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TEXAS INSURANCE LAW NEWSBRIEF

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FORT WORTH COURT CONSIDERS ACCRUAL OF UIM CAUSE OF ACTION, GIVES CRASH COURSE ON UIM CLAIMS

Recently, a Fort Worth court of appeals once again wrestled with the unique legal creation that is an uninsured motorist (UIM) claim and struggled to resolve the question of when an auto insurer's liability on a UIM claim becomes "reasonably clear," i.e., whether a UIM claimant must obtain a judgment awarding damages in order to accrue a colorable UIM claim (and potentially, associated extra-contractual claims) against her auto insurer, or whether the insurer's liability can become reasonably clear at some point before that.

In *In re State Farm Mut. Auto. Ins. Co.*, 02-20-00144-CV, 2020 WL 6788961 (Tex. App.—Fort Worth Nov. 19, 2020, no pet. h.) (orig. proc.) (slip op.) the plaintiff, Mentzer, was injured in an auto accident and filed a direct action against State Farm, her auto insurer, for UIM benefits. She did not sue the tortfeasor driver. With her petition, Mentzer included discovery requests for items such as State Farm's entire claim file and claim handling guidelines – the type of discovery more typical of a suit alleging bad faith. In the first phase of the case, the parties tried the question of Mentzer's legal entitlement to recover damages from the absent tortfeasor. Among other things, the parties stipulated that the tortfeasor's auto insurer had tendered its $50,000 limit and that State Farm's UIM limit was $30,000. The jury returned a verdict finding Mentzer's total recoverable tort damages against the absent driver were $189,000.

Before this verdict was reduced to a final judgment, Mentzer filed a new suit against State Farm alleging a variety of extra-contractual claims, and seeking more discovery related to State Farm's claim handling. Shortly thereafter, the trial court entered a final judgment against State Farm for $30,000, the limit of its UIM coverage, which State Farm promptly paid.

This mandamus proceeding followed, in which State Farm sought to stay all discovery in the bad faith suit because neither a breach of contract claim nor any of the extra-contractual claims could accrue until after State Farm failed to pay the $30,000 UIM judgment – which had not happened. Therefore, State Farm argued, the only thing left to do was for State Farm to file and win a motion for summary judgment in the original suit that its prompt payment of the $30,000 judgment satisfied its contractual obligations and foreclosed all of the extra-contractual claims, as well as the discovery associated with them. State Farm filed that motion, and Mentzer opposed it, arguing State Farm's liability for the UIM limit was reasonably clear before trial, and State Farm acted wrongfully by forcing her to try her damage case.

In resolving this dispute, the mandamus court was forced to confront the inherently hybrid nature of a UIM claim, being born of both a tort committed by the uninsured driver and of a contract between the injured claimant and her own auto insurer, and the resulting need to resolve conflicting lines of Texas authority concerning when and how a UIM claim accrues, which controls what information is discoverable.

The court examined the two major lines of Texas precedent, one exemplified by *Arnold v. Nat'l County Mut. Fire Ins.*, 725 S.W.2d 165 (Tex. 1987), later modified by *Murray v. San Jacinto Agency*, 800 S.W.2d 826 (Tex. 1990), treating the UIM claim as a pure product of contract, and holding a contractual obligation to pay UIM benefits can arise whenever it would be unreasonable not to pay them, without the insured having to prosecute and win a suit against the tortfeasor.

The second line of authority is exemplified by *Brainard v. Trinity Universal Ins.*, 216 S.W.3d 809 (Tex. 2006), in which the Supreme Court of Texas, without reference to *Arnold* or *Murray*, and without expressly overruling them, held that in order to establish she is "legal entitled to recover" damages from the other driver, an insured must first obtain a final judgment against the tortfeasor.

The court noted that a majority of courts in Texas have held extra-contractual discovery is not proper when the claimant's direct action remains pending, but also observed none of the lengthy list of cases it had cited in this regard had directly confronted the conflict at the heart of *Arnold/Murray* and *Brainard*.

To address this conflict, the court delved into the history of direct actions against auto insurers in Texas, from the original prohibition of direct actions against tortfeasors' liability insurers dating back to the 1930s, to the first authorization of direct actions against UIM insurers in 1970, moving on to the analysis conducted by the *Arnold*, *Murray*, and *Brainard* courts, and closely examining their legal underpinnings. The court couched the conflict posed by the two lines of cases as a "jurisdictional conundrum" raising the question of how a court can entertain an insured's direct action for UIM benefits when the insured's ***contractual*** entitlement to UIM benefits depends on the outcome of a separate ***tort*** inquiry against the other driver, thus calling into question the "suit within a suit" nature of the direct UIM action.

In the end, the court concluded that because *Brainard* never expressly overruled *Arnold* and *Murray*, it was bound under the doctrine

of *stare decisis* by their specific holdings and did not have the power to grant mandamus relief stopping the extra-contractual discovery. But its detailed analysis sets the stage for the broader legal issue presented by this discovery dispute to be resolved by the Supreme Court of Texas, perhaps leading to a different result.

Editor's note: The detail and depth of legal analysis in the appellate court's opinion appears to be clearly setting it up for the Supreme Court of Texas to take up the issue and perhaps provide the state with a more definitive answer on the vexing question of when UIM claims, and associated extra-contractual causes of action, can accrue. Some of the wording the court chose, such as "jurisdictional conundrum," appears calculated to catch the attention of the supreme court. It seems clear the court did not like the conclusion it was forced to reach, and is essentially asking the supreme court to resolve it. We will continue to watch this case and report on any further developments. The court also made specific note of several other potentially important UIM cases, some of them also involving State Farm, set for oral argument in December and January, so the next couple of months may be eventful in the world of Texas UIM claims. Meanwhile, the appellate court's analysis is well worth reading in its 31-page entirety because it serves as a short course on Texas UIM claims.

FEDERAL COURTS IN NORTH TEXAS CONTINUE TO HOLD 542A DOES NOT SUPPORT REMOVAL WHEN ELECTION IS MADE AFTER SUIT IS FILED

A federal judge in Wichita Falls recently continued the established practice of the Northern District of Texas, remanding a removed insurance case to state court because the insurer accepted liability for its adjuster too late. In *Duncan v. Safeco Ins. Co.*, No. 7:20-CV-00119-M-BP, 2020 WL 6799180 (N.D. Tex. Nov. 19, 2020) (slip op.) Chief Judge Barbara Lynn adopted a magistrate judge's prior recommendation (2020 WL 6811485 (N.D. Tex. Oct. 30, 2020)) to remand a first-party insurance case to state court.

Safeco and its Texas adjuster were sued for their handling of a windstorm claim. Upon receipt of the lawsuit, Safeco immediately elected to accept responsibility for its adjuster under Texas Insurance Code §542A.006, which mandates dismissal of the adjuster. Safeco removed the case to federal court, contending the non-diverse adjuster was not a proper party to the suit because of its 542A election.

The court granted the policyholder's motion to remand, holding the adjuster was a proper party at the time suit was filed, and Safeco's post-suit election could not create diversity jurisdiction if it did not exist at the time suit was filed. The court also considered the traditional improper joinder standard and concluded the policyholder had pleaded a viable claim against the adjuster.

Editor's note: Courts in the Northern District of Texas are continuing to build a body of law holding a post-suit election under 542A.006 does not create a genuine improper joinder of the adjuster. The court's opinion here was silent on the question of whether Safeco had received the pre-suit notice required by the Insurance Code and the DTPA. It is likely it did not receive a pre-suit notice, or it presumably would have made the 542A.006 election before being served with the suit. This ruling, along with other similar rulings in the Northern and Eastern Districts, will likely motivate more policyholder attorneys to ignore the statutory pre-suit notice requirements so they can avoid litigating in federal court.

COVID-19 UPDATE: FEDERAL COURTS IN TEXAS POSTPONE JURY TRIALS UNTIL 2021

Due to the recent uptick in COVID-19 cases, most federal courts across Texas have declared there will be no federal jury trials for the remainder of 2020. The Northern and Western Districts have kept the possibility open for resuming jury trials in early January 2021, while in the Southern District, the Houston Division set January 19, 2021 as the target date for resuming jury trials. Meanwhile, the Eastern District closed the federal courthouses in Texarkana and Sherman "effective immediately" after a COVID-19 outbreak among the jurors in a commercial case forced the court to declare a mistrial last week. They will stay closed until at least Dec. 4. However, the Eastern District has remained quiet on when it intends to resume jury trials.