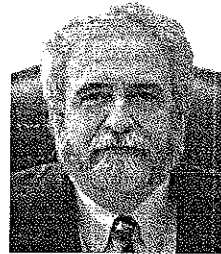


UM/UIM Developments



BY MICHAEL SEAN QUINN

Insurance covers accidents. In the legal world, we call these "fortuities", but it all boils down to accidental happenings. First-party insurance, for example property insurance, covers financial losses sustained by insureds as the result of damage to their property. Of course, the loss must be accidental. If the insured destroys his own property quite deliberately, there is no insurance.

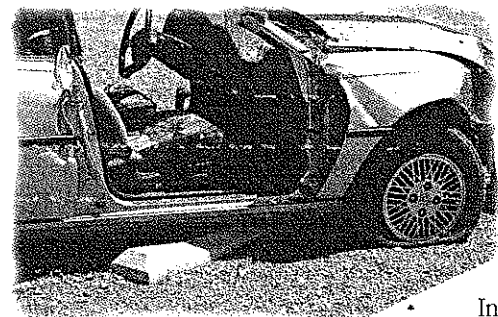
Liability insurance covers damages for which an insured may be legally responsible as the result of negligence, or something of the sort. If an insured quite deliberately inflicts injuries, there is no coverage. Thus, there is coverage for some intentional torts, when the inflicting of the injury is not intentional. Thus, there may be coverage from malicious prosecution, where an insured didn't intend to injure the tort plaintiff, but just—say—get a check collected. There may be coverage for slander, where an insured didn't know that what he was saying was false.

Similarly, in auto insurance, if somebody else sets fire to my car, I have property coverage for that. After all, the injury is fortuitous from my point of view. Similarly, if I accidentally run down a pig, my liability carrier will pay the damages I owe the farmer. On the other hand if I deliberately drive my car into a flock of sheep, meaning to kill as many as possible, and I ask my carrier for coverage, the adjuster will quite rightly say, "In a pig's eye!"

the injuries (if determinable) must either have no insurance or must have insufficient limits. (If a responsible person is unidentifiable, he is considered uninsured. However, in that case the accident must involve physical contact between the two motor vehicles.) If these three facts coincide, then and only then, there is UM/UIM coverage.

As with any insurance, the insured bears the burden of proving in any questionable case that the terms of the insuring agreement are met. This means that the insured has to prove all three of the foregoing propositions.

The exclusions for UM/UIM coverage are routine. Intentional acts by an uninsured motorist are not covered. Stolen cars are not in general covered. If the insured's car is being used as a taxi, there is no coverage. The insurer must consent to a settlement with the uninsured motorist before the UM/UIM coverage is triggered. If bodily injury is involved, the insured-victim must be occupying a relevantly insured motor vehicle, except when he is



struck by an uninsured or underinsured motor vehicle owned by a member of his family.

Of course, there are some controversies about these exclusions.

Insureds sometimes blunder into situations

where they settle without asking for permission. A prejudice to the insurer is often an issue in those cases. (Was the insurer hurt by the forbidden settlement?) The meaning of the term *occupy* is a perennial problem. And, there are other problems, as well. In fact, a multi-volume textbook has been written about UM/UIM coverage.

Issues pertaining to UM/UIM coverage have come to the Texas Supreme Court a couple of times in the last year. One of them involves the complexity of the fortuity insured against. The other one involves a rather complicated arrangement among the insurers.

Texas Supreme Court's thoughts

The Supreme Court of Texas decided *Henson v. Southern Farm Bureau* in April 2000. The general issue there was pre-judgment interest. The more precise issue pertained to when pre-judgment interest begins to run as against the UM/UIM carriers.

UM/UIM specifics

What is the fortuity covered by an uninsured motorist (UM) and underinsured motorist (UIM) coverage in Texas? Substantial confusion exists among the general public about this matter. The explanation for the confusion is quite simple. The "fortuity" that is covered is really a combination of quite separate events the occurrence of which must coincide.

First, an insured must sustain legally perceivable injuries in an auto accident. The injuries may either be to her body or to her property. Second, the accident must not be the insured's fault. Third, the person responsible for

Does UM/UIM Apply?

Three things must happen for the UM/UIM portion of an auto policy to apply:

- 1) An insured must sustain legally perceivable injuries in an auto accident.
- 2) The accident must not be the insured's fault.
- 3) The person responsible for the injuries (if determinable) must either have no insurance or must have insufficient limits. If a responsible person is unidentifiable, he is considered uninsured. However, in that case the accident must involve physical contact between the two motor vehicles.

7.6

(There were two of them. Henson had one, and X had the other.)

Henson was a passenger. X drove the truck. It collided with a car driven by Y. Henson sued both X and Y, and he also sued his insurance companies for UM/UIM coverage. The carriers agreed to be bound by the judgment.

Henson settled with Y for the \$40,000 limits of her liability policy. He had the permission of the insurers. Thereafter, Henson proceeded against X. The insurers agreed to be bound by the judgment rendered in Henson's negligence action against X. The jury assigned 100 percent of the negligence to Y and fixed Henson's damages at a shade under \$134,000. The court entered a take-nothing judgment as to X. Thereafter, the insurers tendered their \$45,000 policy limits to Henson. That amount was the combined UM/UIM limits of both their policies. Henson refused the tender. He demanded pre-judgment interest over and above those benefits.

The insurance company argued that the insurers owed pre-judgment interest on that amount that would have been owed by Y, had there been no insurer-approved settlement. The insurers took the position that they owed pre-judgment interest, on top of policy benefits, only if they wrongfully withheld those benefits, and thereby breached the insurance contracts.

Texas Supreme Court held for the insurers. It observed that when the jury found Y to be at fault and found that Henson had been damaged by her negligence only, Henson became legally entitled to recover from her, for the first time. Because those damages exceeded Y's policy limits, at that point, Henson—again, for the first time—became entitled to UM/UIM insurance benefits, up to the policy limits. Under the terms of those policies, the insurers had no obligation to pay until the jury established Y's liability. Once her liability was established, the insurers paid promptly. Consequently, no contractual duty is breached, so Henson had no right to receive pre-judgment interest in excess of policy limits, as he would have had if the insurance company had breached its contract of insurance with him.

A recent case

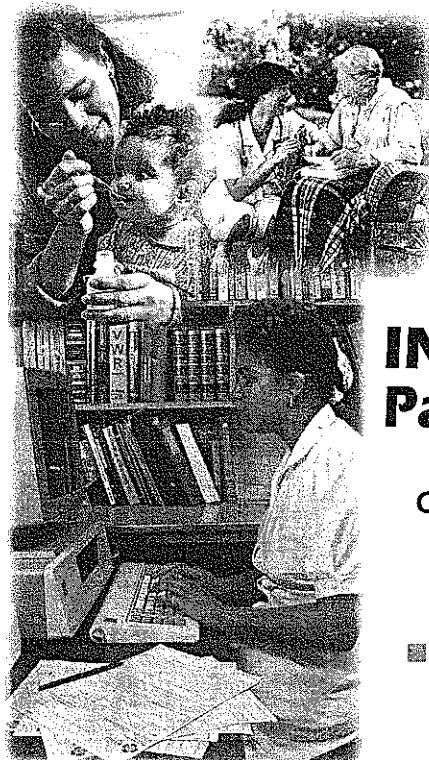
The other recent case is *State and County Mutual v. Miller*, decided in January 2001. That case has a circuitous history. In 1992, there was a rear-end accident in which Miller was injured. Nearly a year later, his insurer consented to his settling with the insurer for the other driver. Miller demanded more money. At this point, the case got complicated.

Miller's insurer, State and County Mutual, was reinsured by Southeastern Fidelity, which was bought out by Windsor Insurance. Thus, Windsor had a "100% Quota Share Reinsurance Agreement" with State and County. Windsor

assumed all of the obligations of adjusting and settling any claims which might arise under that policy. Thus, Windsor, in effect, became the active insurer. Probably, State and County was simply fronting for the reinsurer.

Windsor believed it had \$100,000 in UM/UIM coverage. It tendered \$10,000 to Miller, which he accepted. Subsequently, it tendered \$90,000 to Miller; he rejected that tender. His original policy provided for limits of \$300,000, per occurrence, and \$100,000, per person. Miller apparently believed that this situation was governed by the \$300,000 limits, and not the \$100,000 limits.

After tendering the \$90,000 several times, Windsor filed a declaratory judgment action and placed the funds in the registry of the court. There were many, many procedural wrangles between Miller and Windsor. Was Windsor a proper party? Was the lawsuit filed in the right place? Had Windsor proved a number of the minutia which are sometimes required in cases of this sort? Incredibly, there have actually been three reported appellate opinions regarding this case. There have also been two district court decisions, and there will be another. *Miller* was a case that never should have been brought.



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The Fort Worth Court of Appeals, the first appellate court to consider the case, held that a reinsurer could bring a lawsuit like this, although an insured could not initially sue a reinsurer directly, as a general rule. Although the Fort Worth court did not go into the matter, the real issue was whether the reinsurer could bring this kind of case, after it took over the adjustment of a claim. Once the issue is properly framed, the answer is self-evident. Indeed, under these unusual circumstances, the insured could certainly sue the reinsurer, although he could not do so in normal cases.

After Windsor prevailed against Miller,

Miller sued State and County—remember: it is the primary insurer in Corpus Christi. The court there threw Miller out upon the ground that all of these matters had already been decided, and so there was nothing left to talk about. (Once an issue either has or should have come up in a case, various legal principles prevent its relitigation.) The issues before the Corpus Christi Court of Appeals were purely procedural. They had almost nothing to do with insurance.

At that point, the *Miller* case arrived at the Supreme Court of Texas. The high court, like the Corpus Court of Appeals before it, attended to some procedural matters. However, it

addressed two significant matters of insurance law. Both of them apply to UM/UIM coverage. Both of them are broader than that, however.

In a unanimous, unsigned, so-called "per curiam" opinion, the court observed that as a matter of general reinsurance law, a policyholder may not directly sue a reinsurer. However, the court indicated that if there were an agreement pursuant to which an insured could sue a reinsurer, then the courts would entertain such an action. Consequently, although Miller should have contacted State and County to get his claim paid in the first place, once he began dealing with Windsor, it became difficult—the court implied—for Miller to claim that there couldn't be such an agreement between the reinsurer and himself.

Windsor's liability to Miller, said the court, was "derivative of and co-existed with" State and County's liability to Miller. As a result, to the extent that obligations under the insurance policy were fully and fairly litigated in the original suit brought by Windsor against Miller, Miller was legally prevented from relitigating those issues.

On the other hand, said the Texas Supreme Court, Miller accused State and County of misrepresentations in the Corpus Christi action (a kind of statutory bad faith), and he could not have raised those issues in the earlier Ft. Worth action against Windsor. State and County was not a party there and so could not be accused of conduct in the nature of bad faith, fraud, negligent misrepresentation, or the like. (In this case, Miller accused State and County of misrepresenting various facts.) "While Windsor had been legally determined to be the only company liable under the insurance policy [in the Fort Worth action], whether State and County...made...misrepresentations is a different issue." Miller, said the court, was entitled to go forward against State and County on these claims.

Bad cases

In many ways, both of these cases are silly. In Henson, all the plaintiff had to do was read the policy to see when pre-judgment interest would start running.

Miller is even worse. This case never should have been brought. The only reason one can think of for why it was brought was that the plaintiff's lawyer thought that the policy was inconsistent with respect to limits, consequently that the policy was ambiguous, and hence that the ambiguity would be resolved in favor of the insured. This was a silly mistake. ■

Quinn is an Austin shareholder in the law firm of Sbeinfeld, Maley & Kay. He litigates and testifies on insurance related problems and is currently the chair of the Insurance Section of the State Bar of Texas. He also is a Visiting Professor of Law at the University of Texas-Austin.

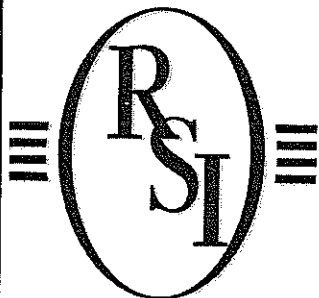
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