

# **Pleading Insurer Bad Faith Claims: Evolving Pleading Standards, Surviving or Filing a Motion to Dismiss**

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# Pleadings Practices for Policyholders

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# Background and Introduction

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- ▶ **Very Brief History of Pleading**
  - ▶ Arcane rules of law and equity
  - ▶ 19<sup>th</sup> century reform: code pleading
  - ▶ Federal Courts used state pleading rules as of 1872, with federal rules for equity established 1912
  - ▶ 1934 Rules Enabling Act leading to FRCP and the advent of notice pleading which the drafters referred to as “simplified pleading”

# Conley v. Gibson

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- ▶ “[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”

# Bell Atlantic Corp. v. Twombly

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- ▶ “Factual allegations must be enough to raise a right to relief above the speculative level.” Including “enough facts to state a claim to relief that is plausible on its face.”
- ▶ A “formulaic recitation of the elements of a cause of action” does not meet the plausibility standard, which “simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence” of the wrongful conduct alleged.

# Ashcroft v. Iqbal.

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- ▶ Twombly pleading standard applies to “all civil actions” in federal courts.
- ▶ “[F]ormulaic recitation of the elements” of a claim is insufficient.
- ▶ Fair notice also includes an element of plausibility.
- ▶ Not as strict as particularity standard under Rule 9.

# Avoiding The New Standard

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- ▶ The new standard has been accepted in several states, including at least Colorado, Massachusetts, Nebraska, South Dakota, and Wisconsin.
- ▶ Rejected in at least Delaware, Tennessee and Washington.
- ▶ Removal: Removed complaint must comply with Twombly/Iqbal - *Faulkner v. ADT Security Services, Inc.* (9th Cir. 2013)

# Removal/Fraudulent Joinder

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- ▶ Fraudulent Joinder: no possibility that plaintiff can maintain a claim in state court .
- ▶ Arguably should be under state court standard but courts have applied Twombly/Iqbal. *Beavers v. Depuy Orthopaedics, Inc.*, (N.D. Ohio May 30, 2012).
- ▶ *Contra Murriel-Don Coal Co. v. Aspen Ins. UK Ltd.*, (E.D. Ky. 2011) – no reference to T/I while assessing suspect claim.

# Insurance Bad Faith Pleading Strategies

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## ▶ What To Avoid

- ▶ Simple recitation of applicable elements of bad faith
- ▶ Conclusory statements of intent or bad faith
- ▶ Preliminary statement of facts with wholly separate legal theories at the end
- ▶ Bad faith facts that simply mirror the breach of contract claim for benefits under the policy

# Insurance Bad Faith Pleading Strategies

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- ▶ **Good Pleading Starts During The Claim Process**
  - ▶ Put Everything In Writing
  - ▶ Both A Record And A Timeline
  - ▶ Your Delay Is Not Your Friend
    - ▶ Respond to all requests quickly
    - ▶ Provide immediate notice
    - ▶ Hand over and report new developments, new losses, damage reports, etc as soon as possible

# Insurance Bad Faith Pleading Strategies

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- ▶ Include all helpful details from the claim process in the discussion of the bad faith claim
- ▶ Do NOT include those same details, except as minimally necessary, in breach of contract claim
- ▶ Tie the factual allegations to specific elements of a bad faith claim

# Insurance Bad Faith Pleading Strategies

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- ▶ **Include and itemize damages as much as possible**
  - ▶ Itemize the loss, both first party and third-party
  - ▶ List what has been paid by insurance and the shortfall
  - ▶ Provide as much of a basis for the numbers as possible
  - ▶ List consequential damages due to breach

# Consider Waiting Until After Discovery

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- ▶ Risk now goes both ways
- ▶ If discovery, including the insurance company claims file supports bad faith, a court might be more willing to allow an amendment on a clean slate rather than after a bad faith claim has already been dismissed

# How Insurers Might Get Allegations of Bad Faith Dismissed

(or, how they might not, in which case it is time to roll up your sleeves!)

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# What did Twombly do?

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- ▶ The plausibility standard: has the insured written a three act play or *Empire*? Has the insured/plaintiff told the whole joke, or alleged only the punchline?
  - ▶ However, see Justice Souter's concluding paragraph in *Twombly*, and his dissent in *Iqbal*.
- ▶ *Phillips v County of Allegheny*, 515 F.3d 224 (3d Cir. 2008) (“...even in rejecting Conley’s ‘no set of facts’ language, the Court does not appear to have believed that it was really changing the Rule 8 or Rule 12(b)(6) framework.”)
- ▶ *Kasten v Ford Motor Co.*, 92 Empl. Prac. Dec. (CCH) P43 (E.D. Mi 2009) (“In this Court’s opinion, Plaintiffs read too much into *Iqbal*. If the Supreme Court had meant to endorse a flexible plausibility standard, it would have said so explicitly.”)
- ▶ *Bronowicz v. Allegheny County*, 804 F.3d 338 (3d Cir. 2015): complaint survives if any reasonable reading entitles the plaintiff to relief (especially interesting case because the basis is an ambiguous court order). Context matters!

## Cont'd

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- ▶ Majority of jurisdictions support the notion that *Twombly/Iqbar* raised the pleading standard, and created a new pleading standard without re-writing Rule 8 or 12: *Dobyns v. United States*, 91 Fed. Cl. 412 (2010); *Flynn v. Nationwide Ins. Co.*, 2014 U.S. Dist. LEXIS 91431 (M.D. Pa. July 7 2014).
- ▶ **IMPORTANT:** Federal Rules of Civil Procedure were amended effective December 1, 2015.
  - ▶ Most of the changes have to do with discovery and what discovery is now required;
  - ▶ No change to Rule 8 or Rule 12;
  - ▶ But: to the degree pleadings are drafted with discovery in mind, these changes should be kept in mind.

# Determine the basis of dismissal, and why it is warranted

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- ▶ Rule 12(b)(6): Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defense[] by motion: failure to state a claim upon which relief can be granted. But there are 6 other defenses, too.
  - ▶ Does “piling on” add shine to the theory that there is no “there” there?
- ▶ Double check any other available causes for dismissal
  - ▶ Venue
  - ▶ Jurisdiction
  - ▶ Are there issues with diversity to explore?
- ▶ Is there another theory to put before the Court?
  - ▶ Rule 12(f)
  - ▶ Rule 12(e)

# Procedural deficiencies

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What are the particular pleading requirements in your District?

- ▶ Did Plaintiff attach a copy of the policy to the complaint?
  - ▶ If so, is the relevant portion of the policy attached?

# Substantive deficiencies

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- ▶ Statutory bad faith
  - ▶ Has the pleading identified all required elements of the statutory violation?
    - If so, have sufficient facts of a sufficient nature been alleged to add up to the statutory violation?
  - ▶ Has the pleading described how the required elements occurred and/or are operative in this case?
  - ▶ Has the statute been identified?
    - Is there any inconsistency between what is alleged and the statute being pled?
- ▶ Common law bad faith
  - ▶ Do the facts identify all required elements?
  - ▶ Has the pleading set forth a relationship between those required elements and any alleged

# Is it the whole joke, or just the punchline

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- ▶ A complaint that provides the whole joke doesn't get dismissed
  - ▶ *Flynn v Nationwide Ins. Co.*: 15 separately identified allegations of bad faith dismissed where stated as conclusions, and not alleged as factual occurrences.
  - ▶ *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300 (3d Cir. 2010): in a claim against insurance brokers, the allegations must be at least “suggestive enough”; “context matters”

# In the alternative

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- ▶ Litigants routinely request opportunity to amend complaint in the absence of complete dismissal
  - ▶ Does the original complaint support a futility argument?
  - ▶ Can any set of facts alleged now or in the future support a verdict in Plaintiff's favor

## And sometimes Courts do it for them

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- ▶ **Hoffer v. Grange Ins. Co.:** “Since the Plaintiffs’ complaint does not clearly articulate the legal and factual footing for any statutory bad faith claim under 42 Pa. C.S. 8371, and in fact does not specifically identify a claim under Pennsylvania’s bad faith statute, directing [Plaintiff] to provide a more definite statement of this claim...would seem a prudent, appropriate exercise of the court’s discretion.” 2014 U.S. Dist. LEXIS 71079 (M.D. Pa. 2014).

# Role of State Courts

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- ▶ **Not completely out of the picture**
  - ▶ See, the replica states: 26 states and the District of Columbia. See also, Justice Stevens's dissent in *Twombly* (part of the objection to the altered pleading standard had to do with a concern for the states that follow federal pleadings rules)
  - ▶ In 24 states, though, *Conley* (“no set of facts or circumstances”) survives.

# Recent Developments and Cases

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# Cases Where Bad Faith Claim Was Dismissed Under Twombly/Iqbal Standard

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- ▶ Plaintiffs do not allege that Defendant knowingly or with reckless disregard denied their claim without a "fairly debatable reason" for doing so. All Plaintiffs allege is that they suffered damage to the Property from both Hurricanes Irene and Sandy, and that their claims to recover for this damage were denied in breach of the Policy and in breach of the covenant of good faith and fair dealing. These conclusory allegations are not enough to survive a motion to dismiss. See *Twombly*, 550 U.S. at 556; *Iqbal*, 556 U.S. at 678-89 ("Rule 8 ... does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."). Accordingly, Plaintiffs' claims for bad faith denial of benefits with regard to both Hurricanes Irene and Sandy are dismissed without prejudice. Plaintiffs, however, will be afforded the opportunity to amend the Complaint to properly allege such claims if they have a basis for doing so.
- ▶ *Kurz v. State Farm Fire & Cas. Co.*, (D.N.J. Sep. 19, 2017)

# Cases Where Bad Faith Claim Was Dismissed Under Twombly/Iqbal Standard

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- ▶ Plaintiff alleged:
- ▶ “That rather than carrying out its contractual, statutory, regulatory and ethical duties, LIBERTY MUTUAL FIRE committed acts during the adjustment of the claim which were not in "good faith" and were in violation of Florida Statute . . . . [such as] Using consultants to develop programs to pay claims unfairly/motivate claims employees to pay claims unfairly.”
- ▶ “As a matter of general business practice, LIBERTY MUTUAL FIRE fails to negotiate damages and/or makes low-ball offers.”
- ▶ Conclusory assertions about business practices and profit motives do not suffice. Such allegations "present[ ] the Court with only the observation that an insurer contested an insured's claims. This is hardly an unusual occurrence in the insurance field."
- ▶ *Moss v. Liberty Mut. Fire Ins. Co.*, (M.D. Fla. Aug. 18, 2017)

# Cases Where Bad Faith Claim Was Dismissed Under Twombly/Iqbal Standard

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- ▶ Plaintiffs allege that defendant "acted in bad faith" through a long list of acts and omissions:
  - ▶ 1. "By agreeing to provide insurance coverage and accepting payment for insurance coverage on Plaintiffs, [sic] home then refusing to provide said coverage under the terms of the agreement";
  - ▶ 2. "By refusing to pay home owners' benefits in a timely fashion"; ...
  - ▶ 6. "By denying benefits when there is no reasonable basis for denial";
  - ▶ 7. "By their frivolous and unfounded refusal to provide the benefits purchased";
  - ▶ 8. "By acting with ill will, malicious intent and self-motive in the handling of Plaintiffs' claim";
  - ▶ 9. "By failing to properly, timely and objectively investigate and evaluate Plaintiffs' claim";...
- ▶ While plaintiffs' list of allegations against defendant is long, the allegations fall short because they are conclusions.
- ▶ *Plummer v. State Farm Fire & Cas. Co.*, (W.D. Pa. June 27, 2014).

# Cases Where Bad Faith Claim Was Dismissed Under Twombly/Iqbal Standard

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- ▶ At base, Plaintiff alleges a contract dispute as to whether or not collision and comprehensive coverage remained a part of her policy given CIG's failure to inform her of the inspection required to maintain coverage. . . . . Plaintiff's assertion in ¶ 45 of the Amended Complaint that "[t]he denial and withholding of benefits for the reasons set forth above are not even debatably valid" is no more than a legal conclusion made in the guise of a factual allegation, and cannot support a claim for relief for bad faith.
- ▶ *Fuscellaro v. Combined Ins. Group, Ltd.*, (D.N.J. Sept. 29, 2011)

# Cases Where Bad Faith Claim Was Dismissed Under Twombly/Iqbal Standard

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- ▶ Defendant argues that Plaintiff has pled no facts indicating the requisite knowledge or recklessness as to having no reasonable basis for denying any claim in this case. The Court agrees with Defendant that Plaintiff has pled no facts at all surrounding the circumstances of the alleged failure to pay the unspecified demand. Plaintiff has not alleged the amount of the demand, when it was made, how Defendant responded to it, or any other facts surrounding the alleged denial apart from the mere fact of a demand (for an unspecified amount) and a denial. That is not enough to plausibly state a claim under the common law theory of bad faith.
- ▶ *Langermann v. Property & Cas. Ins. Co.*, (D. Nev. July 23, 2014)

# Cases Where Bad Faith Claim Was Dismissed Under Twombly/Iqbal Standard

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- ▶ McGonigal pled factual allegations to support a breach of contract claim based on an erroneous denial of an insurance claim, but the factual allegations end there. They do not support a separate claim for insurance bad faith. There are no factual allegations to explain how or when Harleysville (1) delayed or failed to properly investigate the insurance claim, (2) made an unfounded refusal to pay policy proceeds, (3) failed to timely process and pay the insurance claim, (4) improperly delayed making payment to McGonigal on its insurance claim, (5) deceived McGonigal as to the actual insurance coverage and claims process, (6) failed to settle a claim that in good faith could not be disputed, or (7) denied coverage without a rational, principled basis for doing so.... The Complaint fails to allege any conduct by Harleysville other than the legal conclusion that Harleysville "wrongfully denied" coverage. The Complaint does not allege... what policy provisions provide coverage for such a loss, when McGonigal submitted its claim for coverage, when Harleysville processed the claim and denied coverage, or Harleysville's basis for denying McGonigal's insurance claim.
- ▶ *H.E. McGonigal Inc. v. Harleysville Lake States Ins. Co.*, (S.D. Ind. Oct. 26, 2015)

# Cases Where Bad Faith Claim Was Dismissed Under Twombly/Iqbal Standard

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- ▶ Plaintiff avers that Defendant acted in bad faith by (Pl. Compl. ¶ 14):
  - ▶ (a) forwarding correspondence to Plaintiff and/or Plaintiff's representative under date of August 18, 2014, representing to Plaintiff and/or Plaintiff's representatives that his claim was not, in fact, covered under Defendant's policy of insurance when Defendant knew or should have known that such representation was false and misleading;
  - ▶ (b) failing to effectuate a prompt, fair and equitable settlement of Plaintiff's claim when its liability under the policy became reasonably clear;
  - ▶ (c) misrepresenting pertinent facts or policy or contract provisions relating to the coverages at issue;
  - ▶ (d) treating the Plaintiff with reckless indifference and disregard under the circumstances;
  - ▶ (e) not having a reasonable basis for denying Plaintiff's benefits under the policy and in knowingly or recklessly disregarding its lack of reasonable basis when it denied Plaintiff's claim; [and]
  - ▶ (f) interpreting ambiguous terms, provisions and/or conditions of the aforementioned policy in its favor and against Plaintiff.
- ▶ These "bare-bones" allegations are as devoid of factual specificity....
- ▶ *Mills v. Allstate Ins. Co.*, (E.D. Pa. Sept. 29, 2015)

# Cases Where Bad Faith Claim Survived Motion To Dismiss

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- ▶ Encompass [the insurance company] does not consider that Plaintiffs bad faith claim is supported by allegations that Encompass made an initial low offer, and then offered minor increases to the offer twice, followed by a dramatic increase several months later with the caveat that any bad faith claim also be included. Finally, Encompass does not mention that it received a narrative statement documenting Mrs. Winschell's injuries, a document that presumably would provide Encompass a basis upon which to value the claim, and that Plaintiffs cite to as evidence that it timely informed Encompass of the nature and severity of the injuries. Encompass's argument relies only on allegations of the elements of a bad faith claim, such as alleging that Encompass failed to objectively and fairly evaluate the claim in a timely manner.
- ▶ *Winschell v. Encompass Home & Auto Ins. Co.*, (W.D. Pa. Sep. 29, 2017)

# Cases Where Bad Faith Claim Survived Motion To Dismiss

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- ▶ The Complaint sets forth numerous examples of bad faith conduct that sufficiently allege a "reckless disregard" for Plaintiff's rights. Compl. ¶ 25(a)-(q). Plaintiff's allegations include engaging in delay tactics, misusing the investigation of Plaintiff's first party underinsured, and failing to reasonably evaluate the medical records in the record. Compl., ¶ 25 (b), (q) and (i).
- ▶ Geico's Rule 12 (b) (6) motion is denied.
- ▶ *Gussman v. Gov't Empl's. Ins. Co.*, (D.N.J. Sep. 12, 2017)

# Cases Where Bad Faith Claim Survived Motion To Dismiss

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- ▶ Austin does not merely allege, "Auto Owners committed bad faith," and stop. To the contrary, her pleading contains numerous facts that lend content and substance to her bad faith claim, such as that she had a valid insurance policy with Auto Owners, that the Policy covered her loss of June 11, 2010, that Austin made a timely claim under the Policy for the June 11 loss, that there was no arguable basis for denying the claim, that Auto Owners had actual knowledge that the loss was covered and that there was no debatable reason for denying the claim, that Auto Owners nonetheless refused to pay the claim, and that Auto Owners was acting pursuant to a general business practice of refusing to pay claims in such circumstances. ... Accordingly, the Court finds no Twombly / Iqbal infirmity in Count Two, as pleaded.
- ▶ *Austin v. Auto Owners Ins. Co.*, (S.D. Ala. July 30, 2012)

# Cases Where Bad Faith Claim Survived Motion To Dismiss

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- ▶ Having read the Complaint thoroughly, the Court must disagree that the lengthy series of conversations and correspondence catalogued at Paragraphs 12-39 of Plaintiffs' Complaint can be interpreted only as "Defendants' effort to investigate the claim". While the Court is by no means predisposed to credit Plaintiffs' version of events, the Court must accept all factual allegations as true in the context of a 12(b)(6) motion.... The Court ... concludes that the various factual allegations at Paragraphs 12-39 of Plaintiffs' Complaint can be plausibly read to indicate a different possibility, that being the sort of duplicitous delay by an insurer that the Pennsylvania Bad Faith Statute was written to prevent. The facial plausibility of this other possibility requires that this Complaint be allowed to stand even under the more stringent standard imposed by *Twombly* and *Iqbal*, *supra*.
- ▶ *Clemens v. New York Cent. Mut. Fire Ins. Co.*, (M.D. Pa. Feb. 24, 2014)

# Cases Where Bad Faith Claim Survived Motion To Dismiss

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- ▶ The Karases also allege that Liberty Mutual's denial of coverage was made without the benefit of any inspection of the basement walls at issue in order to verify the damage or its possible causes. The Karases further allege that Liberty Mutual ignored the coverage provided for "collapse," intentionally cited inapplicable policy provisions, and misled the Karases solely for the purpose of preserving its own assets. These factual allegations describe the failure of Liberty Mutual to conduct an adequate investigation, accompanied by its intent to mislead the insured and a motive to benefit itself. Thus the complaint alleges the existence of bad faith. Accordingly, Liberty Mutual's motion to dismiss Count Two is denied.
- ▶ *Karas v. Liberty Ins. Corp.*, (D. Conn. July 21, 2014)

# Cases Where Bad Faith Claim Survived Motion To Dismiss

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- ▶ Here, the Court finds that Plaintiff has adequately pled a cause of action for breach of the implied covenant of good faith and fair dealing. Plaintiff asserts that Defendant acted in bad faith by failing to investigate its insurance coverage claims. Although Defendant admits in its Answer that it has agreed to defend Plaintiff from the date of the purported tender, this does not negate Plaintiff's allegations that it failed to respond to Plaintiff's tender of claims for defense and indemnity, and subsequently withheld benefits under the policies for a period of more than nine months.
- ▶ *Kelly Moore Paint Co. v. Nat'l Union Fire Ins. Co.*, (N.D. Cal. May 21, 2014)

# Cases Where Bad Faith Claim Survived Motion To Dismiss

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- ▶ Plaintiffs allege that their home suffered water damage, which was caused by a policy-covered plumbing leak. Plaintiffs assert that defendant sent an adjuster to evaluate the claim who never provided an estimate of damages, defendant closed plaintiffs' claim without paying or notifying plaintiffs, defendant failed to explain the reason for denial of plaintiffs' claim, defendant refused to hire an engineer to inspect the damages, defendant's employee told plaintiffs "It doesn't matter, we are not paying for it either way," defendant did no further investigation after plaintiffs sent defendant a report from their own engineer that stated that the water damage was caused by a policy-covered event, and defendant withheld payment of plaintiffs' claim. . . . The amended complaint contains sufficient factual allegations to state a bad faith claim against defendant. Defendant's assertion that plaintiffs' amended complaint repackages conclusory allegations from the original complaint and its denial that the policy covers the event at issue do not constitute a sufficient basis to dismiss the well-pleaded bad faith claim in the amended complaint.
- ▶ *Kruse v. Travelers Home & Marine Ins. Co.*, (N.D. Okla. Dec. 8, 2015)

# Cases Where Bad Faith Claim Survived Motion To Dismiss

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- ▶ Plaintiffs argue that Liberty Mutual "denied their claim without any investigation" and misled Plaintiffs "into believing that there was no coverage by citing inapplicable policy language." Prior courts in this District have found these same allegations sufficient to state a claim for breach of the covenant of good faith and fair dealing at the 12(b)(6) stage. . . . The Court notes that this is not the first "concrete decay" claim in which Liberty Mutual or a related insurer within the Liberty Mutual Group has initially denied coverage on one basis — here based upon language excluding "settling" or "seepage" of groundwater — only to later raise arguments that the affected structures were excluded "foundation[s]" or "retaining wall[s]." . . . .The Court also finds that Liberty Mutual could have acted in bad faith by describing a structural wall as a "foundation" without any inspection of the premises. These allegations support a plausible claim for breach of the covenant of good faith and fair dealing. Liberty Mutual's motion to dismiss Count Two is DENIED.
- ▶ *Metsack v. Liberty Mut. Fire Ins. Co.*, (D. Conn. Sept. 30, 2015)

# New York Federal Cases Dismissing Bad Faith But Allowing Claims For Consequential Damages

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- ▶ Here, the allegations of the Amended Complaint are sufficient to support plaintiff's demand for consequential damages. Plaintiff alleges it suffered "loss of business income" as a result of defendant's failure to pay its insurance claim.... As noted above, plaintiff alleges that defendant denied its insurance claim in bad faith, mainly by failing to investigate and value plaintiff's claim. Plaintiff further alleges that "[t]he damages sustained by the plaintiff as a result of [Nationwide's] wrongful conduct were within the contemplation of the parties herein as the natural probable result of a breach of [Nationwide's] duties at the time of or prior to the parties renewing the Policy on or about October 12, 2012." .... [F]or the purposes of a Rule 12(b)(6) motion, the court must take plaintiff's allegations as true and draw all reasonable inferences in its favor. Therefore, the court declines to dismiss plaintiff's request for consequential damages in connection with its breach of contract claim.
- ▶ *Sikarevich Family L.P. v. Nationwide Mut. Ins. Co.*, (E.D.N.Y. July 2, 2014)
- ▶ Also *County of Orange v. Travelers Indem. Co.*, (S.D.N.Y. May 14, 2014) dismissing claim for breach of covenant of good faith but allowing consequential damages claim as part of breach of contract.
- ▶ But See *Looks Great Servs., Inc. v. Nat'l Grid El. Servs., LLC*, (Sup. Ct. Nassau Cty. 2015) ("The Court dismisses Plaintiff's claim for consequential damages because Plaintiff does not allege facts that would support the conclusion that the parties contemplated consequential damages at the time of, or prior to, contracting.")