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Washington Case Update

case in point...

Final Judgment in UIM Action does not Bar Subsequent Bad Faith, IFCA Claims

From the desk of Kyle Riley: Insurers generally prefer to resolve uninsured and underinsured motorist ("UIM") claims separately from bad faith claims to avoid prejudice. But when the insured does not bring a bad faith claim at the same time as a UIM claim, does claim preclusion prevent the insured from bringing the bad faith claim at a later time? Read on to find out.

Claims Pointer: In this case arising out of a hit-and-run accident, the Washington Court of Appeals held that because the insurer has a different quality as a party in a UIM claim than in a bad faith claim, the UIM action did not act to preclude the bad faith claim. This case is one of first impression in Washington, and it puts insurers on notice of possible additional exposure where an insured does not allege bad faith in an action to recover UIM benefits.

Forston-Kemmerer v. Allstate Ins. Co., No. 34640-4-III,

Washington Court of Appeals, Div. III (March 28, 2017)In December 2005, Anastasia Forston-Kemmerer ("Forston-Kemmerer") was in a collision with a motorist who fled the scene, was never identified, and was presumed uninsured. She demanded $75,000 in underinsured motorist ("UIM") benefits from her insurer, Allstate Insurance Company ("Allstate"), for damages she incurred as a result of the collision. Allstate offered $9,978, which she rejected. She later sued Allstate, seeking $75,000 in UIM benefits. Following mandatory arbitration, she was awarded $44,151.11. Allstate made a post-award offer of $25,000 that she rejected, after which Allstate paid the award.

Forston-Kemmerer then filed suit against Allstate again, this time alleging it had acted in bad faith and violated Washington's Insurance Fair Conduct Act ("IFCA") by failing to conduct a reasonable investigation into her claim, constructively denying her claim, and compelling her to bring a lawsuit to recover what she was owed under her insurance policy. Allstate raised the affirmative defense that the previous UIM action operated as res judicata, or claim preclusion, and barred her bad faith claim. It then moved for summary judgment on that basis.

Forston-Kemmerer responded with evidence that in other cases where the insured combined UIM claims with bad faith claims, Allstate and other insurers often persuaded courts to bifurcate not only trial, but also discovery. In those cases, the insurers would argue that claims for breach of contract are different from bad faith claims, and that the evidence to support a UIM claim is very different from the evidence needed to support a bad faith claim. Forston-Kemmerer also sought a continuance, arguing that discovery could yield even more evidence that Allstate regularly seeks separate lawsuits on UIM and bad faith claims, citing prejudice and significant differences between the claims. The trial court denied Forston-Kemmerer's motion to continue and granted summary judgment dismissal of her claim, and she appealed.

Claim preclusion prevents relitigating claims that were or should have been decided in an earlier proceeding. Under Washington law, for a judgment to preclude claims in a subsequent action, four "identities" must all be sufficiently similar: (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made. The purpose of claim preclusion is to prevent relitigation of already determined causes and to curtail multiplicity of actions and harassment in the courts.

On appeal, Allstate relied on language from several cases to the effect that claim preclusion prohibits relitigation of cases that

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"could have" or "might have" been asserted in earlier litigation. Because Forston-Kemmerer's first demand letter threatened to sue for IFCA remedies and penalties, Allstate argued that she "could have" advanced IFCA and bad faith claims in her first lawsuit. However, the court noted that the cases on which Allstate relied did not affect claim preclusion analysis, and the Washington Supreme Court had already rejected Allstate's argument in a prior case, holding that "a judgment is res judicata as to every question which was properly a part of the matter in controversy, but it does not bar litigation of claims which were not in fact adjudicated." As the court explained, the four required identities enable them to determine whether a question was "properly a part" of an earlier matter in controversy.

The court began by examining the nature of a UIM claim as compared to a bad faith claim, noting that Washington requires insurers to offer UIM coverage to allow an injured party to recover damages the injured party would have received if the responsible party had been insured with liability limits as broad as the injured party's UIM limits. To accomplish this, the insurance carrier stands in the shoes of the uninsured motorist to the extent of the policy limits. Because the insurer can defend the UIM claim just as the tortfeasor would defend it, the insurer's relationship with its insured in a UIM action is by nature adversarial and at arm's length. In first party bad faith claims, however, insurers are recognized as having a quasi-fiduciary duty to act in good faith toward their insureds. The court also noted that several jurisdictions actually mandate bifurcation and discovery stays where UIM and bad faith claims are joined, while in other jurisdictions, the trial court's discretion to stay discovery and require separate trials is also widely recognized and often exercised.

The court then addressed whether the "quality" of each party was sufficiently similar so as to require claim preclusion, concluding that Allstate had a different quality in the UIM arbitration than it had in the bad faith case. In the UIM arbitration, Allstate defended against Forster-Kemmerer's claim for damages in the shoes of the underinsured motorist and as a pure adversary. In the bad faith case, however, Allstate would defend in a quasi-fiduciary role, as her insurer. The court concluded that claim preclusion does not apply when a party's different posture as to two claims would make it prejudicial for the claims to proceed in the same lawsuit. Because Allstate failed to demonstrate an identity in its quality between the UIM arbitration and bad faith action, the bad faith action was not precluded. Summary judgment was reversed, and the case was remanded for further proceedings.

View full opinion at: https://www.courts.wa.gov/opinions/pdf/346404_pub.pdf

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