

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

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

XI.	BRAINARD, NORRIS & NICKERSON TRILOGY OF CASES	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.	MAKING A CLAIM	57
	A. NOTICE OF CLAIM	57
	B. TIME LIMTS FOR GIVING NOTICE OF CLAIM	57
XIII.	BAD FAITH. WHAT IS IT?	57
	A. EVOLVING STANDARDS FOR WHAT CONSTITUTES “BAD FAITH”	57
	B. POST-MENCHACA BAD FAITH – INTERPRETING THE 5 NEW RULES	62
	1. GENERAL RULE	62
	2. THE ENTITLED-TO-BENEFITS RULE	62
	3. THE BENEFITS-LOS9 RULE	62
	4. THE INDEPENDENT-INJURY RULE	62
	5. THE NO-RECOVERY RULE	62
	C. SCOPE OF THE DUTY OF GOOD FAITH AND FAIR DEALING	62
	D. EXAMPLES OF BAD FAITH CONDUCT	63
	E. EXAMPLES OF CONDUCT THAT ARE NOT BAD FAITH	64
	F. UNRESOLVED ISSUES	67
	G. POTENTIAL BARS TO PURSUING BAD FAITH CLAIMS	67
	H. EXPERT WITNESSES ON BAD FAITH CLAIMS	68
	I. 541 CLAIMS FOR BAD FAITH & PROMPT PAYMENT OF CLAIMS	68
XIV.	DAMAGES RECOVERABLE ON BAD FAITH CLAIMS	69
	A. ACTUAL DAMAGES UP TO THE POLICY LIMITS	69
	B. MENTAL ANGUISH	69
	C. COMPENSATORY DAMAGES	71
	D. PUNITIVE DAMAGES	71
	E. STANDARDS OF PROOF: PRODUCING CAUSE	71
	F. ATTORNEY’S FEES	71
	G. STANDARDS OF PROOF TO RECOVER ATTORNEY’S FEES	72
	H. EQUITABLE AND JUST	73
XV.	STATUTORY BAD FAITH CLAIMS	74
	A. INSURANCE CODE CLAIMS UNDER §541.060 Tex.Ins.Code	74
	B. PROMPT PAYMENT OF CLAIMS VIOLATIONS UNDER CHAPTER 542	76
	C. FAILURE TO SETTLE OR TO DEFEND	83
XVI.	STATUTE OF LIMITATIONS ON FIRST PARTY CLAIMS	84
	A. POST-BRAINARD STATUTES OF LIMITATIONS ON UM/UIM CLAIMS	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
XVII. CAUSES OF ACTION FOR UM/UIM CLAIMS	85
A. <i>DECLARATORY JUDGMENT ACTION</i>	85
B. <i>STAND-ALONE 541 CLAIM</i>	85
C. <i>EXHAUSTION DOCTRINE</i>	87
XVIII. UNIFORM DECLARATORY JUDGMENTS ACT	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 FOR UM/UIM CLAIMS</i>	89
D. <i>PLEADING REQUIREMENTS FOR DECLARATORY JUDGMENT ACTIONS</i> ..	91
XIX. LAWSUITS AGAINST THE ADJUSTER	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 "ADJUSTERS" UNDER THE CODE</i>	92
XX. PLEADING REQUIREMENTS	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
XXI. PRE-TRIAL ISSUES	95
A. <i>VENUE</i>	95
B. <i>SEVERANCE/SEPARATE TRIALS & ABATEMENT</i>	96
C. <i>CONDITIONS PRECEDENT</i>	105
D. <i>SUFFICIENCY OF PLEADINGS</i>	105
E. <i>REMOVAL</i>	106
XXII. DISCOVERY	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 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 & OTHER HEALTH 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 & 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 2024, no pet.).	
2. <u>State Farm Mut. Auto. Ins. Co. v. Valdez</u> , 2024 Tex. App. LEXIS 713 (Tex.App. – San Antonio 2024, pet. filed).	
3. <u>Farmers Texas County Mut. Ins. Co. v. Barr</u> , 2024 WL 2340792 (Tex. App.— Beaumont 2024, no pet.)	
4. <u>Montgomery v. State Farm Lloyds</u> , 2024 WL 2369415 (5 TH Cir. 2024)	
5. <u>Colunga v. State Farm Mut. Auto. Ins. Co.</u> , 2024 Tex.App. LEXIS 4404 (Tex.App.- 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, orig. proc.) (pet granted) (oral argument set for October 3, 2024)	

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