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A Closer Look at New Jersey's Insurance Fair Conduct Act

On January 18, 2022, New Jersey Governor Phil Murphy signed the New Jersey Insurance Fair Conduct Act ("IFCA") into law. The IFCA creates a private civil cause of action for policyholders in connection with uninsured and underinsured motorist claims. An insured may now sue UM/UIM carriers for bad faith conduct as follows:

- unreasonable denial of coverage or payment of benefits
- unreasonable delay in coverage or benefits, or
- violations of the New Jersey Unfair Claims Settlement Practices Act, N.J.S.A. 17:29B-4

The IFCA does not define or provide any guidance on what constitutes "unreasonable" conduct. It defines an "insurer" as "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." The statute specifically excludes producers and public entities from the definition of "insurer."

The Unfair Claims Settlement Practices Act ("UCSPA") enumerates 11 different categories of conduct which constitute unfair methods of competition and unfair and deceptive acts or practices in the business of insurance. However, the UCSPA does not specifically create a private cause of action for policyholders. Rather, it provides a mechanism for enforcement by the Commissioner of Banking and Insurance. The incorporation of the UCSPA into the IFCA appears to change that.

Prior to the enactment of the IFCA, first-party bad faith claims in New Jersey were governed by case law. The seminal bad faith in New Jersey is *Pickett v. Lloyd's*, 131 N.J. 457 (1993). Under *Pickett*, a claim which is "fairly debatable" cannot create a cause of action for a bad faith case. This standard has been interpreted to require policyholders to demonstrate entitlement to judgment as a matter of law on the breach of contract claim in order to proceed with a bad faith claim. Moreover, an insured is required to demonstrate that the carrier either knew or recklessly disregarded the lack of a reasonable basis for its actions.

The IFCA does not incorporate the "fairly debatable" standard nor does it address the level of scienter a policyholder must demonstrate in order to recover. Moreover, the statute is silent concerning the burden of proof required to demonstrate bad faith. Under the Pennsylvania statute, a claim for bad faith must be demonstrated by clear and convincing evidence. It is unclear at this stage whether New Jersey courts will require a heightened burden of proof or if mere negligence will be enough.

With the enactment of the IFCA, the Legislature has codified bad faith law in New Jersey. However, the scope of the statute is limited to uninsured and underinsured motorist claims. In light of the potential significance of this development and the far-reaching effect it may have on insurers and policyholders alike, the vagueness of the language used and the lack of many details that would further aid both sides in navigating this new law is striking. The Legislature's failure to address numerous important issues such as what constitutes unreasonableness and the required burden of proof leaves a great deal of uncertainty concerning how courts will apply this statute and how they will evaluate insurer conduct. The statute states that it becomes effective immediately but is silent about whether it will be applied proactively or retroactively, which potentially raises a whole different set of issues.

Insurers that write motor vehicle coverage in New Jersey should therefore be aware of the IFCA going forward. Other first-party bad faith claims will continue to be governed by *Pickett* and its progeny.



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