N.J. SUPREME COURT ISSUES COMPANION DECISIONS THAT IMPACT INSURERS' HANDLING OF UM/UIM MATTERS AND ADDRESS NEW JERSEY'S "FAIRLY DEBATABLE" BAD FAITH STANDARD

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The New Jersey Supreme Court recently issued companion decisions – *Badiali v. New Jersey Manufacturers Insurance Group* and *Wadeer v. New Jersey Manufacturers Insurance Group* – that impact insurers' handling of uninsured motorist ("UM") and underinsured motorist ("UIM") matters and address New Jersey's "fairly debatable" bad faith standard. The insurer won both cases, fighting off claims that it acted in bad faith in appealing arbitration awards in favor of the plaintiffs from underlying UM arbitrations. The news, however, is not 100 percent positive on these cases, as discussed below.

Badiali

The first case, *Badiali v. NJM*, involved an appeal by an insurer of a $29,000 UM arbitrator award that it shared with Harleysville Insurance. Harleysville paid its 50 percent share and ultimately a court affirmed the fact that NJM should have paid its 50 percent share. The plaintiff alleged bad faith that NJM did not have a legitimate basis to appeal the arbitration award to the Superior Court because its share of the award was under $15,000 and thus non-appealable under the terms of its policy. NJM relied on the fact that an unreported appellate division opinion in New Jersey, on nearly identical facts, had allowed NJM to appeal such a UM award on the theory that the total award was $29,000, even though NJM's share was under $15,000. NJM contended that this unreported opinion, as well as its policy language, permitted its actions and that it otherwise acted in "good faith." The Supreme Court found that NJM had a "fairly debatable" coverage position in appealing the small award and thus acted in good faith. It also reconfirmed the "fairly debatable" standard as applicable to UM cases, despite arguments from the plaintiffs that the standard should be modified in UM cases.

The Supreme Court in *Badiali v. NJM* held, however, that any UM policy provision that forbids appeals of *de minimus* awards, such as provisions that forbid appeals from $15,000 or less, will apply "to the amount that the insurance company is required to pay, not to the total amount of the award."

Wadeer

In the companion case of *Wadeer v. NJM*, the court addressed a situation where the plaintiff had been involved in a hit-and-run accident. She submitted a UM claim to NJM and NJM made no offers to settle. NJM had a $100,000 UM policy limit. The matter was arbitrated before a three-arbitrator panel and all of them agreed that the damages were $125,000, including the NJM appointed arbitrator. The arbitration panel found 30 percent negligence to the plaintiff and thus rendered a molded award of $87,500. The record revealed that NJM appealed because its claims representative felt that the most he could lose was $100,000 and the arbitration award of $87,500 was not a sufficient discount off of NJM's $100,000 policy limits.

In the Superior Court action, the plaintiffs never alleged bad faith against NJM in their pleadings, but did make arguments for an award of attorneys' fees based upon NJM's bad faith claims handling in motion practice. In addition, the plaintiff made an Offer of Judgment of $95,000. The case was tried to a jury, which awarded $227,000 to the plaintiff. The verdict was then molded by the trial judge to NJM's $100,000 limits and the trial court rejected the plaintiffs' arguments of bad faith against NJM. In addition, the trial court did not award counsel fees under New Jersey's Offer of Judgment Rule (R.4:58) even though the verdict was well in excess of 120 percent of the $95,000 Offer of Judgment.

The trial court ruled that the triggering of the Offer of Judgment Rule should be calculated from the "molded" verdict of $100,000, not the jury verdict of $227,000. The plaintiff appealed those rulings and lost in the appellate division.

The plaintiff then filed a new bad faith action against NJM and it was that second action that the Supreme Court addressed. The Supreme Court held that the doctrine of *res judicata* barred the second lawsuit and thus ruled in favor of NJM.

Issues Referred to NJ Civil Practice Rules Committee

Tellingly, though, the Supreme Court in *Wadeer* discussed and referred three significant issues to the New Jersey Civil Practice Rules Committee for recommendations about changes in New Jersey's Court Rules.

First, the Supreme Court strongly suggested that R.4:30A needs to be modified to address bad faith actions against insurance companies in UM/UIM cases. The Supreme Court noted that it seems unfair to require a policyholder to sue on the UM claim and bad faith at the same time. There is case law in New Jersey requiring a stay of discovery on the bad faith action when it is part of a UM proceeding. The court certainly indicated that the Civil Practice Rules Committee may want to make a change and allow for a bad faith action to proceed after the UM/UIM action has been resolved.

Second, the Supreme Court referred the Offer of Judgment issue to the Committee. They said the Committee should clarify whether an Offer of Judgment award of attorneys' fees is triggered based on a jury verdict or the "molded verdict."

The last issue that the Supreme Court asked the Committee to consider was whether R.4:42-9(a)(6) should be changed. That rule requires an award of attorneys' fees in favor of a successful claimant when insurance coverage is established on a liability policy involving *third*-party claims. It has historically never applied to first-party claims, such as UM/UIM claims. The Supreme Court in *Wadeer* suggested that there ought to be consideration of a rule change to allow an attorney fee award in a UM/UIM situation.

Takeaway

The results in *Badiali* and *Wadeer* certainly are favorable to insurance companies on the standard for bad faith and the difficulties that policyholders have in proving bad faith in New Jersey under the "fairly debatable" standard. Nevertheless, the strong suggestion in *Wadeer* that the Civil Practice Rules Committee should consider three significant rule changes should give auto insurers some pause as those rule changes could have an adverse impact on their industry.

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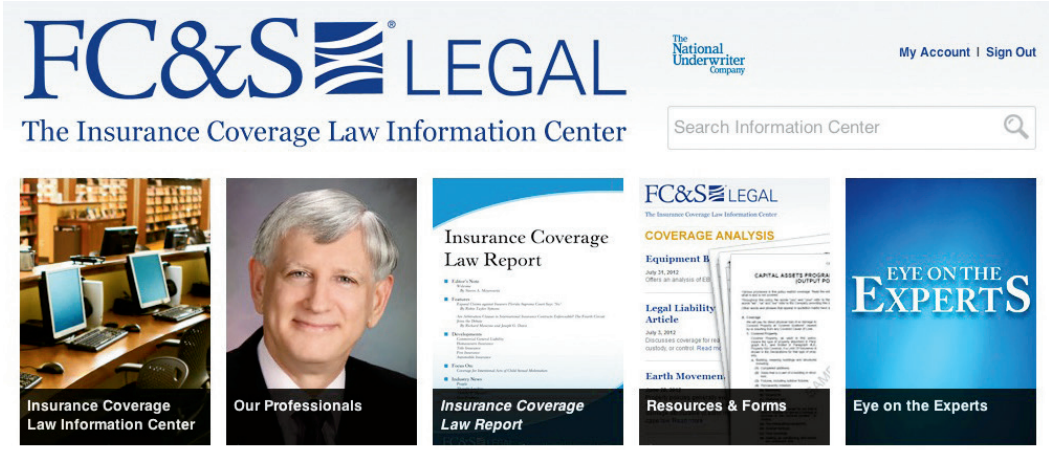

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