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Uninsured-Underinsured Motorists Insurance: *An insurer's liability for uninsured-underinsured motorist insurance may be established in a declaratory judgment action by the insured against the insurer as well as in a suit against the uninsured-underinsured motorist or a direct suit for damages against the insurer.*

Brainard v. Trinity Universal held an insurer's contractual liability to pay under uninsured-underinsured motorist (UIM) liability coverage did not arise "until the insured obtains a judgment establishing the [other motorist's] liability and underinsured status." In *Allstate Ins. Co. v. Irwin*, Allstate's insured settled with an underinsured motorist for $30,000 then demanded Allstate, his auto liability insurer, pay an additional $20,000 pursuant to its $50,000 uninsured-underinsured motorist insuring agreement. Dissatisfied with Allstate's $500 counter-offer, the insured successfully tried his declaratory judgment suit which determined that his damages exceeded the $20,000 available under his UIM coverage and in which he recovered attorney's fees.

Allstate appealed, complaining the insured could not use the declaratory judgment to recover attorney's fees. Allstate argued allowing declaratory judgments circumvented the *Brainard* requirement to first establish Allstate's contractual liability. Allstate insisted doing so was essential to recovering attorney's fees under Civil Practice and Remedies Code chapter 38. Allstate further argued *MBM Financial Corp. v. Woodlands Operating Co*., 292 S.W.3d 660 (Tex. 2009), forbade using declaratory judgment suits as a means for recovering attorney's fees when those fees would not have been available under chapter 38. In other words, Allstate urged that simply seeking declaratory relief to an action for which attorney's fees are not otherwise recoverable does not provide an alternate route for recovering fees.

Under an opinion by Justice Devine, a five-judge majority rejected Allstate's contention that a *Brainard* suit was the only way to establish the insurer's UM liability if no judgment had been rendered against the tortfeasor. According to the majority, *Brainard* allowed the insurer's UIM liability to be established in direct litigation against the insurer, but did not specify the procedural vehicle for doing so. The majority deemed declaratory judgment actions a permissible means to determine the insurer's UIM coverage obligation. Even if the insured's damages were ripe, declaratory relief was specifically available because the statute authorized the declaration of rights under a contract "either before or after … a breach." *MBM Financial*, however, ruled the declaratory judgment action could not be "tacked onto a standard suit based on a matured breach of contract" to recover otherwise unrecoverable attorney's fees because doing so "frustrate[d] the limits Chapter 38 imposes on such recover[y]." Nevertheless the majority observed declaratory relief was permitted even before a breach the action will resolve a "real controversy" declaratory relief will resolve. Accordingly, the majority deemed it an appropriate mechanism to determine whether the tortfeasor was liable and underinsured.

The majority circumnavigated *MBM*'s prohibition against using declaratory relief to expand the scope of recoverable attorney's fees. It observed the insured's breach of contract claim did not mature until the tortfeasor's liability was fixed by judgment. The declaratory judgment action did not, therefore, merely "duplicate" a viable breach of contract claim. In reaching this conclusion, the majority resolved conflicting decisions by the courts of appeals concerning use of declaratory judgments to determine UIM liability. The declaratory judgment statute was deemed

merely to be a statutory avenue for recovering attorney's fees *in addition to* chapter 38 and, therefore, within the exception to the "American" rule that attorney's fees are unrecoverable unless allowed by statute.

Chief Justice Hecht joined by Justices Guzman, Bland and Huddle dissented from the majority's assessment the insured had no breach of contract claim. The dissent reasoned the amount the insured is "legally entitled to recover" has not been adjudicated when the insurer denies a UIM claim. According to the dissent, simply making a claim and suing for the recovery of damages does not establish the insurer's liability. They asserted contractual liability for UIM benefits requires more than a claim of liability. Instead, it requires the *fact* of liability. The dissent insists the majority glossed over the fact that *Brainard* denied recovery of attorney's fee because there had been no thirty-day *presentment* as required by §38.002(3), not because there was no *present* claim for breach of contract.

Defamation: Judicial proceedings privilege and attorney immunity do not apply to allegations repeated in an attorney's press statements.

Texas Citizens Participation Act -- Insufficient Evidence of Damage Causation: To make a *prima facie* of damages required under the TCPA obliged the plaintiff to adduce evidence the lost business resulted from the alleged defamatory statements themselves, and not merely that the broader subject of the alleged defamation.

Generally, statements "statements preliminary to a proposed judicial proceeding or made in open court, pre-trial hearings, depositions, affidavits and any of the pleadings or other papers " are privileged from liability for defamation to promote full and free disclosure of by participants in judicial proceedings. This privilege applies equally to parties and their counsel. In addition, attorneys enjoy immunity from liability for defamation based on "actions" – not just statements – engaged in by attorneys for their clients pursuant to the attorney's office, professional training, skill, and authority.

In *Landry's Inc. et al. v. Animal Legal Defense Fund, et al.*, the ALDF served the owner of the Houston Aquarium with a letter notifying it intent to sue for alleged violations of the Endangered Species Act and a professional association's animal care manual. The ALDF posted a press release on its website that linked the notice letter and criticized the alleged conditions under which the Aquarium displayed its tigers. A local newspaper published a story based on the press release and ALDF's executive director repeated the allegations on social media. After these allegations were made public, two groups cancelled planned visits to the Aquarium. The Aquarium's owner sued ALDF and its attorney for defamation and related torts seeking both declaratory relief and actual and exemplary damages.

1. *The judicial proceedings privilege does not protect against liability for press statements repeating allegations that would otherwise be protected in the course of a judicial proceeding*.

In *Landry's*, a unanimous 6-0 opinion by Justice Blacklock clarified the scope of both judicial proceedings privilege and attorney immunity. Concerning judicial proceedings privileged, the issue was it protected a pre-suit press statement was subject to the privilege. The opinion deemed the juridical proceedings privilege "straightforward," and applicable to "[c]ommunications in the due course of a judicial proceeding … regardless of … negligence or malice" to prevent litigants from self-censoring out of fear of retaliatory suits. This "absolute" privilege immunizes the actor from not only slander or defamation liability, but from any alleged content-based tort liability for a protected communication.

The objective of the privilege is to "facilitates the proper administration of justice by promoting 'full and free disclosure of information … by participants in judicial proceedings.'" Thus, it applies not only to in-court statements, depositions, affidavits and pleadings, but also to statements that are "preliminary to a proposed judicial proceeding." Such as statements or allegations in a mandatory notice letter.

Observing that Texas law had previously been unclear whether the privilege also applied to other statements to the media or the public publicizing defamatory allegations , the Court declined to extend it to such statements. Such protection were deemed to exceed the privilege's purpose of protecting advocacy and instead make it "a license to … make false and slanderous charges against his court adversary" in the community generally with impunity." Pre-suit statements would be protected only if they have "some relation to a proceeding that is actually contemplated in good faith and under serious consideration by the witness or a possible party." The majority reasoned the interests the judicial proceedings privilege was designed to protect did not extend to press statements. Such statements are in no way part of or preparatory to a judicial proceeding. Extending the judicial proceedings privilege to them was unnecessary. The public interest in knowing about court proceedings was adequately protected by other defamation defenses and the First Amendment.

2. *Attorney immunity does not protect against liability for press statements because such statements are not unique to functioning as an attorney*.

The opinion then turned to whether *attorney immunity* applied to the statements in the press release. Attorney immunity attaches when attorneys act for clients uniquely in the capacity of one who possesses "the office,

professional training, skill, and authority of an attorney." The attorney immunity applies to *conduct* whereas the judicial proceedings privilege applies to written or oral communications. It does not apply to repetition of allegations in litigation because sending out press releases or otherwise disseminating potentially defamatory allegations through news or social media is not a unique function of the office as an attorney. If attorney immunity protected out-of-court republication of a lawsuit's defamatory allegations, the limitations of the judicial proceedings privilege to statements made in the course of the litigatory proceeding itself would be unnecessary and redundant.

> 3. *Proof the plaintiff lost bookings after the defamatory publications alone was insufficient to establish by clear and specific evidence a* prima facie *case as required under the TCPA the defamatory publication* caused *the economic damages for business disparagement and tortious interference.*

The evidence showed two groups cancelled events at the aquarium, citing generally the controversy of the aquarium's treatment of its tigers, the subject of the defamatory publication. "[V]ague references to the 'recent controversy' or 'recent publicity,' standing alone, [we]re insufficient to support a causal link between any particular statement … and the decisions made by the two organizations to do business elsewhere." For this reason, the opinion upheld the dismissal of the plaintiff's claims for damages under its business-disparagement and tortious-interference claims. The plaintiff was, however, permitted to continue pursuit of its defamation claims because proof of "economic damages caused by the[defamatory] statements [wa]s not an essential element of th[at] claim."

> **Attorney Immunity**: Attorney immunity can protect attorneys from liability for attorney conduct in representing the client in non-litigation matters.
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> **Preemption of State Jurisdiction in Patent Cases:** The pre-emption of state jurisdiction over patent claims under 28 U. S. C. §1338 applies only if the federal issue is , among other things, important to the federal system as a whole.

The unanimous opinion in *Haynes & Boone LLP, et al. v. NFTD, LLC, et al.* further explored the history and development of attorney immunity beyond the context of defamation litigation. Under a unanimous opinion by Justice Boyd, the court examined the history and development of the attorney immunity privilege to hold the privilege applied, not only client representation in litigation, but "in all adversarial contexts in which an attorney has a duty to zealously and loyally represent a client, including a business-transactional context, but only when the claim against the attorney is based on the 'kind' of conduct attorney immunity.

Before reaching the analysis leading to this holding, the opinion first dealt with whether state court jurisdiction was precluded under 28 U.S.C. §1138, which provides "[n]o State court shall have jurisdiction over any claim for relief
arising under any Act of Congress relating to patents." In *NFTD*, the misrepresentation claim by non-clients against the attorney could be valid only if the patent claims were *in*valid. Thus, the case presented a jurisdictional issue whether a Texas court could resolve the patent validity question necessary to determine whether the attorney engaged in a misrepresentation. The opinion determined §1338 imposed no jurisdictional bar. The patent's validity under federal law – an issue which no federal court had yet addressed – would be not be affected if the plaintiff prevailed on the claim against the attorney. Because the decision concerning the patent would be "situation specific" its effects were not substantial enough to "arise under" federal patent law.

After clearing the jurisdictional bar, the opinion then turns to an examination of the history of attorney immunity to resolve its applicability to non-litigation conduct: the attorney's assessment for the seller concerning the value of certain patents without disclosing contradictory facts and while encouraging the prospective purchaser to proceed with the transaction. The opinion details the evolution of the attorney immunity privilege. It began as a limited protection for the attorney-client relationship intended to prevent lawyers from diluting their client loyalty over liability to third parties. It developed, however, to recognize the privity requirement was not undermined "if the duty alleged by the third party was based on the attorney's manifest awareness of the nonclient's reliance on the misrepresentation and the professional's intention that the nonclient so rely." The dividing line between protected and unprotected conduct is not based on the wrongful nature of the conduct. If the immunity applies, even fraudulent conduct is protected. Instead, the dispositive issue is whether the conduct "outside the scope of an attorney's legal representation of [the] client."

The opinion distinguished between protected conduct on the client's behalf and an attorney's misrepresentations as part of "business scheme *with* his client"(emphasis in original) on the basis identified in *Landry's* – that is, whether it was related to the discharge of the attorney's duties to represent the client that were part of the "office, professional training, skill, and authority of an attorney." The duty of zealous representation is not limited to litigation and the opinion reasoned, therefore, attorney immunity is likewise not confined only to representation in litigation. It extends to other contexts in which the client and the non-client's interests are adverse. The opinion remanded to the case to the court of appeals to resolve the previously unanswered question of whether the attorney's conduct strayed outside the scope of the conduct and the interests the attorney

Practitioners ought to consider carefully a thorough exposition of the legal services in the fee agreement letter provided to the client. If those services are of the "kind" protected by the immunity, the broader the services, the greater the scope of immunity. Practitioners should also remember that the "kind" of protected activities is not that well defined. Therefore, that issue in one likely to be carefully examined in resolving transactional attorney immunity.

> **Parental Termination**: The termination of a father's rights for knowingly endangering the child was supported by evidence of conduct by the child's mother and her boyfriend while the father was incarcerated for criminal offenses.
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> **Legally Sufficient Evidence Review**: The rule that the trier of fact is entitled to reject evidence unless no reasonable trier of fact could do so was invoked to support a conclusion from uncontroverted facts rather than a determination of what facts were actually uncontroverted.

Unless statutorily designated, incarceration for a criminal offense alone is not child endangerment warranting parental termination. In the matter of *In re J. F. -G.*, a 5:4 majority held, however, that "incarceration … support[s] an endangerment finding 'if the evidence, including the imprisonment, shows a course of conduct which has the effect of endangering the physical or emotional well-being of the child.'"

In this case, the father's rights were terminated on grounds that he "engaged in conduct or *knowingly* placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child[.]" (Emphasis added). This finding was essentially based on evidence the father committed increasingly serious crimes and resulting incarcerations that continued after the child was born. Due to these incarcerations, the father was absent from the child's life for substantial periods. During that time, there was but "sparse evidence" the father supported the child's wellbeing. Moreover, the majority observed that the father's "omissions, spanning throughout … childhood, exposed [his daughter] to physical and emotional loss, as he did not care for, nurture, or protect her" from poor treatment and conditions created by the mother and her then boyfriend.

Although the majority noted the father during his incarceration had taken substantial steps to turn his life around and that his post-incarceration conduct was "unimpeachable," it did "not nullify earlier endangering conduct such that the trier of fact must set the earlier conduct aside." That endangering conduct was based on the determination

> [t]he "disruption" in this case was not "normal"—[the child's] life was placed at risk while her father was completely absent from her life for more than eight years. Julie's mother admitted that she had contact with the father only three or four times a year. Leaving aside incarceration, an absence of that duration resulting from criminal conduct is sufficient evidence to establish a "pattern of conduct that is inimical to the very idea of child-rearing" that endangered the child]'s physical or emotional well-being.

Invoking the standard of review that permits the trier of fact to "disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible," the majority deferred to the fact of the father's convictions and absence from the child's life as sufficient evidence to support the finding of endangering conduct.

In a vigorous dissent by Justice Blacklock, joined by Justices Guzman, Devine and Busby, the minority pointed out "abundant evidence that the reckless behavior of Mother and her boyfriend [were the ones whose conduct actively] endangered" the child. Those events transpired while the father was imprisoned, which made it "nearly impossible" for the father to have "intimate involvement in his daughter's life." In the dissenters' view, the majority's

conclusion the father's "imprisonment alone … amounted to [sufficient] endangerment would ignore the legislature's choice that *only some* imprisonment terms automatically make a parent termination-eligible." As a matter of appropriate statutory interpretation, the dissent urged any

> doubt about [the scope]of the statute under which the father's rights were terminated, [should be]… "constru[ed] … in favor of the parent." … This rule of construction is no arbitrary thumb on the scale. Rather, it derives from Texas law's longstanding recognition that a parent "has … a paramount right to the custody of his infant child," and that "[t]he breaking of the ties which bind the father and the child can never be justified without the most solid and substantial reasons.

In this writer's opinion, the majority misapplied the standard of review by disregarding *uncontroverted* facts that undermined the trial court's endangerment finding. To say an incarcerated father knowingly endangered a child solely by virtue of an involuntary absence created circumstances over which the father had no control and did not create cannot be reconciled with the general rules concerning the standards for establishing causation. In the negligence context, a right of control and the resulting potential ability to control is paramount, as shown by the numerous employer liability cases. Moreover, the Texas Supreme Court itself has ruled that merely creating the circumstances under which the criminal behaviors of third parties is not a sufficient causal nexus for the imposition of negligence liability. If passive creation of a circumstance is insufficient to establish causation for negligence liability, it is difficult to understand how the evidence was legally sufficient to show the father, with no power to control the the neglectful and occasionally criminal conduct of the mother and her boyfriend, caused the father to *knowingly endanger* the child.

"Ought" implies "can." – Immanuel Kant. If there is no "can" there should be no "ought."