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UNINSURED/UNDERINSURED MOTORIST CLAIMS AFTER *BRAINARD*

In December 2006, the Texas Supreme Court handed down a trio of cases[1] that (perhaps unwittingly) dramatically altered the face of uninsured/underinsured motorist litigation. These cases (with *Brainard* as the lead case of the trinity) answered whether attorney's fees may be recovered in UM/UIM claims under Chapter 38 of the Civil Practice and Remedies Code (relating to attorney's fees for breach of contract claims).[2] However, in addressing this issue, the Court completely re-wrote the law of UM/UIM claims as we know it.

This article will look at the *Brainard* decision and then discuss some of the minefields that the Court created.

The Decision: *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 and then sought recovery from their insurer, Trinity Universal, of their underinsured motorist benefits of one million dollars. Trinity denied the claim, and the case was tried to a jury. The Gray County jury awarded actual damages of $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, and the Supreme Court granted petition for review. 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.[3]

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.*[4]

The Court reasoned that the statute obligates a carrier to pay damages which the insured is "legally entitled to recover" from the underinsured motorist.[5] 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."[6]

Question 1: What Is The Claimant's Cause of Action?

Traditionally, UM/UIM claims were 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.[7]

So how do claimants get a judgment entitling them to payment?

Courts have provided 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.[8] And the *Brainard* Court stated that a settlement or even admission of liability from the tortfeasor will not satisfy the "judgment" requirement.[9] It appears that the only way to require payment is to get an actual judgment against a UM carrier. Unfortunately, courts have not provided guidance on how to get that judgment.

After evaluating the potential causes of action, it is my belief that the only viable cause of action is a declaratory judgment action under Chapter 37 of the Texas Civil Practices and Remedies Code.

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Chapter 37 provides:

> *A person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.*[10]

Both insurers and claimants have long used declaratory judgment actions to seek their rights and obligations under insurance contracts, including uninsured/underinsured policies.[11] Courts have allowed the use of declaratory judgment to determine rights under an insurance policy even when those rights hinge on questions of fact. For example, in *Trinity Universal Insurance Company v. Sweatt,* the Court allowed an insurer to pursue a declaratory judgment action seeking declarations that: (1) there was no covered loss because the fire at issue was intentionally set; (2) there was no coverage because the claimant was not occupying the property as a dwelling at the time of the loss; and (3) the policy was void because of misrepresentations made by the insured.[12]

Following *Brainard,* it appears that a claimant's only vehicle to seek the necessary judgment to invoke coverage is a declaratory judgment seeking a declaration (among other things) finding: (1) the claimant is entitled to uninsured/underinsured coverage under the policy; (2) the underlying driver is an uninsured or underinsured driver; (3) the underlying driver was a cause of the wreck; (4) the amount of damages that the claimant incurred as a result of the wreck (including a decision on any comparative responsibility issues); and (5) the amount of damages (following any offsets or credits) that the insurer is obligated to pay the claimant under the contract. While no Texas cases have been decided on this issue, one federal trial court has embraced a declaratory judgment as the proper vehicle for establishing liability of a UM/UIM carrier following *Brainard.*[13]

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. [14]

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.

Question 2: Do Extra-contractual Claims Survive?

Prompt Pay Violations

Claimants have traditionally alleged violations of the Texas Insurance Code for failure to make prompt payment of the UIM claim.[15] Under the statute, the insurer has deadlines to acknowledge a claim, commence an investigation and request necessary items from the insured.[16] After receiving all items reasonably requested from the insured, the insurer has 60 days to pay a claim.[17] 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. [18] 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. [19]

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.[20] 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.

"Bad Faith" Claims

Do claimants' bad faith claims survive *Brainard*?[21]

What are the duties?

Simplifying case law, 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 paying/settling a claim without a reasonable basis.[22] 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."[23]

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.[24] Similarly, the duties to effectuate a settlement arise not from the contract, but from the Insurance Code.[25]

In keeping the distinction between contract and bad faith claims, the Supreme Court has made clear that a breach of contract is not always a prerequisite to a claim for bad faith. For example, in *Viles v. Security National Insurance Company,* 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."[26] In *Lyons v. Millers Casualty Insurance Company,* the Court stated, "But the issue of bad faith focuses not on whether the claim was valid, but on the reasonableness of the insurer's conduct."[27] In *Transportation Insurance Company v. Moriel,* the Court wrote, "Claims for insurance contract coverage are distinct from those in tort for bad faith; resolution of one does not determine the other."[28] Finally, in *Twin City Fire Insurance Company 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."[29]

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 Insurance Company.*[30] While the case was decided pre-*Brainard,* the Fifth Circuit properly recognized that the Texas courts of appeal had already reached the same decision as the *Brainard* Court, and the Fifth Circuit assumed that a plaintiff had to receive a judgment before it was entitled to policy benefits.[31]

In *Hamburger,* State Farm argued that 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.[32] 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 longer duties of good faith and the relationship becomes one of judgment debtor and creditor.[33] 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 post-judgment, such an action is barred under existing Supreme Court law. As a result, the Court held that even though State Farm was not contractually obligated to pay under the UIM contract, the claimant could still pursue bad faith claims for State Farm's failure to attempt to settle the claim.[34]

What Are Courts Doing Now?

The bad faith issue has recently been addressed by five courts. 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.[35] The courts have abated the cases 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.

However, one court has dismissed the plaintiff's bad faith claims based on *Brainard.*[36] In this author's opinion, the decision is poorly reasoned. First, it wholly ignores the *Hamburger* decision, which should be controlling authority. 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 [sic] 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.*[37]

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. The Court's argument that the duty to investigate (the second duty) is fulfilled by the trial finding the amount of damages is a reach. 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 latter 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. National Company Mutual Fire Insurance Company.*[38] 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 bad faith suit against his insurer. 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. The Court made this determination despite the fact that Arnold's complaint in a second suit related to the insurer's conduct at issue in the first suit before the trial court determined the exact extent of liability. This is exactly the type of claim made in most UM/UIM cases today.

Conclusion

The more things change, the more they stay the same. While the *Brainard* decision has changed how UM/UIM claims are litigated it appears, the end result will largely be the same. Attorneys' fees will end up recoverable in the declaratory judgment suit now required, and bad faith claims should still be recoverable for an insurer's failure to settle claims.

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1 Brainard v. Trinity Universal Ins. Co., 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).

2 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 attorneys' fees. This article will focus on the attorneys' fee holding.

3 *Brainard*, 216 S.W.3d at 811.

4 Tex. Ins. Code art. 5.06-1(5).

5 *Brainard*, 216 S.W.3d at 811.

6 *Id.* at 818.

7 *See* Stoyer v. State Farm Mut. Auto. Ins. Co., 2009 U.S. Dist. LEXIS 15571 (N. D. Tex. Feb. 24, 2009); Owen v. Emp'r'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).

8 *See, e.g.*, State Farm Fire & 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).

9 *Brainard*, 216 S.W.3d at 818.

10 Tex. Civ. Prac. & Rem. Code § 37.004(a).

11 *See, e.g.*, Stracener v. United Servs. Auto. Ass'n, 777 S.W.2d 378 (Tex. 1989) (insurer filed an action for declaratory judgment as to whether the underlying driver was "uninsured" as defined in the policy); Trinity Universal Ins. Co. v. Sweatt, 978 S.W.2d 257 (Tex. App.—Ft. Worth 1998, no pet.) (insurer filed declaratory judgment action to determine its obligations under the policy); Miller v. Windsor Ins. Co., 923 S.W.2d 91 (Tex. App.—Ft. Worth 1996, writ denied) (UIM re-insurer filed declaratory judgment action to establish its liability under a UIM contract); Conlin v. State Farm Mut. Auto. Ins. Co., 828 S.W.2d 332 (Tex. App.—Austin 1992, writ denied) (claimant filed a declaratory judgment action to have its rights determined under a UIM contract); Monroe v. Gov't Emps. Ins. Co., 845 S.W.2d 394 (Tex. App.—Houston [1st Dist.] 1992, writ denied); Vanguard Ins. Co. v. Young, 517 S.W.2d 65 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ).

12 *Sweatt*, 978 S.W.2d 257.

13 *Owen*, 2008 U.S. Dist. LEXIS 24893.

14 Hartford Cas. Ins. Co. v. Budget Rent-A-Car Sys., Inc., 796 S.W.2d 763, 771 (Tex. App.—Dallas 1990, writ denied).

15 Tex. Ins. Code § 542.051 et. seq. (formerly §21.55).

16 *Id.* at § 542.055(a).

17 *Id.* at § 542.058(a).

18 *Id.* at § 542.060(a).

19 Allstate Ins. Co. v. Bonner, 51 S.W.3d 289, 291 (Tex. 2001).

20 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.

21 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), 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). 950 S.W.2d 48, 54 (Tex. 1997). While each have different elements of proof, those differences aren't significant for the purposes of this article.

22 Arnold v. Nat'l Cnty. Mut. Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987).

23 Tex. Ins. Code § 541.060.

24 Chitsey v. Nat'l Lloyd's Ins. Co., 738 S.W.2d 641, 644 n. 1 (Tex. 1987); Viles v. Sec. 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. Millers Cas. Ins. Co., 866 S.W.2d 597, 601 (Tex. 1993); Transp. 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).

25 Tex. Ins. Code § 541.060.

26 *Viles*, 788 S.W.2d at 567.

27 *Lyons*, 866 S.W.2d at 601.

28 *Moriel*, 879 S.W.2d at 18, n.8.

29 *Twin City*, 904 S.W.2d at 666 n. 3 (Tex. 1995).

30 Hamburger v. State Farm Mut. Auto. Ins. Co., 361 F.3d 875, 880-881 (5th Cir. 2004).

31 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. App.—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).

32 *Hamburger*, 361 F.3d at 881.

33 Mid-Century Ins. Co. of Texas v. Boyte, 80 S.W.3d 546 (Tex. 2002).

34 *Hamburger*, 361 F.3d at 881.

35 *In re* United Fire Lloyds, 2010 Lexis 5454 (Tex. App.—San Antonio 2010, no pet.); *Stoyer*, 2009 U.S. Dist. LEXIS 15571; *Owen*, 2008 U.S. Dist. LEXIS 24893; *Schober*, 2007 U. S. Dist LEXIS 52363.

36 Weir v. Twin City Fire Ins. Co., 2009 U.S. Dist. LEXIS 27464 (S. D. Tex. March 31, 2009).

37 *Weir*, 2009 U.S. Dist. LEXIS 27464, 3.

38 *Arnold*, 725 S.W.2d 165 (Tex. 1987).