OACTA INSURANCE COVERAGE SEMINAR

"RECENT DEVELOPMENTS & RECURRING ISSUES IN OHIO BAD FAITH LAW"

Columbus, Ohio

March 23, 2018

Presented By:

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I. SUFFICIENCY OF BAD FAITH PLEADINGS

PLEADING SUFFICIENCY: NO DUTY OWED TO INJURED CLAIMANTS

Kamnikar v. Fiorita, 2017-Ohio-5605 (10th Dist.)

The Tenth District Court of Appeals affirmed dismissal of the complaint against tortfeasor's insurer for failure to state a claim under an auto policy.

Plaintiffs' vehicle was struck in a parking lot. Insured admitted liability but his insurer later disputed fault based on allegedly "thorough investigation." Plaintiffs sued insured and his auto liability carrier alleging multiple theories. Trial court dismissed suit against insurer and Plaintiffs appealed after obtaining verdict against insureds.

Court of appeals affirmed dismissal of bad faith claim because the insurer's duty to act in good faith runs only from the insurer to the insured and a third party has no cause of action for bad faith against the tortfeasor's insurance company.

The court affirmed dismissal of the negligence claim because the plaintiffs sought recovery of purely economic loss arising from the insurer's alleged negligence; hence, the economic loss rule barred their negligence claim.

Court also affirmed dismissal of plaintiffs' claims under Restatement Sections 323 (Negligent Performance of Undertaking to Render Services) and 324A (Liability to Third Person for Negligent Performance of Undertaking). These claims were without merit because the insurer undertook to investigate the plaintiffs' claims for the benefit of its insured, not the plaintiffs. Moreover, recovery under these provisions requires proof of physical harm. Plaintiffs' claims against the insurer were for economic losses.

The appellate court also affirmed dismissal of Plaintiffs' misrepresentation and fraud claims based on the insurer's allegedly bad faith investigation of the accident. Like the bad faith claim, these claims failed because the insurer owed no duty to the plaintiffs to conduct a proper investigation. Moreover, plaintiffs did not rely on the insurer's allegedly improper investigation.

PLEADING SUFFICIENCY: THIRD PARTY CANNOT SUE AS ASSIGNEE OF INSURED'S DUTY OF GOOD FAITH BEFORE UNDERLYING TORTFEASOR'S LIABILITY HAS BEEN ESTABLISHED

Three-C Body Shops, Inc. v. Nationwide Mut. Fire Ins. Co., 2017-Ohio-1462, 81 N.E.3d 499, appeal not allowed, 2018-Ohio-365, 151 Ohio St. 3d 1504, 90 N.E.3d 946.

Tenth District Court of Appeals affirmed judgment on the pleadings for insurer on body shop's direct action against customer's insurance company based on customer's auto repair contract with body shop and customer's auto policy with insurer.

Plaintiff body shop's customer brought a vehicle in for collision repair after an accident. Defendant insurer had contracted with its policyholder, the customer, to pay for reasonable and necessary repairs. Plaintiff and the insured entered into a contract to repair the vehicle to its pre-accident condition. The body shop charged $3,998.38 for the repair work, but the insurer only paid $2,791.59. Accordingly, Plaintiff sued the insurer for $1,206.79, pursuant to an account statement attached to the complaint

Plaintiff alleged the insurer was a third-party beneficiary of the repair contract, and that the insurer had "exploited Customer's vulnerable position by refusing to pay for the work it performed, thereby placing the customer at legal risk." The complaint also alleged that the repair agreement operated was a valid assignment of the customer's "rights, benefits, good faith, and other claims" against the insurer.

The Court rejected all of the body shop's claims, including that the claim that the customer had assigned its right to sue the insurer for bad faith. The Court held that the customer did not have the ability to assign its right because liability for the accident that damaged the customer's vehicle had not been established at the time the repair agreement was signed, relying on *West Broad Chiropractic v. Am. Family Ins.*, 122 Ohio St.3d 497, 2009-Ohio-3506, 912 N.E.2d 1093, ¶ 5 ("A person who has been injured in an accident but who has not yet established liability for the accident and a present right to settlement proceeds may not assign the right to future proceeds of a settlement if the right does not exist at the time of the assignment.").

PLEADING SUFFICIENCY: NO DUTY OF GOOD FAITH IN CONTRACTS OTHER THAN INSURANCE POLICIES

Capital Equity Grp. v. Ripken Sports Inc., No. 1:16CV1953, 2017 WL 4155766, (N.D. Ohio Sept. 19, 2017)

USDC for the ND of Ohio granted Defendants motion to dismiss for failure to state a claim.

Plaintiff was in the business of raising equity capital for real estate and business development. Defendants engaged Plaintiffs to help them develop a youth baseball sports complex near Sandusky, Ohio. Plaintiff filed a multi-count complaint against Defendant for damages and injunctive relief after the complex opened. The Court dismissed the complaint for failure to state a claim.

The complaint alleged that Defendants breached the "implied covenants of good faith and fair dealing pursuant to Ohio Rev. Code § 1301.304." The Court held that_"Ohio law only recognizes an implied covenant of good faith and fair dealing in insurance contracts and in limited circumstances where the duty arises from the language of the contract." Because the Plaintiff's claim didn't concern an insurance contract, there was no actionable duty of good faith and fair dealing.

PLEADING SUFFICIENCY: ACTIONABLE BAD FAITH CLAIM ASSERTED

Acosta v. Potts, No. 2:16-CV-612, 2017 WL 4418579 (S.D. Ohio Oct. 5, 2017)

USDC for the SD of Ohio denied intervening professional liability insurer's motion for judgment on the pleadings on its own intervening complaint for declaratory judgment and on its motion to dismiss the insured Defendant's counterclaim for breach of contract, declaratory judgment and bad faith.

The suit was filed by the Department of Labor against individual and corporate Defendants for ERISA violations in regard to their sale to an ESOP of 80% of the stock of one of the Defendants at an allegedly inflated price. Insurer was permitted to intervene to seek declaratory judgment on its duty to defend and indemnify under two professional liability policies. Insurer asserted the claims were reported late and insured counterclaimed.

The Court denied the insurer's motion for judgment on the pleadings because: (1) ambiguity in the policy language; (2) the rule of policy construction favoring the insured; and (3) the procedural posture of the case. The Court held that fact issues prevented it from determining the reasonableness of the insured's actions on a motion for judgment on the pleadings.

Likewise, the Court denied the insurer's motion to dismiss the insured's bad faith claim because it was not yet clear whether the insurer's denial of benefits was legally correct or whether there existed a reasonable justification for the denial.

PLEADING SUFFICIENCY: NO ABUSE IN PERMITTING INSURED TO AMEND COMPLAINT TO ASSERT PLASUIBLE CLAIM

Beck Paint & Hardware, Inc. v. Travelers Indem. Co., No. 1:17-CV-307, 2017 WL 4404488, (S.D. Ohio Oct. 4, 2017)

USDC for the SD of Ohio denied insurer's motion to dismiss bad faith claim and granted insured's motion to file a second amended complaint.

Insured filed a first amended complaint alleging among other things, bad faith. Insurer moved to dismiss for failure to plead a plausible bad faith claim. Insured then moved for leave to file a second amended complaint. Insurer did not oppose the motion.

Court granted the insured's motion and denied the insurer's finding that case was in the early stages, no prejudice would befall insurer by permitting another amendment and public policy favored deciding cases on the merits.

II. NO DUTY OF GOOD FAITH OWED

NO DUTY: INSURED CANNOT RECOVER ON MULTIPLE ALTERNATIVE THEORIES FOR SAME LOSS; EVEN WHERE FACT ISSUE EXISTS ON BAD FAITH.

Brenner v. LM Gen. Ins. Co., No. 5:16-CV-1117, 2017 WL 2869350, (N.D. Ohio July 5, 2017)

USDC for the ND of Ohio granted in part and denied in part insurer's motion for partial summary judgment in suit seeking UM/UIM coverage and multiple related claims.

The Court granted summary judgment on the insured's breach of fiduciary duty claim, holding that it was a "tort claim in contractual clothing." Because the insured had already asserted a separate bad faith claim, it could not duplicate that claim as a claim based on an alleged fiduciary duty.

On the bad faith claim, the Court acknowledged that the insurer had acted diligently and responded promptly, a fact issue remained as to whether it had a reasonable justification for offering the amount that did to settle the insured's claim for pain and suffering. Thus, the court denied summary judgment on the bad faith claim even though it appeared that the case "may turn out to be no more than a dispute regarding valuation."

The Court granted summary judgment on the insured's claim for "willful interference with a protected property interest." The Court held that, as with the fiduciary duty claim, the insureds were simply attempting to formulate a separate tort claim out of their underlying claim of breach of the insurance contract.

NO DUTY: NO BAD FAITH WITHOUT COVERAGE

Bolton v. State Farm Fire & Cas. Co., No. 3:16 CV 220, 2017 WL 5132732, (N.D. Ohio Nov. 6, 2017)

The USDC for the ND of Ohio granted summary judgment to the insurer on the insured's complaint alleging breach of contract, bad faith, and unfair trade practices. The suit arose of an incendiary fire at a duplex owned by the insured plaintiffs and leased to relatives.

The Court granted summary judgment to the insurer based on the insured's breach of their duty to cooperate in the insurer's investigation of the fire resulting in a substantial and material prejudice to the insurer's ability to investigate the claim. Due to the insured's failure to turn over relevant records, the insurer was unable to complete a full investigation into motive, alibi, or any other aspect of Plaintiffs' involvement (or non-involvement) in the fire.

The Court granted summary judgment on the bad faith claim because the insurer was justified in denying the claim due to the breach of cooperation, and "where a policy does not cover a claim, it cannot be bad faith to refuse to cover it."

Finally, the Court granted summary judgment on the unfair trade practices act claim finding that Ohio's Administrative Code does not create a private right of action, and should not be considered as evidence as bad faith.

III. <u>DUTY OF GOOD FAITH OWED</u>

No Cases

IV. <u>NO BREAH OF THE DUTY OF GOOD FAITH</u>

NO BREACH: DENIAL BASED ON CLEAR POLICY LANGUAGE FOLLOWING FULL INVESTIGATION IS "REASONABLY JUSTIFIED"

Oak Hill Inv. IV LLC v. State Farm Fire & Cas. Co., No. 15-CV-1996, 2017 WL 4286779, (N.D. Ohio Sept. 27, 2017)

The USDC for the ND of Ohio granted summary judgment to the insurer on the insured's claim for breach of contract and bad faith under a policy providing first party property coverage to a commercial building. The building sustained damage when a scupper drain on the roof became clogged with debris, allowing water to accumulate and to eventually enter the building through a heating and air conditioning vent.

The Court reviewed various policy exclusions finding them to be clear and unambiguous, and to preclude coverage for the factual scenario of this claim.

On the bad faith claim, the Court held that the insurer's decision to deny the claim was supported by the plain language of at least two sections of the Policy. Additionally, the Court found that the insurer did not deny the claim outright, but performed multiple inspections and covered the loss to some of the personal property of the business under the Inland Marine Endorsement to the Policy. Thus, the insurer did not act arbitrarily, but instead investigated the claim with diligence and based its refusal on the plain language of the Policy. Thus, the decision to deny was based on a "reasonable justification."

NO BREACH: THEFT CLAIM REASONABLY DEBATABLE

Wash'N'Roll, LLC v. Selective Ins. Co., No. 4:14-CV-02780, 2017 WL 1166125, (N.D. Ohio Mar. 29, 2017)

USDC for the ND of Ohio granted summary judgment for the insurer on insured's complaint for breach of contract and bad faith and insurer's counterclaim for declaratory judgment. The underlying claim was for the theft of personal property from the insured's commercial premises.

On bad faith, the Court found that the claim was fairly debatable. Plaintiffs never provided documentation to establish the ownership or cost of any item that was claimed stolen. Plaintiffs could not produce inventories, receipts, cancelled checks, bills of sale, bills of lading, customer lists, vendor lists, or any other type of proof that they owned the stolen property prior to the theft, or that the property ever even existed. Moreover, the vast majority of items claimed stolen had no discernable connection to the linens business covered under the policy. The record also reflects that Plaintiffs were in financial distress and subject to tax liens when the insurance claim was made. Further, Plaintiffs did not cooperate with the insurer's investigation and never reported the theft to police. In addition, the insurer's expert testified that its investigation and communication with Plaintiffs met industry standards for claims handling.

NO BREACH: PLAINTIFF DID NOT MEET CONDITION PRECEDENT TO REINSTATEMENT OF LIFE POLICY

European Pensions Mgmt. Ltd. v. Columbus Life Ins. Co., No. 1:16-CV-542, 2017 WL 4540233, (S.D. Ohio Oct. 11, 2017)

The USDC for the SD of Ohio granted summary judgment to the insurer on Plaintiff's claim that it had breached the policy and acted in bad faith in refusing to reinstate a lapsed life insurance policy on the life of Harrison, the deceased original owner of the policy.

The Court held that Plaintiff was required to submit evidence of the insured's insurability satisfactory to the insurer as a condition of reinstatement under the Policy.

The policy required Plaintiff to submit medical evidence that Harrison was in approximately the same good health he was in at the time of the inception of the policy—thus qualifying for a standard mortality class rating—so the policy could be reinstated upon the same terms. In fact, Harrison's health had deteriorated from 2005 to 2012. At best, he qualified for a substandard mortality class rating in 2012. Accordingly, the insurer did not breach the contract or act in bad faith when it denied the Reinstatement Application.

V. BREACH OF THE DUTY OF GOOD FAITH IS A FACT ISSUE

No Cases

VI. DAMAGES FOR BAD FAITH

DAMAGES: NO PUNITIVE DAMAGES FOR BREACH OF CONTRACTUAL IMPLIED DUTY OF GOOD FAITH

Lucarell v. Nationwide Mut. Ins. Co., 2018-Ohio-15

Ohio Supreme Court reversed judgment of the court of appeals affirming a jury verdict in favor of Plaintiff on claims for breach of contract and invasion of privacy but reversing a directed verdict for the Defendant insurance company on her claim for fraud. The Supreme Court remanded to the appellate court for further proceedings.

Plaintiff sued Nationwide asserting it had fraudulently and in bad faith induced her to open a new insurance agency when it intended to terminate her after she generated a profitable book of business. The jury returned verdicts in excess of $42 million in compensatory and punitive damages. The trial court entered judgment for more than $14 million.

The Supreme Court held that punitive damages may not be awarded for a breach of contract. It clarified that a party to a contract does not breach the implied duty of good faith and fair dealing by seeking to enforce the agreement as written or by acting in accordance with its express terms, nor can there be a breach of the implied duty unless a specific obligation imposed by the contract is not met.

The Court also held that a release of liability is an absolute bar to a later action on any claim encompassed within it absent a showing of fraud, duress, or other wrongful conduct in procuring it. A party claiming duress is required to prove duress by clear and convincing evidence. The prevention of performance doctrine—which states that a party who prevents another from performing a contractual obligation may not rely on that failure of performance to assert a claim for breach of contract—is not a defense to a release of liability and therefore cannot be asserted as a defense to a release. Lastly, a claimant cannot rely on predictions or projections that relate to future performance or that are made to third parties to establish a fraud claim.

VII. BAD FAITH DISCOVERY

DISCOVERY: AMENDED PRIVILEGE STATUTE DOES NOT PROTECT DOCUMENTS FROM DISCOVERY

William Powell Co. v. Nat'l Indem. Co., No. 1:14-CV-00807, 2017 WL 1326504, (S.D. Ohio Apr. 11, 2017), aff'd sub nom., No. 1:14-CV-807, 2017 WL 3927525 (S.D. Ohio June 21, 2017), and modified on reconsideration, No. 1:14-CV-00807, 2017 WL 4315059 (S.D. Ohio Sept. 26, 2017)

US District Court for the Southern District of Ohio granted insured's motion to compel and denied insurer's motion for protective order in coverage litigation arising out of underlying asbestos suits filed against insured.

Court rejected insurer's contention that, in order to proceed with discovery on its bad faith claim, insured was required to demonstrate evidence of damages "other than defense and indemnity costs" alleged in support of its breach of contract claim. The court reasoned that the merits of the parties' dispute cannot be resolved at the discovery stage.

The Court also rejected the insurer's contention that the post-*Boone* amendments to RC 2317.02(A)(2) require that insured make "a prima facie showing of bad faith" before a claims file document protected by the attorney-client privilege will be subjected to an in camera review. The Court concluded that the overwhelming weight of authority holds that the testimonial privilege in bad faith insurance cases set forth in § 2317.02(A)(2) does not apply to documents and refused to certify the issue to the Ohio Supreme Court.

DISCOVERY: ATTORNEY CLIENT PRIVILGED DOCUMENTS DISCOVERABLE UNDER BOONE

Shah v. Metro. Life Ins. Co., No. 2:16-CV-1124, 2017 WL 5712562, (S.D. Ohio Nov. 27, 2017)

The US District Court for the Southern District of Ohio granted the insured's request to produce allegedly privileged documents after an in camera review by the magistrate judge in case seeking benefits under physician's disability policy.

Policy benefits were greater for disability classified as an injury than an illness; insurer classified insured's condition as an illness and insured sued demanding discovery of evidence insurer considered in making that determination. Insurer produced documents but withheld documents claimed to be privileged or protected work product.

The Magistrate Judge assessed the various documents in issue and in each instance concluded that none of the documents withheld from discovery constituted protected work product because none were created in anticipation of litigation. The court concluded that though all of the documents were attorney-client privileged, they were nonetheless discoverable because they potentially "cast light" on plaintiff's bad faith claim.

DISCOVERY: NO ABSOUTE RIGHT TO IN CAMERA REVIEW IN FEDERAL COURT

Hosea Project Movers, LLC v. Waterfront Assocs., Inc., No. 1:15-CV-799, 2017 WL 4682384, (S.D. Ohio Oct. 18, 2017)

The USDC for the SD of Ohio denied the insured's motion to compel discovery and for an in camera review of disputed discovery documents. Claim was under a marine insurance policy and arose from the sinking of a barge on the Ohio River. Insured's challenged an attorney's affidavit and asserted that his involvement in the claim was as a claims handler and not as an attorney, thereby invalidating any claim of attorney client privilege.

The Court rejected the insured's bald assertion that Forde was acting as a claims handler. It also rejected the insured's invitation to have the Court conduct a broad *in camera* review of every document concerning Forde as to which the insurer has claimed a privilege. The Court noted that conducting a large-scale *in camera* review of documents as to which an objectively reasonable privilege has been asserted is highly disfavored, both for obvious reasons of judicial economy, and

because neither the parties nor the public interest are well-served by increasing litigation costs relating to discovery disputes.

VIII. <u>BIFURCATTION OF BAD FAITH CLAIMS</u>

BIFURCATION: NO VOLUNTARY DISMISSAL AFTER COMMENCEMENT OF BIFURCATED TRIAL.

Estate of Brummitt v. Ohio Mut. Ins. Grp., 2017-Ohio-8507, (6th Dist., 2017).

The Court of Appeals affirmed summary judgment for the insurer on Plaintiff's bad faith claim for refusing to pay UM/UIM benefits in a wrongful death case.

Plaintiff and his spouse were injured in a car accident caused by an uninsured motorist, resulting in the wife's death. Plaintiff brought suit against the tortfeasor and his own UM carrier. The insurer moved to bifurcate the wrongful death and breach of contract claims from and to stay the bad faith claim. The Plaintiffs obtained a verdict against the tortfeasor. When the bad faith claim was reopened, they voluntarily dismissed the deceased spouse's bad faith claim and prosecuted the husband's bad faith claim to verdict. Plaintiff's then refiled the deceased wife's bad faith claim as a class action suit. The insurer moved to dismiss or in the alternative for summary judgment and the trial court granted the motion under Civ.R. 56.

The Court of Appeals held that because "trial had commenced" (and concluded; i.e., on the tort and breach of contract claims) prior to the attempted voluntary dismissal, Plaintiffs could not avail themselves of a voluntary dismissal under Civ.R. 41(a)(1). Instead the dismissal was on the merits under Rule 41(a)(3). Even though certain claims are bifurcated, they remain part of a single action, and trial on any one part is trial on all for purposes of the right to voluntarily dismiss.

BIFURCATION: BURDEN IS ON MOVING PARTY

Carpenter v. Liberty Ins. Corp., No. 3:17-CV-00228, 2017 WL 6055118, (S.D. Ohio Dec. 7, 2017)

USDC for the SD of Ohio denied insurer's motion to Bifurcate and Stay Discovery in suit alleging breach of contract, bad faith, and severe emotional stress/inconvenience/punitive damages in suit under homeowner's policy for damages due to fire.

Insurer moved under Fed. R. Civ. P. 42 for bifurcation of breach-of-contract claim from remaining claims and stay of discovery on the latter. Insurer further requested in the event of trial, that the breach-of-contract claim be tried first, followed by the trial of the remaining claims.

Trial court denied the motions finding that the insurer's projected conservation of resources would be realized only if it was successful in defeating the breach of contract claim, otherwise, bifurcation would compound the amount of time and money required to resolve all claims. The Court further found that the insurer had not adequately specified the prejudice it anticipated if the insured was permitted to conduct discovery of its bad faith claim contemporaneously with its other claims.

BIFURCATION: INSURER FAILED TO CARRY BURDEN

Shah v. Metro. Life Ins. Co., No. 2:16-CV-1124, 2017 WL 4772870, (S.D. Ohio Oct. 19, 2017)

USDC for the SD of Ohio denied insurer's motion to bifurcate.

The Court found that it has insufficient information to justify a stay of, or bifurcation of, discovery. The insurer argued that resolution of the coverage dispute could obviate the need to conduct bad faith discovery. Court found that the coverage issues likely involved the same discovery as the bad faith claim. Staying or bifurcating discovery in this case would require duplication of efforts and the insurer did not demonstrate, or even argue, that bad faith discovery would cause prejudice.