SUPREME COURT OF NEW JERSEY
Docket No. 072010

KWABENA WADEER and OFELIA WADEER, Plaintiffs-Petitioners, vs. NEW JERSEY MANUFACTURERS INSURANCE COMPANY, Defendant-Respondent.	CIVIL ACTION ON PETITION FOR CERTIFICATION FOR REVIEW OF THE FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION Docket No. A-3206-10T4 SAT BELOW: Hon. Clarkson S. Fisher, Jr. Hon. Christine M. Nugent

BRIEF ON BEHALF OF PROPOSED AMICUS CURIAE NEW JERSEY LAWSUIT REFORM ALLIANCE

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PRELIMINARY STATEMENT

The sole issue decided by the Appellate Division was whether plaintiffs' second complaint alleging "bad faith" against New Jersey Manufacturers Insurance Company ("NJM") was barred by the entire controversy doctrine ("ECD"). The amicus brief filed by New Jersey Association for Justice ("NJAJ") asks the Court to delve beyond that issue and "revise" the standard for determining bad faith established in Pickett v. Lloyd's, 131 N.J. 457 (1993) -- an issue that was never addressed or decided below because the bad faith claim was held to be barred by the ECD.

Proposed amicus, New Jersey Lawsuit Reform Alliance ("NJLRA"), has a strong interest in the clear, predictable and fair application of the ECD, as well as the standard for determining "bad faith" which opens the door to extra-contractual damages. The NJLRA is a statewide, bipartisan group of individuals, businesses and organizations dedicated to improving New Jersey's civil justice system. The NJLRA believes that a balanced civil justice system fosters public trust and motivates professionals, sole proprietors and businesses to provide safe and reliable products and services, while ensuring that truly injured people are compensated fairly for their losses. Such a system is critical to ensuring fair and open

courts, maintaining and attracting jobs, and fostering economic growth in New Jersey.

With respect to the ECD issue, the NJLRA submits that the Appellate Division's decision represents a sound application of the ECD which yielded a consistent and predictable result based on the facts of this case and existing law, and it should be affirmed by this Court.

With respect to the collateral attack on the "fairly debatable" standard established in Pickett, NJAJ completely ignores the underpinnings of that standard. For 20 years the fairly debatable standard has struck a proper balance that preserves an insurer's right to fairly debate coverage questions, allows claimants to pursue a claim where an insurer takes a position in bad faith, and helps protect the public from excess insurance settlements that drive up premiums. There is no need to re-visit -- let alone "revise" -- the standard in this case.

STATEMENT OF FACTS

NJLRA relies on the Statement of Facts and Procedural History set forth in NJM's appellate brief.

ARGUMENT

POINT I

THE APPELLATE DIVISION PROPERLY APPLIED THE ENTIRE CONTROVERSY DOCTRINE TO THE FACTS OF THIS CASE.

The ECD requires "that all aspects of the controversy between those who are parties to the litigation be included in a single action." Pressler & Verniero, Current N.J. Court Rules, comment 1 to R. 4:30A, p. 1694 (2014). A plaintiff must assert in a single action all claims it has against a defendant; a plaintiff who could have but did not assert a related component of the controversy will be barred from raising it in a subsequent proceeding. Aetna Ins. Co. v. Gilchrist Brothers, Inc., 85 N.J. 550, 556-57 (1981); Wm. Blanchard Co. v. Beach Concrete Co., 150 N.J. Super. 277, 292-93 (App. Div.), certif. denied, 75 N.J. 528 (1977). "[A] party cannot withhold part of a controversy for separate later litigation even when the withheld component is a separate and independently cognizable cause of action." Paramount Aviation Corp. v. Agusta, 178 F.3d 132, 137 (3d Cir. 1999), cert. denied, 528 U.S. 878 (1999). The ECD is codified in R. 4:30A, which states:

> Non-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine ....

It is well-settled that the ECD is "an equitable doctrine whose application is left to judicial discretion based on the factual circumstances of individual cases." Oliver v. Ambrose, 152 N.J. 383, 395 (1998). Here, the Appellate Division's decision represents a sound application of the ECD which yielded a predictable result. Indeed, the decision below is now the third one of which we are aware (albeit all of them unpublished) where both the trial and appellate courts applied the ECD to bar a second lawsuit for bad faith following a verdict on the underlying UM/UIM claim. See also Taddei v. State Farm Indem. Co., Docket No. A-2975-08T3, 2010 WL 183900 (App. Div. Jan. 21, 2010) (included at Pet.App.32[1]), certif. granted, 201 N.J. 497 (2010), appeal dismissed, 203 N.J. 433 (2010); Reid v. Transportation Ins. Co., 502 Fed. Appx. 157 (3d Cir. 2012).

Plaintiffs and NJAJ argue that the application of the ECD in this case was unfair because there was no "procedural guidance" on how to preserve a first-party bad faith claim.

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[1] The following references are used in this brief: "P's Pet." refers to plaintiffs' Petition for Certification; "Pet.App." refers to plaintiffs' appendix attached to the Petition for Certification; "NJAJb" refers to the amicus brief filed by NJAJ; "NJLRAa" refers to NJLRA's appendix attached to this brief.

(P's Pet. at 10; NJAJb6). However, there are numerous reported cases where an insured seeking to compel payment of first-party insurance benefits filed a complaint alleging breach of contract and bad faith against the insurer. See, e.g., Brill v. Guardian Life Ins. Co., 142 N.J. 520, 527 (1995); Morag v. Continental Ins. Co., 375 N.J. Super. 56, 58 (App. Div. 2005); Simonetti v. Selective Ins. Co., 372 N.J. Super. 421, 426 (App. Div. 2004); Edwards v. Prudential Prop. & Cas. Co., 357 N.J. Super. 196, 200 (App. Div.), certif. denied, 176 N.J. 278 (2003); Hudson Envtl. Servs., Inc. v. New Jersey Property-Liability Ins. Guar. Ass'n, 372 N.J. Super. 284, 295 (Law Div. 2004); Ketzner v. John Hancock Mut. Life Ins. Co., 118 Fed. Appx. 594, 595 (3d Cir. 2004), cert. denied, 546 U.S. 1089 (2006); Polizzi Meats, Inc. v. Aetna Life & Cas. Co., 931 F. Supp. 328, 332-33 (D.N.J. 1996). This is so even in the UM/UIM context presented here, as evident in the Miglicio case cited by NJAJ. See Miglicio v. HCM Claim Management Corp., 288 N.J. Super. 331, 336-37 (Law Div. 1995) (plaintiff filed complaint to compel payment of UIM benefits, and included claims for compensatory and punitive damages based on the defendant's alleged bad faith).

Plaintiffs and NJAJ further argue that the ECD should not have been applied in this case because the bad faith claim did not "accrue" or "ripen" until the jury rendered its verdict in excess of the policy limit. (P's Pet. at 16-17; NJAJb7-9). But

this argument improperly conflates the first-party bad faith claim at issue here with a "third-party" bad faith claim recognized in Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474 (1974). In the Rova Farms context, the excess judgment against the insured, which exposes the insured's assets to an injured third-party, is the measure of extra-contractual damages sustained by the insured. Clearly, those extra-contractual damages do not exist or "accrue" until after the excess judgment is entered against the insured.

In contrast, in the first-party context, the insured chooses the amount of coverage he wants to recover for himself in the event of a loss sustained directly by the insured. If the insurer fails to pay the first-party claim in bad faith, the insured can recover as extra-contractual damages the "consequential economic losses that are fairly within the contemplation of the insurance company." Pickett v. Lloyd's, 131 N.J. 457, 481 (1993). In Pickett, the extra-contractual damages were lost income because the insured could not use his truck as a result of the insurer's failure to pay collision damage benefits. Id. at 464. In Taddei, which involved a claim for UM benefits, the appellate court noted that consequential economic damages "might typically include, for example, costs of litigation, including expenses for experts and counsel fees, and prejudgment interest." Taddei v. State Farm Indem. Co., 401

N.J. Super. 449, 461 (App. Div. 2008). Accord Endo Surgi Ctr. v. Liberty Mut. Ins. Co., 391 N.J. Super. 588, 593-94 (App. Div. 2007).

The point is that, in the first-party context, an insured's extra-contractual damages that result from the improper denial (or delay) of a claim exist (or "accrue") prior to the entry of any judgment against the insurer. Here, plaintiffs contend that NJM acted in bad faith in rejecting a UM arbitration award, thereby forcing plaintiffs to file a lawsuit to recover UM benefits under his policy. The Appellate Division properly concluded that "[t]he cause of action accrued before plaintiff filed his UM action, and long before the UM verdict." (Slip. Op. at 8).

With respect to the "fairness" arguments offered by plaintiffs and NJAJ, the Court has explained that "where the plaintiff had sufficient information to have included the claims in the prior suit, mandatory joinder [under the ECD] is not unfair." Oliver, supra, 152 N.J. at 396. Here, the Appellate Division concluded that plaintiffs had sufficient information to raise a bad faith claim in the first lawsuit, but they did not do so. (Slip Op. at 9-10). There is no reason to interfere with that finding.

Further, the argument that judicial efficiency is not served because a bad faith claim, had one been asserted in the

first lawsuit, would have been bifurcated and stayed pending the outcome of the underlying claim, simply misses the mark. Whether a claim ultimately is bifurcated is an entirely different issue than whether that claim should have been brought in the first instance pursuant to the ECD:

> [T]he entire controversy doctrine does not require that all claims and parties proceed to culmination in one litigation. Rather, all claims and parties must initially be joined together before one court. The court can determine for itself how best to proceed with the various claims and parties. In order to exercise this discretion, the court must be fully informed of the controversy before it.
>
> [Petrocelli v. Daniel Woodhead Co., 993 F.2d 27, 31 (3d Cir. 1993).]

See also Olds v. Donnelly, 150 N.J. 424, 447 (1997); DiTrolio v. Antiles, 142 N.J. 253, 275 (1995) ("the joinder determination does not repose with the parties").

One last point. The Appellate Division's decision should in no way be construed as suggesting (let alone requiring) that insureds file a bad faith claim every time there is a dispute over a first-party insurance claim resulting in a complaint for breach of contract. Bad faith claims are intended for glaring situations where the insurer has no debatable reason for its position. Pickett, supra, 131 N.J. at 473. If, when fairly considered, the insurer has a reasonable basis for its position -- even if the claimant disagrees with that position -- the

claimant should not be filing a bad faith claim. See, e.g., Westfield Ins. Co. v. Sheehan Constr. Co., 564 F.3d 817, 820 (7th Cir. 2009) (questioning whether insured's unfounded assertion of bad faith was intended "to strong-arm a settlement by in terrorem claims, rather than to vindicate its legal entitlements").

In short, the Appellate Division's decision represents a sound application of the ECD which yielded a consistent and predictable result based on the facts of the case and existing law, and it should be affirmed by this Court.

POINT II

THERE IS NO REASON TO RE-VISIT THE PICKETT v. LLOYD'S "FAIRLY DEBATABLE" STANDARD IN THIS CASE.

NJAJ asks the Court to "revisit and revise" the well-established "fairly debatable" standard for determining bad faith adopted in Pickett. (NJAJb25). This issue was not before the court below and should not now be considered, for the reasons set forth in the brief presented by proposed amici insurance trade associations (ICNJ, PCI and NAMIC). However, in the event the Court considers this issue, there is no reason to "revise" the fairly debatable standard.

As a preliminary matter, NJAJ in recent years has been the main force behind several bills introduced in the Legislature seeking to create a statutory cause of action for bad faith.

See Senate, No. 2460 (introduced Jan. 8, 2013); Assembly, no. 3434 (introduced Nov. 19, 2012); Senate, No. 132 (pre-filed for introduction in 2008 Session) (all included at NJLRAa1-10). Such bills, which represent a departure from the bad faith standard established in Pickett, would have a significant impact on insurance premiums, as the threat of litigation and additional extra-contractual damages could lead insurers to pay claims that should not be paid. Every policyholder, both private and commercial, would consequently pay for this through higher premiums and business costs. Presumably mindful of the impact such proposed bills would have on the insurance market as a whole, the Legislature to date has not seen fit to enact the proposed legislation.

Indeed, NJAJ completely ignores the underpinnings of the bad faith standard. An insured who makes a claim for coverage under his or her own insurance policy (i.e., a first-party claim) is bound by the terms of the contract and generally may not recover in excess of the policy limit (s)he selected. In Pickett v. Lloyd's, 131 N.J. 457 (1993), the Court recognized a cause of action arising from an insurer's "bad faith" failure to pay a first-party claim, which would allow the insured to recover consequential (or extra-contractual) economic damages. To sustain this bad faith claim, the plaintiff must show that (1) the insurer lacked a reasonable basis for denying benefits

of the policy, and (2) it knew of or recklessly disregarded the lack of a reasonable basis for its position. Id. at 473. The Court explained that "[i]f a claim is 'fairly debatable,' no liability in tort will arise" and further elaborated:

> Under this "fairly debatable" standard, 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.
>
> [Ibid.]

"This 'fairly debatable' standard is premised on the idea that when an insurer denies coverage with a reasonable basis to believe that no coverage exists, it is not guilty of bad faith even if the insurer is later held to have been wrong." Hudson Universal, Ltd. v. Aetna Ins. Co., 987 F. Supp. 337, 341 (D.N.J. 1997).

The "fairly debatable" standard is a stringent one by design, because of the "potential in terrorem effect of 'bad faith' litigation." Polizzi Meats, supra, 931 F. Supp. at 334; Hudson Universal, supra, 987 F. Supp. at 341. As explained by the Wisconsin Supreme Court in what Pickett, 131 N.J. at 469, described as one of the "leading [bad faith] cases":

> [W]hile insurers who act outrageously toward legitimate claimants should be punished, the possibility of scaring insurers into paying questionable claims because of the threat of a bad faith suit and its excessive damages is undesirable. This will cause payments of

> claims which should not be paid and accompanying higher insurance rates which must be borne by all of the policyholders. An insurer should have the right to litigate a claim when it feels there is a question of law or fact which needs to be decided before it in good faith is required to pay the claimant.
>
> [Anderson v. Continental Ins. Co., 271 N.W.2d 368, 377 (Wis. 1978).]

The Court in Pickett, after canvassing the various standards used in other states to evaluate bad faith claims, concluded that the "fairly debatable" standard was the "most balanced approach" that best "serves the public interest." Pickett, supra, 131 N.J. at 472-73. To this day, the standard continues to strike a proper balance that preserves an insurer's right to fairly debate coverage questions, allows claimants to pursue a claim where an insurer takes a position in bad faith, and helps protect the public from excess insurance settlements that drive up premiums.

There is absolutely nothing in the record to support NJAJ's inflammatory assertion (NJAJb24) that "bad faith cases are currently being dismissed because trial courts are accepting entirely hypothetical justifications for a carrier's course of conduct from defense counsel, which are neither based in fact, nor evidence." There also is nothing to indicate that those plaintiffs who properly plead a bad faith claim in a complaint are being denied an opportunity to conduct discovery. See,

e.g., Polizzi Meats, supra, 931 F. Supp. at 332-33, 335 (more than two years after complaint was filed and after discovery was closed, court granted insurer's motion for summary judgment dismissing bad faith claim).

NJAJ refers to obvious dicta in Taddei-I wherein the court "express[ed] some reservation as to whether Pickett's 'fairly debatable' formulation, based on the summary judgment standard, should apply when evaluating good faith in failing to settle an unliquidated bodily injury claim, as opposed to an undisputed property damage claim." Taddei, supra, 401 N.J. Super. at 462. The court was concerned that it is often difficult for a claimant to establish the value of his bodily injuries via summary judgment. But the fact that damages might be questionable -- and open to debate -- is not a reason to abandon the "fairly debatable" standard; it is the reason why that standard was adopted in the first place. See, e.g., Bellville v. Farm Bureau Mut. Ins. Co., 702 N.W.2d 468, 481-82 (Iowa 2005) (holding there was no bad faith where insured's fault and extent of his damages were fairly debatable; and further explaining that "[c]ertainly there may be cases in which the UIM limits are so low or the undisputed damage items so high that there would be no reasonable basis to refuse payment notwithstanding the impossibility of accurately predicting the value of the insured's damages. But this case is not one of those.").

CONCLUSION

For the foregoing reasons, the Court should affirm the Appellate Division's decision in this case. The Court also should reject NJAJ's invitation to "revisit and revise" the "fairly debatable" standard for determining bad faith.

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By: _____
David F. Swerdlow

Dated: September 23, 2013

SENATE, No. 2460

STATE OF NEW JERSEY

215th LEGISLATURE

INTRODUCED JANUARY 8, 2013

Sponsored by:
Senator NICHOLAS P. SCUTARI
District 22 (Middlesex, Somerset and Union)
Senator JENNIFER BECK
District 11 (Monmouth)

SYNOPSIS

"Consumer Protection Act of 2012."

CURRENT VERSION OF TEXT

As introduced.

AN ACT concerning bad faith in the settlement of insurance claims and supplementing Title 17 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. This act shall be known and may be cited as the "Consumer Protection Act of 2012."

2. As used in this act:

"Claimant" means an individual, corporation, association, partnership or other legal entity asserting a direct or assigned right to payment by an insurer under an insurance policy, arising out of a contingency or loss covered by the policy.

"Insurance policy" means any property or casualty insurance policy or contract issued, executed, renewed or delivered in this State including a policy issued pursuant to P.L.1972, c.70 (C.39:6A-1 et seq.).

"Insurer" means any individual, corporation, association, partnership or other legal entity which issues, executes, renews or delivers an insurance policy in this State, or which is responsible for determining claims made under the policy.

3. In addition to the enforcement authority provided to the Commissioner of Banking and Insurance pursuant to the provisions of P.L.1947, c.379 (C.17:29B-1 et seq.) or any other law, a claimant may, regardless of any action by the commissioner, file a civil action in a court of competent jurisdiction against its insurer for any violation of the provisions of subsection (9) of section 4 of P.L.1947, c.379 (C.17:29B-4), regarding unfair claim settlement practices, notwithstanding that the insurer did not violate any applicable provision with enough frequency as to indicate a general business practice.

4. Upon establishing that a violation of the provisions of subsection (9) of section 4 of P.L.1947, c.379 (C.17:29B-4) has occurred, pursuant to section 3 of this act, the claimant shall be entitled to:

a. the full amount of damages as set forth in the final judgment, regardless of the coverage limits of the policy;

b. prejudgment interest, reasonable attorney's fees, and all reasonable litigation expenses from the date of the institution of the action filed pursuant to this act. The prejudgment interest shall be calculated at the rate provided for tort actions, or for non-acceptance of a formal offer for judgment, whichever is higher, as prescribed in the Rules of Court; and

c. punitive damages, when the insurer's acts or omissions demonstrate, by clear and convincing evidence, actual malice or

wanton and willful disregard of any person who foreseeably might be harmed by the insurer's acts or omissions.

5. This act shall take effect immediately and shall apply to all claims filed by a claimant on or after October 1, 2012.

STATEMENT

This bill, the "Consumer Protection Act of 2012," establishes a private cause of action for insureds or their assignees regarding unfair practices in the settlement or attempted settlement of insurance claims arising out of property and casualty insurance policies.

The bill provides that a claimant may, regardless of any action by the Commissioner of Banking and Insurance, file a civil action in a court of competent jurisdiction against its insurer for any violation of the provisions of subsection (9) of section 4 of P.L.1947, c.379 (C.17:29B-4) regarding unfair claim settlement practices, notwithstanding that the insurer did not violate any applicable provision with enough frequency as to indicate a general business practice.

Under the bill, if the claimant can establish such a violation, the claimant is entitled to:

(1) the full amount of damages as set forth in the final judgment, regardless of the coverage limits of the policy;

(2) prejudgment interest, reasonable attorney's fees, and all reasonable litigation expenses from the date of the institution of the action filed pursuant to the provisions of this bill. The prejudgment interest shall be calculated at the rate provided for tort actions, or for non-acceptance of a formal offer for judgment, whichever is higher, as prescribed in the Rules of Court; and

(3) punitive damages, when the insurer's acts or omissions demonstrate, by clear and convincing evidence, actual malice or wanton and willful disregard of any person who foreseeably might be harmed by the insurer's acts or omissions.

The provisions of the bill intend to incorporate into statutory law certain aspects of New Jersey's current case law, which recognize private causes of action in first-party and third-party claims regarding the bad faith actions of insurance companies which result in harm to their insureds. See Pickett v. Lloyd's, 131 N.J. 457 (1993), Samuel v. Doe, 158 N.J. 134 (1999), Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474 (1974). This bill is not in any way intended to narrow or limit the rights of insureds under established case law to assert a private cause of action for the bad faith actions of insurance companies.

The bill takes effect immediately upon enactment and applies to all claims filed on or after October 1, 2012.

ASSEMBLY, No. 3434

STATE OF NEW JERSEY

215th LEGISLATURE

INTRODUCED NOVEMBER 19, 2012

Sponsored by:
Assemblyman TROY SINGLETON
District 7 (Burlington)
Assemblyman PETER J. BARNES, III
District 18 (Middlesex)

SYNOPSIS

Provides private cause of action for bad faith in settlement of insurance claims.

CURRENT VERSION OF TEXT

As introduced.

AN ACT concerning bad faith in the settlement of insurance claims and supplementing Title 17 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. a. As used in this section:

"Claimant" means an individual, corporation, association, partnership or other legal entity asserting a direct or assigned right to payment by an insurer under an insurance policy, arising out of the occurrence of a contingency or loss covered by the policy.

"Insurance policy" means any insurance policy or contract issued, executed, renewed or delivered in this State pursuant to the provisions of Title 17 of the Revised Statutes.

"Insurer" means any individual, corporation, association, partnership or other legal entity which issues, executes, renews or delivers an insurance policy in this State, or which is responsible for determining claims made under the policy.

b. A claimant may file a cause of action against an insurer arising from the insurer's breach of its duty of good faith and fair dealing, which breach shall include the insurer's failure to attempt in good faith to effectuate a prompt, fair and equitable settlement of a claim in which liability has become reasonably clear. Notwithstanding any other law, regulation, or rule to the contrary, the cause of action shall be heard and determined by a judge in a court of competent jurisdiction.

c. In order to recover damages in the cause of action provided for in this section, the claimant shall prove that the insurer acted unreasonably in the investigation, evaluation, processing, payment or settlement of the claimant's claim for coverage under the policy or without a reasonable basis in denying the coverage.

d. Upon establishing those proofs provided for in subsection c. of this section, the claimant shall be entitled to:

(1) the full amount of damages as determined by the judge, regardless of the coverage limits of the policy;

(2) prejudgment interest, reasonable attorney's fees, and all reasonable litigation expenses from the date of the institution of the action filed pursuant to this section. The prejudgment interest shall be calculated at the rate provided for tort actions, or for non-acceptance of a formal offer for judgment, whichever is higher, as prescribed in the Rules of Court; and

(3) punitive damages, when the insurer's acts or omissions demonstrate, by clear and convincing evidence, actual malice or wanton and willful disregard of any person who foreseeably might be harmed by the insurer's acts or omissions.

2. This act shall take effect immediately and shall apply to all claims filed on or after the effective date.

STATEMENT

This bill establishes a private cause of action for insureds or their assignees regarding bad faith settlement practices in the settlement or attempted settlement of claims involving insurance coverage.

The bill permits a claimant to file a cause of action against an insurer arising from the insurer's breach of good faith and fair dealing with the claimant, which breach shall include the insurer's failure to attempt in good faith to effectuate a prompt, fair and equitable settlement of a claim in which liability has become reasonably clear. In this "breach of good faith" cause of action, in order to prevail, the claimant shall prove that the insurer acted unreasonably in the investigation, evaluation, processing, payment, or settlement of the claimant's claim for coverage or without a reasonable basis in denying the coverage.

The bill incorporates into statutory law New Jersey's current case law, which recognizes private causes of action in first-party and third-party claims arising out of the bad faith actions of insurance companies which result in harm to their insureds. See Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474 (1974). The bill also reverses the recent holding of the Supreme Court of New Jersey in Wood v. New Jersey Manufacturers Ins. Co., 206 N.J. 562 (2011), that bad faith breach of contract claims against insurers are actions to which the right to a jury trial attaches; the bill provides that these claims are to be heard and decided by a judge of competent jurisdiction.

SENATE, No. 132

STATE OF NEW JERSEY

213th LEGISLATURE

PRE-FILED FOR INTRODUCTION IN THE 2008 SESSION

Sponsored by:
Senator NICHOLAS P. SCUTARI
District 22 (Middlesex, Somerset and Union)

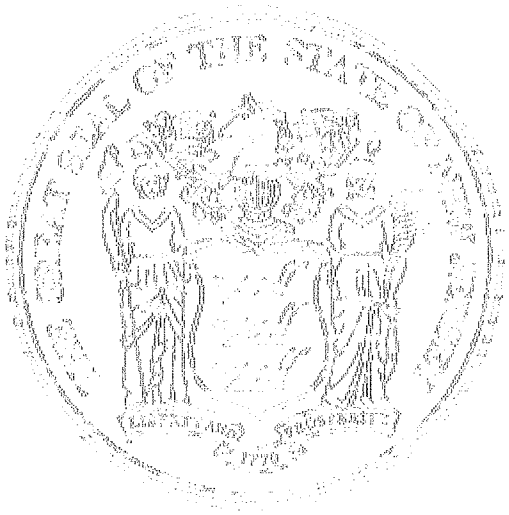
Co-Sponsored by:
Senator Van Drew

SYNOPSIS

Provides private cause of action for first-party insureds regarding unfair claims settlement practices.

CURRENT VERSION OF TEXT

Introduced Pending Technical Review by Legislative Counsel



(Sponsorship Updated As Of: 6/13/2008)

AN ACT concerning unfair practices in the settlement of insurance claims, and supplementing P.L.1947, c.379 (C.17:29B-1 et seq.) and chapter 30 of Title 17B of the New Jersey Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. a. As used in this section:

"First-party claimant" means an individual, corporation, association, partnership or other legal entity asserting a direct right to payment by an insurer under an insurance policy, arising out of the occurrence of a contingency or loss covered by the policy.

"Insurance policy" means any insurance policy or contract issued, executed, renewed or delivered in this State pursuant to the provisions of Title 17 of the Revised Statutes.

"Insurer" means "person" as defined by subsection (a) of section 2 of P.L.1947, c.379 (C.17:29B-2), and includes any individual, corporation, association, partnership or other legal entity which issues, executes, renews or delivers an insurance policy in this State, or which is responsible for determining claims made under the policy.

b. In addition to the enforcement authority provided to the commissioner pursuant to the provisions of P.L.1947, c.379 (C.17:29B-1 et seq.), a first-party claimant may, regardless of any action by the commissioner, file a civil action in a court of competent jurisdiction against its insurer for any violation of the provisions of subsection (9) of section 4 of P.L.1947, c.379 (C.17:29B-4), regarding unfair claim settlement practices, notwithstanding that the insurer did not violate any applicable provision with enough frequency as to indicate a general business practice.

c. The damages recoverable by the first-party claimant for a violation:

(1) shall include the benefits properly due under the first-party claimant's insurance policy with interest, as prescribed in the Rules of Court adopted by the Supreme Court of New Jersey, plus incidental and consequential damages, court costs and reasonable attorneys' fees; and

(2) may include punitive damages when the violation demonstrates, by clear and convincing evidence, actual malice or wanton and willful disregard of persons who foreseeably might be harmed by the insurer's acts or omissions.

2. a. As used in this section:

"First-party claimant" means an individual, corporation, association, partnership or other legal entity asserting a direct right to payment by an insurer under an insurance policy, arising out of the occurrence of a contingency or loss covered by the policy.

"Insurance policy" means any insurance policy or contract issued, executed, renewed or delivered in this State pursuant to the provisions of Title 17B of the New Jersey Statutes.

"Insurer" means any individual, corporation, association, partnership or other legal entity which issues, executes, renews or delivers an insurance policy in this State, or which is responsible for determining claims made under the policy.

b. In addition to the enforcement authority provided to the commissioner pursuant to the provisions of N.J.S.17B:30-1 et seq., a first-party claimant may, regardless of any action by the commissioner, file a civil action in a court of competent jurisdiction against its insurer for any violation of the provisions of section 1 of P.L.1975, c.101 (C.17B:30-13.1), regarding unfair claim settlement practices, notwithstanding that the insurer did not violate any applicable provision with enough frequency as to indicate a general business practice.

c. The damages recoverable by the first-party claimant for a violation:

(1) shall include the benefits properly due under the first-party claimant's insurance policy with interest, as prescribed in the Rules of Court adopted by the Supreme Court of New Jersey, plus incidental and consequential damages, court costs and reasonable attorneys' fees; and

(2) may include punitive damages when the violation demonstrates, by clear and convincing evidence, actual malice or wanton and willful disregard of persons who foreseeably might be harmed by the insurer's acts or omissions.

3. This act shall take effect immediately and shall apply to all claims filed on or after the effective date.

STATEMENT

This bill establishes a private cause of action for insureds regarding unfair claims settlement practices in the settlement or attempted settlement of claims involving their insurance coverage, including first-party claims. Such first-party claims include those in which an insured driver sues his automobile insurance company for benefits when the insured is injured by an uninsured/underinsured driver, or an unidentified driver, as in the case of a hit-and-run accident, and the insurance company is obligated to provide indemnity for that uninsured, underinsured or unidentified driver.

Damages recoverable by a first-party claimant: (1) shall include the benefits properly due under the claimant's insurance policy with interest, as prescribed in the Rules of Court adopted by the Supreme Court of New Jersey, plus incidental and consequential

damages, court costs and reasonable attorneys' fees; and (2) may include punitive damages when the violation demonstrates, by clear and convincing evidence, actual malice or wanton and willful disregard of persons who foreseeably might be harmed by the insurer's acts or omissions.

The provisions of the bill intend to incorporate into statutory law New Jersey's current case law, which recognizes private causes of action in first-party and third-party claims arising out of the bad faith actions of insurance companies which result in harm to their insureds. See Pickett v. Lloyd's, 131 N.J. 457 (1993), Samuel v. Doe, 158 N.J. 134 (1999), Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J.474 (1974).