

Bad Faith in Hard Times

American Council of Life Insurers

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Survey of Recent Case Law

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*It Ain't Over . . .
Even After It's Over*

***Res Judicata - May Not Apply
To Later Bad Faith Action***

Andrew Robinson Int'l, Inc. v. Hartford Fire Ins. Co.,
547 F.3d 48 (1st Cir. 2008)

- > Office condominium owner brought coverage action after lead-laden dust was discharged into plaintiff's unit
- > Insurer disclaimed coverage based on pollution exclusion
- > Court found that pollution exclusion did not apply
- > Eight months later, insured sued for bad faith
- > Although all elements for *res judicata* were present, bad faith claim permitted under Restatement of Judgments § 33
- > Declaratory relief is conclusive on matters declared, but plaintiff may seek further declaratory relief as well as damages

Let's Not “Wait And See”

**Failure To Act Quickly
On Suspicions May Be
Deemed Bad Faith**

Hailey v. California Physicians' Service,

158 Cal. App. 4th 452 (Cal. App. Ct. Dec. 24, 2007)

- > Health insurer became suspicious that plaintiffs withheld negative health information in February 2001, but waited four months before rescinding health coverage
- > Evidence that insurer reviewed approximately 1,000 claims per year for possible misrepresentations or omissions, but rescinded less than one percent of the cases
- > These facts suggested insurer did not immediately rescind health care contracts upon learning of potential grounds for rescission but waited until after claims submitted
- > Insurer cannot adopt “wait and see” attitude after learning of facts justifying rescission

*C'mon, You Can Do
Better Than That*

**Merely Avoiding Bad Faith
Not Sufficient In Maryland**

Cecilia Schwaber Trust Two v. Hartford

Accident & Indemnity Co.,

2009 U.S. Dist. LEXIS 59788 (D.Md. July 14, 2009)

- > Coverage case involving water damage to building
- > Policyholder's motion for summary judgment on coverage question was denied
- > Insurer then argued that denial of summary judgment meant that coverage decision was "fairly debatable," and bad faith claim should be dismissed as a matter of law
- > Court found that "fairly debatable" standard does not comport with Maryland's bad faith statute, which requires "informed judgment based on honesty and diligence supported by evidence the insurer knew or should have known at the time the insurer made a decision on a claim"
- > Maryland provides a cause of action for "lack of good faith" as opposed to an action for "bad faith," and the two are not the same

*So, What's On
Your Mind?*

**Work Product Doctrine
Is Not Absolute**

Bishelli v. State Farm Mut. Auto. Ins. Co.,
2008 U.S. Dist. LEXIS 10406 (D.Co. Jan. 31, 2008)

- > Plaintiff sought insurer's complete claim file
- > Insurer's activity may shift from mere claim evaluation to anticipation of litigation, implicating work product doctrine
- > Work product doctrine, however, is not absolute, and party may discover work product if there is a substantial need and the party cannot otherwise obtain the material
- > Bad faith case more likely to require production of work product

Kemm v. Allstate Prop. & Cas. Ins. Co.,

2009 U.S. Dist. LEXIS 62049 (M.D.Fla. July 7, 2009)

- > Insurer permitted to discover work product of tort plaintiff's lawyer in subsequent bad faith action
- > Motives and conduct of tort plaintiff and attorney were relevant insurer's bad faith defenses

*I Thought You Said
You Were A Lawyer*

**Application Of Privilege
Depends On Attorney's Role**

HSS Enterprises v. AMCO Insurance Co.,

No. 06-1485 (W.D.Wash 2008)

- > Fire loss claim involving tire company
- > Insurer hired law firm to monitor progress of claim adjustment, conduct EUOs, and assist with factual investigation
- > Plaintiff sought law firm's file materials
- > "Line between what constitutes claim handling and the rendition of legal advice is more cloudy than crystalline"
- > If attorney acting as claims adjustor, claims process supervisor, or claim investigation monitor, privilege does not apply

*I Was Just Asking A Question –
Is That So Wrong?*

**Filing Declaratory Judgment
Action Is Not Bad Faith**

Principal Life Ins. Co. v. Minder Trust,

No. 08-5899, 2009 U.S. Dist. LEXIS 56568 (E.D.Pa. July 1, 2009)

Principal Life Ins. Co. v. Weiss Trust,

No. 09-cv-00840-LDD (E.D.Pa. July 30, 2009)

- > Separate but similar actions filed by insurer seeking to have alleged STOLI policies declared void *ab initio*
- > Defendants filed counterclaims for bad faith, asserting there was no legal or factual basis for insurer's claims
- > Bad faith in the first party context relates to obligation to pay a loss, and does not include the filing of a declaratory judgment lawsuit concerning insurer's duties

*You Never Asked
Me That*

**Doctrine Of *Uberrimae
Fidei* Is Alive And Well**

Marietta Campbell Ins. Group v. Jefferson-Pilot Life Ins. Co.,
No. 09-cv-00840-LDD (E.D.Pa. July 30, 2009)

- > Insured signed blank applications for several life insurers, including Jefferson Pilot
- > Agent submitted application to Jefferson Pilot but did not disclose Hartford or Allianz applications
- > Before Jefferson Pilot policy was issued, agent completed and submitted Hartford and Allianz applications but did not supplement Jefferson-Pilot application
- > Issue in litigation related to the meaning of “pending” – awaiting decision by insurer vs. completed with intent to submit
- > Court did not reach question because insured “had a duty of utmost good faith to disclose the Allianz and Hartford applications to Jefferson-Pilot” once they were submitted based on doctrine of *uberrimae fidei*

The Insurer's Perspective (Part 1)

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Bad Faith: Who Needs To Know, Who Wants To Know?

- > Claims handling staff
- > Underwriting staff
- > Customer service staff
- > Financial accounting and reporting staff
- > Auditors
- > Executive management

Bad Faith: A Tort Grounded In Contract; A “Contort”

- > Tort claims are notoriously difficult to describe and quantify
- > Law professors define a tort as a “civil wrong” – but what does that really mean?
- > Judges too often don’t define a tort at all but they write about it anyway
- > A layman buys torts at the pastry counter
- > In the end, confusion reigns

Operational Personnel

- > They ask for an explanation of bad faith.
- > What they really want is guidelines they can train to and use day-to-day to avoid bad faith and stay out of trouble with their bosses and the lawyers.

Executive And Financial Personnel

- > They ask for an explanation of bad faith.

- > But they really want:
 - Quantifiable and predictable exposure to bad faith liability;
 - Elimination or mitigation of that exposure.

So What Do You Tell Them?

- > Explaining bad faith in terms of what it IS frustrates everyone.
- > Explaining bad faith in terms of what it IS NOT comes much closer to the mark for all constituencies.
- > A brief overview of what bad faith IS followed by elaboration on what bad faith IS NOT and suggestions for avoiding it seems to work best for all parties.

A Practical Explanation Of What Bad Faith IS

- > First, a duty of good faith and fair dealing in the policy.
- > Bad faith occurs when a carrier breaches that duty by behaving in a manner that is *unreasonable* under the circumstances.
- > A jury will usually decide these cases.
- > Damages
 - Awarded in addition to actual damages awarded;
 - Usually set by applying a multiple of actual damages awarded; and
 - Often motivated by the desire to punish the carrier
- > Bad faith claims are volatile and unpredictable by their very nature and can arise out of a myriad of facts and circumstances.

A Practical Explanation Of What Bad Faith IS NOT

- > Bad faith generally will not be found where the specific action or inaction of the carrier was *reasonable* under the circumstances in existence *at the time*
- > The carrier must be able to show that action or inaction was reasonable by demonstrating that:
 - All reasonable efforts were made to investigate
 - All facts and circumstances were appropriately considered
 - The process was conducted in a prompt, reasonable and efficient manner
 - The insured was given the benefit of any reasonable doubt throughout the process
 - The personnel involved in the investigative process were appropriately trained
 - The insured was kept informed and was given a final written decision

Points To Consider (Part 1)

- > Each decision must appear reasonable to independent third parties
- > All aspects of decisions and the process must be thoroughly documented
- > Collect ALL relevant facts and circumstances
- > The investigation process must be efficient and minimize inconvenience
- > Consider each relevant fact or circumstance, do not discard any of same
- > Do not guess, instead investigate and document
- > When a reasonable doubt exists, first investigate, then give the insured the benefit of any remaining doubt

Points To Consider (Part 2)

- > Develop and install documented policies and procedures defining how and when investigations are to be conducted and decisions are to be made
- > Once documented policies and procedures are installed, enforce training to and compliance with same
- > Train to, enforce and document compliance with applicable prompt payment or “clean claims” requirements
- > Develop and implement effective and documented training programs, then train and document that you have done so
- > Treat the insured fairly and politely in all respects (even where the insured behaves badly)
- > Communicate, communicate, communicate with the insured!

The Insurer's Perspective (Part 2)

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Outline

- > Determine Root Cause
- > Communications
- > Risk Mitigation
- > Resolution Strategy

Determine Root Cause

- > Peel the Onion
- > Business Practice
- > Product Design
- > Consumer Complaint Story
- > Front Line Call Center Reps
- > Agents/Producers
- > Not in Your Office

Communications – Up, Over (And Out?)

> UP:

– CEO, Board

> OVER:

– CFO, COO, CTO

> OUT:

– Liability Carrier, SEC, Auditors, Regulators, Media

Risk Mitigation

- > Investigate
- > Ascertain
- > Action

Resolution Strategy

- > Imagination & Creativity
- > Ensure Root Cause addressed
- > Win/Win – it depends on who's pitching/singing
 - *Don't stop believing* – Journey

Questions?