

BAD FAITH BLOG

# Evidence Suggesting Substandard Claims Handling Supports South Dakota Statutory Vexatious Awards

AUTHOR: SANDBERG PHOENIX

Summary: Cindy Tripp and Andrea Bjornestad suffered injuries in separate car accidents. Each settled with the at-fault driver and then sought underinsured motorist benefits from their own insurance companies each of which offered to settle for less than the UIM limits and less than the value placed on the UIM claim by the company's adjustor. After separate juries denied the tort-based bad faith claims, separate district court judges ruled that the carrier's refusal to pay the amount demanded by the insured was "vexatious or without reasonable cause" and awarded statutory attorney fees. The Eighth Circuit affirmed.

*Tripp v. W. Nat'l Mut. Ins. Co.*, #10-3759 (8th Cir. Dec. 29, 2011)

*Bjornestad v. Progressive N. Ins. Co.*, #10-3733 (8th Cir. Dec. 29, 2011)

Cindy Tripp was involved in a car accident against an underinsured motorist. After pursuing her claim against the UIM, she notified her insurance company that she would be presenting a UIM claim. She had \$250,000 UIM coverage with Western National Mutual Insurance Company (Western National) but sought UIM payments of \$150,000. The tortfeasor's insurance company settled with Tripp for \$87,500 of the \$100,000 liability limit. Under South Dakota law that was deemed the "best settlement" which could be reached and was all that was necessary in order to preserve her UIM claim. Because Tripp and Western National stipulated that that was the best settlement offer, Western National got credit for the tortfeasor's full \$100,000 liability limit reducing Tripp's UIM claim to the balance of her UIM limits, \$150,000. Western National offered only \$10,000.

Thereafter she filed breach of contract and bad faith claims. The jury awarded her the full amount she sought, the \$150,000 balance left on her UIM coverage. However, the jury verdict was in favor of Western National on the first party common law bad faith claim. Even so, the U.S. district judge awarded attorney's fees to Tripp in the amount of \$65,000 after finding that Western National's failure to pay the \$150,000 was vexatious or without reasonable cause within the meaning of South Dakota's statute, S.D. Codified Laws § 58-12-3.

Western National argued on appeal that the jury verdict denying the bad faith claim precluded the district judge from awarding the attorney's fees under § 58-12-3 as a matter of law. The Eighth Circuit, after reviewing prior rulings of the South Dakota Supreme Court, ruled otherwise. It reviewed the legal argument *de novo*, but ruled that the district judge's fact findings had to be reviewed "for clear error," noting that such a factual finding would be clearly erroneous only if the Eighth Circuit was "left with a definite and firm conviction that a mistake has been committed."

The Eighth Circuit disposed of the legal argument after reviewing multiple rulings by the Supreme Court of South Dakota. The court principally relied upon *Brooks v. Milbank Ins. Co.*, 605 N.W.2d 173 (S.D. 2000) for the proposition that "an award of fees under § 58-12-3 does not depend upon a jury's findings of bad faith." The Eighth Circuit held that that legal proposition supported its holding that "a jury's adverse finding on a bad faith claim does not, as a matter of law, preclude a trial court from awarding attorney's fees under 58-12-3.... [A] trial court should undertake a separate analysis to determine whether the insurer's refusal to pay was vexatious or without reasonable cause in those cases where the jury finds an insurer did not act in bad faith."

In addition, the Eighth Circuit said its holding was supported by another South Dakota Supreme Court case finding that "vexatiousness 'is not an element of a bad faith claim.'" *Bertelsen v. Allstate Ins. Co.*, 796 N.W.2d 685, 696 (S.D. 2011). Thus, while a trial court may certainly consider the jury's disposition of a bad claim relevant, it is not bound by such a finding because the elements of a bad faith claim are distinct from the elements a court considers under § 58-12-3." Finally, the court noted that the bad faith tort was intended to punish insurers for socially unacceptable acts and to compensate claimants for their damages caused by bad faith conduct, whereas the statutory provision only applied to contract claims and was "designed to recompense a claimant for the legal expenses incurred when an insurance company unreasonably forces the claimant to resort to litigation to obtain contractual benefits." *Id.* (citations omitted).

The court also held that the district court's finding was supported by the facts because Western National's "own file supported Tripp's claim that the refusal to pay was without reasonable cause." In particular, the court noted that the claims adjuster had valued Tripp's claim in the range of \$120,000 to \$150,000. Even giving Western National the benefit of its argument that that included the value of the tortfeasor's insurance coverage (\$100,000), the district court noted that Western National had only offered \$10,000. That was one-half of the lower end of the \$20,000 to \$50,000 range, a value which Western National could not contest based upon its claims adjuster's file. Furthermore, the jury had valued Tripp's claim at \$250,000.

Finally, the court looked at the record which suggested that Western National had failed to make an adequate investigation of Tripp's loss. Although Tripp had early on given Western National notice that her damages would exceed the underlying liability limits and she would pursue a UIM claim, Western National did not independently investigate the claim by requesting additional information from her treating physicians, seeking an independent medical examination, or retaining an economist to review Tripp's claimed future wage loss. Considering all of the facts in the record before it, the Eighth Circuit affirmed the ruling in *Tripp*.

On the same day, the same panel of judges affirmed an award of § 58-12-3 damages in the *Bjornestad* case. In *Bjornestad*, the at-fault driver had limits of only \$25,000 and Bjornestad had UIM coverage of \$100,000. Accordingly, the maximum she could recover was \$75,000. As in *Tripp*, the jury awarded the full amount she sought, the jury denied her common law first party bad faith claim, and the district judge awarded her attorney fees. Relying upon the law set forth in its opinion in *Tripp*, the Eighth Circuit easily disposed of Progressive's argument that the district judge was bound by the jury's finding of no bad faith.

On the lower court's factual finding, the Eighth Circuit noted that Progressive's offer to pay \$25,000 in exchange for a full and final release was unreasonable because at that time the insured's medical expenses alone totaled \$24,300 and the \$25,000 offer (above the tortfeasor's \$25,000 limits) did not take into account future medical expenses, past and future economic loss, pain, suffering, impairment, and loss of enjoyment of life. Although Progressive had an independent medical examiner review the insured's medical records and that doctor's opinion was consistent with the belief that there was only a mild neck strain, by the time of trial the insured's medical expenses had increased to over \$50,000.

In affirming the award of attorney's fees, the court noted that when the \$25,000 settlement offer was made, "(1) Progressive itself had valued the UIM claim at a range above that amount (\$25,350-\$50,350); (2) the Progressive claims specialist handling Bjornestad's file communicated to Bjornestad's attorney that Progressive had valued the claim at even less than \$25,000, which conflicted with Progressive's actual evaluation range; (3) Progressive inaccurately told its IME that Bjornestad's low back pain did not begin until [months after the accident] even though Progressive knew the low back pain and low back treatment began the day after the December 2005 car accident; and (4) Progressive demanded a full and final release of all claims as a condition of its \$25,000 offer." Based upon those factors the district court believed that Bjornestad was entitled to an award of attorney's fees in the amount of \$45,718.60. After reviewing the record in detail, the Eighth Circuit stated: "We are not left with a definite and firm conviction a mistake was made. We, therefore, conclude the district court did not clearly err in finding Progressive's refusal to pay was vexatious or without reasonable cause." Accordingly, the Eighth Circuit affirmed.

By Anthony Martin

Martin, A  
margin not found or type unknown