California Court of Appeal Stirs Up Controversy Over the "Genuine Dispute" Doctrine

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In September of 2008, the California Court of Appeal decided *Brehm v. 21st Century Ins. Co*., 166 Cal. App. 4th 1225 (2008). Some plaintiff attorneys trumpet Brehm as a significant decision that substantially erodes the rule – known as the "genuine dispute" doctrine – that an insurer cannot be liable for withholding policy benefits where a legitimate dispute exists about the merit or value of the claim. Upon cursory examination, however, it is clear that *Brehm* simply applies previously established law and does nothing to limit or erode the genuine dispute defense.

Brehm sued 21st Century, alleging that the insurer breached the implied covenant of good faith and fair dealing by unreasonably delaying settlement of Brehm's claim for underinsured motorist benefits. According to the complaint, 21st Century knew that the claim was worth the policy limits, but refused to pay the limits based on its fraudulent reliance on the opinions of a biased medical expert. Specifically, Brehm alleged that 21st Century's expert "was known to the insurance industry to be biased in favor of the defense and was retained, not to objectively and fairly evaluate Brehm's shoulder injury, but with the intent that he minimize its seriousness to make it appear – falsely – there was a genuine dispute about the extent of that injury."

21st Century demurred, arguing that the complaint's allegations established that the insurer's refusal to pay the policy limits was reasonable because its expert's opinion established, as a matter of law, the existence of a genuine dispute. The trial court sustained the demurrer without leave to amend.

The Court of Appeal reversed. The court explained that "the genuine dispute doctrine cannot be invoked to protect an insurer's denial or delay in payment of benefits unless the insurer's position was both reasonable and reached in good faith." Thus, "an expert's testimony will not *automatically* insulate an insurer from a bad faith claim based on a biased investigation." The court then held that Brehm's complaint pleaded sufficient facts to evade the genuine dispute defense. As the court noted, "Brehm has alleged that Dr. Swickard's examination was a sham; that he was retained by 21st Century with the intention he prepare a report that falsely minimized the seriousness of Brehm's injury precisely so that 21st Century could argue there was a 'genuine dispute' as to the value of the claim."

Contrary to what some plaintiff attorneys proclaim, the decision in *Brehm* is hardly groundbreaking. Rather than eroding the genuine dispute doctrine, the decision simply applied the principles first set forth in *Guebara v. Allstate Ins. Co*., 237 F.3d 987, 994 (9th Cir. 2001), and later approved by the *California Supreme Court in Wilson v. 21st Century Ins. Co*., 42 Cal. 4th 713 (2007). In Guebara, the Ninth Circuit held that the genuine dispute doctrine would not apply where (i) the insurer is guilty of misrepresenting the nature of the investigatory proceedings; (ii) the insurer's employees lie during depositions or to the insured; (iii) *the insurer dishonestly selects its experts*; (iv) the insurer's experts are unreasonable; or (v) the insurer fails to conduct a thorough investigation. Brehm's rote

application of *Guebara*'s third and fourth exceptions does little to weaken the use of the genuine dispute defense in cases where none of the exceptions exists.

Moreover, *Brehm* involved a demurrer. Therefore, the Court of Appeal was required to accept as true the allegations that the expert was biased and that 21st Century retained him dishonestly. The decision does not affect the standards applied on summary judgment, where a plaintiff must provide evidence - not mere allegations - to show that an exception to the genuine dispute doctrine would apply.

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