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Bad Faith Insurance Litigation: Scope of Extra-Contractual Damages

Advocating For or Defending Against Consequential and Punitive Damages in First- and Third-Party Claims

WEDNESDAY, JULY 22, 2015

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Today's faculty features:

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Bad Faith Insurance Litigation: Scope of Extra-contractual Damages

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First Party Bad Faith: Compensatory Damages

General Principles for Recovery of Damages for Bad Faith

- Where "bad faith" is considered a tort: all loss *proximately caused* by the bad faith is generally recoverable.
- Where "bad faith" is considered a contract claim, an insured can generally recover *foreseeable consequential damages*.
  - *Beck v. Farmers Ins. Exchange*, 701 P.2d 795 (Utah 1985): Insureds can recover consequential damages that exceed the policy limits, including damages for loss of a business or home and "in unusual cases, damages for mental anguish."

First-Party Bad Faith: Categories of Potential Damages

- Out of pocket expenses (cost of securing alternative housing or transportation or costs of appraisal)
- Lost investment income
- Lost earnings
- Financial distress, including damage to credit, or from foreclosure of property
- Physical harm
- Unpaid policy benefits
- Emotional distress (limitations apply in some jurisdictions)
- Attorneys' fees in securing benefits

-- Whether damages in any of these categories are actually recoverable in any given instance will depend on the facts of the case.

Damage Sought Affects Proof Needed and Potential Discovery

Damage	Proof of Damage and Potential Discovery
Emotional distress	Insureds' testimony and testimony from others who know the insured; medical records; psychological records; other stressors
Physical harm	Medical records, medical reports on causation, medical bills
Financial distress, loss of credit, foreclosure	Financial records
Loss of income	Employment records
Out-of-pocket expenses	Receipts and documentation
Attorneys fees	Attorney bills

First Party Claims: Recovery of Unpaid Policy Benefits

- An insured can recover unpaid policy benefits as part of the damages for the bad faith tort.
- However, the insured cannot generally recover for insured-against bodily injury or property damage in excess of the policy limits on a first party claim.
  - *But see*, Fla. Stat. § 627.727(1): permitting recovery of entire judgment by insured against uninsured motorist in bad faith action, regardless of whether excess judgment was caused by UM carrier's bad faith.

First Party Claims: Accelerated Policy Benefits

- Where a contract requires periodic payments (such as a disability insurance policy), an insured can generally only recover unpaid policy benefits that have already been accrued.
  - *Erreca v. W. States Life Ins. Co*., 19 Cal. 2d 388, 402 (1942): Because the insurer's liability for future benefits is contingent upon the existence of total disability at that time, its refusal to pay benefits for any reason does not entitle the insured to treat the entire contract as repudiated and ask for future benefits upon a theory of anticipatory breach.

First Party Claims: Accelerated Policy Benefits

- But some courts have permitted accelerated recovery of the present value of future policy benefits where: (1) the insurer repudiated the policy and (2) the insured can establish a permanent entitlement to benefits.
  - *DeChant v. Monarch Life Ins. Co*., 204 Wis. 2d 137, 147 (App. 1996): Imposing "lump sum" accelerated award where insurer repudiated its obligations under total disability policy.
  - *Egan v. Mut. of Omaha Ins. Co.*, 24 Cal. 3d 809, 824 (1979): "[T]he jury may include in the compensatory damage award future policy benefits that they reasonably conclude, after examination of the policy's provisions and other evidence, the policy holder would have been entitled to receive had the contract been honored by the insurer."

Damages are Limited to Loss for Infringement of Interests that Arise by Virtue of the Insurance Contract

- Insured could not recover where he lost his job due to insurer's conclusion that he was the "at fault" driver and decision to pay a third party's claim, even though insurer's investigation of fault was negligent.

- Damages do not "extend to the insured's interests that do not arise from the contract."

  – *Brown v. St. Paul Fire & Marine Ins. Co.*, 604 S.W.2d 863, 865 (Tenn. Ct. App. 1980):

In Some Jurisdictions, Only "Severe" Emotional Distress is Recoverable

- *Anderson v. Cont'l Ins. Co.*, 85 Wis. 2d 675, 696 (1978):
  - "[I]n no circumstances may a plaintiff recover for emotional distress, even when there are other accompanying damages, unless the emotional distress is severe."
- *Bailey v. Farmers Union Co-op. Ins. Co. of Nebraska*, 1 Neb. App. 408, 427 (App. 1992)
  - "[A]n insured claiming bad faith damages cannot recover for emotional distress simply by arguing that he or she suffered emotional distress because of the breach of contract from which the bad faith claim arose; there must be other injuries for which the insured is not compensated by the damages awarded for breach of contract, and those other injuries must cause *severe* emotional distress or mental suffering."

In Some Jurisdictions, Emotional Distress Must Be Accompanied By Economic Loss

- *Gruenberg v. Aetna Ins. Co.*, 9 Cal. App. 3d 566, 579 (1973): Where an insured suffers other loss (such as economic loss from interference with property rights), an insured can recover for emotional distress even if it is not severe.
- But, The economic loss suffered does not necessarily need to be extensive.
  - *Delos v. Farmers Group, Inc*., 93 Cal.App.3d 642, 659 (App. 1979): permitting insured to sue for emotional distress based on evidence that insureds had expended "$850 of their community funds for attorney fees to prosecute their claim."

Some Jurisdictions Impose Other Limits on Emotional Distress

- **New Jersey:** Emotional distress only recoverable in "egregious" circumstances. Pickett v. Lloyd's, 131 N.J. 457, 476 (1993)
- **Delaware:** Emotional distress must be accompanied by physical injury. *Devaney v. Nationwide Mut. Ins. Co.*, 679 A.2d 71 (Del. 1996).
- **Florida:** Emotional distress is recoverable only where there has been a physical injury or "the defendant acted with such malice that punitive damages would be justified." *Saltmarsh v. Detroit Auto. Inter-Ins. Exch.*, 344 So.2d 862, 862 (Fla. App. 1977).

Other Considerations Regarding Emotional Distress Damages

- Emotional distress damages are to compensate for distress caused by the bad faith tort, not the underlying loss at issue.
  - But the stress of the underlying loss can be hard to separate from stress related to handling the claim.
- Generally, businesses and corporations cannot sue for emotional distress for bad faith failure to pay their insurance claims.

Emotional Distress: Excessive Awards

- At common law, there is not any bright-line monetary limit on the amount of damages for emotional distress that can be recovered.
- However, the court has the power to reduce or reject an award that is so "grossly disproportionate" to the damage suffered that is "raises the presumption that it is the result of passion or prejudice."
  - *Merlo v. Standard Life & Acc. Ins. Co.*, 59 Cal. App. 3d 5, 17, 130 Cal. Rptr. 416, 424 (Ct. App. 1976): reversing judgment reflecting $250,000 in damage for emotional distress and remanding for new trial.
- Remittitur: the court has the inherent power to correct excessive jury verdicts, where a verdict falls outside the reasonable range.

Recovery of Punitive Damages in Bad Faith Cases

Availability of Punitive Damages

- Most jurisdictions permit recovery of punitive damages in bad faith cases, because bad faith is generally considered a tort.
- Example of exception:
  - *Beck v. Farmers Ins. Exchange*, 701 P.2d 795 (Utah 1985): First-party bad faith claim sounds in contract, not tort, so punitive damages are not available.

Standard for Recovering Punitive Damages

- To recover punitive damages, the plaintiff must show more than bad faith.
- The standard is usually a malicious, fraudulent or "evil" motive or intent:
  - *Linthicum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 331 (Ariz. 1986): Punitive damages are only available in " those limited classes of consciously malicious or outrageous acts of misconduct where punishment and deterrence is both paramount and likely to be achieved."
- In many jurisdictions, the standard must be met by clear and convincing evidence.

Campbell: Factors for Determining Whether to Award Punitive Damages

- "… the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident."
- "The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect."

-- *State Farm v. Campbell*, 538 U.S. 408, 419 (2003)

Amount of Punitive Damages:
State Farm v. Campbell, 538 U.S. 408, 417 (2003)

- "While States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards."
  - Due process prohibits "the imposition of grossly excessive or arbitrary punishments on tortfeasors."
  - Defendants in civil cases "have not been accorded the protections applicable in criminal proceedings."

Campbell Guideposts for Determining Punitive Damages

- The degree of reprehensibility of the defendant's misconduct
- The disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award
- The difference between punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases

Reprehensibility: Previous Similar Conduct

- Dissimilar conduct cannot be considered in determining punitive damages:
  - "A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of reprehensibility analysis…" *Campbell*, 538 U.S. at 422-423.

Reprehensibility: Previous Similar Conduct

- Out-of-state conduct – whether lawful or unlawful – cannot be punished:
  - "A State cannot punish a defendant for conduct that may have been lawful where it occurred. … Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction." *Campbell*, 538 U.S. at 421-22.

Campbell: When is Prior Conduct Similar?

- An alleged general scheme to "cheat" insureds or claimants is generally not admissible, without some nexus to the specific harm suffered.
- In *Campbell*, 523 U.S. at 419-424, evidence of a general scheme to implement "nationwide policies" to meet financial goals by denying or underpaying claims should not have been considered because:
  - the evidence was admitted without regard to whether it was lawful where it occurred;
  - the evidence related to different types of clams (first party claims rather than third party clams)
  - the evidence had no "nexus" to the specific harm suffered.

When is Prior Conduct Similar?

- Factors considered in determining if the conduct is sufficiently similar to be considered for reprehensibility analysis: Same type of claim; same adjuster or office; same alleged harmful conduct.
- *Hangarter v. Provident Life and Acc. Ins. Co.*, 373 F.3d 998, 1010-11 (9th Cir. 2004):
  - Court allowed evidence of "a comprehensive system for targeting and terminating expensive claims" where benefits had been paid for "months or years" by instituting round table reviews with the goal of arbitrarily terminating claims; and there was evidence that practice was employed on plaintiff's claim.

Campbell: Ratio of Compensatory to Punitive Damages

- No "bright line" rule for an acceptable ratio between compensatory and punitive damages. *Campbell*, 538 U.S. at 424.
- But, "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id*. at 425.
- Higher ratios may be permitted where "a particularly egregious act has resulted in only a small amount of economic damages." *Id*.
- Where compensatory damages are substantial, a 1-1 ratio may "reach the outermost limit of the due process guarantee." *Id*.
- Emotional distress awards may already contain a "punitive element" that should not be duplicated in the punitive award. *Id*. at 426.
- An insurer's wealth cannot be used to justify an otherwise unconstitutional award. *Id*. at 427.

Example of Post-Campbell Punitive Damages Case:

Nardelli v. MetLife, 230 Ariz. 592 (App. 2012)

- Reduced punitive damages from $55 million to $155,000; a one-to-one ratio with compensatory damages.
- Factors considered:
  - Harm was largely economic
  - No evidence that MetLife knew of the insured's pre-existing health conditions or acted knowing its actions would aggravate them
  - Insureds were not particularly financially vulnerable
  - No "'established company policy' … to automatically make predetermined arbitration deductions and adjustments in valuing property losses"
  - Compensatory damages were substantial
  - Civil penalties for violation of the Unfair Claims Settlement Practices Act were limited to $50,000 per six month duration

Campbell at Work

- *Chasan v. Farmers Grp., Inc.*, 2009 WL 3335341 (Ariz. Ct. App. Sept. 24, 2009) (reduced punitive damages relative to compensatory damages from a 37:1 ratio to a 4:1 ratio)

- *Leavey v. Unum Provident Corp*., 295 F. App'x 255 (9th Cir. 2008) (affirmed reduction in punitive damages from 3.7:1 ratio to 1.5:1 ratio)

- *Merrick v. Paul Revere Life Ins. Co*., 500 F.3d 1007 (9th Cir. 2007) (vacated 10:1 punitive damages ratio)

Statutory Caps on Punitive Damages (Examples)

- Ohio Revised Code § 2315.21:
  - Punitive damages are limited to twice the jury's award of compensatory damages.
- Iowa Code § 34-51-3-4:
  - Punitive damages cannot exceed the greater of 3 times compensatory damages or $50,000.
- Wisconsin Statutes Annotated § 895.043:
  - Punitive damages cannot exceed twice the amount of compensatory damages or $200,000, whichever is greater.

Jury Instructions

- *Campbell,* 523 U.S. at 422: "A jury must be instructed … that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred."
- Jury generally should not be aware of constitutional or statutory caps on punitive damages.

Bifurcation of Compensatory and Punitive Damages Phases

- Advantages of bifurcation:
  - Avoids introducing potentially prejudicial evidence of wealth in liability phase
  - Conserves court resources, if no liability is found
- Fed. R. Civ. P. 42(b): a court can bifurcate a trial "for convenience, to avoid prejudice or to expedite and economize."

Bifurcation Cases

- *Cline v. 7-Eleven, Inc.*, No. 3:11-CV-102, 2012 WL 5471761, at *5 (N.D.W. Va. Nov. 9, 2012): "Bifurcating the [amount of] punitive damages issue would avoid any risk of prejudice to the Defendant which might result from having evidence of the Defendant's financial condition introduced to a jury before that jury had considered the issue of entitlement to punitives in the first place."
- *Collens v. City of New York*, 222 F.R.D. 249, 254 (S.D.N.Y. 2004): "Issues of punitive damages should normally be bifurcated from issues of liability so that proof of wealth is not admitted at the trial on liability and compensatory damages."
- *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 30 (Tex. 1994): "[E]vidence of a defendant's net worth, which is generally relevant only to the amount of punitive damages, by highlighting the relative wealth of a defendant, has a very real potential for prejudicing the jury's determination of other disputed issues in a tort case."

Statutory Schemes Mandating Bifurcation

- Ohio Revised Code § 2315.21:
  - Initial stage: "presentation of evidence" and determination of compensatory damages.
  - Second stage: whether the plaintiff is "entitled to recover punitive or exemplary damages" and the amount recoverable.
- California Code § 3295(d): evidence of a defendant's "profits of financial condition" is not admissible "until after the trier or fact returns a verdict for plaintiff … and finds defendant guilty of malice, oppression or fraud…"

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Bad Faith Insurance Litigation: Scope of Extra-Contractual Damages

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Recovery of Attorney Fees

- American Rule – a prevailing party in a civil suit generally may not recover its fees and costs associated with the litigation
- In insurance coverage litigation – exceptions exist
- Majority of states permit the recovery of attorneys' fees by a prevailing policyholder in a coverage dispute
- Disparity of bargaining power between insurer and policyholder makes the insurance contact substantially different from other commercial contracts
- Plus recognition that policyholders are purchasing peace of mind, not litigation, with insurer when a claim is made

Rationales for Recovery of Attorney Fees

- The nature of the insurance promise
  - Breach of duty to investigate
  - Breach of duty to defend
  - Breach of duty to settle
- Theory of consequential damages
- Language of the policy
- Public policy considerations
- Statutory authority
  - Legislatures in a majority of states have passed laws that provide for attorneys' fees
  - Some require bad faith, some do not

Recovery of Attorney Fees

- Some courts have found that attorney fees constitute an element of the policyholder's damages for the insurer's bad faith
- Example – under *Brandt v. Superior Court*, 37 Cal. 3d 813 (1985), an insured may recover its attorneys' fees when an insurer breaches the implied covenant of good faith and fair dealing.
  - Must prevail on the tort claim, not just the contract claim
  - Rationale for *Brandt* fees – the attorneys' fees are a type of economic loss proximately caused by the insurer's tortious refusal to pay amounts due under the policy
  - The attorneys' fees are not recoverable as fees, but as an economic loss: damages proximately caused by the insurer's tort
  - The insurer's tort made it necessary for the insured to obtain expert professional services to cure the wrong

Recovery of Attorney Fees (cont'd.)

- Fees Recoverable
  - All policy benefits unreasonably withheld. In other words, those fees attributable to the insured's efforts to prove his or her entitlement to the contract benefits.
  - Not recoverable
    - Those fees incurred to obtain any portion of the award that exceeds the amount due under the policy
    - Fees to obtain emotional distress damages
    - Fees to obtain punitive damages

Recovery of Attorney Fees (cont'd.)

- Attorneys' fees incurred in negotiations leading up to settlement of insured's policy claim and resulting from insurer's prior refusal to pay benefits are recoverable. *Mustachio v. Ohio Farmers Ins. Co.*, 44 Cal. App. 3d 358, 36364 (1975), disapproved on other grounds in *Cassim v. Allstate Ins. Co.*, 33 Cal. 4th 780 (2004)
- Fees incurred in defending against an insurer's appeal – California courts split
  - Cases allowing recovery – *Baron v. Fire Ins. Exch.*, 154 Cal. App. 4th 1184, 1198 (2007) (fees incurred to defend a judgment against insurer's coverage appeal are a "logical extension of the fees incurred in pursuing recovery in the trial court"); *Track Mortg. Group, Inc. v. Crusader Ins. Co.*, 98 Cal. App. 4th 857, 871 (2002)
  - Cases not allowing recovery – *Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc.*, 78 Cal. App. 4th 847, 909 n.17 (2000); *Burnaby v. Standard Fire Ins. Co.*, 40 Cal. App. 4th 787, 794 (1995)

Recovery of Attorney Fees (cont'd.)

- How the Amount of *Brandt* Fees are Determined
  - Insured's burden to identify which fees and costs were incurred to recover the policy benefits. *Slottow v. American Cas. Co.*, 10 F.3d 1355, 1362 (9th Cir. 1993) (applying California law)
  - Courts use a "fair and equitable apportionment." *Jordan v. Allstate Ins. Co.*, 148 Cal. App. 4th 1062, 1080 (2007)
  - In a contingency fee case, *Cassim v. Allstate Insurance Co.*, 33 Cal. 4th 780 (2004), California Supreme Court set forth a numerical formula to calculate the insured counsel's Brandt fees
  - In *Cassim*, the court ruled that the trier of fact is to "determine the percentage of legal fees paid to the attorney that reflects the work attributable to obtaining the contract recovery"

Additional Damages Recoverable

- Other Consequential Economic Losses
  - In addition to attorney fees, policyholder may recover for other financial injury proximately resulting from the insurer's bad faith
  - Tort measure extends to "all the detriment proximately caused … whether it could have been anticipated or not"
- Excess Judgment
  - Where insurer refuses a reasonable offer to settle an injured party's claim against policyholder within policy limits, it is liable for the entire judgment rendered against the policyholder
  - The excess judgment may also be recoverable on a breach of contract theory, as foreseeable consequential damages likely to result from the insurer's breach of its duty to indemnify the insured. *Archdale v. American Int'l Specialty Lines Ins. Co.*, 154 Cal. App. 4th 449, 468 (2007)

Bad Faith: Failure To Accept Reasonable Settlement – CACI 2334

1. Third party suit against insured
2. Insurer failed to accept a reasonable settlement demand for an amount within policy limits
3. A monetary judgment entered against insured for a sum greater than the policy limits

Unreasonable failure to accept: at time the demand rejected, the possible judgment likely to exceed demand

Failure To Settle: Interest of the Insured

- "[T]he implied obligation of good faith and fair dealing requires the insurer to settle in an appropriate case although the express terms of the policy do not impose such a duty."
- "The insurer, in deciding whether a claim should be compromised, must take into account the interest of the insured and give it at least as much consideration as it does to its own interest."
- "When there is great risk of a recovery beyond the policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interest requires the insurer to settle the claim."

Comunale v. Traders & General Ins. Co., 50 Cal.2d 654, 659 (1958)

Cannot Consider Coverage Defenses at Time of Settlement

- "[I]n deciding whether or not to compromise the claim, the insurer must conduct itself as though it alone were liable for the entire amount of the judgment… [T]he only permissible consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer." *Johansen v. Cal State Auto. Ass'n. Inter-Ins. Bureau*, 15 Cal.3d 9 (1975)
- "A good faith belief in noncoverage is not relevant to a determination of the reasonableness of a settlement offer." *Samson v. Transamerica Ins. Co.*, 30 Cal.3d 220, 243 (1981).
- "In determining whether an insurer has given consideration to the interests of the insured, the test is whether a prudent insurer without policy limits would have accepted the settlement offer." *Crisci v. Security Ins. Co. of New Haven, Connecticut*, 66 Cal.2d 425, 429 (1967).

Is an Excess Judgment Required?

- "An insurer that breaches its duty of reasonable settlement is liable for all the insured's damages proximately caused by the breach, regardless of policy limits." *Hamilton v. Maryland Cas. Co.*, 27 Cal.4th 718, 725 (2002)
- In the event of a "a judgment in excess of the policy limits, "the insurer is ordinarily liable to its insured for the entire amount of that judgment, excluding any punitive damages awarded." *Id.*

How to Minimize Bad Faith Exposure for Failure to Settle

- Duty to Settle
  - Steps
    - Undertake a comprehensive liability analysis
    - Understand insured's damages exposure
    - Complete coverage investigation
  - Complexities with multiple claimants
  - Assess risks in declining to fund a settlement

Recent Case Law on Duty to Settle

- California
  - *Du v. Allstate Insurance Co.*, 681 F.3d 1118, 1122 (9th Cir. 2012) (Du #1)
    - "An insurer has a duty to effectuate settlement, where liability is reasonably clear, even in the absence of a settlement demand because of the inherent conflict between insurer and insured where there is substantial risk of exposure to the insured in excess of policy limits."
- Washington
  - *Cox v. Continental Cas. Co.*, 2014 WL 2011238 (U.S.D.C., W.D. Wash. May 16, 2014)
    - Under Washington law an "unmistakable opportunity " to settle not necessary for bad faith.

Assignments of Judgments and Covenants Not to Execute

- Disputes between liability insurers and their policyholders over the settlement of claims often result in assignments. The insured settles with the claimant and assigns to the claimant any rights the policyholder has against its insurer.
- In this manner, the policyholder removes the insurer from participation and involvement in the settlement of the claim. In the typical scenario, the insured receives a release or a covenant not to execute in exchange for the assignment.
- Insurer must have the opportunity to participate in settlement negotiations to overcome the presumption of collusion.
- A final determination of liability is a prerequisite to enforcement of a stipulated judgment.

Assignability of Bad Faith Actions

- While courts generally deny third-party claimants the right to pursue a direct action against the insurer, policyholders may often assign their rights under an insurance contract to third-party claimants in exchange for the claimants' execution of a covenant not to execute a judgment against the policyholder.
- Ability to assign to a third-party claimant a bad faith action depends on several factors
  - When the assignment is made – before or after trial.
  - Typically, if assignment is made after trial, a policyholder can assign a bad faith claim to a third-party claimant, and the claimant will be entitled to seek excess limits damages from the insurer.
  - But if assignment is made before trial or is made in exchange for a stipulated judgment and a covenant not to execute, need to ensure no collusion between policyholder and third-party claimant.

Assignability – What Is Assignable

- Varies among jurisdictions
- In New York as in most jurisdictions, an assignee cannot recover excess civil judgments attributable to a punitive damages award because punitive damages are not subject to indemnification
- Some jurisdictions, such as Pennsylvania, allow assignment of bad faith actions, even where punitive damages or damages in excess of policy limits are involved

Assignability of Attorney Fees

- In California, the policyholder generally can assign only economic damages, not the right to damages for emotional distress or punitive damages
- *Brandt* Fees are assignable to a third party. *Essex Ins. Co. v. Five Star Dye House, Inc.*, 38 Cal. 4th 1252, 1264 (2006)
- *Brandt* fees do not possess any of the personal aspects that preclude assignment of certain other tort damages, such as damages for emotional distress or punitive damages

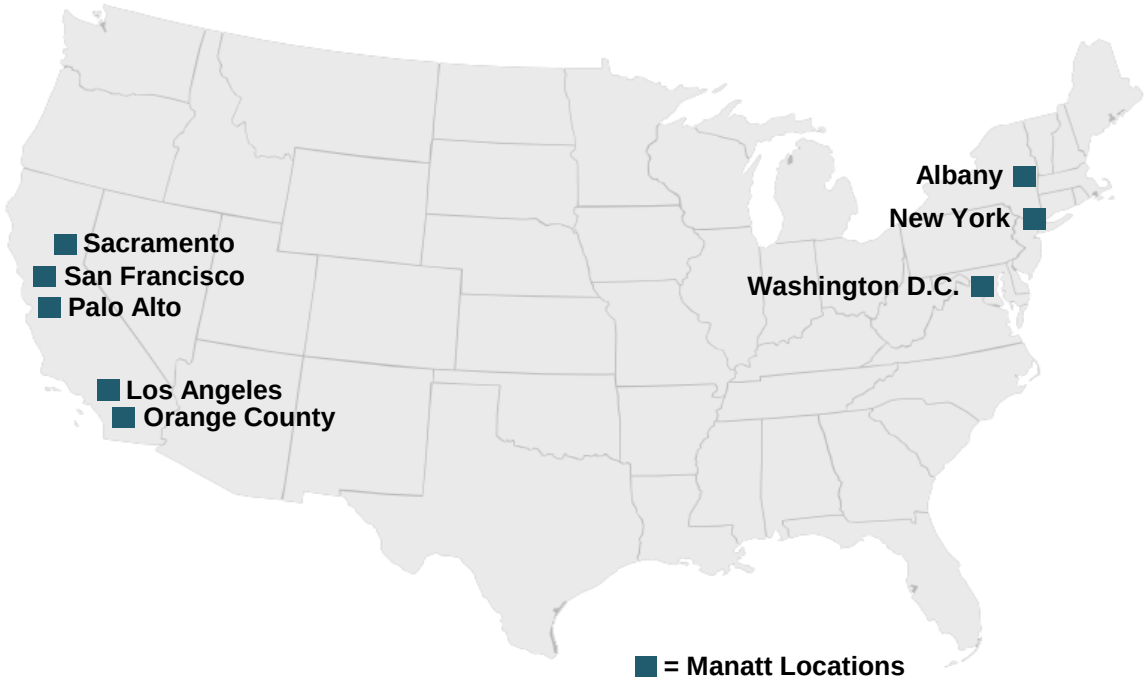
Thank You!

Susan Page White

Partner,
Litigation Recovery & Insurance

- Litigation partner in the firm's Los Angeles office.
- Over 25 years of experience representing client insured in complex insurance coverage matters, including bad faith.
- Provides advice to senior management and executives on how to mitigate risks and maximize insurance protections and recoveries with respect to policy procurement, negotiations, reviews, and renewals.

Who Is Manatt?



At-a-Glance

- Over 400 attorneys and consultants
- Industry-focused:
  - Advertising & Media
  - Energy, Environment & Natural Resources
  - Entertainment
  - Financial Services
  - Government Affairs
  - Healthcare
  - Hospitality
  - Insurance
  - Real Estate
  - Media and Entertainment
  - Not-for-Profit

Key Values

- Commitment to public service
- Entrepreneurial
- Relationship-driven approach

Rankings and Accolades

Chambers USA: America's Leading Lawyers for Business

Eight core practices and 17 firm lawyers were ranked by peers and clients as leaders in their fields in the 2010 edition of Chambers USA: America's Leading Lawyers for Business.

The Legal 500 United States

Five core practice areas and nine firm lawyers were ranked by peers and clients in 2009 as leaders in the legal profession in the third annual The Legal 500 United States.

Working Mother Magazine

Manatt named a "Best Law Firm for Women" by Working Mother magazine, for the third consecutive year, in recognition for commitment to work/life balance and the advancement of women in the law.

The Best Lawyers in America 2010

Fifty-seven of the firm's lawyers were recognized among The Best Lawyers in America 2010 for excellence in the law.

2010 Corporate Equality Index

Manatt earned the top rating of 100 percent in the Human Rights Campaign Foundation's 2010 Corporate Equality Index, an annual survey of major U.S. businesses on treatment of lesbian, gay, bisexual, and transgender employees and consumers.

American Bar Association's Pro Bono Publico Award

Manatt shared in the American Bar Association's Pro Bono Publico Award, the pro bono community's highest honor, in 2009 as part of the Holocaust Survivors Justice Network, the largest coordinated pro bono effort in U.S. history.

National Law Journal's Pro Bono Award

The firm was honored for a second year with the 2010 Pro Bono Award by the National Law Journal for the firm's role in securing victory in an environmental battle to safeguard the rights and quality of life of the residents of McCloud, CA.