Penn State Teaches a Lesson in Asserting Bad Faith Claims

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In *Pennsylvania State University v. Pennsylvania Manufacturers' Association Insurance Company*, Case No. 131103195 (Pa. Com. Pl., Phila. Cnty. Jan. 14, 2015), the court held that the policyholder's allegations of specific, albeit disputed, facts regarding insurer misconduct allowed its bad faith claim to survive the carrier's summary judgment motion.

Penn State asserted a bad faith claim against its insurer, Pennsylvania Manufacturers' Association Insurance Company (PMA), for its alleged mishandling of the underlying claims against Penn State arising from the Gerald Sandusky sexual assault allegations. PMA moved for summary judgment, seeking dismissal of Penn State's bad faith claim. Penn State opposed the motion, arguing both that the motion was premature and that disputed facts precluded summary judgment. On January 14, 2015, the Philadelphia County Court of Common Pleas denied PMA's motion. In so ruling, the court explained that that while PMA's motion "may be untimely," the court's denial was based on the "merits," as the evidence reflected that "multiple issues of material facts" surrounded Penn State's bad faith claim.

In November 2011, former assistant Penn State football coach Gerald Sandusky was indicted, and subsequently convicted, on numerous counts relating to the sexual assault of underage boys on or near Penn State property. An independent investigation commissioned by Penn State revealed that high-level University personnel concealed Sandusky's activities and empowered Sandusky to attract his victims by allowing him access to University events and facilities.

According to Penn State's opposition to PMA's summary judgment motion, as the news broke of the allegations against Sandusky, Penn State turned to its insurer of more than 50 years, seeking the benefit of its experience in defending universities, including requesting guidance in selecting defense counsel and in developing a defense strategy. PMA, however, ignored the requests for assistance. Penn State subsequently submitted a formal notice of circumstances regarding potential claims against Penn State arising out of Sandusky's indictment, and again sought recommendations regarding defense counsel. PMA continued to ignore Penn State's requests.

On November 30, 2011, a complaint was filed against Penn State (and other parties) by Doe A, alleging he had been sexually molested by Sandusky between 1992 and 1996, while he was a minor and while Sandusky was employed by Penn State. Penn State proffered evidence reflecting that PMA had received a copy of the Doe A complaint before Penn State even was served with a copy of it, and that it prioritized its coverage analysis regarding a potential claim, but nevertheless continued to severely limit its communications with Penn State and refused Penn State's request that PMA participate and cooperate in Penn State's defense of the claims.

On January 31, 2012, PMA sent Penn State a reservation of rights letter setting forth its initial coverage position and filed a declaratory judgment action that same day. According to evidence proffered by Penn State, this letter was PMA's first communication to Penn State regarding its coverage position, even though PMA previously had received a copy of the Doe A Complaint and taken the time to prepare a declaratory judgment action against Penn State. As a result, Penn State filed a lawsuit against PMA in the Court of Common Pleas of Philadelphia County, asserting, *inter alia*, a claim for bad faith. The bad faith claim encompasses PMA's alleged failure to timely communicate its coverage position regarding these claims, alleged failure to timely cooperate and participate in Penn State's defense of the claims, its alleged unreasonable refusal to cover the claims, and other alleged misconduct throughout the course of the coverage litigation.

Before the completion of discovery, PMA moved for summary judgment regarding Penn State's bad faith. Penn State opposed PMA's motion on two grounds, arguing that: (1) PMA's motion was premature because discovery (including bad faith-related discovery) was not complete; and (2) genuine issues of material fact existed regarding PMA's investigation of Penn State's insurance claim and its coverage denial.

In its opposition to PMA's summary judgment motion, Penn State asserted numerous facts, supported by deposition testimony, emails produced in discovery, and other evidence, that formed the basis of its bad faith claims. For example, with regard to PMA's investigation of Penn State's claim, Penn State alleged that PMA:

- Failed to timely communicate with Penn State after the claim was submitted despite Penn State's ongoing efforts to engage PMA in discussions and decisions regarding the defense of the underlying claims and the fact that PMA had been conducting a prioritized coverage analysis.

- Refused to help select defense counsel and strategize regarding the defense of the underlying claims.

- Misrepresented and obscured the status of its investigation of Penn State's claim.

Moreover, Penn State alleged that PMA's coverage denial lacked any factual or legal basis and thus also constituted bad faith.

In its January 14, 2015 order, the court agreed with Penn State. The court noted that Pennsylvania's bad faith statute, 42 Pa.C.S.A §8371, does not define "bad faith," and briefly discussed the factors that Pennsylvania courts have examined in determining whether an insurer "breached its duty of good-faith through some motive of self-interest or ill-will." Specifically, Pennsylvania courts have established the following factors to determine whether an insurer's coverage denial constitutes bad faith: (1) whether the insurer had a reasonable basis for denying benefits under the policy, and (2) whether the insurer knew or recklessly disregarded its lack of reasonable basis in denying the claim. *Brown v. Progressive Ins. Co.*, 860 A.2d 493, 500-501 (Pa. Super. Ct. 2004); *Pennsylvania Nat. Mut. Cas. Ins. Co. v. Johnson*, Nos. 05-2045, 05-3358, 2007 Pa. Dist. & Cnty. Dec. LEXIS 123, *47-49 (Pa. Com. Pl. Jan. 16, 2007). Pennsylvania courts also have recognized that a bad faith claim can encompass more than denial of a claim, and thus can include lack of good faith in its investigation of facts and its failure to communicate with the policyholder. *See Grossi v. Travelers Personal Ins. Co.*, 79 A.3d 1141, 1153 (Pa. Super. Ct. 2013); *see also Brown*, 860 A.2d at 501. The Penn State court held: "it is clear that there are multiple issues of material facts that surrounds plaintiff's claim of bad faith." The court thus kept Penn State's bad faith claim alive for the jury to consider.

The Penn State court's ruling is consistent with other opinions in which Pennsylvania courts have denied an insurer's motion for summary judgment regarding a bad faith claim because the policyholder alleged specific facts supporting its bad faith claim. *See Mee v. Safeco Ins. Co. of Am.*, 908 A.2d 344, 351 (Pa. Super. Ct. 2006) (finding genuine issue of material fact exists regarding whether insurer acted in bad faith in not paying overhead and profit on claim); *Schifino v. GEICO Gen. Ins. Co.*, No. 2:11-cv-1094, 2012 WL 6552839, at *4 (W.D. Pa. Dec. 14, 2012) (finding genuine issue of material fact where policyholder proffered evidence regarding insurer's investigation of claim from which jury could find bad faith).

By contrast, courts have granted summary judgment to insurers with respect to bad faith claims where the policyholder asserted only conclusory assertions of bad faith without proffering evidence or alleging specific facts in support of such claims. *See, e.g.*, *Hanna v. State Farm Fire & Cas. Co.*, No. 06-3242, 2007 U.S. Dist. LEXIS 59650, *13-16 (E.D. Pa. Aug. 13, 2007) (granting insurer's motion for summary judgment where policyholder alleged bad faith but provided “no additional evidence to support the allegations of bad faith”); *United States Fire Ins. Co. v. Kelman Bottles*, 538 F. App’x 175, at *182-83 (3d Cir. 2013) (affirming grant of summary judgment to insurer where policyholder’s assertions, without more evidence or facts, were insufficient to allow jury to conclude that insurer acted in bad faith).

Penn State’s recent defeat of PMA’s summary judgment motion, as well as the other cases discussed above, serves as a reminder of the importance of asserting specific facts and evidence in support of a bad faith claim, as opposed to barebones and unsupported allegations. Supporting bad faith allegations with detailed facts and evidence should allow a policyholder to demonstrate, at a minimum, questions of fact that will allow it to withstand summary judgment and get to the jury.

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