CLAIMS AGAINST THE INSURANCE CARRIER FROM A DEFENSE PERSPECTIVE

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UM/UIM CASES

- ***Brainard v. Trinity Universal Ins. Co.,*** 216 S.W.3d 809, 818 (Tex.2006):

  "The [UM/UIM] contract is unique because, according to its terms, benefits are conditioned upon the insured's legal entitlement to receive damages from a third party. Unlike many first-party insurance contracts, in which the policy alone dictates coverage, 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**."

- To determine liability of the uninsured motorist and the resulting damages, the insured may obtain a judgment against the tortfeasor.
- Alternatively, the insured may settle with the tortfeasor and then litigate UM/UIM coverage with the insurance carrier.
- However, neither a settlement nor an admission of liability from the tortfeasor establishes coverage.

NOW WHAT??

Accardo v. Am. First Lloyds Ins. Co., 2012 U.S. Dist. Lexis 62181, 2012 WL 1576022 (S.D. Tex. May 3, 2012)

- Court denied carrier's MSJ on the Declaratory Judgment Action because:
  - Brainard makes it clear such an action is not a claim for breach of contract.
  - The Accardos were seeking declaratory judgement establishing the driver's liability and their resulting damages and they must litigate those issues before the carriers contractual duty to pay UM/UIM benefits arises.

Severance and Abatement of Bad Faith Claims

- Prompt payment claims are not ripe until after a judicial determination. Abatement ensures all the extracontractual claims are tried at the same time.
- A finding that the carrier is not responsible for UM/UIM benefits under the policy will preclude bad faith claims.
- Evidence of settlement discussions would be admissible for the bad faith claims but in the underlying suit.

FINAL THOUGHTS

- There may be cases in which an insurer's liability to pay UM/UIM benefits is reasonably clear despite the fact that no judicial determination of the UM/UIM's liability has been made. ***Hamburger v. State Farm Mut. Auto. Ins. Co.,*** 361 F.3d 875, (5th Cir. 2004).
- When a reasonable investigation reveals overwhelming evidence of the UM/UIM's fault, the judicial determination that triggers the insurer's obligation to pay is no more than a formality.
- Carrier has a reasonable basis for delaying payment:
  - Allegations the insured was negligent
  - Expert disputing treatment and/or cause of injuries
  - Non-economic damages (pain and suffering) are highly subjective.

APPRAISAL CLAUSE - What is it?

Most property insurance policies contain an appraisal clause which reads:

If we and you disagree on the value of the property or the amount of the "loss," either may make written demand for an appraisal of the "loss." In this event, each party will select a competent and impartial appraiser. You and we must notify the other of the appraiser selected within twenty days of the written demand for appraisal. The two appraisers will select an umpire. If the appraisers do not agree on the selection of an umpire within 15 days, they must request selection of an umpire by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and the amount of the "loss." If they fail to agree, they will submit their differences to the umpire a decision agreed to by any two will be the appraised value of the property or amount of "loss." If you make a written demand for an appraisal of the "loss" each party will:

A. Pay its chosen appraiser; and

B. Bear the other expenses of the appraisal and umpire equally.

What appraisal was intended to be….

An amicable, prompt, and independent process to resolve claims when coverage was undisputed and the only issue was the fair price, valuation or estimation of worth of damaged property.

WHAT HAPPENED?

- ***State Farm Lloyds v. Johnson***, 290 S.W.3d 886 (Tex. 2009).
- In ***Johnson***, the Texas Supreme Court considered whether State Farm could be forced to participate in appraisal even though it had denied a homeowner's hail damage claim. The short answer: yes. The reasoning and language of the opinion, however, has interjected a great deal of uncertainty into a previously staid process.
- Bottom line: It can now be argued that appraisal is appropriate to determine more than just the amount of loss.

THREE CRITICAL HOLDINGS IN ***JOHNSON***:

- Indivisible injury – When different causes are alleged for a single injury, causation is a liability question for the courts. Divisible injury – When different types of damage occur to different items of property, appraisers may have to decide damage caused by each before the courts decide liability.
- Appraisers must always consider causation, at least as an initial matter. An appraisal is for damages caused by a specific occurrence, not every repair a home might need.
- Appraisals require no attorneys, no lawsuits, no pleadings, no subpoenas, and no hearings. It would be a rare case in which appraisal could not be completed with less time and expense that it would take to file motions contesting it. There may be a few times when appraisal is so expensive and coverage is so unlikely that it is worth considering beforehand whether an appraisal is truly necessary.

Appraisal Clause Issues

- Waiver – ***In re Universal Underwriters of Texas Insurance Co.***, 345 S.W.3d 404 (Tex. 2011).
- Choosing an Appraiser – competent and unbiased "policy language"
  - The showing of a preexisting relationship without more does not support a finding of bias. ***See Franco v. Slavonic Mut. Fire Ins. Ass ' n***, 154 S.W.3d 777, 786 (Tex. App.—Houston 2004, no pet.).
- Choosing an umpire
  - The appraisal clause states that the appraisers "will select an umpire." My experience has been that good appraisers can usually agree on an umpire.

EFFECT ON BAD FAITH CLAIMS

- Appraisals will not determine bad faith issues or prompt pay issues. By agreeing to appraisal you effectively acquiesce to the notion that the insurance company had a good faith basis for denial of the claim.
- Compliance with the appraisal provision and timely payment of the appraisal award should estop the underlying breach of contract claim.
- In general, a bad faith claim will not survive if the underlying breach of contract claim is not viable.
- An out of tune umpire's award could be evidence of bad faith, but most prompt payment issues would be resolved if timely paid after the umpire's decision.

USAA v. MENCHACA

- Home damaged Hurricane Ike
- Initial adjuster inspection (45 minutes) -$700 in damages
- Second adjuster inspection-no damage
- Menchaca sues
- Menchaca experts-$76k in damages, including new roof needed `
- USAA experts-minimal damages

MENCHACA JURY CHARGE

- Q#1--“ Did USAA fail to comply with the terms of the insurance policy with respect to the claim for damages made by Plaintiff resulting from Hurricane Ike?”
- Ans—“No”

MENCHACA JURY CHARGE

- Q#2--Did USAA commit an unfair or deceptive act or practice that caused damages to Menchaca by:
  - "failing to attempt in good faith to effectuate a prompt, fair and equitable settlement of a claim when the liability under the insurance policy had become reasonably clear"—"No";
  - "failiing to provide a reasonable explanation of the factual and legal basis in the policy for the denial"—"No";
  - "failing to affirm or deny coverage within a reasonable time"—"No"
  - made a misreprentation—"No"
  - "refused to pay a claim without conducting a reasonable investigation with respect to a claim"—"Yes".

MENCHACA JURY CHARGE

- Q#3--"What sum of money . . . would fairly and reasonably compensate Gail Menchaca for her damages, if any, that resulted from the failure to comply you found in response to Question number 1 and/or that were caused by an unfair or deceptive act that you found in response to Question number 2?"
- Instruction: Connsider the difference between the amount that USAA should have paid and what they did pay
- Answer--$11,350

MENCHACA – USAA POINT ON APPEAL

- Finding of no breach of contract =
- no coverage=
- no extracontractual liability

MENCHACA – CT. OF APPEALS HOLDINGS

- The Ch. 541 violation found by the jury (i.e. "refusing to pay a claim without conducting a reasonable investigation") was imposed by Ch. 541, beyond anything in the insurance policy;
- Insurer could comply with its contract but yet violate the statute.
- Thus, findings are not in conflict

MENCHACA – Ct. of App.

- "No" answer on breach of contract question, because of its wording , was not a finding of no coverage.
  - Absent any further requested instructions, the jury could have found that it complied even though the claim was covered.
  - I.e. jury's possible belief that the insurer was only required by contract to pay the covered damages as subjectively determined by its own adjusters.

MENCHACA – Ct. of App.

- "The jury found USAA complied with the insurance policy, but as we have already discussed, this could have been for reasons other than lack of coverage. We believe that this case, therefore, constitutes an exception to the "general rule" that breach of the policy must be established before the policy benefits may be recovered. In any event, USAA has not directed us to any cases, nor can we find any, involving a situation such as this one where (1) the insurer complied with the policy, but (2) nonetheless violated the insurance code, and (3) the insurer would have been contractually obligated to pay policy benefits had the insurer complied with the insurance code."

MENCHACA – Ct. of App.

- The court of appeals reversed the award of 18% penalties under Ch. 542
  - no jury findings that USAA had failed to comply with any of the requirements of Ch. 542
  - failing to conduct a reasonable investigation is not a 542 violation.

The court affirmed the award of attorney fees finding since 541 allows recovery of fees and the contract and Insurance Code claims were factually intertwined such that segregation of the fees not required.

CONCLUSION

- Oral arguments were in October, and there are a large number of briefs filed with the Supreme Court.