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NEWS ALERT

INSURANCE RECOVERY GROUP

Bad Faith Claims Against Insurers: Can They Be "SLAPP"ed?

By Marilyn B. Fagelson & Emily McDonough Souza | December 18, 2019

Responding to what have been called "strategic lawsuits against public participation" ("SLAPP"), twenty-nine states, including Connecticut, have enacted some form of anti-SLAPP legislation in recent years. These anti-SLAPP laws are designed to provide for early dismissal of meritless lawsuits that attack the defendant's exercise of its right of free speech, right to petition the government, or right of association under the U.S. and state constitutions. In Connecticut, for example, defendants have been successful in pursuing these special motions to dismiss against lawsuits targeting their conduct in reporting suspected child abuse,[1] writing letters to a state university concerning a potential job candidate,[2] and making public comments at a city's parks and recreation commission meeting.[3]

Insurance companies in coverage disputes with policyholders have attempted to use anti-SLAPP statutes to quickly defeat bad faith claims asserted against them on the theory that the policyholder is attacking the insurer's "right to petition," i.e., its right to file lawsuits and conduct itself in other ways in litigation. So far, this tactic has not been successful.

Most recently, in California, a Court of Appeal rejected an insurance company's use of an anti-SLAPP motion against a policyholder's bad faith claim. The Court in *Miller Marital Deduction Trust v. Zurich American Insurance Company*, 41 Cal. App. 5th 247 (2019), held that allegations that Zurich improperly failed to provide independent *Cumis*[4] counsel to defend the policyholder in an action involving pollution claims, did not arise from the protected right of free speech or petition and thus were not subject to California's anti-SLAPP statute. In the underlying case, the Millers sued several prior owners of a property they owned, including a related family estate (the "Estate"), to avoid liability for environmental contamination. After another defendant filed a counterclaim against the Millers, the Millers tendered the defense of the counterclaim to Zurich—the Estate's insurer—on the theory that they were additional insureds under the Estate's policy. Zurich agreed to defend the Millers against the counterclaim but issued an extensive reservation of rights.

The Millers brought a separate action against Zurich, alleging that Zurich's reservation of rights created a conflict of interest which entitled the Millers to independent "*Cumis* counsel" and Zurich's refusal to hire *Cumis* counsel constituted a breach of contract and a breach of the implied covenant of good faith and fair dealing. The Millers supported their claims with allegations of several statements made by and between Zurich's various panel counsel in the case. In response, Zurich filed a motion pursuant to the state's anti-SLAPP statute, contending that the allegations of misconduct in the Millers' complaint arose from the protected petitioning activity of Zurich's hired attorneys.

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[1] *Day v. Dodge*, No. KNLCV186035362S, 2019 WL 994532 (Conn. Super. Ct. Jan. 25, 2019).

[2] *Cronin v. Pelletier,* No. CV186014395S, 2018 WL 3965004 (Conn. Super. Ct. July 26, 2018).

[3] *Rivas v. Pepi*, No. FSTCV186034927S, 2018 WL 4199211 (Conn. Super. Ct. Aug. 16, 2018).

[4] In *San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y, Inc.*, 162 Cal. App. 3d 358 (1984), the California Court of Appeal held that if a conflict of interest exists between an insurer and its insured based on possible noncoverage under the insurance policy, the insured is entitled to retain its own independent counsel at the insurer's expense. See also Cal. Civ. Code § 2860 (West).

In ruling on anti-SLAPP statute motions, both California and Connecticut apply a two-part analysis of the claim sought to be dismissed: (1) whether the claim arose from protected conduct and (2) whether plaintiffs had demonstrated a probability of prevailing on the merits. In *Miller*, the Court of Appeal held that the Millers' claims did not arise from conduct protected under the anti-SLAPP statute because the allegations referencing the panel attorneys' communications merely provided context for the substantive basis of their claims. The Court went further, broadly concluding that "the anti-SLAPP statute does not apply to the cause of action of breach of implied covenant of good faith and fair dealing."

This decision joins other courts, mostly out of California, that have refused to grant anti-SLAPP motions seeking to dismiss the bad faith claims of policyholders. Notably, in one 2003 case, another California Court of Appeal held that the insurer's inaction and delay in handling an insurance claim did not involve acts in furtherance of its right to petition, although the court refused to hold that all bad faith claims are categorically exempted from anti-SLAPP motions. *Beach v. Harco Nat'l Ins. Co.*, 110 Cal. App. 4th 82 (2003); *see also Chiulli v. Liberty Mut. Ins., Inc.*, 87 Mass. App. Ct. 229, 230 (2015) (rejecting insurer's argument that engaging in pursuit of jury trial on behalf of insured once liability is reasonably clear constitutes petitioning activity protected under Massachusetts anti-SLAPP statute).

In Connecticut, anti-SLAPP legislation codified at General Statutes § 52-196a went into effect for the first time in January of 2018. Although the current body of case law interpreting and applying § 52-196a is still rather small, the substance of the statute closely mirrors that of California. Accordingly, Connecticut courts are likely to reject any attempt by insurers to defeat policyholders' bad faith claims through Connecticut's anti-SLAPP statute.

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