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## Recent Developments: Campbell v. Allstate Ins. Co.: An Insurer May Be Liable for an Insured's Personal Excess Counsel if It Does Not in Good Faith Settle a Claim within Policy Limits Prior to Trial

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*Campbell v. Allstate Ins. Co.*

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PRIOR TO TRIAL.**

In *Campbell v. Allstate Ins. Co.*, 96 Md. App. 277, 624 A.2d 1310 (Md. Ct. Spec. App. 1993), the Court of Special Appeals of Maryland held there is a contractual right to provide independent excess counsel to the insured at the insurer's expense. The court also held that there arises a valid cause of action when the insurer allegedly breaches its contractual duty to defend by failing to provide excess counsel.

On August 9, 1990, Robert Campbell was involved in an automobile accident in which he was found liable to Kimberly Baptiste. On the date of the accident, Campbell owned an automobile policy with Allstate Insurance Company, ("Allstate") which provided bodily injury recovery limits of \$20,000 per person. Additionally, the policy contained a "duty to defend" clause which provided that Allstate would defend the insured with counsel of its choice if the insured were sued.

When Baptiste filed a complaint against Campbell in the underlying tort claim, Allstate retained Rocco Nunzio to represent Campbell. After reviewing the complaint and injuries, Nunzio projected a jury verdict for the plaintiff in the range of \$15,000 to \$25,000 and relayed this information to Allstate. Nunzio then recommended to Campbell that he obtain independent counsel due to the possibility of an excess verdict. On Nunzio's recommendation, Campbell retained Gerald Solomon who recommended to Allstate that Baptiste's claim be settled within Campbell's policy limit of \$20,000. Though Allstate refused to settle the claim at the time of this recommendation, the action was settled shortly before trial for \$20,000.

Before trial however, Campbell filed a complaint for declaratory relief to enforce his rights under the contract. After the settlement, he filed an amended complaint alleging a breach of contract in order to recover the fees and expenses incurred in obtaining

excess counsel. Concluding that Maryland does not recognize a cause of action for breach of contract in a suit against an insurer for wrongful refusal to settle, the trial judge granted Allstate's motion to dismiss the amended complaint for failure to state a cause of action. *Campbell*, 96 Md. App. at 284, 624 A.2d at 1313.

Campbell then filed an appeal to the Court of Special Appeals of Maryland. Allstate argued on appeal that any claim for wrongful refusal to settle is based in tort rather than in contract, and therefore Campbell's pleadings were insufficient. *Id.* Nonetheless, the court found that the "Breach of Contract" caption in Campbell's pleadings did not preclude him from pursuing a claim in negligence, since the facts of the pleadings indicated negligence rather than a breach of contract. *Id.* at 285, 624 A.2d at 1314. The court further stated that Campbell's complaint cited elements of a tort claim and if proven, could result in liability by Allstate for wrongfully refusing to settle the claim. Thus, the court of special appeals held that the lower court erred in granting Allstate's motion to dismiss Campbell's amended complaint. *Id.* at 286, 624 A.2d at 1314.

Rejecting Allstate's argument that an action in negligence could only arise once an insured was exposed to an excess judgment, the court stated that the insured became exposed once Allstate refused the settlement demand for policy limits. *Id.* The court reasoned that though Campbell suffered no damages from an excess judgment, he was nevertheless subject to attorney fees incurred to prevent or minimize an excess judgment at trial. *Id.* at 287, 624 A.2d at 1315. Allstate also argued that this suit never went to trial on the merits, and therefore the insured was not exposed to an excess verdict. The court found a trial insignificant to expose the insured to an excess verdict.

Next, Campbell alleged that this

was an action in contract because Allstate breached its contractual duty to defend, and therefore the trial court erred in dismissing his amended complaint. He asserted that Allstate left him no alternative but to hire independent counsel because: (1) Allstate failed to settle the claim within policy limits; (2) Allstate failed to follow the recommendations of appointed counsel; (3) Allstate advised Campbell to seek independent counsel; and (4) Allstate tried to direct the defense of Solomon, even though there existed a conflict of interest. *Id.* at 288, 624 A.2d at 1316. On the contrary, Allstate argued it did not breach its duty to defend because Nunzio was chosen to represent the insured. Furthermore, Allstate's contract provision to provide an attorney was valid and accepted by the insured.

The court acknowledged that an insured has a cause of action for a bad faith refusal to settle a claim within the policy limits. *Id.* at 290, 624 A.2d at 1317. Where there is a verdict adverse to its insured in excess of the policy limits caused by the insurer's negligence, the insurance carrier is

liable. *Id.* at 291, 624 A.2d at 1317 (citing *Sobus v. Lumbermens Mutual Casualty Co.*, 393 F. Supp. 661 (D.Md. 1975)). While there is no obligation to accept an offer within policy limits, the court noted there is a duty to negotiate and settle a claim with regard for the interests of the insured. *Id.* at 290, 624 A.2d at 1317. An insurer must use "good faith" in its decision not to settle a claim within policy limits. Good faith must consist of an informed judgment based on honesty and diligence. *Id.* at 292, 624 A.2d at 1318. Additionally, where an appointed counsel recommends settlement at or near the policy limits, the insurer should have a "bona fide" reason for failing to settle. *Id.* at 292, 624 A.2d at 1318.

Confronting the issue of Allstate's breach of its contractual duty to defend and its duty to act in good faith in refusing to settle, the court held that though there is no duty to settle every case for policy limits, that where all of the following conditions exist, there is at least a question of fact whether the insurer has breached its obligation to attempt to settle a claim within the limits of the insured's policy. *Id.* at

293, 624 A.2d at 1318. Consequently, the court listed the conditions where an insurer's action will constitute a breach of the contractual duty to defend. Rejecting the advice of appointed counsel to settle the case for an offer for or near the policy limits prior to the jury verdict when the insured's liability is clear, are conditions which may constitute an insurer's breach of its contractual duty to defend. *Id.* at 294, 624 A.2d at 1319.

In its opinion, the court clearly expanded the insurer's duty to defend. The court redefines "duty to defend" to include a duty to provide independent counsel to the insured when there is an exposure to a verdict in excess of policy limits. Similarly, the court held that an insured may be exposed to an excess verdict once an insurer refuses to settle a claim within policy limits, rather than at the time of trial. As a result of *Campbell v. Allstate Ins. Co.*, it is conceivable that an insurer may be negligent for wrongful refusal to settle regardless of a jury verdict. Even though an insurer may settle a claim before the trial, the court held that the insured is nevertheless exposed to an excess judgment if the insurer failed in good faith to settle within policy limits and recommended independent counsel. More importantly, *Campbell* specifically lists the circumstances where an insurer may be negligent for failing to use good faith in its negotiations. If an insurer breached its duty of good faith in refusing to settle the claim within the policy limits, the insurer may be liable for excess counsel. Moreover, the insurer must provide a "bona fide" reason for failing to offer limits. No longer will a settlement just prior to trial within an insured's policy limits preclude an action for breach of contract or an action for wrongful refusal to settle.

-Debra Johnson Singleton

