

## **No Cause Of Action For "Bad Faith" Accrues Prior to Entry Of Excess Judgment (Md)**

In Allstate Insurance Co. v. Campbell, 334 Md. 381, 639 A.2d 652 (1994), the Maryland Court of Appeals held that where the insurer initially failed to settle a third-party action against the insured, but ultimately settled the claim before trial and no excess judgment was rendered against the insured, no cause of action accrued.

The underlying action arose when Robert Campbell was sued by Kimberly Baptiste for injuries arising out of an auto accident. Liability was not an issue. Allstate assigned the case to counsel, who advised Allstate that the case had a value possibly in excess of the twenty thousand dollar (\$20,000) policy limits. Baptiste subsequently offered to settle within policy limits, Allstate refused and the offer was withdrawn. Defense counsel wrote to Campbell and suggested he retain independent counsel regarding the excess liability. Campbell retained independent counsel, who wrote to Allstate advising that failure to settle the claim within policy limits was a failure to act in good faith and urged Allstate to settle. Allstate still refused to settle and refused to authorize discovery or an independent medical examination of Baptiste.

Campbell filed a Declaratory Judgment action claiming that Allstate failed to act in good faith and thus breached its contract to defend him. Before a ruling was issued in the declaratory judgment action, Allstate settled the tort suit for policy limits and obtained a full release for Campbell. Campbell filed an amended complaint for breach of contract, asking for attorney fees and expenses of \$4,218.85 incurred in obtaining independent counsel. The trial court ruled for Allstate, but the Court of Special Appeals reversed.

The Court of Appeals reversed the Court of Special Appeals. The Court held that while Maryland recognizes a cause of action for bad faith failure to settle within policy limits, such an action does not accrue prior to the entry of an excess judgment against the insured. If an insurer acted improperly in defending an insured it may become liable for a judgment in excess of limits. For example, if the insurer, in bad faith, fails to negotiate and bring about a settlement, the damage to the insured generally will be the amount of the excess judgment. Further, if the insurer refuses to defend, it may be liable for attorneys fees. However, unless the insurer failed to defend, the insured may not recover counsel fees, either for independent counsel retained to minimize excess exposure or for the bad faith suit.

The court observed that in certain situations where a conflict of interest develops between the insurer and the insured, the insured has the right to retain independent counsel at the insurer's expense. However, while the possibility of an excess verdict does create a conflict, it does not create the type of conflict that requires the insurer to give up direction of the defense and pay for independent counsel. The Court held:

In our view, it is unreasonable to allow an insured, dissatisfied with the progress of settlement negotiations, to retain counsel either to monitor or attempt to take over the defense, and then require the insurer to reimburse the insured for the cost of that counsel. Therefore, a cause of action against the insurer for a failure, in bad faith, to settle a claim will not accrue prior to the entry of a judgment against the insured in excess of policy limits.

Id. at 659.

This case affirms the contractual right of the insurer to control the defense, and rejects a rule which would require insurers to pay counsel selected by the insured whenever there is a possibility that the insured and insurer might have different objectives.

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