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INSURANCE PRACTICE

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The Bad Faith Sentinel

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

Eleventh Circuit: Auto Insurance Covers Driver Borrowing His Brother's Rental Car

Garcia v. GEICO General Ins. Co., No. 10-12825, 2012 WL 45393 (11th Cir. Jan. 9, 2012)

"Permission from the owner" clause in insurance policy did not require express permission from car rental agency.

In December 2006, Miguel Baena flew to South Florida for a vacation. Baena rented a car at the airport from Enterprise Rent-A-Car ("Enterprise"). When asked by Enterprise whether there would be any other drivers, Baena responded in the negative. The rental agreement therefore stated, "no other drivers permitted." Baena did not have his own automobile insurance and did not purchase liability insurance from Enterprise.

During his trip, Baena met his brother Edgar, who was not privy to the terms of the rental agreement. The brothers attended a Miami Heat game and on the way home, Miguel asked Edgar to drive. Edgar agreed, and during the course of operating the vehicle, Edgar crashed into Paola Penafiel's car. Penafiel was killed in the collision.

Although Miguel was uninsured, Edgar had an automobile insurance policy with GEICO. GEICO conceded that its policy with Edgar stated that GEICO was liable for damages arising out of Edgar's use of "non-owned auto"—here, the Enterprise rental car. Under the policy, however, GEICO's liability was contingent on the condition that "such use of the non-owned auto must be with the permission, or reasonably believed to be with the permission, of the owner and within the scope of that permission." Because GEICO believed that Enterprise did not grant such permission, GEICO denied coverage for the accident.

The representative of Penafiel's estate reached an agreement with Edgar in which Edgar agreed to the entry of a consent judgment in the amount of $5 million in resolution of the estate's wrongful death action against him. The estate then filed suit against GEICO on a theory of bad faith under Florida law to recover the $5 million judgment. There were three trials in the case. Neither of the first two juries was able to reach a verdict. After the first trial, the district court granted a directed verdict for GEICO on the issue of whether Enterprise consented to Edgar's use of the rental vehicle. In doing so, the district court rejected the argument that Enterprise

had given implied permission to Edgar, and found as a matter of law that Enterprise did not consent to Edgar's use. The second and third trials therefore addressed only whether Edgar reasonably believed he had the owner's permission to drive the rental car. In the third trial, the jury rendered a verdict in favor of GEICO, finding that although Edgar had Miguel's express permission to drive the car, Edgar did not reasonably believe he had permission of Enterprise, the owner. Edgar, Miguel and the Estate all appealed.

The main issue on appeal was whether the district court erred by refusing to apply Florida's dangerous instrumentality doctrine in the case by interpreting "permission from the owner" as express permission. Edgar, Miguel and the Estate argued on appeal that "permission of the owner" is established—even in the absence of an express statement granting permission—where the owner has given its consent to use or operate the vehicle beyond its immediate control, unless there is evidence of a breach of custody amounting to theft or conversion. The Appellants further argued that "permission" is present in the rental car context when the driver receives permission to drive the car from someone lawfully in possession of the vehicle. Because the jury determined that Edgar received express permission from the authorized renter, Miguel, Appellants argued that Edgar therefore had permission from Enterprise as a matter of law.

The Eleventh Circuit, in its recitation of Florida law, explained that "the type of consent given by a car owner is simply consent to the use or operation of such an instrumentality beyond the owner's immediate control" and that consent is not revoked in the absence of a breach of custody amounting to conversion or theft. This permission is unaffected by a restriction on the use of a rental car by unauthorized drivers. The Eleventh Circuit further explained that the definition of "permission" developed in Florida's dangerous instrumentality cases is applicable to contractual insurance disputes.

The Eleventh Circuit held that if Enterprise gave its consent to Miguel to rent the car, that consent extended to any person that Miguel allowed to use the car. The Eleventh Circuit held that the district court did not apply this proper definition of permission, instead incorrectly finding as a matter of law that because Enterprise did not give express permission to Edgar, Enterprise did not consent to Edgar's use of the car. The court thus reversed and remanded for proceedings applying the appropriate definition of "permission."

Eastern District Of Kentucky Excludes Expert Opinion Regarding Bad Faith Claim

Nevels v. Deerbrook Ins. Co., No. 10-83-ART, 2011 WL 6304066 (E.D. Ky. Dec. 16, 2011)

Eastern District of Kentucky excludes expert opinion as to whether insurer acted in bad faith because he did not know the law.

In October 2005, Cecil Nevels and Patrick Scott were driving southbound when lumber from Michael Melton's pickup truck struck their left front tire, causing their vehicle to cross into the northbound lane and collide with a vehicle driven by Robert Coffey. Nevels and Scott corresponded with Melton's insurer, Deerbrook Insurance Company ("Deerbrook"), over the next several months. In May 2006, Deerbrook received notice through Scott's insurance company of a Personal Injury Protection ("PIP") lien for Nevels' medical expenses. In August 2006, Deerbrook received a demand letter from Nevels' attorney including a copy of the PIP ledger indicating a $10,500 lien amount and medical records.

Deerbrook evaluated Nevels' claim using software known as Colossus, which reported a settlement amount between $4,900 and $6,200. Deerbrook made an initial settlement offer of $5,000 and in response, Nevels' attorney sent a demand letter for the policy limits of $25,000. Shortly thereafter, Nevels filed suit and Deerbrook retained an attorney, Ed Henry. Henry investigated

whether another vehicle had pulled out in front of Melton, causing him to swerve and lose control of the trailer holding the lumber. Coffey stated that he did not see another vehicle and reconfirmed his statement when he was deposed in January 2008.

In May 2008, Deerbrook, Nevels and Scott mediated the claims. Nevels had submitted $770 in lost wages in May 2007 and a chiropractor bill on the day of mediation. A new Colossus report gave a settlement range of $20,190 to $22,170. In June 2008, Deerbrook settled with Nevels for $21,700 (the amount remaining under the policy limits).

In October 2008, Nevels filed suit against Deerbrook for bad faith. Nevels alleged that the delay by Deerbrook in settling was a violation of the Kentucky Unfair Claims Settlement Practices Act ("KUCSPA"). Nevels hired David L. Huff as his expert on claims handling procedures and bad faith under Kentucky law. Huff's opinion was that Deerbrook should have offered the policy limits at the outset. Huff believed that Deerbrook had allocated 100 percent liability to Melton at the outset and had all the information necessary to settle for the policy limit. Deerbrook filed a motion to exclude Huff's testimony as to the propriety of the initial settlement offer and as to whether Deerbrook acted in bad faith.

On this issue of bad faith, the Eastern District of Kentucky found that Huff could not opine as to whether Deerbrook acted in bad faith because his testimony reflected that he did not understand Kentucky bad faith law. In order to sustain a bad faith cause of action under Kentucky law, a plaintiff must show evidence sufficient to warrant punitive damages. Punitive damages are awarded where there is proof of bad faith sufficient for the jury to conclude that there was conduct that is "outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." Huff argued that reckless indifference is a standard of proof. The court, however, held that reckless indifference is not the standard of proof, rather it is merely the evidence of outrageous conduct.

The court held that because Huff presumed that bad faith could be proven without demonstrating outrageousness in some form, he was not qualified to provide an opinion as to whether Deerbrook acted in bad faith.

District Of Kansas Holds That Bad Faith Claim Does Not Waive Attorney Client Privilege

Cincinnati Ins. Co. V. M.S., Et Al., No. 11-CV-2075-JAR/KGG, 2011 WL 6304086 (D. Kan. Dec. 16, 2011)

Bad faith claim did not waive attorney-client or work-product privileges, but provision of any privileged material would be a complete waiver.

On May 29, 2009, M.S., a minor, was seriously injured in a motor vehicle accident with Derek Christiani. Christiani had motor vehicle insurance through the Cincinnati Insurance Company ("Cincinnati"). Cincinnati received notice of the accident on June 1, 2009 and established that Christiani was likely at fault. On or about August 21, 2009, M.S.'s parents, Edward and Angela Serrano, sent a letter to Cincinnati announcing that they were legally representing M.S's interests. The Serranos attempted to learn the limits of the policy between June 2009 and October 2009.

On October 29, 2009, Cincinnati informed the Serranos that the liability limit of the policy was $100,000, but did not offer to settle for the policy limits. The Serranos requested additional information regarding the availability of other insurance, but received no response. Neither Cincinnati nor the Serranos made an offer to settle and the Serranos did not make a demand. On November 10, 2009, the Serranos filed suit.

On December 16, 2009, the Serranos' counsel claimed to Christiani's counsel that Cincinnati acted in bad faith by failing to offer to settle for the policy limits. On December 30, 2009, Cincinnati offered to settle the case for the policy limits. The offer was rejected on January 4, 2010.

On January 22, 2010, the Serranos' counsel repeated the bad faith claims to Christiani's counsel. On January 21, 2011, the Serranos

and Christiani entered into a settlement agreement assigning Christiani's bad faith claims to the Serranos and agreeing not to enforce the eventual judgment against Christiani's personal assets. A hearing on damages was held in state court, resulting in a judgment in excess of $18 million.

On February 8, 2011, Cincinnati filed a declaratory judgment action requesting that its liability be limited to the policy limits. The Serranos filed a counterclaim for bad faith, alleging that Cincinnati failed to offer the policy limits. During discovery, the Serranos presented privilege objections to several Interrogatories and Requests for Production that requested information regarding communications between the Serranos and their attorneys. Cincinnati moved to compel.

Cincinnati claimed that the Serranos waived their attorney-client and work product privileges by counterclaiming for bad faith, thereby putting the privileged information at issue. There is a three-part test under Kansas law for determining whether there is waiver of a privilege when the party claiming the privilege puts the fact of the communication at issue. First, the assertion of the privilege was the result of some affirmative act, such as filing suit, by the asserting party. Second, through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case. Third, application of the privilege would deny the opposing party access to information vital to its defense. However, the mere fact that privileged material is relevant to a matter that is raised as an issue in connection with the assertion of an affirmative defense is not sufficient to be a waiver.

Cincinnati argued that the Serranos' counterclaim alleging breach of duty to defend waived their privilege as to communications with their attorneys because proof of causation requires proof that the Serranos would have accepted an earlier offer of the policy limits had such an offer been made. The Serranos' response to Cincinnati's motion to compel stated that Cincinnati was entitled to discovery on the limited issue of when and whether its policy limits offer would have been accepted prior to December 30, 2009 and why such an offer would or would not have been accepted.

The District Court of Kansas found that although the Serranos' communications with their attorneys were factually relevant, the communications were not integral to their claims. Although brought by the Serranos through assignment, Christiani's bad faith claim did not put the Serranos' communications with their attorneys directly at issue. The court found that if the Serranos elected to provide information, they could not limit the inquiry to information they believed would be beneficial to their cause and could not limit the form of the information to statements from counsel. Instead, the privilege would be waived if the Serranos made disclosure of any part of the matter. Consequently, if the Serranos supported their claim that an offer of the policy limits would have been accepted prior to December 30, 2009 by providing privileged information, they would waive the privilege regarding that matter. The court did not evaluate the work product privilege separately from the attorney-client privilege because they were so entangled with one another. The court granted in part and denied in part the motion to compel.

District Court Of New Jersey Holds No Bad Faith Where "Fairly Debatable"

Certain Underwriters at Lloyd's of London, No.10-1796, 2011 WL 6935015 (D. N.J. Dec. 30, 2011)

There is no bad faith where an insurer has a "fairly debatable" reason for its failure to pay a claim.

In May 2005, Salvatore Alesi purchased real property in New Jersey for more than $300,000. Alesi and his wife, Sherri Krasner, lived at the premises together. In July 2007, Alesi and Krasner began divorce proceedings. In February 2008, Alesi obtained homeowner's insurance from Certain Underwriters at Lloyd's of London ("Lloyd's"). After an attempt at reconciliation with Kasner, Alesi moved out and removed certain items from the premises. On November 30, 2008, Krasner too vacated the premises.

On either November 30 or December 1, 2008, a neighbor reported to the police that water was running out the front door of Alesi's home. The interior of the home was extensively damaged, fixtures were destroyed and the ceiling seemed in danger of collapse. Alesi inspected the premises and found that all the faucets in the home had been turned and left on.

On December 10, 2008, an adjuster for Lloyd's, David O'Brien, met with Alesi to review the damage. Alesi provided O'Brien with a handwritten contents list of personal items that Alesi represented were either removed or damaged as a result of the flooding. O'Brien estimated that the cost necessary to repair the building would be $69,023 and that Alesi could claim $11,000 more if other repairs were completed. Alesi submitted a building estimate from Brindisi Builders for repairs, first in the amount of $210,000 and later for $154,000. Alesi claimed a loss of personal contents in an amount more than $100,000. By September 2009, Alesi submitted his final claim for lost contents and a lost rental claim of $9,000 based on a lease with his cousin's son, Chris Brindisi, for rental of the premises in the summer of 2008.

During its investigation of Alesi's contents and rental loss claims, Lloyd's discovered inconsistencies in Alesi's story. For example, the premises could not have been leased during the period Alesi claimed because Krasner was residing at the property. Further, Krasner informed Lloyd's that a washer and dryer included on Alesi's contents list were removed prior to her leaving the home and that Alesi knew of the removal. Moreover, she informed Lloyd's that Alesi himself had taken other items that he claimed to have been lost or destroyed from the property.

On April 8, 2010, Lloyd's filed an action seeking declaratory relief that it did not owe coverage because the damage sustained to the premises was caused by Alesi or his estranged wife and because Alesi misrepresented facts to its investigator. Alesi filed a counterclaim, alleging breach of contract and bad faith for failing to pay his claim. On June 10, Lloyd's filed an amended complaint adding a claim under the New Jersey Insurance Fraud Prevention Act.

Alesi's counterclaim for bad faith was based on Lloyd's failure to pay Alesi's claim in excess of $155,000 in property damages, in excess of $100,000 in personal property damage and $9,000 in lost rents. Lloyd's filed a motion for partial summary judgment of several of the claims, including the personal contents claim, the lost rents claim and the bad faith claim.

As to the personal property damage claim, Lloyd's argued that the insurance did not provide coverage for theft caused by an "insured." Under the policy, both Krasner and Alesi were "insureds." Moreover, the policy did not provide coverage to insureds who intentionally concealed or misrepresented material facts or circumstances relating to the insurance.

Lloyd's presented evidence that many items claimed by Alesi to have been removed or damaged during the date of loss were actually stolen or removed prior to that time. For example, several of the same items described in the October 2007 police report as stolen were included in Alesi's final September 30, 2009 contents list. Items listed in Alesi's signed Certification dated January 2008 and filed with the Superior Court of New Jersey as part of his divorce proceedings indicated that when he retrieved his personal belongings in October 2007, certain items were not at the premises, including: his wedding band, an Erté painting, a bronze "Dolphin in Air," oriental antique, dining room chairs, leather couch and a Japanese "block" painting. These items are also listed on Alesi's September 30, 2009 contents list. Alesi did not provide evidence that any of the items had been returned. The court held that the misrepresentations by Alesi permitted Lloyd's to deem Alesi's claim as forfeited.

As to his lost rental claim, Alesi failed to present any evidence that showed any intent to rent the premises after Krasner moved out. Alesi never provided Lloyd's with a copy of a signed or proposed lease and failed to submit an affidavit from Chris Brindisi to support his claim. Accordingly, the court found that Lloyd's was justified in denying the lost rental claim under the policy.

With regard to Alesi's property damage claim, Alesi argued that Lloyd's had no evidence to support its claim that Alesi caused damage to the premises. Lloyd's argued that O'Brien attempted to reconcile his estimate with the estimate by Alesi's cousin, Michael Brindisi. Michael Brindisi testified that his first estimate of $210,000 was not prepared for insurance claim purposes and included items that Alesi wanted, but that in Brindisi's opinion, would not be acceptable to the insurer. Moreover, Lloyd's noted that it became aware that Alesi was being investigated by the New Jersey Office of Insurance Fraud in connection with his claim. Under New Jersey law, to prove a claim for bad faith, a plaintiff must show that: (1) the insurer lacked a "fairly debatable" reason for its failure to pay a claim, and (2) that the insurer knew or recklessly disregarded the lack of a reasonable basis for denying the

claim. The court found that Lloyd's had a "fairly debatable reason for its failure to pay the property claim because of the large gap between the building estimates, the fact that Brindisi had told O'Brien that the estimate included new items wanted by Alesi, and the fact that Alesi was being investigated for insurance fraud. Lloyd's motion for partial summary judgment against Alesi was granted as to the personal contents claim, the lost rental claim and his bad faith claim.

Florida Supreme Court Determines Statutory Award Of Attorney's Fees Not Within Insurance Coverage

Petty v. Florida Ins. Guar. Assoc., No. SC10-2097 (Fl. Jan. 19, 2012)

Insurance Code attorney's fee provision, while obligating an insurer that wrongfully contested coverage to pay a fee award, does not alter the coverage provisions of the insurance contract itself.

At the time Hurricane Charley damaged Diane Petty's home in August 2004, the property was insured by Florida Preferred Property Insurance company ("Florida Preferred"). After Ms. Petty received partial payment for some of the damages sustained, she demanded an appraisal to resolve the dispute concerning the value of the covered loss. Florida Preferred refused to submit to the appraisal process and Ms. Petty filed suit to compel the appraisal. An appraisal was eventually completed and the award filed with the court indicated that Florida Preferred owed Ms. Petty more money under the policy terms. Ms. Petty filed a motion to confirm the award, a motion for entry of a final judgment and a motion for an award of attorney's fees under Section 627.428 of the Florida Insurance Code. Section 627.428 states:

> Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

After the suit was filed, Florida Preferred paid more insurance benefits, but shortly thereafter became insolvent and an automatic stay was entered in the lawsuit.

On May 30, 2008, Ms. Petty filed a motion to lift the stay, reopen the case and substitute Florida Insurance Guaranty Association ("FIGA") as the defendant. FIGA was served with the complaint and the parties eventually stipulated that the only issue that remained unresolved was whether FIGA could be required to pay Ms. Petty's attorney's fees and costs incurred in the litigation with Florida Preferred pursuant to Section 631.57 of the Code, which provides that in the event an insurer becomes insolvent, FIGA is "obligated to the extent of the covered claims existing" prior to an adjudication of insolvency.

The trial court determined that Florida Preferred's payment of the appraisal award constituted a confession of judgment and thus invoked the mandatory attorney's fee provisions of Section 627.428. The appellate court reversed, holding that because the fee award was not based upon a coverage provision of Ms. Petty's underlying insurance policy, the fee award was not a covered claim that FIGA was obligated to pay.

The Florida Supreme Court agreed that a Section 627.428 fee award, which is not within the coverage of an underlying insurance policy, is not a covered claim that must be paid. According to the Supreme Court, "covered claims" must meet two requirements pursuant to Section 631.57: (1) it must arise or originate from an insurance policy; and (2) it must be within the coverage of or be included within the risks taken on and losses protected against in an insurance policy.

Ms. Petty and FIGA did not dispute that Ms. Petty's Section 627.428 fee award arose from her underlying insurance policy. In order to recover from FIGA, however, the claim for fees must also be within the coverage of her underlying insurance policy and that policy did not expressly provide coverage for the award. Ms. Petty argued that the fee award is impliedly covered by the policy because Florida law subjects every Florida insurance policy to the terms of the insurance code, including Section 627.428. The Supreme Court rejected Ms. Petty's argument, stating that "[t]here is a clear difference between an obligation to pay fees . . . imposed by operation of law. . . and an obligation imposed upon a party by an express provision for which the party contracted." Section 627.428 imposes the obligation to pay a fee award upon an insurer that has wrongfully contested an insured's valid claim; it does not alter the coverage provisions of the insurance contract itself.

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