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Contacts:

Gregory M. Boucher
617.912.0931
gboucher@saul.com

Carolyn Due
202.295.6613
cdue@saul.com

Matthew M. Haar
717.257.7508
mhaar@saul.com

Joseph C. Monahan
215.972.7826
jmonahan@saul.com

Amy L. Piccola
215.972.8405
apiccola@saul.com

Thomas S. Schaufelberger
202.295.6609
tschaufelberger@saul.com

Saul Ewing LLP

Insurance Practice

The Bad Faith Sentinel

Standing guard on developments in the law of insurance bad faith around the country

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Wisconsin Court of Appeals: Insurer Does Not Commit Bad Faith by Refusing to Pay the Undisputed Portion of an Insured's Claim Where the Policy Does Not Require Payment

Eagle Fuel Cells-ETC, Inc. v. Acuity, a Mutual Insurance Company, No. 2012AP2811, 2013 WL 4799375 (Wis. App. Sept. 10, 2013)

Wisconsin Court of Appeals concludes that an insurer does not commit bad faith by refusing to pay the undisputed portion of an insured's claim when the insurance policy does not require it.

Plaintiff Eagle Fuel Cells-ETC, Inc. ("Eagle") suffered a loss of business income as a result of a March 27, 2009 fire that damaged both its equipment and building at Eagle's manufacturing facility. The fire destroyed an autoclave piece of equipment necessary to manufacture its products. Facing at least a six-month timetable for a new autoclave, Eagle obtained a used autoclave with a production capacity 75 percent of Eagle's previous machine. As a result of the diminished capacity of the replacement, Eagle suffered a loss of business income.

Eagle's insurer, Acuity, a Mutual Insurance Company ("Acuity"), disputed the amount of Eagle's business interruption loss claim. Eagle initially submitted a claim for $211,000. In response, Acuity originally only paid Eagle $42,000 and disputed the remainder of the claim. Acuity subsequently retained an accountant who valued Eagle's claim at approximately $58,000. Acuity, however, refused to issue Eagle payment for the remaining $16,000 undisputed portion of Eagle's claim without Eagle signing a release, which Eagle refused to do. Acuity later increased its offer to $70,000 in an effort to resolve the matter, but Eagle declined.

Eagle alleged that Acuity acted in bad faith by requiring a release before issuing payment for the undisputed portion of Eagle's business interruption claim. Eagle defended by arguing that its insurance contract with Eagle did not require payment of the undisputed amount and absent a breach of contract, there can be no bad faith. Acuity's policy requires Acuity to make payment only if: (1) Eagle and Acuity come to an agreement on the amount of Eagle's loss, or (2) an appraisal award has been made. Because neither condition was met, Eagle argued that it did not breach the policy and therefore did not commit bad faith.

The appeals court agreed with Eagle and concluded that Eagle did not commit bad faith because it did not breach its own insurance contract. The appeals court agreed that Acuity's decision to condition full payment of the undisputed amount upon the signing of the release was "reasonable, given the parties' dispute over the total amount of the loss." The appeals court further agreed with a lower court's conclusion that "Acuity had every right to withhold final payment under the circumstances when its liability had yet to be established by potential litigation." [Of note, this opinion was classified as "not to be published" and other decisions around the country require payment of the undisputed portion of the claim. This case shows the potential impact of drafting the insurance policy to not require payment until certain conditions are met.]

Southern District of Texas: Insurer Does Not Commit Bad Faith by Forcing Insureds to Trial to Determine the Amount of Insureds' Recoverable UM/UIM Claim

***Accardo v. America First Lloyds Insurance Company*, No. H-11-0008, 2013 WL 4829252 (S.D. Texas Sep. 10, 2013)**

Southern District of Texas concludes that when there is a bona fide and reasonable dispute over the amount of insureds' UM/UIM damages claim, an insurer does not commit bad faith by forcing insureds to trial to determine damages.

In May 2008, Plaintiffs Carl and Selena Accardo and their child (the "Accardos") were involved in a motor vehicle accident with an unknown and uninsured driver. The Accardos submitted a claim with their automobile insurer, America First Lloyds Insurance Company ("America First"), under the uninsured/underinsured portion of the policy. America First forced the Accardos to go to trial to determine the extent, if any, of the Accardos' contributory negligence, and the amount of the Accardos' damages. The Accardos prevailed in the underlying trial and America First immediately issued payment to the Accardos on the judgment.

The Accardos asserted a bad faith action against America First for failing to promptly pay the Accardos claim. However, America First took the position that it was under no duty to pay the Accords' claim until liability and damages were clear. America First disputed: (1) whether Carl Accardo' s own negligence contributed to the accident; (2) the extent of Carl's future medical procedures; and (3) the monetary value of the Accardos' pain and suffering.

The court found that America First did not commit bad faith because it reasonably disputed liability and damages. On liability, America First believed that Carl Accardo may have been contributorily negligent because he failed to avoid contact with an abandoned car in the road. While the jury disagreed and did not find any contributory negligence, the court concluded that it was not unreasonable for America First to assert a contributory negligence dispute. The Accardos further contended that America First's contributory negligence defense was a sham because one of its claims handlers admitted in a deposition that America First did not discount its settlement offers to off-set for Carl Accardo' s contributory negligence. On that issue, the court ruled that "America First's willingness to set aside any question of comparative negligence in its settlement negotiations does not provide a basis to infer bad faith in the decision to submit this issue to a jury when settlement efforts failed."

With respect to damages, the court determined that America First reasonably disputed Carl Accardo' s future medical treatment and the Accardos' pain and suffering. America First retained a medical expert who testified that Carl Accardo did not require future medical treatment. The court also concluded that America First acted reasonably on the issue of pain and suffering because of the subjective nature of pain and suffering and because America First's pre-trial settlement offers included payment for pain and suffering, which mostly were in the range of pain and suffering awarded at trial.

New Jersey Appellate Court Holds That Privilege is Not Waived in Bad Faith Suits, But that Insurer is Entitled to Ask Questions About Bad Faith Plaintiff's Knowledge of Settlement Discussions

V.K. ex rel Pezzella v. New Jersey Manufacturers Ins. Co., 2013 WL 4503367 (N.J. Super. Ct, App. Div. Aug. 26, 2013).

Although privilege is not entirely waived in bad faith suits, when a central issue in such disputes is whether the insured would have settled for the policy limits, the insurer is entitled to ask questions about the settlement process.

On August 5, 2006, Jennifer Roden and her three children, G.R., V.K. and M.K. were seriously injured when a vehicle operated by Corey Clifford crossed the center dividing line on a roadway and struck Roden's vehicle head-on. Roden and her children filed personal injury actions against Clifford. On November 7, 2007, the Rodens' attorney requested that Clifford's insurer, New Jersey Manufacturers Insurance ("NJM") deposit the insurance proceeds into court. NJM did not comply with the demand. Clifford's counsel did, however, send the Rodens a letter advising that he had obtained authority from NJM to offer $478,122.81, the policy limits minus $21,877.19 previously paid to Roden on her automobile property damage claim, in full settlement of all claims. The Rodens rejected the offer. On November 13, 2008, Clifford filed a motion seeking to deposit the balance of his insurance policy proceedings into court and the court granted the motion.

On March 30, 2009, the lawsuit against Clifford proceeded to trial on the issue of damages only, Clifford having stipulated to liability. Prior to verdict, the Rodens accepted an assignment of rights from Clifford to pursue a bad faith claim against NJM in return for releasing Clifford from any judgment exceeding his policy limits. The jury returned substantial verdicts in favor of M.K., G.R., V.K., and Roden, which judgments were subsequently affirmed on appeal. Within days of the affirmance, the minor Rodens, as assignees of Clifford and with their maternal grandfather, Rocco Pezzella, serving as their guardian ad litem, filed a complaint alleging bad faith against NJM. Roden filed a separate bad faith action against NJM a few months later.

During her deposition, Roden refused to answer certain questions relating to settlement negotiations that occurred during the suit against Clifford. NJM filed a motion seeking to compel Roden's continued deposition to answer questions regarding: (1) her knowledge and understanding of settlement demands in the Clifford case; (2) her motivation for rejecting Clifford's settlement offer; and (3) the circumstances surrounding meetings and communications with her law firm concerning settlement. NJM argued in support of its motion that it was entitled to ask Roden about communications regarding potential settlement because the Rodens were trying to establish a bad faith claim based, in part, upon NJM's failure to respond to several time-restricted settlement demands. NJM argued that it was entitled to determine the reasonableness of those demands.

The court granted the motion, specifically ordering that Roden could not refuse to answer questions concerning settlement on the ground that answering such questions requires disclosure of attorney-client communications. Roden and her children appealed. In the appeal, the Rodens argued that the trial court's order improperly compelled them to disclose privileged communications. NJM responded that information concerning the Rodens' knowledge, understanding of, and motivation behind the settlement demands and offers was "necessary and relevant" and could only be obtained from the Rodens.

As a preliminary matter, the appellate court dismissed the minor Rodens' appeal because the trial court and the parties' briefing never addressed whether Roden could assert a claim of attorney-client privilege regarding communications made in front of others, including counsel for the minor Rodens, because she and her children shared a common interest in the underlying litigation.

Under New Jersey law, a party is not entitled to pierce the attorney-client privilege unless it makes a showing: (1) that there is a legitimate need to reach the evidence sought to be shielded; and (2) of relevance and materiality of that evidence to the issue before the court. Pursuant to this rule, the court explained that NJM must establish the need for Roden's testimony regarding her knowledge of the settlement demands and the single pre-trial settlement offer it made in the underlying lawsuit. NJM argued that a bad faith claim against an insurer implicitly waives the attorney-client privilege as to relevant communications between plaintiff and her counsel in the underlying litigation that might support its defense that it was "set-up" for a bad faith claim. The court agreed that NJM was entitled to ask Roden about her knowledge regarding the settlement demands and offer because once Roden demonstrated bad faith, it would be up to NJM to demonstrate that settlement could not have been achieved within the policy limit or the limit plus any amount the insured would have been able and willing to contribute.

The court made clear, however, that actual conversations Roden had with her lawyer are not necessarily fair game because, pursuant to New Jersey law, NJM must establish that the information sought could not be obtained from any less intrusive source. Because the record of settlement demands was fully set forth in documents and because NJM would have the ability to ask Roden about those documents, the court determined that the record, as it currently stood, did not support the conclusion that NJM has established that questioning Roden about actual communications she had with counsel was the least intrusive method to obtain the information.

Supreme Court of Wyoming: Title Insurer Did Not Act in Bad Faith where Policy Failed to Mention Zoning Restrictions

Sonnett v. First American Title Ins. Co.**, No. S-12-0237, 2013 WL 5180568 (Wyo. Sept. 13, 2013).**

According to the Supreme Court of Wyoming, a "Master Plan," which placed encumbrances on title of property owned by insureds and was adopted by the county, was a governmental regulation for which coverage was excluded by title insurance policy, and, thus, the insurer did not act in bad faith in denying claim.

In 1989, Harold and Leda Reach applied to Sublette County, Wyoming to change the zoning on a twenty-acre parcel of property to recreational use for the purpose of developing a resort lodge. The Reaches' proposed Master Plan restricted the use and development of the property more than the standard limitations placed on property zoned as "Recreational." The county accepted the Master Plan and approved the zoning change. The Reaches then sold the parcel of land to Elk Ridge Lodge, Inc., which operated a resort facility that offered lodging, a restaurant with a beer liquor license, gasoline sales, and a gift shop.

In 2001, Elk Ridge sold the property to George and Wendy Sonnett, who obtained title insurance from First American Title Insurance Company ("First American"). The title insurance policy listed a number of easements and restrictions on the property, but did not mention the Master Plan. In 2006, the Sonnetts received a letter from the county informing them that they were in violation of the Master Plan by offering a restaurant and tavern to the public, renting snowmobiles and plowing the property's driveway to allow access during the winter. Thereafter, the Sonnetts closed the lodge because they could not successfully operate it within the restrictions of the Master Plan.

The Sonnetts filed a claim with First American claiming that the limitations in the Master Plan made the property unmarketable and that there was a cloud on the title because of lack of legal access. First American concluded that the policy did not cover the limitations in the Master Plan or the lack of access claim and denied coverage. The Sonnetts then filed a complaint against First American for, among other things, bad faith. First American filed a motion for summary judgment, which the trial court granted.

On appeal, the Sonnetts claimed that First American acted in bad faith when it determined the Master Plan was a zoning resolution and, therefore, not covered under the policy. The Sonnetts argued that the Master Plan was a set of restrictive covenants and was, therefore, an encumbrance upon title and covered under the policy. The Supreme Court of Wyoming determined that the Master Plan was not a set of restrictive covenants, but rather was adopted by the county as part of a resolution that amended the original zoning resolution. The policy contained an exclusion to coverage for governmental regulations restricting or relating to the use and enjoyment of land. There could be no coverage for the Sonnetts' claims regarding the Master Plan and, thus, First American did not act in bad faith because there was a reasonable basis to deny the claim.

The Sonnetts also claimed that First American acted in bad faith when it denied the Sonnetts' claim for lack of access to the property without a sufficient investigation. The Sonnetts, however, failed to present facts in support of their contention. Consequently, the court found that the record demonstrated that First American conducted an investigation, and appropriately determined that the Sonnetts' claims were not covered under the policy. Thus, the court affirmed summary judgment in favor of First American.

Baltimore, MD 500 East Pratt St. Charles O. Monk, II 410.332.8668

Boston, MA 131 Dartmouth St. Richard D. Gass 617.723.3300

Chesterbrook, PA 1200 Liberty Ridge Dr. Michael S. Burg 610.251.5750 Nathaniel Metz 610.251.5099

Harrisburg, PA 2 North Second St. Eric L. Brossman 717.257.7570

Newark, NJ One Riverfront Plaza Stephen B. Genzer 973.286.6712

New York, NY 555 Fifth Ave., Michael S. Gugig 212.980.7200

Philadelphia, PA 1500 Market St. Bruce D. Armon 215.972.7985

Pittsburgh, PA One PPG Place Charles Kelly 412.209.2532 David R. Berk 412.209.2511

Princeton, NJ 750 College Rd. E Marc A. Citron 609.452.3105

Washington, DC 1919 Pennsylvania Ave, NW Mark L. Gruhin 202.342.3444 Andrew F. Palmieri 202.295.6674

Wilmington, DE 222 Delaware Ave. Wendie C. Stabler 302.421.6865 William E. Manning 302.421.6868