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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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District of South Carolina: No Support For Award of Punitive Damages Where Insured Failed To Prove Recklessness by Insurer

Liberty Mut. Fire Ins. Co. v. JT Walker Indus., Inc., No. 2:08-02043-MBS, 2014 WL 6773517 (D.S.C. Dec. 2, 2014).[1]

The U.S. District Court for the District of South Carolina sets aside a jury's verdict awarding punitive damages to a bad faith plaintiff where there was insufficient evidence to support a finding that the insurer acted with willful, wanton, or reckless disregard for the insured's rights.

MI Windows & Doors, Inc., a subsidiary of J.T. Walker Industries, Inc. (collectively, "MI") was a manufacturer of windows and doors. Liberty Mutual Fire Insurance Company ("Liberty") insured MI under six commercial general liability policies. After MI was named as a defendant in five property damage lawsuits alleging manufacturing defects in MI products, the defense of the suits was tendered to Liberty. Over MI's objection, Liberty settled each of the underlying suits. Liberty sued MI for breach of contract to recover the amount of the settlements, in accordance with the deductible under MI's policies. MI countersued for breach of contract and bad faith.

The jury returned a verdict in favor of both parties. It ruled in Liberty's favor on its breach of contract claim and held MI liable for $894,416, the amount billed by Liberty to MI for the five settlements. The jury ruled in MI's favor on the bad faith claim and awarded $12.5 million in punitive damages. The trial court set aside the jury's verdict, holding that because MI had failed to prove any actual or consequential damages as a result of Liberty's bad faith, it was not entitled to recover any punitive damages. On appeal, the Fourth Circuit disagreed, reasoning that an absence of ascertainable damages does not preclude punitive damages. The Fourth Circuit remanded for the district court to determine whether the evidence supported the jury's finding that Liberty acted "willfully, wantonly, or recklessly" in settling the underlying claims. If the district court found

1. The District Court issued this opinion on remand from the Fourth Circuit. We highlighted the Fourth Circuit's opinion in our March 2014 issue. To read that summary, please click here: (http://www.saul.com/sites/default/files/sites/default/files/BFS031014_0.pdf)

such evidence, it would then have to consider whether punitive damages were appropriate and whether the jury's verdict was excessive.

On remand, the district court concluded that there was insufficient evidence in the record to support the recklessness finding necessary to support an award of punitive damages. The district court emphasized that such a jury finding is scrutinized under the clear and convincing evidence standard. The court reasoned there was no such evidence supporting the jury's verdict because Liberty's settlements eliminated the potential for greater liability for MI in the underlying cases. Indeed, had MI lost in even one of the underlying actions, its liability may have been far greater than all of the settlements combined, in part because MI potentially was subject to joint and several liability with other defendants, including developers and contractors.

The court further noted that the total amount of the settlements was less than the estimated costs of defense and the reserve amounts set by Liberty. Moreover, the court found no evidence to suggest that any of the underlying claims could have been resolved for less than the actual settlement amounts even at trial. Accordingly, the court held that there was no basis for a jury to conclude by clear and convincing evidence that Liberty "consciously failed to exercise due care."

Because it found there was insufficient evidence to support the jury's finding that Liberty acted in willful, wanton, or reckless disregard of the rights of MI, the jury award of punitive damages was struck down. Having struck the punitive damages award, the court did not need to reach the issue of whether the amount of the award was constitutional.

Supreme Court of Missouri Reverses Grant of Summary Judgment for Primary Insurer on Insured's and Excess Insurer's Bad Faith Claims in En Banc Decision

Scottsdale Ins. Co. v. Addison Ins. Co., No. SC 93792 (Mo. Dec. 9, 2014).

Supreme Court of Missouri rules in an en banc decision that neither an excess judgment nor a failure to pay policy limits are essential elements of a claim for bad faith refusal to settle and that an excess insurer may recover on such a claim under theories of assignment and conventional or equitable subrogation.

Plaintiffs Wells Trucking, Inc. and its excess insurer, Scottsdale Insurance Company, filed suit against Wells Trucking's primary insurer, United Fire & Casualty Company and its wholly-owned subsidiary, Addison Insurance Company (collectively, "United Fire"), alleging that United Fire acted in bad faith in refusing to settle within its policy limits a wrongful death action against Wells Trucking arising out of an automobile accident. At the time of the accident, Wells Trucking had a primary insurance policy with United Fire that had a $1 million liability limit. Wells Trucking also had an excess insurance policy with Scottsdale with a $2 million liability limit. The Scottsdale policy specified that it would not apply unless and until the underlying United Fire policy was exhausted. It also provided that if Wells Trucking had any rights to recover any payment Scottsdale made under the policy, those rights would be transferred to Scottsdale.

Wells Trucking and Scottsdale alleged that the available information and evidence required United Fire to pay up to its policy limits to settle the wrongful death claim. Despite numerous opportunities to settle for the policy limits, and demands from Wells Trucking and Scottsdale to do so, United Fire refused. Eventually, the decedent's family withdrew their $1 million settlement demand and raised the demand to $3 million. Thereafter, United Fire agreed to tender the $1 million policy limits toward the $3 million demand. Following a successful mediation, the suit was ultimately settled for a total of $2 million, with each of United Fire and Scottsdale tendering

$1 million. Wells Trucking assigned to Scottsdale its rights to pursue a bad faith refusal to settle claim against United Fire and agreed to pursue a bad faith failure to settle claim for the benefit of Scottsdale.

Scottsdale asserted four theories allowing it to raise a bad faith refusal to settle claim: (1) assignment from Wells Trucking; (2) conventional subrogation; (3) equitable subrogation; and (4) a duty of good faith owed directly to Scottsdale. The trial court entered summary judgment for United Fire, ruling that an excess insurer cannot recover from a primary insurer under a claim of bad faith refusal to settle and that bad faith refusal to settle could not be proven because United Fire paid its policy limits and Wells Trucking did not suffer an excess judgment. Wells Trucking and Scottsdale appealed, and the case was transferred to the Supreme Court of Missouri, which reversed and remanded for the reasons explained below.

The Supreme Court ruled that an excess judgment is not required to maintain an action against an insurer for bad faith refusal to settle. The Court described bad faith as "the intentional disregard of the *financial interest* of the insured in the hope of escaping the responsibility imposed upon the insurer by its policy" (internal quotations omitted) (emphasis in opinion). The Court explained that the insured's financial interests "are impacted by an insurer's breach of duty whether the breach results in an excess judgment or an excess settlement." The Court also explained that "an insurer's obligation to act in good faith when settling a third-party claim is part of what the insured pays for with its premiums . . . [w]hen the insurer refuses to settle, the insured loses the benefit of an important obligation owed by the insurer . . . regardless of whether there is an excess judgment or settlement" (internal quotations omitted).

Similarly, the Court ruled that a claim for bad faith refusal to settle may proceed even when a claim is ultimately settled for the policy limits. "An insurer may be liable over and above its policy limits if it acts in bad faith . . . in refusing to settle the claim against its insured within its policy limits *when it has a chance to do so"* (internal quotations omitted) (emphasis in opinion). Wells Trucking and Scottsdale claimed that United Fire had multiple opportunities to settle the wrongful death claim for the $1 million policy limits but wrongfully refused to do so. By the time United Fire agreed to tender the policy limits, the decedent's family would no longer settle for only $1 million, which required Scottsdale to tender an additional $1 million toward the settlement. The Court concluded that "United Fire's mere payment up to the policy limits does not make Wells Trucking whole or put Wells Trucking in the same position as if United Fire had performed its obligations to settle in good faith."

After ruling that Wells Trucking, as the insured, has a claim against United Fire for bad faith refusal to settle, the remaining question for the Court was whether Scottsdale could also assert such a claim. The Court found that it could do so under multiple theories. First, the Court ruled that Scottsdale could pursue a bad faith refusal to settle claim against United Fire under the assignment from Wells Trucking. The Court explained that although torts "based on contracts of a purely personal nature, such as promises or marriage[,] are not assignable . . . [a]n action . . . aris[ing] from a contract of insurance . . . is not of a purely personal nature" and therefore could be assigned (internal quotations omitted).

Second, the Court ruled that Scottsdale could pursue a bad faith refusal to settle claim against United Fire under a conventional subrogation theory. Wells Trucking's policy with Scottsdale contained a provision granting Scottsdale a right to subrogate any recovery by Wells Trucking of payment Scottsdale made under the policy. Thus, the Court found, "[b]ecause Scottsdale paid $1 million toward the settlement of the wrongful death claim under the policy, it has a right under the policy to recover that amount through Wells Trucking and, therefore, is able to invoke the doctrine of conventional subrogation."

Third, the Court ruled that in addition to Scottsdale's right to subrogation under the insurance policy, Scottsdale also had a right to pursue its claim under a theory of equitable subrogation. "A right to equitable subrogation belongs to one, not a volunteer, who pays another's debt, to recover the amount paid, which in good [conscience] should be paid by the one primarily responsible for the loss" (internal quotations omitted). The Court found that good conscience required United Fire to suffer the loss, since allegedly it was United Fire's bad faith that resulted in Scottsdale's need to contribute $1 million toward settling the wrongful death claim. "An insurer's duty to act in good faith does not simply disappear when a prudent insured has obtained excess coverage. Regardless of the existence of an excess insurer, a primary insurer should be

held liable when it acts in bad faith in refusing to settle within its policy limits."

The Court also noted, as other jurisdictions have, that allowing an excess insurer to bring a bad faith refusal to settle claim against a primary insurer discourages primary insurers from "gambling with the excess insurer's money when potential judgments approach the primary insurer's policy limits" (internal quotations omitted). The Court noted, however, that "allowing an excess insurer to bring an action under equitable subrogation does not create a new duty or impose new obligations on the primary insurer; it merely substitutes the excess insurer for the insured." The Court concluded that "Scottsdale, as the party that actually paid the loss caused by United Fire's bad faith, should be equitably subrogated to the rights of Wells Trucking and able to bring a bad faith refusal to settle action in the name of Wells Trucking."

The Court declined to recognize a cause of action for breach of a primary insurer's independent duty to settle in good faith to an excess insurer. "The duty to settle in good faith arises from the insurance contract between the insured and the insurer . . . but there is no contractual relationship between the primary and excess insurers." Thus, the Court determined that "[b]ecause this Court finds that a bad faith refusal to settle action may be assigned and that an excess insurer may recover for an insurer's breach of its duty to the insured under contractual and equitable subrogation, the Court declines to find primary insurers owe a duty directly to excess insurers."

Eleventh Circuit: Summary Judgment For Insurer Improper Where Fact Question Remained About Whether Insurer Acted In Bad Faith By Missing Settlement Opportunity

Geico Gen. Ins. Co. v. Gould, No. 14-10913, 2014 WL 7013971 (11th Cir. Dec. 15, 2014) *(per curium).*

The U.S. Court of Appeals for the Eleventh Circuit reversed a grant of summary judgment for an insurance company. It found that there remained a question of fact as to whether the injured claimant owned a motorcycle damaged in an accident and whether the insurer had acted in bad faith by failing to settle the claimant's claims for property damage and bodily injury, which subsequently led to a judgment against the insured in excess of the policy limits.

On November 13, 2008, a car driven by Sara Farag struck Elliot Gould, who was riding a motorcycle. Gould broke several bones and required multiple surgeries, and the motorcycle was also damaged.

Sara Farag was insured under her father Hussein's policy with GEICO General Insurance Company ("GEICO"). The policy provided $100,000 each of bodily injury and property damage coverage.

Soon after the accident, GEICO reached out to Gould's attorney and offered the policy limits in exchange for a release of claims. It also appointed counsel for the Farags and advised them that Gould's claim could exceed the policy limits. On January 30, 2009, Gould's attorney made a time-limited demand to GEICO to settle Gould's claims for bodily injury and property damage for $107,730.35. The demand was to remain open until February 16, 2009. It was unclear if GEICO ever transmitted this demand to the Farags.

GEICO was unwilling to accept Gould's demand because it could not confirm that Gould was the actual owner of the motorcycle, which was registered to Crystal Johnson, Gould's girlfriend. Gould and Johnson provided evidence that the bike did belong to Gould but hadn't been registered in his name because of a lien on his license. GEICO, however, continued to view Johnson as the owner and therefore would not authorize payment for the property damage claim. GEICO also rejected Johnson's offer to sign a release of claims unless it received

a letter indicating that Gould's attorney represented Johnson as well.

GEICO never attempted to extend its time to accept Gould's demand while it sorted out the ownership issue. When that demand expired, Gould filed suit in state court against the Farags. A jury subsequently awarded Gould $298,000. Eventually, Gould and Johnson signed releases and GEICO paid approximately $5,900 to settle the property damage claim. In May 2012, GEICO filed a declaratory judgment action in the U.S. District Court for the Middle District of Florida against Gould and Farags. It sought a declaration that it had not engaged in bad faith. Both Gould and the Farags filed counterclaims for bad faith.

The district court granted summary judgment for GEICO, finding that Gould had no valid claim for property damage because he was not the owner of the bike, and thus GEICO had no obligation to settle, advise the Farags or negotiate with Gould with respect to that claim. Further, it found that because Gould would not settle the bodily injury claim without also receiving payment for the property damage, GEICO had no real opportunity to settle the bodily injury claim. Finally, it found that any failure by GEICO to keep the Farags informed about Gould's demand was at most negligent and did not rise to the level of bad faith.

On appeal, the Eleventh Circuit reversed. It found that there was at least a question of material fact about whether Gould was the owner of the bike, noting that under Florida law, a certificate of title is merely evidence of ownership, not a requirement. Because the district court's entire opinion hinged on its conclusion that Gould did not own the bike, the question of whether GEICO acted in bad faith by failing to settle the property damage claim, and thus exposing the Farags to an excess judgment, remained open. The court therefore vacated the summary judgment ruling and remanded for further proceedings.

Eastern District of Kentucky: Insurer's Denial Of Claim Did Not Amount To Bad Faith Where Insureds Could Not Establish Malice or Reckless Disregard

Cline v. Allstate Ins. Co., No. 6:13-CV-182-HAI, 2014 WL 7074973 (E.D. Ky. Dec. 15, 2014).

After denial of claim for loss from fire on basis of exclusion for criminal or intentional acts, Insurer wins cross-motions for summary judgment where insureds cited no applicable law, failed to plead facts with specificity, and mischaracterized deposition testimony.

While away from home, Plaintiffs Allen and Marsha Cline lost their house and personal belongings to a fire. Defendant Allstate Insurance Company performed an investigation and denied the Plaintiffs' homeowners insurance claim pursuant to the exclusion for "intentional or criminal acts of or at the direction of any insured person" and an exclusion for concealment or misrepresentation of material fact or circumstance by any insured. Allstate's investigation showed that the Plaintiffs had the motive and the opportunity to rid themselves of their home, and that the failure of their working alarm system supported the conclusion that the fire was set with input from the Plaintiffs.

After denial of the claim, Plaintiffs and Defendant filed cross-motions for summary judgment. The court disposed of Plaintiffs' arguments that (1) they did not commit civil arson or fraud, (2) they were entitled to punitive damages, and (3) that Allstate was liable under the applicable insurance policy. Plaintiffs' motion was entirely deficient; it failed to cite any applicable law in support of their arguments, and did not provide any part of the policy at issue.

Defendant's motion argued that Plaintiffs failed to establish bad faith. The court noted that under Kentucky law, Plaintiffs must prove that (1) the insurer must be obligated to pay the claim under the terms of the policy; (2) the insurer must lack a reasonable basis in law or fact for denying the claim; and (3) the insurer either knew there was no reasonable basis for denying the claim or acted with reckless disregard for whether such a basis existed. Allstate claimed that Plaintiffs failed to

establish elements two and three in support of their claim, but the court found that an analysis of element three was sufficient to grant summary judgment to Defendant.

Plaintiffs contended that malice and recklessness were evidenced by a purported intentional misrepresentation by Scott B. Griffin, a private investigator who conducted an investigation into certain aspects of the loss caused by the fire. Mr. Griffin concluded that the Cline's son-in-law may have set the fire at their direction. Plaintiffs claimed that in support of his ultimate conclusions, Mr. Griffin mischaracterized a statement of Tammy Depoty, a roommate of their son-in-law. Another Allstate employee failed to verify Mr. Griffin's statement; Plaintiffs claimed that this failure established the "malice and reckless disregard" necessary for their bad faith claim.

The court found that first, Plaintiffs did not specifically identify the claimed "intentional misrepresentation" made by Mr. Griffin. Second, Plaintiffs also claimed that Ms. Depoty later denied relaying information regarding the fire to Mr. Griffin; however, the court's analysis of the deposition transcript showed that Ms. Depoty merely stated she did not remember what she told Mr. Griffin. As Plaintiffs failed to demonstrate any evidence of bad faith, Defendants were entitled to summary judgment on that claim.

The court likewise granted summary judgment to Allstate on the Plaintiffs' Kentucky Unfair Claims Settlement Practices Act ("UCSPA") claim. "A cause of action for a violation of the UCSPA may be maintained only where there is proof of bad faith of an outrageous nature." Plaintiffs had vaguely asserted that Defendant "failed to follow up on all leads and thoroughly investigate this matter before making a decision to deny the claim" and therefore acted in bad faith, but offered no evidence supporting that argument. Finally, Allstate was also granted summary judgment on the cause of the fire, as Plaintiffs provided no evidence in their response to rebut Allstate's arguments on that issue.

In Case You Missed It

The Pennsylvania Supreme Court ruled in December that an insured may assign a statutory bad faith claim under Pennsylvania's insurance bad faith statute, 42 Pa. C.S.A. § 8371. The United States Court of Appeals for the Third Circuit had certified the question to the Pennsylvania Supreme Court, garnering significant interest from the industry for what could have been a major victory for insurers to change the landscape of insurance litigation.

To read our analysis of this important decision, please click here: *http://www.saul.com/publications/alerts/assign-away-pennsylvania-supreme-court-says-bad-faith-claims-may-be-assigned*

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