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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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Central District of California Denies Motion to Dismiss Bad Faith Claim Where Plaintiff Alleged Delay and Failure to Respond

Orange County Plastering Co., Inc. v. American Home Assurance Co., No. CV 11-06364, 2011 WL 5117766 (C.D. Cal. Oct. 28, 2011)

Under California law, unreasonable delay and failure to follow California insurance code and regulations may be evidence of bad faith.

Orange County Plastering Company, Inc. ("OCP") subcontracted with Suffolk Construction Company ("Suffolk") to provide labor and materials on a condominium project for the general contractor. Pursuant to the subcontract, American Home Assurance Company ("AHAC") issued two insurance policies, covering the construction of the project and OCP. Disputes arose between OCP and Suffolk causing Suffolk to withhold payment from OCP. As a result, on April 8, 2010, OCP filed suit against Suffolk for breach of contract. On December 30, 2010, Suffolk filed a counterclaim against OCP alleging that its defective work caused water damage to the project. On February 7, 2011, OCP tendered the defense of the counterclaim to AHAC and requested reimbursement in the amount of $704,204 for work OCP performed to repair the water damage. On May 13, 2011, AHAC denied coverage to OCP based on (1) a "Builder's Risk Exclusion" that precluded coverage for defective work by OCP and (2) an "Exclusion for Water Seepage, Leakage or Intrusion from Exterior Wall Applications" from work by OCP.

On June 8, 2011, OCP requested AHAC reevaluate its claim and informed AHAC that OCP was not at fault for the water damage. OCP informed AHAC that it had exceeded plaster work standards and that the water damage was caused by the window subcontractor's faulty work. AHAC responded by letter that same day and explained that it maintained its denial of coverage based on the allegations of the counterclaim, not the validity of that pleading. On June 30, 2011, OCP filed suit alleging breach of contract and breach of the implied covenant of good faith and fair

dealing. AHAC filed a motion to dismiss the bad faith claim because OCP failed to allege sufficient facts to support such a claim.

In its complaint, OCP alleged that AHAC refused to respond to its initial claim request and continued to fail to respond to numerous communications from OCP until the state opened up a formal investigation in response to OCP's grievance. The district court found that delay in responding to a tender of defense could be evidence of bad faith, especially given the insured's potential legal costs in the interim. Furthermore, the alleged delay violated the California Code of Regulations' requirement that an insurer shall immediately, but in no event more than forty calendar days, accept or deny the claim. The district court found that violations of regulations can also be evidence of bad faith. The court also found that OCP's allegation that AHAC failed to meaningfully reconsider its denial of coverage and refused to provide a copy of one of the two policies for the subcontract could be evidence of bad faith and unreasonable claim handling. Based on the foregoing, the district court found that OCP's allegations were sufficient to support its claim for breach of the implied covenant of good faith and fair dealing and denied AHAC's motion to dismiss.

Northern District of West Virginia Holds That Post-Loss Insurance Claims are Assignable Regardless of Non-Assignment Clause

Negri v. Nationwide Mutual Ins. Co., No. 5:11CV3, 2011 WL 5041214 (N.D. W. Va. Oct. 24, 2011)

West Virginia law provides that insurance claims, including bad faith claims, are assignable post-loss regardless of non-assignment clause in policy.

On February 26, 2010, Paul Dotson, Jr. was driving a van and hit a sport utility vehicle in which Allen Negri was a passenger. Negri was injured in the accident and made a claim for insurance coverage under Dotson's policy issued by Nationwide Mutual Insurance Company ("Nationwide"). Nationwide informed Negri that Dotson's policy had been cancelled prior to the collision. Dotson claimed that he was not notified by Nationwide that it had cancelled his policy. On June 25, 2010, the Negris filed suit against Dotson in state court and a default judgment was entered against Dotson. The Negris were awarded damages against Dotson in the amount of $6,389,320 plus interest and costs. Dotson assigned his first party rights and a portion of his rights to any first party damages to the Negris, who filed suit in the Northern District of West Virginia against Nationwide alleging violations of the West Virginia Unfair Trade Practices Act, statutory and common law bad faith, breach of contract, breach of fiduciary duty, tort of outrage, negligence and civil conspiracy. Nationwide subsequently filed a motion for summary judgment in which it argued that a non-assignability clause in Dotson's policy precluded him from assigning the claims asserted in the litigation, thereby precluding the Negris from recovering through their assignment from Dotson.

In its analysis, the district court looked to *Smith v. Buege*, 182 W. Va. 204 (W. Va. 1989), in which the West Virginia Supreme Court held that all valid post-loss assignments of a fire insurance policy were valid regardless of a non-assignability clause within the policy. The *Smith* court reasoned that the prohibition of assignments without the consent of the insurer was to protect the insurer against an increased risk resulting from the assignment and that this risk was not applicable after a loss because the liability was fixed by the loss prior to the effective date of the assignment.

First, Nationwide attempted to distinguish *Smith* by arguing that it only applied to fire insurance policies. The district court found this argument was without merit because the *Smith* court's reasoning that post-loss non-assignability clauses were contrary to public poli-

cy went beyond application to one particular type of policy. Second, Nationwide argued that *Smith* was distinguishable because it did not address the enforcement of non-assignment clauses in the context of loss based upon personal injury. The court acknowledged that claims based upon the personal injury of an insured were not assignable. It noted, however, that the right assigned in this case was not one for a personal injury, but for a legal cause of action for insurance proceeds based upon liability coverage. Finally, Nationwide argued that *Smith* was distinguishable because it did not address bad faith refusal to provide insurance coverage.

The district court found that *Smith* described post-loss assignable rights broadly and that a claim arising under the policy was assignable. The court also noted that bad faith claims have been found to be assignable even by courts that have found post-loss claims are non-assignable, where a non-assignment clause is contained in the policy. Accordingly, the district court found that bad faith claims were assignable, that the non-assignment clause in Dotson's policy did not invalidate his post-loss assignment to the Negris, and it denied Nationwide's second motion for summary judgment.

Bad Faith is a "Difficult Standard to Satisfy" in Arkansas

Farm Bureau Mut. Ins. Co. of Arkansas, Inc. v. Guyer, No. CA 11-274, 2011 WL 5562735 (Ark. Ct. App. Nov. 16, 2011)

Insureds' claim for bad faith fails when insurer's conduct amounted to no more than "bad judgment" and "nightmarish red tape".

In March 2010, the Guyers' home and personal property were destroyed by fire. Farm Bureau insured the Guyers' home for $200,000 and their personal property for $100,000. After the fire, the Guyers met with their insurance adjuster, Matt Cossey, and executed a sworn statement and proof-of-loss form. An inspector examined the property in April 2010 to determine whether the fire was suspicious in nature. Despite the inspector's determination that the fire was not suspicious, Farm Bureau refused to pay the Guyers their policy proceeds, informing them that it now needed to perform a search for any liens on the property. Even after determining there were no liens on the property, Farm Bureau did not pay the Guyers, insisting that it needed to have a title opinion prepared.

In May 2010, Farm Bureau filed a complaint in interpleader naming the Guyers and Bank of America, a mortgagee on the property and loss payee on the policy. Farm Bureau also named three other banks as defendants in the interpleader action, alleging that one bank had a mortgage on the property and that the other two had outstanding judgments against the Guyers. Farm Bureau claimed it was "in doubt as to which of the defendants is entitled to be paid from the homeowner insurance proceeds" and suggested it tender $300,000—representing its homeowner policy limits of $200,000 for the dwelling and $100,000 for personal property—into the registry of the court pending an order as to how the proceeds should be distributed. The Guyers filed an answer and counterclaim asserting that Farm Bureau was obligated by the policy to pay the amount of insurance on their home to the Guyers and to Bank of America only. The Guyers also asserted claims of breach of contract and bad faith. The trial court granted Farm Bureau's summary judgment motion on the Guyers' bad faith claim and the Guyers appealed.

In Arkansas, a bad faith claim must be premised on allegations that the defendant insurance company engaged in affirmative misconduct that was dishonest, malicious or oppressive. The Guyers claimed that Farm Bureau and its adjuster acted in bad faith by engaging in "coercive conduct," lying to and misleading the Guyers, unreasonably delaying payments for temporary living expenses and refusing to pay the balance due on the Guyers' mortgage as required by the terms of the policy. The court, while acknowledging that the complaints were serious and "undoubtedly egregious and hurtful," held that Farm Bureau's actions did not rise to the level of bad faith but were "more akin to bad judgment."

Pennsylvania Court Determines Insurer Entitled to Sworn Statement of Insured's Indicted Principal

Portside Investors, L.P. v. Northern Ins. Co. of N.Y., No. 2468 EDA 2010, 2011 WL 5866235 (Pa. Super. Nov. 23, 2011)

Insurer's insistence on statement from corporate principal involved in ownership of property prior to proceeding with claim was not statutory bad faith.

In an appeal from a judgment entered by the Court of Common Pleas of Philadelphia County, Portside argued that the court erred in finding in favor of Northern Insurance Co. ("Northern") on Portside's claim that Northern acted in statutory bad faith in investigating and failing to pay its insurance claim.

On May 18, 2000, a pier on the Delaware River in Philadelphia collapsed, causing three deaths and injuries to others. At the time of the collapse, Pier 34, owned by Portside Investors, contained a restaurant and nightclub. Portside filed a claim for the loss with Northern, its insurer. Northern informed Portside that first-party coverage was available, but disputed the value of the loss. While Portside and Northern worked on appraising the loss, a grand jury in Philadelphia indicted Portside's two principals for involuntary manslaughter and other offenses relating to their conduct in ignoring prior warnings of engineers and others as to the unsafe nature and imminent collapse of the pier in the months, days and hours before its ultimate failure. The presentation filed in support of the indictment indicated that the insureds had knowledge of continued movement by the pier, cracking in various parts of the structure, and even that they discussed with their insurance broker a concern that the pier was sinking. In fact, on the morning of the collapse, a construction contractor informed Portside's principals that the pier was in a "state of failure" and would probably collapse at the next low tide, which was to occur that evening.

Northern, after learning of the indictment, informed Portside that it was reopening its investigation as to both coverage and value of the loss and requested that Portside's principals appear for an examination under oath before it would appoint an appraiser. Three months later, Portside sued Northern, asserting claims for breach of contract and bad faith. Portside's bad faith claim was premised on an allegation that Northern's request for examination under oath after some of the claims presented had been paid and after a request for an appraisal had been made was "a pretext and constituted a denial for no good reason" of Portside's right to an appraisal. Portside's bad faith claim was tried non-jury in October 2009 and the court found that Northern's conduct did not amount to bad faith under Pennsylvania's bad faith statute.

On appeal, Portside argued that it met its evidentiary burden of proving Northern violated the Pennsylvania bad faith statute by establishing that Northern insisted it could proceed no further on Portside's claim without an Examination Under Oath of Michael Asbell, Portside's recently indicted principal, as to his pre-collapse knowledge of Pier 34's underwater decay. Portside alleged that this amounted to no more than a bad faith delay tactic, as there was no reason to believe Asbell could do anything at that point except exercise his 5th Amendment rights throughout the course of his criminal case.

The court concluded that Northern's demand was reasonable in the wake of the Grand Jury Presentment that found Asbell knew Pier 34 required considerable maintenance as far back as 1995 and had learned the Pier was in imminent danger of collapse at least two days before collapse occurred. Under Portside's policy, coverage was unavailable for pier loss caused by "decay" unless the decay was hidden. As the Presentment gave reason to believe that Pier 34's collapse resulted from something other than hidden decay, Northern's decision to insist on a statement from Asbell as to what he knew prior to collapse was not an exercise in statutory bad faith.

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