2022 HCBA David H. Hockema Civil Trial Conference

Insurance Law Update

By

Robert E. Valdez
Valdez & Treviño, Attorneys at Law, P.C.
San Antonio, Texas

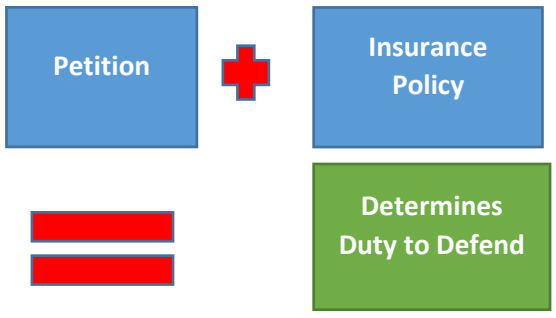
I have included in this presentation five recent Texas Supreme Court cases that affect the litigation practice of attorneys who deal with personal injury and commercial cases. As many of you know, my practice focuses on the development and trial of personal injury, commercial, and insurance cases on the defense side of the docket. These cases in my opinion, however, are critical to the litigation practitioner irrespective of the side of the docket in which he or she practices.

THE DUTY TO DEFEND: MONROE GUARANTY INS. CO. V. BITCO GENERAL INS. CO.[1]

a. General Rule: Eight Corners Test

Texas law is settled that a liability insurer's duty to defend its insured that has been sued is based upon the plaintiff's pleadings in the case.[2] The general rule is that the duty to defend is determined by the "eight corners" rule; that is, the four corners of the petition and the four corners of the insurance liability policy.[3] The duty to defend is determined "irrespective of the truth of the matter asserted" in the pleading. [4] The general rule is that so long as the plaintiff's pleadings alleges conduct that comes within the ambit of the risk insured (the insuring agreement), irrespective of the truth of the facts alleged in the pleading, the insurer is obligated to defend its insured.

The rule likewise was settled that extrinsic evidence (that is, evidence other than that contained in the plaintiff's pleading and the insurance policy) would not be admissible for determining the duty to defend.[5]



[1] 640 S.W.3d 195 (Tex. 2022).
[2] *See Heyden Newport Chemical Corp. v. Southern General Ins. Co*., 387 S.W.2d 22, 24 (Tex. 1965).
[3] *See id*. at 25.
[4] *See Argonaut Sw. Ins. Co. v. Maupin,* 500 S.W.2d 633, 635 (Tex.1973).
[5] *See GuideOne Elite Ins. Co. v. Fielder Road Baptist Church*, 197 S.W.3d 305, 308 (Tex. 2006)("Facts outside the pleadings, even those easily ascertained, are ordinarily not material to the determination and allegations against the insured are liberally construed in favor of coverage.") The court specifically noted that the extrinsic evidence proposed (that the insured church's employee was not employed on the date of the alleged sexual assault), specifically related not only to the coverage facts, but to the merits of the church's defense. *See id*. at 308.

b. Federal Courts, *Northfield* Exception: Extrinsic Evidence Permitted on Matters "Fundamental" to Coverage

The *Northfield* case[6] involved a lawsuit against an insured that operated a nanny-service providing in-home childcare. The case involved an injury inflicted upon a child while in the care of an individual provided by the insured, Loving Home Care, Inc. The individual was prosecuted and convicted for felony injury to a child resulting in a seven-year sentence. Plaintiff removed any reference to criminal activity or intentional acts. The only remaining references were to negligent conduct.[7]

The insurer argued that the criminal acts and physical abuse exclusions in the commercial professional liability policy negated the duty to defend. The district court granted the insured's motion for summary judgment holding that the insurer had the duty to defend Loving Home Care, Inc.[8]

The Fifth Circuit first observed:

> The Texas Supreme Court has never recognized any exception to the strict eight corners rule that would allow courts to examine extrinsic evidence when determining an insurer's duty to defend.[9]

After reviewing pertinent cases from various Texas courts of appeal, the Fifth Circuit made its *Erie* guess regarding the exception to the Eight Corners' Test that the Texas Supreme Court would recognize:

> However, in the unlikely situation that the Texas Supreme Court were to recognize an exception to the strict eight corners rule, we conclude any exception would only apply in very limited circumstances: when it is **initially impossible** to discern whether coverage is potentially implicated and when the extrinsic evidence goes **solely to a fundamental issue of coverage** which does **not overlap with the merits of or engage the truth or falsity** of any facts alleged in the underlying case.

Northfield Ins. Co. v. Loving Home Care, Inc., 363 F.3d 523, 531 (5th Cir. 2004)(emphasis supplied).

The court held that the extrinsic evidence relating to the employee's criminal conviction was not admissible on the issue of

[6] *Northfield Ins. Co. v. Loving Home Care Inc.*, 363 F.3d 523 (5th Cir. 2004).
[7] *See id.* at 526.
[8] *See id.* at 528.
[9] *See id.* at 529.

the duty to defend since there was no reference to criminal or intentional conduct.[10]

c. *Avalos* Exception: Fraud and Collusion

Here's one way to solve coverage problems—let's all get together and lie about the underlying coverage facts. This is what happened in the case of *Loya Ins. Co. v. Avalos*.[11] The insured's husband was involved in an auto accident. The only problem was that he was specifically excluded from the insured wife's auto policy. The plaintiff and the insured's husband told the police and then reported to the insurance company that the *wife* was driving the auto at the time of the accident. The insurer provided a defense and a lawyer to defend the insured wife in the auto accident.

Something happened, though: the wife reported the whole truth to the defense lawyer—she was not driving, her husband was. The lawyer reported this to the insurer who then withdrew a defense.[12]

The trial court later granted Plaintiff's Motion for Summary Judgment and awarded Plaintiff $450,343.34. The Defendant (wife) then assigned her claims against the insurer to Plaintiff who then sued the insurer arguing that under the eight corners rule the insurer had the duty to defend its insured and breached that duty. The San Antonio Court of appeals agreed, holding, "as logically contrary as it may seem," the insurer had a duty to defend under the eight-corners rule.[13]

The supreme court held as follows:

> To address such cases of collusive fraud, we adopt an exception to the eight-corners rule: courts may 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 would not otherwise exist. If the insurer conclusively proves such collusive fraud, it owes no duty to defend.

Loya Ins. Co. v. Avalos, 610 S.W.3d 878, 879 (Tex. 2020)(emphasis supplied).

The supreme court's analysis noted the following:

- The evidence showed conclusively that the insured was not driving the vehicle (wife's deposition);
- The evidence showed conclusively that the parties to the underlying case conspired to lie about who was

[10] *See id*. at 535.

[11] 610 S.W.2d 878 (Tex. 2020).

[12] As Linda Ronstadt once sang, "*La perdición de los hombres / Son las benditas mujeres*." (*Los laureles*). We can save for another seminar whether the circumstances of the wife's confession and the defense lawyer's subsequent report to the insurer violated the *Tilley* doctrine. See *Employers Cas. Co. v. Tilley*, 496 S.W.2d 552 (Tex. 1973).

[13] *See Loya Ins. Co. v. Avalos*, 592 S.W.3d 138, 145 (Tex. App.—San Antonio 2018), *reversed*, 610 S.W.3d 878, 879 (Tex. 2020). One justice concurred in the judgment, urging the supreme court to create a narrow exception for collusion and fraud. *See* 592 S.W.3d.at 146-47 (Angelini, J. concurring). In its opinion, the supreme court also noted the comments of Judge Monica Notzon (111th District Court, Webb County) who stated that the Plaintiffs were "asking this Court to ignore every rule of justice and help [them] perpetuate a fraud." *Loya Ins. Co. v. Avalos*, 610 S.W.3d 878, 880 (Tex. 2020).

driving in order to trigger coverage (wife's deposition).[14]

d. *Monroe Guaranty Ins. Co. v. BITCO Gen. Ins. Corp.*: Texas Supreme Court's Exception to Eight Corners' Rule.

This case involved a dispute between two insurers providing, at different times, comprehensive general liability coverage to its insured, 5D Drilling and Pump Service, Inc. Jones sued 5D for negligence arising out of 5D's drilling of a water well on its property. According to Jones's petition, he contracted with 5D in the summer of 2014 to drill a 3600-foot commercial irrigation well on his farmland. The petition also alleged that the drilling damaged Jones's property in several ways, but was silent as to *when* any of the damage occurred.[15] BITCO General Insurance Corporation provided two consecutive one-year CGL policies covering October 2013 to October 2015. Monroe's CGL policy covered 5D from October 2015 to October 2016.[16]

BITCO defended under reservation of rights. Monroe declined coverage. BITCO and Monroe *stipulated* that 5D's drill bit stuck in the bore hole during 5D's drilling "in or around November 2014," or about *ten months before BITCO's policy would end and Monroe's would begin.* Both parties sought summary judgment, in the federal declaratory judgment action, on the issue of whether Monroe owed a duty to defend. Monroe argued it had none because the stipulation proved that property damage occurred during BITCO's policy period and, therefore, Monroe's policy deemed all property damage to have been known during BITCO's policy period, long before Monroe's policy became effective in October 2015.[17]

So the fact situation presented was one in which the pleading did not allege when the loss occurred (i.e., when did the damage to the plaintiff's property occur). The insurance carriers in the declaratory judgment action in federal court actually stipulated when the drilling started—and the drill bit stuck—but this did not address when the damage occurred (continuing loss).

The Texas Supreme Court case arises out of certified questions from the Fifth Circuit:

> 1. Is the exception to the eight-corners rule articulated in *Northfield Ins. Co. v. Loving Home Care, Inc.*, 363 F.3d 523 (5th Cir. 2004), permissible under Texas law?
>
> 2. When applying such an exception, may a court consider extrinsic evidence of the date of an occurrence when (1) it is initially impossible to discern whether a duty to defend potentially exists from the eight-corners of the policy and pleadings

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[14] *See id.* at 882. The court also noted that the insurer need not pursue a declaratory judgment under such circumstances before withdrawing a defense:

> 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*.

Loya Ins. Co. v. Avalos, 610 S.W.3d 878, 879 (Tex. 2020)(emphasis supplied).

[15] See *Monroe Guaranty Ins. Co. v. BITCO Gen. Ins. Corp*., 640 S.W.3d 195, 197 (Tex. 2022).

[16] See *id*. at 197.

[17] See *id*. at 198 (emphasis supplied).

> alone; (2) the date goes solely to the issue of coverage and does not overlap with the merits of liability; and (3) the date does not engage the truth or falsity of any facts alleged in the third party pleadings?

Monroe Guaranty Ins. Co. v. BITCO Gen. Ins. Corp., 640 S.W.3d 195, 198 (Tex. 2022).

So, before we go any further, the supreme court answered the certified questions as follows:

> 1. Yes—subject to "minor refinements".
>
> 2. There is "no categorical prohibition against extrinsic evidence of the date of an occurrence"; however, the stipulation in *Monroe Guaranty* overlaps with the merits of liability and cannot be considered by the court.[18]

The "minor refinements" to the *Northfield* exception led the court to articulate the exception in this way:

> Today, we expressly approve the practice of considering extrinsic evidence in duty-to-defend cases to which *Avalos* does not apply. In doing so, we do not abandon the eight-corners rule. It remains the initial inquiry to be used to determine whether a duty to defend exists [citation omitted] and it will resolve coverage determinations in most cases. But if the underlying petition states a claim that could trigger the duty to defend, and the application of the eight-corners rule, due to a gap in the plaintiff's pleading, is not determinative of whether coverage exists, Texas law permits consideration of extrinsic evidence provided the evidence **(1) goes solely to an issue of coverage and does not overlap with the merits of liability, (2) does not contradict facts alleged in the pleading, and (3) conclusively establishes the coverage fact to be proved.**

Monroe Guar. Ins. Co. v. BITCO Gen. Ins. Corp., 640 S.W.3d 195, 201–02 (Tex. 2022)(emphasis added).

Texas' Exception to Eight Corners' Rule

- Goes solely to an issue of coverage and does not overlap with the merits of liability;
- Does not contradict the facts pled in the pleading;
- Conclusively establishes the coverage facts to be proved.

DISCOVERY INTO INSURANCE / MEDICARE CHARGES RELEVANT

[18] *Monroe Guaranty Ins. Co. v. BITCO Gen. Ins. Corp.*, 640 S.W.3d 195, 204 (Tex. 2022).

ON ISSUE OF REASONABLENESS OF MEDICAL CHARGES

a. *In re K & L Auto Crushers*[19]

Trial lawyers on both sides of the personal injury docket are often confronted with the issue of the reasonableness of medical charges for injuries allegedly received in an accident. Many times this arises in the context of "Letters of Protection"[20] issued by a client, through his counsel, offering to protect a health care provider charges upon settlement (or collected judgment) of the client's case.

In the *In re K&L Auto Crusher* case, the plaintiff's attorneys sent the medical providers letters of protection stating they would "attempt to protect [the providers'] interest in the [Plaintiff's] account" upon settlement—"but only for any reasonable and necessary medical charges."[21] Plaintiff then sued for personal injury damages and filed medical expense affidavits under Section 18.001 of the Texas Civil Practice and Remedies Code. K & L then served subpoenas on Plaintiff's health care providers requesting information related to billing practices over a period of several years.[22] After considerable haggling, and rulings from the trial court and the Dallas Court of Appeals, we now bring "the moment to its crisis."[23]

K&L Auto Crushers argued that its requests were narrow and tailored to those permitted by the supreme court in an earlier opinion:

> K & L Auto explained, "What we are trying to do is come in with a targeted motion for partial reconsideration" and "focus the Court on the specific discovery requests [it] made that [it thought were] expressly authorized" by *North Cypress*. It then noted that *North Cypress* permitted **discovery of medical providers' reimbursement rates with private insurers, Medicare, and Medicaid, and discovery of the costs to medical providers for the equipment and devices** reflected in the patient's bills. K & L Auto specifically pointed the trial court to the fact that it had made requests "in [its] subpoena that are along those lines and are targeted to the specific medical services and devices at issue in the time frame at issue," and requests "seeking discovery about the cost to the medical providers of the equipment and devices that were included in their bills in the time frame at issue."

K&L Auto Crushers, LLC at 247.

The baby (with no more labor pains): focused discovery relating to insurance and Medicare charges is permitted:

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[19] 627 S.W.3d 239 (Tex. 2021)(original proceeding).

[20] *See id*. at 245 n. 1: "Plaintiffs' personal-injury attorneys sometimes provide 'letters of protection' to their clients' healthcare providers, in lieu of any immediate payment, to assure future payment from the proceeds of any recovery from the third party who allegedly caused the injuries."

[21] *See id*. at 245. Plaintiff incurred $1.2 million in medical expenses.

[22] See id.

[23] See T.S. Eliot, "The Love Song of J. Alfred Prufrock" ("Should I, after tea and cakes and ices / Have the strength to force the moment to its crisis?")

> The reasonableness of the providers' charges goes to the heart of K & L Auto's defense: if the charges are unreasonable, they are not recoverable. K & L Auto argues the denial of its narrowed requests severely compromised its ability to challenge the reasonableness of the providers' charges. We agree. Walker claims medical expenses in an amount exceeding $1.2 million. K & L Auto seeks discovery it believes will contradict Walker's evidence of reasonableness, and without it, can only present counter-affidavits generally arguing the unreasonableness of the expenses.

In re K & L Auto Crushers, LLC, 627 S.W.3d 239, 256–57 (Tex. 2021)(orig. proceeding).

I note here that the court discussed the importance of the letters of protection at issue: First, it stated that the letters provided protection "only for reasonable and necessary charges." Had the letter afforded protection for the charges without such a qualification—would the result have been different?

Second, note that the court mentioned the "vested interest" that the health care provider obtained by virtue of the letters of protection:

> Unlike most non-parties, the providers who treated Walker pursuant to letters of protection invested themselves in the outcome of this case and the amount of damages recovered, and because of that, they forfeit a degree of the protection our rules afford disinterested third parties who are subjected to third-party discovery. In fact, the providers acknowledge in their briefs that their choice to provide treatment based on letters of protection makes them subject to an "intrusion on their time by repeated depositions on written questions and subpoenas."

In re K & L Auto Crushers, LLC, 627 S.W.3d at 254.

COUNTER-AFFIDAVIT NOT NECESSARY TO CONTEST 18.001[24] AFFIDAVIT / NURSE MAY TESTIFY REGARDING REASONABLENESS OF MEDICAL CHARGES

There has been, in the past, considerable confusion over the effect of filing a medical affidavit pursuant to Section 18.001[25]:

- Must an opponent file a timely counter-affidavit in order to contest a plainitff's 18.001 Medical Affidavit?

- If there is no counter-affidavit filed, must the trial court find that the amounts stated in the affidavit are reasonable and necessary as a matter of law?

The court answers: **No to both questions**. As to the first, the court states that Section

[24] TEX. CIV. PRAC. & REM. CODE § 18.001.

[25] *See In re Allstate Indemnity Co*., 622 S.W.3d 870, 882 (Tex. 2021)(orig. proceeding).

18.001 "nowhere provides for the exclusion of any evidence based on the absence of a proper counter-affidavit." *In re Allstate Indem. Co*., 622 S.W.3d at 884.

As to the question posed in the second bullet point, the court stated:

> While an uncontroverted section 18.001(b) affidavit may constitute sufficient evidence of reasonableness and necessity, **nothing in section 18.001 even suggests an uncontroverted affidavit may be conclusive** on reasonableness and necessity.

In re Allstate Indem. Co., 622 S.W.3d 870, 881 (Tex. 2021)(orig. procedding)(emphasis supplied).

Another notable holding in the case of *In re Allstate Indemnity* deals with the ability of a nurse to author an 18.001 counter-affidavit. This part of the opinion is worth a close read (emphasis is mine):

> Dickison's counteraffidavit first sets forth her educational and professional background. She has an associate's degree in Nursing and a bachelor's degree in the Science of Nursing. She is a registered nurse and a **Certified Professional Coder.** Dickison is also **certified as a Professional Medical Auditor** by the AAPC (formerly the American Association of Professional Coders). This portion of the counteraffidavit concludes by stating:
>
> My medical training, 21 years of experience in healthcare including **12 years of medical billing review, coding and auditor certification and demonstrated knowledge of the CPT coding system** qualify me as an expert with regard to understanding medical documentation and medical billing practices.
>
> Dickison's counteraffidavit next explains the process she employed to arrive at her conclusions regarding Alaniz's claimed medical expenses. Dickison averred that "[f]or many years on a regular basis," she has **performed billing and coding reviews involving the same or similar medical services.** She first compares the CPT codes2 on the itemized medical bills to the medical records (or chart) of the visit to determine whether the provider chose the correct CPT code for the medical service rendered. She then uses an **online database** called Context4Healthcare to **determine the median charge** for the service associated with each CPT code in the zip code and on the date on which the service was rendered. According to Dickison, "to correctly utilize

> this database and interpret the analysis, **the user must be proficient in the use of CPT codes, the use of CPT modifiers, billing interpretation, and the different medical fee schedules."**

In re Allstate Indem. Co., 622 S.W.3d 870, 874 (Tex. 2021)(orig. proceeding).

The court held that the nurse was qualified to express the opinions contained in her affidavit concerning the reasonableness of the fees in question. The court found that the statute provided no requirement that the affiant be someone with an expertise in the particular medical field in question. Rather, relying on *Broders v. Heise*, it noted that the court "expressly recognized that even non-doctors could provide expert testimony on a specific medical issue, provided that the offering party establishes the expert's knowledge, skill, experience, training, or education regarding the specific issue."

In re Allstate Indem. Co., 622 S.W.3d 870, 879 (Tex. 2021)(orig. proceeding), *citing*, *Broders v. Heise*, 924 S.W.2d 148, 153-54 (Tex. 1996).

TOPICS FOR UM /UIM CORPORATE REPRESENTATIVE

There have been several courts of appeal that have provided opinions regarding proper topics for a corporate representative in uninsured / underinsured motorist cases. Until the case of *In re USAA General Indemnity Co.*,[26] the supreme court had not addressed the matter. There is no more dispute over this: a plaintiff-insured ***may*** take the deposition of the UIM insurer's corporate representative for certain narrow topics.

The fact pattern in these underinsured motorist cases is generally predictable. A personal injury plaintiff sues a third party for damages arising out of an automobile accident. In addition to asserting the third-party claim, the plaintiff wishes to assert a claim against his or her own insurer for underinsured motorist benefits. I have provided various issues facing the plaintiff and defense lawyers in these cases in other seminars.[27] Our focus here is the supreme court's pronouncements on what may and may not be discovered from an insurer's corporate representative.

In re USAA Indemnity involved an insured's suit for breach of contract as well as a declaratory judgment seeking underinsured motorist benefits.[28] USAA answered with a general denial as well as affirmative defenses. It specifically alleged that the plaintiff:

- "[H]as not complied with all conditions precedent necessary for recovery under the policy in that the liability of [the tortfeasor] and the nature and extent of [plaintiff-

[26] 624 S.W.3d 782 (Tex. 2021)(orig. proceeding).

[27] See Robert E. Valdez, "Defense of Uninsured / Underinsured Motorist Cases in Texas," Prosecuting and Defending Truck and Auto Collision Cases, State Bar of Texas (2019).

[28] The court noted that in those cases in which contractual and extra-contractual claims are joined in one lawsuit, such are subject to severance and abatement. *See In re USAA General Indemnity Co*., 624 S.W.3d 782, 786 n. 1 (Tex. 2021)(orig. proceeding). The court also agreed with USAA that inquiry into extra-contractual matters such as the claims-handling process is improper before entitlement to benefits under the policy has been established. *See id*. at 794.

insured's] damages have not been established by judgment or agreement"; and

- That USAA is entitled to certain offsets and credits (for settlements or payments under any other insurance policy).

See In re USAA Gen. Indem. Co., 624 S.W.3d 782, 786 (Tex. 2021)(orig. proceeding).

Plaintiff then sought the deposition of USAA's corporate representative on certain topics and USAA filed a motion to quash the deposition entirely and noted that it did not dispute any of the following issues:

> • Plaintiff had a policy of insurance with USAA in effect on the date of the accident;
>
> • Plaintiff is a named insured under the policy;
>
> • The vehicle that was involved in the accident is a "scheduled vehicle" under the policy; and
>
> • The policy provides for UIM benefits of up to $100,000 per person if Plaintiff "establishes his legal entitlement to recover such benefits."

See In re USAA Gen. Indem. Co., 624 S.W.3d 782, 787 (Tex. 2021)(orig. proceeding).

The trial court denied the motion to quash and the court of appeals denied USAA's petition for Writ of Mandamus. The supreme court conditionally granted the writ and provided guidance on the propriety of deposition topics that recur in these types of cases.

I have set out for you the topics and the court's holdings for your ready reference:

Topic	Holding
1. Any policy(ies) of insurance issued or underwritten by the Defendant applicable to the wreck made the subject of this suit	**Improper**. Exceeds the relevant scope and unnecessarily lengthens the deposition.[29]
2. The occurrence or non-occurrence of all condition(s) precedent under the contract, including, but not limited to, collision with an uninsured motorist; and compliance by the Plaintiff with the terms and conditions of his policy(ies).	**Improper**. Exceeds the relevant scope and unnecessarily lengthens the deposition.[30]
3. Any facts supporting Defendant's legal theories and defenses**.**	**Proper** (unless privileged).
4. The amount and basis for the Defendant's valuation of the Plaintiff's damages;	**May be improper** to the extent it seeks privileged information.[31]

[29] Note the stipulation offered by USAA in this regard.
[30] Note the stipulation offered by USAA in this regard.
[31] The court stated:

> To the extent questions on this topic seek to delve into issues like USAA's **reasons for denying** [insured-plaintiff's] claim, **the investigation process**, USAA's **work product**, and USAA's **privileged communications with its attorneys**, such questions are improper and subject to an instruction by counsel not to answer. But because **the amount of [insured-plaintiff's] damages** is

5. Whether [Plaintiff] was an uninsured/underinsured motorist at the time of the collision.	**Proper** (unless privileged).[32]
6. Defendant's contention that Plaintiff has failed to comply with all conditions precedent to recovery;	**Improper**. Exceeds the relevant scope and unnecessarily lengthens the deposition.[33]
7. Defendant's claims and defenses regarding Plaintiff's assertions in this lawsuit;	**Proper** (unless privileged).
8. Defendant's contention that it is "entitled to offsets, including any recovery by Plaintiff from other parties or their insurance carriers";	**Improper**—premature and available from plaintiff.
9. Defendant's affirmative defense that there are "contractual provisions with which the Plaintiff has failed to comply.	**Improper.** Exceeds the relevant scope and unnecessarily lengthens the deposition.

Attorney's Fees Recoverable in UM / UIM Cases under Texas Declaratory Judgment Act

In *Allstate Ins. Co. v. Irwin*,[34] the supreme court provided an avenue for the recovery of attorney's fees in a uninsured / underinsured motorist case. Prior to the *Irwin* opinion, it appeared to be settled law that there was no recovery of attorney's fees in such a case since there had been no judicial determination of "legal entitlement" under the insurance policy and therefore no presentment of a claim for the purposes of recovering fees under a written contract.[35]

The *Irwin* case presented an underinsured motorist case cast as a declaratory judgment action under the Texas Declaratory Judgment Act.[36] While there may have been an issue whether a UM / UIM case may be brought as a declaratory

> **disputed, the topic is not wholly irrelevant or cloaked in privilege**. Again, to the extent USAA possesses information that is not privileged and that bears on the existence and amount of those damages, that information is discoverable.
>
> *In re USAA Gen. Indem. Co*., 624 S.W.3d 782, 794 (Tex. 2021)(orig. proceeding)(emphasis supplied).

[32] It would appear that the determination of whether the insured-plaintiff was underinsured for his or her actual damages is a question that must be resolved by the finder of fact absent some agreement of the parties. While the topic generally may be permissible, it appears that a proper answer may be, "That decision will be made once a jury makes its factual determination." The follow-up question that I usually encounter is then, "So you have not made that determination as we sit here today." An answer to that question would be, "That decision will be made with counsel at the appropriate time—and therefore is privileged."

[33] Note the stipulation offered by USAA in this regard.

[34] 627 S.W.2d 263 (Tex. 2021).

[35] *See Brainard v. Trinity Universal Ins. Co*., 216 S.W.3d 809, 818 (Tex. 2006). The *Brainard* case, however, involved an application of § 38.002(3) of the Texas Civil Practice and Remedies Code. *See id*. ("This issue turns on the language in Chapter 38 requiring that 'payment for the just amount owed must not have been tendered before the expiration of the 30th day after the claim is presented.' TEX. CIV. PRAC. & REM. CODE § 38.002(3).")

[36] TEX. CIV. PRAC. & REM. CODE §§ 37.001–.011.

judgment, *Irwin* laid that matter to rest: it is proper.[37]

The court next considered whether attorney's fees properly are recoverable under the Texas Declaratory Judgment Act and they held that they are:

> The Act provides that "the court may award costs and reasonable and necessary attorney's fees as *are equitable and just.*" TEX. CIV. PRAC. & REM. CODE § 37.009. Such awards are committed to the trial court's sound discretion and reviewed for abuse.[38]

I have emphasized the language in the statute, quoted by the court, that such awards are limited to those that are "equitable and just." To date we will have to await guidance on just what that language means in the context of underinsured motorist litigation.[39] All practitioners should be mindful of the supreme courts pronouncement that it may be the case that it is not "equitable or just" to award even reasonable attorney's fees.[40]

Another alternative: if possible—remove the case to federal court. The Texas Declaratory Judgment Act is procedural in nature and is supplanted in federal court by the Federal Declaratory Judgment Act.[41] To date, I have not seen the case that allows the recovery of attorney's fees in underinsured motorist cases under the federal act.[42]

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[37] *See Allstate Ins. Co. v. Irwin*, 627 S.W.2d 263, 269-70 (Tex. 2021).

[38] See id. at

[39] The court did provide this guidance:

> Unlike Chapter 38, Chapter 37's UDJA does not require an award of attorney's fees to anyone; rather, it "entrusts attorney fee awards to the trial court's sound discretion."

Allstate Ins. Co. v. Irwin, 627 S.W.3d 263, 271 (Tex. 2021), *citing, Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998). The *Bocquet* case (dispute over easement) provided this guidance:

> In sum, then, the Declaratory Judgments Act entrusts attorney fee awards to the trial court's sound discretion, subject to the requirements that any fees awarded be **reasonable and necessary**, **which are matters of fact**, and to the **additional requirements** that **fees be equitable and just**, which are matters of law. It is an **abuse of discretion** for a trial court to rule arbitrarily, unreasonably, or without regard to guiding legal principles, e.g., *Goode v. Shoukfeh*, 943 S.W.2d 441, 446 (Tex.1997), or to rule without supporting evidence, *Beaumont Bank v. Buller*, 806 S.W.2d 223, 226 (Tex.1991). Therefore, in reviewing an attorney fee award under the Act, the court of appeals must determine whether the trial court abused its discretion by awarding fees when there was insufficient evidence that the fees were reasonable and necessary, or when the award was inequitable or unjust. Unreasonable fees cannot be awarded, even if the court believed them just, but ***the court may conclude that it is not equitable or just to award even reasonable and necessary fees.*** This multi-faceted review involving both evidentiary and discretionary matters is required by the language of the Act.

Bocquet v. Herring, 972 S.W.2d 19, 21 (Tex. 1998)(emphasis supplied).

[40] See Note 39, above.

[41] *See Martinez v. Allstate Fire and Cas. Co*., 2019 WL 5789988 (W.D. Tex. 2019)(Ezra, J.).

[42] To the contrary, *see Utica Lloyds Ins. Co. v. Mitchell, 138 F.3d 208, 210* (5th Cir. 1998)(holding that the Texas Declaratory Judgment Act is procedural

CONCLUSION

It is good to be back to speaking and visiting with members of the Bar in person at these events. With God's grace, let us pray that we do not experience another pandemic that keeps us from good friends and neighbors. I hope that this outline will help keep you up to date in your trial practice in these areas affecting insurance law.

applying the Federal Declaratory Judgment Act, and and disallowing recovery of attorney's fees in a duty to defend / indemnify action). *See also Philadelphia Indem. Ins. Co. v. Creative Young Minds, Ltd*., 679 F. Supp. 2d 739, 745 (N.D. Tex. 2009)(denying recovery of attorney's fees for UIM case under federal act). The recovery of attorney's fees for extra-contractual violations is a matter of substantive law (i.e., violations of the Insurance Code or Deceptive Trade Practices Act). *See Claypool v. Steadfast Ins. Co*., 2020 WL 3545734 at *2 (N.D. Tex. 2020)((Magistrate's opinion and recommendations adopted). Such matters are the subject of the extra-contractual litigation and not the contract / declaratory judgment causes. *See id*. at *3.