



July 30, 2007

## **UIM INSURER DID NOT BREACH ITS CONTRACT OR VIOLATE PROMPT PAYMENT OF CLAIMS ACT PRIOR TO JUDGMENT OR SETTLEMENT**

Recently, in *Schober v. State Farm Mut. Auto. Ins. Co.*, 3:06-cv-01921 (N.D. Tex. July 18, 2007), a federal court dismissed Plaintiffs' claims for breach of contract, violation of the Prompt Payment of Claims Act, and attorneys' fees concluding that no judgment or settlement establishing Plaintiffs' legal entitlement to recovery from the underinsured had been achieved. Plaintiffs were involved in an auto accident with an underinsured motorist. State Farm accepted Plaintiffs' UIM claim and offered a settlement. The Plaintiffs rejected the offer and, instead sued State Farm claiming payment of UIM damages under their policy, breach of contract, and various extra-contractual claims.

Since the court found that Plaintiffs' pleadings inadequately alleged that State Farm had a contractual duty to pay UIM damages, Plaintiffs' assertion of bad faith connected with that purported duty also failed. Because the possibility remained, however, that State Farm may be found liable under the policy for UIM damages, the court decided to abate Plaintiffs' claims for bad faith and exemplary damages.

## **APPELLATE COURT APPLIED EXPRESS NEGLIGENCE TEST AND FINDS INDEMNITY PROVISION INVALID WHILE ALSO DENYING CONTRACT REFORMATION**

Last Thursday, the Houston Court of Appeals held that a subcontractor did not breach its contract with the general contractor and reformation of their contract was not warranted. In *Gilbane Building Co. v. Keystone Structural Concrete, Ltd.*, 2007 WL 2130373 (Tex. App.—Houston [1st Dist.] July 26, 2007), Gilbane contracted for Keystone to act as a subcontractor on a construction project that Gilbane was performing at Rice University. During construction a Keystone employee suffered an injury and subsequently sued Gilbane. Gilbane then sued Keystone to recover the settlement payment made to the Keystone employee.

The court analyzed the indemnity provision to the contract and held that the express negligence test was not satisfied. As a result, the court found the indemnity provision was invalid. The court further held that the contract did not require Keystone's excess carrier to provide coverage that was primary to the Gilbane policy. Lastly, the court found that Gilbane provided no evidence of a "mutual mistake" and, thus, concluded that reformation of contract was not justified.

## **COURT APPLIES FODGE DECISION AND HOLDS CLAIMANT MUST EXHAUST ADMINISTRATIVE REMEDIES PRIOR TO SEEKING EXTRA-CONTRACTUAL DAMAGES AGAINST WORKERS' COMPENSATION CARRIER**

In *Pickett v. Tex. Mut. Ins. Co.*, 2007 WL 2140948 (Tex. App.—Austin July 26, 2007), the Austin Court of Appeals affirmed the trial court's decision to dismiss Plaintiffs' claims for want of jurisdiction for failure to

exhaust their administrative remedies and granted a take-nothing summary judgment on Plaintiffs' claims arising from disputes for which the administrative remedies had been exhausted. In this case the claimant suffered a back injury while performing duties for a home-cleaning service. The claimant argued that her work-related injury aggravated preexisting psychological conditions. The carrier accepted the claim paying income and disability benefits as well as hundreds of thousands of dollars for her healthcare. Subsequently, the carrier denied preauthorization for certain chronic pain management services related to the claimant's psychological disorders on the basis those medical services were not related to her compensable injuries or were not reasonable and medically necessary. Although she was entitled to contest the carrier's decision through an administrative dispute resolution procedure, the claimant did not request review.

Several years after the injury, the claimant and carrier entered into a Benefit Dispute Agreement, but did not agree to coverage for specific medical treatment. Two months after entering the agreement the Plaintiffs sued the carrier asserting, among other claims, violations of the Texas Insurance Code and Deceptive Trade Practices Act. Analyzing the Texas Supreme Court's decision in *American Motorists Insurance Co. v. Fodge*, the court held that the application of *Fodge* (and specifically the administrative exhaustion requirement) did not violate Plaintiffs' constitutional rights. As part of its decision, the court reiterated the general rule that decisions by the Texas Supreme Court apply retrospectively. The court also held that the Texas Workers' Compensation Commission had exclusive jurisdiction over Plaintiffs' claims, including their tort claims and statutory violations even if Plaintiffs were seeking damages other than denied medical benefits. The court also concluded claims based on delay (as opposed to denial) were also subject to the *Fodge* administrative remedies exhaustion requirement.

Lastly, the Plaintiffs contend they incurred damages connected with the carrier's denial of payment for three final Commission orders (payments sought by a single healthcare provider) due to "numerous collection notices from healthcare providers for medical expenses that have not been paid." In route to its decision, the appellate court noted that a carrier is not legally accountable to a claimant if the claimant is subjected to collection efforts by her healthcare providers prior to a determination that the carrier is not responsible for payment. Any dispute regarding collection efforts by the healthcare provider against the Plaintiffs did not involve the carrier—therefore, summary judgment was appropriate.

**Editor's Note:** Bad faith allegations arising out of workers compensation cases have proliferated in Texas in the last 18 months. This case reflects a slowly growing trend by Texas courts to curb such suits. Workers comp carriers sued for common law or statutory bad faith in Texas should use the administrative abatement defenses available under Texas law which were used in this case in all such cases where it is possible to do so. Carriers selling workers compensation policies in Texas with any questions about the possible unique defenses available in workers compensation cases should contact any of our firm's lawyers.

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