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Cases Decided through May 22, 2007 Recent Developments of National Significance

INSURANCE LITIGATION Reporter™

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Bad Faith

Liability Insurer's Failure to Consider and Act Reasonably on an Injured Party's Policy Limits Settlement Offer May Constitute Bad Faith, Even When There Are Multiple Injured Parties and Low Policy Limits

Third-Party Bad Faith of This Sort May Exist, Even If Insured Has Been Less Than Completely Cooperative

McKinley v. Guaranty National Insurance Company, __ P. 3d __, 2007 1288323 (Idaho, May 3, 2007)

Case at a Glance

Triable issues of fact existed regarding whether an insurer's failure to accept a time-limited settlement offer constituted bad faith, even though the insured's negligence resulted in multiple injuries and the insured was not fully cooperative in responding to the insurer's request for information. The insurer's failure to inform the insured of the time-limited settlement offer until after the offer had expired may have constituted bad faith under the circumstances.

An insured may not recover contract damages for his liability insurer's bad faith delay in paying policy limits.

Summary of Decision

On October 27, 2000, the insured, McKinley, caused a multi-vehicle auto accident. There were two people in each of the other two cars involved in the accident. McKinley had an auto liability policy from the defendant herein, GNIC, which limited coverage for bodily injuries to $25,000 per person and $50,000 per accident. On October 30, GNIC assigned an adjuster who called McKinley that day. The adjuster, or someone else in the claims department, tried to call McKinley eight or more times until November 27, and sent him at least three letters. On November 27, GNIC received a letter from the lawyer for two of the injured people—a married couple. The letter described their injuries, indicated existing costs, and asked for disclosure of policy limits. The same lawyer wrote again on December 11, and then again on December 27. The attorney's third letter contained a demand for policy limits, and stated that the settlement offer expired on January 12, 2001. GNIC received the letter on January 2, 2001, but the adjuster claimed that he did not see it for several days.

Internal counsel for the insurer asked for an extension first by a phone message on January 12 and then by a letter sent on the sent the same day. The letter indicated that GNIC needed more time to investigate. GNIC's request was declined. On February 8, the adjuster authorized counsel to offer $25,000; the offer was made that day; it was rejected. GNIC was unable to settle the case, which proceed to trial, resulting in a $284,334.78 judgment against the insured.

Subsequently, McKinley sued GNIC for breach of contract, bad faith, and intentional infliction of emotional distress ("IIED," as the court called it). The district court granted GNIC's motion for summary judgment on all three causes of action.

The Idaho Supreme Court affirmed the district court as to the breach of contract action and the IIED counts. The insurer had already paid its policy limits, so there could be no contract damages. Regarding the IIED count, there was no evidence presented that the insurer has "acted intentionally or recklessly in carrying out its investigation." Moreover, the insurer's conduct did not rise to the "atrocious," did not extend "beyond all possible bounds of decency" or constitute the "outrageous," and this was true, even hough the insurer "could have acted more expeditiously under the particular facts of the[e underlying] case[.]"

The supreme court, however, reversed as to bad faith. Under Idaho law, liability insurers handling claims have "'a duty to exercise good faith in considering offers to compromise an injured party's claim against the insured for an amount within the insured policy limits.'" *Truck Ins. Exch. v. Bishara,* 916 P.2d 1275, 1278 (Idaho 1996). Insureds may bring independent actions in tort against the insurer for "unreasonably denying or unreasonably delaying settlement of the claim." This is called "third party bad faith," and it "covers both intentional and negligent denials and delays in paying insurance claims."

The court, in *Bishara,* previously had adopted the "equality of consideration" standard to determine whether an insurer acts in bad faith in failing to settle a claim and set forth seven questions the trier of act should consider in determining whether the insurer failed to give the insured's interests equal consideration. Here are the questions, the first two of which the *Bishara* court said were most important: (1) Did the insurer fail to communicate with the insured, especially with respect to the compromise offers? (2) What is the amount of financial risk facing each of them? (3) What was the strength of the underlying tort case? (4) Did the insurer thoroughly investigate the alleged tort? (5) Did the insurer fail to follow the advice of its own counsel? (6) Were there any misrepresentations made by the insured which mislead the insurer in its settlement thinking and negotiation? (7) Are there "any other facts which may weigh toward establishing or negating the bad faith of the insurer?

In this case, the supreme court found that summary judgment was inappropriate because triable issues of fact remained regarding whether GNIC investigated thoroughly and quickly. This was so even though McKinley "was not particularly helpful in cooperating with the investigation." The court pointed out GNIC had authority to settle even without McKinley's approval. Moreover, evidence suggested that GNIC could have done a better job keeping McKinley informed as to settlement, and—in the end—he faced big damages.

GNIC tried to blame the lawyer for the underlying tort plaintiffs, claiming that his settlement-expiration was unreasonable was designed to set the insurer up. The Supreme Court rejected this argument in light of the procedural posture of the case. Not only was there no evidence of the attorney's motives, it would be inappropriate to draw inferences against a non-moving party based on the motives of an attorney for a non-party.

Finally, GNIC argued that it is not bad faith for an insurer to allow a settlement demand date to expire when there are multiple claimants and insufficient policy limits. This is especially true, GNIC maintained, when it would be itself bad faith to "indiscriminately or precipitously" settle with one injured person for policy limits when there are several tort victims. Disagreeing, the supreme court observed: "[E]ven though the demand date may have been somewhat arbitrary, it did pose a risk to McKinley. GNIC *arguably* had adequate time, without acting precipitously or indiscriminately, to investigate all claims and to communicate with its insured before [the] settlement deadline expired." (Italics added.) Hence, summary judgment is inappropriate, although the language the court uses implies that this very matter could be tried as a fact issue.

Comment

The phrase "equal consideration test" is probably good for plaintiffs. This phrase can be used by the insured plaintiff to suggest that the insurer needs to treat the insured's interest as equal to its own. The insurance contract is, then, not an arm's length deal. Given this phraseology, the insurance policy creates a "special relationship." From the insurer's point of view, however, the phrase would be unnecessary if insurers were fiduciaries, since fiduciaries must always place the interest of the insured ahead of its own. Hence, if the defending insurer were a fiduciary of the insured, there would be no need for the "equal consideration" test in evaluating bad faith liability. // Quinn