SEVER EARLY AND SEVER OFTEN: PRACTICAL CONSIDERATIONS ON SEVERING BAD FAITH CLAIMS IN SUPERSTORM SANDY AND OTHER FIRST PARTY INSURANCE CASES

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The practice of severing bad faith claims in first party insurance cases first emerged in Taddei v. State Farm Indemn. Co., 401 N.J. Super. 449 (App. Div. 2008). In Taddei, the insured filed suit against its auto carrier for uninsured/underinsured motorist ("UM/UIM") benefits after he was injured in a motor vehicle accident. The insured did not assert a bad faith claim until the time of trial. The primary issues brought on appeal were whether the trial judge was permitted to mold the verdict to the UM/UIM policy limits and whether the court was required to address the insured's unpled bad faith claim. However, relying on Rule 4:38-2 (which governs severance/bifurcation of trials generally), the Appellate Division noted that it would have been appropriate for the trial judge to have severed the bad faith claim from the underlying claim, with the latter being "held in abeyance until conclusion of the former." Id. at 465-66. The court found that this procedure would preserve the plaintiff's ability to pursue a potential bad faith claim while protecting the insurer from being required to produce its claim file prematurely and potentially disclosing privileged material that would jeopardize the insurer's defense. Ibid.

In Procopio v. GEICO, 433 N.J. Super. 377 (App. Div. 2013), the Appellate Division directly ruled on this issue and established severance of bad faith claims as a well-recognized and legitimate approach to the handling of discovery in UM/UIM cases in which such a claim is plead. In Procopio, the insured filed suit against his auto carrier for UM/UIM benefits, asserting claims for breach of contract, bad faith refusal to pay the claim, and violations of the New Jersey Consumer Fraud Act. The trial judge severed the bad faith claim from the underlying coverage claim for purposes of trial. However, the court directed the parties to proceed with discovery simultaneously on all claims. The Appellate Division reversed, holding that the insured was not entitled to pursue his bad faith claim while litigating the underlying UM/UIM claim. The court reaffirmed the dual rationales discussed in Taddei to support its position: 1) promotion of judicial economy and efficiency since the expensive and time-consuming discovery for a bad faith claim would be rendered moot by a favorable ruling on the UM/UIM claim for the insurer; and 2) protection of the insurer by avoiding premature disclosure of potentially privileged materials to the prejudice of the insurer's defense while preserving the insured's right to pursue the bad faith claim. The court further concluded that it "discern[ed] very little benefit in allowing discovery to proceed simultaneously since a claim for UIM benefits is separate and distinct from a claim of bad faith and the evidence to establish each claim is very different." Id. at 383. The court reasoned that the alternative would incentivize insureds to assert a bad faith claim in every complaint, giving them access to the insurer's claim file at an early stage of discovery. See also Waker-Ciocco v. GEICO, 439 N.J. Super. 603 (App. Div. 2015) (holding that trial court abused its discretion by denying auto insurer's motion to sever bad faith and by compelling disclosure

of bad faith discovery, and finding that insurer was entitled to severance and stay of bad faith claim despite the fact it disclosed some bad faith-related materials in discovery).

Recently, there has been a trend towards adopting the procedure of severing and staying bad faith claims beyond the UM/UIM context, particularly in Superstorm Sandy cases. In a recent unpublished opinion, the Appellate Division reversed and remanded decision on interlocutory review, and ordered the bad faith claim severed and stayed in a Superstorm Sandy case involving a warehouse fire allegedly caused by a chemical reaction due to the mixing of chemicals from flooding. See Alden-Leeds, Inc. v. QBE Specialty Ins. Co., No. A-2034-14T1, 2015 WL 4507151 (N.J. Super. Ct. App. Div., July 27, 2015).

In particular, this practice has become very prevalent in Monmouth and Ocean Counties. Initially, judges in these counties were willing to grant motions for partial summary judgment to dismiss bad faith claims under the right circumstances—namely, when the facts in support of such a claim were minimal and the parties had at least conducted paper discovery. However, beginning in late 2014/early 2015, judges began increasingly denying such motions and severing and staying the bad faith claims, often *sua sponte*. This appears to have been a coordinated effort between the two counties to streamline trials (if not discovery) and to take a consistent approach amongst the two counties handing the largest volume of Superstorm Sandy cases in the state.[1]

Although severing and staying bad faith claims has its benefits, a problem arises when judges opt to sever and stay the bad faith claim, either *sua sponte* or at the request of the plaintiff, after the carrier has already produced all or most of its claim file. In this situation, the carrier endures all of the downsides of this procedure (namely, not having a final resolution on the bad faith claim in its favor) and gets none of the benefits (such as withholding most of its claim file, with the exception of inspection reports, the policy, estimates, etc.).

Therefore, so long as the trend appears to be moving towards increased use of this procedure by courts in first party cases (even after "bad faith discovery" has been conducted), the authors recommend proactively moving to sever and stay bad faith claims immediately after filing the Answer. Assuming it is an individually managed case (such as Superstorm Sandy cases), this issue can be addressed in the initial case management conference/order. However, if it is not, a motion to sever and stay must be filed. Either way, once the bad faith claim is severed and stayed, the carrier will not have to produce any "bad faith discovery," such as internal emails, internal reports, reserve information, and, most importantly, claim notes. Further, any questions regarding an adjuster's mental impressions as to coverage or claim handling during a deposition would not only be objectionable, but would be an appropriate instance to instruct the client not to answer (given the court order limiting discovery, pursuant to Rule 4:14-3).

Severing and staying the bad faith claim at an early stage of discovery will also significantly reduce the likelihood of ever litigating the bad faith claim. It is well-settled that a bad faith claim fails as a matter of law if an insured could not be successful on a motion for summary judgment on the underlying breach of contract/coverage claim. See, e.g., Waker-Ciocco, supra, 439 N.J. Super. at 611-12. Therefore, if the carrier succeeds at trial (or if it can be established that the plaintiff could not have succeeded on summary judgment), the bad faith claim will be moot. But the most important consideration is to ensure that, as coverage counsel, you do not place your client in the position of experiencing all of the drawbacks of severing and staying and not reaping any of the benefits. Thus, for the time being, sever early and sever often.

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[1] A judge in Monmouth County stated on the record that it was the policy of both counties to sever and stay bad faith claims in Superstorm Sandy cases. The authors would note that although they do not agree with utilizing this procedure in response to a motion for partial summary judgment to dismiss any bad faith claims, they believe this coordination between these counties was appropriate and sensible.