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Sandy Claims May Have Lawyers Consulting N.J. Bad-Faith Law

By Richard L. McMonigle

Superstorm Sandy caused property damage and income loss in New Jersey that early estimates suggest will exceed $50 billion. Commercial and personal lines property insurers have been inundated with claims. Disagreement over entitlement to policy benefits will inevitably follow, and the term "bad faith" will doubtless be hurled, sometimes by persons with little familiarity with the actual law governing such assertions. Before the arguments ensue, attorneys representing both insureds and their insurance carriers are well advised to review what New Jersey law provides regarding insurance bad-faith actions.

Insurer's Failure to Process Insured's First-Party Claim in Good Faith

Insurers in New Jersey are required to act in good faith toward their insureds, which includes an obligation to timely investigate a claim and to communicate with the insured in an honest and timely fashion. See, e.g., *Griggs v. Bertram,* 88 N.J. 347, 360 (1982). New Jersey's Unfair Claims Settlement Practices Act (N.J.S.A. 17:29B-4(9); §17B:30-13.1) denotes numerous unfair claim settlement practices, such as "failing to affirm or deny coverage of claims within a reasonable time," and "not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear."

The landmark Supreme Court decision in *Pickett v. Lloyd's,* 131 N.J. 457 (1993), governs first-party property insurance claims brought in New Jersey. Where an insurer fails to process a first-party claim in a timely fashion, "bad faith is established by showing that no valid reasons existed to delay processing the claim and the insurance company knew or recklessly disregarded the fact that no valid reasons supported the delay." *Pickett* involved a claim for property damage to a truck. Although the claim was fairly straightforward, the carrier failed to resolve it after nine months, and the insured was able to establish that, as a result of the company's delay, he suffered a loss of income. The Supreme Court upheld the jury finding of bad faith and award of $70,000.

Attorneys representing policyholders in connection with Sandy claims may look to *Pickett* and subsequent decisions, finding that bad faith may exist where the insurer has failed to process a first-party claim within a reasonable time frame. For example, in *Miglicio v. HCM Claim Mgmt. Corp.*, 288 N.J. Super. 331 (Law Div. 1995), involving a claim under a UIM insurance policy, the court denied the insurer's motion for summary judgment on bad faith where there were factual questions suggesting that the insurer did not timely pay its policy limits of $50,000, even though a UIM arbitration panel had valued the claim at $135,000. Since the case involved a rear-end collision where liability was reasonably clear, the court ruled that a delay of more than two-and-a-half years created a factual issue as to whether the carrier acted in bad faith.

In *NN&R v. OneBeacon Ins. Grp.*, 362 F. Supp. 2d 514 (D.N.J. 2005), the court permitted the plaintiff-insured to proceed on a claim alleging bad-faith delay of a building collapse claim, where the insurer did not provide a proposed scope of work for building repairs until 10 months after the loss, and did not request a proof of loss until nearly 20 months after the loss. The court found that there existed questions of fact as to whether "valid reasons existed to delay processing the claim and [whether] the insurance company knew or recklessly disregarded the fact that no valid reason supported the delay."

On the other hand, counsel for insurers handling Sandy claims may wish to review those decisions where courts have rejected *Pickett* claims, finding, as a matter of law, that the insurance company did *not* act in bad faith in delaying or otherwise unfairly processing an insured's claim. See, e.g., *Rock-N-Rolls*

McMonigle is a principal with the Prince-ton and Philadelphia offices of Post & Schell PC, where he advises and defends insurance carriers on coverage and claims-handling issues. He is the author of ALM's Insurance Bad Faith in New Jersey *(2012).*

Auto Salon v. United States Fid. & Guar. Co., 2006 N.J. Super. Unpub. LEXIS 2439 (App. Div. June 20, 2006); *Kane v. U-Haul Int'l,* 218 F. App'x 163, 168 (3d Cir. 2007); *Tucci v. Hartford Financial Servs. Grp*., 2011 U.S. Dist. LEXIS 68779 (D.N.J. June 27, 2011); *Ketzner v. John Hancock Mutual Life Ins. Co*., 118 F. App'x 594, 599 (3d Cir. 2004).

Insurer's Bad-Faith Denial of Benefits in First-Party Claim

Pickett also set forth the legal standard to be applied in the context of a denial of benefits under a property policy. The court held that to succeed on a bad-faith claim in the case of a denial of benefits, the insured would have to prove that coverage of the claim was not "fairly debatable." This standard can be difficult for an insured to meet because, according to *Pickett*, "a claimant who could not have established as a matter of law a right to summary judgment on the substantive claim would not be entitled to assert a claim for an insurer's bad-faith refusal to pay the claim."

Attorneys representing policyholders may look to those New Jersey decisions where, notwithstanding that high threshold, courts have allowed an insured to proceed with a bad-faith claim based upon an alleged unreasonable denial of a first-party claim. In *NN&R v. OneBeacon Ins. Grp*., the plaintiff was permitted to assert a bad-faith denial claim based upon alleged insurer misdeeds, including "underinsuring the property and concealing information relating to that fact," "misrepresenting the terms of the policy" and "failing to inform plaintiff of policy changes."

In *Dawn Restaurant v. Penn Millers Ins. Co*., 2011 U.S. Dist. LEXIS 91284 (D.N.J. Aug. 16, 2011), an insured was permitted to pursue a bad-faith claim against a commercial property insurer that denied a roof damage claim, where it was alleged that the insurer intentionally failed to include in its denial letter the role that rain and snow played in the roof problems, because to have done otherwise would have undermined the claim denial.

Most recently, the Appellate Division upheld a jury verdict finding that a property insurer acted in bad faith in *Bello v. Merrimack Mut. Fire Ins. Co*., 2012 N.J. Super. Unpub. LEXIS 1654 (App. Div. July 12, 2012), *cert. denied*, 2012 N.J. LEXIS 1273 (Sup. Ct., Dec. 11, 2012). The insured asserted that a roof and a retaining wall on his property had suffered damage because of a violent windstorm. The insurer initially denied the claim, but later reversed its denial and admitted coverage, whereupon the company paid its policy limit of $100,750. In a bad-faith trial, a Burlington County jury found that the insurer denied coverage without a fairly debatable reason, and awarded $624,023, with no setoff for the insurer's prior payment. The trial court allowed imposition of attorney fees of $195,583 and costs of $31,346, all of which were left undisturbed on appeal.

Counsel for the insurance companies may wish to review those decisions in which courts have determined that an insurer's denial of benefits was based upon a policy interpretation or claims determination for which there were fairly debatable reasons, resulting in a rejection of a bad-faith claim. Thus, where a property damage claim was correctly denied under a homeowner's policy, summary judgment was granted in favor of the insurer on a bad-faith action. *See Enright v. Farm Family Cas. Ins. Co*., 2005 U.S. Dist. LEXIS 37544 (D.N.J. 2005); *Certain Underwriters at Lloyd's v. Alesi*, 2011 U.S. Dist. LEXIS 149684 (D.N.J. Dec. 30, 2011). Even where the court disagrees with an insurer's denial, there is no bad faith if the company's decision, though wrong, was reasonably based. *See Rothschild v. Foremost Ins. Co.,* 653 F. Supp. 2d 526, 536 (D.N.J. 2009); *Kane v. U-Haul Int'l*, *supra*.

Likewise, where an insurer denies a property claim based upon a reasonable suspicion of fraud or misrepresentation on the part of the insured, courts have held that there is no bad faith. *See In re Van Holt v. Liberty Mut. Fire Ins. Co*., 163 F.3d 161, 168-69 (3d Cir. 1998). Genuine factual issues regarding a claim may be enough to thwart the assertion of a bad-faith claim under *Pickett*. See *Certain Underwriters at Lloyd's v. Alesi*, *supra*; *In re Sebro Packaging Corp. v. Liberty Mut. Fire Ins. Co*., 69 F. Supp. 2d 642 (D.N.J. 1999).

Damages in Bad-Faith Claims

Pickett held that the cause of action for first-party bad faith "is best understood as one that sounds in contract," so that in the case of either denial or delay, "liability may be imposed for consequential economic losses that are fairly within the contemplation of the insurance company." Despite this sweeping pronouncement, reported decisions allowing imposition of consequential damages are hard to come by, perhaps because of *Pickett's* admonishment that "courts should carefully scrutinize the proofs of extra-contractual damages." Significant awards are not impossible, however, as the extra-contractual award in *Bello v. Merrimac* demonstrates.

On the issue of emotional distress and punitive damages, *Pickett* and subsequent courts have held that "absent egregious circumstances, no right to recover for emotional distress or punitive damages exists for an insurer's allegedly wrongful refusal to pay a first-party claim." See, e.g., *Apicella v. Encompass Ins. Co*., 2011 U.S. Dist. LEXIS 21354 (D.N.J. Mar. 3, 2011).

Recovery of attorney fees under New Jersey Court Rule 4:42-9(a)(6) will likely not be allowed in connection with a Sandy property claim. Recovery of fees under this rule is generally restricted to suits for coverage for third-party claims, and policyholders cannot typically recover counsel fees in successful actions against insurers on first-party claims. *See Enright v. Lubow*, 215 N.J. Super. 306, 311-12 (App. Div.), *certif. denied*, 108 N.J. 193 (1987).

Conclusion

Insurers grappling with Superstorm Sandy claims must be mindful, as always, of their obligation to act fairly, promptly and reasonably; in short, to act in good faith. Policyholders are likewise urged to exercise patience, understanding and reasonableness while awaiting claim resolution by insurance professionals facing an historic level of claims. The vast majority of claims will be resolved in a manner satisfactory to both sides. For those claims ending up in litigation, counsel representing insureds and insurers should know the limits of New Jersey's law of insurance bad faith, to better advise their clients at this difficult time. ■