

BAD FAITH BLOG

Attorneys' Bad Faith Prosecution of Bad Faith Claims Warrants Sanctions

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Summary: Federal law provides for the imposition of sanctions against attorneys who unreasonably and vexatiously cause an opponent to incur excess costs and fees. A bad faith finding is required to impose those sanctions. In the *Nielsen* case, the plaintiff's attorney filed a lengthy complaint alleging eleven causes of action and that ERISA did not apply to a case which was obviously an ERISA case. Two counts were for insurance bad faith and violations of Washington's Insurance Fair Conduct Act (IFCA). After multiple dismissals, Unum filed a motion for summary judgment attacking the alleged insurance bad faith and IFCA violations. Plaintiff's attorney filed a "non-opposition." In light of that non-opposition the court granted the partial summary judgment and dismissed all remaining non-ERISA claims.

Nielsen v. Unum Life Insurance Company of America, et al. 2016 WL 1253861 (W.D. Wash. 2016)

Unum's motion for sanctions demonstrated that plaintiff's attorney had been informed in "2012 that Unum was not plaintiff's insurer." In a footnote to his non-opposition the plaintiff's attorney acknowledged that very likely he would have dismissed the bad faith claims if Unum's attorney had asked him to do so by letter or phone call. Unum combined that evidence to contend that plaintiff's attorney "clearly knew that his insurance bad faith and IFCA claims should have been withdrawn" before Unum filed its motion for partial summary judgment.

The court denied the motion for sanctions regarding two of the motions Unum filed, but granted them regarding the partial summary judgment motion. In support of its ruling the court noted that plaintiff's attorney pursuing the state bad faith and IFCA violations after September 2, 2014 qualified as bad faith. By then the record showed that plaintiff was "on notice that Unum was not his insurer" and that the plan was subject to ERISA. Nevertheless, plaintiff's counsel "continued to repeatedly pursue claims contrary to these facts." The court also found plaintiff's counsel "clearly knew plaintiff's insurance bad faith and IFCA claims were meritless well before Unum was forced to file its motion [for partial summary judgment]." The court rejected the argument that it was up to Unum to file a motion for summary judgment sooner or to ask plaintiff to withdraw the claims. Finally, the court found that plaintiff's attorney "multiplied the proceedings unreasonably and vexatiously and this was done by knowingly pursuing and failing to withdraw causes of action that were legally and factually deficient. As such, sanctions are warranted under 28 USC § 1927." The court found plaintiff's attorney personally liable for those costs.

The *Nielsen* case demonstrates that common law and statutory bad faith actions should be pursued only where there are factual and legal grounds for doing so. The meritless prosecution of such actions can and should lead to the imposition of sanctions whether statutory or through the court's inherent power. The court in *Nielsen* rejected the request to impose sanctions under its inherent authority after doing so based upon § 1927.

By Anthony Martin

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