

Presented:
August, 2021

UT CAR CRASH SEMINAR
Austin, Texas

**IMPORTANT CASES IN THE
PROSECUTION AND DEFENSE OF UM / UIM CASES**

Thomas A. Herald

Thomas A. Herald
THOMAS A. HERALD, PC
1038 S. Elm Street
Carrollton, TX 75006

Tom@TAHeraldPC.com
(214) 432-2800 Telephone
(214) 432-2866 Fax
Email: Tom@TAHeraldPC.com

I.	RULES OF CONSTRUCTION FOR CONSTRUING INSURANCE POLICIES...	1
A.	GENERAL RULES	1
B.	PLAIN LANGUAGE	1
C.	AMBIGUITY	1
D.	INTERPRETATION OF EXCLUSIONARY CLAUSES	1
E.	SEVERABILITY CLAUSES	2
II.	COVERAGE ISSUES	2
A.	EIGHT CORNERS RULE	2
B.	EXCEPTIONS TO THE EIGHT CORNERS RULE	2
C.	WHEN COVERAGE IS DENIED	3
D.	WHO IS COVERED?	3
E.	MEMBER OF THE HOUSEHOLD	4
F.	DEFINITION OF UNINSURED VEHICLE	5
G.	VEHICLES OWNED BY OR FURNISHED TO OR AVAILABLE FOR USE	6
H.	WHO IS AN UNINSURED MOTORIST?	6
I.	NAMED DRIVER POLICIES	7
J.	DEFINITION OF "AUTO ACCIDENT"	8
K.	TYPES OF ACCIDENTS	9
L.	INJURIES OCCURRED WHILE USING A MOTOR VEHICLE	14
M.	PHYSICAL CONTACT	16
N.	BODILY INJURY	18
O.	PROPERTY DAMAGE	21
P.	"OTHER INSURANCE" CLAUSES	22
III.	EXCLUSIONS	23
A.	VEHICLES THAT DO NOT QUALIFY AS AN UNINSURED VEHICLES	23
B.	VEHICLES FURNISHED FOR THE REGULAR USE	25
C.	EXCLUDED DRIVERS	26
D.	FAMILY MEMBER EXCLUSION	27
E.	PERMISSIVE DRIVERS AND OMNIBUS INSUREDS	28
F.	FELLOW EMPLOYEE EXCLUSION	28
IV.	DUTIES OF THE INSURED	29
A.	DUTY TO LIST VEHICLES	29
B.	DUTY TO COOPERATE	29
C.	DUTY TO GIVE NOTICE OF NEW VEHICLE	30
D.	DUTY TO GIVE NOTICE OF CLAIM	30
E.	DUTY TO OBTAIN CONSENT TO SETTLE	30
F.	DUTY TO SUBMIT TO MEDICAL EXAMINATIONS	32
G.	DUTY TO SUBMIT TO EXAMINATIONS UNDER OATH (EUO's)	33
V.	COVERAGES REQUIRED	34
A.	UM/UIM COVERAGE REQUIRED	34
B.	UM/UIM COVERAGE MUST BE OFFERED IN THE AMOUNTS DESIRED	34
C.	PIP COVERAGE	35

VI.	PIP & UM/UIM REJECTIONS	36
A.	LIBERAL CONSTRUCTION	36
B.	THE PIP AND UM/UIM REJECTIONS MUST BE IN WRITING	36
C.	FORM OF THE PIP AND UM/UIM REJECTIONS	38
D.	BURDEN OF PROOF	39
E.	EXCEPTIONS	39
F.	PERPETUAL RENEWALS	39
G.	NOTICE OF CLAIM REQUIREMENTS	40
H.	INSURER'S BURDEN TO SHOW PREJUDICE	40
I.	ASSIGNMENTS OF BENEFITS – PIP CLAIMS	40
J.	PIP OFFSETS PERMITTED TO PREVENT A DOUBLE RECOVERY	40
VII.	CANCELLATION OF THE POLICY	41
VIII.	STACKING COVERAGES	41
A.	GENERAL RULE	41
B.	EXCEPTIONS	41
C.	COMPANY CARS: COVERAGE WHILE OCCUPYING A VEHICLE SUPPLIED FOR THE REGULAR USE	42
IX.	OTHER INSURANCE CLAUSE: PRIORITIES OF COVERAGE & MULTIPLE POLICIES	42
A.	POLICY LANGUAGE	42
B.	NON-OWNED AUTOS	43
C.	CASES INVOLVING NON-STANDARD INSURANCE POLICIES	43
D.	OFFSETS & CREDITS ON UM/UIM CLAIMS	44
E.	WORKERS' COMP BENEFITS	46
F.	TORTEASOR IS NOT ENTITLED TO A CREDIT FOR UM/UIM BENEFITS	48
G.	SETTLEMENTS FOR LESS THAN POLICY LIMITS	48
H.	REQUIRING THE INSURED TO SIGN A RELEASE	49
X.	DAMAGES RECOVERABLE ON UM/UIM CLAIMS	48
A.	WHETHER UIM COVERAGE IS EXCESS OR REDUCTION	48
B.	PURE UM/UIM CLAIMS	48
1)	BODILY INJURY DAMAGES UP TO THE POLICY LIMITS	49
2)	MEDICAL EXPENSES	49
3)	PROPERTY DAMAGES	51
4)	PUNITIVE DAMAGES ARE NOT RECOVERABLE ON A PURE UM/UIM CLAIM	54
5)	PRE-JUDGMENT AND POST-JUDGMENT INTEREST	55
6)	COURT COSTS	56
7)	ATTORNEY'S FEES	57
a.	THE HISTORICAL FIGHT FOR ATTORNEY'S FEES	57
b.	PRE-BRAINARD CASES PERMITTING RECOVERY OF ATTORNEY'S FEES	57
c.	PRE-BRAINARD CASES DISALLOWING RECOVERY OF ATTORNEY'S FEES	59
d.	POST-BRAINARD RECOVERY OF ATTORNEY'S FEES	60
e.	DEFENSES TO CLAIMS OF ATTORNEY'S FEES	61

XI.	BRAINARD, NORRIS & NICKERSON TRILOGY OF CASES	64
A.	<i>Brainard v. Trinity Universal Insurance Company, 216 S.W.3d 809 (Tex. 2006)</i>	64
B.	<i>State Farm Mut. Ins. Co. v. Norris, 216 S.W.3d 819 (Tex.2006)</i>	65
C.	<i>State Farm Mut. Ins. Co. v. Nickerson, 216 S.W.3d 823 (Tex. 2006)</i>	65
XII.	MAKING A CLAIM	65
A.	NOTICE OF CLAIM	66
B.	TIME LIMTS FOR GIVING NOTICE OF CLAIM	66
XIII.	BAD FAITH. WHAT IS IT?	66
A.	EVOLVING STANDARDS FOR WHAT CONSTITUTES “BAD FAITH”	66
B.	POST-MENCHACA BAD FAITH – INTERPRETING THE 5 NEW RULES	71
1.	GENERAL RULE	71
2.	THE ENTITLED-TO-BENEFITS RULE	71
3.	THE BENEFITS-LOS9 RULE	72
4.	THE INDEPENDENT-INJURY RULE	72
5.	THE NO-RECOVERY RULE	72
C.	SCOPE OF THE DUTY OF GOOD FAITH AND FAIR DEALING	73
D.	EXAMPLES OF BAD FAITH CONDUCT	73
E.	EXAMPLES OF CONDUCT THAT ARE NOT BAD FAITH	75
F.	UNRESOLVED ISSUES	78
G.	POTENTIAL BARS TO PURSUING BAD FAITH CLAIMS	79
H.	EXPERT WITNESSES ON BAD FAITH CLAIMS	79
XIV.	DAMAGES RECOVERABLE ON BAD FAITH CLAIMS	79
A.	ACTUAL DAMAGES UP TO THE POLICY LIMITS	79
B.	MENTAL ANGUISH	80
C.	COMPENSATORY DAMAGES	81
D.	PUNITIVE DAMAGES	81
E.	STANDARDS OF PROOF: PRODUCING CAUSE	82
F.	ATTORNEY’S FEES	82
G.	STANDARDS OF PROOF TO RECOVER ATTORNEY’S FEES	82
H.	EQUITABLE AND JUST	83
XV.	STATUTORY BAD FAITH CLAIMS	84
A.	INSURANCE CODE CLAIMS UNDER §541.060 Tex.Ins.Code	84
B.	PROMPT PAYMENT OF CLAIMS VIOLATIONS UNDER CHAPTER 542	87
C.	FAILURE TO SETTLE OR TO DEFEND	95
XVI.	STATUTE OF LIMITATIONS ON FIRST PARTY CLAIMS	95
A.	POST-BRAINARD STATUTES OF LIMITATIONS ON UM/UIM CLAIMS	95
1)	PURE UM/UIM CLAIMS	95
2)	COMMON LAW BAD FAITH CLAIMS	96
3)	DTPA CLAIMS	96
4)	INSURANCE CODE CLAIMS	96
XVII.	CAUSES OF ACTION FOR UM/UIM CLAIMS	97
A.	DECLARATORY JUDGMENT ACTION	97
B.	STAND-ALONE 541 CLAIM	97

C. <i>EXHAUSTION DOCTRINE</i>	98
XVIII. <i>UNIFORM DECLARATORY JUDGMENTS ACT</i>	98
A. <i>THE STATUTE</i>	98
B. <i>ATTORNEY'S FEES ON DECLARATORY JUDGMENT ACTIONS</i>	99
C. <i>CASES ADDRESSING THE USE OF DECLARATORY JUDGMENTS FOR UM/UIM CLAIMS</i>	100
D. <i>PLEADING REQUIREMENTS FOR DECLARATORY JUDGMENT ACTIONS</i> ..	103
XIX. <i>LAWSUITS AGAINST THE ADJUSTER</i>	103
A. <i>LEGAL AUTHORITY FOR SUING THE ADJUSTER</i>	103
B. <i>EXCEPTIONS</i>	104
C. <i>OTHER CAUSES OF ACTION AGAINST THE ADJUSTER</i>	104
D. <i>PROHIBITED CAUSES OF ACTION AGAINST THE ADJUSTER</i>	105
E. <i>THIRD PARTIES THAT ARE NOT CONSIDERED "PERSONS" OR "ADJUSTERS" UNDER THE CODE</i>	105
XX. <i>PLEADING REQUIREMENTS</i>	105
A. <i>RES JUDICATA AND COLLATERAL ESTOPPEL</i>	105
B. <i>"BODILY INJURY" MUST BE PLED AND PROVEN, IT IS NOT INFERRED.</i> ..	106
C. <i>MOTIONS TO DISMISS FOR FAILURE TO PLEAD A CLAIM</i>	107
XXI. <i>PRE-TRIAL ISSUES</i>	107
A. <i>VENUE</i>	107
B. <i>SEVERANCE/SEPARATE TRIALS & ABATEMENT</i>	108
C. <i>CONDITIONS PRECEDENT</i>	117
D. <i>SUFFICIENCY OF PLEADINGS</i>	117
E. <i>REMOVAL</i>	118
XXII. <i>DISCOVERY</i>	123
A. <i>SCOPE OF DISCOVERY</i>	123
B. <i>LIMITATIONS ON DISCOVERY IN UM/UIM CASES</i>	123
C. <i>DISCOVERY OF CLAIMS FILES</i>	123
D. <i>CLAIMS OF TRADE SECRETS</i>	125
E. <i>DEPOSING THE EUO ATTORNEY</i>	125
F. <i>DEPOSING THE ADJUSTER</i>	125
G. <i>DEPOSING CORPORATE REPRESENTATIVES ON UM/UIM CLAIMS</i>	126
H. <i>BAD FAITH DISCOVERY</i>	129
I. <i>DISCOVERY REGARDING ATTORNEY'S FEES</i>	129
XXIII. <i>TRIAL ISSUES</i>	129
A. <i>NOT NECESSARY TO SUE THE TORTFEASOR</i>	129
B. <i>CONSENT TO BE BOUND</i>	130
C. <i>DEFAULT JUDGMENTS</i>	130
D. <i>TRIAL AMENDMENTS SHOULD BE PERMITTED TO ASSERT OFFSETS/CREDITS</i>	130
E. <i>CORRECT PARTIES TO A UM/UIM TRIAL</i>	130

F. <i>BURDEN OF PROOF TO PROVE THE POLICY</i>	131
G. <i>ADMISSIBILITY OF EVIDENCE OF POLICY LIMITS</i>	131
H. <i>THE CORPORATE REPRESENTATIVE AS A TRIAL WITNESS</i>	132
I. <i>ADMISSIBILITY OF INTOXICATION OF THE UM/UIM DRIVER</i>	132
J. <i>ADMISSIBILITY OF OTHER ACCIDENTS & OTHER HEALTH CONDITIONS</i>	133
K. <i>THE CHARGE</i>	133
L. <i>MOTIONS FOR NEW TRIAL</i>	133
XXIV. <i>ASSIGNMENT OF BENEFITS</i>	134
A. <i>SETTLEMENT CHECKS & ASSIGNMENTS</i>	134
B. <i>APPLICATION OF PAID OR INCURRED STATUTE TO PIP CLAIMS</i>	134
XXV. <i>LIENS & SUBROGATION CLAIMS ON PIP AND UM/UIM CLAIMS</i>	134
A. <i>EQUITABLE SUBROGATION</i>	134
B. <i>COMMON FUND DOCTRINE</i>	134
C. <i>MEDICARE AND MEDICAID LIENS</i>	135
D. <i>HEALTH INSURANCE LIENS</i>	135
E. <i>WORKER'S COMPENSATION LIENS</i>	136
F. <i>CHILD SUPPORT LIENS</i>	136
G. <i>HOSPITAL LIENS</i>	140
H. <i>ANTI-SUBROGATION RULE</i>	141
XXVI. <i>RECENT CASES</i>	142
A. <i>Coverage Issues</i>	
1) <i>The Eight Corners Rule</i>	
a. <i>Richards v. State Farm Lloyds</i> , 597 S.W.3d 492 (Tex. 2020)	
b. <i>Loya Ins. Co. v. Avalos</i> , 610 S.W.3d 878, (Tex. 2020)	
B. <i>Definition of an Accident</i>	
1) <i>Frederking v. Cincinnati Ins. Co.</i> , 929 F.3d 195 (5 th Cir. 2019).	
C. <i>Property Damages</i>	
1) <i>Singleton v. Elephant Ins. Co.</i> 953 F.3d 334, (5 th Cir 2020).	
D. <i>Consent to Settle</i>	
1) <i>In re USAA General Indemnity Co.</i> , 2021 WL 1822944 (Tex. May 7, 2021).	
2) <i>Davis v. State Farm Lloyds, Inc.</i> , Not Reported in S.W. Rptr., 2019 WL 5884405, (Tex.App.—Dallas 2019).	
E. <i>Cases Addressing the Use of Declaratory Judgment Actions for UM/UIM Claims.</i>	
1) <i>Allstate v. Irwin</i> , – S.W.3d –, 2021 WL 2021446, (Tex. May 21, 2021).	
2) <i>Allstate Fire & Cas. Ins. Co. v. Inclan</i> , Not Reported in S.W. Rptr., 2020 WL 373061, (Tex.App.— Corpus Christi, 2020, pet. filed)(memorandum).	
3) <i>Ochoa v. Allstate Fire & Cas. Ins. Co.</i> , 2020 WL 2129252 (W.D. Texas – San Antonio Div. 2020).	
F. <i>Attorney's Fees on Declaratory Judgment Actions</i>	
1) <i>Allstate Ins. Co. v. Irwin</i> , – S.W.3d –, 2021 WL 2021446, (Tex. May 21, 2021).	
2) <i>Allstate Fire & Cas. Ins. Co. v. Inclan</i> , Not Reported in S.W. Rptr., 2020 WL 373061, (Tex.App.— Corpus Christi, 2020, pet. filed)(mem. op.).	
3) <i>Utica Lloyd's of Tex. v. Mitchell</i> , 138 F.3d 208, 210 (5 th Cir. 1998).	

- G. *Stand-Alone 541 Claims*
 - 1) *In re State Farm Mut. Auto. Ins. Co.*, No. 19-0791, 2021 WL 1045651, (Tex. March 19, 2021)
- H. *541 Claims and Prompt Payment of Claims Actions*
 - 1) *State Farm v. Cook*, 591 S.W.3d 677, (Tex.App.—San Antonio 2019, orig. proceeding) (mem. op.) (pet. filed and withdrawn).
- I. *Post-Menchaca Bad Faith – Interpreting the 5 New Rules*
 - 1) *In re State Farm Mut. Auto. Ins. Co.*, No. 19-0791, 2021 WL 1045651, (Tex. March 19, 2021),
 - 2) *Garza v. Allstate Fire & Cas. Ins. Co.*, 7:19-CV-129, 2020 WL 3077596 at * 10 (S.D. Texas – McAllen Div. 2020).
- J. *Bad Faith Discovery*
 - 1) *In re State Farm Mut. Auto. Ins. Co.*, 614 SW.3d 316 (Tex.App.—Fort Worth 2020, orig. proceeding, pet. denied).
- K. *Potential Bars to Pursuing Bad Faith Claims*
 - 1) *Fowler v. General Ins. Co.*, 2014 WL 5879490, Not Reported in F.Supp.3d (2014) (N.D. Texas 2014)
 - 2) *Alvarez v. State Farm Lloyds*, 601 S.W.3d 781 (Tex. 2020).
- L. *Bad Faith Experts*
 - 1) *Farris v. State Farm Lloyds*, 2021 WL 398489 (S. D. Tex. Feb. 2, 2021) (mem op.)
- M. *Pre-Trial Issues*
 - 1) *Severance and Abatement*
 - (1) *In re State Farm Mut. Auto. Ins. Co.*, No. 19-0791, 2021 WL 1045651, (Tex. March 19, 2021)
 - (2) *Green v. Allstate Fire and Cas. Ins. Co.*, 2019 WL 2744183 (W.D Texas—San Antonio Div., 2019).
 - (3) *In re State Farm Mut. Auto. Ins. Co.*, (Tex.App.—Houston [1st Dist.] 2019, orig. proceeding).
 - (4) *In re Colonial County Mut. Ins. Co.*, Not reported in SW Rptr, 2019 WL 5699735 (Tex.App.—Houston [1st Dist.] 2019).
 - (5) *Fowler v. General Ins. Co.*, Not Reported in F.Supp.3d, 2014 WL 5879490 (2014) (N.D. Texas 2014)
 - (6) *In re State Farm Mut. Auto. Ins. Co.*, 2020 WL 1264184 (Tex.App.—Houston [1st Dist.] 2020).
 - (7) *Ochoa v. Allstate Fire & Cas. Ins. Co.*, 2020 WL 2129252 (W.D. Texas – San Antonio Div. 2020).
 - 2) *The Effect of Severance on the UIM Claim*
 - 1. *In re USAA General Indemnity Co.*, 2021 WL 1822944 (Tex. May 7, 2021)
 - 3) *Removal*
 - 1) *Boardman v. Allstate Fire & Cas. Ins. Co.*, 2020 WL 487225, No. 5:19-CV-01399-JKP (Jan 29, 2020, W.D. Tex).
 - 2) *Chamberlain v. Geico Indemnity Company*, Case No. 3:19-cv-02036-L (N.D. Tex. May 26, 2020).
 - 3) *Wahlenmaier v. Allstate Indemnity Co.*, 3:20-CV-0704-S, (N.D. Tex. 2020).
 - 4) *James v. Allstate Fire and Cas. Ins. Co. and Torres*, 3:20-CV-00786 (W.D. Tex 2020) *Deposing the Corporate Representative*
 - 2. *Deposing the Corporate Representative*
 - 1) *In re USAA General Indemnity Co.*, --- S.W.3d ---, 2020 WL 1452939 (Tex. June 18, 2021)

- 2) **In re Allstate Fire and Casualty Ins. Co., --- S.W.3d ---, 2021 WL 2483760 (Tex. June 18, 2021) (orig. proceeding)**
- 3) **In re Liberty Mut. Ins. Co., 606 S.W.3d 866, (Tex.App.—Houston [14th Dist.] July 7, 2020) (orig. proceeding).**
- 4) **In re Hamilton, Not Reported in S.W. Rptr. 2020 WL 5494503 (Tex.App.—Corpus Christi 2020, orig. proceeding).**
- 5) **In re Garrison Property & Cas. Ins. Co., Not Reported in S.W. Rptr. 2020 WL 6164982 (Tex.App.—Tyler 2020, orig. proceeding) (mem. op.).**

I. *PIP Claims*

- 1) **PIP Offsets Permitted to Prevent a Double Recovery**
 - a. **Allstate Fire & Cas. Ins. Co. v. Alfred, Not Reported in S.W. Rptr., 2019 WL 6205154 (Tex.App.—Beaumont 2019).**
- 2) **PIP Coverage and Collateral Sources**
 - a. **Farmers Texas County Mut. Ins. Co. v. Beasley, 598 SW3d 237, (Tex. 2020) (rev'g 578 S.W.3d 98 (Tex. App.--Tyler 2018)).**

I. RULES OF CONSTRUCTION FOR CONSTRUING INSURANCE POLICIES

A. *General Rules:*

1. Same Rules of Construction as Any Contract.
2. Insurance policies are construed according to the same rules of construction that apply to contracts generally. **Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.**, 267 S.W.3d 20, 23 (Tex. 2008). Interpretation or construction of an unambiguous contract is a matter of law to be determined by the court. **Coats v. Farmers Ins. Exch.**, 230 S.W.3d 215, 217 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

B. *Plain Language:*

1. **Security Mut. Cas. Co. v. Johnson**, 584 SW 2d 703, 704 (Tex. 1979). Words in an insurance policy are to be given their plain, ordinary meaning unless the policy gives them a different meaning.
2. **Fiess v. State Farm Lloyds**, 202 SW 3d 744, 751 and n.30 (Tex. 2006) To determine the plain and ordinary meaning of the words of an insurance policy, Courts routinely turn to dictionary definitions.

C. *Ambiguity:*

1. **National Union Fire Ins. vs. Hudson Energy Co.**, 811 S.W.2d 552, 555 (Tex. 1991). "Generally, a contract of insurance is subject to the same rules of construction as other contracts. If the written instrument is worded so that it can be given only one reasonable construction, it will be enforced as written. However, if a contract of insurance is susceptible of more than one reasonable interpretation, we must resolve the uncertainty by adopting the construction that most favors the insured. The Court must adopt the construction of an exclusionary clause urged by the insured as long as that construction is not unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties' intent. In particular, exceptions or limitations on liability are strictly construed against the insurer and in favor of the insured."

D. *Interpretations of Exclusionary Clauses:*

1. If the language of an exclusionary clause in an insurance policy is clear and unambiguous, the well-established rule of construction directing adoption of that construction most favorable to the insured, is not applicable. Consequently, absent ambiguity, neither party can be favored by its construction. **Maryland Casualty Co. v. State Bank & Trust Co.**, 425 F.2d 979 (5th Cir. 1970) *cert. denied*, 400 U.S. 828, 27 L. Ed. 2d 57, 91 S. Ct. 55 (1970). **Monte Christo Drilling Corp. v. Byron-Jackson Tools, Inc.**, 266 F. Supp. 123 (S.D. Tex. 1966).
2. The court must adopt the construction of an exclusionary clause urged by the insured as long as that construction is not unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties' intent." **Nat'l Union Fire Ins. Co. v. Hudson Energy Co.**, 811 S.W.2d 552, 555, (Tex. 1991).

E. ***Severability Clauses:***

1. **Clause:** “This insurance applies separately to each insured. This condition will not increase our limit of liability for any one occurrence.”
2. A severability clause generally serves to provide coverage to an “innocent” insured who did not commit the intentional conduct excluded by the policy. ***Bituminous Cas. Corp. v. Maxey***, 110 S.W.3d 203, 210 (Tex. App.—Houston [1st Dist.] 2003, pet. denied). (citing ***State Farm Fire & Cas. Ins. Co. v. Keegan***, 209 F.3d 767, 769 (5th Cir. 2000)). Each insured against whom a claim is brought is treated as if he or she is the only insured under the policy, and thus, stands alone with respect to exclusion provisions. ***Williamson v. Vanguard Underwriters Ins. Co.***, No. 14-97-00276-CV, 1998 WL 831476, at *1 (Tex. App.—Houston [14th Dist.] Dec. 3, 1998, pet denied.)

II. COVERAGE ISSUES

A. ***Eight Corners Rule***

- 1) **Heyden Newport Chemical Corp. v. Southern General Ins. Co.**, 387 SW 22 (Tex. 1965). The duty to defend is determined, regardless of the truth or falseness of the allegations, by reviewing the facts alleged within the four corners of the petition and the coverages and exclusions contained within the four corners of the policy.
- 2) **Richards v. State Farm Lloyds**, 597 S.W.3d 492 (Tex. 2020). The Texas Supreme Court addressed a certified question from the 5th Circuit about whether there is a “policy language exception” (a/k/a the Northfield Exception based on ***Northfield Ins. Co.***, 363 F.3d at 531) to the eight-corners rule if the insurance policy does not contain language requiring the insurer to defend all actions against its insured no matter if the allegations of the suit are groundless, false or fraudulent. An insurer’s duty to defend is determined by the claims alleged in the petition and the coverage provided in the policy.

The Court noted that insurers can contract out of the eight corners rule, but merely omitting the language “even if groundless, false or fraudulent” does not contract out of the eight corners rule. The Court notes that State Farm makes good faith arguments, but it is well aware of the courts’ longstanding approach to the contractual duties to defend and it knows how to contract around that approach.

B. ***Exceptions to the Eight Corners Rule:***

1. **Loya Ins. Co. v. Avalos**, 610 S.W.3d 878, (Tex. 2020) The Texas Supreme Court modifies the eight-corners rule to adopt its first and only exception to the eight-corners rule that permits court to consider extrinsic evidence regarding whether the insured and a third party suing the insured colluded to make false representations of fact in that suit for the purpose of securing a defense and coverage where they such coverage and the duty to defend would not otherwise exist. If the insurer conclusively proves such collusive fraud, it owes no duty to defend. An insurer confronted with undisputed evidence of collusive fraud may choose to withdraw its defense without first seeking a declaratory judgment, though it risks substantial liability if its view of the duty to defend proves to be wrong.

Also available as part of the eCourse

[2021 The Car Crash eConference](#)

First appeared as part of the conference materials for the
2021 The Car Crash Seminar session

"Important Cases in the Prosecution and Defense of UM / UIM Cases"