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BAD FAITH BLOG

Million-Dollar Defense Nets $295 Verdict … and That's the Insurer's Potential Problem

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Summary: A 1996 Jeep Grand Cherokee owned by Daniel and Sheryl Berg sustained heavy damage in an accident. The Bergs took their vehicle to a dealer participating in their automobile insurer's "Blue Ribbon Repair Service Program." According to the Bergs, although the appraiser concluded the Jeep's frame could not be repaired because it was "too twisted," the insurer "reversed" the appraisal and sent the Jeep to another repair shop to attempt repairs over the next four months.

Berg v. Nationwide Mut. Ins. Co., Inc., – A.3d –, 2012 WL 1313055 (Pa. Super. Apr. 17, 2012)

Ten months later the Bergs got a phone call from one of the dealer's former employees, who told the Bergs of possible structural failures during repairs. The Bergs then filed suit against the insurer and dealer under several theories, including violation of the Uniform Trade Practices and Consumer Protection Law (UTPCPL) and Pennsylvania's bad faith statute.

The trial court bifurcated the trial, saving the bad faith allegations for the second phase. In the first phase, a jury returned a verdict on the UTPCPL claim against the insurer for $295, and against the dealer for $1925. The dealer paid the verdict before the second phase began, and was dismissed from the case. The insurer fought the bad faith claim and won a directed verdict in the Common Pleas Court. After a trip to the Superior Court (which affirmed) and then up to the Supreme Court of Pennsylvania (which reversed and remanded (see 6 A.3d 1006)), the Superior Court vacated and remanded for a new trial on the bad faith claim. *Berg v. Nationwide Mut. Ins. Co., Inc.,* – A.3d –, 2012 WL 1313055 (Pa. Super. Apr. 17, 2012).

Instead of looking at the procedural issues addressed, let's examine why the trial and appellate courts disagreed so greatly on the bad faith claim. Then we'll look at whether there are some lessons to be learned from this case.

The Trial Court's Thinking

In support of its directed verdict on the bad faith claim, the trial court found the claim was premised on the insurer's failure to guarantee the repairs, which the insurer was not obligated to do under its insurance policy. The trial court reasoned that the car repair was not sufficiently connected with the insurance policy to allow a statutory bad faith claim. The trial court also found that a violation of the UTPCPL in and of itself is not evidence of bad faith, and that the Bergs were relying solely on that violation to support their bad faith claim.

Bergs' Perspective

On appeal, the Bergs argued they did not base their claim on any guarantees. Instead, they had offered other evidence of bad faith (i.e., beyond the UTPCPL violation), including the insurer's expenditure of nearly $1 million on attorney's fees in defending the claim, and the insurer's "documented litigation strategy" seeking to deter the filing of small value claims and the retention of counsel by policyholders. The Bergs challenged the trial court's exclusion of such evidence, noting among other things that it was improper to keep them from establishing that they had been denied benefits under their policy. In addition, the Bergs challenged the insurer's selective use of redactions and claims of privilege, arguing they were entitled to the unredacted claim log to uncover potentially admissible evidence.

Appellate Court's Analysis

The appellate court agreed with the Bergs' arguments on all issues raised. Regarding the scope of the insurance policy, the trial court misunderstood the nature of the Bergs' claim: They did not allege a failure to guarantee repairs, but rather complained of the manner and method of the claims process, which allegedly violated Pennsylvania insurance law and the covenant of good faith and fair dealing. Regarding the Bergs' basis for their bad faith claim, it included evidence of "multiple" instances of bad faith, such as a claims log indicating the insurer's concern over a likely low salvage value in the event the vehicle was declared a total loss, and actual knowledge (hidden from the Bergs) of failed repairs and a structurally unsound frame.

Additionally, the appellate court noted the evidence of aggressive tactics by the insurer designed to foster a "defense-minded" perception in the legal community. The appellate court agreed with the Bergs that such evidence should have been admitted because it suggested the insurer was not treating the Bergs' claim on an individual basis, instead preferring to use the claim to help "send a message." (Other courts have described this approach as evidence of institutional bad faith.) Finally, the appellate court found that during discovery the insurer used claims of privilege and selective redactions as a sword and a shield; as a result, on remand the trial court needed to conduct an *in camera* review to determine what the Bergs should be entitled to receive. (One judge on the three-judge panel dissented in part, preferring to allow the trial court full discretion to resolve the discovery issue, rather than being required to perform *in camera* review.)

The Take-Away

There's nothing wrong with a claims handling policy that says the insurer will insist on proper documentation to support all claims and will require compliance with the policy conditions, including the duties after loss conditions. Nonetheless, claims handling must be done in accordance with applicable state insurance statutes, rules, and regulations. The *Berg* opinion suggests (without saying so directly) that the court was troubled by Nationwide's alleged policy of singling out "small claims" for a "scorched earth" litigation policy to deter a perceived problem. The court did not declare the claims policy improper, but gave the trial judge discretion to decide the issue on the merits after allowing more discovery and allowing both sides to put on evidence in support of their claims.

There's nothing wrong with telling claims handlers to be fair and firm in their claims handling, but they must also be judicious on all payment decisions. Problems can develop when an insurer forgets to tell or require claims handlers to treat each claim separately, being mindful not only of company policies but also of the specific facts and circumstances of each claim. A part of every insurer's claims manual has to be compliance with the applicable state insurance rules and regulations. No doubt it was part of Nationwide's claims handling process, but the Bergs brought forward evidence that any such requirement was put to the side at some point in handling their claim.

Here, after the insureds took their vehicle to an insurer-approved "Blue Ribbon Repair Service" dealer, an appraiser determined the insureds' Jeep had a twisted frame and could not be repaired. Someone's decision to overrule the presumed expert (presumably to benefit the carrier's economic position) carries great risk for Nationwide on remand.

The potential for a bad faith disaster on remand is made worse when one adds (beyond the overruling of the appraiser) the four-month delay in getting the vehicle back, a suggestion of failed and unsound repairs from someone who worked for the dealer, and a note in the claims file that the insurer purportedly wanted to avoid declaring a total loss because it knew there would be a low salvage value. The defense strategy employed in *Berg* seemingly wore out several attorneys, and the "send a message" strategy did not work. All Pennsylvania insurers, their claims personnel, and their attorneys need to keep in mind this cautionary statement by the appellate court in *Berg:* "An insurance company may not look to its own economic considerations, seek to limit its potential liability, and operate in a fashion designed to 'send a message.'"

By Tim Sansone

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