consumer products, a term that means "tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes."

The district court dismissed Waypoint's complaint against Mooney, Sandel, and Honeywell concluding that an airplane cannot be a consumer product, even if its principal use is personal transportation or recreation. Waypoint appealed, but due to Mooney entering bankruptcy, the appeal was put on hold. Eventually, Waypoint dismissed claims against Mooney, and appellate proceedings resumed.

HOLDING: Vacated and remanded.

REASONING: The court described the district judge's conclusion that an airplane cannot be a consumer product as "problematic." "Airplanes," explained the court, is too large a category for analysis. Analysis must be more fine-grained, and on a motion to dismiss the complaint a court must indulge every factual assumption in the plaintiff's favor. To the question of whether the electronics that Sandel and Honeywell supplied and warranted directly to the purchaser are consumer products, the court had two responses. If the principal use of such equipment is in military jets and large commercial planes, the court responded then they are not "consumer products." If the products are normally used directly by consumers (perhaps in automobiles or boats) they could be "consumer products" even if all airplanes are outside the statute. The appeals court vacated the lower court's opinion and remanded the case with instructions to dismiss Waypoint's claims against Sandel and Honeywell, with prejudice, for failure to present any factual or legal arguments concerning these parties.

INSURANCE

IF AN INSURANCE CONTRACT IS SO WORDED THAT IT CAN BE GIVEN A DEFINITE OR CERTAIN LEGAL MEANING, IT IS NOT AMBIGUOUS

Bexar County Hosp. Dist. v. Factory Mut. Ins. Co., 475 F.3d 274 (5th Cir. 2007).

FACTS: Plaintiff-Appellant Bexar County Hospital District ("UHS") discovered that its water system was leaking. UHS rented temporary cooling towers for its air conditioning system to allow the hospital to continue functioning while it located the source of the leak. Over a period of some 90 days, UHS spent $557,134 to repair the leak and $1,001,093 to rent the temporary water chillers. At the time the damage occurred, UHS had in place Factory Mutual's Global Advantage Policy ("policy"), an "all risks" property insurance policy covering both physical damage and "time element" loss. Time element loss referred to business interruption loss. Factory Mutual paid all of UHS's property damages less a $25,000 deductible and all of UHS's time element losses minus a deductible equal to the value of one day's worth of UHS's total projected operating revenue. UHS complained that the appropriate deductible would have been the value of UHS's actual time element loss. UHS further claimed that there was no actual time element loss because the water chillers prevented the occurrence of any business interruption. Factory Mutual disagreed.

UHS filed suit in Texas state court for declaratory judgment and breach of contract. Factory Mutual removed to federal court, and both parties filed summary judgment motions. Each party argued for its own method of calculating the Time Element loss deductible. The district court granted Factory Mutual's motion, denied UHS's motion, and dismissed the case.

HOLDING: Affirmed.

REASONING: The court explained that if the language of a policy or contract is subject to two or more reasonable interpretations, it is ambiguous. If, however, a written contract is so worded that it can be given a definite or certain legal meaning, then it is not ambiguous. In its determination of whether ambiguity existed within the deductibility provisions of the policy, the court observed that the policy only made reference to the term "time element", in two sections. In the reporting provisions, Factory Mutual required UHS to provide it with values anticipated for the term of the policy as well as the actual time element values for the previous twelve-month period. Because of the way the term time element was situated within these two sections of the policy, the court concluded that Factory Mutual's interpretation of the proper calculation of the policy deductible was the only reasonable interpretation. Specifically, the court concluded that Factory Mutual's reading of the policy's deductible provisions (1) comports directly with the plain meaning and common usage of policy terms, (2) preserves the internal consistency of the policy and (3) gives meaning to all policy provisions. In contrast, UHS's proffered interpretation required a "strained reading" of the policy's plain language and would render meaningless the time element portion of the policy's value reporting provisions.

UIM INSURANCE COVERS PREJUDGMENT INTEREST THAT THE UNDERINSURED MOTORIST WOULD OWE THE INSURED

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

Brainard v. Trinity Universal Ins. Co., 216 S.W.3d 809 (Tex. 2006).

FACTS: Edward H. Brainard II was killed in a head-on collision with a rig owned by Premier Well Service. His widow, Lilith Brainard, and their five children sought uninsured/underinsured motorist ("UIM") benefits from Trinity Universal Insurance Company. Trinity paid $5,000 under the personal injury protection ("PIP") provision of the policy but requested more information supporting the UIM claim. Brainard alleged she submitted the information and performed all conditions precedent to receiving the benefits, but Trinity never paid. Brainard brought action against Trinity alleging breach of contract, breach of the common law duty of good faith, violations of the Deceptive Trade

Practices-Consumer Protection Act, and violations of Insurance Code articles 21.21 and 21.55. Brainard settled all claims against Premier for $1,000,000, Premier's policy limit.

A jury found that Premier's negligence caused the accident and awarded Brainard $1,010,000 and an additional $100,000 for attorney's fees. The trial court applied a $1,005,000 credit for Brainard's settlement and PIP benefits and entered a judgment against Trinity for the remaining $5000 and the attorney's fees, but refused to award prejudgment interest on the $1,010,000 in damages. The court of appeals affirmed the trial court's denial of prejudgment interest.

HOLDING: Affirmed in part, reversed in part, and remanded.

REASONING: The Texas Supreme Court held that the UIM insurance covered prejudgment interest that Premier would owe on the $1,010,000 in actual damages. Tex. Ins. Code. art. 5.06-1(5) mandated that UIM coverage provide payment of the amount that the insured would be able to recover "because of bodily injury or property damage." The court explained that the compensatory purpose of article 5.06-1(5) is well served by allowing the insured to obtain prejudgment interest that the underinsured motorist would have owed.

Compensatory purpose of article 5.06-1(5) is well served by allowing the insured to obtain prejudgment interest that the underinsured motorist would have owed.

The court rejected Trinity's argument that prejudgment interest is compensation for lost use of money, not damages from bodily injury. Interpreting the phrase "because of bodily injury" literally to eliminate covering prejudgment interest contradicts the court's precedent and the statute's history. Precedent requires that article 5.06-1 should be liberally construed to protect those who are legally entitled to recover damages from underinsured motorists. A literal reading of the phrase would also "entail splitting hairs among purely compensatory damages, such as those for mental anguish and loss of society." The court further rejected Trinity's alternative argument that Brainard's recovery was based on a written contract and that prejudgment interest was not authorized for purely contractual claims. Premier would have been liable for prejudgment interest under Tex. Fin. Code § 304.102, which authorizes prejudgment interest in wrongful death, personal injury, and property cases. Although Brainard's suit against Trinity is based in contract, section 304.102 was applicable. The UIM policy "effectively incorporates the statute." Once the liability of the underinsured is determined, the UIM policy controlls the insurer's obligations. Accordingly, Brainard obtained a judgment against Premier which established its negligence and underinsured status, and the contract requirs Trinity to pay benefits, including prejudgment interest.

The court also held that under Chapter 38 of the Civil Practice & Remedies Code 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. Chapter 38 allowed for recovery of attorney's fees in a successful breach of contract suit against an insurer. Because the UIM contract did not require Trinity to pay benefits before determining whether Premier was negligent and underinsured, Brainard did not present a contract claim until the trial court rendered its judgment and Chapter 38 did not authorize the recovery of attorney's fees.

The court explained that the insured party may settle with the tortfeasor and then pursue the UIM coverage claim with the insurer as Brainard did in this case. Nevertheless, obtaining a settlement or an admission of liability from the tortfeasor does not establish UIM coverage. A jury could determine that the suspected tortfeasor was not at fault or it could award damages to be be fully covered by the tortfeasor's liability insurance. An essential element to recovery under Chapter 38 is the existence of a duty to pay the insured which the insurer has failed to meet. The court held, "neither requesting UIM benefits nor filing suit against the insurer triggers a contractual duty to pay."

DEBT COLLECTION

NO DAMAGES FOR VIOLATION OF AUTOMATIC STAY

Goodrich v. Union Planters Mortg., 196 F. App'x 586 (9th Cir. 2006).

FACTS: Jeffrey and Shelly Goodrich were the owners of real property in Mira Loma, California. They filed for Chapter 13 bankruptcy, triggering an automatic stay of all actions and claims upon their property pursuant to 11 U.S.C. § 362(a). Union Planters Mortgage was the beneficiary on the deed of trust on the property. Unaware of the bankruptcy filing, they foreclosed on the Goodrich's home and recorded a trustee's deed of sale. The Goodrichs filed an action for damages under 11 U.S.C. § 362(k) for violation of the automatic stay. The Bankruptcy Court for the Central District of California found in favor of the creditor. The Bankruptcy Appellate Panel for the Ninth Circuit Court of Appeals affirmed the decision. The Goodrichs appealed the decision.

HOLDING: Affirmed.

REASONING: The Court held that the Goodrichs were not able to recover under Section 362 because the violation was not willful and they did not suffer damages.

The Bankruptcy Act establishes an affirmative duty for creditors to discontinue collection actions upon debtor's filing of a bankruptcy application. 11 U.S.C. § 362(k) The Act allows for the recovery of actual damages and in some cases punitive damages when an individual is injured by a willful violation of a stay. A § 362(k) claim requires proof that: (1) a stay was violated, (2) the violation was willful, and (3) that the injury was a result of the violation.

Upon learning of the bankruptcy proceeding, a creditor must immediately discontinue all post-petition collection actions in non-bankruptcy for and against a debtor. *Eskanos & Adler v.*