

THOUGHT LEADERSHIP

News

## TEXAS COURT OF APPEALS REFUSES TO ADOPT “EXHAUSTION DOCTRINE” TO IMPOSE LIABILITY ON UIM INSURER THAT CONSENTED TO INSURED’S POLICY-LIMIT SETTLEMENT WITH THE LIABILITY CARRIER

Newsbrief

09 FEB 2018

Recently, the Dallas Court of Appeals affirmed the trial court’s dismissal of the insured’s claims on the grounds that (1) the insured’s claim for breach of contract was premature under *Brainard* even though the insurer consented to the insured’s liability settlement, and (2) the insured’s claim under the theory of the “exhaustion doctrine” failed to state a viable cause of action. In *Weber v. Progressive County Mutual Ins. Co.*, No. 05-17-00163-CV, 2018 WL 564001, (Tex. App.—Dallas, January 26, 2018, mem. op.), the insured was injured in a motor vehicle accident. Thereafter, with Progressive County Mutual Insurance Company’s consent, the insured settled her claim with the other motorist’s insurer for the \$30,000 policy limit. The insured then made a demand for the policy limit of her UIM coverage with Progressive. Progressive made a counteroffer, which the insured rejected. Next, the insured sued Progressive for breach of contract and for violations of the Texas Insurance Code. Progressive responded with two special exceptions, asserting that (1) the insured’s claims were premature until she obtained a judgment establishing the liability of the other driver and the amount of her damages, and (2) the insured’s claim under the “exhaustion doctrine” was not recognized in Texas and thus failed to state a viable cause of action. Based on the grounds asserted, the trial court sustained the two special exceptions and dismissed the insured’s claims with prejudice.

On appeal, the court, relying on *Brainard v. Trinity Universal Insurance Co.*, 216 S.W.3d 809 (Tex. 2006), affirmed the trial court’s dismissal. In *Brainard*, the Texas Supreme Court ruled that a “UIM insurer is under no contractual duty to pay benefits until the insured obtains a judgment establishing the liability and underinsured status of the other motorist.” Further, “neither a settlement with nor an admission of liability from the underinsured motorist establishes UIM coverage, because a jury could find that the underinsured motorist was not at fault or award damages that do not exceed the [underinsured motorist’s] liability insurance.” As such, on this appeal, the Court of Appeals held that the insured failed to present a contract claim because she had not obtained a judgment prior to suing Progressive for UIM benefits, despite Progressive’s consent to the insured’s liability settlement.

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As to the insured’s claim of the exhaustion doctrine, she cited authority from other jurisdictions entitling UIM claimants to UIM bodily injury benefits upon (1) an agreement by insurer with insured; (2) providing the insurer with a judgment of damages by legal proceeding; or (3) settlement or judgment exhausting the policy limits of all liability policies. The insured urged the doctrine’s application despite the fact she conceded that it had not been recognized in Texas. The court concluded that adoption of the doctrine would directly conflict with *Brainard*, and sustained Progressive’s special exceptions. Notably, the court hinted it had some reluctance, or at the very minimum, a lack of enthusiasm, in affirming the dismissal, as it stated: “[w]hatever the virtues of a contrary rule might be, as an intermediate court, we are bound to follow the rule laid down in *Brainard* unless and until the supreme court reconsiders or revises it.”