What is This Critter?
UM/UIM Causes of Action Post-*Brainard*

by Cade W. Browning

A FEW MONTHS AGO, A STRANGE LOOKING BEAST approached a deer feeder on the Y-6 Ranch just north of the Double Mountain Fork of the Brazos in southern Stonewall County. Out of the cedars, it came with thick fur around its shoulders and a sloping spotted hindquarters. As it gazed towards the deer stand, its dark eyes were accompanied by a menacing snarl. Staring at this beast, my first question was, "Is this an escaped hyena from a traveling circus, a mangy coyote as disgusting as he looks, or had we finally located the mythical chupacabra?" Strangely, my second thought went to the status of UM/UIM litigation in Texas since *Brainard*. What is this critter? A breach of contract, a declaratory judgment, or some new hybrid common law cause of action?[1]

How to file a UM/UIM case? How to try a UM/UIM case? These are currently unanswered questions in Texas and the subject of much angst and gnashing of teeth amongst litigators. Traditionally, UM/UIM cases were filed and tried as breach of contract claims. But tradition began to show some cracks in 2000 with the Texas Supreme Court case of *Henson v. Southern Farm Bureau Casualty Insurance Company* when the Court held that an insured is not "legally entitled to recover" under the UIM contract until the jury establishes the liability of the other motorist and damages.[2] The *Henson* Court held that the insurer lacked any obligation to pay prior to the juries' findings. In *Henson*, the insurer paid promptly post-verdict and, thus, the Court held there was no breach of a contractual duty and the plaintiff was not entitled to prejudgment interest.

However, the earth truly began to shake in UM/UIM litigation in 2006 with a trilogy[3] of cases from the Texas Supreme Court headlined by *Brainard v. Trinity Universal Insurance Company*.

In 1999, Mr. Brainard was killed when his vehicle had a head-on collision with a rig owned by Premier Well Service, Inc. His surviving family filed suit against Premier and sought his $1,000,000 in UIM benefits from his insurer, Trinity Universal Insurance Company. After settling for Premier's policy limit of $1,000,000, Brainard's family demanded that Trinity tender its limits. Trinity refused and offered $50,000. The trial court severed Brainard's extra-contractual claims and the parties proceeded to trial as a breach of contract claim under the UIM contract. The jury awarded Brainard's family $1,010,000 in wrongful death damages and $100,000 in attorney's fees. After applying a credit for the settlement with Premier and for $5,000 in PIP benefits previously paid by Trinity, the trial court signed a judgment against Trinity for $5,000 and $100,000 in attorney's fees. On appeal, Trinity challenged the attorney's fees award, and Brainard, by cross appeal, alleged the trial court erred in refusing to award prejudgment interest on the $1,010,000 in actual damages.[4]

Although *Brainard* discussed what amount of prejudgment interest would be covered by the UIM contract, the crux of the case had to do with attorney's fees. Brainard argued that, under Texas Civil Practice and Remedies Code Chapter 38, they were entitled to attorney's fees because the UIM contract was no different than a regular insurance contract. Thus, the failure of Trinity to pay the policy benefits when the claim was submitted constituted a breach of the contract. Trinity argued a UIM policy is different and unique because the insurer's duty to pay does not arise until the underinsured motorist's liability and the insured's damages are legally determined by the jury.[5]

The Court agreed with Trinity and held that, "the UIM insurer is obligated to pay damages which the insured is 'legally entitled to recover' from the underinsured motorist" citing Texas Insurance Code 5.06-1(15)[6] which states:

> The underinsured motorist coverage shall provide for payment to the insured of all sums which he shall be **legally entitled to recover** as damages from owners or operators of underinsured motor vehicles because of bodily injury or property damage in an amount up to the limit specified in the policy, reduced by the amount recovered or recoverable from the insurer of the underinsured motor vehicle.[7]

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[1] This paper will concentrate on the status of the cause of action for the benefits under the policy. The viability of bad-faith and insurance code violations post-*Brainard* will be left to another day.

[2] *Henson v. Southern Farm Bureau Casualty Insurance Company*, 17 S.W.3d 652, 654 (Tex. 2000).

[3] *Brainard v. Trinity Universal Insurance Company*, 216 S.W.3d 809 (Tex. 2006); *State Farm Mut. Ins. Co. v. Norris,* 216 S.W.3d 819 (Tex. 2006); and *State Farm Mut. Ins. Co. v. Nickerson*, 216 S.W.3d 823 (Tex. 2006).

[4] *Brainard*, 216 S.W.3d at 811-812.

[5] *Brainard*, 216 S.W.3d at 817-818.

[6] *Brainard*, 216 S.W.3d at 818.

[7] Tex. Ins. C. 5.06-1(15) (current version at Tex. Ins. C. §1952.106)

The Court continued, "we have determined that 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. Where there is no contractual duty to pay, there is no just amount owed. Thus, under Chapter 38, a claim for UIM benefits is not presented until the trial court signs a judgment establishing the negligence and underinsured status of the other motorist."[8]

BAM. Thus, forever after, a UM/UIM contract is unlike any other first-party insurance contract because, according to its terms, benefits are conditioned upon the insured's legal entitlement to receive damages from a third party. In other words, you have to try it before they have to pay a dime under the policy. If the verdict is paid within thirty (30) days, there is no breach and attorney's fees are not recoverable.

Although some defense lawyers claim *Brainard* just further clarified *Henson*, we can all agree that with the release of *Brainard*, the number of UM/UIM cases being litigated exploded.

Brainard, for all intents and purposes, applies a damage cap to the amount of damages an insurer might have to pay under the policy, thus destroying a plaintiff's leverage on an insurer to resolve these cases. As Stephanie Baenisch argues in her excellent paper, *Brainard* imposes a "ligation surcharge" on UM/UIM policies. "[W]ith an uninsured/underinsured motorist, the insured will likely find the road to recovery of a fair sum under the UM/UIM policy very difficult, time consuming, and expensive. From the onset, the insured loses 33-40% because the insured is practically forced to hire an attorney and is frequently forced to engage in litigation in order to prove that the insured is 'legally entitled to recover' benefits under the UM/UIM contract."[9]

Nonetheless, the logical conclusion is that if there is no contractual duty to pay benefits until after a verdict, how has an insurer breached a contract beforehand? If the insurer has not breached a contract, how to I seek judicial review of a denied claim? What is my cause of action to sue my UM/UIM insurer when they deny my claim? Wasn't one of the first things I learned in law school that I have to have a cause of action to have a lawsuit? If it is not a breach of contract, what is it? What do I plead? How do I get into court? What is this critter?

Well, the answer is not clear. The courts are all over the place as are various defense and plaintiff lawyers. Many courts, defense and plaintiff lawyers continue as if *Brainard* didn't really mean what it said, and are still filing and trying these cases as breach of contact cases, albeit without attorney's fees. Some plaintiff lawyers have started filing them as a declaratory judgment action to determine the rights of the parties and some courts have agreed. Some defense lawyers seem to argue that *Brainard* created a new common law cause action I will call a "Claim for UM/UIM Benefits." Below, we will address each of the causes of action and the courts that have agreed or ignored the distinctions.

[8] *Brainard*, 216 S.W.3d at 818.

[9] Stephanie Baenisch, *The Litigation Surcharge: Brainard's Impact on UM/UIM Coverage,* 30th Annual State Bar of Texas Advanced Personal Injury law Course, 2014.

A. Declaratory Judgment Actions

If it is not a breach of contract, what else is there? Can an agreed judgment between the tortfeasor and the insured get you there? Nope.[10] What about trying the tortfeasor? Could the insurer be obligated by the trial result? Nope.[11] What about a settlement or even an admission of liability by the underlying driver? Again, nope.[12]

Plaintiff's lawyers are arguing that the only choice left is a declaratory judgment under Chapter 37 of the Texas Civil Practices and Remedies Code as a vehicle into Court, which provides:

> A person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.[13]

The purpose of the Uniform Declaratory Judgments Act "is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and it is to be liberally construed and administered."[14] The Act provides that "[t]he declaration . . . has the force and effect of a final judgment or decree."[15] It provides that "[a] person interested under a . . . contract . . . may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of the rights, status, or other legal relations thereunder."[16] "A contract may be construed either before or after there has been a breach."[17]

The argument is that a UM/UIM claim simply involves a dispute as to whether there is a covered loss. Although UM/UIM insurance law uses principles of tort law to determine a contractual responsibility, the plaintiff's claim against his carrier does not lie in tort because the negligence allegations are against the underinsured tortfeasor, not the carrier. But, under *Brainard*, a breach of contract is not ripe until post-judgment. Therefore, the plaintiff must seek a declaration that: (1) the plaintiff is entitled to UM/UIM coverage under the policy; (2) the underlying driver is an uninsured or underinsured driver; (3) the underlying driver was the proximate cause of the wreck; (4) the

[10] *State Farm Fire and Cas. Co. v. Gandy*, 925 S.W.2d 696, 714 (Tex. 1996) (in a case involving an agreed judgment and assignment of claim against the defendant's insurance company, the court opined that the underlying judgment would not be binding without a fully adversarial trial).

[11] *U.S. Fire Ins. Co. v. Millard*, 847 S.W.2d 668 (Tex. App.-Houston [1st Dist.] 1993, no pet.) (absent a consent to be bound, an insurer is not bound by the suit against the underlying driver).

[12] *Brainard*, 216 S.W.3d at 818 (neither a settlement nor an admission of liability from the tortfeasor establishes UIM coverage, because a jury could find that the other motorist was not at fault or award damages that do not exceed the tortfeasor's liability insurance).

[13] Tex. Civ. Prac. & Rem. C. §37.004(a).

[14] Tex. Civ. Prac. & Rem. C. § 37.002(b).

[15] Tex. Civ. Prac. & Rem. C. §37.003(b).

[16] Tex. Civ. Prac. & Rem. C. §37.004(a)

[17] Tex. Civ. Prac. & Rem. C. §37.004(b).

amount of damages that the plaintiff incurred as a result of the wreck, and (5) the amount of damages (following any offsets or credits) that the insurer is obligated to pay under the contract.[18]

Interestingly, the Act also provides that a court may award costs and reasonable and necessary attorney's fees as are equitable and just.[19] Although *Brainard* disapproved the award of attorney's fees if the insurer paid the judgment within thirty (30) days of judgment, *Brainard* was limited to the request for attorney's fees under Chapter 38, leaving open the possibility of attorney's fees under Chapter 37.[20] However, that sword can cut both ways.[21]

Although no Texas case could yet be found to touch on this issue, several federal district courts have addressed it.

First, in *Owen v. Employers Mutual Casualty Company*, the plaintiff settled with the underinsured tortfeasor and then filed suit against his carrier for breach of contract, bad faith, DTPA violation, and attorney's fees, which was removed to the United States District Court in Dallas.[22] However, while the case was pending, *Brainard* was issued, thus Owen moved to amend her pleadings to add an action for a declaratory judgment. The insurer filed a motion to dismiss the breach of contract cause of action along with the other causes of action. The *Owen* Court recognized that *Brainard* held that neither filing suit against the UIM insurer nor demanding UIM benefits will trigger a contractual duty of the insurer to pay and that the insurer has "no contractual duty to pay benefits [on a UIM claim] until the insured obtains a judgment establishing the liability and underinsured status of the other motorist."[23]

The Court held there was no breach of duty until the case was tried and dismissed the breach of contract action. However, the Court allowed the amended declaratory judgment action seeking a determination of Owen's legal entitlement to recover from the tortfeasor damages which resulted from the vehicular accident as required under the policy language.[24]

Following this logic and citing *Owen*, the United States District Court in *Stoyer* also dismissed a UIM breach of contract claim as unripe, but left pending the declaratory judgment action.[25] In *Stoyer*, the plaintiff asserted causes of action against her carrier for a declaratory judgment, breach of contract, violations of the Texas Insurance Code and DTPA, and bad faith. State Farm subsequently removed the action and moved to dismiss the case as unripe. The Court, citing *Brainard*, dismissed the plaintiff's breach of contract claim, stating that the insurer cannot breach a contractual duty that has not been triggered, and abated the extra-contractual claims pending determination of State Farm's liability for damages under the UM/UIM policy in the insured's declaratory action.[26]

Likewise, in *Accardo*, the United States District Court in Houston dismissed a breach of contract claim for lack of subject matter jurisdiction, but allowed the declaratory judgment action to survive.[27] In this case, Accardo sued its carrier for UM/UIM benefits alleging causes of action for breach of contract, breach of the duty of good faith and fair dealing, violation of the Texas Prompt Payment of Claims Act and sought a declaratory judgment establishing the tortfeasor's negligence and specifying their resulting damages. The insurer moved for summary judgment only on the extra-contractual claims, but the Court, implicating its independent obligation to ensure that it had subject-matter jurisdiction over all claims, examined *Brainard* and determined the breach of contract was not ripe and dismissed it. However, the court allowed the action for declaratory judgment to move forward. The Court, in footnote 3, stated:

> America First has also moved for summary judgment on the declaratory judgment claim. America First argues that the Accardos seek to use the Texas Declaratory Judgment Act "to pave an avenue to attorney's fees", which is improper under Texas law. (Docket Entry No. 24, at 9.) The Accardos seek declaratory judgment establishing the unknown driver's liability and their resulting damages. As discussed above, the Accardos must litigate these issues before America First's contractual duty to pay UM benefits arises. Construing the declaratory judgment claim as a claim to establish coverage under the policy, this court denies the motion for summary judgment on the declaratory judgment claim.[28]

B. Common Law Claim for Benefits under the Policy

Defense lawyers, on the other hand, have fought the propriety of a declaratory judgment action as a correct cause of action, claiming that, "[w]hile declaratory judgment actions are frequently used to resolve coverage disputes in insurance litigation, a declaratory judgment action is not available to establish liability or non-liability in a tort action. Stated another way, liability or non-liability for past conduct is not normally a function of the declaratory judgment statute."[29]

The argument is that, before an insurer is contractually obligated to pay UM/UIM benefits, the insured is obligated, under *Brainard*, to obtain a judgment establishing the liability of the tortfeasor and his damages. Since a declaratory judgment is not proper for a tort claim, the case should just be tried as a "Claim for UM/UIM Benefits." This would seem to be a new common law cause of action since, as I understand it, a lawsuit cannot proceed without a cause of action.[30]

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[18] C. Brooks Schuelke, *Uninsured/Underinsured Motorist Claims After* Brainard, 9th Annual State Bar of Texas Advanced Insurance Law Course, 2012.

[19] Tex. Civ. Prac. & Rem. C. §37.009.

[20] *Brainard*, 216 S.W.3d at 811.

[21] Tex. Civ. Prac. & Rem. C. §37.009.

[22] *Owen v. Emp'rs Mut. Cas. Co.*, No. 3:06-CV-1993-K, 2008 U.S. Dist. LEXIS 24893 2008 WL 833086 (N.D. Tex., March 28, 2008).

[23] *Id.* at 7.

[24] *Id.* at 13.

[25] *Stoyer v. State Farm Mut. Auto. Ins. Co.*, No. 3:08-CV-1376-, 2009 U.S. Dist. LEXIS 15571, 2009 WL 464971, 1 (N.D. Tex., Feb. 24 2009).

[26] *Id.* at 8.

[27] *Accardo v. Am. First Lloyds*, No. H-11-0008, 2012 U.S. Dist. LEXIS 62181, 2012 WL 1576022, 6 (S.D. Tex., May 3, 2012).

[28] *Id.* at FN3

[29] Michal A. Hummert, *Uninsured/Underinsured Motorist Claims After* Brainard - *Counterpoint*, 9th Annual State Bar of Texas Advanced Insurance Law Course, 2012.

[30] Tex. R. Civ. P 45(b), 47, 91a.1.

In *Spannagel*, the plaintiff filed suit against his UIM carrier alleging breach of contract, violation of the Prompt Payment of Claims Act, seeking attorney's fees, and for a "Claim for Underinsured Benefits", but apparently did not bring a declaratory judgment action. The carrier sought dismissal of the breach of contract, attorney's fees, and extra-contractual claims as being unripe under *Brainard*. The Court agreed, dismissing all claims for failure to state a claim, and stated, "Plaintiffs' only remaining claim is their direct action against State Farm to establish the negligence, damages, and the underinsured status of the motorist for the purpose of making a UIM claim."[31]

C. Breach of Contract

Notwithstanding everything above, the vast majority of litigants and courts are still trying these cases as a breach of contract claim without attorney's fees. In fact, there are numerous court of appeals opinions post-*Brainard* that allow a breach of contract case to proceed.[32]

In fact, in *In re Old American County Mut. Ins. Co.*, the defense lawyer did file a motion to sever, abate, and, in fact, dismiss, both the extra-contractual claims and the breach of contract claims as unripe, but the Court's opinion severed only the extra-contractual claims, leaving the breach of contract claim to be litigated.[33]

D. Conclusion

No matter the vehicle through which the UM/UIM cause of action is pled, the case should be tried similarly. To recover UM/UIM benefits, the plaintiff must still establish she had UM/UIM coverage, that the tortfeasor's negligence proximately caused her damages, the amount of her damages, and that the tortfeasor was either uninsured or underinsured.[34]

How to get there will continue to perplex litigants and courts alike until we get a definitive answer from the courts. In the meantime, we trial lawyers will take each suit on a case-by-case basis, making our arguments to the trial courts dependent on the arguments and pleadings of opposing counsel. In the end, each sighting of the mythical goat-bloodsucking chupacabra must be examined on its own merit, until we decide it is, after all, just another old mangy coyote. ■

[31] *Spannagel v. State Farm Mut. Auto. Ins. Co.*, No. 4:13CV177, 2014 U.S. Dist. LEXIS 11658, 2014 WL 341911 (E.D. Tex. Jan. 30, 2014).

[32] *In re Allstate County Mut. Ins. Co.*, 447 S.W.3d 497 (Tex. App.—Houston [1st Dist.], October 16, 2014, orig. proceeding); *In re Progressive County Mut. Ins. Co.*, 439 S.W.3d 422 (Tex. App.—Houston [1st Dist.], June 12, 2014 orig. proceeding); *In re Old American County Mut. Ins. Co.*, 2013 Tex. App. LEXIS 819 (Tex. App.—Corpus Christi, January 30, 2013, orig. proceeding).

[33] *In re Old American County Mut. Ins. Co.*, No. 13-11-00412-CV, 2012 Tex. App. LEXIS 1293 at *13 (Tex. App.—Corpus Christi, February 12, 2012, orig. proceeding); Hummert, *Uninsured/Underinsured Motorist Claims After* Brainard *– Counterpoint* at 1.

[34] *Mid-Century Ins. Co. of Tex. v. McLain*, No. 11-08-00097-CV, 2010 Tex. App. LEXIS 1719 at *8 (Tex. App.—Eastland, March 11, 2010, no pet.).

Error Preservation - Some Recent Holdings That May Surprise You

by Steven Hayes[1] Copyright 2015

I DECIDED TO TAKE a kind of hopscotch approach to error preservation this time, looking at some common error preservation situations which came up the last three or four months, and then to throw in some other interesting situations which we don't see all that often, but as to which, but for the grace of God, we also might not get right.

If you wanna' give a dance, you gotta' pay the band. If you wanna' preserve error, you gotta' pay the filing fee on time.

We all file motions for new trial from time to time. When you do, make sure you pay the requisite filing fee within the 30 day post-judgment time frame in which Rule 324(b)(2) allows for filing a new trial motion. Otherwise, your motion for new trial will not preserve error:

> The law in light of *Garza* and *Moritz* is clear: failure to timely furnish filing fees renders the motion for new trial untimely, and since 'an untimely motion's only purpose is to guide the trial court in the exercise of its inherent plenary power[,]' *Moritz*, 121 S.W.3d at 718, it fails to preserve factual sufficiency error for our review.

Lerma v. Border Demolition & Envtl., 2015 Tex. App. LEXIS 1691, 13-15 (Tex. App.– El Paso Feb. 20, 2015). Given the number of issues which ***only*** a motion for new trial can preserve,[2] it pays to get this filing fee paid on time. Time will tell whether the advent of e-filing with ameliorate or exacerbate this problem.

Objections to the charge: I'd still assert them at the charge conference. No matter what the Supreme Court said.

It is always important to take note of error preservation

[1] Steve Hayes practices law in Fort Worth, where he handles civil appeals. www.stevehayeslaw.com. He is a SBOT Litigation Section Council member, and is also Vice Chair of the SBOT Appellate Section. He publishes a biweekly newsletter on error preservation in Texas civil appeals. Steve's Error Preservation Newsletter

[2] Such complaints include the following: that factually insufficient evidence supports the jury verdict; that a jury finding is against the overwhelming weight of the evidence; that the damages found by the jury are inadequate or excessive; that a jury argument was incurably improper; or any complaint on which evidence must be heard, such as jury misconduct, newly discovered evidence, or failure to set aside a judgment by default.