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UNINSURED AND UNDER-INSURED MOTORIST CLAIMS

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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
II. COVERAGE ISSUES	2
A. EIGHT CORNERS RULE	2
B. EXCEPTIONS TO THE EIGHT CORNERS RULE	2
C. MEMBER OF THE HOUSEHOLD	3
D. DEFINITION OF UNINSURED VEHICLE	3
E. VEHICLES OWNED BY OR FURNISHED TO OR AVAILABLE FOR USE	4
F. WHO IS AN UNINSURED MOTORIST?	5
G. NAMED DRIVER POLICIES	5
H. DEFINITION OF “AUTO ACCIDENT”	6
I. TYPES OF ACCIDENTS	7
J. INJURIES OCCURRED WHILE USING A MOTOR VEHICLE	12
K. PHYSICAL CONTACT	14
L. BODILY INJURY	16
M. PROPERTY DAMAGE	19
N. “OTHER INSURANCE” CLAUSES	19
III. EXCLUSIONS	21
A. VEHICLES THAT DO NOT QUALIFY AS AN UNINSURED VEHICLES	21
B. VEHICLES FURNISHED FOR THE REGULAR USE	22
C. EXCLUDED DRIVERS	22
D. FAMILY MEMBER EXCLUSION	23
E. PERMISSIVE DRIVERS AND OMNIBUS INSUREDS	24

F. FELLOW EMPLOYEE EXCLUSION	24
IV. DUTIES OF THE INSURED	24
A. DUTY TO LIST VEHICLES	24
B. DUTY TO COOPERATE	25
C. DUTY TO GIVE NOTICE OF NEW VEHICLE	26
D. DUTY TO GIVE NOTICE OF CLAIM	26
E. DUTY TO OBTAIN CONSENT TO SETTLE	26
F. DUTY TO SUBMIT TO MEDICAL EXAMINATIONS	27
G. DUTY TO SUBMIT TO EXAMINATIONS UNDER OATH (EUO's)	28
V. COVERAGES REQUIRED	29
A. UM/UIM COVERAGE REQUIRED.....	29
B. UM/UIM COVERAGE MUST BE OFFERED IN THE AMOUNTS DESIRED....	29
C. PIP COVERAGE	30
VI. PIP & UM/UIM REJECTIONS	31
A. LIBERAL CONSTRUCTION	31
B. THE PIP AND UM/UIM REJECTIONS MUST BE IN WRITING	31
C. FORM OF THE PIP AND UM/UIM REJECTIONS	33
D. BURDEN OF PROOF	33
E. EXCEPTIONS.....	33
F. PERPETUAL RENEWALS	33
VII. CANCELLATION OF THE POLICY.....	34
VIII. STACKING COVERAGES	34
A. GENERAL RULE	34
B. EXCEPTIONS	35
C. COMPANY CARS: COVERAGE WHILE OCCUPYING A VEHICLE SUPPLIED FOR THE REGULAR USE	35

IX. OTHER INSURANCE CLAUSE: PRIORITIES OF COVERAGE & MULTIPLE POLICIES	35
A. <i>POLICY LANGUAGE</i>	35
B. <i>NON-OWNED AUTOS</i>	36
C. <i>CASES INVOLVING NON-STANDARD INSURANCE POLICIES</i>	36
D. <i>OFFSETS & CREDITS ON UM/UIM CLAIMS</i>	37
E. <i>WORKERS' COMP BENEFITS</i>	39
F. <i>TORTFEASOR IS NOT ENTITLED TO A CREDIT FOR UM/UIM BENEFITS..</i>	40
G. <i>SETTLEMENTS FOR LESS THAN POLICY LIMITS</i>	40
H. <i>REQUIRING THE INSURED TO SIGN A RELEASE</i>	40
X. DAMAGES RECOVERABLE ON UM/UIM CLAIMS	40
A. <i>PURE UM/UIM CLAIMS</i>	40
1. Bodily injury damages	40
2. Property damages	43
3. Punitive Damages Are Not Recoverable on a Pure UM/UIM Claim	46
4. Pre-judgment and Post Judgment Interest	47
5. Court Costs	49
6. Attorney's Fees	49
XI. BRAINARD, NORRIS & NICKERSON TRILOGY OF CASES	55
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>	56
C. <i>State Farm Mut. Ins. Co. v. Nickerson, 216 S.W.3d 823 (Tex. 2006)</i>	57
XII. MAKING A CLAIM	57
XIII. BAD FAITH. WHAT IS IT?	57
A. <i>EVOLVING STANDARDS FOR WHAT CONSTITUTES "BAD FAITH".....</i>	57
B. <i>SCOPE OF THE DUTY OF GOOD FAITH AND FAIR DEALING</i>	59
C. <i>EXAMPLES OF BAD FAITH CONDUCT</i>	59

D. <i>EXAMPLES OF CONDUCT THAT ARE NOT BAD FAITH</i>	61
E. <i>UNRESOLVED ISSUES</i>	65
XIV. <i>DAMAGES RECOVERABLE ON BAD FAITH CLAIMS</i>	65
A. <i>ACTUAL DAMAGES UP TO THE POLICY LIMITS</i>	65
B. <i>PUNITIVE DAMAGES</i>	67
C. <i>STANDARDS OF PROOF: PRODUCING CAUSE</i>	67
D. <i>ATTORNEY’S FEES</i>	68
E. <i>ATTORNEY’S FEES MAY BE RECOVERABLE UNDER A DECLARATORY ACTION</i>	68
F. <i>STANDARDS OF PROOF TO RECOVER ATTORNEY’S FEES</i>	68
G. <i>DISCOVERY REGARDING ATTORNEY’S FEES</i>	68
XV. <i>STATUTORY BAD FAITH CLAIMS</i>	69
A. <i>INSURANCE CODE CLAIMS UNDER §541.060 Tex.Ins.Code</i>	69
B. <i>PROMPT PAYMENT OF CLAIMS VIOLATIONS UNDER CHAPTER 542</i>	71
C. <i>FAILURE TO SETTLE OR TO DEFEND</i>	79
XVI. <i>STATUTE OF LIMITATIONS ON FIRST PARTY CLAIMS</i>	80
A. <i>PURE UM/UIM CLAIMS</i>	80
B. <i>POST-BRAINARD STATUTES OF LIMITATIONS ON UM/UIM CLAIMS</i>	80
C. <i>COMMON LAW BAD FAITH CLAIMS</i>	80
D. <i>DTPA CLAIMS</i>	80
E. <i>INS. CODE CLAIMS</i>	80
XVII. <i>UNIFORM DECLARATORY JUDGMENTS ACT</i>	80
A. <i>THE STATUTE</i>	80
B. <i>ATTORNEY’S FEES ON DECLARATORY JUDGMENT ACTIONS</i>	81
C. <i>CASES ADDRESSING THE USE OF DECLARATORY JUDGMENTS FOR UM/UIM CLAIMS</i>	82
D. <i>PLEADING REQUIREMENTS FOR DECLARATORY JUDGMENT ACTIONS</i> ..	83

XVIII. LAWSUITS AGAINST THE ADJUSTER	84
<i>A. LEGAL AUTHORITY FOR SUING THE ADJUSTER</i>	84
<i>B. EXCEPTIONS</i>	84
<i>C. OTHER CAUSES OF ACTION AGAINST THE ADJUSTER</i>	85
<i>D. PROHIBITED CAUSES OF ACTION AGAINST THE ADJUSTER</i>	85
XIX. PLEADING REQUIREMENTS	86
<i>A. RES JUDICATA AND COLLATERAL ESTOPPEL</i>	86
<i>B. “BODILY INJURY” MUST BE PLED AND PROVEN, IT IS NOT INFERRED..</i>	86
<i>C. MOTIONS TO DISMISS FOR FAILURE TO PLEAD A CLAIM</i>	87
XX. PRE-TRIAL ISSUES	88
<i>A. VENUE</i>	88
<i>B. SEVERANCE/SEPARATE TRIALS & ABATEMENT</i>	88
<i>C. SUFFICIENCY OF PLEADINGS</i>	95
<i>D. REMOVAL</i>	96
XXI. DISCOVERY	98
<i>A. SCOPE OF DISCOVERY</i>	98
<i>B. DEPOSING THE EUO ATTORNEY.....</i>	99
<i>C. CLAIMS OF TRADE SECRET</i>	99
<i>D. DEPOSING THE ADJUSTER AND CORPORATE REPRESENTATIVE</i>	99
<i>E. LIMITATIONS ON DISCOVERY IN UM/UIM CASES</i>	99
<i>F. DISCOVERY REGARDING ATTORNEY’S FEES</i>	100
XXII. TRIAL ISSUES	100
<i>A. NOT NECESSARY TO SUE THE TORTFEASOR</i>	100
<i>B. TRIAL AMENDMENTS SHOULD BE PERMITTED TO ASSERT OFFSET/CREDIT</i>	100
<i>C. CORRECT PARTIES TO A UM/UIM TRIAL</i>	101
<i>D. BURDEN OF PROOF TO PROVE THE POLICY</i>	101

E. ADMISSIBILITY OF EVIDENCE OF POLICY LIMITS	101
F. ADMISSIBILITY OF INTOXICATION OF THE UM/UIM DRIVER	101
G. ADMISSIBILITY OF OTHER ACCIDENTS & OTHER HEALTH CONDITIONS	102
H. MOTIONS FOR NEW TRIAL	102
XXIII.ASSIGNMENT OF BENEFITS	103
A. SETTLEMENT CHECKS & ASSIGNMENTS	103
B. APPLICATION OF PAID OR INCURRED STATUTE TO PIP CLAIMS	103
XXIV.LIENS & SUBROGATION CLAIMS ON PIP AND UM/UIM CLAIMS	103
A. EQUITABLE SUBROGATION	103
B. COMMON FUND DOCTRINE	103
C. MEDICARE/MEDICAID LIENS	103
D. HEALTH INSURANCE LIENS	104
E. WORKER’S COMPENSATION LIENS	105
F. CHILD SUPPORT LIENS	109
G. HOSPITAL LIENS	109
H. ANTI-SUBROGATION RULE	110
XXV. RECENT CASES	110

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).

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. Here, the extrinsic evidence at issue was the policy’s reference to parties to lease agreements, requiring the court to consider lease agreements to determine insured status under the policy.

The court distinguished other eight-corners cases by noting that Liberty Mutual was not challenging the merits of the underlying claim. The court noted that “[i]n light of the facts of this case, we are persuaded of the need for a very narrow exception to the eight-corners rule. The exception applies only when an insurer establishes by extrinsic evidence that a party seeking a defense is a stranger to the policy and could not be entitled to a defense under any set of facts.

2. **GuideOne Specialty Mutual Insurance Co. v. Missionary Church of Disciples of Jesus Christ**, 2011 WL 3670009 (N.D.Tex., July 7, 2011). The Court allowed the use of extrinsic evidence in support of the insurer’s motion for summary judgment when the “eight-corners rule” did not apply to the duty to defend under that policy due to revisions in the policy language. The court observed that decisions applying the eight-corners rule

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