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The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

MAY 17, 2018

"BUT I DIDN'T SIGN UP FOR THIS"—SUPREME COURT OF TEXAS FINDS INSURANCE POLICY DOES NOT PERMIT NON-SIGNATORY TO ENFORCE POLICY ARBITRATION CLAUSE

This past week, the Supreme Court of Texas addressed the issue of arbitration provisions in an insurance policy enforced by non-signatories. In *Jody James Farms, JV v. Altman Group, Inc.*, No. 17-0062, 2018 WL 2168306 (May 11, 2018) the underlying claim arose from a dispute involving a crop revenue coverage insurance policy purchased by Jody James Farms from Rain & Hail, LLC and reinsured by the Federal Crop Insurance Corporation. The policy was purchased through the Altman Group, an independent insurance agency. The policy included an arbitration provision for disputes under the contract. Neither the Altman Group nor its employees were named in the policy.

James suffered a grain sorghum crop loss and filed a claim with Rain & Hail which was denied on several bases including for failure to provide timely notice of the damage. The parties arbitrated the dispute and the arbitrator agreed with Rain & Hail that James failed to timely present notice of the claim. As a result, James sued the Altman Group and is agent (together the "Agency") for breach of fiduciary duty and deceptive trade practices for the agency's failure to timely submit the crop-loss claim to Rain & Hail. The Agency moved to compel arbitration which James opposed. The court granted the arbitration which was resolved in favor of the Agency. The court of appeals confirmed the arbitrator's award and James appealed—challenging the arbitrator's authority to determine whether a non-signatory can compel a signatory to arbitrate under the policy.

The central issue was whether the arbitration provision in the underlying insurance agreement between James and Rain & Hail reflected an intent to allow third parties like the Agency to arbitrate as well. The Court concluded that it did not. Specifically, an arbitration is a reflection of the parties' intent and the Court could not find that the underlying policy reflected an intent between the parties to arbitrate claims outside of those between signatories. Considering the policy, the Court noted that the Agency's alleged failure to inform Rain & Hail of James' claim in a timely matter was not a dispute between Rain & Hail and James.

The Court further addressed and rejected the Agency's alternative arguments for arbitration under theories including agency, third-party beneficiary status and estoppel. Although an agent of a signatory may, at times, invoke an arbitration clause against another signatory, because the record did not reflect that Rain & Hail had control over the Agency's actions in relaying James' claim, the Agency could not compel arbitration. Arbitration may also be enforced with respect to third-party beneficiaries when the contracting parties intended to secure a benefit to the third party and entered into a contract to confer a benefit to the third party. However, because neither the insurance agreement nor the Federal Crop Insurance Act conferred a direct benefit to the Agency, the Agency could not compel arbitration based on a third-party benefit. Finally, the court rejected the Agency's argument in favor of arbitration based on direct-benefit and alternative theories of estoppel since the underlying policy did not directly impose obligations or duties on the Agency and the Agency's relationship to Rain & Hail was not close enough to imply James' consent to arbitrate the suit.

The Court concluded that James and the Agency did not agree to arbitrate their dispute and James could not be compelled to arbitrate under the agency, third-party beneficiary, or estoppel theories. Accordingly, the Court reversed and remanded the case and vacated the arbitrator's award.

SAN ANTONIO COURT OF APPEALS UPHOLDS REQUIRED ABATEMENT FOR EXTRACONTRACTUAL CLAIMS IN UNDERINSURED MOTORIST SUIT

Last week, the Texas Court of Appeals for San Antonio granted a petition for mandamus and directed the underlying trial court to vacate its order denying abatement as to extra-contractual claims in an underinsured motorist (UIM) lawsuit. In *In re State Farm Mutual Automobile Insurance Company*, No. 4-18-00018-CV, 2018 WL 2121354 (May 9, 2018), State Farm asserted that the trial court erred in refusing to abate the extra-contractual claims. The court of appeals agreed and conditionally granted the petition for writ of mandamus.

The underlying claim arose from an automobile accident. The insureds alleged the accident was caused by another driver's negligence and the other driver's insurance carrier settled, paying the full policy limits. The insureds then presented a claim to their own insurance carrier, State Farm Mutual Automobile Insurance Company, for underinsured motorist coverage and ultimately filed suit against State Farm and two of its adjusters alleging breach of contract and extra-contractual claims including violations of the Texas Insurance Code. State Farm filed a motion requesting severance of the contractual and extra-contractual claims and abatement of the extra-

contractual claims until the contract claims were resolved. The insureds objected and the trial court denied the abatement.

State Farm filed a mandamus action asserting that the trial court erred by denying the abatement because, based on Texas Insurance Code Section 1952.101(a), they were under no obligation to pay until Plaintiffs obtained a judgment establishing liability and the underinsured status of the other motorist.

Citing the 2006 Texas Supreme Court decision in *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809 (Tex. 2006) and subsequent applications, the court determined that abatement of extra-contractual claims in an underinsured motorist case is necessary to do justice and avoid prejudice as an insurer should not be required to incur the expense of litigation on claims that could be rendered moot by the part of trial related to the UIM benefits. *Brainard* established the unique nature of a UIM claim in entitlement to recovery from a third party which differentiates UIM matters from other first party contracts. *Brainard* applied this principle to abatement in *In re United Fire Lloyds*, 327 S.W.3d 250 (Tex. App.—San Antonio 2010, orig. proceeding) which established that abatement was required with severance in UIM suits.

Citing the recent decision in *USAA Texas Lloyds v. Menchaca*, the insureds alleged that *Menchaca* nullified the abatement requirement of an extra-contractual claim in first-party cases because the breach of contract and extra-contractual claims were separate causes of action. Their separate nature therefore, negated the required finding of a breach of contract before pursuit of the statutory claims. The court swiftly rejected this argument, noting that *Menchaca* did not involve a UIM claim, never mentioned *Brainard* (and most definitely did not overrule it) and the two cases reflect two consistent principles: the independent nature of breach of contract claims from extra-contractual claims and the test that an insured must satisfy before pursuing extra-contractual claims in a UIM case. Accordingly, the court concluded that, given their uniqueness, because extra-contractual claims in a UIM matter can be rendered moot based on the contractual findings, abatement is necessary to avoid litigation expense and conserve judicial resources. Because the trial court erred by not granting abatement, the court granted the writ of mandamus and directed the trial court to abate the extra-contractual claims.