

GUEST COLUMN

When is a “genuine issue” a defense against insurance bad faith?

By George Knopfler

The “genuine issue” or “genuine dispute” doctrine is a product of California case law. The doctrine has evolved and mutated over the years but it continues to serve as a defense against insurance bad faith claims.

When insurance claims are tendered by policyholders, they are not always put on the payment fast-track. There may be a disagreement between the carrier and the policyholder about what the policy actually covers. The parties may have different perspectives about the circumstances of the loss or injury for which the claim was submitted. The carrier may have reason to engage in additional investigation or conduct other due diligence before it can properly respond to the claim.

Until the parties’ dispute is resolved, the carrier may choose to hold off making payment. It may even end up denying the claim if it uncovers information that raises significant concerns. When this happens, frustrated policyholders frequently charge their insurers with acting unreasonably or in bad faith, setting the stage for a defense unique to the industry.

Insurers facing allegations of bad faith have the option of playing

the “genuine issue” trump card, asserting that they could not possibly have acted in bad faith because a “genuine issue” lay at the heart of the dispute. If, in fact, such an issue is found to have existed in a particular case, the named carrier could not, as a matter of law, have acted in bad faith.

The “genuine issue” or “genuine dispute” doctrine is a product of California case law. It was first mentioned in *Safeco Ins. Co. of America v. Guyton* (9th Cir. 1982) 692 F.2d 551 and first applied by a California court in *Opsal v. United Services Auto. Assoc.* ((1991) 2 Cal.App. 4th 1197; 10 Cal.Rptr.2d 352). The doctrine has evolved and mutated over the years but it continues to serve as a defense against insurance bad faith claims.

Every insurance policy includes a covenant of good faith and fair dealing on the part of the carrier. Any breach of this covenant is considered bad faith, for which policyholders may recover not just damages for breach of contract but also tort damages including consequential economic losses, emotional distress and attorneys’ fees. They may also recover punitive damages by showing that the insurer acted with fraud, oppression, or malice.

The “genuine issue” defense, if legitimate, can provide insurers with a complete shield against a

bad faith allegation: As a matter of law, there can be no bad faith if there is a “genuine issue.” The doctrine was originally limited to legal disagreements over interpretation of policies, but its scope was expanded in 2001 by the *Ninth Circuit in Guebara v. Allstate Ins. Co.* to cover both legal and factual disputes (237 F.3d 987). In that same year, a California appellate court held, in *Chateau Chamberay Homeowners Assn. v. Associated Internat. Ins. Co.* (90 Cal.App.4th 335, 108 Cal.Rptr.2d 776), that a genuine issue existed whenever there was a fundamental dispute about the facts of a case.

The *Chateau Chamberay* dispute involved a disagreement between experts for the insured and the insurer. Although it was not a legal issue, the court held that where there is a true disagreement between experts on both sides, a “genuine issue” exists and there is no bad faith as a matter of law. The court stated that “an insurer denying or delaying the payment of policy benefits due to the existence of a genuine dispute with its insured as to the existence of coverage liability or the amount of the insured’s coverage claim is not liable in bad faith even though it might be liable for breach of contract.”

The California Supreme Court reframed the “genuine issue” doctrine in 2007 in *Wilson v. 21st Cen-*

tury Insurance Company (S141790 (Cal. Nov. 29, 2007)). The court held that a dispute could not be considered “genuine” unless the insurer’s position was maintained in good faith and on reasonable grounds. Whether or not the insurer’s conduct was unreasonable, there could be no “genuine issue” defense without this finding. As part of its opinion, the court also reaffirmed the insurer’s duty to conduct a thorough investigation and fairly process and evaluate an insured’s claim.

Based on the directive of the *Wilson* court, insurers must now give careful consideration before asserting a “genuine issue” defense to make sure that there is

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an actual dispute that meets the relevant standard. Both *Chateau Chamberay* and *Wilson* make clear that the circumstances under which a “genuine issue” defense can be asserted against a bad faith claim are extremely narrow. Legal disputes over the terms of an insured’s policy are fair game, but factual disputes are generally limited, as in *Chateau Chamberay*, to differences between experts for the two sides. Short of this, a disagreement cannot be considered a “genuine issue” that shields a

carrier from a bad faith claim as a matter of law.

Absent a “genuine issue” claim, the only question to be resolved in a dispute over coverage is whether the insurer’s conduct was or was not unreasonable. Even if there are factual disagreements upon which the insurer wishes to base a “genuine issue” defense, the only relevant question in such cases is whether the insurer’s conduct was or was not unreasonable. Thus, the “genuine issue” doctrine is a small subsection of insurance bad faith de-

fense. Insurers defending against bad faith claims are generally limited to an assertion that their conduct was not unreasonable.

Prior to *Wilson*, courts often found a “genuine issue” when there was a difference of opinion between the carrier and the policyholder. As a result of *Wilson*, that is no longer the case. The mere existence of a dispute cannot be enough to raise a “genuine issue” defense. The record must establish that there is a legitimate dispute because of competing expert

opinions or ambiguity in the terms of the policy.

In light of the holdings in *Chateau Chamberay* and *Wilson*, insurers should now recognize that the mere existence of a disagreement will not by itself be enough to establish a “genuine issue” defense against a bad faith claim. Before asserting the defense, they should review the record, confirm that there is a true legal or factual dispute, and verify that they have handled the insured’s claim in accordance with their obligations under the law.