Texans for Lawsuit Reform

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June 10, 2024

Hon. Blake A. Hawthorne
Clerk, Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

RE: Case No. 24-0156, *State Farm Mutual Automobile Insurance Co. v. Valdez*

Mr. Hawthorne,

Texans for Lawsuit Reform, as amicus curiae, submits this brief for consideration by the Court in the above-referenced matter. I respectfully ask that you provide it to the Court in your customary manner.

TO THE HONORABLE SUPREME COURT OF TEXAS:

This Court's decision in *Allstate Insurance Co. v. Irwin*[1]—which departed from this Court's 2006 decision in *Brainard v. Trinity Universal Insurance Co.*[2]—has caused upheaval in Texas's automobile insurance market. Amicus Curiae, Texans for Lawsuit Reform (TLR), respectfully urges the Court to grant State Farm Mutual Automobile Insurance Co.'s petition for review and use this case to give trial and appellate courts guidance about applying *Irwin*.

TLR's Interest in This Case

TLR has a longstanding and demonstrated interest in how underinsured motorist (UIM) lawsuits are handled by Texas's courts.

[1] 627 S.W.3d 263 (Tex. 2021).

[2] 216 S.W.3d 809 (Tex. 2006).

House Bill 1739, filed during the 86th Regular Session of the Texas Legislature, would have abrogated this Court's decision in *Brainard*, which governed UIM litigation in Texas until *Irwin* was handed down three years ago. When the bill was heard in committee, insurers, insurance trade associations, and TLR opposed the bill, while the Texas Trial Lawyers Association and many attorneys representing policyholders supported it.[3] H.B. 1739 ultimately died in the Senate,[4] but the issue has continued to be the subject of legislative activity, and TLR has maintained its engagement on this issue in the legislative process.[5]

Its historic interest in the UIM issue is the sole impetus for TLR submitting this brief. TLR has no financial interest in the outcome of this case. TLR paid all fees and costs associated with preparing and filing this brief.

The Problem Irwin Has Created

This case demonstrates the problem *Irwin* has created. Mr. Valdez's insurance claim was hardly worth pursuing *at all*. Insurance paid Mr. Valdez $102,501, which a jury found was $824 less than was necessary to make him whole for the injury done to him in an automobile collision.[6] In other words, before he filed his lawsuit, Mr. Valdez had collected more than 99 percent of the money he was owed.

In addition, State Farm offered Mr. Valdez $5,135 in payment of his UIM claim.[7] This pre-suit settlement offer proved to be more than six times the amount he was owed under the UIM provision of his automobile insurance policy.[8] But Mr. Valdez refused that offer and proceeded to a jury trial in which he sought "monetary

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[3] *See* Witness List, Tex. H.B. 1739, 86th Leg., R.S. (2019), available at https://www.legis.state.tx.us/tlodocs/86R/witlistbill/html/HB01739H.htm.

[4] *See* Bill History, Tex. H.B. 1739, 86th Leg., R.S. (2019), available at https://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=86R&Bill=HB1739.

[5] *See* Tex. H.B. 359, 87th Leg., R.S. (2021); Tex. H.B. 1320, 88th Leg., R.S. (2023).

[6] *See State Farm Mut. Auto. Ins. Co. v. Valdez*, No. 04-22-00113-CV, 2024 WL 349295, at *3 (Tex. App.—San Antonio Jan. 31, 2024, pet. filed).

[7] *Id.* at *2.

[8] *See id.* at *3.

relief in excess of $250,000"[9] and $66,272 in attorney's fees.[10] Ultimately, the trial court awarded him the $824 he apparently was owed, plus $20,000 in attorney's fees and $3,854.94 in court costs.[11]

State Farm did nothing wrong in handling and paying Mr. Valdez' claim and, by any fair appraisal, won the case. The court of appeals' analysis, however, is that Mr. Valdez knew he was owed money under his insurance policy, but the amount he was owed was uncertain to him; thus, he was entitled to file a lawsuit to have a jury determine the amount he was owed. And because Mr. Valdez obtained a judgment declaring that State Farm owed him money, State Farm should have to pay his attorney's fees.

The lower court's analysis invites unnecessary litigation.

Valdez followed the path *Irwin* provides, suing State Farm under the Uniform Declaratory Judgments Act (UDJA) rather than for breach of contract. Before *Irwin*, insurers like State Farm had a 30-day window in which to pay a claim.[12] Thus, if an insurer paid a UIM claim within 30 days after the amount owed had been established as provided in *Brainard*, it had not breached its contract and could not be required to pay the policyholder's attorney.[13]

Today, because of *Irwin*, that same lawsuit is pursued under the UDJA; and, under the lower court's reasoning, the insurer may be required to pay the policyholder's attorney if the policyholder is awarded a single dollar in the UDJA adjudication. Indeed, the insurer can be required to pay the policyholder's attorney's fees when it offered to settle the matter for six times the amount the policyholder was owed, as State Farm did in this case. Why would any policyholder ever accept less than the UIM policy limits if they can roll the dice in litigation with no risk, using a contingent-fee lawyer at no cost? That is exactly what is happening in UIM insurance

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[9] *Id.* at *7.

[10] *Id.* at *5.

[11] *Id.* at *3.

[12] *See Brainard*, 216 S.W.3d at 817-18 (interpreting chapter 38, Texas Civil Practice and Remedies Code).

[13] *Id.*

cases today, and every policyholder in Texas is paying for it through higher insurance premiums—which is why TLR opposed the *Brainard* abrogation via H.B. 1739 in the first place.

The Court Should Interpret the UDJA to Dissuade Unnecessary Lawsuits

The UDJA provides that "[i]n any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just."[14] The trial court decided that State Farm paying Mr. Valdez $23,854.94 in attorney's fees and court costs when he was awarded $824 in damages was reasonable, necessary, equitable, and just. This Court does not have jurisdiction to review factual determinations made by lower courts, but it does have power to instruct lower courts on how to interpret and apply a standard required by law.[15]

How should the UDJA be interpreted and applied in UIM matters? The Texas Legislature has provided guidance about its view of reasonable and necessary attorney's fees:

- Chapter 541 of the Insurance Code and the Deceptive Trade Practices Act both provide that if a settlement offer equals, substantially equals, or exceeds the trial court's award to the plaintiff, then the plaintiff cannot recover attorney's fees incurred after the offer was made.[16] These statutes encourage early, reasonable settlement offers, as was made here by State Farm to Mr. Valdez.

- Texas's statute governing weather-related insurance claims bars a policyholder from recovering attorney's fees from an insurer if the

[14] TEX. CIV. PRAC. & REM. CODE § 37.009.

[15] *See* TEX. CONST. art. V, § 6; *In re S.M.R.*, 434 S.W.3d 576, 586 (Tex. 2014) ("Although this Court itself lacks jurisdiction to determine questions of factual sufficiency, we nevertheless have the responsibility to ensure that the intermediate appellate courts follow applicable legal standards in making their review of the evidence. Thus, we are not powerless to correct a clearly erroneous review of the evidence. . . . When an appellate court fails to apply this standard, we may reverse and remand for the court to reexamine the evidence under the appropriate standard." (citations and quotations omitted)).

[16] *See* TEX. INS. CODE § 541.159(b); TEX. BUS. & COM. CODE § 17.5052(h).

policyholder recovers at trial less than 20 percent of the amount demanded.[17] This statute discourages excessive demands.

- Texas's offer of settlement statute prohibits recovery of attorney's fees and costs by a plaintiff and requires the plaintiff to pay the defendant's litigation costs when the plaintiff recovers less than 80 percent of the amount offered to him by the defendant.[18] Again, the Legislature is encouraging early, reasonable settlement offers.

These statutes encourage settlement offers and prevent recovery of attorney's fees when a plaintiff reasonably should have accepted a settlement offer. They all suggest that the Legislature does not believe forcing a litigant to pay an opposing party's attorney's fees is either reasonable or necessary when that party has chosen litigation rather than resolving a matter amicably on favorable terms, as happened here.

We believe this Court should instruct lower courts that, in addition to applying existing law explaining the meaning of each word of section 37.009 of the UDJA, the courts also should be told to read section 37.009 wholistically. Lower courts should be instructed that an award of fees and costs is neither equitable nor just, and fees are neither reasonable nor necessary, when the party who might be forced to pay an opponent's fees made a reasonable pretrial settlement offer that was rejected.

Conclusion

Irwin provides an incentive for unnecessary litigation. As demonstrated in the matter before this Court, in run-of-the-mill cases since *Irwin* was handed down, an insurance company has no practical alternative to paying UIM policy limits when a policyholder engages an attorney. It simply does not make economic sense for an insurance company to pay its own attorney to litigate a UIM case when it is risking paying the policyholder's attorney, too—even when it wins the case by any reasonable analysis.

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[17] *See* TEX. INS. CODE § 542A.007(c).

[18] *See* TEX. CIV. PRAC. & REM. CODE § 42.004.

Irwin is disrupting the insurance market and costing Texas consumers money. TLR respectfully urges the Court to grant State Farm's petition for review and use this case to instruct lower courts that the UDJA does not allow recovery of attorney's fees, except in cases when the litigation was truly necessary, the fees are truly reasonable, and the award is truly equitable and just. And if these criteria are not met when the case is viewed wholistically, the historic rule that each party bears his or her own fees and costs should prevail in UIM cases.[19]

Respectfully submitted,

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Certificates of Compliance and Service

I certify that this brief contains 1818 words.

I certify that, on June 10, 2024, a true and correct copy of this brief was served via electronic service on all parties to this case.

E. Lee Parsley

[19] *See Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 483 (Tex. 2019).