2761 BAD FAITH BY INSURANCE COMPANY: ASSURED'S CLAIM

To prove bad faith against (insurance company), the (plaintiff) must establish that there was no reasonable basis for the insurance company's denying (plaintiff)'s claim for benefits under (his) (her) policy and that (insurance company), in denying the claim, either knew or recklessly failed to ascertain that the claim should have been paid.

Bad faith on the part of an insurance company towards its insured is the absence of honest, intelligent action or consideration of its insured's claim.

Bad faith exists if, upon an examination of the facts found by you, you are able to conclude that (defendant) had no reasonable basis for denying (plaintiff)'s claim.

In answering this question, you may consider whether (plaintiff)'s claim was properly investigated and whether the results of the investigation were given a reasonable evaluation and review. If you find that (insurance company) either refused to consider the (plaintiff)'s claim for damages, made no investigation, or conducted its investigation in such a way as to prevent it from learning the true facts upon which the (plaintiff)'s claim is based, the insurance company can be found to have exercised bad faith. This is because you may infer from these facts a reckless disregard on the insurance company's part to learn that there was no reasonable basis for it to deny (plaintiff)'s claim.

If, on the other hand, you find that the insurance company, after conducting a thorough investigation of the facts and circumstances giving rise to the (plaintiff)'s claim, reasonably concluded that the claim is debatable or questionable, then there is no bad faith even though it refused to pay the claim.

(Burden of Proof: Middle Burden, Wis JI-Civil 205)

SPECIAL VERDICT

Did (defendant) exercise bad faith in denying the claim of (plaintiff)?

Answer: _____
Yes or No

COMMENT

This instruction was approved in 1979 and revised in 1991. The comment was updated in 1997, 1998, and 2011.

Bad faith conduct by an insurer towards its insured is a tort separate and apart from any breach of contract. Anderson v. Continental Ins. Co., 85 Wis.2d 675, 271 N.W.2d 368 (1978); Davis v. Allstate Ins. Co., 101 Wis.2d 1, 303 N.W.2d 596 (1981); Kranzush v. Badger State Mut. Casualty Co., 103 Wis.2d 56, 306 N.W.2d 256 (1982); Benke v. Mukwonago Mut. Ins. Co., 110 Wis.2d 356, 329 N.W.2d 243 (Ct. App. 1982); Brethorst v. Allstate, 2011 WI 41, 334 Wis.2d 23, 798 N.W.2d 467, at ¶ 24.

An insurance company is liable in bad faith only when it has denied a claim without a reasonable basis. The test of the company's conduct in such claims is whether a reasonable insurer under the particular facts and circumstances would have denied or delayed payment of the claim. Poling v. Wisconsin Physicians Serv., 120 Wis.2d 603, 608, 357 N.W.2d 293 (Ct. App. 1984), citing Anderson v. Continental Ins. Co., supra.

The supreme court has said that it is well settled that if an insurer fails to deal in good faith with its insured by refusing, without proper cause, to compensate its insured for a loss covered by the policy, such conduct may give rise to a cause of action in tort for bad faith. DeChant v. Monarch Life Ins. Co., 200 Wis.2d 559, 547 N.W.2d 592 (1996). By virtue of the relationship between the parties created by an insurance contract, a special duty arises, the breach of which is a tort and is unrelated to contract damages. The tort of bad faith "is a separate intentional wrong, which results from a breach of duty imposed as a consequence of the relationship established by the contract. DeChant, at 569. When such a breach occurs, the insurer is liable for any damages which are the result of that breach.

The tort of bad faith was created to protect the insured. Its primary purpose is to redress all economic harm proximately caused by an insurer's bad faith. DeChant, at 570, citing Gruenberg v. Aetna Ins. Co., 510 P.2d 1032, 1037 (Cal. 1973).

In Dechant, the court said that it is the fiduciary relationship between the insured and the insurer that is the key element justifying the use of tort remedies for the insurer's breach of the contractual obligation.

When an insurer acts in bad faith by denying benefits, it is liable to the insured in tort for any damages which are the proximate result of that tort. DeChant, supra. In DeChant, the court concluded that attorney's fees and bond premiums are recoverable by a prevailing party in a first party bad faith action as part of those compensatory damages resulting from the insurer's bad faith.

Elements. In Brethorst v. Allstate, supra, ¶ 65, the court concluded that "some breach of contract by an insurer is a fundamental prerequisite for a first-party bad faith claim against the insurer by the insured.

The Brethorst court noted that traditionally, to prove a first-party bad faith claim, the insured has been required to establish two elements. The first element, an objective measure, is that there is no reasonable basis for the insurer to deny the insured's claim for benefits under the policy. The second element is subjective and requires that the insurer knew of or recklessly disregarded the lack of a reasonable basis to deny the claim.

The court in Brethorst noted that the case was "the first to come before this court in which the insured has initiated a bad faith claim without filing any accompanying claim for breach of contract." 2011 WI 41, at ¶ 51.

In Brethorst v. Allstate, the plaintiff filed a first-party bad faith claim without also filing a breach of contract claim. The case involved an uninsured motorist contract. The trial court denied a motion for bifurcation and a stay after concluding that Wisconsin law allowed a party to bring a bad faith claim separately from any underlying breach of contract claim. The Wisconsin Supreme Court affirmed the trial court, but required the plaintiff to establish a wrongful denial of some contracted for benefit as a prerequisite where the suit was for a bad faith claim only. According to the majority, breach of contact is a required showing both as to discovery and proof of a claim of first-party bad faith.

The court in Brethorst v. Allstate, supra, quoted this instruction (JI-Civil 2761) in full. After reviewing Brethorst, the Committee concluded that this instruction is a proper statement of the elements of bad faith. In cases, where the plaintiff proceeds only on bad faith, a showing of breach of contract is required.

Expert Testimony. In DeChant v. Monarch Life Ins. Co., supra, at 567, the court of appeals certified the following issue: "Is expert testimony required as a predicate to instructing the jury in a bad faith action in conformity with Wis JI-Civil 2761, as to the conduct of a reasonable insurer?" The supreme court concluded that the circuit court had correctly determined that expert testimony was not required in the case. The court said that to establish a claim for bad faith, the insured "must show the absence of a reasonable basis for denying benefits of the policy and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim." Citing Anderson v. Continental Ins. Co, supra. The insured must establish that, under the facts and circumstances, a reasonable insurer could not have denied or delayed payment of the claim. In other words, the trier measures the insurer's conduct against what a reasonable insurer would have done under the particular facts and circumstances. In Weiss v. United Fire and Casualty Co., 197 Wis.2d 365, 541 N.W.2d 753 (1995). The supreme court addressed the question of whether an insured can prevail on a bad faith tort claim against an insurer without first introducing expert testimony. In Weiss, the court rejected a categorical rule requiring expert testimony in all bad faith tort claims. Instead, the court held that:

> Cases presenting particular complex facts and circumstances outside the common knowledge and ordinary experience of an average juror will ordinarily require an insured to introduce expert testimony to establish a prima facie case for bad faith. Under the facts and circumstances of other cases, however, the question of whether an insurer has breached its duty as a reasonable insurer to evaluate its insured's claim fairly and neutrally will remain well within the realm of the ordinary experience of an average juror and therefore will not require expert testimony.

The supreme court concluded that the circuit court correctly determined that the insured was not required to introduce expert testimony to establish a cause of action against the insurer for bad faith denial of his claim because the jury in the case did not need special knowledge or skill or experience to properly understand and analyze the insurer's conduct.

Damages. A concurring opinion in DeChant noted that attorney's fees incurred in proving a bad faith claim are not awarded as attorney's fees, but rather as an item of damages caused by an insurer's bad faith refusal to pay benefits owed. But the very theory supporting an award of attorney's fees as damages resulting from an insurer's bad faith precludes an award of attorney's fees incurred in proving punitive damages.

Punitive Damages. For the award of punitive damages in bad faith cases, see Anderson v. Continental Ins. Co., supra at 697; McEvoy v. Group Health Cooperative, supra, at 526.

Claims Against Health Maintenance Organizations (HMOs). The Wisconsin Supreme Court has held that bad faith claims may properly be maintained against HMOs. McEvoy v. Group Health Cooperative, 213 Wis.2d 507, 570 N.W.2d 397 (1997). It said to prevail, a plaintiff must plead facts sufficient to show, upon objective review: (1) the absence of a reasonably basis for the HMO to deny the plaintiff's claim for out-of-network coverage or care under his or her subscriber contract; and (2) that the HMO, in denying such a claim, either knew or recklessly failed to ascertain that the coverage or care should have been provided. A plaintiff must make this showing by evidence that is clear, satisfactory, and convincing.