MINNESOTA LAWYER

'Good-faith' bills remain a subject of debate

By: Barbara L. Jones March 31, 2008 0

Danny Nelson and his lawyer, Jeffrey Sieben of Minneapolis, think Nelson got a raw deal from his insurance company. Nelson, a 44-year-old bricklayer, was seriously injured in a car accident. He settled his claim against the driver, who was underinsured, for $95,000, and collected another $40,000 in no-fault benefits.

Having suffered injuries to his femur necessitating a future hip replacement and causing recurring health issues, Nelson asked his insurer to pay the $100,000 in underinsured motorist benefits provided for in his auto policy. The insurance company initially offered to pay half, ultimately upping its offer to $75,000 just before trial. Rather than settling the case for $25,000 less than he thought he was entitled to, Nelson opted to go to trial. After hearing the facts, the jury returned a verdict of $793,000.

Despite the highly favorable trial result, the insurer had to pay just $120,000 — the $100,000 policy limit, plus another $20,000 in taxable costs. Both Nelson and Sieben feel that the only reason that the insurance company offered less than it was liable for was that it knew there was little consequence for its conduct.

The experience demonstrates the need for legislation requiring an insurance company to act in good faith, Sieben maintains. Without such a statute, there is no existing law strong enough to require an insurance company to act in good faith, he said.

The effort to create such a cause of action is moving forward at a legislative pace, but a bill has passed out of the Senate. At Minnesota Lawyer's deadline, no bill had been passed by the House, and the House bill under consideration is substantially different from the Senate bill. The House bill is expected to make it to the floor relatively soon.

The proposed legislation would require insurers to act in "good faith" when paying their insured's claims or face a first-party action by the policyholder. It does not cover health insurers. Both bills would award attorney fees in the discretion of the court, but differ in their approach.

Both bills set forth essentially the same standard for a claim. The insured must show:

• the absence of a reasonable basis for denying the benefits of the insurance policy, and

• that the insurer knew of the lack of a reasonable basis for denying the benefits of an insurance policy, or

• that the insurer acted in reckless disregard of the lack of a reasonable basis for denying the benefits of an insurance policy.

The test is considered to fall in the middle of the spectrum of difficulty of proof and is stricter than a straight negligence standard, said Minneapolis attorney Wil Fluegel, who has testified for the Minnesota Association for Justice in favor of the bill. (Known as the Anderson test, it is derived from Wisconsin common law as articulated in Anderson v. Continental Ins. Co., decided in 1978, according to Fluegel.)

But what the damages would be is unclear at this stage. The House bill simply states that the insurer would be liable for costs, damages and attorney fees. The damages presumably would be the difference between the verdict and the amount previously paid, if any. In Nelson's case, the damages would likely be $558,000. But the House bill is silent on punitive damages, meaning the plaintiff's recourse would be under Minn. Stat. Ch. 549, which requires a motion to amend a complaint.

The Senate bill

Interpretations of the potential damages under the Senate bill differ. It has been labeled by Sen. Linda Scheid, DFL-Brooklyn Park, chair of the Commerce and Consumer Protection Committee, as a pro-consumer bill. That arguably means that the Senate bill is intended to allow insureds to collect their damages plus a penalty under the statute.

The bill provides only that a court could tax as costs an amount equal to half the proceeds awarded that were in excess of the amount offered by the insurer ($558,000 in Nelson's case) or $100,000, whichever is less. It is the $100,000 cap that is the problem. Nelson, for example, would still be limited to recovering $100,000 (plus $40,000 in costs) under the language of the bill.

"A straight reading of the bill as presently drafted creates some doubt as to whether the pro-consumer intent voiced by Sen. Scheid during the Senate floor debate is achieved with her current language or needs some technical clarification," Fluegel said.

Fluegel believes the Senate intended the bill to say that Nelson could potentially collect his damages of $558,000, plus a penalty of $100,000, since that is the lesser amount under the statute, plus attorney fees. The Senate bill allows a trial court judge to decide if a plaintiff should collect a penalty or attorney fees or both, Fluegel said.

Procedural differences

The two bills also differ in procedure. As it stands now, the Senate bill would allow a bad-faith claim to be awarded in a post-trial motion as taxable costs under Minnesota Rules of General Practice, Rule 119.

The House bill is as yet silent on the protocol that would be followed in bringing the claim. However, the bill seems to imply that a separate lawsuit would be required because it requires 60 days notice to an insurer as a condition precedent to bringing an action.

Two different viewpoints

The trial lawyers are "cautiously optimistic that a middle ground can be reached and consumers will have a reasonable remedy," said Fluegel. He also said that the governor has not stated whether he will sign a bill, but that MAJ hopes that a bill that is a reasonable compromise will not be vetoed.

MAJ takes the position that a good-faith law will actually reduce litigation.

"I fully expect to see fewer people coming to my door, because their insurance company is going to treat them better," said Joe Crumley, president of MAJ. "A huge number of these case come from disaffected insureds." He also pointed out that under the Senate bill, a bad-faith claim would be a typical post-trial motion and not amount to "double lawsuits," as some have claimed. He called the Senate bill "a good start."

Defense lawyers see no need for the law and say it will cause increases in premiums and make insurance more difficult to get.

"I still haven't seen a valid case for the legislation," said Minneapolis attorney Dale Thornsjo, co-chair of the insurance committee of the Minnesota Defense Lawyers Association. "We get specific anecdotes, snippets of information. We don't know what it is that needs to be fixed."

Defense lawyers and insurers have maintained that existing common-law and statutory duties for requiring contracting parties to act in good faith are sufficient to protect policyholders.

Thornsjo told Minnesota Lawyer the Senate bill is preferable because it keeps the focus on the underlying coverage issue, not the alleged bad faith. "The House bill has a bunch of pitfalls that allow the tail to wag the dog," he said.