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Insurance Practice

# The Bad Faith Sentinel

Standing guard on developments in the law of insurance bad faith around the country

Contents



## Court of Appeals of Florida Grants Summary Judgment in Favor of Insurer on Bad Faith Failure To Settle Claim

*Goheagan v. American Vehicle Ins. Co.*, No. 4D10-3781, 2012 WL 2121082 (Fla. Dist. Ct. App. June 13, 2012)

*No bad faith in bodily injury claim when the personal representative of the estate did not respond to several phone calls and messages from the adjuster requesting attorney contact information that was needed for settlement negotiations.*

On February 24, 2007, Molly Swaby was rear-ended by John Perkins who was speeding. Swaby was severely injured and remained hospitalized until her death on May 12, 2007. Perkins had bodily injury liability coverage through American Vehicle Insurance Company ("AVIC").

Two days after the accident, Perkins reported the claim to AVIC. The claim was opened and an adjuster was assigned, who contacted Perkins's attorney. Perkins received a letter from AVIC advising him that the bodily injury claims for the accident may exceed his policy limits and that AVIC would "make every attempt to settle all claims for bodily injury in accordance with [his] policy limits." On March 1, 2007, AVIC determined it would settle the claim for the $10,000 policy limit.

AVIC attempted to contact Olive Goheagan, who was the personal representative of Swaby's estate, to discuss settlement of the claim for the policy limits. During the first attempt, the adjuster was advised by Swaby's stepfather that Goheagan had retained an attorney. Multiple voicemail messages were left for Goheagan requesting the attorney's contact information, none of which were returned. When the adjuster finally spoke to Goheagan, she informed the adjuster they would talk later and never called back. The adjuster made a total of five attempts to reach Goheagan to obtain the attorney's contact information to no avail.

After these unsuccessful attempts to obtain the attorney information, on April 19, 2007, the adjuster learned that a wrongful death suit had been filed against the insured, Perkins. At that time, a settlement

offer for the policy limits of $10,000 was made to Goheagan's attorney and was rejected. A second settlement offer was made on June 7, 2007 to Goheagan's attorney, which was also rejected. Subsequently, Goheagan's wrongful death action went to trial and following a jury verdict, a final judgment of $2,792,893.65, plus an additional cost judgment of $28,070, was entered against Perkins on January 20, 2009.

After the final judgment was entered in the wrongful death suit, Goheagan filed the instant common law bad faith action against AVIC alleging breach of the duty of good faith with regard to the interests of Perkins by failing to affirmatively initiate settlement negotiations with Swaby, failing to actually tender the policy limits in a timely manner, and failing to warn Perkins of the possibility of a judgment in excess of the policy limits.

Shortly after the bad faith claim was filed, AVIC moved for summary judgment arguing there was no genuine issue of material fact as to whether AVIC fulfilled its duty of good faith to Perkins. The trial court granted summary judgment in favor of AVIC and Goheagan appealed.

On appeal, Goheagan argued AVIC should have sent a letter enclosing a check for the policy limits to Goheagan, despite the fact that AVIC knew of the existence of an attorney hired by Goheagan. The court rejected this argument because it contradicted Florida Administrative Code Rule 69B-220.201 which states that "[a]n adjuster shall not negotiate or effect settlement directly or indirectly with any third-party claimant represented by an attorney, if the adjuster has knowledge of such representation, except with the consent of the attorney."

Furthermore, the court held there was no bad faith by AVIC and granted the motion for summary judgment in favor of AVIC because it had "properly and promptly" attempted to contact Goheagan several times. The court relied on the "totality of the circumstances" standard when reviewing the evidence and Section 624.155 of Florida Statutes, which requires an insurer to act in "good faith" and to act "fairly and honestly toward its insured and with due regard for her or his interests." Moreover, the court indicated that AVIC aspired to engage in settlement negotiations with Goheagan, but was precluded from doing so before learning the name of the attorney, a task that Goheagan directly prevented.

# Illinois Court of Appeals Discusses Importance of Notice to the Insured of Settlement Negotiations and a Final Settlement, and Defines the Role of an Assignee in a Bad Faith Claim

*Kirk v. Allstate Ins. Co.*, No. 5-10-0573, 2012 WL 1861412 (Ill. App. Ct. May 22, 2012)

***Court of Appeals for Fifth District of Illinois held that assignee can bring bad faith claim, even if the assignee induced a release to exclude the insured, absent evidence of coercion or trickery.***

Enver Hamiti was driving a truck owned by Lindsey Skenderi on June 30, 2006 when he ran a stop sign and collided with a motorcycle operated by Steven Thomas Kirk. Kirk's leg was amputated as a result of the accident. The truck owned by Skenderi was insured by Allstate Insurance Company ("Allstate") with liability limits in the amount of $100,000 per person and $300,000 per accident. Additionally, the driver, Hamiti, had his own insurance policy with Mercury Insurance Company ("Mercury") with policy limits of $50,000 per person and $100,000 per accident.

As part of a routine claim investigation, an Allstate adjuster called Hamiti and obtained a recorded statement on July 14, 2006. During this conversation, Hamiti advised the adjuster

he had recently moved and provided his new mailing address. Despite learning about the change in Hamiti's address, all communications from Allstate were erroneously sent to his prior address until March 2008.

Kirk subsequently retained an attorney to represent him regarding the injuries sustained as a result of the motorcycle accident. When considering the two policies available to Kirk, his attorney concluded that the combined policy limits from Skenderi's and Hamiti's coverage totaled $150,000 and the damages Kirk sustained greatly exceeded this amount. Based on this calculation, Kirk's attorney suggested that his client might pursue the personal assets of Skenderi and Hamiti. A letter was sent to Hamiti and Skenderi warning them of potential personal liability, but Hamiti never received this letter because Allstate sent it to the wrong address.

Due to the substantial potential damages, an Allstate supervisor was assigned to assist the claims adjuster. The adjuster was provided specific instructions from the supervisor to "please be sure to check client field for alternate policies to make sure that we do not have excess coverage. Was there a formal demand for the limit? If so, we need to respond in writing with a copy to the insured. Also, as documented, you will need to have insured hire his own counsel to handle the claim against his personal assets. Lastly, we will not issue payment until we can secure a release so if they are going to pursue insured, we will not issue check."

Despite these clear instructions from a supervisor, the adjuster acted otherwise. On October 17, 2006, the claims adjuster offered the $100,000 policy limits to Kirk's attorney and included a release in the correspondence. That same day, Kirk's attorney e-mailed a response to thank him for the offer, but his client intended to sue both the driver and owner of the vehicle personally. On November 1, 2006, Kirk's attorney requested a change in the language of the settlement and release to include only Allstate's insureds and to provide an exception for any other insurance coverage that may surface. The adjuster responded: "No problem. I will send out new release today taking insured driver's name off of it." The next day, the adjuster sent another release excluding Hamiti which was executed by Kirk's attorney and returned to Allstate.

Even though the alteration of the release materially effected the potential liability of Hamiti, the Allstate adjuster never notified the insured. In fact, the last communication between Allstate and Hamiti was in July 2006 when the recorded statement was taken. Moreover, the adjuster admitted he never communicated any offers or demands to Hamiti, nor did he send a copy of the letter from Kirk's attorney to him regarding medical bills exceeding the policy limits, potentially exposing him to personal liability.

As a result of the inadequate insurance coverage under the two policies, Kirk filed an action on February 20, 2007 against Hamiti for the personal injuries sustained in the accident. In March 2007, Allstate received notice of the lawsuit against Hamiti, but again failed to notify him. Allstate also failed to provide Hamiti with an attorney until February 29, 2008. After a jury trial on November 23, 2009, a verdict in the amount of $1.375 million, with a $100,000 setoff for the policy limits paid by Allstate, for a total of $1.275 million, was entered against Hamiti personally.

On January 20, 2010, Kirk negotiated a settlement to obtain assignment rights from Hamiti to sue Allstate for bad faith. On that same day, the instant bad faith case was filed by Kirk, as assignee of Hamiti, alleging that Allstate violated its duties to Hamiti when it obtained a release that excluded Hamiti, which exposed him to personal liability, and also wrongfully refused to defend Hamiti and did not properly defend him at trial.

Allstate filed a motion for partial summary judgment which the trial court granted on October 29, 2010 "because Kirk induced the release" that omitted Hamiti. Kirk appealed and argued that Allstate committed bad faith in removing language in the release that diminished the protection of their insured. Allstate argued that Kirk induced the release in the underlying action.

The appellate court held that as assignee, Kirk is entitled to all of the right, title, or interest in the bad faith claim against Allstate that Hamiti had, and whether Kirk induced the release to omit Hamiti was irrelevant to the bad faith claim. If somehow, Kirk had coerced or tricked Allstate into removing Hamiti's name from the release, the court would consider that

a reason for entering summary judgment in favor of Allstate on the bad faith claim. However, the record was devoid of any suggestion of coercion or trickery involved in the underlying action. Accordingly, the appellate court reversed the trial court's grant of partial summary judgment to Allstate and remanded the case for further proceedings.

# Eastern District of Wisconsin: No Bifurcation at Discovery Stage for Bad Faith Claim in Federal Court

*Fiserv Solutions, Inc. v. Westchester Fire Ins. Co.*, No. 11-C-0603, 2012 WL 2120513 (E.D. Wis. June 11, 2012)

***Federal court in Wisconsin denies insurer's attempt to bifurcate the coverage claim and the bad faith claim at the discovery stage because insurer could create a privilege log, there would be no effect on potential settlement of either claim, and there was no indication of potential jury confusion if the cases proceeded together.***

Plaintiff, Fiserv Solutions, Inc. ("Fiserv") filed claims for declaratory judgment, breach of contract, and breach of the implied duty of good faith and fair dealing against Westchester Fire Insurance Company ("Westchester"). Westchester moved to bifurcate and stay discovery on the bad faith claim, arguing that if Fiserv were permitted to litigate the coverage and bad faith claims simultaneously, it would prejudice Westchester.

Westchester offered three reasons to bifurcate the discovery, which the court ultimately rejected: (1) Fiserv would discover Westchester's work product and attorney-client communications as part of the bad faith claim, but such documents would not be discoverable regarding the coverage claim, (2) internal documents regarding consideration of the claim would adversely impact settlement negotiations and delay resolution, and (3) the presentation of both the coverage and bad faith claims in one trial risks jury confusion and would prejudice its ability to contest coverage.

The court addressed each argument made by Westchester in turn. First, regarding documents potentially covered by the attorney-client privilege, the court found no basis for a universal protection of the internal files and required review on a document-by-document basis with the use of a privilege log. Fiserv also argued that witnesses deposed in one stage of the case may have to be re-deposed for the second phase. Noting the burden is on Westchester as the moving party, the court stated that Westchester failed to demonstrate why discovery would not be duplicative.

The court also rejected the second argument made by Westchester regarding a potential adverse impact on resolution and settlement. Conversely, the court viewed bifurcation as actually facilitating negotiations and found that Westchester's argument was speculative at best. The court did reserve the right to bifurcate the trial, if the facts so dictated at some later point in the litigation. Moreover, the court expressed its concern with needless disputes regarding what information may be discoverable at various stages, in the event the claims were bifurcated.

The court finally rejected the last argument made by Westchester regarding potential jury confusion. It found that Westchester was merely speculating that jury confusion may exist. Having rejected all of Westchester's arguments, the court held that the case would not be bifurcated at the discovery stage because Westchester failed to demonstrate any concrete evidence of prejudice or bias if discovery of the two claims was handled simultaneously.

# U.S. District Court for South Dakota Compels Production of Post-Claim Privilege Log, and Allows Discovery of Claims Manual and Bonus and Incentive Program in Bad Faith Claim Against Insurer

*Hurley v. State Farm Mutual Automobile Insurance Co.*, No. 10-4165-KES, 2012 WL 1600796 (D.C.S.D. May 7, 2012)

*In South Dakota, insurer was compelled to produce a full and detailed post-claim privilege log, bonus and incentive information for all employees and the entire claims manual.*

Willard Hurley was injured in an automobile accident as a result of another driver's actions. Hurley had a policy with State Farm Mutual Automobile Insurance Company ("State Farm") for automobile coverage and umbrella coverage with an under-insurance coverage limit of $250,000 per person, $500,000 per accident, and umbrella coverage with a limit of $5 million. The negligent driver had personal liability insurance with policy limits of $100,000, which would not have fully compensated Hurley. Hurley received an offer for the policy limits of his insurance and notified State Farm. State Farm did not object to the settlement. Hurley accepted the $100,000 from the responsible driver's policy and executed a release.

Hurley filed suit against State Farm to recover the underinsured motorist ("UIM") benefits of his policy. State Farm denied the claim. However, after approximately one year of litigation, State Farm made an unconditional payment of $340,000, and a subsequent payment of an additional $200,000, to resolve the case. Hurley then filed suit for bad faith against State Farm, alleging that he suffered mental and emotional distress in pursuing his UIM case and also incurred attorneys' fees of $180,000.

The federal district court ruled on several discovery disputes which involved privilege logs, employee bonus and incentive information, and a claims manual brought before the court on Hurley's motion to compel.

Several of Hurley's interrogatories and requests for production of documents concerned the conduct of State Farm after the UIM claim was filed. After initially objecting, State Farm eventually provided a portion of the requested information. However, State Farm excluded any information that it alleged was protected by the attorney-client privilege. The court required State Farm to produce a privilege log detailing the documents it intended to withhold and submit the documents under seal for the court's *in camera* review.

Hurley also requested disclosure of "all human resources manuals, salary administration manuals, personal bulletins or manuals, orientation booklets, directives, memos, or other documents in use for the previous ten years to inform claims personnel of how they can receive salary increases, bonuses, or commissions." In response, State Farm only provided the bonus and salary information for the two State Farm employees directly handling Hurley's UIM claim. Since Hurley did not limit his requests to just these two employees, the court required State Farm to provide bonus and incentive programs for all State Farm employees within the requisite time period.

The last piece of evidence Hurley sought to compel was the entire claims manual. State Farm had previously produced only a portion of the Automobile Insurance Company's section within the claims manual. The court required the production of the entire claims manual because it could lead to relevant information and provide context for information relating to the handling of UIM claims in general.



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