

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

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|-------------------------------------|---|---------------------------|
| DENNIS VANHAAREN, |) | |
| |) | |
| Plaintiff |) | |
| |) | |
| v. |) | Civil No. 91-309 P |
| |) | |
| STATE FARM MUTUAL AUTOMOBILE |) | |
| INSURANCE CO., |) | |
| |) | |
| Defendant |) | |

**MEMORANDUM DECISION ON DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT¹**

¹ Pursuant to 28 U.S.C. ' 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order the entry of judgment.

This is an action by plaintiff Dennis VanHaaren against his automobile insurance carrier, State Farm Mutual Automobile Insurance Co. ("State Farm"), for failure to pay a claim asserted under the uninsured motor vehicle coverage of his policy. The plaintiff contends that according to 24-A M.R.S.A. ' 2902 State Farm is liable under the policy for injuries he received in an accident with an uninsured motorist, that it breached its obligation of good faith and fair dealing under 24-A M.R.S.A. ' 2436-A and common law by failing to make him a reasonable settlement offer and that it violated 24-A M.R.S.A. ' 2436 by failing to resolve his claim within thirty days. State Farm seeks summary judgment in its favor contending that VanHaaren is barred from pursuing this action because he failed to submit to an independent medical examination ("IME") as required by the terms of the policy, that he has provided no evidence that State Farm handled his claim in bad faith and that it met the requirements of section 2436 by requesting additional medical information within the specified time period and made a settlement offer within thirty days of receiving that information.²

² The plaintiff has also brought a motion for summary judgment, seeking a determination of liability under 24-A M.R.S.A. ' ' 2902, 2436 and 2436-A. The motion itself, but nothing more, was filed on April 13, 1992, the deadline date for the filing of motions and supporting papers. See Report of Scheduling Conference and Revised Scheduling Order (Docket No. 8). Simultaneously, he filed a request for an enlargement of time within which to submit the supporting papers required by Local Rule 19(a) and (b)(1). The only reason given for the request was that his counsel was absent from the state until April 21, 1992. See Plaintiff's Motion for Extension of Time for Filing Plaintiff's Statement of Facts, Supporting Affidavit and Memorandum of Law in Support of Motion for Summary Judgment (Docket No. 40). The defendant filed an objection on April 16, 1992. Subsequently, on April 21, 1992, VanHaaren filed the required papers.

I **DENY** the plaintiff's extension request because he offered no explanation as to why he could not adhere to the April 13 deadline of which his counsel had knowledge since October 31, 1991. The fact that his counsel was away from his office for a period of time immediately preceding the motion filing deadline does not itself establish good cause for an extension. It follows from my decision that the plaintiff's motion for partial summary judgment was not timely filed and thus I **STRIKE** it. In any

I. SUMMARY JUDGMENT STANDARDS

Fed. R. Civ. P. 56(b) provides that "[a] party against whom a claim . . . is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof." Such motions must be granted if

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining if this burden is met, the court must view the record in the light most favorable to the nonmoving party and "give that party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990) (citation omitted). "Once the movant has presented probative evidence establishing its entitlement to judgment, the party opposing the motion must set forth specific facts demonstrating that there is a material and genuine issue for trial." *Id.* at 73 (citations omitted); Fed. R. Civ. P. 56(e); Local R. 19(b)(2). A fact is "material" if it may affect the outcome of the case; a dispute is "genuine" only if trial is necessary to resolve evidentiary disagreement. *Ortega-Rosario*, 917 F.2d at 73.

II. FACTS

event, in this opinion I address the substance of the plaintiff's motion claims within the context of the defendant's summary judgment motion.

On July 1, 1989 the plaintiff was injured in an automobile accident involving an uninsured motorist. First Amended Complaint §§ 4-5, 7-8; Answer §§ 4-5, 7-8. At the time, he was covered by a policy issued by the defendant which provided medical payments coverage of \$5,000 and uninsured motor vehicle coverage of \$100,000. Affidavit of John T. Hesler ("Hesler Affidavit") §§ 8, 13; Exh. A to Hesler Affidavit. From August 1989 to January 1991 the plaintiff submitted medical bills to the defendant for reimbursement, which in total exceeded the \$5,000 coverage limit. Hesler Affidavit §§ 8-9. State Farm reimbursed VanHaaren up to and even beyond the limit of his medical payments coverage and in a January 9, 1991 letter inquired whether he intended to pursue an uninsured motorist claim, stating that for the moment it was not in a position to make any further advances. *Id.* § 11; Exh. C thereto. Counsel for the plaintiff, Francis M. Jackson, responded by letter dated March 25, 1991 explaining that VanHaaren was indeed making a claim for the full \$100,000 limit of uninsured motorist coverage.³ *Id.* §§ 12-13; Exh. D thereto. In an April 8, 1991 letter an agent for the defendant requested permission from Jackson to schedule an IME of the plaintiff in Florida, where State Farm believed he then resided. *Id.* §§ 14-15; Exh. E thereto. The letter from State Farm's agent to Jackson reads, in pertinent part:

I . . . am unable to consider your demand for \$100,000 as my medical file is incomplete. I am awaiting the final report from Dr. Mitzelfeld At this time, I would like to set up an independent medical exam It is my understanding that Mr. VanHaaren lives in

³ VanHaaren asserts that State Farm was aware of his claim for uninsured motorist coverage well before this date as indicated by its January 9, 1991 letter in which it referred to its payment of his medical bills partially under his uninsured motorist coverage and its request therein that he assert whether he intends to make an uninsured motorist claim. Plaintiff's Memorandum in Opposition to the Defendant's Motion for Summary Judgment at 3; *see* Exh. C to Hesler Affidavit. However, I find that the January 9 letter stands for the converse proposition and means exactly what it says -- namely, that State Farm would make no more payments without a formal claim for coverage under the uninsured motorist provisions of the policy. VanHaaren points to no evidence that he actually made such a claim prior to his March 25, 1991 letter and thus I find nothing in the record to support VanHaaren's interpretation.

Pompano Beach, Florida and if you will confirm this, I will . . . arrange an exam in that area. After I have received the final medical information, I will then be able to give your client's claim further consideration.

Exh. E to Hesler Affidavit. In apparent reference to a letter from Jackson indicating that he had not received State Farm's April 8 letter, on May 2, 1991 the defendant reasserted its request for an IME and enclosed a copy of its earlier letter. Exh. F to Hesler Affidavit. The plaintiff's policy with State Farm provides that a person making a claim under uninsured motor vehicle coverage shall "be examined by physicians chosen and paid by [State Farm] as often as we reasonably may require" and that "[t]here is no right of action against [State Farm] . . . until all the terms of this policy have been met" Exh. A to Hesler Affidavit at 5 & 4(b), 20 & 2(a).

On May 17, 1991 Jackson replied to State Farm that "it is my policy only to have an independent medical examination prior to suit if it is part of an overall agreement leading toward resolution of the case." Exh. G to Hesler Affidavit at 1. However, he stated that he "would be willing to discuss with [State Farm] the possibility of having an independent medical examination," suggesting that he might be willing to allow State Farm "to obtain an independent medical examination in the Asheville, North Carolina area [where VanHaaren was then living] and then to set up an arbitration or mediation to resolve the claim." *Id.* Jackson further commented that he would file a lawsuit to preserve VanHaaren's claims before the statute of limitations ran on June 30, 1991 unless the claim could be resolved prior to that date or State Farm waived its rights under the statute. *Id.* at 2.

State Farm responded on June 10, 1991 by noting that VanHaaren's policy already provided for arbitration where agreement could not be reached. Exh. H to Hesler Affidavit. The letter noted that the applicable statute of limitations is six years, not two years as Jackson had suggested in his letter, and that State Farm "still desire[s] to set up an independent medical examination" *Id.* It then

requested information indicating where VanHaaren would be located for a reasonable period of time so that the proper State Farm office could make arrangements for an IME. *Id.*

The next communication between the parties took the form of VanHaaren's filing of the original complaint in this action in September 1991. Hesler Affidavit & 22. Unable to reach Jackson by telephone during November 1991, defendant's attorney of record, Michael S. Wilson, informed Jackson by letter that he had scheduled an IME with a physician in Portland, Maine for January 14, 1992. Affidavit of Michael S. Wilson ("Wilson Affidavit") & 4-6; Exh. A thereto. Jackson refused to make VanHaaren available for the scheduled examination stating that he might agree to an IME performed by a different physician on another date and in another location, failing which State Farm would have to seek a court order to compel an IME. Wilson Affidavit & 7; Exh. B thereto. He suggested that State Farm send him the names of three physicians to consider. *Id.* State Farm thereupon filed a motion to compel an IME as originally scheduled, which the court granted over the plaintiff's objection. On January 29, 1992, following State Farm's receipt of the IME report, Louise K. Thomas, also counsel for the defendant, sent Jackson a letter disputing VanHaaren's claim for \$100,000, articulating the bases for its denial of the claim and offering to settle for \$15,000. Wilson Affidavit & 9; Exh. C thereto. State Farm notes that as of March 1992 it had incurred legal fees in excess of \$10,000 and expended substantial time to obtain an IME, both as a consequence of the plaintiff's refusal to submit to an IME. Hesler Affidavit & 24.

For the following reasons, I grant the defendant's motion for summary judgment in its entirety.

III. LEGAL ANALYSIS

A. Coverage and Breach of Policy Terms

VanHaaren's first claim is that State Farm is liable for his injuries pursuant to 24-A M.R.S.A. ' 2902(1) which requires that each motor vehicle insurance policy issued in Maine contain uninsured motorist coverage. First Amended Complaint (Count I). State Farm responds that the plaintiff's claim is barred because he breached the terms of his policy by refusing to voluntarily submit to an IME. Memorandum in Support of State Farm's Motion for Summary Judgment ("Defendant's Memorandum") at 6-11. State Farm asserts that he did not remedy the breach by submitting to the court-ordered IME and that his claim should be barred because it was forced to expend unwarranted time and legal fees as a result of his breach. *Id.* at 9-11.

Maine has not addressed the precise question whether or on what basis an insurer may deny coverage when the insured breaches the terms of his insurance policy by refusing to submit to an IME. However, in a case involving an indemnification-seeking insured who voluntarily settled a claim against it and failed to satisfy a condition precedent of the policy that the amount of its liability first be determined judicially or by an agreement approved by its insurer, the Supreme Judicial Court of Maine ("Law Court") held that the insured's failure to comply with these policy preconditions justified the insurer's refusal to indemnify. *Auburn Water Dist. v. Insurance Co. of N. Am.*, 312 A.2d 174 (Me. 1973). Supportive of this approach is Maine's statute providing that an insured's policy may be cancelled for violating its terms or conditions. 24-A M.R.S.A. ' 2914(3). On the other hand, the Law Court has stated that, in order for an insurer to free itself from its obligation to pay when an insured fails to timely notify the insurer of a claim as required by the terms of the policy, the insurer must show resulting prejudice. *Ouellette v. Maine Bonding & Casualty Co.*, 495 A.2d 1232 (Me. 1985).

The plaintiff, however, does not argue that the court must find prejudice resulting from his failure to submit to an IME upon request in order to relieve the defendant of its obligations to him under the uninsured motorist provisions of the policy. Nor does he contest the defendant's assertion

that the amount of time and money spent by State Farm to secure an IME of the plaintiff constitutes prejudice.⁴ He simply argues that any expenses incurred by State Farm are a result of its failure to cooperate with him. *See* Response to Defendant's Statement of Material Facts in Support of Motion for Summary Judgment & 9. Thus, I need not decide whether the Law Court would adopt a test requiring an insurer to show prejudice in the circumstances of this case as there is no dispute as to the existence of prejudice in the event that a breach is found. I will, therefore, confine my discussion to whether the plaintiff breached the terms of the policy. The plaintiff contends that he never refused to submit to an IME required pursuant to his policy. Plaintiff's Memorandum in Opposition to the Defendant's Motion for Summary Judgment ("Plaintiff's Memorandum") at 2-6. Specifically, he asserts that his behavior cannot be deemed a refusal because: (1) State Farm never informed him that its request for an IME was being made pursuant to the terms of his policy, (2) he expressed a willingness to attend an IME and (3) State Farm never actually scheduled one prior to his filing of this action. *Id.*

VanHaaren does not assert that he lacked an opportunity to read the applicable provisions of his policy or even that he was unaware of them. Instead, he argues that he was free to disregard the terms of the policy simply because State Farm failed to specifically link its legitimate request for an IME to the appropriate policy terms. *Id.* at 2-3. This argument is unavailing. It is axiomatic that a party breaches an agreement by violating the express policy provisions whether or not he chooses to familiarize himself with those terms. The plaintiff has cited no authority suggesting that a party may

⁴ Persuasive authority supports the defendant's claim that an insurer's considerable expenditure of money and time to obtain information to which it is entitled constitutes prejudice. *See, e.g., Temple v. State Farm Mut. Ins. Co.*, 548 S.W.2d 838 (Ky. 1977).

ignore his enforceable insurance policy obligations simply because the insurer, in requesting compliance, does not cite chapter and verse.

VanHaaren's second argument is equally meritless. The clear and unambiguous terms of the policy require him to submit to an IME upon the reasonable request of State Farm. This he did not do. On January 9, 1991 State Farm made the first of three such requests prior to suit. VanHaaren's attorney, Francis Jackson, responded that he would be willing to discuss scheduling an IME "if it is part of an overall agreement leading toward resolution of the case." It cannot be said that Jackson's expression of so-called "willingness," conditioned as it was on his requirement that State Farm consent to a negotiated agreement, complied with the terms of the policy. His subsequent failure to directly respond to State Farm's request to arrange an IME confirms his refusal. Even after filing suit against State Farm, Jackson maintained his approach of nonadherence to the policy terms by rejecting a scheduled IME in January 1992 stating that he would consider an exam on a different date, in a different location, performed by a different physician. Such conditional cooperation is flatly contrary to the policy requirement that an insured submit to IMEs performed by physicians of State Farm's choosing as often as State Farm reasonably requires. This history can only be construed as a breach of the terms of the policy.

Similarly, it is disingenuous for the plaintiff to assert that he could not have refused an examination because the defendant never scheduled one. His repeated and unambiguous refusal to attend an IME in the absence of the defendant's acquiescence to certain preconditions obviated the need to schedule one and, in any event, when State Farm did schedule an IME following the commencement of this action he refused to appear until ordered to do so by the court.

B. Untimely Offer to Settle and Bad Faith

The plaintiff also seeks compensatory damages based on his assertion that State Farm failed to satisfy his claim with thirty days as required by 24-A M.R.S.A. ' 2436. Plaintiff's Memorandum at 16.

He also seeks compensatory and punitive or exemplary damages against State Farm for failing to make a good faith offer to settle his claim. *Id.* at 14-19. VanHaaren contends that State Farm has an obligation to engage in good faith and fair dealing according to 24-A M.R.S.A. ' 2436-A and common law.⁵ *Id.* State Farm responds that it complied with the deadlines imposed by section 2436 and that VanHaaren's bad faith claims are barred because of his breach of the policy. Defendant's Memorandum at 11-19. It further argues that, even if the bad faith claims are not absolutely barred, the plaintiff's failure to submit to an IME nevertheless excused it from making a settlement offer, leading to an equivalent result.

⁵ In Count II of his amended complaint the plaintiff simply asserts that he has a bad faith claim under his policy. I find no such provision in his policy and he fails to elaborate on this point; consequently, I treat this assertion as a reference to his statutory and common law claims.

These claims are closely related and so I treat them together. Section 2436(1) states that insurance claims are payable within thirty days except that if during the 30 days the insurer, in writing, notifies the insured that reasonable additional information is required, the undisputed claim shall not be overdue until 30 days following receipt by the insurer of the additional required information." 24-A M.R.S.A. ' 2436(1). Subsection 2436-A(1)(B) and (D) provide, in pertinent part, for damages against one's insurer for "[f]ailing to acknowledge and review claims, which may include payment or denial of a claim, within a reasonable time following receipt of written notice" and for "[f]ailing to affirm coverage . . . or deny coverage within a reasonable time after completed proof of loss forms have been received by the insurer." 24-A M.R.S.A. ' 2436-A(1)(B), (D). As the record clearly indicates, VanHaaren first asserted his uninsured motorist claim by letter dated March 25, 1991. State Farm effectively acknowledged his claim as required by section 2436-A by its letter dated April 8, 1991 in which it also requested additional medical information in the form of an IME in order to evaluate his claim. VanHaaren does not suggest that two weeks is an unreasonable period for reply. Thus, by this action State Farm both satisfied the requirements of subsections 2436-A(1)(B) and (D) and caused the 30-day clock of section 2436(1) to toll. The record further shows that after completion of the IME on January 14, 1992 State Farm made an offer on January 29, 1992 to resolve the plaintiff's claim thus satisfying in full the requirements of section 2436(1). At bottom, these claims, too, are meritless.

⁶ The plaintiff also references a portion of the statute regarding failure of the insurer to reserve appropriate defenses, implying that in this respect as well the defendant is liable for an unfair claims practice. *See* Plaintiff's Memorandum at 17. The referenced language, however, simply indicates that in affirming coverage an insurer may reserve his defenses; it does not provide an independent basis for asserting a claim.

It has not yet been established whether section 2436-A implies a remedy for bad faith or whether such an action lies independently at common law.⁷ As discussed above, however, State Farm has fully complied with the express requirements of the statute. In addition, even assuming that section 2436-A or common law provides for a bad-faith claim, I find nothing in the record to support such a claim. Having found that the plaintiff's breach discharged State Farm from its duty to provide coverage, it cannot be said that the defendant failed to make a settlement offer in good faith.

IV. CONCLUSION

For the foregoing reasons, State Farm's motion for summary judgment is hereby ***GRANTED***.

Dated at Portland, Maine this 22nd day of May, 1992.

United States Magistrate Judge

⁷ In *Seabury Hous. Assocs. v. Home Ins. Co.*, 695 F. Supp. 1244 (D. Me. 1988), this court (Carter, J.) suggested that the Maine legislature's enactment of section 2436-A "can be taken to reflect a legislative intent that bad faith insurance claims be addressed and remedied within statutory guidelines." *Id.* at 1249.