APRIL 2014

Contacts:

Matthew M. Haar
717.257.7508
mhaar@saul.com

Joseph C. Monahan
215.972.7826
jmonahan@saul.com

Amy L. Piccola
215.972.8405
apiccola@saul.com

Matthew J. Antonelli
202.295.6608
mantonelli@saul.com

A.J. Kornblith
202.295.6619
akornblith@saul.com

Patrick F. Nugent
215.972.7134
pnugent@saul.com

Meghan Talbot
215.972.1970
mtalbot@saul.com

Saul Ewing LLP

Insurance Practice

The Bad Faith Sentinel

Standing guard on developments in the law of insurance bad faith around the country

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Third Circuit Seeks Guidance from Pennsylvania Supreme Court Regarding Whether Insured Tortfeasor May Assign Bad Faith Claim to Injured Third Party

***Allstate Prop. & Cas. Ins. Co. v. Wolfe*, No. 12-4450 (3d Cir. Feb. 20, 2014)**

Third Circuit petitions Supreme Court of Pennsylvania to decide whether an insured tortfeasor can assign his or her statutory bad faith claim against an insurer to an injured third party.

On February 20, 2014, the U.S. Court of Appeals for the Third Circuit petitioned the Supreme Court of Pennsylvania to provide guidance on an important and unsettled issue of Pennsylvania law: whether an insured tortfeasor may assign a bad faith claim against an insurer under Pennsylvania's insurance bad faith statute, 42 Pa. Cons. Stat. § 8371, to an injured third party.

The underlying litigation arose out of an automobile accident in which Wolfe was injured. The defendant, Zierle, had an insurance policy with Allstate, which required Allstate to indemnify Zierle for bodily injury up to the policy limit of $50,000, but did not require Allstate to "defend an insured person sued for damages which are not covered by this policy."

Wolfe requested $25,000 in damages, and based on what Allstate perceived as Wolfe's "minimal medical treatment, the lack of out of pocket losses, and [Wolfe's] pre-existing injury," Allstate made a counteroffer of only $1,200-$1,400. Wolfe rejected the counteroffer and brought suit in state court. Thereafter, Wolfe learned that Zierle was intoxicated at the time of the accident. Wolfe amended his complaint to add a claim for punitive damages. Before trial, the court granted a motion *in limine* to admit evidence of Zierle's three prior DUI convictions and/or arrests. The attorney Allstate retained to defend Zierle asked Allstate if an increased settlement offer should be made, but Allstate refused to authorize a higher offer. The case went to trial, and Wolfe was awarded $15,000 in compensatory damages and $50,000 in punitive damages. Allstate paid the compensatory damages but refused to indemnify Zierle for any punitive damages.

In exchange for Wolfe's agreeing not to collect punitive damages from Zierle, Zierle assigned whatever rights he had against Allstate to Wolfe. Wolfe then brought suit against Allstate in state court alleging violation of Pennsylvania's bad faith statute, violation of Pennsylvania's Uniform Trade Practices and Consumer Protection Law ("UTPCPL"), and breach of the duty of good faith. Allstate removed the case to the U.S. District Court for the Middle District of Pennsylvania, and thereafter filed a motion for summary judgment, a motion *in limine* to exclude evidence of the punitive damages award, and a motion to dismiss the bad faith and UTPCPL claims. The district court denied each motion, and a jury found Allstate in violation of Pennsylvania's bad faith statute--awarding Wolfe $50,000 in punitive damages. Allstate appealed this award and the denial of its motions to the Third Circuit.

The Supreme Court of Pennsylvania has not yet decided whether a claim under Pennsylvania's bad faith statute is assignable, and there is conflicting precedent on the issue in both the courts of Pennsylvania and the federal courts within the Third Circuit. Pennsylvania law has long held that tort claims are not assignable. Yet, following enactment of Pennsylvania's bad faith insurance statute, one intermediate Pennsylvania court explicitly held that bad faith claims brought under the statute are assignable. *See Brown v. Candelora*, 708 A.2d 104 (Pa. Super. Ct. 1998). Nine years later, the Supreme Court of Pennsylvania held that an action under the bad faith insurance statute is a tort action subject to the ordinary two-year statute of limitations. Since then, federal district courts have rejected *Candelora* and held that claims under the bad faith insurance statute are not assignable since such claims sound in tort and in the nature of a penalty. Courts have explained the public policy against permitting assignment as preventing speculation or profiteering in litigation by individuals who otherwise have no interest in the claim. In *Candelora,* the Superior Court distinguished "judgment creditors" from an "injured plaintiff," indicating that assignments to the latter can be proper. Whether the distinction between injured third parties and others is legally relevant is an issue of state law, and part of the broader question of whether claims arising under Pennsylvania's bad faith insurance statute are assignable. Seeking guidance on this important and unsettled question of Pennsylvania law, the Third Circuit panel unanimously voted to petition the Supreme Court of Pennsylvania to resolve this question.

The Third Circuit's petition remains pending in the Supreme Court of Pennsylvania at Docket No. 23 MM 2014. The Supreme Court of Pennsylvania has not yet ruled on whether it will resolve this issue.

District of Colorado: Insurer Entitled To Summary Judgment on Bad Faith Claim Where Insured Repeatedly Failed To Provide Requested Information Necessary To Resolve Claim

***Keeney v. Auto-Owners Ins. Co.*, No. 13-CV-00796-RPM, 2014 WL 622509 (D. Colo. Feb. 18, 2014)**

District Court in Colorado grants defendant Insurer's Motion for Summary Judgment where Insured's failure to provide requested information to Insurer caused delay in ultimate denial of claim.

In 2010, Michael Day Keeney, while test driving a 1998 Harley Davidson motorcycle from the repair shop he owned, was struck from behind by a Jeep Grand Cherokee driven by an uninsured motorist. The impact caused Keeney to be thrown from the motorcycle. He was transported by ambulance to a hospital where he received treatment for his injuries. Keeney claimed that he suffered permanent physical impairment from the accident. The uninsured driver of the Jeep was found to be at fault for the accident.

The motorcycle was insured under an automobile insurance policy issued by State Farm, and included UM coverage with

limits of $200,000. Keeney was also an insured under a garage liability policy issued by Auto-Owners Insurance, which included UM benefits with limits of $750,000. The Auto-Owners policy, in exclusion 3.e, excluded from coverage injuries sustained by a person operating or occupying an auto without a reasonable belief that he was entitled to do so or by a person whose driver's license had been suspended or revoked. The Auto–Owners policy also contained a cooperation provision, requiring provision of requested documents.

State Farm determined that its policy was primary with respect to uninsured/underinsured motorist benefits. In November 2012, Keeney reached a policy limits settlement with State Farm. On November 28, 2012, Auto–Owners received notice from State Farm that it had settled Keeney's claim by paying the UM limits of the State Farm policy. On January 30 and 31, 2013, an Auto–Owners claims representative sent letters to Keeney's counsel requesting certain documents, including pre- and post-accident medical records and tax and employment records pertinent to Keeney's claim of lost wages. Auto–Owners made three more written requests for information on March 1, 19, and 28, 2013 – in those communications, the Auto-Owners representative informed Keeney's counsel that Auto–Owners needed the additional information before it could make an offer of settlement. Keeney did not provide the requested documents.

On March 28, 2013, Keeney filed an action seeking payment of UM benefits and damages for breach of contract, bad faith breach of insurance contract, and unreasonable delay/denial of payment of insurance benefits in violation of the state statute, C.R.S. §§ 10–3–1115(1) & 10–3–1116(1). At that time, Auto-Owners was continuing to investigate Keeney's UM claim and, in late June 2013, it obtained a copy of Keeney's motor vehicle records from the Colorado Department of Motor Vehicles. Those records showed that Keeney's driver's license had been suspended on the date of the loss, triggering the exclusion stated in paragraph 3.e of the UM Coverage Form. Auto-Owners informed Keeney that if he had been operating the motorcycle with a suspended license, coverage would be denied, and it requested clarification about Keeney's position on that issue. Auto-Owners also repeated its request that Keeney provide medical records and other information. Having not received clarification on the license issue or other requested information, Auto-Owners denied Keeney's claim for coverage on October 3, 2013 and filed a motion for summary judgment on all of Keeney's claims in the lawsuit.

In response, Keeney provided an affidavit claiming that he had a "reasonable belief" that he was entitled to operate a motor vehicle on the date of the accident. At a hearing on the motion, Keeney's attorney suggested that the DMV had erred by failing to reinstate Keeney's license before the date of the accident, but did not provide any supporting evidence. The court held that Keeney's response was not sufficient to overcome his burden on summary judgment. Plaintiff's "subjective understanding" about his license was irrelevant, because "the plain language of the exclusion" provides that UM benefits are not available to an injured person who was driving without a valid driver's license. Therefore, Keeney's affidavit did not create a triable issue of fact, and he did not submit any other evidence that would create a genuine factual dispute about the status of his license on the date of the accident.

Further, the court held that the statutory and common law bad faith claims for unreasonable delay both failed. The court held that the insurer did not unreasonably delay Plaintiff's claim. First, the claim was only triggered after the exhaustion of the primary UM coverage. Second, Keeney did not provide evidence to justify his lack of responsiveness to Auto-Owners' requests for information about his medical history and earnings. Because the record showed that Plaintiff failed to respond to Auto-Owner's repeated requests for information, both before and after the discovery that Keeney was driving on a suspended license, Keeney's bad faith claims failed, regardless of the fact that the denial letter was issued over three years after the accident.

Florida Court Of Appeals: Insured Who Settled Claim For UM Benefits Still Allowed To Add Bad Faith Claim Against Insurer In The Same Proceeding

***Safeco Ins. Co. of Illinois v. Rader*, No. 1D13-2659, 2014 WL 660204 (Fla. Dist. Ct. App. Feb. 21, 2014).**

After entry of partial summary judgment on UM claim, insured successfully moved to amend his complaint to add a claim for bad faith. On review, the appellate court held that the trial court's actions did not depart from the essential elements of the law in resolving UM claim and retaining jurisdiction over newly-added bad faith claim.

Earle Rader Jr. was in an automobile accident for which another driver was at fault. Rader had underinsured motorist ("UM") coverage from Safeco Insurance Company of Illinois ("Safeco") with a policy limit of $100,000. With Safeco's consent and waiver of subrogation rights, Rader settled his bodily injury claim against the other driver for that driver's policy limits of $25,000. On February 13, 2012, Rader filed a complaint against Safeco seeking UM benefits under his Safeco policy. He asserted that Safeco had tendered a settlement offer lower than the UM policy's limits even though the value of his claim exceeded the limits of the tortfeasor's coverage and his UM coverage combined.

Safeco failed to respond timely to Rader's complaint and defaulted. It finally responded on July 2, 2012, and the default was set aside. When Safeco responded, it indicated that it had tendered the $100,000 available under the UM policy to Rader. It claimed that this tender "operates as a confession of judgment as a matter of law" and that, under Florida law, the court was bound to enter judgment for Rader in the amount of $100,000. Further, Safeco asserted that the tender caused the court to no longer have jurisdiction over the case, because there were no further issues to decide.

On July 12, Rader filed a motion to amend his complaint to, among other things, add a bad faith claim. He contended that Safeco's assertion that it had already confessed judgment was a mere ploy to prevent the court from considering his bad faith claim and force him unnecessarily to file a separate action. Safeco opposed Rader's motion to amend and asked the court to enter a final judgment for Rader awarding him the $100,000 UM policy limit, asserting that: 1) a bad faith action is separate from the underlying UM action; and 2) absent a final judgment on the UM claim, the bad faith claim was not yet ripe.

The trial court noted that although Safeco was correct in its contentions, it was the frequent practice of the courts to allow an insured to amend its complaint to add a bad faith claim and then abate that claim until the underlying claim was resolved. The court therefore allowed the amendment. Moreover, because Rader had already settled with the underinsured tortfeasor and Safeco had already tendered the UM policy limits, the court held that partial judgment on the pleadings could be entered on the UM count for $100,000, the limit of the UM policy, once Safeco filed its answer to the amended complaint. Then, discovery on the bad faith claim could commence and the claim could proceed to trial. Importantly, the trial court decided that it would not enter an appealable final judgment until the bad faith claim was resolved.

Safeco attempted to remove the action to federal court, but the U.S. District Court for the Northern District of Florida held that the removal was untimely, rejecting Safeco's argument that the added claim for bad faith reinstated the 30-day removal period. Back in the state court, Safeco filed a notice of appeal of the trial court's order denying Safeco's motion to enter a final judgment.

The District Court of Appeal for the First District of Florida treated Safeco's appeal as a petition for writ of certiorari because the trial court's order was not appealable. To obtain a writ, the petitioner must demonstrate, among other things, that the lower court's ruling represented "a departure from the essential requirements of the law."

The District Court of Appeal held that the trial court had not departed from the essential requirements of the law by allowing Rader to amend his complaint to add a bad faith claim even though Safeco had already confessed judgment and tendered

the UM policy limit. The court found that Rader's settlement with the tortfeasor and Safeco's tender of the policy limit had the combined effect of causing Rader's bad faith claim to ripen, because at that point the necessary determinations of coverage and the insurer's liability had been made. Furthermore, Rader moved to add his bad faith claim before Safeco moved for a final judgment. Therefore, the trial court properly resolved the underlying UM claim while retaining jurisdiction over the remaining bad faith claim, and at no point was Safeco required to simultaneously defend both claims. For this and other reasons, the court denied Safeco's petition for a writ.

California Court Of Appeals: Discrepancy Between Insurer's Initial Repair Estimate And Actual Cost Of Repairs Did Not Constitute Bad Faith

***Meuser v. Allstate Ins.* Co., A136243, 2014 WL 802535 (Cal. Ct. App. Feb. 28, 2014).**

Court of Appeals of California finds no breach of contract or bad faith where actual cost of repairing fire-damaged home was higher than insurer's initial estimate and holds that an insurer does not assume unlimited liability by exercising oversight over repair efforts.

Robert and Patricia Meuser's (the "Meusers") Newark, California home was damaged in an accidental fire. Allstate Insurance Company ("Allstate") insured the home and contents for fire damage under a homeowner's policy. The policy included coverage for repair or replacement of the building structure, replacement of damaged or destroyed personal property, and reimbursement for temporary living expenses in the event of a fire. Following the fire, Allstate estimated the actual cash value ("ACV") of the structural loss for the Meusers' home at $125,000, and put the full replacement cost at $127,688.99.

The Meusers hired a general contractor from Allstate's recommended vendor program to repair the fire damage. The contractor agreed to repair the home in six months' time for approximately the amount of Allstate's repair estimate. Allstate issued payment to the Meusers totaling $125,000 and agreed to repay the depreciation when repairs were complete. During the repairs, issues arose between the Meusers and the contractor, who ultimately refused to continue work. Allstate wrote to the Meusers to inform them that the contractor was withdrawing from the job. The contractor agreed to refund $28,643.68 in payments it received for incomplete work, and to pay $10,340 to the Meusers for additional temporary living expenses occurred as a result of construction delays. After the contractor withdrew, Allstate made further payments (above the $125,000 of its initial estimate) and also reimbursed the Meusers for the amounts promised by the contractor, who had failed to reimburse them as promised.

Because of the construction delays, the Meusers filed suit against Allstate in Alameda County Superior Court. The Meusers' alleged causes of action included counts for breach of contract, bad faith, fraud, and violations for California's Insurance Code. Pursuant to California Insurance Code Section 2071, Allstate moved to compel appraisal of the Meusers' loss. While the appraisal was pending, Allstate made a supplemental payment to the Meusers for additional landscaping repair and damage to appurtenant structures, bringing Allstate's total payments under its structural coverage to $196,978.22. The appraisal panel assessed the repair cost of the structure at $209,189.54. Allstate subsequently paid the balance.

When the Meusers filed a supplemental complaint alleging additional wrongs by Allstate committed after the suit was filed, Allstate moved to strike the supplemental complaint and moved for summary judgment. The trial court granted both of

Allstate's motions and reasoned that there was no issue of material fact because Allstate had paid the Meusers all amounts due to them under the structure coverage of the policy and had fulfilled its obligation to provide coverage for personal property losses and temporary housing expenses.

On appeal, the Court of Appeal affirmed the trial court's decision. The Meusers argued that Allstate breached the contract and acted in bad faith by "constructively" invoking its option to undertake its own repair of the property and then failing to complete it, underpaying contents losses, and underestimating the cost of the structural repair. The appellate court rejected the Meusers' argument that Allstate elected to self-repair the property. First, the court noted that the Meusers failed to cite any legal authority recognizing a "constructive" election by an insurer to self-repair. The court reasoned that Allstate's actions in seeking an appraisal hearing and advancing the Meusers nearly $200,000 for structural repairs were inconsistent with any election to self-repair. While Allstate did monitor the repair efforts and paid some engineering consultant fees directly to avoid contractor overhead, the court held that an insurer that agrees to pay for repairs does not assume unlimited liability for their completion merely by exercising some oversight over how the money is being spent. The appellate court also held that as a matter of law, the mere fact that there was a discrepancy between Allstate's initial replacement estimates and the amount found after appraisal was insufficient to show that Allstate engaged in bad faith or fraud in handling the claim.

The appellate court also rejected the Meusers' contentions regarding personal property replacement. The Meusers claimed that Allstate failed to include shipping costs when it determined the ACV of contents covered by its personal property protection. The court explained that Allstate's refusal to pay shipping charges in advance of the purchase of replacement property was not a breach of its obligations or an act of bad faith. An insurer has no obligation to pay shipping costs unless they are actually incurred as a result of the actual replacement of destroyed property. The court reasoned that the trial court correctly found no triable issues of material fact arising from the Meusers' breach of contract and bad faith allegations and affirmed the judgment entered in Allstate's favor.

Baltimore, MD
500 East Pratt St.
Charles O. Monk, II
410.332.8668

Boston, MA
131 Dartmouth St.
Richard D. Gass
617.723.3300

Chesterbrook, PA
1200 Liberty Ridge Dr.
Michael S. Burg
610.251.5750
Nathaniel Metz
610.251.5099

Harrisburg, PA
2 North Second St.
Joel C. Hopkins
717.257.7525

Newark, NJ
One Riverfront Plaza
Stephen B. Genzer
973.286.6712

New York, NY
555 Fifth Ave.,
Michael S. Gugig
212.980.7200

Philadelphia, PA
1500 Market St.
Bruce D. Armon
215.972.7985

Pittsburgh, PA
One PPG Place
Charles Kelly
412.209.2532
David R. Berk
412.209.2511

Princeton, NJ
750 College Rd. E
Marc A. Citron
609.452.3105

Washington, DC
1919 Pennsylvania Ave, NW
Mark L. Gruhin
202.342.3444
Andrew F. Palmieri
202.295.6674

Wilmington, DE
222 Delaware Ave.
Wendie C. Stabler
302.421.6865
William E. Manning
302.421.6868