



Updates in Insurance Coverage and Bad Faith - Episode #137

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John Czuba: Welcome to the *Insurance Law Podcast*, the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, managing editor of *Best's Recommended Insurance Attorneys*.

We're pleased to have with us today attorney Charles (CJ) Haddick, Jr. CJ is a shareholder of the [Dickie, McCamey & Chilcote, P.C.](#) law firm, with offices in Pittsburgh and throughout the US. CJ is the shareholder in charge of the firm's Harrisburg office.

He practices in the areas of insurance coverage and insurance bad faith litigation, insurance fraud, arson, fire, and explosion cases, cybersecurity and cyber insurance coverage and litigation, professional liability, including insurance agency errors and omissions, subrogation, and general liability defense.

He is also the author and editor of the insurance blog, www.badfaithadvisor.com. CJ, we're very pleased to have you with us again today.

CJ Haddock: Thanks, John. Good to be here again. Good morning from Central Pennsylvania.

John: Thanks so much, CJ. Today's discussion will center on updates in insurance coverage and bad faith. CJ, for our first question, have you noticed any major trends in the insurance bad faith landscape over the last year or so?

CJ: To be honest, it's "steady as she goes" in the bad faith area. What I see throughout the country, in going through cases for the blog and for my practice, is that the bad faith bar continues to be set very high. It's meant to be a high bar. The opinions I see, the majority seem to recognize that. It could just be that it's the cases that are published.

Most bad faith cases are dismissed, because bad faith statutes and the whole concept of bad faith is not designed to punish insurers for negligence or bad decisions. It's intended to be a special remedy to provide a right of action to insureds only when bad faith insurance companies act unreasonably and without reasonable basis.

We'll talk about, a little bit later, a recent case that I think illustrates that. Is that answer long enough?
[laughs]

John: Yeah, that's perfect. [laughs] Are there any bad faith decisions which stand out for you over the last year or so?

CJ: I'm going to be a little bit of a Homer here and mention a case in particular that seemed to create a little bit of buzz here in Pennsylvania. The name of the case is *Rancosky v. Washington National Insurance*. It was a Supreme Court case here in Pennsylvania, decided this year.

Basically, in that case, the court took up the issue of whether or not an insurer's motive of ill will was a requirement of making out a bad faith case, as opposed to just a factor to be considered. While the opinion was considered to be an important one, the way the case ended, I don't know that it made much of a change in Pennsylvania law.

The Supreme Court said that ill will or bad motive is not a requirement to be proved against the insurers in the handling of claims, but that it was a factor to be considered. In Pennsylvania, and truthfully in some form or another, the bad faith test, the criteria for making out a bad faith against an insurer is a two-step process.

The first of which is that the insurer lack a reasonable basis for a claims decision. Number two, did the insurer know or recklessly disregard the lack of a reasonable basis? Ultimately, *Rancosky* said that two-step test is still the test. It's just that the insurer's motive of ill will wasn't a factor, didn't have to be proved as an element, but certainly could be considered in the process.

If you want to ask whether there are any significant bad faith decisions, at least in my practice, *Rancosky* came down this year as one of those rules.

John: CJ, have there been any significant developments in insurance coverage decisions?

CJ: One of the things that I saw come out this year were some coverage suits over the opioid crisis and the opioid epidemic. There is a case in particular. It's not the only case, but a case, I believe, California appeals court, *Travelers versus Actavis*, A-C-T-A-V-I-S.

It was decided I think in November. It's a case where an opioid manufacturer sought coverage from its CGL insurer, Travelers, for a suit against the manufacturer about intentionally misrepresenting or over-marketing opioid drugs. It sought coverage for the suit, defense and indemnity, and Travelers declined.

The court found in favor of Travelers, saying that these kinds of suits don't allege accidental conduct of any kind. They allege an intentional and deceptive pattern and practice on the part of the manufacturers to over sell and encourage the over prescription of these drugs.

The court said, "This is not an accident. This is not the kind of fortuitous event an insurance policy is designed to cover." They also ruled that the liability policy that Actavis had also had an exclusion for completed operations.

In the opioid suits, one of the key things that you're going to see is, "What are the specific allegations against the opioid manufacturer in the underlying case?" If they continue to be this intentional conduct, there's not going to be coverage for them.

If, however, you start to see suits against drug companies for negligence or something in that vein, then I think the coverage case could come down differently. Certainly, it'd be much harder decision or ruling.

Along with the opioid crisis, I think you're going to see some coverage litigation with respect to some of the emerging suits not just by state attorney generals, but by private plaintiffs.

John: Have there been any industry-wide changes which have impacted how insurers defend themselves and litigate bad faith and coverage cases?

CJ: In this question, you may know as much or more about it than I do. I have noticed the insurance industry is changing. Really, all of business is changing. It's a much more competitive environment and marketplace. Insurance companies, like any other competitor in a business marketplace, they want more bang for their buck.

One of the places they're looking for that value is with outside attorneys. I think that insurers, I don't know that I would say that they're defending cases differently. I would say that the business landscape now is one where law firms and outside lawyers can't just be lawyers. They need to be business advisors to the insurance companies and provide some sort of value.

One of the things we like to do is provide that value in terms of consultation before the bad faith case is filed. We'd rather advise a client to avoid having a suit filed than have to defend the client after a suit is filed. Sometimes we can do more before the case is filed, while the claim is being handled, so we do provide that service.

Insurers, I think they are still defending themselves in the right cases. They're looking for efficiencies in the marketplace.

Artificial intelligence, technology, those things are all making measuring efficiency better. Outside law firms are certainly not immune to having to stay up to speed, so they can provide their clients, including insurance companies, efficiencies, in addition to good, solid legal advice.

John: CJ, any predictions for the insurance coverage and bad faith landscapes for 2018?

CJ: Actually, as I was preparing to answer that question, I came across something I thought was of interest. It's a separate thing on the horizon from the opioid issue. I read an article within the last month that described an insurance company by the name of Lemonade. It's a tiny, startup insurance company that writes mostly tenant policies.

The claims process with this company is almost completely automated. It means that robots and algorithms are actually deciding claims. The reason it caught my eye was that there was a small theft claim for a parka, and the insured completely submitted the claim on an app, on his telephone.

Within 30 seconds to a minute, the claim had been run through these algorithms. The claim had been paid, and the claim was closed. Just from the insured's telephone, a claim was made and closed within a matter of minutes.

That was done because no human being ever looked at it. It was all artificial intelligence. Super interesting idea. Looking ahead, I'm wondering how that is going to be handled, especially when it gets to bad faith cases or coverage disputes.

The insurance industry has always had software as tools – claims valuation programs and things of that nature – but it has never gone fully automated as it was in this example that I read. I think one of the things that could be interesting going forward is, take for example a bad faith case against an insurance company, but where all of the decisions were made by artificial intelligence.

That could be a challenge to defend to a judge and jury who are not artificially intelligent, but who are humanly intelligent. My suggestion would be that I'm not sure that you're ever going to get to a point in the claims process where machines can do what humans do.

As long as humans make decisions about insurance coverage and, unfortunately, bad faith, I think humans need to be involved in the claims process in some way. I guess that's a little bit of a speech on the human element, John. I didn't mean to turn into a professor there. [laughs]

John: The timing is good, with everything happening in claims, data analytics, and everything. So, yes.

CJ: It's truly going to be something that you're going to stumble into one day or another, where a claims decision has been made almost entirely or entirely by artificial intelligence. How do you explain that process if you have to defend a bad faith claim? I've not run into yet, but I certainly can contemplate it in the future.

John: CJ, thank you so much for joining us today.

CJ: Thanks very much. It was a pleasure to be here.

John: That was Charles (CJ) Haddick, Jr., a shareholder of the [Dickie, McCamey & Chilcote, P.C.](#) law firm, with offices in Pittsburgh and throughout the US. Special thanks to today's producer, Frank Vowinkel.

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I'm John Czuba, and now this message.

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