KISSOONDATH v. U.S. FIRE
A REAFFIRMATION OF MINNESOTA BAD FAITH

By Michael L. Weiner

INTRODUCTION

It has been over 20 years since the Minnesota Supreme Court decided *Short v. Dairyland Ins. Co.,*[1] Minnesota's leading "third party" bad faith refusal to settle case. In the interim, Minnesota's appellate courts have decided relatively few bad faith cases. While there have been some important developments, such as the court of appeals' ruling in *Northfield Ins. Co. v. St.*

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1. 334 N.W.2d 384 (Minn. 1983). In a "third party" bad faith case, as distinguished from a first party bad faith case, the claim is brought *against* the insured by a third party, not by the insured against their own insurance company. Unlike many other jurisdictions, Minnesota does not recognize "first party" bad faith claims wherein the insured, covered by a policy providing direct benefits (such as health or medical insurance or disability coverage) has a right to seek extra-contractual damages for their insurer's breach of contract. *See Haagenson v. National Farmers Union Property and Casualty Co.*, 277 N.W.2d 648 (Minn. 1979), and *Pillsbury Co. v. National Union Fire Insurance Co. of Pittsburgh, Pennsylvania*, 425 N.W.2d 244 (Minn. App. 1988).

Paul Surplus Lines Ins. Co.,[2] that an insured/defendant must be "clearly liable" for bad faith liability to accrue (a ruling that seems inconsistent with basic bad faith principles), Minnesota bad faith law has remained essentially stable since *Short*.[3]

In the absence of much appellate attention to bad faith principles, it was not uncommon for the defense bar to attack the clear holdings of *Short* and the high duties *Short* imposes on liability insurers, most importantly the insurer's duty to act as a *fiduciary* toward its insured. Fortunately for those harmed by insures who put their own interests ahead of their insured's, the

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2. 545 N.W.2d 57 (Minn. App. 1996), *rev. denied* (June 19, 1996).

3. For example, where the trial court improperly submitted the issue of bad faith damages to the jury instead of the following well settled law that damages are fixed at the amount of the excess verdict, the court of appeals found clear error and set damages at this amount. *Foss v. State Farm Mutual Automobile Ins. Co.*,1996 WL 653942 (Minn. App. 1996), *rev. denied* (January 7, 1997). More specifically, the court ruled:

> The damage question in this case is well settled by law in this state: the measure of damages in a third-party bad faith action against an insurer is the difference between the policy limits and any excess verdict awarded in the underlying action. *Short v. Dairyland Ins. Co.*, 334 N.W.2d 384, 385 (Minn.1983); *Strand*, 300 Minn. at 311, 219 N.W.2d at 622. n. 1. Consequently, the trial court erred when it submitted the damage question to the jury. The damages in this case are the difference between the $100,000 policy limits and the $254,478.58 verdict in the underlying action.

Minnesota Court of Appeals in 2001 strongly rejected an insurance company's full frontal attack on *Short.* In *Kissoondath v. U.S. Fire Ins. Co*,[4] the court of appeals not only *reaffirmed* the essential holdings of *Short*, but also clarified its application at trial, including standards on critical evidentiary issues and jury instructions. Ultimately, in reversing a multitude of trial court rulings that had gutted *Short* and left Minnesota bad faith law seemingly toothless to protect insureds from their own insurers, the Minnesota Court of Appeals has now provided the framework under which bad faith cases must be litigated in Minnesota.

While *Kissoondath* thus does not represent any dramatic change in Minnesota law, its importance lies in the fact that it now stands as brick wall against defense attempts to erode the most fundamental principles of bad faith law intended to protect insureds. Indeed, it is no exaggeration to say that had the trial court's rulings been affirmed on appeal, this decision would have represented the most dramatic change ever seen in Minnesota bad faith law. Instead, in strong language and no uncertain terms, the court of appeals in *Kissoondath* reaffirmed that:

(a) Liability insurance companies *do* owe a *fiduciary* duty to their insureds;

(b) A breach of *any one* of the many obligations insurers owe to their insureds can severely harm the insured and may be the basis for bad faith liability;

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4. 620 N.W.2d 909 (Minn. App. 2001), *rev. denied* (April 17, 2001).

(c) Insurers are not entitled to a second bite of the apple, i.e., a second attempt to convince another jury of that which they could not convince the jury in the underlying case;

(d) Insurers may not collaterally attack a verdict that is conclusive against their insured, and hence must be conclusive against them;

(e) The insurer's duty to materially inform their insured as if they were represented by a private attorney is not met by merely telling the insured of a theoretical risk of an excess verdict, and the breach of this duty, by itself, is bad faith.

MINNESOTA BAD FAITH LAW: ITS FUNDAMENTAL PREMISE

The term "bad faith" is an unfortunate misnomer that is probably responsible for more confusion than understanding among the bench and bar, much less the general public. Under the current state of Minnesota insurance law, an insurance company's subjective "bad faith" or "good faith," using the common meaning of these terms, is usually completely irrelevant to the action. Indeed, an insurer in Minnesota in a "first-party action" *cannot* be liable for "bad faith" even if its intent was to *maliciously* deny a claim it knew to be legitimate and meritorious. Thus, the critical question in a "third party" bad faith case is not the characterization of the insurer's conduct as a "good" or "bad" but instead, whether the insurer has complied with the numerous *specific* duties imposed upon it by Minnesota law, including acting as a *fiduciary*.

In fact, because the law does not require an aggrieved insured to prove the "bad" or "malicious" motive, the term "bad faith" seems to imply, plaintiff's counsel is well-advised to avoid using the term “bad faith” in front of the jury, and focus instead on the specific duties owed by the insurer. It may be difficult to completely avoid using the term, because it is the shorthand description long used by the courts and attorneys to describe a “third” party refusal to settle case.

"Third-party claims" get their name because they arise out of circumstances where the insured has injured a “third party,” and the tortfeasor’s liability insurer has refused to settle the claim within policy limits. The third-party claimant then tries the case to a verdict and judgment against the insured *over and above* their policy limits, leaving the insured exposed to personal liability. If the insured has assets, they become subject to attachment. Even for the insureds with no assets, the excess judgment may affect their credit and possibly even drive them into bankruptcy.

Under Minnesota law, where a liability insurance company acts in "bad faith" (or, to put it more accurately, breaches its duties to its insured) by denying settlement offers within its policy limits, the insurance company becomes liable for the *full* excess judgment against its insured. The underlying premise of bad faith law is really quite simple--without the threat of a bad faith claim, a liability insurer has no reason or incentive to consider the fiduciary duty owed to its insured when resolving the conflict between its own interests (to pay as little as possible) and that of its insured (to be protected from the personal exposure that would result from a verdict in excess of their liability coverage). Without the threat of *its own exposure* beyond its limit of liability coverage, an insurance company might as well take the risk of going to trial and hope for a low verdict, even if this decision put its insured's personal assets in jeopardy.

SHORT V. DAIRYLAND AND THE INSURANCE COMPANY'S OBLIGATION TO ACT AS A FIDUCIARY

In *Short*, the Minnesota Supreme Court affirmed the trial court's summary judgment, finding that Dairyland acted in bad faith for what could only be described as the most egregious disregard for its insured's rights.[5] In adopting the trial court's memorandum as its

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5. *Short* arose out of an automobile accident on February 23, 1976, where a drunk driver who also had not taken his "anti-blackout" medication crossed the centerline and killed Donald Morin, a 40-year old husband and father of five minor children who was earning approximately $30,000 annually. Kearney had only $25,000 of liability coverage through Dairyland Insurance Company, and it was immediately apparent from the circumstances of the accident that he was solely at fault, and that the damages to Mr. Morin's family vastly exceeded these $25,000 limits.

However, the insurance adjuster assigned to the case by Dairyland, despite having authority to pay the full $25,000 limits to Mr. Morin's family, tried to use the then new no-fault law as leverage (or perhaps more aptly, as a club) to force the Morin family to take less than the full limits, claiming to the Morins' attorney that if the case was sued, the no-fault carrier would be subrogated to the extent of the $10,000 it paid in no-fault survivor's benefits. A verdict of $745,000 was ultimately rendered against Kearney, and his attorney retained by Dairyland then put him into bankruptcy, even though Mrs. Morin's attorneys advised him that they would agree not to pursue this excess verdict in return opinion, the Minnesota Supreme Court not only reaffirmed Minnesota bad faith law developed over decades, but, most importantly, firmly established that the liability insurer's obligations were not limited to *ordinary* contractual duties. Instead, because of the inherent *conflict* between an insurer's own interests and that of its insured when the damages caused to a third party could exceed the policy limits, the court held that an insurer owed a *fiduciary* duty towards its insured.

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for an assignment of his claim against Dairyland. Dairyland's obvious intent in putting Kearney into bankruptcy was to eliminate the bad faith case, but the trustee in bankruptcy, Brian Short, recognized it as a substantial asset of the bankruptcy estate, and retained Mrs. Morin's attorneys to handle the bad faith case.

Dairyland's defense was that Mrs. Morin's attorneys, in demanding the policy limits only a month after the accident, and then commencing suit only two days later, had not given Dairyland a "reasonable time" to respond to the demand for settlement. The parties made cross-motions for summary judgment, and Hennepin County District Court Judge Jonathan Lebedoff granted plaintiff's motion for summary judgment, awarding damages of the difference between policy limits and the jury's verdict, plus interest at the statutory rate. Judge Lebedoff's Memorandum was adopted in its entirety as the opinion of the supreme court. With respect to Dairyland's central contention that the time period it was given to settle was "unreasonable," the opinion flatly dismissed that defense:

> Usually, … , the insurer contractually acquires control of the negotiations and settlement, thus oftentimes creating conflicting interests on the part of the insurer. *On the one hand, the insurer owes a fiduciary duty to the insured to represent his or her best interests and to defend and indemnify*. On the other hand, the insurer is interested in settlement at the lowest possible figure. It is important, however, and must be remembered, that the insurer's right to control the negotiations for settlement must be subordinated to the purpose of the insurance contract -- to defend and indemnify the insured within the limits of the insurance contract.[6]

With respect to Dairyland's egregious conduct towards its insured, all designed to save itself money at the expense of its insured, the court explained:

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6. *Id*. at 387 (emphasis added).

> Dairyland complains that it was under no absolute duty to accept the settlement demand of March 31, and that it was entitled to 'explore' the possibility of settlement for less than the full policy limits. While this may be true, such 'exploration' might lead to a finding of bad faith, and in the instant case, that it what this court has found. To characterize Dairyland's brazen attempts to obtain a discount as 'exploring' the possibility of settlement for less than the full policy limits is specious and *overlooks Dairyland's primary responsibility - its insured*. Not only did Dairyland attempt to obtain a discount, but it also attempted to coerce Morin's attorney into submission by raising the spectre of State Farm's subrogation rights should Morin seek to submit her claim to the jurisdiction of the courts. If such actions do not constitute lack of 'good faith,' this Court is unable to imagine why. Lunzer's reference to State Farm's subrogation rights should the matter be placed into suit could be nothing more than an attempt to gain leverage and a discount from the policy limits--all in dereliction of its *fiduciary* duty to [its insured].[7]

<u>FACTS OF KISSOONDATH</u>

The underlying facts in *Kissoondath* presented a classic example of a liability insurance company that pigeonholed two injured victims into the routine "soft tissue" category, and thereafter essentially closed its eyes (and mind) to dramatic developments and changes in the two cases. All the while, the insurer ignored its fiduciary duty to fairly and objectively analyze the claims, to keep its insureds informed of all important developments (including settlement offers within the policy limits) and to properly advise its insureds of the risks of an excess verdict and personal exposure. In a case where the insurer knew that its

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7. *Id*. at 388-89 (emphasis added).

insureds were responsible for the accident, and that the economic losses from one plaintiff alone were *three times greater* than its policy limits, the insurer failed to protect its insureds by paying the joint demand from the two injured plaintiffs for its $350,000 single limits policy. United States Fire Insurance Company instead offered only $35,000 and $12,000 respectively to these injured plaintiffs. U.S. Fire then attempted to avoid paying *anything* by vigorously defending the case on liability with what it knew to be testimony that had no credibility from the defendant driver, who had fabricated a brake failure defense. The jury found U.S. Fire's insured liable for damages exceeding $2.2 million dollars. On appeal, the court of appeals found the jury's verdict to be supported by substantial evidence. [8]

The plaintiffs in the underlying case were Dipchan (Randy) Kissoondath and Michael Heinonen, who were sitting in a *parked* pickup truck when it was struck from the rear by a taxicab owned by James LaBosco and driven by Gregory Ammerman. U.S. Fire insured Mr. LaBosco's cab company under a liability policy with a single limit of $350,000, and it undertook the defense of Mr. LaBosco and his driver, Mr. Ammerman.

Mr. Kissoondath and Mr. Heinonen each filed suit and their cases were consolidated for trial in Hennepin County District Court. The evidence produced at the trial of the bad faith action demonstrated that U.S. Fire made up its mind very early on that both cases were routine

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8. *Kissoondath v. Ammerman*, Nos. C0-95-1346, C7-95-128, 1995 WL 756840 (Minn. App. Dec. 26, 1995), *review granted* (Minn. Feb. 12, 1996), *order granting review vacated* (Minn. June 19, 1996).

soft tissue cases, and never re-evaluated its position despite substantial changes in these cases, particularly a major worsening of Mr. Kissoondath's condition, and a corresponding mushrooming exposure to its insureds that went far beyond their insurance coverage. Over four months before trial, as U.S. Fire was just starting to get critical new medical and wage loss information from Mr. Kissoondath's new attorney, the supervising adjuster halted his periodic reviews of the file and handwrote what turned out to be his final instructions to the adjuster working under him: "If 35K won't do it, try the case!"

Even though Mr. Kissoondath and Mr. Heinonen remained willing to jointly settle their cases for the $350,000 single limits (and thus protect U.S. Fire's insureds from any personal exposure), U.S. Fire never increased its offers beyond the $35,000 and $12,000 it initially offered, and the cases proceeded to trial in August of 1994. The jury returned verdicts totaling over $2.2 million dollars. Mr. LaBosco thereafter assigned to the Kissoondaths and Mr. Heinonen his cause of action against U.S. Fire for its failure to protect him from this massive personal exposure.[9]

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9. The duties owed by a liability insurer run to its insureds. By virtue of the assignment, the Kissoondaths and Heinonen stood in the shoes of Mr. LaBosco, and obtained his right to proceed against U.S. Fire for its breach of its duties. An insured's right to assign their bad faith claim was affirmed in *Lange v. Fidelity and Casualty Co. of New York*, 290 Minn. 61, 185 N.W.2d 881 (1971).

In the subsequent bad faith trial, the trial court committed numerous prejudicial errors, which led to a jury determination that U.S. Fire had not acted in bad faith. As noted above, the Minnesota Court of Appeals reversed in a strongly worded opinion and remanded the case for a new trial. Because the trial court's erroneous rulings and the court of appeals' opinion covered a number of issues that are certain to reoccur in bad faith trials, *Kissoondath*'s holdings are certain to be critically important in the prosecution of all "third party" bad faith claims in Minnesota.

FIDUCIARY DUTY-TESTIMONY AND JURY INSTRUCTIONS

In *Kissoondath*, U.S. Fire strongly urged the trial court to reject *any* application of a fiduciary duty, including the preclusion of expert testimony on the subject, and the exclusion of all references to fiduciary duty from the court's jury instructions. Mr. Kissoondath's expert was prepared to testify on both the nature of the duty and the multiple ways U.S. Fire violated its duty, and his counsel further intended to extensively cross examine U.S. Fire's two experts on this subject. Mr. Kissoondath also requested a jury instruction that explained the nature and significance of the insurer's fiduciary duty,[10] which the district court denied.[11]

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[10]1. The complete jury instruction requested by Mr. Kissoondath read as follows:

> All insurance companies in Minnesota have a fiduciary duty to act in good faith towards their insureds. A fiduciary duty is the highest standard of duty implied by law, and is a duty of openness, loyalty and the highest integrity. A fiduciary relationship exists when confidence is reposed on one side and there is resulting superiority and influence on the other. A fiduciary relationship also exists where there is a disparity of business experience and therefore invited confidence by the party without experience in the party that does have this experience.

Because Crum and Forster, by its insurance contract with its insureds, controlled all aspects of claims handling and settlement, it had a potential conflict of interest between it and its insureds, and in fulfilling its fiduciary duty its primary responsibility was to its insureds, and it was required to subordinate its own interests to that of its insureds.

Crum and Forster, as a fiduciary towards its insureds, had an obligation to do all of the following:

> Fully, fairly and objectively investigate the claims against its insureds.
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> Fully, fairly and objectively evaluate the claims against its insureds.
>
> Carry out all of its functions and duties without regard to its insureds' policy limits.

The court of appeals explained how seriously the trial court had gone astray in rejecting the application of a fiduciary duty as follows:

> Here, the district court stated that the term fiduciary duty in *Short* was dicta and, therefore, the term was excluded from all aspects of the trial, including expert testimony and jury instructions. We disagree with the district court. …
>
> Dicta are expressions in a court's opinion that go beyond the facts before the court and therefore are the individual view of the author of the opinion and not binding in subsequent cases.

> Fully, continuously and adequately communicate with its insureds, and inform its insureds of all matters necessary for the insureds' protection of their own interests.
>
> Give equal consideration to the interests of its insureds.
>
> Communicate, inform and advise its insureds as they would if they had retained private attorneys concerned only with their interests, and not the interests of the insurance company.
>
> Reasonably settle a claim against their insureds within the insurance policy limits.

Crum and Forster failed to act in good faith towards its insureds if it failed to perform any of the above duties.

11. 620 N.W.2d at 913.

> … The statement in *Short* that an insurer has a fiduciary duty is more than mere dicta because (1) the issue of what duty is owed to an insured by an insurer was squarely before the court in *Short*, and (2) the supreme court clearly expressed its opinion. ... Therefore, we conclude, as stated in *Short*, that an insurer owes its insured a fiduciary duty to represent the insured's best interests.
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> Furthermore, the conclusion that an insurer owes its insured a fiduciary duty is supported by case law in other jurisdictions.
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>> The standard of conduct on the part of the insurer when dealing with claims arising under an insurance policy is shaped by, and must reflect, the quasi-fiduciary relationship that exists between the insurer and the insured by virtue of the insurance contract. Particularly when handling claims of third persons that are brought against the insured, an insurance company stands in a position similar to that of a fiduciary.
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> …The fiduciary duty arises because
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>> [i]n the insurance context a special relationship arises out of the parties' unequal bargaining power and the nature of insurance contracts which would allow unscrupulous insurers to take advantage of their insureds' misfortunes in bargaining for settlement or resolution of claims.
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> …
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> Because case law establishes that an insurer owes its insured a fiduciary duty, the district court was required to make evidentiary rulings and select language for the jury instructions that reflected the fiduciary relationship between an insured and its insurer. … The jury had to know about the relationship between the insurer and the insured in order to properly understand the case. The trial court thus committed reversible error when it failed to recognize the law established in *Short*.[12]

12. *Id.* at 915 (citations omitted).

AN INSURER'S BREACH OF A SINGLE DUTY IS BAD FAITH

Mr. Kissoondath also submitted a jury instruction which, based on longstanding law, listed the specific duties and obligations owed by U.S. Fire and properly stated that the breach of *any single* specific duty was sufficient to impose liability. The duties listed were as follows:

> Crum and Forster, as a fiduciary towards its insureds, had an obligation to do all of the following:
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> > Fully, fairly and objectively investigate the claims against its insureds.
> >
> > Fully, fairly and objectively evaluate the claims against its insureds.
> >
> > Carry out all of its functions and duties without regard to its insureds' policy limits.
> >
> > Fully, continuously and adequately communicate with its insureds, and inform its insureds of all matters necessary for the insureds' protection of their own interests.
> >
> > Give equal consideration to the interests of its insureds.
> >
> > Communicate, inform and advise its insureds as they would if they had retained private attorneys concerned only with their interests, and not the interests of the insurance company.
> >
> > Reasonably settle a claim against their insureds within the insurance policy limits.

The trial court denied this requested instruction, and gave the jury the following instruction:

> *No one factor* in and of itself is determinative of a breach. *All* factors taken together must lead you to believe that the insurance

> company breached its duty of good faith in order to answer question number 1 on the jury verdict form "yes."[13]

Mr. Kissoondath argued that the court's instruction was an *incorrect statement of law* and the court of appeals *agreed*.

> In cases where the insured is clearly liable, it has been established that any one factor in and of itself *may* be determinative of a breach of the duty of good faith. … Because case law has established that the failure of an insurer to perform any one factor *alone* may constitute a breach of the duty of good faith, the district court was required to instruct the jury as such.
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> Here, however, the instruction given by the district court erroneously implied that the jury had to find that the insurer failed to perform more than one of its obligations before it could be found to have acted in bad faith. This implication destroyed the substantial correctness of the instruction. Accordingly, the district court committed substantial prejudicial error by failing to properly instruct the jury and a new trial is warranted.[14]

EVIDENTIARY ISSUES-AN INSURER CANNOT COLLATERALLY ATTACK THE UNDERLYING VERDICT

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13. *Id*. at 916 (emphasis added).

14. *Id*. (emphasis in original) (citations omitted).

A standard tactic used by insurance companies in bad faith cases is to attempt to retry the underlying case. In *Foss v. State Farm Mutual Automobile Ins. Co.*, 1996 WL 653942 (Minn. Ct. App. 1996), *rev. denied* (January 7, 1997), the court of appeals soundly rejected this tactic where an insurance company attempted to retry the issue of the *damages* suffered by the plaintiff in the underlying action.[15]

In *Kissoondath*, the insurance company's tactics to retry the underlying case included: (a) introducing a surveillance tape never seen by the jury in the underlying case, (b) introducing evidence of the plaintiffs' underinsured motorist (UIM) coverage, and (c), most seriously, introducing expert testimony that impeached the underlying verdict.

Relying on the fundamental principle that the law of the case must govern, the court of appeals found reversible error in *all* of these trial court rulings. Because the court so strongly rejected these attempts to retry the underlying case, the courts language is worth examining in full:

> *A. Expert Testimony*
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> In an unpublished opinion, this court concluded that there was evidence reasonably tending to support the damage awards in the underlying case. . . . That is the law of this case and, therefore, the issue of whether the evidence supported the damages award may not be re-examined. …

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15. *Foss v. State Farm Mutual Automobile Ins. Co.*, 1996 WL 653942 (Minn. App. 1996) (bad faith damages are fixed at the amount of the excess verdict), *rev. denied* (January 7, 1997).

Respondent, however, called its expert, Peter Grottodden, to testify that "[t]he jury verdict is not supported by the evidence in the tax returns." In light of the fact that Grottodden's testimony contradicted this court's conclusion in *Kissoondath I*, the district court should have admitted into evidence this court's unpublished opinion and given a cautionary instruction. … Without this evidence, the jury was left with the impression, as provided by Grottodden, that the evidence did not support the underlying verdict. Not only is Grottodden's opinion contrary to the law of this case, but the *opinion had nothing to do with the respondent's knowledge prior to the underlying personal injury trial and this was clearly known by the insurance company*. Because Grottodden's testimony was allowed to impeach this court's prior decision in the underlying personal injury cases, the district court committed reversible and prejudicial error.

B. Edited Surveillance Video

For the same reasons that Grottodden's testimony re-examining the issue of the damages award in the underlying trial was prejudicial error, the admission of the edited surveillance tape, which challenged the underlying damages award, constituted prejudicial error. Respondent clearly used the video to attempt to show that the evidence did not support the damages awarded in the underlying case. But, as previously stated, once an issue has been reviewed and decided upon by this court, the issue may not be re-examined in district court. … Because this court had already determined in *Kissoondath I* that the evidence supported the damages awarded in the underlying case, a videotape challenging that conclusion should not have been admitted into evidence. Moreover, there is no evidence to support the proposition that respondent was justified in relying on an edited version of the tape in evaluating appellants' claims. Therefore, we conclude that the admission of the videotape resulted in prejudice to appellants because it invited the jury to conclude, contrary to the holding of this court, that the evidence did not support the underlying verdict.

C. UIM Evidence

Appellants argue that the district court erred and prejudiced them by permitting the introduction of evidence of appellants' UIM benefits, despite a pretrial motion in limine ruling excluding all reference to such benefits during trial. ...

Here, the district court, over strenuous objection, permitted respondent to question one of appellants' experts regarding the availability of UIM benefits. … However, appellants' UIM benefits played no role in respondent's investigation or evaluation in the underlying case, and there is no evidence in respondent's files or in the trial testimony in the previous trial to show otherwise. Therefore, appellants' UIM benefits were irrelevant and were properly excluded by a pretrial order. …

The district court gave a watered-down cautionary instruction concerning other coverage available to a party, but then it permitted respondent's counsel to continue the reference to UIM coverage by cross-examination and final argument. As a result, the introduction of the UIM evidence inescapably influenced the jury to believe that appellants could pursue UIM benefits, and thus, would be adequately compensated. This evidence unquestionably prejudiced appellants. … Accordingly, allowing respondent to present evidence on the availability and amounts of appellants' UIM benefits was clear error by the district court compelling a new trial.[16]

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16. *Id.* at 917-19 (emphasis in original) (citations omitted).

17. 620 N.W.2d at 919.

18. The insured's testimony at trial included the following:

> Q. You were never told - - let me ask it a different way. You didn't know - - you didn't think you were being sued for more than your limits when you walked into the courthouse that Monday, did you?

A. No, I don't think so. . . .

Q. You didn't know that you could be held personally responsible, that you could be personally liable for that verdict above the limits, did you?

A. No. I thought my corporation would be. . .

Q. From all you know now, do you think that there is any additional information that Crum & Forster could or should have provided to you before trial?

A. Yeah, I guess I would have kind of liked to get a little more information.

Q. Such as?

A. Well, I'd would have liked to have known - - I don't know, it's kind of hard to say, because to this day I don't believe they should have got that much money, but I don't believe - - I believe that maybe Crum & Forster should have notified me of *how much more it could have went.*

Q. Let me refer you to your deposition again that we have had some reference to already. At page 115 of your deposition, beginning at line 13, QUESTION: Mr. LaBosco, with the benefit of hindsight is there any additional information that you now believe Crum & Forster could or should have provided to you before this case went trial? There is an objection and the answer is, WITNESS: No, I don't think so.

A. Well, you see I - - at the time I probably didn't think so. At this time - - I really don't think so because *I wouldn't have changed my mind, unless they'd have came in and said to me we're going to lose this case and here's what your* - - *the money is going to be.*

Q. And you have no reason to - -

A. *and that I was going to have to pay it.*

19. 620 N.W.2d at 919 (citations omitted). It is also worth noting that on remand, the trial court granted Kissoondath's motion for summary judgment, finding a failure to properly communicate with the insured. This ruling was upheld on appeal. *Kissoondath v. U.S. Fire Ins. Co*, 2002 WL 31749100 (Minn. App. 2002), *rev. denied* (Feb. 26, 2003).

20. 290 Minn. 61, 185 N.W.2d 881 (1971)

21. 280 Minn. 482, 160 N.W.2d 541.

22. 185 N.W.2d at 886.

FAILURE "TO MATERIALLY INFORM AND CONTINUALLY COMMUNICATE WITH INSURED"

Finally, one of the *most important* rulings in *Kissoondath* is one that, at first glance, might go unnoticed, since it is the subject of only a brief discussion and is not listed under any of the court's subject headings. Nevertheless, the court of appeal's ruling on an insurance company's continuing duty to communicate with and materially inform its insured in detail as to the implications of an excess verdict is one that is certain to have major impact in Minnesota. While the law on this issue has long been clear and settled, this is a duty that all too often is given only lip service by liability insurers. The *Kissoondath* court reaffirmed that the breach of this duty "to materially inform and continually communicate"[17] is, *in and of itself*, bad faith.

While the details of this issue are not covered at length in the court of appeals' opinion, the insured in *Kissoondath* strongly believed in his defense attorney and thought the two injured plaintiffs undeserving of any compensation. (While this taxicab owner knew his driver was lying about a brake failure, he believed him when he claimed the two plaintiffs were not in the car when he crashed into it.) The insured also believed that he was protected from personal exposure by a corporation (mistakenly so, as it turned out, because the attorney handling his corporation had never filed the papers). His lead insurance defense attorney had met with him only the Thursday before trial, and advised him only of the "theoretical" risk of an excess verdict,[18] which the court found, on its face, to be a failure to proceed in good faith.

Here, the evidence, even when viewed in a light most favorable to the verdict, does not support the jury's special verdict that respondent did not breach its duty of good faith by failing to settle appellants' claims within the policy limits of insured. The record demonstrates that respondent failed to materially inform and continually communicate with insured regarding the settlement offer and the likelihood of an excess verdict. Respondent's counsel only advised insured of a theoretical risk of an excess verdict, when in fact he was obligated to advise insured, in detail, as to the implications of an excess verdict. … [As] the supreme court [has] stated:

> This obligation of counsel retained by the insurer is not fulfilled merely by an explanation which amounts to no more than assurances to the insured that his interests are being zealously and faithfully protected by experienced counsel, but rather by laying bare the truth not only of the potential consequences of a deficiency judgment but of the potential conflict between the interests of the carrier and the insured in the manner in which the insured would be advised if he consulted private counsel.

… Because respondent did not inform its insured of (1) the estimated dollar amount that the insured would be exposed to in the event of an excess judgment, and (2) the likelihood of an excess judgment, respondent did not proceed in good faith. … Accordingly, the district court committed reversible error and a new trial is warranted. [19]

CONCLUSION

Now that the Minnesota Court of Appeals has strongly reaffirmed the fundamental principles of bad faith law, it is important to remember how the public ultimately benefits from this ruling. On the other side of every bad faith case is an injured plaintiff, who also has been victimized by the insurance company that failed to properly pay a claim. As explained in *Lange v. Fidelity & Casualty Co. of N.Y.*, [20] it is not the insured's interest alone, but the *public's* interests as well, that is served by compelling insurers to act in good faith:

> Furthermore, we did not say in *Peterson* [*v. American Family Mutual Ins*.],[21] nor did we intend to imply, that the contractual relationship between a liability insurance carrier and the insured in no way involves the public interest in the payment of just claims to parties injured in motor vehicle accidents. That public interest is embodied in our Safety Responsibility Act, Minn.St. c.170. Under our statutory scheme, a liability insurance policy is not a mere indemnity policy protecting only the insured.[22]

Hence, the *entire* public's interest is served by bad faith law because liability insurance companies are *compelled* to meet their fiduciary duties by properly compensating innocent victims of their insureds' negligence, while at the same time protecting the personal assets of their insureds.