Bahri – Still Good Law or Barely Hanging On?

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PRACTICE AREAS

Insurance Defense

Litigation

The Michigan Court of Appeals recently decided three unpublished cases that have divergent views on the state of fraud defenses under the No-Fault Act in the state. Each had starkly different interpretations of the law established by the Michigan Supreme Court in *Meemic Ins Co v Fortson*, 506 Mich 287; 954 NW2d 115 (2020).

In *Mich Spine & Brain Surgeons, PLLC v Home-Owners Ins Co*, unpublished opinion of the Court of Appeals, issued February 18, 2021 (No. 349367), the Court of Appeals found that the lower court did not err by finding that the insured had committed fraud under the guidance of *Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420, 422; 864 NW2d 609 (2014) where, despite the requirement of a showing of intent, the fraudulent nature of the statements or activities were essentially unavoidable conclusions and thus there was no genuine issue of material fact. The Court further found that the Plaintiff, a provider as assignee of the insured, would be barred from recovery where the insured was barred under the authority of *TBCI, PC v State Farm Mut Auto Ins Co*, 289 Mich App 39, 44; 795 NW2d 229 (2010), as the provider stood in the same shoes as the insured and was thus subject to the loss of benefits for the insured's fraud just as the insured would be. While the case was ultimately decided on different grounds - specifically, the doctrine of *res judicata* - this opinion did not challenge the application or continued validity of *Bahri*.

In contrast, in *Saad v Westfield Ins Co*, unpublished opinion of the Court of Appeals, issued April 22, 2021 (No. 350557), the Court of Appeals adopted the position that *Bahri* is no longer good law based on the prior decisions issued this past year, including *Williams v Farm Bureau Mut Ins Co*, 2021 Mich App LEXIS 646, 2021 WL 297252 and *Haydaw v Farm Bureau*, 2020 Mich. App. LEXIS 4427. Specifically, the Court held that an insurer cannot rely upon *Bahri* to void a policy due to post-procurement fraud. Rather, to justify a rescission, the fraud must constitute a breach of an essential term of the contract, or it must prevent a party from obtaining an expected benefit from the contract. Without much detail, the panel decided that the facts of the case did not constitute a "substantial breach"

and therefore rescission was not warranted. However, in a footnote, the Court reasoned that, because the insurer received a premium, it obtained all of the benefits it expected to receive from the contract, regardless of the fraud committed during the claim. Therefore, the Court reasoned that there could not be a substantial breach by the insured. The opinion therefore implies that post-procurement fraud can only be the basis for rescission when it results in underpayment by the insured, which would be an incredibly rare instance.

However, the Court's view in *Saad* is notably one-dimensional. The opinion fails to consider the realities of the insurance industry and the relationship between the insured and the insurer. An insurer reasonably expects the benefit of honest and faithful cooperation of its insureds, and also expects that it will not be subject to the expense and loss associated with post-procurement fraud. Arguably, these are the bases on which insurers can assert an insured has committed a *substantial* breach of contract.

More recently in *Estate of Bernard v Avers*, unpublished opinion of the Court of Appeals, issued April 8, 2021 (No. 348048), the Court of Appeals found that *Meemic* carved out *Bahri* from its holding, and that it was still good law. In the case, the insured alleged that a previous matter that was dismissed under *Bahri* for fraud was not a rescission, and that he was still entitled to recover. The Court found that the exercise of *Bahri* was in fact a rescission of the contract, despite the exercise of the policy terms voiding the policy in case of fraud. The case suggests that so long as fraud is *material* to the claim, any such fraud is sufficient for rescission without need for review of normal rescission factors.

Michigan Spine and Brain Surgeons suggests, despite *Meemic*, that fraud exclusions are still proper against the named insured under the terms of the policy itself. *Saad* says that no contractual exclusions are proper under *Meemic* and that rescission is only appropriate upon substantial breach, and that *Bahri* is essentially overruled. *Avers* holds that any material fraud justifies rescission against a named insured under *Bahri*, and that previous *Bahri* dismissals are rescissions without regard to whether they were so titled.

In light of these cases and others, it is clear that factual issues of fraud are still capable of being decided on summary disposition, but some courts are resisting the conclusion that an insured can commit a substantial breach even when serious post-procurement fraud is proven. The opinions also do not address if those claims where fraud is committed could alternatively be denied for not being reasonable or necessary– an option that Justice Zahra highlighted in his concurrence in *Fortson*.

Because of the lack of clarity of the law as to fraud by insureds, any attempt to seek rescission related to post-procurement fraud should be accompanied by an argument regarding the benefits that the insured seeks from the contract versus the harms sustained by the insurer due to the fraud. This may include elements such as increased costs to the insurer for extensive pre-litigation investigation of fraud and improper payment of false claims, especially when the fraud is repeated and touches multiple aspects of the insured's claims.

Contact your Novara lawyer to help you best navigate your unique case.