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## BAD FAITH IN THE HANDLING OF THIRD PARTY CLAIMS

### Richards Buell Sutton LLP's Insurance Law Newsletter

In the recent case of *McDonald v. Insurance Corporation of British Columbia*, 2012 BCSC 283, the British Columbia Supreme Court reiterated that breaching a duty of good faith does not require malicious intent; failure to conduct an adequate investigation, provide an objective assessment of coverage and clearly communicate the coverage decision and its effect on the insured can suffice.

#### Factual Background

Eleanor McDonald struck a van while driving the wrong way on a one way street and was thereafter charged with failing to provide a breath sample, impaired driving and dangerous driving. The driver of the van she struck commenced an action against McDonald but her insurer, ICBC, did not appoint counsel for her nor file a statutory third party notice adding itself as a party to the action. Rather, the insurer's claims handler performed a cursory investigation into coverage and largely relied on the criminal proceedings to provide evidence that McDonald was in breach of her contract of insurance for being incapacitated by alcohol at the time of the accident.

In the midst of the alcohol related criminal proceedings McDonald pleaded guilty to the *Motor Vehicle Act* offence of driving without reasonable consideration for others and the criminal charges against her were stayed by the Crown. In the civil suit, her insurer defended the owners of the vehicle McDonald was driving and, without her knowledge, settled the claims against her for \$182,085.36. Thereafter ICBC sought reimbursement of the settlement sum from McDonald.

Upon receipt of the reimbursement demand McDonald commenced an action claiming indemnity for all amounts arising out of the subject accident and punitive damages for her insurer's breach of its duty of good faith in its handling of her third party liability insurance claim.

#### The Ruling

In *McDonald v. ICBC* the court provides an excellent summary of what constitutes bad faith and applies it to the initial claim investigation, the decision on coverage, the manner of the insurer's settlement with the plaintiff and the insurer's communication with the insured respecting coverage and settlement.

The court held that the insurer's poor investigation and almost total reliance on the criminal justice system



in and of itself amounted to bad faith. The court also held that the insurer's failure to obtain statements from witnesses while their memories were still fresh and, more importantly, its failure to investigate the claim more thoroughly when it learned that the alcohol related claims had been stayed amounted to bad faith. In particular, the claims handler failed to follow-up with all on scene police officers, find and contact the name of a witness who was in McDonald's car at the time of the accident, obtain relevant evidence from criminal trial, conduct a licence plate search which would have yielded information respecting a road-check stop by another police officer about an hour before the accident who found no evidence that McDonald was intoxicated and the fact that the insured was not questioned about the police's evidence. The duty of good faith required that the insurer bring reasonable diligence and fairness and an appropriate level of skill, thoroughness and objectivity to the investigation. Additionally, the insurer was obliged to fairly assess the collected information with respect to its coverage decision.

The court in *McDonald v. ICBC* found that the initial letter to McDonald warning her that she may be found to be in breach of the terms of her policy was insufficient notice that she in fact was deemed in breach and therefore may be liable for any amount paid to the plaintiff through judgment or settlement. This inadequate communication was greatly compounded by then settling with the plaintiff without even advising McDonald that settlement would be taking place and without taking her reasonable interests into account when settling. The failure to give clear notice of breach, the insurer's right to independently settle the claim and the potential effects of breach were all deemed breaches of the insurer's duty of good faith by the court.

The court found that punitive damages were warranted because the handling of the claim was overwhelmingly inadequate to the extent that it constituted harsh, high-handed conduct representing a significant departure from the court's sense of decency and fair play. In summarizing its basis for the punitive damage award the court found the insurer would not otherwise be accountable for its bad faith in the absence of punitive damages and that punitive damages were justified to deter other insurance companies from engaging in similar types of misconduct. \$75,000 in punitive damages were awarded.

### **Practical Considerations for Insurers and Claims Handlers**

In the wake of *McDonald*, insurers and claims handlers should bear in mind:

1. the importance of a thorough investigation as the foundation for a fair and proper evaluation of a claim for coverage;
2. the necessity to communicate clearly with the insured in respect of coverage determinations and the potential repercussions to the insured of that determination;
3. that a failure to conduct a fair and proper evaluation of coverage or to communicate with the insured



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respecting coverage and settlement can constitute bad faith handling in respect of a third party claim; and

4. the very real potential for punitive damages in bad faith claims, even those not involving malicious intent.



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