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BAD FAITH BLOG

# Tall Task to Prove Excess Insurer Breached its Duties to Insured

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Summary: Kevin Fox won a $15.5 million jury verdict (including $6.2 million in punitive damages) against Will County detectives. After the verdict, the parties agreed to a settlement in which Fox was assigned any claims the detectives had against the county's insurance companies. Fox filed this suit seeking a declaratory judgment that AAIC, the insurer, had breached its duty to defend the detectives in the earlier suit. The suit also included two breach of good faith duty claims: (1) failure to reasonably settle the claims within policy limits, and (2) failure to inform the detectives of conflicts of interest created by joint representation and Fox's punitive damages claim. The Seventh Circuit affirmed the judgment of the district court and determined that no good faith duties were breached.

Fox v. American Alternative Ins. Corp.

Kevin Fox brought suit against several detectives from Will County, Illinois, asserting multiple claims including wrongful arrest and malicious prosecution. The Will County detectives were covered by the county's insurance policies. The county had a primary insurance policy of $1 million with St. Paul Fire & Marine Insurance Company. It also had two excess insurance policies for $5 million. The first layer of excess insurance coverage was provided by AAIC. Fox's suit proceeded to trial where the detectives were represented by a firm retained by St. Paul. The detectives were not informed that joint representation by a single law firm could create a potential conflict of interest or that another conflict of interest could arise due to Fox's claims for punitive damages (the insurance policies did not cover punitive damages).

The jury returned a verdict for Fox of $15.5 million, including $6.2 million in punitive damages. St. Paul exhausted its coverage by paying its $1 million of coverage under the primary policy. At that point AAIC took control of the defense. The detectives had, however, already entered a settlement agreement with Fox. The detectives received a release of all personal liability for the damages, and Fox was assigned any claims the detectives had against the insurers.

Fox brought suit against AAIC seeking a declaration that AAIC breached its good faith duties. AAIC moved to dismiss the complaint for failure to state a claim, which the district court granted.

AAIC was not the primary insurer, so its duty to defend and reasonably settle claims was first triggered when St. Paul exhausted its policy limits. After that point, Fox had to make a reasonable settlement demand that was within AAIC's policy limits for AAIC to have a duty to settle. There was no evidence indicating that Fox made such a demand after the duty to defend passed to AAIC. Furthermore, AAIC was not required to seek out or initiate fresh negotiations. Accordingly, that claim was properly dismissed.

Regarding the second breach of good faith duty claim, Fox asserted there were conflicts of interest associated with the demand for punitive damages, as well as with the joint representation at trial. A conflict due to punitive damages, however, does not arise automatically whenever punitive damages are sought. There is only a conflict whenever plaintiff seeks vastly more punitive damages than compensatory damages. Here that was not the case. In addition, even if such a conflict had existed, it did not exist whenever AAIC assumed control of the defense. By that time the detectives had settled with Fox and were no longer personally liable for the damages.

Finally, the Court determined that there was no conflict in using the same law firm to jointly represent the detectives. Fox failed to explain why joint representation automatically created a conflict, which usually only occurs when the insureds' interests conflict. No conflict existed because of the settlement by Fox with the detectives. In addition, the compensatory damages award had been fully satisfied. Fox could not establish that the detectives suffered any harm because of this alleged conflict. AAIC, therefore, violated no duty of good faith.

This case demonstrates some of the challenges encountered when prosecuting bad faith claims against excess insurers. That is especially true when the "violations" took place before the duties owed by the excess carrier had been triggered. The Seventh Circuit ruled that before then, the Illinois excess insurer owed no good faith duty to the insured.

By Anthony L. Martin & Cody Hagan

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