SHIRLEY M. BACKSTROM AND DOUGLAS J. BACKSTROM, Plaintiffs vs. STATE FARM INSURANCE COMPANIES AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant, C. P. Franklin County Branch, Civil Action - Law, No. A. D. 1997-219

Backstrom v. State Farm Insurance Companies

1. To establish a claim of bad faith against an insurance company, a plaintiff must show that the insurance company (1) lacked a reasonable basis for denying payments and (2) recklessly disregarded a lack of reasonable basis in denying the payment.

2. Bad faith is any frivolous or unfounded refusal to pay proceeds of a policy; it is not necessary that such refusal be fraudulent.

3. For purposes of an action against an insurer for failure to pay a claim, such conduct imports a dishonest purpose and means a breach of a known dutry (i.e. good faith and fair dealing), through some motive of self-interest or ill-will; mere negligence of bad judgment is not bad faith.

4. Statutorily mandated use of peer review organization cannot be the basis of a bac faith claimn against an insurance company.

W. Scott Henning, Esquire, Attorney for the Plaintiffs
Rolf E. Kroll, Esquire, Attorney for the Defendants

WALKER, P. J., June 14, 1999:

OPINION AND ORDER

Factual and Procedural Background

On May 18, 1993, Shirley Backstrom sustained injuries following a motor vehicle accident in which her car was rear-ended by another vehicle. After the accident, Mrs. Backstrom was taken by ambulance to the emergency room of the Chambersburg Hospital. She was treated and released. Mrs. Backstrom then began to make regularly scheduled visits to a chiropractor, Dr. Thomas Soliday. According to Dr. Soliday's records, Mrs. Backstrom's original diagnosis after the car

accident was that she suffered a cervical sprain and subluxations in her cervical spine. Mrs. Backstrom underwent x-ray examinations that revealed no broken bones and no ruptured tendons or ligaments. Additionally, a later magnetic resonance image ("MRI") was normal.

At the time of the accident, Mrs. Backstrom was insured by the State Farm Insurance Company ("State Farm"). State Farm made payments on her chiropractic visits for one year, and then telephoned Dr. Soliday to request information regarding Mrs. Backstrom's prognosis. Dr. Soliday responded to State Farm by letter dated June 3, 1994 that the treatments would continue for three to four additional months, at which point Mrs. Backstrom was expected to achieve maximum medical improvement and no longer need treatment.

Three to four months passed, and State Farm thereafter continued to receive Mrs. Backstrom's chiropractic bills. In January of 1995, State Farm again corresponded with Dr. Soliday to get an update on Mrs. Backstrom's expected maximum medical improvement. Dr. Soliday then responded to State Farm in February with his analysis that Mrs. Backstrom's condition had become chronic due to her susceptibility to flare-ups. He recommended indefinite chiropractic care and offered no anticipated date for maximum medical improvement.

State Farm then determined to investigate the necessity and reasonableness of Mrs. Backstrom's treatment by contracting with Laurel Rehabilitation Services ("Laurel"), a peer review organization. Dr. James Hoban submitted a peer review report on April 19, 1995. His report revealed that under his analysis, Mrs. Backstrom's injuries would have been adequately treated in a maximum of 24 weeks and 45 treatments. A second report was furnished by Dr. Jeff Behrend after Mrs. Backstrom requested a reconsideration of her claim. His report was in accord with Dr. Hoban's, suggesting that Mrs. Backstrom's

chiropractic treatment with Dr. Soliday after December 16, 1994 was unnecessary given her injuries. Based on these two reports, State Farm discontinued payments for treatment after November 1994.

Mrs. Backstrom, along with her husband Douglas Backstrom, filed a complaint with one claim that alleged breach of contract and one that alleged bad faith. In their complaint, the plaintiffs based the bad faith claim on State Farm's contract with Laurel for peer review of Mrs. Backstrom's medical treatment. The plaintiffs, in support of their bad faith claim, alleged that Laurel is a "sham PRO" and a "captive reviewer" of treatment. Generally, the plaintiffs claim that because Laurel is essentially being paid by insurance companies, it cannot offer an objective opinion regarding medical treatment that the insurance company questions. Thus, they claim that State Farm's reliance on Laurel given its reputation and purpose is bad faith.

Preliminary objections in the nature of a demurrer to the bad faith claim were denied on January 26, 1998. The court stated in its opinion that while it failed to accept the argument that mere submission of a claim to a PRO constitutes bad faith on the part of an insurance company, the plaintiff had alleged sufficient facts to overcome the demurrer. It further stated that the issue may have to be revisited in later proceedings to determine whether the plaintiffs have sufficient evidence to forward to a jury. The defendants have since produced an affidavit from an employee of Laurel and an affidavit from an employee at State Farm, and now move for partial summary judgment solely on the bad faith claim.

Discussion

Under Pa.R.Civ.P. 1035.2, summary judgment may be granted as a matter of law:

> (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
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> (2) if, after completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Summary judgment may only be granted where the right is free and clear from doubt. *Drapeau v. Joy Technologies, Inc.*, 447 Pa. Super. 560, 563, 670 A.2d 165 (1996). The moving party has the burden of proving that there is no genuine issue of material fact. *Drapeau*, at 563. The record and any inferences therefrom must be viewed in the light most favorable to the non-moving party. *Id.* Any doubt must be resolved against the moving party. *Id.* It is in this light that the above stated issues must be determined.

In Pennsylvania, there is no common law remedy for bad faith by insurance companies. *D'Ambrosio v. Pennsylvania National Mutual Casualty Ins. Co.*, 494 Pa. 501, 507, 431 A.2d 966, 970 (1981); *Romano v. Nationwide Mutual Fire Ins. Co.*, 435 Pa.Super. 545, 552, 646 A.2d 1228, 1232 (1984). Thus, the plaintiffs have brought suit for bad faith under 42 Pa.C.S.A. § 8371, a 1990 statute which allows a court that has found bad faith in an insurance company action to:

> 1. Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
>
> 2. Award punitive damages against the insurer.
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> 3. Assess court costs and attorney's fees against the insurer.

To establish a claim of bad faith against an insurance company, a plaintiff must show that the insurance company (1) lacked a reasonable basis for denying payments, and (2) recklessly disregarded a lack of reasonable basis in denying the payment. *Terletsky v. Prudential Property and Cas. Ins. Co.*, 437 Pa.Super. 108, 125, 649 A.2d 680, 688 (1994), appeal denied, 540 Pa. 641, 659 A.2d 560 (1995). In *Terletsky*, the court also stated that "'Bad faith' on part of insurer is any frivolous or unfounded refusal to pay proceeds of a policy; it is not necessary that such refusal be fraudulent. For purposes of an action against an insurer for failure to pay a claim, such conduct imports a dishonest purpose and means a breach of a known duty (i.e. good faith and fair dealing), through some motive of self-interest or ill-will; mere negligence or bad judgment is not bad faith." *Id.* (quoting *Black's Law Dictionary* 139 (6th ed. 1990)).

The two-pronged standard set forth in *Terletsky* must be proven by clear and convincing evidence. *Terletsky.* at 688. The plaintiffs' higher burden to show bad faith at trial consequently also gives them a higher burden when contesting a motion for summary judgment. The plaintiffs must introduce enough evidence that, if believed, would compel a jury to find bad faith by clear and convincing evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254-55, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

This court has shown its disfavor of the use of peer review organizations in the past. In *Milton S. Hershey Medical Center v. State Farm Ins. Co.*, this court stated that it viewed PROs as merely hired guns for the insurance companies. *Milton S. Hershey Medical Center v. State Farm Ins. Co.*, 21 D. & C. 4th 62, 65 (1992). This court recognizes that peer review organizations are comprised of medical professionals who submit their opinions as to the necessity of treatment without conducting a firsthand, personal examination of the

patient. Further, they do not hear any evidence provided by the health care providers or the insured. *Id.* at 65-66. This court is highly skeptical of the neutrality of peer review organizations. Consequently, the plaintiffs' characterization of the peer review organizations as "captive viewers" and "shams" does not offend this court as scandalous.

However, because the Pennsylvania legislature has determined that peer review organizations are worthwhile to insurance companies, this court cannot agree with the plaintiffs that a mere submission of *any* claim to peer review organization is in itself bad faith. The legislature has provided a procedure whereby insurance companies are required to contract with peer review organizations to evaluate the reasonableness and necessity of claims.

> (b) Peer review plan for challenges to reasonableness and necessity of treatment.
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> (1) Peer review plan. Insurers shall contract jointly or separately with any peer review organization established for the purpose of evaluating treatment, health care services, products or accommodations provided to any injured person. Such evaluation shall be for the purpose of confirming that such treatment, products, services or accommodations conform to the professional standards or performance and are medically necessary. An insurer's challenge must be made to a PRO within 90 days of the insurer's receipt of the provider's bill for treatment or services or may be made at any time for continuing treatment or services...

75 Pa.C.S.A. § 1797(b). While this court is skeptical of much of the use of peer review organizations, the instant case presents a fact pattern which lends itself to peer review as contemplated by the legislature.

In the instant case, the insured was evaluated by a

hospital emergency room and released. After treating her for eighteen months and being reimbursed by State Farm, her chiropractor informed the insurance carrier that the insured would reach maximum medical improvement in three to four months. He based this opinion on his own personal examination of the insured, which included x-rays and an MRI. After the expected maximum medical improvement date came and went, the defendants continued to make payments on additional bills that were submitted. After a second inquiry to the chiropractor, the defendants were then informed that the insured's treatment would extend indefinitely. This opinion was not supplemented with any objective evidence of injury.

To deny the defendants' motion for summary judgment, this court would in effect rule that adherence to a statutorily mandated procedure is bad faith. State Farm was faced with a claim that initially prescribed a relatively routine regimen that later developed into an indefinite period of care. This is exactly the case to advance to a peer review organization. Here, there was inconsistency over time with no objective evidence to support the chiropractor's later finding. Faced with these conflicting reports from the chiropractor, the defendants properly utilized the means set forth by the legislature to determine if continued treatment was in a fact a necessity. There was a reasonable basis for State Farm to contract with a peer review organization under the procedure set forth by the statute.

Peer review organizations are to be used to serve the function of providing an independent review of conflicting or questionable evaluations. The use of peer review organizations can be likened to the use of an independent court-appointed expert witness when both sides' experts offer contradictory testimony. The reasoning behind the use of peer review is to curtail any inflated or prolonged bills submitted to the insurance companies. This court agrees with the purpose and objective of the peer review, but also agrees with the plaintiffs' argument

that peer review organizations are not without inherent influence by insurance companies since that is where their compensation comes from.

Nevertheless, it is not for this court to determine whether Laurel was or has been a "sham PRO", but to determine if State Farm exercised bad faith in contracting with a peer review organization approved by the Commonwealth. Because the Insurance Commissioner has given the stamp of approval on Laurel's qualifications to provide objective, independent reviews, this court finds that the defendants complied with the statutory requirements set forth by the Pennsylvania legislature. Had the plaintiff provided sufficient evidence to prove that State Farm unduly influenced Laurel and the subsequent reports from Dr. Hoban and Dr. Behrend by means outside the statutory provisions (i.e. additional under the table funds), they may have compelled a jury to find bad faith.

Based on the foregoing, this court finds that State Farm had a reasonable basis to contract for peer review of Mrs. Backstrom's treatment. Given this court's skepticism of peer review organizations, it still must find that it would be unduly harsh to find an insurance company culpable for bad faith by complying with a statutorily mandated procedure. The motion for partial summary judgment of defendants State Farm Insurance Companies and State Farm Mutual Automobile Insurance Company is granted. An appropriate order follows.

ORDER OF COURT

June 14, 1999, upon consideration of defendants' motion for partial summary judgment as to plaintiffs' claim of bad faith in Count II of the complaint and plaintiffs' response thereto,

IT IS HEREBY ORDERED that the motion for partial summary judgment is granted.