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Bad faith blowback: Ninth Circuit affirms dismissal of insurer's anti-SLAPP motion to strike bad faith claim

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An insurer that brings an action against its insured in California where the insured asserts a counterclaim alleging bad faith may consider filing a motion to strike based on California's anti-SLAPP statute.

However, a recent federal appellate decision suggests that the insurer will face an uphill battle to prevail on such a motion.

The first step of the anti-SLAPP analysis requires a prima facie showing that the statement or conduct underlying the legal claims qualifies for protection under the anti-SLAPP statute.

This article will discuss the recent decision that denied the insurer's motion to strike pursuant to the anti-SLAPP statute and contrast a similar case in the San Francisco County Superior Court where an insurer's motion was granted.

Ninth Circuit decision

The Ninth Circuit U.S. Court of Appeals recently upheld a district court order denying an insurer's motion to strike an insured's bad faith counterclaim based on the California anti-SLAPP statute. *RLI Insurance Co. v. Langan Engineering, Environmental, Surveying and Landscape Architecture, D.P.C.*, 834 Fed.Appx. 362 (9th Cir. 2021) ("*RLI*").

The underlying dispute involves Langan Engineering, Environmental, Surveying and Landscape Architecture, D.P.C.'s ("Langan") purchase of T&R Consolidated ("T&R").

T&R was a geotechnical engineering firm that worked on the Millennium Tower project in San Francisco, California. Langan was named as a defendant in various lawsuits under a theory of successor liability for T&R's work, and Langan notified RLI Insurance Company ("RLI") of the claims.

RLI initially brought an action to rescind the insurance contracts issued to its insured, Langan, due to Langan's alleged failure to disclose potential liability from its purchase of T&R. Langan filed a counterclaim alleging breach of the covenant of good faith and fair dealing.

RLI brought a special motion to strike Langan's counterclaim, alleging that it violates California's anti-SLAPP statute because the bad faith counterclaim increases the expense, hassle, and nuisance of litigation.

At the trial court level, the Northern District of California denied RLI's motion.

The first step of the anti-SLAPP analysis requires a prima facie showing that the statement or conduct underlying the legal claims qualifies for protection under the anti-SLAPP statute; then the burden shifts to the non-moving party to demonstrate a probability of prevailing on the challenged claims.

This decision is illustrative of the risks that insurers face when they choose to sue their insureds in California.

The court reasoned that RLI failed to establish the first step of showing that Langan's counterclaim arises from RLI's protected activity of filing litigation. Rather, the district court held that the "substance of Langan's counterclaim is based on the underlying controversy regarding the insurance contracts and is not based on RLI's complaint." *RLI Insurance Co. v. Langan Engineering, Environmental, Surveying and Landscape Architecture, D.P.C.*, 2019 WL 6612241, *3 (N.D. Cal. December 5, 2019). RLI appealed the district court's ruling.

The Ninth Circuit affirmed the district court's decision, reasoning that Langan's counterclaim was not subject to the anti-SLAPP statute because "Langan's counterclaim is based on an alleged underlying course of bad faith conduct broader than RLI's complaint

alone, making reference to RLI's suit [as] merely 'evidence related to liability.'" *RLI, supra*, 834 Fed.Appx. at 363-364.

This decision is illustrative of the risks that insurers face when they choose to sue their insureds in California.

Where the "gravamen of the entire cross-complaint" is based on the cross-defendant's filing of a lawsuit, the anti-SLAPP statute applies.

The *RLI* case demonstrates that a counterclaim alleging bad faith against an insurer cannot be easily dismissed under California's anti-SLAPP statute where the bad faith claims are based on an insurer's alleged course of conduct rather than solely on the insurer's filing of a lawsuit against the insured. According to the Ninth Circuit, the insurer's course of conduct is not a "protected activity" pursuant to that statute.

Insurer can push back where cross-complaint inadequate

The *RLI* decision does not entirely preclude an insurer's right to assert an anti-SLAPP motion to strike. In contrast to the *RLI* decision, our attorneys represented insurers in a similar matter in California where the trial court granted the insurers' special motion to strike pursuant to the anti-SLAPP statute.

In that case, the insured's cross-complaint arose solely from the insurers' filing of a declaratory relief action and the insured failed to demonstrate a probability of prevailing on its claims.

The insurers subscribed to a professional liability policy issued to the insured law firm. The firm tendered a matter to the policy, and the insurers agreed to provide the insured with a defense but reserved the right to seek reimbursement of all defense expenses incurred in connection therewith.

The insurers later filed a declaratory relief action against the firm seeking a declaration that the subject policy provides no coverage for the matter. The insured filed a cross-complaint for bad faith against the insurers, and in response, the insurers filed a special motion to strike pursuant to the anti-SLAPP statute.

The trial court engaged in the two-step analysis to rule on the anti-SLAPP motion, as discussed above.

The court ruled in favor of the insurers, holding that they established that the insured's bad faith claim arose out of the insurers' right of petition. Specifically, the court found that the insurers had the right to seek a judicial determination of the parties' respective rights under an insurance policy.

Unlike the *RLI* decision, the cross-complaint involved in our case only generally alleged a "bad faith course of conduct" and failed to specifically allege conduct that would give rise to a bad faith claim other than the filing of the declaratory-relief lawsuit.

Where the "gravamen of the entire cross-complaint" is based on the cross-defendant's filing of a lawsuit, the anti-SLAPP statute applies. *Raining Data Corp. v. Barrenecha*, 175 Cal.App.4th 1363, 1374 (2009). As a result, the trial court held that the cross-complaint was based solely on the insurers' filing of the complaint for declaratory relief.

The trial court further held that the insured failed to demonstrate a probability of prevailing on its cross-complaint.

To establish a breach of the implied covenant of good faith and fair dealing under California law, an insured must prove that benefits due under the policy were withheld and the reason for withholding benefits was unreasonable and without proper cause.

The court held that the insured failed to allege that the insurers withheld benefits due under the policy; additionally, there was no evidence that policy benefits were withheld.

Conclusion

The key takeaway from these decisions is that if the insurer is able to establish that the counterclaim is based solely or essentially on the filing of the lawsuit and that the insured is unable to demonstrate a probability of prevailing based on the pleadings, then the insurer should be able to prevail on a motion to strike.

However, as noted in the *RLI* decision, a counterclaim based on the insurer's alleged underlying course of conduct likely will result in the denial of a motion to strike based on the anti-SLAPP statute. The difference between *RLI* and the case our attorneys handled was a cross-complaint alleging a bad faith course of conduct.

Thus, insurers weighing whether to file suit against their insureds in California should consider the risk of bad faith counterclaims based on their course of dealing with the insured.

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