SANDBERG PHOENIX

BAD FAITH BLOG

Wisconsin Supreme Court: When Subrogating Insurers Aren't Required to Make Insureds Whole

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Summary: Dufour, a motorcyclist insured by Dairyland Insurance Company, was seriously injured while riding his motorcycle, collected full policy limits from the tortfeasor for his bodily injuries and full property damage (PD) and underinsured (UIM) bodily injury (BI) limits from Dairyland, and then sued Dairyland for bad faith when it refused to pay him the property damage subrogation funds Dairyland collected from the tortfeasor's insurer. The trial court granted summary judgment to Dufour on his breach of contract claim, but in favor of Dairyland on the bad faith claim finding it had not unreasonably withheld the funds from Dufour. The Court of Appeals affirmed the breach of contract award, but reversed on the bad faith claim holding Dairyland had acted in bad faith due to its made whole doctrine obligations and remanded to determine the bad faith damages. The Wisconsin Supreme Court reversed on both counts.

Dufour v. Progressive Classic Ins. Co.

It was agreed the value of Dufour's bodily injuries exceeded $200,000 and the car driver was at fault. Dufour settled for the $100,000 BI limit with the tortfeasor's insurer and then with his insurer for the $100,000 UIM limit. Dufour was also paid 100% of his PD claim by Dairyland. At that time Dairyland sought and recovered subrogation from the tortfeasor's insurer. Dufour demanded that Dairyland turn those funds over to him which Dairyland refused.

Subrogation is an equitable claim whether pursued as equitable subrogation or contract subrogation. The made whole doctrine is similarly an equitable principle which has as its goal to "balance the insurer's right to recoup benefits it has paid against an insured's right to obtain full compensation." The made whole doctrine in Wisconsin prevents an insurance company from sharing in any recovery from the tortfeasor if the insured's total recovery fails to fully cover the insured's loss. Here, even though it was acknowledged that Dufour had not fully recovered for the bodily damages he sustained, Dairyland had fully paid him everything to which he was entitled for his BI and his PD. He could have paid a higher premium and received higher UIM benefits, but he failed to do so. Because he had fully recovered from his insurance carrier for both BI and PD, the Supreme Court majority concluded the made whole doctrine should not apply to take Dairyland's PD subrogation recovery from Dairyland and give it to Dufour. Doing so would have given Dufour a double recovery for his PD to give him a "more complete" BI recovery for which Dufour had not paid. This would violate a key policy justification for allowing subrogation; preventing a double recovery. The majority concluded the equities were in favor of Dairyland because Dairyland had fully paid Dufour all he had bargained for under Dairyland's policy, Dufour was given priority in settling with the tortfeasor's insurer and, if Dairyland had not pursued its subrogation claim, Dufour would not have had any access to the additional funds he was seeking.

The dissenting justices agreed there was a tension between the subrogation and made whole doctrines, but concluded the equities were in favor of Dufour because Dufour would not be unjustly enriched by receiving the subrogation recovery because Dufour had never been fully compensated for all his losses, and because the tortfeasor was being held responsible for his conduct whether Dufour or Dairyland retained the PD recovery. Because the dispute was really between Dairyland and its insured, the dissenting justices favored the insured.

Nevertheless, the Supreme Court unanimously ruled to reverse the appellate court's judgment on the bad faith issue. For a first party insured to prevail on a bad faith claim in Wisconsin, that insured must show there was no reasonable basis for the insurer to deny the claim for benefits, the insurer knew or recklessly disregarded the fact it had no reasonable basis to deny the claim, and the insurer had in some way breached its contract. The bad faith claim had to fail unless those three elements had been proven. Because Dairyland had paid Dufour every dollar to which he was entitled, there was no breach of contract. Demonstrating such a breach of contract was "a fundamental pre-requisite for a first party bad faith claim." Having failed to prove that, Dufour's bad faith claim failed. Accordingly, the Court of Appeals' ruling on the bad faith issue was also reversed.

The *Dufour* opinion is important to Wisconsin insurers in determining the limits of an insurer's subrogation rights when it seemingly conflicts with Wisconsin's made whole doctrine. It is important for Wisconsin insurers to be familiar with the *Dufour* opinion which at length discusses both doctrines. Understanding the rights of the insurer and the insured under both doctrines will help keep Wisconsin insurers from engaging in unreasonable conduct which could lead to bad faith claims.

By Anthony L. Martin

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