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Revising California's Jury Instructions on Bad Faith Failure to Settle: Does Focusing on the Reasonableness of the Insurer's Decision Raise the Specter of Summary Judgment in Bad Faith Failure to Settle Cases?

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My last post discussed the practical implications of making the reasonableness of a liability insurer's conduct in refusing to accept a reasonable settlement demand a relevant inquiry at trial of a bad faith failure to settle case. This post examines whether making unreasonable insurer conduct an element of a bad faith failure to settle claim affects the ability of insurers to dispose of such claims on summary judgment before trial.

The "Genuine Dispute" Defense

Focusing on whether the insurer's settlement position was reasonable is analytically similar to the focus in first-party cases on whether the insurer had a "reasonable basis" for denying coverage. Insurers therefore are likely to invoke the "genuine dispute" defense that previously has been employed only in first-party bad faith claims in moving for summary judgment or a directed verdict in bad faith failure to settle cases. Insurers will argue that just as a legitimate dispute over coverage precludes bad faith liability in the first party context, a legitimate dispute over whether the insured's liability and the claimant's damages would result in an excess judgment precludes liability for bad faith failure to settlement, entitling the insurer to summary judgment. Insurers will maintain that the plaintiff must prove a negative—that the insurer's settlement position was unreasonable—and the existence of a factual basis for the insurer's evaluation of the claim precludes the plaintiff from showing that the insurer acted unreasonably in rejecting the settlement demand, even if other evidence points to the likelihood of a judgment in excess of policy limits.

Third-Party Claims Distinguished

An insurer's attempt to extend the genuine issue defense to third-party refusal to settle cases is, however, problematic for several reasons. First, while a reasonable legal argument for

refusing to pay a claim may defeat a first party bad faith claim, a legal dispute over whether the policy covers a claim cannot give rise to a reasonable basis for refusing to settle a claim. California courts have held repeatedly that an insurer's good faith but erroneous belief that the policy does not provide coverage is no defense to liability for bad faith failure to settle. *See, e.g., Samson v. Transamerica Ins. Co.*, 30 Cal.3d 220, 237, 178 Cal.Rptr. 343, 353, 636 P.2d 32, 42 (1981); *Johansen v. California State Auto. Assn. Inter–Ins. Bureau*, 15 Cal.3d 9, 15–16, 123 Cal.Rptr. 288, 291–292, 538 P.2d 744 (1975).

Second, the fact that there has not been a rash of summary judgments in failure to settle cases suggests that there are fundamental differences in criteria employed to assess the reasonableness of a liability insurer's failure to settle and a first-party insurer's denial of benefits. Assessing the reasonableness of an insurer's decision is far more complicated in the third-party duty to settle context than in the first-party coverage context. First-party cases present courts with a binary question—either there was coverage or there was not—and the existence of genuine factual or legal disputes may allow the insurer to dispose of the bad faith claim on summary judgment. Third-party cases, by contrast, essentially are malpractice cases against liability insurers that have passed on an opportunity to settle. They require courts to assess the likelihood of an excess judgment in light of a variety of factors, ranging from the insured's liability and the claimant's damages to the quality of the claimant's lawyer, the relative appearance and likely appeal of witnesses at trial, and the history of the particular geographic area in cases of a similar nature. Such questions are rarely amenable to resolution as a matter of law by a court. This is particularly true when the court has an excess judgment staring it in the face and most jurisdictions allow the trier of fact to draw an inference about the reasonable settlement value of the case from the size of the excess judgment. This is why Justice H. Walter Croskey, perhaps the California judiciary's leading expert on insurance law and the Chair of the California Judicial Council's Advisory Committee on Civil Jury Instructions prior to his death in 2014, acknowledged when he proposed that the reasonable insurer inquiry be added to CACI 2334 that the inquiry "will always raise a jury question." Advisory Committee on Civil Jury Instructions, Report to the Judicial Council for Meeting on June 24, 2016, https:// jcc.legistar.com/LegislationDetail.aspx?ID=2731978&GUID=48F7954B-E151-45B4-8AAE-800D033AEA50&Options=&Search=.