SANDBERG PHOENIX

BAD FAITH BLOG

Bad Faith is Almost Always a Question of Fact

AUTHOR: JOHN SANDBERG

Summary: It is a question of fact as to whether an insurer who has a duty to investigate is guilty of bad faith when it asks insured to tell it if facts change such that it is exposed.

Columbia Casualty v. Gordon Trucking, Inc.

Gordon Trucking operated a vehicle that was involved in a serious accident. Another vehicle crossed the center line hitting the Gordon vehicle and then the injured plaintiff's vehicle. Gordon Trucking had the following coverages:

CARRIERAMOUNT OF COVERAGE
Great West Casualty $5,000,000.00 After $500,000 Deductible Columbia Casualty $5,000.000.00 American International Specialty Lines Insurance Company (AISLIC) $20,000,000

Gordon Trucking notified all three carriers of the claim and both Great West and AISLIC had counsel who participated in the trial. Columbia was unaware of the trial. At the trial, the company that operated the truck that crossed the center line settled out and the case went to verdict against Gordon Trucking and its driver and the driver of the other truck. During jury deliberations, Gordon Trucking negotiated a $1,000,000 - $18,000,000 high/low agreement. (Apparently, the damning evidence in the case against Gordon Trucking was that its driver was on his cell phone at the time of the accident.) Gordon Trucking was found 35% at fault and the verdict was $49,000,000. Under California law the ultimate liability of Gordon Trucking "after credits and allocations" was $31,000,000 but was limited by the agreement to $18,000,000.

After trial, Columbia was told of the result and then of Gordon Trucking's high/low agreement. After reviewing the facts, Columbia denied coverage on the basis that the high/low agreement violated the no voluntary payments (NVP) provision of Columbia's policy.

When Columbia refused to pay its $5,000,000 in coverage, AISLIC, for unexplained reasons, paid the $5,000,000. Columbia filed a Declaratory Judgment action against all of the companies and AISLIC sued Columbia to recover the $5,000,000. AISLIC moved for Summary Judgment that Columbia was liable under Washington law for breach of its duty to investigate a claim of which it was made aware. Such a breach under Washington law would expose the insurer to tort liability for bad faith. The duty of good faith under Washington law includes the duty to reasonably investigate a claim. See *Aecon Buildings, Inc. v. Zurich North America* 572 Supp. 2nd 1227 1235 (W.D. Wash. 2008). If the insured's conduct is unreasonable, frivolous, or unfounded it is acting in bad faith.

The court denied the Motion for Summary Judgment holding, as is typical, that whether Columbia had breached its duty of investigation and committed bad faith was a question of fact. The facts had shown that Gordon had informed Columbia of the lawsuit that claimed severe injuries and a Columbia employee had responded to Gordon Trucking's notification. The Columbia employee advised Gordon Trucking that his company did not anticipate that the nature of the incident was likely to impact its limits. As is typical, Columbia asked for notice if any subsequent information indicated the injuries might impact Columbia's limits. When trial was scheduled, Great West and AISLIC were aware of the trial, but Columbia was not.

The court went through a detailed choice of law analysis and determined that Washington law should be applied to this case involving Gordon Trucking which was Washington based even though the accident had occurred on California highways.

The court ruled that Columbia did not breach its duty to investigate with reasonable promptness as a matter of law suggesting that Columbia had acted with reasonable promptness in investigating and communicating with Gordon following notice of the claim. In addition, asking the insured to tell it if facts changed did not, as a matter of law, constitute a failure to investigate. While Columbia had the duty to make a good faith investigation of facts before denying coverage – it only denied coverage after the verdict and after a review of the pretrial report, post trial report, and other reports. As such, Columbia's denial of coverage was not unreasonable, frivolous, or unfounded as a matter of law.

AISLIC also claimed if Columbia conducted a reasonable investigation it would have monitored the ongoing claim and it would not be in the position it is in now. The court said this was true, but reminded AISLIC that initially it too had responded similarly to the claim which supported the court's conclusion that reasonable minds could differ so that it could not find that Columbia had acted unreasonably as a matter of law.

Citation: 2010 W.L 5141865 (N.D. Cal.) - No. 09-CV-05441 (Pacer)