

**OPPOSING MOTIONS FOR SUMMARY ADJUDICATION OF CALIFORNIA
INSURANCE BAD FAITH AND PUNITIVE AND EXEMPLARY DAMAGE
CLAIMS**

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Introduction

Insurance litigation characteristically involves motions for partial summary judgment or summary adjudication filed by insurer defendants on the bad faith cause of action and punitive and exemplary damages. In addition to marshaling the facts, there is an extensive body of California and federal law available for use in defeating these motions.

Motions For Partial Summary Judgment Are Subject To The Standard Of Review Applicable To Summary Judgment.

Summary judgment or partial summary judgment cannot be granted when any genuine issue of material fact is presented on the issue of bad faith. The 7th Amendment to the United States Constitution guarantees plaintiff the right to jury trial on those issues that present questions of fact.

The United States Supreme Court, subsequent to *Celotex Corp. v. Catrett* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed. 2d 265 (1986) has held, on the subject of summary judgments, as follows:

Because this case comes to us on (petitioner's) motion for summary judgment, "the evidence of respondents is to be believed, and all justifiable inferences are to be drawn in their favor." Mindful that respondents' version of any disputed issue of fact is presumed correct, we begin with the factual basis of respondents' claims. *Eastman Kodak Co. v. Image Technical Services* 504 U.S. 451, 456, 112 S.Ct. 2072, 2076-77, 119 L.Ed. 265 (1992) (citations omitted).

As the U. S. Supreme Court noted in *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986), the evidence presented to the court on summary judgment must foreclose the possibility of any facts that would support an inference in the non-moving party's favor.

Determination of the issue of bad faith requires a weighing of the reasonableness

of defendant's actions. As held in Anderson, *supra*:

Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. 477 U.S. at 255, 106 S.Ct. at 2513, 91 L.Ed.2d 202 (citations omitted).

The Anderson court further explained as follows:

(the summary judgment) standard mirrors the standard for a directed verdict....(T)he inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. 477 U.S. at 250-252, 106 S.Ct. at 2505, 2511-12, 91 L.Ed.2d 202.

It is only when a party's claims have "no factual basis" that they are amenable to summary judgment. Fed. R. Evid. 501, Admiral Insurance Co. v. U.S. District Court,

881 F.2d 1486 (9th Cir. 1989)Gruenberg v. Aetna Insurance Company

(1973) 9 Cal.3d 566, 108 Cal.Rptr. 480, 510 P.2d 1032Silberg v. California Life Insurance Company

(1974) 11 Cal.3d 452, 113 Cal.Rptr. 711, 521 P.2d 1103Neal v. Farmers Insurance Exchange

(1978) 21 Cal.3d 910, 148 Cal.Rptr. 389, 582 P.2d 980Wetherbee v. United Insurance Company

(1971) 18 Cal.App.3d 266, 270, 95 Cal.Rptr. 678McLaughlin v. Connecticut General Life Insurance Co.

D.C. Cal. 565 F.Supp 434 (1983)Sumbrum v. United Services Auto Association

E.D. Cal. 719 F.Supp. 890 (1989)Delgado v. Heritage Life Ins.. Co.

(1984) 157 Cal.App.3d 262, 203 Cal.Rptr. 672.Egan v. Mutual of Omaha Ins.. Co.,

(1979) 24 Cal.3d 809, 818-20Mariscal v. Old Republic Life Ins.. Co.

(1996) 42 CA.4th 1617, 1623.McCormick v. Sentinel Life Ins.. Co.
153 Cal.App.3d 1030, 1048-51Egan v. Mutual of Omaha Ins. Co.,supra at 819. An insurer has a duty to obtain readily available evidence, and that includes contacting and speaking to persons with relevant information prior to denial. Mariscal v. Old Republic Life Ins. Co., supra at 1624-25. An insured's alleged "comparative bad faith" does not provide the insurer a defense against the bad faith claim. Kransco v. American Empire Surplus Lines Ins. Co.(2000) 23 Cal.4th 390.

Unreasonable denial of benefits also supports an award of emotional distress damages, which need not be severe or result from outrageous conduct. See e.g., Tomaselli v. TransAmerican Ins.. Co.
(1944) 25 Cal.App.4th 1269Brandt v. Superior Court (Standard Insurance Co.)
(1985) 37 Cal.3d 813White v. Western Title Ins.. Co.
159 Cal.App.3d 977California Code of Civil Procedure Section 3294Egan, supra, at 820-821, Fletcher v. Western National Life Ins.. Co.
(1970) 10 Cal.App.3d 376Delos v. Farmers Ins.. Group, Inc. (1979) 93 Cal.App.3d 642Pistorius, which requires that defendant's motion on this issue be denied.¹

Under California law, a claim for punitive and exemplary damages should not be struck from the complaint where the claim (tortious breach of the implied covenant of good faith and fair dealing by an insurer in this case) could support an award of punitive damages. *Weil & Brown California Practice Guide: Civil Procedure Before Trial Section 7:186 (1997)*; Egan v. Mutual of Omaha Insurance Co., supra at 821. In addition, if the facts discovered during the course of the case and presented at trial would support a punitive and exemplary damage award, such an award is supported by strong public policy considerations. *Id.* at 820. See also Neal v. Farmers Insurance Exchange (1978) 21 Cal.3d 910, 922-23, 148 Cal.Rptr. 389.

An insured can establish that an insurer acted in conscious disregard of rights by showing that the insurer's actions were "firmly established in company policy." Neal, supra at 923. Such proof could also consist of showing similar conduct on two claims.

¹ A word of caution: the court in Wilson v. 21st Century Ins. Co., supra, commented, in *dictum*, that it felt cases involving judgments pre-dating the 1987 amendment of Civ. Code § 3294 that added the word "despicable" to the definitional requirements for "malice" or "oppression" were no longer reliable precedents on the issue of punitive damages.

The court characterized these cases as upholding awards of punitive damages "based solely on the insurer's failure to thoroughly investigate and evaluate the insured's claim." First, the court's characterization of prior precedents is over broad and not wholly accurate. Second, the "despicable" definitional requirement does not apply to all of the four potential grounds upon which a punitive damage award may be based - intent, malice, oppression or fraud; it is not required for intent or fraud.

See e.g., Moore v. American United Life Ins. Co. (1984) 150 Cal.App.3d 610, 197 Cal.Rptr. 878.

However, it is not necessary that plaintiff provide evidence of other claims. A jury may infer that an objectionable company policy exists from evidence presented on the single claim before it. See e.g., Neal, *supra* at 923 and 936; Hughes v. Blue Cross of California (1989) 215 Cal.App.3d 832, 847, 263 Cal.Rptr. 850, 858; Campbell v. Cal-Gard Surety Services, Inc. (1998) 62 Cal.App.4th 563, 571, 73 Cal.Rptr. 2d 4, 68.

Civil Code §3294 does not require proof of a repetitive course of conduct to support punitive damages. See also Oates Construction, Inc. v. Talbot Partners (1997) 53 Cal.App.4th 1420, 62 Cal.Rptr.2d 548, reversed on other grounds, 21 Cal.4th 28, 86 Cal.Rptr.2d 855.

As with case law often cited by insurers in support of their argument on the bad faith issue, the cases they rely upon concerning the punitive and exemplary damages issues may be procedurally and factually distinguishable.

Defendant may claim that Patrick v. Maryland Casualty Co. (1990) 217 Cal. App. 3d 1556, 1576, 267 Cal Rptr. 24, stands for the proposition that “improper claim handling is insufficient for punitive damages.” Patrick often has no application to the case at hand. In Patrick, an insured homeowner claimed a three month delay in the adjustment of his roof damage claim under a homeowner’s insurance policy; impatient, the insured went up on the roof, fell off (allegedly negligently) and suffered injury. The Patrick court held only that “...we cannot find liability here for punitive damages based merely upon the insurer’s inept and negligent handling of the claim.” (emphasis added) 217 Cal. App. 3d at 1576. The Patrick court, in so holding, did not discuss or analyze the facts further; it is an unusual case limited in holding and effect to its facts.

Tomaselli v. Transamerica Ins. Co. (1994) 25 Cal. App.4th 1269, 31 Cal. Rptr. 2d 433, again involves homeowner’s insurance, and the facts relied upon by the plaintiff unsuccessfully in that case to support punitive and exemplary damages are substantially different than those in most cases. In Tomaselli, the court noted the primary operative alleged facts to be the company’s retention of outside counsel, the taking of an examination under oath (EUO) and misplacement of an insurance endorsement. 25 Cal. App. 4th at 1288. Tomaselli also relied on Patrick, and like that case, Tomaselli is an unusual case, limited to its facts, and distinguishable from the present case.

Defendants often cite Mock v. Michigan Millers Mutual Ins. Co., (1992) 4 Cal. App. 4th 306, 5 Cal Rptr. 2d 594 (1992), McLaughlin v. Connecticut Gen. Life Ins. Co., 565 F. Supp 434 (N.D. Cal. 1983) and Silberg v. California Life Ins. Co., (1974) 11 Cal.

3d 452, 113 Cal. Rptr. 711, which merely restate the requirements set forth in California Civil Code § 3294.

None of the cases typically cited by defendant insurers in support of their argument regarding punitive and exemplary damages involve summary judgment, save for McLaughlin v. Connecticut Gen. Life Ins. Co., and McLaughlin is based on an ERISA pre-emption analysis subsequently rejected by the U.S. Supreme Court in Pilot Life Ins. Co. v. Dedeaux, (1987) 481 U.S. 41, and a waiver analysis disapproved of by the California Supreme Court in Waller v. Truck Ins. Exchange, supra, upon which defendants also frequently and erroneously rely, as discussed above.

Plaintiff should, if possible, present evidence that will establish by clear and convincing evidence that defendant acted with intent, oppression, fraud or conscious and wilful disregard of plaintiff's rights under his policy, at least as follows:

1. Intentional conduct of an incomplete and inadequate investigation and evaluation;
2. Intentional misrepresentations of facts and evidence aimed at improperly defeating plaintiff's right to benefits under his policy;
3. Intentional resolving of all doubts against, instead of in favor of, the insured's claim;
4. Intentional conditioning of benefits on an unjustified reservation of rights;
5. Intentional emphasis of economic benefit to the insurer over reasonable claim handling and the insured's interest; and
6. Intentional ignoring of known facts and opinions that supported plaintiff's claim.²

In conformity with the requirements of Code of Civil Procedure §3294(b), as a predicate to an award of punitive and exemplary damages against a business entity, as opposed to an individual, plaintiff must show that the conduct by defendant directed against plaintiff was undertaken and approved by a home office director, officer or managing agent of defendant, and that they had discretionary authority to perform the acts. See Egan v. Mutual of Omaha Ins. Co. supra at 823.

There Is Rarely A “Genuine Dispute” Defense That Can Be Determined As A Matter Of Law

The issue of “genuine dispute,” in spite of some characterizations in case law, is not a “doctrine,” but rather one of a number of a number of factors that may be considered along with other factors in deciding whether an insurer acted unreasonably and in bad faith. There is nothing “new” about the issue of the possible existence of a genuine dispute being considered in evaluating bad faith conduct of an insurer. Established summary judgment standards will apply, and questions of fact are for juries to resolve.

Courts have recognized for some time that if a “genuine issue” exists as to the legal liability of an insurer on the insurance contract (e.g., the existence of coverage) a court may find that an insurer is not liable for bad faith as a matter of law. See e.g., Opsal v. United Services Automobile Association (1991) 2 Cal.App.4th 1197, 1204–1206, 10 Cal.Rptr.2d 352; Chateau Chamberay Homeowners Associated International Insurance Company (2001) 90 Cal.App.4th 335, 347-348, 108 Cal.Rptr.2d 776; Fraley v. Allstate Insurance Company (2001 Cal.Ap.4th 1282, 1293, 97 Cal.Rptr.2d 386; Guebara v. Allstate Insurance Company, 237 F.3d 987, 992-994 (9th Cir. 2001).

Over the last five years or so, Defendant insurers have been asserting that “genuine dispute” cases provide a defense against insurance bad faith for claims involving disputed questions of fact. They assert that the court may conclude as a matter of law that an insurer’s denial of a claim was not reasonable so long as there existed a genuine issue as to the insurer’s liability, whether based on resolution of questions of law or fact. This is an unsupportable, overreaching proposition.

A careful reading of the “genuine dispute” cases cited above indicates that the presence or absence of a genuine dispute is but one factor to be considered in evaluating the conduct of an insurer in its investigation, claim handling and its delay of or withholding of benefits. All of these cases acknowledge the long-standing rules on insurance bad faith, including the primary rule that “the key to a bad faith claim is whether or not the insurer’s denial of coverage was reasonable.” See e.g., Guebara v. Allstate, *supra* at 992; Fraley v. Allstate, *supra* at 1292. It is also important to point out that these “genuine dispute” cases recognize that summary judgment is only appropriate in insurance bad faith cases, like any other case in which summary judgment is sought, where there are no disputed material facts and reasonable minds could only draw one conclusion. See e.g., Chateau Chamberay v. Associated International, *supra* at 344-345. The cases also acknowledge that reasonableness is usually a question of fact.

Consistent with these observations, the Ninth Circuit observed in Amadeo v. Principal

Mutual Live Insurance Company, 290 F.3d.1152 (9th Cir. 2002) that the “genuine issue” rule allows summary judgment in bad faith claims only when “it is undisputed or indisputable that the bases for the insurer’s denial of benefits was reasonable...” 290 F.3d at 1162.

In this regard, a careful reading of the “genuine dispute” cases also reveals that a jury instruction may be offered by plaintiff on the “genuine dispute” defense if necessary. In addition to other comprehensive jury instructions on the duty of good faith and fair dealing, breach of duty and damages, plaintiffs should be entitled to an instruction, which is supported by the cases, along the following lines:

The existence of a “genuine dispute” concerning an insurance benefit claim does not automatically mean an insurer acted in good faith and dealt fairly with its insured. In order to find that a “genuine dispute” existed, an insurer’s questioning of a claim must have been both legitimate and reasonable, and any delay in, or withholding of, a benefit must have been reasonable and with proper cause.

The presence of any of the following on the facts of the case prevent the finding of a “genuine dispute.:

- 1.Lack of thorough investigation or evaluation;
- 2.An incomplete, inadequate or unreasonable investigation or evaluation;
- 3.Bias in the investigation or evaluation;
- 4.Use of improper standards in the investigation or evaluation;
- 5.Unreasonable conduct, including delay in evaluation or payment of benefits;
- 6.Misleading of the insured about any aspect of the investigation or evaluation;
- 7.Misrepresentation or concealment relating to the nature of the investigation proceedings;
- 8.Lying by any of the insurer’s employees to the insured or in deposition testimony;
- 9.Dishonest selection of experts; or
- 10.Unreasonable conduct of opinions by experts.

(This is not an exhaustive list.)

Authority: Chateau Chamberay Homeowners Association v. Associated International Ins. Co. (2001) 90 Cal.App. 4th 335, 348-349, as modified on denial of rehearing (July 30, 2001); Guebarra v. Allstate Ins. Co. 237 F.3d 987, 992-994 (9th Cir. 2001); Amadeo v. Principal Mutual Life Insurance Co. 290 F.3d 1152, 1161-1164 (9th Cir. 2002); Hangarter v Provident Life & Accid. Ins. Co., 373 F.3d 998 (9th Cir. 2004); Hubka v. Paul Revere Life Ins. Co. 215 F.Supp 2d. 1089 (S.D. Cal 2002).

There is a significant difference between a legal dispute that presents a genuine legal issue and a factual dispute. Questions of law arise from, and in the context of, undisputed facts and are generally beyond the control of the insurer to resolve; they are resolved by the court as a matter of law. Factual disputes, on the other hand, may be more readily manufactured, and unreasonably resolved, by an insurer and its hired or retained personnel. There is a substantial difference between the presence of a factual dispute, which must be resolved by the trier of fact (a jury), and the existence of a “genuine dispute” so clear that it should operate to relieve an insurer of the duty of good faith and fair dealing long imposed as a matter of law in California in furtherance of strong public policy.

A careful examination of the facts of the cases in which courts have found a “genuine dispute” to exist reveals that, by and large, the disputes were genuine even in the context of the duty of good faith and fair dealing imposed upon the insurer; that duty remains unchanged by the presence of, or finding of, a “genuine dispute.” In other words, in addition to those exceptions noted above in the proposed jury instruction, an insurer cannot reasonably manufacture a genuine dispute; it still must investigate all reasonably available evidence that could support a claim, it cannot focus unduly on facts that would justify denial of the claim, it cannot place its interests above that of the insured, and it cannot act unreasonably. See e.g., Guenberg v. Aetna Ins. Co. (1973) 9 Cal.3d 566, 574, 108 Ca. Rptr. 480; Silberg v. California Life Insurance Company (1974) 11 Cal.3d 4521, 113 Ca.Rptr. 711; Neal v. Farmers Insurance Exchange (1978) 21 Cal.3d 910, 920, 148 Ca. Rptr. 389; Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal.3d 809, 818-820, 169 Cal.Rptr. 691.

The most recent case on the subject, Wilson v. 21st Century Ins. Co. (2006) ___ Cal. App. 4th ___, 38 Cal. Rptr. 3d 514, rejected the insurer’s genuine dispute defense, citing Chateau Chamberay for the key proposition - “... the genuine dispute defense does not apply when the dispute arises because ‘the insurer failed to conduct a thorough investigation.’”

The finding of a “genuine dispute” sufficient to justify holding that an insurer is relieved of its duties of good faith and fair dealing on the facts of a particular case, or sufficient to remove consideration of factual disputes from a jury on the issue of bad faith, should be, as it has historically been, a rare occurrence reserved only for extraordinary circumstances in which there are no disputed or disputable material facts and reasonable minds could not differ about the conclusion.

Conclusion

Summary adjudication of an insurance bad faith cause of action should only occur in the rare case where facts are undisputed or indisputable and where the insurer's investigation and evaluation was indisputably complete, thorough and reasonable, and with respect to a punitive damages claim only where there is no direct evidence or potential inference to support a jury finding the existence of *either* intent, malice, oppression *or* fraud.

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