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Advanced Issues in Insurance Coverage

What is Bad Faith in Advanced Insurance Coverage Law? A Policyholder's Perspective

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WHAT IS BAD FAITH IN ADVANCED INSURANCE COVERAGE LAW?

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TYPICAL ARGUMENTS IN BAD FAITH BRIEFS

- Reliance upon Supreme Court case law that has been reversed.
- Reliance on state appellate law, and federal court case law.
- "No lawful basis" language from Said still quoted and used.
- "No lawful basis" language includes "fairly debatable" language.
- Briefs argue Zoppo preserved "fairly debatable" language even though Zoppo never mentions "fairly debatable" and Zoppo reverses Said.

THE FAIRLY DEBATABLE STANDARD IS FAIRLY DEBATABLE

- Fairly debatable is a low standard. Almost anything can be fairly debatable.
- "Where a claim is fairly debatable and reasonable minds can come to more than one conclusion, summary judgment must be granted in favor of the insurer."
- There are state appellate courts and federal courts that accept this argument and even cite Tokles in support.

152 OHIO ST. 185 (1949)
HART V. REPUBLIC MUT. INS. CO.

"In the last annotation it is stated that 'a majority of the courts passing upon the question hold that the insurer cannot be held liable in tort for mere negligence on its part in failing or refusing to settle or compromise a claim brought against the insured for an amount within the policy limit, but that to be held liable in tort for its failure or refusal in this respect so as to entitle the insured to recover for the excess of the judgment over the policy limit it must have been guilty of fraud or bad faith.'"

WHAT IS BAD FAITH IN HART?

"However, such a belief may not be an arbitrary or capricious one. The conduct of the insurer must be based on circumstances that furnish reasonable justification therefor."

174 OHIO ST. 148 (1962)
SLATER V. MOTORISTS MUTUAL INS. CO

"Under the decision of this court in Hart v. Republic Mutual Ins. Co., 152 Ohio St. 185, 87 N.E.2d 347, to support a recovery it was incumbent on Slater to allege and prove that his insurer's behavior was of such a reprehensible and intolerable nature as to constitute bad faith."

"2. A lack of good faith is the equivalent of bad faith, and bad faith, although not susceptible of concrete definition, embraces more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another."

32 OHIO ST.2D 69 (1972) WASSERMAN V. THE BUCKEYE UNION CASUALTY

"Such a belief, the court said, 'may not be an arbitrary or capricious one. The conduct of the insurer must be based on circumstances that furnish reasonable justification therefor.' This court has elaborated further on the concept of bad faith or lack of good faith in the Slater case, supra."

“The issue in Slater was whether the insurer's failure to make official disclosure of its maximum liability under the policy held by the insured, thus preventing settlement, amounted to bad faith. In holding that it did not, this court reaffirmed the view that 'bad faith' was not merely negligence or bad judgment but the active and intentional purpose to mislead or breach a known duty.”

62 OHIO ST.2D 221 (1980) CENTENNIAL INSURANCE CO.V. LIBERTY MUTUAL INSURANCE CO.

"Liberty's request for assistance from Centennial in making a settlement in this cause could not be characterized as an insistence upon contribution. Nor can its request be seen to evidence a conscious wrongdoing, a dishonest purpose or an actual intent to mislead, as required by Slater v. Motorists Mut., supra."

6 OHIO ST.3D 272 (1983)
HOSKINS V. AETNA LIFE INSURANCE COMPANY

"It must be stressed that under the thrust of cases such as Hart and Slater, the mere fact that an insurer refuses to settle within the policy limits is not, in itself, conclusive of the insurer's bad faith and does not give rise to tort liability. In order to recover for the excess liability, the insured has the burden to show that the refusal to settle was not made in good faith. The concept of the lack of good faith was further elaborated upon by this court in Slater, paragraph two of the syllabus, providing as follows:"

"A lack of good faith is the equivalent of bad faith, and bad faith, although not susceptible of concrete definition, embraces more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another."

“Applying these principles set forth in the refusal-to-settle type of action to the refusal-to-pay claim type of action, it is clear that whenever an insurance company denies a claim of its insured, it will not automatically expose itself to an action in tort. Mere refusal to pay insurance is not, in itself, conclusive of bad faith. But when an insured insists that it was justified in refusing to pay a claim of its insured because it believed there was no coverage of the claim, " * * * such a belief may not be an arbitrary or capricious one. The conduct of the insurer must be based on circumstances that furnish reasonable justification therefor." Hart, supra, 152 Ohio St. at 188, 87 N.E.2d 347.

37 OHIO ST.3D 298 (1988) STAFF BUILDERS, INC. V. ARMSTRONG

"In *Hart v. Republic Mut. Ins. Co.* (1949), 152 Ohio St. 185, 188, 39 O.O. 465, 466, 87 N.E.2d 347, 349, this court addressed the potential tort liability of an insurer for refusing to settle a claim against an insured. We observed that such refusal "may not be arbitrary or capricious * * *. The conduct of the insurer must be based on circumstances that furnish reasonable justification therefor." In Hoskins, supra, this duty of the insurer was extended to the processing of the claims of its insured. Accordingly, it is our further determination that an insurer fails to exercise good faith in the processing of a claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefor."

"We therefore conclude that there was ample evidence to sustain the jury finding of bad faith in the processing of the insurance claim of appellee. It is abundantly clear that information relevant to the claim was either reviewed by persons unskilled in its evaluation or disregarded by those who possessed such skills."

BAD FAITH V. MALICE

"While the management of this complex litigation by the trial court below was commendable, it appears that there was juror confusion regarding the distinct standards applicable to bad faith and malice, respectively. In explaining the standard of conduct evidencing bad faith on the part of appellant, the trial court in its jury instruction remarked:

> '[Bad faith] imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another.'

This standard, however, is more akin to that necessary to prove malice than bad faith."

63 OHIO ST.3D 690 (1992) MOTORISTS MUTUAL INSURANCE COMPANY V. SAID

"The insurer's duty of good faith towards its insured is implied by law. This duty may be breached only by an intentional failure by the insurer to perform under its contract with the insured."

“In order to demonstrate the tort of bad faith, some form of wrongful intent must be proven. A finding of bad faith involves an inquiry into the insurer's state of mind. It is not enough that the insurance company exercised poor judgment in withholding coverage; the insurer must, through its actions, or inactions, intentionally refuse to satisfy the insured's claim.”

"Accordingly, we hold that a cause of action arises for the tort of bad faith when an insurer breaches its duty of good faith by intentionally refusing to satisfy an insured's claim where there is either (1) no lawful basis for the refusal coupled with actual knowledge of that fact or (2) an intentional failure to determine whether there was any lawful basis for such refusal. Intent that caused the failure may be inferred and imputed to the insurer when there is a reckless indifference to facts or proof reasonably available to it in considering the claim."

"'No lawful basis' for the intentional refusal to satisfy a claim means that the insurer lacks a reasonable justification in law or fact for refusing to satisfy the claim. Where a claim is fairly debatable the insurer is entitled to refuse the claim as long as such refusal is premised on a genuine dispute over either the status of the law at the time of the denial or the facts giving rise to the claim."

65 OHIO ST.3D 621 (1992) TOKLES & SON, INC. V. MIDWESTERN INDEMNITY COMPANY

"In Said, we stated that a cause of action for the tort of bad faith exists: * * * when an insurer breaches its duty of good faith by intentionally refusing to satisfy an insured's claim where there is either (1) no lawful basis for the refusal coupled with actual knowledge of that fact or (2) an intentional failure to determine whether there was any lawful basis for such refusal. Intent that caused the failure may be inferred and imputed to the insurer when there is a reckless indifference to facts or proof reasonably available to it in considering the claim."

" 'No lawful basis' for the intentional refusal to satisfy a claim means that the insurer lacks a reasonable justification in law or fact for refusing to satisfy the claim. Where a claim is fairly debatable the insurer is entitled to refuse the claim as long as such refusal is premised on a genuine dispute over either the status of the law at the time of the denial or the facts giving rise to the claim."

“Therefore, to grant a motion for summary judgment brought by an insurer on the issue of whether it lacked good faith in the satisfaction of an insured's claim, a court must find after viewing the evidence in a light most favorable to the insured, that the claim was fairly debatable and the refusal was premised on either the status of the law at the time of the denial or the facts that gave rise to the claim.”

"The evidentiary materials indicate that the facts underlying Tokles & Son's theft loss were subject to fair debate, and Tokles & Son failed to present any evidence that Midwestern had actual knowledge of a lack of a reasonable justification for refusing the claim or that Midwestern intentionally failed to determine whether there was any such justification."

71 OHIO ST.3D 552 (1994) ZOPPO ET AL. V. HOMESTEAD INSURANCE COMPANY

"Until Said, the element of intent had been notably absent from this court's definition of when an insurer acts in bad faith. In fact, with the exception of Said and the four-to-three decision of *Slater v. Motorists Mut. Ins. Co. (*1962), 174 Ohio St. 148, 21 O.O.2d 420, 187 N.E.2d 45, over the past forty-five years this court has consistently applied the "reasonable justification" standard to bad faith cases."

"According to this standard, first announced in 1949 in the case of *Hart v. Republic Mut. Ins. Co. (*1949), 152 Ohio St. 185, 39 O.O. 465, 87 N.E.2d 347, and reaffirmed in *Hoskins v. Aetna Life Ins. Co.* (1983), 6 Ohio St.3d 272, 6 OBR 337, 452 N.E.2d 1315, and *Staff Builders, Inc. v. Armstrong (*1988), 37 Ohio St.3d 298, 525 N.E.2d 783, "an insurer fails to exercise good faith in the processing of a claim of its insured where its refusal to pay the claim is not predicated upon circumstances that furnish reasonable justification therefor."

"Intent is not and has never been an element of the reasonable justification standard. Hence, in deciding Said, supra, and in relying upon the erroneous Slater decision, this court departed from forty-five years of precedent. By expressly overruling Said and Slater, we will be following the logical progression of case law that has developed over the years."

- “There was ample evidence to support the jury's finding that Homestead failed to conduct an adequate investigation and was not reasonably justified in denying Zoppo's claim.”
- “Despite these leads, and despite the fact that there appeared to have been a robbery and break-in (machines were broken into and one of the windows was broken), there was evidence at trial that the Homestead investigators failed to locate certain key suspects, verify alibis, follow up with witnesses or go to Pennsylvania to determine Zoppo’s whereabouts on the morning of the fire. In fact, evidence was presented that when interviewing some of the alleged perpetrators, the investigators did little more than ask cursory questions such as whether they were responsible for the fire. When they answered negatively, their questioning ceased.”

“The investigators instead focused on the inconsistencies in Zoppo's statements concerning the sequence of events the morning of the fire and on the statement of a bar patron, Dave Pogue. Pogue initially corroborated the theory that the ousted men were responsible for the fire, but he later implicated Zoppo. However, there was evidence that he was paid for this later statement.”

83 OHIO ST.3D 287 (1998) WAGNER ET AL. V. MIDWESTERN INDEMNITY COMPANY

"The reasonable-justification standard set forth in Zoppo lessened the standard of proof necessary to show that an insurer acted in bad faith, as proof of actual intent was no longer required. See Said, 63 Ohio St.3d at 702, 590 N.E.2d at 1237-1238 (Douglas, J., dissenting). It is axiomatic that a standard based on intent imposes a higher burden of proof than one based on reasonableness."

91 OHIO ST.3D 209 (2000) BOONE V. VANLINER INSURANCE COMPANY

COOK DISSENT "But bad faith by an insurer is conceptually different from fraud. Bad-faith denial of insurance coverage means merely that the insurer lacked a "reasonable justification" for denying a claim. *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552, 644 N.E.2d 397, paragraph one of the syllabus. In contrast, an actionable claim of fraud requires proof of a false statement made with intent to mislead. See *Burr v. Stark Cty. Bd. of Commrs.* (1986), 23 Ohio St.3d 69, 23 OBR 200, 491 N.E.2d 1101, paragraph two of the syllabus. Proof of an insurer's bad faith in denying coverage does not require proof of any false or misleading statements; an insurer could, for example, act in bad faith by denying coverage without explanation."

119 OHIO ST.3D 506 (2008) DOMBROSKI V. WELLPOINT, INC.

- "Accordingly, we hold that to fulfill the second prong of the *Belvedere* test for piercing the corporate veil, the plaintiff must demonstrate that the defendant shareholder exercised control over the corporation in such a manner as to commit fraud, an illegal act, or a similarly unlawful act."
- "Insurer bad faith is a straightforward tort, a basic example of unjust conduct; it does not represent the type of exceptional wrong that piercing is designed to remedy."

IN RESPONSE TO THE ZOPPO REASONABLE JUSTIFICATION STANDARD:

- "This standard is somewhat vague in practical application, in part because of its similarity to the definition negligence."
- Zoppo clearly follows Hart.
- Hart clearly states the reasonable justification standard is not a negligence standard.
- There is no confusion: the reasonable justification standard is somewhere between a negligence standard and an intentional tort standard.

THE "NO LAWFUL BASIS" STANDARD IN SAID

- Though the Zoppo Court clearly stated:

  > Intent is not and has never been an element of the reasonable justification standard. Hence, in deciding Said, supra, and in relying upon the erroneous Slater decision, this court departed from forty-five years of precedent. By expressly overruling Said and Slater, we will be following the logical progression of case law that has developed over the years.

- Briefs continue to quote the "no lawful basis" standard in Said.

SO WHAT IS THE REASONING FOR CONTINUING TO QUOTE A CASE THAT HAS BEEN REVERSED

- "Zoppo eliminates intent from the definition of bad faith, but the law in Said is otherwise still applicable because it is not otherwise inconsistent with Zoppo."
- But if the law that you rely upon in Said is based on an intent standard is that not inconsistent with Zoppo?

- Zoppo specifically reverses the intent standard in Said.
- The "No Lawful Basis" definition that incorporates the "fairly debatable" language applies to the intentional refusal to pay a claim.
- The word "intent" or "intentional" is mentioned 15 times in the Said majority opinion.
- The phrase "reasonable justification" is mentioned once in the majority opinion and it is in the definition for "No Lawful Basis" applying it to an intentional tort standard which is rejected by the Zoppo Court.

"Accordingly, we hold that a cause of action arises for the tort of bad faith when an insurer breaches its duty of good faith by intentionally refusing to satisfy an insured's claim where there is either (1) no lawful basis for the refusal coupled with actual knowledge of that fact or (2) an intentional failure to determine whether there was any lawful basis for such refusal. Intent that caused the failure may be inferred and imputed to the insurer when there is a reckless indifference to facts or proof reasonably available to it in considering the claim."

“ 'No lawful basis' for the intentional refusal to satisfy a claim means that the insurer lacks a reasonable justification in law or fact for refusing to satisfy the claim. Where a claim is fairly debatable the insurer is entitled to refuse the claim as long as such refusal is premised on a genuine dispute over either the status of the law at the time of the denial or the facts giving rise to the claim.”

WHAT ABOUT TOKLES?

- Tokles not specifically reversed in Zoppo opinion.
- Tokles decided after Said and before Zoppo.
- Tokles merely follows Said. It adds nothing to the discussion.
- Since Said was reversed, Tokles no longer good law.

FAIRLY DEBTABLE HAS NEVER BEEN THE STANDARD, EXCEPT FOR TWO YEARS.

- "Fairly debatable" not mentioned in any insurance bad faith Supreme Court case prior to Said.
- "Fairly debatable" not mentioned in Zoppo or any subsequent Supreme Court case.
- In the last 70 years, "fairly debatable" standard has only been the standard for two years (1992-1994).
- Reasonable justification has been the standard since 1949.