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July 26, 2016

VIA LAWYERS SERVICE
Hon. Phillip L. Paley, J.S.C.
Superior Court of New Jersey - Middlesex Vicinage
56 Paterson Street
New Brunswick, New Jersey 08903

Re: Sharon Seamon vs. State Farm Insurance Company, *et al*
Docket No. MID-L-3172-14
Our File No.: 12-90

Opposition to Defendant's Motion to Mold the Judgment and in Support of Plaintiff's Cross-Motion for Costs of Litigation Under R. 4:58-2

Motion Returnable: August 5, 2016

Dear Judge Paley:

Please accept this letter brief in lieu of a more formal brief in opposition to Defendant State Farm's Motion to Mold the Judgment and in support of Plaintiff's Cross-motion for Litigation Costs and Fees under *R.* 4:58-2.

The facts with respect to this motion are undisputed. This was an underinsured motorist claim against the plaintiff, Sharon Seamons' insurance carrier. Ms. Seamon was involved in a very serious accident and suffered severe injuries. The original defendant driver was negligent but was underinsured at the time with insurance liability limits of $15,000. That defendant tendered the policy for the full amount of coverage, after admitting liability and reviewing Ms. Seamon's injuries. Ms. Seamon then filed a claim with her own insurance, State Farm, for coverage under her underinsured policy which had coverage up to $100,000. State farm's exposure was limited to $85,000 based on the policy less the $15,000 that was already tendered by the original tortfeasor. Her claim was denied and Ms. Seamon was forced to file a Complaint against State Farm to force them to comply with the terms of the policy.

Prior to filing a complaint, State Farm was provided with ample evidence of Ms. Seamon's injuries and the facts showing the original tortfeasors undeniable liability. Despite the knowledge and overwhelming evidence that Ms. Seamon's injuries were well in excess of the policy amount, State Farm refused to offer Ms. Seamon an amount within her policy limits that even came close to her actual injuries. Ms. Seamon was forced to file suit and endure the emotional trauma of basically being called a liar by her own insurance carrier followed by the lengthy ordeal of additional and unnecessary discovery and trial. In fact, Ms. Seamon now has additional damages due what she was put through because of the bad faith of State Farm.

At trial the jury heard all the same evidence already provided to State Farm. The jury awarded Ms. Seamon $375,000. A judgment in the amount of $375,733.36, which was the jury verdict with pre-trial interest less the credit of $15,000 already received from the original tortfeasor, was entered on behalf of Ms. Seamon over the opposition of the defendant. Following the trial Ms. Seamon filed a motion to amend the complaint to add the bad faith claims against State Farm as it would be premature to file a bad faith claim until it was determined that Ms. Seamon had a valid claim. The bad faith could only be claimed after the jury verdict. The jury found State Farm responsible for Ms. Seamon's injuries. That motion was denied. However, it left open the option that Ms. Seamon could file a new complaint.

The Defendant now asks this Court to mold the judgment to reflect the limits of Ms. Seamon's policy despite their clear breach of the contract and the extraordinary bad faith they exhibited. State Farm refused to negotiate in good faith as required by both the contract and New Jersey law. It is undisputed that Sharon Seamon has been paying premiums to State Farm Insurance for years towards the policy and coverage involved in this matter, without any significant claim until the accident involved in this lawsuit.

State Farm not only refused to honor its contractual requirements, but additionally forced their policyholder to fight in court and endure months or emotionally draining and stressful litigation. The only explanation for this was that State Farm was counting on this court molding the judgment to the policy limits so that they "had nothing to lose" by gambling in court. State Farm believed their "worst case scenario" was to pay Ms. Seamon what they were contractually obligated to do. If they got "lucky" the jury could be convinced to find in favor of State Farm and they would have saved money.

The Defendant was well aware of the seriousness of her injuries and the horrific accident involving the roll-over and "crush" suffered in her vehicle while traveling on the Garden State Parkway. Despite this knowledge State Farm forced its insured to litigate and "roll the dice". It is shameful the way that State Farm has treated Ms. Seamon after her loyalty and their collection of premium payments from her for so many years. Their offer was never more than $28,500.00-$30,000.00, even in view of the evidence presented prior to and during the trial. Counsel for the defense was asked during the trial if the carrier was willing to offer anything close to a real value on the case in light of the testimony and evidence. They were not and no other offers were made. This is clear evidence of a breach of contract and bad faith dealings which goes against both public policy

and New Jersey law.

In *Taddei v. State Farm*, the court stated that it is "common practice in New Jersey to reduce the damage award to reflect the policy limits since Courts have "appropriately recognized the need to mold jury verdicts in these cases to reflect the *rights and duties of the parties under the insurance policy*". Nothing in this case or any other requires that the judgment be molded, especially when the rights and duties under the policy have been intentionally breached by the defendant. In our case State Farm breached policy by failing to live up to the duty they owed and therefore cannot also avail themselves of the protection of a contract which they failed to honor. (*See Taddei v. State Farm*, 401 N.J. Super. 449, 951 A.2d. 104).

State Farm should be responsible for the entire judgment of $375,000.00 minus the $15,000.00 received, totaling $360,000.00. along with attorney fees, costs of litigation and pre-judgment and post-judgment interest thereon. The recent case of *Wadeer v. New Jersey Manufacturer's Insurance*, 220 N. J. 591 (2015) indicates that a bad faith claim in first party actions, such as an underinsured motorist claim here, can be asserted against the carrier. It is well settled that an insurance company owes a duty to its insured to process a first party claim (UIM claim) in good faith and to deal fairly with its insured. This is especially so as to Plaintiff Sharon Seamon who had been paying premiums for years to State Farm without a claim. In *Pickett v. Lloyd's*, 131 N. J. 457 (1993) and in *Wadeer v. New Jersey Manufacturer's Insurance*, 220 N. J. 591 (2015), the Supreme Court reiterated that, in order to make a showing of bad faith in a first party claim, plaintiff must show the **absence of a reasonable basis for the denial of benefits under the policy** and the defendant carrier's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim. Knowledge of the lack of a reasonable basis may be inferred and imputed to an insurance company where there is reckless indifference to the facts and/or proofs submitted by the insured.(*Id.* at 473, *quoting Bibeault v. Hanover Insurance Company*, 417 A. 2d. 313, 319 (R. I. 1980).

For the reasons expressed in this letter memorandum, such is certainly the case here if one reviews the odyssey that this carrier has put Sharon Seamon, its insured, though, in order to obtain UIM benefits. If the insured offers sufficient credible evidence to establish a prima facie loss within the coverage of the policy, the burden of proving that the loss falls within the exclusionary provisions of the policy shifts to the insurer. *Kopp v. Newark Ins. Co.*, 204 N.J. Super. 415, 421 (App. Div. 1985); see also *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 406 N.J. Super. 524, 538 (App. Div.) (*Quoting S.T. Hudson Eng'rs, Inc. v. Pa. Nat'l Mut. Cas. Co.*, 388 N.J. Super. 592, 603-04 (App. Div. 2006), certif. denied, 189 N.J. 647 (2007)), certif. denied, 200 N.J. 209 (2009); *Cobra Prods., Inc. v. Fed. Ins. Co.*, 317 N.J. Super. 392, 401 (App. Div. 1998), certif. denied, 160 N.J. 89 (1999) (*citing Hartford Accident & Indem. Co. v. Aetna Life & Cas. Ins. Co.*, 98 N.J. 18, 26 (1984)). Clearly in this case, Ms. Seamon has offered an abundance of credible evidence to establish a *prima facie* loss which was within the coverage of the policy. State Farm has offered to valid reason to explain why they forced her to litigate this claim. One can only assume that they decided to "gamble" on the case. As State Farm is clearly guilty of bad faith the judgment should not be molded as to do so only sanctions their bad faith dealings by failing to provide any penalty for bad behavior. As such, they are responsible for the full amount of the judgment.

Bad faith dealings has also been codified in New Jersey law. N.J. 17:29B-4(9) defines bad faith insurance practices. Under N.J. 17:29-B-4(9) Unfair methods of competition, unfair, deceptive acts, practices are defined.

The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:

> (9) Unfair claim settlement practices. Committing or performing with such frequency as to indicate a general business practice any of the following:
>
> **(f) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;**
>
> **(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;**
>
> **(n) Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement;**

Clearly, State Farm violated a number of requirements under the above insurance responsibility act. A violation of the above act is also *prima facie* bad faith. Bad faith in refusing to settle is also provable by circumstantial evidence. "Bad faith in that regard "is most readily inferable when the severity of the injuries for which damages are claimed from the insured is such that any verdict against the insured is likely to be greatly in excess of the policy limits and further when the facts in the case indicate that a verdict for the defendant on the issue of liability is doubtful. * * * When these two factors coincide, and the [insurer's] company still refuses to settle, the inference of bad faith is strong." *Brown v. United States Fidelity Guaranty Company*, 314 F.2d at page 679 .

It is clear that State Farm violated their duty to perform under the contract and as such, should not be entitled to the protection of the terms of the contract that they breached. In New Jersey, "every contract imposes on each party the duty of good faith and fair dealing in its performance and its enforcement." *Pickett v. Lloyd's*, 131 N.J. 457, 467 (N.J. 1993). The obligation is an implied term of *every* contract. *Id.* In the insurance context, "principles of equity, fair dealing and good faith" explicitly apply to the contractual relationship between an insured and insurer. *Rova Farms Resort, Inc. v. Investors Ins. Co. of Am.*, 65 N.J. 474, 491 (N.J. 1974). Thus, a failure to settle a claim in good faith constitutes a breach of contract between an insured and insurer. *Id.* at 504 ("A wrongful failure to settle, wherein the insurer has breached the fiduciary obligation imposed by virtue of its policy, sounds in both tort and contract.").

Under the policy's UIM provision, State Farm is required to pay their insured for injuries suffered in a motor vehicle accident where the tortfeasor is underinusred. State Farm refused to pay

despite all the requirements being met. (See Defendant's Exhhibit "C"). Concerning a breach of contract, New Jersey takes a flexible approach to damages. *See Walsh Sec., Inc. v. Cristo Prop. Mgmt., Ltd.*, 858 F. Supp. 2d 402, 425 (D.N.J. 2012); *Donovan v. Bachstadt*, 91 N.J. 434, 446 (N.J. 1982) ("What the proper elements of damage are depend upon the particular circumstances surrounding the transaction, especially the terms, conditions and nature of the agreement."). Typically, after a breach of contract, judicial remedies "fall into three general categories: restitution, compensatory damages and performance." *Walsh*, 858 F. Supp. 2d. At 425. Beyond the three categories of damages, it is a well-founded principle that a contract should not be enforced in favor of a breaching party. *See 23 Williston on Contracts* § 63:8, Westlaw (4th ed. 2015) ("A contracting party cannot benefit from its own breach."). In New Jersey, courts have been increasingly reluctant to enforce a contract in favor of and to the benefit of a breaching party. *See Weiss v. Levine*, 134 N.J. Eq. 1, 3 (N.J. Ch. 1943) (refusing to issue a preliminary injunction "enforcing a contract in favor of one who himself has violated the contract"); *Peoples v. Discover Fin. Servs., Inc.*, 387 F. App'x 179, 185 (3d Cir. 2010) (finding that the plaintiff was "in no position to enforce the contract against the defendant because he breached the contract" as well).

In our case, the insurance company not only acted in bad faith but they have breached the insurance contract with Ms. Seamon. The defendant argues that terms of the contract would allow the molding of the judgment within the Plaintiff's policy limits. However, that does not apply when there is bad faith and a breach of the UIM terms. Thus, if State Farm negotiates or acts with bad faith and breaches a contract and they are allowed to obtain a molded judgment then they–the breaching party–would benefit from the enforcement of the contract and its terms. Such a result is contrary to New Jersey law and accepted attitudes regarding contract law. The contract should not be enforced as the insurance company cannot benefit under a contract that they breached.

The Supreme Court of New Jersey addressed issues surrounding a molded judgment in the UM (uninsured)/ UIM (underinsured) context in *Wadeer v. New Jersey Mfrs. Ins. Co.*, 220 N.J. 591, 611 (N.J. 2015). There the court specifically held that "**the molding of a monetary jury award is appropriate when done to conform with and reflect allocation of liability**." *Id.* Thus, in the absence of specific law, a judge may act with discretion to mold a jury verdict if doing so conforms to the allocation of liability in a given case. These losses are un-indemnified liabilities that would not otherwise be covered by an insurance policy. They are all liabilities that the insured faces only when the insurance company breaches it duty to settle a claim within policy limits. No court would allow an insurance company to defend itself against those damages by arguing that the insurance policy does not cover them.

A punitive damage award is no different than any of these other losses, and the court should not treat it differently. The mere fact that a policy would exclude a certain type of damage like punitive damages should have no bearing on whether a court allows an insured to claim the damages as part of his or her consequential damages in the bad faith case even if those damages exceed the policy limits. A rule that does not force the insurance company to bear the entire burden of failing to settle a case invites the insurance company to act to preserve its own self-interest at the expense of its insured's financial interests.

When deciding on whether to mold the judgment the Court in *Wadeer* went on to say, "We find that the molding of a monetary jury award is appropriate when done to conform with and reflect allocation of liability. However, in the UM/UIM context, where reduction is based not on a tortfeasor's comparative negligence but instead on the policy limits of a given carrier, we find that the current construction of *Rule* 4:58-2 provides no incentive for such carriers to settle. Rather, under the current rule, carriers are prone to take their chances at trial where the offer of judgment is somewhat near their policy limits because they have relatively little to lose in doing so. In light of this, we conclude that the aims of Rule 4:58-2, "to encourage, promote and stimulate early out-of-court settlement," *Crudup v. Marrero,* 57 N.J. 353, 357,273 A.2d 16(1971), are ill-achieved in the UM/UIM context under the rule's current construction. Accordingly, we refer Rule4:58-2 to the Civil Practice Committee to consider and recommend an appropriate amendment addressing this infirmity. *Id.* At 21. (See exhibit "A" Committee Rule changes to be effective on or about September 1, 2016.)

Besides being entitled to a judgment of $375,000, Ms. Seamon is also entitled to the remedies available under R. 4:58-2, the Offer of Judgment Rule. In *Leona C. Taddei v. State Farm Indemnity Company* 401 N.J.Super. 449, 951 A.2d 104. The court stated "We are not persuaded by State Farm's argument that the offer of judgment rule provides the sole remedy available to a UM or UIM claimant who believes his or her carrier acted in bad faith in handling the claim. It is now settled that the offer of judgment rule does apply to UM and UIM cases. (See also McMahon, supra, 364 N.J. Super. at 190. The benefit of the offer of judgment rule is that it is mechanical in its application and requires no proof of bad faith, by whatever standard is deemed relevant.

In *McMahon v. New Jersey Mfrs. Ins.*, 834 A.2d 1074 (N.J. Super. Ct. App. Div. 2003) 834 A.2d 1074 (2003) 364 N.J. Super. 188 the Court stated "We must determine whether an insurance company that suffers an adverse jury verdict in excess of its underinsured liability limits is subject to the consequences of the Offer of Judgment rule, after rejecting its insured's offer to settle within those limits. We hold that the Offer of Judgment rule is applicable to both Uninsured (UM) and Underinsured (UIM) benefits and, therefore, a carrier is subject to the consequences of the rule, namely, exposure to reasonable litigation expenses, reasonable attorney's fees, and interest, even though the cost of those consequences, following a *de novo* jury damage award, subjects the carrier to a judgment in excess of the liability limits of the policy."More importantly, we are satisfied that the policy limits, as explained in *Kotzian,* are not so "sacrosanct" to afford protection to a carrier where it chooses not to participate, despite having the opportunity and ability to do so, in the activity fostered by the rule to avoid the very sanction imposed for non-participation. Unlike the award of prejudgment interest, which can be disallowed by the court's exercise of discretion in exceptional cases, the consequences of non-acceptance of a plaintiff's offer under *R.* 4:58-2 are mandatory.

The carrier refused to deal in good faith with its insured and never offered more than $30,000 to settle. It also ignored a severely injured insured's October, 2015 Offer of Judgment at the available policy limits of $85,000. As such State Farm should be liable for excess damages under the Offer of Judgment Rule. On October 30, 2015 we filed an Offer of Judgment in the amount of $85,000 under Rule 4:58-1. That was not accepted by defendant and the verdict is more than 120% in excess of that. The carrier should be responsible for all enhanced interest in the judgment, and

all costs and counsel fees calculated from the date of the offer of judgment. *Rule* 4:58-2. *Gonzalez v. Safe & Sound Corp.*, 185 N.J. 100 (2005); *McMahon v. NJM,* 364 N.J.Super. 188 (App. Div. 2003)

In our case, the plaintiff filed a valid offer of judgment, and, because the verdict exceeded the amount of the offer in the manner provided by the rule. She is entitled to counsel fees, costs and additional prejudgment interest as authorized by Rule 4:58-2(a).

Damages in the UIM context are still being addressed and modified in N.J. courts depending on the various facts in each case. The courts now find that clear guidelines are needed to be framed which will avoid confusion. This was done in *Wadeer v. New Jersey Mfrs. Ins.* 110 A.3d 19 (2015) 220 N.J. 59. The Court in *Wadeer* refered the issues to the Civil Practice Committee. The Committee was asked to review and study:

> 1. The entire controversy doctrine, Rule 4:30A, to consider whether to allow first-party bad faith claims to be asserted and decided after resolution of an underlying, interrelated UM action.
>
> 2. The Offer of Judgment Rule, *R.* 4:58-2, to determine whether in the UM (uninsured motorist)/UIM (underinsured motorist) context, application of the rule should be triggered by measuring the amount of the offer of judgment filed by the plaintiff against the full damages verdict, rather than against the molded judgment entered by the court[1].
>
> 3. Rule 4:42-9(a)(6) which allows for counsel fees to be awarded "in an action upon a liability or indemnity policy of insurance, in favor of a successful claimant," but not

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[1] Rule 4:58-2 provides that when a pre-trial offer is rejected and the monetary award exceeds 120% of the offer, in addition to costs of suit, the offeror is entitled to:

> (1) all reasonable litigation expenses incurred following non-acceptance;
>
> (2) prejudgment interest of eight percent on the amount of any money recovery from the date of the offer or the date of completion of discovery, whichever is later, but only to the extent that such prejudgment interest exceeds the interest prescribed by R. 4:42-11(b), which also shall be allowable; and
>
> (3) a reasonable attorney's fee for such subsequent services as are compelled by the non-acceptance.

[*R.* 4:58-2(a).]

with respect to first-party insurance claims such as UM/UIM, to determine whether Rule 4:42-9(a)(6) should be extended to authorize a fee award to an insured who brings direct suit against his insurer to enforce any direct coverage, including UM/UIM coverage. The Civil Practice Committee found the rules required a certain change to clear up any ambiguity in the reading of the current rules.

Accordingly, Plaintiff Sharon Seamon should be allowed to litigate her bad faith claims and enforce the entire verdict of $375,000.00 against State Farm due to its reckless indifference to the proofs and its flagrant disregard of the duty to deal in good faith with its insured. To accept the position of defense counsel to the contrary would absolutely nullify any chance for redress in these types of egregious situations where a carrier breaches its obligations to its insured. See also, *Bowers v. Camden Fire Ins. Assoc.* 51 N.J. 62 (1968) 237 A.2d 857

This carrier should be made to realize that its bad faith dealing has consequences under the case law and Court Rules. Plaintiff was forced to expend considerable expenses for trial and should be compensated both for her attorney fees and interest on the entire judgment rendered by the jury minus the $15,000.00 received from the tortfeasor's carrier.

Thanking Your Honor for his attention in this matter,

Respectfully Submitted,

CATHLEEN J. CHRISTIE
For the firm

CJC:od
Enclosure

cc: Motions Clerk - Civil Division (Via Lawyers Service)
Thomas W. Matthews, Esq. (Via Lawyers Service)

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Proposed Amendments to Rules 4:30A, 4:42-9(a)(6) and 4:58-2

In *Wadeer v. New Jersey Manufacturers Insurance Company*, 220 N.J. 591 (2015), the plaintiff filed an uninsured motorist (UM) claim as a result of injuries he suffered in a motor vehicle accident. The insurer refused to settle the UM claim, rejected two arbitration awards (one of which was in the policy limits), and an offer of judgment (within the policy limits) by the plaintiff. The jury awarded the plaintiff an amount in excess of the policy limits and the plaintiff unsuccessfully moved to enter judgment in the full amount of the verdict notwithstanding the policy limits. The trial court entered an award at the policy limits as well as an award for attorneys' fees and prejudgment interest. The plaintiff subsequently filed an action against the insurer alleging the insurer acted in bad faith in refusing to settle the claim. The Supreme Court held that the plaintiff's claim alleging his insurer acted in bad faith by failing to settle his UM claim is barred under the principle of res judicata because it was raised, fairly litigated, and determined by the trial court in the first litigation.

The Supreme Court referred the following items to the Committee for consideration:

- Whether Rule 4:30A (Entire Controversy Doctrine) should be amended to permit an insured to bring a first-party bad faith claim against an insurer after resolution of an underlying, interrelated UM action;

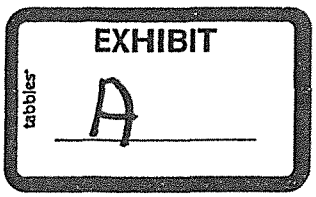
- Whether Rule 4:58-2 (Offer of Judgment – Consequences of Non-Acceptance of Claimant's Offer) should be amended to provide that application of the rule should be triggered by measuring the amount of the offer of judgment filed by the plaintiff against the full damages verdict rather than against the molded judgment entered by the court in a UM/UIM action; and

- Whether Rule 4:42-9(a)(6) should be extended to authorize a fee award to an insured that brings direct suit against his insurer to enforce any direct coverage, including UM/UIM coverage.

A subcommittee was formed to address these issues. With respect to Rule 4:30A, the subcommittee concluded that bad faith issues are separate and distinct from the issues in underlying UM/UIM matters, and should not be required to be plead. The Committee agreed, and unanimously approved the proposed amendments to Rule 4:30A.

Regarding Rule 4:58-2, the subcommittee concluded that UM/UIM carriers are given an unfair advantage in the molding of the judgment to their policy limits thereby avoiding offer of judgment repercussions. Further, the relevant sections of the Rule do not foster settlement of these types of cases. The subcommittee recommended amending Rule 4:58-2 so that all defendants might be in the same position and neither party in this type of action is given an advantage. Rule 4:58-3 is the inverse of Rule 4:58-2, and similar rule amendments are proposed. The Committee agreed that the offer of judgment rule in the UM/UIM context has no teeth and should be amended. The Committee approved the proposed amendments to Rules 4:58-2 and 4:58-3.

Lastly, concerning Rule 4:42-9(a)(6), the subcommittee noted that the Rule has not been



extended to authorize a fee award to an insured that brings a direct suit against his insurer to enforce any direct coverage, including UM/UIM. A slight majority of the subcommittee agreed that the Rule should be amended to allow for fee shifting for any action against an insurer for any first party insurance coverage, not just UM/UIM claims. The rationale for the rule proposal is (1) to discourage groundless disclaimers by assessing against insurers the expense incurred by their insureds in enforcing coverage and (2) to provide more equitably for the insured the benefits bargained for in the contract of insurance without additional expense over and above the premiums paid for insurance protection. A minority of the subcommittee contended that the proposed amendments to Rule 4:58 address the issue the Court asked the Committee to consider regarding UM/UIM claims. The proposed amendments to Rule 4:42-9(a)(6) will put plaintiffs in UM/UIM cases in a better position than plaintiffs in all other automobile negligence cases because they will get counsel fees if they get a verdict. A copy of the subcommittee's report is in Appendix 1.

In discussing the subcommittee's report concerning the proposed amendments to Rule 4:42-9, some Committee members advocated for a fee shifting provision for direct actions because the economics of litigation sometimes discourage policyholders with claims for coverage of smaller amounts (e.g., for certain theft or fire losses) from suing their insurers because the costs of hiring an attorney to handle such small cases will exceed or substantially diminish their net recovery. Other Committee members expressed doubt that the American rule against fee shifting should be diluted in this context, raising concerns that allowing such fee shifting will cause insurance premiums to rise.

A majority of the Committee opposed amending Rule 4:42-9 to provide for the collection of counsel fees for a prevailing claimant in a UM/UIM matter, assuming that the Court adopts the recommendation to amend Rule 4:58 to make the offer of judgment process effective for plaintiffs in UM/UIM matters.

The Committee, however, is requesting clarification from the Court as to whether it should consider the broader and controversial question of amending Rule 4:42-9 to address direct actions by insureds for first party insurance coverage.

The proposed amendments to Rules 4:30A, 4:58-2 and 4:58-3 follow.

> **4:30A. Entire Controversy Doctrine.** Non-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine, except as otherwise provided by R. 4:64-5 (foreclosure actions) and R. 4:67-4(a) (leave required for counterclaims or cross-claims in summary actions). Claims of bad faith, which are asserted against an insurer after an underlying uninsured motorist/underinsured motorist claim is resolved in a Superior Court action, are not precluded by the entire controversy doctrine.

> **4:58-2.Consequences of Non-Acceptance of Claimant's Offer** (a) In cases other than actions against an automobile insurance carrier for uninsured motorist/underinsured motorist benefits, [I]if the offer of a claimant is not accepted

and the claimant obtains a money judgment, in an amount that is 120% of the offer or more, excluding allowable prejudgment interest and counsel fees, the claimant shall be allowed, in addition to costs of suit: (1) all reasonable litigation expenses incurred following non-acceptance; (2) prejudgment interest of eight percent on the amount of any money recovery from the date of the offer or the date of completion of discovery, whichever is later, but only to the extent that such prejudgment interest exceeds the interest prescribed by R. 4:42-11(b), which also shall be allowable; and (3) a reasonable attorney's fee for such subsequent services as are compelled by the non-acceptance. (b) In cases involving actions against automobile carriers for uninsured/underinsured motorist benefits, if the offer of a claimant is not accepted and the claimant obtains a monetary award by jury or non-jury verdict, (adjusted to reflect comparative negligence, if any) in an amount that is 120% of the offer or more, excluding allowable prejudgment interest and counsel fees, the claimant shall be allowed, in addition to costs of suit: (1) all reasonable litigation expenses incurred following non-acceptance; (2) prejudgment interest of eight percent on the amount of any money recovery from the date of the offer or the date of completion of discovery, whichever is later, but only to the extent that such prejudgment interest exceeds the interest prescribed by R. 4:42-11(b), which also shall be allowable; and (3) a reasonable attorney's fee for such subsequent services as are compelled by the non-acceptance. [(b)] (c) No allowances shall be granted pursuant to paragraphs (a) or (b) if they would impose undue hardship. If undue hardship can be eliminated by reducing the allowance to a lower sum, the court shall reduce the amount of the allowance accordingly.

4:58-3.Consequences of Non-Acceptance of Offer of Party Not a Claimant (a) If the offer of a party other than the claimant is not accepted, and the claimant obtains a monetary judgment, or in the case of a claim for uninsured/underinsured motorist benefits, a verdict (molded to reflect comparative negligence, if any), that is favorable to the offeror as defined by this rule, the offeror shall be allowed, in addition to costs of suit, the allowances as prescribed by R. 4:58-2, which shall constitute a prior charge on the judgment or verdict in uninsured/underinsured motorist actions. (b) A favorable determination qualifying for allowances under this rule is a money judgment or in the case of a claim for uninsured/underinsured motorist benefits, a verdict (molded to reflect comparative negligence, if any) in an amount, excluding allowable prejudgment interest and counsel fees, that is 80% of the offer or less. (c) No allowances shall be granted if (1) the claimant's claim is dismissed, (2) a no cause verdict is returned, (3) only nominal damages are awarded, (4) a fee allowance would conflict with the policies underlying a fee-shifting statute or rule of court, or (5) an allowance would impose undue hardship. If, however, undue hardship can be eliminated by reducing the allowance to a lower sum, the court shall reduce the amount of the allowance accordingly.