

Presented:
August, 2018

UT CAR CRASH SEMINAR
Austin, Texas

**UNINSURED AND UNDER-INSURED MOTORIST CLAIMS:
MAKING AND DEFENDING TEXAS UM/UIM CLAIMS**

Thomas A. Herald

Thomas A. Herald
THOMAS A. HERALD, PC
62 Main Street, Suite 310
Colleyville, TX 76034

Tom@TAHeraldPC.com
(817) 756-6437 Telephone
(817) 485-1117 Fax

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	4
	G. VEHICLES OWNED BY OR FURNISHED TO OR AVAILABLE FOR USE	5
	H. WHO IS AN UNINSURED MOTORIST?	5
	I. NAMED DRIVER POLICIES	6
	J. DEFINITION OF "AUTO ACCIDENT"	7
	K. TYPES OF ACCIDENTS	8
	L. INJURIES OCCURRED WHILE USING A MOTOR VEHICLE	13
	M. PHYSICAL CONTACT	15
	N. BODILY INJURY	17
	O. PROPERTY DAMAGE	21
	P. "OTHER INSURANCE" CLAUSES	21
III.	EXCLUSIONS	22
	A. VEHICLES THAT DO NOT QUALIFY AS AN UNINSURED VEHICLES	22
	B. VEHICLES FURNISHED FOR THE REGULAR USE	24
	C. EXCLUDED DRIVERS	24
	D. FAMILY MEMBER EXCLUSION	25
	E. PERMISSIVE DRIVERS AND OMNIBUS INSUREDS	26
	F. FELLOW EMPLOYEE EXCLUSION	26
IV.	DUTIES OF THE INSURED	27
	A. DUTY TO LIST VEHICLES	27
	B. DUTY TO COOPERATE	27
	C. DUTY TO GIVE NOTICE OF NEW VEHICLE	28
	D. DUTY TO GIVE NOTICE OF CLAIM	28
	E. DUTY TO OBTAIN CONSENT TO SETTLE	28
	F. DUTY TO SUBMIT TO MEDICAL EXAMINATIONS	30
	G. DUTY TO SUBMIT TO EXAMINATIONS UNDER OATH (EUO's)	31
V.	COVERAGES REQUIRED	32
	A. UM/UIM COVERAGE REQUIRED	32
	B. UM/UIM COVERAGE MUST BE OFFERED IN THE AMOUNTS DESIRED	32
	C. PIP COVERAGE	32

VI.	PIP & UM/UIM REJECTIONS	33
	A. LIBERAL CONSTRUCTION	33
	B. THE PIP AND UM/UIM REJECTIONS MUST BE IN WRITING	34
	C. FORM OF THE PIP AND UM/UIM REJECTIONS	35
	D. BURDEN OF PROOF	35
	E. EXCEPTIONS	36
	F. PERPETUAL RENEWALS	36
VII.	CANCELLATION OF THE POLICY	36
VIII.	STACKING COVERAGES	37
	A. GENERAL RULE	37
	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	38
	A. POLICY LANGUAGE	38
	B. NON-OWNED AUTOS	38
	C. CASES INVOLVING NON-STANDARD INSURANCE POLICIES	39
	D. OFFSETS & CREDITS ON UM/UIM CLAIMS	40
	E. WORKERS' COMP BENEFITS	42
	F. TORTEASOR IS NOT ENTITLED TO A CREDIT FOR UM/UIM BENEFITS	43
	G. SETTLEMENTS FOR LESS THAN POLICY LIMITS	44
	H. REQUIRING THE INSURED TO SIGN A RELEASE	44
X.	DAMAGES RECOVERABLE ON UM/UIM CLAIMS	44
	A. PURE UM/UIM CLAIMS	44
	1) BODILY INJURY DAMAGES UP TO THE POLICY LIMITS	44
	2) MEDICAL EXPENSES	44
	3) PROPERTY DAMAGES	44
	4) PUNITIVE DAMAGES ARE NOT RECOVERABLE ON A PURE UM/UIM CLAIM	49
	5) PRE-JUDGMENT AND POST-JUDGMENT INTEREST	50
	6) COURT COSTS	52
	7) ATTORNEY'S FEES	52
	A. THE HISTORICAL FIGHT FOR ATTORNEY'S FEES	52
	B. PRE-BRAINARD CASES PERMITTING RECOVERY OF ATTORNEY'S FEES	53
	C. PRE-BRAINARD CASES DISALLOWING RECOVERY OF ATTORNEY'S FEES	54
	D. POST-BRAINARD RECOVERY OF ATTORNEY'S FEES	56
	E. DEFENSES TO CLAIMS OF ATTORNEY'S FEES	57
XI.	BRAINARD, NORRIS & NICKERSON TRILOGY OF CASES	60
	A. Brainard v. Trinity Universal Insurance Company, 216 S.W.3d 809 (Tex. 2006)	60
	B. State Farm Mut. Ins. Co. v. Norris, 216 S.W.3d 819 (Tex. 2006)	61
	C. State Farm Mut. Ins. Co. v. Nickerson, 216 S.W.3d 823 (Tex. 2006)	61

XII.	MAKING A CLAIM	61
	A. <i>NOTICE OF CLAIM</i>	61
	B. <i>TIME LIMITS FOR GIVING NOTICE OF CLAIM</i>	62
XIII.	BAD FAITH. WHAT IS IT?	62
	A. <i>EVOLVING STANDARDS FOR WHAT CONSTITUTES “BAD FAITH”</i>	62
	B. <i>POST-MENCHACA BAD FAITH – INTERPRETING THE 5 NEW RULES</i>	67
	1. <i>GENERAL RULE</i>	67
	2. <i>THE ENTITLED-TO-BENEFITS RULE</i>	67
	3. <i>THE BENEFITS-LOST RULE</i>	67
	4. <i>THE INDEPENDENT-INJURY RULE</i>	68
	5. <i>THE NO-RECOVERY RULE</i>	68
	C. <i>SCOPE OF THE DUTY OF GOOD FAITH AND FAIR DEALING</i>	68
	D. <i>EXAMPLES OF BAD FAITH CONDUCT</i>	69
	E. <i>EXAMPLES OF CONDUCT THAT ARE NOT BAD FAITH</i>	70
	F. <i>UNRESOLVED ISSUES</i>	74
XIV.	DAMAGES RECOVERABLE ON BAD FAITH CLAIMS	74
	A. <i>ACTUAL DAMAGES UP TO THE POLICY LIMITS</i>	74
	B. <i>PUNITIVE DAMAGES</i>	76
	C. <i>STANDARDS OF PROOF: PRODUCING CAUSE</i>	76
	D. <i>ATTORNEY’S FEES</i>	77
	E. <i>STANDARDS OF PROOF TO RECOVER ATTORNEY’S FEES</i>	77
XV.	STATUTORY BAD FAITH CLAIMS	77
	A. <i>INSURANCE CODE CLAIMS UNDER §541.060 Tex.Ins.Code</i>	77
	B. <i>PROMPT PAYMENT OF CLAIMS VIOLATIONS UNDER CHAPTER 542</i>	79
	C. <i>FAILURE TO SETTLE OR TO DEFEND</i>	86
XVI.	STATUTE OF LIMITATIONS ON FIRST PARTY CLAIMS	87
	A. <i>POST-BRAINARD STATUTES OF LIMITATIONS ON UM/UIM CLAIMS</i>	87
	1) <i>PURE UM/UIM CLAIMS</i>	87
	2) <i>COMMON LAW BAD FAITH CLAIMS</i>	87
	3) <i>DTPA CLAIMS</i>	87
	4) <i>INSURANCE CODE CLAIMS</i>	87
XVII.	CAUSES OF ACTION FOR UM/UIM CLAIMS	87
	A. <i>DECLARATORY JUDGMENT ACTION</i>	87
	B. <i>EXHAUSTION DOCTRINE</i>	88
XVIII.	UNIFORM DECLARATORY JUDGMENTS ACT	88
	A. <i>THE STATUTE</i>	88
	B. <i>ATTORNEY’S FEES ON DECLARATORY JUDGMENT ACTIONS</i>	89
	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. LEGAL AUTHORITY FOR SUING THE ADJUSTER	91
	B. EXCEPTIONS	91
	C. OTHER CAUSES OF ACTION AGAINST THE ADJUSTER	92
	D. PROHIBITED CAUSES OF ACTION AGAINST THE ADJUSTER	92
XX.	PLEADING REQUIREMENTS	93
	A. RES JUDICATA AND COLLATERAL ESTOPPEL	93
	B. “BODILY INJURY” MUST BE PLED AND PROVEN, IT IS NOT INFERRED.	94
	C. MOTIONS TO DISMISS FOR FAILURE TO PLEAD A CLAIM	95
XXI.	PRE-TRIAL ISSUES	95
	A. VENUE	95
	B. SEVERANCE/SEPARATE TRIALS & ABATEMENT	96
	C. SUFFICIENCY OF PLEADINGS	104
	D. REMOVAL	104
XXII.	DISCOVERY	108
	A. SCOPE OF DISCOVERY	108
	B. LIMITATIONS ON DISCOVERY IN UM/UIM CASES	108
	C. DISCOVERY OF CLAIMS FILES	109
	D. CLAIMS OF TRADE SECRETS	110
	E. DEPOSING THE EUO ATTORNEY	111
	F. DEPOSING THE ADJUSTER	111
	G. DEPOSING CORPORATE REPRESENTATIVES ON UM/UIM CLAIMS	111
	H. DISCOVERY REGARDING ATTORNEY’S FEES	112
XXIII.	TRIAL ISSUES	112
	A. NOT NECESSARY TO SUE THE TORTFEASOR	112
	B. CONSENT TO BE BOUND	112
	C. DEFAULT JUDGMENTS	112
	D. TRIAL AMENDMENTS SHOULD BE PERMITTED TO ASSERT OFFSETS/CREDITS	113
	E. CORRECT PARTIES TO A UM/UIM TRIAL	113
	F. BURDEN OF PROOF TO PROVE THE POLICY	113
	G. ADMISSIBILITY OF EVIDENCE OF POLICY LIMITS	114
	H. ADMISSIBILITY OF INTOXICATION OF THE UM/UIM DRIVER	114
	I. ADMISSIBILITY OF OTHER ACCIDENTS & OTHER HEALTH CONDITIONS	114
	J. MOTIONS FOR NEW TRIAL	115
XXIV.	ASSIGNMENT OF BENEFITS	115
	A. SETTLEMENT CHECKS & ASSIGNMENTS	115
	B. APPLICATION OF PAID OR INCURRED STATUTE TO PIP CLAIMS	115

XXV. LIENS & SUBROGATION CLAIMS ON PIP AND UM/UIM CLAIMS	116
A. <i>EQUITABLE SUBROGATION</i>	116
B. <i>COMMON FUND DOCTRINE</i>	116
C. <i>MEDICARE AND MEDICAID LIENS</i>	116
D. <i>HEALTH INSURANCE LIENS</i>	116
E. <i>WORKER'S COMPENSATION LIENS</i>	118
F. <i>CHILD SUPPORT LIENS</i>	121
G. <i>HOSPITAL LIENS</i>	121
H. <i>ANTI-SUBROGATION RULE</i>	122
XXVI. RECENT CASES	123

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). "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) 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 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 Court recognized an exception to the eight-corners rule for the first time. In the underlying case, Johnson sued her employer and the landlord. After she was assaulted by an unknown person while working, Johnson sued the landlord, but spelled the landlord’s name wrong in the petition. However, the correct defendant appeared and answered the lawsuit. The court noted the entity actually sued was a “separate and distinct” entity from the intended defendant. The correct defendant never challenged the error and Johnson never fixed it.

The landlord’s carrier defended. Shortly before trial, the landlord made a demand upon Johnson’s employer’s carrier, Liberty Mutual, to provide a defense as an additional insured under its policy. Liberty Mutual rejected the demand to provide the defense to the landlord because the name of the defendant in the petition did not match the name on the policy. The landlord and its insurer sued Liberty Mutual for coverage.

As 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 was asking for a defense to which it was not entitled. The extrinsic evidence at issue was the policy’s reference to lease agreements, which required the court to consider lease agreements to determine the insured’s status.

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: Uninsured and Under-Insured Motorist Claims: Making and Defending Texas UM/UIM Claims

First appeared as part of the conference materials for the
2018 The Car Crash Seminar session
"Uninsured and Under-Insured Motorist"