Fourth Court of Appeals
San Antonio, Texas

DISSENTING OPINION

No. 04-18-00018-CV

IN RE STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Janet Ann Lorenz-Floyd, and Lisa Horton

Original Mandamus Proceeding[1]

Opinion by: Sandee Bryan Marion, Chief Justice
Dissenting Opinion by: Rebeca C. Martinez, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Rebeca C. Martinez, Justice
Patricia O. Alvarez, Justice

Delivered and Filed: May 9, 2018

I dissent from the majority's opinion conditionally granting mandamus relief from the trial court's order denying abatement of the real parties in interest's extra-contractual claims pending resolution of their contractual underinsured motorist claim (UIM). I disagree that abatement of severed extra-contractual claims in a disputed UIM case is always required, as strongly implied, if not stated, by the majority opinion.

As the majority acknowledges, neither *Brainard* nor *Menchaca* addressed the precise issue presented here: "whether extra-contractual claims should be abated pending resolution of the contractual claims in an UIM case." *See Brainard v. Trinity Universal Ins. Co.*, 216 S.W.3d 809, 818 (Tex. 2006) (holding that a UIM contract is unique in that the insurer's contractual duty to pay

[1] This proceeding arises out of Cause No. 2018-CI-00083, styled *Margarito Guajardo and Maria Luisa Guajardo v. State Farm Mutual Automobile Insurance Co., et al.*, pending in the 131st Judicial District Court, Bexar County, Texas, the Honorable Michael E. Mery presiding.

benefits does not arise until liability and damages are determined, but not addressing the issue of a severance and abatement of contractual and extra-contractual claims); *see also USAA Texas Lloyds Co. v. Menchaca*, No. 14-0721, 2018 WL 1866041 (Tex. Apr. 13, 2018) (does not involve a UIM claim or the issue of whether contractual and extra-contractual claims should be severed or abated). Thus, the Supreme Court has not stated that abatement is mandated, without regard for the circumstances of the particular case.

The majority concludes that, "because extra-contractual claims in a UIM case can be rendered moot, abatement is necessary to avoid litigation expenses [incurred by the insurer] and conserve judicial resources." Relying on two post-*Menchaca* opinions by sister courts, the majority reasons that abatement is required in a third-party UIM case because "(1) discovery on a contractual claim may not be relevant to discovery on the extra-contractual claim, and (2) an insurer should not be required to incur litigation expenses on extra-contractual claims that may be rendered moot by trial on the contractual claim." *See In re Allstate Fire & Cas. Ins. Co.*, No. 12-17-00266-CV, 2017 WL 5167350, at *4 (Tex. App.—Tyler Nov. 8, 2017, orig. proceeding) (mem. op.); *see also In re Liberty County Mutual Ins. Co.*, No. 01-17-00363-CV, 2017 WL 4414033, at *5 (Tex. App.—Houston [1st Dist.] Oct. 5, 2017, orig. proceeding). However, as quoted, the cited rationales for abatement are conditional on the facts and circumstances of the case — discovery on the UIM claim "may not" be relevant to discovery on the extra-contractual claims, and the extra-contractual claims "may be rendered moot" by a trial on the UIM claim.

The majority also relies on a prior opinion by this court which involved abatement of extra-contractual claims in a UIM case. *See In re United Fire Lloyds*, 327 S.W.3d 250 (Tex. App.—San Antonio 2010, orig. proceeding). The issue there was whether the trial court erred in bifurcating the trial rather than granting the insurer's motion for severance and abatement of the bad faith claims against it on the grounds that introduction of a prior settlement offer would prejudice it in

the UIM trial. After considering other courts of appeals' opinions addressing whether it was an abuse of discretion to refuse to order a severance of contractual claims from bad faith claims when a settlement offer had been made, we held that the trial court abused its discretion "in bifurcating the case instead of severing and abating." *Id.* at 256. I believe our holding should be limited to the facts of *United Lloyds*.

Until the Texas Supreme Court sets forth a mandate requiring abatement in all UIM cases with extra-contractual claims, I would hold the relators to their mandamus burden to show the trial court "clearly abused its discretion" by failing to abate under the circumstances of this particular case. The instant case presents a unique situation where the extra-contractual claims were severed from the contractual UIM claim, but abatement was denied. Thus, relators were required to establish a factual and legal basis for this court to conclude that denial of the abatement *in this case* was a clear abuse of discretion by the trial court. Relators did not make any specific complaint in the trial court about any particular discovery sought by the real parties in interest, or otherwise show that the insurer's interest in reducing litigation expenses warranted abatement. I believe relators therefore failed to meet their mandamus burden. *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004). Therefore, I would deny the relators' petition for writ of mandamus.

Rebeca C. Martinez, Justice