SANDBERG PHOENIX

BAD FAITH BLOG

Illinois Appellate Court Strikes Down "Bad-Faith" Pattern Instructions

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A six-person jury returned a verdict against the Illinois State Medical Inter-Insurance Exchange Mutual Insurance Company ("ISMIE") for bad-faith failure to settle. ISMIE argued on appeal that, among other things, trial of the bad faith claim to a six-person jury was unconstitutional. The 1st District Court of Appeals agreed and gave retroactive effect to an Illinois Supreme Court decision holding a recent statutory change limiting juries in civil cases to six people was unconstitutional.

However, the Appellate Court exercised its discretion and addressed other issues raised on appeal to guide the trial court upon remand. Most importantly for insurers, the Court found instructional error in how the bad faith claim was submitted to the jury, and found Illinois' pattern jury instructions on bad faith, which have not been amended or updated in decades, did not fairly and accurately state the law of Illinois regarding bad faith failure to settle. The court also ruled on an evidentiary issue and held that evidence of settlement negotiations within the bad faith litigation itself are inadmissible – and irrelevant – to the issue of whether an insurer acted in bad faith in failing to settle the underlying claim.

The case is significant, although its impact is not completely known yet since the court did not propose any language to be used in a non-pattern instruction comporting with Illinois law. How the lower courts interpret this mandate and develop non-pattern instructions, which will no doubt ultimately be reviewed by the Appellate Court in the future (and possibly the Illinois Supreme Court) will determine the true import of this decision. Nevertheless, it is significant to insurers who do business in Illinois.

Alizabeth Hana and Elvin Hana v. Illinois State Medical Inter-Insurance Exchange Mutual Insurance Company

This case arose out of a medical malpractice wrongful death lawsuit. Some of the parties settled prior to trial and the case proceeded to trial against two doctors and a clinic. After an adjustment of the damages awarded by the jury to account for the amount received in the settlement, the doctors and clinic appealed. When the judgment was affirmed on appeal, ISMIE paid its policy limits toward satisfaction of the judgment. However, there was still $1.3 million of the judgment left unsatisfied, which led to the doctors and clinic entering into a covenant not to execute with the plaintiffs – to ensure any collection of that amount would be solely against ISMIE – in exchange for assigning their potential bad faith claim over to plaintiffs.

A bad faith lawsuit was subsequently filed. Pursuant to Public Act 98-1132 (eff. June 1, 2015), which amended section 2-1105(b) of the Illinois Code of Civil Procedure, plaintiffs sought to have their bad faith claim tried to a six-person jury, which was allowed over ISMIE's objection. The bad faith claim resulted in a judgment against ISMIE for the remaining amount of the unsatisfied underlying judgment as well as $13 million in punitive damages and in excess of $1.5 million more in costs, attorneys' fees, interest and penalties. ISMIE appealed and asserted multiple issues on appeal ranging from claims trying the case to a six-person jury was unconstitutional to alleging various instructional and evidentiary errors.

The appellate court reversed. It found dispositive ISMIE's constitutional challenge of the change in Illinois' Code of Civil Procedure prohibiting 12-person juries in civil cases. Specifically, the Court relied on a decision by the Supreme Court of Illinois in *Kakos v. Butler*, 2016 IL 120377, finding section 2-1105(b) to be unconstitutional because the size of the jury – 12 people – "was an essential element of the right of trial by jury enjoyed at the time the 1970 Constitution was drafted." 2018 WL 1384077 * 2. As a result, the Court found ISMIE was denied a fair trial and held the case had to be remanded for a new trial. Id. at * 2-3.

The court did not stop there, however, as it found several of the other issues raised by ISMIE in its appeal should be addressed in order to provide guidance to the trial court on how to proceed on remand for the new trial in order to "expedite the ultimate termination of the litigation." *Id*. at * 4. Specifically, the court concluded it needed to address issues related to the admissibility of evidence and how the jury should be instructed.

First, it addressed the admissibility of a 2013 letter from plaintiff's counsel to ISMIE – which was allowed into evidence at the first trial – offering to settle the bad faith case for the $1.35 excess portion of the underlying judgment. Plaintiffs argued this was relevant to whether ISMIE had committed bad faith but the Court disagreed. The Court held that settlement negotiations within the bad faith case are not only inadmissible but irrelevant as to whether ISMIE committed bad faith with regard to the underlying lawsuit. The Court found a 2013 settlement demand bore no relevance to alleged conduct that led to a 2009 excess judgment. *Id*. at * 5.

Second, it addressed the jury instructions given. The jury was instructed using Illinois Pattern Jury Instructions, Civil, Nos. 710.02 and 710.03. ISMIE proposed modified instructions, which were rejected. 710.02 is the pattern issues instruction and 710.03 is the pattern burden of proof instruction in bad faith cases. Both instructions "provide that a plaintiff must generally establish that the insurer had a 'reasonable opportunity' to settle the underlying lawsuit against its insured within the policy limits." *Id*. However, the Court noted that neither of these instructions have been amended "in decades" and "each instruction relied upon an understanding that the 'Illinois Supreme Court has yet to define the duty or the elements of this cause of action.'" *Id. at * 5-6, quoting Illinois Pattern Jury Instructions, Civil*, 7.10.00 Intro. (2011). However, given that the Illinois Supreme Court has, in fact, recently addressed and defined the duty or elements of bad faith, the court concluded these instructions no longer reflect the "current state of the law in Illinois." *Id*. The court noted the Illinois Supreme Court has specifically held:

The duty does not arise at the time the parties enter into the insurance contract, nor does it depend on whether or not a lawsuit has been filed. The duty of an insurance provider to settle arises when a claim has been made against the insured and there is a *reasonable probability* of recovery in excess of policy limits and a *reasonable probability* of a finding of liability against the insured. Since Illinois law generally does not require an insurance provider to initiate settlement negotiations [citations], this duty also does not arise until a third party demands settlement within policy limits.

Haddick ex rel. Griffith v. Valor Insurance, 198 Ill. 2d 409, 417, 261 Ill.Dec. 329, 763 N.E.2d 299 (2001) (emphasis in original).

Since the Illinois Supreme Court has defined the duty to include the "reasonable probability" of liability in excess of the policy limits is "at least more likely than not, but not necessarily a certainty," the court found the pattern jury instructions no longer reflected Illinois law. 2018 WL 1384077 at * 6, quoting *Powell v. American Service Insurance Co.*, 2014 IL App (1st) 123643, 7 N.E.3d 11. However, although the Court held the pattern instructions should no longer being used, it did not instruct the trial court, or provide any specific guidance regarding what language should be included in a correct non-pattern instruction. *Id*. Instead, the court held generally finding that corrected, non-pattern instructions for bad faith should be crafted in place of 710.02 and 710.03 and "must reflect the holdings in *Haddick and Powell*." *Id*.

The court also found error in how the trial court had given a modified version of 710.07 on damages. Interestingly, and to the contrary of how it handled the bad-faith instructions where it only gave general guidance, the court provided specific guidance and instructions to the trial court on how the damages instruction should be given on remand. The implications of this case remain to be seen, as the Court was attempting to balance the desire to make sure the instructions are proper upon remand with not infringing too much on issues typically left to the trial court's discretion. However, this decision accomplished three things. First, it reaffirmed that an insurer in a bad faith case has a constitutional right to a 12-person jury. Second, it affirmed that it is the conduct of the insurer in failing to settle the underlying claim that is relevant, not its conduct in evaluating settlement within the bad faith case itself. Finally, and most significantly for insurers in Illinois, the court found that the pattern jury instruction on bad faith are not accurate statements of the law, and must be restated.

The court may have chosen not to approve any specific language for a non-pattern instruction so as to minimize the possibility of the Supreme Court of Illinois choosing to weigh in on this issue presently, and also likely to preserve the trial court's considerable discretion and duty to review proposed instructions to ensure they are a fair statement of the law. However, both in noting that pattern instructions are preferred, and that instructions 710.02 and 710.03 have not been amended in decades, the Court seems to be clearly inviting an amendment of the pattern instructions to reflect the current state of bad faith law in Illinois.

Insurers doing business in Illinois should be aware of this decision not only because it held that a six-person jury is unconstitutional, it also found that the Illinois Pattern Instructions pertaining to bad-faith failure to settle are no longer fair and accurate statements of the law and invited the courts to create a non-pattern instruction to fairly state the current law.