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by: Colin E. Flora
Associate Civil Litigation Attorney

Insurance Bad Faith Claims Involving a Decedent's Estate: ***Pistalo v. Progressive***

As a general rule, an insurance company is not liable to an injured person for a judgment in excess of the policy limits of its customer's insurance policy. However, this general rule gives way in certain circumstances where the insurer has acted with bad faith in resolving a dispute within policy limits. The basic concept being that the insurance company owes a duty to the policyholder to not expose the policyholder to personal liability – i.e. a judgment in the amount of the policy limit – where the matter could have been resolved within the policy limits.

The typical scenario that gives rise to an insurance bad faith claim is where a personal injury plaintiff offers to resolve the matter for the policy limits and the insurance carrier rejects the offer. The basis for the bad faith claim then may arise only once the plaintiff has achieved a judgment from the court that is in excess of the policy limits. Though, a recent 9th Circuit opinion – *Du v. Allstate Ins. Co.* – interpreted California law as not requiring the plaintiff to have made a demand first. This decision has been interpreted to mean, at least under California law, an insurance company has an affirmative duty to attempt to resolve a case within policy limits. However, it is important to note that *Du v. Allstate Ins. Co.* applies only to California law and has not yet been adopted by a California state court –

meaning that it is far from settled law even in California let alone anywhere else.

In the typical scenario, once a plaintiff has received his judgment, he will begin proceedings supplemental and execute his judgment against the insurance policyholder. The primary purpose for this is, usually, not to attempt to collect from the individual but to create a vehicle by which the plaintiff can sue the insurance company directly. In many states, such as Indiana, a plaintiff cannot sue a defendant's insurance company directly. However, once a judgment is taken a plaintiff can exchange his rights against the individual defendant for the individual defendant's contractual right to sue his insurance company for acting in bad faith.

This typical approach was thrown into disarray in the proceedings leading up to the recent Indiana Court of Appeals case *Pistalo v. Progressive Casualty Insurance Co*. What made *Pistalo* such a complicated matter was that (1) the defendant had passed away prior to the filing of the case and (2) no estate had been opened on behalf of the defendant until more than nine months after her passing. It is not unusual for a defendant to decease prior to a case being filed. Just think of any car accident in which the negligent driver was killed. This is a sad reality of tort law. The complicating factor was that an estate had not been opened until nine months later. Under Indiana law, a plaintiff can open an estate on behalf of a defendant so that there is some legal fictitious entity from which to seek recovery. However, where the estate is opened more than nine months after the defendant's passing, the only asset of the estate that can be claimed by a victorious plaintiff is an insurance policy.

In *Pistalo*, the insurance policy provided for coverage up to $100,000. The injured plaintiff, Mr. Pistalo, offered to resolve the case for the policy limit. The defendant's insurance provider, Progressive, refused the settlement offer and took the case to trial. At trial the jury awarded Mr. Pistalo $309,000 for his injuries. If you have been following along, you probably see where this is going next. After receiving the judgment, Mr. Pistalo instituted proceedings supplemental against the defendant's estate and sought to exchange his rights to recover against the estate for the estate's bad faith claim against Progressive. The defendant's estate did just that and Mr. Pistalo filed a case against Progressive for its breach of its duty of good faith to the policyholder. The trial judge granted summary judgment in favor of Progressive on the bad faith claim. Mr. Pistalo appealed that decision.

On appeal, the court was confronted with the peculiar issue of whether an estate that had absolutely no other asset could sustain a bad faith claim. The basic argument being that the estate has not suffered any harm by the exposure in excess of policy limits because it has no assets to lose to the plaintiff. In answering this issue, the court looked to the 1994 Court of Appeals decision *Economy Fire &*

Casualty Co. v. Collins. In *Collins*, the court sought to determine what method to apply in Indiana in terms of determining bad faith damages in an insurance case. They looked to two rules – the "judgment rule" and the "payment rule." The "'payment rule,' dictates that an insurer may be held liable for a judgment in excess of policy limits only if part or all of the judgment has been paid by the insured." Clearly, were the "payment rule" the method used in Mr. Pistalo's case, there would be no liability for the insurance company because the defendant's estate had absolutely no other assets to actually have paid to Mr. Pistalo.

Fortunately for Mr. Pistalo, and for injured persons throughout Indiana, the court in *Collins* showed more foresight and wisdom than to adopt the narrow "payment rule." Instead, the court adopted the "judgment rule." "Under the judgment rule, an insurer may be liable for the entire excess judgment, despite its insured's lack of actual partial payment or the insured's lack of capacity to pay any part of the judgment." In adopting the "judgment rule," the *Collins* court explained:

> The rationale behind allowing full recovery to an insured who has not paid the excess judgment is to prevent bad-faith practices in the insurance industry by eliminating the insurer's ability to hide behind the financial status of its insured. Further, the judgment rule prevents an insurer from benefitting from poverty of an insured who has a meritorious claim but cannot first pay the judgment imposed upon him. If payment or demonstration of ability to pay a judgment were the rule, then an insurer may be encouraged to refuse to settle a claim merely because the insured is insolvent. Such a course of action would impair the use of insurance by the poor.

Mr. Pistalo's case is precisely the scenario that this rationale sought to protect against. In accordance with the policy embodied by the "judgment rule," the court reversed the trial court and thereby held that an estate with no other asset other than an insurance policy could still hold its insurer liable for bad faith in an amount equal to the full value of the judgment.

While this is a phenomenal result for Mr. Pistalo and one clearly supported by the policies of Indiana, I fear that this is not the final say on this case. The decision was a unanimous one by the Court of Appeals, nevertheless, I fully expect that Progressive will seek transfer to the Indiana Supreme Court. So long as they uphold the appellate decision, I see two potential advantages to the Indiana Supreme Court granting transfer in this case. The first is that it will place very strong authority behind the decision and go a long way toward making this a settled issue. The second is to clarify a confusing footnote in the appellate decision. In footnote three, Judge Crone writes, "It is important to note that at the time Progressive committed the alleged bad faith, the liquidity of [defendant]'s estate had not yet been established." This footnote is puzzling to say the least. It seems to contradict the reasoning laid out in the rest of the opinion and has no merit upon the rationale behind the "judgment rule" set forth in *Collins*.

We shall certainly keep an eye on this case and monitor its progress. Join us again next time for further discussion of developments in the law.

Sources

- *Du v. Allstate Ins. Co.*, 681 F.3d 1118 (9th Cir. 2012), *amended and superseded on denial of reh'g en banc*, 697 F.3d 753 (9th Cir. 2012).
- *Pistalo v. Progressive Cas. Ins. Co.*, ___ N.E.2d ___, No. 45A04-1204-PL-214 (Ind. Ct. App. Dec. 27, 2012).
- *Economy Fire & Cas. Co. v. Collins*, 643 N.E.2d 382 (Ind. Ct. App. 1994), *trans. denied* (1995).