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BAD FAITH BLOG

# Pro Se Bankruptcy Filings Lead to Breach of Contract and Vexatious Penalties, Rather Than Misrepresentation Defense

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Summary: The Merseals had a fire loss and made a personal property claim for $150,000. A few years earlier they filed bankruptcy and prepared bankruptcy schedules valuing their personal property at $600. The jury's verdict was for the Merseals awarding $134,000 on the policy, vexatious penalties of $13,586, and attorney's fees of $67,000. Those rulings were affirmed on appeal.

Merseal v. Farm Bureau Town & Country Insurance Company of Missouri, *396 S.W.3d 467*

Farm Bureau defended the case on grounds that the Merseals had made a material misrepresentation of fact when they presented their claim. The misrepresentation defense was based upon the substantial discrepancy between what the Merseals had filed with the federal bankruptcy court and what they were claiming when they presented their loss to Farm Bureau Insurance after the fire. The Farm Bureau policy provided that there was no coverage if the insureds intentionally concealed or misrepresented any material fact relating to the insurance.

The Merseals countered by stating that they had mistakenly filed incorrect bankruptcy schedules when they filed their *pro se* bankruptcy using a "do-it-yourself" computer program. A bankruptcy attorney was retained and confirmed that they used the wrong methodology and incorrectly valued their personal property in their bankruptcy filings. He also noted that valuations in bankruptcy are different than valuations for a personal property loss covered by insurance. A bankruptcy valuation is similar to what a person would get at a yard sale. However, personal property under a policy of insurance would be valued at replacement cost. Furthermore, Mrs. Merseal testified that the insurance adjuster told them to include things which they would have never included as part of their bankruptcy filing. The record also showed that after the Merseals learned of their mistaken bankruptcy filing, they sent a detailed letter to Farm Bureau outlining the discrepancies and stating that they intended to amend their bankruptcy schedules. That proposed amendment was attached to the letter to the insurance company.

When all of those factors were considered, the appeals court found there was sufficient evidence for a jury to conclude the Merseals had not intentionally misrepresented the amount of their personal property with an effort toward deceiving the insurance company. For that reason, the trial court had properly denied the insurer's motion for judgment NOV.

The appeals court also disagreed with the insurance company's argument regarding the vexatious refusal penalties. The insurer argued on appeal that the Merseals had failed to show that the insurer's denial was without reasonable cause. However, in Missouri a vexatious refusal claim is proven when the plaintiff shows the refusal to pay was "willful and without reasonable cause or excuse" as the facts appeared to a reasonable person before trial. Insurers can insist upon a judicial determination whenever there are open questions of law or fact. Even so, the existence of such a question does not preclude liability for vexatious refusal whenever the insurance company's attitude is shown to be "vexatious and recalcitrant." The appeals court noted only circumstantial evidence is required to prove a vexatious refusal.

After reviewing the facts, the appeals court held there was sufficient evidence to support the jury's verdict. Significantly, Farm Bureau had issued a policy after the bankruptcy concluded with personal property limits of $103,125. In addition, the insurer had used a computer program to assess the personal property claim which calculated $131,929 as the actual cash value and $146,135 as the replacement cost. The Merseals also provided a spreadsheet to the insurance company explaining the discrepancies between the bankruptcy filing and the insurance claim submission. However, even after Farm Bureau received that letter, it did not investigate the different valuation methods the Merseals had used the appeals court cited the 1988 *Allen v. State Farm* case, which found the adequacy of an insurance company's investigation of a claim is a factor which can be considered when ruling on a vexatious refusal to pay claim.

The appeals court affirmed the trial court's denial of the remittitur motion since there was no showing of gross excessiveness nor was there any evidence that either the judge or jury had abused its discretion. The final blow to the insurance company was the appellate court's finding that the Merseals were also entitled to reasonable attorney's fees for having to defend the post-trial motions, as well as defending against the appeal. Citing *Stark Liquidation Co. v. Florists' Mutual*, the appeals court found that it would be wrong not to compensate an attorney for time reasonably spent on appellate work defending the judgment below. Specifically, the appeals court found that would be inconsistent with the legislative intent providing for an award of attorney's fees under the vexatious refusal to pay statute.

The lessons for insurers and their attorneys are to truly investigate and make sure to listen to and read explanations provided by insureds. If those explanations are reasonable, be willing to make a change in position. It is less expensive to respond in a reasonable way to a reasonable explanation than to ignore reason and end up paying about 60%-70% more due to a vexatious penalty and attorney's fee award.

By Anthony Martin

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