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1-1:1 TEXAS PERSONAL AUTO POLICY[1, 2] AGREEMENT

In return for payment[3, 4, 5] of the premium[6] and subject to all the terms[7] of this policy[8] we agree with you as follows:[9, 10, 11, 12, 13]

PRACTICE TIP

Make sure that you are dealing with a policy issued in Texas before you make any assumptions! The fact that an accident happened in Texas doesn't mean you will be dealing with a Texas policy.

1. Before we even look at the policy itself . . . If you think that there is no such thing as coverage by estoppel, you may wish to review *Ulico Casualty Company v. Allied Pilots Association* which may or may not resolve the issue. In that commercial case, the Texas Supreme Court held "if an insurer's actions prejudice its insured, the insurer may be estopped from denying benefits that would be payable under its policy as if the risk had been covered, but the doctrines of waiver and estoppel cannot be used to re-write the contract of insurance and provide coverage for risks not insured." *Ulico Cas. Co. v. Allied Pilots Ass'n,* 262 S.W.3d 773 (Tex. 2008), *see also Farmers Texas Cty. Mut. Ins. Co. v. Wilkinson,* 601 S.W.2d 520, 521 (Tex. App.—Austin 1980, writ ref'd n.r.e.) (stating that on the one hand, there is no such thing as coverage by estoppel; on the other hand, an insurer can waive all policy defenses, including non-coverage, by certain actions—in other words, coverage by estoppel) The authors recommend a thorough reading of both of these cases if the issue of "coverage by estoppel" is raised. *Dempsey v. ACCC Ins. Co.*, No. 05-16-01502-CV, 2018 Tex. App. LEXIS 3172 (Tex. App.—Dallas May 4, 2018) (citing the 1988 Texas Supreme Court case McGuire stating that waiver and estoppel may operate to avoid a forfeiture of a policy, but they have consistently been denied operative force to change, re-write and enlarge the risks covered by a policy. In other words, waiver and estoppel cannot create a new and different contract with respect to risks covered by the policy. *Texas Farmers Ins. Co. v. McGuire*, 744 S.W.2d 601, 602-03 (Tex. 1988)).

2. The Policy: Texas law requires that motor vehicle operators demonstrate their financial responsibility if they are to be permitted to drive on the public roads of the State of Texas. Tex. Transp. Code Ann. § 601.051 (West 1999). Compliance typically involves the purchase of a liability insurance policy in the format set forth herein. § 601.071.088; *Birnbaum v. Alliance of American Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied) *abrogated on other grounds by In re Bass*, 113 S.W.3d 735 (Tex. 2003); *Office of Pub. Ins. Counsel v. Texas Auto. Ins. Plan*, 860 S.W.2d 231, 233 (Tex. App.—Austin 1993, writ denied).

3. It's a Contract: Insurance policies are contracts and are governed by the rules of construction applicable to contracts. *Barnett v. Aetna Life Ins., Co.*, 723 S.W.2d 663 (Tex. 1987). Ambiguities are resolved in favor of coverage. *Puckett v. U.S. Fire Ins. Co.*, 678 S.W.2d 936 (Tex. 1984); *Ranger Ins. v. Bowie*, 574 S.W.2d 540 (Tex. 1978). (Note that this does not mean that every dispute is going to be resolved in favor of coverage.) An insurer's wrongful failure to pay each type of benefit under the policy can give rise to a separate

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cause of action. *Lane v. State Farm Mut. Auto. Ins. Co.*, 992 S.W.2d 545 (Tex. App.—Texarkana 1999, pet. denied).

4. The Insured Has a Legal Duty to Read the Policy and is charged with knowledge of its terms whether he reads it or not. *Ruiz v. Gov't Employees Ins. Co.*, 4 S.W.3d 838 (Tex. App.—El Paso 1999, no pet.); *E.R. Dupuis Concrete Co. v. Penn Mut. Life Ins. Co.*, 137 S.W.3d 311, 321-22 (Tex. App.—Beaumont 2004, no pet.); *Jeffries v. Madison,* 209 S.W.3d 689 (Tex. App.—Eastland 2009, no pet.).

5. Payment of Premium/Down Payment: When selling an auto policy, insurers may charge a "down payment" no greater than 16.67% of the total premium for a 12 month policy, or no greater than 33.33% of the total premium for a 6 month policy, whenever this rule's installment payment plan is used. Commissioner's Order No. 970903, adoption of amendments to the Texas Automobile Rules and Rating Manual, Rule 14 (Installment Payments) and to the Texas Standard Provisions for Automobile Policies, Personal Auto Policy, Special Instructions, October 8, 1997. Rule 14 also sets forth the permissible number of monthly installments and requires insurers to advise customers in writing of the availability of installment payment plans.

6. An agent's statement that a new policy "replaced" an old policy will not serve to delete exclusions in the new policy that were not in the prior policy, at least not in San Antonio. *See Mudd v. SelectQuote Ins. Servs. of Texas, Inc.*, No. 04-04-00761-CV, 2005 WL 1475364 (Tex. App.—San Antonio June 22, 2005, no pet.) (life insurance policy mem. op.). The Court in *Mudd* also held that the agent and the insurer had not committed fraud. Although *Mudd* is a memorandum opinion, the Court in that case relied on several published cases for the proposition that an insurance agent does not have a duty to explain policy terms to an insured; rather, the insured has a duty to read the policy, and, even if he does not read the policy, is charged with knowledge of the policy terms and conditions. However, even though Courts have held that while an insured who accepts a policy without dissent is presumed to know its contents, the presumption may be overcome by proof that "he did not know its contents when it was accepted, as by showing that when he received it he put it away without examination, or that he relied upon the knowledge of the insurer and supposed he had correctly drawn it." *See Colonial Sav. Ass'n v. Taylor*, 544 S.W.2d 116, 119 (Tex. 1976); *Insurance Network of Tex. v. Kloesel*, 266 S.W.3d 456, 483 (Tex. App. — Corpus Christi 2008, pet. denied).

7. Payment: Payment of premiums may be made by mail when such payment is either authorized by the insurer or established by the parties' course of conduct. *American Cas. Co. of Reading, Pa. v. Conn*, 741 S.W.2d 536 (Tex. App.—Austin 1987, no writ). However, the consumer should proceed promptly and with caution when faced with a cancellation notice that sets forth a specific date and hour of cancellation. *Cox v. Gulf Ins. Co.*, 858 S.W.2d 615 (Tex. App.—Fort Worth 1993, no writ) (Although the court applied the "mailbox rule" to benefit the insureds if they remitted their check "by return mail" as authorized by the cancellation notice, this was based upon the particular wording of the cancellation notice.). *But see Texas Specialty Underwriters, Inc. v. Tanner*, 997 S.W.2d 645 (Tex. Civ. App.—Dallas 1991, pet. denied) (holding that once the insured is given the option to renew the policy and does not accept the offer by either paying the renewal premium before expiration or taking other action that could constitute acceptance, the policy expires by its own terms, and the

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insurer is not required to mail written notice of nonrenewal).

8. Yes, You *Really* Do Have to Pay the Premiums: *Hartland v. Progressive Co. Mut. Ins. Co.*, 290 S.W.3d 318 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

9. Is It a Premium or Isn't It? *Mid-Century Ins. Co. v. Shefqet Ademaj*, 243 S.W.3d 618 (Tex. 2007): The Insurance Commission rule authorizing insurers to collect a statutory $1 fee from insureds to create the Texas Automobile Theft Prevention Authority does not violate former Insurance Code article 21.35B(a), which restricts insurers to collection of no more than items listed. The Court found that the $1 fee was a fee and not part of the premium, and thus did not run afoul of the rule.

10. Payments: An insurer's use of an installment plan and assessment of late fees does not constitute an extension of credit or the charging of interest, *Domizio v. Progressive Cty. Mut. Ins. Co.*, 54 S.W.3d 867 (Tex. App.—Austin 2001, pet. denied).

11. Form: Although carriers are now permitted to draft their own forms, subject to the TDI's approval (Tex. Transp. Code Ann. § 1952.051 and Tex. Ins. Code Ann. § 2301), each policy must contain certain basic terms; for example, it cannot be cancelled after a collision as to that collision. *See* Tex. Transp. Code Ann. §§ 601.072 (minimum limits), 601.073 (statement of terms each policy must contain), 601.074 (allowable terms), and 601.075 (prohibited terms) (Rev. 2009). Prior caselaw and Article 5.06 of the Texas Insurance Code held that insurers may use only a form approved by the Board of Insurance.

12. In Return for Payment: Payment of an insurance premium purchases the coverage set forth in the policy; it is not accurate to say that nothing is received in return for payment of premiums if a claim which is not covered is denied. *T.C. Bateson Constr. Co. v. Lumbermens Mut. Cas. Co.*, 784 S.W.2d 692 (Tex. App.—Houston [14th Dist.] 1989, writ denied) (comprehensive general liability policy).

13. How Many Policies Does Your Family Have? Guess Again. Two policies issued by the same insurance company may, in fact, constitute a single, ambiguous policy. In *Progressive Cty. Mut. Ins. Co. v. Kelley*, 284 S.W.3d 805 (Tex. 2009), Regan Kelley, who was struck by a car while riding her horse, sought underinsured motorist benefits under her parents' insurance policy after recovering policy limits from the at-fault motorist. At the time of the accident, Progressive insured a total of five vehicles for the Kelley family; four of them were under one policy and the other was under a second policy. Progressive denied that there was a second policy and sought a declaratory judgment that it was only required to pay under one policy and not two. In a per curiam decision, the Texas Supreme Court found that this was a fact issue and remanded it to the trial court for resolution of what it termed to be a "latent ambiguity" distinguishing that question (two policies?) from interpreting a particular exclusion or provision within an insurance policy.

1-1:2 DEFINITIONS

A. Throughout this policy, "you" and "your"[14, 15, 16, 17] refer to:

In case the definitions set forth in the policy (and the cases interpreting them) aren't sufficient, the Texas Department has an auto insurance glossary of terms on its website for your reference: http://www.tdi.state.tx.us/auto/autoglossary.html.

14. "You" or "Your": In *Grain Dealers Mut. Ins. Co. v. McKee*, 943 S.W.2d 455 (Tex. 1997) (business automobile insurance policy),

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the named insured was a business. The president of the business claimed that the business automobile insurance policy covered his daughter for uninsured motorist (UM), underinsured motorist (UIM) and personal injury protection (PIP) benefits. The Texas Supreme Court held that the president's daughter was not a "designated person" named in the policy, nor was it possible for her to be a family member of the company that was the named insured and, therefore, she was not insured under the policy. This is not the first time that Texas courts have found that companies don't have families, at least in the context of auto insurance coverage for the family members of employees. (This ruling is interesting in light of CGL policy ruling in *CU Lloyd's of Tex. v. Hatfield*, 126 S.W.3d 679 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) by *Hatfield v. CU Lloyds of Tex.*, 2004 Tex. LEXIS 903 (Tex. Sept. 24, 2004)). In *Burling v. Employers Mut. Cas. Co.*, No. 05-04-0015-CV, 2005 WL 100887 (Tex. App.—Dallas 2005, no pet.) (mem. op.). The Dallas Court of Appeals relied upon *Grain Dealers Mut. Ins. Co. v. McKee*, 943 S.W.2d 455 (Tex. 1997) to hold that a corporation's failure to name a designated person renders the policy's language regarding a "designated person" *inapplicable* but it did not create an ambiguity and therefore did not extend UM/UIM coverage to the corporation's employee who sustained injury while in the course and scope of his employment.

15. "You" and "Your": Ownership of the covered automobile is a prerequisite to coverage under this policy, which provided coverage to any person using "your" covered auto, and insurer of original owner had no obligation to defend or indemnify estate of purchaser of automobile for liability to another. *Gulf Ins. Co. v. Bobo*, 595 S.W.2d 847 (Tex. 1980); *Black v. BLC Ins. Co.*, 725 S.W.2d 286 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.). In *Bobo*, the purchaser was considered to be the owner even though the title had not yet been transferred; the accident occurred on the day before the papers were to be drawn up. The Supreme Court held, "a conditional vendee is not covered as an additional insured . . . because after an agreement is reached and delivery is made, the buyer, and not the seller, has control over the vehicle." *Id.* at 848. In *Black*, the court stated: "A finding of coverage under these facts would deprive an insurance company of the right to choose its customers and delegate that power to the insured when choosing a buyer." *Black*, 725 S.W.2d at 288 (*Accord Trull v. Serv. Cas. Ins. Co.*, No. 14-07-00314-CV, 2008 WL 2837775 (Tex. App.—Houston [14th Dist.] July 22, 2008, no pet.) (holding transfer of possession and control of the vehicle, pursuant to the parties' intent to effectuate the sale determines ownership for insurance purposes).

16. Ownership: The ownership of a vehicle is a question of law based upon the facts. *Alamo Cas. Co. v. William Reeves & Co.*, 258 S.W.2d 211, 214 (Tex. Civ. App.—Fort Worth 1953, no writ). Ownership of a vehicle, within the meaning of an insurance policy, vests in a purchaser on the day the sales contract is executed and possession of the vehicle is delivered. *Nat'l Auto. & Cas. Ins. Co. v. Alford*, 265 S.W.2d 862, 865 (Tex. Civ. App.—Eastland 1954, no writ); *see Republic Ins. Co. v. Luna*, 539 S.W.2d 69 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.). "Owner" has been statutorily defined as a person who: holds the legal right of possession; or has the legal title to the vehicle; or has the legal right of control of the vehicle. Tex. Transp. Code Ann. § 502.001(16) (Vernon Supp. 1998). An installment purchaser who has possession of the vehicle qualifies, even though legal

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title has not yet vested in him. *State Farm Mut. Auto. Ins. Co. v. Chatham*, 318 S.W.2d 684 (Tex. Civ. App.—Dallas 1958). *See also*: buyer became "owner" of car when he took possession four days after check cleared bank, not when the check was written; buyer and seller had agreed that buyer would not become owner until seller received funds, and buyer had no control over or management of car until he took possession. *Foust v. Old Am. Cty. Mut. Fire Ins. Co.*, 977 S.W.2d 783 (Tex. App.—Fort Worth 1998, reh'g denied). Courts look to more than the name on the title. When an insurer and the District Attorney's office each claimed ownership to a vehicle for which the insurer had paid a criminal claim (fraud), the 14th Court in Houston held that the insurer, which held the title, had the superior claim. It is noteworthy that the Court also looked to other evidence, not relying solely on the title. *Universal Underwriters Grp. v. State*, 283 S.W.3d 897 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

17. In a Federal Declaratory Judgment Action, a United States District Court granted summary judgment that the insurer had no duty to defend or indemnify the operators of a commercial vehicle that was listed in the policy Declarations, when the evidence showed that the named insured under the policy, a corporation, had transferred ownership of the vehicle prior to the accident. Although there was a question as to whether defects in the transfer of the certificate of title rendered it invalid under the Texas Certificate of Title Act, the buyer had possession of the vehicle and the exclusive right of control. *See State Farm Mut. Auto. Ins. Co. v. Scott*, 866 F. Supp. 2d 680 (S.D. Tex. 2012).

1. The "named insured"[18, 19, 20] shown in the Declarations, and

18. Business Policy: A business policy will generally not cover use of a personal auto. *Truck Ins. Exchange v. Chalfant*, 192 S.W.3d 813 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

19. Corporations: A corporation is separate from the persons who compose it. *Lucas v. Texas Industries*, 696 S.W.2d 372 (Tex. 1984). Don't make any assumptions about coverage without seeing who is listed on the policy as a named insured. Also, keep in mind that policies may contain specific lists of persons not covered or "excluded" from coverage. Property owned by a corporation does not belong to the shareholders, and vice versa. *Rapp v. Felsenthal*, 628 S.W.2d 258, 260 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.).

20. Do not forget that a person who might ordinarily be covered by definition may be excluded from coverage by being specifically named in an excluded driver endorsement to the policy.

2. The spouse[21] if a resident of the same household.[22]

21. Insured: This issue was discussed in *Texas Farm Bureau v. Riley*, No. 07-97-0326-CV, 1998 WL 391135 (Tex. App.—Amarillo 1998, rev. denied) (mem. op. not designated for publication) (umbrella policy). H and W married in 1948; they divorced in 1986 and formed a business. The business had an auto policy, and W also had a $1,000,000 umbrella policy in her own name. While on partnership business, H was in a car accident that killed one claimant and injured another. The insurer sought a declaration that the umbrella policy did not cover H. The court found that H was not covered: he was not a named insured, nor an insured by definition, nor was the partnership an insured.

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22. The El Paso Court of Appeals has held that a vehicle awarded to the wife in a divorce was no longer owned by the husband, despite the fact that it was still listed on the husband's policy and not the wife's. In *Hernandez v. De La Rosa*, 172 S.W.3d 78 (Tex. App.—El Paso 2005, no pet.), the son of a divorced insured was in an accident while driving the vehicle involved. The vehicle had previously been given to the ex-wife in the divorce action. Despite the fact that the vehicle was still listed on the insured's policy (rather than the wife's), the court found that this was no evidence of "ownership" and affirmed summary judgment in favor of the father on the negligent entrustment claim.

B. "We," "us" and "our" refer to the company providing this insurance.

C. For purposes of this policy a private passenger type auto or pickup or van shall be deemed to be owned by a person if leased:

1. Under a written agreement to that person; and

2. For a continuous period of at least six months.

Other words and phrases are defined.[23] They are boldfaced italics when used.

23. Definitions: When the parties to a contract set forth their own definitions of terms, the courts are not at liberty to disregard these definitions and substitute other meanings. This is true even if the meaning to which the parties have agreed differs from the ordinary and customary meaning of a word. *Hart v. Traders & General Ins. Co.*, 487 S.W.2d 415, 417 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.).

*D. **Family member** means a person who is a resident[24] of your household and related to you by blood, marriage or adoption.[25] This definition includes a ward or foster child who is a resident of your household, and also includes your spouse even when not a resident of your household during a period of separation in contemplation of divorce.[26, 27]*

24. Resident Family Member: Under a policy that defined the "insured" to include "you and your relatives whose primary residence is your household," the court determined that the driver's primary residence did not include his parent's residence where the driver leased an apartment in another town, spent the majority of his time at the apartment and listed the apartment address on his truck title and bank records. *See State Farm Fire & Cas. Co. v. Lange*, No. H-09-2011, 2011 WL 149482 (S.D. Tex. Jan. 18, 2011).

25. Family Member/Minors: A child of divorced parents can be a member of both parents' households. *Hartford Cas. Ins. Co. v. Phillips*, 575 S.W.2d 62 (Tex. Civ. App.—Texarkana 1978, no writ).

26. Family Member/Adults: In *Southern Farm Bureau Casualty. Insurance Company v. Kimball*, a husband and wife were separated but were still seeing each other and reconsidering their separation; the court upheld a jury finding of "resident of same household." *Southern Farm Bureau Cas. Ins. Co. v. Kimball,* 552 S.W.2d 207 (Tex. Civ. App.—Waco 1977, writ ref'd n.r.e.). In *Boon v. Premier Insurance Company*, the husband and wife were separated, divorce papers had been filed and they had "no intent to resume living together." Therefore, the wife was not a "resident of the

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same household" as her insured husband. *Boon v. Premier Ins. Co.*, 519 S.W.2d 703 (Tex. Civ. App.—Texarkana1975, no writ). In *Travelers Indemnity Company v. American Indemnity Company*, a grown son was killed in a motor vehicle accident while moving clothes to his father's home; the court held him not to be a resident of his father's household. *Travelers Indem. Co. v. American Indem. Co.*, 315 S.W.2d 677 (Tex. Civ. App.—Fort Worth 1958, no writ); *see Cunningham v. Members Mut. Ins. Co.*, 456 S.W.2d 216 (Tex. Civ. App.—Fort Worth 1970, no writ); *Allstate Ins. Co. v. Wallace*, 435 S.W.2d 537 (Tex. Civ. App.—Fort Worth 1968, no writ).

27. Coverage during separation in contemplation of divorce is required by Texas Insurance Code § 1952.056 (Rev. 2007).

E. ***Occupying***[28] *means in, upon, getting in*[29] *on, out or off.*[30, 31, 32, 33, 34]

28. Occupying: Regardless of what definition or meaning the word "occupying" might otherwise have, the insurance contract expressly stated that the word "occupying," as used in the policy meant "Upon or entering into or alighting from an insured automobile." *Hart v. Traders & Gen. Ins. Co.*, 487 S.W.2d 415, 417 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.) (older policy form). In the tragic case of *United States Fid. & Guar. Co. v. Goudeau*, 272 S.W.3d 603 (Tex. 2008), Mr. Goudeau was held not to be "occupying" his employer's vehicle when a driver struck the vehicles he was assisting and pinned him to a retaining wall. His injuries were terrible, and the insurance coverage of the third parties and the workers' compensation coverage were insufficient to make him whole. Nonetheless, he was not entitled to UIM benefits because he was not "occupying" the insured vehicle at the time he was injured Goudeau also required a causal connection between the insured's covered vehicle and the personal injury. *Id.* at 605-06.

29. In or Upon: *Ferguson v. Aetna Cas. & Surety Co.*, 369 S.W.2d 844 (Tex. Civ. App.—Waco 1963, writ ref'd.). Contact with the insured car alone does not make a person "in or upon" a car. In *Ferguson* the plaintiff was not "in or upon" a car belonging to another person when she had placed her hand on the door handle to steady herself as she walked around the car.

30. Occupying: Injuries sustained while the passenger of the insured car was out of the car, walking in a parking lot, when he was struck by an unidentified vehicle, were not covered under the policy. *Fulton v. Texas Farm Bureau Ins. Co.*, 773 S.W.2d 391 (Tex. App.—Dallas 1989, writ denied).

31. Occupying: The Amarillo Court held that a man who was struck and killed while standing outside a parked vehicle in the emergency lane of a highway was not "occupying" that vehicle and therefore his widow was not entitled to UM/UIM Coverage. *Ins. Co. of Pa. v. Pearson*, No. 07-03-0340-CV, 2004 WL 2053285 (Tex. App.—Amarillo Sept. 7, 2004, no pet.). The appellate court noted that the phrase "in, upon, getting in, on, out or off" required not necessarily some physical contact with the vehicle, but rather a causal relationship between the vehicle and the injuries. The appellate court found that the company truck was simply present when the decedent was struck by the taxi cab and that there was no nexus between the truck and the decedent's injuries to indicate that, as a matter of law, he was neither "occupying" the truck or an insured under the policy when he was killed. There was no petition for review in *Pearson*, and the court also based its opinion on the fact that the decedent was not an insured. However, *Pearson* is consistent with prior and subsequent opinions (both published and not). (*See* below)

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32. The Texas Supreme Court did find coverage in *Texas Farm Bureau Mut. Ins. Co v. Sturrock*, 146 S.W.3d 123 (Tex. 2004). The insured was injured when his foot became entangled with his truck's door while he was exiting the vehicle. His insurer initially denied the claim; the issue was whether his injury resulted from a "motor vehicle accident" for purposes of PIP coverage under his Texas standard automobile insurance policy. The Court held that a "motor vehicle accident" occurred when (1) one or more vehicles were involved with another vehicle, an object, or a person, (2) the vehicle was being used, including exit and entry, as a motor vehicle, and (3) a causal connection existed between the vehicle's use and the injury producing event. Therefore, the insured's injury resulted from a "motor vehicle accident" within his policy's PIP coverage.

33. *McKiddy v. Trinity Lloyd's Ins. Co.*, 155 S.W.3d 307 (Tex. App.—Dallas 2004, rev. denied by 2004 Tex. LEXIS 806 (Tex. 2004)). McKiddy was a passenger in a car that skidded off an icy road. After exiting the car, McKiddy was struck by another car that skidded off the road. McKiddy testified that he was "no more than ten feet" from the covered vehicle, but produced no evidence showing how long he had been out of the covered vehicle before being struck, and no evidence showing that his injuries related to an impact with the covered vehicle. Thus, the court held that McKiddy failed to raise a fact issue as to whether "a causal connection" between his injuries and the covered vehicle existed, and further held that the term "occupying" is not ambiguous as a matter of law. 2004 Tex. App. LEXIS 2919, at *3.

34. *McDonald v. Southern Cty. Mut. Ins. Co.*, 176 S.W.3d 464 (Tex. App.—Houston [1st Dist.] 2004, no pet.). In *McDonald*, truck drivers who were walking to get help after a breakdown could not recover UIM benefits after being struck because their injuries did not arise out of the use of the insured vehicle; the Court held that their driving "use" had ceased. The blowout of the tractor tire and resulting need for maintenance was a condition precedent to them being hit by the car while walking to obtain help, but the walk was deemed not to be "maintenance" of the vehicle and their ensuing auto-pedestrian accident was not a consequence of maintenance.

F. ***Trailer*** *means a vehicle designed to be pulled by a:*

1. Private passenger auto; or

2. Pickup or van.

It also means a farm wagon or farm implement while towed by a vehicle listed in F.1. or F.2. above.

G. ***Your***[35, 36] ***covered auto***[37] *means:*

35. Who owns the car? While this is typically straightforward and involves the title (or the occasional conditional vendee who is mid-purchase), an insurer was held to have a superior right to ownership of a vehicle for which it had paid the dealership's fraud claim in an identity theft case. *Universal Underwriters Grp. v. State*, 283 S.W.3d 897 (Tex. App.—Houston [14th Dist.] 2009, no pet.). The Court rejected a challenge from the Harris County District Attorney's Office, which claimed that it had a superior claim because the police department had seized the vehicle.

36. In a Federal Declaratory Judgment Action, a United States District Court granted summary judgment that the insurer had no duty to defend or indemnify the operators of a commercial vehicle that was listed In the policy Declarations, when the evidence showed that the named insured under

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the policy, a corporation, had transferred ownership of the vehicle prior to the accident. Although there was a question as to whether defects in the transfer of the certificate of title rendered it invalid under the Texas Certificate of Title Act, the buyer had possession of the vehicle and the exclusive right of control. *See State Farm Mut. Auto. Ins. Co. v. Scott*, 866 F. Supp. 2d 680 (S.D. Tex. 2012). *See also Republic Ins. Co. v. Luna*, 539 S.W.2d 69, 70 (Tex. Civ. App. — Beaumont 1975, writ ref. n.r.e.) (holding that when an auto policy does not define "owner", the term may be synonymous with "holder" or "possessor"). *Id.* at 788 "Owner includes one who (1) holds the legal title of a vehicle; (2) has the legal right of possession of a vehicle; or, has the legal right of control of a vehicle. *Id. See also* Tex. Transp. Code Ann. § 502.001 (31) (West Supp. 2016).

37. Insurable Interest: In *Valdez v. Colonial Cty. Mut. Ins. Co.*, 994 S.W.2d 910 (Tex. App.—Austin 1999, pet. denied), the insurer sought a declaration that the named insured was not entitled to recover for the theft of his car after he sold it to his son. The Austin Court of Appeals held that the car remained the insured's covered auto if he continued to list it on the policy *and* retained exclusive possession and control, and the insured only needed an insurable interest, not ownership, in order to recover. For these reasons, there were fact questions regarding the issues of coverage and insurable interest. Under Texas law, a party must have an insurable interest in the insured property to recover under an insurance policy.

The purpose of the insurable interest requirement is to discourage the use of insurance for illegitimate purposes. *Id.* at 914.

Jones v. Tex. Pac. Indem. Co., 853 S.W.2d 791, 794 (Tex. App. —Dallas 1993, no writ) (An insurable interest exists when the insured "derives pecuniary benefit or advantage by the preservation and continued existence of the property or would sustain pecuniary loss from its destruction." If a claimant cannot suffer any pecuniary loss or derive any benefit from the property, he has no insurable interest."). *Id.* at 794.

1. Any vehicle[38] shown in the Declarations;[39]

2. I. Any[40] of the following types of vehicles on the date you became the owner:[41]

38. Vehicle: The Federal Court for the Northern District of Texas has held, in the context of a farm and ranch policy, that an accident caused by the detachment of a trailer from a pickup truck was caused by the use of a motor vehicle. *Southern Farm Bureau v. Allen*, No. Civ.A3:00CV2765-BC 2001 WL 1148117 (N.D. Tex. Sept. 19, 2001).

39. Declarations: A vehicle recently deleted from the policy was held not to be covered in *Armendariz v. Progressive, Mut. Ins. Co.*, 112 S.W.3d 736 (Tex. App.—Houston [14th Dist.] 2003, no pet.). In so holding, the Court rejected the family's contention that the policy exclusion at issue violated public policy and the Texas Motor Vehicle Safety Responsibility Act, Tex. Transp. Code Ann. § 601.001 et seq. Among other things, the summary judgment evidence showed that, when the vehicle's coverage was deleted, the family had received a decrease in the cost of the policy. In addition, coverage was barred by the "owned-but-uninsured" exclusion applicable to bodily injury arising out of maintenance or use of any vehicle other than covered auto which was owned (but recently deleted) by any family member and furnished for regular use of any family member.

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40. Any Auto: The term "any auto" was liberally interpreted in the context of a commercial policy in *Foremost Cty. Mut. Ins. Co. v. Home Indem. Co.*, 897 F.2d 754 (5th Cir. 1990). In *Hartford Cas. Ins. Co. v. Commerce*, 864 S.W.2d 648 (Tex. App.—Houston [1st Dist.] 1993, writ denied), the term "any auto" did not extend to a non-owned auto that was being unloaded on the insured's premises.

41. Your Covered Auto: The innocent purchaser of a stolen vehicle was permitted to recover from his insurer in *State Farm Mut. Auto. Ins. Co. v. Kelly*, 945 S.W.2d 905 (Tex. App.—Austin 1997, no writ) *abrogated on other grounds by Don's Building Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20 (Tex. 2008). The court found that he had an insurable interest even though he was not the legal owner.

a. a private passenger auto;[42] *or*

BURNING QUESTION

What is an "automobile?"

A. a motor scooter (*Texas Cas. Ins. Co. v. Wyble*, 333 S.W.2d 688 (Tex. Civ. App.—San Antonio 1960)

B. a motorcycle

C. a covered wagon

D. a tricycle

E. "stock car" (*Williams v. Cimarron Ins. Co.*, 406 S.W.2d 173 (Tex. 1966)

Correct answer: B, under certain types of policies.

42. Auto: Neither a motor scooter nor a motorcycle is an automobile within the meaning of the automobile policy. *Agricultural Workers Mut. Auto Ins. Co. v. Baty*, 517 S.W.2d 901 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.); *Texas Cas. Ins. Co. v. Wyble*, 333 S.W.2d 668 (Tex. Civ. App.—San Antonio 1960, no writ). The term "automobile" generally means a wheeled vehicle propelled by its own motor for transportation of persons or property on streets or roadways. *Hardware Mut. Cas. Co. v. Buck's Tri-State Irr. Engine Co.*, 500 S.W.2d 897 (Tex. Civ. App.—Amarillo 1973, writ ref'd n.r.e, 1974). However, a motorcycle may be considered to be an "automobile" within the meaning of a Farm and Ranch policy (referred to it as a homeowners' policy), recognizing the generally accepted meaning of the term "automobile" unless there is policy language to the contrary. *Crocker v. Gulf Ins. Co.*, 524 S.W.2d 566 (Tex. Civ. App.—Texarkana 1975, no writ).

See also Equitable Gen Ins. Co. v. Williams, 620 S.W.2d 608 (Tex. Civ. App.—Dallas 1981, writ ref'd. n.r.e) holding the term "motor vehicle" has a broader meaning than the word "automobile".

b. a pickup or van with a G.V.W. of 10,000 lbs. or less not used for the delivery or transportation of goods, materials or supplies other than samples; unless, (1) the delivery of goods, materials or supplies is not the primary usage of the vehicle, or (2) used for farming or ranching.

II. This provision (G.2) applies only if you:

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a. acquire the vehicle during the policy period; and

b. notify us within 30 days after you become the owner.[43, 44]

BURNING QUESTION
When does a purchaser "own" a vehicle?

43. Newly Acquired Auto: A policy requiring the insured to notify the company within 30 days of the date the a vehicle is acquired is unambiguous. *Thompson v. Geico Ins. Agency, Inc. d/b/a Geico Secure Ins. Co.,* 527 S.W.3d 641 (Tex. App.— Houston [14th Dist.] 2017, no writ). *See also Pride v. State Farm Fire & Cas. Ins. Co.*, 434 S.W.2d 146 (Tex. Civ. App.—Amarillo 1968, no writ) (The requirement of notification is a condition subsequent which must be complied with in order to extend coverage beyond 30 days.). Newer policies now set the notification requirement as *20 days, shortening the time by 10 days* and I don't mean business days. Therefore, it is important to read the policy.

44. Newly Acquired Auto: A vehicle already owned by the insured before the policy was issued is not "newly acquired." *Rogers v. Trinity Universal Ins. Co.*, 478 S.W.2d 639 (Tex. Civ. App.—Eastland 1972, no writ); *Providence Washington Ins. Co. v. Hawkins*, 340 S.W.2d 874 (Tex. Civ. App.—Waco 1960, no writ).

If the vehicle you acquire[45] *replaces*[46] *one shown in the Declarations, it will have the same coverage as the vehicle it replaced. You must notify us of a replacement vehicle*[47] *within 30 days only if you wish to add or continue Coverage for Damage to Your Auto.*[48]

45. After Acquired Vehicle: An owner who failed to notify the insurer until 40 days after the acquisition of a vehicle was not covered for an accident that occurred within the 30 day window. *Guerra v. Sentry*, *Ins.* 927 S.W.2d 733 (Tex. App.—Eastland 1996, writ denied); *see Garrote v. Liberty Mut. Ins. Co.*, 496 F.2d 1168 (5th Cir. 1974).

46. Replacement Vehicle: The term "replacement" was broadly interpreted in *Pioneer Cas. Co. v. Jefferson*, 456 S.W.2d 410 (Tex. Civ. App.—Houston [14th Dist.] 1970, writ ref'd n.r.e.). In that case, the court held that a second vehicle purchased because the insured's vehicle was inoperable fell within the coverage of the policy as a replacement vehicle, even though the first vehicle was not sold and the insured's family had plans to repair the first vehicle and possibly use it in the future.

47. Replacement: The language eliminating the notice requirement for liability coverage of a vehicle which "replaces one shown in the Declarations" does not apply to a vehicle which is "in addition to" the vehicle(s) shown on the declaration page of the policy. *Guerra v. Sentry Ins.*, 927 S.W.2d 733 (Tex. App.—Eastland 1996, writ denied).

48. Purpose: An insurer is entitled to accurately reflect in the policy the risks being insured and to charge premiums based upon those risks. *Conlin v. State Farm Mut. Auto Ins. Co.*, 828 S.W.2d 332 (Tex. App.—Austin 1992, writ denied); *Holyfield v. Members Mut. Ins. Co.*, 566 S.W.2d 28 (Tex. Civ. App.—Dallas 1978, writ ref'd. n.r.e, 572 S.W.2d 672 (Tex. 1978)).

If the vehicle you acquire is in addition to any shown in the Declarations, it

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will have the broadest coverage we now provide for any vehicle shown in the Declarations.

3. Any ***trailer*** *you own.*

4. Any auto[49] *or* ***trailer*** *you do not own*[50] *while used as a temporary substitute*[51, 52, 53] *for any other vehicle described in this definition which is out of normal use*[54] *because of its:*

49. Any Auto: The "any auto" paragraph extends coverage to any auto operated by the named insured, but does not prohibit the insurer from limiting coverage for certain autos not owned or operated by the insured. *Hartford Cas. Ins. Co. v. Commerce*, 864 S.W.2d 648 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

50. Ownership: Under the express language of this provision, an "auto" may be a substitute auto only if the insured does not own it. *John Deere Ins. Co. v. Truckin' U.S.A.*, 122 F.3d 270 (5th Cir. 1997) (commercial truck policy).

51. Permissive Use: In a case of first impression, *Sink v. Progressive Cty. Mut. Ins. Co.*, 107 S.W.3d 547 (Tex. 2003), the Texas Supreme Court held that the standard automobile policy's exclusion from coverage of a vehicle used by the insured without a reasonable belief that he or she is entitled to do so does not apply to the provision covering an insured's use of a temporary substitute vehicle while the named insured vehicle is temporarily out of service. The court held that the trial court erred in holding that this exclusion applied when referenced to a temporary substitute vehicle.

Implied consent is sufficient if the permission of the owner is obtained or if the insured driving the non-owned vehicle believes that permission of the owner has been given; such implied consent may be inferred from a course of conduct or a relationship. *Royal Indem. Co. v. H. E. Abbott & Sons, Inc.*, 399 S.W.2d 343 (Tex. 1966); *Republic Ins. Co. v. Luna*, 539 S.W.2d 69 (Tex. Civ. App. Beaumont 1975), writ ref'd n.r.e. (July 16, 1975).

52. Burden of Proof: The insured has the burden of proving that an automobile was not furnished for his regular use. *Neal v. United States Fire Ins. Co.*, 427 S.W.2d 676, 678 (Tex. Civ. App.—Corpus Christi 1968, no writ).

53. Temporary Substitute: Where the automobile named on the policy, while not in good running order, was left at home for the insured's son to drive on short trips around town while the named insured used another vehicle, that other vehicle was not a temporary substitute vehicle. *Atlantic Ins. Co. v. Gonzalez*, 358 S.W.2d 716 (Tex. Civ. App.—San Antonio 1962, no writ).

54. Temporary Substitute: In *State Farm v. Cobos*, 901 S.W.2d 585 (Tex. App.—El Paso 1995, writ denied), a vehicle which was "boxed in" by other vehicles was "out of normal use" to allow an insured to drive a "temporary substitute" under this provision. In other words, the vehicle used was not available or furnished for regular use.

a. breakdown;[55]

b. repair;

c. servicing;

d. loss; or

e. destruction.

55. Breakdown: The *Cobos* Court was also asked to decide whether the lack of keys to a vehicle constituted a "breakdown" under the policy. The Court found that the absence of keys, a flat tire or a missing battery all rendered the car inoperable, and thus these situations constituted a "breakdown." *Id.* at 590.

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BURNING QUESTION

If an injury is sustained while "occupying" a "trailer" but the trailer is not being pulled or otherwise hooked to a covered auto/truck, is it a covered claim? *See Lyons v. State Farm Lloyds & Nat'l Cas. Co.*, 41 S.W.3d 201 (Tex. App.—Houston [14th Dist.] 2001, review denied).

1-2 LIABILITY COVERAGE INSURING AGREEMENT

A. We will pay damages[1] for bodily injury[2, 3] or property damage for which any ***covered person*** *becomes legally responsible because of an auto accident.[4, 5, 6, 7, 8, 9, 10, 11] Property damage includes loss of use of the damaged property. Damages include prejudgment interest awarded against the* ***covered person****. We will settle or defend[12, 13] as we consider appropriate, any claim or suit asking for these damages. In addition to our limit of liability, we will pay all defense costs we incur. Our duty to settle or defend[14] ends when our limit of liability for this coverage has been exhausted.[15, 16, 17, 18]*

1. Punitive Damages: The Texas Supreme Court has held, in response to a certified question from the Fifth Circuit that Texas public policy does not prohibit a liability insurer from indemnifying a punitive damage award based upon gross negligence. "Texas public policy does not prohibit coverage under the type of workers' compensation and employer's liability insurance policy at issue in this case." *Fairfield Ins. Co. v. Stephens Martin Paving L.P.*, 246 S.W.3d 653 (Tex. 2008). The Court distinguished gross negligence from an intentional act and held that parties are free to insure and exclude risks from coverage. The express language of the standard automobile contract excludes coverage for intentional acts, so presumably this ruling would also apply to afford coverage for gross negligence—but not intentional acts—in the automobile policy context. The Supreme Court did not address whether punitive damages are recoverable under a liability policy. Cases involving other types of insurance indicate that punitive damages would generally be covered under liability coverage. *See Fairfield Ins. v. Stephens Martin Paving,* 246 S.W.3d 653 (Tex. 2008); *Manriquez v. Mid-Century Ins. Co.,* 779 S.W.2d 482 (Tex. App.—El Paso 1989, writ denied) *disapproved of on other grounds by Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 826 (Tex.1997); *Westchester Fire Ins. Co. v. Admiral Fire Ins. Co.,* 152 S.W.3d 172 (Tex. App.—Ft. Worth 2004 (El Paso, pet. denied). However, in *Farmers Tex. Cty. Mut. Ins. Co. v. Zuniga*, the Court reasoned that the language in the Farmer's liability policy covered damages for "bodily injury" and because the "plain meaning of "bodily injury" is physical damage to a human being's body, punitive

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damages are not covered under a liability policy. The phrase "all damages for bodily injury" was not broad enough to cover punitive damages. *Farmers Tex. Cty. Mut. Ins. Co. v. Zuniga*, 548 S.W.3d 646 (Tex. App.—San Antonio 2017).

Some policies now specifically exclude punitive damages! Make sure you read the policy!

BURNING QUESTION
What is a bodily injury?

2. Loss of Consortium is not Bodily Injury: Claims of loss of consortium and mental anguish are purely derivative claims (arising only as a consequence of injury to the spouse) and not a separate bodily injury claim. Loss of consortium is not encompassed within the term "bodily injury". *McGovern v. Williams*, 741 S.W.2d 373 (Tex. 1987). *See also Miller v. Windsor Ins. Co.*, 923 S.W.2d 91, 97 (Tex. 1996) (finding that family members' claims for mental anguish and loss of consortium were not "bodily injuries" under UM/UIM coverage).

3. Psychological Damages: "Unless there is an allegation of physical manifestation of mental anguish, a claim of mental anguish is not a 'bodily injury' as defined in the policy for purposes of invoking the duty to defend." *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819 (Tex. 1997) (homeowners' policy). However, one Federal District Court has held that a bystander's emotional distress (which was accompanied by physical symptoms) did constitute a bodily injury under an auto policy whereas loss of consortium and loss of household services were derivative and therefore did not constitute bodily injury in *Haralson v. State Farm Mut. Auto. Ins. Co.*, 564 F. Supp. 2d 616 (N.D.Tex.2008) (further proceedings at No. 3-05-CV-2513-BD, 2008 WL 4821326, at *1 (N.D. Tex. Nov. 5, 2008) (slip op.).

In an unusual case, the Texas Supreme Court held that the liability insurer for an organ donation charity had no duty to defend the charity against allegations by the daughter of a deceased woman that she suffered mental anguish as the result of the charity harvesting organs and transferring them to a for profit company. *See Evanston Ins. Co. v. Legacy of Life, Inc.*, 370 S.W.3d 377 (Tex. 2012). The Court held that the daughter's claim for mental anguish did not state a claim for bodily injury, which required some physical manifestation to be covered. The Court also recognized a "quasi-property" right regarding a deceased's body; however, organs and tissue do not attain the status of property. Therefore, there was no claim alleged for property damage.

4. Motor Vehicle Accident: There has been some controversy concerning the issue of what constitutes a motor vehicle accident. Not every incident occurring in and around a vehicle qualifies as a "motor vehicle accident" which would invoke policy coverage. *Farmers Texas Cty. Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81 (Tex. 1997); *see Mid-Century Ins. Co. of Texas v. Lindsey*, 997 S.W.2d 153 (Tex. 1999). In *Griffin*, the Texas Supreme Court stated that a driveby shooting was not an "auto accident." *Griffin* limits "auto accidents" to "[S]ituations where one or more vehicle are involved with another vehicle, objects, or person." *See State Farm Mut. Auto. Ins. Co. v. Peck*, 900 S.W.2d 910, 913 (Tex. App.—Amarillo 1995, no writ). However, in *Lindsey*, a child, who was climbing into the back window of a pickup truck, accidentally discharged a gun into another vehicle. The Texas Supreme Court ruled that this was an accident arising from the use of the automobile as a matter of law. The court in *Lindsey* cited

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LeLeaux v. Hamshire-Fannett Independent School District, in which the Supreme Court held that if a vehicle is only the location setting for an injury, the injury does not arise out of any use of the vehicle. In that case, a high school student jumped up from where she had been sitting in the open rear doorway of an empty school bus and hit her head on the door frame. *LeLeaux v. Hamshire-Fannett ISD*, 835 S.W.2d 49 (Tex. 1992). In *Employers Mut. Cas. Co. v. Bonilla,* the Fifth Circuit Court of Appeals held that the tort plaintiff's injuries arose out of the use of an automobile where the plaintiff, a cook, was severely burned when she lit a stove on the insured catering truck that ignited fumes from a flammable liquid the driver had used earlier to clean the floor. *See Employers Mut. Cas. Co. v. Bonilla,* 613 F.3d 512 (5th Cir. 2010).

5. Texas is *still* not a direct action state: The named defendant in a car is the insured person, not his insurance company. *Hamilton v. Farmers Texas Cty. Mut. Ins. Co.*, 328 S.W.3d 664 (Tex. App.—Dallas 2010, no pet.). A third-party plaintiff had no standing to sue a liability insurer for breach of contract relating to an oral agreement to settle the plaintiff's claims against the insured. Under a liability policy containing provision that that no action may exist against insurer until the insured's obligation has been determined by either judgment or actual trial, third party's right of action against the insurer does not arise until he has secured an agreement or judgment. *Great Am. Ins. Co. v. Murray*, 437 S.W.2d 264 (Tex. 1969).

Despite the plaintiff's claim that he had standing as a party to the oral agreements, the Court of Appeals rejected this argument, explaining that there was no evidence in the record of any judgment or agreement establishing the insured's liability, which were conditions to the insurer's duty to indemnify the insured under the policy. *See Haygood v. Hawkeye, Ins. Servs., Inc.*, No. 12-11-00262, 2012 WL 1883811 (Tex. App.—Tyler May 23, 2012, no pet.).

6. Duty to Defend: A drive by shooting is not an "accident." "If a petition does not allege facts within the scope of coverage, an insurer is not legally required to defend a suit against its insured." *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Merchants Fast Motor Lines*, 939 S.W.2d 139 (Tex. 1997) citing *American Physicians Ins. Exchange v. Garcia*, 876 S.W.2d 842, 848 (Tex. 1994); *Fidelity & Guar. Ins. Underwriters Inc. v. McManus*, 633 S.W.2d 787, 788 (Tex. 1982).

7. Auto Accident: A proceeding by the State of Texas against a trucking company for alleged repeated and intentional violations of the vehicle size and weight limitation statute was not a covered occurrence. It involved intentional conduct and did not involve an automobile accident. *Baldwin v. Aetna Cas. & Surety*, 750 S.W.2d 919 (Tex. App.—Amarillo 1988, writ denied) (commercial policy).

8. How Many Occurrences Can One Accident Be? According to two Federal Courts, sometimes two. *Esparza v. Eagle Express Lines, Inc.*, No. 4:05-CV-315, 2007 WL 969585 (E.D. Tex. Mar. 28, 2007); *Evanston Ins. Co. v. Mid-Continent Cas. Co.*, No. H-16-818, 2017 WL 5067604 (S.D. Tex. Sept. 6, 2017) (remarking that "Texas law focuses on the events that cause the injuries and give rise to the insured's liability rather than the number of injuries"). *Id.* at *4.

BURNING QUESTION

Can a single accident constitute more than one occurrence?

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9. A Vehicle Must Be Used as a Vehicle to Trigger Coverage . . . At Least In Federal District Court. *Employers Mut. Cas. Co. v. Bonilla*, 612 F. Supp. 2d 734 (N.D. Tex. 2009), *rev'd in part* 613 F.3d 512 (5th Cir. 2010) wherein a pilot light ignited a vehicle. (Note: this case was decided under three policies, none of which were a personal auto policy).

10. Accident or Occurrence: To invoke coverage, there must be an "accident" or "occurrence," which are unexpected happenings without intention or design. *Allen v. Auto. Ins. Co. of Hartford, CT*, 892 S.W.2d 198 (Tex. App.—Houston [14th Dist.] 1994, n.w.h.). "[T]here is no accident or occurrence where the insured intends the act and the injury is the natural and probable result of that act." *Pierce Mortuary v. Forrest*, 212 B.R. 549 (Bankr. N.D. Tex. 1997) (commercial policy).

11. The alleged theft of a rental car is not an "occurrence" under the policy. In *Avelon v. Nationwide*, the insured failed to return a rental car and claimed that it had been stolen. The rental company obtained a default judgment against the insured and attempted to collect against the policy. Part of the Court's reasoning was that the alleged occurrence was actually a breach of contract on the part of the insured, which is not a covered occurrence and which could not be considered an accident. Further, coverage did not extend to a temporary substitute vehicle. *Avelon v. Nationwide Mut. Ins. Co.* No. 05-02-00082-CV 2003 WL 115324 (Tex. App.—Dallas Jan. 14, 2003, no pet.) (mem. op.).

12. Settle or Defend: An insured's refusal to cooperate with a proffered defense can constitute a waiver of the contractual right to be defended under the liability coverage of the policy. *Northern Cty. Mut. Ins. Co. v. Davalos*, 140 S.W.3d 685 (Tex. 2004). The insured was held to have forfeited his right to a defense after rejecting the insurer's proffered defense without a sufficient conflict. In *Davalos*, the insured and the insurer disagreed about where the insured should be defended. The insured did not ask the insurer to provide a defense until after his own personal attorney had filed an answer and moved to transfer venue. The insurer later argued that, having rejected the insurer's defense, the insured lost his right to recover defense costs. The Court held that the disagreement over venue did not constitute a sufficient conflict to justify the insured's refusal to allow the insurer to take over the defense. As the insurer's offer to defend the insured in the other county satisfied its obligation under the policy, the insurer did not breach its duty to defend, nor did it violate the Insurance Code. After prevailing at the lower level, the insured was poured out by the Texas Supreme Court.

13. Breach of Duty to Defend. The Texas Supreme Court held that judgment creditors of the insured had no standing to sue the liability insurer for breach of its duty to defend because the judgment creditors had no justiciable interest in the insurer's duty to defend its insured, and the insurer owed the judgment creditors no duty directly. The duty to defend is owed to insureds, not to third-party judgment creditors of the insureds. *Lancer Ins. Co. v. Garcia Holiday Tours,* 345 S.W.3d 50 (Tex. 2011).

14. Duty to Defend: *Farmers Texas Cty. Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81 (Tex. 1997); *Reser v. State Farm & Cas. Co.*, 981 S.W.2d 260 (Tex. App.—San Antonio 1998, no pet.). As a general rule, the duty to indemnify does not exist in the absence of a duty to defend.

15. Termination of Duty to Defend: *American States Ins. Co. of Texas v. Arnold*, 930 S.W.2d 196 (Tex. App.—Dallas 1996, writ denied). The duty to defend and indemnify terminates when the policy limits have been paid. The liability limitation is not enlarged because there is more

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than one insured. This is true even though it could result in the apparent preference of one insured over another; there is no "general duty not to favor one insured over another." *Travelers Indem. Co. v. Citgo Petroleum Corp.*, 166 F.3d 761 (5th Cir. 1999) (commercial general liability policy). *See also Carter v. State Farm Mut. Auto. Ins. Co.*, 33 S.W.3d 369 (Tex. App. —Fort Worth 2000, hearing overruled) (holding in the UIM context that an insurer will not be liable in bad faith claims for settling reasonable claims with one of several claimants even if such settlement exhausts or diminishes the proceeds, when faced with settlement demands arising out of multiple claims and inadequate proceeds).

In the context of a liability policy, the Supreme Court concluded that when faced with a settlement demand arising out of multiple claims and inadequate proceeds, an insurer may enter into reasonable settlement with one of the several claimants even though such settlement exhausts or diminishes the proceeds available to satisfy other claims. *Texas Farmers Ins. Co. v. Soriano*, 881 S.W.2d 312 (Tex. 1994).

16. Duty to Defend Held Not to Extend to Plaintiff's Surviving Counterclaims After Summary Judgment Granted In Favor of Insured: So held the Corpus Christi Court of Appeals in *Vansteen Marine Supply, Inc. v. Twin City Fire Ins. Co.*, No. 13-05-00231-CV 2008 WL 599850 (Tex. App.—Corpus Christi Mar. 6, 2008) (mem. op.) (corporate liability policy).

17. Prejudgment Interest: In *Embrey v. Royal*, the Texas Supreme Court held that an insurer was not responsible to pay prejudgment interest that exceeded the policy limits. *Embry v. Royal Ins. Co.*, 22 S.W.3d 414 (Tex. 2000). In *Embrey*, the insured attempted to rely upon a Texas State Board of Insurance Order (General Casualty Bulletin No. 644), but the Court rejected this argument because that Order did not specifically apply to automobile liability insurance.

BURNING QUESTION

What does a "Minimum Limits Policy" include?

For all policies purchased or renewed on or after January 1, 2011, the statutory minimum amount of insurance for a personal automobile has been increased $30,000 per injured person, $60,000 bodily injury coverage per accident, and $25,000 for property damage ("30/60/25").

18. If the insurer settles a liability claim in good faith, the amount of the settlement may be deducted from the liability limits available to settle other claims arising from the same accident. *See* Tex. Transp. Code Ann. § 601.073(e) (West 1995). The policy may provide for coverage in excess of or in addition to the coverage required by the Act. Such excess or additional coverage is not subject to the requirements of the Act. *See* Tex. Transp. Code Ann. § 601.078 (West 1995).

B. ***Covered person*** *as used in this Part means:*

1. You or any ***family member*** *for the ownership, maintenance, or use*[19, 20 21, 22] *of any auto or* ***trailer****.*

19. Maintenance or Use: Note that coverage is extended to "you or any family member" for "ownership, maintenance or use," while coverage for "any person" is only extended if "any person" is "using" the covered auto.

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Thus, in the case of *Nationwide Property and Cas. Ins. Co. v. McFarland*, M, who was neither the named insured nor a family member of the named insured, was not covered for "maintenance" that did not qualify as "use" of the vehicle. Specifically, the car fell off jacks, injuring the owner working underneath, while M was manipulating the controls of the vehicle. Since this manipulation of the controls constituted "maintenance" but not "use," there was no coverage for M. *Nationwide Prop. & Cas. Ins. Co. v. McFarland,* 887 S.W.2d 487 (Tex. App.—Dallas 1994, writ denied).

20. Using or Maintaining: The insured, who lay on the seat of a third party's car and jiggled the accelerator with his hand to eliminate the sticking of the pedal, causing the car to move forward and injure a person, was "using or maintaining" the non-owned car within coverage provisions of automobile policy which obligated the insurer to pay for bodily injury arising out of ownership, "maintenance or use" of any non-owned automobile. *Queen Ins. Co. of America v. Creacy*, 456 S.W.2d 538 (Tex. Civ. App.—San Antonio 1970, no writ).

21. Use of an Automobile: *State Farm Mut. Auto. Ins. Co. v. Francis*, 669 S.W.2d 424, 427 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). The owner of a boat and trailer being towed by an automobile owned and driven by the insured was riding as a passenger while both men were embarked on a hunting trip; the boat and motor fell from the trailer and struck the automobile, injuring its driver and the insured (the passenger); the owner of the boat and trailer was "using" the insured vehicle within the meaning of the policy and was entitled to coverage as an insured. "Use" has been defined as "to put into action or service or employment of a vehicle as a means of transportation, or some other purpose incident to transportation. *Tucker v. Allstate Texas Lloyds Ins. Co.*, 180 S.W.3d 880 (Tex. App.—Texarkana 2005, no pet.).

22. "Use" or "maintenance" of a vehicle: A U.S. District Court has held that cleaning the floor around a truck with gasoline—which led to a tragic fire involving the truck exploding— was not the "maintenance" or "use" of the vehicle to confer coverage. *Employers Mut. Cas. Co. v. Bonilla*, 612 F. Supp. 2d 734 (N.D. Tex. 2009 mem. op.), rev'd in part, 613 F.3d 512 (5th Cir. 2010). On remand *Employers Mut. Cas. Co. v. Bonilla*, No. 3:07-CV-0648-G, 2011 WL 3628950 (N.D. Tex. Aug. 16, 2011) (holding that "Molina was an independent contractor as a matter of law when the accident occurred and therefore the auto policy's employee exclusion was inapplicable). SEE THE TEXAS RULES OF APPELLATE PROCEDURE FOR CITATION OF MEMORANDUM OPINIONS AND UNPUBLISHED OPINIONS. But, in *Salcedo v. Evanston Ins. Co.*, 462 Fed. App'x 487 (5th Cir. 2012) (per curiam) the Fifth Circuit Court of Appeals held that a worker's burn injuries arose out of the use of a vehicle when hot asphalt sprayed from a hose that was filling the truck's asphalt holding tank. The Court held that the truck was being used for its intended purpose of hauling asphalt, which included loading it, the accident occurred within the territorial limits of the truck, and the injuries would not have arisen if the worker was not using the truck to fill it.

"Use" within the liability policy covering damages arising out of ownership, maintenance and use of automobile was the general catchall of the insuring clause designed to include all proper uses of the vehicle not falling within other terms of definition such as ownership and maintenance. *State Farm Mut. Auto Ins. Co v. Pan Am. Ins. Co.*, 437 S.W.2d 542 (Tex. 1969).

2. Any person[23] *using,*[24, 25, 26, 27, 28, 29] ***your covered auto.***[30]

23. Any Person: An individual covered under this clause (that is, a nonfamily member using

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the covered auto) is referred to in Texas caselaw as an **omnibus insured**, **covered person or an insured by definition**. These types of clauses are sometimes referred to as omnibus clauses. *Coronado v. Employers Nat. Ins. Co.*, 596 S.W.2d 502 (Tex. 1979) (also adopting the "minor deviation rule in the context of an employers comprehensive automobile liability policy"); *Nationwide Prop. & Cas. Ins. Co. v. McFarland*, 887 S.W.2d 487 (Tex. App.—Dallas 1994, writ denied); *Hartford Accident & Indem. Corp. v. Lowery*, 490 S.W.2d 935 (Tex. Civ. App.—Beaumont 1973, no writ); *Universal Underwriters Ins. Co. v. Hartford Accident & Indem. Co.*, 487 S.W.2d 152 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.). "A named insured is the one who purchases the policy, presumably has it in his possession and is deemed to know the contents of the contract he made. On the other hand an 'omnibus insured' under a comprehensive policy stands in the position of a third party beneficiary of a contract to which he is not a party, but is a stranger." *Standard Acc. Ins. Co. v. Employers Cas. Co.*, 419 S.W.2d 429 (Tex. Civ. App.—Dallas 1967, writ ref'd n.r.e.). For the purposes of determining coverage under an omnibus clause of a policy, "permission" is consent to use the vehicle at the time and place in question and in a manner authorized by the owner, either express or implied. *Adams v. Travelers Indem. Co. of Connecticut*, 465 F.3d 156 (5th Cir. 2006). *See also Salinas v. Progressive Cty. Mut. Ins.* Co., No. 07-16-00361-CV, 2017 WL 4399366 (Tex. App.—Amarillo 2017).

24. Does the spread of tuberculosis on a bus arise from "use" of the bus? No. In *Lancer Ins. Co. v. Garcia Holiday Tours,* 345 S.W.3d 50 (Tex. 2011), the Texas Supreme Court held that a commercial auto policy covering injuries that "result from" the "use" of a covered auto did not cover claims by passengers who contracted tuberculosis from the driver of the bus. The Court determined that the bus was merely the site where the infection occurred. This case concluded that the transmission of a communicable disease from a bus driver to his passengers was not a risk assumed by the insurance carrier under a business auto policy because the passenger's injuries did not result from the vehicle's use but rather from the bus company's use of an unhealthy driver.

25. Permissive Users: A motorist driving the named insured's car with the permission of the named insured was an omnibus insured. The insurer may assert any defense against an omnibus insured that it could have asserted against that person if he were a named insured. Waiver by the insurer as to one insured does not waive its policy defenses as to another. *Sparks v. Aetna Life & Cas. Co.*, 554 S.W.2d 228 (Tex. Civ. App.—Dallas 1977, no writ).

BURNING QUESTION

How far can a permissive user go and still be a permissive user?

26. Permissive Use: In *Atkinson v. Snodgrass*, the Eastland Court of Appeals held that a mechanic who exceeded his permission to drive the vehicle back and forth to the customer's house was not covered as a permissive user. *Atkinson v. Snodgrass*, No. 11-05-00011-CV, 2006 WL 648334 (Tex. App.—Eastland Mar. 16, 2006, no pet.) (mem. op.). This case also cited *Coronado v. Emp'rs Nat'l Ins. Co.*, 596 S.W.2d 502, 505 (Tex. 1979) stating that the Supreme Court adopted the minor deviation rule, to wit: (1) the deviation is so slight that a fact issue is not raised on whether permission was revoked;

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(2) the deviations are of more significance which raise a fact question; and (3) deviations that are so gross as to destroy the initial permission as a matter of law. *Id.* at 506.

27. Use: *Federal Ins. Co. v. Forristall*, 401 S.W.2d 285 (Tex. Civ. App.—Beaumont 1966, writ ref'd n.r.e.). The Beaumont Court of Appeals found that an insured's actions in entering the plaintiff's automobile, releasing the gearshift from park, and pushing the car a short distance did not constitute "use" of the vehicle (comprehensive dwelling policy which contained an exclusion for "ownership, maintenance, operation, use . . . of land motor vehicles while away from the premises).

28. Permission: *Snyder v. Allstate Ins. Co.*, 485 S.W.2d 769 (Tex. 1972); *Indiana Lumbermen's Mut. Ins. Co. v. Hartford Accident & Indem. Co.*, 454 S.W.2d 781 (Tex. Civ. App.—Waco 1970, writ ref'd n.r.e.). The driver of an insured car was entitled to coverage because he had implied permission from the named insured's daughter, to whom the named insured furnished the car. The court held that the permission granted by the daughter was an extension of the permission that the daughter had from her father.

29. Permissive User: Subject to certain exceptions, a permissive user of your vehicle is covered under your policy. *See Tull v. Chubb Grp. of Ins. Cos.*, 146 S.W.3d 689 (Tex. App.—Amarillo 2004, no pet.). (Intoxicated employee who exceeded scope of permission to use company truck was not covered). *Minter v. Great American Ins. Co. of New York*, 423 F.3d 460 (5th Cir. 2005).

30. In a Federal Declaratory Judgment Action, a United States District Court granted summary judgment that the insurer had no duty to defend or indemnify the operators of a commercial vehicle that was listed in the policy Declarations, when the evidence showed that the named insured under the policy, a corporation, had transferred ownership of the vehicle prior to the accident. Although there was a question as to whether defects in the transfer of the certificate of title rendered it invalid under the Texas Certificate of Title Act, the buyer had possession of the vehicle and the exclusive right of control. *See State Farm Mut. Auto. Ins. Co. v. Scott*, 866 F. Supp. 2d 680 (S.D. Tex. 2012).

3. For ***your covered auto***[31]*, any person or organization*[32, 33] *but only with respect to legal responsibility for acts or omissions of a person for whom coverage is afforded under this Part.*

31. Your Covered Auto: Current Texas law holds that a third party claimant (i.e., a plaintiff in a liability suit against an insured) has no standing to make a contract claim or statutory claims against the defendant's insurance carrier. *See Caplinger v. Allstate Ins. Co.*, 140 S.W.3d 927 (Tex. App.—Dallas 2004, pet. denied), (because such claims belong only to the insured).

32. Any Person or Organization: The U.S. government may qualify as an additional insured under this clause. *U.S. v. Myers*, 363 F.2d 615 (5th Cir. 1966) (government employee using his own car on business*). See also Travelers Lloyds Ins. Co. v. Cruz Contracting of Tex., LLC, D&D Contractors, Inc.*, No. 5:16-CV-759-DAE, 2017 U.S. Dist. LEXIS 215264 (W.D. Tex. Mar. 17, 2017).

33. Insurer's Duties Towards an Additional Insured: In *National Union Fire Ins. Co. v. Crocker*, 246 S.W.3d 603 (Tex. 2008) (nursing home liability policy), the Texas Supreme Court answered "no" to the following certified question from the Fifth Circuit: Where an additional insured does not and cannot be

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presumed to know of coverage under an insurer's liability policy, does an insurer that has knowledge that a suit implicating policy coverage has been filed against its additional insured have a duty to inform the additional insured of the available coverage? "Insurers owe no duty to provide an unsought, uninvited, unrequested, unsolicited defense." *See also Egly v. Farmers Ins. Exch.*, No. 03-17-00467-CV, 2018 WL 895043 (Tex. App.—Austin Feb. 15, 2018, no pet. h.).

*4. For any auto or **trailer**, other than **your covered auto**, any person or organization but only with respect to legal responsibility for acts or omissions of you or any **family member** for whom coverage is afforded under this Part. This provision (B.4.) applies only if the person or organization does not own or hire the auto or **trailer**.*

1-2:1 SUPPLEMENTARY PAYMENTS

*In addition to our limit of liability, we will pay on behalf of a **covered person**:*

1. Up to $250 for the cost of bail bonds required because of an accident including related traffic law violations. The accident must result in bodily injury or property damage covered under this policy.

2. Premiums on appeal bonds and bonds to release attachments in any suit we defend.

3. Interest accruing after a judgment is entered in any suit we defend. Our duty to pay interest ends when we offer to pay[34] that part of the judgment which does not exceed our limit of liability for this coverage.

34. "Escape Clause": The first part of this clause is designed to protect the insured from liability for additional interest and/or costs incurred because of actions taken by the insurer. *Western Cas. & Sur. Co. v. Preis*, 695 S.W.2d 579, 586 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.). The second part of the Supplementary Payment provision, the "escape clause," is drafted for the protection of an insurer. The insurer cannot invoke it by making a conditional offer of settlement. *Texas Farmers Ins. Co. v. Miller*, No. 03-97-00233-CV, 1997 WL 746027 (Tex. App.—Austin Dec. 4, 1997, pet. denied) (not designated for publication) (mem. op.).

4. Up to $50 a day for loss of earnings, but not other income, because of attendance at hearings or trials at our request.

5. Other reasonable expenses incurred at our request.[35]

35. Expenses: The expenses contemplated by this clause are expenses in connection with the risk insured against, not expenses incurred in a suit between the insured and insurer to determine whether the risk was covered by the policy. *Milwaukee Mechanics Ins. Co. v. Davis*, 198 F.2d 441 (5th Cir. 1952). The *Milwaukee Mechanics* case has been cited as authority by over a dozen states, including Texas. *See Mundy v. Knutson Const. Co.*, 283 S.W.2d 245 (Tex. Civ. App.—Galveston 1955, aff'd).

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1-2:2 EXCLUSIONS

A. We do not provide Liability Coverage for any person:

1. Who intentionally[36] causes[37] bodily injury or property damage;[38, 39, 40, 41]

36. Intentional Acts: In *Misle v. State Farm Mut. Auto. Ins. Co.*, a passenger in a vehicle insured by State Farm fired an air rifle into a group of people standing on the sidewalk. *Misle v. State Farm Mut. Auto. Ins. Co.*, 908 S.W.2d 289 (Tex. App.—Austin 1995, no writ). An individual hit with a projectile from the gun sued the driver and the shooter. The courts ruled that the insurance company had no duty to defend the case, as the injuries were intentional and did not result from an "auto accident," and thus not covered by the policy.

37. Intentional Act: The Texas Supreme Court has held that a driver engaged in a high-speed chase with police did not "forfeit coverage" because the insurer failed to establish as a matter of law that he intentionally caused the family's injuries, reasoning, "The exclusion requires intentional damage, not just intentional conduct." *Tanner v. Nationwide Mut. Fire. Ins. Co.*, 289 S.W.3d 828 (Tex. 2009).

38. Intent: "Under Texas law, when the insured's acts are voluntary and intentional, the results or injuries, even if unexpected, are not caused by an 'accident,' and therefore the event is not an 'occurrence' under the policy." *State Farm Lloyds v. Kessler*, 932 S.W.2d 732, 738 (Tex. App.—Fort Worth 1996, writ denied) (homeowners' policy).

39. Intent: An intentionally committed assault is not covered under any type of liability insurance in the State of Texas in the absence of a special endorsement expressly extending coverage. *National Union Fire Ins. Co. v. Bourn*, 441 S.W.2d 592 (Tex. 1969); *Gilliland v. Employers Liab. Assur. Corp.*, 417 S.W.2d 921 (Tex. Civ. App.—El Paso 1967, writ ref'd n.r.e.) (homeowners' policies). The purpose of insurance is to protect against the unintended and the unforeseen, not to indemnify for intentional acts.

A two-vehicle collision caused by a drunk driver was a covered accident under a commercial auto policy where the driver's decision to drive while intoxicated was intentional but the driver did not intend to cause the collision. The term as used in the policy although not defined is consistent and common usage of the term accident included "drunk driving accident". *Frederking v. Cincinnati Ins. Co.*, 929 F.3d (5th Cir. 2019).

40. Assault: "There is, properly speaking, no such thing as a negligent assault." *Fulmer v. Rider*, 635 S.W.2d 875, 882 (Tex. App.—Tyler 1982, writ ref'd n.r.e.) citing Prosser, The Law of Torts, ch. 2, § 10 at 4041 (4th ed. 1971). "For example, an automobile driver operates his car in violation of the speed law and in so doing inflicts injury as a proximate result; his liability is based on negligent conduct. On the other hand, if the driver intentionally runs over a person, it makes no difference whether the speed is excessive or not, the driver is guilty of an assault and if death results, of manslaughter or murder. The injury was intended so it makes no difference whether the weapon used was an automobile or a pistol. Such willful conduct is beyond and outside the realm of negligence."

HOT TIP

When Prosser is cited as authority in a published opinion, the issue is probably so well settled that a Court will not be impressed with your advocacy of a contrary position, no matter how brilliant your persuasive skills may be.

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41. Validity: Excluding an intentional act from coverage is nothing more than enforcing the contract as written. *Reilly v. Rangers Mgt., Inc.*, 727 S.W.2d 527, 529 (Tex. 1987) (contract law). Intentional acts cannot be recast as negligence in an attempt to obtain insurance coverage. *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993) (homeowners' policy).

2. For damage to property owned or being transported by that person;

3. I. For damage to property: [42]

42. Damage to Property: Coverage for damage sustained to a non-owned pickup being driven by the insured's son was excluded under this provision where the son was "in charge of property" in that he had sole control of the pickup at the time of the collision and was the only person present with a driver's license. *Security Mut. Cas. Co. v. Johnson*, 584 S.W.2d 703 (Tex. 1979) (auto policy with no collision or comprehensive coverage).

a. rented to;

b. used by; or

c. in the care of; [43]

that person.

43. Damage to Property: There was no coverage for damage from a fire sustained by the owner of real property (a warehouse used for the storage of automobile parts) and personal property (automobile parts), under the automobile liability insurance policy of the person who was negligently responsible for the fire. The policyholder was a warehouseman in charge of the property who drove his personal car into the warehouse and cleaned it on company time. The fire started when he turned on the ignition of his car, having left flammable liquid on the engine. *Employers Mut. Cas. Co. v. Trinity Universal Ins. Co.*, 376 S.W.2d 766 (Tex. Civ. App.—Fort Worth 1964, no writ).

II. This exclusion (A.3.I.) does not apply to damage to:

a. residence or private garage; or

b. any of the following type vehicles not owned by or furnished or available for the regular use [44] *of you or any* ***family member****;*

44. Non-Named Vehicles: Non-named vehicles furnished for an insured's regular use are not covered pursuant to this exclusion. *National Emblem Ins. Co. v. McClendon*, 481 S.W.2d 186 (Tex. Civ. App.—Texarkana 1972, writ ref'd n.r.e.) (finding that the damaged vehicle was not furnished for the wife's regular use when she had moved in with her mother while her husband was serving in the military noting that the living arrangement was only temporary); *International Serv. Ins. Co. v. Walther*, 463 S.W.2d 774 (Tex. Civ. App.—Austin 1971, no writ) (An employee was injured in a collision while driving his employer's truck; the court found that the vehicle was furnished for his regular use as a matter of law); *Hall v. Southern Farm Bureau*, 670 S.W.2d 775 (Tex. App.—Fort Worth 1984, no writ); the purpose of the "non-owned automobile" provision is to make certain that the insured properly pays premiums on all vehicles regularly used by the insured and that are therefore covered by the policy; such coverage is designed as a convenience to the insured to provide coverage for occasional and sporadic use of replacement vehicles, rental vehicles and the like. *Benjamin v. Plains Ins. Co.*, 650 F.2d 98 (5th Cir. 1981).

(1) private passenger auto;

(2) ***trailers****; or*

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(3) pickups or vans.

However, the exclusion 3.I. does apply to a loss due to or as a consequence of a seizure[45] of an auto listed in 3.II.b. by federal or state law enforcement officers as evidence in a case against you under the Texas Controlled Substances Act or the Federal Controlled Substances Act if you are convicted in such case.[46]

PRACTICE TIP:
Whether a particular vehicle was furnished for the regular use of a driver is often a question of fact that will preclude summary judgment in favor of the insurer. (*See Johnson v. Home Indem. Co.*, 401 S.W.2d 871 (Tex. Civ. App. —Texarkana 1966, writ denied).

45. Seizure: The Texas and Federal drug forfeiture laws permit the government to confiscate vehicles used in the commission of certain crimes. Tex. Code Crim. Pro. Ann. art. 59.01 (Vernon 1989, Amended 1995); *1991 Nissan Pickup v. State*, 896 S.W.2d 344 (Tex. App.—Eastland 1995, no writ).

46. Stolen Car: The Austin Court of Appeals has held that loss of the vehicle due to "defective title" (i.e., repossession of a stolen car from the innocent insured who bought it in good faith) does not fall within this exclusion. *State Farm Mut. Auto. Ins. Co. v. Kelly*, 945 S.W.2d 905 (Tex. App.—Austin 1997, writ denied) indicating that the insured need only have an insurable interest. *abrogated on other grounds by Don's Building Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20 (Tex. 2008). The Commissioner of the Texas Department of Insurance agrees. Commissioner's Bulletin B004298 (June 4, 1998).

4. For bodily injury to an employee of that person during the course of employment.[47, 48] This exclusion (A.4.) does not apply to bodily injury to a domestic employee unless workers' compensation benefits are required or available for that domestic employee.[49]

47. Employees of the Insured: The wording of this exclusion was held to unambiguously exclude coverage for the insured's employees in *Westchester Fire Ins. Co. v. American Gen. Fire & Cas. Co.*, 790 S.W.2d 816 (Tex. App.—Austin 1990, no writ) (commercial auto policy); *see also Travelers Indem. Co. v. CenTexas Vending Co.*, 530 S.W.2d 354 (Tex. Civ. App.—Eastland 1975, writ refused n.r.e.) (commercial auto policy); *Nautilus Ins. Co. v. Zamora*, 114 F.3d 536 (5th Cir. 1997) (commercial general liability policy).

48. Course of Employment: In *Southern Farm Bureau Cas. Ins. Co. v. Bohls*, the court there held that farm laborers being transported back to town by their employer after the day's labor were not engaged in their employment. *Southern Farm Bureau Cas. Ins. Co. v. Bohls*, 304 S.W.2d 534 (Tex. Civ. App.—Austin 1957, writ ref'd n.r.e.); *see Republic Cas. Co. v. Obregon*, 290 S.W.2d 267 (Tex. Civ. App.—Waco 1956, writ ref'd n.r.e.). The Fort Worth Court of Appeals affirmed summary judgment granted in favor of the employer when its employee, a traveling salesman, was involved in an automobile accident while en route home from his weekly established route. *See, Upton v. Geneso, Inc.*, 962 S.W.2d 620, 621-22 (Tex. App.—Fort Worth 1998, pet. denied).

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Exception to the general rule is focused on whether the employee is undertaking a "special mission" that is, undertaking a specific errand at the specific request of the employer. *See Upton v. Gensco Inc.*, 962 S.W.2d 620, 621 (Tex. App.—Fort Worth 1997, pet. denied).

49. Domestic Employees: In *Robertson v. Home State Cty. Mut. Ins. Co.*, 348 S.W.3d 273 (Tex. App.—Fort Worth 2011, pet. denied) (en banc), the Fort Worth Court of Appeals, sitting en banc, held that the term "domestic employee" in a commercial auto liability policy exclusion was not ambiguous and referred to a person engaged in employment that was incidental to a personal residence, not persons who were "employed in the United States." Although the term "domestic" could refer a person employed in the United States, the Court rejected this definition based on provisions of the Texas Labor and Transportation Codes that allowed liability coverage only for "domestic employees" who were engaged in employment incidental to a personal residence. The Court also observed that the plaintiff, a truck driver, only considered the term "domestic" in isolation from other terms and that his interpretation would render meaningless language that would that allowed coverage only if the "domestic employees" were "not entitled to worker's compensation benefits." The Fort Worth Court declined to follow the Corpus Christi Court of Appeal's opinion in *Carroll v. Castillo*, No. 13–99–006–CV, 2000 WL 34592617, at *5 (Tex. App.—Corpus Christi Apr. 6, 2000, no pet.) (not designated for publication). In *Carrol*, the Corpus Christi Court of Appeals found the definition of "domestic employee" to be ambiguous. The Fort Worth Court of Appeals found the reasoning in *Carrol* to be unpersuasive because it relied solely on a definitional approach that did not consider the meaning of the word in its context.

The insured's non-domestic employee, who was in course of his employment for the insured at time of accident, could not recover from the insurer for his medical expenses. *Travelers Indem. Co. v. CenTexas Vending Co.*, 530 S.W.2d 354 (Tex. Civ. App.—Eastland 1975, writ ref'd n.r.e.).

5. For that person's liability arising out of the ownership or operation of a vehicle while it is:

a. being used to carry persons for a fee; this does not apply to a share the expense car pool.[50]

50. Car Pool: There are no reported cases interpreting this provision. Under the former automobile Guest Statute which was held to be unconstitutional in 1985 in *Whitworth v. Bynum*, 699 S.W.2d 194, 195-97 (Tex. 1985) a "definite tangible benefit moving from the rider to the driver or it must be shown to have been the motivating influence for furnishing the transportation" in order to remove a person from "guest" status and make that person a passenger for hire. *Fernandez v. Kiesling*, 500 S.W.2d 459 (Tex. 1973); *Willis v. Buchanan*, 358 S.W.2d 727 (Tex. Civ. App.—Fort Worth 1962); *Hutcheson v. Estate of Se'Christ*, 459 S.W.2d 495 (Tex. Civ. App.—Amarillo 1970, writ ref'd).

b. being used to carry property for a fee; this does not apply to you or any ***family member*** *unless the primary usage of the vehicle is to carry property for a fee;*[51] *or*

51. Carrying Property for a Fee: *See* discussion of *Dhillon v. Gen. Acc. Ins. Co.*, 789 S.W.2d 293 (Tex. App.—Houston [14th Dist.] 1990, no writ), *appeal after*

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remand, *Dhillon v. Gen. Acc. Ins. Co.*, No. C14-90-00714-CV, 1991 WL 51470 (Tex. App.—Houston [14th Dist.] Apr. 11, 1991, writ denied) (not designated for publication), The Houston Court of Appeals initially reversed the trial court's summary judgment because there was no evidence showing that Dhillon was carrying property for a fee. However, the proceeds a driver possesses from the sale of the pizza on the return trip would constitute "property" within the meaning of the exclusion. When the case returned after remand, the Court was satisfied with the evidentiary record and rejected Dhillon argument that the "livery" exclusion was ambiguous and held the claim excluded. See discussion in § 1-5:3. *See also Fort Worth Lloyds Ins. Co. v Lane*, 189 S.W.2d 78 (Tex. Civ. App.—Dallas 1945, no writ) (reasoning that the exclusion applies only if the insured vehicle has been held out to the general public for carrying passengers and that at the time of the accident was actually so used); *Canal Ins. Co. v. Gensco, Inc.*, 404 S.W.2d 908, 909 (Tex. Civ. App.—San Antonio 1966, no writ).

c. rented or leased to another, this does not apply if you or any ***family member*** *lends* ***your covered auto*** *to another for reimbursement of operating expenses only.*

6. While employed or otherwise engaged in the business[52, 53] *or occupation of:*

a. selling;

b. repairing;

c. servicing;[54, 55]

52. Use in the Automobile Business: An automobile owned by the insured which was involved in an accident while being returned to a service station for servicing from the insured's place of employment was not "used in the automobile business" within this exclusion. *Western Alliance Ins. Co. v. Cox*, 394 S.W.2d 238 (Tex. Civ. App.—Waco 1965, writ ref'd n.r.e.).

53. Character of Use: *Allstate Ins. Co. v. Universal Underwriters Ins. Co.*, 439 S.W.2d 385 (Tex. Civ. App.—Houston [14th Dist.] 1969, no writ). This case involved a garage's liability insurer suing the liability insurer of an automobile owner to recover moneys the garage liability insurer paid in settlement of a claim. The claim had been made by a party injured in a collision with the owner's automobile while it was being driven by a garage employee to the shop for repairs. The court held that at the time of the collision the automobile was not being used in the automobile business within the meaning of this clause in the owner's liability policy. The exclusion was based on the character of the use being made at the time, not on the character of the business of the person using it.

54. Servicing Automobiles: Coverage was unambiguously excluded from a service station's policy for a service station employee who had been returning insured owner's serviced automobile. *Humble Oil & Refining Co. v. Lumbermens Mut. Cas. Co.*, 490 S.W.2d 640 (Tex. Civ. App.—Dallas 1973, writ ref'd n.r.e.) (combination automobile general liability policy).

55. Servicing Automobiles: There was no coverage for a collision occurring while the employee of a garage was driving the insured's vehicle from one service department of the garage to another in *Tindall Pontiac, Inc. v. Liberty Mut. Ins. Co.*, 441 S.W.2d 948,

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949 (Tex. Civ. App.—San Antonio 1969, writ dism'd), nor was there coverage for an accident occurring while the insured automobile, after its repair, was being returned to the owner by the repairer's employee in *Universal Underwriters Ins. Co. v. Pan Am. Ins. Co.*, 450 F.2d 1050 (5th Cir. 1971) (garage policies).

d. storing; or

e. parking;

vehicles designed for use mainly on public highways. This includes road testing and delivery. This exclusion (A.6.) does not apply to the ownership, maintenance or use of ***your covered auto*** *by;*

a. you;

b. any ***family member****; or*

c. any partner, agent or employee of you or any ***family member****.*

7. Maintaining or using any vehicle while that person is employed or otherwise engaged in any business or occupation not described in Exclusion A.6. This exclusion (A.7.) does not apply to the maintenance or use of a:

a. private passenger auto;

b. pickup or van that is ***your covered auto****; or*

c. ***trailer*** *used with a vehicle described in 7.a. or 7.b. above.*

8. Using a vehicle without a reasonable[56, 57, 58] *belief*[59] *that that person is entitled*[60] *to do so.*[61, 62]

56. Permissive Use: Subject to certain exceptions, a permissive user of your vehicle is covered under your policy. *See Tull v. Chubb Grp. of Ins. Cos.*, 146 S.W.3d 689 (Tex. App.—Amarillo 2004, no pet.) (Intoxicated employee who exceeded scope of permission to use company truck was not covered); *Minter v. Great American Ins. Co. of New York*, 423 F.3d 460 (5th Cir. 2005).

57. Permissive Use: In *Atkinson v. Snodgrass*, the Eastland Court of Appeals held that a mechanic who exceeded his permission to drive the vehicle back and forth to the customer's house was not covered as a permissive user. *Atkinson v. Snodgrass*, No. 11-05-00011-CV, 2006 WL 648334 (Tex. App.—Eastland Mar. 16, 2006, no pet.) (mem. op.).

58. Permissive Use: *Progressive Cty. Mut. Ins. Co. v. Sink*, 107 S.W.3d 547 (Tex. 2003): In a case of first impression, the Texas Supreme Court held that the standard automobile policy's exclusion from coverage of a vehicle used by the insured without a reasonable belief that he or she is entitled to do so does not apply to the provision covering an insured's use of a temporary substitute vehicle while the named insured vehicle is temporarily out of service. The court held that the trial court erred in holding that this exclusion applied when referenced to a temporary substitute vehicle.

59. Reasonable Belief: In *United States Fire Ins. Co. v. United Serv. Auto. Ass'n*, 772 S.W.2d 218 (Tex. App.—Dallas 1989, writ denied), the court held that being a passenger can constitute "use" of a vehicle. In that case, the allegation was that the passenger had seized the steering wheel.

60. Implied Consent: A person who borrows a vehicle may have the implied consent of the insured owner to permit another person to drive the automobile, thus making the driver a permissive user and omnibus insured. *Phoenix*

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Ins. Co. v. Allstate Ins. Co., 412 S.W.2d 331 (Tex. Civ. App.—Corpus Christi 1967, no writ).

61. Reasonable Belief: Using a vehicle, or permitting another to do so, for a use beyond the permission granted is not using the vehicle with "reasonable belief" that one is entitled to do so. *Tristan v. Gov't Employees Ins. Co.*, 489 S.W.2d 365 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.).

62. Reasonable belief must be objectively reasonable: The Northern District of Texas has held that "reasonable belief" requires an objective basis in fact. *Empire Indem. Ins. Co. v. Allstate Cty. Mut. Ins. Co.* 617 F. Supp. 2d 456 (N.D. Tex. 2008).

This exclusion (8.) does not apply to you or any ***family member*** *while using* ***your covered auto****.*[63]

63. Excluded Driver Endorsement: This provision can apparently be "trumped" by an excluded driver endorsement. There was no coverage in *International Serv. Ins. Co. v. Boll*, in which the insurance policy expressly excluded from coverage damages resulting from the operation of an automobile driven by Roy Hamilton Boll, without identifying Roy's relationship to Bastiaan Boll, the insured. The petition in the underlying damages lawsuit alleged the car was driven by the insured's son, without naming the son. It was "stipulated or undisputed" that at the time of the accident, Roy Hamilton Boll, the insured's only son, was driving. *International Serv. Ins. Co. v. Boll* 392 S.W.2d 158, 160 (Tex. Civ. App.—Houston [1st Dist.] 1965, writ ref'd n.r.e.). Likewise, in *Cook v. Ohio Cas. Ins. Co.*, an excluded driver endorsement that excluded the insured's daughter had the same effect. *Cook v. Ohio Cas. Ins. Co.*, 418 S.W.2d 712 (Tex. Civ. App.—Texarkana 1967, no writ). *See also Johnson v. State Farm Mut. Ins. Co.*, 520 S.W.3d 92 (Tex. App.—Austin 2017, pet. denied).

9. I. For bodily injury or property damage for which that person:

a. is an insured under a nuclear energy liability policy; or

b. would be an insured under a nuclear energy liability policy but for its termination upon exhaustion of its limit of liability.[64]

64. Nuclear Energy Liability Policy: The nuclear energy liability exclusion contained in a commercial general liability (CGL) policy did not apply to the insured's business of handling, transporting, storing and disposing of biomedical nuclear waste near residences. The 5th Circuit Court of Appeals held that a similarly worded exclusion in commercial policies only applied to "nuclear material" at a "nuclear facility" or to injuries for which the insured was also insured by a "nuclear energy liability policy." Since the insured's activities did not involve "nuclear material" of that type and the insured's operations did not fall within the definition of "nuclear facility," the exclusion was held to be inapplicable in *Constitution State Ins. Co. v. IsoTex Inc.*, 61 F.3d 405 (5th Cir. 1995). It is unknown whether the courts of the State of Texas would apply this holding to an automobile policy.

II. A nuclear energy liability policy is a policy issued by any of the following or their successors:

a. Nuclear Energy Insurers;

b. Mutual Atomic Energy Liability Underwriters; or

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c. Nuclear Insurance Association of Canada.

B. We do not provide Liability Coverage for the ownership, maintenance or use of:

1. Any motorized vehicle having fewer than four wheels;[65]

65. Definitions: A motorcycle is a "vehicle," as that term is used in the policy, although it is not an "automobile." *Slaughter v. Abilene State Sch.*, 561 S.W.2d 789 (Tex. 1977); *Equitable Gen. Ins. Co. v. Williams*, 620 S.W.2d 608 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.); *Agricultural Workers Mut. Auto Ins. Co. v. Baty*, 517 S.W.2d 901 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.); *Travelers Ins. Co. v. Elkins*, 468 S.W.2d 487 (Tex. Civ. App.—Tyler 1971, no writ), (citing Tex. Ins. Code Ann. art. 5.01 (Vernon 1963) and Tex. Rev. Civ. Stat. Ann. art. 66871(2) (Vernon 1977)).

2. Any vehicle, other than ***your covered auto****, which is:*

a. owned by you; or

b. furnished or available for your regular use.[66, 67]

66. Purpose: The purpose of this exclusion is to ensure that the insured pays premiums on all of the vehicles which are regularly used and thus covered by the policy. The exclusion seeks to avoid obligating auto insurers to unknown liability for vehicles that insureds do not own but use as theirs. *Benjamin v. Plains Ins. Co.*, 650 F.2d 98, 100 (5th Cir.1981).

67. Regular Use: The purpose of this clause is to provide coverage to an insured for infrequent use of vehicles other than those insured by the policy. It is not intended to relieve the insured of paying premiums for vehicles he uses regularly. *Benjamin v. Plains Ins. Co.*, 650 F.2d 98 (5th Cir. 1981).

In a subrogation action brought by one insurer to enforce a judgment against the insurer of the named insured, the Court of Appeals held that the "owned but unlisted vehicle" exclusion was unambiguous, and applied to exclude coverage for the named insured's liability arising out of his use of a vehicle that he owned but was not listed in the policy declarations. The court rejected the argument that the policy exclusion applied only to unlisted persons while driving an unlisted vehicle. *See Nat'l Fire Ins. Co. of Hartford v. State and Cty. Mut. Fire Ins. Co.*, No. 01–11–00176–CV, 2012 WL 3776422 (Tex. App.—Houston [1st Dist.] Aug. 30, 2012, no pet.) (mem. op.).

3. I. Any vehicle, other than ***your covered auto****, which is:*

a. owned by any ***family member****; or*

b. furnished or available for the regular use[68, 69, 70] *of any* ***family member****.*

68. Regular Use: If an employer assigns to an employee a specific automobile or a number of automobiles, any one of which he may use for a particular trip, in either event the automobile is furnished "for regular use." This provision not only excludes from coverage vehicles that are actually regularly used, but also those "furnished"; i.e., available, for the insured's regular use. *International Serv. Ins. Co. v. Walther*, 463 S.W.2d 774 (Tex. Civ. App.—Austin 1971, no writ).

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69. Regular Use: In *Commercial Standard Ins. v. Ford*, the Amarillo court upheld a jury finding that the insured's son's vehicle was not "available for his regular use," 400 S.W.2d 934 (Tex. Civ. App.—Amarillo 1966, writ ref'd n.r.e.). The evidence in that case was that the insured and his son interchanged trucks, that insured would not use the son's truck for two or three weeks at a time, and that no understanding existed between the insured and his son that the insured could use his son's truck regularly or at will.

70. Regular Use: In *National Emblem Ins. Co. v. McClendon*, the insured's wife moved out of her husband's house and into her mother's home. Twenty days later, she was involved in an auto accident while driving her mother's car. The court upheld a jury finding that her mother's car was not owned by the wife or "furnished for her regular use." *Nat'l Emblem Ins. Co. v. McClendon*, 481 S.W.2d 186 (Tex. Civ. App.—Texarkana 1972, writ ref'd n.r.e.).

II. However, this exclusion (B.3.) does not apply to your maintenance or use of any vehicle which is:

a. owned by a ***family member****; or*

b. furnished or available for the regular use of a ***family member****.*[71]

71. Exception to Exclusion: This exception to the foregoing exclusion was added by the Department of Insurance in 1990. *Emmert v. Progressive, disapproved of on other grounds by Trinity Universal Ins. Co. v. Cowen*, 945 S.W.2d 819, 823 (Tex. 1997) (finding that when *Emmert v. Progressive Cty. Mut. Ins. Co.*, 882 S.W.2d 32 (Tex. App.—Tyler 1994, writ denied)).

C. We do not provide Liability Coverage for you or any family member for bodily injury to you or any family member.[72, 73]

BURNING QUESTION

What is the Family Member Exclusion and what does it mean?

72. Validity: This exclusion is invalid, but only as to the *minimum amount of mandated liability insurance coverage*, and is enforceable for any additional amounts. *Liberty Mut. Fire Ins. Co. v. Sanford*, 879 S.W.2d 9 (Tex. 1994). The minimum amount of mandated liability coverage, as of this writing, is $30,000 per person and $60,000 per accident for bodily injury. The minimum insurance may allow a deductible for each accident: (1) the first $250 of liability for bodily injury or death; (2) the first $500 for bodily injury or death of two or more persons; and (3) the first $250 of liability for property damage to or destruction of property of others. *See* Tex. Transp. Code Ann. § 601.072(b)(1)(3). Prior to the Texas Supreme Court's decision in *National Cty. Mut. Fire Ins. Co. v. Johnson*, 879 S.W.2d 1 (Tex. 1993), the "family member exclusions" allowed insurance companies to completely deny liability coverage for injuries sustained by family members of the insured.

73. Family Member Exclusion: In *Verhoev v. Progressive Cty. Mut. Ins. Co.*, 300 S.W.3d 803 (Tex. App.—Fort Worth 2009, no pet.), the Fort Worth Court of Appeals held that the named insured was entitled to recover both Liability Coverage and Underinsured Motorist Coverage from the same policy when she was injured as the passenger of the insured vehicle while her former husband, who was also named as an insured under the policy

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was driving. At the time the policy was issued, the named insured and her former husband were divorced. The Court of Appeals held that the family-member exclusion applied to cap Liability Coverage to the statutory minimum limits. The family-member exclusion applied because it excluded coverage "for you . . . for bodily injury to you," and both were named insured under the policy. The Court held that the wife was entitled to Underinsured Motorist Coverage as the named insured and that the family member exception did not apply because they were not married at the time of the accident, and she did not own the vehicle driven by her former husband. *But see Johnson v. State Farm Mut. Auto Ins. Co.*, 520 S.W.3d 92 (Tex. App—Austin 2017, rev. denied.) where rental car driven by named insured on family trip was not "underinsured motor vehicle" under auto policy defining "underinsured motor vehicle" to exclude any vehicle owned by or furnished or available for the regular use of the named insured or any family member, and thus, passenger could not recover UIM benefits after recovering statutory minimum in liability coverage.

In *Kidd v. State Farm Mut. Auto Ins. Co.*, No. 05-16-01387-CV, 2018 WL 1755487 (Tex. App.—Dallas 2018, mem. op. rev. denied) the Dallas Court held that even though the umbrella policy's family member exclusion was broader than the liability policy exclusion it nonetheless included the "step -daughter" (who was killed in the car wreck) as a family member and further rejected the argument that the broader umbrella policy exclusion was against public policy. Because the Supreme Court has upheld the family member exclusion in auto policies as long as it provides the state minimum coverage, the same public policy considerations apply to the family member exclusion in the umbrella policy. (*Id.* page 4).

1-2:3 LIMIT OF LIABILITY

A. If separate limits of liability for bodily injury and property damage liability are shown in the Declarations for this coverage the limit of liability for "each person" for bodily injury liability is our maximum limit of liability for all damages for bodily injury sustained by any one person in any one auto accident. Subject to this limit for "each person," the limit of liability shown in the Declarations for "each accident" for bodily injury liability is our maximum limit of liability for all damages for bodily injury resulting from any one auto accident. The limit of liability shown in the Declarations for "each accident" for property damage liability is our maximum limit of liability for all damages to all property resulting from any one auto accident.[74]

74. Limit of Liability: If an insurer settles a liability claim in good faith, the amount of the settlement may be deducted from the liability limits to settle other claims arising from the same accident. Tex. Transp. Code Ann. § 601.073(e) (Vernon 1999). The standard for "good faith" is not hard to meet, as public policy encourages settlement. When faced with more than one settlement demand arising out of multiple claims and inadequate policy proceeds, an insurer may enter into a reasonable settlement or settlements with one or more of several claimants, even though such a settlement may exhaust or diminish the policy proceeds available to satisfy other claims. *Texas Farmers Ins. Co. v. Soriano*, 881 S.W.2d

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312 (Tex. 1994). The test for "reasonableness" of each settlement is based upon the merits of each individual claim.

If the limit of liability shown in the Declarations for this coverage is for combined bodily injury and property damage liability, it is our maximum limit of liability for all damages resulting from any one auto accident.

This is the most we will pay regardless of the number of:

1. ***Covered persons****;*

2. Claims made;

3. Vehicles or premiums shown in the Declarations; or

4. Vehicles involved in the auto accident.

We will apply the limit of liability to provide any separate limits required by law for bodily injury and property damage liability. However, this provision will not change our total limit of liability.[75]

75. Liability Limit: The liability coverage provided is subject to the limits set forth in the policy. It is not enlarged based upon the number of insured persons who may be sued or based upon the number of injured claimants. *American States Ins. Co. of Texas v. Arnold*, 930 S.W.2d 196 (Tex. App.—Dallas 1996, writ denied); *see Manriquez v. Mid-Century Ins. Co.*, 779 S.W.2d 482 (Tex. App.—El Paso 1989, writ denied), *disapproved of on other grounds by Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 823 (Tex.1997) (finding that there are two covered persons, a $50,000 liability limitation for "each person" for bodily injury is not enlarged to $100,000 limitation for "each accident").

B. Any payment under the Uninsured/Underinsured Motorists Coverage or the Personal Injury Protection Coverage of this policy to or for a ***covered person*** *will reduce any amount that person is entitled to recover under this coverage.*[76]

76. Offset: See extended discussion in *Policy and Extra-contractual Issues in Chapter 3.*

1-2:4 OUT OF STATE COVERAGE

If an auto accident to which this policy applies occurs in any state or province other than the one in which ***your covered auto*** *is principally garaged, we will interpret your policy for that accident as follows:*

A. If the state or province has:

1. A financial responsibility or similar law specifying limits of liability for bodily injury or property damage higher than the limit shown in the Declarations, your policy will provide the higher specified limit.

2. A compulsory insurance or similar law requiring a nonresident to maintain insurance whenever the nonresident uses a vehicle in that state or province, your policy will provide at least the required minimum amounts and types of coverage.

B. No one will be entitled to duplicate payments for the same elements of loss.

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1-2:5 FINANCIAL RESPONSIBILITY REQUIRED

When this policy is certified as future proof of financial responsibility,[77, 78, 79] *this policy shall comply with the law to the extent required.*[80]

77. Proof of Insurance: Evidence of financial responsibility must be submitted by a motorist who is obtaining or renewing a driver's license, inspection sticker, or registration or renewal of any of them. V.T.C.A., Transportation Code § 502.153; V.T.C.A., Transportation Code § 521.143; V.T.C.A., Transportation Code § 548.105. Satisfactory evidence of financial responsibility includes a written instrument issued by the liability insurer stating: the name of the insurer, policy number, policy period, the name of the insured, and policy limits or a statement that the policy complies with the required minimum amount of liability insurance. Tex. Rev. Civ. Stat. Ann. art. 6701h, § 1B (West 1990). This requirement has been challenged and upheld as constitutional by the state courts, the federal courts, and the Texas Attorney General. *Riggle v. State*, 778 S.W.2d 127 (Tex. App.—Texarkana 1989, no writ); *Macias v. Raul A.*, 23 F.3d 94 (5th Cir. 1994), *cert. denied*, 513 U.S. 883 (1995); Op. Atty. Gen.1987, No. JM826 (1987).

78. Financial Responsibility: A rental automobile liability policy which specifically excluded a particular driver (the renter) did not, in the case of that driver's accident, afford coverage to him even though the policy recited that it should be construed to comply with financial responsibility laws in *U.S. Cas. Co. v. Brock*, 345 S.W.2d 461 (Tex. Civ. App.—Amarillo 1961, writ ref'd).

79. Financial Responsibility: The responsibility of an insurance company with respect to mandatory insurance becomes absolute whenever injury or damage covered by a motor vehicle liability policy occurs, if the policy is a T.A.I.P. policy (*see* discussion) issued to a person who, in the past, has committed a motor vehicle offense and who is required to have insurance before he is again permitted to drive. *Employers Cas. Co. v. Mireles*, 520 S.W.2d 516 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.); *National Sur. Corp. v. Diggs*, 272 S.W.2d 604 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.); Tex. Transp. Code Ann. § 601.073 (West 1995).

80. Insurance Card: It is a crime to tamper with an insurance card in order to make it appear that it complies with the financial responsibility requirements when it does not. Tex. Penal Code Ann. §§ 37.01(2)(B), 37.10(a)(2) (West 1994); *Elliott v. State*, 976 S.W.2d 355 (Tex. App.—Austin 1998, pet. ref'd).

1-2:6 OTHER INSURANCE

If there is other applicable liability insurance we will pay only our share of the loss.[81, 82] *Our share is the proportion*[83] *that our limit of liability bears to the total of all applicable limits.*[84, 85]

81. Effect: *Pro rata* apportionment among insurers does not affect the terms of the contractual relationship between the insurer and its insured. *Texas Prop. & Cas. v. Southwest Aggregates*, 982 S.W.2d 600 (Tex. App.—Austin 1999, no pet.).

82. Expect more litigation over "Other Insurance" provisions now that insurance companies are permitted to use alternate policy forms. It is important to read each policy carefully. *Safeco Lloyds Ins. Co. v. Allstate Ins. Co.*, 308 S.W.3d 49 (Tex.

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App.—San Antonio 2009, no pet.). A party to litigation is entitled to discovery of the other opponent's liability insurance. *See* Tex. R. Civ. P. 192.3(f).

83. Other Insurance: Each insurer is not liable for any greater proportion of any loss than the amount named in the policy bears to the entire amount of insurance available. *State Farm Fire & Cas. Co. v. Griffin*, 888 S.W.2d 150 (Tex. App.—Houston [1st Dist.] 1994, no writ).

84. Concurrent Coverage: If both policies recite that coverage is concurrent, the *pro rata* clauses of each policy apply. *Traders & Gen. Ins. Co. v. Hicks Rubber Co.*, 140 Tex. 586, 169 S.W.2d 142 (1943); *Security Ins. Co. v. Pioneer Cas. Co.*, 449 S.W.2d 158 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e.).

85. Other Insurance: The question of whether 2 policies are pro rata has been a recurring theme. Two Fifth Circuit commercial cases give differing approaches for resolving two conflicting "other insurance" clauses, while a Federal District Court adopted a *pro rata* approach in proportion to each policy. *Willbros RPI, Inc. v. Continental Cas. Co.*, 601 F.3d 306 (5th Cir. 2010); *Royal Ins. Co. of America v. Hartford Underwriters Ins. Co.*, 391 F.3d 639 (5th Cir. 2004); *Amerisure Mut. Ins. Co. v. Travelers Lloyds Ins. Co.*, No. H-09-662, 2010 WL 1068087 (S.D. Tex. Mar. 22, 2010).

However, any liability insurance we provide to a ***covered person*** *for the maintenance or use of a vehicle you do not own shall be excess*[86] *over any other applicable liability insurance.*[87]

86. Excess: In *Snyder v. Allstate Ins. Co.*, there were two applicable policies. *Synder v. Allstate Ins. Co.*, 485 S.W.2d 769 (Tex. 1972). The vehicle involved in the accident was an "owned automobile" within the meaning of one policy and a "nonowned" vehicle within the meaning of another; thus, the policy under which the vehicle was "owned" was primary and the "nonowned" coverage was excess within the meaning of both policies. *Snyder*, 485 S.W.2d at 770 citing *Great American Indem. Co. v. McMenamin*, 134 S.W.2d 734 (Tex. Civ. App. 1940, error dism'd, judgmt. cor.); *United Servs. Auto Ass'n v. Russom*, 241 F.2d 296 (5th Cir. 1957); *Allstate Ins. Co. v. Universal Underwriters Ins. Co.*, 439 S.W.2d 385 (Tex. Civ. App.—Houston [14th Dist.] 1969, no writ); and *Canal Ins. Co. v. Gensco Inc.*, 404 S.W.2d 908 (Tex. Civ. App. 1966, no writ).

87. Proration: As a general rule, in the event of "other insurance" clauses in which both policies purport to be excess, both clauses are ignored and the claim is prorated between the two insurers. *Hardware Dealers Mut. Fire Ins. Co. v. Farmers Ins. Exch.*, 444 S.W.2d 583 (Tex. 1969). However, an umbrella carrier's excess clause "trumps" a primary policy's excess clause. *Liberty Mut. Ins. Co. v. U.S. Fire Ins. Co.*, 590 S.W.2d 783 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.).

PRACTICE TIP

Do not assume that you know what the term "full coverage" means. It may only mean the minimum liability coverage required by the State of Texas. You may think the involved policy has "the works." Always check the actual policy itself for available coverages.

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1-3 MEDICAL PAYMENTS COVERAGE [1, 2]

1-3:1 INSURING AGREEMENT [3]

A. We will pay[4] reasonable expenses[5] incurred for necessary medical and funeral services because of bodily injury:

1. Medical Payments: The liability of the insurer under Medical Payments Coverage is based upon contract and not on the insured's negligence. *Williams v. Employers Mut. Cas. Co.*, 368 S.W.2d 122 (Tex. Civ. App.—San Antonio 1963, no writ).

2. Nature of Coverage: This provision constitutes a separate accident insurance coverage. *Foundation Reserve Ins. Co. v. Cody*, 458 S.W.2d 214 (Tex. Civ. App.—Dallas 1970, no writ); *American Indem. Co. v. Garcia*, 398 S.W.2d 146 (Tex. Civ. App.—San Antonio 1965, writ ref'd n.r.e) (Medical Payment Coverage, unlike other types of coverage, was available for injuries sustained by the insured while occupying an unscheduled automobile owned and furnished for his regular use). However, the standard auto policy does not provide med pay coverage for any person for bodily injury occurring during the course of employment if worker's comp benefits are available for the bodily injury. *Williams v. Emprs. Mut. Cas. Co.*, 368 S.W.2d 122, 124 (Tex. Civ. App.—San Antonio 1963, no writ). Med pay will only apply if the insured does NOT have worker's comp benefits available.

3. Scope of Coverage: Medical Payments Coverage is broader than Personal Injury Protection. *Dhane v. Trinity Universal Ins. Co.*, 497 S.W.2d 323, 328 (Tex. Civ. App.—Waco 1973), *aff'd*, *Westchester Fire Ins. Co. v. Tucker*, 512 S.W.2d 679 (Tex. 1974).

4. Duplicate Payments: The Austin Court of Appeals permitted an insured to recover under the Medical Payments Coverage of more than one policy in *Harlow v. Southern Farm Bureau Cas. Ins. Co.*, 439 S.W.2d 365 (Tex. Civ. App.—Austin 1969, writ refused n.r.e.). *See also Southwestern Fire & Cas. Co. v. Atkins*, 346 S.W.2d 892 (Tex. Civ. App.—Houston 1961, no writ) (insured was entitled to Medical Payments Coverage as if it were on two separate policies, where a single policy covered two automobiles and premium was established for each automobile separately.). However, this holding is limited to this section of the policy. *Holyfield v. Members Mut. Ins. Co.*, 572 S.W.2d 672 (Tex. 1978); *Westchester Fire Ins. Co. v. Tucker*, 512 S.W.2d 679 (Tex. 1974).

5. Medical Expenses Incurred/Paid: Texas appellate courts have held that a Plaintiff may not recover for medical bills that were "written off" or "adjusted down" by a health insurer. *See Mills v. Fletcher*, 229 S.W.3d 765 (Tex. App.—San Antonio 2007, no pet.) relying upon Tex. Civ. Prac. & Rem. Code Ann. § 41.0105 (West 2008). In so holding the Courts rejected arguments based on the collateral source rule and the potential of inserting insurance before the jury, asserting that the "written-off" amounts were neither incurred by or on behalf of the plaintiff, nor actually paid. The Texas Legislature submitted a bill to Governor Perry effectively reversing these decisions (HB 3281), and Governor Perry vetoed this bill on June 15, 2007, issuing a strong statement which included the following language: "The purpose of damages in a civil lawsuit is to make an injured individual whole by reimbursing the actual amount they have been deprived by the defendant's actions. It should not be used to artificially inflate the recovery amount by

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claiming economic damages that were never paid and never required to be paid." The Amarillo Court has held that medical bills discharged in bankruptcy are not "paid" or "incurred" under § 41.0105 of the Texas Civil Practices and Remedies Code, and thus not recoverable in a personal injury case. *Tate v. Hernandez*, 280 S.W.3d 534 (Tex. App.—Amarillo 2009, no pet. h.); *see Garza de Escabedo v. Haygood*, 283 S.W.3d 3 (Tex. App.—Tyler 2009, pet. filed) (*see* below); *Mills v. Fletcher*, 229 S.W.3d 765 (Tex. App.—San Antonio 2007, no pet.). The question of whether medical expenses have been "paid or incurred" is a question of law, which a Court of Appeals is entitled to review *de novo*. In *Progressive Cty. Mut. Ins. Co. v. Delgado*, the Amarillo Court of Appeals reversed the trial court's judgment and rendered a take nothing judgment against the plaintiff on his UIM claim after the trial court failed to apply § 41.0105 and erroneously considered medical expenses that were written off by the plaintiff's healthcare providers pursuant to contractual agreements with the plaintiff's Medicaid insurer. *See Progressive Cty. Mut. Ins. Co. v. Delgado*, 335 S.W.3d 689, 691-92 (Tex. App.—Amarillo 2011, no pet.).

In *Haygood v. DeEscobedo*, the Texas Supreme Court reaffirmed that not only were the limitations of Section 41.0105 valid and enforceable, but, when a healthcare provider has agreed to charge a claimant at a contractually discounted rate negotiated by the claimant's health insurer, the claimant cannot introduce evidence of the amount billed, but can only introduce evidence of the contractually negotiated charge after adjustment. *Haygood v. DeEscobedo*, 356 S.W.3d 390 (Tex. 2011).

1. Caused by accident;[6] *and*

6. Auto Accident: The Fort Worth Court of Appeals held that the statute does not limit the type of accident covered and, if the parties intended by adding the language "in a motor vehicle accident" to narrow the coverage afforded, it would be repugnant to the Insurance Code, *Berry v. Dairyland Cty. Mut. Ins. Co. of Texas*, 534 S.W.2d 428 (Tex. Civ. App.—Fort Worth 1976, no writ) *disapproved of by Texas Farm Bureau Mut. Ins. Co. v. Sturrock*, 146 S.W.3d 123, 142 (Tex. 2004). Thus, the court extended coverage for injuries received by insured while alighting from the insured automobile. The decision in *Berry* has not been followed by other courts. *Texas Farm Bureau Mut. Ins. Co. v. Sturrock* 146 S.W.3d 123, 142 (Tex. 2004) (In *Berry v. Dairyland Cty. Mut. Ins. Co. of Texas*, the Court of Appeals concluded the "phrase 'motor vehicle accident' can be construed as having more than one meaning" and that it was therefore the courts "duty" . . . "to give the phrase the construction that is most favorable to the insured," however, the court has since "held that the term 'auto accident' is unambiguous, and Berry's holding is therefore unsound."). For insurance: unloading of a deer stand from the motorist's trailer constituted "use" of the trailer for purposes the policy providing underinsured-motorist coverage when liability arises out of use of under-insured vehicle, though policy's "use" clause did not contain words "loading" and "unloading". *Farmers Ins. Exch. v. Rodriguez*, 366 S.W.3d 216 (Tex. App.—Houston [14th Dist.] 2012, rev. denied).

2. Sustained by a ***covered person.***

We will pay only those expenses[7] *incurred within three years from the date of the accident.*

7. Medical Expenses Incurred/Paid: See note 5, this section.

B. ***Covered person*** *as used in this Part means:*

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*1. You or any **family member:***

*a. while **occupying;**[8, 9] or*

8. Owned but Unscheduled Auto: Medical payments can be available even though other types of payments would be excluded because the automobile in which the insured is riding when injured is owned by the insured but not listed on the declarations page of the policy. *American Indem. Co. v. Garcia*, 398 S.W.2d 146 (Tex. Civ. App.—San Antonio 1965, writ ref'd n.r.e.).

9. "Owned but unscheduled" exclusion held to be valid and enforceable: In an unreported case, the Dallas Court of Appeals held the "owned but unscheduled family vehicle" exclusion in the standard personal auto policy regarding UM/UIM Coverage did not violate the Texas Insurance Code. In *Chappell v. Hartford Cas. Ins. Co.*, No. 05-04-01431-CV, 2005 WL 1039975 (Tex. App.—Dallas 2005, no pet.) (mem. op.) the Dallas Court relied upon several other intermediate appellate cases to hold this exclusion valid and enforceable.

b. when struck by;[10]

10. Struck: The insured's son, who drove his motorbike into the rear of a stationary car was not "struck by an automobile" and was thus not entitled to Medical Payments Coverage. *Gallup v. St. Paul Ins. Co.*, 515 S.W.2d 249 (Tex. 1974). In an earlier case, a boy on a bicycle that ran into a parked car was also held not to be "struck by" the car. *Hale v. Allstate Ins. Co.*, 162 Tex. 65, 344 S.W.2d 430 (1961).

a motor vehicle[11, 12, 13] *designed for use mainly on public roads or a trailer of any type.*

11. Owned/Unowned Auto: An insured who was involved in a collision while driving a government owned truck qualified for Medical Payments Coverage even though the truck may have been neither an "owned" automobile nor a "nonowned" automobile under the policy. *Liberty Universal Ins. Co. v. Bodiford*, 426 S.W.2d 583 (Tex. Civ. App.—Houston [1st Dist.] 1968, no writ).

12. Any Auto: An endorsement excluding a specific pickup truck from the policy, except with respect to bodily injuries resulting from being struck by an automobile, did not work to exclude Medical Payments coverage for injuries sustained by the insured and his family while occupying the pickup truck when it collided with another automobile. *Hale v. Allstate Ins. Co.*, 344 S.W.2d 430 (Tex. 1961).

13. Coverage: On a family auto policy covering three vehicles, in which the declarations page provided for Medical Payment Coverage on the first described automobile but not on the second or third described automobiles, the named insureds were entitled to Medical Payments Coverage even though they were not in the first vehicle at the time of their injury. The coverage for the named insured and his family members does not stipulate that the insureds must be in the insured vehicle to invoke coverage. *Cockrum v. Traveler's Indem. Co.*, 420 S.W.2d 230 (Tex. Civ. App.—Dallas 1967, no writ).

*Any other person while **occupying your covered auto**.*

1-3:2 EXCLUSIONS

We do not provide Medical Payments Coverage for any person for bodily injury:

*1. Sustained while **occupying** any motorized vehicle having fewer than four wheels.*[14]

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14. Fewer than Four Wheels: An insured's son was not permitted to recover under this coverage from injuries resulting from a collision between his motorbike and a motorcycle in *Futrell v. Indiana Lumbermens Mut. Ins. Co.*, 471 S.W.2d 926 (Tex. Civ. App.—Houston [1st Dist.] 1971, no writ).

2. Sustained while ***occupying your covered auto*** *when it is:*

a. being used to carry persons for a fee; this does not apply to a share the expense car pool; or

b. being used to carry property for a fee; this does not apply to you or any ***family member*** *unless the primary usage of the vehicle is to carry property for a fee; or*

c. rented or leased to another, this does not apply if you or any ***family member lends your covered auto*** *to another for reimbursement or operating expenses only.*

3. Sustained while ***occupying*** *any vehicle located for use as a residence or premises.*

4. Occurring during the course of employment if workers' compensation benefits are required or available for the bodily injury.[15]

15. Workers' Compensation: This exclusion has been held to be unambiguous and enforceable. *Williams v. Employers Mut. Cas. Co.*, 368 S.W.2d 122 (Tex. Civ. App.—San Antonio 1963, no writ); *Shaver v. Allstate Ins. Co.*, 289 S.W.2d 429 (Tex. Civ. App.—San Antonio 1959, no writ).

5. Sustained while ***occupying*** *or, when struck by, any vehicle (other than* ***your covered auto****) which is:*

a. owned by you; or

b. furnished or available for your regular use.[16]

16. Exclusion: *Gonzales v. Farmers Ins. Exchange*, 399 S.W.2d 888 (Tex. Civ. App.—Eastland 1966, writ ref'd n.r.e). Gonzales had a policy covering a Dodge Dart, with Medical Payment Coverage, and a policy covering an Oldsmobile, with no Medical Payment Coverage. Gonzales and his wife were in an accident while operating the Oldsmobile. The court, in denying recovery under the Medical Payment provisions, relied upon this exclusionary clause. The result would have been different if they had been in some other vehicle [*See* discussion of *Cockrum v. Traveler's Indem. Co.*, 420 S.W.2d 230 (Tex. Civ. App.—Dallas 1967, no writ), above].

6. Sustained while occupying or, when struck by, any vehicle (other than ***your covered auto****) which is:*

a. owned by any ***family member****; or*

b. furnished or available for the regular use of any ***family member****.*[17, 18]

However, this exclusion (6.) does not apply to you.

17. Exclusion: *Vaughn v. Atlantic Ins. Co.*, 397 S.W.2d 874 (Tex. Civ. App.—Tyler 1965, writ ref'd n.r.e.). The insured had a policy on each of his two cars, a Ford and a Chevrolet. While Vaughn, his wife and his daughter, were driving the Ford, they were in a collision in which Mrs. Vaughn was killed. The insurance company admitted liability on the Medical Payments provision

of the policy covering the Ford. Mr. Vaughn attempted to collect Medical Payment Coverage on the Chevrolet. This exclusion precluded recovery.

18. Exclusion: *See Gonzales v. Farmers Ins. Exchange*, 399 S.W.2d 888 (Tex. Civ. App.—Eastland 1966, writ ref'd n.r.e).

7. Sustained while ***occupying*** *a vehicle without a reasonable belief that person is entitled to do so. This exclusion (7.) does not apply to you or any* ***family member*** *while using* ***your covered auto****.*

8. Sustained while ***occupying*** *a vehicle when it is being used in the business or occupation of a* ***covered person****. This exclusion (8.) does not apply to bodily injury sustained while* ***occupying*** *a:*

a. private passenger auto;

b. pickup or van that you own; or

c. trailer used with a vehicle described in 8.a. or 8.b. above.

9. Caused by or as a consequence of:

a. discharge of a nuclear weapon (even if accidental);

b. war (declared or undeclared);

c. civil war;

d. insurrection; or

e. rebellion or revolution.

10. From or as a consequence of the following whether controlled or uncontrolled or however caused:

a. nuclear reaction;

b. radiation; or

c. radioactive contamination. [19]

19. Exclusion: There are no Texas cases discussing this provision. *See* discussion under *Liability.*

1-3:3 LIMIT OF LIABILITY

A. The limit of liability shown in the Declarations for this coverage is our maximum limit of liability for each person injured in any one accident. This is the most we will pay regardless of the number of:

1. ***Covered persons****;*

2. Claims made;

3. Vehicles or premiums shown in the Declarations; or

4. Vehicles involved in the accident. [20]

20. Limit of Liability: *See* discussion of identical provision under *Liability.*

B. Any amounts otherwise payable for expenses under this coverage shall be reduced by any amounts paid or payable for the same expenses under any Auto Liability or Uninsured/Underinsured Motorists Coverage provided by this policy. [21]

21. Validity: *Westchester Fire Ins. Co. v. Tucker*, 512 S.W.2d 679 (Tex. 1974). In *Westchester*, the court was presented with whether the insurer was liable under UM for amounts paid pursuant to the Medical Payments Coverage. The policy carried the statutory minimum UM and liability limits of $10,000. The insured's damages were stipulated to be more than three times that amount. The court refused to allow a credit for sums paid under Medical Payments *to the extent that it would reduce the UM coverage*

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below the minimum limits required by statute. Westchester did not allow an offset because the insured's damages were stipulated to exceed the minimum limits policy by $26,000.

C. No payment will be made unless the injured person or that person's legal representative agrees in writing that any payment shall be applied toward any settlement or judgment that person receives under any Auto Liability or Uninsured/Underinsured Motorists Coverage provided by this policy.

1-3:4 OTHER INSURANCE

If there is other applicable auto medical payments insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible auto insurance providing payments for medical or funeral expenses.[22]

22. *Pro rata* Clause: When two policies have "other insurance" clauses which state that the policy provides only excess insurance with respect to non-owned vehicles, but provides for prorated coverage with respect to owned vehicles, the company insuring the non-owned vehicle is considered excess. *See Synder v. Allstate Ins. Co.*, 485 S.W.2d 769 (Tex. 1972); *American States Ins. Co. v. ACE Am. Ins. Co.*, 547 Fed Appx. 550 (5th Cir. 2013); *American Nat'l. Cty. Mut. Ins. Co. v. Travelers Indem.. Co.*, No. H-09-340, 2010 WL 2541975, slip op. at *2 (S.D. Tex. June 22, 2010). When two "other insurance" clauses state they are only excess with respect to non-owned vehicles, the owned vehicle is considered primary and the non-owned vehicle is considered excess.

1-3:5 ASSIGNMENT OF BENEFITS

Payment for medical expenses will be paid directly to a physical or other health care provider if we receive a written assignment signed by the ***covered person*** *to whom such benefits are payable.*

1-4 PERSONAL INJURY PROTECTION COVERAGE[1,2,3,4,5,6,7]

1. Comparison: In *Dabney v. Home Ins. Co.*, 643 S.W.2d 386 (Tex. 1982), the Texas Supreme Court observed that PIP coverage is comparable to Medical Payments Coverage in that both are no fault and pay for similar expenses. However, the coverage of MPC is broader. *See Medical Payments Coverage* in § 1-3.

PRACTICE TIP

If there is no written rejection of PIP and/or UIM, the insured has an amount equivalent to the statutory liability minimum.

2. Required by Statute: Section 1952.151 (formally Article 5.063(b)) of the Texas Insurance Code establishes PIP coverage as a

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quick source of funds for an insured accident victim for immediate medical expenses and wage losses that are likely to result from an accidental injury involving an automobile. Although the statutory minimum amount is $2,500, the insured is free to purchase a higher amount of PIP coverage. *See* Tex. Ins. Code Ann. § 1952.153 (West 2017).

3. Statutorily Required: Absent a written rejection, UM/UIM and PIP coverage exist in every automobile policy as a matter of law. *Ortiz v. State Farm Mut. Auto. Ins. Co.*, 955 S.W.2d 353 (Tex. App.—San Antonio 1997, pet. denied); Tex. Ins. Code Ann. § 1952.101(c) (requiring written rejection of UM/UIM coverage by the insured) (West 2017); Tex. Ins. Code Ann. § 1952.152 (requiring written rejection of PIP coverage by the insured) (West 2017). Each insured must individually reject PIP and UM/UIM in order for the rejection to be valid as to him. *Old Am. Cty. Mut. Fire Ins. Co. v. Sanchez*, 81 S.W.3d 452 (Tex. App.—Austin 2002), *rev'd on other grounds*, 149 S.W.3d 111 (Tex. 2004).

4. Coverage: If a policy does not contain UM/UIM or PIP and a written rejection cannot be found, this would ordinarily result in coverage. However, in *Johnen ex rel. Sidatt v. State Farm Mut. Auto. Ins. Co.,* No. 03-04-00144-CV, 2004 WL 1792435 (Tex. App.—Austin 2004, no pet.). An affidavit from the named insured stating that UIM had been rejected, along with affidavits from the carrier's personnel and a copy of the declarations page and policy was sufficient, despite the fact that the written rejection had been lost by the insurer. Presumably, this would apply to PIP as well.

5. Purpose of PIP: PIP is no fault insurance designed to cover the immediate expenses arising from physical injuries due to an automobile accident. *Creighton v. Fidelity & Cas. Co. of New York*, 581 S.W.2d 815 (Tex. Civ. App.—Fort Worth 1979, no writ).

6. Rejection: A written rejection within an application which stated, "PERSONAL INJURY PROTECTION COVERAGE has been offered pursuant to Art. 5.063 Texas Insurance Code, I reject," has been held to be clear and effective, even though the insured signed the application at the bottom of the page and not next to this statement. *Ortiz v. State Farm Mut. Auto. Ins. Co.*, 955 S.W.2d 353 (Tex. App.—San Antonio 1997, writ denied). The Austin Court of Appeals has held that PIP rejection signed on a prior policy with one company (Mid Century) was effective as to a renewal with another related company (Farmers). *Payne v. Mid-Century Ins. Co.*, No. 03-02-00641-CV. 2003 WL 22024458 (Tex. App.—Austin Aug. 29, 2003, no pet.). SEE THE TEXAS RULES OF APPELLATE PROCEDURE FOR CITATION OF MEMORANDUM OPINIONS AND UNPUBLISHED OPINIONS. *See also Cain v. Progressive Cty. Mut. Ins. Co.*, 448 S.W.3d 550, Tex. App.—Houston [14th Dist.] 2014, judgment aff'd.) (holding that original written rejection was valid for each new successive policy in an unbroken chain of coverage going back to the initial policy).

7. Waiver: In *Old American Cty. Mut. Fire Ins. Co. v. Sanchez*, 149 S.W.3d 111 (Tex. 2004), the Texas Supreme Court held that the legislature intended to equate the phrase "any insured named in the policy" with "the named insured," as found in Tex. Ins. Code Ann. arts. 5.061(1), 5.063(a) for UM and PIP coverage, respectively. The insured's wife, therefore, was a "named insured" and thus an "insured named in the policy" as contemplated by the legislature when enacting the articles. As such, she had statutory authority to reject UM and PIP coverages.

1-4:1 INSURING AGREEMENT

A. We will pay Personal Injury Protection benefits because of bodily injury:

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1. resulting from a motor vehicle accident;[8, 9, 10] *and*

8. Auto Accident: The Eastland Court of Appeals in *Flores v. Dairyland Cty. Mut. Ins. Co. of Texas*, 595 S.W.2d 893 (Tex. Civ. App.—Eastland 1980, writ ref'd n.r.e.), refused to permit PIP payments to an insured who was injured after he alighted from the automobile, closed the door, stepped four steps from the vehicle, and tripped and fell on a curb, breaking his leg. Such an accident did not constitute a motor vehicle accident. *See also Le v. Farmers Tex. Cty. Mut. Ins. Co.*, 936 S.W.2d 317, 324 (Tex. App.—Houston [1st Dist.] 1996, writ denied) (drive-by shooting did not constitute "motor vehicle accident".).

9. Bodily Injury: A person injured when alighting his vehicle was found to have PIP coverage in *Texas Farm Bureau Mut. Ins. Co v. Sturrock*, 146 S.W.3d 123 (Tex. 2004). The insured was injured when his foot became entangled with his truck's door while he was exiting the vehicle. His insurer initially denied the claim; the issue was whether his injury resulted from a "motor vehicle accident" for purposes of PIP coverage under his Texas standard automobile insurance policy. The Court held that a "motor vehicle accident" occurred when (1) one or more vehicles were involved with another vehicle, an object, or a person, (2) the vehicle was being used, including exit and entry, as a motor vehicle, and (3) a causal connection existed between the vehicle's use and the injury producing event. Therefore, the insured's injury resulted from a "motor vehicle accident" within his policy's PIP coverage.

10. Accident: An automobile passenger who was injured in a drive by shooting was not permitted to recover uninsured motorist (UM) benefits or personal injury protection (PIP) benefits in *Le v. Farmers Texas Cty. Mut. Ins. Co.*, 936 S.W.2d 317 (Tex. App.—Houston [1st Dist.] 1996, writ denied). The court held that the passenger's injuries did not arise from "use" of the vehicle, so the passenger was not entitled to UM benefits; the physical contact requirements for UM coverage were not met; and the shooting was not an "accident" to implicate PIP coverage.

2. sustained by a ***covered person****.*[11]

11. Covered Person: The Texas Supreme Court has held that a named driver exclusion is insufficient as partial rejection of statutory Personal Injury Protection that has been a required part of every policy, unless rejected in writing, since 1973. *Unigard Sec. Ins. Co. v. Schaefer*, 572 S.W.2d 303 (Tex. 1978). A named insured's spouse was a named insured and an insured named in the policy and therefore had authority to reject PIP benefits for the named insured even though declarations page did not list the spouse as a named insured. *Old Am. Cty. Mut. Fire Ins. Co. v. Sanchez*, 149 S.W.3d 111 (Tex. 2004).

Our payment will only be for losses or expenses incurred[12, 13] *within three years from the date of accident.*

12. Incurred: The word "incur' means to become liable to or subject to, to bring on, occasion, cause, or become liable or subject to through one's own action; bring upon oneself; as to incur liabilities or penalties." In *GEICO v. Vail*, the court held that an insured who was treated for free at a military hospital was nonetheless entitled to the reasonable and necessary cost of his care under personal injury protection. *Government Employees Ins. Co. v. Vail*, 623 S.W.2d 170 (Tex. App.—Beaumont 1981, writ ref'd n.r.e.). Medical expenses under this coverage are "incurred" regardless

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of whether the insured has actually had to pay the expense. *Black v. Am. Bankers Ins. Co.*, 478 S.W.2d 434 (Tex. 1972); *American Indem. Co. v. Olesijuk*, 353 S.W.2d 71 (Tex. Civ. App. San Antonio 1961), writ dismissed (Mar. 21, 1962).

13. Medical Expenses Incurred/Paid: The San Antonio Court of Appeals held that a Plaintiff may not recover for medical bills that were "written off" or "adjusted down" by a health insurer. *See Mills v. Fletcher*, 229 S.W.3d 765 (Tex. App.—San Antonio 2007, no pet.) relying upon Tex. Civ. Prac. & Rem. Code Ann. § 41.0105 (West 2008). In so holding the Courts rejected arguments based on the collateral source rule and the potential of inserting insurance before the jury, asserting that the "written-off" amounts were neither incurred by or on behalf of the plaintiff, nor actually paid. The Texas Legislature submitted a bill to Governor Perry effectively reversing these decisions (HB 3281), and Governor Perry vetoed this bill on June 15, 2007, issuing a strong statement which included the following language: "The purpose of damages in a civil lawsuit is to make an injured individual whole by reimbursing the actual amount they have been deprived by the defendant's actions. It should not be used to artificially inflate the recovery amount by claiming economic damages that were never paid and never required to be paid." As we all are now aware in *Haygood v. De Escabedo*, 356 S.W.3d 390 (Tex. 2011), the Supreme Court held that "recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant." *Id.* at 398. Section 41.0105 limits a claimant's recovery to "expenses that have been or will be paid and excludes the difference between such amounts and charges the service provider bills but has no right to be paid."

B. Personal Injury Protection benefits consist of:

1. Reasonable expenses incurred for necessary medical and funeral services.[14, 15, 16]

14. Medical Expenses Incurred/Paid: *See* note 13, above.

15. Standing/Reasonableness of Medical Bills: *Allstate Indem. Co. v. Forth*, 204 S.W.3d 795 (Tex. 2006): An insured sued her automobile insurer for settling her daughter's medical bills for 85 cents on the dollar under her PIP coverage. The insured claimed that Allstate was "arbitrary" and "unreasonable" in failing to pay the full amount of her "reasonable expenses." Reasoning that Forth did not show injury (or even potential injury), the Texas Supreme Court ruled in favor of Allstate.

16. Reasonable and Necessary: The Texas Insurance Commissioner declined to prohibit insurers' use of medical review organizations in Bulletin B005000, issued September 11, 2000. However, in so ruling, the Commissioner reiterated the legal requirements for fair claims handling.

2. I. Eighty percent of a ***covered person****'s loss of income from employment. These benefits apply only if, at the time of the accident, the* ***covered person***

a. was an income producer; and

b. was in an occupational status.[17, 18]

17. Occupational Status: A fact issue exists as to the insured's occupational status where the insured had accepted an offer of definite employment to begin on the first working day after the accident, and had evidence of the conditions of the employment, history of job

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during past two semesters and the wage he would have earned. *Slocum v. United Pac. Ins. Co.*, 577 S.W.2d 805 (Tex. Civ. App.—Houston [14th Dist.] 1979), appeal after remand *Slocum v. United Pac. Ins. Co.*, 615 S.W.2d 807 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.).

18. Occupational Status: One need not actually be on the job when injured to be in an "occupational status"; one need merely be employed. In *Slocum v. United Pac. Ins. Co.*, the court upheld a jury finding that the insured, whose hand was fractured in an automobile accident, rendering him unable to commence work on a summer job which was to begin two days later, was not a wage or income producer within this clause. 615 S.W.2d 807 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.).

*These benefits do not apply to any loss after the **covered person** dies.*[19]

19. Death: The limitation providing loss of income benefits only for that income lost while the insured was living was held to be valid and not contrary to the Insurance Code in *Sterling v. U.S. Fidelity & Guar. Co.*, 555 S.W.2d 889 (Tex. Civ. App.—Beaumont 1977, writ ref'd n.r.e.).

II. Loss of income is the difference between

*a. income which would have been earned had the **covered person** not been injured; and*

b. the amount of income actually received from employment during the disability.

III. If the income being earned as of the date of accident is a salary or fixed remuneration, it shall be used in determining the amount of income which would have been earned. Otherwise, the average monthly income earned during the period (not more than 12 months) preceding the accident shall be used.

*3. I. Reasonable expenses incurred for obtaining services. These services must replace those a **covered person** would normally have performed:*

a. without pay;

b. during a period of disability; and

c. for the care and maintenance of the family or household.[20]

20. Policy Language: This language is taken directly from Tex. Ins. Code Ann. art. 5.063(b). "A unique feature of the Texas PIP statute is its retention of the collateral source rule with regard to other medical and wage continuation benefits that the recipient might be entitled to receive." *Laurence v. State Farm Mut. Auto. Ins. Co.*, 984 S.W.2d 351 (Tex. App.—Austin 1999, pet. denied).

*II. These benefits apply only if, at the time of the accident, the **covered person**:*

a. was not an income producer; and

b. was not in an occupational status.

*These benefits do not apply to any loss after the **covered person** dies.*

*C. **Covered person** as used in this Part means:*

*1. You or any **family member**;*[21]

21. Family Member: In *Grain Dealers Mut. Ins. Co. v. McKee*, 943 S.W.2d 455 (Tex. 1997),

the Texas Supreme Court held that the daughter of the sole shareholder of the corporate insured was not a "family member" of the insured corporation, which would have made her entitled to PIP and UM benefits. In so doing, the court held that the clause was not ambiguous.

*a. while **occupying**; or*

*b. when struck by; a motor vehicle designed for use mainly on public roads or a **trailer** of any type.*

*2. Any other person while **occupying your covered auto** with your permission.*

1-4:2 EXCLUSIONS

We do not provide Personal Injury Protection Coverage for any person for bodily injury sustained:

1. In an accident caused intentionally by that person.

2. By that person while in the commission of a felony.

3. By that person while attempting to elude arrest by a law enforcement official.[22]

*4. While **occupying**, or when struck by, any motor vehicle (other than **your covered auto**)*[23, 24] *which is owned by you.*[25]

22. Source: These three exclusions are taken directly from Article 5.06-3, Tex. Ins. Code Ann., now V.T.C.A. Insurance Code § 152.158. *Springfield v. Aetna Cas. & Sur. Ins. Co.*, 612 S.W.2d 285 (Tex. Civ. App.—Austin 1981), writ ref'd n.r.e. 620 S.W.2d 557 (Tex. 1981). They are similar to the exclusions contained in the *Liability* section.

Section 152.158 reads as follows:

An insurer shall exclude benefits to an insured or the insured's personal representative under the coverage required by this subchapter if the insured's conduct contributed to the injury the insured sustained and that conduct:

(1) involved intentionally causing injury to the insured;

(2) occurred while committing a felony or while seeking to elude lawful apprehension or arrest by a law enforcement official.

23. Owned but Unscheduled: This exclusion has been held to be valid in *Springfield v. Aetna Cas. & Sur. Ins. Co.*, 612 S.W.2d 285 (Tex. Civ. App.—Austin 1981, writ ref'd n.r.e.) 620 S.W.2d 557 (Tex. 1981). Insurers have a right to know what vehicles are covered and to charge premiums based on these risks.

24. "Owned but Unscheduled" Exclusion Held to Be Valid and Enforceable: In an unreported case, the Dallas Court of Appeals held the "owned but unscheduled family vehicle" exclusion in the standard personal auto policy regarding UM/UIM Coverage did not violate the Texas Insurance Code. In *Chappell v. Hartford Cas. Ins. Co.,* No. 05-04-01431-CV, 2005 WL 1039975 (Tex. App.—Dallas 2005, no pet.) (mem. op.). The Dallas Court relied upon several other intermediate appellate cases to hold this exclusion valid and enforceable.

25. Owned but Unscheduled: *State Farm Mut. Auto. Ins. Co. v. Maynord*, 689 S.W.2d 292 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.). The insured could recover PIP benefits under his motorcycle policy, but not his auto policy (upon which the motorcycle was not listed) due to this exclusion.

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*5. By a **family member** while **occupying**, or when struck by any motor vehicle (other than **your covered auto**) which is owned by a **family member**.*[26]

26. Owned by a Family Member: In *Moore v. State Farm Mut. Auto. Ins. Co.*, 792 S.W.2d 818 (Tex. App.—Houston [1st Dist.] 1990, no writ), the Houston court relied upon *Holyfield v. Members Mut. Ins. Co.*, 566 S.W.2d 28 (Tex. Civ. App.—Dallas 1978), writ ref'd n.r.e., 572 S.W.2d 672 (Tex. 1978), to hold that this exclusion was valid as to Personal Injury Protection and UM/UIM because an insurer is entitled to accurately reflect in the policy the risks that the insurer is underwriting and to reflect those risks in the premium charged.

1-4:3 LIMIT OF LIABILITY

The limit of liability shown in the Declarations for this coverage is our maximum limit of liability for each person injured in any one accident. This is the most we will pay regardless of the number of:

*1. **Covered persons**;*

2. Claims made;

3. Vehicles or premiums shown in the Declarations; or[27, 28, 29]

4. Vehicles involved in the accident.

27. Liability Limit: A single multicar policy providing PIP benefits cannot be increased by multiplying the PIP policy limit by the number of cars insured under one policy. *Guerrero v. Aetna Cas. & Sur. Co.*, 575 S.W.2d 323 (Tex. Civ. App.—San Antonio 1978, no writ). However, if two separate policies covering the same cars are involved, the PIP benefits are not stacked, but the insurer is required to pay up to the limit under each policy. In other words, a single multi-car policy providing PIP coverage cannot be increased by multiplying the PIP policy limits by the number of cars insured under one policy. (*Id.* at page 326). *Travelers Indem. Co. of Rhode Island v. Lucas*, 678 S.W.2d 732 (Tex. App.—Texarkana 1984, no writ).

28. Limit: In *Carter v. Republic Ins. Co.*, 579 S.W.2d 326 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.), there was only one insured. The court held that she had contracted to be limited to collection of no more than a single policy limit of $2,500 and that amount could not be enlarged. This was despite her contention that because she had paid for PIP coverage under a single policy for coverage of five automobiles, with no particular amount assessed as premium for any single one of them, but a single premium amount that covered all five vehicles, the $2,500 should be considered as contracted to be multiplied five times.

29. Stacking: In cases where an attempt has been made to "stack" coverage on an insured's own policy covering two or more automobiles, Texas courts have consistently held that, unlike Medical Payments Coverage, PIP coverage may not be stacked. *Carter v. Republic Ins. Co.*, 579 S.W.2d 326 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.); *Guerrero v. Aetna Cas. & Sur. Co.*, 575 S.W.2d 323 (Tex. Civ. App.—San Antonio 1978, no writ); *Sterling v. United States Fidelity & Guar. Co.*, 564 S.W.2d 779 (Tex. Civ. App.—Beaumont 1977, no writ).

1-4:4 OTHER INSURANCE

If there is other Personal Injury Protection insurance, we will pay only

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our share. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible Personal Injury Protection insurance.[30]

30. Double Recovery: The El Paso Court of Appeals refused to permit an insured a double recovery for funeral and hospital expenses under two separate policies providing Personal Injury Protection in *United Servs. Auto. Ass'n v. DiCarlo*, 670 S.W.2d 756 (Tex. App.—El Paso 1984, writ ref'd n.r.e.).

1-4:5 OTHER PROVISIONS

*A. **Loss payments.** Benefits are payable:*

1. Not more frequently than every two weeks; and

2. Within 30 days after satisfactory proof of claim is received.[31]

31. Timetable: In the unpublished case of *Lusk v. Mid-Century Ins. Co. of Texas*, No. 07-97-0328-CV, 1998 WL 609766 (Tex. App.—Amarillo 1998, no writ) (mem. op.), not designated for publication. The Amarillo Court of Appeals held that the 30 day window for PIP payments contained in the policy and Article 5.063(d) of the Texas Insurance Code "trumps" the five day deadline for payment in Article 21.55, Section 4 of the Insurance Code.

*B. **Modification.** The General Provision part of this policy entitled "Our Right to Recover Payment" does not apply to this coverage.*

1-4:6 ASSIGNMENT OF BENEFITS

*Payments for medical expenses will be paid directly to a physician or other health care provider if we receive a written assignment signed by the **covered person** to whom such benefits are payable.*

1-5 UNINSURED/ UNDERINSURED MOTORISTS

1-5:1 COVERAGE[1,2,3,4,5,6,7,8,9,10]

1. What Constitutes UM Coverage: *Sidelnik v. American States Ins. Co.*, 914 S.W.2d 689 (Tex. App.—Austin 1996, writ denied). An umbrella indemnity insurance policy providing excess coverage for liability arising from automobile accidents is not an "automobile liability insurance" policy within the meaning of Texas Motor Vehicle Safety Responsibility Act mandating uninsured motorist (UM) coverage in automobile liability insurance. Thus, the umbrella policy did not have to provide UM coverage in addition to the UM coverage that was provided for in the primary automobile insurance policy. (Citing Tex. Ins. Code Ann. art. 5.061(1) (Supp. 1995)). "The umbrella policy issued by [the insurance company] is an inherently different type of insurance from an automobile or motor vehicle liability policy, and consequently does not come within the scope of the uninsured motorist statute." *Sidelnik v. American States Ins. Co.*, 914 S.W.2d at 693.

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2. You Gotta Have It: This coverage is statutorily required (unless rejected) in the standard personal automobile policy, but this is not true with regard to other types of insurance, even if those policies apply to automobiles. *Taylor v. State Farm Lloyds, Inc.*, 124 S.W.3d 665 (Tex. App.—Austin 2003, pet. denied) (multi-peril business policy).

3. A self-insured employer is not required to provide UM/UIM Coverage for its employees who are covered for work related injuries by Workers' Compensation: In a case of first impression, the Amarillo Court of Appeals held that an employee who was injured in an automobile accident while driving in the course and scope of his employment was not entitled to sue his employer as a self-insurer for UM/UIM benefits where the employee received Workers' Compensation benefits under a policy purchased by his employer. The Court held that the Workers' Compensation Act provided the exclusive remedy to the employee. *See Smith v. City of Lubbock*, 351 S.W.3d 584 (Tex. App.—Amarillo 2011, pet. denied).

4. UM/UIM Is Part of Every Policy Unless There Is a Written Rejection: If an insured does not reject UM/UIM coverage in writing at time of the issuance of the policy, then there is UM/UIM coverage Tex. Ins. Code Ann. § 1952.101(c) (West 2017). The intent of the parties is not relevant and a policy cannot be reformed to retroactively reject UM/UIM coverage. *Howard v. INA Cty. Mut. Ins. Co.*, 933 S.W.2d 212 (Tex. App.—Dallas 1996, writ denied). The insured cannot waive the requirement that rejection of UM/UIM be in writing. *Employers Cas. Co. v. Sloan*, 565 S.W.2d 580 (Tex. Civ. App.—Austin 1978, writ ref'd n.r.e.).

PRACTICE TIP
Rejected Coverage
If a policy does not contain UM/UIM or PIP and a written rejection cannot be found, this would ordinarily result in coverage.

5. Rejected Coverage: However, in *Johnen ex rel. Sidatt v. State Farm Mut. Auto. Ins. Co.*, No. 03-04-001144-CV, 2004 WL 1792435 (Tex. App.—Austin 2004, no pet.), an affidavit from the named insured stating that UIM had been rejected, along with affidavits from the carrier's personnel and a copy of the declarations page and policy was sufficient, despite the fact that the written rejection had been lost by the insurer. Presumably, this would apply to PIP as well.

6. Waiver: In *Old American Cty. Mut. Fire Ins. Co. v. Sanchez*, 149 S.W.3d 111 (Tex. 2004), the Texas Supreme Court held that the legislature intended to equate the phrase "any insured named in the policy" with "the named insured," as found in Tex. Ins. Code Ann. arts. 5.061(1), 5.063(a) for UM and PIP coverage, respectively. The insured's wife, therefore, was a "named insured" and thus an "insured named in the policy" as contemplated by the legislature when enacting the articles. As such, she had statutory authority to reject UM and PIP coverages.

7. Amount: If there is no written rejection and the coverage exists by operation of law, it exists in an amount equivalent to the statutory minimum of liability insurance. *Allstate Ins. Co. v. Hunt*, 469 S.W.2d 151 (Tex. 1971).

8. Subsequent Policies: Different courts have reached different results about whether a rejection of uninsured motorist coverage

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signed by an insured was effective against the renewal policy issued by the same insurer. It was not effective as a rejection and uninsured motorist coverage was included in the otherwise identical subsequent policy by operation of law in *Guarantee Ins. Co. of Texas v. Boggs*, 527 S.W.2d 265 (Tex. Civ. App.—Amarillo 1975, writ dism'd). However, the opposite result was reached in *Berry v. Texas Farm Bureau Mut. Ins. Co.*, 782 S.W.2d 246 (Tex. App.—Waco 1989, writ denied) (An extension certificate may show the purpose and intention of the parties is not to make a new contract but to continue the original contract in force). Interestingly, the Dallas Court of Appeals has cited *Berry* in support of requiring a separate rejection for each subsequent policy. *Howard v. INA Cty. Mut. Ins. Co.*, 933 S.W.2d 212 (Tex. App.—Dallas 1996, writ denied).

9. Rejection: An endorsement stating, "You further agree that this endorsement will also serve as a rejection of Uninsured/ Underinsured Motorists Coverage and Personal Injury Protection Coverage," constitutes a clear and express rejection of UM/UIM coverage. *Sims v. Standard Fire Ins. Co.,* 781 S.W.2d 328 (Tex. App.—Houston [1st Dist.] 1989, writ denied).

10. Waiver: In *Old American Cty. Mut. Fire Ins. Co. v. Sanchez*, 149 S.W.3d 111 (Tex. 2004). The court ruled that the spouse was "named insured" and therefore had authority to reject UM and PIP benefits even though declarations did not list the spouse as named insured.

1-5:2 INSURING AGREEMENT[11]

11. Purpose of UM/UIM Coverage: The purpose of UM/UIM coverage is to place the insured in the same position as if the uninsured/ underinsured motorist had been properly insured. *Sikes v. Zuloaga*, 830 S.W.2d 752 (Tex. App.—Austin 1992, no writ). The legislature's purpose was to protect conscientious motorists from "financial loss caused by negligent financially irresponsible motorists." *Stracener v. United Servs. Auto. Ass'n*, 777 S.W.2d 378 (Tex. 1989).

A. We will pay damages[12] which a covered person[13, 14] is legally entitled[15, 16, 17, 18, 19, 20, 21] to recover from the owner or operator of an uninsured motor vehicle because of bodily injury[22] sustained by a covered person,[23] or property damage, caused by [24] an accident.[25, 26, 27, 28, 29]

12. Damages: In *Warmbrod v. USAA Cty. Mut. Ins. Co.*, 367 S.W.3d 778 (Tex. App.—El Paso 2012, pet. denied), the El Paso Court of Appeals held that UM/UIM Coverage paid contractual benefits and not "damages" within the meaning of the Federal Medical Care Recovery Act, 42 U.S.C. §§ 2651–53, which allows the United States Government to subrogate against a person for tort liability to pay "damages." Therefore, the U.S. Army was not entitled to reimbursement from the insured's UM/UIM policy for benefits paid on behalf of the Insured serviceman's spouse who received medical treatment at an Army facility as the result of an automobile accident. However, the U.S. Army was entitled to reimbursement pursuant to 10 U.S.C. § 1095, which allows reimbursement of reasonable charges for health care services from a "third-party payer" because the insurer, USAA was a "third-party payer as defined by the statute. Therefore, the insurer was entitled to include the U.S. Army on the check as a co-payee.

13. Covered Person: An excluded driver endorsement was sufficient to exclude a driver from UM/UIM coverage in *Greene v. Great American Ins. Co.*, 516 S.W.2d 739 (Tex. Civ. App.—Beaumont 1974, writ ref'd n.r.e.),

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disapproved of on other grounds by Unigard Sec. Ins. Co. v. Schafer, 572 S.W.2d 303 (Tex. 1978). It is doubtful that this case would be followed today, since one of the bases for the opinion was that UM/UIM was not mandatory at the time.

PRACTICE TIP
Check the policy limits! *Metropolitan Ins. Co. v. Foster*, 226 S.W.3d 597 (Tex. App.—Houston [1st Dist.] 2007, no pet.), an insurer who settled a UIM claim for $50,000 was bound to the settlement even after it belatedly realized that (whoops!) the actual policy limit was only half that amount. In holding the insurer to the settlement, the Court noted that the settlement was Court approved and that the insurer did not seek the appropriate appellate remedies within 30 days of the signing of the judgment.

14. Covered Person: If an insured wants a resident of his household to be a covered person under his policy's UM/UIM coverage, he should, in an abundance of caution, list her as a covered person. *See Williams v. State Farm Mut. Auto. Ins. Co.*, No. 06-09-00084-CV, 2010 WL 415408 (Tex. App.—Texarkana Feb. 5, 2010, no pet.).

15. Legally Entitled: In *United States Fidelity & Guar. Co. v. Cascio*, 723 S.W.2d 209 (Tex. App.—Dallas 1986, no writ), an insured who dismissed with prejudice her action against the allegedly negligent third party without her insurer's consent could not subsequently recover against her insurer. The court held that the dismissal with prejudice of the at-fault motorist removes the predicate for recovery under this policy language and Article 5.061 of the Insurance Code. Now Tex. Ins. Code § 1952.106 et seq. The Dallas Court of Appeals upheld summary judgment against an insured who had inadvertently nonsuited the third party in the unpublished case of *Walken v. Prudential Prop. & Cas.,* No. 05-98-01134-CV, 2001 (2001 WL 1013569) (Tex. App.—Dallas Sept. 6, 2001, no pet.) (mem. op.). Walken initially sued both Prudential, his insurer, and Mitchem, the third party with whom he had the accident. By amended pleading filed after the statute of limitations had run, Walken dismissed his claims against Mitchem. In affirming summary judgment in favor of Prudential, the Dallas Court of Appeals focused on the phrase "legally entitled," noting that, since Walken was not "legally entitled" to recover from Mitchem, Prudential had no obligation under his UM/UIM coverage.

16. Legally Entitled to Recover: See extended, detailed discussion in Chapter 3, § 3-3.

17. Cross Your T's and Dot Your I's: In a contract suit for UIM coverage, an insured must introduce her policy and establish that she had underinsured motorist coverage. She also has the burden to provide evidence of her settlement with the underinsured driver and his policy limits. *Mid-Century Ins. Co. of Texas v. McClain*, No. 11-08-00097-CV, 2010 WL 851407 (Tex. App.—Eastland Mar. 12, 2010, no pet.).

18. Prejudgment Interest: *See* extended, detailed discussion in Chapter 3, § 3-2.

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19. Attorneys' Fees: Attorneys' fees are generally not recoverable in a suit to establish UM/UIM Coverage because the obligation of the insurer to pay benefits is not triggered until liability and damages have been established by a judgment. Therefore, the insured has no "claim" to present and there is no "just amount owed" to support an award of attorney's fees under Chapter 38 of the Texas Civil Practices & Remedies Code. *See Brainard v. Trinity Univ. Ins. Co.*, 216 S.W.3d 809, 815-19 (Tex. 2006); *State Farm Mut. Auto. Ins. Co. v. Nickerson*, 216 S.W.3d 823, 824 (Tex. 2006); *State Farm Mut. Auto. Ins. Co. v. Norris*, 216 S.W.3d 819, 822-23 (Tex. 2006).

CURRENT SPLIT IN AUTHORITY: *Allstate Ins. Co. v. Irwin*, 2019 WL 3937281 (Tex. App.—San Antonio Aug. 21, 2019, pet. filed) allowed for attorney fee recovery in a UIM claim filed as a declaratory judgment holding that the trial court has discretion to award equitable and just attorney fees without regard to whether the recipient is the prevailing party. *Contra:* the Texarkana Court of Appeals held that allowing recovery of attorney fees in the UM cases under the UDJA would create a special category of contract cases where attorney fees would be recoverable prior to "presentment". The Texarkana Court made it clear that the UDJA cannot be used as a vehicle to obtain otherwise impermissible attorney fees. *Allstate v. Jordan*, 503 S.W.3d 450, 457 (Tex. App.—Texarkana 2016, no pet.).

Attorneys' fees are generally not recoverable under the Prompt Payment of Claims Act in a suit to establish UM/UIM Coverage because a "claim" under the Act, which is one that "must be paid" does not arise until liability and damages are established by a judgment. *See Mid-Century Ins. Co. of Tex. v. Daniel*, 223 S.W.3d. 586, 589 (Tex. App.—Amarillo 2007, reh'g overruled); *Schober v. State Farm Mut. Auto. Ins. Co.,* No. 3:06-CV-1921-M, 2007 WL 2089435 (N.D. Tex. July 18, 2007); *Owen v. Employers Mut. Cas. Co.*, No. 3:06-CV-1993-K, 2008 WL 833086, at *4 (N.D. Tex. Mar. 28, 2008); *Stoyer v. State Farm Mut. Auto. Ins. Co.*, No. 3:08-CV-1376-K, 2009 WL 464971, at *2 (N.D. Tex. Feb. 24, 2009).

20. For a discussion of how the Courts are supposed to slice and dice and apportion the attorneys' fees, *see Great American Ins. Co. v. AFS/IBEX Financial Servs. Inc.*, No. 3:07-CV-924-O 2008 WL 2795205 (N.D. Tex., July 21, 2008). (looking at the separate injury to support an award of attorney fees).

21. Attorneys' fees: The First Court of Appeals in Houston upheld an award of $0.00 in attorneys' fees in *Crounse v. State Farm Mut. Auto. Ins. Co.*, 336 S.W.3d 717 (Tex. App.—Houston [1st Dist.] 2010, pet. denied). The insured in that case made a variety of property damage and extra-contractual claims, but the jury ultimately returned a verdict of $100 representing a towing charge. The Court reasoned that $0.00 award satisfied Chapter 38 of the Civil Practice and Remedies Code, which permits a prevailing party to recover reasonable and necessary attorneys' fees. The Court noted, "In a case where attorney's fees are recoverable, an award of no fees by a jury can only be proper if the evidence affirmatively shows that no attorney's services were needed or that any services provided were of no value," and observed that the amount sought was over 40 times that amount awarded, and that there was evidence that the towing bill had not been submitted to State Farm, and that it could have been paid without the necessity of hiring a lawyer.

22. Liability of Third Party: Essman was in an accident with Trevino and Contreras, and was sued by both. Essman claimed Trevino and Contreras were also negligent, but settled

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with both and then attempted to make a UIM claim under her own policy. Essman was barred from recovering on the grounds that the agreed dismissal with prejudice in *Trevino and Contreras v. Essman* had disposed of all claims of negligence against the allegedly underinsured motorists (Trevino and Contreras) and barred a showing of their negligence as a matter of law. *Essman v. Gen. Accident Ins. Co.*, of Am., 961 S.W.2d 572 (Tex. App.—San Antonio 1997, no pet.).

23. Paid v. Incurred. The Amarillo Court of Appeals held that the plain language of Tex. Civ. Prac. & Rem. Code Section 41.0105 limited the insured's recovery of medical expenses to those that were "actually paid or incurred." Therefore, medical expenses the health care provider subsequently wrote of were not actually incurred by the insured because neither the insured, nor anyone acting on his behalf, would ever be liable to pay those expenses. Because the insurer's offsets and credits exceeded the amount of the insured's damages after limiting the insured's medical expenses to those that were actually incurred, the insured was entitled to take nothing on his claim for Underinsured Motorist Coverage. *Progressive Cty. Mut. Ins. Co. v. Delgado*, 335 S.W.2d 689 (Tex. App.—Amarillo 2011, pet. denied).

24. Inclusion of Medicare as a CoPayee: An insurer was held not to have breached its contract with the insured by including Medicare as a copayee on the settlement check for uninsured motorist benefits when both parties knew Medicare had issued payments for the insured's medical treatment. *Lewis v. Allstate*, Ins. Co., No. 09-05-225-CV, 2006 WL 665790 (Tex. App.—Beaumont Mar. 16, 2006, no pet.) (mem. op.). In *Lewis*, the insured conceded that Medicare would have had the right to seek reimbursement from an insurance company that knew or should have known about payments made by Medicare but failed to protect Medicare's rights. *See* 42 U.S.C. § 1395y(b)(2)(B)(ii) (West Supp. 2005). The insured attempted to rely upon *Texas Farmers Ins. Co. v. Fruge,* 13 S.W.3d 509, 511 (Tex. App.—Beaumont 2000, pet. denied), in which the Court held "that it is a breach of contract for an insurer to include Medicare on a benefit check where the insurer had no reason to suspect that Medicare had any entitlement to a portion of the benefits paid." The Court refused to hold that the insurer had a duty to determine the amount paid by Medicare, and distinguished *Fruge*, wherein the insurer knew Medicare had made a very small payment, yet it included Medicare as a co-payee on checks totaling nearly ten times that amount. Medicare's lien is sometimes referred to as a "super lien," and it is not to be taken lightly. For more discussion of Medicare liens (and other types of liens), *see* Chapter 3, § 3-6.

25. In *Warmbrod v. USAA Cty. Mut. Ins. Co.*, 367 S.W.3d 778 (Tex. App.—El Paso 2012, pet. denied), the El Paso Court of Appeals held that UM/UIM Coverage paid contractual benefits and not "damages" within the meaning of the Federal Medical Care Recovery Act, 42 U.S.C. §§ 2651–53, which allows the United States Government to subrogate against a person for tort liability to pay "damages." Therefore, the U.S. Army was not entitled to reimbursement from the insured's UM/UIM policy for benefits paid on behalf of the Insured serviceman's spouse who received medical treatment at an Army facility as the result of an automobile accident. However, the U.S. Army was entitled to reimbursement pursuant to 10 U.S.C. § 1095, which allows reimbursement of reasonable charges for health care services from a "third-party payer" because the insurer, USAA was a "third-party payer" as defined by the statute. Therefore, the insurer was entitled to include the U.S. Army on the check as a co-payee.

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26. Punitive Damages: In *Home Indem. Co. v. Tyler*, 522 S.W.2d 594 (Tex. Civ. App.—Houston [14th Dist.] 1975, writ ref'd n.r.e.), the Houston court held punitive damages were covered under the policy. However, cases have since held that the uninsured motorist coverage does not require the insurer to cover punitive damages. *Government Employees Ins. Co. v. Lichte*, 792 S.W.2d 546 (Tex. App.—El Paso 1990), writ denied *per curiam*, 825 S.W.2d 431 (Tex. 1991); *Vanderlinden v. United Servs. Auto. Ass'n Prop. & Cas. Ins. Co.*, 885 S.W.2d 239 (Tex. App.—Texarkana 1994, writ denied. *State Farm Mut. Auto. Ins. Co. v. Shaffer*, 888 S.W.2d 146 Tex. App.—Houston [1st Dist.] 1994, writ denied). These cases reason that, since the wrongdoer was the uninsured motorist and not the insurer, punitive damages were not recoverable under this clause. *See also Milligan v. State Farm Mut. Auto. Ins. Co.*, 940 S.W.2d 228 (Tex. App.—Houston [14th Dist.] 1997, writ denied). In *Hartford Cas. Ins. Co. v. Powell*, 19 F. Supp. 2d 678 (N.D. Tex. 1998), the Northern District of Texas held that any coverage provided by a commercial automobile policy for punitive damages for gross negligence was void and unenforceable under Texas public policy (keep in mind that the Texas Supreme Court, and not the Federal courts, has the final word on this issue). In *Laine*, the Court held that the UM provision of an umbrella policy (which stated that its coverage was identical to that of the underlying UM coverage) does not cover an exemplary damages award that a jury assessed against the uninsured drunk driver who caused the death of an insured. The Court held that the public policy which prevented the underlying policy from covering the punitive damages would also apply to the umbrella policy. *Laine v. Farmers Ins. Exch.,* 325 S.W.3d 661 (Tex. App.—Houston [1st Dist.] 2010, rehearing *en banc* denied June 21, 2010, rev. denied Dec. 17, 2010). *Fairfield Ins. Co. v. Stephens Martin Paving*, LP, 246 S.W.3d 653 (Tex. 2008) set out a two-part test to determine whether exemplary damages for gross negligence are insurable: (1) whether the plain language of the policy covers exemplary damages and (2) if the policy provides coverage, then a determination must be made whether the public policy of Texas allows or prohibits coverage in the circumstances of the underlying suit. (*Id.* at page 655). In *Farmers Tex. Cty. Mut. Ins. Co. v. Zuniga*, 548 S.W.3d 646 (Tex. App.—San Antonio, 2017, reconsideration en banc denied (2018)) the San Antonio Court held in this "U" case the "plain meaning of the phrase 'bodily injury' is physical damage to a human being's body and the plain meaning of the phrase 'damages' is a sum of money to compensate for an injury." Therefore, under the plain language of the policy, punitive damages are not covered and there was no need to address the public policy argument. (*Id.* at page 655).

27. Motor Vehicle: The former wording of this section referred to an "uninsured automobile," rather than an "uninsured motor vehicle"; under the old wording, an uninsured motorcycle was not an "uninsured automobile" within uninsured automobile coverage. (*See* Chapter 1, § 1-2; a motorcycle is a "motor vehicle," but not an "automobile.") *Members Mut. Ins. Co. v. Randolph*, 477 S.W.2d 315 (Tex. Civ. App.—Houston [1st Dist.] 1972, writ ref'd n.r.e.).

BURNING QUESTION
What is an accident?

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28. Accident: *Mid-Century Ins. Co. of Texas v. Lindsey*, 997 S.W.2d 153 (Tex. 1999, reh'g overruled). An accident, when viewed from the standpoint of a victim, is an unexpected happening without intent or design. The court in *Lindsey* concluded that an incident in which a child accidentally fired a shotgun while entering a vehicle was covered as an accident. Note that this is treated differently than a drive-by shooting.

Using the three-part test outlined in *Lindsey* (1. the accident must arise out of the inherent use of the vehicle; 2. the accident must have arisen within the natural territorial limit of an automobile and must not have been terminated; and, 3. the automobile must not merely contribute to cause the condition but must itself produce the injury), the Amarillo Court of Appeals found that the insured's "next friend" was "using" the vehicle as that term is understood within the context of an auto insurance policy and that his status alone as a passenger constituted "use" of the vehicle. *Salinas v. Progressive Cty. Mut. Ins. Co.*, No. 07-16-00361-CV, 2017 WL 4399366 (Tex App.—Amarillo 2017, no pet.).

29. Auto Accident: *Farmers Texas Cty. Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81 (Tex. 1997). *Griffin* is a declaratory judgment action in which Farmers sought a declaration that it had no duty to defend or indemnify its insured in a suit resulting from a drive by shooting. The court held that Farmers was not required to defend Royal because the petition did not allege that the injuries resulted from an auto accident. The court noted that the liability section has an intentional act exclusion which is not expressly included in the UM coverage. However, after discussing the intentional act exclusion, the Texas Supreme Court stated that Farmers was not required to defend Royal because the term "auto accident" refers to situations where one or more vehicles are involved with another vehicle, object or person. *See also State Farm Mut. Auto. Ins. Co. v. Peck*, 900 S.W.2d 910, 913 (Tex. App.—Amarillo 1995, no writ) (Insured's dog, while in the insured vehicle, bit one of the passengers. The mere fact that an "accidental" or unintended occurrence happens within the vehicle itself does not make the occurrence an "auto accident.").

The owner's or operator's liability[30] for these damages[31, 32] must arise out of the ownership, maintenance or use[33, 34, 35, 36] of the ***uninsured motor vehicle.***

30. Legally Entitled: The policy does not provide that an insurer will unconditionally pay the insured for injuries received as a result of acts of an uninsured motorist. It provides that the insurer will pay the insured what the insured is legally entitled to recover from the uninsured motorist. *Reliance Ins. Co. v. Falknor*, 492 S.W.2d 721 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.). This language means the UIM insurer is under no contractual duty to pay benefits until the insured obtains a judgment establishing the liability and underinsured status of the other motorist. Neither requesting UIM benefits nor filing suit against the insurer triggers a contractual duty to pay. *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809 (Tex. 2006). *See* discussion on UM/UIM Coverage in Chapter 3, § 3-8.

In Dallas, an insured sued her carrier under the UIM provision of the policy claiming among other things that because the insured had "exhausted" the limits of the liability policy ("the exhaustion doctrine") but did not allege that she had obtained a judgment against the other driver. The Dallas Court held the insureds reliance on the "exhaustion doctrine" (not recognized in Texas) was in direct conflict with

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Brainard's holding that a settlement did not trigger the insurer's contractual duty to pay. "Whatever the virtues of a contrary rule might be, as an intermediate court, we are bound to follow the rule laid down in *Brainard* unless and until the Supreme Court reconsiders or revises it. *Weber v. Progressive Cty Mut. Ins. Co.*, No. 05-17-00163-CV, 2018 WL 564001 (Tex. App.—Dallas 2018, rev. denied).

31. Mental Anguish: Statutory beneficiaries and estate of a motorcyclist killed in a collision with an insured automobile brought a wrongful death and survival action and took the position that each of them was entitled to the $100,000 "each person" limit in the automobile policy. The court held that the per person limit referred to the deceased motorcyclist and not to each person alleging damages as a result of his death. *Cradoct v. Employers Cas. Co.*, 733 S.W.2d 301 (Tex. App.—El Paso 1987, writ ref'd).

32. Loss of Consortium: A claim of loss of consortium is a purely derivative claim and is not a separate bodily injury claim. *McGovern v. Williams*, 741 S.W.2d 373 (Tex. 1987) *see also Miller v. Windsor Ins. Co.*, 923 S.W.2d 91, 97 (Tex. App.—Fort Worth 1996, writ denied), (Family members' claims for mental anguish and loss of consortium were not "bodily injuries" under UM/UIM coverage).

33. Use: "The term 'use' is a general catchall of the insuring clause, designed and construed to include all proper uses of the vehicle not falling within other terms of definition such as ownership and maintenance." *State Farm Auto. Ins. Co., v. Pan Am. Ins. Co.*, 437 S.W.2d 542, 545 (Tex. 1969).

34. Use: In *Collier v. Employers Nat'l Ins. Co.*, 861 S.W.2d 286, 289 (Tex. App.—Houston [14th Dist.] 1993, writ denied), and *Le v. Farmers Texas Cty. Mut. Ins. Co.*, 936 S.W.2d 317 (Tex. App.—Houston [1st Dist.] 1996, writ denied), courts have adopted a test: 1. the accident must have arisen out of the inherent nature of the automobile; 2. the accident must have arisen within the physical limits of the automobile, and the actual use, loading, or unloading must not have terminated; and 3. the automobile must not merely contribute to the cause of the condition which produces the injury, but must itself produce the injury. "The same injury could have been suffered in the same way if the parties had been on foot, on bicycles, or in any other of a number of circumstances. Allowing coverage simply because an automobile provided the site for a criminal assault or provided transportation to the location of a criminal act could lead to absurd and wide-ranging results." *Collier*, 861 S.W.2d at 289, cited in *Le*, *supra*. However, the Texas Supreme Court recently stated: "[A] causal relationship between the injury and the use of the auto is essential to recovery," in finding in an insurer's favor on an intentional shooting case. *National Union Fire Ins. Co. v. Merchants Fast Motor Lines*, 939 S.W.2d 139 (Tex. 1997).

35. Use: The "use" of the vehicle need not proximately cause the injury complained of. *State Farm Mut. Auto. Ins. Co. v. Francis*, 669 S.W.2d 424, 427 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). In that case, the owner of a boat and trailer being towed by a car owned and driven by the policyholder was riding as a passenger while both men were on a hunting trip; the boat and motor fell from trailer and struck a third party. The passenger, who owned the boat and trailer, was a "user" within meaning of the policy and was entitled to coverage as an insured.

36. Use: In *Whitehead v. State Farm Mut. Auto. Ins. Co.*, 952 S.W.2d 79 (Tex. App.—Texarkana 1997), *rev'd on the other grounds*, 988 S.W.2d 744 (Tex.1999) the Texarkana

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Court of Appeals stated that the actions of a van driver in overtaking a second vehicle once he became aware of his passengers' intention to shoot the vehicle's occupants did constitute a "use" of the vehicle. Although the issue of people having an altercation was not at issue in that case, the court held that *exercise of control over a vehicle was what constituted a use*. In *Whitehead v. State Farm Mut. Auto. Ins. Co.*, 952 S.W.2d 79 at 83. Importantly, the court also pointed out that the liability coverage agreement is much more specific and restrictive than the UM coverage, and "there is no real indication of Texas legislative intent in this area." In *Whitehead v. State Farm Mut. Auto. Ins. Co.*, 952 S.W.2d 79 at 85. That adds some ambiguity to this situation as well. Common sense would seem to dictate that being beaten is not "use" of a motor vehicle.

In *Farmers Ins. Exchange v. Rodriguez*, 366 S.W.3d 216 (Tex. App.—Houston [14th Dist.] 2012, rev. denied), the Court of Appeals recognized that the inherent nature of a trailer is that it will be used to haul and tow materials, which includes not only the immediate action of loading and unloading materials from the trailer but also moving them from their starting point to their destination. Therefore, the court found that the claimant's injuries which occurred while unloading a deer stand from a trailer arose out of the use of the trailer for the purpose of determining UM coverage. The court also found that the injuries occurred within the territorial limits of the trailer, even though the claimant had carried the deer stand for a few feet before dropping it.

In *Homestate Cty. Mut. Ins. Co. v. Binning*, 390 S.W.3d 696 (Tex. App.—Dallas 2012, no pet.) the Court of Appeals held that the plaintiffs' injuries from an assault that was committed after his vehicle was struck from the rear did not arise out of an automobile accident for the purpose of UM coverage even though the assault may have been motivated by an attempted carjacking of the plaintiff's vehicle.

Any judgment for damages arising out of a suit[37] brought without our consent is not binding[38] on us.[39] If we and you do not agree as to whether or not a vehicle is actually uninsured, the burden of proof as to that issue shall be on us.

37. Judgment: In *United States Fidelity & Guar. v. Cascio*, 723 S.W.2d 209 (Tex. App.—Dallas 1986, no writ), an insured who dismissed with prejudice her action against the allegedly negligent third party without her insurer's consent could not subsequently recover against her insurer because she had prejudiced the insurer's right to subrogate.

38. Settlement Without Consent Provision: This exclusion was not rendered ambiguous by general right to recover payment provision; this exclusion, which was more specific, excluded from UM/UIM coverage anyone who settled "the claim" without the consent of the insurer, but applied in context only to uninsured/underinsured motorists; the right to recover payment provision only became applicable if insurer made payment under policy. *Simpson v. GEICO Gen. Ins. Co.*, 907 S.W.2d 942 (Tex. App.—Houston [1st Dist.] 1995, no writ). (The Supreme Court however has limited the impact of this rule in as much as an insurer has to prove that it was prejudiced by its insured's breach of this provision in order to void UM coverage. *Hernandez v. Gulf Grp. Lloyds*, 875 S.W.2d 691 (Tex. 1994)). Although the insured had obtained his insurer's permission to settle with the uninsured motorist, he did not seek or obtain permission before settling with two defendants who manufactured and maintained barricades at a construction site near the

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accident scene. The *Simpson* court held that the exclusion did not apply to settlements with non-motorist tortfeasors. Rather, the purpose of the exclusion was to preserve the insurer's subrogation rights against the uninsured motorist that caused the insurer to make payment under its policy. (*Simpson* at page 947).

39. Written Consent Requirement: The written consent requirement is valid and enforceable. *United States Fire Ins. Co. v. Millard*, 847 S.W.2d 668 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding). Mere notice of suit against an underinsured or uninsured motorist is not sufficient to comply with this provision. A subrogation letter to an insured suggesting that an insured should "contact the other party or their insurance carrier" for reimbursement did not indicate the insurer's consent to sue under this provision. *State Farm Mut. Auto. Ins. Co. v. Azima*, 896 S.W.2d 177 (Tex. 1995). Texas courts have upheld such terms as a means of protecting the carrier's subrogation rights. *Ford v. State Farm Mut. Auto. Ins. Co.*, 550 S.W.2d 663 (Tex. 1977); *Dairyland Cty. Mut. Ins. Co. v. Roman*, 498 S.W.2d 154 (Tex. 1973).

B. ***Covered person***[40] *as used in this Part means:*

40. Covered Person: In the case of *Amica Mut. Ins. Co. v. Moak*, 55 F.3d 1093 (5th Cir. (Tex.) 1995), the 5th Circuit addressed the interplay of Sections 1, 2 and 3 of Section B. Moak was involved in a car accident, in which he was killed. The court interpreted the policy to cover Moak's entire immediate family. The court rejected the contention of Moak's second wife that only she and her son were "covered persons," and that Moak's parents and two other sons were precluded from recovery.

1. You or any ***family member;***[41, 42, 43]

41. Family Member: A newborn baby who spent her entire six-day life in the hospital was held to be a member of her parents' household in *State Farm Mut. Auto. Ins. Co. v. Nguyen*, 920 S.W.2d 409 (Tex. App.—Houston [1st Dist.] 1996, no writ).

42. Family Member: "The word 'resident' embodies the concept of *place*, connoting the physical or geographical location or locale where individuals dwell or reside. On the other hand, the word household is universally defined in terms of *persons*—an agglomeration of individuals who dwell as a unit under one roof." *Cicciarella v. Amica Mut. Ins. Co.*, 66 F.3d 764 (5th Cir. 1995).

43. Corporate Insured: A corporation's employee is not covered as a "family member" under a policy in which the corporation is the named insured. *Webster v. U.S. Fire Ins. Co.*, 882 S.W.2d 569 (Tex. App.—Houston [1st Dist.] 1994, writ denied). In *Webster*, an employee of a car dealership sought unsuccessfully to recover under the dealership's UM coverage for injuries incurred while he and his wife were test driving a customer's car by contending they were "family members" of the corporation.

PRACTICE TIP

Carefully check the wording of all policies, especially those owned by businesses! Look carefully at the identity of the insured, and read the definitions!

2. Any other person ***occupying***[44, 45] ***your covered auto;***

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44. Occupying: The brother of the insured was injured in a collision between an uninsured automobile and insured owner's parked automobile, on which the brother was working. The court held that the brother, who was resting his entire body weight on the insured car when that car was struck by the uninsured, was "occupying" the insured automobile. *Hart v. Traders & Gen. Ins. Co.*, 487 S.W.2d 415 (Tex. Civ. App.—Fort Worth 1972, writ ref'd n.r.e.).

45. Occupying: *Schulz v. State Farm Mut. Auto. Ins. Co.*, 930 S.W.2d 872, 875 (Tex. App.—Houston [1st Dist.] 1996, n.w.h.): A driver who was shot outside the insured vehicle by his passenger was not entitled to recover personal injury protection benefits because his injuries did not result from a "motor vehicle" accident. *But see Mid-Century Ins. Co. of Texas v. Lindsey*, 942 S.W.2d 140 (Tex. App.—Texarkana 1997, *aff'd*, *Mid-Century Ins. Co. of Texas v. Lindsey*, 997 S.W.2d 153, 42 Tex. Sup. Ct. J. 504 (Tex. 1999), in which the court allowed UM benefits to be paid to an insured who was injured by the accidental discharge of a shotgun fired by a child within a vehicle.

3.Any person for damages that person is entitled to recover[46, 47] because of bodily injury to which this coverage applies sustained by a person[48] described in B.1. or B.2. above.

46. Insured's Employer: In *Valentine v. Safeco Lloyds Ins. Co.*, the First Court of Appeals in Houston held that an employee's UIM coverage was not available to her when she was injured through the negligence of her employer, while occupying the employer's vehicle in the course and scope of her employment, and had collected Workers' Compensation benefits. *Valentine v. Safeco Lloyds Ins. Co.*, 928 S.W.2d 639 (Tex. App.—Houston [1st Dist.] 1996, writ denied).

47. Negligence: The purpose of UM coverage is to protect the insured and his family from the negligence of others, not from his own negligence. *Burton v. State Farm Mut. Auto. Ins. Co.*, 869 F. Supp. 480 (S.D. Tex. 1994), *aff'd*, 66 F.3d 319 (5th Cir. 1995).

48. Stacking: *Upshaw v. The Trinity Companies*, 842 S.W.2d 631 (Tex. 1992); *Monroe v. Gov't Employees Ins. Co.*, 845 S.W.2d 394 (Tex. App.—Houston [1st Dist.] 1992, writ denied). In an accident involving only one vehicle insured under a single, multivehicle insurance policy, only one policy limit applied per injured person, even though there were separate declaration sheets for each vehicle. In *Monroe*, there were two vehicles listed, and the policy limit was $300,000 per person. The insureds attempted to collect $600,000 for the death of their daughter in an accident. The court rejected the argument that the two Declaration sheets created two separate policies. *See also Allstate Ins. Co. v. Zellars*, 462 S.W.2d 550 (Tex. 1970). The prohibition against stacking may have some interesting results; for example, in a recent case, two policies issued by the same insurance company may, in fact, constitute a single, ambiguous policy. In *Progressive Cty. Mut. Ins. Co. v. Kelley*, 284 S.W.3d 805 (Tex. 2009). Regan Kelley, who was struck by a car while riding her horse, sought underinsured motorist benefits under her parents' insurance policy after recovering policy limits from the at-fault motorist. At the time of the accident, Progressive insured a total of five vehicles for the Kelley family; four of them were under one policy and the other was under a second policy. Progressive denied that there was a second policy and sought a declaratory judgment that it was only required to pay under one policy and not two. Texas Supreme Court found that this was a fact issue and remanded it to the trial court for resolution.

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C. ***Property damage***[49] *as used in this Part means injury to, destruction of or loss of use of:*

1. ***Your covered auto****, not including a temporary substitute auto.*

2. Any property owned by a person listed in B.1. or B.2. or ***covered person*** *while contained in* ***your covered auto.***

3. Any property owned by you or any ***family member*** *while contained in any auto not owned, but being operated, by you or any* ***family member.***

D. I. ***Uninsured motor vehicle***[50] *means*[51] *a land motor vehicle or trailer of any type,*

49. In *Ibarra v. Progressive Cty. Mut. Ins. Co.*, No. 02-10-00312-CV, 2012 WL 117955 (Tex. App.—Fort Worth Jan. 12, 2012) (memorandum opinion) the Fort Worth Court of Appeals held that damage to the insured's residence when an intoxicated driver collided with it was not "property damage" under the insured's UM/UIM coverage which limited the definition of "property damage" to: (1) a covered auto, (2) any property owned by an insured person and contained in the covered auto at the time of the accident, and (3) any property owned by appellant or a relative while contained in an auto being operated by appellant or her relative.

50. Vehicle: *Bruckner Truck Sales, Inc. v. Farm Credit Leasing Servs. Corp.*, 909 S.W.2d 75 (Tex. App.—Amarillo 1995, no writ), citing Tex. Rev. Civ. Stat. Ann. art. 6675a2 (Vernon Supp.1995). "Vehicle" is defined by the statute as: Every mechanical device, in, upon or by which any person or property is or may be transported or drawn upon a public highway, including motor vehicles, commercial motor vehicles, truck tractors, trailers, and semitrailers but excepting devices moved by human power or used exclusively upon stationary rails or tracks." *Scurlock Permian Corp. v. Brazos Cty.*, 869 S.W.2d 478, 487 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

51. "Motor Vehicle": There are two different common definitions of the term "motor vehicle": the broad definition of a "motor vehicle" is a "self propelled vehicle not operating on stationary rails or tracks"; the more narrow definition of a "motor vehicle" is a "self propelled vehicle designed for, intended to be used for, or actually used to transport persons and property over roads or highways." *Western Ins. Companies v. Andrus*, 694 S.W.2d 657, 659 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.). In *Stroud v. State Farm Mut. Auto. Ins. Co.*, a van that remained as a permanent fixture from which shrimp were sold was not considered a "motor vehicle" for the purposes of UM coverage. No. 01-96-01452-CV, 1998 WL 259973, *3 (Tex. App.—Houston [1st Dist.]. 1998, no writ) (mem. op., not designated for publication).

1. To which no liability bond or policy applies at the time of the accident, [52]

2. Which is a hit and run vehicle whose operator or owner cannot be identified and which hits: [53, 54, 55, 56]

52. In *State Farm Mut. Auto. Ins. v. Bowen*, 406 S.W.3d 182 (Tex. App.—Eastland 2013, no pet.), involving a direct action by the named insured against his own UM insurer, the Court of Appeals held that the driver of the other motor vehicle was not uninsured at the time of the accident even though his auto liability insurer would never have any obligation to pay

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damages under the policy because any tort action against the motorist was barred by the two year statute of limitations.

53. Physical Contact Requirement: In order to recover under uninsured motorist coverage, actual physical contact must occur between the insured vehicle and the "hit-and-run" vehicle. Tex. Ins. Code Ann. art. § 1952.104 et seq.); *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338 (Tex. 1995). The Insurance Code provides: "The portion of a policy form adopted under Article 5.06 of this Code to provide coverage under this Article shall require that in order for the insured to recover under the uninsured motorist coverages where the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured is unknown, actual physical contact must have occurred between the motor vehicle owned or operated by such unknown person and the person or property of the insured." Tex. Ins. Code Ann. art. 1952.104(3) as amended 2017)). The physical contact requirement for recovery under hit and run provisions of uninsured motorist coverage is not unconstitutional as being against public policy. *Young v. State Farm Mut. Auto Ins. Co.*, 711 S.W.2d 262 (Tex. App.— El Paso 1986, writ refused.). *See Guzman v. Allstate Ins. Co.*, 802 S.W.2d 877 (Tex. App.—Eastland 1991, no writ); (indirect contact rule); *Goen v. Trinity Universal Ins. Co.*, 715 S.W.2d 124 (Tex. App.—Texarkana 1986, no writ). Contact between insured vehicle and detached ramp from unknown trailer was not actual physical contact between insured's vehicle and the unknown trailer itself. *Smith v. Nationwide Mut. Ins. Co.*, No. 04-02-00646-CV, 2003 WL 21391534 (Tex. App.—San Antonio June 18, 2003, no pet.) However, the rule would not apply if the intervening object were something other than a car, even if the object were in the roadway. A collision with a detached axle and wheel which came off a truck heading in the opposite direction did not satisfy this rule. *Nationwide Ins. Co. v. Elchehimi*, 249 S.W.3d 430 (Tex. 2008). Similarly, ice flying off a vehicle headed in the opposite direction also did not satisfy the rule. *Hernandez v. Allstate Cty. Mut. Ins. Co., Eyeglasses*, No. 04-09-00311, 2010 WL 454949 (Tex. App.—San Antonio Feb. 10, 2010, pet. denied) (mem. op.).

54. Physical Contact: In *Mayer v. State Farm Mut. Auto. Ins. Co.*, 870 S.W.2d 623 (Tex. App.—Houston [1st Dist.] 1994, no writ), the plaintiff, who was driving a motorcycle, was forced off the highway by a truck that began to move into his lane. The motorcycle flipped over and hit a roadside object. *Mayer v. State Farm Mut. Auto. Ins. Co.*, 870 S.W.2d at 624 (Tex. App.—Houston [1st Dist.] 1994, no writ), at 624. In affirming summary judgment for the insurer, the court stated that the policy required that a hit and run vehicle actually "hit" the insured or the vehicle. *Mayer v. State Farm Mut. Auto. Ins. Co.*, 870 S.W.2d at 625 (Tex. App.—Houston [1st Dist.] 1994, no writ).

Uninsured motorist provision of the policy did not cover accident that occurred after unknown driver allegedly forced insured into another lane during a high-speed pass, where the unknown vehicle did not make actual physical contact with the insured's vehicle. *Franks v. Liberty Cty. Mut. Ins. Co.*, 582 S.W.3d 648 (Tex. App—Houston [14th] Dist. 2019, aff'd.).

PRACTICE TIP
Be aware of rulings regarding indirect physical contact!

55. The insurer was not liable to pay Uninsured Motorist benefits where the evidence was factually sufficient to support the jury's finding that there was no actual physical contact between the insured's

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vehicle and another vehicle. The police report contained no indication that a second vehicle was involved, and the insured testified that he had a very limited memory of the accident while the passenger was asleep at the time of the accident. *Y Ngoc Mai v. Farmers Tex. Co. Mut. Ins. Co.*, No. 14-07-00958-CV, 2009 WL 1311848 (Tex. App.—Houston [14th Dist.] May 7, 2009, pet. denied) (mem. op.). *In Walker v. Presidium, Inc.*, 296 S.W.3d 687 (Tex. App.—El Paso 2009, no pet.), summary judgment was granted for a rental car company on UM claims because the unidentified hit and run vehicle did not contact the rental car in which the plaintiffs were passengers.

56. Indirect Physical Contact: If the underinsured motor vehicle hits another car, which then hits the insured vehicle, the underinsured motor vehicle is held to have indirectly contacted the insured motor vehicle and satisfied the physical contact requirement. *Latham v. Mountain States Mut. Cas. Co.*, 482 S.W.2d 655 (Tex. Civ. App.—Houston [1st Dist.] 1972, writ ref'd n.r.e.). However, the rule would not apply if the intervening object were something other than a car, even if the object were in a roadway. *Williams v. Allstate Ins. Co.*, 849 S.W.2d 859 (Tex. App.—Beaumont 1993, no writ); *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338 (Tex. 1995).

*a. you or any **family member;***

*b. a vehicle which you or any **family member** are **occupying**[57]; or*

*c. **your covered auto.***

3. To which a liability bond or policy applies at the time of the accident but the bonding or insuring company:

a. denies coverage; or

b. is or becomes insolvent. [58, 59]

BURNING QUESTION

What does it mean to "occupy" a vehicle?

57. Occupying: The Austin Court of Appeals has ruled that this "occupying" exclusion did not apply to an insured who was lying beneath his insured truck and was crushed beneath the truck when another vehicle struck it. *Old Am. Cty. Mut. Fire Ins. Co. v. Sanchez*, 81 S.W.3d 452 (Tex. App.—Austin 2002), *rev'd on other grounds*, 149 S.W.3d 111 (Tex. 2004). In *Texas Farm Bureau v. Sturrock*, the insurer claimed that the insured was not involved in a "motor vehicle accident" because he was injured when his foot became entangled when he got out of his pickup. The Beaumont Court disagreed, holding that the pickup was stationary, but the insured was still actively engaged in the act of using the truck as a means of transportation from one place to another. A "good Samaritan" who was walking on the side of the freeway while aiding another motorist was deemed not to be occupying his vehicle when he was struck by a third vehicle. *Goudeau v. United States Fid. & Guar. Co.*, 272 S.W.3d 603 (Tex. 2008).

58. Insolvency of Insurers: "One is an uninsured motorist in Texas, under standard insurance contracts, when (1) his insurer becomes insolvent or denies liability, (2) he is a hit and run driver, (3) he has less coverage than the legally required minimum, or (4) he has no insurance." *Milton v. Preferred Risk Ins. Co.*, 511 S.W.2d 83, 85 (Tex. Civ. App.—Houston [14th Dist.] 1974, writ ref'd n.r.e.). Companies that are permitted to write insurance policies in Texas are heavily regulated, and the Texas Insurance Code contains safeguards to protect the public against insurer insolvency. Tex. Ins.

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Code Ann. art. 21.28C (West Supp. 1999); Tex. Transp. Code Ann. § 643.105 (1997); *Eagle Life Ins. Co. v. Hernandez*, 743 S.W.2d 671 (Tex. App.—El Paso 1987, writ denied); *disapproved of on other grounds by Grand Prairie Indep. Sch. Dist. v. Southern Part Imports Inc.*, 813 S.W.2d 499 (Tex. 1991). Tex. Const. art. 4, § 22 and arts. 1380 (repealed), 1381 (repealed), 4408 and 4409 (attorney general's authority); *John L. Hammond Life Ins. Co. v. State*, 299 S.W.2d 163 (Tex. Civ. App.—Austin 1957, writ ref'd n.r.e.).

59. Insurer Insolvency: The Insurance Code requires the definition of an uninsured motor vehicle to include a vehicle for which the liability carrier is insolvent. Tex. Ins. Code Ann. art. 5.061(2)(a).

4. Which is an underinsured motor vehicle. An underinsured motor vehicle is one to which a liability bond or policy applies at the time of the accident but its limit of liability either:

a. is not enough[60, 61] *to pay the full amount the* ***covered person*** *is legally entitled to recover as damages;*[62] *or*

60. Underinsured Motorist: The insured is not required to exhaust the tortfeasor's limits to make an underinsured motorist claim. However, the insurer may claim an offset for the full amount of the tortfeasor's policy limits. *Olivas v. State Farm Mut. Auto. Inc. Co.*, 850 S.W.2d 564 (Tex. App.—El Paso 1993, writ denied) (settlement for $15,000 of a $25,000 policy limit); *see Leal v. Northwestern Nat'l Cty. Mut. Ins. Co.*, 846 S.W.2d 576 (Tex. App.—Austin 1993, no writ).

61. Stacking: The policy limits available may be "stacked" to determine whether or not a person is underinsured. *Stracener v. United Servs. Auto. Ass'n*, 777 S.W.2d 378 (Tex. 1989). In *Stracener*, the court permitted the stacking of the limits of underinsured motorist coverage under four separate insurance policies to determine whether a tortfeasor was underinsured.

62. Burden of Proof: To establish entitlement to uninsured/underinsured motorist benefits, an insured is required to establish the third party's negligence and the amount of damages, and that the third party is, in fact, uninsured or underinsured. *State Farm Mut. Auto. Ins. Co. v. Matlock*, 462 S.W.2d 277 (Tex. 1970); *Essman v. Gen. Accident Ins. Co. of America*, 961 S.W.2d 572, 573 (Tex. App.—San Antonio 1997, no pet.); *State Farm Mut. Auto. Ins. Co. v. Grayson*, 983 S.W.2d 769 (Tex. App.—San Antonio 1998, no pet.).

b. has been reduced by payment of claims to an amount which is not enough to pay the full amount the ***covered person*** *is legally entitled to recover as damages.*[63]

63. Reduction: Underinsured motorist coverage applied because liability limits were reduced to zero through the payment of plaintiff's claim in *Montanye v. Transamerica Ins. Co.*, 638 S.W.2d 518 (Tex. App.—Houston [1st Dist.] 1982, no writ).

II. However, ***uninsured motor vehicle*** *does not include any vehicle or equipment:*[64]

1. Owned by or furnished or available for the regular use[65] *of you or any family member.*[66]

64. Exclusion Valid: This exclusion has been held to be valid, enforceable, unambiguous, and not against public policy by the Dallas Court of Appeals: The Dallas Court of Appeals, in *Ostrander v. Progressive Cty. Mut. Ins. Co.*,

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No. 05-03-01811-CV, 2005 WL 110352 (Tex. App.—Dallas 2005, no pet.) (mem. op.), held that the UM/UIM exclusion for "any vehicle or equipment . . . [o]wned by or furnished or available for the regular use of you or any family member" is valid, enforceable and unambiguous. The Court further determined that such exclusion did not violate Texas public policy. The Court further summarily reiterated the position that there is no general fiduciary duty between an insurer and its insured; and that there is also no fiduciary duty between an insurer and a third party claimant.

65. Motor Vehicle: An insured was injured while riding his motorcycle that was not listed in his policy as a covered vehicle in *Equitable Gen. Ins. Co. v. Williams,* 620 S.W.2d 608 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.). When Equitable General refused to pay UM benefits, Williams argued that the exclusion was an invalid restriction of coverage required by Article 5.061 of the Insurance Code. He also argued that the motorcycle was not a motor vehicle. The court rejected both arguments. Since the Dallas Court's decision in *Equitable General*, several appellate decisions have upheld the validity of this exclusion. A vehicle that is owned by or regularly available to an insured or a family member, as a matter of law, does not qualify as an uninsured/underinsured motor vehicle under the terms of the automobile insurance policy. *Farmers Texas Co. Mut. Ins. Co. v. Griffin*, 868 S.W.2d 861 (Tex. App.—Dallas 1993, writ denied); *Texas Farmers Ins. Co. v. McKinnon*, 823 S.W.2d 345 (Tex. App.—Beaumont 1991, writ denied); *Moore v. State Farm Mut. Auto. Ins. Co.*, 792 S.W.2d 818 (Tex. App.—Houston [1st Dist.] 1990, no writ); *Harwell v. State Farm Mut. Auto. Ins. Co.*, 782 S.W.2d 518 (Tex. App.—Houston [1st Dist.] 1989, no writ); *Berry v. Texas Farm Bureau Mut. Ins. Co.*, 782 S.W.2d 246 (Tex. App.—Waco 1989, writ denied); *Beaupre v. Standard Fire Ins. Co.*, 736 S.W.2d 237 (Tex. App.—Corpus Christi 1987, writ denied); *Broach v. Members Ins. Co.*, 647 S.W.2d 374 (Tex. App.—Corpus Christi 1983, no writ).

66. Owned but Unscheduled: This exclusion is a valid bar to coverage. *Conlin v. State Farm Auto. Ins. Co.*, 828 S.W.2d 332 (Tex. App.—Austin 1992, writ denied). This exclusion is intended to prevent double recovery of policy limits where the insured driver is at fault, first under the liability coverage, and second under UM/UIM coverage. Put another way, a vehicle cannot be insured for liability coverage for the operator under a policy and provide underinsured motorist protection under the same policy for the operator's negligence. The provision has been repeatedly upheld. *Farmers Texas Cty. Mut. Ins. Co.v. Griffin*, 868 S.W.2d 861 (Tex. App.—Dallas 1993, writ denied); *State Farm Mut. Auto. Ins. Co. v. Conn*, 842 S.W.2d 350 (Tex. App.—Tyler 1992, writ denied); *Rosales v. State Farm Mut. Auto. Ins. Co.*, 835 S.W.2d 804 (Tex. App.—Austin 1992, writ denied); *Bergensen v. Hartford Ins. Co. of the Midwest*, 845 S.W.2d 374 (Tex. App.—Houston [1st Dist.] 1993, writ ref'd); *Scarbrough v. Employers Cas. Co.*, 820 S.W.2d 32 (Tex. App.—Fort Worth 1991, writ denied). The purpose of UM coverage is to protect insureds from the "negligence of strangers." *Bergensen*, 845 S.W.2d at 375. *Frazer v. Wallis*, 979 S.W.2d 782 (Tex. App.—Houston [14th Dist.] 1998, no pet.). For a recent case *see Hunter v. State Farm Co. Mut. Ins. Co.*, No. 2-07-463-CV, 2008 WL 5265189 (Tex. App.—Fort Worth Dec. 18, 2008, no pet.) (mem. op.). The Court of Appeals held that the Family Use Exception did not violate public policy and precluded the named insured's daughter from recovering UIM benefits for injuries she sustained while her sister, who was insured under the same policy,

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was driving the vehicle. The court cited well-established caselaw reflecting that vehicles owned by or furnished for the regular use of a family member are not underinsured vehicles. *Hunter v. State Farm Co. Mut. Ins. Co.*, No. 2-07-463-CV, 2008 WL 5265189 (Tex. App.—Fort Worth Dec. 18, 2008, no pet.) (mem. op.).

But see Verhoev v. Progressive Cty. Mut. Ins. Co., 300 S.W.3d 803 (Tex. App.—Fort Worth 2009, no pet.). The Fort Worth Court of Appeals held that the named insured was entitled to recover both Liability Coverage and Underinsured Motorist Coverage from the same policy when she was injured in an accident as the passenger of the insured vehicle while her former husband, who was also named as an insured under the policy was driving. At the time the policy was issued, the named insured and her former husband were both divorced. The Court of Appeals held that the family-member exclusion applied to cap Liability Coverage to the statutory minimum limits. The family-member exclusion applied because it excluded coverage "for you . . . for bodily injury to you," and both were named insured under the policy. The Court held that the wife was entitled to Underinsured Motorist Coverage as the named insured and that the family member exception did not apply because they were not married at the time of the accident, and she did not own the vehicle driven by her former husband.

2. Owned or operated by a self insurer under any applicable motor vehicle law.[67]

67. Self Insurer: Neither the policy nor the case law elaborate upon this clause; it appears to be based upon common sense and experience. Under Texas law, to qualify as a self-insurer, a person must have more than 25 motor vehicles registered in his name and be financially responsible. *Texas Dept. of Pub. Safety v. Banks Transp. Co.*, 427 S.W.2d 593 (Tex. 1968). Therefore, it is unlikely that such a person would have insufficient assets to compensate a person injured by his negligence. In an unreported opinion, the Federal Fifth Circuit Court of Appeals held that the definition of "uninsured motor vehicle" which excluded any vehicle "owned or operated by self-insurer under any applicable motor vehicle law" was unambiguous and did not violate public policy. *McQuinnie v. Am. Home Assur. Co.*, 400 Fed. Appx. 801 (5th Cir. 2010).

3. Owned by any governmental body[68] *unless:*

68. Governmental Body Exclusion: In *Foster v. Truck Ins. Exch.*, 933 S.W.2d 207 (Tex. App.—Dallas 1996, *writ denied*), the insured argued that this exclusion violated public policy because the availability of coverage was dependent upon a condition beyond the insured's control, i.e., the identity of the tortfeasor. The court rejected this argument, holding that this exclusion was not inconsistent with the purpose of the UM/UIM statute, which is to provide protection only from those motorists who are "financially irresponsible." Reasoning that the government is not a "financially irresponsible" party simply because it may be shielded from liability by sovereign immunity or its liability may be limited by statute, the court upheld the applicability of this exclusion.

In a declaratory judgment action to establish UM/UIM coverage, the Court of Appeals held that a city owned vehicle was not "uninsured" and UM/UIM coverage was excluded for damages caused by a city employed motorist when the city who employed the motorist was a party to an agreement that created the Texas Municipal League Joint Self–Insurance Fund. The Agreement incorporated the Texas

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Municipal League Liability Self Insurance Plan along with accompanying Declarations of Coverage. The liability coverage document associated with the Plan provided the Fund would pay on behalf of the covered party all sums that the covered was legally obligated to pay as damages arising out of the ownership, operation, use, loading, unloading or maintenance of an automobile. *Malham v. Gov't Employees Ins. Co.*, No. 03-11-000006-CV, 2012 WL 413969 (Tex. App.—Austin Feb. 8, 2012, pet. denied) (mem. op.). *See also Loncar et al v. Progressive Cty. Mut. Ins. Co. et. al*, No. 05-16-00530-CV, 2018 WL 2355205 (Tex. App.—Dallas May 24, 2018) discussing the governmental body exclusion and holding that the insurers were not obligated to pay underinsured benefits to a driver seriously injured when his car collided with a Dallas fire truck when the other driver was legally protected by "immunity".

a. the operator of the vehicle is uninsured;[69] *and*

b. there is no statute imposing liability for damage because of bodily injury or ***property damage*** *on the governmental body for an amount not less than the limit of liability for this coverage.*[70, 71]

69. Uninsured: In a declaratory judgment action to establish UM/UIM coverage, the Court of Appeals held that a city owned vehicle was not "uninsured" and, therefore, UM/UIM coverage was excluded by this provision when the city who employed the at-fault motorist was a party to an agreement that created the Texas Municipal League Joint Self–Insurance Fund. The Agreement incorporated the Texas Municipal League Liability Self–Insurance Plan along with accompanying Declarations of Coverage. The liability coverage document associated with the Plan provided the Fund would pay on behalf of the covered party all sums which the covered party shall become legally obligated to pay as damages arising out of the ownership, operation, use, loading, unloading or maintenance of an automobile. *Malham v. Gov't Employees Ins. Co.*, No. 03-11-0006-CV, 2012 WL 413969 (Tex. App.—Austin Feb. 8, 2012) (memorandum opinion).

70. Validity: The government vehicle exclusion precluded coverage for injuries suffered in an accident with: 1. a government vehicle being operated by a governmental employee who was insured; 2. a government vehicle exclusion that did not violate public policy; and 3. an insurer not equitably estopped from denying coverage. *Ohio Cas. Grp. of Ins. Companies v. Chavez*, 942 S.W.2d 654 (Tex. App.—Houston [14th Dist.] 1997, writ denied).

71. Governmental Body: The Texas Supreme Court upheld this clause (worded slightly differently at the time) and discussed its reasoning of this clause in *Francis v. International Serv. Ins. Co.*, 546 S.W.2d 57 (Tex. 1976). At that time, it was worded as follows: "'uninsured automobile' shall not include: . . . 3. an automobile or trailer owned by the United States of America, Canada, a state, a political subdivision of any such government or an agency of any of the foregoing." In *Francis*, the insured was struck by a fire truck owned by the City of Grand Prairie and operated by a fireman. Neither the city nor the fireman had liability insurance. The court concluded that the purpose of the Act was not to protect insureds from all negligent uninsured motorists, but only from those who were "financially irresponsible," and reasoned that UIM coverage: "[W]as not designed as a system for giving relief to people who cannot recover from a tortfeasor because of sovereign immunity . . . . That a governmental unit is protected by sovereign

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immunity would certainly preclude recovery from that unit, but that does not mean that the unit is 'financially irresponsible' for purposes of the Texas Uninsured Motor Vehicle Act."

4. Operated on rails or crawler treads.

5. Designed mainly for use off public roads while not on public roads.[72, 73]

BURNING QUESTION
What is an "automobile?"

72. Auto: Whether a dune buggy was a "motor vehicle" designed principally for use on public roads under the terms of the policy was a jury question in *Republic Ins. Co. v. Bolton*, 564 S.W.2d 440 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.).

73. Auto: A modified stock car racer which was not equipped with horns, taillights, headlights, signaling equipment, and windshield, and which was not licensed for operation on public highways and which was carried on a trailer to and from a race track or was towed, was "designed for use principally off public roads" and was therefore not within the coverage of automobile Medical Payments provision. *Williams v. Cimarron Ins. Co.*, 406 S.W.2d 173 (Tex. 1966).

6. While located for use as a residence or premises.[74]

74. Premises: In the unpublished case of *Stroud v. State Farm*, the First Court of Appeals held that a van which remained as a permanent fixture from which shrimp were sold was not considered a "motor vehicle" for the purposes of UM coverage. *Stoud v. State Farm Mut. Auto. Ins. Co.*, No. 01-96-01452-CV, 1998 WL 259973, at *3 (Tex. App.—Houston [1st Dist.] 1998, no writ) (not designated for publication).

1-5:3 EXCLUSIONS

A. We do not provide Uninsured/Underinsured Motorists Coverage for any person:

1. For bodily injury sustained while ***occupying****, or when struck by, any motor vehicle or trailer of any type owned by you or any* ***family member*** *which is not insured for this coverage under this policy.*[75]

75. Family Members: There is no UM coverage available for a loss by one family member in the vehicle of another family member that is *not* insured under the client's policy. *Farmers Texas Cty. Mut. Ins. Co. v. Griffin*, 868 S.W.2d 861 (Tex. App.—Dallas 1993, writ denied); *Reyes v. Tex. All Risk Gen. Agency*, 855 S.W.2d 191 (Tex. App.—Corpus Christi 1993, no writ). Both *Griffin* and *Reyes* are summary judgment cases in which the courts have agreed that the plain language of this exclusion precludes recovery by a family member as a matter of law. *Griffin*, 868 S.W.2d at 864. Likewise, in *Reyes*, a car owner's daughter who was injured as a passenger in a car driven by her father sought to recover UIM under another policy which covered her; the same exclusion operated in that case to exclude coverage. *Reyes*, 855 S.W.2d at 191. *Reyes* was consistent with the court's prior interpretation of this exclusion: "We have previously reviewed a similar case in which an injured party sued for underinsured motorist benefits after being injured as a passenger in

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a vehicle which was not covered by the policy in question. The family owned two vehicles which were insured by the defendant but the accident occurred in a third vehicle. We upheld a summary judgment in favor of the insurer, finding identical exclusionary language valid." *Reyes*, 855 S.W.2d at 192 (citing *Beaupre v. Standard Fire Ins. Co.*, 736 S.W.2d 237, 238-39 (Tex. App.—Corpus Christi 1987, writ denied)). This language "clearly excludes underinsured motorist coverage to persons who are injured while occupying vehicles owned by the family but not covered under the policy."

2. If that person or the legal representative settles the claim without our written consent. [76, 77]

76. Settlement Without Consent: An insured who had been involved in a three-vehicle accident obtained a default judgment against the uninsured motorist and settled, without consent, with the insured motorist. *Gaulden v. Johnson*, 801 S.W.2d 561 (Tex. App.—Dallas 1990, writ denied). The court held that this policy provision was ambiguous despite the fact that neither party alleged ambiguity. The enforceability of this exclusion has been limited. The Texas Supreme Court held that an insurer may not enforce the "settlement without consent" clause unless it could show that it had been prejudiced by the insured's failure to obtain consent before settling with the uninsured motorist. *Hernandez v. Gulf Grp. Lloyds*, 875 S.W.2d 691 (Tex. 1994); *Guaranty Cty. Mut. Ins. Co. v. Kline*, 845 S.W.2d 810 (Tex. 1992). In *Hernandez*, the court held that where the insurer is not prejudiced by a settlement, the insured's breach of contract is not material and would not bar coverage. *See also State Farm Auto. Ins. Co. v. Azima*, 896 S.W.2d 177 (Tex. 1995) where the insurer was held not to have given consent to the insured to sue an uninsured motorist simply because it sent a subrogation letter to the insured. *See also Cantu v. State Farm Mut. Auto. Ins. Co.*, No. H-16-3703, 2017 WL 2463628 (S.D. Tex. June 7, 2017).

77. Validity: This clause was held not to violate the Insurance Code in *Huttleston v. Beacon Nat'l Ins. Co.*, 822 S.W.2d 741, 746 (Tex. App.—Fort Worth 1992, writ denied); *Traylor v. Cascade Ins. Co.*, 836 S.W.2d 292 (Tex. App.—Dallas 1992, no writ); Tex. Ins. Code Ann. art. 1952.106 (V.T.C.A. 2007).

*3. When your **covered auto** is:*

a. being used to carry persons for a fee; this does not apply to a share the expense car pool; or

*b. being used to carry property for a fee; this does not apply to you or any **family member** unless the primary usage of the vehicle is to carry property for a fee;* [78, 79] *or*

HOT TIP

The pizza delivery guy who just hit your client's car is probably not covered.

78. Delivery of Property: In an unpublished case, the Houston Court of Appeals held that pizza delivery fell under the "being used to delivery property for a fee" exclusion. *Dhillon v. Gen. Acc. Ins. Co.*, No. C14-90-00714-CV, 1991 WL 51470 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (not designated for publication). The court held that the insured driver of the vehicle could not recover under UM: "The language excludes

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uninsured/underinsured coverage when the covered auto is being used in a commercial endeavor. There is no dispute that the accident occurred while appellant was driving the car insured by the policy. There is also no dispute that appellant was using the car to make pizza deliveries for remuneration in the form of an hourly wage and mileage reimbursement. It is unreasonable to assume that the "fee" in the policy refers to the payment received by the insured's employer. The focus of the exclusion is the use to which the covered vehicle is being put. Here, appellant was being paid to use his car to deliver pizzas. This is clearly excluded under the policy." In a prior, published, opinion on the same case, the court held fact issues existed about whether delivering pizzas constituted "delivery of property for a fee." *Dhillon v. Gen. Acc. Ins. Co.*, 789 S.W.2d 293 (Tex. App.—Houston [14th Dist.] 1990, no writ), *appeal after remand*, *Dhillon v. Gen. Acc. Ins. Co.*, No. C14-90-00714-CV, 1991 WL 51470 (Tex. App.—Houston [14th Dist.] Apr. 11, 1991, writ denied) (mem. op. not designated for publication).

79. Delivery of Property: In *Valentine v. Safeco Lloyds Ins. Co.*, the First Court of Appeals in Houston was presented with the issue of carrying property for a fee but decided the case on other grounds. *Valentine v. Safeco Lloyds Ins. Co.*, 928 S.W.2d 639 (Tex. App.—Houston [1st Dist.] 1996, writ denied).

THE CHANGING LANDSCAPE WITH THE EXPLOSION OF TRANSPORTATION NETWORK COMPANIES (TNC'S) THAT BEGAN WITH THE BIRTH OF UBER IN 2008.

"The Texas Legislature adopted House Bill 1733 which became effective on January 1, 2016 and is codified in chapter 1954 of the Texas Insurance Code. This legislation ensures that insurance is available to accident victims even if not provided by the driver's personal auto insurer. It also attempts to address the question of what insurance coverage is required during the time the driver is logged on to the TNC's digital network, but does not yet have a passenger. The new law requires that the TNC driver or the TNC on the driver's behalf, maintain primary automobile insurance with bodily injury limits of $50,000 per person and $100,000 per accident and $25,000 in property damage for the coverage period." *See* Catherine L. Hanna, *The New Frontier: Automobile Insurance in the Rider-Share World*, 15 J. Tex. Ins. L. 17 (Fall 2017).

c. rented or leased to another, this does not apply if you or any ***family member*** *lends* ***your covered auto*** *to another for reimbursement of operating expenses only.*

4. For the first $250 of the amount of damage to the property of that person as the result of any one accident.

5. Using a vehicle without a reasonable belief that the person is entitled to do so.[80] *This exclusion (A.5.) does not apply to you or any family member while using your covered auto.*

80. Reasonable Belief: See discussion under *Liability* in Chapter 1, § 1-2.

6. For bodily injury or ***property damage*** *resulting from the intentional acts of that person.*[81]

81. Intent: Texas courts have treated this exclusion like the similar exclusion in the liability section of the policy. In *Collier v. Employers Nat'l Ins. Co.*, the court held there

was no UM coverage where the insured was shot in his vehicle by an individual in a passing car. *Collier v. Employers Nat'l Ins. Co.*, 861 S.W.2d 286 (Tex. App.—Houston [14th Dist.] 1993, writ denied). The holding was based on a finding that the injury was intentionally caused and did not arise from the "use" of the vehicle. "The same injury could have been suffered in the same way if the parties had been on foot, on bicycles, or in any other of a number of circumstances. Allowing coverage simply because an automobile provided the site for a criminal assault or provided transportation to the location of a criminal act could lead to absurd and wide ranging results." *State Farm Mut. Auto. Ins. Co. v. Hawkins*, 962 F. Supp. 984 (E.D. Tex. 1996), *aff'd*, 109 F.3d 765 (5th Cir. (Tex.) 1997). The courts make a distinction between accidental and intentional shootings in this context. *See Mid-Century Ins. Co. of Texas v. Lindsey*, 997 S.W.2d 153 (1999).

The Fifth Circuit declined to accept Cincinnati Insurance Company's interpretation of the phase "accident" in the context of a "drunk driving accident" offering the proposition that choosing to drive drunk was an intentional act on the part of the drunk driver thereby negating coverage. The Fifth Circuit said Cincinnati's interpretation would render the common phrase "drunk driving accident" an oxymoron. *Frederking v. Cincinnati Ins. Co.*, 929 F.3d 195 (5th Cir. 2019) (commercial liability policy).

B. This coverage shall not apply directly or indirectly to benefit:

1. Any insurer or self insurer under any workers' compensation, disability benefits or similar law;[82]

82. Validity: The Amarillo Court of Appeals has held that this exclusion is invalid insofar as it conflicts with any workers' compensation insurer's statutory right of subrogation against the UM carrier. *Employers Cas. Co. v. Dyess*, 957 S.W.2d 884 (Tex. App.—Amarillo 1997, writ denied).

2. Any insurer of property.

1-5:4 LIMIT OF LIABILITY

A. I. If separate limits of liability for bodily injury and ***property damage*** *liability are shown in the Declarations for this coverage the limit of liability for "each person" for bodily injury liability is our maximum limit of liability for all damages for bodily injury sustained by any one person in any one motor vehicle accident. Subject to this limit for "each person", the limit of liability shown in the Declarations for "each accident" for bodily injury liability is our maximum limit of liability for all damages for bodily injury resulting from any one motor vehicle accident. The limit of liability shown in the Declarations for "each accident" for* ***property damage*** *liability is our maximum limit of liability for all damages to all property resulting from any one motor vehicle accident.*

If the limit of liability[83] *shown in the Declarations for this coverage is for combined bodily injury and* ***property damage*** *liability, it is our maximum limit of liability for all damages resulting from any one motor vehicle accident.*

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83. Amount of UM/UIM Coverage: The minimum amount of UM coverage (whether permitted by statutory presumption/lack of written rejection or otherwise) is equal to the minimum amount of liability insurance required by statute. Currently, that amount for bodily Injury is 30/60: $ 30,000 per person and $ 60,000 per accident V.T.C.A., Transportation Code § 601.072; *Employers Cas. Co. v. Sloan*, 565 S.W.2d 580 (Tex. Civ. App.—Austin 1978, writ ref'd n.r.e.).

This is the most we will pay[84] *regardless of the number of:*

84. Payment of Claims: Under Art. 5.061(2)(b) of the Texas Insurance Code, "payment of claims" includes the payment of the claim of the injured party seeking to recover the proceeds of UM coverage. Therefore, a negligent party is underinsured whenever the available proceeds of his liability insurance are insufficient to compensate the insured party's actual damages. The offset is to be subtracted from the amount of actual damages rather than the limits of the UM policy. *Stracener v. Untied Servs. Auto. Ass'n*, 777 S.W.2d 378 (Tex. 1989).

a. ***Covered persons,***[85]

85. Number of Covered Persons: The Texarkana Court of Appeals has adopted the reasoning of several other jurisdictions and held that an insurance company may settle with one or more covered persons, even when the settlement depletes or exhausts the policy proceeds available to other covered persons. *Lane v. State Farm Mut. Auto. Ins. Co.*, 992 S.W.2d 545 (Tex. App.—Texarkana 1999, pet. denied). Texas law does not contain a general prohibition against favoring one insured and an insurer may in effect settle one Uninsured Motorist claim at the expense of another, so long as the payment of the first claim is reasonable.

PRACTICE TIP
When several people have been injured in an accident, it's important not to be last in line.

b. Claims made;[86]

86. Per Person Limit: In *Christian v. Charter Oak Fire Ins. Co.*, 847 S.W.2d 458 (Tex. App.—Tyler 1993, writ denied), the Tyler Court of Appeals held that where the wrongful death beneficiaries settled their claim arising out of the husband/father's death under the UM/UIM portion of the deceased's policy, they could not recover additional "per person" limits for their bystander claim. The court concluded there was but one claim and one recovery for the father/husband's death. *See also Leal v. Northwestern Nat'l Mut. Ins Co.*, 846 S.W.2d 576 (Tex. App.—Austin 1993, no writ).

c. Policies or bond applicable;

d. Vehicles or premiums shown in the declarations;[87] *or* [88]

e. Vehicles involved in the accident.

87. PIP Offset: *See* detailed discussion in Chapter 3, *Policy and Extra-contractual Issues*.

88. The Texas Supreme Court has upheld the validity of this provision which prevents intra-policy stacking (the stacking of limits within the same policy) when the policy lists more than one vehicle in the declarations. *See Upshaw*

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v. The Trinity Companies, 842 S.W.2d 631 (Tex. 1992).

II. Subject to this maximum, our limit of liability will be the lesser of:

a. The difference between the amount of a covered person's damages for bodily injury or property damage[89] *and the amount paid or payable to that covered person for such damages, by or on behalf of persons or organizations who may be legally responsible; and*[90, 91]

b. The applicable limit of liability for this coverage.

89. Damages: A negligent party is underinsured whenever the available proceeds of his liability insurance are insufficient to compensate for the injured party's actual damages. The amount due under UM/UIM coverage, if any, is determined by subtracting the negligent party's policy limits from the amount of actual damages incurred by the insured as a result of that person's negligence rather than from limits specified in the underinsured motorist insurance policy. *Stracener v. United Servs. Auto. Ass'n*, 777 S.W.2d 378 (Tex. 1989).

90. In an Uninsured Motorist case, the trial court erred by refusing to allow the insurer to amend its pleadings to assert an offset for the motorist's liability coverage limits when it was learned at trial that the motorist was actually insured. *Allstate Prop. & Cas. Ins. Co. v. Gutierrez*, 281 S.W.3d 535, 539 (Tex. App.—El Paso 2008, no pet.) Benefits under an UIM policy are the actual damages less the amount recovered or recoverable from the negligent party. (citing *Stacner v. USAA*, 777 S.W.2d 378 (Tex. 1989).

91. The Fort Worth Court of Appeals held that the insured was not entitled to Underinsured Motorist Coverage where the total amount the insured obtained through settlements with other motorists exceeded the amount of the insured's damages proved at trial. The court found the Limit of Liability clause unambiguously allowed the insurer to take a credit for amounts from any "persons or organizations who *may* be legally responsible," which would included all three of the settling parties. The court also explained that the settlements would reduce the underinsured motorist's liability as settlement credits. Therefore, the insurer was not precluded from offsetting its liability under the Uninsured Motorist statue, which provided for payment of damages "reduced by the amount recovered or recoverable from the insurer of the underinsured motor vehicle." *Melancon v. State Farm Mut. Auto. Ins. Co.*, 343 S.W.3d 567 (Tex. App.—Houston [14th Dist.] 2011, no pet.). *Accord Farmers Tex. Cty. Mut. Ins. Co. v. Okelberry*, 525 S.W.3d 786 (Tex. App.—Houston [14th Dist.] 2017, rev. denied).

B. In order to avoid insurance benefits payments in excess of actual damages sustained, subject only to the limits set out in the Declarations and other applicable provisions of this coverage, we will pay all covered damages not paid or payable under any workers' compensation law,[92] *disability benefits law, any similar law, auto medical expense coverage or Personal Injury Protection Coverage.*

92. Workers' Compensation: *Employers Cas. Co. v. Dyess*, 957 S.W.2d 884 (Tex. App.—Amarillo 1997, writ denied): An injured employee has the right to sue a third party,

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but that right is burdened by the workers' compensation carrier's right to subrogate. In 1952, the Supreme Court held that an injured workers' cause of action against a third party only exists to the extent that his damages exceed his workers' comp recovery. In 1966, the Supreme Court reaffirmed a comp carrier's right to the first money the employee recovers from the third party. The court held that a workers' comp carrier's right to subrogation is statutory, not equitable, and held that the employer's right to recover was not affected by the "other insurance" clause because the employer was not bound by a contract to which it was not a party. Therefore, the "other insurance" clause could not bar the employer's right of subrogation against a third party tortfeasor. (*see also: City of Corpus Christi v. Gomez*, 141 S.W.3d 767 (Tex. App.—Corpus Christi 2004). However, subrogation is not available to the comp carrier from the employees UIM policy (or employee purchased policy). *Liberty Mut. v. Kinser*, 82 S.W.3d 71 (Tex. App.—San Antonio 2002, rev. withdrawn).

C. Any payment under this coverage to or for a ***covered person*** *will reduce any amount that person is entitled to recover for the same damages under the Liability Coverage of this policy.*[93, 94]

93. UIM and Liability Sometimes Can be Recovered Under the Same Policy: UIM and liability can both be recovered under the same policy where there is some liability attributable to both parties and the liability policy is not sufficient to fully compensate the injured party. *Jankowiak v. Allstate Prop. & Cas. Ins. Co.*, 201 S.W.3d 200 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (*but see Hanson v. Republic Ins. Co.*, 5 S.W.3d 324 (Tex. App.—Houston [1st Dist.] 1999, pet. denied)). Incidentally, when a UIM claim arises, the fact that the UIM and the liability coverage happen to be with the same company is also not material to what can be recovered. *See State Farm Mut. Auto Ins. Co. v. Perkins*, 216 S.W.3d 396 (Tex. App.—Eastland 2006, no pet.). In practical terms, the claims would be handled by separate adjusters who owed different duties to their respective insureds.

94. Policy: Public policy against double recovery is frustrated when an insured is permitted to recover under two separate provisions of a single policy if such recovery results in the total amount of benefits received exceeding the amount of actual damages. *Mid-Century Ins. Co. of Texas v. Kidd*, 997 S.W.2d 265 (Tex. 1999).

1-5:5 OTHER INSURANCE

A. If there is other applicable similar insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.[95]

95. Other Insurance: *See* discussion of identical language in Chapter 1, § 1-2:6.

B. For any ***property damage*** *to which the Coverage for Damage to Your Auto of this policy (or similar coverage from another policy) and this coverage both apply, you may choose the coverage from which damages will be paid. You may recover under both coverages, but only if:*

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1. Neither one by itself is sufficient to cover the loss;

2. You pay the higher deductible amount (but you do not have to pay both deductibles); and

3. You will not recover more than the actual damages.[96]

96. Double Recovery/Excess: *American Motorists Ins. Co. v. Briggs*, 514 S.W.2d 233 (Tex. 1974): Under this clause, an insurer argued its liability was for sums only in excess of the other carrier's policy limits, even though the insureds had settled their claims with the other insurer for less than the policy limits. The Texas Supreme Court rejected this argument, holding that the UM statute "preclud[ed] the use of 'other insurance' clauses to limit the recovery of actual damages caused by an uninsured motorists." The Supreme Court concluded that "[i]f coverage exists under two or more policies, liability on the policies is joint and several to the extent of plaintiff's actual damages, subject to the qualification that no insurer may be required to pay in excess of its policy limits." The family's insurer invoked the "other insurance" clause, which purported to reduce its own policy limits by the policy limits of any available insurance policy, to deny any recovery. The Supreme Court held that this was invalid. "[T]o permit one policy, or the other, to be reduced or rendered ineffective by a liability limiting clause would be to frustrate the insurance benefits which the statute sought to guarantee and which were purchased by the respective insureds." *American Motorists Ins. Co. v. Briggs*, 514 S.W.2d 233 (Tex. 1974) cited in *Mid-Century v. Kidd*, 997 S.W.2d 265 (Tex. 1999).

1-6 COVERAGE FOR DAMAGE TO YOUR AUTO

1-6:1 INSURING AGREEMENT

A. We will pay for direct and accidental loss[1] *to* ***your covered auto****, including its equipment, less any applicable deductible shown in the Declarations. However, we will pay for loss caused by* ***collision*** *only if the Declarations indicate that Collision Coverage (Coverage D2) is provided.*

B. Collision means the upset[2, 3] *or* ***collision***[4, 5] *with another object of* ***your covered auto****.*[6] *However, loss caused by the following are not considered* ***collision*** *and are covered only if the Declarations indicate that Coverage D1 is provided:*

1. Arson: In a criminal case, the Texas Court of Criminal Appeals held that the evidence was legally sufficient to affirm the insured's conviction for arson. The court noted the following evidence supported the conviction: 1) the defendant had financial problems and owed a substantial amount of money for the vehicle, 2) the rims and tires had been removed from the vehicle and replaced with cheaper ones, 3) the defendant had both sets of keys, 4) the vehicle's ignition and steering column was intact, 5) there were no marks indicating that the vehicle had been towed to the scene, 6) the defendant did not call "On Star" to immediately locate the vehicle, while it took the police several hours to find it, 7) the defendant gave inconsistent statements, 8) items claimed

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to be in the vehicle were found in the insured's garage, 9) there was no indication of forced entry, 10) items had been removed from the vehicle before it was burned, 11) the defendant had reported a stolen vehicle four other times, and 12) the burn patterns in the vehicle showed that there were three separate, non-contiguous points of origin, indicating that the fire was intentionally set. *See Merritt v. State*, 368 S.W.3d 516 (Tex. Crim. App. 2012).

2. Insurer Not On the Hook For Bad Repairs: The case of *Walker v. Travelers Indem. Co.*, No. 14-07-00238-CV, 2008 WL 123869 (Tex. App.—Houston [14th Dist.] Jan. 15, 2008), joins the patchwork of rulings on whether an insurer is liable for repairs which failed to restore the car to its pre-accident condition, ruling in favor of the insurer. No. 14-07-00238-CV, 2008 WL 123869 (Tex. App.—Houston [14th Dist.] Jan. 15, 2008) (mem. op., not designated for publication). (holding that defects from a re-repair did not qualify as "upset" or "collision" under the terms of the policy).

3. Upset: An accident caused by the wheels of a vehicle coming off was ruled to be due to "upset" within the collision coverage and not due or confined to wear and tear or mechanical breakdown in *Home Serv. Cas. Ins. Co. v. Barry*, 277 S.W.2d 280 (Tex. Civ. App.—Waco 1955, writ ref'd n.r.e.).

4. Collision: The former Galveston Court of Appeals held in *Calvert Fire Ins. Co. v. Koenig*, 259 S.W.2d 574 (Tex. Civ. App.—Galveston 1953, writ dism'd), that when the tire of a covered automobile struck a rock in the road and caused the rock to strike the underside of the vehicle and make a hole in the oil pan, there was a collision. Impact occurring when a trailer strikes a road bed as the result of a jolt produced by a depression in the road is a collision with an object or obstruction within the purview of the policy. *Nutchey v. Three R's Trucking Co., Inc.*, 674 S.W.2d 928 (Tex. App.—Amarillo 1984, writ refused n.r.e.).

5. Collision: The insurance policy does not cover wear and tear. In a suit to recover for damage sustained by the insured's car when the arm holding the front bumper broke, permitting the bumper to drop to the ground where it was forced under the automobile, the court held that the evidence was insufficient to show that the loss was not the result of wear and tear or mechanical failure of the part itself. *Republic Cas. Co. v. Mayfield*, 251 S.W.2d 764 (Tex. Civ. App.—Fort Worth 1952, no writ). *See also Providence Washington Ins. Co. v. Proffitt*, 239 S.W.2d 379, 382 (Tex. 1951) defining "collision".

6. Accident: An accident between a moving automobile and an intoxicated pedestrian has been ruled to be a "collision" under the policy. Such accident was not within the comprehensive coverage for contact with bird or animal, malicious mischief or vandalism. *McKay v. State Farm Mut. Auto. Ins. Co.*, 933 F. Supp. 635 (S.D. Tex. 1995), *aff'd*, 91 F.3d 137 (5th Cir. 1996).

1. Missiles or falling objects; [7, 8]

7. Falling Objects: In *Great American Ins. Co. v. Lane*, 398 S.W.2d 592 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.), it was held that the falling of a bucket onto a truck it was loading with dirt constituted a collision within the meaning of the collision coverage of an automobile policy.

8. Falling Trees: In *Shillings v. Michigan Miller Mut. Ins. Co.*, the court held that a covered "collision" occurred when the covered vehicle, a tractor used to clear trees, was struck by a falling tree. That policy was ambiguous as to whether the damage fell within the exclusion for "incidental loss or damage due to operation of equipment" so that the exclusion did not

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bar recovery. *Shillings v. Michigan Miller Mut. Ins. Co.*, 536 S.W.2d 627 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.)

2. Fire;

3. Theft[9] or larceny;

9. Theft: The Texas Supreme Court deemed the loss of a vehicle a "theft" when the owner had advanced compensation to his employee, and had instructed the employee to drive it to a designated place, but never saw the vehicle or the employee again. *Hall v. Great Nat. Lloyds*, 154 Tex. 200, 275 S.W.2d 88 (1955).

4. Explosion[10] or earthquake;

10. Explosion: An implosion of a tank truck, defined as being an internal collapse followed immediately by an outward rush of air, as opposed to a result of the breaking forth of a confined substance or ignition of combustible gases, was not an "explosion" within the meaning of the policy. *Allen v. Manhattan Fire & Marine Ins. Co.*, 519 S.W.2d 706 (Tex. Civ. App.—El Paso 1975, no writ).

5. Windstorm;[11, 12, 13]

11. Wind: If a windstorm is the dominant cause of loss, the insured may recover under comprehensive coverage notwithstanding the fact that another cause or causes contributed to the damage. *Providence Washington Ins. Co. v. Cooper*, 223 S.W.2d 329 (Tex. Civ. App.—Texarkana 1949, writ ref'd n.r.e.); *Farmers Ins. Exchange v. Wallace*, 275 S.W.2d 864 (Tex. Civ. App.—Fort Worth 1955, writ ref'd n.r.e.).

12. Storm: Damage caused by debris falling from a tornado damaged building onto a stationary vehicle would be covered under comprehensive coverage. Such act does not constitute a collision with an object since the destruction of the automobile was due to windstorm. *Home Ins. Co. of N.Y. v. Cox*, 153 Tex. 421, 269 S.W.2d 343 (1954); *U.S. Ins. Co. of Waco v. Boyer*, 153 Tex. 415, 269 S.W.2d 340 (1954).

13. Storm: *Firemen's Ins. Co. of Newark, N.J. v. Weatherman*, 193 S.W.2d 247 (Tex. Civ. App.—Eastland 1946, writ ref'd n.r.e.): A windstorm struck the insured's car and ran it off the road against a post, practically destroying the car. The court found that the damages were caused by a windstorm, rather than by a collision.

6. Hail, water,[14] or flood;

14. Water: Under the prior language of the policy, the force of flood waters against an automobile was a "collision" within policy coverage, even though the automobile had come to rest without damage following the original collision and upset, and was damaged beyond repair by water. *Providence Washington Ins. Co. v. Proffitt*, 150 Tex. 207, 239 S.W.2d 379 (1951).

BURNING QUESTION

How would *Providence Washington* be decided today?

7. Malicious mischief or vandalism;[15]

15. What Constitutes "Vandalism?": Damage to a parked car which was "rammed" by another vehicle was covered under comprehensive coverage (the insured did not have collision coverage) for "vandalism" damage. *USAA Cty. Mut. Ins. Co. v. Cook*, 241 S.W.3d 93 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

8. Riot or civil commotion;

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9. Contact with bird or animal; or

10. Breakage of glass.

*If breakage of glass is caused by a **collision** or if loss is caused by contact with a bird or animal, you may elect to have it considered a loss caused by **collision**.*

1-6:2 TRANSPORTATION EXPENSES

*In addition, we will pay up to $20 per day, to a maximum of $600 for transportation expenses incurred by you. This applies only in the event of the total theft of **your covered auto**. We will pay only transportation expenses incurred during the period:*

1. Beginning 48 hours after the theft; and

*2. Ending when **your covered auto** is returned to use or we pay for its loss.*

1-6:3 EXCLUSIONS

We will not pay for:

*1. Loss to **your covered auto** while it is:*

a. being used to carry persons for a fee; this does not apply to a share the expense car pool; or

*b. being used to carry property for a fee; this does not apply to you or any **family member** unless the primary usage of the vehicle is to carry property for a fee; or*

*c. rented or leased to another; this does not apply if you or any **family member** lends **your covered auto** to another for reimbursement of operating expenses only.*

2. Damage due and confined to:

a. wear and tear;[16]

16. Maintenance: An insurance policy is not a maintenance policy, it is intended to provide coverage for the unexpected and unforeseen, i.e. accidents.

b. freezing;

c. mechanical or electrical breakdown or failure; or

d. road damage to tires.

*This exclusion (2.) does not apply if the damage results from the total theft of **your covered auto**.*

3. Loss due to or as a consequence of:

a. radioactive contamination;

b. discharge of any nuclear weapon (even if accidental);

c. war (declared or undeclared);

d. civil war;

e. insurrection; or

f. rebellion or revolution.

*4. Loss to stereos, radios and other sound reproducing equipment. This exclusion (4.) does not apply if the equipment is permanently installed in **your covered auto.***

5. Loss to tapes, records or other devices for use with equipment

designed for the reproduction of sound.

6. Loss to a camper body or ***trailer*** *not shown in the Declarations. This exclusion (6.) does not apply to a camper body or* ***trailer*** *you:*

a. acquire during the policy period; and

b. notify us within 30 days after you become the owner.[17]

17. Notification Within 30 Days:

7. Loss to any vehicle while used as a temporary substitute[18] *for a vehicle you own which is out of normal use because of its:*

18. Temporary Substitute: Collision coverage, unlike other coverages, does not cover damage to a temporary substitute automobile. *Providence Washington Ins. Co. v. Hawkins*, 340 S.W.2d 874 (Tex. Civ. App.—Waco 1960, no writ); *Serv. Mut. Ins. Co. of Texas v. Chambers*, 289 S.W.2d 949 (Tex. Civ. App.—Fort Worth 1956, writ ref'd). A car did not constitute a temporary substitute vehicle under the driver's insurance policy where he took the car without the owner's permission; thus, the insurance company was not liable to the injured party. *Progressive Cty. Mut. Ins. Co. v. Sink*, 107 S.W.3d 547 (Tex. 2003).

a. breakdown;

b. repair;

c. servicing;

d. loss; or

e. destruction.

8. When in or upon any ***trailer****, loss to:*

a. TV antennas;

b. awnings or cabanas; or

c. equipment designed to create additional living facilities.

9. Loss to any of the following or their accessories:

a. citizens band radio;

b. two-way mobile radio;

c. telephone;

d. scanning monitor receiver; or

e. any device or instrument used for detection of radar or other speed measuring equipment.

This exclusion (9.) does not apply if the equipment is permanently installed in the opening of the dash or console of the auto. This opening must be normally used by the auto manufacturer for the installation of a radio.

10. Loss to any custom furnishings or equipment in or upon any pickup or van. Custom furnishings or equipment include, but are not limited to:

a. special carpeting and insulation, furniture, bars or television receivers;

b. facilities for cooking and sleeping;

c. height extending roofs; or

d. custom murals, paintings or other decals or graphics.

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This exclusion (10.) does not apply if the value of the custom furnishings or equipment has been reported to us prior to a loss and included in the premium for this coverage.

11. Loss due to or as a consequence of a seizure[19] of ***your covered auto*** *by federal or state law enforcement officers as evidence in a case against you by the Texas Controlled Substances Act or the federal Controlled Substances Act if you are convicted in such case.*

19. Seizure: *See* discussion in Chapter 1.

1-6:4 LIMIT OF LIABILITY

Our limit of liability for loss will be the lesser [20] of the:

20. Amount Due: If there is a difference in these amounts, the amount due is the smallest of the amounts listed. *Superior Pontiac Co. v. Queen Ins. Co. of America*, 434 S.W.2d 340 (Tex. 1968).

1. Actual cash value of the stolen or damaged property; [21]

21. Diminished Value: In 2003, the Texas Supreme Court resolved a dispute among the Courts of Appeal on the issue of diminished value, ruling in *American Manufacturers Mut. Ins. Co. v. Schaefer* that this policy language does not obligate an insurer to compensate a policyholder for a vehicle's diminished market value when there has been adequate repair of the damage. *American Manufacturers Mut. Ins. Co. v. Schafer*, 124 S.W.3d 154 (Tex. 2003). * Note that this is not the case in a liability claim, in which a claim for diminution of value can be sustained. *Texas Department of Ins. Commissioners' Bulletin*, No. B-0027-00 (Apr. 6, 2002).

2. Amount necessary to repair or replace[22, 23] the property with other of like kind and quality; [24] or

22. Replacement Cost: Unlike Actual Cash Value payments, Replacement Cost is generally not payable until the item is actually replaced. If the insured invokes Replacement Cost Coverage, it is generally the insured's responsibility to submit receipts once the work is completed in order to receive the replacement cost benefit. *State Farm Fire & Cas. Co. v. Griffin*, 888 S.W.2d 150 (Tex. App.—Houston [1st Dist.] 1994, no writ) (homeowners' policy).

23. Insurer Not Responsible for Quality of Repairs: *Walker v. Travelers Indem. Co.*, No. 14-07-00238-CV 2008 WL 123869 (Tex. App.—Houston [14th Dist.] Jan. 15, 2008 pet. denied).

24. Like Kind and Quality: The phrase "like kind and quality" allows an insurer to deduct for betterment or depreciation. "[L]ike kind or quality refers to parts fit for their intended purpose rather than parts similar in age, condition, or value to the parts damaged." *Great Texas Cty. Mut. Ins. Co. v. Lewis*, 979 S.W.2d 72 (Tex. App.—Austin 1998, pet. denied).

3. Amount stated in the Declarations of this policy.[25]

25. Amounts Due Under Policy: The insurance policy does not require an offer and acceptance as part of the process of an insurer's giving notification of intent to pay a claim. The insurance contract only requires a statement of intent to pay in order for the insurance company's liability for payment to vest.

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Daugherty v. American Motorists Ins. Co., 974 S.W.2d 796 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (rule 53.7(f) motion granted).

The most we will pay for loss to equipment listed in Exclusion 4. is $1500. Our payment for loss will be reduced by any applicable deductible shown in the Declarations.

1-6:5 PAYMENT OF LOSS[26]

We may pay for loss in money or repair or replace the damaged or stolen property. We may, at our expense, return any stolen property to:

1. You; or

2. The address shown in this policy.

If we return stolen property we will pay for any damage resulting from the theft. We may keep all or part of the property at an agreed or appraised value.

26. Payment of Loss: *Hamby v. State Farm Mut. Auto Ins. Co.*, 137 S.W.3d 834 (Tex. App.—Houston [1st Dist.] 2004, pet. denied). As a matter of law, the contract was construed as a whole and in pertinent part to give the insurer the right to keep all or part of the subject property at an agreed or appraised value. In so holding, the Court rejected the argument that this language applied only to stolen property.

1-6:6 NO BENEFIT TO BAILEE

This insurance shall not directly or indirectly benefit any carrier or other bailee for hire.

1-6:7 OTHER INSURANCE

A. If other insurance also covers the loss we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits.

B. For any loss to which Uninsured/Underinsured Motorists Coverage (from this or any other policy) and this coverage both apply, you may choose the coverage from which damages will be paid.

You may recover under both coverages, but only if:

1. Neither one by itself is sufficient to cover the loss;

2. You pay the higher deductible amount (but you do not have to pay both deductibles); and

3. You will not recover more than the actual damages. [27]

27. Effect: *See* discussion under *Uninsured/Underinsured Motorists Coverage* in Chapter 1.

1-6:8 APPRAISAL

If we and you do not agree on the amount[28] *of loss, either may demand an appraisal*[29] *of the loss. In this event, each party will select a competent appraiser. The two appraisers will select an umpire. The appraisers*[30] *will state separately the actual cash value and the amount of loss. If they fail to agree, they will submit their differences to the*

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umpire. A decision agreed to by any two will be binding.[31, 32] *Each party will:*

28. Appraisal Award Greater Than Offer: The fact that an appraisal award turns out to be greater than the insurer's offer is not enough to support a breach of contract claim if the insurer participates in the process and tenders the amount awarded. *Brownlow v. United Serv. Auto. Ass'n* No. 13-03-758-CV, 2005 WL 608252 (Tex. App.—Corpus Christi Mar. 17, 2005, pet. denied) (mem. op.). **PLEASE CONSULT THE TEXAS RULES OF APPELLATE PROCEDURE FOR CITATION OF MEMORANDUM OPINIONS AND UNPUBLISHED OPINIONS.**

IMPORTANT UPDATE: *Barbara Technologies Corp. v. State Farm Lloyds* 598 S.W.3d 806 (Tex. 2019) AND *Ortiz v. State Farm Lloyd's*, No. 17-1048, 2019 WL 2710032 (Tex. 2019).

Clarifying how appraisal affects liability under the Prompt Payment of Claims Act and Unfair Insurance Practices Act. (A first party property insurer's payment of an appraisal award does not by itself, subject the insurer to liability under the TPPCA. By the same token, the insurer's prompt payment of an appraisal award does not establish as a matter of law the absence of liability for penalties under the TPPCA.

29. Appraisal and Arbitration: The Texas Supreme Court reiterated that Texas courts have distinguished between appraisal and arbitration for more than 100 years and enforced appraisal provisions over that same time. The Court held that a trial court's denial of an insurer's motion to invoke appraisal regarding a vehicle's value was error, and that the trial court proceedings did not need to be abated while the appraisal went forward. *In re Allstate Cty. Mut. Ins. Co.*, 85 S.W.3d 193 (Tex. 2003). A post suit demand for appraisal was held to be valid in a homeowners' claim in *In re State Farm Lloyds, Inc.*, 170 S.W.3d 629 (Tex. App.—El Paso 2005, no writ) and *In re Clarendon Ins. Co.*, No. 2-04-305-CV, 2004 WL 2984916 (Tex. App.—Fort Worth 2004, orig. proceeding, no pet.) (mem. op.).

30. Unsuccessful Attempt to Impose Liability on Appraiser: A Federal Court rejected an insured's attempt, in a homeowner's policy case, to pursue DTPA and Insurance Code claims against an independent appraiser. *Woodward v. Liberty Mut. Ins. Co.*, No. 3:09-CV-0228-G 2009 WL 1904840 (N.D. Tex. July 2, 2009); (case later abated for completion of appraisal, March 26, 2010).

PRACTICE TIP
Always determine whether there has been an appraisal before trying to dispute the value of a claim.

31. Appraisal: Texas law is well established: An appraisal award made pursuant to an insurance policy is binding and enforceable unless one party proves that the award was unauthorized or the result of fraud, accident or mistake. *Toonen v. United Servs. Auto. Ass'n*, 935 S.W.2d 937 (Tex. App.—San Antonio 1996, no writ); *Barnes v. Western Alliance Ins. Co.*, 844 S.W.2d 264 (Tex. App.—Fort Worth 1992, writ dism'd by agr.); *Providence Lloyds Ins. Co. v. Crystal City I.S.D.*, 877 S.W.2d 872 (Tex. App.—San Antonio 1994, no writ); *Scottish Union & Nat'l Ins. Co. v. Clancy*, 71 Tex. 5, 8 S.W. 630, 631 (1888).

32. Appraisal/Appointment of Umpire by Default: There is precedent for an umpire to be appointed by a Court (in this case, by default) if the appraisers cannot agree on an umpire. *Allstate Texas Lloyds v. Shah*, No. 1:08-CV-56, 2009 WL 1025399 (E.D. Tex. Apr. 16, 2009). (homeowners' policy).

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Appraisal/Bad Faith: Where the insured invoked the appraisal provision of a commercial property coverage policy, and the insurer promptly paid the award, the insured could assert no claim for breach of contract or bad faith even though the award exceeded the insurer's highest estimate by $700,000. *See Blums Furniture Co. Inc. v.Certain Underwriters at Lloyds London*, 459 Fed. App'x 366 (5th Cir. 2012).

But see: Barbara Technologies Corp. v. State Farm Lloyds, 598 S.W.3d 806 (Tex. 2019) AND *Ortiz v. State Farm Lloyd's*, No. 17-1048, 2019 WL 2710032 (Tex. 2019).

Clarifying how appraisal affects liability under the Prompt Payment of Claims Act and Unfair Insurance Practices Act. (A first party property insurer's payment of an appraisal award does not by itself subject the insurer to liability under the TPPCA. By the same token, the insurer's prompt payment of an appraisal award does not establish as a matter of law the absence of liability for penalties under the TPPCA).

1. Pay its chosen appraiser; and

2. Bear the expenses of the appraisal and umpire equally.

We do not waive any of our rights under this policy by agreeing to an appraisal.

This is an ever changing and evolving area of law, centered primarily around homeowners and commercial policies. To the extent that the auto policy addresses appraisal, we make mention here, but encourage the reader to look for changes in this area that are fast-paced and constantly evolving.

1-6:9 SPECIFIED CAUSES OF LOSS

We will pay for direct and accidental loss to ***your covered auto*** *including its equipment, less any applicable deductible, caused by the following specified causes of loss:*

(a) fire, lightning or explosion;

(b) theft;

(c) the sinking, burning, collision or derailment of any vessel or vehicle in or upon which your auto is being transported;

(d) windstorm, hail or earthquake;

(e) flood;

(f) mischief or vandalism; or*

** **$25 Deductible applies to mischief or vandalism***

(g) collision.

However, we will pay for loss caused by collision only if the declarations indicate that Collision Coverage is provided.

The provisions and exclusions that apply to Coverage for Damage to Your Auto also apply except as amended by this coverage.

1-6:10 OPTIONAL AND LIMITED SPECIFIED CAUSES OF LOSS (Fire, Theft, Wind)

The provisions and exclusions that apply to Coverage For Damage To Your Auto also apply to this Coverage.

However, we will pay for loss caused by collision only if the declarations indicate that Collision Coverage is provided.

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We will pay for direct and accidental loss to ***your covered auto*** *including its equipment, less any applicable deductible, caused by the following specified causes of loss for which a premium charge is shown on the declarations:*

(a) fire, lightning or explosion, the sinking, burning, collision or derailment of any vessel or vehicle in or upon which your auto is being transported;

(b) theft; or

(c) windstorm, hail or earthquake.

1-7 DUTIES AFTER AN ACCIDENT OR LOSS

1-7:1 GENERAL DUTIES

A. We must be notified promptly[1] *of how, when and where the accident or loss happened.*[2] *Notice,*[3] *should also include the names and addresses of any injured persons and of any witnesses. If we show that your failure to provide notice*[4] *prejudices our defense,*[5] *there is no liability coverage under the policy.*[6, 7, 8, 9]

BURNING QUESTION
What constitutes timely notice?

1. Timely Notice: Note that the "prompt notice" requirement is not necessarily confined to situations where suit has already been filed. The Dallas Court of Appeals upheld a lower court's ruling finding of no coverage due to the insured's failure to provide timely notice of the claim which resulted in prejudice to the insurer under a CGL policy. In *Blanton v. Vesta Lloyds Ins. Co.*, the insured did not notify the insurer of claims that might reasonably be expected to ripen into litigation and preserve evidence, even though it timely forwarded the actual lawsuit papers. *Blanton v. Vesta Lloyds Ins. Co.*, 185 S.W.3d 607 (Tex. App.—Dallas 2006, no pet.).

2. Notice: An insured does not have a duty to comply with the notice provisions of a policy until he knows or, in the exercise of reasonable diligence, should know, of the available coverage. *Allstate Ins. Co. v. Darter*, 361 S.W.2d 254 (Tex. Civ. App.—Fort Worth 1962, no writ). In determining whether an insured has given notice within a reasonable time, all the circumstances are considered including, but not confined to, the insured's age, experience, capacity for understanding, and knowledge. "[W]hat would be reasonable time in one case might be wholly inadequate to shut off the rights of parties in a different case or under different circumstances." *Atteberry v. Allstate Ins. Co.*, 461 S.W.2d 219 (Tex. Civ. App.—El Paso 1970, writ ref'd n.r.e.).

3. Notice of Claim: A notice of the claim received before suit was filed is not notice of suit. It is the insured's duty to notify the insurer of suit, not the insurer's duty to determine if the insured has been served. *Harwell v. State Farm Mut. Auto. Ins. Co.*, 896 S.W.2d 170 (Tex. 1995); *E & L Chipping Co. Inc. v. Hanover Ins. Co.*, 962 S.W.2d 272 (Tex. App.—Beaumont 1998, no pet.).

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4. Warning: The requirements of this provision do not change because the insurer may have been warned by the claimant's attorney that a suit would be filed. *Baker v. State Farm Lloyds*, No. 05-93-00755-CV 1994 WL 468181 (Tex. App.—Dallas 1994, no writ) (mem. op. not designated for publication).

5. Insurer's Actual Knowledge of Service of Process/Prejudice: In *Nat'l. Union Fire Ins. Co. v. Crocker*, 246 S.W.3d 603 (Tex. 2008) (nursing home liability policy), the Texas Supreme Court answered "no" to the following certified question from the Fifth Circuit: Does proof of an insurer's actual knowledge of service of process in a suit against its additional insured, when such knowledge is obtained in sufficient time to provide a defense for the insured, establish as a matter of law the absence of prejudice to the insurer from the additional insured's failure to comply with the notice-of-suit provisions of the policy? *See also Jenkins v. State & Cty. Mut. Fire Ins. Co.*, 287 S.W.3d 891, 897 (Tex. App.—Fort Worth 2009, pet. denied) (citing *National Union Fire Ins. Co. v. Crocker*, 246 S.W.3d 603 (Tex. 2008)) *explaining*, ("If an additional insured who has no knowledge of the policy must comply with its conditions in order to invoke coverage, then certainly compliance will be required of a named insured, who is assumed to have read the policy and is charged with knowledge of its contents.").

6. Insurer Must Show Prejudice to Refuse Payment: *PAJ, Inc. v. Hanover Ins. Co.*, 243 S.W.3d 630 (Tex. 2008). "[A]n insured's failure to timely notify its insurer of a claim or suit does not defeat coverage if the insurer was not prejudiced by the delay." An immaterial breach does not deprive the insurer of the benefit of the bargain and thus cannot relieve the insurer of the contractual coverage obligation. *Hernandez v. Gulf Grp. Lloyds*, 875 S.W.2d 691, 692 (Tex. 1994).

7. Prejudice: Where an insurer does not receive notice of suit until after a judgment has become final and non-appealable, it is prejudiced as a matter of law. *Members Ins. v. Branscum*, 803 S.W.2d 462 (Tex. App.—Dallas 1991, no writ).

8. Notice: The failure to comply with a notice of suit clause until after a default judgment against the insured becomes final, absent actual knowledge of the suit on the part of the insurer, constitutes prejudice as a matter of law. *Liberty Mut. Ins. Co. v. Cruz*, 883 S.W.2d 164 (Tex. 1993).

9. Validity: This provision is valid and enforceable. *Nat'l. Sur. Corp. v. Diggs*, 272 S.W.2d 604 (Tex. Civ. App.—Fort Worth 1954, ref. n.r.e.); *Ratcliff v. Nat'l Cty. Mut. Fire Ins. Co.*, 735 S.W.2d 955 (Tex. App.—Dallas 1987, writ dismissed w.o.j.). However, the Texas Department of Insurance has required a showing of prejudice to the insurer by the insured's failure to forward suit papers before the adverse judgment will bar liability under an automobile insurance policy since 1973. State Board of Insurance, revision of Texas Standard Provision for Automobile Polices additions of April 1, 1955 and October 1, 1966—Amendatory Endorsement—Notice Order No. 22582 (Jan. 26, 1973).

B. A person seeking any coverage must:

1. Cooperate with us in the investigation, settlement or defense of any claim or suit. [10, 11]

2. Promptly[12] *send us copies of any notices or legal papers received in connection with the accident or loss.*

10. Late Notice and Attendant Prejudice Relieved Liability Insurance Carrier of Any

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Obligations Under the Policy: Where the insured failed to provide notice of the lawsuit to the insurer until after a default judgment against him was final, and where the insurer did not otherwise have actual notice of the lawsuit, the Dallas Court of Appeals held that the insurer was prejudiced as a matter of law and relieved of liability under the policy, such that summary judgment was properly entered in the insurer's favor. In *Matthew v. Old American Cty. Mut. Fire Ins. Co.*, No. 05-04-00663-CV, 2005 WL 895561 (Tex. App.—Dallas 2005, no pet.), the court rejected the contention that the insurer was not entitled to rely on the notice provision of the policy.

11. Duty to Cooperate: The Dallas Court of Appeals affirmed a summary judgment for an insurer against judgment creditors who had taken a default judgment against the insured for an amount far in excess of the policy limits. The court observed that the judgment creditors, as third party beneficiaries, stood in the shoes of the insured. The Court found that, although the insurer had notice of the lawsuit, there was no police report and the insured did not report the accident, respond to attempts to contact her, or forward suit papers. The court held that the insured's failure to cooperate in the investigation, defense, and settlement of the claim, which were conditions to coverage. Therefore, the insurer had no a duty to defend or indemnify the insured for the judgment. *See Martinez v. ACCC Ins. Co.*, 343 S.W.3d 924, 929-30 (Tex. App.—Dallas 2011, no pet.).

12. Cooperation: These provisions are intended to notify the insurer that the insured has been served with process and that the insurer is expected to defend the suit. Compliance with these provisions is a condition precedent to the insurer's liability on the policy. *Weaver v. Hartford Acc. & Indem. Co.*, 570 S.W.2d 367 (Tex. 1978). However, since 1973 the Texas Department of Insurance has required a showing of prejudice to the insurer by the insured's failure to forward suit papers before the failure will bar liability under an automobile insurance policy. State Board of Insurance, revision of Texas Standard Provision for Automobile Polices additions of April 1, 1955 and October 1, 1966—Amendatory Endorsement—Notice Order No. 22582 (Jan. 26, 1973). *Martinez v. ACCC Ins. Co.*, 343 S.W.3d 924 (Tex. Civ. App.—Dallas 2011, no pet.) held that (among other things) the failure to forward suit papers and request a defense can be interpreted as a failure to cooperate and the cooperation clause is a condition precedent to coverage (citing *Progressive Cty. Mut. Ins. Co v. Trevino*, 202 S.W.3d 811 (Tex. Civ. App.—San Antonio 2006, pet. denied)).

3. Submit, as often as we reasonably require, to physical exams by physicians we select. We will pay for these exams.

4. Authorize us to obtain:

a. medical reports; and

b. other pertinent records.[13]

13. Unfair Claims Settlement Practices: Section 542.004(a) of the Texas Insurance Code states that it is an unfair claims settlement practice for an insurer to require a claimant, as a condition of settling a claim, to produce the claimant's federal income tax return for examination or investigation by the person except in very limited circumstances.

5. When required by us:

a. submit a sworn proof of loss;

b. submit to examination under oath.[14, 15]

14. Examinations Under Oath: An Examination Under Oath (EUO) is a formal

proceeding whereby an insured, under oath, and in the presence of a court reporter, is questioned regarding the specifics of the claim. Although the insured's failure to give a EUO when properly requested by an insurer may technically be construed as a breach of contract, it does not permit an insurer to refuse to pay a claim. *State Farm Gen. Ins. Co. v. Lawlis*, 773 S.W.2d 948 (Tex. App.—Beaumont 1989, no writ). In the event of an insured's refusal to submit to a EUO, this Texas court held—as would a majority of courts throughout the United States—that the insured's failure to submit to an examination under oath did not form a valid basis for denial of the claim. In *Lawlis*, the court held that abatement of the insured's suit against the insurer, not denial, is the proper remedy. An insurer cannot delay payment based solely upon failure to give a EUO. *Aetna Cas. & Sur. Co. v. Garza*, 906 S.W.2d 543 (Tex. App.—San Antonio 1995, writ dism'd by agrmt.).

15. Right to Demand EUO Upheld: In *Trahan v. Fire Ins. Exchange*, 179 S.W.3d 669 (Tex. App.—Beaumont 2005, no pet.), the Beaumont Court of Appeals did not require an insurer to show any particular reason to request an Examination Under Oath from its insured. The insured in that case failed to cite any case law limiting an insurance carrier's right to obtain a EUO under a homeowners' insurance contract. Presumably, this would apply in the auto context as well. In another Beaumont case, the Court held that a lawsuit should be abated to allow a EUO. *In re Foremost Cty. Mut. Ins. Co.*, 172 S.W.3d 128 (Tex. App.—Beaumont 2005, orig. proceeding). The Court held that it was an abuse of discretion to refuse to abate. The Court also refused to hold that the Prompt Payment of Claims Act (formerly Insurance Code Art. 21.55, currently, Tex. Ins. Code Ann. §§ 542.055 542.060 (Vernon 2005), requires an insurer to request all items within the first 15 days of its investigation. (Again, this was a homeowners' policy, but the Act is reiterated verbatim in the standard auto policy.) The Court appeared to sidestep the issue by stating that an insurer who violates the Prompt Payment of Claims Act does not risk waiver of contractual rights, but rather risks incurring penalties and attorneys' fees for unduly delaying the payment of a valid claim.

1-7:2 ADDITIONAL DUTIES FOR UNINSURED/UNDERINSURED MOTORISTS COVERAGE

A person seeking Uninsured/Underinsured Motorists Coverage must also:

1. Promptly notify the police if a hit and run driver is involved;[16]

16. Prompt Notice Requirement is a Condition Precedent: In *Fuller v. State Farm Mut. Auto. Ins. Co.*, 971 F. Supp. 1098 (N.D. Tex. 1997), the insured alleged that she had been involved in a hit and run and never contacted the police. She notified the insurance company months after the alleged accident. The court concluded that notifying the police was a condition precedent, and the insured's failure to do so precluded recovery.

2. Promptly send us copies of the legal papers if a suit is brought;

3. Take reasonable steps after loss, at our expense, to protect damaged property from further loss; and

4. Permit us to inspect and appraise the damaged property before its repair or disposal.

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1-7:3 ADDITIONAL DUTIES FOR COVERAGE FOR DAMAGE TO YOUR AUTO

A person seeking Coverage for Damage to Your Auto must also:

1. Take reasonable steps after loss, to protect ***your covered auto*** *and its equipment from further loss. We will pay reasonable expenses incurred to do this;*

2. Promptly notify the police if ***your covered auto*** *is stolen,*[17] *and*

3. Permit us to inspect and appraise the damaged property before its repair or disposal.

17. Prompt Notice to Police: In the context of a hit and run accident, prompt notice to the police was found to be a condition precedent to recovery under the policy in *Fuller v. State Farm Mut. Auto. Ins. Co.*, 971 F. Supp. 1098 (N.D. Tex. 1997). The factors supporting this requirement would likely apply to this clause as well: "Reasons of public policy support the police notification provisions in a policy of insurance. Notification of the proper law enforcement authorities permits the police to investigate the accident scene, gather information, and prepare a police report from which the insurer can then verify the circumstances surrounding the accident." *Shelter Mut. Ins. Co. v. Selley*, 942 S.W.2d 1370, 137273 (Colo. App. 1997); *Billings v. State Farm Mut. Auto. Ins. Co.*, 741 S.W.2d 886, 888 (Mo. App. 1987). Courts in other jurisdictions have observed that the insured public as a whole will incur additional and unnecessary costs if an insurer must pay a stale claim because of a lack of opportunity to investigate the claim and ensure that it is meritorious.

1-8 GENERAL PROVISIONS

1-8:1 BANKRUPTCY

Bankruptcy or insolvency of the ***covered person*** *shall not relieve us of any obligations under this policy.*[1]

1. Bankruptcy or Insolvency: The only reported case regarding this provision is *Firemen's Ins. Co. of Newark, N.J. v. Burch*, 426 S.W.2d 306 (Tex. Civ. App.—Austin 1968, *aff'd in part* and *rev'd in part*) 442 S.W.2d 331 (Tex. 1968). In that case, the Austin Court of Appeals held that the insolvency of a defendant accused of alienation of affections would not bar the liability of the defendant's insurer up to the policy limits. However, the Texas Supreme Court reversed that portion of the judgment, stating that "any attempt to declare the liability of the insurance company upon any judgment which may hereafter be rendered in the case of *Burch v. Butler* is purely advisory in nature and beyond the power and jurisdiction of the district court to render. Accordingly, such portion of the trial court's judgment is vacated." *Firemen's Ins. Co. of Newark, N.J. v. Burch*, 442 S.W.2d 331 (Tex. 1968). (Superseded by Constitutional Amendment as stated in *Farmers Tex. Cty. Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81 (Tex. 1997) (holding that based in part on the amended language of *Art. V, Section 8 of the Texas Constitution*, and the decision in *Gandy*, 925 S.W.2d 696 (Tex. 1996) parties may secure a declaratory judgment on the insurer's duty to indemnify before the underlying tort suit proceeds to judgment).

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1-8:2 CHANGES

A. This policy contains all the agreements between you and us.[2, 3] Its terms may not be changed or waived except by endorsement issued by us.[4]

2. Side Agreements: *Tankersley v. Durish*, 855 S.W.2d 241 (Tex. App.—Austin 1993, writ denied); *Glenn H. McCarthy, Inc. v. Knox*, 186 S.W.2d 832 (Tex. Civ. App.—Galveston 1945, writ ref'd w.o.m.). In each of these cases, the policy reflected the appropriate, regulated premium, but the insurers had illegal side agreements with the insureds which reduced the premiums below the amounts stated on the face of the policies. The result was that unlawful premium rates were being charged. In both cases, the insurer went into receivership and the courts allowed the receiver to circumvent the side agreements and collect the additional, legally required premiums.

3. Verbal: Verbal understandings or agreements do not alter the policy. *Heap v. Progressive Cty. Mut. Ins. Co.*, No. 01-00-01242-CV, 2001 WL 1345694 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (mem. op. not designated for publication).

4. Named Driver Exclusion: An endorsement excluding a named driver is valid in Texas. *Zamora v. Dairyland Cty. Mut. Ins. Co.*, 930 S.W.2d 739 (Tex. App.—Corpus Christi 1996, writ denied); *Wright v. Rodney D. Young Ins. Agency*, 905 S.W.2d 293 (Tex. App.—Fort Worth 1995, no writ); *DiFrancesco v. Houston Gen. Ins. Co.*, 858 S.W.2d 595 (Tex. App.—Texarkana 1993, no writ). The Texas Supreme Court's decisions in *Johnson* and *Sanford* partially striking down the family member exclusion do not affect excluded driver endorsements, even if the excluded driver is a family member. *Zamora*, 930 S.W.2d at 741. The wording of a named driver exclusion, which may be added as an endorsement to the policy, is:

515(A) Exclusion of Named Driver and Partial Rejection of Coverages

You agree that none of the coverages afforded by this policy shall apply while _____ is operating your covered auto or any other motor vehicle. You further agree that this endorsement will serve as a rejection of Uninsured/Underinsured Motorists Coverage and Personal Injury Protection Coverage while your covered auto or any other motor vehicle is operated by the excluded driver.

B. If a change requires a premium adjustment, we will adjust the premium as of the effective date of change in accordance with rules prescribed by the Texas Department of Insurance or its successor.[5] Changes during the policy term that may result in a premium increase or decrease include, but are not limited to, changes in:

5. Modification of Policy Terms: Where the parties agree to renew an insurance contract and no new terms are added, the new agreement incorporates the provisions of the old agreement. Just as one party cannot unilaterally create or modify a contract, it may not change the terms of a renewed contract without the agreement of the other party. In a month-to-month policy, it was not permissible for the insurer to omit a named insured on the renewals without the agreement of the insured.

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Safeway Managing Gen. Agency for State & Cty. Mut. Fire Ins. Co. v. Cooper, 952 S.W.2d 861 (Tex. App.—Amarillo 1997, no writ).

1. The number, type or use classification of the insured autos;

2. Operators using insured autos;[6]

6. Experience Modification Endorsement: The Automobile Liability Experience Rating Plan issued by the State Board of Insurance provides that policies shall provide for adjustment of premiums based upon STATE BD. OF INS., AUTOMOBILE LIABILITY EXPERIENCE RATING PLAN § 4(b)(1991). Notwithstanding this requirement, an insurer may not collect an additional premium based on an experience modification endorsement unless it is actually contained within the policy.

3. The place of principal garaging of insured autos;

4. Coverage; deductible or limits.

C. If this policy form is revised to provide more coverage without additional premium charge, we will automatically provide the additional coverage as of the date the revision is effective.

D. We will compute the premium at the rates in effect on each anniversary date of the policy's inception date for a policy written for more than a full year.

1-8:3 LEGAL ACTION AGAINST US

A. No legal action may be brought against us until there has been full compliance with all the terms of this policy. In addition, under Liability Coverage, no legal action may be brought against us until:

1. We agree in writing that the ***covered person*** *has an obligation to pay; or*

2. The amount of that obligation has been finally determined by judgment after trial.

B. No person or organization has any right under this policy to bring us into any action to determine the liability of a ***covered person****.*[7]

7. No Legal Action Clause: The "no legal action clause" was used to preclude the discovery of policy limits in an ongoing case in *Great American Ins. Co. v. Murray*, 437 S.W.2d 264 (Tex. 1969). This situation is unlikely to arise today in light of Texas Rules of Civil Procedure 192.3(f) and 194.2(g) (Vernon 1999).

1-8:4 OUR RIGHT TO RECOVER PAYMENT

A. If we make a payment under this policy and the person to or for whom payment was made has a right to recover damages from another, we shall be subrogated to that right.[8] *That person shall do:*

8. Nonmotorists: In *Simpson v. GEICO Gen. Ins. Co.*, 907 S.W.2d 942 (Tex. App.—Houston [1st Dist.] 1995, no writ), the court did not extend this reasoning to settlements with nonmotorist tortfeasors.

1. Whatever is necessary to enable us to exercise our rights; and

2. Nothing after loss to prejudice them.[9]

(A release of the insurer of an underinsured motor vehicle does not prejudice our rights.)

However, our rights in this paragraph do not apply under Part D, against any person using ***your covered auto*** *with a reasonable belief that person is entitled to do so.*

9. Subrogation Rights: Texas law recognizes both equitable and contractual subrogation. *Benchmark Bank v. Crowder*, 919 S.W.2d 657 (Tex. 1996); *Interfirst Bank Dallas, N.A. v. United States Fidelity & Guar. Co.*, 774 S.W.2d 391 (Tex. App.—Dallas 1989, writ denied). Texas courts have repeatedly declared an insurer's subrogation rights to be valid and enforceable. Texas courts are "peculiarly hospitable" to upholding rights of subrogation. *Duval Cty. Ranch Co. v. Alamo Lumber Co.*, 663 S.W.2d 627 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.); *Group Hosp. Serv., Inc. v. State Farm Ins. Co.*, 517 S.W.2d 897 (Tex. Civ. App.—*Eastland* 1974, no writ); *Oss v. United Servs. Auto. Ass'n*, 807 F.2d 457 (5th Cir. 1987); *Yonack v. Interstate Securities Co. of Texas*, 217 F.2d 649 (5th Cir. 1954).

But, in *Allstate Ins. Co. v. Spellings*, 388 S.W.3d 729 (Tex. App.—Houston [1st Dist.] 2012), the father of a 17-year-old driver who was killed in an automobile collision filed a wrongful death action against the parties who provided alcohol to him. The father's insurer intervened asserting a claim for equitable subrogation to recover amounts it paid to settle the claims of the other motorists involved in the collision. The Court of Appeals held that the insurer's recovery on its equitable subrogation claim was limited to the proportion of fault attributed to the intoxicated minor. The court explained that the doctrine of equitable subrogation does not allow a party to recover voluntary payments, and, because the liability policy provided for liability payments to the injured motorists based only upon the fault of the insured, any payments exceeding the amounts owed in proportion to the fault of its insured were voluntary.

B. If we make a payment under this policy and the person to or for whom payment is made recovers damages from another, that person shall:

1. Hold in trust for us the proceeds of the recovery; and

2. Reimburse us to the extent of our payment. (However, we may not claim the amount recovered from an insurer of any underinsured motor vehicle.) [10, 11]

10. Subrogation Rights: In *Foundation Reserve Ins. Co. v. Cody*, the Dallas Court of Appeals held that an insured can forfeit his right to Medical Payments Coverage by releasing the at fault party and thus destroying the insurer's right of subrogation. *Foundation Reserve Ins. Co. v. Cody*, 458 S.W.2d 214 (Tex. Civ. App.—Dallas 1970, no writ).

11. Statutory basis: *See also* Tex. Ins. Code, Ann. art. 5.06-1.

1-8:5 POLICY PERIOD AND TERRITORY

A. This policy applies only to accidents and losses which occur:

1. During the policy period[12] *as shown in the Declarations; and*

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12. Policy Period: A liability insurer's duty to defend its insured on a claim occurring partially within and partially outside of the policy period is not reduced *pro rata* by the insurer's time on the risk in *Texas Prop. & Cas. v. Southwest Aggregates, Inc.*, 982 S.W.2d 600 (Tex. App.—Austin 1998, no pet.) (commercial general liability policy).

2. Within the policy territory.[13]

13. Mexico: In *U.S. Trust & Guar. Co. v. West Texas State Bank of Snyder Texas*, 272 S.W.2d 627 (Tex. Civ. App.—Eastland 1954, writ dism'd), the court held that a mortgagee was not entitled to recover damages sustained while the owner was driving a vehicle in Mexico, which was outside the territorial limits of the policy. (*But see* Tex. Ins. Code Ann. art. 5.063 and Mexico Endorsement).

B. The policy territory[14] *is:*

14. Geographic Limitation Valid: A claim for Personal Injury Protection benefits for an accident occurring in Jamaica could be denied on a geographic basis as outside coverage of policy. *McCalla v. State Farm Mut. Auto. Ins. Co.*, 704 S.W.2d 518 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

1. The United States of America, its territories or possessions;[15]

15. United States: In *Birmingham Fire Ins. Co. of Pa. v. American Nat. Fire Ins. Co.*, the Texarkana Court of Appeals rejected an insured's argument that Texas was not part of the United States. *Birmingham Fire Ins. Co. of Pa. v. American Nat. Fire Ins. Co.*, "Having lost the War of Northern Aggression, sometimes mislabeled the Civil War, Texas remains a part of the United States." 947 S.W.2d 592 (Tex. App.—Texarkana 1997, writ denied), (citing *El Paso Reyco, Inc. v. Malaysia British Assurance*, 808 S.W.2d 529 (Tex. App.—El Paso 1991), *rev'd on other grounds*, 830 S.W.2d 919 (Tex. 1992)).

2. Puerto Rico; or

3. Canada.

This policy also applies to loss to, or accidents involving, ***your covered auto*** *while being transported between their ports.*[16]

16. Validity: In *Ruiz v. Gov't Employees Ins. Co.*, 4 S.W.3d 838 (Tex. App.—El Paso 1999, no pet.), the insureds challenged the validity of this provision, alleging that it was "inconceivable" that GEICO would "market, promote, sell and collect premiums from drivers in the United States/Mexico border area and that, upon occurrence if an accident in the Mexican side of the border, inform them they are not covered in Mexico." The court rejected this argument and held that the insureds were charged with notice of the written terms and conditions of the policy. Summary judgment in favor of the insurer was affirmed. The court further noted that the Mexico endorsement was available, but the insureds had opted not to purchase it.

If coverage provided by the policy is clearly limited to an area or territory specifically designated in the policy, no recovery may be had by the insured for damages to the vehicle resulting from an accident occurring outside the territory designated. *McCalla v. State Farm Mut. Auto Ins. Co.*, 704 S.W.2d 518 (Tex. App.—Houston [14th Dist.], writ ref'd n.r.e 1986).

1-8:6 TERMINATION

A. ***Cancellation.*** *This policy may be canceled during the policy periods as follows:*

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1. The named insured shown in the Declarations may cancel by:

a. returning this policy to us; or

b. giving us advance written notice of the date cancellation is to take effect.[17]

17. Waiver of Cancellation: It is the insured's burden to prove that an insurer waived cancellation of the insurance policy. Waiver may be shown by a statement made by an authorized agent of the insurance company that the insured is still covered. *Aetna Ins. Co. v. Durbin*, 417 S.W.2d 485, 487 (Tex. Civ. App.—Dallas 1967, no writ). As a general statement, waiver may be established by a showing of the insurer's intentional conduct that is inconsistent with its initial claim of the right of cancellation. *American Cas. Co. of Reading v. Conn*, 741 S.W.2d 536, 539 (Tex. App.—Austin 1987, no writ).

2. We may cancel[18, 19] *by mailing at least 10 days notice*[20] *to the named insured shown in the Declarations at the address shown in this policy.* [21]

18. Cancellation: The Texas Supreme Court recently upheld the decision of the Corpus Christi Court of Appeals that it was "unconscionable" for an insurer to retain premiums and simultaneously deny coverage based on an allegedly mailed cancellation notice in *Ray Ins. Agency v. Jones*, 92 S.W.3d 530 (Tex. 2002). The detailed discussion of the facts of this case is contained in the lower court's opinion, Jones v. Ray Ins. Agency, 59 S.W.3d 739 (Tex. App.—Corpus Christi 2001).

19. Statutory Basis: *See* Tex. Ins. Code Ann. § 551.054:

(a) An insurer may refuse to renew a liability insurance or commercial property insurance policy if the insurer delivers or mails written notice of the nonrenewal to the first-named insured under the policy at the address shown on the policy.

(b) The notice must be delivered or mailed not later than the 60th day before the date on which the policy expires. If the notice is delivered or mailed later than the 60th day before the date on which the policy expires, the coverage remains in effect until the 61st day after the date on which the notice is delivered or mailed.

20. Notice of Cancellation: An insurer who timely mailed a cancellation notice for nonpayment of the balance of a premium, addressed to the insured at the address shown in the policy, without knowledge that the insured had died, validly effected a cancellation of policy. *Willis v. Allstate Ins. Co.*, 392 S.W.2d 799 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.). However, the Texas Supreme Court later ruled that evidence that the notice was not received may preclude summary judgment in the insurer's favor. *Sudduth v. Commonwealth Cty. Mut. Ins. Co.*, 454 S.W.2d 196 (Tex. 1970).

The general rule is that an insured's failure to pay premiums when they become due causes the insurance policy to lapse and become ineffective. *Walker v. Federal Kemper Life Assurance Co.*, 828 S.W.2d 442, 447 (Tex. App.—San Antonio 1992, writ denied); *Avila v. Loya*, No. 07-04-0096-CV, 2005 WL 1902120, at *2 (Tex. App—Amarillo 2005, no pet). The payment of the premium in accordance with the provisions of an insurance policy is a condition precedent to the establishment of liability of the insurer. *Walker*, 828 S.W.2d at 449.

A notice of cancellation by an insurer is not required when a policy expires or terminates pursuant to policy provisions for failure to pay renewal premiums when due. *Longoria v. Greyhound Lines, Inc.*, 699 S.W.2d 298, 304 (Tex. App.—San Antonio 1985, no writ); *Viking*

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Cty. Mut. Ins. Co. v. Jones, 1992 WL 211068, at *4 (Tex. App.—Dallas 1992, writ denied).

21. Waiver: An insurer was held to have waived the right of cancellation when, upon the expiration of the original policy, it issued renewal of a certificate and extended credit to the agent for premium payments. *Martinez v. Great Am. Ins. Co. of New York*, 286 F. Supp. 141 (W.D. Tex. 1968). In that case, a policy was in effect until the effective date of the cancellation as set forth in the notice of cancellation that the insurer later sent to the insured. The insurer was deemed to have waived its right to enforce the original termination date and was estopped from contending that the policy was not renewed.

3. After this policy is in effect for 60 days or if this is a renewal or continuation policy, we will cancel[22, 23] only;

a. if you submit a fraudulent claim; or

b. for nonpayment of premium; or

c. if your driver's license or motor vehicle registration or that of:

(1) any driver who lives with you; or

(2) any driver who customarily uses ***your covered auto*** *has been suspended or revoked.[24] However, we will not cancel if you consent to the attachment of an endorsement eliminating coverage when* ***your covered auto*** *is being operated by the driver whose license has been suspended or revoked.[25]*

22. Statutory Basis: *See* Tex. Ins. Code Ann. §§ 551.054 - 551.055.

23. Statutory Requirements for Cancellation Notice: *See* Tex. Ins. Code Ann. § 551.002: . . .

(b) An insurer's written statement giving the reasons for the declination, cancellation, or nonrenewal of an insurance policy must fully explain a decision that adversely affects an applicant for insurance or a policyholder by denying the applicant or policyholder insurance coverage or continued coverage.

(c) The statement must:

(1) state the precise incident, circumstance, or risk factors applicable to the applicant for insurance or the policyholder that violates any applicable guidelines;

(2) state the source of information on which the insurer relied regarding the incident, circumstance, or risk factors; and

(3) specify any other information considered relevant by the commissioner.

24. Suspension: In *Pan Am. Ins. Co. v. Claunch*, a liability policy was issued to an insured whose license had been suspended. It was issued before the license was restored, and it contained an endorsement excluding the insured from coverage, with the stipulation that the policy exclusion would be deleted upon receipt of information that the license had been restored. The court held that the exclusion was deleted automatically upon restoration of license. *Pan Am. Ins. Co. v. Claunch*, 398 S.W.2d 792 (Tex. Civ. App.—Amarillo 1965, no writ).

25. SR22: The statutory scheme for individuals whose licenses have been revoked following a conviction for driving while intoxicated and who are unable to have their licenses reinstated without showing evidence of insurance is contained in the Transportation Code. *Lumbermens Mut. Ins. Co. v. Grayson*, 422 S.W.2d 755 (Tex. Civ. App.—Waco 1967, no writ).

4. We may not cancel this policy based solely on the fact that you are an elected official.

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B. ***Nonrenewal.*** *If we decide not to renew or continue this policy, we will mail notice to the named insured shown in the Declarations at the address shown in this policy. Notice will be mailed at least 30 days before the end of the policy period.*[26] *If the policy period is other than one year, we will have the right not to renew or continue it only at each anniversary of its original effective date. We will not refuse to renew because of a* ***covered person's*** *age. We may not refuse to renew this policy based solely on the fact that you are an elected official.*

26. Renewal: *Texas Specialty Underwriters, Inc. v. Tanner*, 997 S.W.2d 645 (Tex. App.—Dallas 1999, pet. denied). When an insured receives an offer to renew a policy approximately 60 days prior to the expiration of the existing policy, but does not accept it by timely payment of the renewal premium, or by any other action of acceptance, the policy lapses on its expiration date. Under these circumstances, the insurer was not required to mail the insured a notice of nonrenewal. The purpose of the requirement of notice of nonrenewal in Article 21.492b, Section 5 (now V.T.C.A. § 551.104 et seq.) of the Insurance Code is to ensure that policyholders receive advance notice when an insurer intends not to renew. The court refused to require notice where the insurer seeks to renew, but the insured does not respond. The court refused to apply Mr. Tanner's construction, which would have the effect of automatically *renewing a policy at expiration, regardless of whether a renewal premium was paid. See also Texas Farm Bureau Underwriters v. Rasmussen*, 410 S.W.3d 335 (Tex. App.—Houston [1st Dist.] 2013, reh'g denied). Note that both the *Tanner* and *Rasmussen* opinions are cases decided under a homeowner's policy. The result should not be any different under the auto policy.

C. ***Automatic Termination.*** *If, at any time, you obtain other insurance on* ***your covered auto,*** *any similar insurance provided by this policy will terminate as to that auto on the effective date of the other insurance.*[27]

27. Renewal/Automatic Termination: The Texarkana Court of Appeals held that a provision with this wording, which was under the heading "Renewal," instead of "Automatic Termination," was not intended to provide for automatic termination, but to allow the insurer to elect not to renew the policy at the end of the policy term, even without notice to the insured, if insured was covered by another policy. *Travelers Indem. Co. of Rhode Island v. Lucas*, 678 S.W.2d 732, 61 A.L.R. 4th 1123 (Tex. App.—Texarkana 1984, no writ).

If we offer to renew or continue and you or your representative do not accept, this policy will automatically terminate at the end of the current policy period. Failure to pay the required renewal or continuation premium when due shall mean that you have not accepted our offer. [28]

28. In *Hartland v. Progressive Cty. Mut. Ins. Co.*, the Court of Appeals affirmed the trial court's finding that the insured did not mail the premium to renew the policy until after the policy had

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expired, eight hours before the accident, so that he did not have insurance when the accident occurred. *Hartland v. Progressive Cty. Mut. Ins. Co.*, 290 S.W.3d 318 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

D. ***Other Termination Provisions.***

1. We may deliver any notice instead of mailing it. Proof of mailing of any notice shall be sufficient proof of notice.[29]

29. Cancellation: Even if there is a dispute about receipt of the notice, an insured is legally charged with notice of cancellation when the insured does not pay the premiums. Therefore, the insurer could not be said to have waived the cancellation by sending the insured a questionnaire after the cancellation. *Mid-Century Ins. Co. v. H & H Meat Products Co., Inc.*, 822 S.W.2d 747 (Tex. App.—Corpus Christi 1992, no writ).

2. If this policy is cancelled, you may be entitled to a premium refund. If so, we will send you the refund promptly. The premium refund, if any, will be computed pro rata*, subject to the policy minimum premium. However, making or offering to make the refund is not a condition of cancellation.*

3. The effective date of cancellation stated in the notice shall become the end of the policy period.

4. Any cancellation or restriction of coverage made without your consent will be of no effect, except as

a. provided for in this Termination provision under:

(1) Cancellation;

(2) Nonrenewal; or

(3) Automatic Termination; or

b. required by the Texas Department of Insurance.

1-8:7 TRANSFER OF YOUR INTEREST IN THIS POLICY

A. Your rights and duties under this policy may not be assigned without our written consent. However, if a named insured shown in the Declaration dies, coverage will be provided for:

(1) The surviving spouse if resident in the same household at the time of death. Coverage applies to the spouse as if a named insured shown in the Declarations.

(2) The legal representative of the deceased person as if a named insured shown in the Declarations. This applies only with respect to the representative's legal responsibility to maintain or use your covered auto.

B. Coverage will be provided until the end of the policy period.[30]

30. Death of Named Insured: *Nielson v. Allstate Ins. Co.*, 784 S.W.2d 735 (Tex. App.—Houston [14th Dist.] 1990, no writ). In November 1978, Timm purchased a policy from Allstate. She was the sole named insured. She died in March of 1979. Allstate received renewal premiums for the policy and automatically renewed the policy in November of 1979 and 1980, but was not apprised of Timm's death. In July 1981,

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Doyle, who was using the vehicle with the permission of Timm's executor, died in an accident while driving the insured vehicle. "The deceased, Mrs. Timm, was obviously incapable of renewing coverage, and allowing other parties (Timm's legal representative) to renew and extend coverage to other individuals would vary the risk assumed by Allstate and would consequently create a new contract." The court held that Allstate did not waive its right to deny coverage by continuing to accept premiums subsequent to death of the insured and renewing the policy. "Policy coverage therefore ended in November of 1979, one year after Timm purchased the insurance and over a year before the accident."

NOTE: *Refer to Medical Payments and/or Personal Injury Protection Coverages for Assignment of Benefits.*[31]

31. Non-assignment Clause: *Texas Farmers Ins. Co. v. Gerdes*, 880 S.W.2d 215 (Tex. App.—Fort Worth 1994, writ denied). The non-assignment clause in the PIP coverage of the standard form policy is valid and prevents the insured from making a valid assignment (relying upon *Dallas Cty. Hosp. Dist. v. Pioneer Cas.*, 402 S.W.2d 287 (Tex. Civ. App.—Fort Worth 1996, writ ref'd n.r.e.). However, an insurer can waive this clause. In *Pioneer Cas. Co. v. Feldman*, 468 S.W.2d 910 (Tex. Civ. App.—Corpus Christi 1971, no writ), this provision was waived by the actions of the insurer. The insurer contacted the insured's medical care providers and assured them that their bills would be paid directly if they would obtain assignments from the insured. The doctors did so, and the insurer paid the insured directly, rather than paying the doctors. The assignments were found to be valid due to waiver.

1-8:8 TWO OR MORE AUTO POLICIES

If this policy and any other auto insurance policy issued to you by us apply to the same accident, the maximum limit of our liability under all the policies shall not exceed the highest applicable limit of liability under one policy.[32]

32. Intra Company Stacking: In a case of first impression, the Waco Court of Appeals considered whether this provision, which prevents intra company stacking of policy limits—the stacking of policy limits from two separate policies issued by the same company. The court held that the clause was invalid because it improperly inhibited the insured's ability to recover actual damage and frustrates the purpose of the Uninsured Motorist statute. Justice Gray dissented without opinion, and the judgment was later reversed on other grounds by the Texas Supreme Court. See *Kelley v. Progressive Cty. Mut. Ins. Co.*, 285 S.W.3d 1 (Tex. App.—Waco 2007, pet granted), *rev'd*, 284 S.W.3d 805 (Tex. 2009) (per curiam). The Texas Supreme Court held that there was an issue of material fact as to whether there were one or two policies that applied in that case, which precluded the Court from reaching the issue of whether stacking of policy limits was permitted. *But see Upshaw v. The Trinity Companies*, 842 S.W.2d 841 (Tex. 1992) (upholding the Limit of Liability provision which prevented intra policy stacking—the stacking of policy limits from the same policy when the policy lists more than one vehicle in the declarations).

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1-9 ADDITIONAL COVERAGES AND PROVISIONS

1-9:1 TOWING AND LABOR COSTS COVERAGE

*We will pay towing and labor costs incurred each time **your covered auto** is disabled, up the amount shown in the schedule as applicable to that vehicle. We will only pay for labor performed at the place of disablement.*

*This coverage applies only to **your covered auto** for which a premium charge is shown in the Declarations for Towing and Labor Costs Coverage. Check your coverage symbol shown in the declarations with the following schedule for the choice of coverage you made.*

1-9:2 RENTAL REIMBURSEMENT COVERAGE

The provisions and exclusions that apply to Coverage for Damage to Your Auto also apply to this coverage except as changed by this coverage. No deductible applies to this coverage.

*When there is a loss to **your covered auto** described in the Declarations for which a specific premium charge indicates that Rental Reimbursement Coverage is afforded:*

We will reimburse you for expenses you incur to rent a substitute auto. We will pay up to $20 per day to a maximum of $600. This coverage applies only if:

*1. **Your covered auto** is withdrawn from use for more than 24 hours, and*

*2. The loss to **your covered auto** is covered under Coverage for Damage to Your Auto of this Policy.*

However, this coverage does not apply when there is a total theft of the auto.

Our payment will be limited to that period of time reasonably required to repair or replace the auto.[1]

1. Loss of Use: In a liability case, the Austin Court of Appeals held that damages awarded for "loss of use" of a damaged vehicle may exceed the total value of the undamaged vehicle. *Mondragon v. Austin*, 954 S.W.2d 191, 195-96 (Tex. App.—Austin 1998, writ denied). If, for example, these damages were based on long term rental of a car to replace a vehicle which was not worth very much money, it could easily exceed the value of the car. It is unlikely that this would apply to an insurance policy.

1-9:3 530A. LOSS PAYABLE CLAUSE — MODIFIED

*Loss or damage under Coverage for Damage to Your Auto shall be paid as interest may appear to you and the loss payee shown in the declarations. This insurance covering the interest of the loss payee shall not become invalid because of your fraudulent acts or omissions, unless the loss results from your conversion, secretion or embezzlement of **your covered auto**.*[2]

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However, we reserve the right to cancel the policy as permitted by policy terms. Notice of the cancellation mailed to the loss payee at least ten days prior to the date the coverage for the loss payee will end terminates this agreement.

The insurance covering the loss payee's interest as specified in this loss payable clause will continue for subsequent policy periods regardless of any policy expiration date shown on the declarations until we mail notice to the loss payee at least ten days prior to the date the coverage for the loss payee will end.

If you cancel the policy as permitted by policy terms we agree to mail notice of the cancellation to the loss payee at least 10 days prior to the date the coverage for the loss payee will end. In any event, your coverage ends on the date of your cancellation.

When we pay the loss payee[3] we shall, to the extent of payment, be subrogated to the loss payee's rights of recovery.

2. Texas courts have held that this type of loss payable clause does not extend greater protections to a dealership than an insured buyer. A car dealer could not recover its "interest" after repossessing a vehicle it had sold to the insured while being driven by an expressly excluded driver. *Stadium Auto, Inc. v. Loya Ins. Co.*, 440 S.W.3d 772, 778 (Tex. App.—El Paso 2013, no pet.); *Old American Mut. Fire Ins. Co. v. Gulf States Fin. Co.*, 73 S.W.3d 394, 397 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).

3. As Interests May Appear: A mortgagee is protected by the term "as interests may appear" that is found on the declarations page of the policy. *Cable Comm. Network Inc. v. Aetna Cas. & Surety Co.*, 838 S.W.2d 947, 955 (Tex. App.—Houston [14th Dist.] 1992, no writ); *see also Tillerson v. Highrabedian*, 503 S.W.2d 398, 399400 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.); *General Exch., Ins. Corp. v. Collins*, 110 S.W.2d 127 (Tex. Civ. App.—Fort Worth 1937, no writ). If an insurer is in doubt about who is entitled to policy benefits, it may file an interpleader suit and let a court decide which of the rival claimants is entitled to the proceeds of the policy. *Great American Reserve Ins. Co. v. Sanders*, 525 S.W.2d 956, 958 (Tex. 1975) *superseded by statute*, Tex. Ins. Code Ann. §§ 542.058 546.060, *as recognized in State Farm Life Ins. Co. v. Martinez*, 216 S.W.3d 799 (Tex. 2007).

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