

November 2007

**INSURED PHYSICIAN'S BAD FAITH ACTION**

by Ted Babbitt

The Bible for bad faith suits against an insurance company who fails to settle within the policy limits is the case of Boston Old Colony Insurance Co. v. Guiterrez, 386 So. 2d 783 (Fla. 1980). There the Supreme Court held:

“An insurer, in handling the defense of claims against its insured, has a duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business. For when the insured has surrendered to the insurer all control over the handling of the claim, including all decisions with regard to litigation and settlement, then the insurer must assume a duty to exercise such control and make such decisions in good faith with due regard for the interests of the insured. This good faith duty obligates the insurer to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid same. The insurer must investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so. Because the duty of good faith involves diligence and care in the investigation and evaluation of the claim against the insured, negligence is relevant to the question of good faith.”

That language was turned around in the case of Rogers v. Chicago Ins. Co., 32 Fla. L. Weekly D1280 (Fla. 4<sup>th</sup> DCA 2007) to allow a physician to sue his insurer for settling a malpractice case on the basis of alleged bad faith.

Dr. Rogers was sued for medical malpractice and shortly before the end of the ninety day presuit screening period, his insurer settled the case without his permission. To add insult to injury, the insurer then refused to renew him because of that settlement, resulting in him having to pay for increased malpractice coverage with another company. Dr. Rogers sued Chicago Insurance Company, claiming that the settlement was arrived at in bad faith and alleging, among other things, that Chicago Insurance Company did not even begin its investigation until a week before the expiration of the presuit period and failed to contact Dr. Rogers to obtain appropriate materials which would have shown that the case should never have been settled.

The trial court dismissed the suit relying, in part, on the case of Shuster v. South Broward Hospital District Physicians' Professional Liability Insurance Trust, 591 So. 2d 174 (Fla. 1992). In that case, the Supreme Court held that where a medical malpractice policy contained words which indicated that the carrier had the right to settle claims that it "deemed expedient," the policy gave the insurer the right to settle claims considering only its own interests and not the best interests of its insured and that the contractual provision prevented a later suit claiming bad faith on the part of the insurer.

Shuster, supra, however, predated the enactment of Fla. Stat. 627.4147(1) which specifically prohibits an insurer from issuing a policy containing any clause which gives the insured the right to veto a settlement but which provides:

"However, any offer of admission of liability,

settlement offer, or offer of judgment made by an insurer or self-insurer shall be made in good faith and in the best interests of the insured.”

In interpreting that statute, the Court concluded that the statute has two purposes. First, it prohibits a doctor from having veto power over an insurance company in a decision as to whether or not to settle a case but second, unlike the policy interpreted in Shuster, supra, it sets the standard for the carrier and requires that the carrier act in the best interests of its insured rather than solely in its own interests.

The Court then concluded that in order to give the statute effect the provision requiring the carrier to act in good faith and in the best interests of the insured must create a private cause of action. Without that, that provision in the statute is meaningless. At Page D1282, the Court concluded:

“We conclude that a medical malpractice insurer has a duty to settle within the policy limits in the best interests of the insured. Further, in the context of a claim for medical malpractice, it may not always be in the best interests of the insured to concede liability, where none is present, and settle the claim within the policy limits. We find that the insurer’s failure to act in the insured’s best interests can be enforced by the insured.”

The Boston Old Colony, supra, case holds that the standard to be applied as to whether an insurer acts in good faith is negligence. The Court in Rogers, supra, concluded the same standard applies when a physician sues its insurance company for failing to act with good faith in the insured’s best interest in improperly settling a case.

NOTE: BECAUSE A NUMBER OF PEOPLE HAVE REQUESTED COPIES OF PAST ARTICLES, A COMPILATION OF THESE ARTICLES IS NOW AVAILABLE TO MEMBERS OF THE PALM BEACH COUNTY BAR ASSOCIATION, FREE OF CHARGE, BY CALLING (561) 684-2500.