dri™ The Brief Case: DRI Committee News
July/August 2022 | Volume 1 Issue 5

First-Party Bad-Faith Lawsuits? New Jersey Expands Exposure to Insurers for Bad Faith Failure to Settle

By Kenneth Sharperson and Aaqib Khan
Edited by Robert F. Friedman

On Jan. 18, 2022, the New Jersey Legislature enacted the New Jersey Insurance Fair Conduct Act (the "Act"), which provides that, under certain circumstances, claimants may file a civil action against their own automobile insurance company. Prior to the Act, there was no remedy against insurance companies that demonstrated bad faith in the settlement of "first party" uninsured and underinsured motorist claims. The Act, however, provides for a new private cause of action for "unreasonable delay" or for "unreasonable denial" of an insured's uninsured/underinsured motorist ("UM/UIM") claim.

Specifically, the Act provides that claimants, defined as individuals injured in a motor vehicle accident and entitled to the uninsured or underinsured motorist coverage owed directly to or on behalf of the insured under that insurance policy, may file a civil action against their own automobile insurance company for an unreasonable delay of a claim for payment of benefits under an insurance policy or an unreasonable denial of a claim for payment of benefits under an insurance policy; or any violation of the provisions of the New Jersey Unfair Claims Settlement Practices Act ("UCSPA"), N.J.S.A. § 17:29B-4.

A claimant who establishes a violation under the Act is entitled to (1) "Actual damages" which "shall include, but need not be limited to, actual trial verdicts" (not to exceed three times the UM/UIM coverage); (2) Pre-judgment interest; (3) Post-judgment interest; (4) Reasonable attorney fees; and (5) Reasonable litigation expenses. The Act does prohibit rate increases as a result of compliance with the Act, however, the Commissioner of the Department of Banking and Insurance is permitted to make certain rate adjustments. Insurers are also forbidden from disseminating inaccurate or misleading information about the Act to policyholders or consumers. Notably, with respect to proof, the Act states that "the claimant shall not be required to prove that the insurer's actions were of such a frequency as to indicate a general business practice."

The Act does not define the term "unreasonable," and the courts will be left to interpret what constitutes an "unreasonable denial" or "unreasonable delay" of a claim. Under existing New Jersey law, a claimant pursuing a claim for the breach of the duty of good faith and fair dealing for failure to pay benefits or delaying payment must prove the insurer lacked a reasonable basis for its position and knew or recklessly disregarded its lack of a reasonable basis. The well-known "fairly debatable" standard established in Pickett v. Lloyd's, 131 N.J. 457 (1993) requires the insured to prove it is entitled to summary judgment as a matter of law on its claim for coverage before it can assert a bad

faith claim. The Act appears to create a different standard — whether the denial or delay was unreasonable — and it will be up to New Jersey courts to determine whether to apply the fairly debatable standard and the unreasonable standard in the same fashion. It is likely, however, that courts will adopt some version of the Pickett standard when interpreting the definition of "unreasonable" delay or denial of a UM/UIM claim as previously noted in Badiali v. New Jersey Mfr. Ins. Co., (which addressed the issue of whether an insurer was acting in bad faith when it rejected an arbitration award) and Wadeer v. New Jersey Mfr. Ins. Co., (which address the issue of whether an insurer's bad faith claim is barred by the Doctrine of Res Judicata).

The Act also does not set forth a statute of limitations period for its statutory bad faith claim. Common law bad faith claims in New Jersey have a six-year limitations period, which is the same as the limitations period for UM/UIM claims. The Act also does not state whether it applies to pre-suit or post-suit claims handling. As such, insureds may argue that a claim under the Act extends the statute of limitations period for all alleged bad faith actions and is not ripe until the conclusion of the underlying UM/UIM claim.

In comparison to other states, New Jersey's law is significantly pro-plaintiff. There are a variety of acts passed in all 50 states that detail each state's position on unfair claims settlement practices. Insurance Unfair Trade Practices Acts and Unfair Claims Settlement Practices Acts 50 State Chart: Overview (a 50-state survey containing a comprehensive list of statutes and regulations pertaining to unfair claims settlement practices acts, and any applicable private rights of action for an insurer's violation of statutes). For example, New York does not recognize any statutory authority which allows first-party bad-faith uninsured motorist/underinsured motorist claims. The lack of statutory authority and overall recovery for first-party bad-faith UM/UIM claims in New York constrains the overall volume of plaintiff action regarding bad-faith UM/UIM claims. Thus, New York law is not friendly towards first-party UM/UIM plaintiffs. New York's Unfair Claims Settlement Practice Act (§ 2601) allow the recovery of damages only for third-party claims.

Delaware also does not have direct statutory authority pertaining to first-party bad-faith UM/UIM claims. In Enrique v. State Farm Mutual Automobile Insurance Co. the state's Supreme Court held that a first-party bad-faith UM/UIM claim is grounded in contract law, because "there is no sound theoretical difference between a first-party insurance contract and any other contract." Further, the Court held, as the law now stands, "given the special nature of the insurance relationship, punitive damages are available as a remedy for bad faith breach of the implied covenant of good faith where the plaintiff can show malice or reckless indifference by the insurer." The damages recoverable in first-party claims are the insured's economic losses, the insured's emotional distress, attorney fees, and punitive damages. Thus, in the absence of relevant statutory law in Delaware, such first-party bad-faith claims are recognized only under the common law of the state, which provides certain remedies.

Pennsylvania has a very liberal approach towards plaintiffs that bring forth first-party bad-faith UM/UIM claims. Both the state's common law and statutory law support a plaintiff's ability to bring forth such claims. 42 Pa.C.S. § 8371 states:

[I]f the court finds that the insurer has acted in bad faith toward the insured, the court may take the following actions: award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%; award punitive damages against the insurer; assess court costs and attorney fees against the insurer.

New Jersey, when compared to its neighboring jurisdictions, is unequivocally plaintiff-friendly on the issue of first-party bad-faith UM/UIM claims. While New Jersey is not as favorable to plaintiffs as Pennsylvania because it has a more limited scope on which kinds of bad-faith claims are valid under the Act, Pennsylvania's law broadly encompasses acts of bad-faith in general and enumerates the available remedies for successful plaintiffs pursuing a claim for bad faith related to a UM/UIM claim.

The Act also makes New Jersey a more favorable jurisdiction than Delaware for bringing bad faith UM/UIM claims. Indeed, Delaware does not provide any statutory authority that allows a claimant to bring a first-party bad-faith UM/UIM claim because contract law applies.

Finally, New York law appears to be pro-insurer in the UM/UIM context because it only allows for recovery of damages by third parties for bad faith.

Insurers in New Jersey will need to have heightened awareness as first-party bad-faith UM/UIM lawsuits are likely to increase as a result of the Act. The enactment of the Act is bound to expose insurance companies in New Jersey to an increased volume of bad-faith UM/UIM suits.

Takeaways: Although insurance companies handle claims professionally, the Act will expose insurers to bad faith suits even because of honest mistakes. Significantly, the Act increases the exposure presented by UM/UIM claims threefold (where minimum coverage limits are typically only $15,000/$30,000), and insurers should carefully assess their internal processes for handling these types of claims. For example, insurers should make sure that a plaintiff's lawyer cannot characterize their internal goals, incentives, performance evaluations, or anything else as evidence that individuals who handle claims have a personal motive to deny them even when they should be paid. While having an internal goal of processing a certain number of claims should not be a problem, having an internal goal of denying a minimum number or a minimum percentage of claims might create liability under the Act. Further, to minimize the risk of bad-faith claims, insurers may want to consider policy language that requires all policy-related claims resolved by arbitration.

In sum, the Act will likely increase the volume of bad faith claims being filed, as well as significantly more bad faith claims requiring litigation through discovery and potentially

trial. Further, since there are significant undefined terms in the Act, there will also be a significant amount of litigation simply to have the courts define the applicable terms for a cause of action under the statute. Insurers should keep abreast of developments in this area and be prepared to take advantage of any helpful case law, or subsequent legislation, that may arise.

Kenneth Sharperson, Esquire, is Partner and Diversity, Equity and Inclusion Director at Weber Gallagher. He currently serves as national counsel for clients in sophisticated insurance coverage litigation and commercial litigation matters before federal and state trial and appellate courts. Kenneth has worked with a wide variety of insurance companies on issues related to the duty to defend, bad faith, number of occurrences, allocation and notice and trigger of coverage. He has also handled the defense of claims related to D&O insurance matters, mass tort and environmental issues, media, technology and cyber liability, residual value insurance, financial institution bonds, errors and omissions, employment practices liability insurance, property insurance and professional liability matters.

Aaqib Khan is a Law Clerk at Weber Gallagher.