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MONTANA SUPREME COURT DISALLOWS RECOVERY FOR ATTORNEY FEES BY A THIRD-PARTY CLAIMANT

In *Robert Jacobsen v. Allstate Insurance Company*, 2009 WL 2217529 (Mont. July 23, 2009), the Montana Supreme Court reversed an award in favor of a “bad faith” claimant for compensatory and punitive damages based solely on a request for attorney fees and costs. The Court also remanded for a new trial after finding that the lower court erred in not allowing the jury to consider emotional distress as an element of “bad faith” damages.

Jacobsen sustained injuries in an auto accident with Allstate’s insured. Allstate accepted liability for the claim and began to negotiate a settlement with Jacobsen pursuant to Allstate’s Claim Core Process Redesign (“CCPR”), a set of guidelines implemented by Allstate to promote early settlements with unrepresented claimants. Six days following the accident, Jacobsen settled with Allstate for \$3,500 and 45 days of “open medicals” in exchange for a signed written release. A month later, Jacobsen asked Allstate to rescind the release because he had experienced shoulder pain, which he attributed to the accident. Allstate refused to rescind the release. Jacobsen subsequently retained an attorney and Allstate eventually settled Jacobsen’s claim for approximately \$200,000.

Jacobsen later filed suit against Allstate seeking compensatory damages for violation of Montana’s Unfair Trade Practices Act (“UTPA”), common law “bad faith,” intentional and negligent infliction of emotional distress, and actual malice. Jacobsen sought only two types of compensatory damages: emotional distress and attorney fees. The lower court granted Allstate’s pretrial motion for summary judgment on Jacobsen’s negligent and intentional emotional distress claims on the grounds that Jacobsen failed to prove “serious or severe” emotional distress as required by the Montana Supreme Court’s ruling in *Sacco v. High Country Independent Press*, 271 Mont. 209 (1995). Because Jacobsen failed to

meet the “serious or severe” threshold, the Court also prohibited Jacobsen from presenting evidence of emotional distress damages arising out of Allstate’s alleged “bad faith” and actual malice.

Allstate also argued that Jacobsen could not claim attorney fees as compensatory damages pursuant to *Sampson v. Nat’l Farmers Union Property and Casualty Co.*, 333 Mont. 541 (2006), which held that a third-party claimant may not recover attorney fees incurred in settling a claim for “bad faith” as an element of damages under the UTPA. Montana follows the well established American Rule, which provides that a party prevailing in a lawsuit is generally not entitled to attorney fees absent a specific contractual provision or statutory grant. However, the lower court determined that Jacobsen’s claim for attorney fees fell within an equitable exception to the American Rule.

The jury subsequently returned a verdict in favor of Jacobsen, finding Allstate was liable for both common law and statutory “bad faith,” awarding as compensatory damages the attorneys fees and costs incurred by Jacobsen in settling the underlying claim. The jury also awarded \$350,000 in punitive damages based upon its finding that Allstate acted with actual malice in settling Jacobsen’s claim.

The Montana Supreme Court reversed the award for Jacobsen’s attorney fees and costs as well as the punitive damages award. While recognizing the equitable

exception to the American Rule is available in certain situations where a party is forced into a frivolous lawsuit and must incur attorney fees to dismiss the claim, the Court concluded that Jacobsen’s position as a plaintiff in the litigation rendered the equitable exception inapplicable.

The Court similarly found the insurance exception to the American Rule inapplicable to Jacobsen, as that exception only arises where an insurer breaches its duty to defend or indemnify the insured party. The Court refused to extend the insurance exception to “bad faith” claims brought under the UTPA by third-parties such as Jacobsen, who had no contractual relationship with Allstate. According to the Court, “The American Rule is a foundation of our jurisprudence, and we must narrowly construe the exceptions lest they swallow the rule.”

The Court further decided that the trial court erred in ruling that Jacobsen was required to prove serious or severe emotional distress in order to recover emotional distress damages arising out of the underlying “bad faith” claim. In doing so, the Court clarified that the “serious or severe” standard adopted in *Sacco* applied only to *independent* claims of negligent or intentional infliction of emotional distress, not to *parasitic* emotional distress claims, such as Jacobsen’s. Thus, the Court remanded the case for a new trial.

The Court also examined the issue of whether the lower court erred in granting

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DECISION WORTH NOTING...



The Oklahoma Supreme Court recently held that in the absence of controlling legal authority in Oklahoma invalidating a “Loaned Vehicle Exclusion” (“LVE”) in an insurance policy, an insurer relying on the exclusion does not act in “bad faith” for denying or delaying payment. In *Ball v. Wilshire Ins. Co.*, 2009 WL 1679954 (Okla. June 16, 2009), a repair shop loaned an uninsured customer a vehicle, but the repair shop’s insurance policy with Wilshire Insurance Company (“Wilshire”) contained a LVE that excluded uninsured motorist (“UM”) coverage. The customer sued Wilshire for “bad faith” because it denied UM coverage to the customer after an accident. In the course of the litigation, several questions were certified to the Oklahoma Supreme Court concerning a LVE, including whether the exclusion is void in light of Oklahoma’s requirement for insureds to carry UM (“UM”) insurance and whether an insurer can act in “bad faith” if it relied on an invalid exclusion. Although the Oklahoma Supreme Court invalidated the LVE, it held that an insurer’s prior reliance on that exclusion did not amount to “bad faith,” *i.e.*, Wilshire had a “good faith belief, at the time performance was requested, that it had a justifiable reason for withholding (or delaying) payment under the policy.”

EIGHTH CIRCUIT HOLDS INSURER DID NOT DENY CLAIM IN “BAD FAITH” SINCE IT HAD A REASONABLE BASIS FOR ITS DENIAL

The Eighth Circuit Court of Appeals, applying Iowa law, recently held that an insurer did not act in “bad faith” in denying a first-party claim, regardless of whether the insurer was ultimately correct in its decision. The insured’s occupational accident benefits claim under his trucker’s occupational accident insurance policy was fairly debatable and the insurer had an objectively reasonable basis for its denial.

In *Merriam v. National Union Fire Insurance Company of Pittsburgh, Pennsylvania*, 2009 WL 2066514 (8th Cir. July 17, 2009), Timothy Merriam (“Merriam”), an independent contractor driving trucks for Landstar Ranger (“Landstar”) purchased a Contractor Protection Plan (“CPP”) from National Union Fire Insurance Company (“National Union”). The CPP provided a \$1,000,000 per accident limit for “occupational accident benefits” and a \$7,500 per accident limit for “nonoccupational accident benefits.” The CPP defined an “occupational accident” as one that “occurs or arises out of or in the course of the Insured Person performing services within the scope of contractual obligations to the Contractee.” Merriam was designated as the “Insured Person” and Landstar as the “Contractee” in the CPP.

On March 24, 2005, Merriam picked up a load in Nevada for delivery to Iowa. Merriam arrived in Iowa on March 29, 2005, and stopped at his house for a mandatory federal Department of Transportation driving break. Upon arrival at his house, Merriam began pulling the truck into a special driveway next to his house built for tractor trailer parking. As he pulled the truck into the driveway, he noticed a sinkhole in the driveway above an underground waterline. Merriam exited the truck, and used his own personal dump truck to fill the sinkhole with gravel. After filling the sink hole, Merriam was unable to put the dump truck back into neutral. As he attempted to reach under the truck bed to find the source of the problem, the truck bed fell on the left side of his head, left shoulder, and left arm. Merriam incurred \$400,000 in medical bills, lost function in his left arm, and was declared permanently and totally disabled by the Social Security Administration.

Merriam reported the accident to

National Union’s claim adjuster, Gallagher Transportation Services (“Gallagher”), on August 30, 2005 and incorrectly stated that the accident had taken place at his mother’s house. The Gallagher claim adjuster set a \$7,500 reserve, the limit for nonoccupational benefits, because Merriam was in a personal vehicle at the time of the accident. The claim adjuster then mailed Merriam several claim documents to fill out and return, contacted Landstar to investigate details of the accident, and obtained copies of Merriam’s medical records, driver log, and a statement from Merriam confirming that the accident had taken place at his home (and not at his mother’s home, as he originally reported). On October 21, 2005, Gallagher, acting on National Union’s behalf, sent a letter to Merriam stating that, based on the circumstances of his accident, his claim qualified for only the \$7,500 nonoccupational benefits of the CPP policy.

Merriam did not respond to the letter, but immediately filed suit against National Union and Gallagher, alleging that they frustrated his reasonable expectations as to the policy’s coverage, breached the CPP contract, and denied his occupational accident benefits in “bad faith.” The parties filed cross-motions for summary judgment, and the District Court held that National Union and Gallagher had a reasonable basis for denying Merriam’s claim, and thus did not act in “bad faith.”

On appeal, the Eighth Circuit Court of Appeals, applying Iowa law, noted that, in order to establish that National Union and Gallagher acted in “bad faith,” Merriam was required to prove: (1) that the insurer had no reasonable basis for denying benefits under the policy; and (2) the insurer knew, or had reason to know, that its denial was without basis. Under Iowa law, an insurer

has a reasonable basis to deny a claim if the claim is “fairly debatable” or is “open to dispute on any logical basis,” without regard to whether the insurer’s position is ultimately found to lack merit.

Ultimately, the Eighth Circuit affirmed the District Court’s holding that National Union did not act in “bad faith.” Regardless of whether National Union was ultimately correct in its decision to deny Merriam occupational accident benefits, Merriam’s claim was fairly debatable and National Union had an objectively reasonable basis for its denial. National Union’s subsequent denial of Merriam’s claim was based on several undisputed facts at the time of the accident: Merriam was beginning a driving break, he was repairing a personally owned vehicle, and he reported more than once that the accident occurred at a different address than his home.

Although the Eighth Circuit agreed that an improper investigation cannot alone sustain a tort action for “bad faith” if the insurer had an objectively reasonable basis for denying the insured’s claim, the Eighth Circuit stated that the record demonstrated Gallagher engaged more than a cursory investigation by speaking with Merriam on several occasions about the accident, asking Merriam to provide a written statement about the accident, obtaining Merriam’s medical records and driver log, contacting Landstar about the load Merriam was hauling and the details of the accident, and sending an investigator to Merriam’s home.



Prepared by Nicolas Mesco, an associate in our Chicago office.

DECISION WORTH NOTING...



In the insurance portion of *In re Katrina Canal Breaches Consolidated Litigation*, Slip Copy, 2009 WL 1707923 (E.D.La. June 16, 2009), the District Court for the Eastern District of Louisiana ruled on June 16, 2009 that class certification for “bad faith” claims was inappropriate. In order to prevail on a “bad faith” claim in Louisiana, a plaintiff needs to show that “(1) an insurer has received satisfactory proof of loss, (2) the insurer fails to tender payment within thirty days of receipt thereof, and (3) the insurer’s failure to pay is arbitrary, capricious or without probable cause.” In assessing probable cause, a court must determine whether the insurer’s conduct was reasonable. Since individualized inquiries are needed to determine whether the insurers acted reasonably as to each plaintiff, the District Court determined that class certification for “bad faith” claims was inappropriate.

Jacobsen's motion to exclude evidence of the legal effect of the release. Allstate argued that because it relied upon the release in its subsequent dealings with Jacobsen, it had a reasonable basis in law for contesting his demands, and it therefore should have been allowed to present evidence in support of that defense. The

Court disagreed. Allstate's rescission of Jacobsen's release effectively voided the release from the beginning. Allstate was not, as a matter of law, entitled to rely upon the legal effect of the release prior to its rescission.



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