Bad Faith and the Insurer's Claims Committee

I don't address bad faith failure to settle cases too often in *Coverage Opinions*. They are important decisions for sure. But they are often fact-specific. And that makes them not ideal for providing lessons and guidance for future claims. So they often-times do not pass the *CO* case section test.

But Tuesday's decision from a New Jersey federal court, which addressed bad faith failure to settle, is worth discussing. While it's fact intensive, the facts at the core of the court's bad faith analysis are ones worthy of attention. The court's decision, that bad faith could possibly be established [insurer's MSJ was denied], was tied to two key issues – (1) the insurer not accepting its adjuster's recommendation to settle and (2) the court taking issue with how the insurer's claims committee went out its business of analyzing whether the claim should be settled.

BrightView Enterprises Solutions v. Farm Family Cas. Ins. Co., No. 20-cv-7915 (D.N.J. Feb. 7, 2023) is not your typical bad faith failure to settle case. In other words, it is not a situation where an insurer refused to accept a settlement demand within limits, the case went to trial and there was a verdict in excess – and perhaps well in excess – of the limits. Then the court identifies the relevant state's standard for an insurer's obligation to accept a within-limits settlement. After that it turns to whether, based on numerous factors concerning the potential for the insured's liability, and extent of damages that could be awarded, the failure to settle was in bad faith.

At issue in BrightView was coverage for three companies [CBRE, Retzko and Brightview] under a $1 million commercial general liability policy issued by Farm Family to one of them (with two as additional insureds). The companies were involved in a project at a Bank of America location to overhaul the exterior landscape irrigation system. A BoA employee, Candice Morciglio, slipped and fell on a puddle of water and may have hit or head (disputed). A week later, she fell again striking her head.

At a settlement conference just days before trial, the judge indicated that an offer in the range of $650,000 to $750,000 from Farm Family -- on behalf of all three defendants -- would likely settle the case. The day before that conference, the Farm Family claim examiner recommended to Farm Family that "it would be a good idea to try and settle" and that it could "be resolved fully up to 650k rather than try the case." Farm Family did not follow the adjuster's recommendation. Further, while settlement authority was $400,000, the highest settlement offer made to plaintiff was $250,000.

Brightview demanded that Farm Family settle, stating that the insurer's $250,000 settlement offer was "astoundingly low—just over 4% of Plaintiffs' hard number damages [of over $6 million in future medical expenses and economic losses]." BrightView notified Farm Family that it would settle the suit on behalf of itself and CBRE and later seek to recover the settlement from Farm Family. BrightView settled the Morciglio suit for $350,000. The case went to trial against Retzko and the jury did not return a verdict in favor of plaintiff.

Brightview filed a bad faith suit against Farm Family. The court denied the insurer's motion for summary judgement.

The court, addressing Rova Farms (1974), the New Jersey Supreme Court's seminal bad faith failure to settle case, set out reasons why a jury could conclude that the failure to settle was in bad faith.

I set out some of the court's key discussion here:

"The first piece of record evidence supporting the denial of summary judgment in Farm Family's favor can be found in Stiehl's [the claim examiner] testimony. Just days before the scheduled Morciglio Suit trial, Stiehl notified her supervisors that Judge Harrington believed Farm Family could settle the suit on behalf of its three insureds for $650,000, and recommended that the case be settled for that amount. Specifically, Stiehl recommended that Farm Family should[.] . . . The fact that Judge Harrington informed Farm Family that it could settle the Morciglio Suit for $650,000, coupled with Stiehl's recommendation that Farm Family should authorize a $650,000 settlement, raises a genuine dispute as to whether Farm Family acted intelligently, and in turn, in good faith, when it decided to limit settlement authority to $400,000 and offered only $250,000."

"O'Meara's [litigation examiner] testimony that the Farm Family claims' committee spent only 15 to 20 minutes discussing the Morciglio Suit at a meeting, unlike other claims discussed for up to 45 minutes, and his testimony that the cumulative amount of time and consideration Farm Family gave to the Morciglio Suit was about an hour, could lead a jury to find that Farm Family's evaluation was cursory. Additionally, O'Meara's testimony that Farm Family did not have a procedure for evaluating the settlement value of claims, but instead, that the final settlement value was derived only through the expertise and the judgment of the

claims' committee, could also lead a jury to find that Farm Family's evaluation of the Morciglio Suit was subjective and cursory."

As I said at the outset, while BrightView is a fact intensive case, as bad faith failure to settle cases are wont to be, the facts here are ones worthy of attention.