SANDBERG PHOENIX

BAD FAITH BLOG

Under Florida Law Court Agrees the Insured and the Insured's Attorney's Conduct Are Relevant to Bad Faith

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An insured motorist who sustained injuries in a motor vehicle accident brought a first party bad faith action alleging the automobile insurer acted in bad faith in attempting to settle the claim for underinsured motorist (UIM) benefits. The district court granted summary judgment for the insurer; however, the Eleventh Circuit held that although actions of the insured or the insured's lawyer were part of the "totality of circumstances" to be considered in bad faith claims, there were factual issues that still existed precluding summary judgment. Therefore, the Eleventh Circuit vacated and remanded for further proceedings.

Cousin v. GEICO General Insurance Company

The insured's bad faith claim arose from a June 2009 car accident in which she and her husband both sustained serious injuries after another vehicle struck their car. The same day as the accident, the insured reported it to both her insurer and the insurer of the at-fault vehicle. By coincidence, it was the same insurer for both parties.

After retaining a lawyer, the insured sent a letter demanding the $10,000.00 bodily injury limit under the at-fault driver's policy. The insurer paid the $10,000.00 limit within days of the demand.

Following payment, the insured's attorney notified the adjuster assigned to the insured's UIM case and demanded payment of the full $100,000.00 UIM limit. The insured's attorney also enclosed a demand package, which included medical records showing injuries to her leg, knee, neck and shoulder. Simultaneously with the UIM demand, the insured's lawyer also filed the first of two Civil Remedy Notice of Insurer Violations ("CRN"), which are required under Florida statute to give the insurer 60-day notice of any alleged violation. The insurer then has a 60-day window to comply with claims handling obligations and if damages are paid or the alleged violation is otherwise corrected, then there is no action under the Florida statute §624-155. The CRN asserted the insurer acted in bad faith by failing to offer anything in settlement for the UIM claim despite serious injuries. The insured's lawyer also submitted additional medical records; however, some of these medical records pre-dated the accident.

Based upon the information provided by the insured, the insurer completed its review of the UIM claim and determined the information available to it was limited and it requested personal injury protection logs, lost wage information and medical billing information in order to properly evaluate the claim. This same information was requested at least two additional times over the course of the next month. Finally, the insured's lawyer provided an update and noted the insured's fractured tibia had received a positive prognosis and was healing, but that she was still experiencing tremendous back pain for which she had already began treatment. The insured had also met informally with her husband's neurosurgeon and the neurosurgeon had reviewed her MRI films and requested she schedule an appointment to explore a lumbar fusion procedure. However, the insured's attorney did not provide anything in writing directly from the neurosurgeon which opined on the insured's condition. Moreover, the insured still had not provided the requested personal injury protection logs or lost wage information.

At the end of the first 60 day CRN cure period, the insurer responded that it received the additional medical records, but still needed medical bills, personal injury protection logs, any recommendation for surgery, and lost wages documentation. Based upon the lack of quantifiable damages and the $10,000.00 bodily injury benefits already paid, the insured offered approximately $5,000.00 to resolve the UIM claim. The insured also reiterated its requests for additional information and asked if it could conduct an independent medical evaluation ("IME") per its rights under the policy.

Following this settlement offer from the insurer, the insured provided additional medical bills and evidence of lost wages totaling approximately $2,000.00. The insured's lawyer also filed a second CRN asserting the insurer had again acted in bad faith by failing to make a timely, reasonable offer to settle the UIM claim despite being presented with documentation supporting a very serious set of injuries. Later, an IME was scheduled but rescheduled at the insured's counsel's request. The insured's counsel also finally provided personal injury protection logs showing the insured had received an additional $10,000.00 under her personal injury protection coverage with the same insurer.

Before the rescheduled IME could take place, the insured's counsel informed the insurer that the insured was not medically able to undergo the IME for at least another three weeks because she had recently had a procedure performed by the neurosurgeon on her back. The surgeon's bill was for approximately $27,000.00. The insurer was told the total out-of-pocket expenses thus far were approximately $60,000.000. The insured had also filed a state court lawsuit and threatened to perfect service on the insurer if she did not receive the full $100,000.00 UIM policy limits. The insurer responded by sending a letter outlining its previous efforts to resolve the insured's UIM claim, including its repeated attempts to gather the necessary documentation and scheduling an IME, and its belief the cost of the surgery was excessive and not reasonable, and would be reviewed for proper coding and pricing. However, the insurer increased its settlement offer to approximately $14,000.00.

The insured's attorney responded the next day with a letter of his own expressing his confidence a jury would agree that the insurer had failed to offer a reasonable amount. His letter also included the first hard evidence linking the car accident to a permanent injury in the form of a report from the neurosurgeon stating his belief the insured sustained a permanent lumbar injury as a result of the accident. The insured's lawyer provided a short extension of the deadline to pay the full $100,000.00 UIM policy limits otherwise the offer would be withdrawn.

At the end of the second 60-day CRN period, the insurer sent a letter to the insured stated the parties had a difference in opinion as to the value of the case, and because a lawsuit had already been filed, the case would be handled by the insurer's attorneys' office.

The state court bad faith action was tried and the jury rendered a verdict in the insured's favor and against the insurer in the amount of $1.3M, which the state court reduced to the UIM policy limits of $100,000.00. In an attempt to collect the balance of the award, the insured filed a lawsuit in United States District Court for the Middle District of Florida alleging again that the insurer had acted in bad faith in handling her UIM claim. The district court granted summary judgment in favor of the insurer and found that it was the insured's lawyer's delay in providing the necessary information to make an informed offer frustrated the attempts to conduct a meaningful evaluation of the insured's claim before the deadline.

The insured appealed the summary judgment ruling and the appellate court found that although the bad faith claim derives from and emphasizes the duty of the insurer to the insured, the conduct of an insured and an insured's attorney are relevant to determining the realistic possibility of settlement within the policy limits. The appellate court found the lower court did not run afoul of Florida law by considering the actions or inactions of the insured and whether those actions impeded the investigation and ability to settle reasonably within the policy limits. For instance, by filing the first CRN asserting the insured had handled the UIM claim in bad faith on the same day the initial UIM demand was communicated and providing the first hard evidence of a permanent injury after the original lawsuit was filed were factors that should have been taken into consideration.

However, the appellate court found fact issues remained which needed to be tried to a jury. The appellate court acknowledged Florida courts have had at times resolved bad faith claims as a matter of law where undisputed facts would allow no reasonable jury to conclude that an insurer acted in bad faith. However, the general rule is that the issue of bad faith is a question for the jury. Here there was, for instance, a dispute as to the reasonableness of the billing for the insured's procedure and the adequacy, in light of this procedure, of the second settlement offer by the insurer. Under Florida's "totality of the circumstances" approach, the reasonableness and adequacy of an insurer's settlement offer are relevant factors to be considered when determining bad faith and as such constituted genuine issues of material facts that precluded summary judgment in this case.

Insurers handling claims in Florida should be mindful of the conduct of the insured and the insured's lawyer in attempting to set insurers up for bad faith claims. Insurers should remain reasonable in their requests for additional information and additional time to evaluate claims and document these requests in writing and explain why additional time or additional information is necessary and reasonable. If the insured or the insured's attorneys do not timely provide information or reasonably provide additional time to evaluate information, it could be a factor used against them in any subsequent bad faith claim.