

Texas Supreme Court to Decide Whether a Declaratory Judgment Action is the Proper Way to Assert an Underinsured Motorist Claim

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Ever since the landmark Texas Supreme Court decision in *Brainard v. Trinity Universal Ins. Co.*, 216 S.W. 3d 309 (Tex. 2006), Texas courts and practitioners have struggled with the proper way for insureds to assert a claim for underinsured motorist coverage. In current practice, claims for breach of contract and insurance code violations in connection with underinsurance motorist claims are commonly dismissed or abated. In the past few years, Texas courts started to entertain claims for underinsured motorist coverage against insurers as declaratory judgment actions.

Earlier this morning, the Texas Supreme Court heard oral arguments in *Allstate v. Ins. Co. v. Irwin*, 606 S.W. 3d 774 (Tex. App.—San Antonio 2019, pet. granted), in which Allstate takes the position that while policyholders can bring an action against their underinsurance insurers to determine the negligence of an alleged tortfeasor and the insured's damages, it should not be under the rubric of a Declaratory Judgment action. The link to the Texas Supreme Court's YouTube recording of the argument is https://www.youtube.com/watch?v=XjN52ef0f_g.

Although the argument was fascinating in its exploration of esoteric concepts of subject matter jurisdiction, case and controversy and standing, the bottom line is that policyholders desire to use, and Allstate opposes the use of, a declaratory judgment action to resolve underinsurance motorist cases because of the discretion bestowed on judges to award attorneys fees under Tex. Civ. Prac. & Rem. Code §37.009.

Interestingly, Allstate did not take the position that insureds cannot sue to seek underinsurance motorist coverage benefits. Rather, Allstate argued that the cause of action is pursuant to the contract; but it is not a breach of contract action or declaratory judgment action (either of which allows for the awarding of attorneys fees to the insured).

The take-away from the oral argument is that the Texas Supreme Court will announce the procedure on how insureds access their underinsured motorist coverage after they settle with the tortfeasor. There does not seem to be any dispute that insureds have the right to pursue such coverage in a lawsuit. Instead, the dispute is over whether the appropriate cause of action to access underinsured motorist coverage will support an award of attorneys fees to the insured.