When Genuine Issues Argue Against a Genuine Dispute

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A. Introduction.

During 2002, the federal courts published two important decisions concerning the genuine dispute doctrine: Amadeo v. Principal Mut. Life Ins. Co. (9th Cir. 2002) 290 F.3d 1152 and Hubka v. The Paul Revere Life Ins. Co. (S.D.Cal. 2002) 215 F.Supp.2d 1089. Both deal with the genuine dispute doctrine in a disability insurance bad faith setting. Both reversed trial court grants of summary adjudication on bad faith claims and restored punitive damages.

The good news about Amadeo and Hubka is they signal a reaffirmation by the Ninth Circuit that reasonable conduct in insurance claims handling is best evaluated by the trier of fact. With genuine dispute doctrine summary adjudication motions the current defense d'jour, practitioners need to remind trial courts that the same circuit that created the genuine dispute defense with Guyton, Franceschi and Guebara has declared:

[A]n insurer is not entitled to summary judgment as a matter of law where, viewing the facts in the light most favorable to the plaintiff, a jury could conclude that the insurer acted unreasonably.

Hubka, supra, 215 F.Supp.2d 1089, 1092 (quoting Amadeo, supra, 290 F.3d at 1161-62) (emphasis added).

B. Understanding Why the Genuine Dispute Doctrine is a Popular Defense.

1. The Genesis of Genuine Dispute.

The Ninth Circuit first announced what it called the "genuine issue" rule in Safeco Ins. Co. of Am. v. Guyton (9th Cir. 1982) 692 F.2d 551, 557, where the Court of Appeals held that whether a carrier's coverage position was reasonable could be decided as a matter of law when the decision involved a pure legal question:

Although the district court did not specify the grounds on which it entered judgment for [the carrier on the bad faith] cause of action, it may have concluded that since the policy in dispute involved a genuine issue regarding legal liability, [the carrier] could not, as a matter of law, have been acting in bad faith by refusing to pay on the Policyholders' claims. . . . [W]e agree that there existed a genuine issue as to Safeco's liability under California law. We therefore affirm the dismissal of Policyholder's claims of bad faith.

See also, Hanson v. Prudential Ins. Co. of Am. (9th Cir 1986) 783 F.2d 762; Franceschi v. American Motorists Ins. Co.(9th Cir. 1988) 852 F.2d 1217.

The doctrine found its way into California decisional law in Opsal v. United Services Auto. Ass'n (1991) 2 Cal.App.4th 1197, 10 Cal.Rptr.2d 352 and was used to take away a bad faith verdict in Filippo Industries, Inc. v. Sun Ins. Co.(1999) 74 Cal.App.4th 1429, 88 Cal.Rptr.2d 881. In Fraley v. Allstate Ins. Co.(2000) 81 Cal.App.4th 1282, 97 Cal.Rptr.2d 386, the doctrine worked to uphold summary judgment where an insured and insurer disagreed over an allowable repair/replace period following appraisal during an homeowner insurance claim.

2. Genuine Dispute is applied to Factual Disputes.

It was 2001 when two decisions -one federal and one state – opened a floodgate of genuine dispute doctrine summary adjudication motions.

The first was Guebara v. Allstate Ins. Co. (9th Cir 2001) 237 F.3d 987. Published by the Ninth Circuit in January 2001, it announced that the genuine dispute doctrine would now be applied to factual disputes as well as legal ones.

In a 2-1 decision, the majority wrote:

The Ninth Circuit has affirmed the dismissal of bad faith claims in numerous cases over the past 17 years because of genuine issues about liability under California law. . . . No Ninth Circuit case, however, has limited the genuine issue as to coverage rule to legal disputes. . . . Given the current state of California insurance law, the state appeals court's recent decision in Fraley, and the decisions of this court and other federal courts, we decline to limit the genuine dispute doctrine to purely legal or contractual disputes. Rather then establish a bright-line rule, we Hold that the genuine dispute doctrine should be applied on a case-by-case basis. Id., 237 F.3d at 993-994.

The Guebara majority advised that while genuine dispute would now apply in fact situations where there was a "battle of experts," it was not intended to "eliminate bad faith claims based on an insurer's allegedly biased investigation," and recited a non-exhaustive list of five circumstances where biased investigation claims could go to a jury. Id., 237 F.3d at 996.

But there were concerns on the panel about the direction the genuine dispute doctrine was taking. In her dissent, Justice Fletcher commented:

Indeed, the California Supreme Court has not even considered whether the "genuine issue as to coverage" rule is an accurate statement of California law. The rule is of uncertain provenance. We announced the "genuine issue" rule in [Guyton] without citing any California authority for the proposition that a genuine coverage dispute may be used as a proxy for reasonableness. There is some question as to whether the California Supreme Court would endorse the rule, even when restricted to coverage disputes arising out of questions of law.
Id., 237 F.3d at 999, n.4.

In July 2001, the Second District California Court of Appeal weighed in on the subject with Chateau Chamberay Homeowners Ass'n v. Associated International Ins. Co. (2001) 90 Cal.App.4th 335, 108 Cal.Rptr.2d 776. Adopting the Guebara rationale, the court stated:

It is now settled law in California that an insurer denying or delaying the payment of policy benefits due to the existence of a genuine dispute with its insured as to the existence of coverage liability or the amount of the insured's coverage claim is not liable in bad faith even though it might be liable for breach of contract. . . . While many, if not most, of the cases finding a genuine dispute over an insurer's coverage liability have involved legal rather than factual disputes, we see no reason why the genuine dispute doctrine should be limited to legal issues. Id., 90 Cal.App.4th at 347-348, 108 Cal.Rptr.2d at 784-785 [emphasis in original; citations omitted].

While adopting the Guebara rationale for deciding factual disputes as a matter of law in bad faith proceedings, the appellate court reminded that the intent of the genuine dispute doctrine is not to declare open season on insureds, with paid experts the primary beneficiaries. We concur, however, with the caveat advanced by the Guebara court. It cautioned that an expert's testimony will not automatically insulate an insurer from a bad faith claim based on a biased investigation. It suggested several circumstances where a biased investigation should go to the jury: (1) the insurer was guilty of misrepresenting the nature of the investigatory proceedings; (2) the insurer's employees lied during the depositions or to the insured; (3) the insurer dishonestly selected its experts; (4) the insurer's experts were unreasonable; and (5) the insured failed to conduct a thorough investigation.
Chateau Chambrey, supra, 90 Cal.App.4th at 348-349, 108 Cal.Rptr.2d at 785.

At footnote 8, the court added, "Nor, we must also add, may an insurer insulate itself from liability for bad faith conduct by the simple expedient of hiring an expert for the purpose of manufacturing a 'genuine dispute.'"

Even so, the insurance industry and defense bar could barely conceal their glee. On internet forum linking title insurer First American's regional counsel and its training coordinators provides some insight into the defense perspective:

Posting: November 12, 2001.

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Now--from California of all places--comes a leavening dose of reason via the decision of a Court of Appeal in the case of Chateau Chamberay Homeowners Association v. Associated International Insurance Company, 90 Cal. App. 4th 335 (2001).

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[The] Court of Appeal explained that proof of bad faith requires a showing that an insurer has acted "unreasonably or without proper cause." On the other hand, where a "genuine dispute" exists between

the insurer and insured "as to the existence of coverage liability or the amount of the insured's coverage" the insurer is not liable for bad faith, "even though it might be liable for breach of contract." This is what the Court refers to as the "genuine dispute doctrine."

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And, most importantly, the Court said existence of a "genuine dispute" should make bad faith claims amenable to resolution by summary judgment, as "a matter of law." In other words, such cases should not go to a jury.

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Comment by in-house claims counsel Jamin Hawks (Oakland, CA): The case doesn't make new law, but I love the opinion as a tool for (a) convincing noisy attorneys to retreat without the expense of litigation; or (b) convincing judges that it's okay to grant our summary judgment motions made on undisputed facts, without having to decide whether our coverage conclusion was correct.

Source: http://www.firstam.com/landsakes/html/email/111201badfaith.html.

3. Why Genuine Dispute is favored by Defense Counsel.

The reason that defense counsel are so fond of the genuine dispute doctrine is that, under California law, mere negligence in claims handling is not bad faith. Guebara v. Allstate Ins. Co. (9th Cir. 2001) 237 F.3d 987, 995.

Instead, bad faith conduct requires some element of bad intent or conscious disregard of an insured's rights during the course of a claim. The conduct must be rooted in a course of unreasonable conduct that is effectively calculated to deprive insureds of benefits they are rightfully owed. See, e.g., Hubka v. The Paul Revere Life Ins. Co. (S.D. Cal. 2002) 215 F.Supp.2d 1089; Amadeo v. Principal Mut. Life Ins. Co. (9th Cir. 2002) 290 F.3d 1152.

A carrier's goal in bringing its genuine dispute motion is to convince the judge that, at worst, it made a simple mistake during the claims process. Should the motion be granted, the insured is limited to recovering for breach of contract damages, which in most instances is simply what the insured was entitled to in the first place, only now there are attorneys fees and litigation costs attached.

What was troubling about the genuine dispute doctrine world following Guebara and Chateau Chamberay was that the twin decisions seemed an invitation for trial courts to freely invade the jury's province in determining whether a carrier acted reasonably. The decisions also seemed to encourage carriers to feel safe in denying claims based on biased opinions of carefully selected paid experts, with the genuine dispute doctrine providing a kind of insulation from their conduct ever being reviewed by a jury.

There is no question this was not what either the federal or the state bench was intending. For the most part, published decisions expanding the genuine dispute doctrine into factual disputes revolved around cases where the reviewing court believed that the insured's complaint of bad faith was something of an attempt to overreach.

But following Guebara and Chateau Chambrey, there were signs in the case law that the genuine dispute doctrine was providing too much insulation to carriers and too much discretion to trial courts.

For example, in July 2001, Cardiner v. Provident Life & Accident Ins. Co. (C.D.Cal. 2001) 158 F.Supp.2d 1088 was published. In Cardiner, there was a dispute between plaintiff and defense experts over whether an insured was physically able to return to his previous employment as a stockbroker. The carrier's retained doctors reported that the insured could go back to work. The insured's doctor's reported the insured could not. The court noted:

[F]ollowing this initial denial, it is undisputed that Plaintiff was examined by [a defense doctor], that Plaintiff provided rebuttal reports and recent reports of testing provided by his attending HIV specialist, that these reports were reviewed by [another defense Doctor] and that Provident then reaffirmed its decision to discontinue further benefits. . . . Again, this Court has read these subsequent reports, and based on the facts and these reports, concludes that Provident acted reasonably as a matter of law. Id., 158 F.Supp.2d at 1105.

In Cardiner, the trial court appeared to feel free to weigh evidence on its way to ruling as a matter of law. This, of course, runs contrary to the basic rule of summary judgment.

The genuine dispute doctrine seemed on an ominous path.

C. Amadeo and Hubka limit the Trial Court's Role in weighing Evidence of Unreasonable Claims Conduct.

The year 2002 will perhaps be remembered as perhaps the year when the federal courts began tapping on the brakes of the genuine dispute doctrine by reaffirming the limits of a court's power to rule on issues properly belonging to the jury.

The rule first announced in Amadeo and then reaffirmed in Hubka, is relatively straightforward:

Under California's genuine issue doctrine, the insurer's denial of coverage must have been unreasonable or without proper cause, i.e., there was no genuine issue as to whether coverage was due . . . . an insurer is not entitled to summary judgment as a matter of law where, viewing the facts most favorable to the plaintiff, a jury could conclude that the insurer acted unreasonably." [Emphasis added. Citations omitted.] Hubka v. The Paul Revere Life Ins. Co. (S.D.Cal. 2002) 215 F.Supp.2d 1089, 1092 (quoting Amadeo v. Principal Mut. Life Ins. Co. (9th Cir 2002) 290 F.3d 1152).

Amadeo in particular, affirms that for summary judgment is only available in cases where there is no dispute that a carrier's conduct was reasonable. By extension, the meaning is that so long as there is evidence present regarding unreasonable claims handling conduct, the issue of bad faith must be decided by the jury.

"The key to a bad faith claim is whether or not the insurer's denial of coverage was reasonable." "[T]he reasonableness of an insurer's claims handling conduct is ordinarily a question of fact." The genuine issue rule in the context of bad faith claims allows a district court to grant summary judgment when it is undisputed or indisputable that the basis for the insurer's denial of benefits was reasonable – for example, where even under the plaintiff's version of the facts there is a genuine issue as to the insurer's liability under California law. In such a case, because a bad faith claim can succeed only if the insurer's conduct was unreasonable, the insurer is entitled to judgment as a matter of law. On the other hand, an insurer is not entitled to judgment as a matter of law where, viewing the facts in the light most favorable to the plaintiff, a jury could conclude that the insurer acted unreasonably. [Citations omitted.] Amadeo, supra, 290 F.3d at 1161-1162.

Aside from decisional precedent, there are no hard and fast rules for distinguishing unreasonable from reasonable conduct. Indeed, under current law, where there is a factual dispute concerning unreasonable claims handling, the trial court judge acts as a gatekeeper "on a case-by-case basis."

In sum, "[w]hile the reasonableness of an insurer's claims-handling conduct is ordinarily a question of fact, it becomes a question of law where the evidence is undisputed and only one reasonable inference can be drawn from the evidence." Hubka, supra, 215 F.Supp.2d at 1092 (quoting Chateau Chambrey Homeowners Ass'n v. Associated Int'l Ins. Co. (2001) 90 Cal.App.4th 335, 108 Cal.Rptr.2d 776).

D. Opposing Genuine Dispute Motions Post-Amadeo and Hubka.

The art in arguing against a genuine dispute motion is being able to identify the boundaries between mistake and malign and then explaining the difference to the trial court in concise, no nonsense fashion.

While the practical concerns in opposing such motions are numerous, much has been written on them during the past year and there is no need to repeat that work here. See, e.g., Bidart, How to Defeat the "Genuine Issue" Doctrine at Summary Judgment, CAALA 20th Annual Las Vegas Convention Syllabus, at p. 15-43; Garris, The "Genuine Dispute" Doctrine and Disability Insurance Bad Faith Cases, 32 CAOC Forum (Nov. 2002) at p. 8. For a defense viewpoint, see also, Celebrezze & Meyers, The "Genuine Issue" or "Fairly Debatable" Defense in Bad Faith Actions, 52 Federation of Defense & Corporate Counsel Quarterly (Spring 2002).

Just remember that when evaluating the reasonableness of an insurer's conduct, the carrier's actions and decisions are considered at the time they occurred, not with the benefit of hindsight. Adams v. Allstate Ins. Co. (C.D.Cal.2002) 187 F.Supp.2d 1207, 1214. With a clear eye, sharp mind and Amadeo and Hubka in hand, your solid evidence of unreasonable claims conduct should be sufficient to carry the day at summary judgment time.

D. Conclusion.

There is a notion in the insurance bar that bad faith law is a powerful tool for consumer rights that might easily be taken away if abused. It is that old notion of "killing the golden goose." As guardians of consumer rights, we have a duty and responsibility to preserve them as best we can.

It may be said that developing insurance bad faith common law of the past half-century represents a struggle by the courts to enunciate what constitutes unreasonable versus reasonable conduct on the part of insurers. The genuine dispute doctrine is one effort by the judiciary to take a heightened role in overseeing the process of regulating insurance claims in the tort system.

If there is any lesson to be learned from Guebara, Chateau Chambrey, Amadeo and Hubka, it is the eternal truth that rights which can be given by the pen can also be taken away. With that in mind, it probably will behoove practitioners to apply their own genuine dispute analysis to cases at intake time.

The result will be a more effective bad faith caseload and better results for both client and counsel over the short – and long – term.

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