

November 1, 2011

## **I. INSURANCE COVERAGE LITIGATION**

### **Phased Discovery Not Required to Protect Insurers Interest in Bad Faith Actions**

In *Craker v. State Farm Mut. Auto Ins. Co.*, 2011 WL 4565582 (W.D.Pa. September 29, 2011), the Crakers were involved in a car accident and received \$200,000 from the liable driver's insurance company. The Crakers filed a claim against their insurance company, State Farm, seeking to recover an additional \$200,000 each under the underinsured motorist ("UIM") coverage of their automobile insurance policy. State Farm refused to pay the Crakers the full value of their policy and the Crakers sued in the Court of Common Pleas of Allegheny County, Pennsylvania seeking to recover that amount. The Crakers also brought a claim under Pennsylvania's bad faith insurance coverage statute.

Plaintiff sought bad faith discovery during the pendency of both claims. Plaintiff filed a Motion to Compel State Farm to respond to the bad faith discovery requests. State Farm opposed the motion refusing to engage in any discovery that was directed to the bad faith claim until after the UIM claim was decided. According to State Farm, it would be irreparably prejudiced in its defense of the UIM claim if forced to disclose claim file materials and information regarding its mental impressions and evaluation of the Crakers' claim, which information was relevant only to the bad faith claim. Therefore, State Farm sought to sever and stay the bad faith claim while the underlying UIM litigation is pending.

The Court noted that although the parties debate whether or not the UIM claim and the bad faith claim should be tried together, bifurcation of the trial was not the "real question" being presented to the court. Rather, the court viewed the issue presented as to whether or not State Farm was entitled to a "phased discovery" plan pursuant to Federal Rule of Civil Procedure 26. The Court provided that while phased discovery is appropriate in federal court, in this case the parties' Rule 26(f) Report stated that discovery was not anticipated to be completed in phases. Based on this report, a single discovery deadline was set by the Court. The Court noted that State Farm's motion to sever and stay, which was actually a motion to conduct discovery in phases, was made twelve days after that original discovery deadline had passed. As a result, the Court found that State Farm's request for phased discovery was untimely.

Despite the Court's finding regarding the timeliness of the motion, the Court reviewed the merits of the Motion to Sever and Stay the bad faith claim and found that it would be inappropriate to postpone discovery on the bad faith claim until the UIM claim was resolved as that would delay the entire resolution of the case. The Court noted that an entirely new discovery plan, and discovery period, would have to be created after the UIM claim is decided by the jury. As such,

the court would be unable to seek an advisory verdict on the bad faith claim from the same jury that decided the UIM claim. In addition, proceeding as State Farm proposed would result in inefficiencies and increased costs for the parties. Some of the same witnesses would have to be re-deposed and different documents in the same files would have to be relocated and produced.

The Court found that State Farm failed to identify any benefit to proceeding as it proposed, other than protecting its interests by shielding potentially unfavorable evidence relevant to the bad faith claim from the jury deciding the UIM claim. The Court noted that there are other adequate procedures available in federal court, including staged trials and jury verdicts to address this concern.

## **II. GENERAL LITIGATION**

### **In Single Defendant Cases, Reinstatement of a Plaintiff's Complaint is Permitted Upon a Showing of Good Cause**

The case of *Baskett v. Kowkleung Cheung*, 422 N.J. Super. 377, 28 A.3d 1255 (A.D. Oct. 17, 2011), stems from an August 18, 2005, automobile accident. Just days before the expiration of the two-year statute of limitations, plaintiffs Regina Baskett (the driver), Diano Baskett (a passenger), and Patricia Crumidey (a passenger), filed a six-count complaint against a single defendant, Kwokleung Cheung (the other driver).

For reasons that are unclear, defendant was not personally served with process. Accordingly, approximately four months after the filing of the complaint, a sixty-day notice of future dismissal pursuant to Rule 1:13-7(a) was issued by the Law Division and sent to plaintiffs' designated trial attorney at the New Brunswick address indicated in the complaint.

It was later revealed during motion practice that the designated trial attorney actually worked elsewhere. The attorney who drafted the complaint worked in the New Brunswick office; the designated trial attorney worked in Trenton. The law firm had operational procedures to ensure that each location would forward to the other any necessary paperwork involving its clients' matters. Unfortunately, those procedures failed, as the designated trial attorney in Trenton never received the Rule 1:13-7(a) notice from the New Brunswick office.

Not having received the notice of future dismissal, plaintiffs' counsel did nothing on his own initiative to advance the case. Since defendant had never been served, there was no discovery to conduct. Similarly, there was no opportunity to enter default and apply for a default judgment. Instead, pursuant to Rule 1:13-7(a) plaintiffs' complaint was dismissed without prejudice. The record does not reveal what plaintiffs or their attorney did for the next two years.

Eventually, plaintiffs' attorney was replaced on May 19, 2010, by their current counsel. Immediately thereafter, defendant was served with the complaint, and on June 17, 2010,

plaintiffs' new attorney filed a motion to reinstate the complaint. Defendant opposed reinstatement and cross-moved to dismiss the complaint with prejudice.

Applying the standard of exceptional circumstances, which was never challenged by any of the parties, the motion judge ultimately denied the motion to reinstate the complaint and dismissed it with prejudice. The Law Division denied plaintiff's motion for reconsideration citing the exceptional circumstances standard.

On appeal, the Appellate Court Rejected the exceptional circumstances standard noting that according to Rule 1:13-7(a), in single defendant cases, reinstatement is permitted upon a showing of good cause. (The 2008 amendment of the Rule provides separate standards for cases with a single defendant and cases with multiple defendants. In multi-defendant cases, reinstatement within ninety days is permitted on a showing of good cause, but otherwise a party must demonstrate exceptional circumstances.) The Court explained the concept of good cause citing *Ghandi v. Cespedes*, 390 N.J.Super. 193, 915 A.2d 39 (App.Div.2007), for the proposition that "absent a finding of fault by the plaintiff and prejudice to the defendant, a motion to restore under the rule should be viewed with great liberality."

The Appellate Court found that defendant failed to demonstrate any prejudice whatsoever. On appeal, the most that defendant posited as prejudice are "[t]he potential unavailability of witnesses, the potential destruction or loss of evidence, lack of discovery from [p]laintiffs, [and] the lack of depositions and independent medical examinations." The Court did not find "a scintilla of evidence in the record to suggest that anything in this parade of horrors exists or is likely to come to pass, including the approach of the seven-year expiry of the maintenance of patient treatment records."

And, while the Appellate Court believed that plaintiffs' excuses for not exercising personal oversight were meager and incomplete, it found that in light of the good cause standard and lack of evidence of prejudice to defendant, "the courthouse doors should not be locked and sealed to prevent their claims from being resolved in the judicial forum."

The Appellate Court held that in light of these circumstances, the motion court misapplied both the law and its discretion in denying the motions to reinstate the complaint and for reconsideration. Therefore, the Appellate Court reversed the orders of the Law Division, reinstated the complaint, and remanded the matter for management and disposition of all issues.

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