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Pennsylvania Appellate Court Throws Out \$21 Million Insurance Bad Faith Decision, Directs Verdict in Favor of Insurer

SUMMARY

The Pennsylvania Superior Court recently held that a trial court's decision to impose \$18 million in punitive damages and \$3 million in attorneys' fees for violations of Pennsylvania's Insurance Bad Faith Statute, 42 Pa. C.S.A. § 8371, was unsupported by the record, and instead directed the entry of a judgment in favor of the insurer. *Berg v. Nationwide Mut. Ins. Co.*, No. 713 MDA 2015 (Pa. Super. April 9, 2018). The Superior Court also admonished the trial court for making irrelevant observations about the insurance industry and rejected what it believed were unsubstantiated findings of fact.

The Berg case originated from a 1996 car accident and a subsequent property damage claim presented to Nationwide as the Berg's insurer. In 2004, a jury awarded the Bergs \$295 against Nationwide for a violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law related to Nationwide's involvement in the repair of Berg's Jeep. The jury rejected the Berg's fraud claim. In a bench trial, Nationwide prevailed on the insurance bad faith claim presented by Berg, but the Pennsylvania Supreme Court ultimately reversed that decision, *Berg v. Nationwide Mut. Ins. Co.*, 6 A.3d 1002 (Pa. 2010), and the Superior Court remanded the matter for a new trial. *Berg v. Nationwide Mut. Ins. Co.*, 44 A.3d 1164 (Pa. Super. 2012). The second insurance bad faith trial resulted in an April 21, 2015, judgment in favor of Berg and against Nationwide for approximately \$21 million.

In a rare occurrence, the Superior Court reversed the trial court largely based on a lack of support in the record for the trial court's "critical findings of fact." Specifically, the Superior Court rejected the trial court's determination that Nationwide "vetoed" an auto repair shop's conclusions that the Jeep was totaled, that the Jeep was beyond repair, that Nationwide knew that the Jeep was in substandard condition when it was returned to the insured, and that Nationwide engaged in conduct to cover its misdeeds, including conduct in the bad faith litigation itself. The Superior Court specifically rejected the trial court's conclusion that Nationwide engaged in "scorched earth" litigation tactics to try to overwhelm its insured.

The Superior Court took issue with large sections of the trial court's opinion that expressed the judge's personal opinion about the insurance industry, noting "[w]e are troubled by Judge Specher's failure to limit his analysis to the facts of this case and applicable law." The Superior Court devoted six pages to topics such as the trial judge's "irrelevant analysis of insurance industry advertising," which was not at issue in the case. The Superior Court ultimately concluded that "[a] judge sitting as fact finder in a bad faith case should confine his or her analysis to the facts of the case at bar without any consideration of the perceived ills of the insurance industry in general."

This 22 year saga is likely to continue, with Berg seeking reconsideration from the Superior Court en banc, or requesting review by the Pennsylvania Supreme Court. Nonetheless, the Superior Court's decision emphasizes the diligence and resolve insurers must demonstrate to prevail in bad faith litigation. It also demonstrates that a plaintiff must establish bad faith with specific facts, and not by merely attacking the insurance industry in general.

Saul Ewing will continue to monitor and report on this and other bad faith decisions around the country. Saul Ewing has a team of seasoned insurance practitioners who understand bad faith litigation and can help insurers develop a plan for success.

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