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Commentary

Bad-Faith Litigation: The Next Frontier

By Evan L. Goldman

A Camden County jury awarded $1.5 million in May in an uninsured motorist's case against an insurance carrier. However, the carrier only had a $50,000 insurance policy covering the plaintiff/insured/policyholder. What complicated the matter was that the carrier offered the plaintiff only $6,000 to settle, even after three arbitrators had awarded the plaintiff the $50,000 policy.

One may wonder why the carrier made the plaintiff try the case when it was apparent that the injury was worth at least $50,000 and probably much more. The answer, due to the current state of law in New Jersey, is simple: There was nothing to prevent the carrier from lowballing the plaintiff, forcing the plaintiff to try the case and incur all trial expenses.

If the jury returned a verdict of less than $50,000, the carrier would have won. If the jury returned a verdict in excess of $50,000, the carrier still would have won, having to pay only the $50,000, yet earning interest on the $50,000 and making the plaintiff and his counsel try the case. Why can this happen?

New Jersey currently has a bad-faith law with teeth that applies to third-party suits, as enunciated by the Supreme Court more than 30 years ago in *Rova Farms Resort Inc. v. Investors Ins. Co. of America*, 65 N.J. 474 (1974). The Court held that the insurer may be liable for an excess judgment because it has a fiduciary relationship with the insured, and therefore must protect its insured since the policyholder is prevented from settling a suit on his/her own behalf.

But there has been no such law with regard to first-party suits. Although *Picketts v. Lloyd*, 131 N.J. 457 (1993), attempted to extend some bad-faith concepts to first-party claims, it was limited (at least by application) to a denial of first-party benefits, such as PIP or income continuation benefits. However, the Supreme Court also stated that if the claim is fairly debatable, the insured is not liable on the insurer's claim for bad-faith refusal to pay the first-party benefits. As a result, *Picketts* has had very little effect in practical terms on the continued delay or denial of first-party benefits.

Where does that leave the plaintiff/policyholder in the recent New Jersey case? Unfortunately, until the state Supreme Court or the Legislature does something to prevent insurers from forcing plaintiffs to jump through hoops merely to obtain the settlement to which their policy says they are entitled, insurers will merely roll the dice with the hope of obtaining a jury verdict of less than the policy.

While New Jersey has done nothing to prevent carriers from barring their own policyholders from obtaining benefits for which they have paid, Pennsylvania has had a first-party, bad-faith statute since 1990 and as recently as three years ago extended it to underinsured motorists' claims in *Bonenberger v. Nationwide Mutual Ins. Co.*, 791 A.2d. 378 (Pa. 2002). The courts in Pennsylvania have held that UIM (and by analogy underinsured motorists') cases are really first-party cases, and although they have components of third-party cases, this does not change the fact that the insurance company owes its insured a duty of good faith and fair dealing. (New Jersey has used similar language in the Unfair Claim Settlement Practices Act, N.J.S.A. 17:29B-1 et seq.)

As a result, in UIM cases, and based on the facts of a particular case, an insurer in Pennsylvania may be liable for bad-faith damages if it breached its duty of good faith and fair dealing.

With regard to the recent New Jersey case, it could be argued that the carrier, which for some strange reason did not believe its insured's claim was worth more than $6,000, while arbitrators thought the case was worth $50,000 and a jury thought the case was worth $1.5 million, would have thought twice about trying that case if it knew it could be hit for bad-faith damages.

Instead, not only did the carrier breach its duty to its insured, but it tied up the courts with unnecessary litigation. It is time for the courts or the Legislature to look into this situation and put an end to it. ■

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