

Effective Immediately: New Jersey Enacts an Insurance Bad Faith Statute for Auto Insurers

WRITTEN BY

Kristin H. Jones | Brian H. Callaway

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New Jersey has enacted an insurance bad faith statute that will penalize insurers for certain types of conduct in handling claims for uninsured and underinsured motorist coverage as the result of auto accidents. The new law allows prevailing insureds to recover extra-contractual damages, up to three times the policy limit, as well as attorney's fees, meaning automobile insurers in New Jersey now face substantially more risk in litigation.

Governor Phil Murphy signed the New Jersey Insurance Fair Conduct Act (IFCA) into law on January 18. Effective immediately, the IFCA allows claimants injured in motor vehicle accidents and entitled to uninsured (UM) or underinsured motorist (UIM) coverage — benefits due where there is either no bodily injury coverage at all on the vehicle responsible for the accident, or where that vehicle's policy limit is insufficient to cover all of a claimant's injuries — to file suit against an insurer who has:

- 1) "unreasonably denied a claim for coverage or payment of benefits,"
- 2) unreasonably delayed "coverage or payment of benefits," or
- 3) violated the New Jersey Unfair Claims Settlement Practices Act (UCSPA), N.J.S.A. § 17:29B-4, which governs "unfair methods of competition and unfair and deceptive acts or practices in the business of insurance."

Importantly, "deceptive acts or practices in the business of insurance" under the UCSPA include "unfair claim settlement practices." Section 17:29B-4 sets forth 15 examples of such practices, ranging from the misrepresentation of the available policy limit, to failing to promptly investigate a claim, to not making a good faith effort to settle a claim when liability becomes reasonably clear, to compelling insureds to institute litigation to recover benefits.

Previously, the commissioner of the New Jersey Department of Banking and Insurance had sole enforcement power under the UCSPA, exercised only based upon a finding that the violations occurred "with such frequency as to indicate a general business practice." The IFCA not only provides a private right of action under the UCSPA to claimants, but also expressly provides that "the claimant shall not be required to prove that the insurer's actions were of such a frequency as to indicate a general business practice."

Claimants who can prove an IFCA violation are entitled to recover actual damages, including trial verdicts, up to

three times the applicable coverage, as well as pre-and post-judgment interest, litigation costs, and attorney's fees.

New Jersey joins other states that have created statutory bad faith regimes for policyholders to pursue claims against insurers. Pennsylvania, for example, is known for having a particularly strict bad faith statute, 42 Pa. C.S. § 8371, allowing policyholders in certain cases to recover multimillion-dollar punitive damages awards.

In some respects, the IFCA is not as sweeping as Pennsylvania's bad faith statute. The IFCA is limited to UM and UIM coverage under automobile insurance policies, whereas Pennsylvania's bad faith statute applies to a much broader range of insurance policies and coverages. Further, New Jersey's bad faith statute caps damages at three times the available policy limit, whereas punitive damages under the Pennsylvania statute are only limited by constitutional constraints and case law.

However, the IFCA is broader than Pennsylvania's bad faith statute in at least three respects. First, a violation of the IFCA only requires proof of "unreasonable" behavior, whereas an insurer is only liable under Pennsylvania's bad faith law when it knew or recklessly disregarded its lack of a reasonable basis for denying benefits. Second, the IFCA contains a much broader definition of "insurers" subject to potential suit than Pennsylvania law. The IFCA defines "insurer" to include "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." That means statutory bad faith liability could potentially attach to individual claims adjusters, although it is unclear as a matter of law how an individual employee of an insurance company could be considered an "insurer." Pennsylvania's bad faith statute does not provide a cause of action against employees. Third, the IFCA allows a violation of New Jersey's UCSPA to constitute bad faith, whereas Pennsylvania courts have concluded that a violation of Pennsylvania's nearly identical statute may be some evidence of bad faith but is not a *per se* violation of the bad faith statute.

Perhaps the most notable aspect of the IFCA is how many questions it leaves unanswered, which will likely lead to significant amounts of litigation. Most important, while the IFCA seeks to punish "unreasonable" conduct by insurers, it does not specify what type of conduct will be considered unreasonable and whether the standard applied will be purely objective or also incorporate a subjective component. As to specific conduct alleged to be unreasonable, the statute raises more questions than it answers, including: How much time amounts to an "unreasonable delay"? What is an "unreasonable denial of a claim for benefits," particularly if the facts or law are unsettled? When is a difference of opinion between an insurer and claimant as to the value of a UM/UIM claim unreasonable?

The New Jersey legislature could have addressed the issues that took decades of litigation to resolve in its sister state of Pennsylvania, but chose not to. Now, insurers and claimants must face a host of fundamental questions, such as:

- Will IFCA claims be tried by a judge or jury?
- What is a claimant's burden of proof? Clear and convincing evidence? Some other standard?
- What is the statute of limitations for an IFCA claim? When does it begin to run?

- Would it be unconstitutional to apply the IFCA retroactively?

Despite being little more than a blurry roadmap, the IFCA provides insureds with a new avenue of recourse against their carriers and exposes auto insurance companies and their employees in New Jersey to high-stakes litigation. Given the many uncertainties about what the law means and how it will be interpreted, insurers may want to consider reviewing their good faith claims handling practices for objective reasonableness and consistency with the New Jersey UCSPA. Insurers should also consider educating their UM/UIM adjusters on the new law and ensure there is a process in place for addressing situations in which employees are sued individually.

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