

UNINSURED/UNDERINSURED MOTORIST COVERAGE

Insurance Law in Texas

Lorman Education Services

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I. PRELIMINARY MATTERS

Uninsured and underinsured motorist (“UM/UIM”) coverage is a form of first-party insurance intended to protect responsible drivers from those on the road who do not procure liability insurance at all, who have insufficient insurance to cover the damages they cause, who “hit and run” so that their insurance status cannot be determined, or whose liability carriers deny coverage or become insolvent. Because uninsured/ underinsured coverage is frequently an issue in the automobile collision cases that are actually litigated and because the courts have not had as much time to construe the provisions of this coverage as they have the similar provisions of liability policies, the purpose of this paper, in addition to providing an overview of the coverage’s primary provisions and their judicial constructions, is to identify issues currently pending resolution or yet to be raised. In order to track future developments in unsettled areas of UM/UIM law, the following “hot topic” list is provided:

Hot Topics:

- Attorney’s Fees and 21.55 Liability.
- PIP Offset Validity/Double Recovery Rule.

- Workers Compensation Offset/Subrogation Rights.
- Liability Coverage Offset/Intra-Policy Stacking.
- Scope of Subrogation Statute.
- Extra-Contractual Liability.

A. Statutory Limits and Purpose

Financial responsibility for the operation of motor vehicles in Texas is governed primarily by two related statutes: the Texas Motor Vehicle Safety Responsibility Act, found at Texas Transportation Code Ann. (hereafter Transport. Code) §601.001 *et seq.* (Vernon 1999), and the Texas Uninsured/ Underinsured Motorist Statute, found at Texas Insurance Code Ann. (hereafter “Ins. Code”) art. 5.06-1 (Vernon 1981 & Supp. 1999). The minimum amount of liability coverage mandated by the Safety Responsibility Act is \$20,000 per person and \$40,000 per accident. *See* Transport. Code §601.072. UM coverage must be offered to the insured in at least the same limits for every policy of automobile liability insurance “delivered or issued for delivery in this state.” Ins. Code art. 5.06-1(1). However, an insured may purchase UM coverage up to the actual amount of bodily/property injury coverage contained in the policy’s liability coverage. Ins. Code art. 5.06-1(3), (4)(a). An insured may also reject UM coverage. Ins. Code art. 5.06-1(1).

The purpose of the Texas UM/UIM statute is “the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured or underinsured motor vehicles.” *Id.*; *Stracener v. United Serv. Auto. Ass’n*, 777 S.W.2d 378, 382 (Tex. 1989). UM/ UIM coverage is meant to place an injured party in the position he would have been in had the uninsured tortfeasor been covered to the extent of the UM/UIM coverage purchased. *United Serv. Auto Ass’n v. Hestilow*, 754 S.W.2d 754, 757 (Tex. App.–San Antonio 1988), *aff’d sub nom.*, *Stracener v. United Serv. Auto. Ass’n*, 777 S.W.2d 378 (Tex. 1989).

B. Contractual Nature of UM/UIM Claims; Attorney’s Fees

An insured’s cause of action against its insurer for recovery of uninsured motorist benefits is a contract cause of action. *Franco v. Allstate Ins. Co.*, 505 S.W.2d 789, 791-92 (Tex. 1974). Such actions are therefore governed by the four-year statute of limitations. *Id.* at 793. However, because the insured’s damages are due to and require proof of the tort of a third party, uninsured motorist statutes place carriers in an unusual position that raises ethical and conflict of interest concerns over the carrier’s duties to its insured and to the uninsured motorist. *See Allstate Insurance Co. v. Hunt*, 450 S.W.2d 668 (Tex. Civ. App.–Houston [14th Dist.] 1970), *aff’d*, 469 S.W.2d 151 (Tex. 1971). The liability insured has a duty to cooperate and “bare his soul” to the company regarding his injuries and the accident; on the other hand, it is to the carrier’s advantage to shift blame from the uninsured motorist if possible to limit its exposure. *Hunt*, 469 S.W.2d at 153. For this reason, the carrier is prohibited from assuming the defense of the uninsured motorist, even though it “steps into the shoes” of a liability insurer in a narrow sense. *Hunt*, 450 S.W.2d at 672-73. Consequently, if the carrier disputes the liability of or damages caused by the uninsured motorist, the carrier must either consent to be bound by the judgment in a tort action against the uninsured motorist or subject itself to direct action. *Hunt*,

469 S.W.2d at 155; *see also State Farm Mut. Auto. Ins. Co. v. Matlock*, 462 S.W.2d 277 (Tex. 1970) (permitting direct action against UM carrier).

Perhaps because of this hybrid first-party/third-party nature of UM/UIM claims, some confusion exists as to whether or when a plaintiff's attorneys fees are recoverable in an action for UM/UIM benefits. In *Sikes v. Zuloaga*, 830 S.W.2d 752, 753-54 (Tex. App.–Austin 1992, no writ), the court held that because the phrase “legally entitled to recover” in the UM insuring agreement presumed determination of liability and damages in addition to the other motorist's uninsured status as conditions precedent to the insured's contractual right to recover UM benefits, there could be no “presentment” or failure to “tender payment of the just amount owed” as required for the recovery of attorney's fees in a suit on contract under Texas Civil Practice & Remedies Code Ann. §§38.001-.002. *See also Sprague v. State Far Mut. Auto Ins. Co.*, 880 S.W.2d 415, 416-17 (Tex. App.–Houston [14th Dist.] 1993, writ denied) (same). In contrast, the court in *Novosad v. Mid-Century Ins. Co.*, 881 S.W.2d 546, 552 (Tex. App.–San Antonio 1994, no writ), held that when the carrier admits liability of the uninsured motorist and disputes only the amount of damages, proper presentment has been made that justifies the award of attorney's fees. In reaching this holding, the court noted that attorney's fees are recoverable in contract actions even when money damages are not sought. *Id.*

The Texarkana Court of Appeals recently went even further to hold that an admission of liability was unnecessary to prove presentment: Although the claim might turn out to be invalid, that does not mean that the presentment cannot be made until the propriety of the claim was determined. If so, then attorney's fees could never be available in a suit on contract, because until a court determined whether a party was actually liable under the contract, no presentment could be made. *Whitehead v. State Farm Mutual Automobile Insurance Co.*, 952 S.W.2d 79, 89 (Tex. App.–Texarkana 1997), *rev'd on other grounds*, 42 Tex. Sup. Ct. J. 404 (March 11, 1999). Because the Texas Supreme Court reversed the substantive coverage ruling of the court of appeals, which had found UM coverage for an intentional shooting, the court expressly declined to consider the attorney's fee issue. *Whitehead*, 42 Tex. Sup. Ct. J. at 405.

The same interpretive questions will undoubtedly arise with regard to the 18% statutory penalty and attorney's fees available for the late payment of claims under article 21.55 of the Insurance Code. *See Ins. Code art. 21.55 § 6* (Vernon Supp. 1999). Recent cases have held that article 21.55 is essentially a strict liability statute to which the insurer's good faith in denying the claim is no defense. *See, e.g., St. Paul Reinsurance Co., Ltd. v. Greenberg*, 134 F.3d 1250, 1255 (5th Cir. 1998); *Higginbotham v. State Farm Mut. Auto. Ins. Co.*, 103 F.3d 456, 461 (5th Cir. 1997); *Oram v. State Farm Lloyds*, 977 S.W.2d 163, 167 (Tex. App.–Austin 1997, no writ). However, an early 21.55 case involving UM/UIM coverage from the Austin Court of Appeals has specifically held that until the insured proves it is “legally entitled to recover” a certain amount by agreement or judgment, there is no claim “that must be paid by the insurer.” *Mid-Century Ins. Co. v. Barclay*, 880 S.W.2d 807, 811 (Tex. App.–Austin 1994, writ denied). In essence, resolution of both the 21.55 and attorney's fees issues will require the supreme court to decide whether the fact that the carrier's liability and amount of damages depends on a third party justifies a departure from the way these questions are handled in other first-party insurance contexts.

C. Presumption of Coverage

Unless the insured rejects UM/UIM coverage in writing, this coverage is presumed. Ins. Code art. 5.06-1(1); *Employers Cas. Co. v. Sloan*, 565 S.W.2d 580 (Tex. Civ. App.–Austin 1978, writ ref’d n.r.e.). In other words, the carrier bears the burden of proving that the insured has rejected UM/UIM coverage. However, no special form or procedure is required for the written rejection and any written indication that the coverage is rejected will suffice. *See Ortiz v. State Farm Mut. Auto. Ins. Co.*, 955 S.W.2d 353 (Tex. App.–San Antonio 1997, rev. denied) (check marks on application rejecting UM/UIM coverage were sufficient even without signature next to check-mark and even though application was not made part of policy); *Howard v. INA County Mutual Ins. Co.*, 933 S.W.2d 212, 218 (Tex. App.–Dallas 1996, writ denied) (almost any written indication will suffice). Moreover, this presumption applies only to the minimum amount required by statute, or \$20,000 per person, \$40,000 per accident, even if the insured carries liability coverage with higher limits. *See Geisler v. Mid Century Ins. Co.*, 712 S.W.2d 184, 187 (Tex. App.–Houston [14th Dist.] 1986, writ ref’d n.r.e.). Thus, the carrier is under no obligation to affirmatively offer or obtain a rejection of coverage in excess of the statutorily mandated minimums. *Id.*

Once rejected, coverage can only be reinstated by the insured’s written request. Ins. Code art 5.06-1(1). However, if the renewal policy is issued by a different carrier (as it might be under the Texas Automobile Insurance Plan), the first rejection becomes ineffective and coverage will again be presumed. *See Guaranty Ins. Co. v. Boggs*, 527 S.W.2d 265 (Tex. Civ. App.–Amarillo 1975, writ dismissed).

D. Other Burden of Proof Issues

1. Tortfeasor’s Status As Uninsured/Underinsured

Formerly, the burden of proving the uninsured status of the operator in direct actions between the insured and his insurer lay on the claimant. *See State Farm Mut. Auto. Ins. Co. v. Matlock*, 462 S.W.2d 277, 278 (Tex. 1970). The burden of proving the negligent motorist was insured is now statutorily assigned to the carrier. Ins. Code art. 5.06-1(7). However, once the carrier is able to show that the negligent motorist has some insurance, the burden of proof shifts back to the insured to show that the coverage is insufficient, i.e., that the tortfeasor is underinsured.

The Texas Insurance Code defines an “underinsured motor vehicle” as

[One] on which there is valid and collectible liability insurance coverage with limits of liability for the owner or operator which were originally lower than, or have been reduced by payment of claims arising from the same accident to, an amount less than the limit of liability stated in the underinsured coverage of the insured’s policy. Ins. Code art. 5.06-1(2)(b). Before 1989, insurers and the courts usually construed this definition to mean that a vehicle was underinsured only if the claimant’s UIM coverage limits were greater than the liability limits of the tortfeasor, thereby ignoring the claimants’ actual damages. However, with the Texas Supreme Court’s seminal decision in *Stracener v. United Services Automobile Association*, 777 S.W.2d 378 (Tex. 1989), an underinsured vehicle became one for which the available proceeds of “liability insurance are insufficient to compensate for the injured party’s *actual damages*.” *Id.* at 380 (emphasis added).

2. Liability and Amount of Damages--”Legally Entitled to Recover”

The standard insuring agreement provides that the carrier will pay “all sums which the insured . . . shall be legally entitled to recover as damages . . . because of bodily injury . . . or property damage caused by an accident.” The provision that the claimant be “legally entitled to recover” requires proof of fault on the part of the uninsured motorist and the extent of damages. *United Serv. Auto. Ass’n v. Blakemore*, 782 S.W.2d 277 (Tex. App.–Waco 1989, writ denied).

The carrier is entitled to assert all of the substantive defenses available to the uninsured motorist. However, because of its unusual character as a first-party/third-party insurance hybrid, a UM/UIM carrier “stands in the shoes” of the financially irresponsible tortfeasor for some purposes, but is not permitted to avail itself of all procedural defenses that would otherwise be available to the negligent driver. *See Franco v. Allstate Ins. Co.*, 505 S.W.2d 789 (Tex. 1974) (UM cause of action governed by four-year statute of limitations, not by two-year statute of limitations that would have barred insured’s action against tortfeasor); *but see Valentine v. Safeco Lloyds Ins. Co.*, 928 S.W.2d 639, 644 (Tex. App.–Houston [1st Dist.] 1996, writ denied) (employee’s claim against her personal UM/UIM insurance was barred by her workers compensation settlement with her employer; workers compensation bar preventing suit against employer meant claimant was not “legally entitled to recover” from employer). In general, the fact that a procedural bar to recovery exists against the uninsured or underinsured driver does not preclude recovery against the UM/UIM carrier. *See Blakemore*, 782 S.W.2d at 279 (governmental immunity protecting uninsured driver did not bar plaintiff’s claim against UM/UIM carrier).

Punitive damages for the gross negligence of an uninsured motorist are not recoverable. Although an early case held that “all sums” encompassed a judgment for punitive damages, *see Home Indem. Co. v. Tyler*, 522 S.W.2d 594 (Tex. Civ. App.–Houston [14th Dist. 1975], writ ref’d n.r.e.), later courts have uniformly held that only actual damages are recoverable under UM/UIM coverage. *See, e.g., Government Employees Ins. Co. v. Lichte*, 792 S.W.2d 546 (Tex. App.–El Paso 1990), *writ denied per curiam*, 825 S.W.2d 431 (Tex. 1991); *Vanderlinden v. United Serv. Auto. Ass’n Prop. & Cas. Ins.*, 885 S.W.2d 239 (Tex. App.–Texarkana 1994, writ denied); *State Farm Mut. Auto. Ins. Co. v. Shaffer*, 888 S.W.2d 146 (Tex. App.–Houston [1st Dist.] 1994, writ denied). Even the 14th District Court of Appeals in Houston overruled its earlier decision in *Tyler* by holding in *Milligan v. State Farm Mutual Automobile Insurance Co.*, 940 S.W.2d 228 (Tex. App.–Houston [14th Dist.] 1997, writ denied), that Insurance Code article 5.06-1(5), on which the provision is based, does not require coverage of punitive damages. The court agreed with its sister courts of appeals that the public policies of punishment and deterrence would not be served by having a first-party insurer pay punitive damages caused by a third-party tortfeasor. *See Milligan*, 940 S.W.2d at 231. Although the Texas Supreme Court expressly reserved this question in its per curiam denial of writ in *Lichte*, its repeated denial of writ and current unity among the courts of appeals on this question has essentially resolved the issue. Practitioners should note that these holdings apply only to punitive damages for conduct of the uninsured tortfeasor, however; in appropriate cases, punitive or treble damages could be awarded for the carrier’s own misconduct (see section on “Extra-Contractual Liability”).

II. DEFINITIONS

A. Who is An Insured?

The UM/UIM endorsement contains its own definition of “Who is an insured”: (1) You and any designated person and any family member of either; (2) Any other person occupying a covered auto; (3) Any person or organization for damages that person or organization is entitled to recover because of bodily injury sustained by a person described in 1. or 2. above. Each category is discussed below.

1. Named Insured and Family Members

The UM/UIM endorsement defines “family member” as “a resident of your household and related to you by blood, marriage or adoption, including a ward or foster child.” Not surprisingly, most of the interpretive debate has centered on “resident” and “household,” which are not otherwise defined. In an age of frequent divorce, remarriage, and alternative living arrangements, the strictness or laxity with which these terms are defined can have an impact on coverage that may upset the expectations of some insureds.

In *State Farm Mutual Automobile Ins. Co. v. Nguyen*, 920 S.W.2d 409 (Tex. App.—Houston [1st Dist.] 1996, no writ), which was actually a liability case, the court held that a baby who was delivered as a result of her mother’s involvement in an automobile accident was a “family member,” even though the baby died in the hospital six days later without ever living in her parents’ house. The court reasoned that the age, lack of self-sufficiency, absence of other lodging, relationship between the parties, and the parties’ intent justified the conclusion that the child was nonetheless a “resident of the Nguyen household.” *Id.* at 412-13.

While the *Nguyen* decision considered the terms “resident” and “household” together as a unit to determine the baby’s status as a matter of law, the Fifth Circuit in *Cicciarella v. Amica Mutual Insurance Co.*, 66 F.3d 764 (5th Cir. 1995), separated the terms for consideration to hold that both were ambiguous with regard to a UM/UIM claimant who sought coverage under her daughter’s auto policy. The daughter owned a New York dwelling in which the claimant lived year-round; however, the daughter occupied that dwelling with her husband only 60 days per year. *Id.* at 766. The *Cicciarella* court held that the term “resident . . . embodies the concept of place, connoting the physical or geographical location or locale where individuals dwell or reside” while “household is not a place . . . but is a group or set of individuals” who live together. *Id.* at 768-69. Thus, to qualify as a “family member,” an individual must meet both of these criteria. Because the policy modified neither term with adjectives such as “principal” or “primary,” the court held that material questions of fact remained as to whether the daughter resided in the New York dwelling and whether the claimant and her daughter constituted a household. *Id.* at 767, 770.

Although the Texas Supreme Court has not addressed the definitions of “resident” or “household” in the context of a personal automobile policy, it did recently address the question of coverage for “family members” under a business auto policy. *See Grain Dealers Mutual Insurance Co. v. McKee*, 943 S.W.2d 455 (Tex. 1997). In *McKee*, the court held that because the insured corporation was a legal entity distinct from the sole shareholder, the shareholder’s daughter was not insured as a “family member.” *Id.* at 458. The court rejected the argument that coverage was rendered illusory because the corporation could have no “family members” and similarly refused to hold that the phrase was ambiguous as applied to the daughter because the corporation was closely held. *Id.* The court also noted that if Mr. McKee had been designated as an individual insured, his daughter would have been covered. *Id.* at 459; *see also Webster v.*

United States Fire Ins. Co., 882 S.W.2d 569 (Tex. App.–Houston [1st Dist.] 1994, writ denied) (“family member” does not include employee of insured corporation). The question of whether a policy issued to a partnership would inure to the benefit of the individual partners’ family members has not been addressed.

2. Others Occupying Insured Vehicle

Because one of the primary purposes of UM/UIM coverage is to protect not only the named insured but also passengers from the financial irresponsibility of other drivers, the UM/UIM endorsement applies to others occupying the insured vehicle as well. “Occupying” means “in or upon or alighting from” a vehicle. *Hart v. Traders & Gen. Ins. Co.*, 487 S.W.2d 415, 418 (Tex. Civ. App.–Ft. Worth 1972, writ ref’d n.r.e.)

If the occupant is insured under his own UM/UIM policy, both the limits of that policy and those of the host driver’s policy are available to cover the insured’s damages. *United Serv. Auto. Ass’n v. Hestilow*, 754 S.W.2d 754 (Tex. App.–San Antonio 1988), *aff’d sub nom. Stracener v. United Serv. Auto. Ass’n*, 777 S.W.2d 378 (Tex. 1989); *American Liberty Ins. Co. v. Ranzau*, 481 S.W.2d 793 (Tex. 1972). This “inter-policy stacking” (see discussion below) is not prohibited by the “other insurance” clause of the policy; the clause is void as against public policy in this circumstance. *Ranzau*, 481 S.W.2d at 797; *Hestilow*, 754 S.W.2d at 760. When two first-party UM/UIM policies apply to a given claimant, the insurers are jointly and severally liable as primary insurers. *American Motorists Ins. Co. v. Briggs*, 514 S.W.2d 233, 236 (Tex. 1974); *Holter v. Employers Mut. Fire Ins. Co.*, 520 S.W.2d 435, 438 (Tex. Civ. App.–Houston [14th Dist.] 1975, no writ); *Employers Cas. Co. v. Sloan*, 565 S.W.2d 580, 585-86 (Tex. Civ. App.–Austin 1978, writ ref’d n.r.e.).

3. Claimants of Non-Physical Damages

Individuals who suffer non-physical losses due to the physical injuries of others are covered as “insureds” under the UM/UIM endorsement. Consequently, family members of physically injured passengers are “insureds” and their claims for loss of consortium are covered, even if those family members were not in the vehicle.

B. “Arising Out of Ownership, Maintenance or Use”

The UM/UIM insuring agreement covers damages arising out of the “ownership, maintenance or use of the uninsured motor vehicle.” While the words “arising out of” have been given expansive meaning in other contexts, until recently the entire clause in the UM/UIM endorsement had been interpreted restrictively to require that the injury arise out of use of the automobile as such, not merely in or around the automobile as “the situs of the accident.” *National Union Fire Ins. Co. v. Merchants Fast Motor Lines, Inc.*, 939 S.W.2d 139, 142 (Tex. 1997). Although *Merchants Fast Motor Lines* actually involved the duty to defend under the liability coverage of a truckers policy, the court held that the negligent discharge of a firearm, which killed the passenger in another vehicle, failed to establish the “causal relation between the injury and the use of the auto . . . essential to recovery.” *Id.*

The supreme court recently expanded this holding to the UM/UIM context in *State Farm Mutual Automobile Insurance Co. v. Whitehead*, 42 Tex. Sup. Ct. J. 404 (March 11, 1999). In *Whitehead*, the claimant was not actually shot, but suffered injuries when the driver of the truck

in which she was riding was shot and lost control of the vehicle. In a per curiam decision, the court held that the injury was “purely incidental to the use of a vehicle” and failed to establish the proper nexus for coverage, even though the claimant’s injuries actually resulted from the crash into a bridge stanchion after the driver lost control of the vehicle. *Id.* slip op. at *1. In addition to holding that the claimant’s injuries did not result from “use” of a vehicle, the court noted that the shooting was an independent and intentional action which was not an “accident” and was therefore not intended to be covered by the policy. *Id.* slip op. at *2; *see also Le v. Farmers Tex. County Mut. Ins. Co.*, 936 S.W.2d 317, 321 (Tex. App.–Houston [1st Dist.] 1996, writ denied) (holding that “the ‘use’ requirement of [uninsured motorist] coverage is not satisfied by a drive-by shooting”; injuries were caused by a gun, not by an automobile); *Collier v. Employers Nat’l Ins. Co.*, 861 S.W.2d 286 (Tex. App.–Houston [14th Dist.] 1993, writ denied) (same).

However, less than one month after handing down *Whitehead*, the supreme court appears to have retreated a step from its absolute requirement that the vehicle be used “as such” to invoke coverage. In *Mid-Century Ins. Co. v. Lindsey*, 42 Tex. Sup. Ct. J. 504 (April 8, 1999), the court affirmed a judgment of the Texarkana Court of Appeals, which held there was UIM coverage for the passenger of a parked car who was injured when a child attempted to enter his parents’ adjacently parked truck through the rear window and accidentally discharged a loaded shotgun on the truck’s gun rack. *Id.* at 507. In an opinion that drew three dissenting justices, the court relied heavily on an analysis of the Missouri Court of Appeals in *Cameron Mutual Insurance Co. v. Ward*, 599 S.W.2d 13, 15-16 (Mo. Ct. App. 1980), to conclude that because the gun rack was permanently attached **and** because the act of entry into the vehicle caused the discharge, the accident arose from use of the vehicle as a matter of law. 42 Tex. Sup. Ct. J. at 509-11. Not surprisingly, the dissent relied on *Merchants Fast Motor* and criticized the majority for creating an unworkable definition. *Id.* at 512-13 (Enoch, J., dissenting). *Lindsey* does appear to have reopened an apparently settled question that will require fact-intensive inquiry examining the “purpose and circumstances of the injury-producing act” and the connection between the vehicle and the injury. *See id.* at 511-12.

C. “Hit and Run”

The UM/UIM statute specifically requires “actual physical contact” where the owner or operator of an alleged hit and run vehicle is unknown or unidentified. Ins. Code art. 5.06-1(2)(d). This rule is particularly harsh in its exclusion of all accidents of “avoidance,” i.e., in which the claimant has been injured by a driver’s attempt to avoid the negligence of another. *See Beacon Nat’l Ins. Co. v. Fenwick*, 557 S.W.2d 379 (Tex. Civ. App.–Eastland 1977, writ dismissed). Moreover, the statute requires that the “person or property of the insured” must have come into contact with the “motor vehicle owned or operated” by the unknown person. Ins. Code art 5.06-1(2)(d). This requirement precludes coverage for injury caused by objects attached to or transported by vehicles that come loose and strike or are struck by the claimant’s vehicle. *See Republic Ins. Co. v. Stoker*, 903 S.W.2d 338 (Tex. 1995) (no coverage where unidentified pickup truck dropped furniture on highway causing multiple collisions); *Williams v. Allstate Ins. Co.*, 849 S.W.2d 859 (Tex. App.–Beaumont 1993, no writ) (no coverage for collision with piece of steel that fell from unidentified truck).

The only relief from the “actual physical contact” requirement is a judicially crafted exception for indirect vehicular contact, in which, for example, vehicle A hits vehicle B,

propelling vehicle B into vehicle C. *Latham v. Mountain State Mut. Cas. Co.*, 482 S.W.2d 655 (Tex. Civ. App.–Houston [1st Dist.] 1972, writ ref’d n.r.e.). However, this exception is narrowly construed; it does not include situations in which vehicle B seeks to avoid vehicle A and then hits vehicle C. See, e.g., *Collier v. Employers Nat’l Ins. Co.*, 861 S.W.2d 286, 290 (Tex. App.–Houston [14th Dist.] 1993, writ denied); *Guzman v. Allstate Ins. Co.*, 802 S.W.2d 877, 880 (Tex. App.–Eastland 1991, no writ); *Goen v. Trinity Universal Ins. Co.*, 715 S.W.2d 124 (Tex. App.–Texarkana 1986, no writ). There must be some contact with the unidentified vehicle.

Hit-and-run provisions of the policy also typically require the claimant to contact the police and notify the insurance company promptly. While “prompt” notification often becomes a question of fact, the court in *Fuller v. State Farm Mut. Auto. Ins. Co.*, 971 F. Supp. 1098 (N.D. Tex. 1997), *aff’d*, 141 F.3d 165 (5th Cir. 1998), held that the police notification requirement was a condition precedent to recovery and that the insured’s non-compliance relieved the carrier of liability.

III. EXCLUSIONS, OFFSETS, AND OTHER CONTRACTUAL LIMITATIONS

A. Consent to Sue/Consent to Settle

The UM/UIM endorsement provides that “[a]ny judgment for damages arising out of a suit brought without our written consent is not binding on us.” The purpose of requiring the insurer’s written consent to sue is to protect it from liability arising from the insubstantial defense of or default judgment against the uninsured motorist. *State Farm Mut. Auto. Ins. Co. v. Azima*, 896 S.W.2d 177, 178 (Tex. 1995). Not only has the provision been held valid and enforceable in Texas, but it requires fairly exacting compliance. Mere notice of the suit to the carrier is insufficient. *U.S. Fire Ins. Co. v. Millard*, 847 S.W.2d 668 (Tex. App.–Houston [1st Dist.] 1993, orig. proceeding). Even other correspondence to the insured identifying the carrier’s subrogation rights and suggesting that the insured “contact the other party or their insurance carrier” for reimbursement of out-of-pocket expenses does not constitute “consent to sue” as a matter of law. *Azima*, 896 S.W.2d at 178. If the claimant fails to secure the insurer’s written consent to sue, any judgment on liability or damages will not bind the carrier. *Millard*, 847 S.W.2d at 674.

An exclusion to the UM/UIM endorsement also precludes coverage “if [the insured] or the legal representative settles the claim without our consent.” This exclusion protects the insurer’s contractual subrogation rights against the negligent uninsured/ underinsured motorist to the extent he or she is not judgment-proof. See *Guaranty County Mut. Ins. Co. v. Kline*, 845 S.W.2d 810 (Tex. 1992). Despite the exclusion’s validity, the supreme court has held that an insurer may not strictly enforce the exclusion; instead, the insurer must show actual prejudice to its rights by the settlement. *Hernandez v. Gulf Group Lloyds*, 875 S.W.2d 691 (Tex. 1994). Absent a showing of actual prejudice, the insured’s breach of contract is immaterial and does not bar coverage. *Id.*

There is also some question whether the “consent to settle” clause applies to settlement with any potentially liable party or only to settlement with uninsured/ underinsured motorists. In *Gaulden v. Johnson*, 801 S.W.2d 561 (Tex. App.–Dallas 1990, writ denied), the court reversed a summary judgment in favor of the carrier for the claimant’s failure to obtain the carrier’s consent before settling with an insured party. The court held that “the claim” as used in the UM/UIM

endorsement was ambiguous because it appeared to apply only to claims against the uninsured/underinsured motorist, not other insured tortfeasors. *Id.* at 564.

Although the *Gaulden* court was unwilling to go further than label the clause ambiguous, the Houston 1st District Court of Appeals held as a matter of law that the insurer's consent to settle is required only for settlement with the uninsured motorist. *Simpson v. GEICO Gen. Ins. Co.*, 907 S.W.2d 942 (Tex. App.–Houston [1st Dist.] 1995, no writ). In *Simpson*, the claimant sued both an underinsured motorist and two non-motorist tortfeasors, who manufactured and maintained barricades that allegedly contributed to the accident causing claimant's injuries. *Id.* at 944. The insured settled with all parties, but obtained consent from the insurer only with regard to the motorist. In rejecting the carrier's argument that its consent was required before the claimant was entitled to settle with the non-motorist tortfeasors, the court held that the statute granting the UM/UIM carrier subrogation rights (on which the consent to settle clause is based) applied only against the uninsured/underinsured motorist for whom the insurer made payment. *Id.* at 947. (For further discussion of this case and concept, see section *infra* on "Subrogation.")

If the insured settles with a judgment-proof underinsured tortfeasor for less than its liability limits, can the carrier disclaim any additional coverage? No, but the insurer is entitled to a credit for the full amount of the tortfeasor's liability limits. See *Olivas v. State Farm Mut. Auto. Ins. Co.*, 850 S.W.2d 564 (Tex. App.–El Paso 1993, writ denied); *Leal v. Northwestern Nat'l County Mut. Ins. Co.*, 846 S.W.2d 576 (Tex. App.–Austin 1993, no writ). For example, if a claimant with \$35,000 in damages and a \$20,000 UM/UIM policy settles with a negligent motorist for \$15,000 of that motorist's \$20,000 liability policy, the claimant is not barred from claiming UIM coverage from his carrier, but his recovery in this case is limited to \$15,000 – the amount he would have been entitled to if he had fully exhausted the responsible party's liability limits. Of course, if the insurer is able to prove that the underinsured tortfeasor had additional assets, i.e. was not judgment-proof, the carrier would be relieved of any liability for UIM benefits because the settlement would have actually prejudiced the carrier's subrogation rights. See also *United States Fidelity & Guar. Co. v. Cascio*, 723 S.W.2d 209 (Tex. App.–Dallas 1986, no writ) (claimant's dismissal of suit with prejudice against underinsured motorist meant he was not "legally entitled to recover," which thereby eliminated his contractual rights to UM coverage).

B. Definitional and Related Exclusions

1. "Uninsured Motor Vehicle"

The definition of "uninsured motor vehicle" specifically excepts "any vehicle owned by or furnished or available for the regular use of you, a designated person or family member of either." Also known as the "owned vehicle exclusion," this provision prevents the "intra-policy stacking" (see discussion *infra*) of liability coverage and underinsured motorist coverage on the same policy for the operator's negligence. *Rosales v. State Farm Mut. Auto. Ins. Co.*, 835 S.W.2d 804 (Tex. App.–Austin 1992, writ denied); see also *State Farm Mut. Ins. Co. v. Conn*, 842 S.W.2d 350 (Tex. App.–Tyler 1992, writ denied); *Farmers Tex. County Mut. Ins. Co. v. Griffin*, 868 S.W.2d 861 (Tex. App.–Dallas 1993, writ denied); *Bergensen v. Hartford Ins. Co.*, 845 S.W.2d 374 (Tex. App.–Houston [1st Dist.] 1993, writ ref'd). Without this provision, the anomalous situation can arise in which one spouse not only sues the other for negligent operation of the vehicle but then is also able to recover for failing to adequately insure the vehicle – a

decision the claimant spouse was likely involved in making. *See Bergensen* 845 S.W.2d at 376; *see also Scarborough v. Employers Cas. Co.*, 820 S.W.2d 32 (Tex. App.–Ft. Worth 1991, writ denied) (same). Moreover, even if the insured’s vehicle is being driven by an underinsured driver with the insured’s permission, this clause excludes coverage for injuries the insured suffers as a result of that driver’s negligence. *See Texas Farm Bureau Mut. Ins. Co. v. Tatum*, 841 S.W.2d 89, 93 (Tex. App.–Tyler 1992, writ denied).

Determination of whether a vehicle is “available for the regular use” of the insured or her family member has also been frequently litigated, even though the conclusion often seems driven by the equities or irrelevant to the ultimate decision on coverage. For instance, in *State Farm Mutual Automobile Insurance Co. v. Cobos*, 901 S.W.2d 585 (Tex. App.–El Paso 1995, writ denied), a liability coverage case, the named insured had a company vehicle which was rarely used for purposes other than work. One day his son used the vehicle because the insured’s personal vehicle was “boxed in” and the keys were not available. Because the son had never before used the vehicle and the vehicle was rarely used for personal purposes at all, the court of appeals upheld the jury’s finding that the vehicle was not furnished or available for the insured’s regular use and affirmed coverage. *Id.* at 590.

Under the proper circumstances, however, even the fact that a vehicle is available for the use of or owned by the insured will not preclude coverage. For example in *Briones v. State Farm Mutual Automobile Insurance Co.*, 790 S.W.2d 70 (Tex. App.–San Antonio 1990, writ denied), a worker was allowed to recover under his personal UM/UIM policy for injuries he received as a passenger in an uninsured company truck driven by an uninsured co-employee, even though the truck was “available for his regular use.” The court reasoned that most insureds would expect coverage in this instance. *Id.* at 73. Similarly, the Tyler Court of Appeals held that injuries an insured suffered while an uninsured thief was stealing her vehicle were covered because it was unlikely the insured realized that UM/UIM coverage would not apply in this case. *Fontanez v. Texas Farm Bureau Ins. Co.*, 840 S.W.2d 647, 649-50 (Tex. App.–Tyler 1992, no writ).

2. Unscheduled Vehicles

Related in a sense to the “owned vehicle exclusion,” the UM/UIM endorsement also excludes from coverage “bodily injury sustained while occupying, or when struck by any motor vehicle or a trailer of any type owned by you, a designated person or a family member of either which is not insured for this coverage under this policy.” Because UM/UIM coverage follows the person, i.e., a policyholder riding in someone else’s car is still an insured under his or her own policy even if UM/UIM coverage is also available under the driver’s policy, the purpose of this exclusion is to prevent insureds from failing to insure all of their vehicles. *See Reyes v. Texas All Risk Gen. Agency, Inc.*, 855 S.W.2d 191 (Tex. App.–Corpus Christi 1993, no writ). The exclusion has been held valid and not an unauthorized limitation on statutory coverage. *Berry v. Texas Farm Bureau Mut. Ins. Co.*, 782 S.W.2d 246, 246-47 (Tex. App.–Waco 1989, writ denied); *Beaupre v. Standard Fire Ins. Co.*, 736 S.W.2d 237, 238-39 (Tex. App.–Corpus Christi 1987, writ denied).

3. Government Vehicles

The policy provides that the term “uninsured motor vehicle” does not include any vehicle or equipment owned by “any governmental body unless the operator of the vehicle is uninsured

and there is no statute imposing liability for damage because of bodily injury or property damage on the governmental body for an amount not less than the Limit of Insurance for this coverage.” This restriction on coverage has been held valid. *Ohio Cas. Group v. Chavez*, 942 S.W.2d 654, 660 (Tex. App.–Houston [14th Dist.] 1997, writ denied). Citing the Texas Supreme Court’s opinion in *Francis v. International Services Insurance Co.*, 546 S.W.2d 57 (Tex. 1976), which upheld an absolute exclusion of government-owned vehicles from UM coverage, the *Chavez* court noted that the purpose of the UM/UIM statute was not to protect insureds from all negligent uninsured motorists, but only those who were financially irresponsible. *Chavez*, 942 S.W.2d at 660. Sovereign immunity or definitional protection approved by the State Board of Insurance does not render governmental entities “financially irresponsible.” *Id.*; *Foster v. Truck Ins. Exch.*, 933 S.W.2d 207, 209 (Tex. App.–Dallas 1996, writ denied) (exclusion upheld because UM limits were equal to government unit’s potential liability under Tort Claims Act).

4 Intentional Acts

In addition to the intentional shootings of others, which are excluded because they do not arise from “use” of the vehicle, the policy also excludes coverage for “bodily injury or property damage resulting from the intentional acts of [the insured].” Consequently, a driver who engages in a high speed chase, or who provokes another driver to an intentional act falls within the exclusion. *Dryden v. Dairyland County Mut. Ins. Co.*, 633 S.W.2d 912 (Tex. App.–Beaumont 1982, no writ).

C. Subrogation

The UM/UIM statute provides that: In the event of payment to any person under any coverage required by this Section . . . the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of *any rights of recovery* of such person *against any person or organization legally responsible* for the bodily injury, sickness or diseases, or death for which such payment is made Ins. Code art. 5.06-1(6) (Vernon Supp. 1999) (emphasis added). The policy provision on subrogation echoes this broad right of recovery against other responsible parties: “If we make any payment and the insured recovers from another party, the insured shall hold the proceeds in trust for us and reimburse us to the extent of our payment. However, we may not claim the amount recovered from an insurer of any underinsured motor vehicle.”

Despite the broad language of the statute and of the policy, which purportedly grant subrogation rights to the insurer if the claimant later recovers from any other “legally responsible party,” the only court to construe the provision in Texas has held that the right of subrogation applies only against money recovered from the uninsured motorist. *See Simpson v. GEICO Gen. Ins. Co.*, 907 S.W.2d 942 (Tex. App.–Houston [1st Dist.] 1995, no writ). In *Simpson*, the claimant recovered from both an underinsured motorist and two non-motorist tortfeasors, who manufactured and maintained barricades that allegedly contributed to the accident causing claimant’s injuries. *Id.* at 944. The insurer argued it was entitled to subrogation against all monies the claimant received. Relying on the statute’s language “for which such payment is made,” the court noted that “such” payment was only made for the benefit of the underinsured motorist. *Id.* at 947. Therefore, the court held that the statutory rights of subrogation applied only to recovery against an uninsured/ underinsured motorist. *Id.*

Simpson will likely draw opposition at some point. The phrase “for which such payment is made” refers more logically under the rule of “last antecedent” to the injury sustained; the phrase would have to follow the words “legally responsible” to achieve the meaning the court ascribed to the statute in *Simpson*.

D. Offsets

1. Personal Injury Protection, Medical Payments, Workers Compensation

Among the various provisions limiting the carrier’s liability for UM/UIM coverage the policy states: In order to avoid insurance benefits payments in excess of actual damages sustained . . . we will pay all covered damages not paid or payable under any worker’s compensation law, disability benefits law, any similar law, auto medical expense coverage or Personal Injury Protection (“PIP”) coverage. In the past, the Texas Supreme Court has held certain offsets and exclusions void as violative of public policy, but usually only to statutory limits. In *Westchester Fire Insurance Co. v. Tucker*, 512 S.W.2d 679, 685-86 (Tex. 1974) and *Dabney v. Home Insurance Co.*, 643 S.W.2d 386, 389 (Tex. 1982), the court held void offset clauses for medical expenses and personal injury protection (“PIP”) to the extent those provisions would have reduced UM protection below the minimum statutory limits. In *Westchester*, the court held *inter alia* that (1) the offset was “ineffective to the extent that it reduces the uninsured motorist protection below the minimum limits required by Art. 5.06-1” and (2) medical payments limits could be stacked, even intra-policy. 512 S.W.2d at 686. Relying on its decision in *Westchester* and the similarity between PIP and medical payments coverage as “no-fault” insurance, the supreme court also held in *Dabney* that the carrier was not entitled to a credit against UM/UIM benefits for PIP payments previously made to the insureds. *Dabney*, 643 S.W.2d at 389.

However, because the question of a double recovery for the plaintiffs was not in issue in either *Westchester* or *Dabney*, courts of appeals applying these decisions have been split as to whether the offset is absolutely void to statutory UM limits or void only to the extent payment would represent a double recovery for the insured. Compare *James v. Nationwide Property & Cas. Ins. Co.*, 786 S.W.2d 91, 94 (Tex. App.–Houston [14th Dist.] 1990, no writ) (offset not void where statutory limits not implicated and where payment of claim would have represented double recovery); *Kim v. State Farm Mut. Auto. Ins. Co.*, 966 S.W.2d 776 (Tex. App.–Dallas 1998, no writ) (same); *State Farm Mut. Auto. Ins. Co. v. Brown*, 984 S.W.2d 695 (Tex. App.–Houston [1st Dist.] 1998, n. pet. h.); *Laurence v. State Farm Mut. Auto. Ins. Co.*, 984 S.W.2d 351 (Tex. App.–Austin 1999, n. pet. h.) with *Mid-Century Ins. Co. v. Kidd*, 974 S.W.2d 848 (Tex. App.–El Paso 1998, pet. rev. granted) (offset is absolutely void as applied to owner or operator of vehicle) and *Nationwide Mut. Ins. Co. v. Gerlich*, 982 S.W.2d 456 (Tex. App.–San Antonio 1998, pet. rev. granted) (not yet reported) (offset not available where carrier failed to demonstrate double recovery and may not be available at all).

It should also be noted with regard to these cases that they involve issues of statutory interpretation that are not always discussed. The specific offset provision in the PIP statute states: When any liability claim is made by any guest or passenger . . . against the owner or operator of the motor vehicle in which he was riding or the owner’s or operator’s liability insurance carrier, the owner or operator of such motor vehicle or his liability insurance carrier

shall be entitled to an offset, credit, or deduction against any award made to such guest or passenger in an amount of money equal to the amounts paid by the owner, operator or his automobile liability insurance carrier under [PIP]

Ins. Code art. 5.06-3(h) (Vernon 1981). While the *Kidd* court relied on the distinction between “guest or passenger” and owner/ operator in reaching its decision to invalidate the offset, it failed to discuss the fact that the statute appears to apply only to liability not UM/UIM coverage. Perhaps in granting review in *Kidd* and *Gerlich*, the Texas Supreme Court is poised to construe this statute and give additional guidance on the meaning of *Dabney* and *Westchester* and the carrier’s right to offsets in general.

A similar tension has also arisen with regard to workers compensation payments. In *Employers Casualty Co. v. Dyess*, 957 S.W.2d 884 (Tex. App.–Amarillo 1997, rev. denied), the court held that the offset for workers compensation payments was invalid because it conflicted with the workers compensation carrier’s statutory right to subrogation, which was applicable against any party liable in tort or contract for the claimant’s injury. *Id.* at 891; *see also Fidelity & Casualty Co. v. McMahon*, 487 S.W.2d 371 (Tex. Civ. App.–Beaumont 1972, writ ref’d n.r.e.). In so holding, the court declined to follow the Fifth Circuit’s decision in *Bogart v. Twin City Fire Insurance Co.*, 473 F.2d 619, 628-29 (5th Cir. 1973), which held that the statutory workers compensation subrogation right applied only against tortfeasors. Although the court in *Valentine* (discussed *supra* at section I.D.2.) was not confronted with a workers compensation subrogation question, its holding that receipt of workers compensation benefits acts as a bar because the employee is then not “legally entitled to recover” from the employer validates the offset indirectly by relieving the carrier of liability. 929 S.W.2d at 644. Regardless of how the supreme court addresses the issues in *Kidd* and *Gerlich*, the additional complexities of a second insurer with subrogation rights will undoubtedly demand the court’s separate attention to the workers compensation offset in the future.

2. Offsets Affecting Other Automobile Insurance

In addition to the offset prohibiting double recovery of benefits when the claimant has received workers compensation, PIP, or medical payments benefits, the UM/UIM endorsement also provides : If there is other applicable similar insurance we will pay only our share of the loss. Our share is the proportion that our Limit of Insurance bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance. The supreme court has expressly invalidated this “other insurance” clause as to the covered person with regard to multiple UM/UIM insurers; all available UM/UIM carriers are jointly and severally liable to all claimants and may not adopt an excess carrier position. *Briggs*, 514 S.W.2d at 233; *Ranzau*, 481 S.W.2d at 793. However, no case has yet addressed the meaning of “applicable similar insurance” (i.e., does this include other automobile liability insurance?) and possible application of this clause to limit a UM/UIM carrier’s exposure where an insured and uninsured motorist are both liable for the claimant’s damages. If, for example, the insured tortfeasor has \$1,000,000 worth of liability coverage and the claimant’s UM coverage is \$100,000 with \$500,000 in damages, the UM carrier’s “share” would be only one-eleventh (\$100,000/\$1,100,000), or \$45,455. If the uninsured motorist’s percentage of fault were high enough to subject him to joint and several liability under the Civil Practice and Remedies Code, the clause would probably be held invalid under the same sort of reasoning found in *Briggs* and *Ranzau* and the carrier would be liable—at least to the claimant—to

the full extent of its limits. If, on the other hand, the uninsured motorist's percentage of responsibility were equal to or less than its percentage of applicable insurance, the clause probably applies because the claimant would not be "legally entitled to recover" more than this amount from the uninsured motorist. *See Patel v. State Farm Mut. Auto. Ins. Co.*, 866 S.W.2d 709, 710 (Tex. App.—Houston [14th Dist.] 1993, no writ). The difficult call comes when the uninsured motorist's responsibility lies between the two: if the uninsured motorist's responsibility were 20% in this case, would the insurer be entitled to rely on this clause vis-a-vis the claimant? Probably not, but the UM carrier should be able to then seek contribution from the other tortfeasor's liability carrier based on the contractual allocation of exposure contained in both policies.

The UM/UIM endorsement also contains another untested offset provision: Any payment under this coverage to or for an insured will reduce any amount that insured is entitled to recover for the same damages under the LIABILITY COVERAGE of this policy. Interestingly, there is no corresponding offset provision in the liability portion of the policy. Consequently, if a person is entitled to make both a liability claim and a UM/UIM claim under the same policy, the claimant stands a better chance of recovering both limits if the liability claim is settled first.

Furthermore, the validity of this offset has never been addressed by a Texas court. Although most other jurisdictions acknowledge that the language of similar offsets is unambiguous, they have split on whether the offset is valid, void entirely, or void only to statutory limits. *Compare West Am. Ins. Co. v. Reibel*, 762 F. Supp. 808, 811-12 (N.D. Ill. 1991) (offset is valid and does not violate the "public policy expressed in the State's uninsured motorist law") with *Nicholson v. Home Ins. Co.*, 405 N.W.2d 327, 332 (Wis. 1987) (offset is void to statutory limits) and *Spain v. Valley Forge Ins. Co.*, 731 P.2d 84 (Ariz. 1987) (offset is void entirely because UM and liability coverages insure against two separate risks: "the risk of liability if [the insured] should negligently injure someone, and the risk of having no source from which to recover damages caused by a financially irresponsible driver who might injure her and/or another insured under her policy"); *Missouri General Ins. Co. v. Youngblood*, 515 F.2d 1254, 1256-57 (5th Cir. 1975) (Miss. law) (same).

Given the Texas Supreme Court's past tendency to hold exclusion and offsets void to statutory limits, the court may in fact do the same with this clause when confronted with the issue. However, because the offset could, in the proper case, deprive the liability insured of significant protection if policy limits were paid under the UM/UIM coverage, and because the insurer in this case could have conflicting duties to different insureds under the policy (the named liability insured and the UM insured), the court's earlier decisions may not be dispositive of the validity of this particular offset.

IV. STACKING

The Texas Supreme Court has addressed the question of "stacking" policy limits and offsets in different contexts and has held that an injured party may stack UM coverage on separate policies to the extent of actual damages not recovered from other sources, but may not stack UM coverage on a single multi-vehicle policy, even if additional premiums are paid. *Compare Stracener*, 777 S.W.2d at 383 (permitting "interpolicy" stacking of UM coverage when different policies apply to the same accident) with *Upshaw v. Trinity Co.*, 842 S.W.2d 631 (Tex. 1992) (denying "intra-policy" stacking of UM limits in single multi-vehicle policy). Thus, the

payment of additional premiums on multi-vehicle policies broadens the range of situations in which injured parties are protected (by increasing the number of covered autos), but it does not deepen the protection by increasing the amount of coverage in any given accident situation. See *Monroe v. Government Employees Ins. Co.*, 845 S.W.2d 394, 397 (Tex. App.–Houston [1st Dist.] 1992, writ denied).

However, the supreme court has not yet addressed the intra-policy stacking of UM/UIM and liability coverages in the same policy. And, while several courts of appeals have confronted the question of intra-policy stacking of UM and liability coverages, no reported case addresses the situation in which both the insured driver and uninsured driver in a two-vehicle accident are alleged to be negligent. In *Rosales v. State Farm Mut. Auto. Ins. Co.*, 835 S.W.2d 804 (Tex. App.–Austin 1992, writ denied), two passengers injured in a two-car accident attempted to stack the UIM and liability coverage under a single policy after State Farm had paid each passenger the maximum per person bodily injury benefits under the liability portion of the policy. In affirming the trial court’s summary judgment in favor of State Farm, the court held that “UIM coverage is not available for damages sustained by a passenger who has already recovered the full amount of liability limits under that same policy.” *Id.* at 806; see also *Bergensen v. Hartford Ins. Co.*, 845 S.W.2d 374, 376 (Tex. App.–Houston [1st Dist.] 1993, writ ref’d) (“owned vehicle exclusion” prevented wife from stacking UM and liability provisions of single policy based on husband’s negligence).

Despite *Rosales*, some commentators have assumed that the result would be the opposite if there were two negligent drivers. However, this conclusion is far from foregone. Even though liability and UM/UIM insurance arguably cover different risks, there are numerous provisions in the UM/UIM endorsement and in the general conditions section of the policy that seek to limit the carrier’s total exposure for any one accident. Moreover, the offset against liability limits in the UM/UIM endorsement and relatively low premiums charged for that coverage are further indications that high UM/UIM limits are intended only to broaden rather than deepen the coverage for insureds. See *Monroe*, 845 S.W.2d at 397; see also *Westchester Fire Ins. Co. v. Tucker*, 512 S.W.2d 679, 685 (Tex. 1974) (additional premium clearly not made for purpose of increasing policy limits). In any event, the arguments both for and against this sort of stacking are complex and will eventually have their day in court.

V. EXTRA-CONTRACTUAL LIABILITY

Another area that has not yet been explored in much detail involves the extra-contractual duties a UM/UIM carrier owes to its various insureds. Relying on the supreme court’s analysis in *Texas Farmers Insurance Co. v. Soriano*, 881 S.W.2d 312 (Tex. 1994), a recent case has held in the UM/UIM context that a carrier cannot be liable in bad faith for settling reasonable claims as they are presented, even if these settlements reduce or exhaust the proceeds available to remaining claimants. *Lane v. State Farm Mut. Auto. Ins. Co.*, 1999 WL 147855, slip op. at *5 (Tex. App.–Texarkana, March 18, 1999, no pet. h.). Moreover, if the carrier is skeptical of the uninsured motorist’s liability or the claimant’s damages, the holdings of some courts that “legal entitlement” to recover or “presentment” of a claim have not been demonstrated until the claimant obtains a judgment establishing these elements suggest that common-law “bad faith” causes of action might have limited viability in enforcing UM/UIM obligations. *E.g.*, *Sprague*, 880 S.W.2d at 417. On the other hand, the court in *State Farm County Mutual Insurance Co. v. Moran*, 809 S.W.2d 613, 618 (Tex. App.–Corpus Christi 1991, writ denied), held that evidence

of a carrier's failure to conduct a thorough investigation of a claim was legally and factually sufficient to support an award of damages for bad faith denial of the claim or delay in payment. Similar conflicts have also arisen with regard to statutory mechanisms to enforce timely compliance under Insurance Code article 21.55, discussed *supra*, and requests for attorney's fees under the Civil Practice and Remedies Code. *See, e.g., Barclay*, 880 S.W.2d at 811 (definition of "claim" under 21.55 means amount of damages insured actually suffers and insurer is obligated to pay, not amount which insured demands).

Of course, other statutory mechanisms such as actions under article 21.21 of the Insurance Code or under the Deceptive Trade Practices Act ("DTPA") are also available in appropriate circumstances. *See, e.g., Lane*, 1999 WL 147855, slip op. at *7-8 (claims of misrepresentation and fraudulent settlement by carrier in UIM settlement relied on different factual predicate than common-law bad faith claims, which was not conclusively negated by carrier so as to justify award of summary judgment); *Moran*, 809 S.W.2d at 619 (general misrepresentation claim was insufficient to support DTPA claim). Moreover, the fact that some "insureds" for UM/UIM coverage are mere third-party beneficiaries of the insurance contract means that their standing to bring causes of action under certain statutes may be limited. *See, e.g., Mendoza v. American Nat'l Ins. Co.*, 932 S.W.2d 605 (Tex. App.—San Antonio 1996, no writ) (for general discussion of standing of intended beneficiaries to bring causes of action under Insurance Code article 21.21 and the DTPA).

Although additional discussion of extra-contractual liability is beyond the scope of this paper, practitioners on both sides of the bar should remain alert to developments in general "bad faith" insurance law and further judicial clarification of central UM/UIM concepts such as "legally entitled to recover" for practical application in asserting or defending extra-contractual UM/UIM claims.