PLUNKETT COONEY

Bad Faith, Intervention as of Right Coverage Update

November 1, 2022

Bad Faith – Nebraska

Millard Gutter Co. v. Shelter Mut. Ins. Co.
312 Neb. 606, --- N.W.2d ---- (Neb. Oct. 14, 2022)

Millard Gutter Co. v. Farm Bureau Prop. & Cas. Ins. Co.
312 Neb. 629, --- N.W.2d ---- (Neb. Oct. 14, 2022)

The Nebraska Supreme Court upheld decisions in two cases brought by a roofing and gutter company, finding that bad faith claims against insurers could not be assigned from policyholders to third parties.

Millard Gutter Co. (Millard) had obtained assignments of proceeds from policyholders under various property policies issued by Shelter Mutual Insurance Co. (Shelter) and Farm Bureau Property & Casualty Insurance Co. (Farm Bureau) resulting from a 2013 storm that caused damage to multiple policyholders' properties. According to Millard, it had provided copies of the assignments to the insurers and made claims for storm damage. In subsequent lawsuits against Shelter and Farm Bureau, Millard alleged that the insurers had breached the respective insurance policies issued to the policyholders, and that the insurers had acted in bad faith. The trial courts granted pre-answer motions to dismiss Millard's claims based on lack of standing.

On appeal to the Nebraska Supreme Court, the high court unanimously affirmed the dismissals in both cases, agreeing that Millard did not have standing to assert bad faith claims. In particular, the Supreme Court found that, under Nebraska law, "only a policyholder has standing to bring a first-party bad faith claim against an insurer." Even if the policyholders assigned their rights under their respective policies, the high court concluded that "even assuming without deciding that the proceeds from first-party bad faith actions can be validly assigned under Nebraska law, we hold that a policyholder cannot validly assign the right to prosecute or control such an action."

In the alternative, the Supreme Court also found that "[t]he implied covenant of good faith and fair dealing that Nebraska law imposes on insurers 'is dependent upon a contractual relationship between the [policyholder] and the insurer.'" Millard had no contractual relationship with Shelter or Farm Bureau, and as the Supreme Court noted, "the postloss assignments did not create one." In the *Farm Bureau* case, the Supreme Court found that "just as in *Shelter*, regardless of their validity for other purposes,

the assignments from Farm Bureau's policyholders could not, as a matter of law, give [Millard] standing to prosecute any tort actions for first-party bad faith against Farm Bureau."

Intervention as of Right – Ninth Circuit (California Law)

Chevron Envtl. Mgmt. Co. v. Environmental Prot. Corp.
No. 20-16206, 2022 WL 10966098 (9th Cir. Oct. 19, 2022)

The U.S. Court of Appeals for the Ninth Circuit affirmed the denial of National Union Fire Insurance Company's (National Union) motion to intervene in an environmental action between its insured, Environmental Protection Corporation (EPC), and Chevron Environmental Management Company (Chevron). National Union sought to intervene as of right to protect its interests because EPC was a suspended corporation, and thus, EPC did not have the capacity to defend itself in litigation.

The appellate court initially recognized that timeliness is a "threshold requirement" for intervention. Whether a motion is timely is assessed by examining three factors: (1) the stage of litigation, (2) prejudice to other parties and (3) the reason for the delay in moving to intervene. On balance, the appellate court found that National Union's motion was untimely because it was filed five months after National Union was notified of EPC's suspension, by which time the trial court had already issued a default judgment against EPC. In so ruling, the appellate court rejected National Union's "conclusory assertions" that it did not receive Chevron's letter that enclosed a copy of the complaint.

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