Practical Tips On Genuine Dispute And Advice of Counsel

by Bill Daniels

Introduction

The good news is, insurers have pushed so hard on the genuine dispute doctrine as a defense to bad faith that it may be the courts, both state and federal, are starting to push back. The bad news is, the common law develops *slowly*, so insurance bad faith litigation remains a challenging area.

As for the advice of counsel defense, it seems that genuine dispute has been so powerful for carriers that to the extent advice of counsel is used, it no longer plays a leading role. Even so, practitioners need to keep a weather eye out to avoid getting surprised at trial. It's simple to do, but you will need to add the prophylactic measures described below to your bag of tricks.

Defining the Limits of Genuine Dispute

As you probably already know, the genuine dispute doctrine really found its feet as a powerful defense in 2001 *Guebara v. Allstate Ins. Co.* (9th Cir. 2001) 237 F.3d 987 (no bad faith where there is genuine dispute over carrier's legal obligation) and *Chateau Chamberay v. Associated Intn'l Ins. Co.* (2001) 90 Cal.App.4th 335 (an insurer cannot be liable for bad faith if there is an objectively reasonable dispute about coverage). Simply put, genuine dispute gives the trial court broad powers to dismiss bad faith and punitive damages on summary adjudication.

At the time *Chateau Chamberay* was published, many defense minds crowed that it spelled the end of bad faith. Of course, it hasn't, but it has encouraged carriers to push the envelope.

Two recent Court of Appeal decisions, *Delgado* and *Jordan*, highlight the trend towards refining genuine dispute rather than expanding its reach.

Delgado v. Interinsurance Exch. of the Auto. Club of So. Cal. (June 25, 2007) 152 Cal.App.4th 671, declined to apply the defense to a factual dispute in a third party failure to defend case.
As we have shown, a *potential* for coverage *establishes* the duty to defend. Such a potential *necessarily* arises from the existence of a factual dispute as to coverage under the policy. Thus, an insurer faced with a pleading such as the one filed against the insured Reid in this case, would have no reasonable basis for concluding that a defense obligation was not owed, at least until it could conclusively negate the possibility of coverage raised by such pleading. It was the very existence of the unresolved factual dispute, raised by that pleading, over whether Reid's actions were intentional or negligent that created the *potential* for coverage in the first place, thereby *establishing* the duty to defend.
Id. at 692-693.

In *Jordan v. Allstate Ins. Co.* (Apr. 20, 2007) 148 Cal.App.4th 1062, summary judgment was reversed where there was evidence of the carrier's failure to conduct a full, fair investigation in the context of a homeowner claim, even though the carrier's interpretation of policy terms was reasonable.
As we made clear in [*Chateau Chamberay*], where an insurer denies coverage but a reasonable

investigation would have disclosed facts showing the claim was covered, the insurer's failure to investigate breaches its implied covenant. The insurer cannot claim a "genuine dispute" regarding coverage in such cases because, by failing to investigate, it has deprived itself of the ability to make a fair evaluation of the claim. Thus, although Allstate's interpretation of a policy exclusion was reasonable, it also had a duty to investigate Jordan's coverage claim that was based on the "additional coverage" provisions relating to an "entire collapse," which we held, in [our prior opinion in this case] was also reasonable and consistent with Jordan's objectively reasonable expectations.
Id. at 1074.

Other cases you should consider in framing your discovery and summary judgment/adjudication oppositions are:

United Investors Life Ins. Co. v. Grant (E.D.CA Feb. 15, 2007) 2007 WL 521804. Bench memorandum denying in part and granting in part summary adjudication. Life insurance policy claim where the decedent was murdered and the beneficiary spouse was not eliminated as a suspect. (California Probate Code § 252 prohibits a beneficiary involved in a murder from collecting on a policy insuring the life of the victim.) After fourteen months, carrier filed interpleader for face amount of the policy ($518,616.44). Surviving spouse cross-complained for bad faith and other claims. Held: In California, unreasonable delay in paying a covered claim may support a bad faith claim. Carrier could not rely on genuine dispute doctrine to avoid the general proposition that delay in paying an admittedly payable claim may be actionable. Claims for intentional and negligent infliction of emotional distress, coverage by estoppel and punitive damages dismissed.

NOT CITABLE BY WATCH FOR DEVELOPMENTS: *Wilson v. 21st Century Ins. Co.* (Jan. 30, 2006) 136 Cal.App.4th 97, rev. granted April 26, 2006. Underinsured motorist claim with $100,000 policy limit. Auto v. auto accident, other driver carried $15,000 limits. Plaintiff claimed orthopedic injuries valued at $500,000 to $1.5 million. 21st Century adjuster evaluated as soft tissue with pre-existing degenerative disc disease and stated plaintiff was fully compensated at $20,000 ($15,000 from adverse driver, $5,000 in medpay). After two year delay, plaintiff was evaluated by 21st Century neurosurgeon who examined plaintiff and reviewed medical records, concluding surgical intervention was indicated. Less than one month after the report, 21st Century paid the remaining amount of UIM coverage available, $85,000. Plaintiff filed suit for bad faith delay. Trial court granted summary judgment. Court of Appeal reversed. Held: Genuine dispute doctrine did not provide a defense because there were triable issues as to whether 21st Century fulfilled its duty to conduct a thorough investigation of the claim. "The key word here is 'genuine.' As the *Chateau Chamberay* court recognized, the genuine dispute defense does not apply when the dispute arises because 'the insurer failed to conduct a thorough investigation.' In other words, a breach of the covenant of good faith and fair dealing can be found even where the insurer harbors actual doubts about the amount of benefits which should be paid on a covered claim if a reasonable investigation would have disclosed information making those doubts no longer tenable." Opinion at 520. Note: This is a useful case for anyone handling a UM or UIM claim. The discussion of Colossus is especially valuable. However, it is not citable authority.

Bernstein v. Travelers Ins. Co. (N.D.Cal. Aug. 28, 2006) 447 F.Supp.2d 1100. Plaintiff's discovery motion seeking to obtain reserve information. Underlying case seeks bad faith for carrier allegedly delaying payment and making a lowball offer in hopes of forcing insured to settle a property claim for less than fair value. Defense argued information is irrelevant. Court cited *Lipton v. Superior Court* (1996)

48 Cal.App.4th 1599 (which authorized such discovery), as helpful but not controlling, though noting that federal Rule 26 discovery is narrower than California's Discovery Act and because of recent genuine dispute case law.
Held: Motion granted with protective order.

[U]nder California law, there are limits to the applicability of the genuine dispute doctrine -- and [] courts should take care not to extend the use of that doctrine so far that it obliterates across the board the fundamental precept that the requirement of "good faith and fair dealing" imposes both a subjective and an objective duty. In other words, despite (or maybe even especially in view of) the creep of the genuine dispute doctrine, California court should not forget **that "an insurer's bad faith is ordinarily a question of fact to be determined by the jury by considering the evidence of motive, intent and state of mind." *Chateau Chamberay*, 90 Cal.App.4th at 350.**
Bernstein, 447 F.Supp.2d at 1114 (emphasis in original).

Century Surety Co. v. Polisso (May 22, 2006) 139 Cal.App.4th 922. Bad faith and punitive damage verdict for failure to defend and indemnify a third party claim. Defendant carrier contended awards must be reversed because of genuine disputes as to its legal liability under CGL policy and floater. Held: Verdict affirmed. The carrier's conduct is judged according to its conduct during the claim, not in hindsight. The carrier knew that it had a duty to defend, but engaged in unfair conduct and pressure tactics to try to escape paying for a full defense. No legitimate dispute regarding coverage for defense or indemnity. Note: This is a good case to illustrate how far a carrier will go to wriggle out of its obligations. The underlying file must be humongous! Also, in upholding the $2,015,000 punitive award, the Court of Appeal observed that at "only 3.2 percent" of the carrier's net worth, anything less "would not amount to much more than a slap on the wrist." Finally, the jury found the defendant had not reasonably relied on the advice of counsel. The defendant did not challenge this finding on appeal.

Dealing with the Advice of Counsel Defense.

The advice of counsel defense seems to have lost its luster since the blossoming of genuine dispute. Even so, it can directly impact your ability to claim bad faith and punitive damage, so it cannot be disregarded.

Since advice of counsel need not be pled as an affirmative defense (*State Farm Mut. Auto. Ins. Co. v. Superior Court* (1991) 228 Cal.App.3d 721, 725-726), it is up to you to determine in discovery whether or not it will be a factor in your case.

I routinely propound a special interrogatory asking if the defendant is relying on advice of counsel ("Are you relying on advice of counsel as a defense in this matter?) and then add a request for admission for good measure ("Admit you are relying on defense of counsel as a defense").

Nine times out of ten the response is that the defense will not be raised. However, if you do not propound the discovery, it allows the defendant the option of springing it on you at trial.

The elements of the advice of counsel defense are: (1) That the carrier acted in good faith reliance upon the advice of counsel, (2) the carrier was not so knowledgeable as to the legal standard involved that it knew the advice of counsel was erroneous, (3) it made a full disclosure of all relevant

facts to counsel and (4) the carrier was willing to reconsider and act accordingly when it determined the lawyer's advice was incorrect. *See*, *Melorich Builders, Inc. v. Superior Court* (1984) 160 Cal.App.3d 931, 936-937.

What's great about the defense is that, in raising it during a case, the carrier waives the attorney client privilege as to all relevant communications. This is a big reason why defendants are leery about using advice of counsel.

If you find yourself facing advice of counsel as a defense in your case, check out the Rutter Group's Cal.Prac.Guide Ins.Lit. Ch. 12D-F (Insurer's Reliance On Advice Of Counsel) to educate yourself on the scope of the defense and discovery tips you can utilize. Then, ask yourself how the attorney advice will play into genuine dispute. (Also, see 16 Am.Jur. Proof of Facts 3d 419 (Insurance Bad Faith Actions -- "Advice of Counsel" Defense).)

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