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Bad Faith Focus

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Bad Faith Focus provides timely summaries of and access to key bad faith litigation matters throughout the United States. We appreciate your interest and welcome your feedback. Please share this publication with your colleagues. If others in your organization are interested in receiving *Bad Faith Focus*, please contact Sarah J. Delaney, editor of *CaseWatch: Insurance.*

ALABAMA

PRP Letters Qualify as "Suit" to Trigger Coverage

Ala. Gas Corp. v. Travelers Cas. & Sur. Co. (N.D. Alabama, June 25, 2013)

A policyholder owned and operated property for gas-related services from 1886 to 1967. The property was transferred to a housing authority for a public housing project. The policyholder was covered by liability policies obtained from an insurer and its subsidiaries between 1947 and 1984. In 2008, the Environmental Protection Agency (EPA) sent the policyholder an information request and pollution report regarding the site. The insurer refused to cover liability because there was no "formal claim" and would not provide coverage until "such a claim or lawsuit is received." In 2010, the EPA sent the policyholder a formal Potentially Responsible Party Letter (PRP); the insurer again denied coverage. The policyholder filed suit and asserted that the insurer acted in bad faith. The district court certified a question to the Supreme Court, asking if a PRP letter is sufficient to satisfy the suit requirement of an insurance policy. The Supreme Court responded in the affirmative. The district court held that since there was an arguable reason for refusal, reason was "open to dispute or question," and the insurer had not acted in bad faith.

Comment: Where there is reasonable basis to deny a claim and/or refusal to defend a claim at the time of the insurer's action or inaction, courts should not utilize "hindsight" (i.e. a subsequent ruling on the court), under these circumstances, to hold that the insurer acted in bad faith.

ALASKA

Policyholder's Embezzlement Claim Not Barred by Insurer's Victory in Bad Faith Suit

Patterson v. Infinity Ins. Co. (Alaska, June 28, 2013)

The policyholder was involved in an accident. The insurer paid the medical claims up to the policy limit. However, the policyholder filed suit against the insurer for bad faith. The insurer won on summary judgment. The policyholder filed a second suit alleging, among other things, false advertising, breach of contract, and embezzlement. The insurer argued that these claims were precluded based on res judicata. The Alaska Supreme Court ruled that all but one of the claims including the false advertising claim were precluded by res judicata. The embezzlement claim was not precluded and therefore could proceed forward

Comment: Although there was an overlap in evidence from the policyholder's first bad faith case against the same insurer, the court found it compelling that the injury and harm in the subsequent action was distinct from the conduct alleged in the prior action.

ARIZONA

Choice of Law for Bad Faith Claim Governed by Location of Accident

Coronel v. GEICO Ins. Agency Inc. (D. Arizona, June 23, 2013)

A decedent was killed when he was struck by another vehicle in Arizona. The car was his father's, and was obtained in New York State by his father. The policy contained a choice-of-law provision choosing New York law. The decedent's fiancée filed suit to recover for emotional distress and bad faith. The court held that the uninsured motorist claim was governed by New York law and the bad faith claim was governed by Arizona law. Since the accident occurred

in Arizona, the injured parties lived there, and the policy claims were filed there, Arizona had the most significant ties. The bad faith claim could move forward under Arizona law.

Comment: This case highlights the reasons and need to conduct a choice of law anlaysis early on in the litigation process. Such an early assessment is extremely cost effective.

CALIFORNIA

Breach of Good Faith and Fair Dealing Against a Parent Company of the Insurer Permitted

Wallis v. Centennial Ins. Co.
(E.D., Cal., July 19, 2013

An insured was issued a professional liability policy by an insurer, and filed suit against the insurer regarding obligation to defend in an underlying lawsuit. The insured brought claims against the insurer and its parent company, alleging that the insurer was a wholly owned subsidiary. The insured claimed the parent company made all of the decisions and took all the actions with regard to the defense in an underlying lawsuit. By alleging certain facts, the court allowed the insured's claim to go forward on two legal theories: agency and alter ego.

The court allows a breach of good faith and fair dealing claim to go forward against a non-party to a contract if a signing party enters the contract on behalf of a non-signing party. When that occurs, the signing party is said to be the agent of the non-signing party. In parent-subsidiary relationships, agency occurs when the parent controls the subsidiary to the point that it has taken over performance of the subsidiary's day-to-day operations.
In this case, the court would not dismiss the claims because the insured alleged that once the insurer issued the policy, the parent assumed responsibility for almost everything related to the insured's defense. This included corresponding with the insured, paying for the defense, and handling the administration of the claims.

The alter ego theory is similar to agency theory. Under alter ego theory, a claim can be brought against a parent when it is abusing the corporate form of its subsidiary. A party using this theory must prove: (1) that the parent and subsidiary are so united in interests that the two are essentially one company; and (2) that it would be unfair to not allow the claim against the parent.

The court allowed the claims to continue on alter ego theory as well. The insured alleged that the two companies shared a bank account, that the parent company repeatedly stated that it was obligated to pay the insurer's policy obligations, that the companies shared common officers and directors, and more. According to the insured, it would be unfair for the court to recognize the companies as separate because it would allow the parent company to avoid liability for harm that it caused through the insurer.

Comment: This case illustrates that a claim may be brought against a parent of an insurance company. To receive the benefit of corporate forms, it is important to maintain separate structures and respect corporate forms.

FLORIDA

A Third Party May Bring a Bad Faith Action Against an Insurer to Recover the Amount of an Excess Judgment

Tanaka v. GEICO General Insurance Company
(M.D. Fl., July 12, 2013)

A claimant was rear-ended by an insured. The claimant appeared uninjured at the time immediately following the accident, but eventually experienced problems with her right shoulder. The claimant's attorney sent a demand letter for the policy limits of $10,000 because she had been and would continue to receive medical attention. Six days later, the attorney sent another letter to the insurer, stating that the claimant was scheduled for surgery. The insurer offered to settle but the parties failed to reach an agreement. The claimant filed suit, and a jury awarded a verdict fives times the policy limits. Following the suit, the insured assigned her bad faith action to the claimant in return for a release of liability. The insurer argued the claim was barred because the judgment was satisfied when the insured was released from liability. The court disagreed, denying the insurer's motion for dismissing a third-party bad faith claim, holding that a claim is only barred when it is satisfied before the assignment of the bad faith claim. Since the assignment and release occurred simultaneously, and the agreement specified that it did not release the insurer, the claim was not barred.

Comment: The court reinforced that the intent of the parties when entering into an agreement is key. In other words, the parties control the interpretations of their releases so careful consideration should be given to draftmanship of assignments, releases or satisfaction of judgments.

GEORGIA

Failing to Accept a Time-Limited Offer to Settle is Not Bad Faith

Baker v. Huff
(Ga. App., July 5, 2013)

In 2002, a claimant was injured in a motor vehicle accident in which his father was killed. The insurer provided coverage for the vehicle with a $100,000 limit per person. The claimant incurred bodily injury exceeding policy limits, and made a time-limited offer to settle the claim for the policy limits. After receiving medical results concerning the claimant's purported injuries, the insurer accepted the claimant's offer and tendered the $100,000. The claimant rejected the insurer's tender because the insurer submitted the payment after the time-offered deadline. The insurer unsuccessfully sued the claimant to enforce the settlement.

The claimant, acting as administrator for his father's estate, filed suit in 2008 alleging that the insurer acted in bad faith by failing to accept the time-limited offer. The claimant contended that the insurer was liable for bad faith because it did not accept the offer within the time-offered limit. The trial court denied the insurer's motion for summary judgment, and granted immediate review to the Georgia Court of Appeals.

The court found that the trial court erred in denying the insurer's motion for summary judgment. The insurer acted reasonably in declining to accept the time-limited settlement offer because it did not have adequate time to review the claimant's medical records concerning the alleged injuries. The time-limited offer did not contain current medical records or information regarding the claimant's alleged injuries that would allow the insurer to respond to the settlement within the time-offered deadline. Therefore, the offer provided no reasonable settlement opportunity for the insurer to determine the claimant's injuries and investigate the claim.

Comment: An insurer is not necessarily required to accept an offer that imposes an unreasonably short period of time to respond, and an insurer does not act in bad faith for failing to respond to a time-offered settlement. Courts look to the extent an insurer would reasonably be expected to investigate a claim and respond before acting in bad faith.

MONTANA

Insurer Cannot Be Held Liable for Bad Faith if it Had a Reasonable Basis for Contesting Claim

White v. Montana
(Mont., July 12, 2013)

A claimant was injured at a construction site and began collecting disability benefits from an insurer. The insurer sent the claimant at least two letters stating that he must notify the insurer of any employment, and that he would be subject to criminal charges if he failed to do so. The claimant had surgeries and collected disability for two years. After receiving anonymous tips that the claimant was building and selling furniture out of his garage, the insurer investigated. The investigation was turned over to the Montana Department of Justice. The claimant was accused of felony theft, but was acquitted. The insurer terminated his benefits shortly after the evidence was collected, and before his acquittal. The claimant filed suit against the insurer, alleging statutory bad faith, among other claims, and for terminating benefits.

The codified claim for bad faith was dismissed because the statute explicitly excluded the insurer. The claimant was unable to graft the provisions of the code onto a common-law bad faith claim. Generally, reasonableness is a question for the jury. However, when reasonableness depends on interpreting legal precedents, it is a question for the judge. It was held that the decision to terminate benefits had a basis in law because the insurer terminated based on the belief that the claimant was violating Montana law by collecting benefits and working at the same time.

Comment: This case reinforces that an insurer will not be held liable for bad faith so long as it has a reasonable basis for its actions. Here, although the claimant was found not guilty, some evidence showed he was violating the law. Basing a decision on that evidence was reasonable.

NEW MEXICO

Principal-Surety Relationship Is Not Sufficient to Warrant a Claim of Bad Faith in Tort

U.S. ex rel. Custom Grading, Inc. v. Great American Ins.Co.
(D. N.M., July 10, 2013)

A subcontractor sued an insured and its surety insurer who issued a project bond. The subcontractor alleged that the insured failed to pay the subcontractor for labor and materials. insured executed an indemnity agreement regarding bond payment. The insured sued the insurer for, among other things, breach of good faith and fair dealing for interfering with the insured's ongoing discussions with the subcontractor to resolve claim and payment issues. The insurer investigated and communicated with subcontractors because they were making claims on the surety bond. Since the Indemnity Agreement allowed the insurer to investigate these claims, they did not breach any covenant of good faith and fair dealing. The insurer's motion to dismiss the tort claim for breach of good faith and fair dealing was dismissed, but the bad faith claim sounding in contract was sustained. A cause of action for breach of this duty sounding in contract is recognized when the claim is based on the Indemnity Agreement. A tort claim is only available where a special relationship exists. A relationship as principal and surety, respectively, is not a special relationship.

Comment: In interpreting the New Mexico Unfair Insurance Practices Act, the court underscored that when determining if a contract falls under the UIPA, the code articulates a functional approach which means looking to the substance of the contract rather than to its label.

PENNSYLVANIA

Jury to Determine Whether Bad Faith May Be Subject to Lesser Threshold

Nat'l Fire Ins. Co. of Hartford v. Robinson Fans Holdings, Inc.
(W.D. Pa. 12th July, 2013)

An insured alleged that an insurer failed to provide coverage for the defense of a prior lawsuit. The insured claimed breach of implied duty of good faith and fair dealing, as well as violation of statutory bad faith. The court concluded that a genuine issue of fact precludes judgment on bad faith claim. The insurer failed to pay further defense costs without notifying the insured. The insurer's conduct could reasonably constitute bad faith by acting to the detriment of the insured's interest. However, the court concluded that the insurer's good or bad faith conduct involved jury questions.

Comment: A court in this jurisdiction will assess the totality of the circumstances surrounding the actions or inactions of the insured and insurer in determining which factors constitute bad faith.

TEXAS

Insured's Conduct Key to Determining Bad Faith

Santacruz v. AllState Texas Lloyds, Inc.
(Civ. Action No. 3:12-CV-02553;
June 25, 2013)

In this case, an insured lost shingles on their roof due to a wind storm and reported a claim for wind and water damage. The insured fully repaired the roof before the insurer had time to inspect the potential claim. Since the damaged roof could not be investigated for its loss, the claim was denied. The insured sued the insurer, claiming breach of its duty of good faith and fair dealing by denying the claim. The court granted summary judgment to the insurer, holding that the insured did not comply with post-loss procedures because it replaced the roof before the insurer could inspect the claim. Since there was insufficient evidence that wind blew the shingles off the roof, the insurer did not act in bad faith, and had a reasonable basis for denying the claim.

Comment: In this jurisdiction, an insurer has the "right to be wrong" and that an objective standard (i.e. what a reasonable insurer would have done) is utilized in assessing the insurer's position.

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