INSURANCE UPDATE – CRITICAL ISSUES FOR PI CASES

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CHAPTER 23

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Mark Kincaid is a partner in George Brothers Kincaid & Horton, L.L.P., where he represents consumers and businesses in consumer, insurance, and deceptive trade practices litigation. He has extensive experience representing consumers and businesses in insurance disputes, and in a broad array of civil litigation. Mark Kincaid has represented insureds and claimants in cases involving liability insurance, life insurance, errors and omissions, directors and officers liability, homeowners, commercial property, automobile, commercial automobile, health, disability, employment practices, workers compensation, title, excess, and reinsurance. In addition, Mark Kincaid represents consumers in professional liability suits.

Mark is board-certified by the Texas Board of Legal Specialization in Civil Trial Law, Consumer & Business Law, and Civil Appellate Law. He represents clients as trial lawyer, appellate advocate, expert, advisor, and negotiator in individual cases, class actions, and mass torts. Mark also assists other lawyers in representing clients with insurance issues.

Mark Kincaid successfully argued the landmark Texas cases establishing the right of first party insureds to sue for unfair insurance settlement practices (*Vail v. Texas Farm Bureau*) and the right of insureds under liability policies to sue for an insurer's unfair refusal to settle (*Rocor v. National Union*).

In 1994, Mark Kincaid was appointed by Governor Ann Richards to head the Office of Public Insurance Counsel, a state agency that advocated for insurance consumers, where he served before returning to private practice.

From 1995 to the present, Mark Kincaid has taught Insurance Litigation as an Adjunct Professor at the University of Texas School of Law. He has also served as chair of the Consumer Law Council of the State Bar of Texas, and was editor of the *Texas Consumer Law Reporter*. Mark Kincaid co-authors West's *Texas Practice Guide: Insurance Litigation* (2000-2013)

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Mark's colleagues have given him an "AV" rating in the Martindale-Hubbell Law Directory, the highest rating for competence and ethics, and have designated him a *Super Lawyer* in the 2003 through 2014 surveys of Texas lawyers published by Law & Politics Media and the publishers of *Texas Monthly* magazine.

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Suzette Selden is a partner at George Brothers Kincaid & Horton, L.L.P. She has extensive experience representing consumers and businesses in insurance disputes and other civil litigation matters. Suzette has represented insureds and claimants in matters involving liability insurance, life insurance, homeowners, commercial property, commercial automobile, automobile, health, and disability. She has represented clients in various practice areas, including insurance litigation, deceptive trade practices, business disputes, securities litigation, and construction defect cases.

Suzette was selected by Thomson Reuters for inclusion in 2012 – 2014 *Texas Rising Stars*.® Only 2.5 percent of lawyers in the state were selected. Suzette currently serves on the executive committee of the Capital Area Trial Lawyers Association. She has co-authored the *Annual Survey of Texas Insurance Law* in 2007, 2009, 2010, 2011, 2012, and 2013. Additionally she was head notes and comments editor of the *Houston Journal of International Law* from 2005-2006 and is a member of the Order of the Barons.

She graduated *magna cum laude* from Brigham Young University with a B.A. degree and *cum laude* from the University of Houston Law Center with a J.D. degree. She was a visiting student at the University of Texas School of Law during her third year of law school.

Before becoming a lawyer, Mrs. Selden worked as a television news producer for an ABC affiliate station in Washington state and interned for the *Dateline NBC* news magazine program in New York City. She also worked for International Sports Broadcasting during the 2002 Winter Olympics in Salt Lake City.

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An insured sued her insurer for breach of contract and extra-contractual claims after she was hit by an uninsured driver. The trial court concluded that the diminished value of the car was not recoverable under the UM coverage. The appellate court reversed holding that UM coverage could allow an insured to recover for diminished value, in addition to the cost of repairs and loss of use. *Noteboom v. Farmers Tex. Co. Mut. Ins. Co.*, 406 S.W.3d 381 (Tex. App.—Fort Worth 2013, no pet. h.).

An insured sued her insurer after being injured in an accident, but the jury found no damages for past physical pain. The appeals court reversed, holding that the jury's finding was so against the great weight of the evidence as to be unjust, because experts for both sides conceded that part of the insured's pain was caused by the accident. *Schaffer v. Nationwide Mut. Ins. Co.*, No. 13-11-00503-CV, 2013 WL 2146833 (Tex. App.—Corpus Christi May 16, 2013, pet. denied) (mem. op.).

An uninsured motorist provision did not cover injuries sustained by an insured due to an assault committed by an uninsured passenger from another car after a rear-end collision. *Home State County Mut. Ins. Co. v. Binning*, 390 S.W.3d 696 (Tex. App.—Dallas 2012, no pet.). The insured was rear-ended and then attacked and beaten by a passenger in the car at fault. The police were unable to apprehend the attacker. The insured sued his insurer for uninsured motorist benefits, which the insurer denied. The policy stated that for coverage to apply, the damages "must arise out of the … use… of the uninsured motor vehicle." The insured argued that the damages arose from use of the vehicle because, but for the collision, he would not have exited the car to exchange information with the driver, which put him in position to be assaulted. The court disagreed, reasoning that at the time of the collision the insured was pulling into a parking space at a convenience store and would have exited the vehicle to enter the store, and thus "the assault involved the vehicle only incidentally." Further, the injuries were not caused by the vehicle itself but by the assailant striking the insured with a pistol. Because the assailant was not caught, the insured could not establish that the assault was an attempted carjacking, and no Texas law supported the theory that a carjacking constitutes a use of the uninsured vehicle.

A car dealership lost coverage under an auto policy when an excluded driver drove the insured's car. *Stadium Auto, Inc. v. Loya Ins. Co.*, No. 08-11-00301-CV, 2013 WL 3214618 (Tex. App.—El Paso Jun. 26, 2013, no pet.). An insured purchased a car from a car dealership, which also financed the purchase. The insurer issued a standard auto policy to the insured for the car. The policy included an exclusion of named driver endorsement and listed an individual as an excluded driver. That individual was operating the car without the insured's permission when it was involved in a collision. The insured stopped making payments to the dealership for the car, and she sought coverage under the policy for the car. The dealership made demand on the insurer under the loss payable clause of the policy, but the insurer refused to pay, based on the named driver exclusion. The dealership then sued the insurer for violations of section 541.060 of the Insurance Code and section 17.46(b) of the DTPA, arguing that the loss payable clause provided coverage to the loss payee (the dealership) despite the named driver exclusion.

The court found that the named driver exclusion unambiguously stated that no coverage applied when the excluded driver operated the vehicle and that the insured thus lost her coverage because an excluded driver was operating the car at the time of the accident. The court then examined the loss payable clause, which stated that coverage for the dealership would "not become invalid because of your fraudulent acts or omissions." According to the court, the loss payable clause protected the dealership only from the insured's fraudulent acts or omissions; it did not protect the dealership from any act or neglect of the insured. Here, the excluded driver took the insured's keys without her permission, but there was no evidence of any omission on the insured's part since she had no obligation under the policy to prohibit the excluded driver from driving the car. Under these circumstances, the dealership lost coverage to the same extent as the insured when the excluded driver drove the car. The new named driver statute will be discussed in more detail below.

A person was injured while helping his neighbor unload a deer stand off a trailer at his residence. The injured party sued his neighbor and his own UM/UIM carrier. The UM/UIM policy required that the injury "arise out of" use of the trailer. The court held that the process of using a trailer includes not only the immediate action of loading and unloading materials from the trailer but also moving them to their destination point. Therefore, coverage was allowed. *Farmers Ins. Exch. v. Rodriguez*, 366 S.W.3d 216 (Tex. App.–Houston [14th Dist.] 2012, no pet.).

In a suit arising from a drunk driver crashing into the insured's home, the court held that the insured's UM/UIM policy, which limited coverage to an automobile and property inside the automobile, did not cover damage to the insured's home. *Ibarra v. Progressive Co. Mut. Ins. Co.*, No. 02-10-00312-CV, 2012 WL 117955 (Tex. App.–Fort Worth Jan. 12, 2012, no pet.) (mem. op.).

An insurer's payment to the United States Army for medical services rendered was proper. *Warmbrod v. USAA County Mut. Ins. Co.*, 367 S.W.3d 778 (Tex. App.–El Paso 2012, no pet. h.). An insured sued her insurer to recover the full amount of her policy's underinsured motorist coverage after the insurer paid part of that amount to the Army for care she received at an Army hospital after her car accident. The court analyzed the Army's right to the proceeds and the property of the insurer's payment, under various laws. The Army did not have a right to first party insurance proceeds under the Federal Medical Care Recovery Act, 42 U.S.C. §§ 2651-53. However, the Army had a valid reimbursement claim under 10 U.S.C. § 1095, which gives the federal government the "right to collect reasonable medical expenses for the care it provided at government expense from third-party payers," which includes automobile insurers. Because the Army had a right to recover from the insurer under section 1095, the insurer's payment to it was proper.

An insured's damages were not covered by her policy's uninsured motor vehicle coverage, where she was injured in an accident caused by a city employee in the course and scope of his employment. *Malham v. Gov't Employees Ins. Co.*, No. 03-11-00006-CV, 2012 WL 413969 (Tex. App.–Austin Feb. 8, 2012, pet. denied) (mem. op.). At issue was whether the city vehicle was an "uninsured motor vehicle" under the policy. The policy definition excluded government-owned vehicles unless the operator was uninsured and "there is no statute imposing liability for damage because of bodily injury … on the governmental body for an amount not less than the limit of liability for this coverage." The city was party to an agreement with other political subdivisions to create a fund meant to provide "coverages against risks which are inherent in operating a political subdivision." The agreement insured the city and its employees acting in the scope of their duties, for up to $2,000,000. The court concluded that the agreement was a liability policy within the meaning of the insured's policy and that, accordingly, the operator of the city-owned vehicle was not uninsured. Therefore, the vehicle was not an "uninsured motor vehicle."

An insured was not entitled to recover under his uninsured/underinsured motorist coverage where his damages were less than the total amounts paid by the other motorist and other parties in settlement. The court found the policy language unambiguously allowed the UM insurer to take a credit for amounts from anyone who "may" be liable, which would include all three of the settling parties. The court also held that a statute allowing the insurer to reduce its liability by the amount recoverable from the underinsured motorist's insurer did not preclude consideration of settlements from other parties, because those settlements would reduce the underinsured motorist's liability as settlement credits. *Melencon v. State Farm Mut. Auto. Ins. Co.*, 343 S.W.3d 567 (Tex. App.–Houston [14th Dist.] 2011, no pet.).

A city employee was injured by a drunk driver and received worker's compensation benefits for his injuries. The employee then attempted to recover benefits under the city's UIM policy, which the city acquired for its employees. The court held that if an employee suffers work-related injuries and seeks redress from an employer that subscribes to a workers' compensation program, the only way to obtain damages is through that compensation program. The law bars the employee from forcing the employer to redress the injuries through other means. *Smith v. City of Lubbock*, 351 S.W.3d 584 (Tex. App.–Amarillo 2011, no pet.).

An insured who was injured in a car accident sued the driver and his underinsured motorist insurer. The jury awarded damages that the UIM carrier would have to pay, but the appeals court reversed, holding that the plain language of Tex. Civ. Prac. & Rem. Code section 41.0105 provides that medical expenses subsequently written off by a health care provider do not constitute medical expenses actually incurred by the claimant or on his behalf where neither the claimant nor anyone acting on his behalf will ultimately be liable for pay those expenses. Therefore, because the insurer's offsets and credits subsumed the insured's collectible damages, the trial court held that the insured take nothing. *Progressive Co. Mut. Ins. Co. v. Delgado*, 335 S.W.2d 689 (Tex. App.–Amarillo 2011, pet. denied).

The Fifth Circuit held that a policy unambiguously excluded a vehicle owned by a self-insured entity from the definition of "uninsured/underinsured vehicle," so there was no coverage. Further, the court held this exclusion did not violate Texas law, because the insurance commissioner had the authority to approve policies that exclude certain motor vehicles whose operators are in fact uninsured. *McQuinnie v. Am. Home Assur. Co.*, 400 F. App'x 801 (5th Cir. 2010).

In *Laine v. Farmers Insurance Exchange*, No. 01-08-01010-CV, 2010 WL 375937 (Tex. App.–Houston [1st Dist.] Feb. 4, 2010, pet. filed), an insured sued her insurer for coverage under her umbrella policy for damages sustained in an accident with an uninsured drunk driver. The trial court awarded $175,000 in actual damages and $1,500,000 in exemplary damages against the drunk driver. The insurer had paid the policy limits of $250,000, but did not respond to the insured's request for additional payment under the umbrella policy. The court held that the umbrella policy did not cover exemplary damages against the third party uninsured drunk driver. The court stated it is against public policy to cover exemplary damages

assessed against a third-party wrongdoer, because that would not punish the wrongdoer.

An insured could not recover uninsured motorist benefits for damages resulting from an accident in which ice fell off a tractor trailer and hit the insured's vehicle. The policy defined an uninsured motor vehicle to mean a vehicle "which hits" the insured or his car. Because no part of the tractor trailer came in contact with the insured's car, the court concluded that the policy did not cover the accident. *Hernandez v. Allstate County Mut. Ins. Co.*, No. 04-09-00311-CV, 2010 WL 454949 (Tex. App.–San Antonio Feb. 10, 2010, pet. denied) (mem. op.).

Even though an employee and his wife were protected by liability insurance under the husband's employer's commercial auto policy, the policy did not include them as insureds for underinsured motorist coverage. The court concluded this was permissible and that the insurer was not required to extend UIM coverage merely because the policy covered them for liability. The court agreed that, because the employer could entirely waive UIM coverage, it could also have a policy that limited UIM coverage to only certain insureds. *Amanzoui v. Univ. Underwriters Ins. Co.*, No. 2:09-CV-65-TJW, 2010 WL 1945775 (E.D. Tex. May 12, 2010).

In an accident where the owner of a company was hit and killed by a car while riding her bike, the court found that the company's insurance policies for uninsured and underinsured motorist coverage did not cover her injuries. *Phila. Indem. Ins. Co. v. Creative Young Minds, Ltd.*, 679 F.Supp.2d 739, 743-44 (N.D. Tex. 2009). The named insured on the policy was the company. Therefore, the owner did not meet the definition of "insured," and coverage did not apply.

The supreme court considered whether two documents constituted a single auto policy or two separate policies in *Progressive County Mutual Insurance Co. v. Kelley*, 284 S.W.3d 805 (Tex. 2009) (per curiam). Kelley was injured in a collision and suffered injuries alleged to exceed $1 million. Her family had one policy with a limit of $500,000, insuring four vehicles. Another policy with the same limit and a separate policy number, insured a fifth vehicle. The insurer argued these were just one policy and, even if they were separate, the "two or more auto policies" provision in each allowed for only a single policy limit. The insurer pointed to evidence that its computer system would only allow four vehicles, so a second document was generated when there was a fifth vehicle. The insurer also pointed to the fact that the fifth vehicle got a multicar discount.

The supreme court found there was a latent ambiguity in the second document. The court noted Kelley's evidence that the insurer's own policy guide referred to a "second policy" when there was a fifth vehicle, and giving a multicar discount could be a reward for insuring an additional vehicle, whether it was a single policy or a separate policy.

The court recognized the principle that ambiguities are construed in favor of the insured but stated:

> "Here, we are not interpreting a particular exclusion or provision within an insurance policy …; rather, we are determining whether two policies amount to a single or separate policies."

Based on this distinction, the court remanded for a determination by the factfinder whether there was a single policy or two separate policies. The court did not reach the question whether the "anti-stacking" provision nevertheless would limit recovery to one policy limit.

The distinction the court made in remanding the ambiguity for the factfinder to decide is in conflict with *Balderama v. Western Casualty Life Insurance Co.*, 825 S.W.2d 432 (Tex. 1991), where the court was faced with a similar question whether several documents constituted a single policy. Justice Hecht, for unanimous court, wrote: "At best, whether Western's documents constitute a single policy is an ambiguity, which in these circumstances, must as a matter of law be resolved against Western, and in favor of coverage." *Id.* at 434.

An insured was not "occupying" his car at the time of the accident, when he had exited the car, closed the door, and walked around the front towards a retaining wall before another car hit his vehicle. Coverage applied to injuries while "occupying" a covered vehicle and defined the term as "in, upon, getting in, on, out, or off." The insured argued that he was occupying the vehicle because after the collision he ended up being "upon" it. The court found the plain meaning of the word "occupying" could not apply to this situation. *U.S. Fid. & Guar. Co. v. Goudeau*, 272 S.W.3d 603 (Tex. 2008).

Where an insured's renewal had to be received by May 9th, but was postmarked May 11th, the policy did not renew and did not cover an accident on May 9th. Further, when the insurer renewed the policy effective May 12th, it did not extend the original offer to renew effective May 9th. The insurer did not violate administrative code provisions that require a policy to be in force at least twelve months. The insurer offered twelve months of coverage, but the insured failed to pay in time. In addition, the insurer was not required to give thirty days notice of its intent to decline to renew, because it intended to renew. *Hartland v. Prog. Co. Mut. Ins. Co.*, 290 S.W.3d 318 (Tex. App.–Houston [14th Dist.] 2009, no pet.).

An insured was prohibited by the family-use exception from recovering underinsured motorist

benefits where the insured's sister, a co-insured under the policy, was driving at the time of the accident. The court also held that the family-use exception did not violate public policy. *Hunter v. State Farm Co. Mut. Ins. Co.*, No. 2-07-463-CV, 2008 WL 5265189 (Tex. App.–Fort Worth Dec. 18, 2008, no pet.) (mem. op.).

An insurer was not liable to pay an uninsured motorist claim where the insureds were unable to establish that the uninsured vehicle made "actual physical contact" with the insured's vehicle. Also, because the insureds lacked proof of damages, they could not prevail on their unreasonable investigation claim. *Y Ngoc Mai v. Farmers Tex. Co. Mut. Ins. Co.*, No. 14-07-00958-CV, 2009 WL 1311848 (Tex. App.–Houston [14th Dist.], pet. filed) (mem. op.).

An insured purchased a truck trailer and had it insured by Underwriters at Lloyd's of London. After the trailer was damaged, an adjuster for Underwriters declared the trailer totaled and placed it up for salvage bids. Underwriters sent the insured payment in full under the policy, conditioned on execution of a power of attorney that would allow the adjuster to transfer title to the trailer. The insured did not execute the power of attorney, nor did he attempt to negotiate the Underwriters' check. Despite the insured's refusal to grant the power of attorney to transfer the title, the adjuster ultimately assigned the trailer to the highest bidder. The insured sued Underwriters and the adjuster on various theories. On appeal, the court addressed whether the Underwriters were permitted to dispose of the property under a title theory or if it was prohibited from doing so until it received the power of attorney signed by the insured. The Underwriters argued that policy language allowing it to "take all or any part of the property at the agreed or appraised value" entitled it to dispose of the property upon tendering payment. The court disagreed because the plain language of the policy did not put the insured on notice that he would lose all rights to his property once the Underwriters tendered a check. Another reasonable interpretation of the language was that the right does not attach until the insured negotiated the check and executed a power of attorney to assign title. Thus, Underwriters did not acquire title to the trailer merely by tendering payment. *Bruton v. Underwriters at Lloyd's, London*, 283 S.W.3d 502 (Tex. App.–Fort Worth 2009, rehearing overruled).

An insurer issued a personal auto policy to a divorced husband and wife, naming both as insureds. *Verhoev v. Progressive County Mutual Ins. Co.*, 300 S.W.3d 803 (Tex. App.–Fort Worth 2009, no pet.). After the wife was severely injured while a passenger in her ex-husband's car, the insurer sought a declaration that it owed no UM benefits and that the liability coverage for the husband as to the wife's claim was limited to $20,000 by the policy's family-member exclusion. In analyzing the policy language, the court held that the liability coverage was limited to $20,000 because of the family-member exclusion, but that the wife was entitled to full UM benefits. Regarding the liability coverage, the court found that the family-member exclusion capped coverage not because the wife was a family member but because she was an insured. The policy language excluded coverage "for you … for bodily injury to you." The court agreed with the insurer that the only reasonable way to interpret that provision, in this circumstance, was that the policy did not provide coverage "for the husband … for bodily injury to the wife." Accordingly, the liability coverage was capped. Regarding the UM benefits, the court found that the policy was ambiguous and adopted the wife's interpretation. Under that interpretation, the wife was entitled to UM coverage as a named insured, and the family member exclusion did not apply because the car driven by her husband at the time of the accident was underinsured and was not owned by her. Therefore, although the husband's liability coverage was capped, the wife was entitled to the full UM benefits as a named insured.

An injured driver sued her insurer for uninsured motorist coverage. The court held that an insurer's contractual duty to pay a UM claim is not triggered until liability and damages are determined. The court dismissed the insured's claim for breach of contract, and abated the other claims pending the determination of the other driver's liability and underinsured status. *Stoyer v. State Farm Mut. Ins. Co.*, No. 3-08-CV-1376-K, 2009 WL 464971 (N.D. Tex. Feb. 24, 2009).

II. THIRD PARTY INSURANCE POLICIES & PROVISIONS

A. Automobile Liability Insurance

A policy's "reasonable-belief-of-entitlement exclusion" barred coverage for the death of a passenger in the insured's car. *Sederberg v. IDS Property Cas. Ins. Co.*, No. 05-11-01275-CV, 2013 WL 1646398 (Tex. App.—Dallas Apr. 17, 2013, no pet.). The insured owner of a car allowed her daughter to drive the car. The daughter borrowed the car one night to attend a party with her friend. After the party, the friend drove the car and, while driving, drove off the side of the road. The daughter died as a result of her injuries from the accident. The insurer brought a declaratory judgment action against the daughter's estate, arguing that it did not have a duty to defend or indemnify under the policy because there was no coverage for the friend and there was no uninsured motorist coverage for the daughter.

The court of appeals affirmed the trial court's summary judgment in favor of the insurer. The policy excluded liability for persons "using a vehicle without a reasonable belief that that person is entitled to do so." According to the court, this type of exclusion requires permission or consent to the use of the vehicle at the

time and place in question and in a manner authorized by the owner, expressly or impliedly, and that such permission may be inferred from a course of conduct or relationship between the parties. Here, although the insured gave her daughter permission to use the car, the summary judgment evidence showed that the friend did not have the same permission. The insured did not know the friend, had never met him, did not give him permission to drive the car on the occasion in question, did not know he was driving the car, and had no prior relationship with him from which he could have reasonably believed he was authorized to drive the car. The insured's affidavit statement that she "would have allowed him to drive" the car "since he was one of the coworkers" of the daughter was conclusory and subjective and insufficient to raise an issue of fact.

Failure to obtain a judgment against a driver does not make the driver an uninsured motorist. *State Farm Mut. Auto. Ins. Co. v. Bowen*, 406 S.W.3d 182 (Tex. App.—Eastland 2013, no pet.). An insured was involved in a collision with another driver, who had automobile insurance sufficient to cover his damages. However, the insured did not file suit against the other driver within the limitations period, so that case was dismissed. The insured then sued his automobile insurer for uninsured/underinsured motorist benefits. The policy language defined an uninsured motor vehicle to include a vehicle "to which a liability … policy applies at the time of the accident but the … insuring company: a. denies coverage[.]" The insurer argued that the other driver was not uninsured, because her policy applied at the time of the accident. The insured argued that the other driver became an uninsured driver because her insurer ultimately denied his claim. Looking to similar cases for guidance, the court of appeals concluded that the other driver was not an uninsured motorist within the policy's meaning, because she had liability coverage and there was no evidence that her insurer denied that she had coverage under her policy. The insured did not recover under the other driver's policy because he was barred by limitations. This did not amount to a denial of coverage under the insured's policy.

The Fifth Circuit held that an adult son was not insured under his parents' personal liability umbrella policy because his "permanent residence" was his apartment, not his parents' house. *State Farm Fire Ins. Co. v. Lange*, 480 Fed. Appx. 309 (5th Cir. 2012) (per curiam). The policy provided coverage to the insured's relatives "whose primary residence is your household." The court construed "primary" to mean one's chief, principle, and most important residence.

Motorists injured in a car accident with an uninsured truck sued an insurer that had given the trucking company insurance quotes, even though the trucking company did not purchase insurance. However, the insurance company did help the trucking company get state registration for the truck. The court found these facts did not show that the insurer had any duty to warn motorist of dangers relating to the trucking company's operations. *Salazar v. Ramos*, 361 S.W.3d 739 (Tex. App.–El Paso 2012, pet. denied).

A driver ran a red light, striking another vehicle. The driver's insurer denied coverage, so the injured party's insurer filed a subrogation suit against the driver to recover the insurance proceeds it paid to the injured party. The injured party's insurer obtained a default judgment against the driver, and the court signed a turnover order assigning to the insurer all of the driver's causes of action against its insurer. The court held that the driver's insurer had properly denied coverage, because the owned-vehicle exclusion applied. The negligent driver owned the vehicle he was driving at the time of the accident, but had failed to tell his insurer. *Nat'l Fire Ins. Co. of Hartford v. State & Co. Mut. Fire Ins. Co.*, No. 01-11-00176-CV, 2012 WL 3776422 (Tex. App.–Houston [1st Dist.] Aug. 30, 2012, no pet. h.) (mem. op.).

An injured motorist did not have standing to sue an insured's automobile liability insurer. The motorist claimed to have an oral settlement agreement with the insurer that the insurer breached. However, because there was no evidence showing that the insured had entered into a settlement agreement with the motorist and the insurer as to her liability or that the motorist had a judgment against the insured, the court concluded that, the motorist did not have standing. *Haygood v. Hawkeye Ins. Services., Inc.*, No. 12-11-00262, 2012 WL 1883811 (Tex. App.–Tyler May 23, 2012, no pet.) (mem. op.).

In *Amerisure Insurance Co. v. Navigators Insurance Co.*, 611 F.3d 299 (5th Cir. 2010), the court considered whether several exclusions applied under a commercial automobile-liability insurance policy. Satterfield and Clanton, both of whom were employees of Texas Crewboats, were severely injured when the driver, Sylvester, fell asleep and caused the vehicle to veer off the road and flip over. Sylvester had been driving the two to the location of their employer's boat.

Amerisure had the primary policy, and Navigators had the excess policy. They settled the injured workers' claims, with Amerisure paying $1 million and Navigators paying $1.35 million. Amerisure contended that it did not owe coverage and sought to recover from Navigators the $1 million, claiming contractual subrogation. The Fifth Circuit held that Amerisure could pursue its claim and then considered whether Amerisure established there was no coverage under its policy. The first exclusion was for any obligation that the insured or insured's insurer may have under a worker's compensation or similar law. The court concluded this exclusion did not apply, because suit was brought against Texas Crewboats under the Jones Act, which the court concluded was

not a law that was similar to worker's compensation. The exclusion would not apply to Sylvester, either, because he was not the worker's employer.

The exclusion next asserted was for "employee indemnification and employer's liability," and it excluded coverage for bodily injury to an employee of an insured arising out of and in the course of employment, but the exclusion did not apply to bodily injury to domestic employees. The court found this exclusion would preclude coverage for Texas Crewboats, as employer of the two workers, but would not preclude coverage for Sylvester, because he was not their employer. Navigators argued that an exception to the exclusion applied, for "domestic employees," and argued this meant employees who work in the United States, not just "butlers and chambermaids." The court rejected this interpretation and found the exception to the exclusion did not restore coverage.

Finally, the court considered the "fellow employee" exclusion, which barred coverage for bodily injury to any fellow employee of the insured arising out of and in the course of the fellow employee's employment. The court held this exclusion would not apply to Texas Crewboats because it was the workers' employer, not their fellow employee.

With respect to Sylvester, the court considered two more issues. First the court held that the injuries did arise in the course of the employees' employment, concluding that when Texas Crewboats hired someone to pick up its workers and pay for their transportation, and paid for their time while in transit to get them to the location of its vessel, that was within the course of their employment with respect to that vessel. The second question was whether Sylvester was the workers' "fellow employee." The court found conflicting evidence on whether Sylvester was an employee of Texas Crewboats or was an independent contractor, so the court remanded for determination of that issue.

An auto policy that excluded liability for injuries caused "intentionally," including willful acts the result of which the insured knows or ought to know will follow from the insured's conduct," did not exclude liability for a collision caused by a high speed chase in which the insured fled from police. *Tanner v. Nationwide Mut. Fire Ins. Co.*, 282 S.W.3d 828 (Tex. 2009). The insured fled from the police at high speeds for quite some time, through urban and rural areas before colliding with the plaintiffs. Prior to the collision, the insured tried to stop but could not. A jury found the insured did not act "intentionally" under the policy language, but the trial court and court of appeals found his conduct fit within the exclusion.

The supreme court held that the exclusion did not conclusively apply. The evidence did not show that the insured actually intended to cause the injuries, as opposed to intending to engage in the conduct. Further, the policy excluded injuries that the insured ought to know "will follow" from his conduct, not that were likely to follow.

While the *Tanner* court found the insured's conduct was reprehensible, the injuries were not the necessary result of that conduct. The chase could have ended many other ways, including injuries to no one or injuries to the insured, not necessarily only resulting in injuries to a third party. The court expressed its concern that reading the exclusion broadly would render coverage "illusory" for many common risks. For example, a broad reading of the exclusion would deny liability for an insured who ran a red light but intended no harm, which would frustrate the purpose of requiring liability insurance to protect third parties.

The *Tanner* court construed a policy from Ohio, but the court noted that the standard Texas policy also excludes liability for intentionally causing bodily injury. The Texas exclusion does not refer to willful acts. The court further noted that the standard Texas policy has an exclusion under personal injury protection coverage for bodily injury sustained by a person while attempting to elude arrest, but does not have a similar language under the liability coverage. Thus, it appears that injuries caused during a high speed chase would not be excluded under a Texas policy.

B. Commercial Automobile Liability Insurance

In a case of first impression, the supreme court held that a business auto policy did not cover claims by passengers infected with tuberculosis after riding on a bus driven by a diseased employee. The policy provided that covered injuries had to "result from" the "use" of the covered auto. The court concluded that the bus was merely the situs of the infection and did not have a sufficient causal nexus to the injuries. *Lancer Ins. Co. v. Garcia Holiday Tours*, 345 S.W.3d 50 (Tex. 2011).

The Fort Worth Court of Appeals, sitting en banc, held that the term "domestic employee" in an exception to an exclusion was not ambiguous and only provided coverage to persons engaged in employment incidental to their personal residents, not persons who were in the United States. *Robertson v. Home State County Mut. Ins. Co.*, 348 S.W.3d 273 (Tex. App.–Fort Worth 2011, pet. denied) (en banc). The court recognized the dictionary definitions of the term "domestic" supported both arguments; however, the court reasoned that the exception was based on provisions of the Labor Code and the Transportation Code that intended to allow liability coverage only for "domestic employees" who were engaged in employment incidental to a personal residence. To read the phrase broadly, the court concluded, would render meaningless language requiring that the

"domestic employees" were "not entitled to worker's compensation benefits." In reaching its conclusion, the court declined to follow a contrary decision from the Corpus Christi Court of Appeals and instead followed several federal court decisions.

A driver was not an "insured" under his parents' liability policy, because their home was not his "primary residence." Although the driver listed his parents' home as his address on several documents and kept valuables there, the court concluded that his apartment in another town was his primary residence, because he spent most of his time there, had several months remaining on his lease, and listed that address on his bank and truck title documents. *State Farm Fire & Cas. Co. v. Lange*, No. H-09-2011, 2011 WL 149482 (S.D. Tex. Jan. 18, 2011).

C. *Stowers* Doctrine

A recent case out of the Houston Court of Appeals issued a ruling regarding the *Stowers* doctrine that is inconsistent with *Texas Farmers Ins. Co. v. Soriano*, 881 S.W.2d 312 (Tex. 1994). The court in *Patterson v. Home State Co. Mut. Ins. Co.*, No. 01-12-00365-CV, 2014 WL 1676931 (Tex. App.—Houston [1st Dist.] April 24, 2014, no pet.), held that there was not a valid *Stowers* demand unless all plaintiffs offered to release all claims for policy limits. *Stowers* can apply if just one or several plaintiffs offer to release their claims for policy limits, which allows all policy limits to be exhausted with claims remaining of plaintiffs who either made no offer or whose claims were rejected. This case directly contradicts the *Stowers* doctrine, and hopefully will not be applied by other Texas courts.

III. PRACTICE AND PROCEDURE

A. Severance & Separate Trials

After being hit by an uninsured motorist, the injured party sued her insurer for breach of contract and extra-contractual claims for violations of the Texas Ins. Code and breach of the duty of good faith and fair dealing. The insurer filed a motion to sever and abate the extra-contractual claims from the contract claim for the uninsured motorist benefits, which the trial court denied. The appellate court reversed, holding that Texas case law establishes that severance and abatement of extra-contractual claims is required in many instances in which an insured asserts a claim to uninsured or underinsured motorist benefits, and that in this instance the facts of the case required a severance to prevent manifest injustice. *In re Old Am. County Mut. Fire Ins. Co.*, No. 13-12-00700-CV, 2013 WL 398866 (Tex. App.—Corpus Christi Jan. 30, 2103, no pet.).

The same result was reached in another UIM case. The insured was injured in a car accident with an underinsured motorist. The insured's UIM insurer offered to settle the claim for $850 and later $1,000. The insured sued his insurer for breach of contract, breach of the duty of good faith and fair dealing, violations of the Insurance Code, violations of the DTPA, and common law fraud. The insurer moved to sever the insured's breach of contract claim from his extra-contractual claims, which the trial court denied. The appeals court granted mandamus relief and ordered the trial court to sever the claims, holding that when the insurer has made an offer to settle the contract claim, a severance of the tort and contract claims is required to avoid undue prejudice to the insurer in its defense of the coverage dispute. The appeals court held that the insured's argument that the insurer made just a small offer in order to sever the claim was a fact question, on which mandamus will not issue. *In re Allstate Prop. & Cas. Ins. Co.*, No. 14-12-00867-CV, 2012 WL 5987580 (Tex. App.—Houston [14th Dist.] Nov. 29, 2012, no pet.).

An insurer was entitled to mandamus relief after its motion for severance was denied. *In re Reynolds*, 369 S.W.3d 638 (Tex. App.–Tyler 2012, orig. proceeding). An injured motorist brought a personal injury action against a truck driver and his employer, and also asserted a claim against his insurer for underinsured motorist benefits. The truck driver and his employer moved to sever the claims against them from those against the insurer. The trial court denied the motion, but the court of appeals granted mandamus relief, finding that the motorist's claims against the various defendants were not interwoven and were thus properly severable. The issues of whether the motorist had UIM coverage and whether the truck driver had adequate insurance were unrelated to the facts pertaining to the negligence claim. Furthermore, the truck driver and his employer would have been prejudiced by having the negligence claim tried along with the insurance claim, because it would interject insurance into the case by presenting evidence that the truck driver and his employer were or were not insured against liability, in violation of Tex. R. Evid. 411.

An insured involved in a car accident sued his employer's insurer for underinsured motorist benefits. The claims made were for underinsured motorist benefits and extracontractual bad faith claims. The court reversed the trial court's ruling in favor of bifurcation, and instead granted the insurer's motion to sever, holding that the insurer was under no contractual duty to pay UIM benefits until the insured established liability and the underinsured status of the other driver. *In re United Fire Lloyds*, 327 S.W.3d 250 (Tex. App.–San Antonio 2010, orig. proc.).

B. Liens

After a settlement was obtained in a car accident case, the insurer paid the plaintiffs, making the checks out to the individual plaintiffs and the hospital, jointly. The plaintiffs' banks both negotiated the checks,

allowing the plaintiffs to cash them without obtaining the hospital's endorsement. The hospital filed suit against the insurer, alleging that it violated the Texas Hospital and Emergency Medical Services Lien statutes for settling without resolving the hospital's liens. The trial court granted summary judgment for the insurer, holding that the insurer fulfilled its obligations under the hospital lien statute by issuing and delivering co-payable settlement drafts, as joint-payees with the hospital. The appeals court agreed. *McAllen Hospitals, L.P. v. State Farm Co. Mut. Ins. Co. of Tex.*, No. 13-11-00330-CV, 2012 WL 5292926 (Tex. App.—Corpus Christi-Edinburg Oct. 25, 2012, pet. granted) (mem. op.).

C. Jurisdiction

An insurer had sufficient contacts with Texas to establish jurisdiction. An automobile accident occurred in Oklahoma where the insured was located. A person injured in the accident was treated at a hospital in Texas. The insured was at fault in the accident, and its insurer paid settlement proceeds to the injured party. However, the insurer failed to pay a hospital lien owed in Texas. The hospital sued the insurer in Texas. The court held that the insurer maintained a license to do business in Texas and systematically conducted business in Texas with Texas insurance companies. Therefore, the court concluded that the insurer's contacts with Texas were such that it could reasonably foresee being hailed into Texas court. Additionally, the court held there was no question that Texas has an interest in the enforcement of statutes enacted to secure payment for healthcare services provided within its borders. *Shelter Mut. Ins. Co. v. Dallas Co. Hosp. Dist.*, 366 S.W.3d 858 (Tex. App.–Dallas 2012, pet. denied).

IV. LEGISLATIVE DEVELOPMENTS

Texas Senate Bill 1567 amended the Texas Transportation Code section 601.081 by requiring a disclosure for named driver policies. A named driver policy is, "an automobile insurance policy that does not provide coverage for an individual residing in a named insured's household specifically unless the individual is named on the policy." Act of June 14, 2013, 83rd Leg., 1st C.S., ch. 803, § 1 (amending Subchapter B, Ch. 1952, Ins. Code and § 601.081, Transportation Code). The amendment requires that before accepting any premium or fee on a named driver policy, the agent or insurer is required to make the following disclosure, orally and in writing:

> "WARNING: A NAMED DRIVER POLICY DOES NOT PROVIDE COVERAGE FOR INDIVIDUALS RESIDING IN THE INSURED'S HOUSEHOLD THAT ARE NOT NAMED ON THE POLICY." *Id.*

A bill that recently took effect directly affects the rights of injured parties, allowing them to retain more of their recovery. Texas House Bill 1869 was enacted last session making significant changes to Chapter 140 of the Texas Civil Practice and Remedies Code. The Act took effect January 1, 2014. Under the statute, the insurer's share of a covered individual's recovery is an amount that is equal to the lesser of either

1) one-third of the insured's total recovery or
2) the total cost of benefits paid by the insurer as a direct result of the tortious conduct of the third party.

If the insured shows that his total recovery is less than 50 percent of the value of his underlying claim for damages, the insurer's recovery is limited to an amount that is not less than 15 percent of and not more than one-third of the insured's total recovery. A reasonable fee for the attorney is also outlined in the statute as one-third. These revisions basically allow for three parties – the insurer, the insured, and the attorney – to split the recovery equally, with each receiving one-third of the recovery. Certain health insurers not subject to HB 1869 are Medicare plans, Medicaid plans, self-funded ERISA plans, CHIPS, and worker's compensation plans. Act of May 25, 2013, 83rd Leg., R.S. (amending Chapter 140 of the Tex. Civ. Prac. & Rem. Code).