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# EXTRA! EXTRA!

A Bulletin Dedicated to Recent Developments in the Law of Extracontractual Liability and Claims Handling



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# NINTH CIRCUIT CONCLUDES THAT INSURER AND AGENT DID NOT ENGAGE IN OBJECTIVELY UNREASONABLE BEHAVIOR IN DENYING CLAIM

The Ninth Circuit recently affirmed a district court's grant of summary judgment in favor of Allstate Insurance Company ("Allstate") against a claim of "bad faith" filed by Allstate's insureds. In *Tang v. Shell Chemical, et al.*, 2009 WL 605888 (9th Cir. March 5, 2009), the Ninth Circuit concluded there was no evidence of any objectively unreasonable behavior by Allstate or the insurance agent that was sufficient to establish "bad faith".

In this case, the Plaintiffs-Appellants, Tracy and Dawnelle Tang ("insureds") asserted a claim for "bad faith" against Allstate. As the Ninth Circuit explained, "the 'cruX' of the insureds' bad faith claim was the manner in which their insurance agent, Lim, handled the insureds' inquiry into possible coverage for the damage caused by the plumbing leaks." In response to their inquiry, Lim informed the insureds there was no coverage under their policy issued by Allstate for water leaks. Lim then sent portions of the policy to the insureds that Lim believed showed a lack of coverage. The insureds also claimed Lim failed to return a single subsequent phone call.

Citing *Zilisch v. State Farm Mut. Auto Ins. Co.*, 196 Ariz. 234, 238 (Ariz. 2000), the Ninth Circuit stated that in order to establish the tort of "insurance bad faith" under Arizona law, "a plaintiff must show (1) that the defendant-insurer handled her claim in an objectively unreasonable

manner, and (2) that the insurer subjectively knew that its conduct was unreasonable."

In deciding Lim's actions did not constitute "bad faith", the Ninth Circuit assumed, without deciding, that an insurance agent's actions before the formal filing of a claim could constitute "bad faith". However, in this case, Lim's actions were "objectively reasonable" and therefore, insufficient to establish "bad faith". The Ninth Circuit noted that the insureds failed to provide the court with any evidence, such as a copy of the policy, "that would indicate that Lim was wrong, much less that her answer was in bad faith." The Ninth Circuit also concluded "the failure to return a single voicemail message does not constitute objectively unreasonable behavior sufficient to establish bad faith."

Finally, the Ninth Circuit rejected the insureds' argument that Allstate's investigation into their claim was unreasonable simply because Allstate did

not conduct follow-up testing. Allstate's investigator confirmed the water damage to the insureds' property was caused by plumbing leaks. Based on this finding, Allstate was able to conclude the loss was not covered under the policy without the need for further testing. According to the Ninth Circuit, "nothing in the record indicates that it was objectively unreasonable for Allstate to conclude that no further testing was required for its purposes." Therefore, the Ninth Circuit affirmed summary judgment in favor of Allstate on the issue of "bad faith".



Prepared by Amber Coisman, an associate in our Chicago office.

## DECISION WORTH NOTING...



The District Court of Utah recently bifurcated "bad faith" claims from breach of contract claims. However, the same jury will hear both phases of the trial with the breach of contract claim being heard first and the "bad faith" claim being heard thereafter. In *Trujillo v. American Family Mut. Ins. Co.*, 2009 WL 440638 (D. Utah February 20, 2009), Margaret Trujillo ("Trujillo") brought claims against American Family Insurance Company ("American Family") for breach of contract for failing to pay on an under-insured motorist claim and for "bad faith" due to American Family's allegedly improper actions in denying Trujillo's claim. In support of its motion to bifurcate, American Family argued that if Trujillo is unable to show that her damages exceeded the amounts she already received, her "bad faith" claim will fail. The District Court rejected this argument based on Utah law allowing Trujillo to proceed with her "bad faith" claim even absent a finding of liability on the breach of contract claim. The District Court indicated that American Family's position would provide no recourse for a plaintiff with whom an insurance company refused to bargain and settle in good faith merely because the plaintiff did not prevail under the breach of contract claim. While the District Court granted American Family's motion to bifurcate based on the potential for "bad faith" evidence to prejudice the jury, it allowed the same jury to hear the "bad faith" claim after the breach of contract claim.

# ELEVENTH CIRCUIT CERTIFIES “BAD FAITH” ISSUES FOR REVIEW BY THE FLORIDA SUPREME COURT -- INCLUDING WHETHER FLORIDA LAW PERMITS A “BAD FAITH” CAUSE OF ACTION BASED UPON AN INSURER’S FAILURE TO TIMELY PROCESS A CLAIM

In *Chalfonte Condominium Apartment Assoc., Inc. v. QBE Ins. Corp.* 2009 WL 580775 (11th Cir. March 9, 2009), the insured sued a property insurer alleging a “bad faith” failure to pay for a hurricane loss. The United States Court of Appeals, Eleventh Circuit certified several questions for review by the Supreme Court of Florida, including whether Florida law permits a “bad faith” cause of action based upon an insurer’s failure to timely process a claim.

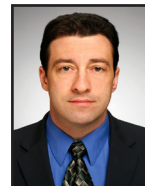
In October 2005, Hurricane Wilma caused substantial damage to property owned by Chalfonte Condominium Apartment Association, Inc. (“Chalfonte”) in Florida. Chalfonte subsequently submitted a claim under a property insurance policy issued by QBE Insurance Corporation (“QBE”). Based on QBE’s alleged failure to timely investigate and process the claim at issue, Chalfonte filed an action in the United States District Court for the Southern District of Florida, which included causes of action for declaratory relief regarding coverage and for breach of the implied warranty of good faith and fair dealing. The jury found for Chalfonte on all claims.

On appeal, QBE asserted that Florida law does not recognize a claim for “bad faith” based on an insurer’s failure to investigate and assess its insured’s claim within a reasonable period of time. QBE argued in the alternative that Chalfonte’s “bad faith” claim was the equivalent of a statutory “bad faith” claim under Fla. Stat. § 624.155, which does not accrue until

the insured prevails against its insurer on a coverage claim, thereby requiring bifurcation of the coverage and “bad faith” issues. As such, QBE contended that the bifurcation requirement applied to Chalfonte’s common law “bad faith” claims and that the district court erred by allowing Chalfonte to try its “bad faith” claim along with its coverage claim.

After surveying Florida law regarding common law and statutory “bad faith” based upon a failure to settle, the Eleventh Circuit concluded that Florida law: (1) has not definitively concluded that an insured may bring a “bad faith” claim based upon an insurer’s failure to investigate and assess its insured’s claim within a reasonable time; (2) has not resolved whether a statutory “bad faith” action provides the exclusive remedy for such a claim and (3) has not determined whether the bifurcation requirement for statutory “bad faith” claims also applies to a “bad faith” claim based on the insurer’s failure to timely investigate a claim. In

light of the absence of controlling Florida Supreme Court authority on these issues, the Eleventh Circuit certified the issues to the Supreme Court of Florida.



Prepared by Nicholas Andrea, a partner in our Orange County office.

## DECISION WORTH NOTING...



In *MarkWest Hydrocarbon, Inc. v. Liberty Mut. Ins. Co.*, 2009 WL 581706 (10th Cir. March 9, 2009), the Tenth Circuit affirmed a “bad faith” claim must fail under Colorado law if coverage was properly denied and the plaintiff’s only claimed damages flowed from the denial of coverage. MarkWest Hydrocarbon, Inc. (“MarkWest”) brought action against its insurers for breach of contract and “bad faith” after its insurers denied coverage for costs MarkWest incurred to comply with corrective action orders. The Tenth Circuit affirmed the district court’s summary judgment ruling in favor of the insurers on the breach of contract cause of action on the ground that compliance with the corrective action orders were not covered under MarkWest’s insurance policies. Having concluded that the insurers’ denial of coverage was proper, the Tenth Circuit affirmed the district court’s grant of summary judgment in favor of MarkWest’s insurers as to MarkWest’s “bad faith” claim. The Tenth Circuit reasoned that a cause of action for “bad faith” under Colorado law cannot proceed if coverage was properly denied and the only claimed “bad faith” damages flowed from the denial of coverage.

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