MEALEY'S™ LITIGATION REPORT

Insurance Bad Faith

Causal Friday: Better To Be Lucky Than Good

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Commentary

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By
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[Editor's Note: Julius F. "Rick" Parker III is a partner with the law firm of Butler Pappas Weihmuller Katz Craig LLP, which has offices in Tampa, Chicago, Charlotte, Mobile, Tallahassee, Philadelphia, and Miami. He is an experienced litigator in the firm's Third-Party Coverage and Extra-Contractual Departments. This commentary is the author's opinion, not the opinion of Butler Pappas or Mealey's. Copyright © 2013 by the author. Responses are welcome.]

Sometimes it is better to be lucky than good, as the insurers in the following cases learned. These cases demonstrate that, even where the facts indicate that the insurer acted in bad faith, it is still possible for the insurer to escape extra-contractual exposure. In the absence of a causal link between the excess judgment and the insurer's actions, bad faith liability cannot exist as a matter of law.

Barnard v. Geico Gen. Ins. Co.

In *Barnard v. Geico Gen. Ins. Co.*,[1] the insurer, Geico General, tendered its $10,000 policy limits to Robin Baxley, the personal representative of the Estate of Michael Scarberry, shortly after its insured caused an accident which resulted in Mr. Scarberry's death. Geico's insured was driving a vehicle owned by her parents, Winnie and Raymond Paulk. The release included with the settlement check only included as releases the daughter, Layura Sellers, and Winnie Paulk. After months of a complete lack of response to the offer by the plaintiff's attorney, Geico sent an additional check and release after the first check became stale. Again, the plaintiff ignored Geico and ultimately filed suit against the insureds, who quickly entered into a consent judgment for $2,500,000. The plaintiff then sued Geico for bad faith.

The federal district court granted summary judgment in Geico's favor and the plaintiff appealed. The Eleventh Circuit affirmed the ruling, explaining:

> Baxley also emphasizes that the initial releases—proposed by Geico but never signed by Baxley—do not include the name of Raymond Paulk. Baxley explains that this exclusion can give rise to an inference of bad faith because, if they had been signed, Raymond Paulk would have been subject to personal liability. We agree with the district court that this was a negligent oversight that falls far short of bad faith contemplated by this cause of action. Moreover, because these releases were never executed, the failure to include Raymond Paulk's name does not in any way constitute causation for the liability in excess of the policy. *See Perera v. U.S. Fid. & Guar. Co.*, 35 So. 3d 893, 903–04 (Fla. 2010) ("[T]here must be a causal connection between the damages claimed and the insurer's bad faith.").[2]

The lesson from *Barnard* is that, when settling a claim with minimal limits, claims professionals must be aware of any potential vicariously liable parties and include them as releasees. In Florida, if the driver of the vehicle is a minor, there will always be a vicarious liability claim against one of the parents of the minor, because Florida mandates the assumption of liability for accidents caused by a minor by one of the minor's parents as a pre-condition to licensure.[3]

Frankenmuth Mut. Ins. Co. v. Keeley

In *Frankenmuth Mut. Ins. Co. v. Keeley*,[4] the insurer retained counsel for its insured. However, during the defense of a suit against the insured, it was revealed that counsel for the insured was also representing and advising the insurer regarding coverage. During the pendency of the action, the insurer offered $25,000 to the plaintiff, which offer was refused. The insurer later offered the policy limits of $50,000, which was also refused. The case was then tried resulting in a $250,000 judgment against the insured.

The claimant then sought to recover the excess from the insurer under a bad faith theory. The trial court determined that the insurer acted in bad faith with regard to the dual representation, but held that the bad faith was not the cause-in-fact of the excess judgment. Since the plaintiff never accepted the policy limits offer, causation was lacking. The Michigan Supreme Court agreed and held as a matter of law that the insurer was not liable for the excess judgment.

Peckham v. Continental Cas. Co.

In *Peckham v. Continental Cas. Co*,[5] a husband was seriously injured in a car accident caused by Continental Casualty's insured. At the time the parties were negotiating settlement, Massachusetts law was unsettled regarding whether a loss of consortium claim constituted a separate injury to the wife, such that the policy's per-accident limit, rather than its per-person limit, would apply. However, a case was pending in the Massachusetts supreme court, which would address that precise question.[6] Accordingly, Continental Casualty offered the per-person limit, subject to the *caveat* that, if the Massachusetts court ruled that the consortium claim was a separate bodily injury claim, it would offer the remaining per-accident limit.

Plaintiffs refused this offer and proceeded to trial, resulting in a judgment in the amount of $3,075,000. Plaintiffs then sought to recover the excess from Continental Casualty. The trial court submitted the bad faith question to a jury, which found that, while Continental acted in bad faith, its bad faith was not the proximate cause of the excess judgment. The First Circuit affirmed, finding that the jury could have believed:

> that CNA breached its duty to Tripp by failing to offer a *Bilodeau* agreement earlier than March 1984, but that this failure had no causal effect because, given Corey's intransigence, he would have spurned such a proposal (as indeed happened when the carrier tendered a *Bilodeau* agreement in March 1984).
>
> 2. The jury could have believed that CNA's bad faith refusal to settle Scott Peckham's claim occurred in the winter of 1983-84 and stemmed from its failure to acknowledge the possibility of JoAnne Peckham's entitlement to an independent application of the "per person" limits. The causal chain could have snapped, however, because CNA made a curative offer in March 1984, when it proposed entering into a *Bilodeau* agreement-and it was never proved that Corey told the Peckhams about that proposal. The jury could, therefore, have believed that the Peckhams, if apprised, would have accepted the agreement, thus ending the matter.[7]

Thus, Continental Casualty dodged a large caliber bullet.

Lessons from *Frankenmuth* and *Peckham* are more difficult to discern. However, as all three cases show, when analyzing a bad faith claim, practitioners should look closely at the causation question as a possible means of exoneration. It is all too easy when analyzing a bad faith claim to focus simply on the claims handling to determine whether the insurer faces extra-contractual exposure. But if the end result would have been the same, then the bad faith claim vanishes.

Endnotes

1. Barnard v. Geico Gen. Ins. Co., 448 Fed. App'x 940 (11th Cir. 2011).
2. Barnard, 448 Fed. App'x at 944.
3. *See* Fla. Stat. § 322.09 (2012).
4. Frankenmuth Mut. Ins. Co. v. Keeley, 436 Mich. 372 (1990).
5. Peckham v. Continental Cas. Co., 895 F.2d 830 (1st Cir. 1990).
6. *See* Bilodeau v. Lumbermens Mut. Cas. Co., 467 N.E.2d 137 (Mass. 1984).
7. Peckham, 895 F.2d at 838. ■

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