Clients&FriendsMemo

Important Court Decision For No-Fault Insurers -- Federal Court Rejects Argument To Limit Insurers' Right To Seek Judicial Relief From Fraud Schemes

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We are pleased to inform you of a very favorable recent caselaw development in the no-fault insurance area, in which our firm played a significant role. Specifically, on March 24, 2016, in the case of *Liberty Mutual Fire Insurance Company, et al. v. Shapson, et al.*, the United States District Court for the Eastern District of New York (Honorable Eric N. Vitaliano) rejected certain defendants' attempt to stay or dismiss an insurer's federal lawsuit seeking declaratory relief stemming from a major no-fault fraudulent scheme involving the fraudulent incorporation of providers, unlawful fee-splitting and other improper conduct. The decision is significant because it is the first time that a federal court in New York has been faced with the issue of whether the doctrine of "primary jurisdiction" would prevent insurers from bringing or prosecuting such lawsuits unless and until State regulatory authorities determine the impropriety of the fraudulent conduct alleged. Judge Vitaliano specifically rejected the application of the "primary jurisdiction" doctrine, denied the defendants' motion to dismiss, and refused to stay the action pending State regulatory actions. Cadwalader represented Allstate Insurance Company, GEICO, Progressive Northeastern Insurance Company and the Property Casualty Insurers Association of America ("PCIAA") as *amici curiae* before the Court on the primary jurisdiction issue.

In *Shapson*, Liberty Mutual sought a judgment declaring there was no duty to pay certain pending and future no-fault reimbursement claims because the defendants had wrongfully represented they were solely owned by licensed healthcare professionals, and were also engaged in unlawful fee-splitting with unlicensed individuals and referral kickback schemes. A number of the defendants moved to dismiss the action or alternatively stay the action pending referral of the claims to New York State no-fault insurance regulatory authorities. Defendants' application argued, as is often argued in these cases, that the insurer plaintiff had failed to allege certain elements of a RICO cause of action, that certain fraud-based claims were not alleged with the requisite degree of particularity, and that the case was not an appropriate RICO case as opposed to a simpler breach of contract case.

The application also raised, however, a unique (but misguided, in our view) argument that the case should be stayed pursuant to the doctrine of "primary jurisdiction" because the questions of whether the providers were fraudulently incorporated or engaged in unlawful fee-splitting with non-professionals must be determined by the New York State Departments of Financial Services, Health and Education rather than the judicial system. In essence, the defendants argued that because New York Insurance Law Section 5109 permitted investigations by the State authorities and de-authorization of medical providers from the no-fault system by the State regulators, the judicial system should not be permitted to address such issues until any State investigation is concluded.

On behalf of Allstate, GEICO, Progressive and the PCIAA, Cadwalader submitted a brief to the Court addressing specifically the issue of primary jurisdiction. In particular, the brief (1) provided the Court with background information concerning the rampant level of no-fault fraud plaguing New York State, (2) detailed for the Court how the position of the defendants, if adopted, would promote no-fault fraud and abuse and further increase the costs to insurers and consumers alike, (3) described the absurd results that the application of such doctrine would create, including the gutting of the New York Court of Appeals decision in *State Farm v. Mallela*, which held that insurers may seek relief through affirmative litigation when entities fail to comply with licensing requirements, and (4) explained why courts have the competence and ability to examine and determine fraudulent no-fault activity. Citing extensively to the brief Cadwalader submitted, the Court soundly rejected application of the primary jurisdiction doctrine, denied the stay application, and upheld the co-extensive authority of the State regulatory authorities and the judiciary to address these types of issues. In doing so, the Court issued a number of legal holdings that no-fault insurers and their counsel will find useful in future cases. These include the following:

- "[Nowhere] is there any indication in the plain language of the statute [Insurance Law Section 5109] or the intent the words implicate, that the designated state agencies' investigatory power be anything other than co-extensive with properly commenced litigation."
- "No-fault insurance fraud is rampant and pervasive in New York, skyrocketing 1700% in the period between 1992 and 2000."
- "[T]here is no indication that there is any particular discretion that courts would intrude upon by considering claims of the sort brought by Liberty Mutual. Such a finding is in no way intended, nor could it be, to diminish the reality that state agencies have laudably endeavored to combat this epidemic through increased investigations and regulatory action. These activities, however, have never restrained courts from examining allegations, on behalf of insurers, that they were entitled to damages because medical providers had been fraudulently incorporated and received reimbursements to which they were not entitled."

- "[T]he Court agrees with *amici* that the Department of Financial Services was never designed, nor has it been equipped, to be the sole gladiator fighting against tens of thousands of *noxii* each year. Try as it might, it cannot be reasonably expected to litigate the flood of claims and fully protect the rights of insurers, and the motoring public they serve, who have been defrauded by such racketeering activity."

This decision is critically important to no-fault insurers as providers and others who are engaged in no-fault fraud continue to seek ways to delay or prevent judicial review of their fraudulent activities. The decision should prove helpful to insurers and their counsel in continuing to fight to curb the proliferation of no-fault fraud and to do so in a manner that ensures a fair, prompt and full hearing of the merits of insurers' properly brought legal claims.

If you have any questions, or require assistance in no-fault or other health care/insurance issues generally, please do not hesitate to contact any of the below listed attorneys at Cadwalader.

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