



The Weekly Update of Texas Insurance News
TEXAS INSURANCE LAW NEWSBRIEF



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January 8, 2007

TEXAS SUPREME COURT DEFINES UM/UIM COVERAGE AND ITS IMPACT ON CLAIMS FOR PREJUDGMENT INTEREST AND ATTORNEY FEES

In three significant decisions issued on December 22nd, the Texas Supreme Court examined the scope of underinsured/underinsured (“UM/UIM”) coverage under Texas law and the impact on claims for prejudgment interest and attorney fees. The high court held: 1) prejudgment interest on the loss is covered under UM/UIM coverage; 2) the “declining principal” formula is used to calculate prejudgment interest on UIM benefits; and 3) an insured may recover attorney fees only when the insurer does not tender the UIM benefits within thirty days after the trial court signs a judgment establishing liability and damages. These significant decisions are discussed in greater detail below.

In *Brainard v. Trinity Universal Insurance Co.*, 2006 WL 3751572 (Tex. December 22, 2006), the insured was killed in a head on collision and his wife and five children sued the other driver and sought UIM benefits from their own insurer. The other driver’s liability insurer settled for its \$1,000,000 policy limit and the deceased’s estate received \$5,000 in PIP benefits from his own insurer. The estate then demanded the \$1,000,000 UIM limit from their insurer and received a \$50,000 offer. A lawsuit followed, the extra-contractual claims were severed, and the jury awarded \$1,010,000 in damages on the UIM contract claim and \$100,000 in attorney fees. The trial court allowed a \$1,005,000 offset for the liability and PIP payments previously received and entered a judgment for \$5,000 in contract damages plus \$100,000 in attorney fees. On appeal, the estate sought \$263,430 in prejudgment interest and the UIM insurer sought to overturn the award of attorney fees. The intermediate appellate court reversed the attorney fee award and refused to award prejudgment interest. An appeal to the Texas Supreme Court followed.

The Texas Supreme Court concluded that prejudgment interest is designed not to punish but to compensate the injured party for their bodily injury and property damage and, as a result, pre-judgment interest on the loss is covered under UM/UIM coverage. By statute, prejudgment interest begins to accrue on the 180th day after the tort defendant receives written notice of the claim or when suit is filed. The high court noted that “payments must be credited periodically, according to the date they are received.” Settlement payments from the liability insurer are to be credited first to any accrued prejudgment interest as of the date of settlement and then to the principal. Thus, using the “declining principal” formula, a trial court must consider the date on which the insured received each payment. Because the PIP payment was issued before prejudgment interest began to accrue, no interest was owed in this case on the \$5,000 PIP payment.

Prejudgment interest accrued on the remaining \$1,005,000 for almost 11 months until the \$1,000,000 settlement was received, and then on the \$5,000 until the \$50,000 offer was made. Because the offer was left open, but never accepted, the high court held any related prejudgment interest did not accrue on the amount of the offer. The Texas Supreme Court then provided a formula for the trial court to calculate prejudgment interest and remanded the case to the trial court to address the prejudgment interest issue.

Turning its attention to the attorney's fees issue, the court observed its prior rulings based on the UM/UIM statute and policy language and held the insurer's duty to pay UM/UIM benefits does not arise until the UM/UIM driver's liability and the insured's damages are legally determined. The high court held:

Neither requesting UIM benefits nor filing suit against the insurer triggers a contractual duty to pay. Where there is no just amount owed, there is no duty to pay. Thus, under Chapter 38, a claim for UIM benefits is not presented until the trial court signs a judgment establishing the negligence and underinsured status of the other motorist....[N]either a settlement nor an admission of liability from the tortfeasor establishes UIM coverage, because a jury could find that the other motorist was not at fault or award damages that do not exceed the tortfeasor's liability insurance."

Accordingly, the court affirmed the denial of attorney fees and remanded the case for calculation of and entry of judgment on prejudgment interest.

In *State Farm Mutual Auto. Ins. Co., v. Norris*, 2006 WL 3751580 (Tex. December 22, 2006), as a matter of first impression, the court addressed the impact of the insured's signing of a release with the tortfeasor on prejudgment interest. The insured settled with the tortfeasor for \$40,000 of his \$50,000 policy limit and then obtained an agreed judgment in the amount of \$51,200. Although State Farm had paid \$5,000 in PIP benefits, it never offered to settle the UIM claim. Following its analysis in *Brainard*, discussed above, the court noted that the "declining principal" formula applied to any calculation of prejudgment interest in a UIM case. But because the dates of the PIP payment and settlement were not part of the record, and because prejudgment interest cannot be calculated without those dates, the case was remanded to the trial court to address the issue.

The court then observed that this case presented an issue of first impression for the court which was not answered in *Brainard*--the impact of a release on the calculation of prejudgment interest. Norris settled with the other driver for \$10,000 less than their liability limit. The court observed that UIM coverage was designed to compensate the insured for an amount "reduced by the amount *recovered or recoverable* from the insurer of the underinsured motor vehicle." Noting that "the purpose of prejudgment interest is to compensate the claimant for the lost use of money as damages" and because Norris did not lose the use of the \$10,000 and released any entitlement to it, he also released any entitlement to any prejudgment interest on that amount. Accordingly, he was only entitled to prejudgment interest on the amount the judgment exceeded the tortfeasor's policy limits (\$1,200).

The court held: "Credits applied before prejudgment interest began to accrue will reduce the principal. Thereafter, each credit will apply first to the accrued prejudgment interest and second to the remaining principal. Thus, State Farm is liable, up to the UIM policy limits, for the principal plus accrued prejudgment interest remaining after the credits are applied." Addressing attorney fees, the court noted that the insured could only recover if the insurer did not tender the UIM benefits within thirty days after the trial court signs a judgment establishing liability and damages. In this case, the trial court entered a take nothing judgment and so no attorney fees were owed.

In the third decision, *State Farm Mutual Auto. Ins. Co. v. Nickerson*, 2006 WL 3754824 (Tex. December 22, 2006), the insured sued the responsible driver and released her claims after accepting their \$25,000 policy limit. The insured also received \$10,000 in PIP benefits but sued to recover more under her \$300,000 UIM policy. The jury ultimately awarded \$225,000 in damages and \$46,500 in attorney fees. Less than thirty days after the judgment, State Farm paid the amount of the judgment less the offset, plus interest on that amount from the date of judgment until the date payment was issued (approximately \$1,300). The trial court, however, signed a final judgment awarding prejudgment interest in the amount of \$181,849.32, calculated from the date suit was filed until the day before the judgment was signed. The trial court also awarded attorney fees and post-judgment interest.

State Farm initially challenged both the award of prejudgment interest and attorney fees but later withdrew the challenge against the prejudgment interest and paid the remainder of its \$300,000 UIM policy limit. Thus, the only issue presented on appeal was the attorney fee award. Following its ruling in *Brainard*, the court held that any insured may only recover attorney fees under “Chapter 38 only if the insurer does not tender UIM benefits within thirty days after the trial court signs a judgment establishing liability and underinsured status of the other motorist.” Therefore, the trial court erred in awarding Nickerson attorney’s fees incurred during the trial, and the court of appeals erred in affirming that judgment.”

Note: These recent decisions from the Texas Supreme Court emphasize the insurer’s need to promptly evaluate and tender settlement offers in a timely manner, and leave them open if not accepted, to help limit or avoid prejudgment interest. Also, insurers retain the right to have a trial court determine both legal liability and damages owed under a UM/UIM claim without being obligated to pay attorney fees incurred in prosecuting the UIM claim through trial. Once a judgment is signed by a trial court, payment within thirty days will preclude any obligation to pay attorney fees. Anyone seeking copies of these decisions, analysis of specific claims or pending cases, or further clarification of these issues should feel free to contact any of our lawyers.

DALLAS OFFICE EXPANDS

Our firm’s Dallas office expanded this week with the addition of partners Mark Dyer and Alan Moore and associate Jason Spivey. All three are trial lawyers who specialize in the defense of personal injury cases with particular emphasis in product liability, toxic torts, auto liability, premise liability and professional negligence claims. They join our firm from the Dallas office of Fanning, Harper & Martinson. The addition of these talented lawyers significantly expands the firm’s trial practice in north Texas in order to continue to meet the litigation needs of our clients.

AUSTIN OFFICE RELOCATES

Our firm’s Austin office relocated over the New Year’s weekend by moving to larger accommodations in downtown Austin. Our new office is located at 111 Congress Avenue in the One Congress Plaza Building. The new phone number is 512-610-4400. By continuing to maintain close proximity to the state and federal courthouses in Austin, as well as close proximity to the Texas Supreme Court, the Austin Court of Appeals, and the Texas Department of Insurance, our Austin office continues to serve the litigation needs of our firm’s insurance clients in central and south Texas.

SOUTH TEXAS INSURANCE LAW C.L.E. PROGRAM—JANUARY 25-26, 2007

The South Texas College of Law will hold its annual Texas Insurance Law Symposium on January 25th & 26th in Houston. Chris Martin of our firm is serving as the Chair of this great continuing education program for the 6th consecutive year. This program is certified for adjuster CE credits by TDI and attorney CLE credits by the State Bar of Texas. The program will highlight many of the cutting edge insurance issues in auto, homeowners and commercial liability insurance in Texas. It will also cover all of the significant insurance decisions from Texas courts over the past year. For more information on this CLE program, see <http://www.stcl.edu/cle/TXINS2007schedule.html>.

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