FEDERATION OF REGULATORY COUNSEL, INC.

TREATMENT OF INSURANCE CLAIMS UNDER TENNESSEE'S CONSUMER PROTECTION ACT

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Tennessee's General Assembly enacted the Tennessee Consumer Protection Act**1** in 1977 and has amended it frequently in the interim. This Act declares a number of "unfair or deceptive acts" to be unlawful and in violation of the Act, and, when any of these is found to have been a willful and knowing violation, the Act permits an award that may be as much as three times**2** actual damages and for the non-prevailing party to be charged for the prevailing party's attorneys fees.**3**

The Supreme Court of Tennessee in 1998 affirmed a decision of the Tennessee Court of Appeals to the effect that the Act applied to insurance.**4** While, the *Myint* case opened up the Act to claims for wrongful actions by insurers, the Court specifically found based on the trial record that the carrier's conduct in handling the claim in that case was neither unfair nor deceptive**5** so that no award of damages under the Act was made.

In *Myint*, the Tennessee Supreme Court was not persuaded of inapplicability of the Act to insurance due to other Tennessee statutes that provided remedies for essentially the same conduct.**6** It was persuaded on this by the broad declaration of acts declared to be violations,**7** a scope provision in the Act that declared it was to be liberally applied,**8** and an absence of any statutory exclusion for insurance in the Act.**9** Immediately after and as the result of *Myint*, the Act was opened up for suits against insurers, but that case did not affirm or declare any award against an insurer or remand the case for further proceedings about liability under the Act.

Sparks v. Allstate Ins. Co.**10** held that the Act applied to claim handling under, as well as to the sale of, an insurance policy. *Sparks* involved denial of the insurer's motion to dismiss, but there is no published information as to outcome at the trial if in fact the case proceeded to trial. *Soloman v. Hager***11** was an action against a builder and the insurer which had issued a builder's risk policy to the builder and involved a wall that fell following heavy rains and caused the roof to sag and the house to bow in the middle; the carrier denied liability on the ground that damage had been caused by a flood. Evidence at trial differed as to cause of the damage; the jury found for the plaintiff under the contract, under the Act and under Tennessee's penalty statute. The Court of Appeals affirmed, rejecting arguments that motions for directed verdict or new trial should have been granted or that requested charges should have been given to the jury. The case also held that the one-year statute of limitations did not bar additions of a claim under the Act in an amended complaint since the claim asserted in the amended complaint arose out of the conduct, transaction or occurrence set forth in the original complaint and was related back to that date for purposes of that one-year statute.**12**

Gaston v. Tennessee Farmers Mut. Ins. Co.**13** reached the Tennessee Supreme Court, which found that principles under the Act would permit a jury to conclude that the carrier's conduct in not telling an insured (unrepresented by counsel) that her third party settlement would prevent her from collecting under her own policy, due to her failure to secure carrier consent under the policy's subrogation provision, violated the Act. The directed verdict for the insurer was reversed and the case was remanded for trial.**14** On remand, a bench trial resulted in judgment for the insured, effectively finding a waiver of the subrogation provision by the carrier, making an award under the Act, and including plaintiff's attorney's fees (which the trial court had cut back from those sought). The trial court found that the 25% penalty statute did not apply because the trial court had no proof that the carrier's refusal to pay the claim was not in good faith and the trial court did not award treble damages as it found no deceptive conduct, all of which was affirmed by the Tennessee Court of Appeals.**15**

The recent case of *Farris v. Standard Fire Ins. Co*.**16** was an appeal from a trial court judgment on a case involving a claim under a homeowner's policy. Plaintiffs sought damages based on contractual liability and additional damages under the Act for costs they incurred which were not thought to be covered by the policy, e.g., loss of use, interest on home equity loan, along with attorney's fees incurred at trial and on appeal. The jury found for plaintiffs on contract and under the Act, and the trial court, concerned about double recovery, forced plaintiff to elect between remedies. The appellate court made it clear that a claim under the Act was to be treated as a separate cause of action, reduced the award under the Act to eliminate duplication, left undisturbed the portion of the award under the Act for damages not covered by contract, and awarded attorney's fees for the trial and the appeal.

Case law under the Act and the Act itself make Tennessee a potentially dangerous place for defendant insurers in litigation. As yet, no judgment amount in reported cases involving insurance under the Act has been outrageous, which we believe is attributable to several factors, none easily demonstrable. First, carriers are aware of the Act and we think they have taken it into account in resolving claims, have borne in mind that appearances are a separate reality, and have both paid the claims they owe and largely avoided creating unfortunate records in the claims process on claims they believe they did not owe. Second, we think insurers have improved their trial advocacy. Third, and finally, we think that alternative dispute resolution by mediation, which many trial courts require, and by mandatory arbitration provisions in policies, have reduced exposure at trial by providing attractive means other than litigation by which parties may resolve insurance disagreements. In summary, this may be a situation where legislation has worked to achieve its aim of improving lives of consumers and done so without undue cost, but it may simply be a situation where the worst is yet to come.

Endnotes

1. Tenn. Pub. Acts 1977, Ch. 438, now codified at Tenn. Code Ann. Sec. 47-18-101, et seq., and sometimes referred to as the Act.

2. Tenn. Code Ann. Sec. 47-18-109(a)(3).

3. Tenn. Code Ann. Secs. 47-18-109(e)(1) permits recovery by prevailing plaintiffs and 47-18-109(e)(2) for defendants if the action in found to be frivolous, or with legal or factual merit or brought to harass.

4. *Myint v. Allstate Ins. Co*., 970 S.W.2d 920 (Tenn. 1998).

5. *Id*. at 927.

6. Specifically, Tenn. Code Ann. Sec. 56-7-105 (Provides for a penalty of up to an additional 25% of a contract award in a private action for refusal to pay an insurance claim if not made in good faith) and Tenn. Code Ann. Sec. 56-8-101, et seq. (Tennessee's Unfair Trade Practices Act in the business of insurance, which provides no private cause of action).

7. Tenn. Code Ann. Sec. 47-18-104.

8. Tenn. Code Ann. Sec. 47-18-102 and remedially interpreted, Tenn. Code Ann. Sec. 47-18-115.

9. Tenn. Code Ann. Sec. 47-18-111.

10. 98 F. Supp. 2d 933 (W.D. Tenn. 2000).

11. 2001 Tenn. App. LEXIS 929.

12. Tenn. Code Ann. Sec. 47-18-110. The one-year period runs from date of discovery and there is a five-year maximum.

13. 120 S.W. 3d 815 (Tenn. 2003).

14. *Id.* at 822-23.

15. 2007 Tenn. App. LEXIS 388. The Court of Appeals reversed the trial court only on its denial of pre-judgment interest.

16. 2008 U.S. App. LEXIS 12068, 2008 FED. App. 0315N (6th Cir.), not recommended for full publication.