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Prosecuting and Defending Declaratory Judgment Actions Related to UM/UIM

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This article will address the litigation of uninsured motorists coverage claims in Texas, and the 2021 holding of the Texas Supreme Court in *Allstate v. Irwin,* which permits the recovery of attorneys fees under the Uniform Declaratory Judgments Act, Tex. Civ. Prac. & Rem. Code § 37.001, *et seq*.

As a result of this ruling, the litigation of UIM cases will likely revert back to the way they were typically handled prior to 2007. Back then, because there were cases holding that an insurer who lost a UIM trial under a breach of contract theory could also be liable for the claimant's attorney fees, the vast majority of UIM cases settled without a trial. After the *Brainard* decision at the end of 2006, the landscape changed. Many insurers interpreted *Brainard* to no longer require the UIM carrier to act in good faith to negotiate the settlement of UIM claims; rather, relying on the language of *Brainard*, they insisted that "the 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." *Brainard*, 216 S.W.3d 809, 816 (Tex. 2006). Many UIM carriers, such as Allstate, would simply force the claimant to litigate their claim to final judgment before acknowledging any obligation to pay the claim.

I. BRAINARD V. TRINITY UNIVERSAL

In 2006, the Texas Supreme Court issued its pro-insurer opinion in *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809 (Tex. 2006). The plaintiff brought a breach of contract claim pursuant to Chapter 38 of the Texas Civil Practice and Remedies Code. The defendant insurance company argued that a UIM policy is different from a regular breach of contract suit because "the insurer's duty to pay does not arise until the underinsured motorist's liability, and the insured's damages, are legally determined." *Id.* at 818. The court analyzed the meaning of "legally entitled to recover" language contained in the UM policy. The court held:

> [W]e have determined that this language means the 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. Neither requesting UIM benefits nor filing suit against the insurer triggers a contractual duty to pay…. Thus, under Chapter 38, a claim for UIM benefits is not presented until the trial court signs a judgment establishing the negligence and underinsured status of the other motorist.

Id. at 818. (internal citations omitted).

II. LEGISLATIVE ATTEMPTS TO FIX BRAINARD

There have been multiple attempts to legislatively abrogate the holding in *Brainard*. In the 2019 and 2021 sessions, for example, a bill garnered bipartisan support in the Texas House. The bill was intended to be a "Brainard-Fix."[1] The proposed legislation attempted to nullify *Brainard*'s requirement that a plaintiff must obtain a ***judgment*** before a UIM insurer has a duty to pay benefits under the contract. The bill also sought to impose a good faith element for the evaluation of UM/UIM claims. Despite this bipartisan support in the House, the Bill did not pass.

[1] Tex. H.B. 1739, *available at* https://capitol.texas.gov/tlodocs/86R/billtext/pdf/HB01739I.pdf#navpanes=0.

III. USING THE UDJA TO LITIGATE ENTITLEMENT TO UIM BENEFITS

Tex. Civ. Prac. & Rem. Code § 37.001 is known as the Uniform Declaratory Judgments Act. Using the act to bring UM/UIM claims is not a new technique. Since 2007, the co-author of this Article, Tom Crosley, has exclusively filed UM/UIM cases pursuant to the UDJA, and has advocated in numerous CLE presentations that in the post-*Brainard* era, this is the only logical approach. *Brainard* recognized that "the UIM contract is unique" because recovery is based on the tortious conduct of a third party.[2] *Brainard* held that there is no breach of contract claim prior to presentment. The UM/UIM insurer is not a tortfeasor; its liability lies in contract, not in tort. Since there is neither a cause of action in tort nor for breach of contract, we argued that the UDJA is the most appropriate, and perhaps the only, proper vehicle for bringing a UM/UIM cause of action in Texas after *Brainard*.

In 2016, the Texarkana Court of Appeals addressed the use of the UDJA for bringing a UM/UIM cause of action. The court concluded "that a declaratory judgment is an appropriate method of establishing the prerequisites to recovery in a UIM benefits case." *Allstate Ins. Co. v. Jordan*, 503 S.W.3d 450, 456 (Tex. App.—Texarkana 2016, no pet.). However, the Court held that attorney's fees were not available based on the Court's analysis of *Brainard, Norris* and *MBM Financial*. *Jordan*, 503 S.W.3d at 456–57.

In February 2018, June 2018, and January 2020, the Crosley Law Firm tried three UM/UIM cases against Allstate. Each of the three plaintiffs was awarded an amount significantly over the UM/UIM policy limits, and in each, the plaintiff was awarded attorney's fees pursuant to the UDJA.

The underlying facts in the trial court in *Irwin v. Allstate* were as follows. The plaintiff, Daniel Wes Irwin, injured his back in a car crash with an underinsured driver. The tortfeasor's insurer settled Irwin's claim for its minimum policy limits of $30,000. Plaintiff' counsel then sent Irwin's own UIM carrier, Allstate, a demand for his UIM policy limits of $50,000, and supported this demand with recoverable medical bills of just over $30,000.00. Allstate extended an offer of $500 to Irwin. Plaintiff responded by filing a lawsuit. By the time of trial, Irwin's past medical bills were $53,000, and he had a $300,000 claim for future medical expenses. The jury awarded a verdict in favor of Irwin for $499,000. The issue of attorney's fees was presented to the trial judge pursuant to CPRC § 37.009. Plaintiff's counsel proved up the attorney's fees by filing an affidavit. No controverting affidavit was filed. The court awarded all requested attorney's fees.

Inclan v. Allstate was a UM case. The uninsured tortfeasor was intoxicated and attempted to flee the scene of the wreck. Inclan was given a surgical recommendation for a fibrocartilage tear in his wrist. Allstate's highest pre-trial offer was $14,000. The case proceeded to trial; Inclan was awarded over $73,000 in compensatory damages and an additional $150,000 in punitive damages against the intoxicated defendant driver. The attorney's fee claim was bifurcated into a second trial phase with the same jury because defense counsel would not consent to a bench trial on fees. The attorney fee evidence was presented to the jury following the jury's initial deliberation and reading of the verdict. The jury awarded the entirety of the requested attorney's fees.

In *Walker v. Allstate*, Ms. Walker attempted to settle her case *pro se* with Allstate, her uninsured motorist insurer. Due to Allstate's paltry offer of $3,825.79 on her $50,000 policy, she sought legal representation. After Ms. Walker's counsel provided additional medical records and bills to Allstate, the insurer actually *reduced* its offer by 79 cents. After a one-and-a-

[2] *Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809, 818 (Tex. 2006) ("UIM insurance utilizes tort law to determine coverage. Consequently, the insurer's contractual obligation to pay benefits does not arise until liability and damages are determined.").

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