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Extra! Extra!



WASHINGTON DISTRICT COURT RULES THAT INSURER'S DECISION NOT TO ARBITRATE, AND TO REMOVE ACTION TO FEDERAL COURT, DID NOT AMOUNT TO BAD FAITH

The United States District Court for the Western District of Washington found that an automobile insurer's decision not to arbitrate with its insureds, and the insurer's removal of the action to federal court, did not result in bad faith because: (1) the insurance agreement only permitted arbitration by mutual agreement; and (2) removal was proper.

In *McCoy v. Liberty Mutual Fire Insurance Company*, 2009 U.S. Dist. LEXIS 120690 (W.D. Wash. December 29, 2009) ("McCoy"), plaintiff insureds purchased an automobile policy from defendant insurer which included \$100,000 in underinsured motorist ("UIM") coverage. A motorist injured one of the insureds in an automobile accident. The insureds obtained a settlement from the motorist's insurer in the amount of the \$25,000 policy limit. The insureds also brought a UIM claim to their insurer under the terms of their automobile policy. The insurer offered a settlement, which the insureds

refused. The insurer also declined to arbitrate the matter.

In response, the insureds filed suit against the insurer in state court, alleging that the amount offered by the insurer was insufficient. The insurer removed the action to federal court based on diversity jurisdiction, which the federal court found proper. Following removal, the insureds amended their complaint to include allegations that the insurer had acted in bad faith.

In their motion for partial summary

judgment, the insureds based their bad faith claim on: (1) the insurer's decision not to arbitrate the insureds' claim; and (2) the insurer's removal of the state court action to federal court. In opposition, the insurer contended that the insureds' bad faith claim lacked merit because: (1) the insurance contract between the parties did not contain a provision requiring the parties to arbitrate in the event of a policy coverage dispute; and (2) the federal court already ruled that removal was proper.

Denying, in part, the insureds' motion for partial summary judgment, the District

Court stated, "To bring a successful bad faith claim, an insured must establish, among other things, that the insured owed a duty to the insured." *McCoy* at *6, citing *Smith v. Safeco Insur. Co.*, 150 Wn.2d 478, 485 (2003) (en banc).

The District Court ruled that the insureds failed to establish that the insurer breached a duty to arbitrate, as the insurance agreement only permitted arbitration by mutual agreement. The District Court also ruled that the insureds failed to establish that removal based on diversity was a breach of a duty owed, where the District Court had already ordered removal was proper. The District Court also found that, to the extent that the insureds' bad faith claim was based on the insurer's decision not to arbitrate or its removal decision, the insureds' claim lacked merit.

With respect to the UIM coverage claim and the bad faith claim, the insurer sought to bifurcate the trial on these issues and stay discovery with respect to the bad faith claim. The insurer argued that if the insureds did not prevail on their breach of contract claim, the insurer would have a complete defense to the insureds' bad faith claim. In other words, a breach of contract claim was not intertwined with a bad faith claim

because the resolution of one could dispose of the other as a matter of law. The District Court ruled, "Bifurcation thus would further the interest of expedient resolution of litigation. Further, bifurcation would simplify the issues for trial and reduce the possibility of undue prejudice by allowing the jury to hear evidence of bad faith only upon establishing that...[the insurer] breached the insurance contract." *McCoy* at *10, citing *Drennan v. Maryland Cas. Co.*, 366 F. Supp. 2d 1002, 1008 (D. Nev. 2005). Consequently, the District Court granted the insurer's motion to bifurcate trial on the breach of contract claim from the bad faith claim.

However, the District Court found that a stay of discovery on the issue of bad faith was unnecessary in this case, as discovery on both claims would be more convenient for the parties and would further judicial economy. The District Court further found that joint discovery would also aid the parties in settlement efforts. The District Court reasoned that, should a second trial on the issue of bad faith become necessary, joint discovery would permit the second trial to commence immediately after the first. Therefore, the District Court denied the insurer's motion to stay discovery on the issue of bad faith.

TRESSLER COMMENTS

This decision reminds insurers that courts often look to the exact language in the insurance policy to determine whether the insurer breached a duty to its insured. It is significant that the insuring agreement in *McCoy* required mutual agreement to arbitrate between the insurer and its insureds, as the court did not comment on whether the insurer would have breached a duty to its insureds had the insuring agreement not expressly permitted arbitration only by mutual agreement.



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DECISION WORTH NOTING...

In *Collins v. Allstate Indem. Co.*, 2010 U.S. Dist. LEXIS 2144 (N.D. Cal. January 11, 2010), the Northern California District Court recently held that an insurer's disclosure of uninsured motorist ("UM") limits in an arbitration did not amount to bad faith. The underlying arbitration involved Allstate Indemnity Company's ("Allstate") denial of Heather and Tyrone Collins' UM claim. The Collins filed a motion in the arbitration to exclude disclosure of the UM limits because they believed the arbitrator's awareness of the UM limits could influence him to render a lesser award. Before ruling on the Collins' motion, Allstate allegedly disclosed the UM limits. The Collins then instigated a bad faith lawsuit in the District Court despite the fact that the arbitration did not proceed. In granting Allstate's motion to dismiss, the District Court found that Allstate's policy did not contain any provision precluding Allstate from disclosing the UM limits. The District Court also held that Allstate's disclosure might not have harmed the Collins, given their acknowledgement that the arbitrator could not have awarded an amount above the UM limits. In addition, the District Court found that Allstate's disclosure was protected, based on California's statutorily recognized litigation privilege.

BAD FAITH! NOT SO FAST . . . SAYS THE COLORADO DISTRICT COURT AS TO THIRD-PARTY CLAIMS AGAINST AN ALLEGED TORTFEASOR'S INSURER

The Colorado District Court, applying Colorado law, recently held that third-party claimants could not maintain a bad faith action against the alleged tortfeasor's insurer, absent an explicit policy or statutory provision.



In *Webb v. Brandon Express, Inc. et al.*, 2009 U.S. Dist. LEXIS 119498 (D. Colo. December 23, 2009), Plaintiffs were involved in a motor vehicle accident with a semi-truck and trailer operated by an employee of Brandon Express, Inc. ("Brandon Express"). Plaintiffs then sued the employee, Brandon Express and its alleged insurer, Zurich NA Insurance Company ("Zurich"), for breach of contract, bad faith and negligence. Plaintiffs subsequently dismissed the employee.

Under the breach of contract claim, Plaintiffs alleged that Zurich breached its obligations by failing to provide payments for damages and injuries arising from the negligence of Brandon Express and its employee. Under the bad faith claim, Plaintiffs alleged that Zurich failed to respond to their claims, failed to advise them of their rights and responsibilities and failed to pay amounts owed. Plaintiffs also alleged "as third party beneficiaries to the contract" that Zurich engaged in conduct that violated the policy's implied covenant of good faith and fair dealing.

In granting Zurich's Motion to Dismiss Plaintiffs' bad faith claim, the District Court held that "Unless specifically authorized by statute, a bad faith cause of action against an insurer by a third party claimant is not recognized in Colorado." The District Court highlighted that the parties to an insurance contract "do not intend to benefit the general

public," but rather "their intent is to benefit the named insured" and protect it against future liability. Here, Plaintiffs were not parties to the insurance contract. Instead, they were injured parties making a third-party claim on the alleged tortfeasor's insurance policy. Accordingly, the District Court held Plaintiffs could not maintain a bad faith claim against Zurich.

In dismissing Plaintiffs' breach of contract claim, the District Court stated Plaintiffs could assert a breach of an insurance contract claim in Colorado against the alleged tortfeasor's insurer if Plaintiffs were intended third-party beneficiaries of insurance policy. In other words, a person who is not a party to an express contract may maintain an action on the contract if the parties to the agreement intended to benefit the third-party "provided that such benefit is direct and not merely incidental." The District Court held that the requisite intent was absent in Plaintiffs' case. The District Court also noted that the only other way Plaintiffs could maintain a direct action on Zurich's policy is if a Colorado statute specifically authorized a direct action. However, Plaintiffs failed to present such a statute.

TRESSLER COMMENTS

This decision does not appear to leave much room for third-party claimants to proceed directly against an alleged tortfeasor's insurer in Colorado. The

Colorado District Court highlighted that parties to an insurance contract typically intend to benefit the named insured, *and not the general public*, by protecting the insured against future liability.



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DECISION WORTH NOTING...

A dissenting opinion from the Mississippi Supreme Court recently stated that an adjuster's negligent delay in paying workers' compensation benefits could not support a bad faith claim. In *Gallagher Bassett Servs. v. Malone*, 2010 Miss. LEXIS 15 (Miss. Jan. 7, 2010), Gary Lee Malone ("Malone") instigated a bad faith lawsuit against several defendants, including his former employer, Nabors Drilling USA, Inc. ("Nabors"), and the workers' compensation claims adjuster, Gallagher Bassett Services, Inc. ("Gallagher Bassett") for delaying payment of workers' compensation benefits. Nabors cross-claimed against Gallagher Bassett for breach of contract, asserting that Nabors was a third-party beneficiary of a claims adjusting contract between Gallagher Bassett and Nabors' workers' compensation insurance carrier, CNA Insurance Services. Nabors argued that Gallagher Bassett's bad faith delay in paying Malone's workers' compensation claim proximately caused Nabors to incur potential liability and defense costs from Malone's bad faith lawsuit.

Nabors and Malone subsequently entered into a settlement agreement in which Nabors paid Malone \$1.5 million. However, Nabors remained a party to the litigation in order to seek recovery against Gallagher Bassett. Based on a finding of jury confusion due to the bad faith and the breach-of-contract/indemnity cases being tried together, the Supreme Court vacated the trial court judgments and remanded the case for a new trial.

However, a detailed dissenting opinion was also issued based on a finding of no bad faith against Gallagher Bassett. While not binding authority, the dissenting opinion cited to Mississippi case law holding that an adjuster, like an employer or carrier, cannot be held liable for bad faith when the conduct at issue amounts to ordinary or simple negligence. Here, the dissenting opinion concluded that not only was Gallagher Bassett's conduct insufficient to support a finding of bad faith, but also recovery against Gallagher Bassett for simple negligence was barred by Mississippi Workers' Compensation Act's exclusivity clause.

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