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Insurance Practice

The Bad Faith Sentinel

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

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En Banc Mississippi Court of Appeals Affirms Summary Judgment for Insurer, Adjuster and Employer on Bad Faith Claims Arising from Denial of Coverage and Benefits for Work-Related Injury

Chapman v. Coca-Cola Bottling Co., No. 2013-CA-01883-COA (Miss. Ct. App. Mar. 17, 2015).

Ruling en banc, court affirms grant of summary judgment for insurer, adjuster and employer on bad faith claims brought by former employee and his spouse stemming from denial of benefits related to injury later determined to be work-related and compensable under workers' compensation law.

Thomas and Brenda Chapman sued defendants Coca-Cola Bottling Company ("Coke"), American Casualty Company and CNA ClaimPlus, alleging that defendants acted in bad faith by wrongfully denying benefits that arose from a back injury Thomas suffered while working for Coke in 2001. Thomas previously injured his back in 1991 while working for Coke, and injured it again in a vehicle rollover accident in 2000. Thomas sought evaluation and treatment at the direction of Coke after the 2001 injury, and Coke initially approved some of Thomas's medical expenses. However, Thomas's doctors later determined that his injuries resulted from a pre-existing condition and not the 2001 incident. Thomas filed a petition to controvert with the Mississippi Workers' Compensation Commission, and the administrative law judge ruled that the 2001 injury was compensable and awarded past-due compensation for temporary total disability. The defendants appealed the ruling to the Commission, and the Commission affirmed its ruling. Thereafter, the parties reached a settlement.

Plaintiffs subsequently filed suit in the Jasper County Circuit Court alleging, among other things, that the defendants acted in bad faith by wrongfully denying benefits, refusing to pay Thomas's workers' compensation claim, and denying and delaying payments of medical bills as agreed to in their settlement. After completion of discovery, defendants filed a motion for summary judgment, which the Circuit Court granted. Plaintiffs appealed the grant of summary judgment to the Court of Appeals.

The Court of Appeals, ruling *en banc*, affirmed the Circuit Court's entry of summary judgment for defendants. The Court of Appeals first analyzed the decision below as it related to the insurer, American Casualty. To

establish a bad faith claim against an insurer under Mississippi law, the plaintiff "must show that the insurer lacked an arguable or legitimate basis for denying the claim, or that the insurer committed a wil[l]ful or malicious wrong, or acted with gross and reckless disregard for the insured's rights" (internal quotations omitted). "However, the fact that an insurer's decision to deny benefits may ultimately turn out to be incorrect does not in and of itself warrant an award of punitive damages if the decision was reached in good faith," such as when the insurer "has a reasonable cause for such denial or delay" in paying a valid claim (internal quotations omitted).

Here, plaintiffs failed to carry their burden. The Court found that American Casualty, through its adjuster, CNA, conducted a prompt and reasonable investigation, and acted in good faith by speaking with Coke and reviewing relevant documentation. American Casualty also reopened Thomas's investigation file upon receiving notice of Thomas's petition to controvert. After the 2001 incident, American Casualty, through CNA, received information that linked Thomas's treatments to a preexisting condition – the vehicle accident in 2000 – which would not require any payments under workers' compensation. The Court determined, at the very least, that the source of Thomas's injury was in dispute. Thomas admitted as much in his deposition when he agreed that there was a legitimate dispute between him, Coke and American Casualty over the workers' compensation claim. Thomas also attested to the existence of a legitimate or arguable basis for denying his claim in the settlement petition approved by the Commission. The Court, therefore, affirmed summary judgment for American Casualty on plaintiffs' bad faith claims.

The Court next examined the ruling below as it related to the claims adjuster, CNA. The Court explained that plaintiffs bear a different burden in proving that CNA acted in bad faith: "The adjuster does not owe the insured a fiduciary duty nor a duty to act in good faith" (internal quotations omitted). Instead, "an adjuster has a duty to investigate all relevant information and must make a realistic evaluation of a claim. . . . He can only incur independent liability when his conduct constitutes gross negligence, malice, or reckless disregard for the rights of the insured" (internal quotations omitted). The Court determined that "CNA conducted an adequate investigation of the claim in 2001, and reasonably concluded no workers' compensation claim existed until receiving notice of Thomas's petition to controvert." CNA communicated with Coke during the investigation and reviewed all materials Coke provided. CNA also promptly reopened Thomas's file after receiving notice of the petition to controvert. The Court found that CNA reasonably delayed any payments pending the Commission's determination of Thomas's claim, and thus ruled that any denial of compensation was neither grossly negligent, malicious, nor reckless until the dispute was resolved in Thomas's favor. Thus, the Court affirmed summary judgment for CNA.

Middle District of Pennsylvania: No Bad Faith Where Insurer's Brief Inspection Yielded Reasonable Basis to Deny Claim

Boulware v. Liberty Ins. Corp., No. 3:13-CV-1541, 2015 WL 1219283 (M.D. Pa. Mar. 17, 2015).

After a portion of the insured's deck collapsed, the insurer denied coverage based on a brief inspection without hiring an engineer or other expert. The insured brought a bad faith claim for insufficient investigation, which the court denied, holding that the insurer's employees had a reasonable basis for their denial based on their observations and experience.

On March 4, 2012, a portion of the deck attached to Taitwana Boulware's home collapsed, taking with it the sunroom built on the deck. At the time, Boulware's home was covered by a homeowners insurance policy issued by Liberty Insurance Corporation ("Liberty"). Boulware notified Liberty of the damage on March 5.

On March 7, Daniel Baron, a senior property loss specialist with Liberty, investigated the damaged deck. He inspected the property for about half an hour and took photographs, concluding that the damage had been caused by defective construction which led to dry or wet rot. Before leaving, he explained to Boulware that based on exclusions contained in

her policy for defective construction and wet or dry rot, there was no coverage for the loss. Baron subsequently drafted a denial letter to that effect which his manager, after reviewing the policy language and Baron's photographs, approved. Baron sent the denial letter on March 28.

After a public adjuster hired by Boulware disputed the denial in October 2012, Baron once again reviewed the claim file and, along with another manager, confirmed the conclusion that there was no coverage for the damage to the deck. As before, Liberty did not hire an engineer or other construction expert to support its findings. Liberty denied coverage a second time in January 2013.

The following month, Boulware filed a lawsuit in Pennsylvania state court for breach of contract and bad faith, alleging that Liberty had conducted an insufficient investigation before denying her claim by conducting only a single brief inspection and failing to have an expert review the damage. Liberty removed the suit to federal court. After the suit commenced, Boulware retained an expert who opined that the deck had not collapsed due to defective workmanship, while Liberty retained an engineer who concluded that improper construction was the cause of the damage. At the close of discovery, Liberty filed a motion for summary judgment on the bad faith claim.

The Court stated that, under Pennsylvania law, bad faith claims are not limited to unreasonable denials of coverage but "can have various other bases, including an insurer's lack of investigation." However, the insurer need only show that it had a "reasonable basis" for its actions, which it can accomplish by demonstrating that "it conducted a review or investigation sufficiently thorough to yield a reasonable foundation for its action." When the plaintiff fails to show that there is "clear and convincing evidence that the insurer's conduct was unreasonable and that it knew or recklessly disregarded its lack of a reasonable basis in denying the claim," summary judgment for the insurer is appropriate.

On these facts, the court granted Liberty's motion. The court pointed out that while Baron's inspection was relatively brief, it produced direct evidence of faulty workmanship and rot, including the use of nails instead of screws to attach the deck to the house, the lack of a certain feature that would have prevented water from entering the deck, and visible areas of rot and rust. Baron saw and photographed each of these elements, and he and his supervisors relied on this evidence when they decided that there was no coverage for the loss. These findings were consistent with the conclusion eventually reached by the expert Liberty retained in its defense of Boulware's suit.

In these circumstances, the court stated that "it can hardly be said that [Liberty's] decisions were unreasonable or that they knew an expert or engineer was required to properly evaluate plaintiff's claim yet recklessly disregarded this in denying her claim." Moreover, it noted that "even if the insurer erred by not retaining an expert to examine the damage prior to the initial denial of a claim, this amounts to only negligence or poor judgment and not bad faith." The court therefore held that Liberty conducted a reasonably detailed investigation which supplied a reasonable basis to deny the claim, and it dismissed the bad faith claim.

Middle District of Pennsylvania: Possibility of Bad Faith Exists Despite Payment of Claim Where Insured Alleges Untimely Claims Handling

Scheirer v. Nationwide Ins. Co. of Am., No. 3:13-CV-1397, 2015 WL 1013986 (M.D. Pa. Mar. 9, 2015).

Middle District of Pennsylvania denies cross-motions for summary judgment on bad faith claim, holding that material issues of fact existed where Plaintiff ultimately received benefits but claimed that insurer handled the claim in an untimely manner.

Virginia Sheirer was thrown to the floor of a county bus when the driver swerved to avoid an oncoming vehicle. Sheirer had an insurance policy from defendant Nationwide Insurance Company of America which covered tort and uninsured motorist claims of "up to $100,000 per person." Upon notification of the plaintiff's UM claim and demand for arbitration, Nationwide refused the arbitration request and made a written request for a medical examination and the plaintiff's statement

under oath. Sheirer then sued for breach of contract, bad faith, and violations of Pennsylvania's consumer protection law. The parties filed cross-motions for summary judgment on the breach of contract and bad faith claims.

The Court denied both motions as to the bad faith claim, holding that there were disputed material facts and a reasonable jury could credit either party's account of events. At the time of the Court's ruling, the claim had been resolved by way of binding arbitration, the result of which was not challenged by the plaintiff. Therefore, the plaintiff did not claim that she had been wrongfully denied benefits. Rather, the plaintiff based her bad faith claim primarily upon an "alternative" basis recognized under Pennsylvania law; namely, that the defendant handled the claim in an untimely manner.

The court found that disputes existed, inter alia, as to whether defendant promptly evaluated and investigated plaintiff's UM claim; failed to timely respond to plaintiff's demands; failed to promptly resolve plaintiff's claim within the $100,000 policy limits; failed to act promptly upon communication regarding plaintiff's claim; failed to have reasonable standards with respect to plaintiff's UM claim; and failed to timely pay plaintiff's UM claim when it had all of the necessary information.

District of Colorado: "First-Party Claimant" Under State Bad Faith Statute is Not Synonymous With First-Party Bad Faith Under Common Law

Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Intrawest ULC, et al., No. 13-cv-00079-PAB-KMT, 2015 WL 1326199 (D. Colo. Mar. 20, 2015).

The U.S. District Court for the District of Colorado denies an insurer's motion to dismiss, reasoning that under Colorado law, a party may assert a statutory bad faith claim as a "first-party claimant" and still pursue a third-party bad faith claim under common law.

National Union Fire Insurance Company of Pittsburgh, PA ("National Union") issued five commercial general liability ("CGL") insurance policies to Intrawest ULC f/k/a Intrawest Corporation ("Intrawest"), a developer of US and Canadian ski resorts, under an Owner Controlled Insurance Program ("OCIP"). As part of the OCIP, National Union and Intrawest entered into a Paid Loss Addendum and Policy Funding Schedule applicable to policies issued from 1998 to 2001, and another such addendum applicable to policies issued from 2001 to 2002. National interpreted these addenda as placing a $5,000,000 aggregate limit on coverage for all development projects.

Intrawest began developing a number of ski resorts in 1998. Over the course of the next several years, several lawsuits were commenced against Intrawest in both the United States and Canada. Each of the suits included allegations of faulty construction and design and sought compensation for property damage. In response to these actions, National Union filed suit in the United States District Court for the District of Colorado seeking a declaration that its policies had an aggregate limit of $5 million pursuant to the Paid Loss Addenda, and that its obligations were satisfied after paying this limit.

In addition, a number of real estate developers who worked on projects covered by the National Union policies, or were named defendants in suits arising from covered projects, were permitted to intervene. The intervenors had tendered claims to National Union under the OCIP that totaled over $25 million. The intervenors' complaint included, among other things, claims for common law bad faith and statutory bad faith under Colo. Rev. Stat. § 10-3-1115 and § 10-3-1116. National Union moved to dismiss intervenors' bad faith claims.

National Union argued that the intervenors' statutory claim should be dismissed because only "first party claimants" could bring statutory bad faith claims under Colorado law. According to National Union, because courts view claims under CGL policies as "third-party claims" under common law, intervenors' claims under the CGL policy could not provide a basis for a statutory cause of action. The court rejected National Union's argument, explaining that courts interpreting Colorado's bad faith statutes made clear that the statutory right of action was different from common law bad faith. The court reasoned that there was no indication that Colorado's General Assembly intended for "first-party claimants" under the bad faith statute to include only those persons who could

bring "first-party claims" under common law. Rather, the statute clearly defined "first-party claimant" in a manner that does not preclude CGL insureds from bringing a statutory bad faith claim.

National Union further argued that the statutory claims had to be dismissed because intervenors sought "damages" resulting from the satisfaction of underlying claims, instead of "benefits owed" under an insurance policy, as required under the bad faith statute. According to National Union, defense and indemnity costs are not "benefits" under a CGL policy. The court disagreed, explaining that Colorado indeed views the payment of defense costs and indemnity for covered claims as "benefits" of a CGL insurance policy. Accordingly, National Union's motion to dismiss was denied.

National Union also moved to dismiss the intervenors' common law bad faith claims, arguing that because intervenors asserted that they were "first-party claimants" for purposes of their statutory claims, they were required to plead a first-party common law bad faith claim. The court again rejected National Union's argument. Because the statutory definition of "first-party claimant" does not directly correspond to first-party bad faith claims under common law, intervenors were not precluded from pursuing a third-party common law bad faith claim. The court went on to explain that in a third-party claim, the insured must prove that a reasonable insurer under the circumstances would have paid or settled the third-party claim. Meanwhile, in a first-party claim, the insured must prove that the insurer acted knowingly or recklessly in disregarding the insured's claim. The court reasoned that it could not conclude as a matter of law that National Union's actions with respect to the intervenors' claims were reasonable. Thus, National Union's motion to dismiss was denied and intervenors' common law and statutory bad faith claims were permitted to move forward.

Join us in Chicago! DRI's biannual Insurance Bad Faith and Extra-Contractual Liability Seminar is scheduled for June 17-19 at the Loews Chicago Hotel. Our own Matt Haar will be speaking on Friday, June 19 on "Handling Multi-Claimant and Multi-Insured Bad Faith Exposures." This seminar is the preeminent national event for bad faith practitioners and we hope to see many of you there. Details are available at **http://www.dri.org/Event/20150045**. Please let us know if you will be attending so that we can make plans to get together in Chicago.

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