UNINSURED/UNDERINSURED MOTORIST CLAIMS AFTER *BRAINARD*

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As a special Christmas gift to Texas' trial bar in 2006, the Supreme Court rendered unto us the unholy Trinity: *Brainard v. Trinity Universal Insurance Company*, 216 S.W.3d 809 (Tex. 2006); *State Farm Mut. Ins. Co. v. Norris*, 216 S.W.3d 819 (Tex. 2006); and *State Farm Mut. Ins. Co. v. Nickerson*, 216 S.W.3d 823 (Tex. 2006). These cases (with *Brainard* as the lead case of the trinity) answered whether attorney's fees may be recovered in UM/UIM claims under Section 38.002 of the Civil Practice and Remedies Code (relating to attorney's fees for breach of contract claims).[1] However, in reaching that decision, the Court completely re-wrote the law of UM/UIM claims as we know it.

This paper will look at the *Brainard* decision and then look at some of the minefields that the Court created. I have several criticisms of the *Brainard* decision, but those won't be at issue in this paper.

The Case: *Brainard v. Trinity Universal Insurance Company*

Brainard involved an underinsured motorist claim brought by the family of an insured who was killed in a head on collision with a rig owned by a well service company. The family secured the underlying policy limits of the well service company in the amount of one million dollars, then sought recovery of their underinsured motorist benefits of one million dollars from their insurer, Trinity Universal. Trinity denied the claim, and the case was tried to a jury. The Gray County jury awarded actual damage of

[1] A less significant but related holding in *Brainard* involves the accrual of pre-judgment interest. That holding rests on the same premises as the later holding on attorney's fees. For the purpose of this paper, I will focus on the attorney's fee holding.

$1,010,000.00 and attorney's fees of $100,000.00. After an offset for PIP and the underlying liability limits, the trial court signed a judgment for $5,000.00 and $100,000.00 in attorney's fees. The court of appeals reversed the trial court judgment on attorney's fees, with the Supreme Court granting petition for review. Importantly, the insured's extra-contractual claims against Trinity were severed from the breach of contract claims and remained pending at the time of the Court's opinion. *Brainard,* 216 S.W.3d at 811.

In arguing for recovery of attorney's fees under Chapter 38 of the Civil Practice and Remedies Code, the insured asserted that a UIM contract is no different in any material respect from any other insurance contract. Thus, the insurer's failure to pay the policy benefits upon the submission of a claim constituted a breach of the insurance contract.

The Court rejected this argument. The Court relied on the relevant section of the UM/UIM statute, which reads:

> The underinsured motorist coverage shall provide for payment to the insured of all sums which he shall be legally entitled to recover as damages from owners or operators of underinsured motor vehicles because of bodily injury or property damage in an amount up to the limit specified in the policy, reduced by the amount recovered or recoverable from the insurer of the underinsured motor vehicle. Tex. Ins. Code art. 5.06-1(5).

The Court reasoned that the statute obligates a carrier to pay damages which the insured is "legally entitled to recover" from the underinsured motorist. *Id*. This requirement, according to the Court, means that the insurer has no contractual duty to pay benefits until the insured "obtains a judgment establishing the liability and underinsured status of

the other motorist. . . . [n]either requesting UIM benefits nor filing suit against the insurer triggers a contractual duty to pay." *Brainard*, 216 S.W.3d at 818.

Question 1: What Is Our Cause of Action?

Those of us in the plaintiffs' bar always thought that UM/UIM claims were to be brought as breach of contract claims. But with *Brainard* holding that an insurer can't breach the insurance contract until it refuses to pay a judgment, a number of courts have held that a breach of contract claim is no longer the proper vehicle to prove up a UM/UIM claim. *See Stoyer v. State Farm Mut. Auto. Ins. Co.,* 2009 U.S. Dist. LEXIS 15571 (N. D. Tex. Feb. 24, 2009); *Owen v. Employer's Mut. Cas. Co.,* 2008 U.S. Dist. LEXIS 24893 (N. D. Tex. March 28, 2008); *Schober v. State Farm Mut. Auto. Ins. Co.,* 2007 U.S. Dist. LEXIS 52363 (N. D. Tex. July 18, 2007) (all holding that the UM/UIM insureds could not pursue breach of contract claims).

So how do we get a judgment entitling our clients to payment? We have some guidance on how not to do it. For example, the Supreme Court has made it clear that an agreed judgment between the insured and tortfeasor would not likely suffice. *See, e.g., State Farm Fire and Cas. Co. v. Gandy*, 925 S.W.2d 696, 714 (Tex. 1996) (in a case involving an agreed judgment and assignment of claim against the defendant's insurance company, the court opined that the underlying judgment would not be binding without a fully adversarial trial). And the *Brainard* court stated that a settlement or even admission of liability from the tortfeasor will not satisfy the "judgment" requirement. *Brainard*, 216 S.W.3d at 818.

It appears that the only way to require payment is to get a judgment against a UM carrier.[2] Unfortunately, courts haven't given us guidance on how to get that judgment. If you are a member of the TTLA Listserve, you know that I have been advocating that the proper vehicle is a declaratory judgment action under Chapter 37 of the Texas Civil Practices and Remedies Code. While no Texas cases have been decided on this issue, one federal trial court has embraced this method of establishing liability. *Owen v. Employers Mut. Cas. Co.,* 2008 U.S. Dist. LEXIS 24893 (N. D. Tex. March 28, 2008).

Ironically, in light of *Brainard*, attorneys' fees are recoverable in an action for declaratory relief. However, attorney's fees are not mandatory under the statute and can be awarded regardless of which party is seeking affirmative relief. *Hartford Cas. Ins. Co. v. Budget Rent-A-Car Sys., Inc*., 796 S.W.2d 763, 771 (Tex. App.—Dallas 1990, writ denied). Thus, our clients have some risk of exposure to an award of attorney's fees if they don't prevail.

Question 2: Do Extra-contractual Claims Survive?

Prompt Pay Violations

Insureds have traditionally alleged violations of the Texas Insurance Code for failure to make prompt payment of the UIM claim. Tex. Ins. Code § 542.051 et. seq. (formerly §21.55). Under the statute, the insurer has deadlines to acknowledge a claim, commence an investigation and request necessary items from the insured. *Id.* at §

[2]A small crack in the judgment requirement may have opened in *Haralson v. State Farm Mut. Auto Ins. Co*., 2008 U.S. Dist. LEXIS 90002 (N.D. Tex. Nov. 5, 2008). In that case, State Farm acknowledged that the insured was injured in excess of the $50,000.00 UIM policy limit, but attempted to force the insured to accept a check made out to him and his wife, jointly. The court rejected State Farm's motion for summary judgment, concluding that if the insured could show State Farm improperly conditioned the release upon the release of his wife's claim, he could recover damages for both breach of contract and delay damages under the Texas Insurance Code. *Id*. at *4.

542.055(a). After receiving all items reasonably requested from the insured, the insurer has 60 days to pay a claim. *Id*. at § 542.058(a). If an insurer is found liable on the policy but fails to comply with the statute, it must pay the policy benefits, a penalty of 18 percent per year on the policy benefits, and attorney's fees. *Id*. at § 542.060(a).

The elements for a prompt payment claim are: (1) a claim under an insurance policy; (2) the insurer's liability for that claim; and (3) the insurer's failure to comply with one or more sections of the statute regarding the claim. *Allstate Ins. Co. v. Bonner,* 51 S.W.3d 289, 291 (Tex. 2001).

Two courts have relied upon *Brainard* to conclude that no prompt pay violation exists prior to the rendering of a judgment because there is no liability for the claim. *Mid-Century Ins. Co. of Texas v. Daniel*, 223 S.W.3d 586, 589 (Tex. App.—Amarillo 2007, pet. denied); *Owen*, 2008 U.S. Dist. Lexis 24893 at 2. The courts have reasoned that if no contractual duty to pay exists prior to a judgment, then no prompt pay violation can occur before then.

As noted above, *Brainard* did not involve prompt pay violations. On its face, the statute defines the sort of notice an insured must provide to trigger the statute's protections: an insured must provide "written notification provided by a claimant to an insurer that reasonably apprises the insurer of the facts relating to the claim." *Id*. at § 542.051(4). Nowhere in the statute is there a requirement that a judgment be taken before an insured can assert a claim. Extending *Brainard* in this manner makes UIM contracts the only insurance contract that requires the intervention of a judge before one can assert a claim.

Bad Faith

If you cannot assert a claim for breach of contract prior to a judgment, can you assert a claim for bad faith in the UIM context[3]?

What are the duties[4]?

The common law duty of good faith and fair dealing has traditionally had three components: (1) a duty to not breach the contract by failing to pay a claim within a reasonable time; (2) a duty to properly investigate a claim; and (3) a duty to not delay in settling a claim without a reasonable basis. *Arnold v. National County Mut. Ins. Co.,* 725 S.W.2d 165, 167 (Tex. 1987).

Similarly, Texas Insurance Code section 541.060 states that an insurer has a duty to "attempt in good faith to effectuate a prompt, fair and equitable settlement of a claim with respect to which the insurer's liability has become reasonably clear." TEX. INS. CODE § 541.060.

***Brainard* Shouldn't Affect These Duties Because Historically These Duties Are Separate From Duties Regarding Breach Of The Contract**

The duty of good faith and fair dealing has a tortured history, but through it all, courts have been clear that bad faith claims are distinct and separate from any cause of action for breach of the underlying insurance contract. *Chitsey v. National Lloyd's Ins. Co.,* 738 S.W.2d 641, 644 n. 1 (Tex. 1987); *Viles v. Security Nat'l Ins. Co.,* 788 S.W.2d 566, 567 (Tex. 1990)("That duty [of good faith and fair dealing] emanated not from the terms of the insurance contract, but from an obligation imposed in law."); *Lyons v.*

[3] By bad faith, I'm referring collectively to the common law duty of good faith and fair dealing (reaffirmed in Universe Life Ins. Co. v. Giles, 950 S.W.2d 48, 54 (Tex. 1997)), statutory violations relating to unfair settlement practices (Tex. Ins. Code § 541.060), and violations of the Texas Deceptive Trade Practices Act (Tex. Bus. & Com. Code § 17.50). While each have different elements of proof, those differences aren't significant for the purposes of this paper.

[4] The duties set out are a simplification of ridiculously complicated caselaw. But the defined duties should be sufficient for understanding the claims and for responding to any motions for summary judgment.

Millers Casualty Ins. Co., 866 S.W.2d 597, 601 (Tex. 1993); *Transportation Ins. Co. v. Moriel,* 879 S.W.2d 10, 18 (Tex. 1994); *Republic Ins. Co. v. Stoker,* 903 S.W.2d 338, 340-341 (Tex. 1994); *Twin City Fire Ins. Co. v. Davis,* 904 S.W.2d 663, 666 (Tex. 1995).

Similarly, the duties to effectuate a settlement arise not from the contract, but from the Insurance Code. TEX. INS. CODE § 541.060.

In keeping the distinction between contract and bad faith claims, the Supreme Court has made clear that a breach of contract is not a prerequisite to a claim for bad faith. For example, the Court has stated that "While the failure to file a proof of loss, if not waived by the insurer, bars a breach of contract claim, it is not controlling as to the question of breach of the duty of good faith and fair dealing." *Viles,* 788 S.W.2d at 567; See also *Lyons,* 866 S.W.2d at 601 ("But the issue of bad faith focuses not on whether the claim was valid, but on the reasonableness of the insurer's conduct."); *Moriel,* 879 S.W.2d at 18, n.8 ("Claims for insurance contract coverage are distinct from those in tort for bad faith; resolution of one does not determine the other").

In *Twin City Fire Ins. Co. v. Davis*, the Court observed that "some acts of bad faith, such as a failure to properly investigate a claim or an unjustifiable delay in processing a claim, do not necessarily relate to the insurer's breach of its contractual duties to pay covered claims, and may give rise to different damages." 904 S.W.2d 663, 666 n. 3 (Tex. 1995).

Because the bad faith duties are separate from the duties under the contract, the duty to settle the claim once liability becomes reasonably clear is independent from the duty to pay under the contract; there may still be a common law and statutory duty to try and settle the claim even without the obligation to pay under the contract. After all, the

common law and statute says the insurer must make an effort to resolve the claim when the claim is "reasonably clear," not when the claim is certain, as insurance companies' interpretations would require.

The 5th Circuit *Hamburger* Decision

The most clear announcement of whether bad faith claims should survive the *Brainard* decision comes from the Fifth Circuit in *Hamburger v. State Farm Mutual Automobile Ins. Co.,* 361 F.3d 875, 880-881 (5th Cir. 2004). While the case was decided pre-*Brainard*, the Fifth Circuit properly recognized that the Texas courts of appeals had already reached the same decision as the *Brainard* court, and the 5th Circuit assumed that a plaintiff had to receive a judgment before it was entitled to policy benefits.[5]

Based on that law, State Farm made the same argument that defendants are now making under *Brainard*: no bad faith liability could attach for State Farm's failure to settle the claim until there was a judicial determination of State Farm's liability under the contract.

The Fifth Circuit specifically rejected State Farm's argument. *Id. at 881.* In rejecting the argument, the court noted that Texas law has clearly established that once there is a judgment, an insured does not have a bad faith claim against an insurer for failing to attempt a fair settlement of a UIM claim because at that time there are no

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[5] Prior to *Brainard*, there was a split in the courts of appeals. Some courts of appeals held that a UM/UIM claim was like any other claim and that attorneys' fees were recoverable for the breach of contract. *State Farm Mut. Auto. Ins. Co. v. Nickerson,* 130 S.W.3d 487, 490 (Tex. App. - Texarkana 2004, rev'd 216 S.W.3d 823 (Tex. 2006)); *Allstate Ins. Co. v. Lincoln,* 976 S.W.2d 873 (Tex. A.. - Waco 1998, no pet.); *Novosad v. Mid-Century Ins. Co.,* 881 S.W.2d 546 (Tex. App. - San Antonio 1994, no writ). On the other hand, a majority of the courts of appeals had already reached a holding consistent with *Brainard. De La Garza v. State Farm Mut. Auto. Ins. Co.*, 175 S.W.3d 29 (Tex. App. - Dallas, 2005, pet. denied); *Menix v. Allstate Indem. Co.*, 83 S.W.3d 877 (Tex. App. - Eastland 2002, pet. denied); *Sprague v. State Farm Mut. Auto. Ins. Co.*, 880 S.W.2d 415 (Tex. App. - Houston [14th Dist.] 1993, writ denied); *Sikes v. Zuloaga*, 830 S.W.2d 752 (Tex. App. - Austin 1992, no writ).

longer duties of good faith and the relationship becomes one of judgment debtor and creditor. *Mid-Century Ins. Co. of Texas v. Boyte, 80 S.W.3d 546 (Tex. 2002).* Thus, if State Farm was right, an insured could never successfully assert a bad faith claim on a UIM claim: pre-judgment, liability wouldn't be possible under the State Farm argument, and postjudgment, such an action is barred under existing Supreme Court law. *Id.*

What Are Courts Doing Now?

Generally, courts have refused to dismiss bad faith claims based on *Brainard*, and instead have abated the bad faith claims pending the resolution of the insurers' UM/UIM liability. *In re United Fire Lloyds,* 2010 Tex. App. Lexis 5454 (Tex. App. - San Antonio 2010, no pet.); *Stoyer v. State Farm Mut. Auto. Ins. Co.,* 2009 U.S. Dist. LEXIS 15571 (N. D. Tex. Feb. 24, 2009); *Owen v. Employers Mut. Cas. Co.,* 2008 U.S. Dist. LEXIS 24893 (N. D. Tex. March 28, 2008); *Schober v. State Farm Mut. Auto. Ins. Co.,* 2007 U. S. Dist. LEXIS 52363 (N. D. Tex. July 18, 2007). These cases abate the case on the grounds that if the jury finds that the claim is covered, then the insurers could be found to have violated their bad faith duties prior to that determination.

On the other hand, one court has dismissed the plaintiff's bad faith claims based on *Brainard*. *Weir v. Twin City Fire Ins. Co.,* 2009 U.S. Dist. LEXIS 27464 (S. D. Tex. March 31, 2009). The opinion itself is poorly reasoned. First, it wholly ignores the *Hamburger* decision, which should be controlling on the federal court. Second, the Court completely ignores the substantive law of the duty of good faith and fair dealing and the statutory causes of action.

In reaching its decision the Court notes:

> If there is no contractual duty to pay, Twin City cannot be in "bad faith," under common law or statute, for not paying. Twin City cannot be guilty of performing a proper investigation of his UIM claim because it is the trial of the UIM claim at which it will be determined who was at fault and the amount of damages, that constitutes the investigation. *Weir,* 2009 U.S. Dist. LEXIS 27464, 3.

The Court only addresses two of the three traditional duties that are part of the common law duty of good faith and fair dealing. On the first duty, the Court may be correct that there cannot be a violation of the duty to not breach the contract by failing to pay a claim within a reasonable time when the claim is not yet due. I also think the Court's argument that the duty to investigate (the second duty) is fulfilled by the trial finding the amount of damages is ridiculous. But even accepting the Court's argument, the Court still does not address the common law duty to not delay in settling a claim without a reasonable basis or the statutory duty to attempt in good faith to effectuate a prompt, fair and equitable settlement of a claim when the insurer's liability is reasonably clear. These ignored duties are the most common bad faith claims in UM/UIM cases.

The Irony Of It All

The common law duty of good faith and fair dealing was first established in the case of *Arnold v. Nat'l Co. Mut. Fire Ins. Co.,* 725 S.W.2d 165 (Tex. 1987). What kind of insurance was at issue? Uninsured motorist coverage.

In *Arnold,* the plaintiff made a UM claim following a wreck. Despite recommendations to settle from an independent adjusting firm, the carrier denied the claim. Arnold sued the underlying tortfeasor and the UM carrier. Arnold obtained a verdict for $17,975.00 and the UM carrier tendered its policy limits of $10,000.00.

After prevailing in his suit, Arnold filed a second bad faith suit against his insurer, and the Supreme Court held that he had a claim for the insurer's breach of its common law duty of good faith and fair dealing. And while Arnold made the complaint in a second suit, he was complaining about the insurer's conduct that occurred before the trial court determined the exact extent of liability, exactly opposite of what insurers are arguing today.

Conclusion

The Texas Supreme Court has made our life more difficult, but we're still in the fight. Even after *Brainard*, insureds still have a path to attorneys' fees through a declaratory judgment action, and plaintiffs should still have the ability to pursue some extra-contractual claims.