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October 20, 2016

Charles Bryant
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Dear Mr. Bryant:

Please accept this Legal Opinion in response to your request for legal interpretation as to whether insurance carriers are responsible for fees related to storage of vehicles at New Jersey auto body shops following collisions. Additionally, the Legal Opinion seeks to further address whether insurance companies' widespread practice of deducting these fees from payouts to claimants is a violation of the Consumer Fraud Act.

By way of background, auto body repair facilities frequently charge fees for the storage of vehicles on their premises awaiting repairs and/or a determination of whether the vehicle will be repaired or classified as a "total loss." Insurance companies have engaged in policies and practices wherein they subsequently refuse to pay for the storage and related fees and/or deduct those fees from any recovery paid to claimants. This Legal Opinion will evaluate: (1) whether insurance

companies must pay storage fees under New Jersey law; and (2) can claimants bring first-party or third-party law suits under the Consumer Fraud Act against insurance companies for failing to pay storage fees.

ANALYSIS

1. Insurance Companies are Responsible for Storage and Related Fees.

In *State Farm Mut. Auto. Ins. Co. v. Toro*, an insurance company brought a declaratory action against the insured to determine whether towing and storage charges after an accident were recoverable under uninsured motorist provisions of the policy. 127 N.J. Super. 223, 224 (Law Div. 1974). Although State Farm was promptly notified of the claim, it waited nearly four (4) months to inspect the vehicle at the auto body shop. *Id.* at 225. Following an arbitration wherein the arbitrator determined that the insurance company was responsible for payments for damage to the vehicle, the declaratory action was commenced to determine whether the storage and related charges also were recoverable, inclusive of daily storage charges from the date of the accident to the date of the inspection. *Id.*

Notably in *Toro*, the policy contained an express exclusion for any "towing, storage or other 'salvage' charges" in instances where the insured made claims under the uninsured motorist provision. *Id.* at 226. Therefore, the Court was tasked with determining whether the insured was "legally entitled to recover" storage and related charges notwithstanding the exclusionary language in the insurance policy disclaiming coverage. *Id.*

First, the Court noted that exceptions, exclusions and reservations within an insurance policy will be constructed in accordance with their plain language and the "usual rules governing the construction of insurance contracts," unless the language is inconsistent with public policy. *See id.* (citing *State Farm Mut. Auto. Ins. Co. v. Cocuzza*, 91 N.J. Super, 60, 63 (Ch. Div. 1966);

Allstate Ins. Co. v. McHugh, 124 N.J. Super. 105, 11 (Ch. Div. 1973)). The *Toro* Court then determined that "property damage" must be defined as inclusive of all damages which flow "as a proximate result of the basic property damage." *State Farm Mut. Auto. Ins. Co. v. Toro*, 127 N.J. Super. at 227. Although the general rule for damages is the difference in market value of the vehicle immediately before and immediately after the injury, the proper measure of damages is an amount which will compensate the insured for "all the detriment naturally and proximately caused" by the accident. *See id.* (citing *Hintz v. Roberts*, 98 N.J.L. 768, 770-71 (E & A 1923)).

In the event that an auto insurance policy contains a "protection of salvage" or "duty to protect" clause, the storage charges would be covered under the purview of that clause. *See State Farm Mut. Auto. Ins. Co. v. Toro*, 127 N.J. Super. at 227-28 (citing *Parodi v. Universal Ins. Co.*, 128 N.J.L. 433 (1942). Notably, duty to protect clauses provide for reimbursement to the insured for all reasonable expenditures incurred in recovering or preserving the vehicle in the case of loss or damage. *State Farm Mut. Auto. Ins. Co. v. Toro*, 127 N.J. Super. at 227-28. Therefore, the Court noted storage and related charges were clearly recoverable under such a clause as storage charges were undertaken for the benefit of all concerned to preserve the value of the vehicle following an accident. *See id.*

If an auto insurance policy does not contain a duty to protect clause, the Court held that storage and related charges would still be covered as the charges would be considered to have come about as a "natural and proximate" cause of the accident. *Id.* at 228. The Court noted these types of damages were "highly foreseeable" and that the claimant had a legal entitlement to recovery for these types of damages. *Id.* ("Policy exclusions notwithstanding, an insured is entitled as part of his property damage claim to reimbursement of the expenses incurred in protecting his

insurer against further property loss and safeguarding the damaged vehicle by application of general principles of law").

In light of the above, it is beyond dispute that insurance companies are responsible for storage fees regardless of whether such fees arise from a first-party or third-party claim. The *Toro* case unequivocally establishes such a right as a matter of law, regardless of whether insurance contracts contain a duty to protect clause and notwithstanding any exclusionary language which would limit a claimant's right to recovery for storage or related fees. Regardless of the scenario, storage and related charges are encompassed within those expected charges which would flow as a natural and probable consequence of any accident causing property damage.

Furthermore, as the claimant is entitled to reimbursement for these fees, it is wholly improper for insurance companies to deduct them from payouts to claimants. By engaging in this course of conduct, insurance companies are impermissibly shifting the burden of paying the fee to the claimant even though the claimant is entitled to reimbursement for these types of charges. Moreover, although case law is sparse on this issue, there is nothing which indicates that insurance companies need only pay storage fees from the date they declare a vehicle a total loss rather than storage fees for the entirety of the cars duration in storage. Under the principles established in *Toro*, New Jersey Courts likely would hold that an insurance company acts in bad faith by failing to pay for storage fees for the entirety of the vehicle's duration in storage, particularly in instances wherein the insurance company delayed in declaring the vehicle a total loss. Such a determination would be consistent with underlying policies which protect actions which are done for the benefit of the insured to safeguard the property and/or to compel insurance companies to pay for acts which are a natural and proximate cause of the accident. Further, *N.J.A.C.* 11:3-10.4, entitled Adjustments for Total Losses, does not list storage costs or related costs as permissible deductions

from the overall payout for a total loss of a vehicle. Therefore, there is no support either statutorily or in case law for insurance companies to deduct storage costs from payouts to claimants.

Considering all of the above, it is our opinion that insurance companies cannot refuse to pay storage or related costs or otherwise deduct those costs from a claimant's total payout.

2. **Insurance Companies Can Be Sued By First And Third Party Claimants Under The New Jersey Consumer Fraud Act.**

Having established that insurance companies, not insureds, are generally responsible for storage and related fees for vehicles involved in collisions, we next determine whether the insurance companies' practices of refusing to pay the fees and/or deducting the fees from claimants gives rise to a potential cause of action under the Consumer Fraud Act.

To prevail on a Consumer Fraud Act claim, a plaintiff must establish three elements: 1) unlawful conduct by defendant; 2) an ascertainable loss by plaintiff; and 3) a causal relationship between the unlawful conduct and the ascertainable loss. *Zaman v. Felton*, 219 N.J. 199, 222 (2014) (quoting *Bosland v. Warnock Dodge, Inc.*, 197 N.J. 543, 557 (2009)). Under the Consumer Fraud Act an "unlawful practice" is defined to include:

> [U]nconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby.

N.J.S.A. 56:8–2

With respect to what constitutes an "unconscionable commercial practice," the New Jersey Supreme Court explained in *Kugler v. Romain*, that unconscionability is "an amorphous concept obviously designed to establish a broad business ethic." 58, N.J. 522, 543 (1971). The standard of conduct that the term "unconscionable" implies is lack of "good faith, honesty in fact and

observance of fair dealing." *Id.* at 544. However, "a breach of warranty, or any breach of contract, is not per se unfair or unconscionable…and a breach of warranty alone does not violate a consumer protection statute." *D'Ercole Sales, Inc. v. Fruehauf Corp.*, 205 N.J. Super. 11, 25 (App. Div. 1985). The Legislature intended that substantial aggravating circumstances be present in addition to the breach in order to sustain a Consumer Fraud Act claim. *DiNicola v. Watchung Furniture's Country Manor*, 232 N.J. Super. 69, 72 (App. Div. 1989). Bad faith and/or a lack of fair dealing will be sufficient for a transaction to rise to the level of an unconscionable commercial practice. *See Cox v. Sears Roebuck, Inc.*, 138 N.J. 2, 20 (1994).

Here, it is likely that a compelling argument can be made that the failure of insurance companies to pay storage and related fees constitutes and unconscionable commercial practice within the meaning of the consumer fraud act. First, although *N.J.S.A.* 17:29B-4 does not create a private cause of action, it would likely provide an evidentiary basis as to what activities are improper.[1] Notably, it categorizes the following activities, among others, as "unfair or deceptive practices" with respect to claim settlement practices:

> (c) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;
> (d) Refusing to pay claims without conducting a reasonable investigation based upon all available information;
> (f) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear; and
> (g) Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds.

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[1] *N.J.S.A.* 17:29B is not construed as being incorporated into contracts of insurance written in New Jersey and thereby creating a cause of civil action for breach of contract for the individual policyholder. *Retail Clerks Welfare Fund, Local No. 1049, AFL-CIO v. Continental Cas. Co.*, 71 N.J. Super. 221, 225 (App. Div. 1961); *see also ProCentury Ins. Co. v. Harbor House Club Condominium Ass'n, Inc.*, 652 F. Supp. 2d 552, 563-64 (D.N.J. 2009) (While *N.J.S.A.* 17:29B-4, cannot be used as a basis for a private cause of action, it can be used as a guideline for a common law claim). Moreover, complaints to the Commissioner of Banking and Insurance based on violations of *N.J.S.A.* 17:29B could lead to statutory penalties by way of a State action.

Therefore, by failing to pay storage and related fees despite a clear and unambiguous obligation to do so either under the plain meaning of the insurance policy and/or countervailing public policy, insurance companies are engaging in a bad faith practice and/or unfair dealing which is designed to eschew their obligations under the law in favor of cost saving measures. As such, provided the requisite bad faith can be established, insurance companies failing to pay for storage and related costs, and subsequently charging those costs back to the claimant, are likely sufficient to support a claim under the Consumer Fraud Act.

With that in mind, claims against insurance companies under the Consumer Fraud Act are subject to additional scrutiny. Previously, it was the policy of New Jersey to bar Consumer Fraud Act claims against businesses that belonged to an industry which was subject to extensive administrative regulation. *Hampton Hosp. v. Bresan*, 288 N.J. Super. 372 (App. Div. 1996). Such a bar previously extended to insurance companies as they were a heavily regulated industry scrutinized closely by the Department of Banking and Insurance. However, in *Lemelledo v. Beneficial Management Corp.*, the Court rejected this traditional notion, holding that the Consumer Fraud Act applied to the sale of insurance policies. 150 N.J. 255, 265 (1997).

Consequently, "[i]n order to overcome the presumption that the CFA applies to a covered activity," a carrier must demonstrate:

> that a direct and unavoidable conflict exists between application of the CFA and application of the other regulatory scheme or schemes. It must be convinced that the other source or sources of regulation deal specifically, concretely, and pervasively with the particular activity, implying a legislative intent not to subject parties to multiple regulations that, as applied, will work at cross-purposes. We stress that the conflict must be patent and sharp, and must not simply constitute a mere possibility of incompatibility. If the hurdle for rebutting the basic assumption of applicability of the CFA to covered conduct is too easily overcome, the statute's remedial measures may be rendered impotent as primary weapons in combating clear forms of fraud simply because those fraudulent practices happen also to be covered by some other statute or regulation.

Id. at 270.

Following *Lemelledo*, the New Jersey Supreme Court has been silent as to whether the Consumer Fraud Act also extends to actions against insurance companies regarding the payment of benefits under an existing policy. Unfortunately, Courts have taken divergent views on this issue., but we believe a claim is under the CFA is cognizable.

In *Weiss v. First Unum Life Ins. Co.*, the Third Circuit permitted plaintiff to sustain a claim against his insurance company under the Consumer Fraud Act. 482 F.3d 254 (3d Cir. 2007). In *Weiss*, the plaintiff alleged that his insurance company wrongfully stopped paying his monthly disability payments as part of a broader scheme to reduce high payouts to disability insurance policy holders. *Id.* Notably, the plaintiff alleged a pattern of potential fraudulent activity aimed a wide range of policy holders rather than alleging facts related to an isolated insurance policy dispute. *Id.* The *Weiss* Court explicitly held that the Consumer Fraud Act should be applicable to schemes wherein the insurance company seeks to defraud insureds of their benefits. *Id.* at 266. Moreover, the Court held that such a scheme would be "clearly an unconscionable commercial practice" because the Consumer Fraud Act covers both fraud in the initial sale of a good or service and fraud in the performance of obligations subsequent to that sale. *Id.* Although the *Weiss* Court noted the New Jersey Supreme Court's pointed silence regarding the applicability of the Consumer Fraud Act to schemes designed to deny insurance benefits, the Third Circuit determined to allow those claims as they would not conflict with regulations already in place for the insurance industry and would serve the Consumer Fraud Act's underlying purpose of deterring and punishing deceptive practices. *See id.*

On the other hand, in *Myska v. New Jersey Mfrs. Ins. Co.*, the Court held that plaintiff could not pursue a claim under the Consumer Fraud Act against an insurance company stemming from an initial coverage dispute. 440 N.J. Super. 458 (App Div. 2015). In that case, the Plaintiff sought damages for diminution of value following a car accident. *Id.* In examining whether such a claim gave rise to a cognizable action under the Consumer Fraud Act, the *Myska* Court noted that *Lemelledo* only authorized a cause of action under the Consumer Fraud Act for the selling or advertising of insurance policies. *Id.* at 485. The *Myska* Court averred that the *Lemelledo* Court held that the Consumer Fraud Act was not intended to allow for the recovery in instances stemming from an insurance company's refusal to pay benefits. *Id.*; *see also Nikiper v. Motor Club of Am. Cos.*, 232 N.J. Super. 393, 400-01 (App. Div. 1989). The Court went on to hold that it was outside the ambit of the Consumer Fraud Act to assert a claim under it concerning whether a claim was properly filed and supported under an insurance policy. *Myska v. New Jersey Mfrs. Ins. Co.*, 440 N.J. Super. at 485-86.

However, the *Myska* Court did not reject the analysis outlined in *Weiss,* rather the *Myska* Court noted the cases were factually distinguishable as the *Weiss* matter involved allegations that the insurance company fraudulently discontinued previously authorized benefits. *Id.* at 486. The *Myska* Court ultimately determined that such a scenario was different enough than an initial coverage dispute to warrant disparate treatment as to whether the claims could be brought under the Consumer Fraud Act.

In examining whether a claim could be made under the Consumer Fraud Act for insurance companies' unauthorized refusal to pay storage and related fees, the *Weiss* case would appear to be more on point to the present circumstances. Notably, as in the *Weiss* matter, the controversy at issue involves insurance companies' bad faith refusal to pay a benefit to which the insured is

indisputably entitled. Additionally, the insurance companies are engaging in a widespread practice of refusing to pay the storage charges rather than engaging in a one-off policy dispute which, under *Myska*, likely would not give rise to Consumer Fraud Action. Therefore, to the extent that it can be established that insurance companies are engaging in a widespread pattern of fraudulent activities by failing to pay storage charges, it would elevate the dispute beyond the simple "coverage dispute" outlined in *Myska* to a widespread fraudulent scheme noted in *Weiss* as sufficient to sustain a claim against an insurer under the Consumer Fraud Act.

Moreover the *Myska* decision incorrectly recites the Supreme Court's decision in *Lemelledo* because the Supreme Court in that case expressly ***declined*** to assert any opinion regarding the lower Court's decisions with respect to asserting a cause of action under the Consumer Fraud Act against insurance companies for non-payment of entitled insurance benefits. *Lemelledo*, 150 N.J. at 265, n. 3; *see also Rodio v. Smith*, 123 N.J. 345, 352 (1991) (Supreme Court declined to reach issue of applicability of Consumer Fraud Act to payment of insurance benefits). This is especially true where the *Lemelledo* Court expressly cautioned that:

> If the hurdle for rebutting the basic assumption of applicability of the CFA to covered conduct is too easily overcome, the statute's remedial measures may be rendered impotent as primary weapons in combating clear forms of fraud simply because those fraudulent practices happen also to be covered by some other statute or regulation.

Lemelledo, 150 N.J. at 270.

Therefore, the *Myska* decision cannot find an adequate basis in Supreme Court precedent to support the contention that coverage disputes of this nature would not fall within the ambit of the Consumer Fraud Act. It thus seems probable that a Complaint plead with sufficient specificity could sustain a claim under the Consumer Fraud Act for widespread fraud.

Finally, such a claim could be brought on either a first party or third party basis. Notably, Court have consistently held that bad faith claims against insurance companies can be brought in instances of third party coverage disputes provided the requisite elements of the cause of action are sufficiently pled. *See, e.g.*, *Hudson Universal, Ltd. v. Aetna Ins. Co.*, 987 F.Supp. 337 (D.N.J. 1997); *Universal-Rundle Corp. v. Commercial Union Ins. Co.*, 319 N.J. Super. 223, 250-51 (App Div. 1999). Therefore, a claim likely would be permitted as analogous to an action for bad faith against insurance companies on a third party basis as long as the third party can meet the requisite elements for sustaining a claim under the Consumer Fraud Act.

CONCLUSION

In sum, under New Jersey law it is abundantly clear that insurance companies are responsible for reasonable storage and related charges following a collision, even if the insurance company specifically disclaims coverage for such charges in the insurance policy. There is also a strong probability that insurance companies' practice of charging claimants for the storage fees gives rise to both first and third party claims under the Consumer Fraud Act.

Sincerely,

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