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Alerts

Wisconsin Holds Breach of Contract Claim Not Prerequisite for First-Party Bad Faith Claim

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Insights for Insurers

The Wisconsin Supreme Court recently held that an insured may file a bad faith claim without also filing a breach of contract claim; however, some breach of contract is a fundamental prerequisite for a first-party bad faith claim against an insurer. *Brethorst v. Allstate Property & Casualty Ins. Co.,* Case No. 2008AP2595, 2011 WI 41, (Wis. June 14, 2011). The Court stated that "[t]he insured may not proceed with discovery on a first-party bad faith claim until [he or] she has (1) pleaded a breach of contract by the insurer as part of a separate bad faith claim; and (2) satisfied the court that [he or] she has established such a breach or will be able to prove such a breach in the future."

In *Brethorst,* plaintiff insured was injured in a automobile accident involving an uninsured motorist. The insured was covered under an automobile liability policy with defendant insurer. Her policy included coverage for injuries caused by an uninsured motorist as well as $5,000 in medical expenses.

The insured incurred a total of $9,789 in medical expenses related to treatment of her injuries from the accident and submitted a claim to her insurer. The insurer offered to settle the injury claim for only $1,500 above the $5,000 in medical expenses already paid (total of $6,500). The insurer questioned the amount of damages, contending that it was a minor accident and should not have resulted in serious injury. After receiving a letter from the insured's treating physician confirming that the injuries and medical treatment were related to the accident, the insurer increased its settlement offer to $6,800.

The insured sued the insurer for bad faith denial of benefits. The insurer moved to have the bad faith claim bifurcated from the denial of benefits claim and to stay all proceedings on the bad faith claim until breach of contract issues were resolved. The trial court denied that motion, holding that "Wisconsin law allows a party to bring a bad faith claim separate and distinct from any underlying breach of contract claim." The insurer was granted an interlocutory appeal and the court of appeals certified the case to the Wisconsin Supreme Court.

The Supreme Court affirmed the trial court, but on more narrow grounds. It agreed that the insurer's motion should be denied, but refused to hold that all bad faith claims may proceed without pleading breach of contract. Some breach of contract is a fundamental prerequisite for a first-party bad faith claim, and the insured may not proceed with discovery on such a claim "until it has pleaded a breach of contract by the insurer *as part of a separate bad faith claim* and satisfied the court that the insured has established such a breach or will be able to prove such a breach in the future." (Emphasis added.) In essence, an insured choosing to pursue a bad faith claim in Wisconsin "must plead facts which, if proven, would demonstrate not only that the insurer breached its contract with the insured but also that there was no reasonable basis for not honoring the terms of the contract." The Supreme Court concluded that within the insured's bad faith claim the insured did plead facts which, if proven, would demonstrate that the insurer breached its contract. Therefore, the denial of the insurer's motion was affirmed.

Practice Note
A plaintiff bringing a first-party bad faith claim against an insurer in Wisconsin is not required to make a separate breach of contract claim. But, in order to proceed with discovery, the plaintiff must plead facts within the bad faith claim that if proven

demonstrate that the insurer breached its contract.

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