



The Weekly Update of Texas Insurance News

## TEXAS INSURANCE LAW NEWSBRIEF



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### **HOUSTON COURT OF APPEALS CONDITIONALLY GRANTS PETITION FOR MANDAMUS IN UIM CASE RE SEVERANCE & ABATEMENT**

Last Thursday, in *In re Allstate County Mut. Ins. Co.*, --- S.W.3d ---, 2011 WL 5005352 (Tex.App. – Houston [14th Dist.] Oct. 20, 2011), the court of appeals in Houston conditionally granted Allstate’s petition for mandamus directing the trial court to sever extra-contractual claims from contractual claims for underinsured-motorist (UIM) benefits and abate the extra-contractual claims until the contractual claims are resolved. Charlotte Juneau sued Allstate for UIM benefits due to an automobile accident and also alleged a breach-of-contract claim, along with extra-contractual claims for bad faith under the insurance code and deceptive trade practices act. Allstate offered to settle the claim, but the offer was not accepted. Allstate filed a motion to sever the contractual claims and abate the extra-contractual claims. The trial court denied Allstate’s motion.

Allstate complained that the trial court abused its discretion in refusing to sever the extra-contractual claims from the claim for UIM benefits when a settlement offer had been made and in refusing to abate the extra-contractual claims until the underlying contractual claims are resolved. In cases in which contractual and extra-contractual claims are being pursued simultaneously, the court stated it “repeatedly has held that extra-contractual claims must be severed and abated when the insurer has made a settlement offer on the contract claim.” Accordingly, the court concluded the trial court abused its discretion in not severing and abating the extra-contractual claims.

In a concurring and dissenting opinion, Justice McCally concurred in the majority’s determination that the petition should be conditionally granted and the trial court directed to vacate its order denying Allstate’s motion to sever but dissented from the majority’s conclusion that mandamus should also conditionally issue directing the trial court to vacate its order denying Allstate’s motion to abate.

### **AMARILLO COURT OF APPEALS DENIES PETITION FOR MANDAMUS IN UIM CASE REGARDING ABATEMENT**

In another decision related to severance and abatement of extra-contractual claims last week, the court of appeals in Amarillo *denied* a petition for mandamus seeking an order compelling the trial court to abate extra-contractual claims asserted by Terry Henrie in *In re Farmers Tex. County Mut. Ins. Co.*, 2011 WL 4916303 (Tex.App. – Amarillo Oct. 17, 2011) (not designated for publication). Henrie was involved in an auto accident in September 2008 when William Walker Rainey collided with Henrie’s parked vehicle. Henrie sued Rainey and, later, amended his pleading to assert claims against Farmers, his personal auto carrier. Henrie’s claims against Farmers alleged breach of contract for failure to pay uninsured/underinsured motorist (UIM) benefits, and extra-contractual claims for breach of the duty of good faith and fair dealing and for violations of the Texas Insurance Code.

In July 2011, Farmers filed a plea in abatement requesting the trial court abate all extra-contractual claims until after resolution of the UIM claim. After holding a hearing on Farmers's plea in abatement on August 30, 2011, the trial court denied the plea on the record. The parties mediated on September 29, 2011, and in a letter dated September 30, Farmers informed the trial court judge that it "made a settlement offer to conclude the entire contract claim" of Henrie. Trial was set to begin on October 14.

In its Petition for Mandamus, Farmers argued Texas law establishes that, when an auto insurance carrier makes a settlement offer for a UIM claim, a trial court is without discretion and must abate extra-contractual claims until the contractual UIM claim is resolved. Because the trial court has not abated Henrie's extra-contractual claims, Farmers argued it was entitled to mandamus relief.

The court of appeals agreed with Farmers that Texas case law establishes that abatement of extra-contractual claims is required in most instances in which an insured asserts a claim to UIM benefits. The court stated, however, in a mandamus context, for a party to preserve its complaint that the trial court failed to abate extra-contractual claims, that party must have brought the issue to the trial court's attention by seeking the issuance of an abatement order from the trial court. The record did not establish that the trial court had been asked to reconsider its denial of Farmers's plea in abatement in light of its settlement offer to Henrie. Yet Farmers's mandamus petition alleged that the trial court judge clearly abused her discretion by failing to abate Henrie's extra-contractual claims after Farmers made a settlement offer on Henrie's entire contract claim. As such, Farmers failed to preserve its complaint by failing to seek an abatement order from the trial court on the grounds upon which it sought mandamus relief. The court of appeals stated, consequently, it could not conclude the trial court clearly abused its discretion or that Farmers did not have an adequate remedy available at law. Thus, it denied Farmers's petition.

**WACO COURT OF APPEALS HOLDS DIVISION OF WORKERS'  
COMPENSATION LACKS RIGHT TO REVIEW LIFETIME INCOME  
BENEFITS AFTER ADMINISTRATIVE AND APPELLATE REMEDIES HAVE  
BEEN EXHAUSTED**

Also last week, in *Liberty Mut. Ins. Co. v. Adcock*, --- S.W.3d ---, 2011 WL 5009821 (Tex.App. – Waco Oct. 20, 2011), the court of appeals in Waco affirmed a summary judgment in favor of Ricky Adcock following a review in 2009 of an earlier award of Lifetime Income Benefits (LIBs) to Adcock. In 1991, Adcock received a compensable on-the-job injury and, in 1997, the Texas Department of Insurance Division of Workers' Compensation Appeals Panel held Adcock was entitled to LIBs. Several years later, Liberty Mutual, the workers' compensation carrier, sought to reopen Adcock's case, asserting that Adcock was no longer entitled to LIBs because he no longer had the total and permanent functional loss of use that was the basis of his award. After a hearing officer determined that Adcock was entitled to continued LIBs, the Division's Appeals Panel found that the Division had jurisdiction to reopen the case but that Adcock continued to be entitled to LIBs. On appeal to the district court, Adcock argued the case could not be reopened. The Division intervened, asserting that it had jurisdiction. The trial court agreed with Adcock's premise that the Division could not reopen the 1997 case and granted Adcock's summary judgment finding the Division, and by extension the trial court, lacked jurisdiction to revisit the issue of LIBs awarded in 1997.

Liberty Mutual and the Division argued to the court of appeals that the Division can revisit whether the loss of use of a body part is permanent because the legislature vested the Division with exclusive jurisdiction to resolve workers' compensation disputes. They also argued that to hold otherwise would be nonsensical because an injured worker who improved would continue to receive LIBs, even though the

worker no longer met the statutory criteria. Adcock responded by asserting that that once he became eligible for LIBs, no further review was permitted.

The court of appeals reviewed the statutory scheme, which states that LIBs are “paid until the death of the employee,” and which clearly allowed for review under several other circumstances but not once entitlement to LIBs has been established. Specifically, there is no express language in the statutes that give the Division the right to revisit the issue of LIBs entitlement whenever it chooses, and the statutory scheme clearly shows that the legislature knew how to include this authority if it so desired. Therefore, the court of appeals concluded that the Division has no right to review LIBs after the initial administrative and appellate remedies have been exhausted.

## **MDJW UNIVERSITY: TEXAS INSURANCE SEMINAR (NOVEMBER 15, 2011)**

The lawyers of MDJW will host a free continuing education seminar in Dallas on November 15, 2011 covering the latest developments in Texas insurance law, litigation management, and trial strategy. Lawyers from the firm’s tort trial group and its insurance trial team will provide updates on a host of cutting edge topics for those in the insurance industry who handle claims or manage litigation. This free one-day program will cover the latest claims handling issues, coverage issues, and litigation strategies arising out of auto and HO claims, construction defect claims, responsible third party claims, and primary/excess issues. We will also be examining the implication of the 2011 Texas “Tort Reform” Legislation, the future of Texas bad faith litigation, continuing *Stowers* exposures, and much more. A special lunch presentation from one of the nation’s best jury science researchers will examine recent discoveries from Texas jury research projects. Chris Martin, Mark Dyer, Barrie Beer, Andrew Schulz and many of the other lawyers of MDJW will be speaking at this program. CE credit from the Texas Department of Insurance (including consumer protection hours) and CLE credit from the State Bar of Texas will be available for each attendee. The program will be held from 9:00 a.m. to 3:30 p.m. on November 15, 2011 in the large auditorium at the Studio Movie Grill, 4721 W. Park Boulevard Plano, TX 75093. The venue is located in north Dallas just off the Dallas North Tollroad, one mile north of the George Bush Turnpike. The venue is easy to reach from Love Field and any location in the DFW metroplex. Although attendance is free, we do need each attendee to register in advance so we can get an accurate count for lunch. Registration can be completed by emailing [teresai@mdjwlaw.com](mailto:teresai@mdjwlaw.com) or calling Teresa Ivory-Jones at **214-420-5534**. We hope to see many of our friends and clients in the insurance industry on November 15<sup>th</sup> in Dallas for the **2011 MDJW Texas Insurance Seminar**.

If you wish to discuss legal principles mentioned herein, reply to this e-mail or contact any of our lawyers at Martin, Disiere, Jefferson & Wisdom, L.L.P.  
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