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The Bad Faith Sentinel

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

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Florida District Court of Appeal: A Prematurely Filed Bad Faith Claim Does Not Compel Dismissal

Safeco Ins. Co. of Ill. v. Beare, No. 4D13-3104, 2014 WL 4626851 (Fla. Dist. Ct. App. Sept. 17, 2014).

The Fourth District Court of Appeal of the State of Florida denies an insurer's petition seeking review of the trial court's abatement of an insured's bad faith claim because the insurer did not demonstrate that the trial court departed from the essential requirements of law.

In 2011, Christine Beare ("Beare") sued third party tortfeasors following an automobile accident. After the parties agreed to a settlement in October 2012, Beare was granted leave to amend her complaint to add her insurance carrier, Safeco Insurance Company of Illinois ("Safeco"). Beare's amended complaint against Safeco included an uninsured/underinsured motorist ("UM") claim and a bad faith count. Beare asserted that Safeco acted in bad faith by refusing to settle her claim. Safeco answered the UM claim and moved to dismiss the bad faith claim as premature. Safeco argued that Florida law requires dismissal of a first party bad faith claim filed prior to a determination of liability and damages under the insurance agreement between the insurer and insured. At Beare's request, the trial court abated the bad faith claim instead of dismissing it.

Safeco filed a petition with the Fourth District Court of Appeal challenging the trial court's decision to abate the bad faith claim instead of granting the motion to dismiss. The Court rejected Safeco's argument and held that Safeco had not met its burden to show that the trial court departed from the essential requirements of law. Safeco argued that Florida law required the trial court to dismiss the bad faith claim as premature. The Court disagreed, reasoning that precedent dictated that a trial court could either dismiss or abate a bad faith action while the underlying coverage issues were pending. Safeco also argued that because the bad faith claim was an amendment to the original negligence suit, which suit was filed more than one year prior to Safeco's joinder, it was prevented from removing the claim to federal court. Safeco argued that it was irreparably harmed because it had lost its right to remove

the case to federal court and would be forced to litigate the bad faith claim in state court. The Court recognized that the loss of the right to remove a case to federal court could indeed constitute a material irreparable injury under established Florida law; however, Florida Supreme Court cases suggested

that either dismissal or abatement is proper where coverage and bad faith actions are filed together. Accordingly, the trial court did not err by deciding to abate the bad faith count. Safeco's petition was denied.

Florida District Court of Appeal: Insurer's Liability For Breach Of Contract Need Not Be Determined Before Bad Faith Claim Ripens

Cammarata v. State Farm Florida Insurance Company, No. 4D13-185 (Fla. Dist. Ct. App. Sept. 3, 2014) (*en banc*).

Clarifying recent conflicting precedents, the Florida District Court of Appeal for the Fourth District held that an insured was not required to prevail on a breach of contract claim against the insurer before proceeding on a bad faith claim. Instead, the insured need only show that liability for the underlying damages and the extent of those damages were determined, which could be done through other means such as an appraisal.

Resolving a conflict between two lines of case law, the Florida District Court of Appeal for the Fourth District, sitting *en banc*, held that while an insurer's liability for coverage and the extent of damages must be determined before a bad faith claim becomes ripe, the insured need not also show that the insurer is liable for breach of contract before proceeding on the bad faith claim.

After sustaining damage to their home caused by Hurricane Wilma in late 2005, Joseph and Judy Cammarata filed a claim for benefits under their homeowners' policy with their insurer, State Farm Florida Insurance Company ("State Farm") in 2007. After inspecting the property, State Farm concluded that the amount of damages was lower than the insurance policy's deductible and notified the Cammaratas that it owed them no payments. In spring 2008, the Cammaratas requested that State Farm participate in the appraisal process.

After the Cammaratas' appraiser submitted a damage estimate higher than the deductible and State Farm's appraiser submitted one lower than the deductible, the parties filed motions asking the circuit court to appoint a neutral umpire per the terms of the policy. Once appointed, the umpire, in October

2009, issued a damage estimate that fell between the estimates of the two appraisers but was higher than the policy's deductible. In December 2009, State Farm paid to the Cammaratas the amount of damages determined by the umpire, minus the deductible.

The Cammaratas subsequently brought suit in circuit court against State Farm, alleging a bad faith failure to settle before the appointment of the umpire. State Farm moved for summary judgment, arguing that Florida law required a finding of liability on a breach of contract claim before a bad faith action was ripe. The circuit court granted the motion, and the Cammaratas appealed.

On appeal, the district court of appeal noted that two of its own recent precedents gave contrary indications about whether the insured was required to prevail on a claim for breach of contract before going forward with a bad faith claim. After reviewing the Florida Supreme Court's evolving rulings on the matter, it concluded that while the insured must obtain a determination of the existence of liability under the policy and show the extent of its damages, a ruling on a breach of contract claim was not the only way the insured could make those

showings. For instance, a settlement pursuant to a policy's appraisal process would satisfy both of those conditions precedent to the bad faith claim.

Therefore, the district court of appeal reversed the grant of summary judgment for State Farm, holding that because liability and the Cammaratas' damages had been established by the

appraisal, their bad faith claim was ripe. The court cautioned, however, that although a successful breach of contract claim was not necessary, the insurer's liability for the underlying damages and the extent of those damages would still have to be determined in some fashion before a bad faith claim could go forward.

Missouri Court of Appeals Rejects Insurers' Appeal of Jury Verdict on Bad Faith Failure to Settle, but Remands for New Trial on Amount of Compensatory Damages and Liability for Punitive Damages

Advantage Bldgs. & Exteriors, Inc. v. Mid-Continent Cas. Co., No. WD76880, 2014 WL 4290814 (Mo. Ct. App. Sept. 2, 2014), reh'g and/or transfer denied (Sept. 30, 2014).

Missouri Court of Appeals affirms sufficiency of evidence of bad faith and exclusion of evidence of declaratory judgment, but reverses and remands for erroneous jury instructions.

After a trial in Missouri's Jackson County Circuit Court, insurer Mid-Continent Casualty Company appealed the entry of final judgment on a jury verdict in favor of insured Advantage Buildings & Exteriors, Inc., on Advantage's bad faith failure-to-settle claim. At trial, the jury had awarded Advantage both compensatory and punitive damages.

In a mixed decision, the Missouri Court of Appeals found in favor of Advantage on the issues of submission of a bad faith claim to the jury at trial and exclusion of evidence of the same court's declaratory judgment on policy limits. However, due to erroneous jury instructions, the Court remanded the case for a new trial on the amount of compensatory damages, liability for punitive damages, and the amount of punitive damages.

Duty to Defend

Mid-Continent first argued that there was no basis for Advantage's bad-faith claim because it properly agreed only to defend Advantage under a reservation of rights while Mid-Continent investigated the claim and performed a coverage analysis. Because it was ultimately determined by the court

that there was no coverage as to the claim, Mid-Continent argued, there could be no bad faith.

After being sued by Alsation, Advantage tendered the lawsuit to Mid-Continent. Shortly thereafter, Mid-Continent advised Advantage by letter dated August 12, 2008, that it would investigate the claim and perform a coverage analysis but that it was reserving its right to assert that there may be no duty to defend or indemnify against the claims. On September 2, 2008, Mid-Continent sent Advantage a second letter, generally reiterating that Mid-Continent was reserving its rights and that it would "promptly inform" Advantage if other facts came to light.

The day after sending its second letter to Advantage, Mid-Continent concluded that "the only potential coverage with respect to this loss is to the interior of the building" (estimated to be around \$50,000). By October 28, 2009, Mid-Continent knew that "the insured was certainly at risk of obtaining a large judgment against them" if Alsation was able to prove its claims. Mid-Continent knew that such a judgment would

exceed the limits of Advantage's policy, exposing Advantage to "a very significant, multimillion dollar exposure" with little or no insurance coverage. Despite having promised, in its purported reservation of rights letter, to share its coverage analysis "promptly," Mid-Continent did not inform Advantage of the outcome of its actual coverage analysis until July 15, 2010, just four days before Advantage's trial.

Under Missouri law, an insurance company has a duty to defend an insured when the insured is exposed to *potential* liability to pay based on the facts known at the outset of the case. Defending an action with knowledge of non-coverage without a proper and effective reservation of rights in place precludes an insurer from later denying liability due to non-coverage. The Court of Appeals, in examining Mid-Continent's letters, noted that both letters only vaguely informed the insured that Mid-Continent would investigate and perform a coverage analysis and that it was reserving its right to assert that there may be no duty to defend or indemnify against the claims. While the letters generally discussed the nature of the underlying lawsuit and set forth various provisions of Advantage's general liability policy, neither clearly and unambiguously explained how those provisions were relevant to Advantage's position or how they potentially created coverage issues. As such, the Court of Appeals found that Mid-Continent was estopped from denying coverage for the claim to the extent of its policy limits and held that the circuit court did not err in submitting the bad faith claim to the jury despite the declaratory judgment that the policy language did not expressly provide coverage for the insured.

Sufficiency of Evidence of Bad Faith

Mid-Continent next argued that the circuit court erred in denying its motion for JNOV, in which Mid-Continent argued that Advantage did not make a submissible case for bad faith.

In finding that Advantage made a submissible case for both bad faith and punitive damages, the trial court noted that Mid-Continent assumed control of the negotiations, settlement, and legal proceedings, and refused to settle for \$800,000 after Advantage demanded that it do so. The court held that the jury could find that Mid-Continent acted in bad faith because it refused the settlement demand when it knew that Advantage was exposed to millions of dollars in liability with little or no insurance coverage and did not advise Advantage of this pre-

carious situation until the eve of trial when Advantage could not properly prepare to defend itself.

Agreeing with the trial court, the Court of Appeals noted that "[i]t is only *where there is a complete absence of probative fact to support the jury's conclusion* that th[e] Court will decide [that] the plaintiff did not make a submissible case." Further, in addition to the evidence showing a failure to *settle* in good faith, the Court also noted that evidence also supported the conclusion that there was an *overall failure to handle the claim in good faith*.

Exclusion of Evidence of Declaratory Judgment on Policy Limits

Mid-Continent also argued that the circuit court erred in excluding evidence of the court's declaratory judgment ruling that Alsation's claim was not covered by Advantage's policy. It stated that because the question of its bad faith in failing to settle that claim was a jury issue, its correct belief regarding the lack of coverage was relevant.

The Court of Appeals rejected this argument, noting that admission of this evidence would be reviewed pursuant to an abuse of discretion standard. The trial court had reasoned that the declaratory judgment ruling with respect to coverage came *after* Mid-Continent refused to settle and Alsation secured the \$4,604,000 judgment against Advantage. In other words, Mid-Continent did not know how the court would ultimately rule on the issue of coverage when it refused to settle Alsation's claim against Advantage. The evidence of that coverage ruling, the court explained, would have been unduly misleading and prejudicial because it would have strongly suggested that no coverage existed *prior* to the entry of the Alsation judgment when Mid-Continent is alleged to have acted in bad faith. In reality, however, the court had not ruled on the matter at that time, and, as the court pointed out, Mid-Continent believed that *some coverage* existed prior to the entry of the Alsation judgment. Backed by this reasoning, the trial court's exclusion of this evidence did not rise to abuse of discretion.

Bifurcation of Bad Faith Trial

The Court of Appeals, after finding the preceding issues in favor of the insured, found for the insurer on the issue of an erroneous jury instruction. This error in instruction was

deemed sufficiently harmful to reverse and remand for a trial on both damages and liability for punitive damages

The circuit court had granted Mid-Continent's request for a bifurcated trial. Missouri law requires the jury, in the first stage of a bifurcated trial, to determine (1) "liability for compensatory damages," (2) "the amount of compensatory damages," and (3) "the liability of a defendant for punitive damages." If, in the first stage, the jury finds liability for punitive damages, then the jury will determine, in a second stage of trial, the amount of punitive damages to be awarded.

Contrary to those provisions, the circuit court instructed the jury in the *first stage* of the bifurcated trial that it could award an amount of punitive damages. Counsel for Mid-Continent asked the court to re-submit the first stage of the case to the jury with corrected instructions and a corrected verdict form or to have the jury polled as to whether or not their verdict contained any punitive damages. The court denied both requests, and refused to grant a mistrial. On appeal, Mid-Continent

contended that the court abused its discretion in denying its request to submit a corrected instruction package and verdict form before the second stage began, because even though the court knew it had improperly instructed the jury in the first stage, it refused to correct the error.

The Court of Appeals agreed, and found that due to the erroneous jury instructions, and the court's failure to correct its errors, it was impossible to determine which portion of the jury's original damage award was intended as compensatory damages and which (if any) was intended as punitive damages. Consequently, the Court reversed and remanded for a new trial as to the amount of both compensatory and punitive damages. In addition, because Missouri law indicates that the jury that determines liability for punitives should *also* determine the amount of punitives, the Court also reversed as to the liability for punitive damages and remanded so that the same jury could determine both the liability for and the amount of punitive damages.

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