HINSHAW

Alerts

# Wisconsin Recognizes Claim for Bad Faith Failure to Settle Within Insured's Deductible Where Verdict Was Within Policy Limits

**October 6, 2010**
*Insurance Coverage Alert*

In *Roehl Transportation v. Liberty Mutual Ins. Company,* 2010 WI 49, 784 N. W.2d 542, the Wisconsin Supreme Court recognized a bad faith claim against an insurer for failing to settle a case within the insured's deductible, even though the ultimate payment was within the insurer's policy limit. This was the first time that the Wisconsin Supreme Court has recognized such a cause of action, which is also rare in other states.

The insured trucking company, Roehl Transportation was insured by Liberty Mutual. The automobile liability policy had $2 million limits, with a $500,000 deductible. Despite the large deductible, the policy provided that the insurer retained control over the investigation, defense and settlement of any claim. In a separate agreement, Liberty Mutual agreed to advise Roehl in settlement and claim handling and to discuss and obtain the insured's agreement on all bodily injury settlements.

A Roehl driver was involved in a collision, which seriously injured the plaintiff. Liberty Mutual took control of the case from the outset. Liberty Mutual did not settle the case, which was ultimately tried to an $830,400 verdict against Roehl, consuming the full $500,000 deductible. Thereafter, Roehl sued Liberty Mutual for bad faith, claiming that it had missed the opportunity to settle at an amount below the full $500,000 deductible based on Liberty Mutual's mishandling of the claim and a lack of good faith efforts in pursuing settlement for less than the $500,000 deductible.

After an unsuccessful motion to dismiss by Liberty Mutual, Roehl presented expert testimony at trial that the underlying case could have been settled for $100,000 early in the claim process and asked the jury to award damages of $400,000. The jury returned a verdict finding that Liberty Mutual had acted in bad faith and awarded damages of $127,000.

The Wisconsin Supreme Court, deciding a case of first impression, analyzed Wisconsin's tort of bad faith, and decided that it should be extended to the type of claim presented by Roehl. The Court found that this type of case was analogous to a traditional excess bad faith claim—in both instances, the insurer has control over settlement, the insured has direct financial exposure, and the interests of the insurer and insured may diverge. Thus, an insurer may be liable

## Attorneys

Thomas R. Schrimpf

for the tort of bad faith when the insurer fails to act in good faith and exposes the insured to liability for sums within the deductible. As acknowledged by the Court, only a few jurisdictions (most notably New York and Texas) have addressed and allowed this type of bad faith cause of action to proceed.

**Practice Note:** Insurers and their defense counsel can protect the insured's interest and avoid this type of bad faith claim by following the four obligations courts have imposed on insurers when defending claims that could result in excess verdicts: (1) exercise reasonable diligence in ascertaining facts upon which a good faith decision to settle or not settle must be based; (2) where a likelihood of liability in excess of the deductible exists, the insurer must inform the insured so that the insured might properly protect itself; (3) the insurer must keep the insured abreast of any settlement offers received from the plaintiff and of the progress of settlement negotiations; and (4) an insurer has an affirmative duty to settle within the deductible if it can, even without a legally binding offer from the plaintiff.

For further information, please contact Thomas R. Schrimpf or your regular Hinshaw attorney.

*This alert has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.*

## Register Today for Hinshaw's Annual Insurance Services Symposium: An Ounce of Prevention: Proactive Risk Management for Agents, Brokers, and Insurers

**October 21, 2010**
8:00 a.m. – 4:00 p.m.
Registration and Continental Breakfast begin at 8:00 a.m.

**Chicago Marriott Downtown Magnificent Mile**
540 North Michigan Avenue
Chicago, Illinois

**Who Should Attend?**
Adjusters
Brokers
Claims and Underwriting Professionals
Corporate Counsel
Executives
Risk Managers

**Why Attend?**
This Symposium brings together representatives from major insurance companies and insurance coverage attorneys to explore recent decisions and the impact on the insurance industry.

**Registration Fee**
The $35 non-refundable registration fee includes a continental breakfast, symposium materials and lunch.

**Symposium Topics include:**

- Truth or Consequences: The Importance of Making Truthful Disclosures in the Application Process
  - Truth – The Brokers Obligation to Provide Accurate Information During the Application Process
  - Consequences – The Insurer Can Sue the Broker Instead of Rescinding the Policy
- When the Barn Is Blazing: Recent Developments in Law on Montrose Endorsements, "Prior Knowledge" Exclusions and Limitations, and the True Meaning of Fortuity
- Between a Rock and a Hard Place: The Risks and Rewards of Broker Involvement in Coverage Disputes

- Is It OK to Be Wrong? Can an Insurer Avoid An Extra-Contractual Liability If Its Position Is Fairly Debatable?
- From the Outside Looking In: Effective Management of Underlying Litigation Where Coverage Is Disputed
- To See and Foresee: The Pro-Active Use of Monitoring and Appellate Counsel at Trial

**Lawyers may earn up to 5.50 hours of continuing legal education credit.**
**Illinois brokers may earn up to 5.50 hours of continuing education credit.**

Please contact Renee Odom at 312-704-3050 if you have any questions regarding the Symposium. To download a copy of the Symposium brochure, please click on the following link: Hinshaw Annual Insurance Symposium