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BAD FAITH UPDATE

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INTRODUCTION

This subject was covered recently by Jacqueline T. Lewis, Esq., in a paper entitled "Good Faith is Good Business: Denying a Fidelity Claim While Avoiding Bad Faith Liability and Keeping the Customer Satisfied," which was presented in January, 1998 at the Annual Mid-Winter Meeting of the Fidelity and Surety Law Committee. Due to the currency and thoroughness of Jackie's paper, which discussed bad faith principles applied in recent decisions adjudicating claims in both the fidelity and surety bond areas, there is little need to attempt a more contemporary survey of the scene.

It is likely that all who read this paper already have some visceral and intellectual understanding of what the phrase "bad faith" means when used in the context of insurance, surety bonds and fidelity instruments. All readers probably know in a general way what their companies or clients should do, or should not do, in order to avoid becoming the "really stupid defendants" or "really mean defendants" entitled to a bad faith judgment against them.¹ However, as every golfer knows, the best way to really get a feel for a golf course is to play each hole, thus actually experiencing the elevations, textures, hazards and other features which clearly differentiate that course from others. Similarly, one seeking to understand a specific area of law can efficiently do so by reading the pertinent cases. Thus, the sole purpose of this paper is to identify several decisions issued by a variety of courts considering bad faith claims against fidelity and surety companies during the past decade or so, to highlight the issues considered and, where appropriate, to quote judicial language which enlightens as to the courts' concerns. It is hoped that this exercise in the particular will be of service to those encountering specific bad faith cases or who simply wish to build upon their more generalized knowledge of the area.

DECISIONS

Corwin Chrysler-Plymouth, Inc. v. Westchester Fire Ins. Co., 279 N.W.2d 638 (N.D. Sup. Ct. 1979). Plaintiff presented a claim for loss resulting from an employee embezzlement. The claim was asserted under an instrument variously referred to in the opinion as an "insurance policy" and "fidelity coverage." The defendant's "fidelity loss insurer/insurance company" paid a portion of the loss, but refused to pay the balance because, according to the plaintiff's first accounting, the balance of the loss occurred after the policy had expired. Defendant continued this refusal despite plaintiff's second submission which included both a confession from the employee that the embezzlement had occurred during the coverage period and a second accounting consistent with that confession. The trial court found the defendant liable for the balance of the claim, imposed liability for "compensatory damage" due to the defendant's bad faith, but decided the defendant was not liable for punitive damages.

On appeal, the North Dakota Supreme Court, for the first time, recognized that "an insurer" owes a duty of "good faith" to its policyholder, a violation of which entitles the policyholder to damages "proximately caused thereby." Whether or not the company acted in bad faith is a factual question, meaning that reversal of the decision is subject to the clearly erroneous rule. The supreme court affirmed the finding of bad faith saying that, "Westchester persisted in its

¹ TXO Production Corp. v. Alliance Resources Corp., 419 S.E.2d 870, 888 (W. Va. 1992).

refusal to pay" despite the second analysis from the plaintiff's accountant; that "it continued to deny its liability" in the face of the employee's confession.

"Westchester had no valid ground to continue to deny liability after the employee explained in her expanded confession that she took all but, at most, \$500.00 of the money during the period of Westchester's coverage, and after John Renner clarified his first analysis" (Id. at 644).

Furthermore, the court found that Westchester's defense regarding expiration of the policy had relied upon an ambiguity in the policy.

"Westchester is held to know the law of North Dakota and therefore should have known that in the light of the ambiguous policy language, if litigation ensued, it undoubtedly would be found liable for the balance of Corwin's claim" (Id. at 644).

Finally, the court said the defense was inconsistent with the partial payment and was not conceived "until this litigation began ..." (Id. at 644).

"Each of these factors indicates that the legal defense upon which Westchester relies to establish its good faith was an afterthought conceived when Westchester realized that litigation was imminent" (Id. at 644).

The court also affirmed the trial court's denial of punitive damages, noting that the applicable North Dakota statute authorized exemplary damages in non-contract actions only when the defendant is guilty of "oppression, fraud, or malice" (Id. at 645). The trial court properly found that these elements had not been proven. Finally, the supreme court refused plaintiff's claim for attorney's fees arising out of the appeal, determining that the appeal was not frivolous due to the issues of first impression which were presented.

Downey Savings & Loan Association v. The Ohio Casualty Ins. Co., 234 Cal. Rptr. 835 (Cal. App. 1987). This was a bad faith action filed by Downey against Ohio Casualty after Ohio Casualty refused to pay benefits under "a fidelity bond" it had issued. Plaintiff's loss was caused by a rather elaborate employee embezzlement which led to a suit against Downey by a third-party which had also been victimized by the embezzlement.

In a section of the court of appeals' opinion entitled, "Facts Relating to Ohio's Bad Faith," the court noted that, although Downey had notified Ohio Casualty of the embezzlement within 48 hours after Downey had learned about it, Ohio Casualty did not respond until four months later and, in its response, claimed it had not received notice until ten days before the response; that Ohio Casualty conducted no interviews until seven months after notification; that Ohio Casualty's supervisor of bond claims, who also had written the company's claims manual, ordered the claims department to "keep all possible defenses in the forefront"; that Ohio Casualty conducted no further interviews even after receiving a copy of the third-party complaint against Downey; that Ohio Casualty refused to acknowledge coverage, even after a co-conspirator had

testified in a criminal trial about the Downey employee's involvement in the embezzlement; that Ohio Casualty established a reserve while simultaneously telling Downey there was no coverage; and that Ohio Casualty continued to deny coverage even after a copy of the third-party's motion for summary judgment against Downey was sent to Ohio Casualty. The trial court found in favor of Downey, awarded compensatory damages in the amount of \$152,983 and punitive damages in the amount of \$5,000,000. However, Downey's claim for attorney's fees was denied.

Downey appealed from that portion of the ruling denying attorney's fees while Ohio Casualty appealed from the bad faith award. The court of appeals, citing Gruenberg v. Aetna Ins. Co., 108 Cal. Rptr. 488, 510 P.2d 1032 (Cal. Sup. Ct. 1973), the seminal bad faith case, said the following:

"The law implies a covenant of good faith and fair dealing in every insurance contract *** Therefore, when an insurer unreasonably and in bad faith withholds payment on a claim of its insured, it is subject to liability in tort *** An insurer may also breach the covenant of good faith and fair dealing when it fails to properly investigate its insured's claim *** Under this implied promise, in determining whether to settle a claim, the insurer must give 'at least as much consideration to the welfare of its insured as it gives to its own interests'" (Id. at 848).

The bad faith judgment was sustained. Discussing punitive damages, the court cited a California statute which provided that punitive damages may be awarded in a non-contract action if the plaintiff proved "oppression, fraud, or malice, express or implied" (Id. at 848-849). It quoted California authority, saying that an insurer's "obligations of good faith and fair dealing encompass qualities of decency and humanity inherent in the responsibilities of a fiduciary." The court noted the "adhesive nature" of insurance contracts, finally arriving at the conclusion that,

"the availability of punitive damages is thus compatible with recognition of insurers' underlying public obligation and reflects an attempt to restore balance in the contractual relationship ***"

The court found "substantial evidence" justifying the award of punitive damages (Id. at 849).

Regarding Ohio Casualty's argument that the ratio between the punitive damage and the compensatory damage award was 32.7 to 1 and that the punitive damage award was 1.9% of its net worth, the court found the award was not "excessive as a matter of law" (Id. at 849). Elaborating, the court said,

"We will not assume that the jury's award of punitive damages was solely to punish Ohio for its reprehensible conduct towards Downey. The jury could also have intended to punish Ohio for its invidious practices *** In this regard we note that it was 'standard procedure' for Ohio to instruct its claims adjusters to keep defenses 'in the forefront' of the investigation. This was in direct violation of Ohio's duty as an insurer 'to give the interests of the insured at least as much consideration as it gives to its own interests' *** Ohio's own expert

testified it was improper to have the investigation focus on the development of facts which would support the insurer's defenses. We also note that Ohio's claims manual instructed its claims personnel to create a 'climate for settlement' through the use of depositions 'to cause harassment, embarrassment, inconvenience or expense' (Id. at 850).

Regarding the latter, the court noted that Ohio Casualty had scheduled 18 depositions close to the time of the mandatory settlement conference.

Szarkowski v. Reliance Ins. Co., 404 N.W.2d 502 (Sup. Ct. N. Dakota 1987). Plaintiff was a subcontractor to the principal on payment/performance bonds issued by Reliance. The subcontractor filed suit against Reliance when it was unable to collect the balance due under the subcontract from either the principal or the "surety" (Id. at 503). Szarkowski alleged liability under North Dakota's Unfair Insurance Practices Act, saying that Reliance had engaged in unfair claim settlement practices. It also asserted a bad faith claim independent of the statute.

The trial court granted summary judgment in favor of Reliance, ruling that, as a surety company, Reliance was not subject to the Unfair Insurance Practices Act; that, as the Act did not create a private right of action, Szarkowski could state no independent tort claim; and that Szarkowski's claim was barred by the statute of limitations.

The supreme court reversed. It equated suretyship with insurance, saying, "this court has recognized that a paid surety or bonding company is generally treated as an insurer rather than according to the strict law of suretyship" (Id. at 504).

Thus, the Unfair Insurance Practices Act was applicable to Reliance "in its transaction of insurance and bonding business within this State ..." (Id. at 505). The court further held that plaintiff had asserted a valid tort claim against Reliance. Pointing to the language of the bond, the court said,

"Thus, Szarkowski, as a subcontractor who furnished labor and materials to Scherbenske on the bonded projects, was a third-party beneficiary and an intended claimant having the right to sue Reliance on the bonds in the event of Scherbenske's default *** As an intended claimant, Szarkowski stands in a substantially identical relationship with Reliance as did the insured claimants with the insurers in Corwin, supra, and Smith, supra. We conclude, therefore, that Reliance owed Szarkowski a similar duty of good faith and fair dealing in handling its claim and that Szarkowski has a right to bring an independent tort action against Reliance for breach of that duty" (Id. at 505-506).

Finally, citing a course of dealing in which Reliance had continually assured plaintiff that its claim was valid, subject only to determining the amount, the court found a factual issue as to whether the doctrine of equitable estoppel was a bar to Reliance's right to assert the statute of limitations as a defense.

Dodge v. Fidelity & Deposit Company of Maryland, 778 P.2d 1240 (Sup. Ct. of Arizona 1989). Plaintiffs, the obligees under a performance bond issued to the contractor building their home, sued F&D asserting breach of contract and bad faith claims. They claimed that F&D had "... refused to investigate timely plaintiffs' claim or remedy the default ..." of plaintiffs' contractor (Id. at 1241). The trial court dismissed the bad faith claims. The dismissal was affirmed by the court of appeals which, after carefully distinguishing between suretyship and insurance, concluded there was no good reason to extend the relief available in the suretyship context beyond traditional breach of contract remedies.

The supreme court reversed. It concluded that surety companies are insurers as defined by the applicable Arizona statutes. Therefore, the court said that surety companies have the same obligations of good faith as do insurers. Responding to the argument that surety agreements contain an inherent conflict between the interests of the principal and those of the obligee, the court said,

"We do not dispute that a surety has an enforceable obligation of good faith toward its principal *** However, the duty imposed on a surety to deal in good faith with its obligee does not require it to act in bad faith with its principal. *** So long as a surety acts reasonably in response to a claim made by its obligee, the surety does not risk bad faith tort liability. *** 'The tort of bad faith arises when the insurance company intentionally denies, fails to process or pay a claim without a reasonable basis for such action'" (Id. at 1243).

The court articulated the following as justification for a bad faith action in the suretyship context:

"Contract damages 'offer no motivation whatsoever' for the insurer not to breach. If the only damages an insurer will have to pay upon a judgment of breach are the amounts that it would have owed under the policy plus interest, it has every interest in retaining the money, earning the higher rates of interest on the outside market, and hoping eventually to force the insured into a settlement for less than the policy amount" (Id. at 1242-1243).

The case was remanded to the trial court for further proceedings on the bad faith claim.

Loyal Order of Moose, Lodge 1392 v. International Fidelity Ins. Co., 797 P.2d 622 (Sup. Ct. of Alaska 1990). Plaintiff was the obligee under payment and performance bonds issued by IFI in connection with the construction by IFI's principal of a new lodge for the obligee. The project progressed to substantial completion without incident. However, the obligee then refused to pay the balance of the contract price due to claimed deficiencies in the completed work and an incomplete punch list. There followed a long interval of communications among the parties to the bonds which escalated to the obligee declaring the principal to be in default and the obligee filing suit against the principal and IFI. The trial court granted IFI's motion for summary judgment on the obligee's bad faith claim under the performance bond saying that there was a "legitimate dispute" regarding the propriety of the declaration of default, which dispute was subject to mandatory arbitration under both the construction contract and the bonds.

The supreme court reversed. Resolving the first issue, the court determined that in Alaska "... an implied covenant of good faith and fair dealing exists between a surety and its obligee on payment and performance bonds" (Id. at 626). Furthermore,

"In our view, the relationship of a surety to its obligee -- an intended creditor third-party beneficiary -- is more analogous to that of an insurer to its insured than to the relationship between an insurer and an incidental third-party beneficiary. *** The surety may satisfy its duty of good faith to its obligee by acting reasonably in response to a claim by its obligee, and by acting promptly to remedy or perform the principal's duties where default is clear" (Id. at 628).

The court then discussed facts which it believed mandated reversal of the summary judgment on the bad faith claim. Specifically,

"The Lodge [obligee] has adduced evidence that as early as January-February, 1994, and no later than April of that year, IFI was aware of the Lodge's numerous and apparently supported claims that Darling had defaulted on the contract. The Lodge made a showing that IFI failed to adequately investigate the Lodge's claims, and that IFI failed to either remedy Darling's evident default or to arrange for the completion of the contract consistent with its terms *** Contrary to the court's reasoning, failure by a surety minimally to investigate its principal's alleged default may constitute bad faith if that investigation would confirm the obligee's allegations in material part. *** IFI's abortive inquiries and professed reliance without question upon its principal Darling's claims for additional compensation, do not merit summary judgment in IFI's behalf" (Id. at 628).

The court went on to hold that the construction contract's arbitration provision, specifically incorporated into the payment and performance bonds, was enforceable, thus justifying the surety in requiring that all disputed issues of fact relating to the principal's and obligee's compliance with the terms of the construction contract to be arbitrated, which arbitration "will bind the surety as well as the principal and beneficiary" (Id. at 629).

Reading Tube Corporation v. Employers Insurance of Wausau, 944 F.Supp. 398 (E.D. Penn. 1996). Plaintiff, the obligee under a performance bond accompanying the purchase of an industrial furnace, sued the surety, claiming breach of the performance bond and bad faith. The facts supporting the claims were that the obligee had removed the principal from the project, simultaneously notifying the surety; had met with the surety to formulate the procedures for locating a successor to complete the job; was told by the surety that it was proceeding properly; that the surety wished to obtain at least two bids for the remedial work; that bids were received, evaluated and a contract awarded; that the surety then reversed field, telling the obligee it had improperly terminated the principal, that the remaining work constituted only punch list items and that the surety would make no progress payments for the work.

Both parties filed motions for summary judgment. Denying the plaintiff's motion for judgment on the bad faith claim, the court found that other courts had extended application of the Pennsylvania statute authorizing damages against an insurer which acts in bad faith to claims against sureties which issued, and failed to honor, performance bonds. Bad faith under Pennsylvania law requires proof of, "... a 'dishonest purpose, a state of mind affirmatively operating with ill will,' and in insurance contexts, the 'frivolous refusal' to pay policy proceeds ****" (*Id.* at 403). The court held that the standards just articulated "... require factual determinations by the jury of the state of mind of the defendant" (*Id.* at 403). The court ruled summary judgment was not justified as the defendant had come forward with sufficient facts which, if believed by the jury, could lead to a factual determination that the surety had not acted with the requisite state of mind to justify a bad faith judgment.

Transamerica Premiere Ins. Co. v. Brighton School District 27J, 940 P.2d 348 (Colorado Sup. Ct. 1997). In this case, the obligee third parted the surety and asserted various claims, including breach of the performance bond terms and a bad faith denial of the obligee's claim under the performance bond. The jury's award in favor of the obligee on the bad faith claim was affirmed by the court of appeals.

The first issue before the supreme court was whether the bad faith doctrine, previously applied to the relationship between insurer and insured, should be extended into the suretyship context. The court noted that various Colorado insurance statutes included sureties within the definition of "insurer" and suretyship agreements within the definitions of "insurance policy" and "insurance contract." The statutes indicated a legislative intent to equate suretyship with insurance. The court also cited numerous holdings from other jurisdictions which applied bad faith reasoning to suretyship relationships. It said that,

"A special relationship exists between a commercial surety and an obligee that is nearly identical to that involving an insurer and insured *** When an obligee requests that a principal obtain a commercial surety bond to guarantee the principal's performance, the obligee is essentially insuring itself from the potentially catastrophic losses that would result in the event the principal defaults on its original obligation" (*Id.* at 352).

Finally, the court wove a contract of adhesion theory into its opinion by saying,

"... It is the commercial surety who controls the ultimate decision of whether to pay claims made by the obligee under the terms of the surety bond. For this reason, the commercial surety has a distinct advantage over the obligee in its ability to control performance under the secondary agreement" (*Id.* at 353).

The court rejected the surety's argument that a suretyship agreement is "a financial service," saying,

"While there may be differences in the form of the suretyship agreement and the obligations of the parties, its substance is essentially the same as insurance" (Id. at 353).

For all those reasons, the court decided to

"... adopt the rule *** that a commercial surety acts in bad faith when the surety's conduct is unreasonable and the surety knows that the conduct is unreasonable or recklessly disregards the fact that its conduct is unreasonable."

Great American Ins. Co. v. General Builders, Inc., 934 P.2d 257 (Sup. Ct. of Nevada 1997). Payment and performance bonds were issued by Great American's agent. The principal was a contractor which had been awarded a contract to enlarge a hospital for the obligee. Great American revoked the bonds, saying the agent did not have authority. As a result, the construction contract was not awarded to the principal which then sued Great American for breach of contract and "tortious breach of the covenant of good faith and fair dealing." The jury awarded compensatory damages in the amount of the anticipated profit on the job and awarded punitive damages.

On appeal, the issue of when and how a suretyship contract is formed was briefed and discussed in detail. That issue is not relevant to the subject at hand. What is pertinent is the court's reversal of the bad faith judgment. Agreeing with the surety's contention that this was simply a breach of contract case, the court said:

"The tort action for breach of the implied covenant of good faith and fair dealing requires a special element of reliance or fiduciary duty *** and is limited to 'rare and exceptional cases'" (Id. at 263).

The court said it traditionally has,

"limited bad faith tort actions to those cases involving special relationships characterized by elements of public interest, adhesion, and fiduciary responsibility" (Id. at 263).

It pointed out that in this case both parties were sophisticated commercial entities who were adequately represented in the transaction. It also said that the only damage the principal suffered was loss of potential profits, which loss was adequately addressed in the jury's award of compensatory damages for breach of contract.

Lynch Properties, Inc. v. Potomac Insurance Company of Illinois, 962 F.Supp. 956 (N.D. Texas 1996), decided under Texas law, involved a suit on a fidelity policy insuring plaintiff against employee dishonesty. Plaintiff's business was commercial real estate. However, the company also managed the finances of its president's grandmother due only to the family relationship. One of plaintiff's employees embezzled about \$19,000 from the grandmother's accounts, a sum which plaintiff replaced after discovery of the loss. After a claim was submitted under the policy, Potomac obtained legal advice due to its doubts about coverage. The result was denial of the claim. Plaintiff sued, alleging breach of the policy provisions and bad faith.

The district court granted Potomac's motion for summary judgment, dismissing both the breach of contract and bad faith claims. It found there was no coverage for several reasons. First, plaintiff's loss did not result "directly from" the employee's dishonesty. Rather, the direct cause of the loss was plaintiff's voluntary decision to replace the funds taken from the grandmother's accounts. Second, the policy protected plaintiff against "employee dishonesty" defined as an act motivated by the "manifest intent to (1) cause you to sustain loss ****" (Id. at 962). Here the employee had limited her thefts to the grandmother's accounts, stealing nothing from the company's accounts. Thus, there was no "manifest intent" to harm the plaintiff. Finally, the policy specifically provided coverage "for your benefit only" (Id. at 962). As it did not cover third parties, the court found it did not cover the grandmother's loss. Thus, the court agreed there was no coverage.

The court also dismissed the bad faith claim. It found that the evidence presented "... indicates that Potomac investigated both the facts and the policy's scope and sought legal advice because of uncertainty over the extent of coverage." Stating its interpretation of Texas law on the question of the fidelity insurer's duty, it said, "Lynch bears the burden of proving that no reasonable basis existed for denial of its claim *** and also of demonstrating that a genuine issue of material fact exists as to its extra-contractual claims" (Id. at 964). (My underline.)

First National Bank of Louisville v. Lustig, 96 F.3d 1554 (5th Cir. 1996), marked the second time that case was decided by the Fifth Circuit, this opinion being issued after a trial in the district court following an earlier reversal, reported at 961 F.2d 1162. In the meantime, the Kentucky Supreme Court had issued its opinion in Wittmer v. Jones, 864 S.W.2d 885 (1993), a decision which greatly clarified the law of bad faith in that state in a suit arising out of an automobile insurance policy. Though First National involved claims under a "Banker's Blanket Bond," the court relied heavily upon Wittmer's enunciation of bad faith principles, Kentucky style.

The bond in First National, issued by Aetna Casualty and Surety Co. and Federal Insurance Co., both referred to throughout the opinion as "the Sureties," covered the bank against employee fraud. Coverage was triggered by a loss "resulting directly from" employee dishonesty committed with the "manifest intent ... to cause ..." a loss to the insured (Id. at 1559). According to the bond's terms, discovery by the bank "of any dishonest or fraudulent act committed [by the employee involved] ... against the Insured or any other person or entity ..." would cause the bond to automatically terminate (Id. at 1559).

First National presented a claim under the bond after several loans brought to the bank by a particular loan officer went bad. During their investigation, the Sureties learned that the bank had overlooked several less than admirable acts of the loan officer during his training period and had given him a bonus despite learning he had misrepresented the credit history of a certain borrower, had closed two of the bad loans outside of the bank's procedures and had fudged the financial strength of a guarantor. The Sureties said the coverage had thus automatically terminated. Additionally, they said the "manifest intent" requirement had not been met, pointing to the loan officer's statement at the sentencing stage of his plea bargain that he had not intended to injure the bank. For these and other reasons, the Sureties denied coverage but offered \$5.5 million to settle though knowing the bank's claimed loss was far more. Ultimately, the jury found in favor of the bank on all claims and the district court awarded the bank \$10 million against each of the defendants under the coverage portion of the bond plus \$17.8 million on the bad faith claim.

On appeal, the Fifth Circuit reversed the bad faith award. It found that under Kentucky law a bad faith plaintiff must prove three elements in order to recover. They are that:

- (1) the insurer is obligated to provide coverage under the terms of the policy;
- (2) that the insurer had no reasonable basis for denying coverage for the claim; and
- (3) that the insurer knew there was no reasonable basis to deny the claim or the insurer acted with reckless disregard for whether a basis to deny the claim existed (Id. at 1564).

The second of these elements was crucial in the court's analysis of the bad faith judgment. The Sureties argued they had a "reasonable basis" for denying the claim. The court defined this term by saying, "Under this factor [reasonable basis], if a genuine issue exists as to either questions of law or fact, FNBL's claim is considered fairly debatable and the bad faith tort claim may not be maintained." A claim is "fairly debatable" if, "(1) the issue is one of first impression in Kentucky and authorities from other jurisdictions support the insurer's position and (2) if a dispute over relevant facts related to coverage exists" (Id. at 1565).

Here, the Sureties said, and the Fifth Circuit agreed, the claim was fairly debatable for two reasons. First, the term "manifest intent" had not previously been construed by Kentucky's courts and there was authority from other jurisdictions which supported the Sureties' view that the "manifest intent" provision was not satisfied by the facts of this case. Second, a factual issue existed regarding whether or not the coverage had been terminated by the bank's knowledge of the loan officer's tendency to disregard truth and bank procedures. The jury resolved this issue against the Sureties but, "... sufficient evidence was presented whereby this same jury could have reached the opposite determination, i.e., that the termination clause of the bond was triggered" (Id. at 1567). Finally, referring to the third element requisite to a bad faith award, the court said the trial court should not have submitted the bad faith issue to the jury because the bank had failed to prove the Sureties had no reasonable basis for denying the claim or that they acted in "reckless disregard" of whether or not a valid claim existed. Citing Wittmer, supra, the court said a bad faith claim should not reach a jury unless the plaintiff presents "... sufficient evidence of outrageous conduct on the part of an insurer, committed because of the insurer's evil motive or its reckless indifference to the rights of others" (Id. at 1567).

DISCUSSION

A few words about what all of this means. Courts do not hesitate to find that a duty of good faith attends the issuance of fidelity and surety bonds. This duty is found either in common law principles, which say that those in contract must deal with one another in good faith, or in statutory law which legislatively imposes this duty upon insurers. Additionally, courts are not really interested in discussions about the differences between suretyship and insurance in the context of bad faith claims asserted by principals or obligees. Rather, the courts simply equate the two and apply the bad faith analysis utilized in insurance cases to claims against sureties.

Like beauty, bad faith is in the eye of the beholder. Thus, one can never predict with certainty whether a court will find bad faith within the mosaic of facts presented to it. However, cases such as those discussed in this paper provide certain guideposts, such as, companies should respond promptly after receiving a bond claim; they should seek supporting data from the claimant; they should conduct their own investigation; they should follow the procedures set forth in their claims manuals; they should maintain close communication with the claimant and the other parties to the relationship; in tender situations, they should make clear to the attorney assuming their defense what they want him/her to do and then maintain close contact to make sure their directions are followed; they should not hesitate to obtain a legal opinion regarding issues pertinent to the claim; they should be sure to place the interests of the claimant on at least the same plane as their own; they should carefully document their handling of the claim; they should continuously review the terms of the bond in question to maintain familiarity with the rights and obligations imposed; they should evaluate new information as it is presented to determine whether decisions already made require change. Over arching all, the companies should sensitize themselves to the theoretical underpinnings of bad faith decisions and attempt to do those things which, when viewed retrospectively by a judge or jury, will lead to the conclusion that, whatever the merits of the company's ultimate decision, it was not made in bad faith.

BIBLIOGRAPHY

David T. Dibase and Lisa M. Le Nay, "Fidelity Bond Claims and the Covenant of Good Faith and Fair Dealing," Tort and Insurance Practice Section, 1994

Jill A. Douthett, "Getting Your Insurer's Attention: The Bad Faith Claim as the Policyholder's Means to an End," Tort and Insurance Practice Section, 1993

Jacqueline T. Lewis, Esq., "Good Faith is Good Business: Denying a Fidelity Claim While Avoiding Bad Faith Liability and Keeping the Customer Satisfied," Tort and Insurance Practice Section, 1998

Bruce E. Larson and Susan B. Hansen, "Alternative Dispute Resolution and Bad Faith Claims," Tort and Insurance Practice Section, 1992

Alan J. LeFebvre and Kurt C. Faux, "Application of Insurance and Bad Faith Principles to Surety and Fidelity Claims Handling"

Lawrence Lerner, The Most Important Questions A Surety Can Ask About Bad Faith Claims, Tort and Insurance Practice Section, 1993

Patrick M. Regan, "Setting Up the Bad Faith Case: The Plaintiffs' Perspective," Tort and Insurance Practice Section, 1993

Bernard A. Reinert, "The Duty of the Performing Surety to the Bond Principal and the Indemnitors: Good Faith, An Update"

Thomas L. Selden, "Bad Faith Update -- Federal Magistrate Finds Surety 'Bad Faith' to be Valid Cause of Action," Southern Surety and Fidelity Claims Association, 1993