When Can a Failure to Settle a Suit Amount to Bad Faith

Anyone who has litigated enough civil cases has been in the following situation at least once. Settlement talks are reaching a standstill. Plaintiff's counsel has no doubt in her mind that her client's case is worth at least the policy limit available to indemnify the defendant. But, the defendant's insurance carrier is not willing to offer the policy limit and settle the case. As the settlement conference breaks down, Plaintiff's counsel informs defense counsel that she feels his client's carrier's failure to settle the case amounts to bad faith. This exchange then leads to a discussion between both counsel and their clients, and likely a discussion between defense counsel and his client's insurer.

The issue facing civil litigators is not whether Connecticut recognizes a duty of dealing in good faith in insurance contracts, but rather how the courts define what constitutes bad faith on the part of an insurer when it fails to settle a claim. In *Imperial Cas. & Indem. Co. v. ITT Hartford Ins. Group Foundation, Inc.*, 1997 WL 53320 (Conn. Super. Ct. January 31, 1997), the Connecticut Superior Court explained that "bad faith is not simply bad judgment or negligence, but rather . . . implies the conscious doing of a wrong because of dishonest purpose or moral obliquity. [I]t contemplates a state of mind affirmatively operating with furtive design or ill will." *Id*. at *2. A plaintiff cannot merely allege that the insurer denied his or her claim. *Id*. There must be evidence of a dishonest motive or intent.

The United States District Court for the District of Connecticut later summarized Connecticut's approach to bad-faith insurer claims in *Altice v. Nationwide Mut. Ins. Co.*, 2009 WL 1474953, *2 (D. Conn. May 27, 2009). In order to state a claim for bad faith, a plaintiff must show (1) that the plaintiff and defendant were parties to a contract under which the plaintiff reasonably expected to receive certain benefits; (2) that the defendant engaged in conduct that injured the plaintiff's right to receive some or all of those benefits; and (3) that when engaging in that conduct, the defendant was acting in bad faith. *Id*. The court then elaborated

on the definition of bad faith given in *Imperial Cas. & Indemn. Co.*: "bad faith is defined as the opposite of good faith, generally implying a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation not prompted by an honest mistake as to one's rights or duties." *Id*.

In adopting this definition of bad faith, Connecticut aligned itself with a minority of jurisdictions which hold that bad faith requires a showing of an intentional or reckless failure to carry out an insurance contract. In these jurisdictions, bad faith is absent when (1) an insurer fails to settle because it reasonably concluded that there was no coverage, *Gordon v. Nationwide Mut. Ins. Co.*, 285 N.E.2d 849 (N.Y. 1972); (2) an insurer entertained a bona fide belief that an action might be defeated or the verdict kept within policy limits, *Hart v. Republic Mut. Ins. Co*., 87 N.E.2d 347 (Ohio 1949); (3) an insurer relies on an opinion of counsel as to the possibility and amount of an adverse judgment, *Gordon, supra*. *Gordon* exemplifies the minority rule. In *Gordon*, the New York Court of Appeals required an "extraordinary showing of a disingenuous or dishonest failure to carry out a contract" in order to impose a punitive measure of damages—the amount of an excess judgment entered against the insured over his policy limits—on an insurer for bad-faith breach of contract. *Gordon*, 285 N.E.2d at 854. The Connecticut Superior Court has also held that although Connecticut recognizes a common-law duty of an insurer to act in good faith in the settlement of the claims of its insured, a cause of action for breach of that duty may be asserted only against an insurer. *Scribner v. AIU Ins. Co., 43 Conn. Supp. 147, 151-152 (1994)*. An action for bad faith cannot lie against a person not a party to the insurance contract, including the attorney hired by the carrier to defend the insured. *Id*. At 152.

It is important that counsel recognize the distinction between Connecticut's definition of bad faith and how the majority of other jurisdictions treat a bad faith claim for a failure to settle a suit. Unlike Connecticut, the majority of jurisdictions hold that an insurance company acts in bad faith whenever it breaches its duty to settle by failing adequately to consider the interest of the insured. These

jurisdictions have essentially established a negligence standard. *Transport Ins. Co., Inc. v. Post Exp. Co., Inc.*, 138 F.3d 1189 (7th Cir. 1998) (Illinois law).

There is one federal case that has sometimes been cited for the proposition that Connecticut has adopted the negligence standard. *Bourget v. Government Emp. Ins. Co.*, 456 F.2d 282 (2nd Cir. 1972) (Connecticut law). In *Bourget*, the Second Circuit acknowledged that there was a basis for the judicial imposition of liability on insurers which fail to exercise good faith or due care with respect to opportunities to settle within policy limits. *Id*. at 285. However, the court asserted that in "the unusual circumstances of this case," such a duty did not exist. *Id.*. Plaintiff Gerald Bourget was injured in an automobile accident in which there was no question that the defendant's insured was at fault. *Id.* The defendant's insured died as a result of the accident and was left insolvent. *Id*. The court reasoned that because Thompson's death and insolvency meant that he was essentially judgment-proof, there was thus no possible conflict of interest between the insurer and the insured. *Id*. at 286. The court then held that there was no basis for imposing a duty on the insurer as a matter of common law. *Id*. Given subsequent decisions, discussed above, and the holding in *Bourget*, it is not accurate to cite this case for the proposition that Connecticut has adopted the negligence standard.

Since deciding the *Gordon case,* New York has since moved to a middle ground between the minority and majority jurisdiction. While not expressly overruling *Gordon*, the New York Court of Appeals did set a new standard in *Pavia v. State Farm Mut. Auto. Ins. Co.*, 626 N.E.2d 24 (N.Y. 1993). The *Pavia* court adopted the "gross disregard" standard: an insurer's deliberate or reckless failure to place on equal footing the interests of its insured with its own interests when considering a settlement offer. *Id*. at 27. The court reasoned that the gross disregard standard "struck a fair balance" between ordinary negligence and dishonest motive. *Id*. at 28. Requiring ordinary negligence would remove the freedom insurers must have to investigate and resist unfounded claims, while requiring a dishonest motive would essentially insulate insurance carriers from all but malicious conduct. *Id*.

Connecticut has not adopted the middle-ground holding in *Pavia*. Connecticut continues to follow the minority rule requiring a showing of a conscious doing of a wrong because of dishonest purpose or moral obliquity or ill will. In order to prevail in a bad faith claim in Connecticut for a failure to settle a disputed claim, a Plaintiff cannot merely allege that the insurer failed to settle his or her claim even though there was a good chance the Plaintiff could obtain a verdict in excess of the defendant's insurance policy. The Plaintiff must allege and present evidence of a dishonest motive or intent on behalf of the Defendant's insurance carrier. This essentially means that each counsel faced with this scenario will have to make an objective detailed review of the specific facts of the case using this caselaw as a yard stick.