

no-fault newsline

A ROAD MAP FOR MOTOR VEHICLE INSURERS AND OWNERS

04-01-2014

Defending Fraudulent PIP Claims: Jury Instructions Can Be Critical

By Drew Broaddus

No-fault carriers must always be on guard against fraudulent claims. Moreover, because the existence of fraud is generally a question of fact, claims involving fraud are far more likely to go to trial than ordinary no-fault claims. Recently, in *Carter v Liberty Mutual Group*, unpublished opinion per curiam of the Court of Appeals, re'd 3/18/14 (Docket No.s 308359 & 308884), the Court of Appeals explored the type of evidence that can support a no-fault carrier's fraud defense, and the procedure for presenting such defenses at trial.

The plaintiff in *Carter* was driving on a freeway on June 30, 2008, when his vehicle was suddenly rear-ended by another vehicle. This caused the plaintiff's vehicle to spin out of control and crash. The Plaintiff was not at fault in the accident. He filed suit, claiming that he had sustained injuries in the accident and that defendant, his no-fault insurance provider, refused to pay PIP benefits to which he was entitled. The matter proceeded to trial, and the defendant requested that the jury be given a fraud instruction concerning plaintiff's claim for benefits. The defendant also requested that a question concerning fraud be placed on the jury verdict form. The trial court denied both requests. The jury ultimately returned a verdict in favor of plaintiff, and the trial court later awarded the plaintiff attorneys' fees as well.

The defendant appealed, claiming that the trial court committed reversible error when it failed to provide the jury with a requested fraud instruction, and failed to place a fraud question on the jury verdict form. The Court of Appeals agreed, vacated the jury verdict in favor of the plaintiff, and remanded for a new trial.

Specifically, the defendant offered multiple proposed fraud instructions to the trial. This turned out to be critical, because the panel found that two of the defendant's proffered fraud instructions were not applicable. However, the panel found that a third fraud instruction, proposed by the defendant below, should have been given. This instruction read: "If you find that Plaintiff submitted a claim that is in some respect so excessive as to have no reasonable foundation, you may find that Plaintiff submitted a fraudulent claim to Defendant." *Carter, supra* at *4.

The panel explained that the defendant had pled fraud and misrepresentation as affirmative defenses. If it were found that the plaintiff had engaged in fraudulent conduct or made fraudulent statements relative to the loss, the defendant's policy explicitly stated that coverage would not be provided. At trial, the insurer presented the following evidence of fraud by the plaintiff which, in the panel's view, warranted a fraud instruction and/or question on the verdict form:

The vast majority of plaintiff's claims consisted of claims for replacement services and attendant care services. ...[I]mmediately after his accident plaintiff obtained the services of a "case manager" to handle his insurance matters. [An

SECRET WARDLE NOTES:

Fraud is an affirmative defense, *Carter, supra* at *4, and as such, should be asserted by the carrier in its first responsive pleading in order to avoid waiver.

Proper presentation of a fraud defense is critical because, in addition to defeating the plaintiff's claim, MCL 500.3148(2) can entitle an insurer to an award of attorney fees if the claim is fraudulent or so excessive that it had no reasonable foundation. This award may offset any claim for PIP benefits that are due or will come due.

Carter demonstrates that even when the insurer presents evidence of the claimant's fraud, the insurer's efforts will be for naught if the jury is not properly instructed. Jury instructions "should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them." *Carter, supra* at *2. When the standard jury instructions do not adequately address a topic, the trial court is obligated to give additional instructions when requested by a party, if the supplemental instructions are legally correct and are supported by the evidence. *Id.*

CONTINUED...

investigator] testified that it was unusual to see a case manager in a fairly simple claim such as plaintiff's. ...[C]ase managers are typically involved only in cases where catastrophic injuries are involved and ... case managers are typically registered nurses or medical professionals who bill the no-fault insurer. The case manager used by plaintiff was a disbarred attorney who ... sent documents out under other attorney's letterhead and would alternately use the title of paralegal or case manager. He did not bill defendant.

...[D]efendant received forms listing replacement services and attendant care services that were allegedly performed for plaintiff. In several instances ... the adjuster was ... receiving statements for services that had supposedly been rendered when the dates listed for the services had not even yet occurred. One of the forms bore a notary that was post-dated as well, and one of defendant's disability slips was also post-dated. And ... the only doctor that had provided any disability slips for plaintiff, even though he had been treating with several doctors, was [a] doctor that defendant had been investigating for years.

...[P]laintiff testified that immediately after the accident, he was unable to work or drive and required help getting out of bed, showering, dressing, and with all aspects of daily life. Plaintiff testified that a close family friend ... performed services for him every day from June 30, 2008, until sometime in May 2011 for approximately 8 to 9 hours per day. [Plaintiff] then testified that he was out of town on at least three week long trips during that time during which [this friend] did not accompany him or provide services. ...[P]laintiff submitted forms to defendant indicating that replacement and attendant care services were performed by [this friend] ... [during] those time periods when plaintiff was out of town....

...[V]ideo surveillance was performed on plaintiff ... [and] [o]n one date that services were allegedly performed, just four months after the accident, [the aforementioned friend] did not appear at plaintiff's house. Despite the video evidence, an affidavit attesting to the fact that [this friend] was there on that date was submitted.... Video evidence was also shown of plaintiff driving himself to school, of putting a backpack on his back and walking to classes, of driving for over an hour, and of him driving [the friend] around.... *Carter, supra* at *4-6.

CONTACT US

Troy

2600 Troy Center Drive, P.O. Box 5025
Troy, MI 48007-5025
Tel: 248-851-9500 Fax: 248-538-1223

Lansing

6639 Centurion Drive, Ste. 100, Lansing, MI 48917
Tel: 517-886-1224 Fax: 517-886-9284

Grand Rapids

2025 East Belkline SE, Ste. 600, Grand Rapids, MI 49546
Tel: 616-285-0143 Fax: 616-285-0145

www.secrestwardle.com

CONTRIBUTORS

Motor Vehicle Litigation Practice Group Chairs

Jane Kent Mills
Michael W. Slater

Editor

Linda Willemsen

We welcome your questions and comments.

OTHER MATERIALS

If you would like to be on the distribution list for No-Fault Newslines, or for newsletters pertaining to any of our other practice groups, please contact Secrest Wardle Marketing at swsubscriptions@secrestwardle.com or 248-539-2850.

Other newsletters include:

Benchmarks – Navigating the hazards of legal malpractice
Blueprints – Mapping legal solutions for the construction industry
Boundaries – A guide for property owners and insurers in a litigious society
Community Watch – Breaking developments in governmental litigation
Contingencies – A guide for dealing with catastrophic property loss
Fair Use – Protecting ideas in a competitive world
In the Margin – Charting legal trends affecting businesses
Industry Line – Managing the hazards of environmental toxic tort litigation
Landowner's Alert – Defense strategies for property owners and managers
On the Beat – Responding to litigation affecting law enforcement
On the Job – Tracking developments in employment law
Safeguards – Helping insurers protect their clients
Standards – A guide to avoiding risks for professionals
State of the Art – Exploring the changing face of product liability
Structures – A framework for defending architects and engineers
Vital Signs – Diagnosing the changing state of medical malpractice and nursing home liability

SECRET
SW
WARDLE

Copyright 2014 Secrest, Wardle, Lynch, Hampton, Truex and Morley, P.C.

This newsletter is published for the purpose of providing information and does not constitute legal advice and should not be considered as such. This newsletter or any portion of this newsletter is not to be distributed or copied without the express written consent of Secrest Wardle.