SANDBERG PHOENIX

BAD FAITH BLOG

No Settlement Check – No Problem: Florida Appellate Court Affirms Summary Judgment in Favor of Insurer in Bad Faith Case

AUTHOR: SANDBERG PHOENIX

Summary: Automobile insured brought action against insurer for common law bad faith after $2.8 million judgment was entered against insured in wrongful death action. Trial court entered summary judgment in favor of insurer. The Court of Appeals affirmed summary judgment holding that the insurer did not act in bad faith by failing to tender offer of $10,000 policy limits to personal representative of decedent's estate.

Goheagan v. American Vehicle Insurance Company, 2012 WL 2121082 (Fla. App. 4 Dist.)

Insured rear-ended the decedent while traveling at a high rate of speed while intoxicated. The insured had bodily injury liability coverage with the insurer in the amount of $10,000. The decedent was severely injured in the accident and remained hospitalized in a coma until she died.

Two days after the accident, the insured reported the accident to the insurer and the insurer opened a claims file. The insurer advised its insured that the bodily injury claims for the accident may exceed the insured's policy limit and that the insurer would "make every attempt to settle all claims for bodily injury in accordance with [insured's] policy limits."

The insurer attempted to contact the decedent's mother on five separate occasions between February 28 and April 16. The insurer was informed decedent's mother had retained an attorney. The insurer followed up requesting that decedent's mother provide the attorney's contact information; however, this information was never provided, even though the insurer spoke to decedent's mother over the phone several times.

After repeatedly following up with decedent's mother, the insurer learned decedent's mother, as personal representative of decedent, had filed a wrongful death suit against the insured. After learning of the suit, insurer offered to tender the $10,000 available coverage to decedent's mother; however, this tender was rejected. A second settlement offer was also rejected by decedent's mother.

The wrongful death action against the insurer went to trial and following a jury verdict a final judgment was entered against the insured in the amount of approximately $2.8 million dollars.

Following the wrongful death trial, decedent's mother filed a common law bad faith action against the insurer alleging that the insurer breached its duty of good faith with regard to the interests of its insured by failing to affirmatively initiate settlement negotiations with decedent, failing to actually tender the policy limits in a timely fashion, and failing to warn its insured of the possibility of an excess judgment.

The insurer moved for summary judgment arguing there was no genuine issue of material fact as to whether it fulfilled its duties of good faith towards its insured. In opposition, decedent's mother filed the affidavit and deposition of an insurance expert she had retained. The expert opined "[t] the claim should have immediately been recognized as one requiring tender of the $10,000 policy limits. Steps should have been taken to immediately tender the $10,000 policy limits to [decedent]. This did not happen." The expert also submitted that no ethical rules would have prohibited the insurer from tendering a check to decedent's mother.

The trial court granted summary judgment in favor of the insurer.

The Appellate Court affirmed finding there was no evidence to support the position that the insurer failed to settle the claim where a reasonably prudent person would do so and decedent's mother failed to demonstrate that the failure to settle was "willful and without reasonable cause." The insurer's attempts to contact decedent's mother to determine the name of her counsel five times did not constitute a lack of diligence or care envisioned as an example of a bad faith claim. The Appellate Court found it was hard to see how the insurer failed to act in good faith with due regard for the interests of its insured. Moreover, the Appellate Court found there was no evidence in the record which demonstrated that the insurer placed its interests above the interests of its insured.

Decedent's mother had argued that the insurer should have sent a letter enclosing a check for the policy limits to her, despite the fact that the insurer knew of the existence of an attorney hired by decedent's mother. The Appellate Court specifically rejected this interpretation of what an insurer must do to meet its obligation to demonstrate that it is defending a claim in good faith.

Also, the Appellate Court cited ethical rules in Florida which govern the adjuster's conduct. Under the applicable rule, an adjuster shall not negotiate or effect settlement directly or indirectly with any third party claimant represented by an attorney if the adjuster has knowledge of such representation. FLA. Admin. Code R. 69B-220.201(3)(i). The plain language of the rule appeared to prohibit even the tendering of a check since that could be construed as "negotiating" or "effecting" a settlement. The insurer had knowledge of representation following its conversations with decedent's mother.

The Appellate Court also found that the affidavit and deposition of the mother's expert were insufficient to defeat summary judgment. The statements were deemed to be conclusions of law and fact and immaterial. The Appellate Court found there was no evidence in the record to allow reasonable juror to infer that the insurer failed to act with due regard for its insured's interests. The Appellate Court acknowledged that usually the question of whether an insurer acted in bad faith is to be decided by a jury; however, the Appellate Court cited a number of cases where the evidence demonstrated that the insurer fulfilled all of its legal obligations as a matter of law.

The Appellate Court held that the claim for bad faith failure to settle should be exactly that – only for situations in which the insurer truly is refusing in bad faith to settle a claim, not when it is attempting to settle the claim. According to the Appellate Court, the undisputed facts demonstrated no basis from which a reasonable jury could conclude that the insurer acted solely in its own interests. The insurer acted "properly [and] promptly" in continually contacting decedent's mother in order to discover the name of the attorney retained by her, so that it could then contact the attorney.

It should be noted Judge Hazouri filed a strong dissent in opposition to the majority opinion. The dissent argued the majority appeared to adopt a new bad faith standard. The dissent feared that insurers would insulate themselves from a claim of bad faith by merely attempting to settle the claim no matter how "anemic" the attempt to settle was.

The dissent argued the insurer when faced with a prospect of paying the entire amount of the judgment should have immediately tendered its limits and advised decedent's mother that it was acknowledging liability and that it had only $10,000 worth of liability insurance available to cover the claim. According to the dissent, the insurer had a fiduciary duty to its insured.

The dissent also believed the mother's expert created an issue of fact with his testimony regarding whether the insurer acted in bad faith. The insurer arguably should have sent letters to decedent's mother or the comatose son disclosing the policy limits. The dissent argued given the catastrophic injuries, clear liability, and the limited available liability limits of $10,000, a jury could decide there was not much to negotiate and the representation by an attorney would not have been an impediment to at least make an offer to settle.

The dissent would not hold as a matter of law that the insurer was guilty of bad faith. However, the dissent believed there were disputed issues of fact and issues of credibility that must be resolved by a jury.

It will be interesting to see if this case is appealed to the Florida Supreme Court. What seemed to carry the day for the insurance company was the repeated follow up with the mother who was not cooperative. Even if the insurance company had tendered a settlement check, the comatose state of the son would have precluded an immediate settlement. Thereafter, the mother rejected the $10,000 settlement offer after the wrongful death suit was filed; however, the Appellate Court did not appear to attach much importance to this fact.

One lesson to take from this case for future reference would be to follow up oral communications with written communications. Had the insurer followed up each time it attempted to communicate with decedent's mother with a letter noting her lack of cooperation and refusal to provide contact information for her attorney and noted the insurer's ethical dilemma, this may have blunted some of the issues raised by the dissent. The dissent noted the insurer never raised any ethical issues in its claim file and first raised the issue in the bad faith suit.

By Aaron French

French, A

Image not found or type unknown