SANDBERG PHOENIX

BAD FAITH BLOG

Seventh Circuit finds a “mere possibility of liability” against an insured is insufficient for an insurer’s duty to settle to arise under Illinois law.

AUTHOR: MEGHAN E. LEWIS

The Seventh Circuit Court of Appeals concluded the mere possibility of liability against an insured is insufficient for an insurer’s duty to settle to arise under Illinois law.

American Physicians Assurance Corporation, Inc. and American Physicians Capital, Inc. (“APA”) issued a medical malpractice insurance policy to Surgery Center at 900 North Michigan Avenue, LLC (“Surgery Center”) with a $1 million limit of liability. APA defended Surgery Center for medical malpractice claims brought against it by Gwendolyn Tate for complications resulting from a surgery performed by Dr. Harrith Hasson at the Surgery Center. Dr. Hasson was an outside physician with privileges at Surgery Center but not its employee. As a result of the surgical complications, Ms. Tate, an otherwise healthy 34 year old, became quadriplegic, and sued Dr. Hasson and the Surgery Center. Ms. Tate settled her claims against Dr. Hasson before trial for his $1 million policy limits. Also before trial, Ms. Tate offered to settle with Surgery Center for its $1 million policy limits; shortly thereafter the court granted Surgery Center’s motion for summary judgment. The judgment was eventually reversed and the matter remanded, with Ms. Tate renewing her $1 million policy limits settlement demand against Surgery Center. APA rejected the demand. Ms. Tate’s claim proceeded to trial, resulting in a $5.17 million verdict against Surgery Center and an eventual settlement of $2.25 million, with APA paying its $1 million policy limits. Surgery Center, in turn, filed suit against APA alleging bad faith failure to settle Ms. Tate’s claim for its policy limits.

The bad faith case proceeded to trial. The U.S. District Court for the Northern District of Illinois granted APA's motion for judgment as a matter of law, finding the case was "highly defensible." Surgery Center appealed, with the parties disputing whether APA's duty to settle Ms. Tate's claim arose. Ultimately, the Seventh Circuit affirmed the District Court's judgment in favor of APA, concluding a reasonable jury would not have a legally sufficient evidentiary basis to find there was a reasonable probability of a finding of liability against Surgery Center in Ms. Tate's claim.

In support of its decision, the Seventh Circuit recited well-established Illinois law holding an insurer has a duty to act in good faith when responding to a settlement offer. *Haddick ex rel. Griffith v. Valor Insurance*, 198 Ill.2d 409, 763, N.E.2d 299 (2001). Though an insurer may consider its own interests when evaluating a settlement offer, it must, "in good faith, give at least equal consideration to the interests of the insured and if it fails so to it acts in bad faith." *Cernocky v. Indem. Ins. Co. of N. Am.,* 69 Ill.App.2d 196, 216 N.E.2d 198, 205 (1966). For Surgery Center's bad faith failure to settle claim against APA to be sustained, it must have established "[1] the duty to settle arose; [2] the insurer breached the duty; and [3] the breach caused injury to the insured." *Haddick,* 198 Ill.2d 409, 763 N.E.2d at 304. Under Illinois law, the duty to settle arises when a third party demands settlement within the policy limits, "a claim has been made against the insured[,] and there is a reasonable probability of recovery in excess of policy limits and a reasonable probability of a finding of liability against the insured." *Haddick,* 763 N.E.2d at 304.

At issue in *Surgery Center* was the evidence required to satisfy the standard of "reasonable probability" of a liability against the insured. APA argued the standard is akin to a more-likely-than-not standard, while Surgery Center maintained the standard fell somewhere above a mere possibility but less than a preponderance standard. The Seventh Circuit acknowledged the Illinois Supreme Court has not clarified its "reasonable probability" standard for bad faith failure to settle claims, but found the Illinois Appellate Court's decision in *Powell v. Am. Serv. Ins. Co*., 2014 Ill. App. 123643, 379 Ill.Dec. 585, 7 N.E.3d 11, 17 (2014) as authoritative. The *Powell* court stated it "read[s] *Haddick* as requiring the pleading of facts which show that liability is at least more likely than not, but not necessarily a certainty." The Seventh Circuit, however, found APA prevailed as a matter of law under either definition of the standard suggested by the parties.

In reaching its decision, the Seventh Circuit concluded the "mere possibility of liability" against Surgery Center is not enough to prevent a judgment in favor of APA. Rather, Surgery Center must proffer evidence its liability was reasonably probable for the duty to settle to have arisen." The Seventh Circuit found Surgery Center failed to present such evidence. For example, the APA claims representative testified to believing, since the beginning of the case, Surgery Center would not be found liable for Ms. Tate's claim. Similarly, Surgery Center's defense counsel believed in the defensibility of the case, citing the lack of expert witnesses retained by Ms. Tate and her theory of liability. Surgery Center's president, who was an attorney and the primary contact for defense counsel during the Tate litigation, also believed the case was defensible and Surgery Center would not be found liable, as reflected in numerous documents. Moreover, Surgery Center's president made clear to APA and to defense counsel in writing that she did not want the Tate case settled. The only evidence Surgery Center relied on was APA's increase in reserve to the policy's limits after the case was remanded. However, the Seventh Circuit Court found the increased reserve did not support Surgery Center's case, as it did not take into account the likelihood of success on the case but only the potential damages, which Surgery Center and APA knew could exceed the policy limits. Furthermore, Surgery Center was frequently reminded it would be responsible for any excess judgment and was fully aware of Ms. Tate's injuries and potential damage award in the event liability was found.

In sum, Surgery Center did not offer any evidence indicating anyone involved in litigating the Tate case believed there was more than a mere possibility Surgery Center would be found liable. The Seventh Circuit's decision in *Surgery Center* offers guidance to practitioners and insurers defending bad faith failure to settle claims under Illinois law, making clear the mere possibility of liability against the insured is insufficient for an insurer's duty to settle to arise.

Case citation: *Surgery Center at 900 North Michigan Avenue, LLC v. American Physicians Assurance Corporation, Inc., et al*, 922 F.3d 778 (7th Cir. 2019)