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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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Supreme Court of Louisiana: Bad Faith is Not Presumed where Insurer Thoroughly Investigates the Claim Only After Suit is Filed

Merwin v. Spears, et al., No. 2012-CC-0946, 2012 WL 2549826 (La. June 22, 2012).

The Supreme Court of Louisiana reversed a trial court's grant of summary judgment against an insurer where the insurer subsequently conducted a more thorough investigation of a water leak claim and revised its initial coverage determination after the plaintiff filed a bad faith suit.

The plaintiffs filed a claim with their homeowners' insurer, Farmers Insurance Exchange ("Farmers") based on a water leak in their bathroom. Farmers investigated the leak and determined that the damage was caused by a slow, long-term leak in the wall of the master bedroom, which was not covered under the policy. The company thus denied the claim. Following the denial, plaintiffs hired their own expert who met with a Farmers' investigator, but Farmers maintained its position that the damage was not covered under its policy. The plaintiffs then filed suit in Louisiana state court against Farmers, alleging bad faith.

After plaintiffs had commenced their suit, Farmers conducted a detailed examination to explore whether it could replicate the leak. Based on this investigation, it discovered that at least some of the damage to plaintiffs' property was caused by a sudden leak rather than a slow, long-term one. Within 30 days of receiving the reports from its experts containing these findings, Farmers tendered unconditional payment of the claim to the plaintiffs.

The plaintiffs then filed a motion for summary judgment on their bad faith claim. The trial court granted the motion, finding that Farmers acted in bad faith by waiting until after plaintiffs filed a civil suit to do a more thorough investigation that revealed the validity of plaintiffs' insurance claim. Farmers sought appellate review, but the intermediate appellate court denied its request.

The Louisiana Supreme Court reversed, holding that the trial court erred in granting summary judgment on the bad faith claim. The Court noted that while it was apparent in hindsight that the Farmers' policy provid-

ed coverage for at least part of the plaintiffs' damages, that did not settle the separate question of whether Farmers' failure to make timely payment was arbitrary, capricious or without probable cause, the statutory pre-requisites for bad faith under Louisiana law. The Court concluded there was a genuine issue

of material fact "as to whether Farmers' initial decision to deny the claim, based on its investigation and consultation with plaintiffs' expert, was reasonable under the totality of the facts." It remanded the case to the trial court to make that determination.

New Jersey Court of Appeals Upholds Jury Award of Over \$850,000 for Insurer's Denial of Claim that Relied on Outside Adjuster and Investigation Services

Bello v. Merrimack Mut. Fire Ins. Co., No. L-781-09, 2012 WL 2848642 (N.J. Super. Ct. App. Div. July 12, 2012).

A New Jersey appellate court upheld a jury verdict over eight times the policy limit against an insurer for twice denying the claim without having an engineer perform an inspection. The court also ruled that the insurer could not escape liability by claiming that it had relied on the opinion of an outside claims adjuster.

After a violent wind storm in March 2008, Jeffrey Bello submitted claims to his homeowner's insurance carrier, Merrimack Mutual Fire Insurance Company ("Merrimack"), for damage to the roof of his home and a retaining wall at the rear of the property. Thomas Cusack, an adjuster, inspected Bello's roof on behalf of Merrimack and arranged for Peter Vallas Associates, Inc. ("Vallas"), an engineering firm, to assess the retaining wall. Wind damage to the retaining wall would have been covered under the policy, however, the investigator sent by Vallas, who was not an engineer, concluded that the wall had already been compromised due to lack of maintenance prior to the wind storm. On that basis, Merrimack denied coverage for the wall in May, citing various exclusions in Bello's policy.

Bello challenged the denial of his claim, and spoke with a claims examiner for Merrimack's parent company, The Andover Companies ("Andover"). The Andover claims examiner advised Bello that the prior denial would not be changed and informed him of his right to appeal the denial. Bello then filed an internal appeal of the denial and provided Merrimack with the report of an engineering inspection company stating that the wall had been properly maintained. The denial of the retaining wall claim was reversed before re-inspection. After the re-inspection, an adjuster valued the claim at \$108,813,

but Bello contended that the wall could not be replaced for that sum. Merrimack eventually issued a check to Bello in January 2009 for \$62,569.65, representing the adjuster's estimated cost, depreciated by 43 percent because of the wall's age. Bello returned the check and subsequently secured two estimates for the wall's replacement – one for \$425,688 and the other for \$365,485. When Cusack wrote to Bello invoking the Merrimack policy's appraisal procedure, Bello filed suit in New Jersey court alleging breach of contract and consumer fraud on account of the delay in repairing the storm damage. At that time, Bello did not advance any bad faith allegations.

At Merrimack's request, the trial court ordered Bello to submit to the company's appraisal procedure. As a result of that procedure, Merrimack paid Bello \$100,750, his policy limit, for the damaged retaining wall. The trial court subsequently dismissed Bello's contract claims but allowed him to amend his complaint to add a claim for bad faith in delaying the resolution of his claim.

Following a 10-day trial, the jury awarded Bello \$624,023.20, representing the total estimated cost to replace the wall and landscape his yard, without setoff for sums previously paid by Merrimack. The trial court also added \$195,583.34 in attorney's fees and \$31,346.41, representing costs of the suit.

Further, the court denied Merrimack's motions for a new trial, judgment notwithstanding the verdict, and for a "molded" verdict.

Merrimack appealed, advancing multiple arguments why a new trial or molded verdict should be granted. Among those, it contended that Bello failed to demonstrate sufficient facts supporting a finding of bad faith. The appellate court disagreed, pointing out that even though Merrimack conceded that sudden and accidental wind damage was a covered loss under the policy, the company twice denied Bello's claim for damages to the wall without having an engineer perform an inspection.

These actions, the court stated, could properly be deemed unreasonable by a jury.

Merrimack also argued that reversal was necessary as a matter of law because the company acted reasonably in relying on the advice of Cusack, an outside agent, when it denied the claim. The appellate court rejected the contention. It stated that while the existence of a defense is a legal issue, whether that particular defense applied in this case is a factual one. Merrimack had a full opportunity to argue to the jury that this "outside adjuster" defense applied but the court noted the jury apparently did not accept Merrimack's argument in this regard.

Arizona District Court Denies Summary Judgment on Bad Faith Claim based on Insufficient Claims Documentation

Wood v. Liberty Mut. Fire Ins. Co., No. CV-11-2380-PHX-GMS, 2012 WL 2798761 (D. Ariz. July 9, 2012).

Liberty Mutual's motion for summary judgment was denied because the claims file lacked documentation indicating a review of all of the insured's materials.

On May 23, 2009, while serving in the line of duty as a City of Phoenix Police Officer, Justin Wood was injured in a motorcycle accident. He suffered an injury to his hand that required a skin graft and sustained head injuries when the force of the crash knocked his helmet off.

In addition to workers' compensation insurance, Wood had an Uninsured Motorist policy with Liberty Mutual Fire Insurance Company ("Liberty Mutual") with a limit of \$250,000. Wood's combined medical bills and lost wages from the accident totaled \$86,791.31. Liberty Mutual investigated and offered an initial settlement of \$120,000, offsetting for workers compensation, in October 2010. Wood disputed the value of the claim and filed suit claiming bad faith, breach of contract and seeking punitive damages in January 2011. Liberty Mutual moved for partial summary judgment on the bad faith and punitive damages claims.

Wood alleged that Liberty Mutual failed to adequately investigate his injuries in that the company conducted only a brief

interview with him and otherwise relied on files and medical information provided by Wood's lawyer. Wood contended that as a result, Liberty Mutual failed to take into account the permanence of his head injuries, a mistake that would have been avoided if Liberty Mutual had obtained additional medical examinations of Wood, taken an injury statement or conducted a records review.

The trial court noted that there are two prongs to bad faith claims: (1) an objective analysis asking whether the insurer acted unreasonably; and (2) a subjective analysis asking whether the insurer knew that its conduct was unreasonable or acted with such reckless disregard that knowledge of unreasonableness could be imputed to it. At the outset, the court stated that reliance on records provided by a plaintiff does not necessarily constitute bad faith. At least some of the evidence in Wood's file, however, indicated Wood may suffer permanent head injuries that would interfere with his ability to continue working as a motorcycle police officer, including the declaration of one of Wood's treating physicians. Wood's claims

expert reviewed the insurer's claim log and found no indication that Liberty Mutual had considered the physician's declaration regarding the permanence of Wood's injury. Liberty Mutual argued that it took into account the physician's materials provided prior to the demand letter, and these materials conflicted with the physician's prior assessment that the injury "should gradually improve with time." However, the expert's review of the claim log noted an absence of the documentation indicating a review of the materials, thereby creating a credibility issue.

On that basis, the trial court held a fact-finder could decide Liberty Mutual was objectively unreasonable in its investigation of Wood's claim and this inadequate investigation may have impacted the company's valuation of the claim. The court added the fact that Wood's claim might have been "fairly debatable" did not impact its holding that the company may

have acted unreasonably in investigating or evaluating the claim.

Turning to the subjective analysis of whether Liberty Mutual knew of its unreasonableness or acted recklessly with regard to Wood's claim, the District Court noted Wood offered no direct evidence that Liberty Mutual had knowingly refused to pay the fair value of his claim. It nonetheless held a jury could plausibly infer from Liberty Mutual's alleged failure to adequately review Wood's materials that "the insurer either knew or was conscious of the fact that this omission was unreasonable." In other words, the jury could infer the insurer's improper intent from its inadequate investigation of the claim. Wood's allegation of Liberty Mutual's inadequate investigation was thus found to satisfy both the objective and subjective prongs of the bad faith test and the court denied Liberty Mutual's summary judgment motion.

Pennsylvania District Court Permits Bad Faith Claim for Insurer's Unnecessary Requests for Documentation

Schlegel v. State Farm Mut. Auto. Ins. Co., No. 3:11-CV-2190, 2012 WL 2885052 (M.D. Pa. July 13, 2012).

Bad faith claim survived dismissal where plaintiffs added allegation that insurer made unnecessary document requests.

On December 20, 2007, Matthew Schlegel and his wife Jennifer were driving when Doris Ferko allegedly pulled in front of the Schlegels' vehicle and caused an accident that left Jennifer Schlegel badly injured. Ferko's vehicle was underinsured, so the Schlegels lodged an Underinsured Motorist ("UIM") claim with their automobile insurer, State Farm Mutual Automobile Insurance Co. ("State Farm"). Ferko was also insured by State Farm.

When State Farm failed to pay any UIM benefits, the Schlegels filed suit in Pennsylvania state court alleging breach of contract, a statutory bad faith claim, and violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law. After removing the case to federal court, State Farm moved to dismiss for failure to state a claim. The

trial court granted the motion on the basis that the Schlegels had made only conclusory allegations, but it allowed the Schlegels leave to amend.

The Schlegels made the same claims in their amended complaint but added a few new factual assertions. They alleged that they had formally requested UIM benefits from State Farm in November 2009 and provided State Farm with all relevant medical reports, documents and records. State Farm, however, denied coverage in November 2010, claiming the Schlegels had not provided sufficient documentation to evaluate the claim. In particular, State Farm indicated it was waiting for the Schlegels to provide an Uninsured/Underinsured Affidavit of Coverage even though State Farm's internal insurance documents showed the Schlegels were fully covered. In short, the

Schlegels alleged that State Farm made redundant document requests in order to delay and ultimately deny their claim for UIM benefits.

Viewing the complaint in the most favorable light possible, "one could conclude," the court stated, "that State Farm did not merely delay in proceeding on the UIM benefits, but actively 'misperformed' in improperly delaying and ultimately denying UIM benefits" without a reasonable basis for doing so. Thus, the district court held the Schlegels' specific allegations of unnecessary document requests enabled their statutory claims of bad faith and unfair trade practices to go forward.

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