OACTA INSURANCE COVERAGE SEMINAR

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

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Presented By:

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I. SUFFICIENCY OF BAD FAITH PLEADINGS

INSUFFICIENT PLEADINGS: CLAIM FOR BREACH OF IMPLIED DUTY OF GOOD FAITH IN CONTRACT OTHER THAN INSURANCE POLICY NOT ACTIONABLE UNDER OHIO LAW

Capital Equity Grp. v. Ripken Sports Inc., 744 F. App'x 260 (6th Cir. 2018)

The Sixth Circuit Court of Appeals affirmed the District Court's order dismissing the Plaintiff's lawsuit for failure to state 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 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, and because they failed to explain how the letter of intent at issue fell within a set of "*limited* circumstances where the duty arises from the language of the contract," there was no actionable duty of good faith and fair dealing.

CLAIM SUFFICIENTLY PLED: ACTIONABLE BAD FAITH CLAIM ASSERTED BY TORTFEASOR'S EMPLOYER

Harsh v. GEICO Gen. Ins. Co., No. 2:17-CV-00814, 2018 WL 4521934 (S.D. Ohio Sept. 21, 2018)

The United States District Court for the Southern District of Ohio granted in part and denied in part the insurer's motion for judgment on the pleadings in the insured's suit alleging breach of contract, bad faith, contractual breach of implied covenant of good faith and fair dealing, tortious breach of the implied covenant of good faith and fair dealing, and unfair trade practices.

The insured's employee caused a fatal traffic accident while operating the insured's auto under the influence of alcohol. Plaintiffs sued for wrongful death and the insurer defended. The insurer then filed a separate suit for declaratory judgment on the employee's status as a permissive user. Plaintiffs obtained summary judgment on coverage, which the insurer appealed and lost. When the insurer finally offered its policy limits in the wrongful death action, Plaintiffs rejected the offer and obtained a verdict well in excess of the limits.

The insured then filed this third lawsuit against the insurer, which the insurer removed to federal court. The Court granted judgment on the pleadings for the insurer on all of the substantive counts except bad faith.

The Court held that the bad faith allegations were not so narrowly plead as to fall completely within outside the four year statute of limitations, and implied that the insurer may have engaged in "foot dragging" (first settlement offer made approximately two years after the accident and was on behalf of the employee, not the insured; duty of good faith extends to the processing of an insured's claims as well as to the settlement of such claims).

The Court further rejected the insurer's argument that the insured's bad faith allegations actually stated a claim for attorney malpractice against the insurer-appointed defense lawyer, noting that the complaint "plausibly pled allegations that the insurer acted in bad faith within an actionable time period."

CLAIM SUFFICIENTLY PLED: AMENDED COMPLAINT ASSERTED PLAUSIBLE BAD FAITH CLAIM

Winter Enterprises, LLC v. W. Bend Mut. Ins. Co., No. 1:17-CV-360, 2018 WL 1522119 (S.D. Ohio Mar. 28, 2018)

The United States District Court for the Southern District of Ohio denied the insurer's motion to dismiss and permitted the insured to file a second amended complaint alleging, among other claims, bad faith in failing to adjust and pay the insured's first party commercial property claim.

The insured owned and operated a roller rink that was severely damaged in a storm, including partial collapse of the roof. The parties disagreed as to the extent of the damage

and the cost of repair. The insured claimed that the repair authorized by the insurer was ineffective, diminished the value of the property, and breached the insurance contract.

The insured further alleged that the insurer acted in bad faith by: performing an inadequate and incomplete investigation of the loss; denying the insured's request for reconsideration of the claim based on a written engineering report less than four hours after receiving it; failing to prepare a repair estimate for a collapsed portion of the wall; and, wrongfully intending to deny the claim from its inception.

The insurer moved to dismiss counts 3-6 of the amended complaint which asserted claims for: Contractual Breach of the Implied Covenant of Good Faith and Fair Dealing; Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing; Bad Faith; and, Unfair Trade Practices. The insured then moved for leave to file a second amended complaint that would consolidate these claims into a single claim for "bad faith." The Court permitted the insured to amend and then denied the insurer's motion to dismiss the consolidated bad faith claim because the allegation that the insurer "ignored a contrary engineering report and denied Plaintiff's claim only four hours after receiving it is particularly supportive of a bad faith claim."

II. NO DUTY OF GOOD FAITH OWED

NO DUTY: ISSUER OF ANNUITY DID NOT OWE DUTY OF GOOD FAITH TO ANNUITANT'S BENEFICIARIES.

Whitman v. Estate of Whitman, No. 1:17-CV-667, 2018 WL 2063317 (S.D. Ohio May 3, 2018)

The United States District Court for the Southern District of Ohio entered judgment on the pleadings for the insurer and its agent on Plaintiffs' misrepresentation and bad faith claims.

Plaintiffs' decedent purchased three annuities from the insurer, one for the benefit of each of his children from a first marriage. The executor of the decedent's estate (the second wife) acquired certain rights with regard to the annuities when he predeceased the annuitants. When the executor refused to authorize the insurer to pay the proceeds of the annuities to the Plaintiffs, they sued. The insurer interplead the annuities and the Plaintiffs counterclaimed for bad faith.

The Court dismissed the negligent misrepresentation claim based on the statute of limitations. It then entered judgment on the pleadings for the insurer and its agent on the bad faith claim, for three separate reasons.

The Court held that the tort of bad faith applies only to an insurer's denial of a claim for insurance coverage, not an annuitant's claim to the proceeds of an annuity. An annuity is a contract that provides for the payment of a sum of money at yearly or other regular intervals; it is not an insurance contract. Plaintiffs failed to demonstrate that the relationship between the seller of an annuity and its purchaser gives rise to a cause of action for bad faith under Ohio law. The Court rejected Plaintiffs' claims that Ohio statutes relating to life benefits and identity theft, had any relevance to the issue of whether a duty was owed.

Plaintiffs failed to state a bad faith claim because they lacked contractual privity. A bad faith claim arises out of the contractual relationship between the insurer and the insured. Ohio courts have consistently rejected bad faith claims where the parties are not in privity with each other.

Plaintiffs' bad faith claim also fails because, even accepting their allegations as true, they could not establish that Allianz had no reasonable justification for bringing an interpleader action instead of paying the proceeds of the annuities to Plaintiffs.

NO DUTY: NEITHER TPA NOR ADJUSTER OWED DUTY OF GOOD FAITH TO INJURED CLAIMANTS

Shoemaker v. Murdock, No. 1:18-CV-564, 2019 WL 358920 (S.D. Ohio Jan. 29, 2019)

The United States District Court for the Southern District of Ohio denied the Plaintiffs' motion to remand the suit to state court, granted the insurers' motion to dismiss three counts of the complaint and dismissed the insurer defendants from a suit for personal injuries and insurance coverage arising out of an automobile accident.

Plaintiffs were injured in an auto accident caused by another driver. The tortfeasor was operating a rental car. The rental company had retained a third party administrator to oversee claims against it like the Plaintiffs' here. The TPA's adjustor acknowledged to Plaintiffs' counsel in an email: "I have received the materials; I will review and call you with a settlement offer."

When the TPA failed to extend a settlement offer within 30 days, Plaintiffs sued the tortfeasor, the rental company, the TPA and its adjustor. The claims asserted against the TPA and the adjustor included bad faith, breach of contract, and civil conspiracy.

The Court held that the claims against the adjustor had been fraudulently joined to defeat diversity jurisdiction. The Plaintiffs' bad faith claims against the TPA and the adjustor failed because under Ohio law, a liability insurance company has no "duty enforceable by a third party injured by their insured to negotiate in good faith to attempt to settle the matter without litigation." The Court further observed that an insurer cannot be sued for negligence by an insured" and that "there is no duty owed by an insurance adjuster, in her individual capacity, to a person making a claim on a policy of insurance."

The Court rejected the breach of contract claim based on the adjustor's email communication to Plaintiff's counsel because it lacked a "definite offer," and dismissed the civil conspiracy claim for lacking a predicate unlawful act.

NO DUTY: NO DUTY OWED TO ASSIGNEE WHERE ASSIGNOR FAILS TO DEFEND IN DECLARATORY JUDGMENT ACTION; NO BAD FAITH WITHOUT COVERAGE

Link v. Wayne Ins. Grp., 2018-Ohio-3529, Allen App. No. 1-18-13 (3rd Dist.)

Court of Appeals affirmed summary judgment for the insurer on complaint for breach of contract, refusal to defend, and bad faith.

Plaintiff was attacked and injured by a dog kept on the insured's property. The insurer disclaimed coverage and cancelled the homeowner's policy based on the insured's representation in her application that she kept no dogs. Plaintiff sued the insured and they eventually entered into a consent judgment and assignment of their rights against the insurer.

Plaintiffs then filed this suit against the insurer. The insurer counterclaimed and filed a third party claim against the insureds for declaratory judgment. The insureds failed to appear and the trial court entered default judgment for the insurer finding no duty to defend or indemnify. The trial court ultimately entered summary judgment for the insurer on the Plaintiff's claims as well.

The Appellate Court held that the Plaintiff lacked standing to challenge the default judgment against the insureds because the Plaintiff failed to establish a sufficiently close relationship with them.

The Court rejected that the Plaintiff's claim that even if the breach of contract claim could not survive summary judgment, the bad faith and failure to defend claims, would.

The Court distinguished *Bullet Trucking, Inc. v. Glen Falls Ins. Co.*, 84 Ohio App.3d 327, 333, 616 N.E.2d 1123 (2nd Dist.1992), because in *Bullet Trucking* there was no declaratory judgment related to the insurance policy. In this case, the trial court declared that not only was the insurance policy null and void as a matter of law, but also that the insurer had no duty to defend or indemnify.

Finally, the Court held that Plaintiff's assertion that a claim for bad faith *may* survive a motion for summary judgment on a breach of contract is not a "specific fact" that demonstrates a genuine triable issue.

NO DUTY: NO DUTY OWED TO PROVIDER OF HEALTH CARE SERVICES

Patel v. Aetna, No. 2:17-CV-78, 2018 WL 6574734 (S.D. Ohio Dec. 12, 2018)

The United States District Court for the Southern District of Ohio granted in part and denied in part the insurer's motion for summary judgment on the pro se Plaintiff's complaint alleging unjust enrichment and seeking declaratory judgment that the insurer had acted in bad faith under a health and disability policy issued to her mother.

Plaintiff was a State Tested Nursing Assistant ("STNA"), licensed by the State of Ohio. She became a registered provider with the insurer and began providing home health services to her mother, who was insured under the policy. For over two years, Plaintiff provided services to her mother and was paid in excess of $200,000. The insurer then ceased paying Plaintiff's invoices and demanded return of past payments.

The Court entered summary judgment for the insurer finding that as an out-of-network provider who did not meet certain Medicare guidelines, Plaintiff's services were reimbursable only to the extent they were reimbursable under Medicare----which expressly

excluded payment of "charges imposed by immediate relatives of such individual or members of her household."

The Court found that Plaintiff's requests for declaratory relief was "confusing, at best," particularly with respect to what "appears to be a bad faith claim" contained within it. Nonetheless, the Court found that the insurer was entitled to summary judgment because Plaintiff was not its "insured," noting that the duty of good faith arises out of the contractual relationship between the insurer and the insured and requires privity of contract. The Court further found that, even if a bad faith claim was possible, no reasonable juror could find that the insurer acted in bad faith. .

III. DUTY OF GOOD FAITH OWED

INSURER OWED DUTY TO DEFEND AND INDEMNIFY--AND GOOD FAITH--WHERE LIQUOR LIABILITY EXCLUSION INAPPLICABLE

Mesa Underwriters Specialty Ins. Co. v. Secret's Gentleman's Club, No. 17-3779, 2018 WL 5004919 (6th Cir. Oct. 16, 2018).

The Sixth Circuit Court of Appeals affirmed the District Court's order denying the insurer's motion for judgment on the pleadings and granting the insured's and underlying tort Plaintiffs' motions for partial summary judgment in the insurer's declaratory judgment action to determine if it owed a duty to defend and indemnify the insured bar under a CGL policy in a wrongful death suit arising out of car crash caused by an intoxicated bar patron.

Plaintiff's daughter was killed when her vehicle was struck head-on by a heavily intoxicated driver who had minutes earlier been ordered to leave the insured bar. The bar's CGL policy contained a liquor liability exclusion that excluded coverage for claims arising out of the insured's causing or contributing to anyone's intoxication, or serving or selling alcohol. Plaintiffs sued the bar alleging wrongful death based on multiple liability theories. The insurer refused to defend or indemnify, citing the liquor liability exclusion. The Plaintiffs and the bar eventually entered into a consent judgment in which the bar stipulated to common law negligence claims that scrupulously avoided the parameters of the liquor liability exclusion. The proceedings concluded with a judgment in favor of the Plaintiffs in excess of $8,000,000. The insurer then instituted the declaratory judgment action in federal court.

In affirming partial summary judgment for the Plaintiffs and the bar, The Sixth Circuit Court of Appeals held that the factual findings made in the consent judgment order entered in state court were collateral estoppel against the insurer, and that the insurer---as a party in privity with the bar---was bound by the consent judgment.

The Court affirmed the district court's finding that the insurer had a duty to defend because the complaint alleged acts or omission "of the bar's employees which arguably amounted to negligence, whether or not the tortfeasor was sold or consumed alcohol at the bar."

The Court held that the insurer had a duty to indemnify the bar because the consent judgment entered in the state court action established that the bar was liable for the

Plaintiffs' daughter's death based on negligent acts that are separate, distinct, [and] independent from and unrelated to the sale and service of alcohol.

Bad faith claim now to be litigated.

IV. NO BREAH OF THE DUTY OF GOOD FAITH

NO BREACH: DISABILITY CLAIM REASONABLY DEBATABLE; NO CONTINUING BAD FAITH

Shah v. Metro. Life Ins. Co., No. 2:16-CV-1124, 2019 WL 688055 (S.D. Ohio Feb. 19, 2019)

The United States District Court for the Southern District of Ohio granted partial summary judgment to the insurer on the insured's bad faith claim in a suit for breach of a disability policy.

The insured was a physician who claimed to be totally disabled. The policy paid a higher benefit for total disability due to injury than for disability due to sickness. The insured's disability was in part due to his many years of standing in a laboratory while wearing a lead apron. A broken clavicle many years earlier may have also contributed. The insurer determined that the disability was due to sickness and the insured sued, alleging breach of contract, declaratory judgment, and bad faith.

The insured asserted that the insurer was not reasonably justified in determining that his disability was due to "sickness" and not "injury." The insurer moved for partial summary judgment on the bad faith claim and related claims for punitive damages and attorneys' fees.

In concluding that the insurer had demonstrated a reasonable justification, the Court noted that the insurer had commissioned several medical evaluations, including discussions with the insured's treating physicians, and commissioned its in-house counsel to research and ascertain the status of Ohio law with respect to the insured's claims.

The insured asserted "continuing bad faith" when the insurer "refuted the opinion of its own expert." The insurer argued that post-litigation conduct could not be used to prove bad faith in the denial of the claim three-to-four years beforehand. The Court agreed, noting that the insurer's expert's third report did not relate to the handling or refusal to pay the claim. Rather, it was a further consideration of his own prior opinions in which he acknowledges the possibility of a link between an old clavicle fracture and the insured's current condition. While the third report diverged from his earlier assessments, it was issued well after the denial of the claim.

The Court held that in assessing bad faith, the Court must analyze the information the insurer relied on in making the coverage determination and whether it was reasonably justified. It would be inappropriate to accord any weight to the third opinion in assessing bad faith when it was not available when the insured handled the claim.

NO BREACH: DISPUTE AS TO THE APPLICATION OF THE LAW TO A PARTICULAR CLAIM IS NOT BAD FAITH

Avery v. Erie Ins. Co., No. 1:17-CV-562, 2018 WL 2100371 (S.D. Ohio May 7, 2018)

The United States District Court for the Southern District of Ohio granted in part and denied in part the insurer's motion for summary judgment and denied the insured's motion, on their complaint for breach of contract; breach of the duty of good faith; and bad faith under a homeowner's policy.

The insureds' roof was damaged in a storm. An adjuster inspected the damage and the insurer offered to pay the cost of replacing five damaged tiles. The insureds demanded a new roof because the old tiles were no longer commercially available and because they contained asbestos. The insurer then retained an expert to re-inspect the roof and determined the claim was excluded due to "fungi" and rot.

The Court held that the Ohio Administrative Code did not require the replacement of the insured's roof and granted summary judgment. It denied summary judgment on the application of the exclusions because neither the expert's report nor the insureds' testimony established facts that triggered the exclusions.

The Court entered summary judgment for the insurer on the bad faith claim because the insureds' claim was "fairly debatable" as to status of the law and whether the facts required a replacement roof or simply a repair. The Court found no evidence that the insurer breached its duty of good faith and fair dealing. Rather, it concluded that the parties merely disagreed as to the application of relevant law to the facts at hand.

NO BREACH: NO BREACH OF THE IMPLIED DUTY OF GOOD FAITH WITHOUT AN ACTIONABLE CONTRACT CLAIM

Sourial v. Nationwide Mut. Ins. Co., 2018-Ohio-2528, Franklin App. No. 17AP-731 (10th Dist.)

The Court of Appeals affirmed summary judgment for the insurer on the agent's breach of contract, breach of the implied covenant of good faith and fair dealing, promissory estoppel, and unjust enrichment claims

Plaintiff was an agent with a competing insurer when he was approached with an opportunity to join one of the Defendant insurer's agency programs. The program was to provide training and an opportunity to purchase a book of business producing $350,000 annually. Plaintiff left his position to join the program. Plaintiff did not enjoy the success he anticipated and claimed Defendant's executives had induced him to join the program by making false representations regarding his potential for success.

The Court of Appeals affirmed summary judgment because: the breach of contract claims were barred both by the contractual limitations period and the release; the contract's integration clause and the release barred the quasi-contract claims for promissory estoppel and unjust enrichment; and, the release barred the fraud claims.

The "bad faith" claim against the insurer was premised on an implied duty of good faith and fair dealing in performing and enforcing the written contract so as not to take opportunistic advantage of the other party in a way that could not have been contemplated at the time of drafting. The Court held that the agent could not maintain an action against the insurer for violating this implied covenant of good faith and fair dealing without an actionable contract claim.

NO BREACH: NO BREACH OF THE DUTY OF GOOD FAITH WITHOUT CLEAN HANDS

Mavis v. Allstate Vehicle & Prop. Ins. Co., No. 3:18CV1671, 2018 WL 4932459 (N.D. Ohio Oct. 11, 2018), *appeal dismissed,* No. 18-4086, 2019 WL 410916 (6th Cir. Jan. 9, 2019)

The United States District Court for the Northern District of Ohio granted summary judgment to the insurer on the insureds' breach of contract and bad faith claims arising out of the insurer's denial of coverage under their homeowner's policy following a fire in their detached garage.

The insureds sought to recover as insured personal property lost in the fire certain professional machinists' tools and woodworking equipment. Allstate refused to pay those items of the insureds' claim on the basis that the insureds failed to list the destroyed items at issue in a bankruptcy petition filed seven months before the fire. One of the insured's testified at the bankruptcy to the effect that the tools and equipment "had been sold, none were left, and there were no assets remaining."

The Court held that the doctrine of judicial estoppel precluded the insured's from recovering under the Policy for assets that they had failed to itemize in the bankruptcy. The bad faith claim was dismissed as well with the Court's observation that "the law makes sure that such double-dealing is self-defeating."

NO BREACH: COLLATERAL ESTOPPEL BARS CLAIM THAT AGENT BREACHED DUTY OF GOOD FAITH

H.P. Mfg. Co., Inc. v. Westfield Ins. Co., 2018-Ohio-2849, Cuyahoga App. No. 106541 (8th Dist.)

The Court of Appeals affirmed summary judgment for the insurer on the breach of contract claim and for its agent on the bad faith claim in insured's declaratory judgment action seeking coverage for damages awarded in an employer intentional tort suit.

The insured was sued by an employee who claimed to have been injured as a result of an employer intentional tort (i.e., deliberate removal of a safety guard). Insurer provided a defense, subject to a reservation, and the jury returned a verdict for the employee. The jury found the employer had acted "deliberately" in causing the injury. The insurer refused to pay the substantial judgment.

Insured then sued the insurer and the agent. The insured alleged that the agent breached a duty to provide a policy that would cover "all potential employer liability" except workers' compensation claims or claims where the insured "intended to cause injury."

The doctrine of collateral estoppel barred the insured's claims against both Defendants. The Court held that the agent did not breach its duty to exercise good faith and reasonable diligence in obtaining insurance requested by a customer. By its own admission, the insured did not seek coverage for circumstances in which it actually intended to cause injury to an employee. And, the insured could not relitigate its intent to injure the employee in order to sustain its bad faith claim against the agent, even though the agent's duty to the insured was not decided in the underlying litigation.

V. BAD FAITH DISCOVERY

INSURER NOT ENTITLED TO SUMMARY JUDGMENT WITHOUT INSURED BEING PERMITTED TO CONDUCT DISCOVERY

Crane Serv. & Inspections, LLC v. Cincinnati Specialty Underwriters Ins. Co., 2018-Ohio-3622, Butler App. No. CA2018-01-00 (12th Dist.)

The Tenth District Court of Appeals reversed bad faith summary judgment for the insurer in property damage liability claim under CGL policy arising out of crane collapse.

The insured was sued in Marion County and its insurer provided a defense under a reservation of rights. Just before the Marion County case was to be mediated, the insurer intervened to obtain declaratory relief and to submit jury interrogatories at trial.

The insurer decreased settlement authority based on the coverage evaluation and suggested that the insured should consider contributing to settle the Marion County case. The mediation was not successful.

The insured then retained personal counsel who participated in the defense of the original claim, the defense of the intervening claim, and who filed a separate lawsuit in Butler County alleging bad faith (among other claims).

The insureds sought discovery in the Butler County case, but the insurer moved to dismiss (in lieu of answering the complaint) and to stay the case until the Marion County litigation was concluded. When the Marion County eventually settled (with no contribution from the insured), the Butler County judge converted the motion to dismiss to a motion for summary judgment and eventually granted the motion without ruling on the insured's Civ.R. 56(F) motion.

On Appeal, the 12th District Court of Appeals held that the Butler County trial court had abused its discretion in failing to address insured's Civ.R. 56(F) motion and in precluding it from conducting discovery prior to granting summary judgment for the insurer on bad faith.

Insured had a right and a need to investigate whether the insurer had reasonable justification for moving to intervene and withdrawing settlement authority on the eve of mediation, failing to make an unequivocal coverage determination until three and one-half years after notice of the third party claims, and requesting insured to contribute toward settlement of the claims.

VI. LIMITATION OF ACTIONS

CONTRACTUAL LIMITATIONS NOT APPLICABLE TO BAD FAITH

Bolin v. Allstate Prop. & Cas. Ins. Co., 2018-Ohio-3396, Montgomery App. No. 27764 (2nd. Dist.)

The Court of Appeals affirmed dismissal of three counts of the insured's complaint and reversed dismissal of two others, on claims for fire damage to a home, boat and trailer insured under multiple policies issued by the insurer.

The insurer denied the claims and the insureds filed suit. At issue was whether the policies' contractual limitations clauses began to run at the time of the loss or at the time the claims were denied. The trial court entered judgment on the pleadings and dismissed the claims for: declaratory judgment; breach of contract; bad faith; and, punitive damages. The trial court dismissed the remaining claim for "negligent fulfillment of contractual duties," on the day of trial, because it failed to state a claim.

The Court of Appeals affirmed dismissal of the contract and declaratory judgment claims, as well as the "negligent fulfillment" claim. It reversed dismissal of the bad faith claim, acknowledging that "bad faith sounds in tort," and that "the limitations clauses in the policies did not apply." The court also reversed dismissal of the claim for punitive damages as it was dependent on the bad faith claim.