

TEXAS LAW★ALERT

Important Texas Supreme Court Decision on UM/UIM Claims

On May 21, 2021, the Texas Supreme Court issued its opinion in *Allstate Insurance Company v. Daniel Irwin*. This case involved an underinsured motorist claim brought by Irwin after he was involved in an accident with an underinsured driver. After obtaining a policy limits settlement from the responsible driver, Irwin sought the limits of his underinsured motorist coverage under his personal auto policy issued by Allstate. Allstate offered a settlement of \$500, which was rejected. After rejecting Allstate's settlement offer, Irwin filed suit. However, instead of bringing a breach of contract claim against Allstate, Irwin filed suit under the Texas Uniform Declaratory Judgments Act (UDJA) seeking a determination of his damages from the accident, a declaratory judgment that he was entitled to recover benefits under his UIM policy, and attorney's fees.

Under Texas law, an insured is required to secure a determination of liability and the amount of their damages against the responsible tortfeasor before a claim exists under a UM/UIM policy of insurance. *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809 (Tex. 2006). Since the *Brainard* decision in 2006, UM/UIM suits have followed this roadmap: suit is filed against the UM/UIM carrier for breach of contract (and typically also insurance code violations a/k/a bad faith) and the breach of contract and extra-contractual bad faith claims are abated pending a determination of the liability of the alleged responsible driver and the damages, if any, caused by the accident. Once the liability and damages were determined, an insurer could then pay any UM/UIM benefits owed based on that determination and not face liability for breach of contract- since the insurer promptly paid the claim once it existed under the policy. Importantly, such suits rarely generate attorney's fees against the insurer provided payment of the adjudicated damages within policy limits was made promptly.

In *Irwin*, the insured deliberately did not bring a breach of contract claim and therefore argued that this *Brainard* framework did not apply. The Texas Supreme Court agreed and held that an action under the UDJA to determine the existence of conditions precedent to coverage in connection with the underlying tort and to declare the insured's rights and status under the insurance policy is a proper mechanism for asserting a UM/UIM claim against an insurer and that an insured is not required to bring a breach of contract suit under *Brainard*.

Importantly, in authorizing UM/UIM suits to be brought via actions under the UDJA, the Supreme Court has opened up an avenue for insureds to recover attorney's fees on UM/UIM suits as the UDJA specifically provides that a Court may award costs and reasonable and necessary attorney's fees. In *Irwin*, the trial court awarded attorney's fees to the insured. In upholding that award, the Supreme Court noted that the decision to award attorney's fees was within the discretion of the trial court and that Allstate had not

challenged that the trial court abused its discretion in doing so.

Based on this decision, we expect that plaintiffs will pursue UDJA actions for UM/UIM suits and seek attorney's fees. Because the award of those fees is left to the discretion of the trial judges, the venue where the UM/UIM suit is filed will be an important consideration in evaluating these claims. Prompt evaluation of the potential to remove these suits to federal court will also be key.

[ABOUT THE AUTHOR:](#)

[Kristi Kautz](#) has been called an "excellent advocate for her client" by opposing counsel and she considers this to be one of the best compliments any attorney can receive. She is an experienced litigator who thrives on representing clients in cases ranging from simple to complex, from single-party to multi-party, and from pre-suit to post-judgment litigation. She has achieved excellent results in numerous fields including transportation, construction defect, product liability, premises liability, insurance coverage, and personal injury. Her practice extends to jurisdictions across Texas and you'll find her equally at home advocating for her client in the courtroom and at the bargaining table.

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