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I. INSURANCE LAW

Court Dismisses Bad Faith Claim Based on Litigation Conduct

In *Homer v. Nationwide Mut. Ins. Co.*, 2016 U.S. Dist. LEXIS 114548 (W.D. Pa. Aug. 26, 2016), Homer was injured in a motor vehicle accident on May 24, 2008. He suffered a number of medical problems as a result of the accident. Homer eventually settled with the third-party driver. At the time of the accident, Homer was driving a car owned by his mother, who had Underinsured Motorist ("UIM") coverage though Nationwide up to $500,000 for bodily injury. Homer made a written demand for the full $500,000 to compensate him for the injuries he sustained. Nationwide offered $12,500, which Homer rejected, and the case proceeded to trial in the Court of Common Pleas of Allegheny County.

On June 1, 2015, while the trial was ongoing, Homer's counsel, and the parties signed, a Binding "High-Low" Settlement Agreement (the "Agreement"), which stipulated that Homer would receive a settlement payment within the range of $100,000 to $300,000, depending on the verdict of the jury. In addition to a monetary settlement within the agreed-upon range, the Agreement contained the following provisions that are the basis of the present case:

> 5. All claims for bad faith for acts or omissions occurring prior to the date of the execution of this Agreement, including all claims contained in GD No. 13-009777, are dismissed with prejudice and barred, released and controlled by this Binding High- Low Agreement.
>
> 6. Any claims for bad faith for acts or omissions occurring after the date of the execution of this Binding High-Low Agreement will not be barred by the Agreement.

On the same day the Agreement was signed, Nationwide introduced into evidence videotaped testimony of two medical experts during its case-in-chief. The following day, June 2, 2015, both parties gave closing arguments, and counsel for Nationwide referenced the testimony of the medical experts. Homer alleges that Nationwide knew these experts were biased and, thus, committed bad faith by offering their testimony at trial and relying on same during closing arguments. On June 2, 2015, the jury returned a verdict in favor of Homer for $1.61 million dollars. Two days later, Nationwide filed a motion to mold the verdict, seeking to have the Judge reduce the verdict to $300,000 and to dismiss Homer's bad faith claim for acts that occurred "as of June 1, 2015." In response, Homer objected to the wording of Nationwide's motion, arguing instead that given the Agreement, it should reflect "all claims for bad faith or acts or omissions occurring prior to June 1, 2015" be dismissed with prejudice. The Court of Common Pleas of Allegheny County ruled in favor of Homer and against Nationwide.

Homer filed the present lawsuit on September 10, 2015, alleging Nationwide acted in bad faith when it introduced the videotaped testimony of its experts at trial, referenced the experts' testimony during closing arguments, and filed the motion to mold with what Homer believes was inaccurate wording. Nationwide moved to dismiss on the ground that

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the Plaintiff could not rely upon litigation conduct as the basis for an insurance bad faith claim under Pennsylvania law. The court noted that that the case presented an issue of first impression with respect to litigation conduct in the context insurance bad faith allegations.

Nationwide took the position that there is no precedent under Pennsylvania law for litigation tactics to serve as the basis of a bad faith claim. It argued that allowing Homer's Amended Complaint to go forward would "open the doors for any insurer to be subject to a bad faith lawsuit for putting on a defense at trial and [would] allow[] plaintiffs to dictate defendants' trial strategy." Homer argued that courts in Pennsylvania have held that an insurer's conduct during the course of litigation may support a finding of bad faith.

The court's review found that Pennsylvania case law does not yield a hard and fast rule regarding what types of litigation tactics may serve as the basis for an insurance bad faith claim. Yet, some decisions indicate that certain acts committed during the course of litigation can constitute bad faith. O'Donnell v. Allstate Ins. Co., 1999 PA Super 161, 734 A.2d 901, 906 (Pa. Super. 1999). Courts are also mindful that all litigation is inherently adversarial and defendant insurers have a right to defend themselves in court. Therefore, state and federal courts in Pennsylvania have allowed bad faith claims for certain types of litigation conduct and not others

In other jurisdictions, courts have developed more comprehensive rules for dealing with bad faith claims premised on litigation conduct. In summary, the four approaches are: (1) most litigation conduct can constitute bad faith; (2) no litigation conduct can constitute bad faith; (3) only litigation conduct relating to settlement offers can constitute bad faith; and (4) litigation conduct can constitute bad faith but only in "rare cases involving extraordinary facts."

The court predicted that the Supreme Court of Pennsylvania would adopt the fourth approach described above, i.e., that evidence of litigation conduct can be admissible as evidence of bad faith but only in "rare cases involving extraordinary facts." In the Court's view, nothing that Homer alleged about the defense experts was at all rare, extraordinary, or egregious. His concerns were fully addressed by cross-examination and use of his own experts. As such, the court granted Nationwide's Motion to Dismiss the bad faith case.

New Jersey Supreme Court Joins Recent Trend Holding That Construction Defects Causing Consequential Damage Unambiguously Give Rise to an "Occurrence" and "Property Damage"

In *Cypress Point Condo Assoc. v. Adria Towers*, et al., 226 N.J. 403 (August 4, 2016), plaintiff sought coverage from the general contractor on the complex, Adria Towers LLC, for consequential damages caused by the subcontractors' faulty workmanship. According to plaintiff, the subcontractors, which handled all of the construction work, failed to properly install the roof, gutters, windows, doors and other components, allowing rain to seep into the buildings in the complex. Plaintiff sued the developer/general contractor, its Comprehensive General Liability ("CGL") insurance carriers, and various subcontractors whose work was allegedly defective.

The defendant carriers convinced the trial court that they were entitled to summary judgment because the subcontractors' faulty workmanship did not constitute an "occurrence" that caused "property damage" as defined by the 1986 ISO form CGL policy. The carriers effectively argued that because the damage arose entirely from faulty work performed by or on behalf of the developer/GC, such risk was not covered.

The Appellate Court reversed, finding that under the plain language of the policies, the unintended and unexpected consequential damages to the common areas and residential units constituted "property damage" caused by an "occurrence."

The New Jersey Supreme Court affirmed the Appellate Division. The court conducted a three-step analysis. First, the court examined the facts of the Association's claims to ascertain whether the policies provide an initial grant of coverage. If coverage is found, the second step is to consider any policy exclusions. If there are exclusions, the third step is to determine whether there are exceptions to the exclusions.

In the first step, the Court found that the Association's damages caused by water infiltration from rain after the completion of construction of the condo met the definition of "property damage." Therefore, plaintiff's consequential damages were covered "property damage" under the terms of the policies. The Court then found that there was an "occurrence" under the policies, which defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The Court reasoned that "[i]n any event, under our interpretation of the term 'occurrence' in the policies, consequential harm caused by negligent work is an 'accident.' Therefore, because the result of the subcontractors' faulty workmanship here . . . was an 'accident,' it is an 'occurrence' under the policies . . . ."

In the second and third steps of their analysis, the Court considered whether any policy exclusion precluded coverage and, if so, whether an exception to the pertinent exclusion applied to restore coverage. The policies contained the "your work" exclusion eliminating coverage for the cost of repairing damage to the contractor's own work. While the Court acknowledged that the "your work" exclusion "would seem to eliminate coverage for the water damage to the completed sections of" the condominium, the Court noted that the policies also contained an exception for the work of a subcontractor. The Court noted that the subcontractor exception to the "your work" exclusion was the result of an agreement between insurers and policyholders that CGL policies should provide coverage for damage caused by a subcontractor's bad work. Thus, the Court rejected the insurers' argument that faulty workmanship could not result in coverage.

II. PROFESSIONAL MALPRACTICE

Affidavit of Merit Standard Requiring Like-Qualified Credentials Limited to Medical Malpractice Actions

In *Meehan v. Antonellis*, 226 N.J. 216 (August 9, 2016), the plaintiff consulted the defendant orthodontist for treatment of sleep apnea. The defendant fitted the plaintiff with a dental appliance, intended to help reduce plaintiff's sleep apnea symptoms. The "plaintiff asserts that he expressed a concern that the device would cause his teeth to shift and that [the] defendant 'unequivocally assured' him that his teeth would not move." Two years later, the plaintiff, representing himself, "filed a complaint against the defendant alleging that [the] defendant's treatment caused chronic muscle pain and headaches, created large gaps between his teeth, and worsened his sleep apnea condition."

Plaintiff produced a timely affidavit of merit from Mark F. Samani, D.M.D., a licensed dentist with a specialty certificate in prosthodontics and expertise in sleep apnea treatment. He opined that defendant's failure to inform plaintiff of the risks associated with use of the dental device fell outside the standards of care for oral appliance therapy. Defendant filed a motion to dismiss plaintiff's complaint with prejudice, asserting that plaintiff was required to submit an affidavit of merit from a like-qualified dentist, which, in this case, was an orthodontist. The trial court granted defendant's motion and dismissed plaintiff's complaint with prejudice based on a ruling that plaintiff was required to submit an affidavit of merit from a practitioner with like credentials to that of defendant, as called for by the Patients First Act, N.J.S.A. 2A:53A-41, which plaintiff had not done. The Appellate Division affirmed.

The Supreme Court granted certification. The Court reversed the judgment of the Appellate Division holding that in professional negligence actions, other medical malpractice claims, “the affiant must hold an appropriate license and must demonstrate particular expertise in the general area or specialty involved in the action, but he or she is not required to possess credentials equivalent to those of the licensed professional defendant.” The Court concluded that “[n]either the plain language nor the purpose and history of the AOM statute or Patients First Act support importation of the like-credential standard governing physicians in medical malpractice actions to professional negligence actions governed by section 27.”

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