

Insurer's Denial of Coverage for Negligence Claim Arising Out of Breach of a Statutory Duty Constituted Bad Faith

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The Third Circuit, applying New Jersey law, upheld findings of breach of contract and bad faith against an insurer that denied coverage for a negligence claim arising out of an insured law firm's alleged failure to comply with a New Jersey child support lien statute. *Boccone v. Eichen Levinson LLP*, 2008 WL 5158741 (3rd Cir. Dec. 10, 2008).

The insured law firm represented the *pro se* claimant's ex-wife in connection with certain personal injury and child support matters. The firm disbursed a personal injury settlement award to the wife before confirming she had no outstanding child support debts, as required by N.J.S.A. § 2A: 7-56.23b. When the firm discovered the outstanding liens, it took steps to satisfy them and comply with the statute. The firm also attempted to comply with the statute following the settlement of a subsequent personal injury action. The claimant refused to accept payment in each instance and challenged the lien amounts.

Following his ex-wife's second personal injury settlement, the claimant filed suit against the firm, alleging that it had committed fraud by intentionally concealing the first settlement award and by disbursing it to the firm's client and conversion by disbursing the second settlement without satisfying the child support lien. Two years later, the claimant amended his complaint to include a negligence count, alleging that the firm disbursed both awards to its client, despite knowledge that she had substantial child support debts.

The firm timely notified its professional liability carrier of the lawsuit. The insurer denied coverage based on a dishonesty exclusion and cited the complaint's allegations of intentional misconduct. The insured disputed the carrier's coverage position and noted that, "[a]lthough the complaint is couched in terms of intentional acts, the language of [the] [c]omplaint is clearly construable in terms of negligence and/or in terms of an accidental occurrence which would be covered under the policy." The firm filed a third-party complaint against the insurer, alleging breach of contract and bad faith denial of coverage.

When the claimant added the negligence count, the firm re-tendered the lawsuit to the carrier. The insurer advised the firm that it was "reviewing the negligence count with the expectation that it would not "be

entering a defense,"" but clarified that "no definitive decision [had] been reached." The carrier never provided the firm with a final coverage determination.

The district court granted summary judgment in favor of the firm against the claimant. The district court likewise granted summary judgment to the firm against the insurer. The Third Circuit affirmed both rulings. In so holding, the court agreed with the insured that the complaint triggered coverage under the policy and noted that, although the claimant "couche[d] his claims in terms of fraud and deceit," the complaint "essentially state[d] a claim for breach of the duty imposed by the child support lien statute, that is, defendants did not do what the statute required and satisfy the child support judgment lien out of the settlement proceeds." According to the court, the claimant's lawsuit "undoubtedly fell within the scope of the policy." It noted that the duty to defend is determined "by whether a covered claim is made, not by how well it is made." Finally, the court upheld the lower court's ruling that the insurer's denial of coverage was in bad faith because after the claimant amended his complaint to include the negligence count, the insurer had no reasonable basis to deny coverage.