B137320

IN THE COURT OF APPEAL OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CHATEAU CHAMBERAY HOMEOWNERS ASSOCIATION

Plaintiff and Appellant,

vs.

ASSOCIATED INTERNATIONAL INSURANCE CO.

Defendant and Respondent.

Appeal from the Superior Court of Los Angeles County

Honorable Hugh C. Gardner, III, Judge

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR REHEARING

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EITHER A REHEARING IS WARRANTED

OR THIS COURT SHOULD RECONSIDER PUBLICATION

United Policyholders ("UP") hereby requests that the Court reconsider the opinion in this case and that it reconsider publication of the opinion in its present form. UP is not sufficiently familiar with the facts of the underlying action to comment on the propriety of the trial court's grant of summary judgment. However, UP believes that the sweeping language of the opinion will fundamentally alter the playing field between insureds and insurers in a manner certain to create mischief for and damage to insureds on a widespread basis. For that reason, we urge reconsideration of the opinion in this matter.

Of concern here is the application of the so-called "genuine issue" doctrine. This principle has continued to be raised by insurers since it was given life in the California appellate courts in *Opsal v. United Services Auto Ass'n* (1991) 2 Cal.App.4th 1197. As pointed out in the important dissent in *Guebara v. Allstate Ins. Co.* (9th Cir. 2001) 237 F.3d 987, the concept has never been adopted by the Supreme Court and originated in the Ninth Circuit without any California authority. However, even if it may have been appropriate in the context of a legal dispute, it is not an appropriate measure of good faith in a factual setting, such as that before the Court here.

The Court's opinion states, "we see no reason why the genuine dispute doctrine should be limited to legal issues." (Slip. Op. at 16.) We submit, however, that there is a fundamental and important difference between a "genuine issue" as to a legal issue and one as to a factual issue. An insurer cannot create a genuine issue as to a legal issue, only the courts can. However, an insurer can easily create a genuine issue of fact simply by hiring and paying for an expert opinion. While this Court's opinion requires this expert to be "independent", many such experts who provide opinions are "independent" in name only. The reality is that many so-

called experts who make themselves available to insurers and others are abundant and know "where their bread is buttered". For an insurer to obtain an intended "expert opinion" is a rather simple task.

We are most concerned that the Court's opinion will be interpreted as an inversion of the customary analysis of the covenant of good faith and fair dealing and that it dangerously extends the discussions in *Guebara* and *Fraley v. Allstate Ins. Co.* (2000) 81 Cal.App.4th 1282. In *Guebara*, the court was careful to note that the "case involves an independent investigation by three experts and a valid reason for denying the claim . . . Guebara merely asserts that Allstate's prolonged investigation was biased and unreasonably long." (237 F. 3d 995-96). It then listed some examples, which were "not exhaustive" which might have indicated bad faith behavior. Similarly, in *Fraley*, the claim was for a delay in benefits, not a denial of benefits, and plaintiff's claim was based solely on the difference between the original repair estimate and the arbitration award, notwithstanding the insurer's repeated re-evaluation of the claim and prompt payment upon the arbitration award.

Once again, the subject case involves a claim of unreasonable delay in the payment of benefits rather than a denial of benefits. Yet, it will surely be claimed by insurers that this Court, in essence, set forth a "genuine issue" rule to be applied in all bad faith cases. This rule will likely be seen as the following. Where an insurer obtains an expert report, it may not be held in bad faith unless the insured can establish one of the five types of conduct specified in *Chateau Chamberay*. Thus, rather than looking at the conduct of the insurer as a whole, the insurer can simply immunize itself against bad faith liability unless the insured can establish one of the five specific areas of conduct identified by the Court. Bad faith in these instances is thus no longer determined by whether the insurer has acted unreasonably or

without probable cause. The question is simply, has the insurer committed one of the five enumerated acts. If not, there is no bad faith.

We recognize that the Court has explained that the "genuine issue" doctrine is to be determined on a case-by-case basis and only where there is no factual dispute. Yet, the Court then states that the insurer had an expert opinion, none of the five enumerated acts have been established by the insured and therefore there is a "genuine issue". We expect insurers and others to hue closely to this analytical framework.

It is certain that insurers will realize the windfall of this decision and modify their claims practices to take advantage of the defense provided. Claims departments will assuredly be trained to obtain an "independent" or expert opinion, not for the purpose of fairly evaluating the claim, but for the very opposite reason – to permit the denial of a claim under an immunity against bad faith liability. This is the very opposite of the purpose of the covenant of good faith and fair dealing.

Moreover, we expect insurers to argue that the retention of an expert who is not employed by an insurer in most instances necessarily precludes a finding of most of the five areas of specified bad faith conduct. If an expert is "independent", an insurer will claim that this necessarily establishes the lack of bias, honesty in the selection and reasonableness of the opinion. Further, the insurer will contend that if an expert evaluated the matter and rendered an opinion without requesting further information, the insurer must surely be considered to have satisfied its duty to thoroughly investigate. Thus, unless the insurer misrepresents matters to the insured or in deposition, insurers will claim that, under the rule set forth in *Chateau Chamberay*, the retention of an expert absolves them of bad faith as a matter of law in nearly all circumstances.

Yet, this is clearly not the law. What happens, for example, to the insurer which obtains an expert report but intentionally gives it more credence than it

should be given? The Court's opinion makes no mention of an improper evaluation, an evaluation which fails to give the interests of the insured as much consideration as its own or an evaluation otherwise made in bad faith. Certainly insurers will claim that the Court appears to prevent any such claim by an insured where the insurer has an expert opinion because it is not contained within the five areas of bad faith conduct which would preclude application of the genuine issue doctrine.

Disability cases pose obvious examples where this approach will cause innumerable problems. It is commonplace for insurers to require the insured to submit to purported independent medical examinations. These can be as brief as fifteen minutes. Similarly, it is not uncommon for insurers to require insureds to submit to repeated independent examinations until it obtains one that supports a denial. Where the insurer obtains such a medical examination, can that immunize the insurer from bad faith where it stands in contradiction to the opinion of other doctors or the treating physician, who may have treated the insured for ten years? Should that be sufficient grounds to eliminate bad faith liability of the insurer? We submit that such a claim should be submitted to a jury. Yet, given the Court's decision, a trial court may well believe that it is bound to exonerate the insurer against a claim of bad faith unless one of the five specified elements is proven.

Clearly, however, these five areas of conduct are not exclusive. In the leading insurance treatise numerous examples of bad faith conduct are listed which are not within the five specified areas of this Court's opinion. (See *Croskey et al.*, Cal. Practice Guide: *Insurance Litigation*, ¶ 12:847 *et seq.* (Rutter Group 2000).) These include the failure to evaluate a claim objectively, adopting unduly restrictive interpretations of claim forms, denials based on standards known to be improper, unreasonable delays in payment or processing of claims, abusive practices to avoid payment of claims, such as intimidating witnesses, hostile attitude, or threats to

"retire file without payment", certain post-claim underwriting, making unreasonably low settlement offers and engaging in unreasonable litigation tactics. (*Id.*) Undoubtedly there are many other examples. (*See e.g., Davis v. Blue Cross of No. Cal.* (1979) 25 Cal.3d 418, 428 (failure to bring necessary information to the attention of insured is bad faith).) Yet, where the insurer has obtained an expert opinion, it may be argued these are eliminated as bases for bad faith by the language of the Court's opinion.

The practical effect of the Court's opinion is to elevate an insurer's expert to the level of a make-or-break defense. In order to rebut this defense, the insured may be required to attack the expert as biased or unreasonable when the real issue may not be his opinion, but the insurer's evaluation of or use of that opinion in the context of all of the information in the file. In so doing, an insured may be required to conduct the widest ranging *Colonial Life* discovery[1] possible, seeking all claims files the expert has ever been involved in and investigation into the expert's financial affairs. Alternately, the insured may feel it necessary to spend an inordinate amount of time searching for misrepresentations or false testimony during depositions of insurance claims adjusters.

The issue then is no longer the conduct of the insurer as a whole, but the viability of an expert report and whether the insured can establish one of the five areas of conduct specifically noted in the Court's opinion. In effect, insurers will undoubtedly claim that as long as they obtain an expert report, bad faith conduct is now limited under this decision to the five specific types of conduct, and only those five.

We submit that this is an unfair and incorrect limitation on an insurer's obligations under the covenant of good faith and fair dealing. We emphasize that

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[1] See, *Colonial Life & Accident Ins. Co. v. Superior Court* (1982) 31 Cal.3d 785.

we, of course, have no quarrel with a Court's determination as a matter of law that the evidence in a given case, taken as a whole, is insufficient to establish bad faith. Trial and appellate courts do so regularly and are called upon to evaluate such evidence in a wide variety of cases when ruling on summary judgment motions, non-suit motions and similar matters. Indeed, the Court appears to have engaged in just such an analysis in section "3. HOA Failed to Demonstrate a Triable Issue of Fact as to AIIC's Alleged Bad Faith." (Slip. Op. at 17.) We submit that this discussion may and should take place without reference to a "genuine issue" doctrine.

Of paramount concern is the elevation of the concept of a "genuine issue" as a defense to all bad faith claims unless one of five types of conduct are established. Of even greater concern is that such a genuine issue - and thus a complete defense to bad faith - can be simply purchased by an insurer, merely by the hiring of an expert. We respectfully submit that there is no need, nor is it appropriate to set forth a factual "genuine issue" standard in bad faith cases. It is particularly troublesome to hold that all an insurer needs to do to establish such a "genuine issue" is to hire and pay an expert to provide it with the desired opinion. Such an opinion should not be elevated to, in essence, a *prima facie* defense of no bad faith, which the insured must now rebut in one of only five ways. It should be merely one piece of evidence to be considered as a whole in the decision whether the insurer's conduct is unreasonable or without proper cause.

Fundamental to the judicial process is the right of plaintiffs to present their cases to a jury where the evidence taken as a whole presents a factual question of whether the insurer has acted in violation of the covenant of good faith and fair dealing. However, the Court here now imposes a new hurdle for all such plaintiffs. Where the insurer has retained an expert who supports its determined decision to deny a claim, an insured no longer has the right to submit the matter to a jury. He

must first establish to the satisfaction of a court certain narrowly circumscribed circumstances before he may pursue a bad faith action. This represents a dramatic departure from the manner in which all cases, not just bad faith cases, are normally treated.

We submit that this ruling will have wide-ranging unintended consequences and will result in the dismissal of countless valid and meritorious bad faith actions to the detriment of seriously injured insureds. We believe that the Court should find that the so-called "genuine issue" doctrine is not a defense in a factual setting. Rather, a bad faith case, like any other case, must be decided under the long-standing rule in California, that the evidence as a whole must show that the insurer's conduct is unreasonable or without proper cause. No further refinement of that principle is appropriate for all cases.

CONCLUSION

We respectfully submit that a rehearing should be granted in this case. While the ultimate holding in this case that the insurer did not act in bad faith may be correct, the language of this opinion is extraordinarily broad and represents a dramatic change in the nature of all bad faith cases. Insurers will certainly seek to apply it across the spectrum of bad faith cases. Such a broad holding will carry the almost certain legacy of grave inequities where application of the principles applied here are simply inappropriate in other factual settings. Moreover, where such a wide ranging principle is to be considered, it would be beneficial for the Court to have the input of various other counsel across the state who represent other insureds in a variety of other factual circumstances. We thus urge the Court to grant a rehearing.

In the event the petition for rehearing is denied, we respectfully submit that the opinion should not be a published opinion.

As set forth above, we take no position on the ultimate disposition of the merits of this action.

Respectfully submitted,

Dated: July __, 2001

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