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Alleged Bias in Peer Review Keeps Bad Faith Claim Alive

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U.S. Courthouse Correspondent

An allegation that an insurer used a biased peer review to deny medical coverage to an auto accident victim is enough to keep a bad faith claim alive because such a claim goes beyond the exclusive remedies provided by Pennsylvania's Motor Vehicle Financial Responsibility Law, a federal judge has ruled.

In his 23-page opinion in *Perkins v. State Farm Insurance Co.*, U.S. District Judge John E. Jones III of the Middle District of Pennsylvania found that the question of whether and to what extent MVFRL pre-emptis Pennsylvania's bad faith statute "has produced an array of conflicting opinions in Pennsylvania's state and federal courts."

Jones concluded that the "pivotal question" in the analysis is whether the plaintiff's allegations fall within the purview of MVFRL's Section 1797, thereby triggering its remedies and precluding any resort to the bad faith statute, Section 8371.

For plaintiff Robin Perkins, he found, some

Levy Angstreich

of the allegations of bad faith — such as State Farm's alleged failures to conduct a reasonable investigation or timely notify her of a denial of benefits — are "nothing more than a challenge to the denial of first-party benefits."



JONES

But Jones found that Perkins' bad faith claim was also premised on the allegation that State Farm used a biased peer review organization that does substantial work for State Farm and therefore has a financial interest in providing a biased determination.

The suit alleges that the peer reviewer has continuously provided negative peer review reports to State Farm and other insurers to maintain their business.

"These allegations of abuse of the [peer review] process are not within the scope of Section 1797," Jones wrote.

According to court papers, Perkins was struck by a car while she was walking in

a grocery store parking lot, and began receiving treatment from Marsha Kestin, a chiropractor.

Initially, State Farm paid for the treatment, but later cut off payments, citing a peer review report from Brian Tarola, another chiropractor, who opined that Kestin's treatment of Perkins was not reasonable or necessary.

Perkins filed suit alleging claims of breach of contract, bad faith, fraud and violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law.

State Farm's lawyers moved to dismiss all but the breach of contract claim, arguing that MVFRL provides the exclusive remedy for Perkins' claim.

Jones found the state Supreme Court has never addressed whether MVFRL pre-emptis Section 8371, and that the intermediate Pennsylvania appellate courts and the federal courts have reached conflicting decisions.

"Even the apparent split in authority is difficult to define and sometimes mischaracterized. The developing case law addresses conflicts between varied combinations of effective statutes under various factual situations

as well as other collateral issues. Thus, any inquiry must be fact-sensitive," Jones wrote.

The Superior Court first addressed the potential conflict between Section 8371 and MVFRL in its 1993 decision in *Okkerse v. Prudential Property and Casualty Insurance Co.*, reversing a lower court's decision to dismiss the bad faith claim because it was irreconcilably inconsistent with MVFRL.

But less than eight months later, Jones said, another panel of the Superior Court came to a different conclusion in *Barnum v. State Farm Mutual Automobile Insurance Co.*, upholding a trial judge's decision to dismiss a bad faith claim because the plaintiff had failed to seek reconsideration of the peer review report.

The state Supreme Court later decided that an insured is not required to seek reconsideration of an adverse peer review report before suing to recover medical benefits.

The 3rd U.S. Circuit Court of Appeals weighed in in 1994, Jones noted, with a decision in *Gentini Physical Therapy, and Rehabilitation Inc. v. State Farm Mutual*

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they will become more common in the nation's courtrooms.

Bad Faith

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Automobile Insurance Co. that predicted the holding in *Barrum* would ultimately be adopted by the state Supreme Court.

But that prediction proved to be shaky when, just two weeks later, the state Supreme Court reversed the Superior Court's decision in *Barrum* and remanded the case for further proceedings consistent with its decision in *Terminato v. Pennsylvania National Insurance Co.*

'DISSONANT PRECEDENT'

As a result, Jones said, trial judges in the state and federal courts are faced with a "tab-leau of dissonant precedent."

Some courts, Jones said, have continued to hold that Section 8371 and MVFRL are irreconcilable and that Section 1797 is the exclusive remedy for insureds alleging bad

put together a video that's inflammatory or very compelling," he said.

faith in the peer review process.

But other courts, Jones said, have taken a more nuanced view, holding that while Section 8371 is pre-empted by MVFRL where an insured challenges only the denial of first-party medical benefits, an insured may raise a Section 8371 claim based on allegations of bad faith conduct on the part of an insurer that goes beyond the scope of Section 1797.

Jones opted to follow the reasoning of 3rd Circuit Judge Marjorie O. Rendell who, while serving on the Eastern District of Pennsylvania, held in her 1996 opinion in *Schwartz v. State Farm Insurance Co.* that some bad faith claims may survive.

"Nothing in *Barrum* or *Gemini* suggests that a bad faith insurance coverage claim under Section 8371 is barred by Section 1797 where the peer review process set out in Section 1797, namely to determine the propriety of treatment and charges

Office and Clerk of Quarter Sessions have said they may have to lay off staff because of the cuts, which could affect the staffing of courtrooms and how quickly criminal cases move through the system.

The final impact of the budget cuts on the court system is still unclear as the leaders of the various offices negotiate with the Nutter administration about the cuts.

Other perennial public policy problems only worsened in 2008 and resulted in the initiation of litigation.

A group of Philadelphia criminal defense attorneys who represent court-appointed clients too poor to afford their

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therefore, is not actually followed," Rendell wrote.

Applying Rendell's logic, Jones found that Perkins had alleged a valid bad faith claim that goes beyond MVFRL's exclusive remedies.

"Perkins's allegations, although thin, suffice to state a claim under Section 8371, and therefore, State Farm's motion to dismiss Perkins's bad faith claim will be denied," Jones wrote.

Perkins is represented by attorney James R. Carroll of Carroll & Carroll in Athens, Pa.

State Farm is represented by attorney Moira Clare Duggan of Bennett Bricklin & Salzburg in Philadelphia. She could not be reached for comment.

(Copies of the 23-page opinion in Perkins v. State Farm Insurance Co., PICS No. 08-2090, are available from The Legal Intelligence. Please refer to page 9 for ordering information.)

own attorneys filed a federal lawsuit in Eastern District court challenging the constitutionality of the fee regime as inadequate to prepare fair defenses of their clients.

A group of Philadelphia inmates also brought a proposed class action against the city challenging overcrowded conditions in the Philadelphia Prison System.

The prison system has a design capacity of 6,800, and may hit 10,000 inmates in 2009.

Both cases are still pending.

MISCONDUCT ALLEGATIONS

Three Philadelphia judges got in *Year in Review* continues on 10



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