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Recent Supreme Court of Florida Decision May Give Insureds Additional Bad Faith Trap

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In *State Farm Mutual Automobile Insurance Company v. Curran,* No. SC12-157 (Fla. March 13, 2014), the Supreme Court of Florida held that an insured's breach of a compulsory medical examination ("CME") provision did not result in a forfeiture of benefits under an uninsured motorist contract. Instead, for the insurer to prevail as a result of the breach, the insurer must plead and prove, as an affirmative defense, that the insured's breach of the CME provision caused actual prejudice to the insurance company. The decision, as the dissent aptly makes clear, may provide an insured with yet another trap to set up an insurance company for a bad faith claim. Slip op. at 22.

The case arose as a result of an automobile accident in which an uninsured motorist rear-ended the insured's car. Once the insured settled with the uninsured motorist, the insured demanded $100,000, her uninsured motorist policy limits, and offered to settle and release her insurance company if it tendered the policy limits within 30 days. The insured claimed that her estimated damages as a result of the accident were $3,500,000 because she suffered from reflex sympathetic dystrophy syndrome Type 1, which also is known as complex regional pain syndrome.

The day before the insured's demand was set to expire, the insurance company contacted the insured's attorney to schedule a CME under the terms of the policy, which imposed a duty on the insured to

> be examined by physicians chosen and paid by us, as often as we reasonably may reasonably require. A copy of the report will be sent to the person upon written request. The person or his or her legal representative if the person is dead or unable to act shall authorize us to obtain all medical reports and records.

Slip op. at 4. The insurance policy also provided that the insured had no right of action against the insurance company until all terms of the policy were met. The insured refused to attend the CME, absent compliance with her demands regarding the CME, and instead filed suit against the insurer.

Both parties sought summary judgment in the trial court. The insurer contended that it was entitled to decline coverage as a matter of law, given the insured's failure to participate in the CME. The insured, among other things, argued that she never refused to participate in the CME and instead asserted certain requests relating to the CME, which she described as reasonable to protect her interests. The trial court granted summary judgment to the insured finding that under these circumstances she did not refuse to appear for the CME.

Initially, a three judge panel from Florida's Fifth District Court of Appeal rendered a decision for the insurer, finding that the insured's breach of the CME provision precluded recovery under the policy. The full court, sitting ***en banc***, withdrew the

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three-judge panel opinion, and held that while the insured breached the contract when she refused to appear for her CME, the insurance company did not prove any prejudice suffered as a result of this failure. For this reason, the insured's breach of the CME provision did not result in forfeiture of uninsured motorist benefits under the policy.

On appeal, the Supreme Court of Florida affirmed the Fifth District's decision. The Supreme Court of Florida rejected the insurance company's argument that the CME provision was a condition precedent to both suit and coverage. Instead, the Supreme Court of Florida concluded that the CME provision, in the context of uninsured motorist coverage, was a post-loss obligation of the insured rather than a condition precedent to coverage. As a result, an insured's breach of the CME provision did not result in a post-occurrence forfeiture of insurance benefits, absent a showing of prejudice to the insurance company.

The Supreme Court of Florida also held that the burden of pleading and proving prejudice, resulting from an insured's breach of the CME provision, rested with the insurance company. The Supreme Court of Florida found that requiring an insurance company to plead and prove an affirmative defense based on prejudice comported with the intended purpose of the uninsured motorist statute, ***i.e.***, to protect persons who are entitled to recover damages for injuries caused by uninsured or underinsured motorists. The Supreme Court of Florida also noted that the insurance company had two remedies for an insured's breach of a CME provision. First, the insurance company could seek to abate the action until the insured complied with the CME provision. Second, the insurance company could assert a breach of the CME requirement as a complete defense to coverage if it could establish prejudice.

The Supreme Court of Florida refused to remand to the trial court for determination regarding prejudice because, like the Fifth District Court of Appeal, the Supreme Court of Florida found that the undisputed facts of the case established that the insurance company was not prejudiced by its insured's refusal to submit to a CME before filing suit. The insured eventually attended the CME with the medical doctor selected by the insurance company. That medical doctor was not called to testify at trial, and the record, according to the Supreme Court of Florida, did not indicate that the delayed CME affected the integrity of the CME in any way, shape or form. For this reason, the record did not include any evidence suggesting that the initial refusal to submit to the CME, before the insured filed suit, operated to prejudice the insurance company, thereby making it necessary to remand the case to the trial court for a determination of prejudice

At trial, a jury awarded more than $4.6 million in damages. Judgment was entered against the insurance company for the uninsured motorist policy limits of $100,000. As concurring and dissenting opinions by the Fifth District, sitting ***en banc***, acknowledged, the pre-suit machinations by the plaintiff about the CME were a thinly veiled effort to create a bad faith claim against the insurance company, which never had the opportunity to settle the claim before suit was filed unless it was willing to settle without a medical evaluation and report by a physician of its choosing.

As the dissenting opinion in the Fifth District explained:

> This case is a prime example of how a clever litigant can game the legal system and get away with it. The record reveals

that appellee Robin Curran willfully and materially breached the insurance policy State Farm issued to her by twice refusing to attend a scheduled compulsory medical examination as required under the policy. Curran breached the policy as part of a scheme she employed to establish a bad faith action against State Farm so she could recover in excess of the policy limits. Her damages far exceeded the $100,000 policy limits, as is evident from the multi-million dollar verdict she received from the jury. Attending the scheduled compulsory medical examination (CME) would have revealed to State Farm the extent of her injuries and risked its pre-trial tender of the policy limits, thus precluding a bad faith action.

State Farm Mutual Automobile Insurance Company v. Curran, 83 So. 3d 794, 810 (Fla.5th DCA 2011) (Sawaya, J., dissenting). No doubt future plaintiffs will refuse to cooperate with their insurance companies in regard to a whole host of conditions subsequent, *i.e.*, cooperation clauses as specified in their insurance policies, given the Supreme Court of Florida's holding in *Curran*, in hopes of potentially creating a bad faith claim. ■

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