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What's New in UM/UIM Law: Case Law, Strategy, and Pitfalls

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Since 2006, I have been heavily involved in UIM law in Texas, even helping to change the law to be more favorable to insureds. I was lead trial and appellate counsel in the Texas Supreme Court's pivotal 2021 decision in *Allstate Insurance Co. v. Irwin*, 627 S.W.3d 263 (Tex. 2021). That ruling resolved a long-standing procedural dispute in Texas UIM litigation by holding that an insured may use the Uniform Declaratory Judgments Act (UDJA), Tex. Civ. Prac. & Rem. Code § 37.001 *et seq*., to establish entitlement to UIM benefits—and that attorney's fees may be recoverable under the Act, even in the absence of a breach of contract by the insurer.

The Court's decision in *Irwin* marked a turning point. It provided clarity on how Texas lawyers—on both sides of the docket—can litigate UM/UIM claims in the wake of the Court's earlier decision in *Brainard v. Trinity Universal Insurance Co.*, 216 S.W.3d 809 (Tex. 2006), which had created confusion and inconsistency across the state. After *Brainard*, many insurers took the position that they owed no obligation to pay UIM benefits—or even negotiate in good faith—until the insured obtained a final judgment establishing the liability and underinsured status of the tortfeasor. This strict interpretation led to procedural gridlock, with insurers routinely forcing plaintiffs to try cases they previously would have settled.

Before *Brainard*, it was common for plaintiffs to pursue UIM claims as breach of contract actions and recover attorney's fees under Chapter 38 of the Civil Practice and Remedies Code. But *Brainard* changed the playing field by holding that no contractual duty to pay existed until liability and damages had been judicially determined—effectively cutting off access to Chapter 38 attorney's fees in most UIM cases. The result that many auto insurers ceased offering reasonable settlements in IM cases, instead taking the position that there was no duty to pay the claim unless and until a judgment was obtained, and even then, their maximum exposure was capped at the amount of the policy limit since Brainard had expressly foreclosed attorney's fees to the prevailing party under Chapter 38. Plaintiffs were now left in a procedural bind, and courts offered little uniform guidance.

Soon after *Brainard*, I began filing UIM cases solely as petitions for declaratory judgment under CPRC Ch. 37. From 2007 to 2012, I advocated this approach in CLE papers and presentations. It was the only approach that made sense in the post-*Brainard* era, since the Texas Supreme Court had ruled as a matter of law that an insurance company cannot "breach" the contract unless and until the insured obtains a judgment that the insurer fails to pay.

By using the UDJA to obtain judicial declarations of UIM entitlement, the goal was twofold: to satisfy *Brainard*'s prerequisite of a judgment, and to preserve a viable path for recovering attorney's fees. Several intermediate appellate courts issued conflicting opinions on whether the UDJA was appropriate in this context, or whether it was merely an end-run around *Brainard*'s fee restrictions.

The Texas Supreme Court's decision in *Irwin* resolved the uncertainty. It confirmed that the UDJA is a proper vehicle for resolving UIM coverage disputes, so long as the action is used to determine the insured's legal entitlement to benefits—and not merely "tacked onto" a routine breach of contract claim to manufacture a fee award. The Court also held that attorney's fees under

the UDJA are discretionary and may be awarded when "equitable and just," even in the absence of breach.

In effect, *Irwin* rebalances the scales. It restores access to attorney's fees in legitimate UIM disputes and provides a procedural path forward for plaintiffs who are legally entitled to coverage but are forced to litigate because their insurers refuse to pay. For insurers and defense counsel, the decision confirms that they may still demand proof of liability and damages—but they do so at the risk of being held responsible for attorney's fees under the UDJA if a court later finds that declaratory relief was necessary to resolve a real dispute.

In the sections that follow, we examine the legal background leading up to *Irwin*, explain the Court's reasoning and holdings, discuss the practical implications for trial lawyers handling UM/UIM cases today, and highlight two recent cases that every UM/UIM practitioner should know.

I. *Allstate v. Irwin:* The Foundational Case

The Texas Supreme Court's 2021 decision in *Allstate Insurance Co. v. Irwin*, 627 S.W.3d 263 (Tex. 2021), clarified the procedural path for litigating underinsured motorist (UIM) claims and significantly shaped the landscape for both plaintiff and defense counsel handling UM/UIM litigation in Texas. The decision answered a long-disputed question: Can an insured use the Uniform Declaratory Judgments Act (UDJA) to establish entitlement to UIM benefits and recover attorney's fees—even in the absence of a breach of contract by the insurer? The Court said yes.

A. Factual and Procedural Background

Daniel Irwin was injured in a motor vehicle crash caused by an underinsured driver. After recovering the $30,000 policy limits from the at-fault driver's insurer, Irwin sought UIM benefits under his Allstate policy, which provided coverage up to $50,000. Allstate offered to settle for $500, prompting Irwin to file suit. He did not sue Allstate for breach of contract; rather, he brought a declaratory judgment action under the UDJA to establish his right to UIM benefits. He sought a judicial determination of the liability and underinsured status of the at-fault driver—conditions precedent to Allstate's contractual obligation to pay—and requested attorney's fees.

A jury awarded Irwin nearly $500,000 in damages. After applying the credit for the third-party settlement, Allstate paid its $50,000 policy limits but contested the award of attorney's fees. The trial court awarded Irwin both the policy limits and attorney's fees under the UDJA. Allstate appealed, arguing that *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809 (Tex. 2006), precluded such a fee award because there had been no breach of contract.

B. The Texas Supreme Court's Holding

The Court reaffirmed its holding in *Brainard*—that a UIM insurer has no contractual duty to pay benefits until the insured obtains a judgment establishing the liability and underinsured status of the other motorist. But it distinguished *Irwin* by recognizing that the insured is not required to obtain this judgment by suing the tortfeasor. Instead, the insured may sue the insurer directly under the UDJA to secure a declaratory judgment establishing those prerequisites.

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