LAW NOTES

from the Law Offices of

Kay & Andersen, LLC

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What Every Insurer Should Know . . . . . .

ABOUT DISCOVERY AND PROOF IN FIRST- PARTY BAD FAITH CLAIMS

Counsel retained by insureds in disputes with carriers will frequently assert a bad faith claim in addition to an underlying breach of contract claim. The Wisconsin Supreme Court recently considered whether bad faith claims must be accompanied by breach of contract claims and under what circumstances discovery on a bad faith claim may proceed. In Brethorst v. Allstate Property and Casualty Insurance Company, 2011 WI 41 (June 14, 2011), found at: http://www.wicourts.gov/sc/opinion/DisplayDocument.html?content=html&seqNo=65844, Wanda Brethorst was injured in an automobile collision and incurred $9,789.00 in medical expenses. The other driver was uninsured, so Brethorst submitted a UM claim to her carrier, Allstate. Allstate paid $5,000.00 under the policy's med pay coverage and offered an additional $1,500.00, which was subsequently increased to $1,800.00. Brethorst responded by filing suit for bad faith denial of benefits. Brethorst alleged that Allstate acted in bad faith by failing to conduct a fair investigation, failing to have her claim evaluated by anyone with medical training, and ignoring her doctor's opinion. Allstate moved to bifurcate and stay all bad faith proceedings until the breach of contract claim was resolved. Brethorst argued that she had only asserted one claim for bad faith. The circuit court denied Allstate's motion, holding that parties may bring separate bad faith claims distinct from breach of contract claims. Allstate sought an interlocutory appeal, which was immediately certified to the Supreme Court. The Supreme Court held that while a bad faith claim may be brought without bringing a breach of contract claim, the bad faith claim cannot exist without some wrongful denial of benefits under the insurance contract. Id, ¶¶56, 65. While an insurer's "bad behavior unrelated to a breach of contract might be subject to some sanction," it does not give rise to a bad faith claim. Id, ¶70. The insured must plead in the separate bad faith claim that she was entitled to payment under the policy and allege facts to show that her claim under the contract was not fairly debatable. Id, ¶76. To proceed with discovery, these allegations must withstand the insurer's rebuttal, which may be presented not only by responsive pleading but also by motion. Id, ¶77. In this case, Allstate's belief that Brethorst's injury did not result from the accident was speculation and no evidence was provided to the circuit court to undermine Brethorst's claim. Allstate's theory supporting its failure to pay was not enough to preclude discovery on the bad faith claim. Id, ¶85.

A clear lesson to take away from this case is that in the interest of rebutting a potential claim of bad faith, insurers should always undertake an appropriate fact investigation tailored to the particular claim in lieu of relying on general experience or prior similar cases.

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