Defeating the “Genuine Issue” Defense at Summary Judgment

By

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Sooner or later anyone bringing a first-party bad faith case will be faced with a summary judgment motion by the insurer asserting the “genuine issue” or “genuine dispute” defense. The insurer’s position will be that, because there was supposedly a “genuine” issue or dispute about the validity of the claim, its failure to pay was not bad faith, as a matter of law.

The “genuine issue” defense is a construct of the Ninth Circuit, and has never been endorsed by the California Supreme Court. The California Courts of Appeal have, however, imported it into California law, most recently in Chateau Chamberay Homeowners Association v. Assoc. International Ins. Co (2001) 90 Cal.App.4th 335, 90 Cal.App.4th 1314E, 108 Cal.Rptr.2d 776. Unfortunately, if not read carefully, these cases suggest that an insurer can shield itself from bad faith liability by relying on experts. This is the position the carriers take, and they now rely on it to argue that summary judgment is proper in virtually every bad faith claim. This article examines the origins and development of the defense, and tries to offer some practical tips for how to overcome it at summary judgment.

Birth of the “Genuine Issue” Doctrine

The “genuine issue” defense was first announced in Safeco Ins. Co. of America v. Guyton, 692 F.2d 551 (9th Cir. 1982), with little fanfare. Guyton was an appeal from a judgment awarding declaratory relief to the insurer, finding that it owed no coverage to insureds whose property was damaged by torrential rains in 1976 in Palm Desert. The 9th 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. Here is the entirety of its analysis:

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 their existed a genuine issue as to Safeco’s liability under California law. We therefore affirm the dismissal of the Policyholders’s claims of bad faith.” 692 F.2d at 551.

And, thus, was the “genuine dispute” defense born; without any citation of authority, and based on the court’s “agreement” with a theory that the district court “may” (or may not) have adopted. But it was now officially “law of the Circuit,” and other panels were bound to apply it.

Four years later, in Hanson v. Prudential Ins. Co. of America, 783 F.2d 762 (9th Cir. 1986), the court relied on the doctrine again to affirm the dismissal of a plaintiff’s bad faith claims on summary judgment, even as it reversed the summary judgment on the issue of coverage. Citing Guyton, the court found that “because Prudential’s interpretation of the policy was not unreasonable, we conclude that Prudential’s conduct did not rise to the level of bad faith.” 783 F.2d at 766. The court noted that Prudential actually tried to find a way to make partial payment of the claim under a different part of its policy. Tellingly, the court applied the “clearly erroneous” standard to the district court’s finding on this point, admitting, perhaps unwittingly, that the issue of reasonableness was a question of fact. 783 F.2d at 767.

Franchesi v. American Motorists Ins. Co., 852 F.2d 1217 (9th Cir. 1988) was the next application of the “genuine dispute” defense. The case involved a dispute over whether a diagnostic colonoscopy was a “medical treatment” under the policy. The court found that the term “medical treatment” was ambiguous, and affirmed the district court’s grant of coverage. But it also found that the insurer’s construction was not unreasonable, and citing Guyton, affirmed summary judgment against the policyholder on the bad faith claim. 852 F.2d at 1220.

The Defense Crosses Over Into California Law

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The Opsal court rejected the carrier’s view of the law, but held that it was not unreasonable 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. 2 Cal.App.4th at 1206, 257 Cal.Rptr. at 357.

The doctrine went unmentioned in the California cases for the next eight years. Then, in Filippo Industries, Inc. v. Sun Ins. Co., 74 Cal.App.4th 1429, 88 Cal.Rptr.2d 881 (1999), the court declined to apply the doctrine to overturn a bad faith verdict. The insurer in Filippo had originally persuaded the trial court that it was entitled to summary judgment on coverage. That order was reversed on appeal, and the case was tried, resulting in a bad faith verdict and a punitive damages award. On appeal from that judgment, the carrier argued that there must have been a “genuine issue” concerning coverage or it would not have been able to convince the trial court to rule its way on summary judgment. The Court of Appeal wisely declined the carrier’s invitation to make the trial court’s coverage determination binding on all subsequent proceedings, even if it was reversed on appeal. 74 Cal.App.4th at 1441, 1442, 88 Cal.Rptr.2d at 888.

The doctrine became more firmly entrenched in California law after the Court of Appeal applied it in Fraley v. Allstate Ins. Co., 81 Cal.App.4th 1282, 97 Cal.Rptr.2d 386 (2000.) Fraley involved a fire loss. The dispute arose after the claim went to appraisal. The carrier paid $200,000 actual cash value for the property, and agreed to pay an additional $164,500, if the insureds repaired or replaced their home within 180 days after the appraisal. When it became clear to the insureds they could not complete the repairs within the 180-day limit, they purchased a new, less desirable house, and sued
for bad faith.

The trial court held that the 180-day limit applied, that the carrier acted reasonably as a matter of law, and granted summary judgment. The Court of Appeal affirmed, applying the “genuine dispute” doctrine. The court cited Opsal, Guyton, and other Ninth Circuit cases and district court cases applying the genuine issue doctrine. 81 Cal.App.4th at 1292, 97 Cal.Rptr. at 391.

Although the doctrine had been a part of Ninth Circuit law since 1982, the first decision to examine it critically was Guebara v. Allstate Ins. Co., 237 F.2d 987 (9th Cir. 2001), a bad faith case arising from a fire loss. In a 2-1 decision, the court held that the genuine dispute doctrine was not limited in its application to legal disputes, such as the meaning of policy terms, or of controlling law. Instead, the court applied the doctrine to the carrier’s decision to deny coverage based on the recommendations of three independent experts.

Judge Betty Fletcher, writing in dissent, argued that the doctrine should be confined to legal disputes. She noted that it was “of uncertain provenance,” and had not been adopted or endorsed by the California Supreme Court. 237 F.3d at 999 n. 4. Unlike the majority, Judge Fletcher felt that the record contained triable issues of fact about whether the carrier had treated the insured reasonably, and that the issue should be resolved by a jury. 237 F.3d at 1001.

Judge Fletcher warned that the majority’s view would allow an insurer to obtain summary judgment on a bad faith claim -- even if the insured had raised triable issues of fact on whether the insurer’s conduct was reasonable -- simply by pointing to a “disputed facts concerning coverage, value, cause or a myriad of other factual disputes.” 237 F.3d at 1000-1001. The majority responded by explaining that “expert testimony does not automatically insulate insurers from bad faith claims based on a biased investigation.” 237 F.3d at 996.

The majority provided a list of five factors, which it made clear was not exhaustive, that would allow a bad faith claim based on a biased investigation to go to a
jury. These circumstances were (1) the insurer was guilty of misrepresenting the nature of investigatory proceedings, (2) the insurer’s employees lie 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. 237 F.3d at 987.

Just as Guebara was the first Ninth Circuit decision to give the genuine issue doctrine a hard look, Chateau Chamberay, written by Justice Croskey, was the first California decision to do so. Like Fraley, Chateau Chamberay was a property loss case in which the insured and the carrier had not agreed on the amount necessary to restore the property, and resolved the dispute through the statutory appraisal process. In both cases, the insurance company had paid what the appraisal had determined was owed, and the suit was based on the delay in making payment.

In Chateau Chamberay, the policyholder’s claim seemed grossly inflated in light of the appraisal award, which was only 45 percent of the original claim. The carrier had paid 80% of that amount before suit had been filed. 90 Cal.4th at 350-351, 108 Cal.Rptr.2d at 787. The court found that there was no dispute about the underlying facts of the claim, which made the case ripe for summary judgment. Id. at 340 n.1, 108 Cal.Rptr. 2d at 779, n.1.

The court further emphasized that the “genuine dispute” defense was not mandatory; rather, where the insurer relies on the advise of experts, “then a basis may exist for invoking the doctrine . . .” Id. at 348, 108 Cal.Rptr. 2d at 785. The court’s modification of the opinion on denial of rehearing added the emphasis to the word “may” in this sentence.

Likewise, the court explained that, “an expert’s testimony will not automatically insulate an insurer from a bad faith claim based on a biased investigation.” Ibid. Again, when it modified the decision, the court added emphasis to “automatically.” Finally, lest there be any doubt about the point the court was making, it added a new footnote when it modified the opinion, which states, “[n]or, must we add, may an insurer insulate itself
from liability for bad faith conduct by the simple expedient of hiring an expert for the purpose of manufacturing a "genuine dispute." 90 Cal.App.4th at 1413E, 108 Cal.Rptr.2d n. 8.

*Chateau Chamberay* followed the *Guebara* majority in refusing to limit the genuine issue doctrine to legal disputes, and also adopted the five factors that would allow a bad faith case based on a claim of biased investigation to go to the jury. 90 Cal.App.4th at 348, 108 Cal.Rptr.2d at 786.

**The Ninth Circuit narrows the defense**

A recent Ninth Circuit decision, *Amadeo v. Principal Mutual Life Ins. Co.* 290 F.3d 1152 (2002), refused to uphold summary judgment based on the “genuine issue” doctrine where the insurer’s conduct was clearly unreasonable. In *Amadeo*, the insured suffered from depression and post-traumatic stress disorder of such magnitude that she was unable to work. After quitting her job, she filed a claim for disability benefits.

The insurer refused to pay, citing policy language that payment was due if “solely due to Injury or Sickness, you are unable to perform the substantial and material duties of your regular occupation in which you were engaged just prior to the disability.” Interpreting “just prior” to mean “the day before” a claim is filed, the insurer construed the insured’s “regular occupation” as “unemployed.” According to the insurer, because she was able to perform all of the “substantial and material duties” of an unemployed person, there was no coverage.

The district court granted the insurer’s motion for summary judgment, finding as a matter of law that the insurer’s denial of benefits was not unreasonable. The Ninth Circuit reversed. The court first noted that the insurance industry is affected with the public interest and that bad faith claims are society’s way of leveling the playing field between powerful insurance companies and their policyholders. Within that context, the court pointed out that when an insurer’s interpretation of policy language is sufficiently “arbitrary or unreasonable” a jury should be allowed to find that the insurer acted in bad
The court went on to find that the insurer's interpretation of the insured's status prior to filing the claim was sufficiently arbitrary and unreasonable. Basing its opinion on the maxim that a reasonable interpretation of policy language is one that a layperson would give it, the court found a discrepancy between a layperson's definition and the insurer's. The language “substantial and material duties of your regular occupation” would be read by most people to mean “duties of your last employment,” rather than ‘the day before you filed the claim.”

The insurer's adjusters also testified that there were no guidelines for “establishing when it would consider someone’s regular occupation as employment and that the application of the policy’s language in the context of an unemployed person was ‘subjective.’” 290 F.3d 1152 at 1163. The insured had been an employee in the securities industry for 20 years and had not taken on other employment prior to filing a claim. The court noted that an insurance contract is supposed to provide “peace of mind and security in the event the insured is unable to work” Id. (citing Egan v. Mutual of Omaha Ins. Co., 23 Cal.4th 390).

The court further held that a jury could find the insurer’s investigation into the circumstances of the insured's claim to be lacking to the point of constituting bad faith.

**Tips for Defeating Summary Judgment**

There can be no doubt that these cases provide insurers with a powerful tool to seek summary judgment. Here are three strategies for overcoming the motion:

1. **Emphasize that “reasonableness” is a factual question.**

   Ultimately, the genuine dispute doctrine is merely a framework that allows a court to find that the carrier’s conduct was reasonable as a matter of law. Although trial courts are familiar with the summary judgment standard, the genuine issue doctrine almost invites them to usurp the jury's role and treat reasonableness like it was a legal issue. It is not.

   The issue of whether the carrier acted reasonably is a factual one, and hence not
one that may be resolved on summary judgment when it turns on factual conflict or conflicting inferences, so that reasonable minds could differ. *Filippo Industries*, 74 Cal.App.4th at 1438, 88 Cal.Rptr. 2d at 886. The insured’s counsel must find the factual discrepancies and point out the inferences that would allow the jury to find in favor of the insured.

Trial courts are also familiar with, and tend to appreciate, the “substantial evidence” standard of review, because it results in affirmances. It can be helpful to frame the argument about the insurer’s conduct in terms of substantial evidence review; that is, by stressing that if the jury were to go the insured’s way, the judgment would be supported by substantial evidence. Trial courts understand that the substantial evidence standard is easily satisfied, and if they view the record from that perspective, it can help offset the temptation to decide the key factual issue of reasonableness.

2. **Emphasize the facts in the genuine dispute cases to distinguish them**

It is helpful to review the facts of *Chateau Chamberay*, *Fraley*, and *Guebara* in some detail, to show why the courts were comfortable deciding those cases as a matter of law. As explained above, the carrier in *Chateau Chamberay* had paid 80% of the appraised value of the loss before any suit was filed. The record in *Fraley* showed that, not only was there a disparity of opinion between the experts engaged by the insurer and the policyholder; even the policyholder’s own experts disagreed with each other. One of plaintiff’s experts submitted repair estimates of $227,000. A second expert estimated $291,000, and a third $490,000. *Fraley*, 81 Cal.App.4th at 1292, 1293, 97 Cal.Rptr.2d at 388. With the plaintiff’s own experts in conflict, it was understandable that the court found that the insurer had reasonably investigated the loss, paid the undisputed amounts of the claim, and paid the appraisal award promptly, providing no basis for bad faith liability. *Ibid.*

*Guebara* is cut from the same cloth. The insured’s statements to the carrier were conflicting, as were those of her witnesses. The evidence at the fire scene
was not consistent with the insured’s account of her losses, and the carrier relied on an independent fire investigator, whose conclusions agreed with the City’s fire investigators. The insured delayed the investigation for months by failing to return transcripts and by changing her story. 237 F.3d at 989-992.

If the facts in these decisions were stated fairly, then all three were very difficult bad faith cases. Hopefully, the insured fighting summary judgment can point to more egregious conduct by the carrier than in Chateau Chamberay, Fraley, or Guebara.

It is also important to stress that in all three cases the graveman of the bad faith claim was not a complete refusal to pay benefits; it was a dispute about a delay in paying benefits, or a dispute about the amount paid. If the carrier has refused to make any payments, argue that none of the three cases is remotely applicable.

3. **Explore the five factors, and do not hesitate to add more**

Conduct discovery and prepare the case with an eye to the five factors discussed in Chateau Chamberay and Guebara. Pay particular attention to how the insurer selected any experts it relied on. Without a showing that the advice relied on was provided by “independent experts” there is no predicate for the carrier to rely on the genuine dispute defense. Chateau Chamberay, 90 Cal.App.4th at 348, 108 Cal.Rptr.2d at 785. Make sure that any “experts” relied on by the carrier are actually experts, and are truly independent.

And make sure that the opinions cited to the trial court were the ones the carrier relied on to make its coverage determination. An after-the-fact rationalization by an expert does not justify application of the genuine dispute doctrine, since the carrier’s conduct must be evaluated as of the time it was made. Filippo Industries, 74 Cal.App.4th at 1441, 88 Cal.Rptr. 2d at 888.

Is the opinion given by the insurer’s expert reasonable? If not, then the fourth factor applies, and the genuine dispute doctrine does not apply. Presumably, if a plaintiff’s expert testifies that the insurer’s expert was unreasonable, that should create a triable issue of fact that precludes summary judgment. The genuine dispute doctrine
does not allow trial courts to resolve disputes between experts; that is the jury’s role.

With skillful case selection and preparation, summary judgment can be overcome. Before filing any bad faith case, ask the hard question: Is what the carrier did here truly unreasonable? Be objective. Get other opinions. If the answer is “yes,” make sure the case is worked up with an eye to creating triable issues of fact about the sufficiency of the insurers’ investigation, the reasonableness of its experts, the reasonable of its interpretation of its policy, and ultimately about whether it reasonably denied the claim at issue.