

# IN WUTZ JUDGE WETTICK FURTHER DEFINES DISCOVERY AND TRIAL PROCEDURE FOR UNDERINSURED MOTORIST (UIM) CASES WHEN A BAD FAITH CLAIM PURSUANT TO 42 Pa. C.S.A. § 8371 IS ALSO ALLEGED.

By Wesley Payne, Esquire. White and Williams, Philadelphia, PA

## I. INTRODUCTION

In *Wutz v. Smith and State Farm Insurance Company*, No. GD07-021766 (Court of Common Pleas, Allegheny County Sept. 9, 2009), Judge Wettick, of the Court of Common Pleas of Allegheny County revisited the problematic discovery and procedural issues presented in cases containing underinsured motorist (UIM) and, possibly, uninsured motorist (UM) claims (hereinafter "UM/UIM claims"), and alleged bad faith claims. Previously, Judge Wettick in *Gunn v. The Automobile Insurance Company of Hartford*, Civil No. GD07-002888, PICS Case No. 08-1266 (C.P. Allegheny July 25, 2008) had ruled that discovery for the UM/UIM claim and bad faith claim should be conducted at the same time and that the claims could proceed to trial simultaneously. However, in this case the ruling of the court, although following the same rationale, was slightly different and may have a substantively different impact upon the trial of the matter. Instead of requiring the defendant carrier to produce the discovery relating solely to the bad faith claim during the discovery period, the court held that the bad faith discovery should not be turned over to the plaintiff until immediately after the UM/UIM claim is submitted to the jury. Further, if plaintiff believed that his or her case would be prejudiced by receiving the bad faith discovery at that point in time, plaintiff can request a continuance of the bad faith trial. Accordingly, Judge Wettick has established a procedure that prevents prejudice to defendants and provides adequate discovery to plaintiffs.

## II. PRIOR HISTORY – THE *KOKEN* AND *GUNN* CASES

Prior to 2005, the issue of how to try a UM/UIM claim with a bad faith claim before a jury did not exist in the Commonwealth of Pennsylvania because the Pennsylvania Insurance Commission required all auto insurance carriers to include in their policies a provision

which required all UM/UIM claims to be adjudicated before mandatory UM/UIM arbitration panels. Accordingly, UM/UIM matters were rarely if ever tried before a jury in state courts. However, in a case referenced herein as *Koken*, the Pennsylvania Supreme Court ruled that the Insurance Commissioner did not have the authority to require mandatory arbitration provisions for UM/UIM claims. *Insurance Federation of Pennsylvania, Inc. v. Com., Dept. of Ins.*, 889 A.2d 550 (Pa. 2005). After the *Koken* case, many insurance companies changed the terms of their Pennsylvania insurance policies so that mutual consent was required in order to go to arbitration. Therefore, without a mutual agreement between the parties to proceed with the UM/UIM matter via binding arbitration, the only forum left to hear UM/UIM matters is the state trial courts.

As a result, several UM/UIM matters have made and are making their way through the courts. Additionally those cases that also contain a bad faith claim, have presented challenging discovery and procedural issues for trial courts. One of the cases was *Gunn v. The Automobile Insurance Company of Hartford, supra*.

In *Gunn*, the insured brought a UIM claim for breach of contract and bad faith. The insurance carrier, Hartford, sought to sever and stay the bad faith claim while the UIM claim was decided by a jury. Hartford also sought to preclude discovery from proceeding in the bad faith case while the underlying UIM claim was at issue. Hartford argued that the bad faith claim was dependent on the outcome of the UIM claim, and that considerations of judicial economy, prevention of unnecessary expense to the parties, and prejudice to the insurer, required the bad faith claim to be stayed pending the outcome of the UIM claim. Judge Wettick rejected these arguments. He reasoned, notwithstanding the fact that the UIM claim and bad faith claim were plead in the same complaint, that procedurally and substantively the claims

were very different. Even though the claims were proceeding to trial together, the cases would be decided in different forums. The UM/UIM matter would be decided by the jury; the bad faith matter would be decided by the judge. Further, there was the potential that the requested discovery arguably applied to both the UIM and bad faith claim.

Judge Wettick based his rationale, in part, on the case of *Mishoe v. Erie Ins. Co.*, 573 Pa. 267, 824 A.2d 1153 (2003), which holds that there is no right to a jury trial in a bad faith claim brought pursuant to 42 Pa. C.S.A. § 8371. The court reasoned that the UM and bad faith actions were already severed because the breach of contract or UIM claim would be decided by a jury and that the bad faith claim would be heard by the trial judge. As Judge Wettick wrote, "Obviously, plaintiff's bad faith claim will be severed because plaintiff's UIM claim will be resolved through a jury trial while bad faith claims are tried nonjury." Further the court ruled that the discovery on the bad faith claim should not be stayed because "a trial of the bad faith claim held immediately after the trial of the UIM claim is likely to be the most efficient and fairest method of resolving the UIM claim because it avoids duplicate testimony and permits the judge to make his or her decision when the judge best recollects the relevant evidence." Therefore, the court stated that there would be no prejudice to defendant by turning over the bad faith discovery prior to the beginning of the UIM trial. *Gunn, supra*.

However, in the *Gunn* opinion, Judge Wettick noted that he would consider other remedies to prevent prejudice to the carrier short of severing the trial if the carrier made a showing that it would be prejudiced by a court order allowing discovery relevant *only* to the bad faith claim before the UIM claim is tried. The options included: (1) restricting the scope of discovery because of the back-to-back trials and (2) providing for compliance with specific discovery

requests immediately after the trial of the UIM claim. *Gunn, supra*.

Hartford appealed the decision to the Superior Court; however, the appeal was quashed as interlocutory. *Gunn v. Automobile Ins. Co. of Hartford*, No. 1345 WDA 2008 (Pa. Sup. Ct. Apr. 6, 2009), 2009 PA. Super. 70; 2009 Pa. Super. LEXIS 85 (April 15, 2009). Against this backdrop, State Farm sought similar relief to Hartford's before the same judge. However, the insurance carrier limited the area of discovery to be withheld to the discovery pertaining to the bad faith claim only.

### III. UNDERLYING FACTS IN *WUTZ*

In *Wutz*, State Farm, was defending a UIM action, where the insured claimed breach of contract for failure to pay UIM benefits and bad faith for that alleged failure to pay. State Farm sought to stay discovery on its evaluation of the value of the claim and how it reached its evaluation, pending the outcome of the breach of contract claim. The discovery that State Farm sought to protect only related to the bad faith claim. State Farm argued that requiring it to furnish information as to the values it placed on the UIM claim, how it reached those values and its opinions on the strengths and weaknesses of the UIM claim would be prejudicial to the carrier. However, State Farm did not raise an advice of counsel defense in the bad faith claim. Plaintiff took the position that they were entitled to the discovery and failure to produce the discovery would delay the trial of the bad faith claim. Plaintiff also requested an in camera inspection of the requested bad faith discovery.

### IV. DISCUSSION

Interestingly, in *Wutz*, all parties agreed that information sought to be withheld was limited and relevant solely to the bad faith claim. State Farm argued that to allow discovery relating to State Farm's evaluation of the underlying, UM/UIM, breach of contract claim would be unfairly prejudicial. State Farm argued that the release of the information would be akin to "the defense in a football game [being required] to furnish its defensive formation for the upcoming play to the Plaintiff before the Plaintiff selected the play that it would call."

After evaluating the arguments, the trial court noted that it would not necessarily permit discovery of information in the files of the insurance company relevant to the bad faith claim, and that the insurance company should have an opportunity to show that the discovery of certain information relevant to the bad faith claim will unfairly prejudice the insurance company in the breach of contract claim. Thus, the trial court in *Wutz* refused to allow discovery of State Farm's evaluation ranges relating to the underlying claim, as well as the factors that were considered in evaluating the claim.

The court ruled consistent with its earlier rationale as stated in *Gunn* and disallowed the discovery. The court required that State Farm furnish the bad faith discovery when the UIM claim went to the jury and that State Farm should have ready for use at the UIM trial an unredacted copy of the claims activity log. The court further refused plaintiff's request for an in camera inspection of the discovery because the parties had agreed to the discovery related to the bad faith claim only. Additionally, the court ruled that once the jury returned its verdict, the trial court judge would begin trying the bad faith claim. Further, the trial court noted in its order that, even though State Farm did not assert an advice of counsel defense in the bad faith claim, it retained the right to assert attorney-client privilege and protect documents that otherwise would not be discoverable in a bad faith case.

Finally, the court stated that if the situation arises where a plaintiff believes the bad faith claim cannot immediately go to trial because of the postponement of discovery until the time of jury deliberations, then that plaintiff should file a motion under Pennsylvania Rule of Civil Procedure 213 to stay the bad faith trial. Such a motion must be filed promptly or immediately after the court's ruling to withhold the bad faith discovery and that the basis of the motion should be that there was not adequate time to prepare for the bad faith trial. In addition, the court would also consider postponing the bad faith trial if plaintiff, upon receipt of the bad faith discovery, offers a compelling explanation as to why the trial cannot proceed at that time, and as to why the request for a later trial

was not made shortly after the court issued the order delaying the discovery.

### V. CONCLUSION

What we can take from this case is that Judge Wettick has attempted to balance the interests of the parties and to prevent prejudice to either party by ensuring full and complete discovery at a point when neither party's case will be prejudiced or given an unfair advantage. In this post *Koken* world, where UM/UIM and bad faith claims can be brought in the same proceeding, the potential for prejudice against a defendant insurance carrier is great. Judge Wettick's ruling attempts to prevent the potential prejudice and allow plaintiffs all the discovery necessary and adequate time to fully prepare for the prosecution of a bad faith claim. Finally, even if plaintiff's counsel does not originally request additional time for evaluation of the bad faith discovery, but, based upon the bad faith discovery received after the UM/UIM matter is submitted to the jury believes additional time may be required to properly prepare for the bad faith trial, plaintiff's counsel may still request a delay of the bad faith trial to prepare for the bad faith trial before the judge.

The above procedure relies upon counsel making the trial judge aware of the potential issues that may arise. It also relies upon the discretion of the trial judge as a gatekeeper of what discovery is related to the UM/UIM claim and what discovery is related to the bad faith claim and what discovery is related to both claims. It further relies upon the judge's discretion as to whether the bad faith discovery provided while the jury is deliberating on the UM/UIM claim can be digested in a timely fashion to immediately start the bad faith trial. But, if plaintiff believes the discovery may require additional review, the procedure does allow plaintiff's counsel two (2) opportunities to request a continuance of the trial of the bad faith claim. Overall, the system is workable. There are kinks to be worked out in future cases but Judge Wettick's process and procedure demonstrates when appropriate procedural safeguards are taken, all parties can receive a fair trial.

