |
| E.    | <b><i>WORKERS' COMP BENEFITS</i></b>  | 40 |
| F.    | <b><i>TORTEASOR IS NOT ENTITLED TO A CREDIT FOR UM/UIM BENEFITS</i></b>                         | 42 |
| G.    | <b><i>SETTLEMENTS FOR LESS THAN POLICY LIMITS</i></b>   | 42 |
| H.    | <b><i>REQUIRING THE INSURED TO SIGN A RELEASE</i></b>   | 42 |
| X.    | <b>DAMAGES RECOVERABLE ON UM/UIM CLAIMS</b>   | 42 |
| A.    | <b><i>WHETHER UIM COVERAGE IS EXCESS OR REDUCTION</i></b>                                       | 42 |
| B.    | <b><i>PURE UM/UIM CLAIMS</i></b>  | 42 |
| 1)    | <b><i>BODILY INJURY DAMAGES UP TO THE POLICY LIMITS</i></b>                                     | 42 |
| 2)    | <b><i>MEDICAL EXPENSES</i></b>  | 42 |
| 3)    | <b><i>PROPERTY DAMAGES</i></b>  | 44 |
| 4)    | <b><i>PUNITIVE DAMAGES ARE NOT RECOVERABLE ON<br/>PURE UM/UIM CLAIM</i></b>                     | 47 |
| 5)    | <b><i>PRE-JUDGMENT AND POST-JUDGMENT INTEREST</i></b>   | 48 |
| 6)    | <b><i>COURT COSTS</i></b>   | 49 |
| 7)    | <b><i>ATTORNEY'S FEES</i></b>   | 49 |
| a.    | <b><i>THE HISTORICAL FIGHT FOR ATTORNEY'S FEES</i></b>  | 49 |
| b.    | <b><i>PRE-BRAINARD CASES PERMITTING RECOVERY OF<br/>ATTORNEY'S FEES</i></b>                     | 50 |
| c.    | <b><i>PRE-BRAINARD CASES DISALLOWING RECOVERY OF<br/>ATTORNEY'S FEES</i></b>                    | 51 |
| d.    | <b><i>POST-BRAINARD RECOVERY OF ATTORNEY'S FEES</i></b>   | 52 |
| e.    | <b><i>DEFENSES TO CLAIMS OF ATTORNEY'S FEES</i></b>   | 53 |

|       |  |    |
|-------|--|----|
| XI.   | <b>BRAINARD, NORRIS &amp; NICKERSON TRILOGY OF CASES</b>                           | 53 |
| A.    | <i>Brainard v. Trinity Universal Insurance Company, 216 S.W.3d 809 (Tex. 2006)</i> | 55 |
| B.    | <i>State Farm Mut. Ins. Co. v. Norris, 216 S.W.3d 819 (Tex.2006)</i>               | 55 |
| C.    | <i>State Farm Mut. Ins. Co. v. Nickerson, 216 S.W.3d 823 (Tex. 2006)</i>           | 56 |
| XII.  | <b>MAKING A CLAIM</b>  | 57 |
| A.    | <b>NOTICE OF CLAIM</b>   | 57 |
| B.    | <b>TIME LIMITS FOR GIVING NOTICE OF CLAIM</b>                                      | 57 |
| XIII. | <b>BAD FAITH. WHAT IS IT?</b>  | 57 |
| A.    | <b>EVOLVING STANDARDS FOR WHAT CONSTITUTES “BAD FAITH”</b>                         | 57 |
| B.    | <b>POST-MENCHACA BAD FAITH – INTERPRETING THE 5 NEW RULES</b>                      | 62 |
| 1.    | <b>GENERAL RULE</b>  | 62 |
| 2.    | <b>THE ENTITLED-TO-BENEFITS RULE</b>   | 62 |
| 3.    | <b>THE BENEFITS-LOS9 RULE</b>  | 62 |
| 4.    | <b>THE INDEPENDENT-INJURY RULE</b>   | 62 |
| 5.    | <b>THE NO-RECOVERY RULE</b>  | 62 |
| C.    | <b>SCOPE OF THE DUTY OF GOOD FAITH AND FAIR DEALING</b>                            | 62 |
| D.    | <b>EXAMPLES OF BAD FAITH CONDUCT</b>   | 63 |
| E.    | <b>EXAMPLES OF CONDUCT THAT ARE NOT BAD FAITH</b>                                  | 64 |
| F.    | <b>UNRESOLVED ISSUES</b>   | 67 |
| G.    | <b>POTENTIAL BARS TO PURSUING BAD FAITH CLAIMS</b>                                 | 67 |
| H.    | <b>EXPERT WITNESSES ON BAD FAITH CLAIMS</b>  | 68 |
| I.    | <b>541 CLAIMS FOR BAD FAITH &amp; PROMPT PAYMENT OF CLAIMS</b>                     | 68 |
| XIV.  | <b>DAMAGES RECOVERABLE ON BAD FAITH CLAIMS</b>                                     | 69 |
| A.    | <b>ACTUAL DAMAGES UP TO THE POLICY LIMITS</b>                                      | 69 |
| B.    | <b>MENTAL ANGUISH</b>  | 69 |
| C.    | <b>COMPENSATORY DAMAGES</b>  | 71 |
| D.    | <b>PUNITIVE DAMAGES</b>  | 71 |
| E.    | <b>STANDARDS OF PROOF: PRODUCING CAUSE</b>   | 71 |
| F.    | <b>ATTORNEY’S FEES</b>   | 71 |
| G.    | <b>STANDARDS OF PROOF TO RECOVER ATTORNEY’S FEES</b>                               | 72 |
| H.    | <b>EQUITABLE AND JUST</b>  | 73 |
| XV.   | <b>STATUTORY BAD FAITH CLAIMS</b>  | 74 |
| A.    | <b>INSURANCE CODE CLAIMS UNDER §541.060 Tex.Ins.Code</b>                           | 74 |
| B.    | <b>PROMPT PAYMENT OF CLAIMS VIOLATIONS UNDER CHAPTER 542</b>                       | 76 |
| C.    | <b>FAILURE TO SETTLE OR TO DEFEND</b>  | 83 |
| XVI.  | <b>STATUTE OF LIMITATIONS ON FIRST PARTY CLAIMS</b>                                | 84 |
| A.    | <b>POST-BRAINARD STATUTES OF LIMITATIONS ON UM/UIM CLAIMS</b>                      | 84 |

|   |     |
|---|-----|
| 1) <i>PURE UM/UIM CLAIMS</i> .....  | 84  |
| 2) <i>COMMON LAW BAD FAITH CLAIMS</i> .....   | 85  |
| 3) <i>DTPA CLAIMS</i> .....   | 85  |
| 4) <i>INSURANCE CODE CLAIMS</i> .....   | 85  |
| <br>XVII. <i>CAUSES OF ACTION FOR UM/UIM CLAIMS</i> .....   | 85  |
| A. <i>DECLARATORY JUDGMENT ACTION</i> .....   | 85  |
| B. <i>STAND-ALONE 541 CLAIM</i> .....   | 85  |
| C. <i>EXHAUSTION DOCTRINE</i> .....   | 87  |
| <br>XVIII. <i>UNIFORM DECLARATORY JUDGMENTS ACT</i> .....   | 87  |
| A. <i>THE STATUTE</i> .....   | 87  |
| B. <i>ATTORNEY'S FEES ON DECLARATORY JUDGMENT ACTIONS</i> .....   | 88  |
| C. <i>CASES ADDRESSING THE USE OF DECLARATORY JUDGMENTS</i><br><i>FOR UM/UIM CLAIMS</i> .....           | 89  |
| D. <i>PLEADING REQUIREMENTS FOR DECLARATORY JUDGMENT ACTIONS</i> ..                                     | 91  |
| <br>XIX. <i>LAWSUITS AGAINST THE ADJUSTER</i> .....   | 91  |
| A. <i>LEGAL AUTHORITY FOR SUING THE ADJUSTER</i> .....  | 91  |
| B. <i>EXCEPTIONS</i> .....  | 91  |
| C. <i>OTHER CAUSES OF ACTION AGAINST THE ADJUSTER</i> .....   | 92  |
| D. <i>PROHIBITED CAUSES OF ACTION AGAINST THE ADJUSTER</i> .....  | 92  |
| E. <i>THIRD PARTIES THAT ARE NOT CONSIDERED "PERSONS" OR</i><br><i>"ADJUSTERS" UNDER THE CODE</i> ..... | 92  |
| <br>XX. <i>PLEADING REQUIREMENTS</i> .....  | 93  |
| A. <i>RES JUDICATA AND COLLATERAL ESTOPPEL</i> .....  | 93  |
| B. <i>"BODILY INJURY" MUST BE PLED AND PROVEN, IT IS NOT INFERRED..</i>                                 | 93  |
| C. <i>MOTIONS TO DISMISS FOR FAILURE TO PLEAD A CLAIM</i> .....   | 94  |
| <br>XXI. <i>PRE-TRIAL ISSUES</i> .....  | 95  |
| A. <i>VENUE</i> .....   | 95  |
| B. <i>SEVERANCE/SEPARATE TRIALS &amp; ABATEMENT</i> .....   | 96  |
| C. <i>CONDITIONS PRECEDENT</i> .....  | 105 |
| D. <i>SUFFICIENCY OF PLEADINGS</i> .....  | 105 |
| E. <i>REMOVAL</i> .....   | 106 |
| <br>XXII. <i>DISCOVERY</i> .....  | 113 |
| A. <i>SCOPE OF DISCOVERY</i> .....  | 113 |
| B. <i>LIMITATIONS ON DISCOVERY IN UM/UIM CASES</i> .....  | 113 |
| C. <i>DISCOVERY OF CLAIMS FILES</i> .....   | 113 |
| D. <i>CLAIMS OF TRADE SECRETS</i> .....   | 114 |
| E. <i>DEPOSING THE EUO ATTORNEY</i> .....   | 115 |
| F. <i>DEPOSING THE ADJUSTER</i> .....   | 115 |
| G. <i>DEPOSING CORPORATE REPRESENTATIVES ON UM/UIM CLAIMS</i> .....                                     | 115 |
| H. <i>BAD FAITH DISCOVERY</i> .....   | 118 |
| I. <i>DISCOVERY REGARDING ATTORNEY'S FEES</i> .....   | 118 |

|   |     |
|---|-----|
| XXIII. TRIAL ISSUES .....   | 119 |
| A. <i>NOT NECESSARY TO SUE THE TORTFEASOR</i> .....   | 119 |
| B. <i>CONSENT TO BE BOUND</i> .....   | 119 |
| C. <i>DEFAULT JUDGMENTS</i> .....   | 120 |
| D. <i>TRIAL AMENDMENTS SHOULD BE PERMITTED TO ASSERT<br/>        OFFSETS/CREDITS</i> .....  | 120 |
| E. <i>CORRECT PARTIES TO A UM/UIM TRIAL</i> .....   | 120 |
| F. <i>BURDEN OF PROOF TO PROVE THE POLICY</i> .....   | 121 |
| G. <i>ADMISSIBILITY OF EVIDENCE OF POLICY LIMITS</i> .....  | 121 |
| H. <i>THE CORPORATE REPRESENTATIVE AS A TRIAL WITNESS</i> .....   | 121 |
| I. <i>ADMISSIBILITY OF INTOXICATION OF THE UM/UIM DRIVER</i> .....  | 122 |
| J. <i>ADMISSIBILITY OF OTHER ACCIDENTS &amp; OTHER HEALTH<br/>        CONDITIONS</i> .....  | 122 |
| K. <i>THE CHARGE</i> .....  | 122 |
| L. <i>MOTIONS FOR NEW TRIAL</i> .....   | 122 |
| XXIV. ASSIGNMENT OF BENEFITS .....  | 123 |
| A. <i>SETTLEMENT CHECKS &amp; ASSIGNMENTS</i> .....   | 123 |
| B. <i>APPLICATION OF PAID OR INCURRED STATUTE TO PIP CLAIMS</i> .....   | 123 |
| XXV. LIENS & SUBROGATION CLAIMS ON PIP AND UM/UIM CLAIMS .....  | 123 |
| A. <i>EQUITABLE SUBROGATION</i> .....   | 123 |
| B. <i>COMMON FUND DOCTRINE</i> .....  | 123 |
| C. <i>MEDICARE AND MEDICAID LIENS</i> .....   | 124 |
| D. <i>HEALTH INSURANCE LIENS</i> .....  | 124 |
| E. <i>WORKER'S COMPENSATION LIENS</i> .....   | 125 |
| F. <i>CHILD SUPPORT LIENS</i> .....   | 128 |
| G. <i>HOSPITAL LIENS</i> .....  | 128 |
| H. <i>ANTI-SUBROGATION RULE</i> .....   | 129 |
| XXVI. RECENT CASES .....  | 130 |
| A. <i>ATTORNEYS FEES ON DECLARATORY JUDGMENT ACTIONS</i> .....  | 130 |
| 1. <u>El Dorado Homeowner's Assoc., Inc. v. Clough</u> , 2024 WL 20170 (Tex.App.—Dallas<br>2024, no pet.).  |     |
| 2. <u>State Farm Mut. Auto. Ins. Co. v. Valdez</u> , 2024 Tex. App. LEXIS 713 (Tex.App. – San<br>Antonio 2024, pet. filed).                                     |     |
| 3. <u>Farmers Texas County Mut. Ins. Co. v. Barr</u> , 2024 WL 2340792 (Tex. App.—<br>Beaumont 2024, no pet.)   |     |
| 4. <u>Montgomery v. State Farm Lloyds</u> , 2024 WL 2369415 (5 <sup>TH</sup> Cir. 2024)   |     |
| 5. <u>Colunga v. State Farm Mut. Auto. Ins. Co.</u> , 2024 Tex.App. LEXIS 4404 (Tex.App.-<br>San Antonio 2024, no pet.)   |     |
| B. <i>SEVERANCE</i> .....   | 131 |
| 1. <u>In re State FarM Mut. Auto. Ins. Co.</u> 2023 WL 5604142 (Tex.App. --- Dallas 2023,<br>orig. proc.) (pet granted) (oral argument set for October 3, 2024) |     |

|   |     |
|---|-----|
| C. <b>REMOVAL</b> .....   | 132 |
| 1. <b><u>Zavala v. State Farm Mut. Auto. Ins. Co.</u></b> , SA-23-CV-01372-XR, 2024 WL 51028, at * 4 (W.D. Tex. Jan. 3, 2024)                                       |     |
| 2. <b><u>Werder v Allstate Fire and Casualty Ins. Co.</u></b> , F. Supp. 3d, No. 3:24—cv-130-BN, 2024 WL 1810474 (N.D. Tex. Apr. 25 2024).                          |     |
| D. <b>DEPOSING AND CALLING THE CORPORATE REPRESENTATIVE</b>   |     |
| <b>AS A WITNESS</b> .....   | 133 |
| 1. <b><u>In re State Farm Mut. Auto. Ins. Co. and Borowec</u></b> , 2023 WL 7984390, at * 1 (Tex.App.—Dallas Nov. 17, 2023, orig. proceeding).                      |     |
| 2. <b><u>In re State Farm Mut. Auto. Ins. Co.</u></b> 2023 WL 5604142 (Tex.App. --- Dallas 2023, orig. proc.) (pet granted) (oral argument set for October 3, 2024) |     |
| 3. <b><u>In re State Farm Mut. Auto. Ins. Co.</u></b> , 2024 WL 1591032 (Tex.App.—Fort Worth 2024, orig. proceeding)  |     |
| 4. <b><u>In re State Farm Mut. Auto. Ins. Co.</u></b> , 2024 WL 1749942 (Tex.App.—Fort Worth 2024, orig. proceeding) \  |     |
| 5. <b><u>In re Hartford Cas. Ins. Co.</u></b> , 2023 WL 456997 (Tex. App.—Houston [1 <sup>st</sup> Dist.] 2023, orig. proceeding).                                  |     |

## 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. **Fieess 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). "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).

### E. *Severability Clauses:*

1. **Clause:** "This insurance applies separately to each insured. This condition will not increase our limit of liability for any one occurrence."
2. A severability clause generally serves to provide coverage to an "innocent" insured who did not commit the intentional conduct excluded by the policy. **Bituminous Cas. Corp. v. Maxey**, 110 S.W.3d 203, 210 (Tex. App.—Houston [1st Dist.] 2003, *pet. denied*). (citing **State Farm Fire & Cas. Ins. Co. v. Keegan**, 209 F.3d 767, 769 (5th Cir. 2000)). Each insured against whom a claim is brought is treated as if he or she is the only insured under the policy, and thus, stands alone with respect to exclusion provisions. **Williamson v. Vanguard Underwriters Ins. Co.**, No. 14-97-00276-CV, 1998 WL 831476, at \*1 (Tex. App.—Houston [14th Dist.] Dec. 3, 1998, *pet denied*.)



## II. COVERAGE ISSUES

### A. *Eight Corners Rule*

- 1) **Heyden Newport Chemical Corp. v. Southern General Ins. Co.**, 387 SW 22 (Tex. 1965). The duty to defend is determined, regardless 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.
- 2) **Richards v. State Farm Lloyds**, 597 S.W.3d 492 (Tex. 2020). The Texas Supreme Court addressed a certified question from the 5<sup>th</sup> Circuit about whether there is a “policy language exception” (a/k/a the Northfield Exception based on *Northfield Ins. Co.*, 363 F.3d at 531) to the eight-corners rule if the insurance policy does not contain language requiring the insurer to defend all actions against its insured no matter if the allegations of the suit are groundless, false or fraudulent. An insurer’s duty to defend is determined by the claims alleged in the petition and the coverage provided in the policy. The Court noted that insurers can contract out of the eight corners rule, but merely omitting the language “even if groundless, false or fraudulent” does not contract out of the eight corners rule. The Court notes that State Farm makes good faith arguments, but it is well aware of the courts’ longstanding approach to the contractual duties to defend and it knows how to contract around that approach.
- 3) **Richards v. State Farm Lloyds**, 597 S.W.3d 492 (Tex. 2020). The Texas Supreme Court addressed a certified question from the 5<sup>th</sup> Circuit about whether there is a “policy language exception” (a/k/a the Northfield Exception based on *Northfield Ins. Co.*, 363 F.3d at 531) to the eight-corners rule if the insurance policy does not contain language requiring the insurer to defend all actions against its insured even matter if the allegations of the suit are groundless, false or fraudulent. An insurer’s duty to defend is determined by the claims alleged in the petition and the coverage provided in the policy. The Court noted that insurers can contract out of the eight corners rule, but merely omitting the language “even if groundless, false or fraudulent” does not contract out of the eight corners rule. The Court notes that State Farm makes good faith arguments, but it is well aware of the courts’ longstanding approach to the contractual duties to defend and it knows how to contract around that approach.
- 4) **Encompass Indemnity Company v. Steele**, 2022 U.S. Dist. Lexis 152823 (Northern Dist. – Dallas, Aug 24, 2022). In this case addressing the duty to defend and the eight corners rule, all parties filed motions for summary judgment to determine whether the occurrence was an "accident" under the relevant insurance policies. Encompass argued that the comments to the driver to "nail it" by continuing his off-road driver was the natural result of an intentional act. Encompass also argues that the claims of negligence in the petition do not transform the intentional conduct into a covered accident. The policies do not define accidents so the ordinary meaning is "a fortuitous, unexpected and unintended event." The Texas Supreme Court and the Fifth Circuit made clear: accidents are accidents. The statement to "Nail It!" was not an intentional tort. It was only a comment to continue driving, not to eject passengers. Therefore, this was an accident and there is a duty to defend.

### B. *Exceptions to the Eight Corners Rule:*

3. **Loya Ins. Co. v. Avalos**, 610 S.W.3d 878, (Tex. 2020) The Texas Supreme Court modifies the eight-corners rule to adopt its first and only exception to the eight-corners rule that permits court to consider extrinsic evidence regarding whether the insured and a third party suing the insured colluded to make false representations of fact in that suit for the purpose of securing a defense and coverage where they such coverage and the duty to defend would not otherwise exist. If the insurer conclusively proves such collusive fraud, it owes no duty to defend. An insurer confronted with undisputed evidence of collusive fraud may choose to withdraw its defense without first seeking a declaratory

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 \(utcle.org/elibrary\)](https://utcle.org/elibrary)

## Title search: Important Cases in the Prosecution and Defense of UM / UIM Cases Session

First appeared as part of the conference materials for the  
2024 The Car Crash Seminar session

"Important Cases in the Prosecution and Defense of UM / UIM Cases Session"