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TEXAS INSURANCE LAW NEWSBRIEF

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UIM CLAIMANT SUES INSURER AND ADJUSTER WITHOUT A JUDGMENT AGAINST TORTFEASOR, PREVENTING REMOVAL TO FEDERAL COURT

A federal district judge in Dallas recently remanded an underinsured motorist (UIM) case in which the UIM claimant had sued both his auto insurer and the in-state adjuster alleging breach of contract and Insurance Code violations, without first obtaining a judgment against the underinsured driver. *James v. Allstate Fire & Cas. Ins. Co.*, No. 3:20-CV-0786-K, 2020 WL 4338953 (N.D. Tex. July 28, 2020) (slip op.) involved a hit-and-run accident, after which the policyholder made a UIM claim with Allstate. Unsatisfied with Allstate's settlement offer, James sued both Allstate and the Allstate adjuster, alleging breach of contract and violations of Insurance Code Chapter 541.

Allstate removed the suit to federal court and argued the adjuster was improperly joined and James had no cause of action against the adjuster because under Texas law, UIM claims do not mature until the insured becomes "legally entitled to recover" damages from the tortfeasor. The court agreed this was true of contract claims, but relied on the 2018 Supreme Court of Texas decision in *USAA Texas Lloyds v. Menchaca* for the proposition that an Insurance Code claim can be brought independently of a contract claim, and to bring an Insurance Code claim, the claimant must only prove that liability is "reasonably clear," which is a lesser standard than "legally entitled to recover."

Editor's Note: Allstate did not have access to the adjuster election and dismissal provision of Texas Insurance Code Chapter 542A, which applies only to weather-related claims for property damage. Instead, it was forced to rely on a traditional improper joinder argument. In its remand analysis, the federal court did not examine whether James had alleged any damages that were independently recoverable under the five-part rule set out in *Menchaca*. Instead, it merely concluded the petition alleged facts that could potentially support a viable cause of action against the adjuster and remanded on that basis. Thus, this ruling appears likely to pave the way for more adjusters to be sued in UIM cases, and the application of *Menchaca*'s five-part rule governing recovery of Insurance Code damages independent of contract damages in UIM cases may be led heavily by Texas state courts.

FEDERAL DISTRICT COURT REFUSES TO REMAND BECAUSE INSURER DID NOT GET PRE-SUIT NOTICE, INSTEAD REFUSES TO REMAND BECAUSE THE ADJUSTER HAD NOT BEEN SERVED

Last week, a Dallas federal judge refused to remand based on its narrow construction of Texas Insurance Code § 542A.006 even when the insurer had not been given the required pre-suit notice by the insured. But the court still denied the insured's motion to remand because the adjuster had not been served at the time of removal. In *Tadeo v. Great Northern Ins. Co.*, No. 3:20-CV-00147-G, 2020 WL 4284710 (N.D. Tex. July 27, 2020) (slip op.), the insured failed to give the insurer the 60-day pre-suit notice required by the Insurance Code, and thus the lawsuit was the insurer's first notice of the dispute.

Having had no opportunity to elect responsibility for its adjuster prior to suit, the carrier did so immediately upon being served and then removed the suit to federal court. The court, following existing Northern District precedent, held the adjuster was properly joined at the time suit was filed because the 542A election was not made until after filing. Therefore, the post-filing 542A election could not support remand. The court noted that the statutory remedy for failure to give the required pre-suit notice is not dismissal of the adjuster, but abatement.

Ultimately, however, the removal was held to be proper because the adjuster had not been served at the time of removal, and only "properly joined and served" defendants are considered for purposes of removal. The policyholder argued the adjuster had waived service because the attorneys representing him (the same attorneys representing the carrier) had appeared before the court. The court rejected this waiver-of-service argument because the carrier's attorneys had filed documents only on behalf of the carrier and not the adjuster, although they represented both.

Editor's note: As jurisprudence concerning the relatively new Texas Insurance Code Chapter 542A continues to develop, the courts of the Northern District have led the way in building a prevailing body of law holding that a post-suit election under 542A.006 does not create a genuine improper joinder of the adjuster. The court here followed its own existing rule, and declined to make any exception for circumstances which prevented the insurer from exercising its rights under §542A.006 before suit. This ruling will likely motivate more policyholder attorneys to omit the statutory pre-suit notice, considering abatement an acceptable alternative to federal court.

INSPECTION IS A "SERVICE," FEDERAL DISTRICT COURT HOLDS, APPLYING POLICY EXCLUSION

A federal district judge in San Antonio found in favor of a garage liability insurer last week, allowing it to withdraw its defense of a tire shop under a garage policy based on an exclusion barring coverage for losses arising out of service of aged tires. In *Scottsdale Ins. Co. v. Flores*, No. 5:19-CV-0156-JKP, 2020 WL 4353179 (W.D. Tex. July 28, 2020) (slip op.), the claimant alleged that the insured tire shop negligently inspected a vehicle's tires and negligently failed to warn of the tires' dangerous condition, resulting in a blowout and rollover accident that left the claimant a quadriplegic.

The garage policy issued to the tire shop contained an exclusion which expressly excluded losses that "arise out of ... sales, service, installation, maintenance, or repair, of any tire(s) five years or older." After the insurer brought a declaratory judgment action to determine whether the exclusion barred any duty to defend or indemnify, the claimants amended their petition to remove all references to "service" or to any services provided by the tire shop other than inspection of the tires, instead alleging only negligent inspection and negligent failure to warn.

Even after the amendment designed to strip the petition of coverage-destroying language, the court concluded that because the claimants alleged they took their vehicle to the shop and paid to have the tires inspected, the inspection was a "service" within the meaning of the policy exclusion. The court also held the failure to warn claim was concurrent with, and not independent of, the excluded service and therefore it was not an independent covered claim which could create a duty to defend.

The court, however, declined to rule on the insurer's duty to indemnify noting the insurer had not carried its burden to prove the same reasons that precluded a duty to defend also precluded any possibility there could ever be a duty to indemnify. The court also declined to dismiss the tire shop's insurance agent, which the tire shop brought in as a third-party defendant based on allegations the agent had misrepresented the scope of coverage.