

BAD FAITH BLOG

# The Absence of Bad Faith Diminishes Potential Consequential Damages Award

AUTHOR: SANDBERG PHOENIX

**Summary:** Burgraff was injured when a Menard employee was loading Burgraff's vehicle with materials purchased from Menard. Burgraff's vehicle and trailer were insured by Millers First Insurance Company (Millers First). Menard was self-insured up to \$500,000 and had an excess layer of \$500,000 with CNA. During mediation Millers First agreed to settle Burgraff's claim for \$40,000. In exchange for the payment of \$40,000, Millers First would be fully discharged as would "one-sixth of any liability that Menard, Inc. may have to [ ] Burgraff." Millers First then stopped defending Menard. Menard did not settle so the tort case proceeded to trial. The circuit court, thereafter, ruled Millers First had no further defense obligation to Menard, the court of appeals reversed, and the Supreme Court of Wisconsin agreed Millers First had a duty to defend Menard through trial.

Burgraff v. Menard, Inc. 875 N.W.2d 596, (WI 2016)

The Supreme Court of Wisconsin found that Menard's tender to Millers First was proper because Menard was a permissive user of Burgraff's vehicle at the time of the accident. Furthermore, because Millers First had not paid its \$100,000 liability limit, it had a continuing duty to defend Menard notwithstanding Millers First's settlement with Burgraff. The Court agreed that Menard's \$500,000 self-insured retention was "other applicable liability insurance" within the meaning of the Millers First policy's "other insurance" clause. Even though the operation of that other insurance clause called for a pro rata sharing of the duty to indemnify, that clause did not terminate Millers First's duty to defend before exhaustion of the limits. For those reasons, Millers First's withdrawal after making its \$40,000 payment was a breach of its duty to defend.

Millers First's breach of its duty to defend subjected it to consequential damages that the trial court would have to award on remand. Under Wisconsin law, the consequential damages an insurance company must pay after it breaches its duty to defend are all "damages necessary to put the insured in the same position he would have been in had the insurance company fulfilled the insurance contract." Menard argued that Millers First was required to pay "(1) the amount of the judgment or settlement plus interest; (2) costs and attorney fees incurred by the insured in defending the suit; and (3) any additional costs that the insured can show naturally resulted from the breach." The Court ruled Menard was asking for too much.

The Court noted that Menard had a \$500,000 self-insured retention and had to show that it was worse off due to the breach. Menard was not entitled to a windfall due to the Millers First's breach of the duty to defend. Any such windfall would be "punitive in nature to the insurer." The Court stated that "punitive damages are not awarded unless an insurance company acts in bad faith." In the *Burgraff* case Menard had not alleged that "Millers First acted in bad faith when it withdrew its defense from Menard."

To require Millers First to pay the entire verdict in the case would be a windfall for Menard in light of its \$500,000 self-insured retention. Menard was unable to demonstrate that "the amount of the jury verdict was a result of the breach. Menard chose its own counsel and there is no assertion that it would have achieved a better result at trial had Millers First chosen Menard's counsel." In addition, there was no excess judgment and the amount of the jury verdict was not the natural outcome of the breach of the duty to defend.

In Wisconsin an insurance carrier that breaches its duty to defend while a coverage determination is pending takes the risk that a ruling on appeal will be adverse. Because Millers First had not settled with Burgraff in a fashion that eliminated its duty to defend, it was required "to pay damages to Menard in the amount of costs and attorney fees" incurred by Menard after Millers First breached its duty to defend. Because Millers First had not acted in bad faith and there was no allegation that it acted in bad faith, it had no duty to pay anything beyond the attorney fees and costs incurred after it withdrew from Menard's defense after paying Burgraff \$40,000 and agreeing to pay its pro rata share of any verdict imposed. The Court's ruling was crafted to avoid a windfall in favor of Menard which punished Millers First.