CAUSE NO. 10-0-637

STEVEN DUNCAN,	§	**IN THE DISTRICT COURT**
	§	
Plaintiff,	§	
	§	
V.	§	**22ND JUDICIAL DISTRICT**
	§	
FARMERS INSURANCE EXCHANGE,	§	
	§	
Defendant.	§	**CALDWELL COUNTY, TEXAS**

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO SEVER AND ABATE AND MOTION FOR PROTECTIVE ORDER

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, STEVEN DUNCAN, Plaintiff in the above-styled cause, who hereby files his Response to Defendant Farmers Insurance Exchange's Motion to Sever and Abate, and Defendant Farmers Insurance Exchange's Motion for Protective Order, and in opposition to both motions, respectfully shows the Court as follows:

I.
INTRODUCTION

Plaintiff filed suit against Defendant on November 18, 2010, for claims relating to breach of contract, bad faith, statutory violations of the Texas Insurance Code, and other damages.

Defendant answered, by and through its counsel of record, on December 10, 2010. Concurrently with its answer, Defendant has filed a Motion for Protective Order ("MPO") and a Motion to Sever and Abate ("MSA"). Because both of these motions rely upon the same essential arguments, Plaintiff hereby files this one response to both.

For the reasons that follow, Plaintiff will show that both of Defendant's motions should be denied.

II.
ARGUMENT AND AUTHORITIES

A. Severance of the Contractual and Extra-Contractual Claims is Not Mandatory

Plaintiff's Original Petition contains claims that are both contractual and "extra-contractual" in nature. The suit involves, in part, Defendant's breach of contract to pay on both the underinsured motorist coverage in Plaintiff's insurance policy, as well as the comprehensive / collision coverage in the same insurance policy. The suit also involves certain claims under the Texas Insurance Code (specifically, Articles 541 and 542), which provide for additional statutory damages for bad faith / unfair claim settlement practices.

Defendant begins the arguments in its MSA with the sweeping assertion that, "Courts mandate severance of extra-contractual claims from contractual claims" (see Section 3 of Defendant's MSA, at page 2, *et seq.*). In fact, this statement is patently untrue. There is a wealth of long-standing case law for the proposition that courts enjoy wide discretion in determining whether contractual and extra-contractual claims must be severed and tried separately. *See, e.g.*, *Womack v. Berry*, 291 S.W.2d 677, 683 (Tex. 1956); *Lusk v. Puryear*, 896 S.W.2d 377, 379 (Tex. App.—Amarillo 1995, no writ). In fact, the courts have interpreted Texas procedural rules to clearly hold that in some cases (such as the type presented to this Court), it may be an abuse of discretion for the court to sever the two sets of claims, and that the court has a duty to deny any such motion to sever. According to the Texas Supreme Court, a claim is severable under Rule 41 of the Texas Rules of Civil Procedure if: (1) the controversy involves more than one cause of action, (2) the severed claim is one that could be asserted independently in a separate lawsuit, and (3) the severed actions are not so interwoven with the other claims that they involve the same facts and issues. *See Liberty Nat'l Fire Ins. Co. v. Akin*, 927 S.W.2d 627, 629 (Tex. 1996). The controlling reasons for a severance are to do justice, avoid prejudice, and further the interest

of convenience. *See Allstate Ins. Co. v. Hunter*, 865 S.W.2d 189, 191 (Tex. App.—Corpus Christi 1993, orig. proceeding). However, Rule 41 does not contemplate the severance of essentially one cause of action into two or more parts; when all the facts and circumstances unquestionably require claims to be tried together, when there is no fact or circumstance tending to support a contrary conclusion, and when the legal rights of the parties will not be prejudiced thereby, there is no room for discretion and the trial court has a duty to deny a motion to sever. *See Lusk*, 896 S.W.2d at 379.

The *Lusk* case provides an excellent example of how the appeals court found it an abuse of discretion for the trial court to sever an insurance contract claim from a statutory Texas Insurance Code claim, because the two claims were essentially the same cause of action. *See id.* at 380. In this case, the plaintiff combined a claim for breach of contract with a claim for statutory damages under Article 21.55 of the former Texas Insurance Code (which has since been re-codified as of 2003 into Sections 542.051-061 of the new Texas Insurance Code). *See id.* at 378. The trial court severed the statutory (i.e., extra-contractual) claim from the contract claim. *See id.* at 379. The appeals court held that this was an abuse of discretion because they were essentially the same cause of action and should not be tried separately:

> Although the damages and attorney's fees provided by the article do not arise from the insurance contract, they are recoverable for the insurer's failure to timely pay for any loss for which it may be liable under the contract. Thus, when relator Doris Lusk alleged Mid-Century failed to timely pay her claim and pleaded for damages and attorney's fees provided by article 21.55, was put in issue as one cause of action.

Id. at 380.

A side-by-side comparison makes it clear that Defendant owes the same obligation to Plaintiff under the insurance contract as it does under Sections 542.051-061 of the Texas Insurance Code. Thus, a violation of the provisions of Article 542 is both a breach of the insurance policy and a

statutory violation. The two theories of recovery rely on the same evidence, testimony by the same witnesses, and the same set of facts. Consequently, under the Texas Supreme Court decision cited above, the actions are so interwoven (i.e., they involve the same set of facts and issues) that they are not subject to being severed from one another. *See Akin*, 927 S.W.2d at 629.

There will also be no prejudice to Defendant in trying the contract and statutory claims together, because the same evidence will be admissible and probative on both sets of claims. Evidence needed to prove the breach of contract claim will certainly include the conduct of Defendant with respect to the handling of the claim. Since much of the same evidence will speak to both issues, Defendant will not be prejudiced, and a combined trial would be more convenient and economical for the Court and all parties. This point has already been eloquently and definitively made by the Texas Supreme Court:

> Contrary to Liberty National's Arguments, [plaintiff's] claims are largely interwoven, most of the evidence introduced will be admissible on both claims, and any prejudicial effect can be reasonably ameliorated by appropriate limiting instructions to the jury. For example, evidence regarding Liberty National's investigation and reasons for denial of the claim will no doubt be admissible in the contract case because the linchpin of any coverage case is the insurer's denial of the claim. We assume that an insurer would introduce all evidence tending to support its conclusion that the claim was not covered by the policy. We also assume that an insured would offer evidence of any bias against the claim on the part of the insurer's agents, which would likely be admissible on cross-examination to test the agent's credibility and to allow the jury to determine the weight to be given to the agent's testimony.

Id. at 630.

Plaintiff would also point out that as the movant, Defendant has the burden of proving prejudice in not severing the claims. Defendant has not met this burden, under the reasoning just cited above. Additionally, the *Hunter* case indicates that evidence should be proffered in support of the motion to sever. *See Hunter*, 865 S.W.2d at 193-94 (stating also, "There is no general prohibition against trying contract and bad faith claims together…"). In Defendant's motion, we

see no such evidence offered, beyond Defendant's sweeping assertion and misstatement of Texas case law, i.e., that severance of insurance contract and extra-contractual claims is "mandatory."

On a final note, it is puzzling that Defendant itself cites the *Akin* case for the proposition that severance and abatement is mandated where the carrier has made a settlement offer on the disputed claim (see Section 3.4 of Defendant's MSA, at pages 3-4). The *Akin* court argued, as Defendant points out, that when a carrier makes a partial settlement offer on a claim, then evidence admissible on a bad faith claim would prejudice the insurer to such an extent that a fair trial on the contract claim would be unlikely. *See Akin*, 927 S.W.2d at 629-30. Plaintiff wholeheartedly agrees with and adopts Defendant's argument, under *Akin*. Accordingly, in the present case, Defendant has made **no** settlement offer either on Plaintiff's underinsured motorist bodily injury claim or on Plaintiff's comprehensive / collision property damage claim. Please see Defendant's latest pre-litigation correspondence to Plaintiff, dated November 5, 2010, attached as "Exhibit A," hereto. In that letter, it is clearly stated in the second full paragraph: "Therefore, we cannot extend any settlement offer under our insured's UM/UIM coverage." Accordingly, using Defendant's own analysis and its own reliance upon the *Akin* decision, there has been no settlement offer and therefore, the corollary rule would apply; there would be no prejudice to Defendant in trying the contractual and extra-contractual claims together, and therefore no mandate for severance. *See id.*

B. Plaintiff Has Valid Breach of Contract Claims to Assert at this Time

Defendant makes much of the language contained in the case of *Brainard v. Trinity Univ. Ins. Co.*, 216 S.W.3d 809 (Tex. 2006), to try and argue that Plaintiff cannot proceed with a breach of contract claim on the underinsured motorist policy as a matter of law (see Sections 4.1-4.4 of Defendant's MSA, at pages 4-6). However, there are major differences between the

present case before this Court, and the facts of the *Brainard* case, which Defendant has conveniently ignored.

Defendant's entire reliance upon the *Brainard* case has to do with the underinsured motorist coverage bodily injury claim. As the Court can see, in every place that Defendant has cited *Brainard*, it has done so with regard to the question of when a contractual duty to pay is triggered on an uninsured / underinsured motorist claim (see Sections 4.1-4.4 of Defendant's MSA, at pages 4-6). There is no discussion in *Brainard* whatsoever on the question of a comprehensive / collision coverage claim for property damage.

As the Court can plainly see from the original petition, one of the central issues in this lawsuit is Defendant's breach of contract and bad faith as regards Plaintiff's claim for property damage (and related damages, such as loss of use) under his collision / comprehensive coverage in the insurance policy with Defendant (see, e.g., Section VIII of Plaintiff's Original Petition, dealing entirely with the facts underlying the comprehensive / collision coverage claim; Section X(e)-(f) of same, dealing with Plaintiff's plea for declaratory relief under the comprehensive / collision coverage claim; and, Section XI (and subsections A-C under that section) of same, dealing in part with the contractual and other damages pertaining to Defendant not paying on the comprehensive / collision coverage claim). An underinsured motorist claim relies, for the most part, on the tort liability of the third party tortfeasor, as Defendant argues. *See Brainard*, 216 S.W.3d at 818. However, there is no such requirement, contractual or otherwise, pertaining to Plaintiff's comprehensive / collision coverage claim; under the insurance policy with Defendant, he was entitled to pursue and make that claim with Defendant (which he did), no matter who was "at fault" for the collision. Once he did, Defendant had both contractual and statutory (i.e., Texas Insurance Code) obligations to reasonably investigate and pay that claim. As Plaintiff has

set forth in great detail in Section VIII of his original petition, Defendant engaged in a pattern of dismissive, outlandish, and shocking behavior with regard to the comprehensive / collision coverage claim, which Plaintiff has pled both breaches the contract and violates the Texas Insurance Code, opening up a range of available damages.

Defendant's reliance on *Brainard* therefore does nothing whatsoever to "abate" Plaintiff's contractual claims relating to the comprehensive / collision coverage, nor to "sever" the extra-contractual claims arising out of Defendant's bad faith and statutory violations of the Texas Insurance Code with respect to the comprehensive / collision claim. This fact alone, which Defendant conveniently ignores, is enough to render its motion almost entirely moot.

C. Defendant Overreaches and Tries to Vastly Expand the Holding in *Brainard*

Defendant would presumably argue that, even if Plaintiff's contractual and/or statutory claims can go forward on the comprehensive / collision coverage issue, *Brainard* still prevents any underinsured motorist injury claim from proceeding. In order to make this argument, though, Defendant strains, stretches, and expands the *Brainard* holding far beyond its plain language, in a zealously overreaching fashion.

In the first place, the vast majority of the *Brainard* decision had to do with how pre-judgment interest should be calculated in an underinsured motorist claim, and how the insurer could use its offsets for personal injury protection payments and the third-party settlement to factor into the mathematical accrual of pre-judgment interest. *See id.* at 811-17. It is not until the last two pages of the opinion that Defendant cites anything whatsoever from the case (see Sections 4.1-5.3 of Defendant's MSA, at pages 4-6, liberally citing 817-19 of *Brainard*).

As this Court can see from the headings and explanations in that opinion, those final two pages deal only with the issue of attorney's fees in an underinsured motorist claim. *See id.* at

817 ("IV. Attorney's Fees: The final issue is whether Brainard may recover attorney's fees on her contract claim."). In determining that issue, the court considered only Chapter 38 of the Civil Practice & Remedies Code (CPRC), i.e., the statute dealing with attorney's fees under a breach of contract claim, because this was the only grounds advanced by the plaintiff in that case:

> Attorney's fees are recoverable from an opposing party only as authorized by statute or by contract between the parties. Chapter 38 of the Civil Practice & Remedies Code permits an insured to recover attorney's fees incurred in a successful breach of contract suit against the insurer unless the insurer is liable for the fees under a different statutory scheme. **Because no other statutory scheme applies**, Brainard seeks to recover the fees under Chapter 38.

Id. (emphasis added).

The plaintiff in the *Brainard* case was evidently unaware of either of the following provisions of the Texas Insurance Code, because either or both of them most definitely did apply as "statutory schemes" that permit attorney's fees to be recovered against an insurer:

> A plaintiff who prevails in an action under this subchapter may obtain the amount of actual damages, plus court costs and reasonable and necessary attorney's fees.

Tex. Ins. Code. § 541.152(a)(1) (emphasis added).

> If an insurer that is liable for a claim under an insurance policy is not in compliance with this subchapter, the insurer is liable to pay the holder of the policy or the beneficiary making the claim under the policy, in addition to the amount of the claim, interest on the amount of the claim at the rate of 18 percent a year as damages, together with reasonable attorney's fees. If a suit is filed, the attorney's fees shall be taxed as part of the costs in the case.

Tex. Ins. Code. § 542.060(a)-(b) (emphasis added).

The fact that the plaintiff in *Brainard* did not advance either of those statutory remedies, and the *Brainard* court was not called upon to consider them, necessarily means that its holding is limited strictly to the plain language of whether and when attorney's fees could be awarded on a contract claim under Chapter 38 of the CPRC. 216 S.W.3d at 817-18. The *Brainard* opinion

says nothing whatsoever about whether or when a statutory / bad faith claim against an underinsured motorist insurance carrier may proceed under the Texas Insurance Code (and of course, whether or when attorney's fees could be awarded under such a claim).

As Defendant does correctly concede, even the *Brainard* opinion points out that an insured, such as Plaintiff in this case, is not required to go to trial against the liable third party and obtain a judgment in order to assert his claim against the underinsured motorist carrier. *See id.* at 818 ("Of course, the insured is not required to obtain a judgment against the tortfeasor. The insured may settle with the tortfeasor, as Brainard did in this case, and then litigate UIM coverage with the insurer."). This is precisely what Plaintiff has done. Furthermore, Plaintiff has pled for declaratory relief (see Section X of Plaintiff's Original Petition), as well as various statutory grounds under the Texas Insurance Code, none of which were advanced by the plaintiff or considered by the court, in the *Brainard* case. This means, unfortunately for Defendant, that its heavy reliance upon *Brainard* throughout its MSA and MPO does very little for it, and should do very little to impress or persuade this Court.

D. Plaintiff's Extra-Contractual Claims Can Proceed Even under *Brainard*

As Plaintiff has already argued above, the *Brainard* court never touched on the bad faith / statutory claims that may be pursued against an insurance carrier under Texas Insurance Code articles 541 and 542. Indeed, that court was never even called upon to consider those claims by the plaintiff, which accounts for why its holding is so narrow and limited to the discussion of Chapter 38 of the CPRC.

Therefore, Defendant must resort to some clever sleight-of-hand to expand the holding of *Brainard* even further than it already has, to now argue the absurd proposition that if there is no breach of contract claim yet to pursue on the underinsured motorist case, then there must be no

extra-contractual claim, either (see Section 6.1 of Defendant's MSA, at page 7). Once again, this is a gross misstatement of Texas case law. A breach of contract claim is not a pre-requisite to having a statutory / bad faith claim.

The Texas Supreme Court has long held that an insurance company owes a duty of good faith and fair dealing to its insured. *See Arnold v. National County Mut. Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987) ("Arnold raises the issue of whether there is a duty on the part of insurers to deal fairly and in good faith with their insureds. We hold that such a duty of good faith and fair dealing exists."). The Supreme Court further held that this duty encompassed at least three independent responsibilities: (1) a duty to not breach a contract by failing to pay a claim; (2) a separate duty to properly investigate a claim; and, (3) a duty to not delay in settlement of a claim without reasonable basis. *See id.* The Supreme Court has consistently followed this ruling and created a line of jurisprudence holding that there are minimum duties insurers owe by law, irrespective of the contract. *See Viles v. Security Nat'l Ins. Co.*, 788 S.W.2d 566, 567 (Tex. 1990) ("That duty [i.e., of good faith and fair dealing] emanated not from the terms of the insurance contract, but from an obligation imposed in law."); *see also, e.g.*, *Twin City Fire Ins. Co. v. Davis*, 904 S.W.2d 663, 666 n.3 (Tex. 1995) ("Some acts of bad faith, such as a failure to properly investigate a claim or an unjustifiable delay in processing a claim, do not necessarily relate to the insurer's breach of its contractual duties to pay covered claims, and may give rise to different damages."); *Republic Ins. Co. v. Stoker*, 903 S.W.2d 338, 340-41 (Tex. 1994); *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 18 n.8 ("Claims for insurance contract coverage are distinct from those in tort for bad faith; resolution of one does not determine the other."); *Lyons v. Millers Cas. Ins. Co.*, 866 S.W.2d 597, 601 (Tex. 1993) ("But the issue of bad faith focuses not on whether the claim was valid, but on the reasonableness of the insurer's

conduct."), *et al*.

Accordingly, the Texas Legislature has codified certain minimum statutory obligations with which insurers such as Defendant must comply, or else suffer penalties for bad faith. Those obligations are set forth in Texas Insurance Code articles 541 and 542, some of which Plaintiff cites verbatim in his original petition (see Section XI-B of Plaintiff's Original Petition). This can only make common sense, as there must be certain minimum standards that insureds are guaranteed by law, otherwise an insurer could write draconian contracts that give its insureds almost no rights at all, and then claim that it acted fully in compliance with the contract and breached no contract terms whatsoever.

The over-arching judicial (and statutory) principle is to prevent insurers from taking advantage of their insureds' weak bargaining positions by delaying settlement and payment of claims, "with no more penalty than interest on the amount owed" under the contract. *Arnold*, 725 S.W.2d at 167.

Accordingly, Defendant zealously overreaches when it argues that there can be "no extra-contractual cause of action at this point" based on the UM/UIM claim (see Section 6.1 of Defendant's MSA, at page 7). The *Brainard* decision, which is essentially the entire basis for Defendant's MSA and MPO, says no such thing. It discussed nothing more than whether attorney's fees could be awarded under the breach of contract provisions set forth in Chapter 38 of the CPRC. It made no reference whatsoever to bad faith or statutory claims under the Texas Insurance Code. All of Plaintiff's above-cited Texas Supreme Court case law makes clear that such claims may proceed irrespective of whether a technical breach of the contract has occurred.

E. There are Clear Examples of Defendant's Bad Faith / Statutory Violations

Plaintiff has alleged various grounds of bad faith / statutory violations against Defendant

in this lawsuit, and can convincingly explain to this Court why those claims are viable and ripe for adjudication now, even if it should find Defendant's contractual duty to pay underinsured motorist benefits has not been triggered under Defendant's expansive reading of *Brainard*.

In the first place, Plaintiff has alleged various grounds of bad faith pertaining to Defendant's failure to investigate and pay on his comprehensive / collision claim for property damage and related losses, e.g., loss of use. As Plaintiff has explicitly alleged in Section VIII of his Original Petition, he suffered property damage to his truck in the collision that was estimated by two repair shops to be between $6,000.00 and $8,000.00 to fix. When his efforts to get this amount from the liable third party's insurance carrier were met with substantial delay and resistance, Plaintiff turned to Defendant, his own carrier, for payment under the comprehensive / collision coverage portion of the insurance policy. Plaintiff's entitlement to this coverage did not in any way rely upon a judicial finding of liability or damages by the third party tort-feasor. However, Defendant unreasonably denied, failed, and refused to pay for Plaintiff's property damage, as a result of which Plaintiff suffered additional damages, i.e., loss of use, for the many, many months during which his truck was inoperable. As Plaintiff further alleges, Defendant did not even send out an appraiser to assess the damage itself, and instead relied upon the opinions of a purported accident reconstruction expert who had been retained by the third party's insurance carrier. Defendant's agent also shockingly accused Plaintiff in a telephone conversation of being some type of crook or scam artist, and claiming damages not caused in the collision. This was even after Plaintiff's counsel sent copies of the signed statements of three independent, neutral eyewitnesses to the collision, all of whom refuted the absurd conclusions of the third party's accident reconstruction "expert" (who surmised that this must have been no more than a "rolling" impact at 5-10 miles per hour). This behavior on the part of Defendant is certainly in

bad faith and violates at least the following provisions of the Texas Insurance Code:

> It is an unfair method of competition or an unfair or deceptive act or practice in the business of insurance to engage in the following unfair settlement practices with respect to a claim by an insured or beneficiary:
>
> …[F]ailing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim with respect to which the insurer's liability has become reasonably clear….

Tex. Ins. Code § 541.060(a)(2).

> …[F]ailing to promptly provide to a policyholder a reasonable explanation of the basis in the policy, in relation to the facts or applicable law, for the insurer's denial of a claim or offer of a compromise settlement of a claim….

Id. § 541.060(a)(3).

> …[R]efusing, failing, or unreasonably delaying a settlement offer under applicable first-party coverage on the basis that other coverage may be available or that third parties are responsible for the damages suffered, except as may be specifically provided in the policy….

Id. § 541.060(a)(5).

> …[R]efusing to pay a claim without conducting a reasonable investigation with respect to the claim….

Id. § 541.060(a)(7).

> …[W]ith respect to a Texas personal automobile insurance policy, delaying or refusing settlement of a claim solely because there is other insurance of a different kind available to satisfy all or part of the loss forming the basis of that claim….

Id. § 541.060(a)(8).

Again, these bad faith / statutory claims are all centered on Defendant's handling of Plaintiff's comprehensive / collision coverage claim for property damage, and not on the underinsured motorist injury claim. Accordingly, even Defendant's incredibly strained and overreaching interpretation of *Brainard* will be of no help to Defendant here, as the comprehensive / collision claim does not involve any need for a finding, judicial or otherwise, of third party liability.

Secondly, even on the underinsured motorist injury claim, Plaintiff can and will assert the following bad faith / statutory violations, irrespective of whether contractual duties have been triggered or breached under *Brainard*:

(1) Defendant has forced Plaintiff to comply with contractual provisions of the insurance policy, and is now turning around and asserting Plaintiff's compliance with the contract against him, as grounds for not having to pay under the contract. Specifically, Plaintiff again refers the Court to Defendant's last pre-litigation correspondence sent to Plaintiff's counsel, on November 5, 2010. As the Court can see, in the last full paragraph of that letter, Defendant states: "Additionally, this is to confirm that we have given permission for Mr. Duncan to settle his claim with the tortfeasor for his policy limits." *See* "Exhibit A," attached hereto. Defendant requires by contract that Plaintiff seek its permission and consent in order to obtain the policy limits which were offered by the third party liability insurance carrier, on the grounds that Defendant's rights may be 'prejudiced' if Plaintiff settled without Defendant's consent. Only once Defendant gives its consent can Plaintiff proceed to obtain the badly needed funds (i.e., third party policy limits) to begin compensating and reimbursing his damages (e.g., outstanding medical expenses and lost wages, not to mention pain and suffering and physical impairment). Knowing full well that Plaintiff was badly in need of such funds (Plaintiff sent Defendant complete and detailed proof of loss, i.e., medical records, bills, wage documentation, and other documents in support of his damages, on October 14, 2010), Defendant gave written permission for Plaintiff to obtain those third party funds, and now has the utter audacity to argue, in its

MSA and MPO, that because there is no "judicial finding" of the third party's liability and damages (i.e., because Plaintiff settled, and quite reasonably did not waste another year and a half going to litigation against the third party when the third party's policy limits were already being offered), Plaintiff is now prevented from asserting an underinsured motorist claim against Defendant. This is duplicity and bad faith of the worst sort, and amounts to enticement, entrapment, and unfair claim settlement practices of the precise sort contemplated in the Texas Insurance Code. For example, "misrepresenting to a claimant a material fact or policy provision relating to coverage at issue." Tex. Ins. Code. § 541.060(a)(1) (since Defendant completely failed to disclose that, upon properly seeking Defendant's permission and obtaining the third party policy limits, Plaintiff would now be unable to pursue an underinsured motorist claim without filing suit, going to trial, and obtaining a judgment against the third party).

(2) Defendant has also engaged in the following bad faith: "failing to promptly provide to a policyholder a reasonable explanation of the basis in the policy, in relation to the facts or applicable law, for the insurer's denial of a claim or offer of a compromise settlement of a claim." *Id.* § 541.060(a)(3). Nowhere in Defendant's November 5, 2010 letter did Defendant state or in any way imply that Defendant's decision not to pay on the underinsured motorist claim had anything to do with Plaintiff not obtaining a judgment against the third party; quite the contrary, Defendant's explanation was entirely different to the point of being duplicitous. It based its decision entirely on what its determination of the "settlement value" of Plaintiff's claim was. *See* "Exhibit A," attached hereto.

> Defendant is obligated, at minimum, by the Texas Insurance Code, to deal with Plaintiff in good faith and be forthright in explaining to all its insureds what the consequence is of certain decisions, e.g., settling for the third party policy limits. It must also disclose the basis for why it believes it is not obligated by law (citing and explaining *Brainard*, if necessary) to pay anything on Plaintiff's underinsured motorist claim at this time. Defendant has completely failed to deal with Plaintiff forthrightly (as evidenced by comparing its November 5, 2010 correspondence with its altogether different position taken in the MSA and MPO), and should be held to have engaged in bad faith for these reasons as well.

F. Plaintiff's Claim for Attorney's Fees Can Proceed

Defendant dedicates an entirely separate section to its argument that Plaintiff cannot make a claim for attorney's fees at this time (see Section 5 of Defendant's MSA, at page 6). Plaintiff will briefly reiterate the arguments that he has already made in Section C, above. *Brainard* considered only whether attorney's fees could be awarded on an underinsured motorist claim under the analysis of Chapter 38 of the CPRC:

> Attorney's fees are recoverable from an opposing party only as authorized by statute or by contract between the parties. Chapter 38 of the Civil Practice & Remedies Code permits an insured to recover attorney's fees incurred in a successful breach of contract suit against the insurer unless the insurer is liable for the fees under a different statutory scheme. **Because no other statutory scheme applies**, Brainard seeks to recover the fees under Chapter 38.

216 S.W.3d at 817 (emphasis added).

Again, the *Brainard* court was not presented with any arguments by the plaintiff under the Texas Insurance Code, because that code most definitely provides a "statutory scheme" for attorney's fees to be recovered against an insurer:

> A plaintiff who prevails in an action under this subchapter may obtain the amount of actual damages, plus court costs and reasonable and necessary attorney's fees.

Tex. Ins. Code. § 541.152(a)(1) (emphasis added).

> If an insurer that is liable for a claim under an insurance policy is not in compliance with this subchapter, the insurer is liable to pay the holder of the policy or the beneficiary making the claim under the policy, in addition to the amount of the claim, interest on the amount of the claim at the rate of 18 percent a year as damages, together with reasonable attorney's fees. If a suit is filed, the attorney's fees shall be taxed as part of the costs in the case.

Tex. Ins. Code. § 542.060(a)-(b) (emphasis added).

Plaintiff will not further burden the Court by regurgitating the exact same arguments and analysis here that are already presented in Section C, above. Suffice it to say, Defendant is flatly wrong that Plaintiff can assert no claim for attorney's fees at this time.

G. "Abating" Plaintiff's Claims would be Burdensome and Wasteful

Here, we come to the real crux of Defendant's position, and its real motivation for seeking to abate and postpone discovery and litigation of almost all of Plaintiff's claims in this lawsuit. Defendant desires to force Plaintiff to have to litigate this case twice, spend twice the amount of time, attorney's fees, and court costs, and engage in essentially the same discovery twice, to cripple his case and potential for recovery against Defendant.

The fact is, even if the Court decides to "sever" Plaintiff's claims, there is no reason in the world to "abate" some of them. Abating discovery on a great deal of Plaintiff's case would require undue burden on Plaintiff and would result in a judicially wasteful farce. The Texas Supreme Court has, again, spoken eloquently and definitively on this very issue: "[W]e also disagree with Liberty National's argument that our decision in *Stoker* mandates that the trial court abate a severed bad faith claim until it renders final judgment and perhaps until all appeals have been exhausted on the contract claim." *See Akin*, 927 S.W.2d at 630-31.

Appeals courts have also followed this ruling: "[T]here is no reason to require that all activity on the extra-contractual claims cease pending a final resolution of the contract claim, nor any requirement that the contractual claim be tried first." *See Texas Farmers Ins. Co. v. Cooper*, 916 S.W.2d 698, 701 (Tex. App.—El Paso 1996, no writ). That court went on to discuss the undue burdens, waste, and loss of evidence that would ensue:

> The parties' ability to make full, complete discovery, the availability of witnesses and documents, and the expense and delay resulting from an abatement must all be considered by the trial court in determining whether abatement is the best course at any given point in the proceedings.

Id. at 702.

In its MSA and MPO, Defendant makes much of how it will serve "efficiency" and "judicial economy" to abate almost all of Plaintiff's claims, arguing that "if" Defendant succeeds on one set of claims (a presumptuous premise, indeed), it will render other claims moot. However, the above appeals court easily saw through this kind of ruse in another uninsured motorist case:

> [E]ven assuming that Texas Farmers prevails on the contract claim (which is certainly not foregone) this is only one aspect of judicial economy. Other features of that consideration weigh against abatement now. For example, as mentioned above, if discovery in the extra-contractual case is stayed until the uninsured motorist claim is final, years may pass. Witnesses may die or disappear, files may be lost, and memories will undoubtedly fade. Rather than minimizing pretrial efforts, abatement may require that discovery be conducted twice, as the carrier may successfully argue it initially prepared for trial only on Kidd's contractual claim, not his extra-contractual causes. Moreover, it is possible that the entire lawsuit, contractual and extra-contractual, is subject to disposition before trial (summary judgment on limitations or dismissal for lack of personal jurisdiction may ensue, for two examples). Numerous pretrial rulings may effect both contractual and extra-contractual claims. Thus, **refusing to abate may enhance rather than diminish judicial efficiency** during pretrial proceedings.

Id. (emphasis added).

It is not difficult to see that the waste, loss of evidence, and extra expense to Plaintiff in making duplicative discovery efforts, are precisely what Defendant is aiming at in the present case.

Abatement of Plaintiff's claims benefits only Defendant; not this Court, not Plaintiff, not the witnesses (almost all of whom would essentially be the same, and who should not be forced to be deposed once on one limited set of facts, and then again, a year or two later, on another broader set), not anybody else. If this Court exercises its discretion and properly denies Defendant's motions, then all the issues in this case can be resolved in a single trial, before a single jury; Defendant will suffer no prejudice thereby. However, to grant Defendant's motions would greatly handicap Plaintiff in the pursuit of discovery, burden him with twice the litigation costs, and waste the Court's and witnesses' time and resources.

H. Defendant's MPO, which Recycles All of the Same Arguments, is Frivolous

Defendant's concurrently filed Motion for Protective Order (MPO) seeks to allow Defendant to avoid responding to Plaintiff's written discovery, and relies on all of the same groundless arguments that Plaintiff has thoroughly addressed and refuted above. It is a waste of judicial time and resources to force Plaintiff to engage in two sets of litigation, two sets of discovery (both written and oral), and to burden witnesses with two sets of subpoenas, depositions, and/or trial appearances.

Furthermore, the very notion of a "protective order" being invoked by Defendant is frivolous. A protective order is a serious judicial remedy meant to, e.g., prevent the disclosure of highly sensitive, confidential, proprietary information, such as in a patent or trade secret lawsuit. It can also be invoked to prevent disclosure of attorney-client privileged information or attorney work product, which are also inherently highly sensitive and must be protected. But Defendant raises no such concerns in its MPO whatsoever, and merely relies on all the arguments already addressed above, in its attempt to be "protected" from responding to Plaintiff's legitimate written discovery requests. For Defendant to seek a "protective order" under these circumstances seems

a particularly outlandish request, a mockery of the important circumstances under which protective orders must be legitimately enacted, and a frivolous waste of the Court's time.

Finally, Plaintiff would point out that Defendant has also overreached in its MPO, by claiming that any of Plaintiff's discovery pertaining to breach of contract, extra-contractual claims, or claims handling are inadmissible and irrelevant in the present suit (see Section IV of Defendant's MPO, at page 3). Included in that discovery are requests pertaining to Plaintiff's comprehensive / collision coverage claim (and Defendant's contractual breach and bad faith handling of that claim), a claim which not even Defendant's hyper-expanded reading and interpretation of *Brainard* can touch. Defendant's reliance upon *Brainard* applies only (if it even applies at all) to the underinsured motorist injury claim. There is nothing at all in Defendant's MPO to explain to this Court why it should be "protected" from discovery on the breach of contract and Texas Insurance Code violations pertaining to its handling of the comprehensive / collision claim.

Plaintiff respectfully urges this Court to simply do away with all such pointless delay tactics, and deny both of Defendant's motions, i.e., the MSA and MPO, in their entirety.

III.
CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that Defendant's Motion for Protective Order, and Defendant's Motion to Sever and Abate, both be denied in all respects, and that Plaintiff have such other and further relief to which the Court finds him justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document has been served upon the following counsel of record, by the method indicated, on this 30th day of December, 2010, pursuant to the Texas Rules of Civil Procedure:

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