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## Allstate Asks Texas Justices To Ax Fee Award In Crash Suit

By **Jeff Sistrunk**

Law360 (January 7, 2021, 4:57 PM EST) -- Allstate Insurance Co. urged the Texas high court on Thursday to overturn a jury verdict granting a policyholder more than \$45,000 in attorney fees in connection with his claim for underinsured motorist benefits, saying the policyholder impermissibly brought his case as a declaratory judgment action to obtain the fee award.

The insurance company is aiming to upend a state appeals panel's August 2019 decision affirming a jury verdict that ordered Allstate to pay policyholder Daniel Wes Irwin the full \$50,000 in underinsured motorist, or UIM, benefits to cover his injuries in a crash caused by another driver, plus court costs and \$45,540 in attorney fees.

During a virtual hearing Thursday, Allstate attorney Roger D. Higgins of Thompson Coe Cousins & Irons LLP told the Texas Supreme Court that the trial court was wrong to let Irwin bring his suit under the Uniform Declaratory Judgment Act — which permits the recovery of "reasonable and necessary" attorney fees — because the case involves only factual issues regarding the circumstances of Irwin's crash and the extent of his damages, not any legal issues that would fall under the statute.

Higgins argued that allowing Irwin to proceed under the Uniform Declaratory Judgment Act enabled the policyholder to skirt the Texas Supreme Court's 2006 ruling in *Brainard v. Trinity Universal Insurance Co.*, which held that an insurer is not obligated to pay a UIM claim until its policyholder obtains a judgment establishing the other driver's liability and underinsured status. Under *Brainard*, Higgins said, an insurer cannot be required to pay a policyholder's attorney fees if it did not breach its duty to pay policy benefits, and here Allstate committed no such breach because it paid Irwin in full following the jury verdict.

Several of the Texas justices peppered Higgins with questions about what the "proper vehicle" for determining a policyholder's entitlement to UIM benefits would be, if not a suit brought under the Uniform Declaratory Judgment Act. Higgins argued that a policyholder can directly bring a contract-based action against an insurer to try to prove they are entitled to the benefits.

"Our position is, if we are looking at what the nature of the suit is, this is a suit that involves a tort," Higgins said during a series of exchanges with Justice Brett Busby. "The case or controversy is an automobile accident where there was injury, there was negligence, and there was causation. That is what this court needs to create a lawsuit. It can be brought against Allstate under the contract."

In response to Higgins' characterization of the case, Justice Busby appeared to favor Irwin's position, saying, "That is why it is a declaratory judgment action, because you need to declare your rights under the contract before you can then put that to the insurer and see if they are going to pay it or not."

Higgins emphasized that Allstate stipulated before trial that Irwin's UIM coverage applied to the crash, leaving the jury to decide only whether Irwin's damages exceeded a \$30,000 payout he received in a prior settlement with the insurer for the at-fault driver, Bertha Alonso. That stipulation eliminated any legal questions about the proper interpretation of Irwin's policy that may have been appropriate for a court to address under the Uniform Declaratory Judgment Act, Higgins said.

"Really, the interpretation of the contract doesn't come into play," Higgins argued. "The Declaratory Judgment Act is intended to address disputes over contracts, rights and statuses, and there is no dispute over the contract or the validity of it in this case. None. And there wouldn't be whether [the policy] was introduced or not, or whether there was a stipulation."

Later in the hearing, during exchanges with Justice Jane Bland and Chief Justice Nathan Hecht, Irwin's attorney, Thomas A. Crosley of Crosley Law Firm PC, countered that "the only viable cause of action post-Brainard is declaratory judgment."

Justice Hecht pressed Crosley on this position, asking him if in the 15 years since the Brainard decision came down, every decision in a UIM case that was not brought as a declaratory judgment action was "just wrong."

"If they were tried as breach of contract cases, then they were wrong, because there was no subject matter jurisdiction," Crosley responded. "The claim wasn't ripe. And if a claim isn't ripe, the court has no jurisdiction to resolve that dispute. The only vehicle that actually gets you into court properly in Texas for a UIM claim is a declaratory judgment action."

Crosley also rebuffed Allstate's assertion that Irwin's case involved solely factual issues that are not properly adjudicated under the Uniform Declaratory Judgment Act, saying the suit involves "mixed questions of law and fact."

"Were there any rights arising from the policy that were in dispute, other than how much of that benefit the litigant was entitled to receive?" Justice Eva Guzman asked Crosley.

"That's it; that's really what the case is about," Crosley said. "We are litigating the status of Mr. Irwin — was he the victim of an underinsured motorist? And we are litigating his rights — what benefits he is entitled to under his policy."

Following the hearing, Texas-based insurance attorney Bob Allen of The Allen Law Group, who has been tracking the case, told Law360 the Texas Supreme Court's forthcoming decision will provide much-needed clarity on the procedure for policyholders to pursue UIM coverage after settling with the at-fault parties.

As it stands, suits for breach of contract or insurance code violations in connection with UIM claims "are commonly dismissed or abated," while others policyholders have found success pursuing UIM cases as declaratory judgment actions, Allen noted.

"There does not seem to be any dispute that insureds have the right to pursue such coverage in a lawsuit," said Allen, who also serves as co-chair of the extracontractual and bad faith claims litigation committee at the American College of Coverage Counsel, an organization of insurance lawyers. "Instead, the dispute is over whether the appropriate cause of action to access underinsured motorist coverage will support an award of attorney fees to the insured."

Allstate is represented by Roger D. Higgins, Jacquelyn Chandler and Elizabeth Lee Thompson of Thompson Coe Cousins & Irons LLP and Wallace B. Jefferson, Rachel A. Ekery and William J. Boyce of Alexander Dubose & Jefferson LLP.

Irwin is represented by Thomas A. Crosley and Shawn M. Mechler of Crosley Law Firm PC.

The case is Allstate Insurance Co. v. Daniel Wes Irwin, case number 19-0885, in the Supreme Court of Texas.

--Editing by Daniel King.