

BAD FAITH BLOG

# A \$1.275 Million Ouch? What Can Happen When an Omnibus Insured Slips Through the Fingers of Allstate's Good Hands

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Summary: Hamiti borrowed Skenderi's truck and hit motorcyclist Kirk resulting in a leg amputation. Allstate, Skenderi's insurer, failed to obtain a release for Hamiti when it settled on behalf of Skenderi for Allstate's policy limits. The Appellate Court in Illinois reversed and remanded the trial court's award of partial summary judgment in favor of Allstate.

*Steven Thomas Kirk v. Allstate Insurance Company*, 2012 Ill.App. (5th) 100573

Enver Hamiti ran a stop sign while driving Lindsey Skenderi's automobile, hit Steven Kirk, who was riding a motorcycle, and injured Kirk to the point that his leg was amputated. Allstate insured Skenderi's car for \$100,000 per person and Mercury Insurance provided liability coverage to Hamiti for \$50,000 per person.

Skenderi lived in one location, but Hamiti lived a few miles away in a different Madison County, Illinois community. Even though Hamiti told Allstate that his address was not the same as Skenderi's, Allstate continued to send all letters intended for Hamiti to Skenderi's home for almost two years.

The badly injured Kirk retained counsel who made a policy limits demand to both insurers and notified Allstate that her client's medical bills exceeded \$100,000. Although the Allstate adjuster advised the Allstate named insured that this was an excess case, and that she might want to hire her own attorney, Hamiti did not receive such a letter. The Allstate adjuster met with his supervisor because of the excess nature of the case. The supervisor instructed, in part, to "not issue payment until we can secure a release...." After the Allstate adjuster agreed to pay the policy limits to the Plaintiff- Kirk, that adjuster was advised that Plaintiff was going to sue both the named insured and Hamiti, but thereafter agreed to settle. Plaintiff's attorney advised the Allstate adjuster that the release language had to be changed to include only Allstate's "insureds." The adjuster obliged by taking the omnibus insured's name off of the release. A few months later the Plaintiff signed the release which had excluded Hamiti. Thereafter, there was a trial against Hamiti which resulted in a jury verdict against him for \$1.375 million. The trial court set off the \$100,000 previously paid by Allstate and reduced the excess verdict to \$1.275 million.

Thereafter, Mercury Insurance paid its \$50,000 limits and Hamiti assigned to Kirk his rights to pursue his bad faith claim against Allstate. That same day the bad faith case was filed by Kirk against Allstate asserting Hamiti's bad faith claims. The bad faith complaint alleged (among other things) that Allstate had violated its duties to Hamiti, that it had obtained a release that excluded Hamiti and which had exposed him to personal liability, that Allstate wrongfully refused to defend him, and that Allstate did not properly defend him at trial.

During discovery the Allstate adjuster admitted that he had never advised Hamiti of any offers or demands, that he never sent a copy of the letter which stated that the medical bills exceeded the policy limits, and admitted that Hamiti should have been consulted before the language was removed from the release which had previously protected him. That adjuster also admitted "that if a letter was not sent in July 2006 to Hamiti to the correct address that would be an element of bad faith."

The issue which the Appellate Court addressed on appeal was whether the Plaintiff in both the underlying and bad faith cases, Kirk, had improperly "induced the release" that had omitted Hamiti, making it proper to enter partial summary judgment in favor of Allstate. The Court of Appeals had no problem in finding that the partial summary judgment was improperly entered due to multiple questions of fact requiring a jury resolution. Kirk pointed out, and the Appellate Court accepted, the difference in status of Kirk as the bodily injury plaintiff in the underlying case seeking a judgment against Hamiti, and a bad faith plaintiff asserting Hamiti's bad faith claim against Allstate. Because Kirk was standing in the shoes of Hamiti in the bad faith case, neither the trial court nor the Appellate Court should have looked at Kirk's conduct in the underlying case. Instead, the proper analysis was how Allstate had treated Hamiti, undeniably its omnibus insured.

Kirk insisted that the facts showed that "Allstate committed bad faith by taking out language in a release that protected Hamiti, who was Allstate's insured under the policy, without informing him it was doing so and without obtaining his consent." (Para. 17, pg. 5). Allstate's counter-position was that Kirk should not be allowed to pursue the action against Allstate because he had "induced the release in the underlying action" and that "a bad faith case is untenable ... because it paid its policy limits, and bad faith cases can only arise where an insurance company fails to pay its policy limits." The unanimous Court of Appeals rejected all of Allstate's arguments and accepted Kirk's counter arguments.

Because Hamiti had assigned all of his rights to recover on a bad faith claim from Allstate, Kirk had received all of those rights and was standing in Hamiti's shoes. For that reason, "the issue of whether Kirk induced the release that omitted Hamiti is irrelevant." If Kirk had "coerced or tricked Allstate in removing Hamiti's name from the release that might be a reason for entering partial summary judgment in favor of Allstate." However, the record before the Court contained no evidence of coercion or trickery. The Allstate adjuster prepared the release of its named insured and Hamiti and Plaintiff's counsel asked the adjuster to change the release so that it covered only "your insureds" and to "provide an exception for any other coverage which may exist." It was the adjuster who then replied that that was not a problem and that he would "send out new release today taking insured driver's name off of it." Allstate's adjuster "admitted no negotiations took place regarding the removal of Hamiti's name from the release." Instead, he complied with the request to omit Hamiti's name.

The Appellate Court did not declare that Allstate's conduct was bad faith. Instead, it ruled that "if the facts show that Hamiti was the victim of bad faith by Allstate, Hamiti has assigned his right to recover against Allstate to Kirk."

The court next addressed Allstate's claim that because Hamiti had received the full benefit of the payment of the \$100,000 liability limits as a set-off then, as a matter of law, Allstate's settlement could not be in bad faith or considered vexatious or unreasonable. The Appellate Court disagreed relying on well settled Illinois law holding "that an insurer cannot discharge its duty to defend simply by paying policy limits," citing the Illinois Supreme Court's in *Conway v. Country Casualty Insurance Company*, 442 N.E.2d 245 (1982) and the more recent *Douglas v. Allied American Insurance*, 725 N.E.2d 376 (2000). In quoting from *Douglas* the Court stated that there are "strong public policy arguments against allowing insurers to discharge their duty to defend by paying policy limits and then leaving the insured to fend for himself." 727 N.E.2d at 382.

Relying once again upon admissions by the Allstate adjuster, the Court noted that it was undisputed that Hamiti was an Allstate insured. The Court also cited well settled Illinois law that whenever an insurer negotiates a settlement in which a recovery might exceed the policy limits, "the insurer must give at least equal consideration to the insured's interest as it does to its own." (Par. 26, pg. 9) After reviewing the facts, including the failures to protect Hamiti's interests despite knowledge of those interests, the Court of Appeals held that "Allstate's payment of \$100,000 in policy limits did not discharge Allstate of its duty to defend Hamiti, nor did it give Allstate the right to release Skenderi at the expense of Hamiti." (Par. 28, pgs. 9-10)

The Appellate Court also rejected Allstate's assertion that it had no leverage to negotiate and had no choice but to sacrifice Hamiti while protecting the interests of Skenderi. The Court distinguished one of the cases Allstate cited noting that it was not a case involving an excess verdict. The other case involved an excess verdict, but there were multiple defendants represented by multiple insurers. Two insurers and their insureds elected to settle while the third took its chances and lost. The Court basically ruled that in a case where the insured and insurer both know the situation completely and elect to take a chance, the insurer has no bad faith exposure. Furthermore, unlike that case, Allstate had not gone into Court and sought a ruling that its actions were in good faith. The Court elected not to discuss the bad faith aspects of the case any further and, instead, ruled that there were "genuine issues of material fact present... that preclude entry of partial summary judgment" in favor of Allstate. The Court remanded for further proceedings.

I predict that the parties will settle the *Kirk* case after remand. As Kenny Rogers might sing, you've got to know when to hold 'em and know when to fold 'em. This does not look like a case which Allstate wants to have a jury decide.

Extreme pressures come to bear when there are bodily injury claims presented which have significant excess exposures. Sometimes the difference between a dismissal of a bad faith case as a matter of law and a bad faith case which has to be tried comes down to such simple matters as making sure that the letters go to the correct address, and making sure that a supervisor's instructions are both understood and followed. Finally, even though no one wants to spend more money than is absolutely necessary, spending a few extra dollars to have a coverage attorney review the facts and advise an insurance company regarding the proper handling of a case can result in savings in the tens or even hundreds of thousands of dollars. In this case, the likely savings would have exceeded one million dollars.

There are many methods and/or procedures which would have prevented this result. A couple of which come to mind are sending the complex cases out for attorney review. Another potential procedure is an occasional bulk file review. In bulk file reviews an experienced attorney can frequently identify problem areas requiring greater training which can help prevent future bad faith cases. That training can lead to avoidance of claims handling problems and alert front line adjusters to areas needing either supervisory input or a referral to an experienced attorney for guidance.

By Anthony Martin

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