

MEMORANDUM

To: Jennifer North, Senior Partner
From: Unknown, Junior Associate
Date: October 8, 2017
Re: Aubrey St. Clair; Bad Faith Refusal to Pay

QUESTION PRESENTED

Under South Carolina law, does an insured plaintiff recover damages for bad faith refusal to pay when she has purchased an insurance policy, paying all necessary fees and premiums, some of the products in the shipment protected by the policy are lost or damaged, the insurer took six weeks to communicate to the insured, but there was no clear refusal to pay, and the insured failed to keep the damaged products for investigative use?

BRIEF ANSWER

Yes. In South Carolina, damages can likely be recovered for bad faith refusal to pay because Ms. St. Clair had an existing mutually binding insurance agreement with Atlantic Global, there was denial of her claim and an assumed refusal to pay, Atlantic Global acted unreasonably, and damages were caused subsequently due to the refusal to pay benefits owed. Atlantic Global acted unreasonably by not communicating with the insured until six weeks after the claim was filed, there was no claim review committee, and they lost her paper

work. The insurer unreasonably requested legal documents that they knew would be unattainable and put Ms. St. Clair through a corrupt administrative incident. Atlantic Global's unreasonable actions in bad faith caused Ms. St. Clair the loss of her shipped products, one of her biggest contracts with her client Jean-Marc Fontenot. Therefore, St. Clair can bring a successful bad faith and refusal to repay action to recover damages: within and exceeding the existing contract of insurance.

FACTS

Aubrey St. Clair is the owner of an import/export business, Private Enterprises, Incorporated. Recently, Ms. St. Clair employed Four Oceans Transport to pack and export items to a client in France. Four Oceans offered to insure the shipment for an additional fee. Subsequently, Ms. St. Clair accepted the offer of insurance and paid all required costs and premiums associated with insuring the shipment. The value of the coverage for the items to be shipped totaled \$50,000.

Several days later, Four Oceans Transport arrived at Ms. St. Clair's place of business and packed all the goods that were to be transported to France; there were no notes of damages to any item. Approximately nine weeks later, Ms. St. Clair was contacted by the French buyer, Jean-Marc Fontenot indicating the shipment had arrived however, many items were missing from the original inventory list. In addition to the missing items, some of the most expensive items were broken

beyond repair. Infuriated, Mr. Fontenot, told Ms. St. Clair to “remedy the situation” and that he would “never work with her again” and that he would not recommend her to any of his friends either.

Upon receiving a list of what was damaged and missing from the shipment, Ms. St. Clair contacted Four Oceans and notified them of the issue at hand. They instructed her to contact Atlantic Global, the company who issued the certificate of insurance. Atlantic Global advised Ms. St. Clair to have a police report filed noting the items that were lost and damaged. Upon arrival, the officer notified Mr. Fontenot that no report could be made on a civil matter. The officer seemed amused and said he had “never heard of making a police report for a business transaction”.

After the failed attempt to get a report from local law enforcement, Ms. St. Clair contacted Atlantic Global to inform them that no report could be made due to the civil nature of the issue. Atlantic Global agreed to send out a claims adjuster. Six weeks after the conversation with Ms. St. Clair, Atlantic Global contacted Mr. Fontenot to set up an inspection appointment. Two conversation transpired between Mr. Fontenot and the AG before, the third communication proved successful and a mutually beneficial time was scheduled for the inspection.

Upon investigation by the Mr. Benoit, the claim adjuster, it was discovered that Mr. Fontenot had thrown away the damaged items, did not have a copy of the inventory, or any records of the shipment at all.

After investigations in France, Ms. St. Clair was instructed by Atlantic Global to submit a valued inventory, the original certificate of insurance, and any and all relevant documents pertaining to the shipment. Ms. St. Clair complied with all requests made by Atlantic Global. Several more weeks passed, and Ms. St. Clair had not been given any update as to the status of her claim. She then reached out through phone calls, a couple of letters, and several emails. Twice, she was informed that her claim's manager, Amy was out of the office. Other times she was instructed to send the documents which she previously sent to AG again. In total Ms. St. Clair asserts that only half of her total correspondences with Atlantic Global were ever reciprocated. Most currently, St. Clair received a letter from AG stating that the investigation showed evidence of fraud. Our client, Ms. St. Clair, needs to know if she can recover damages from Atlantic Global for bad faith and refusal to pay.

DISCUSSION

I. St. Clair will be able to bring a cause of action for bad faith and refusal to pay against Atlantic Global in the State of South Carolina.

In South Carolina, a bad faith and refusal cause of action can be brought to recover damages. "If insured can demonstrate bad faith or unreasonable action by

insurer in processing claim under their mutually binding insurance contract, (s)he can recover consequential damages in tort action, and actual damages are not limited by contract; further if (s)he can demonstrate insurer's actions were willful or in reckless disregard of insured's rights, he can recover punitive damages."

(Nichols, 617) In order for Ms. St. Clair to be successful in a bad faith refusal to pay action it must be shown that "(1) the existence of a mutually binding contract of insurance between the plaintiff and the defendant; (2) refusal by the insurer to pay benefits due under the contract; (3) resulting from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing arising on the contract; (4) causing damage to the insured." (Cock-N-Bull, 150) Because these four requirements can be satisfied, St. Clair can bring a successful bad faith refusal to pay action against Atlantic Global.

A. There was an existing mutually binding contract of insurance between St. Clair and Atlantic Global.

The first element for establishing bad faith refusal to pay benefits under insurance contract is the "existence of mutually binding contract of insurance between plaintiff and defendant" (Cock-N-Bull, 727) To establish if a mutually binding contract is in existence between the insurer and the insured, the "circumstances may imply acceptance of offer to purchase insurance" (Crossley, 396) However, an existing contract does not always have to be

inferred due to the circumstances of the facts. “Normally, layperson who pays his or her premium at the time of application for insurance is filed is justified in assuming that payment will bring immediate protection” (Crossley, 395). It is assumed in the circumstances surrounding insurance contracts specifically “that neither party will do anything to impair the other’s rights to benefits under the contract” (Tadlock, 53)

St. Clair can prove there was an existing mutually binding contract of insurance between herself (the insured) and Atlantic Global (the insurer). The circumstance in the facts of this case show Four Oceans Transport offered to insure the shipment and Ms. St. Clair accepted; ensuring it for the actual value of \$50,000. Ms. St. Clair paid all the required and necessary fees and premiums directly after accepting the offer of insurance. She is therefore justified in assuming immediate protection under the insurance contract. Ms. St. Clair established a legally binding agreement of insurance with Atlantic Global through Four Oceans Transport.

B. There was a refusal on behalf of Atlantic Global to pay benefits due under contract.

The second element necessary to prove a cause of action for bad faith refusal to pay is “refusal by insurer to pay benefits due under contract” (Cock-n-Bull, 727). The court further defines this refusal in 1996 “Furthermore, we decline to

make breach of an express contractual provision a prerequisite to bringing the action” The law is not defined by an explicitly expressed refusal, however is just defined as a refusal to pay benefits owed under the contract.

St. Clair was denied benefits that were covered under her insurance policy by Atlantic Global. It can be inferred by the correspondence from Atlantic Global to Ms. St. Clair “stating the adjuster’s report showed evidence of fraud” that they had no intention of paying of her. Furthermore, the amount of time transpired between Ms. St. Clair filing the claim and the final correspondence can also show refusal to pay benefits in a reasonable amount of time.

C. Atlantic Global acted unreasonably and breached the implied covenant of good faith and fair dealings.

The third element necessary for a claim of bad faith refusal to pay is “...insurer’s bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealings arising on contract” (Cock-N-Bull, 727). The unreasonable breach does not have to derive specifically from the contractual obligations, it can also come from the implied covenant of good faith. For example, “It argues, however, that an insured can only bring a bad faith action if the insurer has breached some express contractual provision, we (the court) disagree” (Tadlock, 54).

Unreasonable action on behalf of an insurance company does not necessarily have to be the neglect of payment for claims. It can be unreasonable time to process a claim, unreasonable requests of the insured, in addition to the way the insurer investigates claims; all of which expand the scope of most insurance contracts. For example, the court found the insurer acted unreasonably by “waited four months to respond to a claim, never contacted the daughter who filed claim for the insured, failed to return at least 15 phone calls daughter made...adjusters used no claims manual or guideline to process claim, it had no medically trained personnel assisting adjusters in reviewing records, and no claim review committee”. (Hansel v. National States Insurance). It is important when analyzing this specific element of bad faith refusal to pay to consider “liability can only be imposed where there has been a clear showing by the insured that the insurer unreasonably and in bad faith, withheld payment” (Varnadore, 715)

The unreasonableness of this claim specifically derives from the process in which Atlantic Global put Ms. St. Clair through. After filing the claim, it took Atlantic Global six weeks to return a correspondence to Ms. St. Clair. While that fact alone may not be unreasonable, it could have been a contributing factor as to why the products were disposed of by the time the adjuster was able to begin investigations. Second, the company acted unreasonably by requesting a

police report for a civil matter. The scope of knowledge for an average claim adjuster should cover the fact the officers will not file a report for a civil matter. Atlantic Global's practices were unwarranted and were not well regimented. It can be inferred by their poor practices that Atlantic Global did not use a claim manual, or a guideline for civil claims. AG did not employ any experts in international exports, and there was no claim review committee. It is reasonable to have these policies in effect to ensure that adjusters are not denying claims on prejudicial grounds. Atlantic Global acted unreasonable in their practices and breached the implied covenant of good faith with Ms. St. Clair.

D. The unreasonable actions of Atlantic Global, in addition to the failure to pay benefits, caused Ms. St. Clair damages.

The final element that needs to be sufficed for an action of bad faith refusal to pay is "damage to the insured". "...bad faith refusal to settle the claims of its insured renders the insurer liable in tort for all consequential damages" (Nichols, 618) Actual damages are those defined by the contract while consequential damages can encompass a great deal more. "Plaintiffs call these damages 'consequential damages' and give the interest plaintiff lost by the delay in payment as only an example of such damage" (MUSC, 708) Another form of consequential damages is exemplified in *Tadlock v. Maryland* "Insured then brought a bad faith action against insurer for damages caused by insurer's

actions. It claimed Cargill would not consider it for any more painting jobs because of the delay in cleaning Cargill's employee's cars...the jury agreed" (Tadlock, 53) This form of damages applies to professional contracts and loss of future wages due to the unreasonableness of the insurer. In addition to actual damages, and professional damages, one can also suffer emotional damages.

Ms. Saint Clair suffered actual and consequential damages due to the refusal to pay on behalf of Atlantic Global. The value of her products which were shipped was \$50,000. In addition to what was defined by contract, Ms. Saint Clair suffered consequential damages to her career. The French buyer said to "remedy the situation" or "he would never work with her again". Because of the delay in remedy on behalf of Atlantic Global, Ms. Saint Clair's career has suffered.

CONCLUSION

St. Clair should be able to bring a successful bad faith refusal to pay action to recover damages that accumulated due to Atlantic Global's unreasonable actions. There was a mutually binding contract between the insured and the insurer, Atlantic Global refused to pay, subsequently their unreasonable actions and breach of contract caused St. Clair considerable damage. Therefore, in the State of South Carolina, St. Clair can recover for her damages under tort action of bad faith refusal to pay.

CERTIFICATE OF COMPLIANCE

I, Unknown, the undersigned student of the Charleston School of Law, hereby certify that this document was prepared in compliance with the established CSOL Local Rules and further that I have neither given nor received inappropriate assistance during the preparation of this document.

s/ Unknown

Dated: 10/08/2017