



TIME LIMIT DEMANDS and BAD FAITH LIABILITY

TIME LIMIT DEMANDS

- MO, CA, others – active in bad faith litigation
- TLDs very common
- Puts carrier in a position where response is demanded quickly
- Can create conditions which are an attempt to lead to bad faith liability for the carrier

WHAT IS “BAD FAITH”

- Under common law, no COA for bad faith
- Policyholder’s damages were limited to amount payable under policy
- Now, most states recognize insurer’s implied duty of good faith
- Recognition of unequal bargaining power between insurer and insured

WHAT IS “BAD FAITH”

- A few states began enacting statutes recognizing bad faith claims
- Allowed for the recovery of pre-judgment interest and legal costs
- 1950s - Model Unfair Trade Practices Act adopted by all states
- No private COA
- Now, courts in most states recognize an insurer's right to sue for damages

WHAT IS “BAD FAITH”

General definition

When an insurer places its financial interests over those of its insured

Elements of the tort of bad faith

1. An opportunity to settle claim against insured within policy limits
2. Failure of insurer to settle within those limits
3. “Bad faith” conduct – refusing to settle within policy limits and/or exposing insured to excess liability

CLAIM FILE DOS AND DON'TS

A. Document, document, document

1. Objective detail about facts, investigation
2. Document demands received, offers made
3. Identify and leverage your experts, early
4. Ask defense counsel about similar cases
5. Request a compendium

B. What to leave out of the claim file

1. Subjective opinions

CLAIM FILE DOS AND DON'TS

C. Who may end up reading the claim file?

1. Insured upon demand
2. Claimant and claimant's attorney
3. Defense attorney's file is available to insured upon demand
4. First party case? Parts of claim file available
5. Department of Insurance
6. Judge
7. Jury

CLAIM FILE DOS AND DON'TS

D. Attorney-client privilege and the claims file

What is privileged in a third-party liability claim file?

What is privileged in defense counsel's file on a third-party liability claim?

PREPARING FOR THE DEMAND

A. Unfair Trade Practices Act

- Model act adopted by most states
- National Association of Insurance Commissioners
- Primarily addresses 1st party claims, but also applies to 3rd party claims
- Outlines activities considered unfair claims practices

PREPARING FOR THE DEMAND

A. Unfair Trade Practices Act

- Split among states whether Unfair Trade Practices Act creates a private right of actions
- Mo. Rev. Stat. §375.1000 et. seq. prohibits:
 - Misrepresenting facts, policy
 - Failing to acknowledge communications
 - Failing to negotiate promptly and in good faith ST of claims once liability has become reasonably clear
 - Refusing to pay without conducting a reasonable inv.
- To see if your jurisdiction has adopted, go to <https://www.naic.org/store/free/MDL-880.pdf>

PREPARING FOR THE DEMAND

B. Department of Insurance Regulations

- Time frames to respond to demands & comm'n
 - Acknowledging claim within 10 days
 - Providing response to inquiry within 10 days
 - Can't demand a release w/in specific time period or else claimant's rights are impaired
 - Can't demand a release broader than claim
- Requirements for documenting claim denials
- Available online through Dept. of Ins. websites

PREPARING FOR THE DEMAND

C. When does the carrier have a duty to settle?

1. Generally when the policy covers the claim and the insured's liability is reasonably clear
 - Texas – Liability insurer has duty to exercise ordinary care in settlement of claims when demand is:
 - Within scope of coverage
 - Within policy limits and
 - Terms of demand are such that ordinarily prudent insurer would accept it given insured's potential exposure to excess judgment

Am. Physicians Ins. Exch. v. Garcia, 876 S.W.2d 842, 848 (Tex. 1994)

PREPARING FOR THE DEMAND

C. When does the carrier have a duty to settle?

Generally when the policy covers the claim and the insured's liability is reasonably clear

- Texas –Implied duty of liability insurers to accept reasonable settlement demands within policy limits
G.A. Stowers Furniture Co. v. Am. Indem. Co., 15 S.W.2d 544, 547-48 (Tex. Comm'n. App. 1929).
- California –Duty to pursue an “opportunity to settle”, which may include a claimant conveying an interest in discussing settlement. *Reid v. Mercury Ins. Co.*, 220 Cal. App. 4th 262 (Ct. App. 2013).

PREPARING FOR THE DEMAND

D. Does your jurisdiction require the carrier to initiate settlement negotiations?

Most states do not.

- Texas – *Am. Physicians Ins. Exch. v. Garcia*, (876 S.W. 2d 842 (Tex. 1994) (proactive negotiations would force insurer to bid against itself and discourage early settlements)
- Georgia – *First Acceptance Ins. Co. of Ga., Inc. v. Hughes* (2018 Ga. LEXIS 407) (Unanimous Supreme Court held no affirmative duty to settle absent a valid settlement offer; valid offer requires a clear demand to settle within policy limits and reasonable deadline)

PREPARING FOR THE DEMAND

D. Does your jurisdiction require the carrier to initiate settlement negotiations?

Most states do not.

- California – *Graciano v. Mercury General Corp.*, 231 Cal. App. 414, 427 (Ct. App. 4th 2014) (citing *Reid v. Mercury Ins. Co.*, 220 Cal. App. 4th 262, 277 (Ct. App. 2d 2013)) (bad faith failure to settle cannot be based on insurer's failure to *initiate* settlement overtures).

PREPARING FOR THE DEMAND

D. Does the jurisdiction require the carrier to initiate settlement negotiations?

Some states do.

- AZ, FL, KS, LA, NJ, NM, OK, OR, RI, TN, WA
- Kansas – *Smith v. Blackwell*, 791 P.2d 1343 (Kan. App. 1989)
(insurer can be held liable for an excess judgment for failure to offer policy limits prior to commencement of the litigation)
- Florida – *Powell v Prudential Prop. & Cas. Ins. Co.*, 584 So. 2d 12 (Fla. App. 1991) (bad faith can be inferred)
- Rhode Island - *Skaling v. Aetna Ins. Co.*, 799 A.2d 997 (R.I. 2002)

TIME LIMIT DEMANDS

A. How to respond

1. Acknowledge immediately
2. Act immediately
3. Notify insured of demand
4. Calendar deadline
5. Retain appropriate experts
6. Identify what investigation and documents are needed to respond

TIME LIMIT DEMANDS

B. What if you can't respond by the deadline?

1. Request more time, as soon as you know
2. Provide detailed basis for need for more time
 - what docs are needed
 - what witnesses are needed to interview

TIME LIMIT DEMANDS

B. Be aware of . . .

- Demand by claimant may not be necessary to a subsequent bad faith claim
- Carrier has a duty to evaluate and make appropriate offer in the absence of a demand
- Counteroffer will constitute rejection
- In MO, CA, others:
 - Insured's or excess insurer's demand not necessary element of bad faith
 - Excess judgment not necessary element of bad faith
 - Ultimate payment of your policy limits is not fatal to a BF claim

Scottsdale Ins. Co. v. Addison, 448 S.W.3d 818 (Mo. 2014).

TIME LIMIT DEMANDS

C. Is there a statute in your jurisdiction governing TLDs?

- MO, GA
- GA – Ga. Code Ann. §33-4-6
 - 60 days to accept statutory TLD
 - BF refusal to pay
 - Loss + the greater of 50% of the liability of insurer or \$5000 + attorneys' fees
 - Action for BF not abated by payment after 60 day period

TIME LIMIT DEMANDS

Mo. Rev. Stat. §537.058 (2017)

- In writing, via certified mail
- Reference the statute
- 90-day window after receipt
- Specify dollar amount demanded or “applicable policy limits”
- Specify who & what claims released
- Unconditional release of insured for all liability
- DOL, Claim No., date and location of loss; description of injuries
- List of names & address of health care providers + auth
- List of employers, if wage loss claim + auth
- Payment no sooner than 10 days after receipt of release

TIME LIMIT DEMANDS

Mo. Rev. Stat. §537.058 (2017)

- If no compliance with statute, no reasonable opportunity to settle, but statute is untested
- Applies to “personal injury, bodily injury, or wrongful death,” so statute appears to include broader scope of personal injury claims (*i.e.*, sexual harassment, etc.)

BAD FAITH LIABILITY

How can bad faith liability arise?

- Refusal to defend
 - Carrier believes no coverage under policy
 - Claims in Petition do not fall within policy coverage
 - Can create a path to bad faith liability

BAD FAITH LIABILITY

Fact Pattern #1

(Improper coverage investigation; excess judgment)

- Insured had an auto policy with Carrier which provided coverage to insured for driving vehicles she did not own.
- Car trouble caused her to put a down payment on a used car, which the seller allowed her to keep for a test drive.
- Inquired of premium cost; problem with VIN; seller to provide info
- In meantime, accident occurred, injuring 3 pedestrians.
- Claim handler presumed no coverage, admitting not considering insured's financial interests.

BAD FAITH LIABILITY

Fact Pattern #1

- Referral to coverage counsel - EUO & opinion of denial
- Suit file; defense under ROR & filed dec action
- \$50k policy limit demand by injured pedestrians; denied due to no coverage
- Judgment for \$138K
- Equitable garnishment to collect judgment
- Coverage found by court
- \$50K policy limit paid + interest
- Insured spoke with bankruptcy attorney about unpaid portion of judgment

BAD FAITH LIABILITY

Fact Pattern #1

- Insured sued carrier for BFFS
- Insured did not understand circumstances that led to judgment
- Perfect credit ruined
- \$500K compensatory; \$500K punitive

Ruling: When insurer wrongfully breaches the fiduciary duty to its insured to evaluate and negotiate third party claims in good faith, it may be held liable for resulting losses to insured.

Shobe v. Kelly, 279 S.W.3d 203, 209 (W.D Mo. 2009).

BAD FAITH LIABILITY

How can bad faith liability arise?

- ROR
 - In MO, insured given right to reject defense under ROR
 - Notify insurer and give 30 days
 - Insurer options: fully defend, deny, or file action for declaratory Judgment

Truck Ins. Exch. v. Prairie Framing, LLC, 162 S.W.3d 64 (Mo. App. W.D. 2005).
- In MO, filing a dec action is tantamount to a denial of coverage.

BAD FAITH LIABILITY

- Consent or uncontested judgment (Mo. Rev. § 537.065) with covenant not to execute against insured's assets
- Injured party then receives assignment of rights and files garnishment action against liability insurer to collect judgment

BAD FAITH LIABILITY

How else can bad faith liability arise?

- Insurer decides no liability, but defends, and jury delivers excess judgment

BAD FAITH LIABILITY

How else can bad faith liability arise?

- Missed TLD deadline
 - Carrier misses reasonable opportunity to settle
 - Can expose insured to excess judgment
- Failure to settle for policy limits, then excess judgment

BAD FAITH LIABILITY

Fact Pattern #2

(Missed TLD & Failure to Settle for PL)

- Insured crossed centerline and caused head-on collision with plaintiffs and serious injuries and long hospitalizations
- Insured notified his insurer and told them he had been drinking and admitted fault
- \$25K/\$50K policy
- Claims handler “needed to know how extensive injuries are”
- Medical records and bills requested
- Demand received for the policy limits
- No response from insurer

BAD FAITH LIABILITY

Fact Pattern #2

- No response from insurer; demands expire
- Insured said he did not receive demands; bills showed medical expenses far exceeded policy limits
- Limits offered; rejected & 30-day TLD for \$3M; rejected
- Plaintiffs sued insured; Insurer defended
- Insurer told insured of his excess exposure during litigation
- Plaintiffs and entered into consent judgment/covenant not to execute

BAD FAITH LIABILITY

Fact Pattern #2

- Mo. Rev. Stat. §537.065 Agreement terms were:
 - Insured admitted liability
 - Admitted BAC
 - His conduct met standard for punitive damages
 - \$2.5M compensatory; \$1.5M punitive, \$1M pre-judgment interest, costs
 - Covenant not to execute against insured's assets
 - Assigned plaintiffs 90% of his BFFS claim against insurer

BAD FAITH LIABILITY

Fact Pattern #2

- Next, equitable garnishment action by plaintiffs against insurer to collect judgment
- Jury awarded \$5.8M compensatory; \$10.5M punitive
- Ruling:
 - Insurer had exclusive right to negotiate ST under policy
 - Failed to exercise good faith by refusing to consider policy limit demands
 - After breach of duty of good faith, insured was free to reach a reasonable settlement on his own and enforce against insurer

Johnson v. Allstate, 262 S.W.3d 655 (Mo. App. W.D. 2008).

BAD FAITH IN THE ABSENCE OF COVERAGE

**Can you have bad faith exposure when there is
no insurance coverage for the claim?**

Some jurisdictions have held there can be.

BAD FAITH IN THE ABSENCE OF COVERAGE

Fact Pattern #3

(BF in the absence of coverage)

- Insured attorney is sued for malpractice
- Carrier provides defense pursuant to ROR
- During litigation, carrier rejects multiple offers, electing to instead let the case “play out”
- No investigation by carrier of its ROR

BAD FAITH IN THE ABSENCE OF COVERAGE

Fact Pattern #3

- After 3 years of litigation, insured worries case is affecting his practice, so he settles without carrier's consent
- Insured violated cooperation clause to settle, forfeiting coverage
- Can the insured sue his carrier for BF after forfeiting coverage?

BAD FAITH IN THE ABSENCE OF COVERAGE

Fact Pattern #3

- After 3 years of litigation, insured worries case is affecting his practice, so he settles without carrier's consent
- Insured violated cooperation clause to settle, forfeiting coverage
- Can the insured sue his carrier for BF after forfeiting coverage?
- Does insured's conduct insulate the carrier for 3 years of bad faith claims handling?

BAD FAITH IN THE ABSENCE OF COVERAGE

Rawlings v. Apodaca, 726 P.2d 565 (Ariz. 1986) (insurer was liable for bad faith after insurer issued ROR in fire loss suit against insured)

BAD FAITH LIABILITY

Defenses to bad faith liability

- Focus will be on the *reasonableness* of insurer's conduct
- Document, document, document
- Actions were in good faith by performing an adequate investigation and seeking outside legal and scientific opinions
- Timely efforts made to collect records and documentation of damages
- Fact investigation of liability was done timely

BAD FAITH LIABILITY

Defenses to bad faith liability

- Insurer informed insured of pending demand & risk to insured considered
- Insured consulted and asked to advise defense counsel on defense or settlement strategy
- Investigation was not just limited to coverage. Insured's interests must also be considered.

Landie v. Century Indem. Co. 390 S.W.2d 558, 566 (Mo. App. 1965).

BAD FAITH LIABILITY

Defenses to bad faith liability

- Investigation status, demands, offers documented
- Defense counsel timely retained
- Demand did not comply with TLD statute, therefore, no reasonable opportunity to settle
- An excess verdict does not mean that the case was not properly evaluated in good faith