Fact Pattern – "Dug In"

Janet Garland was driving home from the movies, having just seen "Born is a Star" with some friends. Janet, who is quite elderly, was stopped for traffic and deep in thought as to how the movie compared to earlier versions. Just then, she hears screeching tires as a vehicle driven by Fredric Mason strikes her from the rear. Janet is injured by the impact and settles a claim against Mason for his $10,000 bodily injury liability limits.

This settlement with Mason was approved by Niles Casualty, her underinsured motorist (U/M) carrier. Janet, through her lawyer, Walter Libby, then demands the $100,000 UM policy limits. In his letter to Niles, Mr. Libby explains that Janet's injuries are quite extensive as she now suffers from reflex sympathetic dystrophy syndrome.

Niles Casualty responds by seeking to schedule a compulsory medical examination (CME) pursuant to the terms of the policy, which provides that a claimant has a duty to "be examined by physicians chosen and paid by us as often as we reasonably may require." A different section of the policy provides that "(t)here is no right of action against [Niles Casualty] until all terms of this policy have been met."

Mr. Libby and Niles Casualty exchange several contentious letters regarding Niles' attempts to schedule the CME. Despite a reservation of rights letter from Niles that Janet's failure to "assist and cooperate" may result in a denial of coverage, Janet ultimately does not attend the CME and, instead, files suit. Niles Casualty responds by asserting an affirmative defense that Janet is not entitled to coverage because she breached the CME provision.

Niles Casualty moves for summary judgment claiming it was entitled to deny coverage as a matter of law. Janet's position is that the CME provision is not a condition precedent to coverage and that she did not refuse to attend the CME, but had only asserted reasonable requests to protect her personal interests. The defense motion for summary judgment is set for hearing one week from the date of the mediation.

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