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**Tips for Defending UM / UIM Cases**

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## TABLE OF CONTENTS

Rule No. 1: Location, location, location.....	1
Rule No. 2: A house divided against itself cannot stand.....	1
Rule No. 3: Who's on first?.....	2
Rule No. 4: Proportionality: is it really worth it?.....	2
Rule No. 5: The corporate representative—be preparado, not desperado.....	4
Rule No. 6: Fight the subpoena of the corporate representative at trial: “This is déjà vu all over again”.....	5
Rule No. 7: For every action, there is an equal and opposite reaction.....	6
Rule No. 8: No lawyer can serve two masters.....	11
Rule No. 9: No punitive damages.....	13
Rule No. 10: Tell them what you will tell them, tell them, then tell them what you just told them.....	14

## TABLE OF AUTHORITIES

### *Cases*

Advantage Physical Therapy, Inc. v. Cruse, 165 S.W.3d 21, 24 (Tex. App. 2005).....	11
Allstate v. Irwin, 627 S.W.3d 263 (Tex. 2021) .....	1, 7
Blevins v. State Farm Mutual Automobile Ins. Co., 2018 WL 5993445 (Tex. App. –Fort Worth 2018).....	5, 6
Fairfield Ins. Co. v. Stephens Martin Paving, LP, 246 S.W.3d 653(Tex. 2008)(Hecht, C.J., concurring, joined by Brister, Medina, and Willett, JJ.) .....	13
Farmers Texas County Mutual Ins. Co. v. Barr, 2024 WL 2340792 (Tex. App.—Beaumont 2024, no pet. h.) .....	7, 9
HSAM Inc. v. Gatter, 814 S.W.2d 887, 892 (Tex. App.—San Antonio 1991, writ dismissed by agr.) .....	9
In re Allstate Fire & Cas. Co., 2017 WL 516350 (Tex. App.—Tyler 2017, orig. proceeding).....	1
In re K & L Auto Crushers, LLC, 627 S.W.3d 239, 254 (Tex. 2021).....	11
In re National Lloyds Ins. Co., 532 S.W.3d 794 (Tex. 2017) .....	10
In re State Farm Mutual Automobile Ins. Co., 629 S.W.3d 866 (Tex. 2021) .....	1
In re USAA Gen. Indem. Co., 624 S.W.3d 782 (Tex. 2021) Natividad v. Alexis, Inc., 875 S.W.2d 695 (Tex. 1994).....	3, 4, 5
Navidad v. Alexis, Inc., 875 S.W.2d 695 (Tex.1994) .....	10
Oyster Creek Fin. Corp. v. Richwood Invs. II, Inc., 176 S.W.3d 307 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) .....	9
Rodriguez v. Allstate Fire & Cas. Co., 2019 WL 650438 (W.D. Tex. 2019).....	2
State Farm Mutual Automobile Ins. Co. v. Valdez, 2024 WL 349295 (Tex. App.—San Antonio 2024, pet. filed) .....	7
Tony Gullo Motors I, L.P. v. Chapa, 212 S.W.3d 299, 310–11 (Tex. 2006).....	10

U.S. Fire Ins. Co. v. Millard, 847 S.W.2d 668 (Tex. App.–Houston [1st Dist.] 1993, orig. proceeding) .....	2
Von Clark v. Butler, 916 F.2d 255, 259 n. 6 (5th Cir. 1990) .....	10
Williams v. Allstate Fire & Cas. Co., 2019 WL 51764 (W.D. Tex. 2019).....	2
<i>Statutes &amp; Rules</i>	
Fed. R. Civ. P. (12)(b)(6).....	2
Tex. Civ. Prac. Rem. Code Ann. § 42.003 .....	8
Tex. Civ. Prac. & Rem. Code Ann. § 42.004 .....	8
Tex. R. Civ. P. 91a.....	2
Tex. R. Civ. P. 167.....	7,8
Tex. R. Civ. P. 192.4.....	2,3
Tex. R. Prof’l Conduct R. 1.06 (b)(2).....	11
Tex. R. Prof’l Conduct 1.06(c) .....	12
28 U.S.C. §1446(b).....	2
<i>Other Sources</i>	
Abbott & Costello, “Who’s on First?” <a href="https://en.wikipedia.org/wiki/Who%27s_on_First%3F">https://en.wikipedia.org/wiki/Who%27s_on_First%3F</a> (accessed July 2024) .....	2
Dylan Thomas, “Do Not Go Gentle into that Good Night” < <a href="https://poets.org/poem/do-not-go-gentle-good-night">https://poets.org/poem/do-not-go-gentle-good-night</a> > (accessed July 2024).....	7
Matt. 6:24 (NIV).....	11
Matt. 12:25 (NIV) .....	1
Newton’s Laws of Motion < <a href="https://www1.grc.nasa.gov/beginners-guide-to-aeronautics/newtons-laws-of-motion/">https://www1.grc.nasa.gov/beginners-guide-to-aeronautics/newtons-laws-of-motion/</a> > (accessed July 2024) .....	6
Reader’s Digest < <a href="https://en.wikipedia.org/wiki/Reader's_Digest">https://en.wikipedia.org/wiki/Reader's_Digest</a> > (accessed July 2024) .....	4

Samuel Taylor Coleridge, <i>The Rime of the Ancient Mariner</i> , < <a href="https://resources.saylor.org/wwwresources/archived/site/wp-content/uploads/2014/05/ENGL404-Coleridge-The-Rime-of-the-Ancient-Mariner.pdf">https://resources.saylor.org/wwwresources/archived/site/wp-content/uploads/2014/05/ENGL404-Coleridge-The-Rime-of-the-Ancient-Mariner.pdf</a> > .....	13
Stephanie M. Green, <i>Texas Excessive Demand Doctrine Impacts Recoveries in Litigation</i> , 47 ST. MARY’S L. J. 889 (2016) .....	9
Tex. Comm. On Professional Ethics, Op. 681 (2018) .....	13
Waynes World (Paramount Pictures 1992) .....	3
Yogi-isms—Yogi Berra Museum < <a href="https://yogiberramuseum.org/about-yogi/yogisms/">https://yogiberramuseum.org/about-yogi/yogisms/</a> > (accessed July 2024) .....	5

## Tips for Defending UM / UIM Cases

Since the Texas Supreme Court's case in *Allstate v. Irwin*,<sup>1</sup> uninsured / underinsured motorist (UM / UIM) litigation has increased. The following are some thoughts to assist in the defense of these cases.

### **Rule No. 1: Location, Location, Location.<sup>2</sup>**

This adage, taken from the business of real estate, holds true for the defense of UM /UIM cases: location means everything! As a general rule, the first thing a defense lawyer should do is review every case for removal to federal court.<sup>3</sup> Aside from the general

*Run, don't walk, to federal court.*

perception that federal judges pay more attention to precedent—and actually will give summary judgments where appropriate—there is a much more

<sup>1</sup> See *Allstate v. Irwin*, 627 S.W.3d 263 (Tex. 2021)(approving the recovery of attorney's fees under the Texas Declaratory Judgment Act).

<sup>2</sup> A cliché used in real estate transactions to emphasize the importance of location in valuing a property. See Wikipedia

<[https://en.wikipedia.org/wiki/Location,\\_Location,\\_Location#:~:text=4%20References-,%20Etymology,real%20estate%20magnate%20Harold%20Samue](https://en.wikipedia.org/wiki/Location,_Location,_Location#:~:text=4%20References-,%20Etymology,real%20estate%20magnate%20Harold%20Samue)> (accessed July 2024).

<sup>3</sup> Back in the old, dern days, when I first began practicing, there was a troubling sentiment among civil defense lawyers: they did not want to practice in federal court for fear that they would receive criminal appointments. In many districts, that fear has been alleviated—but civil attorneys may well receive appointments in select civil cases. The stakes now simply are too high—a defense lawyer does not do his or her client a service when he or she does not remove a UM / UIM case to federal court.

primordial reason for removing these cases to federal court: plaintiff gets no attorney's fees under the federal declaratory judgment act! More on corollaries to this rule when we discuss attorney's fees.

### **Rule No. 2: A House Divided against Itself Cannot Stand.<sup>4</sup>**

Whether your case remains in state court or is removed to federal court, remember the most effective defense involves dividing (i.e., severing) the opponent's case to increase one's opportunity to conquer. In most UM /UIM cases I encounter, for some reason the plaintiff's counsel insists on asserting contractual and extra-contractual causes of action in the same suit.<sup>5</sup> Texas law holds that the contract causes are properly severed from the extra-contractual causes.<sup>6</sup> There is no advantage

*Sever contract causes from extra-contractual causes—and abate discovery on extra-contractual causes.*

<sup>4</sup> Matt. 12:25 (NIV) (“Every kingdom divided against itself is brought to desolation, and every city or house divided against itself will not stand.”).

<sup>5</sup> I include declaratory judgment actions in my discussion of “contract” causes of action.

<sup>6</sup> See *In re State Farm Mutual Automobile Ins. Co.*, 629 S.W.3d 866, 876 (Tex. 2021), citing, *In re Allstate Fire & Cas. Ins. Co.*, 2017 WL 516350 at \*4 (Tex. App.--Tyler Nov. 8, 2017, orig. proceeding)(mem. op.)(noting that the “extra-contractual claims must be severed and abated until the underinsured motorist breach of contract claim is determined.”)

to the defense in keeping these causes together—in fact—as we will see later in our discuss of corporate representative depositions, keeping the causes joined in one lawsuit materially affects discovery to the plaintiff’s advantage.<sup>7</sup> In federal court, the defense practitioner will want to utilize Federal Rule 12(b)(6) to dismiss the extra-contractual causes of action.<sup>8</sup>

**Rule No. 3:  
Who’s on  
First?<sup>9</sup>**

It is important to know who the players

*Get the adjuster out of  
the contract case:  
open the path to  
removal.*

<sup>7</sup> The defense practitioner will want to sever the contract and extra-contractual causes and abate all discovery on the extra-contractual causes. As the courts have noted, there is no point in conducting expensive discovery if a jury finds that the underlying tortfeasor was not uninsured or underinsured. *See U.S. Fire Ins. Co. v. Millard*, 847 S.W.2d 668, 673 (Tex. App.–Houston [1st Dist.] 1993, orig. proceeding) (“Without abatement, the parties will be put to the effort and expense of conducting discovery and preparing for trial of claims that may be disposed of in a previous trial[ ]”);

<sup>8</sup> *See Williams v. Allstate Fire & Cas. Co.*, 2019 WL 51764 (W.D. Tex. 2019)(dismissal of breach of contract case since no determination of legal entitlement); *see also Rodriguez v. Allstate Fire & Cas. Co.*, 2019 WL 650438 (W.D. Tex. 2019)(dismissing breach of contract, statutory and common law extra-contractual claims, as well as fraud and gross negligence claims).

<sup>9</sup> This comedy sketch by Abbott & Costello is “required watching” at my firm. At its essence, it demonstrates the necessity of knowing and understanding the players in the game. The same is true in litigation. *See* “Who’s on First,” [https://en.wikipedia.org/wiki/Who%27s\\_on\\_First%3F](https://en.wikipedia.org/wiki/Who%27s_on_First%3F) (accessed July 2024). Even before asking about the facts of a case, I ask my young lawyers: Are we in state or federal court? Who is the judge? Who represents the plaintiffs? Tell me about the plaintiffs.

are in your lawsuit—and to eliminate those parties who simply do not belong. In many UM / UIM lawsuits, I see is the joinder of the insurance adjuster. Many times, this is simply an attempt to keep a non-diverse party (i.e., your adjuster) in the lawsuit long enough to prevent removal.<sup>10</sup> The insurance adjuster does not belong in the contract case—the adjuster simply was not a party to the insurance contract and owes no contractual duties to the insured (see why it is important to sever and abate?)<sup>11</sup>

Rule 91a<sup>12</sup> provides the defense lawyer with an effective pretrial vehicle for removing the adjuster from the contract case. Use it. If you allow the case to linger over a year with the non-diverse party in the case, you will lose the ability to remove the case on diversity grounds.

**Rule No. 4:  
Proportionality:  
Is It Really Worth It?**

Note that proportionality is a necessary consideration in the defense of a corporate representative’s deposition. Proportionality is founded on Rule 192.4 of the Texas Rules of Civil Procedure<sup>13</sup> and basically boils

<sup>10</sup> Remember that removal is not available to a defendant once the lawsuit has been pending over a year. *See* 28 U.S.C. §1446(b).

<sup>11</sup> *See Natividad v. Alexis, Inc.*, 875 S.W.2d 695, 698 (Tex. 1994)(noting, in the context of the duty of good faith and fair dealing, that the adjuster was not a party to the insurance contract).

<sup>12</sup> *See* Tex. R. Civ. Pro. 91a.

<sup>13</sup> Rule 192.4 provides:

The discovery methods permitted by these rules should be limited by the court if it determines, on motion or on its own initiative and on reasonable notice, that:

- (a) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from

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