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The Erosion Continues: Washington Supreme Court Expands the *Olympic Steamship* Rule and Finds a Viable Bad Faith Claim by a PIP "Insured"

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In *Matsyuk v. State Farm Fire & Cas. Co.*, 2012 Wash. LEXIS 119 (Feb. 9, 2012), the Washington Supreme Court held that: (1) a tortfeasor's insurer that provides both Personal Injury Protection (PIP) and liability coverage must pay a pro rata share of the attorney fees incurred by the PIP insureds via the equitable "common fund" doctrine, even though the insurer derived no benefit from the "fund"; (2) PIP insureds are entitled to *Olympic Steamship* attorney fees for bringing actions to gain an equitable pro rata share of legal expenses incurred in securing the "fund"; and (3) where a liability and PIP insurer allegedly "leverages" its position as holder of the liability settlement funds to get the PIP insured to release her PIP claim, such conduct may amount to a viable claim for bad faith.

This opinion decided two factually similar consolidated cases, *Matsyuk* and *Weismann*. In both cases, a tortfeasor's insurer paid PIP benefits pursuant to the tortfeasor's policy. The same insurer then paid additional damages under the policy's liability coverage. According to the majority, this created a "common fund" that consisted solely of the "insured's" additional recovery under the liability coverage provisions, paid by the exact same insurer that had also paid the PIP benefits. As a result, the majority held that each injured insured was entitled to share pro rata legal costs — with the PIP insurer — incurred in obtaining a "recovery" from the tortfeasor's liability insurer. In effect, this reduces the PIP insurer's monetary offset of its PIP payout, even if the liability and PIP carriers are one and the same.

As the dissent noted, however, the underlying theory behind the common fund doctrine is that the PIP insurer is benefited by the insured's creation of a common fund that inures to the benefit of the PIP insurer, because without the common fund, the PIP insurer would not have this source of reimbursement for the PIP benefits paid. The dissent reasoned that the tortfeasor's insurance company does not benefit if it recovers from itself.

In addition to its ruling extending the common fund doctrine to cases in which the tortfeasor's PIP insurer recovers from *itself*, the majority also significantly broadened the scope of *Olympic Steamship* attorney fee availability. Under *Olympic Steamship*, when insureds are forced to file suit to obtain the benefit of their insurance contract, they are entitled to attorney fees. The majority held that Weismann was entitled to recover her attorney fees for having to initiate a legal action to recover her pro rata legal costs. In so holding, the majority stated that *Olympic Steamship* fees were appropriate because the question was "one involving interpretation of the insurance policy." However, as the dissent aptly noted, the majority also stated, "[T]he rule requiring pro rata sharing of legal expenses is based on equitable principles and not on construction of specific policy language." The majority never reconciled this contradiction.

Finally, the majority vacated the trial court's dismissal of Matsyuk's bad faith claim. In so holding, the court stated that the PIP insurer's actions in "improperly leverag[ing] its position as the holder of the liability settlement funds" *could* state a bad faith claim for breach of an insurer's duty to treat its insured fairly, honestly, and in good faith. More specifically, Matsyuk's allegation that the insurer refused to effectuate the agreed liability settlement on behalf of the tortfeasor unless she released her claims as a PIP insured against the insurer was, according to the majority, enough to survive a Rule 12(b)(6) dismissal. It should also be noted that the majority did not declare bad faith existed as a matter of law. The case was remanded for further consideration of Matsyuk's bad faith claim.

This is troubling because it concerns the actions of a liability insurer relative to a non-insured claimant. Washington

courts have repeatedly refused to recognize a direct action right for non-insureds. Here, however, by virtue of being elevated to "insured status" under the PIP section of the policy, Matsyuk was able to gain the benefit of the protections normally reserved for insureds when it came to the handling of the third-party liability claim. The court again failed to reconcile this issue.

The *Matsyuk* decision illustrates the continuing expansion of the *Olympic Steamship* rule in Washington, and the efforts of the Washington State Supreme Court to find remedies for insureds and third-party claimants that feel wronged by an insurer.

To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact:

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