

## DISPUTES OVER UM CLAIMS ARISE OUT OF CONTRACT, ALLOWING A COURT TO AWARD ATTORNEYS' FEES

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*Assyia v. State Farm*

(Ct. Appeals, Div. One, March 22, 2012)

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An uninsured motorist (UM) injured Plaintiff Assyia, a passenger in a vehicle. State Farm insured both Assyia and her host driver. After the accident, Assyia fell, causing additional injuries. Assyia demanded the host driver's \$100,000 UM policy limits, plus her own UM policy limits of \$50,000. State Farm paid the host driver's \$100,000 UM policy limits, but determined that her claim was only worth another \$2,000, so paid only that amount from her own policy. Assyia sued State Farm for breach of contract, alleging it failed to adequately compensate her under the policy. She sought the balance of her UM limits, as well as costs and attorneys' fees. State Farm argued that Assyia was not entitled to fees because her action sounded in tort, rather than contract.

After filing her lawsuit, Assyia amended her disclosure statement to assert that her injuries from the subsequent fall were causally related to the automobile accident, and re-characterized previously-disclosed medical records from the fall as being related to the automobile accident. State Farm re-evaluated Assyia's claim and tendered the \$48,000 balance of her UM coverage.

The parties agreed to submit the question of Assyia's entitlement to fees, costs, and offer of judgment sanctions to the trial court. The court ruled that Assyia was the successful party to a dispute arising out of contract, and awarded her attorneys' fees and costs under A.R.S. § 12-341.01(A), which allows the award of fees to the prevailing party in a case arising out of contract. (The court denied Rule 68 sanctions). State Farm appealed.

The court of appeals affirmed, holding that the dispute over the value of a UM claim arises out of contract, and not tort. State Farm had argued that the dispute arose out of tort, because the purpose of UM coverage is to place the victim's insurer in the shoes of the tortfeasor, and the UM insurer is the functional equivalent of a liability carrier for the uninsured motorist. The court of appeals disagreed. It applied a "but for" test, reasoning that Assyia would not have had a claim against her insurer but for the contract between them. It therefore found that the UM tort was simply the event that triggered State Farm's duty under the contract, and so the dispute between Assyia and State Farm arose out of contract.

The court upheld the fee award against State Farm even though it had ultimately paid Assyia her full UM amount. The court said it was immaterial whether State Farm had actually breached its contract; as long as Plaintiff was the "successful party," Plaintiff may be awarded fees. The relevant question is whether the underlying lawsuit is a contested action arising out of a contract, not whether State Farm in fact breached the insurance contract. And a "contested action" is one in which a defendant appears and generally defends against plaintiff's claims and demands. Here, State Farm appeared in the lawsuit and denied liability in its answer. Even after it paid the UM balance, the parties continued to dispute whether an award of attorneys' fees was appropriate.

The court also rejected State Farm's attempt to limit the fee award on the ground that such an award would cause its payments to exceed Assyia's \$50,000 UM policy limit. Though there is a policy against awarding plaintiffs a windfall, fees are merely a reimbursement, and the total award may therefore exceed UM policy limits.

The court finally rejected State Farm's argument that Assyia could not be the prevailing party without a judgment or adjudication in her favor. Assyia was the successful party because she received a monetary judgment in a contested proceeding.