21st Annual Auto Law Update

THE LATEST IN BAD FAITH

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GENERAL BAD FAITH UPDATE

If No Coverage, Then No Bad Faith Claim

In their recent "non-precedential" decision (why do they mark them "non-precedential" on occasion?!) in the bad faith case of ***Yera v. Travelers Ins. Co., of Am.,*** 1398 EDA 2013 (Pa. Super. April 22, 2014)(Ford Elliott, P.J.E., Ott, J., Strassburger, J.) (Opinion by Ott, J.)(Concurring and Dissenting Op. by Strassburger, J.), the Pennsylvania Superior Court affirmed a trial court's finding that the homeowner's insurance carrier for the Plaintiff did not act in bad faith by waiting six (6) months to deny the Plaintiff's fire loss claim as there could be no bad faith claim where there was an underlying decision that the carrier need not afford any coverage under the policy in any event.

By way of background, the Plaintiff owned an apartment building that was insured by Travelers. The building was destroyed by fire. Travelers denied the claim because there was not automatic sprinkler system in the building at the time of the fire as required by a protective safeguard endorsement in the policy of insurance.

After the Plaintiff filed a lawsuit seeking to recover insurance benefits from Travelers under the policy and alleging bad faith, the trial court ruled that no coverage was required as the building did not have a sprinkler system as required by the terms of the insurance policy. Travelers was granted summary judgment.

On appeal, the Plaintiff argued that the trial court had erred because the policy provision was ambiguous and therefore unenforceable. Further, the Plaintiff asserted that Travelers' actions supported the Plaintiff's bad faith claims.

The Superior Court rejected the Plaintiff's arguments on appeal. The court found that because Travelers did not improperly deny the Plaintiff's claim under the policy provisions at issue, the general definition of bad faith was not met. Stated otherwise, the Superior Court more specifically ruled that Travelers' investigation practices did not result in an improper delay in the payment of the Plaintiff's claim because no payment was due under the application of the policy provisions to the facts presented. Accordingly, the lower court's decision in favor of the carrier was affirmed.

Assignment of Rights to Bad Faith Claim Permissible?

The Pennsylvania Supreme Court agreed to hear the appeal of the Third Circuit Court of Appeals for advice on the following important issue in the case of ***Allstate Prop. and Cas. Co. v. Wolfe***, No. 23 MM 2014 (Pa. April 24, 2014):

"Under Pennsylvania law, can an insured tortfeasor assign his or her bad faith claim against an insurer, under 42 Pa.C.S. § 8371, to an injured third party?"

By way of background, Judge John E. Jones, III of the U.S. Federal Court of the Middle District Court of Pennsylvania previously ruled in this case, at 877 F.Supp.2d 228 (M.D.Pa. 2012), that both the insured's bad faith claims and Unfair Trade Practices and Consumer Protection Law (UTPCPL) claims were indeed assignable.

In the underlying third party case, an Allstate insured defendant who was allegedly driving under the influence at the time of the accident, incurred compensatory and punitive damages as a result of a jury verdict. After that trial, the insured defendant assigned his alleged rights to sue the carrier for bad faith and violation of the UTPCPL to the plaintiff to pursue.

The federal trial court denied the carrier's motion to dismiss the claims presented and the case went up to the Third Circuit which has now tossed the issue over to the Pennsylvania Supreme Court for an analysis and decision.

Prima Facie Elements for Bad Faith Claim

In its recent November 1, 2013 Opinion and Order in the case **of *Grossi v. Travelers Personal Insurance Company***, 2013 Pa. Super. 284, No. 769 WDA 2012 (Pa. Super. Nov. 1, 2013 Bowes, Donohue, and Mundy, JJ) (Opinion by Mundy, J.), the Pennsylvania Superior Court affirmed in part, vacated in part, and remanded the case for entry of a corrected verdict in accordance with its Opinion in this bad faith litigation.

Among the issues reviewed by the Pennsylvania Superior Court were whether or not the Plaintiffs have met their burden of proving by clear and convincing evidence that Travelers had allegedly acted in bad faith under 42 Pa. C.S.A. §8371 in its handling of this underinsured motorist claim. The Court also addressed the validity of the entry of punitive damages against the carrier as well as the award of expert witness fees and costs of litigation under the bad faith statute.

In this *Grossi* opinion, the Superior Court again reviewed the principals of law pertaining to its review of a verdict in an insurance bad faith claim under 42 Pa. C.S.A. §8371. As such, this case represents this appellate court's latest pronouncement of the standard of review for a recovery in an insurance bad faith claim.

Applying the applicable standard of review to the case before it, the Pennsylvania Superior Court agreed with the trial court's findings that the carrier's establishment of a reserved amount of only $1,000.00 under the case presented was without any basis, thereby supporting the bad faith claims presented.

The Superior Court also faulted the carrier in its rejection of the Claimant's loss of future earnings claim given the record presented. The carrier is also faulted for delaying or postponing an independent medical evaluation of the Claimant while the carrier monitored the Claimant's third party claims. It is also noted that the carrier never secured a report from an economist even after noting a need to do so.

Overall, the Superior Court noted that, while the length of time the carrier took to investigate the claims presented was not *per se* bad faith, it was indeed a factor to be considered by the trial court in considering all of the circumstances of the bad faith claim. The Superior Court found that the factors reviewed by the trial court supported the trial court's conclusion that the Plaintiff had met their burden of proof of bad faith.

The court also found that the punitive damages award under 42 Pa. C.S.A. §8371 was not only permissible but was within the discretion of the trial court upon a showing of bad faith. The Superior Court found that the trial court's entry of punitive damages award was sufficiently supported by the record and the trial court's findings of fact. No abuse of discretion of constitutional impropriety was found in this regard. In this matter, the award of punitive damages by the trial court approximated to a ratio of punitive damages to compensatory damages of 4:1 or 5:1, depending upon the measure of compensatory damages utilized.

With regard to the final issue raised by the defendant carrier, the Superior Court agreed with the carrier's position that expert witness fees should not have been awarded under the allowance of an award for "costs" under the bad faith statute.

With regards to the issues raised by the Plaintiff on appeal, the Pennsylvania Superior Court in *Grossi* also revisited the issue previously raised in the case of *Marlette v. State Farm* as to whether the trial court erred or abused it discretion in calculating interest, or delay damages, based upon the $300,000 underlying UIM policy limits, rather than the $4 million dollar arbitration award entered.

The Superior Court followed the *Marlette* decision in this regard and determined that, in accordance with *Marlette*, the Plaintiff's recovery of delay damages under Pa. R.C.P. 238 is limited to the amount of the legally recoverable molded verdict as reflected by the amount insurance policy limits.

The Superior Court also noted that, under the language of the bad faith statute, 42 Pa. C.S.A. §8371, a trial court is permitted ("may") calculate interest upon an entire verdict as opposed to only the policy limits, but if it is not required to do so. Ultimately, the Superior Court found that the Plaintiff had not demonstrated that the trial court's award of interest in this matter on only the $300,000.00 UIM coverage limits constituted an abusive discretion under the case presented.

Motion to Dismiss

In a recent memorandum Opinion, the Eastern District Federal Court of Pennsylvania in ***Clark v. Progressive Advanced Insurance Company***, No. 12-6174 (E.D. Pa. April 26, 2013 Ludwig, J.) dismissed a bad faith claim in an underinsured (UIM) motorists case.

This case involved a bad faith claim filed under Section 8371 of the Pennsylvania Judicial Code and was essentially based upon the Plaintiff's claim of an inadequate offer by the insurance company in a UIM case. There were $300,000 in UIM limits available and Progressive made a settlement offer of $18,578.00.

The Plaintiff sued for bad faith by asserting that Progressive's settlement offer was unreasonable and represented a failure to make a good faith offer of settlement. The court noted that these allegations were legal conclusions by the Plaintiff and not facts presented in support of a bad faith claim.

After reviewing the record before it, the court determined that the facts pled were not sufficient to support a bad faith claim in this context. More specifically, the court found that the Plaintiff's allegations that the carrier had made a settlement offer that was not acceptable to the Plaintiff did not amount to bad faith under the statute. Accordingly, the claim for bad faith was dismissed without prejudice.

In his recent decision in the case of ***Pauling v. State Farm***, No. 1:13-CV-01348 (M.D.Pa. Sept. 26, 2013 Conner, C.J.), Chief Judge Christopher C. Conner denied a carrier's Motion to Dismiss a bad faith claim under 42 Pa. C.S. §8371.

This matter arose from an investigation of a motor vehicle accident in which the insured was allegedly the victim of a hit and run, i.e., an uninsured (UM) motorist benefits matter.

The Motion to Dismiss filed by the carrier was denied where there were allegations that the carrier refused to visit the accident scene and declined to seek out eyewitnesses who would have corroborated the insured's version of the events. The Plaintiff also alleged that the carrier actively worked against the insured by allegedly pressuring eyewitnesses into providing a false statement placing blame for the accident with the insured.

Believing that such allegations went beyond allegations of mere negligence on the part of the carrier, the court denied the carrier's motion to dismiss this bad faith claim and allowed the matter to proceed into discovery.

In the case of ***Schaffer v. State Farm***, No. 1:13-CV-01837 (M.D.Pa. Oct. 15, 2013 Rambo, J.), Judge Sylvia H. Rambo denied a motion to dismiss a UIM bad faith claim under 42 Pa.C.S.A. Section 8371.

The court found that the record before it contained potentially unacceptable delays in the carrier's acknowledgment of the insured's rights under the policy as well as with the payments of the UIM benefits. According to the court, the plaintiff alleged that 14 months passed without the carrier completing an evaluation and making and offer.

The court allowed the case to proceed into discovery after finding that the facts alleged in the Complaint indicated questionable investigative and communication practices, particularly when considering that the matter involved no questions of liability with respect to the underlying accident.

Excess Verdict Bad Faith Case

In a bad faith decision which was handed down back around the beginning of 2013 in the case of ***Dolph v. Ill. Nat'l Ins. Co.,*** NO. 3:12-2167, 2013 U.S. Dist. LEXIS 20158 (M.D. Pa. Feb. 11, 2013 Mannion, J.), Judge Malachy E. Mannion of the Federal Middle District Court addressed a motion to dismiss a bad faith claim that was filed after the entry of an excess verdict in an underlying motor vehicle accident litigation.

In this matter, the defendant insurance carriers were sued for bad faith and breach of contract by plaintiffs from an underlying tort suit stemming from injuries they sustained in a car accident.

The plaintiffs had secured an assignment of the right to sue for bad faith from the underlying defendant who had $50,000 in liability coverage but was hit with a jury verdict that amounted to a little over $1.9 million dollars. According to the Opinion, the underlying alleged tortfeasor defendant was allegedly driving under the influence at the time of the subject accident and died as a result of his own injuries from the accident.

The assignees filed suit against two insurers, the named carrier and another insurance company that claimed to be a holding company.

The assignees alleged that the insured had a contract of insurance with the second insurer, entitling the assignees to proceed with their bad faith and breach of contract suit against both carriers.

The second insurer filed a motion to dismiss, arguing that it is not an "insurer" under Pennsylvania's bad faith statute, but rather only a holding company that did not issue policies or collect premiums.

While Judge Mannion acknowledged that dismissal may be appropriate if that entity was not found to be an insurer, the court nevertheless denied the secondary insurer's motion because there were sufficient allegations in the Complaint asserting that an agent of both insurer-defendants handled the investigation of the assignor's claims following the underlying personal injury trial.

Allegations of Bad Faith in UIM Claim

In its recent decision in the case of ***Rowe v. Nationwide Insurance Company***, Civil Action No. 3:12-81 (W.D. Pa. March 20, 2014 Gibson, J.), Judge Kim R. Gibson of the Federal District Court for the Western District of Pennsylvania ruled on a Motion for Summary Judgment filed upon bad faith claims in a UIM contract.

On the insured Plaintiff's personal injury UIM claims, the carrier initially secured a copy of the police report, inquired as to the status of medical treatment, and spoke with the other driver's carrier regarding the claim. According to the Opinion, the UIM adjuster followed up with the insured's counsel for almost a year and a half, but was unable to fully evaluate the claim due to a lack of the complete medical file. At one point, the insured's counsel advised the UIM carrier

that even she was unable to estimate a value for the UIM claim until she received additional medical information.

Thereafter, when a chiropractor's report was produced, the carrier for the tortfeasor paid the $15,000.00 in bodily injury liability limits. The insured then turned to Nationwide as the UIM carrier and demanded an additional $313,500.00.

Nationwide conducted its own internal evaluation of the claims presented and concluded that the Plaintiff's claims did not reach a value in excess of the $15,000.00 bodily injury credit due to the UIM carrier. The UIM carrier indicated that it would continue to evaluate the claims with any new additional information provided.

Thereafter, the UIM carrier completed a Statement Under Oath, a records review, and an IME.

When the carrier offered $5,000.00 to settle the UIM claim, the counter demand was $275,000.00. The injured insured thereafter brought suit and the UIM claim eventually settled at $50,000.00, the amount of the UIM limits.

However, the statutory and contractual bad faith claims remained open. At issue before this court were cross Motions for Summary Judgment.

According to the Opinion, the basis for the Plaintiff's bad faith claims was the alleged violation of the Unfair Insurance Practices Act ("UIPA") for refusing to pay claims, not attempting to effectuate a prompt and fair settlement in good faith in a clear liability case, compelling the Plaintiffs to file a lawsuit to recover amount due under the policy, and for allegedly attempting to settle Plaintiffs' claims for less than what a reasonable person would believe he was entitled to recover.

On the contractual bad faith claim, the court in *Rowe* found that the Plaintiff did not show that the UIM carrier's conduct was unreasonable or negligent by clear and convincing evidence. The court noted a general rule that, while there may be generally no breach of contract claim where the UIM carrier pays the policy proceeds, an insured may be able to pursue a claim for bad faith related to the carrier's handling of the claim. As stated, the court found that the injured insured did not produce any clear and convincing evidence that the carrier's conduct was unreasonable or negligent.

In so ruling, the *Rowe* court stated that the fact that the insured disagreed with the carrier's claim evaluation was not a proper basis for a contractual bad faith claim where the insureds did not

show that the carrier did not breach some contractual duty. The court in this matter found that the UIM carrier demonstrated a reasonable basis for its conduct and, as such, summary judgment on the contractual bad faith claim was granted in favor in the UIM carrier.

On the statutory bad faith claim, the court noted that bad faith could include such conduct as an unreasonable delay in the handling of a UIM claim, a frivolous or unfounded refusal to pay, a failure to communicate with the insured, acting in a dilatory manner, extend settlement offers that bear no reasonable relationship to the insured's medical treatment and expenses, or conducting an inadequate investigation into the claims presented.

The court reiterated that clear and convincing evidence was required to support such claims.

The *Rowe* court also stated that, at the summary judgment stage on a statutory bad faith claim, the insured's burden is to meet this high level of evidence required. However, if the court found that a reasonable jury could find that the carrier did not have a reasonable basis for denying benefits under the policy and move, or recklessly disregarded this fact, summary judgment would not be appropriate.

Reviewing the evidence against this standard lead the court to also enter summary judgment in favor of the carrier in a statutory bad faith claim. Of note, is the court's finding that the Plaintiff's claims that the carrier failed to provide 30 days/45 day updates as required by the Pennsylvania Code, even if accepted as true, was not the type of negligence that amounted to bad faith in the context of this case where the record was otherwise replete with evidence of regular written and oral communications from the carrier to the insureds and their lawyers regarding the status and progress of the investigation.

In ***Strausser v. Merchant's Insurance Group***, Case No. 3:12-cv-1551 (M.D. Pa. April 7, 2014 Conaboy, J.), United States Federal Court Judge Richard P. Conaboy of the Middle District of Pennsylvania issued an Order denying a carrier's Motion for Summary Judgment in a UIM bad faith claim after finding issues of fact.

According to the Opinion, the insured complained that the carrier had requested 33 separate authorizations and tax returns in a sporadic fashion over a period of many months. The Plaintiff also complained that a psychologist who could not assemble the Plaintiff's treatment records because of computer malfunction was allegedly unreasonably subjected to a lawsuit by the carrier which resulted in a further delay in arbitrating the UIM claim. Moreover, the Plaintiff asserted that, despite an investigation that spanned over 4 ½ years, the carrier allegedly never obtained any evidence to support its position that the insured had been disabled before the subject accident.

The carrier countered with an argument that it investigated the UIM claim and discovered red flags in a form of a prior accident history and pre-existing financial and psychological problems. The carrier also stated that it ultimately agreed to arbitrate the UIM claim and promptly paid the award once it was rendered.

The insurance company additionally asserted that the 43 month time period between the insured's filing of the UIM claim and the entry of the award was allegedly largely the result of a refusal by one of the insured's medical providers to respond to a subpoena.

The carrier also asserted that there was a delay beyond its control in the form of personal issues for the mediator.

Finally, the carrier described the parties' inability to settle the matter over a disagreement over the value of the claims presented.

In his Opinion, Judge Conaboy observed that the arbitration award that was entered was almost four (4) times the carrier's best offer. The Court defined the ultimate question presented in this matter as whether, at some point before the entry of the arbitrator's award, did the carrier have enough information to comprehend that its final settlement offer was unreasonably low.

In its Opinion, the court acknowledged that the mere negotiation of a disputed claim does not qualify as bad faith, that the existence of a substantial discrepancy between the carrier's settlement offer and the amount that the carrier ultimately pays on a claim does not, in every circumstance, support a finding of bad faith, that it is not always bad faith for a carrier to rely upon the results of an independent medical examination, and that the mere fact that there was a substantial delay between the time the claim was filed and the time it ultimately resolved, in and of itself, does not necessarily indicate bad faith.

The court found that reasonable jurors could differ on the issue of whether or not the carrier was unreasonable to refuse to submit the case to mediation before obtaining a psychologist's records in the context of a case primarily involving physical injuries.

Judge Conaboy also felt that reasonable jurors could conclude that the carrier acted unreasonably in relying upon the Opinions of an IME doctor who never saw the insured Plaintiff until approximately five (5) years after the accident in question. The court also felt that the carrier's piecemeal request for 33 authorizations over a period of more than a year could be viewed as an effort to pressure the insured Plaintiff to accepting a settlement that bore no resemblance to the actual damages claimed.

In concluding his opinion, Judge Conaboy stated that his denial of summary judgment should not be viewed as an indication that the court thought it was likely that the Plaintiff would prevail at trial. The court reiterated that the Plaintiff was required to demonstrate the insurance company's alleged bad faith by the heightened standard of clear and convincing evidence and that the insurance company would have the benefit of that jury instruction at trial.

In his Opinion in the case of ***Kearney v. Travelers Insurance Company and the St. Paul Fire and Marine Insurance Company***, No. 2010-CV-8801 (C.P. Lacka. Co. Nov. 13, 2013 Mazzoni, J.), Judge Robert A. Mazzoni of the Lackawanna County Court of Common Pleas denied the Defendants' Motion for Summary Judgment in a bad faith claim pursued under 42 Pa. C.S.A. §8371 and arising out of the handling of the Plaintiff's underinsured motorist claim.

Judge Robert A. Mazzoni

Lackawanna County

According to the Opinion, after settling his third party claim in this tractor trailer accident involving two tractor trailers, the Plaintiff submitted a claim for underinsured motorist benefits to the Defendants.

In this matter, due to the fact that the carrier could not locate the relevant "signed down" form for the UIM coverage under the policy, the policy limits were asserted to be $1million in coverage rather than $35,000.00.

Thereafter, the Plaintiff continued to provide the carrier with medical documentation in support of the claims presented, including several IME reports that were generated during the litigation involving the third party tortfeasor. The Plaintiff also underwent a Statement Under Oath. According to the court's Opinion in *Kearney*, at some point during the litigation, the carrier's claims representative authorized its defense counsel to communicate to Plaintiff's attorney a settlement offer of $200,000.00.

However, this offer was never made because, in part, an argument was raised by the UIM defense counsel that the third party Release executed by the Plaintiff constituted a General Release which had the effect of releasing the UIM carrier as well. Upon receiving this opinion of the defense counsel, the claims representative for the Defendant UIM carrier directed the defense attorney to hold off on any settlement offers.

The parties thereafter exchanged legal arguments through correspondence over the parameters of the Release and over whether the Court or a panel of arbitrators had the authority to resolve the dispute.

Judge Mazzoni outlined in detail in his *Kearney* decision the extent to which the issues of the scope of the Release and the jurisdiction of the arbitration panel to decide the case was litigated by the parties before the Arbitration panel, in the Lackawanna County Court of Common Pleas ,and up to the Superior Court and back again, as well as in the Federal District Court for the Middle District Court of Pennsylvania.

After the Plaintiff ultimately prevailed in all of these separate court actions with repeated decisions that the third party Release did not bar the UIM claim, that the UIM Arbitration Panel had the authority to rule upon that issue, and that the UIM Arbitration award should be confirmed, the UIM carrier then proceeded to pay the Plaintiff the full amount of the net arbitration award together with interest.

The Plaintiff followed that payment with this breach of contract and bad faith action. After the bad faith action proceeded through discovery, the Defendant carrier filed a Motion for Summary Judgment.

In his Opinion, Judge Mazzoni provided thorough review of the current status of bad faith law in Pennsylvania. After applying that law to the case presented, the court denied the summary judgment motion.

In his Opinion, Judge Mazzoni noted that a significant part of the court's analysis in denying the motion for summary judgment involved the issues surrounding the carrier's repeated raising of the legal challenges of the scope of the Release and jurisdiction of the arbitration panel, the timing thereof, and whose decision (defense counsel vs. claims representative) it was to proceed with such arguments.

Judge Mazzoni found that issues of fact remained on the matters presented such that a trier of fact could conclude that the carrier acted in bad faith by raising allegedly patently inapplicable legal issues which were not supported of in law or in fact and which allegedly served no purpose but to delay the ultimate resolution of the claim.

The court also noted that, despite the carrier's claim of insufficient medical information, the Plaintiff claimed that, from the first medical records submission by the Plaintiff to the carrier, it took the carrier approximately 18 months to communicate a formal settlement offer.

Accordingly, based upon his analysis and after reviewing the record in a light most favorable to the Plaintiff as a non-moving party, Judge Mazzoni found that the there were genuine issues of material fact which precluded the court from granting the UIM carrier's request for summary judgment.

Federal Middle District of Pennsylvania Judge Malachy E. Mannion recently granted a motion for partial summary judgment in favor of the defense in a bad faith claim brought under 42 Pa.C.S.A. § 8371 arising out of an underlying UIM claim pursued by a limited tort plaintiff.

In the bad faith case of ***Miezejewski v. Infinity Auto Ins. Co.***, No. 3:12-1000 (M.D. Pa. Jan. 22, 2014 Mannion, J.) (mem.), the court granted a carrier's motion for partial summary judgment where the primary issue presented was whether it was bad faith for the UIM carrier to not include plaintiff's wage loss claim in its damage calculation.

The limited tort plaintiff also asserted that the carrier acted in bad faith by failing to review the first party benefits file, failing to request permission to speak with the plaintiff, failing to review pre-accident medical records, and failing to give any value to plaintiff's wage loss claim.

After reviewing the record before the court on the motion, Judge Mannion found that the plaintiff never demanded that defendant review the first party file and that the plaintiff never established what was in the file or how it would have affected the outcome. The court also noted that the insurer's failure to request permission to speak with the plaintiff was not bad faith as the insurer was aware of the plaintiff's position from regular communications with plaintiff's counsel.

The court noted that, under Pennsylvania bad faith law, there is no legal requirement that insurers conduct perfect investigations.

Ultimately the court ruled in *Miezejewski* that, based upon the case presented, the insurer had reasonable bases to make the increasing offers it made and to inquire further into plaintiff's prior medical condition and wage loss claim particularly where some of the medical records revealed pre-existing issues, and employment documents established that the plaintiff continued to perform her job one year post accident until being terminated along with four other workers.

Bad Faith Experts Allowed?

In his recent decision in the case of ***Monaghan v. Travelers***, No. 3:12CV1285 (M.D.Pa. July 16, 2014 Munley, J.), Judge James Munley bucked the recent trend of Pennsylvania court decisions holding that expert testimony is unnecessary in insurance bad faith cases by ruling that, under F.R.E. 702, each bad faith case should be decided on its own merits in determining whether such expert testimony would be beneficial in assisting a jury of lay people in understanding the issues presented.

In denying the defense motion in limine to preclude the Plaintiff's bad faith expert, the court deferred its decision on whether the Plaintiff's proposed bad faith expert testimony impermissibly addresses the ultimate issues presented. The court granted the defense the right to raise this objection at trial if necessary.

In his recent Opinion in the case of ***Scott v. GEICO***, No. 3:11-CV-1790 (M.D. Pa. Nov. 15, 2013 Mannion, J.), Judge Malachy E. Mannion of the United States District Court of the Middle District of Pennsylvania addressed a series of Motions In Limine filed the parties to preclude the introduction of various pieces of evidence at a bad faith trial.

Judge Malachy E. Mannion

Federal Middle District Court

More specifically, GEICO filed Motions In Limine to preclude the Plaintiff's bad faith expert witness from testifying, to preclude anticipated new testimony, to preclude evidence of alleged punitive damages, attorneys' fees, costs, interest, and GEICO's net worth, to preclude evidence of the arbitration award and post-arbitration memorandum, and to preclude evidence of claimed activity during and after the arbitration.

The Plaintiff filed a Motion In Limine to preclude any reference to settlement negotiations that occurred after the arbitration award. The court noted that the Defendant filed a Certificate of

Concurrence with regard to the Plaintiff's motion and, as such, the Plaintiff's motion was granted.

With respect to the issues raised by the defense, the court noted that, although the Plaintiff did not concur with the Defendant's Motion to Preclude Claim Activity that occurred during and after the arbitration, the Plaintiff did not file a Brief in Opposition. As such, that particular motion was deemed to be unopposed pursuant to the Middle District of Pennsylvania local rule 7.6 and was, therefore, granted.

Significantly, with respect to the remaining Motions In Limine, Judge Mannion granted the Defendant's Motion In Limine to preclude the Plaintiff's bad faith expert witness.

After reviewing the legal precedent on this issue from both the federal and state courts of Pennsylvania, including the recent cases of *Smith v. Allstate Insurance Company* and *Schifino v. GEICO* (both out of the Western District of Pennsylvania), Judge Mannion followed those cases and concluded that a bad faith expert was "unnecessary" as a "reasonable juror is capable of determining what the Defendant [insurance company] knew, how the claim was evaluated, and whether, in light of that information, the Defendant's actions constituted bad faith." See Op. at 8-9.

Also of note was the court's additional granting of the Defendant's Motion In Limine to preclude the introduction into evidence of the arbitration award and post-arbitration memorandum. However, the court denied that motion in part with respect to the introduction of the Defendant carrier's pain and suffering valuation of $219,000.00 contained in its arbitration memorandum as that information was relevant to the question of whether the carrier's previous, lower offers amounted to bad faith conduct.

"Bad Faith Set Up" Affirmative Defense

Federal Middle District Judge Richard P. Conaboy issued a ruling in the case **of *Shannon v. New York Central Mut. Ins. Co***., No. 3:13-CV-1432 (M.D.Pa. Nov. 20, 2013 Conaboy, J.), allowing an insurance company defendant in a bad faith case to move beyond the pleadings stage with its affirmative defense alleging the attorneys for the plaintiff in the underlying automobile accident litigation purposefully orchestrated a "bad-faith setup" in an attempt to garner a punitive damages award.

According to the Opinion, the insurance company defendant "define[d] this 'bad faith set-up' as 'a quick settlement demand, followed by a quick closing of the window before important information is provided so that any subsequent limits offers by the insurer are bemoaned as too late.'"

This case came before the court, in part, by way of a motion by the Plaintiff to strike certain allegations from Paragraph 120 of the carrier's Answer and Affirmative Defenses in the bad faith action.

More specifically, New York Central Mutual Insurance Company asserted in Paragraph 120 of its Answer and Affirmative Defenses that plaintiff's counsel in the underlying matter had engaged in a "bad-faith setup" by "making unreasonably early and/or accelerated time limit settlement demands, the actual goal of which was to make compliance with such demands impossible" and by "refusing to accept offers of the policy limits, making settlement of the underlying claim impossible."

As also pointed out by Mr. Needle in his article in *The Legal Intelligencer*, the insurance company also averred in Paragraph 120 that the plaintiff's counsel in the underlying car accident case made settlement demands beyond the maximum allowable contractual policy limit in an attempt to create "a pre-textual settlement demand which the defendant could not possibly satisfy consistent with its insuring obligation(s), and which the defendant was not required to satisfy, under the terms of the insuring agreement."

The carrier also asserted as part of its "bad-faith setup" defense noted in Paragraph 120 of its Answer and Affirmative Defenses that plaintiff's counsel attempted to "take unfair advantage of claims representatives through the use of intimidation and threat" and failed to provide records, evidence and other documentation that would have allowed the insurer to evaluate the plaintiff's injury.

In their motion to strike Paragraph 120, the plaintiff argued that the allegations contained therein constituted "scandalous and defamatory allegations" and further argued that such assertions were "inappropriate defenses not contemplated by Federal Rule of Civil Procedure 8(c)."

In his Memorandum Opinion, Judge Conaboy rejected these contentions of the Plaintiff, noting that Rule 8(c) states that a party must set forth affirmative defenses along with "'any other matter constituting an avoidance or affirmative defense.'"

In his ruling, Judge Conaboy stated, "The court finds that, for the most part, the allegations contained in Paragraph 120 would, if proven, assist in establishing an 'avoidance' under the terms of Rule 8 (c)."

While the court allowed the "bad-faith setup" defense to proceed beyond the pleadings stage in this federal court case, the judge did also state, in a footnote, that the insurance company defendant failed to cite any Pennsylvania appellate case law confirming the existence of a "bad-faith setup" defense was valid or could ultimately prevail in the litigation.

Notably, the court did also strike portions of Paragraph 120 in which the insurance company defendant generally asserted, without specific citation to any statutes or criminal code provisions, that the underlying plaintiff's attorney's actions amounted to violations of unspecified state and federal criminal statutes.

POST-KOKEN AUTOMOBILE LITIGATION MATTERS

Motion to Sever Bad Faith Claim

In his recent decision in the case of ***Comrie v. Atlantic State Ins. Co.***, PICS Case No. 14-096 (C.P. Monroe Co. May 29, 2014 Zulick, J.), Judge Arthur Zulick of the Monroe County Court of Common Pleas granted a UIM carrier's Motion to Sever and Stay the bad faith portion of the claims asserted in a post-Koken matter.

In *Comrie*, the Plaintiff filed a breach of contract UIM claim along with a companion bad faith claim following a motor vehicle accident.

In granting the Motion to Sever and Stay the Bad Faith Claim, the Court noted that, while a UIM claim is decided by a jury in state court, a bad faith claim is decided by the Court after a bench trial.

Judge Zulick noted that if the cases had been tried together, evidence pertaining to the allegations of bad faith in handling the UIM claim would not be relevant to a jury's determination of the UIM liability and damages claims. Judge Zulick more specifically stated that the handling of the claims presented occurred after the collision and had nothing to do with the collision itself. In addition to ruling that the UIM count would be severed from the bad faith count, Judge Zulick also held that discovery and trial of the bad faith claims would be stayed pending the settlement for verdict or further order in the UIM claim.

Discovery on Bad Faith Post-Koken Claim

In her decision in the Post-Koken case of ***Keefer v. Erie Insurance Exchange***, Civil No. 1:13-CV-1938 (M.D. Pa. March 7, 2014 Rambo, J.), Judge Sylvia H. Rambo of the Middle District of Pennsylvania Federal Court addressed the scope of allowable discovery in the context of a bad faith UIM claim.

With respect to reserves information in a UIM carrier's claims file, the court in *Keefer* found that the amount of reserves, if any, assigned to the insured's UIM claim by the UIM carrier should be produced in a bad faith case where the insured was asserting that that the insurer acted in bad faith during its claim investigation. Judge Rambo ruled in *Keefer* that a comparison between the reserve value of the claim and the insurer's actual actions in processing the claim could shed light on the insurer's liability under the bad faith statute. Thus, the reserve amount was deemed relevant or, in the alternative, evidence that could potentially lead to the discovery of other relevant information. In so ruling, the court also rejected the argument that the reserve information is protected from discovery by the work product doctrine.

On another issue of note, the insurer argued against the plaintiff's request that claims handling manuals be produced in this case where both the UIM claim and the bad faith claims were still pending.

The court in *Keefer* permitted the insured to inquire into the processes that the insurer used to investigate her claims. The court found that the allowance of discovery of the carrier's policies for handling claims was reasonably calculated to lead to information relevant to the bad faith cause of action.

In *Keefer*, the UIM carrier also opposed the plaintiff's request for information regarding its adjusters' impressions, conclusions, and opinions regarding the value and merit of the claim and their evaluations of the insured's demands and the insurer's offers.

The court noted that mental impressions and opinions of a party and its agents are not generally protected by the work product doctrine unless they are prepared in anticipation of litigation. Thus, "work product prepared in the ordinary course of business is not immune from discovery." The gravamen of a claim of work product protection necessarily requires an assessment of when litigation was anticipated, which, the court noted, is a determination that is not subject to a bright-line rule.

Judge Rambo found that, in this matter, the facts were not sufficiently developed yet to determine whether litigation was reasonably anticipated and, as such, the court deferred ruling on this discovery request for the moment.

In *Keefer*, the carrier also objected to the plaintiff's request for discovery regarding the adjuster's or supervisor's rationale behind the decision not to pay the Plaintiff's UIM claim. In light of the liberal scope of federal discovery allowed, and the fact that the reason for non-payment may be probative on the issue of whether insurer acted in bad faith in the handling of the UIM claim, the objection was overruled.

The court in this matter also noted that the UIM carrier could rely upon the work product doctrine to reject the plaintiff's request for the unredacted production of the carrier's entire claims file.

In another notable decision, Judge Rambo upheld the carrier's objection to the plaintiff's demand for information pertaining to unrelated bad faith claims against the insurer over the previous five years. The court found that past claims in that regard were irrelevant to the case at hand.

Discovery of Claims File

In her March 10, 2014 Opinion in the case of ***Shaffer v. State Farm Mutual Automobile Insurance Company***, Civil Action No. 1:13-cv-01837 (M.D. Pa. 2014 Rambo, J.), Judge Sylvia Rambo of the Federal District Court for Middle District of Pennsylvania issued a discovery Opinion in the UIM insurance bad faith context.

In this matter, the judge originally ordered the insurance company to submit unredacted versions of all of the redacted and partially redacted pages of the log notes for an *in camera* review by the court.

The court evaluated the redactions under the attorney work product privilege and Federal Rule 26(b)(3).

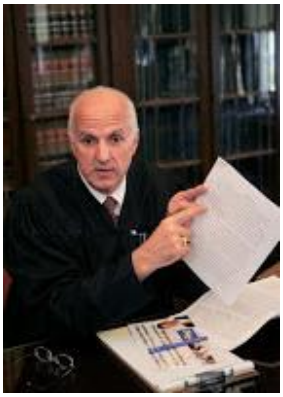
More specifically, with regards to the carrier's redaction of all reserves information, the court found that, because the Plaintiff had alleged that the carrier acted in bad faith during its investigation of the UIM claim, the amount set aside for reserves by the carrier could be relevant to the determination of whether or not the carrier acted in bad faith in processing the claim. Accordingly, the court allowed the disclosure of such information in this limited context.

With regards to the discovery of the insurance claims representative's impressions, conclusions, or opinions, the court initially noted that such information is generally not protected under the Work Product Doctrine unless such information is prepared in anticipation of litigation.

Accordingly, the test of whether the Work Product Protection applies requires an assessment of when litigation was anticipated. The court generally noted that this assessment is not subject to a bright line rule. The court did recognize that the Third Circuit of Court Appeals has indicated that "[p]rudent parties anticipate litigation and begin preparation prior to the time suit is formally commenced."

While this assessment of when litigation was anticipated is ordinarily a fact-dependent inquiry, the court here reviewed the claims file with the standard of review in mind and found that certain portions of the requested documents were indeed prepared in anticipation of litigation and should therefore be protected from any discovery.

In an appeal from a decision from the Lackawanna County Special Trial Master for discovery matters in the Post-Koken case of ***Marion v. Lukaitis and Motorists Mutual Insurance Company***, No. 2011-CV-7451 (C.P. Lacka. Co. Nov. 12, 2013 Minora, J.), Judge Carmen D. Minora of the Lackawanna County Court of Common Pleas affirmed the Special Trial Master's decision on a variety of discovery issues and denied the appeal of the Defendant, Motorists Mutual Insurance Company.



Judge Carmen D. Minora

Lackawanna County

This matter arose out of a July 30, 2011 motor vehicle accident during which the Plaintiff and her minor children were in a stopped vehicle when the tortfeasor Defendant, allegedly traveling at a high rate of speed and under the influence of alcohol, struck the Plaintiff's vehicle, allegedly resulting in injuries.

At the time of the accident, the tortfeasor Defendant had no automobile liability insurance. As such, in addition to suing the tortfeasor Defendant, the Plaintiffs also sued Motorist Mutual Insurance Company in support of an uninsured motorist benefits claim.

During the course of discovery, the Plaintiff filed a Motion to Compel against the Defendant, Motorist Mutual Insurance Company, alleging insufficient responses to Interrogatories and a Request For Production of Documents. The Plaintiff's Motion to Compel was granted by Order of Special Trial Master Burke, after which the Defendant carrier filed its appeal up to Judge Minora in the Lackawanna County Court of Common Pleas.

One of the central issues presented was the Plaintiff's discovery requests seeking disclosure of information relating to the Defendant carrier's evaluation and investigation of the claims for UM benefits, the terms of the policy under which the claim was made, and the nature of the claims handling after suit was filed. The Defendant carrier asserted that these discovery requests were not relevant and/or were barred by the attorney/client privilege, the work product protection, or Pa. R.C.P. 4003.3.

According to the Opinion, the Plaintiffs were more specifically requesting information regarding the records custodian for the insurance application in effect at the time of the accident, information regarding whether the policy, as originally issued, included a mandatory arbitration provision, information on the premiums paid, and information regarding whether or not the Defendant carrier maintained that the Plaintiff was at fault for the accident and/or otherwise barred from recovery.

The Defendant carrier responded by asserting that it had produced all relevant and discoverable pre-accident log notes, with appropriate redactions. The Defendant carrier argued that requiring the carrier to produce its post-suit log notes in this claim for UM benefits would violate the attorney/client privilege, the work product protection, or Pa. R.C.P. 4003.3.

The Plaintiff asserted that relevancy was not a basis for a privilege argument and that they were seeking information reasonably calculated to lead to the discovery of admissible evidence. The Plaintiff additionally argued that a claim against post-suit discovery was not a recognized privilege. The Plaintiff additionally confirmed that they were not seeking any attorney-client or work product privileged portions of the post-suit log notes.

After noting the Pennsylvania Rules of Civil Procedure generally permit discovery that is broad and liberal, the court denied the Defendant's appeal.

Judge Minora initially found that there was law on point allowing for the discovery of the insurance policy in question in both the Rules of Civil Procedure and under Pennsylvania case law.

As to the Plaintiff's request for information regarding the Defendant's investigation and evaluation of the UM claim, Judge Minora found that such information, including the identity of the records custodian of the insurance application, as well as the specific information related to the Defendant carrier's evaluation and investigation of the claim presented, was discoverable as such information pertained to matters stemming from the insurance investigators, and not Defendant's legal counsel. As such, the requested information was found not to fall under the attorney work product privilege.

In terms of the Plaintiff's request for production of post-suit claims log notes, the court noted that the Plaintiff had withdrawn its request for the production of documents requesting the Defendant carrier's impressions upon the merits of the UM claim as such discovery would violate Rule 4003.3. Rather, it was emphasized that the Plaintiff was seeking information regarding the methods the Defendant carrier utilized in arriving at its evaluation as well as information upon which individuals were charged with employing those methods.

Since this UM case involved a breach of contract action, the court found that the production request regarding how the Defendant carrier evaluated a claim, and thereby fulfilled its obligations under the contract in question, were relevant as such information was reasonably calculated to lead to the discovery of admissible evidence. As such, this discovery was also allowed.

Deposition of a Claims Representative

On October 4, 2013, President Judge Thomas F. Burke, Jr. of the Luzerne County Court of Common Pleas issued an Order in the case of ***Garrett v. Griffin and Erie Ins. Exchange***, No. 17274 of 2012 (C.P. Luz. Co. Oct. 4, 2013 Burke, J.) granting the Motion of Erie Insurance Company for a Protective Order against the Plaintiff's request for a deposition of that UIM carrier's claims representative in a Post-Koken automobile accident case.

On the same date, President Judge Burke, Jr. issued an Order in the separate Luzerne County case of ***Krzynefski v. Bish and State Farm***, No. 16643 of 2012 (C.P. Luz. Co. Oct. 4, 2013 Burke, J.) granting the Motion of State Farm Mutual Automobile Insurance Company for a Protective Order against the Plaintiff's request for a deposition of that UIM carrier's claims representative in a Post-Koken automobile accident case.

In a February 20, 2014 Order (with explanatory rationale in a footnote) in the case of ***Wagner v. State Farm Mut. Automobile Ins. Co***., No. 5:13 - CV - 06645 (E.D. Pa. Feb. 20, 2014 Sitarski, M.J.), Magistrate Judge Lynne A. Sitarski of the Eastern District Federal Court of Pennsylvania denied the Plaintiff's Motion to Compel and granted State Farm's Motion for a Protective Order to prevent the deposition of a State Farm claims representative and claims manager as requested by the Plaintiff in this Post-Koken UIM case.

According to the explanatory details provided by the court, the Plaintiff contended that the depositions of the claims professionals was necessary to enable the Plaintiff to meet his burden of proof at trial.

The Defendant carrier countered with a primary argument that information about the process of claims handling was not relevant in the Plaintiff's breach of contract claim particularly where no bad faith was being asserted. The defense additionally asserted that it would be unreasonable, inconvenient, and expensive to require the claims professionals to attend a deposition where the redacted claims file had already been produced by the carrier.

The Court found that that the Defendant carrier had demonstrated good cause for the issuance of a protective Order to preclude the requested depositions. As such, the carrier's Motion for a Protective Order was granted and the Plaintiff's Motion to Compel was denied.