

Defending a Bad Faith Claim in Georgia? Expert Testimony Can Support Summary Judgment

By John V. Burch August 5, 2021

A claim made against a surety is often accompanied by a bad faith demand. There are many defenses to bad faith claims, but here is one more to add to your arsenal in Georgia: a surety can use expert opinion to support the dismissal of a bad faith claim on summary judgment.

A recent case granting summary judgment on bad faith to an insurer on a property damage claim is instructive. Bad faith claims under insurance policies are governed by O.C.G.A. § 33-4-6, and Georgia's courts have said the rules under that statute are applicable to claims made against sureties under O.C.G.A. § 10-7-30, the exclusive basis for extra-contractual damages against sureties in the state.

The Georgia Court of Appeals in *Montgomery v. Traveler's Home & Marine Ins. Co.*, 859 S.E.2d 130 (Ga. App. 2021), *reconsideration denied* (July 13, 2021), recently set out the framework for when an expert's opinion to an insurer will support a grant of summary judgment denying bad faith. The case involved a claim by a homeowner for water damage. The policy excluded damage caused by groundwater. The homeowner said the loss came from a busted hose. The adjuster inspected the property and thought the damage probably came from groundwater but in a letter to the insured stated that he was unable to determine coverage. The letter also stated that no decision had yet been made. The insurer then hired a structural engineer who opined that the damage was caused by groundwater. Based on the structural engineer's report and investigation, the claim was formally denied.

The court held the insurer had shown that it was entitled to summary judgment on the bad faith claim because, when it denied the claim, it did so on the advice of the structural engineer, and the insured had not presented any evidence from which a jury could find either that the structural engineer's advice was patently wrong or that this advice was a pretext to deny the claim. Summary judgment in favor of the insurer on the bad faith claim is proper unless there is evidence that the insurer had no reasonable grounds whatsoever to contest the claim.

The court went on to state that, as a matter of law, it is reasonable in most cases for an insurer to deny a claim based upon the advice of an independent consultant. Unless that expert opinion is patently wrong or evidence shows that the opinion was a mere pretext to deny the claim, summary judgment should be granted.

One other very important note about this case is that the actual merit of the expert's advice is not dispositive of the bad faith claim. Even if a jury were to reject the expert's opinion, determine that the claim is covered, and find in favor of the plaintiff, there is no bad faith denial of the claim. What matters is whether the insurer based its decision on the advice of the expert – that is, it had a good faith, reasonable basis for denial as distinct from an arbitrary, capricious denial.

The court said that any determination that the expert's advice was patently wrong means that it must have been clearly and obviously incorrect. Moreover, perceived flaws or weaknesses in the investigation by the company and by the engineer questioning whether their conclusions are right or wrong do not show that this was a pretext for denial. The court went on to note, where liability is close, there is no bad faith even if genuine issues of fact exist about conduct of investigating the claim. Finally, a *Daubert* challenge to the expert's opinion is simply not applicable on this issue. Under these circumstances, the expert's opinion is simply being used to establish the advice given to the insurer and reasonable reliance on that advice. It is not a vehicle for the engineer to testify as an expert or show the truth of the matter asserted in the report. Also, the report is not governed by the rules of expert testimony or rules governing hearsay.

Bad faith claims are not authorized where the insurer has a reasonable ground to contest the claim and liability is disputed. While sometimes this may be a question for the jury, summary judgment will be granted where evidence shows that the defense is reasonable as a matter of law.

Practice Pointer

If a claim is going to be analyzed by a consultant, it is critical not to make a final decision until receipt of a bona fide consultant's report. While the claims handler can have doubts and reservations about the claim from the inception, an expert's opinion cannot be used just to bootstrap the decision once it is made. But if a surety in good faith relies on that opinion as a basis for denial, and the opinion is not patently wrong (that is, there simply are at most disputed facts and conclusions), then bad faith does not exist as a matter of law. And one other cautionary thought: be very careful about relying on advice of counsel as an expert opinion and the basis for denial. Doing so may waive attorney-client privilege and work-product protection, and Georgia has not yet held that reliance on an attorney's opinion is a shield against bad faith. Because counsel does not make the claim decision, the surety's decision-maker must understand the specific legal basis for the denial and be able to explain it without blindly deferring to "advice of counsel."