SANDBERG PHOENIX

BAD FAITH BLOG

Wow! Wisconsin Supreme Court "Needlessly Alters the Well Established [Bad Faith] Law and Creates… New Pleading Requirements and Uncertain Procedures That are Unnecessary and Confusing." (Bradl

AUTHOR: SANDBERG PHOENIX

Summary: Allstate insured Wanda Brethorst was injured while a passenger in the car her husband was driving. The Allstate policy provided both medpay and uninsured motorist coverages. Allstate paid her medical expenses up to the $5,000.00 medpay limit and offered to pay a small portion of the remaining $4,789.00 in medical expenses to settle the UM claim. She rejected the offer to settle the UM claim for roughly 37 percent of her unpaid medical expenses and filed a bad faith claim. The case was before the Supreme Court of Wisconsin on an interlocutory appeal to decide if Wisconsin law allowed her to proceed with a stand alone bad faith claim. In two separate opinions, the court unanimously agreed that she could.

Brethorst v. Allstate Property & Casualty Insurance Company, 798 N.W.2d 467 (WI 2011)

The facts of the case are pretty straightforward. An uninsured drunk driver hit the Brethorst car causing minor property damage, but Ms Brethorst incurred medical bills approaching $10,000.00 and her treatment extended over several months instead of the several weeks Allstate anticipated. Allstate first offered Brethorst $1,500.00 to settle the UM claim, followed by an offer to settle for $1,800.00. The offers were rejected and about 13 months after the accident, Brethorst a stand alone bad faith case alleging that Allstate "had adopted a companywide policy of routinely offering 'substantially less than the medical bills incurred' in an accident where MIST [minor impact soft tissue] injuries were involved." She also alleged that the bad faith was shown by Allstate's failures to "conduct a full and fair investigation," to "have her claim evaluated by anyone with medical training," and by "ignoring both the medical opinion of the [the insured's treating doctor] and the law of Wisconsin governing the liability for medical bills and expenses." Allstate admitted its MIST policy and filed a motion to bifurcate an unfiled breach of contract claim from her filed bad faith claim and to stay the bad faith proceedings until the unfiled UM claim was resolved. The trial judge agreed with Brethorst's argument that there was nothing to bifurcate since only a bad faith claim had been filed. Even so, the trial judge thought it wise to resolve those issues by certifying questions to a higher court. Likewise, the court of appeals wanted the Wisconsin Supreme Court to decide the questions.

The majority opinion authored by Justice Prosser stated that the court had been asked "to decide whether an insured must prove a breach of contract… prior to seeking discovery and litigating a claim of bad faith against an insurer where there is no accompanying claim for breach of contract." (¶ 22) Before answering that question the majority first examined "the development of the law of bad faith in Wisconsin" and then looked at the bifurcation request. That was followed by an examination of the distinction between first party and third party bad faith claims and "the threshold showing that an insured must make to pursue a claim of bad faith without filing an accompanying claim for breach of contract." The court then applied those principles to the certified question and discussed how those principles affected "this case as it proceeds beyond these preliminary procedural stages."

The court reviewed in detail the seminal case of *Anderson v. Continental Insurance Co.*, 271 N.W.2d 368 (1978), the first Wisconsin case to recognize that in first party cases "an insured is entitled to bring a claim against her own insurance company for bad faith." The court in *Anderson* stated that the bad faith tort recognized in Wisconsin "is a separate intentional wrong, which results from a breach of duty imposed as a consequence of the relationship established by contract." The *Anderson* court recognized that insurance companies "may challenge claims which are fairly debatable and will be found liable only where it has intentionally denied (or failed to process or pay) a claim without a reasonable basis." That court was convinced that allowing first party bad faith intentional tort claims would not result in extortionate lawsuits because such a result could not obtain "when an insurance company in the exercise of ordinary care makes an investigation of the facts and law and concludes, on a reasonable basis, that the claim is at least debatable." The *Brethorst* majority then reviewed subsequent Wisconsin cases, the applicable pattern jury instruction, and looked to Wisconsin's seminal third party bad faith case, *Hilker v. W. Auto. Ins. Co.*, 231 N.W.257, 235 N.W. 413 (1930, 1931). The Supreme Court in *Brethorst* noted that third party bad faith law is rooted in "a quasi-fiduciary relationship." However, in a first party bad faith claim "the insured insists that the insurer wrongfully denied benefits or intentionally mishandled a legitimate claim for benefits."

The court then recognized that in a first party bad faith claim, traditionally, there are two elements which have to be satisfied. The first element is "that there is no reasonable basis for the insurer to deny the insured claims for benefits under the policy." The second element is that "the insurer knew of or recklessly disregarded the lack of a reasonable basis to deny the claim." The majority noted that "historically, the two separate claims [breach of contract and bad faith] have gone together." Through a review of cases and well recognized insurance and bad faith treatises, the majority noted that the Brethorstclaim is truly unusual.

The court then discussed at length its recent decision in *Jones v. Secura Insurance Co.*, 2002 WI 11. *Jones* involved a breach of contract claim which was dismissed because it was barred by the statute of limitations. Even so, the insureds were allowed to assert their bad faith claim. The court held that the insurer "is liable for any damages arising as a proximate result of the insurer's bad faith, including the same damages that may be recovered under a breach of contract." (Emphasis added.) In light of the *Jones* holding, the court concluded that the bad faith claim could proceed on its own while also holding that "some breach of contract by an insurer is a fundamental prerequisite for a first party bad faith claim against the insurer by the insured."

The majority was willing to allow discovery to proceed in the first party bad faith claim in *Brethorst* while concluding "that the insured may not proceed with discovery on a first party bad faith claim until it has pleaded a breach of contract by the insurer *as part of a separate bad faith claim* and satisfy the court that the insured has established such a breach or it will be able to prove such a breach in the future." (Emphasis in the original.) Furthermore, in order to "go forward in discovery, these allegations must withstand the insurer's rebuttal."

The majority concluded that an insured should be allowed to pursue bad faith discovery in a bad faith claim only by pleading "facts which, if proven, would demonstrate not only that the insurer breached it contract with the insured, but also that there was no reasonable basis for not honoring the terms of the contract." If the insured failed to do so, that would be grounds for summary judgment in favor of the insurer. In other words, the insured would not be required to plead and prove a separate breach of contract claim, but as a part of the bad faith tort action must plead and be prepared to demonstrate to the court that it would be able to prove at a later date that the contract had been breached by the insurer before proceeding with the bad faith discovery. Since Brethorst had pleaded the breach of the contract as part of her bad faith claim and the court was satisfied that the insured could later prove up the breach of contract as a part thereof, bad faith discovery could proceed. However, at trial "Brethorst will be required to prove her injuries and the resulting breach of contact, but at this point the complaint with supporting documentation fully satisfies the burden she was required to meet to proceed with discovery on her claim for bad faith." The court found that the trial judge had "properly exercised his discretion in denying Allstate's motion for a bifurcated trial and a stay of discovery."

Concurring Justice Bradley agreed that it was proper to deny the motion to bifurcate and to deny the motion to stay. However, she did not believe that the court needed to go through such a lengthy analysis and stated that it created numerous questions about how to carry out the rules stated. She was ready to hold that Brethorst's "free standing claim for bad faith can proceed," primarily because earlier Wisconsin opinions allowed that result. Furthermore, she found it easy to deny Allstate's motion to bifurcate since "Brethorst raised only one claim and there is no issue of insurance coverage, so there is nothing to bifurcate." Justice Bradley raised a lot of questions about what the majority meant by numerous statements in its lengthy majority opinion. She may be concerned that the *Brethorst* opinion is a predicate for retreating from some earlier opinions (such as *Jones v. Secura*) which, because of *stare decisis*, seemed to require the result in *Brethorst*. However, because of the challenges presented to Wisconsin's trial courts in trying to apply the *Brethorst* rules, the likely need for clarification may lead to a retreat to the more traditional rules observed in other states and described in the treatises the majority cited. That could lead Wisconsin back into the mainstream of bad faith law, a result which the majority seems more likely to embrace than the two concurring justices.

Here's some free background information. The judicial philosophies of these two justices are markedly different. (My Wisconsin sources report that they do not like one another either.) Justice Prosser was very narrowly reelected during a hotly contested 2010 judicial election. Shortly after this opinion was handed down, news broke that Justice Bradley had accused Justice Prosser of grabbing her around her neck during an argument in chambers. During the two months since then, no criminal charges have been filed.

By Anthony Martin

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