‘Tyger River’ demand nets woman hit by shorn-off tire $489K

By Paul Tharp
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Mount Pleasant sweetgrass basket maker Geneva Gathers was tending her stand on U.S. Highway 17 when a tire that was shorn off a Lexus in a collision with a truck bowled her over.

Gathers later threatened to sue the driver of the Lexus, who was alleged to be at fault in the crash.

“We made a *Tyger River* demand,” attorney D. Nathan Hughey, who represented Gathers, told Lawyers Weekly. The claim settled for $489,613 last month before any suit was filed.

The *Tyger River* doctrine, defined by the 4th Circuit in *Smith v. Maryland Casualty Company*, 742 F. 2d 167 (1984) “provides that the insurer owes to the insured the duty of settling a personal injury claim covered by the policy if the settlement is the reasonable thing to do, or, that the insurer is liable to the insured if the insurer’s failure to settle is due to either fraud or bad faith or negligence.”

Hughey

Hughey said you can’t make a *Tyger River* demand unless you are prepared to follow through on it.

"The good thing about this case is that Ms. Gathers is such a beloved person in her community," said Charleston attorney David L. Hoffman Jr., who also represented Gathers. "As soon as people found out about the accident, there was a huge outpouring of support not only from her family but from the community at large."

And both lawyers said they made the case to the carrier that it would be wise to pay the limits on the Lexus driver's policy rather than face a jury trial in a county full of Gathers' supporters.

A *Tyger River* demand is appropriate when plaintiff's counsel determines that a case's value is near or in excess of the applicable policy limits, Hughey said. After determining that the Lexus driver carried $500,000 in coverage, the lawyers wrote the insurer and set a firm deadline for paying out the limits, he said. "If they didn't pay by the deadline, we would refuse further negotiation and sue."

If Gathers had made the demand for the policy limit and the carrier denied the claim or failed to respond to the demand, and Gathers then obtained a jury verdict of say, $750,000, there would have been coverage to satisfy only part of the verdict, Hughey explained.

The defendant - in *Gathers*, the driver of the Lexus - would then have had "a first-party cause of action against his carrier for bad-faith failure to adjust and settle the claim, subject to factual defenses," he said.

But Gathers could also have agreed not to execute against the Lexus driver's personal assets if he assigned her his cause of action for bad faith. Gathers could then have tried the bad-faith case against the carrier and obtained a judgment of up to $250,000 - the difference between the policy limit and the verdict.

'Cuts both ways'

Charleston attorney Mark C. Tanenbaum, who was not involved in the *Gathers* case, said *Tyger River* demands cut both ways.

"If it is reasonable to believe a jury may return a verdict in excess of the policy limits, insurers should act in the best interest of the insured to settle the case," he said. At the same time, plaintiffs' attorneys have the ability to use the *Tyger River* doctrine when it is in the best interest of the plaintiff to do so, he added.

But it's not always in a plaintiff's best interest, Hughey suggested, saying if he had a case he thought was worth $10,000 that involved coverage limits of $500,000, "I'd be shooting myself in the foot" by invoking the doctrine.

Charleston defense attorney Molly Hughes Cherry told Lawyers Weekly that the S.C. Insurance Unfair Claims Practices Act "requires insurance companies to attempt in good faith to effect 'prompt, fair and equitable settlement of claims, including third-party liability claims, submitted to it in which liability has become reasonably clear.'"

But the statute does not create a private right of action against insurance companies, so any claim of bad faith against an insurance company would be brought under the state common law, Cherry said. She was not involved in *Gathers*.

Floridian example

Tanenbaum said a statutory bad-faith cause of action would be unnecessary and duplicative of the common law.

"Once the legislature becomes involved, that sort of regulation becomes overly burdensome and cumbersome for insurers, plaintiffs and defendants," he said. "We don't need that."

But Florida thought it did when it passed legislation in 1982 recognizing a statutory first-party bad-faith cause of action, former Florida Supreme Court Chief Justice Charles T. Wells told Lawyers Weekly. That state's bad-faith statute was adopted to address situations where insurance companies refused to settle claims they should have settled, he said.

Instead, Tampa, Fla., defense attorney Sylvia H. Walbolt said it became a mechanism for some plaintiffs' lawyers to avoid a settlement and use a bad-faith claim to turn a claim involving low policy limits into one without limits. She called it "the bad-faith setup."

Wells said some lawyers artificially set up a bad-faith claim by making a short-fused offer to settle. When insurers fail to respond by deadline, lawyers withdraw the offer and assert a bad-faith claim based on the insurer's failure to respond. Lawyers also build conditions into the demand for settlement that cannot reasonably be fulfilled, Wells said. He called it "bad faith by contrivance."

He said legislation is pending in Florida that would require good faith on the part of claimants, give insurers 60 days to respond to written settlement demands and require claimants to turn over medical records or other documents that support their claims.

Florida's bad-faith problem could repeat in other states depending on the analysis that courts of last resort employ in cases involving the cause of action, Wells said.

But Cherry said she hasn't seen any abuse of bad-faith claims here.

Tanenbaum suggested that Florida's statutory scheme could be the crucial difference between the two states' bad-faith experience.

And while the *Tyger River* doctrine was invoked in *Gathers*, Hughey said, there wasn't any resulting bad-faith claim.

Hoffman said the carrier, Amica, hired an attorney "to do the usual stuff. He came down to Charleston and wanted to discuss settling. We said we'll take the policy limits."

That’s about what Gathers got: $489,613 in damages, $122,861 of which would cover her medical bills.

An attorney for the defendant declined to comment for this story.

Settlement Report

Type of action: Tort, negligence, personal injury

Injuries alleged: T-6 vertebral fracture, loss of portions of colon and intestines, vocal cord paralysis

Case name: *Geneva Gathers v. Dale Jones and Amica Mutual*

Case number: No action filed

Verdict or settlement: Settlement

Date: March 8, 2011

Amount: $489,613

Demand: $500,000

Insurer: Amica Mutual

Plaintiff’s attorneys: David L. Hoffman Jr. of the Hoffman Law Firm (Charleston) and D. Nathan Hughey of the Hughey Law Firm (Mount Pleasant)