Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
August 2008 Issue

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The genuine-dispute doctrine after *Wilson v. 21st Century Ins. Co.*

In early 2007, I wrote an article for the Consumer Attorneys of California's *Forum* magazine, in which I compared the growth of the so-called *genuine-dispute* or *genuine-issue* doctrine to barnacles attaching themselves to the hull of a ship. I borrowed this metaphor from Professor Arthur Miller, who likened the development of common-law doctrines to a ship becoming weighted down with barnacles. He explained that, from time to time, it became necessary for a high court to haul the ship out of the water and scrape the barnacles away. I wrote that I hoped that the Supreme Court of California would take the opportunity to scrape away the *genuine-issue* doctrine when it decided *Wilson v. 21st Century Insurance Co.*, which was then pending before it.

The Supreme Court issued its opinion in *Wilson* in November 2007. (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 714 [68 Cal.Rptr.3d 746].) When I first read the decision, I was disappointed because the Court did not completely do away with the doctrine. But on further review of the decision, I came to believe that most of the barnacles had, in fact, been scraped away, and that the *genuine-issue* doctrine after *Wilson* was a far more limited, less potent defense for insurers, and that many bad-faith cases that might formerly have been disposed of on summary judgment would now go to a jury.

The birth of the genuine-dispute doctrine

The *genuine-issue* defense was first announced in *Safeco Ins. Co. of America v. Guyton* (9th Cir. 1982) 692 F.2d 551, an appeal from a judgment awarding declaratory relief to the insurer, finding that it owed no coverage for property damage caused by heavy rains. The Ninth Circuit found that the district court had misapplied the doctrine of concurrent causation, and reversed its finding of no coverage. But the court affirmed summary judgment of the insured's counterclaim for bad faith, explaining:

> Although the district court did not specify the grounds on which it entered judgment for Safeco on this cause of action, it may have concluded that since the policy in dispute involved a genuine issue concerning legal liability, Safeco could not, as a matter of law, have been acting in bad faith by refusing to pay on the Policyholders' claims. Although we conclude that the Policyholders' losses are covered by the policy if third-party negligence is established, *we agree that there existed a genuine issue as to Safeco's liability under California law.* We therefore affirm the dismissal of the Policyholders' claims of bad faith.

(692 F.2d at 551, emphasis added.)

The doctrine was first applied by a California court in 1991, in *Opsal v. United Services Auto. Assoc.* (1991) 2 Cal.App.4th 1197 [10 Cal.Rptr.2d 352]. *Opsal* was also a concurrent-cause case arising out of a claim for earth movement. The carrier denied coverage based on its reading of a footnote in *Garvey v. State Farm Fire & Cas. Co.* (1989) 48 Cal.3d 395 [257 Cal.Rptr. 292]. The *Opsal* court rejected the carrier's view of the law, but held that it was reasonable for the carrier to deny coverage based on its construction of *Garvey*. Citing *Guyton*, the court held, "clearly there was a genuine issue . . . under California law" until the meaning of the footnote in *Garvey* was resolved. (*Opsal,* 2 Cal.App.4th at 1206.)

The doctrine went unmentioned in the California cases for the next eight years, until *Filippo Industries, Inc. v. Sun Ins. Co.* (1999) 74 Cal.App.4th 1429 [88 Cal.Rptr.2d 881], where the court declined to apply the doctrine to overturn a bad-faith verdict.

The growth years: 2000 through 2007

The *genuine-issue* defense became firmly established in California after the decisions in *Fraley v. Allstate Ins. Co.* (2000) 81 Cal.App.4th 1282 [97 Cal.Rptr.2d 386], *Guebara v. Allstate Ins. Co.* (9th Cir. 2001) 237 F.3d 987, and *Chateau Chamberay Homeowners Association v. Assoc. International Ins. Co* (2001) 90 Cal.App.4th 335 [108 Cal.Rptr.2d 776]. As of April 2008, *Fraley*'s discussion of the *genuine-issue* doctrine has been cited by 17 California appellate decisions, and in 29 federal decisions. *Chateau Chamberay*'s discussion of the doctrine has been cited in 24 California appellate decisions and 25 federal decisions.

Guebara was the first decision to take a hard look at the doctrine. There, the Ninth Circuit held (over a dissent by Judge Betty Fletcher), that the doctrine could be applied to both legal and factual disputes. But the court provided a non-exhaustive list of factors that could preclude operation of the doctrine in a given case: (1) the insurer was guilty of misrepresenting the nature of investigatory proceedings, (2) the insurer's employees lied during the depositions, or to the insured, (3) the insurer selected its experts dishonestly, (4) the experts were unreasonable, or (5) the insurer failed to conduct a thorough investigation. (*Guebera,* 237 F.3d at 987.)

Chateau Chamberay was the California appellate equivalent to *Guebara*, also finding that the doctrine was applicable to both factual and legal disputes, and adopting the list of factors that would allow a court not to apply the doctrine in a particular case.

Courts continued to apply the doctrine with increasing frequency and more broadly. In *Rappaport-Scott v. Interinsurance*

See Ehrlich, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
August 2008 Issue

Exchange of the Automobile Club (2007) 146 Cal.App.4th 831 [53 Cal.Rptr.3d 245], the court applied the doctrine at the pleading stage, affirming a demurrer to a bad-faith action because the complaint (supposedly) showed that, as a matter of law, there was a genuine dispute.

In *CalFarm Ins. Co. v. Krusiewicz* (2005) 131 Cal.App.4th 273, 287 [31 Cal.Rptr.3d 619] and in *Morris v. Paul Revere Life Ins. Co.* (2003) 109 Cal.App.4th 966, 973-974 [135 Cal.Rptr.2d 718], the same court held that, under the genuine-dispute doctrine, "If the conduct of the insurer in denying coverage was objectively reasonable, its subjective intent is irrelevant."

Relying on this rule, in *Starr-Gordon v. Massachusetts Mutual Life Ins. Co.* (E.D. Cal. 2006) 2006 WL 3218778, a district court held that the genuine-issue doctrine compelled it to grant summary adjudication against the policyholder on her bad-faith claim, even though the record would support a jury finding that the carrier fraudulently terminated her benefits with knowledge that she was entitled to these benefits.

Not all of the *genuine-issue* decisions during this period applied the rule broadly. Perhaps the first case to affirmatively limit the scope of the doctrine was *Amadeo v. Principal Mut. Life Ins. Co.* 1161 (9th Cir. 2002) 290 F.3d 1152, which held that the genuine-issue defense does not apply in a case where a reasonable jury could find that the insurer's conduct was unreasonable. The court explained:

> The genuine issue rule in the context of bad faith claims allows a district court to grant summary judgment when it is undisputed or indisputable that the basis for the insurer's denial of benefits was reasonable — for example, where even under the plaintiff's version of the facts there is a genuine issue as to the insurer's liability under California law. (*Safeco Ins. Co. of Am. v. Guyton* (9th Cir. 1982) 692 F.2d 551, 557.) In such a case, because a bad faith claim can succeed only if the insurer's conduct was unreasonable, the insurer is entitled to judgment as a matter of law. On the other hand, an insurer is not entitled to judgment as a matter of law where, viewing the facts in the light most favorable to the plaintiff, a jury could conclude that the insurer acted unreasonably. [Citation omitted.] . . . . Although summary judgment may be awarded under the genuine-issue rule where the insurer reasonably construes ambiguous language in its policy, *see, Guebara,* 237 F.3d at 993 (discussing cases), summary judgment is not appropriate when the insurer's interpretation of the policy is sufficiently "arbitrary or unreasonable" that a jury could conclude it was adopted in bad faith. [Citations.]

(*Amadeo*, 290 F.3d at 1161-1162.)

Hangarter v. Provident Life and Acc. Ins. Co. (9th Cir. 2004) 373 F.3d 998, 1010, cites this language with approval and adds that, "Though the existence of a 'genuine dispute' will generally immunize an insurer from liability, a jury's finding that an insurer's investigation of a claim was biased may preclude a finding that the insurer was engaged in a genuine dispute, even if the insurer advances expert opinions concerning its conduct." (*Id.* at 1010.)

Wilson v. 21st Century

Wilson was an underinsured-motorist (UIM) bad-faith case. The claimant, Regan Wilson, was a 21-year old woman who suffered neck injuries in an auto accident when she was struck by a drunk driver. She demanded policy limits of $100,000 from her UIM carrier.

Wilson's demand was based on the opinion of her treating orthopedic surgeon, Dr. Southern, who, based on x-rays and an MRI, found that she suffered changes in her cervical spine that were atypical for a woman her age and were the result of the trauma. He also opined she would suffer degenerative disk changes as a result of her injury. Wilson went on a long-planned backpacking trip in Europe after the accident. Her attorney told 21st Century that her neck pain ruined the trip. He also told the carrier that she was planning to study in Australia for a year.

21st Century did not obtain an independent medical examination, or speak to Dr. Southern. Based on its adjuster's view that Wilson had only suffered soft-tissue injuries and had a preexisting degenerative illness, it offered her $5,000 in med-pay benefits, which it contended, when added to the $15,000 she had received from the other driver, would fully compensate her.

When the case would not settle, Wilson commenced arbitration proceedings. She continued to treat with various doctors as the case moved forward. When 21st Century learned during her deposition that one of her doctors recommended surgery, it sought an independent medical examination. Its IME doctor found injuries that warranted surgery, and 21st Century paid the balance of its $100,000 policy, less a $15,000 credit for the amount Wilson recovered from the other driver.

The trial court granted summary judgment for the carrier, finding that there was a genuine dispute about the extent of her injuries. The Court of Appeal reversed in a published decision. The Supreme Court affirmed the Court of Appeal's decision.

The legal analysis of the decision is divided into two parts. Part I is titled, "Lack of Thorough Investigation and Fair Evaluation." In it, the Court relies on statements from its prior decisions, and from two appellate decisions, to reaffirm in strong terms that an insurer who denies a claim without conducting a fair, thorough investigation, can be held liable for bad faith. The Court explained:

> While an insurance company has no obligation under the implied covenant of good faith and fair dealing to pay every claim its insured makes, the insurer cannot deny the claim "without fully investigating the grounds for its denial." (*Frommoethelydo v. Fire Ins. Exchange, supra,* 42 Cal.3d at p. 215.) To protect its insured's contractual interest in security and peace of mind, "it is essential that an insurer fully inquire into possible bases that might support the insured's claim" before denying it. (*Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 819.) By the same token, denial of a claim on a basis unfounded in the facts known to the insurer, or contradicted by those facts, may be deemed unrea-

See Ehrlich, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
August 2008 Issue

> sonable. "A trier of fact may find that an insurer acted unreasonably if the insurer ignores evidence available to it which supports the claim. The insurer may not just focus on those facts which justify denial of the claim."

(*Mariscal v. Old Republic Life Ins. Co.* (1996) 42 Cal.App.4th 1617, 1623 [50 Cal.Rptr.2d 224]; see also *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 880 [93 Cal.Rptr.2d 364].) (*Id*., 42 Cal.4th at 721.)

Applying these standards to the summary-judgment record, the Court held that there was a triable issue of fact as to whether 21st Century's denial of her claim was made unreasonably and in bad faith. (*Ibid*.) The Court explained that 21st Century was not obliged to accept Dr. Southern's opinion without scrutiny or investigation. If it had good-faith doubts, it would have been within its rights to investigate Wilson's claim by asking Dr. Southern to explain or re-examine his findings, to have another doctor review the medical records and provide it with an opinion, or to have Wilson examined by an IME physician. (*Id*. at 722.) It could not, however, simply ignore Dr. Southern's opinion without making any attempt to investigate, and reach a contrary conclusion that lacked any discernable medical foundation. (*Ibid*.) Since a jury could find that this is what the carrier did, summary judgment was improper. (*Ibid*.)

Part II of the decision is titled "The Genuine Dispute Rule." It acknowledges that an insurer's delay in paying or denial of a claim is not tortious unless it is unreasonable. As a close corollary of this rule, it cites *Chateau Chamberay* for the rule that if the denial of a claim is based on a genuine dispute, then it is not tortious, even if it is found to have breached the contract. The Court noted that the rule was originally applied to legal disputes, but that recent decisions have broadened it to apply to factual disputes as well. The Court then explained that the rule did not relieve an insurer from its obligation to conduct a thorough investigation, and to fairly process and evaluate its insured's claim. (*Wilson*, 42 Cal.4th at 723.) The Court also noted that a dispute cannot be said to be "genuine" unless the insurer's position is maintained in good faith and on reasonable grounds. (*Ibid*.) The Court then added a footnote, explaining that certain cases applying the rule had stated that, under the rule, "bad faith cannot be established where the insurer's withholding of benefits 'is reasonable *or* is based on a legitimate dispute as to the insurer's liability," citing *Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 949 [43 Cal.Rptr.3d 468], *Chateau Chamberay,* 90 Cal.App.4th at 346, and *Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1281 [31 Cal.Rptr.2d 433]. The Court stated that this formulation was misleading, because, "In the insurance bad faith context, a dispute is not 'legitimate' unless it is founded on a basis that is reasonable under all the circumstances." (*Wilson*, 42 Cal.4th at 723, n.7.)

The Court then went to the heart of the matter, and explained when the genuine-dispute rule can be used to dispose of a bad-faith claim, and when it cannot:

> Nor does the rule alter the standards for deciding and reviewing motions for summary judgment. "The genuine issue rule in the context of bad faith claims allows a [trial] court to grant summary judgment when it is undisputed or indisputable that the basis for the insurer's denial of benefits was reasonable-for example, where even under the plaintiff's version of the facts there is a genuine issue as to the insurer's liability under California law. [Citation.] ... On the other hand, an insurer is not entitled to judgment as a matter of law where, viewing the facts in the light most favorable to the plaintiff, a jury could conclude that the insurer acted unreasonably." (*Amadeo v. Principal Mut. Life Ins. Co.* (9th Cir. 2002) 290 F.3d 1152, 1161-1162.) Thus, an insurer is entitled to summary judgment based on a genuine dispute over coverage or the value of the insured's claim only where the summary judgment record demonstrates the absence of triable issues (Code Civ. Proc., § 437c, subd. (c)) as to whether the disputed position upon which the insurer denied the claim was reached reasonably and in good faith.

(*Wilson*, 42 Cal.4th at 723-724.)

The Court then turned to the three contentions made by 21st Century about why there was a genuine dispute, rejected each of them. First, it held that the carrier's investigation was insufficient, so that its evaluation of Wilson's medical condition was not reasonable. Second, it rejected the carrier's claim that its offer was reasonable in light of the fact that Wilson's medical expenses were only $4,700. The Court found that the value of Wilson's claim was in her future medical difficulties, and therefore the fact that her expenses had thus far been modest did not address that issue. Finally, the Court rejected 21st Century's reliance on the fact that Wilson traveled to Europe and studied in Australia after the accident. It found that the claims adjuster's reliance on these facts without having a medical opinion to support his view showed that the opinion was merely a rationalization of the decision not to pay the claim. (*Wilson*, 42 Cal.4th at 724, 725.)

The impact of *Wilson*

Wilson's principal impact is felt in two ways. First, the Court's powerful statement and reliance on the insured's duty to conduct a fair, thorough investigation is significant. While technically, the Court merely restated the law on this point, it did so in a way that not only reaffirmed the insurer's obligation to investigate fully before denying a claim, it strengthened it.

Second, the Court refocused the inquiry in summary-judgment proceedings. Before *Wilson*, many courts would determine that there was a genuine dispute if the insurer relied on experts, or if there simply was a difference of opinion between the carrier and the policyholder. In the absence of affirmative proof that the carrier's position was held in bad faith, the courts would find that the existence of the dispute was sufficient to trigger application of the doctrine.

This was why the *genuine-issue* defense had become so powerful and so frequently asserted. Carriers and claimants seldom are in complete agreement about all aspects of a claim. The *genuine-dispute* doctrine allowed carriers to avoid bad-faith liability simply by disagreeing with the insured in some fashion.

See Ehrlich, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
August 2008 Issue

This no longer works after *Wilson*, because the issue is now whether a jury could find that plaintiff's view of the claim was correct. The mere existence of a dispute is no longer sufficient; to obtain summary judgment, the record must be sufficient to allow the trial court to find that no reasonable jury could accept the view of the plaintiff or the plaintiff's experts.

Finally, *Wilson* makes clear that the question of whether there is a genuine dispute is a legal question for the trial court to resolve on summary judgment, not a factual issue to be decided by the jury. In essence, *Wilson* confirms that the *genuine-issue* doctrine was, and is, no more than a shorthand way for a court to conclude that the insurer's conduct was reasonable as a matter of law. Once the court decides that there is a triable issue of fact about whether the insurer acted reasonably, the issue of the insurer's conduct must be put to the jury to decide. The jury does not, however, decide whether or not a dispute was genuine; it decides whether the insurer's conduct was reasonable.

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