

THOUGHT LEADERSHIP

News

## SAN ANTONIO COURT OF APPEALS UPHOLDS REQUIRED ABATEMENT FOR EXTRA-CONTRACTUAL CLAIMS IN UNDERINSURED MOTORIST SUIT

Newsbrief

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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-

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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.