JUDGES – NOT JURIES – AWARD ATTORNEY'S FEES IN VIRGINIA BAD FAITH CASES

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The Virginia Supreme Court recently held in *REVI, LLC v. Chicago Title Insurance Company* that a trial judge, rather than a jury, should determine whether an insured is entitled to attorney's fees by virtue of the insurer's bad faith.[1]

Background

In 2000, REVI, LLC ("REVI") purchased a five-acre parcel of residential property in the Washington, D.C., metropolitan area, desirable and valuable in part because of its view of the Potomac River. REVI obtained title insurance from Chicago Title Insurance Company ("Chicago Title"), which disclosed no unusual easements or encumbrances with respect to the property. Years later, when REVI sought to remove trees from the property, the National Park Service ("NPS") notified REVI that it had an easement on the property that restricted tree removal. A later title search confirmed the easement.

When it finally accepted the claim (which was originally denied), Chicago Title negotiated at length with NPS on REVI's behalf. Those negotiations resulted in an agreement between NPS and REVI which modified the easement, including allowing for some limited tree removal subject to NPS permission. Nevertheless, REVI persisted in its claim to the extent that the defect in title caused diminution in the property's value, which was not fully resolved by the NPS-REVI agreement. Chicago Title refused to pay the claim on the grounds that there was no diminution in value because the property could still be used for its "highest and best use" (i.e., the building of a single, high-end mansion).

REVI sued for breach of contract, alleging that Chicago Title had acted in bad faith when it refused to pay for the diminution in the property's value allegedly caused by the undisclosed easement restrictions. REVI pursued attorney's fees and costs through Virginia Code § 38.2-209, which allows a policyholder to recover those sums against its insurer if "the court['s]" "reasonableness" analysis turns in its favor.[2] The statute provides, in relevant part:

> . . . [I]n any civil case in which an insured individual sues his insurer to determine what coverage, if any, exists under his present policy . . . or the extent to which his insurer is liable for compensating a covered loss, the individual insured shall be entitled to recover from the insurer costs and such reasonable attorney fees as the court may award . . . [if] the court determines that the insurer, not acting in good faith, has either denied coverage or failed or refused to make payment to the insured under the policy.[3]

Before trial, Chicago Title moved to bifurcate the case, and asked that the issue of bad faith under Virginia Code § 38.2-209 be presented to the trial judge rather than to the jury. Chief Judge Dennis J. Smith granted Chicago Title's motion that the trial be bifurcated, but allowed the jury to determine the issue of bad faith. Judge Smith relied on the General Assembly's revision of the statute in 1986, which replaced references to "trial judge" with "court." Judge Smith concluded that the revision was intended to "authorize a jury, as well as a trial judge[,] to make such awards."[4]

Judge Brett Kassabian, the trial judge, reached a different conclusion. After REVI won its case-in-chief and a separate trial on bad faith, Judge Kassabian set aside the bad faith award, holding that the 1986 revision of Section 38.2-209 did not indicate legislative intent to allow a jury trial since the General Assembly just as easily could have included the words "jury" or "trier of fact" as it had in analogous statutes.[5] REVI appealed.

Holding

In a split opinion, the Virginia Supreme Court affirmed Judge Kassabian's ruling. Justice Mims, writing for the majority, focused on the legislative history of Section 38.2-309, noting that other revised parts of the Insurance Code dealing with breach of an insurance contract expressly mentioned "court or jury" when intending to allow the jury's consideration of

an issue.[6] Further, the 1986 recodification was intended to fix internal "inconsistencies," such as replacing "trial judge" with "court" so as to match other parts of the Insurance Code.[7]

The court rejected REVI's contention that the court's interpretation would deny the Constitutional right to a jury trial. According to the court, REVI still has the right to a jury with respect to its breach of contract claim. Further, Section 38.2-309 does not create an independent cause of action for bad faith; rather, it simply provides a "vehicle for shifting attorney's fees and costs where otherwise such costs would not be recoverable."[8] And, historically, such ministerial matters have not been for a jury to decide.[9]

Justice Kelsey dissented. Warning that the majority's opinion added to a growing national trend against jury trials, Justice Kelsey noted that, traditionally, the word "court" has been understood to encompass more than just the trial judge, but the "constituent parts" of the legal system as well, like juries.[10] Moreover, there is little consistency within the Virginia Code for how the General Assembly describes the system. For example, in numerous places, the Code refers to the "'court' sitting 'without a jury,'" in which case "without a jury" would be superfluous if "court" means the trial judge acting on his own, as held by the majority.[11] Also, even in the Insurance Code, the General Assembly refers to "judge" as distinct from "court," which undermines the majority's contention that the terms are equivalents. Further, Justice Kelsey noted that amendments to the Code are presumed to have been meaningful, such that the 1986 amendment of Section 38.2-309 – replacing "trial judge" with "court" – must have been a substantive revision.[12]

Implications

Although *REVI* concerns what the majority described as a ministerial statute, the implications of the court's decision are far from rote. The Virginia Supreme Court has placed the responsibility for a key bad faith determination in the hands of the judge. In doing so, it adds to a national split regarding who awards attorney's fees in bad faith litigation.[13] Although Virginia juries can still consider bad faith in the context of breach of contract actions, a single jurist is now responsible for determining whether an insurer's bad acts will require payment of the policyholder's attorney's fees. Thus, with *REVI*, venue and which judge is assigned to the case will play an even more important role in bad faith litigation.

Notes

[1] No. 141562 (Sept. 17, 2015), *available at* http://www.courts.state.va.us/opinions/opnscvwp/1141562.pdf.

[2] In Virginia, attorney's fees are available only if allowed by contract or statute. *See Prospect Dev. Co. v. Bershader*, 258 Va. 75, 92, 515 S.E.2d 291, 300 (1999) ("The general rule in this Commonwealth is that in the absence of a statute or contract to the contrary, a court may not award attorney's fees to the prevailing party.").

[3] VA. CODE ANN. § 38.2-209(A) (emphasis added).

[4] May 9, 2014 Order.

[5] Aug. 8, 2014 Hrg. Tr. at 40:4-11.

[6] *REVI*, No. 141562 at 6 (emphasis added).

[7] *Id.* at 8.

[8] *Id.* at 9.

[9] *Id.* at 10.

[10] *Id.* at 14-15.

[11] *Id.* at 15-16.

[12] *Id.* at 18.

[13] Compare Ariz. Rev. Stat. Ann. § 12-341.01 ("The court and not a jury shall award reasonable attorney fees . . . ."), and Conn. Gen. Stat. Ann. § 42-110g(g) ("right to a jury trial except with respect to . . . the award of costs [and] reasonable attorneys' fees . . . ."), and 215 Ill. Comp. Stat. Ann. 5/155 ("the court" decides "reasonable attorney fees," as distinguished from "jury" elsewhere in section), with Idaho Code Ann. § 41-1839 ("the court shall adjudge reasonable . . . attorney's fees") and Kan. Stat. Ann. § 40-908 ("the court . . . shall allow the plaintiff a reasonable sum as an attorney's fee"), and Neb. Rev. Stat. § 44-359 ("the court . . . shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his or her recovery . . . ."), with Mo. Ann. Stat. §§ 375.296 ("the court or jury may . . . allow the plaintiff damages for vexatious refusal to pay and attorney's fees"), 375.420 ("the court or jury may . . . allow . . . a reasonable attorney's fee").

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