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www.garanlucow.com

Garan Lucow Miller, P.C. 1111 West Long Lake Road, Suite 300 Troy, Michigan 48098 248.641.7600

From the Co-Editors
James L. Borin & Simeon R. Orlowski

COURT OF APPEALS DISCUSSES FRAUD CLAIMS IN NO FAULT CONTEXT

EMILY LEE PARTRIDGE¹ - Contributor

Last year, on June 25, 2008, the Michigan Supreme Court decided *Cooper v. Auto Club*, 481 Mich 399 (2008), wherein they held that a plaintiff's claim for common law fraud was a separate and distinct cause of action from a breach of contract claim for PIP no-fault benefits and, therefore, it was not subject to the limitations imposed by the one year back rule, MCL 500.3145(1). This opened the door for crafty plaintiffs' attorneys to attempt to circumvent the one year back rule, especially in claims for attendant care benefits involving old catastrophic accidents.

However, the Supreme Court did caution against this possibility, and indicated that the trial courts "should exercise special care" in assessing allegations of common law fraud. The Court specifically pointed out that an insured will not prevail alleging fraud when an insurer's representations are contradictory to what their insurance policies say, as an insured is *presumed* to have read their policy. In fact, the Court further pointed out that only information and facts

¹Emily Lee Partridge is an Associate with the Firm's Grand Rapids office and can be reached at (616)242-2721 or epartridge@garanlucow.com

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which are exclusively within the insurer's possession and cannot be obtained by the insured/claimant are those that can be misrepresented.

On May 12, 2009, the Court of Appeals approved for publication its previously unpublished decision in *Johnson v Wausau* (Docket No. 281624). The fact that the Court has decided to publish this decision means that it now has precedential value.

In *Johnson*, on October 5, 1983, Nancy Eastman, who was 10 months old at the time, suffered severe brain injuries in an automobile accident because she was not in a child safety seat at the time of the collision. When she was released from the hospital, Dorothy Bencheck became her legal guardian and provided 24 hour attendant care to the little girl. The no-fault insurer agreed to pay Ms. Bencheck \$20 per day to care for Nancy. Ms. Bencheck allegedly called the no-fault insurer constantly on different occasions and at different times asking whether she was entitled to additional benefits for the care provided. Ms. Bencheck claims that she was never told about attendant care benefits. In 1989, Ms. Bencheck suffered financial difficulty and was no longer able to care for the girl, who would have been approximately six years old at the time.

In April 1990, Tammy Johnson became Nancy's legal guardian and care provider. She too received \$20 per day for 24/7 attendant care. At some point, the pay was increased to \$21 per day as a "cost of living adjustment."

In the summer of 2006, Johnson sued the no-fault insurer for breach of contract under the No-Fault Act and for common law fraud. The Plaintiff alleged that the no-fault insurer had fraudulently induced the caretaker to accept an unreasonably low compensation rate for her in-home attendant care services. The claims adjuster for the no-fault insurer admitted that he had never advised either care provider about attendant care benefits, and further stated that he did not believe they were entitled to such benefits because "it made caring for the disabled person a job."

The defendant insurer filed a motion for partial summary disposition in order to dismiss the claim for benefits accrued prior to the year before suit was filed pursuant to MCL 500.3145(1) and in order to dismiss the allegations for common law fraud. The trial court granted the motion and the plaintiff appealed.

In order to establish fraud, a plaintiff must demonstrate that (1) the insurer made a material representation; (2) that the representation was false; (3) that when the insurer made the material representation, the insurer knew that it was false, or made it recklessly without any knowledge of its truth and as a positive assertion; (4) that the insurer made it with the intention that it should be accepted upon by the insured; (5) that the insured acted in reliance upon it; and (6) the insured thereby suffered injury. Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any of them is fatal to recovery.

The Court of Appeals said that even if the claims adjuster's representation was fraudulent, the plaintiff cannot establish that she relied on the fraudulent misrepresentation. The claims adjuster's representation did not involve information or facts that were exclusively or primarily in the control of the no-fault insurer, and in fact, the claimants had the means, i.e. by consulting with

a lawyer, to determine if the representation was true. There was no evidence to suggest that the no-fault insurer prevented either care provider from determining the truthfulness of the insurer's representation. Because plaintiff had the means to determine the accuracy of the adjuster's representation, plaintiff is unable to establish that she relied on the representation. Accordingly, the provider's claim for fraud fails. The Court affirmed the summary disposition entered in favor of the defendant at the trial court level.

Editor's Note:

The Court's application of *Cooper* to this set of facts is most interesting. This claim failed because the plaintiff could not establish that she relied on the alleged fraudulent misrepresentation. The reason the plaintiff could not establish that she relied on the representation is because the plaintiff had the means to determine the accuracy of the adjuster's representation. The "means to determine the accuracy" is defined by this Court as "consultation with a lawyer."

Query: Since a person, presumably, always has the ability to consult with a lawyer, can a plaintiff ever establish a claim for fraud???



SAVE THE DATE

Garan Lucow Miller's Annual Golf Outing

The Inn at St. John's, Plymouth, Michigan

September 16, 2009

INDY CITY SEMINAR

Mark your calendar for the Firm's Indy City Seminar which will be held in Indianapolis on Thursday, October 22, 2009. **Watch Law Fax for further details.**

FALL BREAKFAST SEMINAR

Mark your calendar for the Firm's Fall Breakfast Seminar which will be held at the Troy Marriott Hotel on Thursday November 5, 2009. **Watch Law Fax for further details.**