



**April 21, 2008**

## **HOUSTON APPELLATE COURT AFFIRMS DECISION THAT UM/UIM COVERAGE WAS EXCLUDED FOR A CLAIM AGAINST A FAMILY MEMBER**

Last Thursday, a Houston appellate court ruled a UM/UIM provision was not triggered to provide benefits to an insured's family member who had been injured in an accident. In *Charida v. Allstate Indemnity Co.*, 2008 WL 1747784 (Tex. App.—Houston [1st Dist.] April 17, 2008), Charida was severely injured while riding in a car owned and driven by her father. After exhausting the available coverage under the liability provision of her father's policy, Charida sought to recover under the UM/UIM provision of the policy.

Allstate denied coverage and Charida sued for breach of contract and violations of the Texas Insurance Code and DTPA. The trial court rendered summary judgment in favor of Allstate and Charida appealed.

Charida's father carried an automobile liability insurance policy that provided liability and UM/UIM coverage. The declared limit of liability coverage was \$100,000; however, the actual limit was reduced to \$20,000 once the family exclusion under the policy was applied. Allstate argued Charida's father was not an uninsured/underinsured motorist as defined by the policy. Specifically, the policy language states an uninsured motor vehicle does not include any vehicle or equipment owned by or furnished to or available for the use of the policyholder. In response, Charida argued the policy provision was invalid and unenforceable under the Texas Insurance Code because it contravenes public policy.

After surveying Texas law on the subject and in route to its decision, the appellate court returned to the purpose of UM/UIM coverage: to protect against the negligence of strangers to the policy, not family members.

## **AUSTIN APPELLATE COURT HOLDS HOMEOWNERS NOT ENTITLED TO ATTORNEYS' FEES WHILE INSURANCE CARRIER MAY PURSUE SUBROGATION RIGHTS AGAINST SETTLEMENT PROCEEDS**

Last week (in an en banc rehearing), the Austin Court of Appeals declined to award attorneys' fees to the insureds but reversed the trial court's decision and ruled the carrier could pursue its subrogation rights against the settlement proceeds. In *Osborne v. Jauregui, Inc.*, 2008 WL 1753553 (Tex. App.—Austin April 17, 2008), the insureds purchased a home designed and built by Jauregui. State Farm provided the homeowners insurance policy. Shortly after moving in, the insureds noticed flaws in construction and later learned the home had a serious mold problem due to the construction errors. State Farm paid \$1,874,687 in mold-related claims.

The insureds sued Jauregui asserting causes of action for breach of contract, negligence, breach of warranty, real estate fraud, negligent misrepresentation and violations of the DTPA. Before trial the insureds settled with all defendants except for Jauregui for a total of \$1,260,500. The insureds proceeded to trial against Jauregui alleging they had suffered at least \$2,418,000 in damages.

At trial the jury found Jauregui was negligent and breached warranties made to the insureds and found damages totaling \$835,158.78. Jauregui elected a dollar-for-dollar credit of the settlement funds against the jury's damages award, and the trial court entered judgment that the insureds should take nothing against Jauregui, refusing to award attorneys' fees, and denying State Farm's claim that it was entitled to subrogation against the settlement funds.

On appeal the insureds argued since they were the prevailing party under the DTPA, they were not required to segregate their attorneys' fees. In its cross-appeal against the insureds, State Farm argued the trial court abused its discretion in denying State Farm's subrogation claim (in violation of the one-satisfaction rule) and the trial court properly denied the insureds' request for attorneys' fees.

Applying the one-satisfaction rule and based on the fact the insureds recovered more than the damages found by the fact finder, the appellate court held the insureds were not entitled to attorneys' fees. Likewise, the court concluded the one-satisfaction rule entitled State Farm to recover its benefits payments since the insureds had received a windfall based on the jury's damage calculation.

### **AMARILLO APPELLATE COURT FINDS REVERSIBLE ERROR FOR TRIAL COURT'S FAILURE TO CHARGE JURY ON ISSUE OF TIMELINESS OF NOTICE OF RESCISSION OF THE INSURANCE POLICY**

Recently the Amarillo Court of Appeals held the trial court's failure to charge a jury on the timeliness of a notice of rescission of an insurance policy constituted reversible error. In *In re Myers*, 2008 WL 1758640 (Tex. App.—Amarillo April 17, 2008), Myers filed suit based upon an insurance contract issued by Mega Life ("Mega"). Myers sought damages for breach of contract, breach of duty of good faith and fair dealing, negligence, exemplary damages, unfair claims settlement practices and violations of the DTPA. Mega responded, in part, with a counterclaim seeking rescission of the insured's coverage due to material misrepresentations in his insurance application regarding his medical condition.

The trial court issued a letter ruling that Mega's counterclaim for rescission would be tried to the jury prior to the proceeding with Myer's liability and damages case. Prior to trial, Myers moved in limine to prohibit Mega from putting on any evidence related to its counterclaim because it failed to give proper notice per the Texas Insurance Code (rescission notice must be given before the 91st day after discovery of the falsity of the representation). The trial court overruled the motion in limine and proceeded to try the counterclaim. At the conclusion of trial Myers submitted an instruction which included the rescission notice requirement. The trial court denied the instruction and the jury returned a verdict in favor of Mega's counterclaim.

Based on the evidence the appellate court ruled the trial court abused its discretion by failing to instruct the jury about the rescission notice deadline. As such, the appellate court reversed and remanded the case for further proceedings.