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"DUTY OF GOOD FAITH": WHAT IS ITS SCOPE?

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"Duty of good faith" is a term heard often in the insurance Industry, but the broad scope of this duty is often not fully understood. In the recent decision of *Stewart v. Lloyd's Underwriters*, 2019 BSCS 1582, the BC Supreme Court took the opportunity to educate insurers on what the "duty of good faith" entails, particularly when an insurer is investigating whether coverage for a claim should be granted and dealing with other individuals on behalf of the insured.

THE FACTS

In *Stewart*, the plaintiff was on vacation in the US. While sitting at a bar he had a brief loss of consciousness and fell to the floor resulting in the inability to move his arms and legs (the "Incident"). He received medical care in the US over the next 12 days including insertion of a pacemaker and surgery to his spine and was able to regain use of his limbs.

The plaintiff made a claim on his travel insurance policy for payment of his outstanding medical bills totaling $274,052.97 USD.

The plaintiff had been consuming alcohol on the day of the Incident and the insurer denied coverage and refused to pay the remaining medical bills owing in the US. The insurer denied coverage on the basis that the plaintiff's injuries were directly or indirectly as a result of alcohol intoxication and relied on the following exclusion in the policy:

In addition to the exclusions specified in each Insurance coverage, this Insurance does not provide payment or indemnity for expenses incurred directly or indirectly as a result of:

…Your abuse of (prior to or during your trip), or intoxication due to alcohol, drugs or medication.

On December 18, 2018, over three years after the claim was denied and three-and-a-half months prior to trial, the insurer advised the plaintiff that it was no longer denying coverage and that it had satisfied all of the plaintiff's outstanding health care bills. Of the total $274,052.97 USD outstanding on the invoices, the insurer paid $56,429.81 USD, "or approximately 21 cents on the dollar".

At trial, the plaintiff claimed for, amongst other things, punitive damages for the breach of the duty of good faith. The Insurer denied it acted in bad faith and argued that the test was not whether the denial of coverage was wrong; but whether the assessment of coverage was made in good faith.

THE RULING

The Court first examined the duty of good faith in the context of the coverage determination. While the Court agreed that the Insurer had a reasonable basis to investigate whether intoxication led to the Incident, the Court found that the investigation itself breached the duty of good faith to the plaintiff because:

- The Insurer was discussing denying coverage prior to undertaking any investigations;
- There was no consideration of the fact that the trauma physicians determined that alcohol was not a factor in the Incident and the Insurer took no further steps to make inquiries as to why the trauma physicians had come to that conclusion;
- The Insurer did not speak to the plaintiff or patrons or employees of the bar where the Incident occurred or take any steps to obtain the Incident report;
- The Insurer relied on an independent medical opinion of Dr. Stahl, which identified two possible causes of the Incident, one of which was potentially contributed to by alcohol and one which was not. The Insurer did not undertake any investigations into the non-alcohol related cause;
- Stahl expressed reservations regarding his opinion, and recommended further investigation but these investigations were never undertaken; and
- The tenor of the Insurer log notes suggested that the investigation was not a balanced review but rather a search to deny coverage.

The Court then examined the duty of good faith in the context of settlement of the plaintiff's outstanding medical bills, for a significant discount. After the Insurers had reversed their coverage position, **they did not advise the medical providers that the claim was now insured** and proceeded to settle the plaintiff's medical bills in a sum that represented a significant discount on the $274,052.97 USD claim.

The plaintiff alleged that the Insurers had breached their duty of good faith by obtaining the discounts from health care providers on the false premise that the claim was not covered. The plaintiff argued that where the insurer pays an account **on behalf of an insured,** the insurer must do so honestly. Furthermore, the plaintiff felt that he had received excellent medical care in the US and that he had a moral obligation to pay. It bothered him that his health care providers had been paid very little or nothing when they should have been paid properly for their services.

The Court held that the insurer's duty of good faith included a duty to negotiate the health care bills with the health care providers in a manner that did not put the plaintiff at any moral or legal risk. The Court held that the Insurers had breached that duty of good faith by not specifically advising that the decision on coverage had been reversed and then negotiated significant discounts with the health care providers, who thought that the claim was still uninsured.

The court held that despite the fact that the plaintiff had not established that he suffered any damages as a result of the breach of the duty of good faith in negotiating the health care bill, the unusually large discounts the insurers received warranted an award of punitive damages of $100,000, as the manner of settling the claims was "*motivated solely by the economic interests of the Insurers*" and did not take into account the moral or legal interests of the plaintiff. The Court also awarded the plaintiff $10,000 for mental distress arising out of the breach of the policy.

PRACTICAL CONSIDERATIONS

Stewart emphasizes that the "duty of good faith" extends to all aspects of handling of a claim. The duty includes an obligation to investigate claims thoroughly and objectively, including investigating circumstances that may lead to a grant of coverage as thoroughly as circumstances that may lead to a denial of coverage. The duty's scope extends to taking into account the moral and legal interests of the Insured in all dealings on the claim, including dealings with other parties on behalf of the insured. Insurers must also recognize that all aspects of their internal communications can be considered when examining breaches of the duty of good faith and should conduct themselves always with as much consideration to the interest of the insured as to their own.

The failure to comply with the duty of good faith can have significant consequences. It is advisable that underwriters and claims examiners continue to keep this duty at the forefront of their considerations when dealing with insureds and any other individuals on behalf of the insured.