Martin, Disiere, Jefferson & Wisdom

The Weekly Update of Texas Insurance News

TEXAS INSURANCE LAW NEWSBRIEF

MAY 24, 2021

# TEXAS SUPREME COURT HOLDS THAT THE UNIFORM DECLARATORY JUDGMENT ACT CAN BE USED TO ESTABLISH A CARRIER'S LIABILITY FOR UM/UIM BENEFITS AND AN AWARD OF ATTORNEY'S FEES

Last week, the Texas Supreme Court settled a long-running dispute and upheld an appeals court's ruling that claimants can use the Uniform Declaratory Judgments Act to establish a carrier's liability for uninsured/underinsured ("UM/UIM") motorist benefits under the claimant's policy and obtain attorney's fees as well. *Allstate Ins. Co v. Daniel West Irwin*, No. 19-0885, 2021 WL 2021447 (Tex. May 21, 2021).

In the underlying tort action, the claimant was injured in a motor vehicle accident and settled with the at-fault driver for the driver's policy limits prior to trial. Subsequently, the claimant sent a letter to Allstate seeking his own UIM policy limits. Allstate responded with a counteroffer, which the claimant rejected. The claimant then sued Allstate and invoked the Uniform Declaratory Judgments Act (UDJA) to obtain a declaratory judgment from the court that he was entitled to recover under his UIM policy and attorney's fees.

The Allstate responded by denied the claimant was entitled to UIM benefits and demanded a jury trial. Prior to trial, Allstate stipulated that the claimant had coverage under the UIM policy but contested the issues of causation and damages. The jury eventually awarded the claimant damages far in excess of his policy limits, so Allstate tendered the UIM policy limits and court costs to the claimant. However, Allstate objected to and appealed the award of attorney's fees and the invocation of the UDJA.

The appeals court held the UDJA was properly invoked and served as a proper basis for an award of attorney's fees. Allstate again appealed, arguing that the appeals court had defied Supreme Court precedent, as set out in the *Brainard* and *MBM Financial Corp.* decisions.

In *Brainard*, the Supreme Court held that a carrier has no contractual duty to pay UIM benefits until the claimant obtained a judgment establishing the liability and underinsured status of the other motorist and, because there was no liquidated amount due under the policy, no basis for attorney's fees existed under the UDJA. Consequently, in this case, Allstate maintained that the claimant was not entitled to attorney's fees because Allstate had not breached its contractual duty to pay UIM benefits and, indeed, had paid them immediately after the claimant obtained the judgment, which rendered the UDJA inapplicable and the award of attorney's fees improper.

The claimant responded that, after Allstate failed to make a reasonable adjustment of his UIM claim, his only recourse was to bind Allstate to a judgment establishing the underlying conditions precedent to his UIM coverage. Because the claimant could not sue Allstate for underlying tort or breach of contract (since no breach had yet occurred), the claimant argued that the UDJA was the only remedy available, and he used it to determine the existence of conditions precedent to coverage under the policy and to declare his rights and status thereunder. The appeals court and the Supreme Court agreed.

Under *MBM Financial Corp.,* a party cannot tack on a declaratory judgment action onto a matured breach-of-contract claim just to recover attorney's fees, and the UDJA must be invoked to do "more than duplicate the issues" being litigated by claims for which attorney's fees were unavailable, which is what Allstate argued the claimant was doing in this case.

The appeals court and Supreme Court again disagreed, holding that the claimant in this case was not making a breach-of-contract claim, he was seeking a declaration of rights under the UIM contract, so he was not merely duplicating a claim. Further, the plain terms of the UDJA, allowing for the construction of a contract before or after a breach and allowing a party to obtain attorneys' fees it would otherwise not be entitled to recover, along with the UDJA's purpose of settling disputes before substantial damages accrue and the legislature's intent in having the UDJA "liberally construed and administered," supported the claimant's argument. That is, the UDJA's application in this case—to determine whether the conditions precedent to recovery under the UIM policy had been met and to determine the parties' status and responsibilities under the breach—was proper, and the trial court had discretion under the plain terms of the UDJA to award attorney's fees.

**Editor's Note:** Friday's decision from the Texas Supreme Court is a significant change in Texas' law regarding the litigation of UM/UIM claims and we can now expect to see more DJ actions filed by injured insureds against their own UM/UIM carriers as a means to get attorney fees in addition to the unpaid policy benefits in question.

## U.S. MAGISTRATE JUDGE RECOMMENDS DISMISSAL OF INSURER'S SUIT AGAINST INSURED REGARDING DISPUTE OVER WITHDRAWN CLAIM FOR DEFENSE AND INDEMNITY

Recently, U.S. Magistrate Judge Susan Hightower issued a report and recommendation to U.S. District Court Judge Lee Yeakel urging the Court to grant the insured's motion to dismiss for lack of subject matter jurisdiction in a curious case about a withdrawn liability claim. *Admiral Ins. Co. v. K&K Roofing and Construction, LLC*, No. 1:20-CV-399-LY, 2021 WL 2019201 (W.D. Tex. May 20, 2021) involved a dispute between Admiral Insurance Company (Admiral) and its insured, K&K Roofing and Construction, LLC (K&K), over whether Admiral owed K&K a defense and indemnity in an underlying tort action in which K&K was being sued by the victims of an apartment fire.

In the underlying tort action, the victims of an apartment fire that killed five people and caused injuries to multiple occupants of the apartment complex sued various parties, including K&K, which had performed roofing work on the apartment complex. K&K's policy with Admiral provided for a defense and indemnity of such bodily injury claims, but the policy period expired on July 20, 2018 at 12:01 A.M. standard time.

The plaintiffs in the suits alleged that the fire broke out at 4:30 a.m. and "in the early hours" of July 20, 2018, so when K&K filed a claim under its Admiral policy for defense and indemnity in those lawsuits, Admiral initially accepted defense coverage and appointed defense counsel to represent K&K under a reservation of rights. Admiral then filed suit in federal court seeking a declaratory judgment that it had no duty to defend or indemnify K&K in the apartment fire lawsuits because the policy had lapsed several hours before the fire broke out, and that it had no duty to indemnify K&K for any future settlement or judgment that may be entered in such lawsuits.

After Admiral filed its motion for summary judgment in the federal court case, K&K sent Admiral a letter formally withdrawing its request for defense and indemnity under the policy and filed a motion to dismiss for lack of subject matter jurisdiction, arguing that the case was now moot given that there was no longer a case or controversy between K&K and Admiral.

Admiral disagreed, claiming that K&K had not established that it would not later seek coverage under the policy for the apartment fire lawsuits, as the lawsuits were still pending. K&K countered, and Judge Hightower agreed, that K&K's letter "clearly and unequivocally" withdrew its request for defense and indemnity for the apartment fire lawsuits and any other potential future litigation that involved the same facts and circumstances as those in the apartment fire lawsuits. Moreover, K&K represented to the Court that it had done so and stated that it did not reserve the right to seek coverage at a later time.

In turn, Judge Hightower reported that, because a declaratory judgment action in this context "hinges on whether a defendant is actually seeking to obtain coverage under [its] policy" withdrawal of a claim under the policy renders the declaratory judgment action moot, and the Court therefore lacks subject matter jurisdiction. As such, she recommended the Court grant K&K's motion to dismiss and dismiss Admiral's motion for summary judgment.

## COURT FINDS INSUFFICIENT EVIDENCE TO SUPPORT JUDGMENT AGAINST PROPERTY INSURER FOR CONTRACTOR'S ALLEGED THEFT OF INSURANCE PROCEEDS

The Fort Worth Court of Appeals recently reversed a trial court judgment in a case where an insurer failed to pay additional amounts after a contractor stole some of the insurance proceeds meant for repairs. In *Argonaut Great Central Insurance Company v. MLLCA, Inc.,* 2021 WL 1919641, (Tex.App.—Fort Worth, May 13, 2021), the court examined a trial court's judgment after a jury found against Argonaut on claims for fraud and fraud by nondisclosure, breach of contract, insurance code violations, violations of the duty of good faith and fair dealing, and deceptive trade practices.

In November 2015, a hailstorm struck Decatur, Texas. The storm hit a gas station owned by MLLCA, damaging the roof of the station and the canopies over the gas pumps. MLLCA presented a claim to Argonaut which assigned the claim to an independent adjuster, Vericlaim. MLLCA arranged for a roofing company, RS Roofing, to submit an estimate for repairs. Vericlaim asked for an itemized bid that did not include certain repairs which were unnecessary, but RS Roofing would not provide one. Negotiations between Vericlaim and RS Roofing broke down over itemization and the scope of repairs, and RS Roofing became unresponsive. Argonaut requested another bid, so Vericlaim asked a contractor named Frank Walley to evaluate the damage and MLLCA ultimately decided to hire Walley as its contractor. Argonaut and Walley agreed on the total cost of repairs. Pursuant to the policy, the actual cash value amount would be disbursed first, followed by additional payments as the completion of repairs demanded. MLLCA agreed to the plan, but it asked to have the check made jointly payable to MLLCA and Walley. When the check was received, MLLCA endorsed it over to Walley.

Walley gave some of the proceeds back to MLLCA and did some of the work. However, Walley ultimately took the remaining funds without completing the work. MLLCA's owners used their own money to pay for the completion of repairs to the canopies, but not all the remaining work. Argonaut declined to release the remaining funds, because its obligation to pay the full repair cost would be triggered under the policy only if MLLCA documented more than the actual cash value payment in expenses on completed repairs.

MLLCA filed suit. At trial, MLLCA argued that Argonaut breached the policy by refusing to pay the remaining $95,000 in repair costs. The jury found against Argonaut on MLLCA's claims for fraud and fraud by nondisclosure, breach of contract, insurance code violations, violations of the duty of good faith and fair dealing, and deceptive trade practices. MLLCA elected to recover on its fraud claims the trial court rendered judgment accordingly, with four alternative recoveries in the event the appellate court reversed the

judgment on the fraud claims. Argonaut appealed, and MLLCA cross-appealed.

On appeal, Argonaut argued that there was insufficient evidence to support the fraud, DTPA and breach of contract claims. The court agreed. The court also found that because the policy had not been breached, and there was no evidence of independent injury to support the "narrow" exception, the claims for breach of the insurance code and the duty of good faith and fair dealing also failed. The court reversed the trial court's judgment and rendered judgment that MLLCA take nothing.