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Trio of Supreme Court Cases Provides Incentive to UM/UIM Carriers to Promptly Assess and Remit Payment of UM/UIM Benefits and Possibly to “Front” Liability Carrier Benefits and Subrogate.

***Brainard v. Trinity Universal Ins. Co.*, 2006 WL 3751572 (Tex. Dec. 22, 2006): UM/UIM Claimant Can Recover Pre-Judgment Interest But Not Attorney’s Fees**

In a long-awaited decision that resolved a split of authority among the intermediate appellate courts, the Texas Supreme Court held that claimants under the UM/UIM coverage of an auto policy cannot recover attorney’s fees pursuant to Chapter 38 of the Civil Practice and Remedies Code unless the insurer delays for more than 30 days payment of the judgment establishing liability and uninsured/underinsured status of the tortfeasor. The court further addressed the recovery of prejudgment interest owed by the tortfeasor and held that this interest was covered under a UM/UIM policy and should be calculated using the “declining principal” formula.

Edward Brainard was killed in a collision with a rig owned by Premier Well Service. In addition to the wrongful death action brought against Premier, Brainard’s family sought UIM benefits from their own insurer, Trinity. Trinity had paid \$5,000 in personal injury protection (PIP) benefits but requested further information to support the UIM claim. The Brainards joined Trinity in their action against Premier under causes of action for breach of contract and common-law and statutory extra-contractual damages.

The Brainards settled their claim against Premier for the \$1 million limits of Premier’s policy. Trinity countered the Brainards’ demand for its own \$1 million UIM limits with an offer of \$50,000. The trial court severed the extra-contractual claims from the breach of contract and the parties proceeded to trial. The jury found that Premier’s negligence caused the accident and awarded the Brainards \$1, 010,000 in damages and \$100,000 in attorney’s fees. After offsetting the \$1,005,000 received by the Brainards from Premier’s liability insurance and the PIP benefits, the trial court entered judgment for \$5,000 in damages and the attorney’s fees but denied any prejudgment interest. The court of appeals reversed the award of attorney’s fees by affirmed the denial of prejudgment interest.

On the issue of prejudgment interest, the supreme court first held that the trial court had correctly determined that Premier was underinsured by offsetting the liability limits of Premier’s policy and the Brainards’ PIP recovery from actual damages. The court next held that, pursuant to statute, prejudgment interest is recoverable in cases of wrongful death, personal injury or property damage; thus, Premier would be liable for the interest if it was liable to Brainard. Because Trinity’s policy obligated it to pay damages Brainard was “legally entitled to recover” from Premier, and because prejudgment interest has consistently been interpreted to fall within the common-law meaning of “damages,” the court held that prejudgment interest constituted damages covered by the UIM policy. The court noted that this holding was consistent with the legislative intent of protecting conscientious motorists from financial loss caused by financially irresponsible motorists and the compensatory rather than punitive nature of prejudgment interest. Rejecting a

narrower interpretation by Trinity, the court held that this interest was additional compensation for damages the insured suffered as a result of his bodily injury and property damage.

The court also rejected Trinity's argument that Brainard's claim was really for breach of contract and therefore not subject to the prejudgment interest authorized by the Finance Code. The court of appeals had adopted this approach based in part on the supreme court's earlier decision in *Henson v. Southern Farm Bureau Cas. Ins. Co.*, 17 S.W.3d 652 (Tex. 2000). In distinguishing *Henson*, the supreme court noted that the insured's damages in that case completely exhausted the UIM policy limits, so any prejudgment interest on the tort liability was not in issue. Because the UIM insurers promptly tendered their policy limits, they also did not breach their contract. The issue of whether UIM insurance covers prejudgment interest an uninsured or underinsured motorist would owe the insured was not presented in *Henson*.

The court next turned to the calculation of prejudgment interest. The Finance Code directs that interest begins to accrue on the 180th day after the defendant receives written notice of the claim or the day suit is filed, whichever occurs first, and ends on the day preceding judgment. Brainard's suit triggered the interest in this case. Brainard contended that prejudgment interest must be calculated on the entire jury award before deducting credits for the settlement with Premier and for Trinity's PIP payment; Trinity argued that Brainard should not earn interest on amounts already received. Referring to another recent case, *Battaglia v. Alexander*, 177 S.W.3d 893 (Tex. 2005), the court held that settlements must be credited when received to preserve the purpose of prejudgment interest as compensation for the lost use of money. Under the "declining principal" formula, credits are applied when received, first to accrued prejudgment interest and then to principal, with interest accruing then only on the remaining principal. The interest is simple and not compounded. Furthermore, an offer of settlement that exceeds the claimant's ultimate recovery tolls accrual of prejudgment interest during the period the offer remains open. After listing the relevant dates and "intervals" for calculating prejudgment interest, the court remanded this issue to the trial court.

Finally, the court considered whether an insured is entitled to recover attorney's fees pursuant to the Civil Practice and Remedies Code for its breach of contract action against a UM/UIM carrier. Under section 38.002, the plaintiff must show that he (1) was represented by counsel, (2) presented the claim to the defendant, and (3) the defendant failed to pay the just amount owed within thirty days of presentment. Brainard argued that presentment was made when she made her claim for UIM benefits, a position supported by three courts of appeals. In contrast, Trinity argued that UM/UIM coverage is fundamentally different because the insurer's duty to pay does not arise until the tortfeasor's liability and the insured's damages are legally established. The court adopted Trinity's position and held that "the UIM insurer is under no contractual duty to pay benefits until the insured obtains a judgment establishing the liability an underinsured status of the other motorist. Neither requesting UIM benefits nor filing suit against the insurer triggers a contractual duty to pay." The court further noted that neither a settlement with the tortfeasor nor an admission of liability from the tortfeasor establishes UIM coverage because a jury could reach a different decision on fault or damages. The court also distinguished UM/UIM coverage from other first-party insurance, noting that "[t]he UIM contract is unique because, according to its terms . . . UIM insurance utilizes tort law to determine coverage." Thus, the judgment constitutes "presentment" for purposes of Chapter 38.

Commentary: The court’s holding and discussion of the “unique” nature of UM/UIM coverage bodes well for (and almost forecloses) the future consideration of extra-contractual damages in the UM/UIM context. However, as discussed below, the court’s treatment of prejudgment interest may have unintended and unforeseen consequences for UM/UIM carriers, particularly in large-dollar cases.

***State Farm Mut. Auto. Ins. Co. v. Nickerson*, 2006 WL 3754824 (Tex. Dec. 22, 2006): UM Claimant Not Entitled to Attorney’s Fees**

In this companion case to *Brainard*, the supreme court reaffirmed that UM/UIM claimants are not entitled to recover attorney’s fees under Chapter 38 of the Civil Practice and Remedies Code unless “the insurer does not tender the UIM benefits within thirty days after the trial court signs a judgment establishing liability and underinsured status of the other motorist.”

***State Farm Mut. Auto. Ins. Co. v. Norris*, 2006 WL 3751580 (Tex. Dec. 22, 2006): UM/UIM Claimant Can Recover Pre-Judgement Interest Owed by Tortfeasor Calculated by “Declining Principal Formula”**

Claimant Jimmie Norris was injured in an accident caused by Allen Johnston. After recovering \$40,000 of Johnston’s \$50,000 liability policy limits, Norris sued his own UM/UIM carrier, State Farm. State Farm had already paid \$5,000 in personal injury protection (PIP) benefits. The jury found that Norris suffered past damages of \$51,200 and also awarded Norris \$24,000 in past and future attorney’s fees. The trial court applied a credit of \$55,000 (the sum of Johnston’s policy limit and the PIP benefits State Farm had paid) and rendered a take-nothing judgment in State Farm’s favor. The court of appeals reversed, holding that Norris was entitled to both pre-judgment interest and attorney’s fees. The supreme court held that Norris was entitled to pre-judgment interest calculated by the declining principal formula but held that Norris was not entitled to attorney’s fees.

In addition to the questions answered in its *Brainard* decision, the court addressed the application of the declining principal formula to settlements for less than the tortfeasor’s policy limits. Rejecting Norris’s argument that he was entitled to pre-judgment interest on the entire \$50,000 limit of Johnston’s policy until the time of settlement, the court held that Norris’s release of Johnston for less than policy limits also released any interest in the difference between those amounts. Because pre-judgment interest is intended to compensate the claimant for lost use of money, Norris could not claim that he lost the use of the \$10,000 he willingly released. Accordingly, Norris was entitled to recover pre-judgment interest on only the \$40,000 he recovered from Johnston’s liability carrier and the amount of his damages that exceeded the liability policy’s limits (\$1,200). The court remanded these calculations to the trial court because the dates of neither the settlement nor State Farm’s PIP payments (which would also be applied to interest and principal under the declining principal method) were part of the record.

In accordance with *Brainard*, the court held that Norris was not entitled to attorney’s fees unless State Farm failed to tender UIM benefits within 30 days of the trial court’s judgment establishing the liability of the underinsured motorist.

Commentary: As the court also noted in *Brainard*, prejudgment interest is calculated from the earlier of the date suit is filed or 180 days after the defendant receives written notice of the claim. The court appears to use the date State Farm was notified for the second half of this equation; however, since prejudgment interest is premised on the tortfeasor's liability, insureds may argue that the date the tortfeasor was notified should apply - at least to the amounts within the tortfeasor's liability limits in underinsured motorist cases.

Summary: *Brainard*, *Nickerson*, and *Norris* provide certainty on the question of attorney's fees under Chapter 38 of the Civil Practice and Remedies Code but do not expressly address the availability of fees pursuant to former article 21.55. The cases also do not address the question of extra-contractual remedies in the UM/UIM context. However, the cases do provide an indication that the supreme court stands behind its strict interpretation of the conditions precedent to UM/UIM liability contained in the policy, which the court emphasized in its earlier *Henson* opinion.

On the issue of prejudgment interest, the court has crafted a definite, if cumbersome, formula that is not altogether equitable. By making the UIM insurer liable for prejudgment interest on even the underlying limits of the liability policy, the court has subjected the UIM carrier to liability over which it has little control. For example, assume a large damages case (\$1.5 -2 million) with tortfeasor liability limits of \$1 million and commercial UIM coverage of \$2 million. Even if the UIM carrier promptly assesses damages and pays \$1 million in benefits, the carrier is still potentially liable for additional damages in prejudgment interest if the liability carrier drags its feet and fails to timely pay. If this settlement takes years, the prejudgment interest could be substantial. To forestall this possibility the UIM carrier is left with two options: (1) pay the insured's total damages and subrogate against the tortfeasor; or (2) seek a release from the insured on payment of the UIM benefits. The supreme court's opinions may unintentionally have provided insurers with a justification for requesting a release - to cut off future prejudgment interest on amounts not yet paid by the liability carrier.