UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-6355

AETNA CASUALTY AND SURETY COMPANY,

Plaintiff/Counter-Defendant-Appellant/ Cross-Appellee,

versus

JIMMY HAROLD SECREST and SUE SECREST,

Defendants/Counter-Plaintiffs-Appellees/Cross-Appellants.

Appeal from the United States District Court
For the Southern District of Texas
(CV H 89 1531 c/w H 89 1814)

(May 31, 1993)

Before POLITZ, Chief Judge, JOLLY and DAVIS, Circuit Judges.

POLITZ, Chief Judge:[*]

Aetna Casualty and Surety Company appeals a jury verdict that it breached its duty of good faith and fair dealing in handling Jimmy and Sue Secrest's insurance claim, as well as the denial of

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

its motions for judgment as a matter of law and for a new trial. Finding that the pertinent jury instruction was erroneous and that the evidence was insufficient to support the verdict as it relates to extracontractual damages, we reverse and render judgment in Aetna's favor. We reject the Secrest cross-appeal for an increase in the award of attorney's fees.

Background

The Secrests' house in Plantersville, Texas was totally destroyed by fire shortly before midnight on November 26, 1988. They filed a claim with Aetna, their insurer. After an investigation, Aetna denied the claim on the grounds that the fire was caused by arson and it filed a declaratory judgment action in federal court seeking to determine its obligations under the casualty policy. The Secrests filed suit in Texas state court claiming breach of the policy and of the duty of good faith and fair dealing. Aetna removed the state court suit and the actions were consolidated and tried to a jury.

The jury found for the Secrests on both their contractual and tort claims, assessing damages against Aetna for property loss and mental anguish and also imposing punitive damages. Judgment was entered thereon. Aetna did not challenge the adverse judgment on its contractual obligations under the insurance policy but moved for judgment as a matter of law or a new trial on the good faith and fair dealing claims. After its post-judgment motions were denied, Aetna timely appealed. The Secrests cross-appealed the

denial of their Motion for Reformation of Judgment, seeking *inter alia*, a larger award of attorney's fees.[1]

Analysis

Aetna challenges the instructions under which the bad faith claim was submitted to the jury. We review jury instructions to determine whether the charge as a whole "accurately states the law and does not mislead the jury" and will reverse only if we have "substantial doubts as to whether the jury received proper guidance."[2] Applying this standard, we conclude that the error assigned by Aetna requires reversal.

The jury was instructed:

> [Y]ou may consider any of the following actions as evidence of bad faith on the part of the insurance carrier:
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> 1. Failing to effectuate a settlement of this claim;
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> 2. Making policy holders file suit in a claim in which liability has become reasonably clear;
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> 3. Failing to properly admit or deny coverage and to give the reasons therefore.

Aetna contends that the first type of evidence designated --

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[1] Both parties raise jurisdictional challenges. None has merit. Aetna's post-judgment motions were timely because intervening weekends do not count in the computation of time periods of 10 days or less. Fed.R.Civ.P. 6(a). Filed too late to qualify as a Fed.R.Civ.P. 59(e) motion, the Secrests' Motion for Reformation of Judgment is deemed a Fed.R.Civ.P. 60 motion. **United States v. Reyes**, 945 F.2d 862 (5th Cir. 1991). The Secrests' notice of appeal was timely because it was filed within 14 days after Aetna's. Fed.R.App.P. 4(a)(3).

[2] **FDIC v. Wheat**, 970 F.2d 124, 130 (5th Cir. 1992).

evidence of "failing to effectuate a settlement of this claim" -- is not *per se* probative of bad faith. We agree.

Bad faith in the handling of insurance claims is prohibited both by common law and statute in Texas. An insurer breaches its common law duty if "there is no reasonable basis for denial of a claim or delay in payment or a failure on the part of the insurer to determine whether there is any reasonable basis for the denial or delay."[3] To prevail, a claimant must prove that: (1) there was no reasonable basis for denying or delaying payment of the benefits of the policy, and (2) the carrier knew or should have known that there was not a reasonable basis for denying the claim or delaying payment.[4] Insurers "maintain the right to deny invalid or questionable claims and will not be subject to liability for an erroneous denial of a claim."[5]

The contested prong of the jury charge fundamentally misstates the law. It permits imposition of liability for what the jury determines to have been an erroneous denial of a claim rather than requiring the essential finding that the insurer lacked a reasonable basis for its denial. Because the instruction allowed

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[3] **Plattenburg v. Allstate Ins. Co.**, 918 F.2d 562, 563 (5th Cir. 1990), quoting **Arnold v. National County Mut. Fire Ins. Co.**, 725 S.W.2d 165, 167 (Tex. 1987), modified on other grounds, **Murray v. San Jacinto Agency, Inc.**, 800 S.W.2d 826 (Tex. 1990).

[4] **Aranda v. Insurance Co. of North America**, 748 S.W.2d 210, 213 (Tex. 1988).

[5] **Id.**

the jury to find evidence of bad faith in "any" of the three listed actions, the verdict may have rested solely on the invalid ground. Accordingly, the judgment must be reversed.[6]

The Secrests contend that the instruction adequately expresses the elements of their statutory claim as explicated in **Vail v. Texas Farm Bureau Mut. Ins. Co.**[7] We are not persuaded. In **Vail** the Texas Supreme Court held that failure to attempt in good faith to settle a claim after liability becomes reasonably clear violates article 21.21, section 16, of the Insurance Code and section 17.50(a)(4) of the Deceptive Trade Practices Act. The portion of the instruction contested herein lacks a critical element of such a claim: the precondition that liability be reasonably clear before the insurer's duty to attempt settlement arises. Furthermore, the **Vail** court treated this statutory duty as identical to that arising under common law.[8] By allowing the jury to impose liability on the basis of mere denial of a claim, the charge therefore misstates the statutory cause of action as well as the common law.

Aetna also contends that there was insufficient evidence to

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[6] See **Neubauer v. City of McAllen, Texas**, 766 F.2d 1567 (5th Cir. 1985).

[7] 754 S.W.2d 129 (Tex. 1988).

[8] 754 S.W.2d at 135 ("In **Aranda v. Insurance Co. of North America**, we held that an insurer breaches the duty of good faith and fair dealing by failing to promptly and equitably pay an insured's claim when liability becomes reasonably clear.") (internal citation omitted).

support the jury's finding of bad faith denial of the Secrests' claim. Federal standards govern our review of the sufficiency of the evidence.[9] Under the familiar test articulated in **Boeing Co. v. Shipman**,[10] we may reverse only if reasonable minds could not disagree that Aetna had a reasonable basis for denying the claim. Our review of the record so convinces us.

At the time of its denial, Aetna had a report by a cause and origin expert concluding that the fire was intentionally set. The expert's opinion was based, *inter alia*, on his observation of severe burning near floor level and erratic burn patterns on floors, and also on chemical tests indicating the presence of flammable liquid on two samples taken from the house. Aetna also learned from its local agent that the Secrests had a motive for arson: they were experiencing financial difficulties. Despite these difficulties, they recently had sought to increase coverage on their house and its contents. The policy was due to expire 10 days after the fire and Aetna had declined to renew. Finally, Aetna had indications that the Secrests had the opportunity to set the fire. Sue Secrest had returned early from a hunting trip with her husband and admitted that she was present in the house until 6:00 p.m. on the day of the fire. A neighbor told Aetna's investigator that someone was at the house only minutes before the fire began; she thought that person was the Secrests' son Ralph.

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[9] **Pagan v. Shoney's, Inc.**, 931 F.2d 334 (5th Cir. 1991).

[10] 411 F.2d 365 (5th Cir. 1969) (*en banc*).

When the firemen arrived the house was secure. Only the Secrest family had keys. This totality of evidence amply establishes a reasonable basis for Aetna's denial of the claim.

The Secrests point to countervailing evidence, in particular evidence that the fire may have been accidentally caused by a defective heater and that Ralph Secrest was not at the house immediately before the fire. In evaluating this evidence, we must underscore the parameters of our inquiry. We do not ask whether the Secrests' evidence permits a reasonable jury to find a basis for allowing the insurance claim. We ask, rather, despite the Secrests' evidence, could a reasonable jury deny the existence of a reasonable basis for Aetna's denial of the claim. The extra contractual verdict may stand only if the Secrests so discredited Aetna's ground for denying the claim that a fair-minded jury could find it non-existent or whimsical. This is a burden which the Secrests have not carried. At best their evidence, viewed in the light most favorable to the verdict, proves merely that Aetna's decision was erroneous. This does not create a jury question. The trial court should have granted Aetna judgment as a matter of law.[11]

[11] The Secrests highlight Aetna's directive to its consulting engineer to rewrite his report on the heater and Aetna's failure to preserve a copy of the original version. Indeed, their attorney surmised at oral argument that this conduct led the jury to find bad faith. The undisputed evidence, however, is that Aetna required the rewrite because the initial version was based on the Secrests' statements instead of a technical evaluation of the unit. Aetna did not destroy the original report but rather returned it to the engineer, who independently decided not to retain it. The engineer did retain his original field notes. Viewed in context, this incident cannot bear the weight that the Secrests would place on it.

Our disposition of Aetna's appeal moots the issues raised on cross-appeal by the Secrests, except for their objections to the amount of attorney's fees awarded for trial work. We find no abuse of discretion[12] in the $37,500 award. That award is reasonable, considering the amount of the only claim on which the Secrests ultimately prevailed -- the contract claim for the loss of the home and contents, a total of $64,000.[13]

[12] **Texas Commerce Bank N.A. v. Capital Bancshares, Inc.**, 907 F.2d 1571 (5th Cir. 1990) (the amount of attorney's fees awards is reviewed for abuse of discretion).

[13] See **id.** (attorney's fees recoverable under Texas law must have some reasonable relationship to the amount in controversy or to the complexity of the issue).