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Demystifying the "Bad Faith Set-Up" in Insurance Litigation

Navigating the Space Between Aggressive Advocacy and Allegations of the So-Called Set-Up

WEDNESDAY, FEBRUARY 26, 2020

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Today's faculty features:

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Demystifying "Bad Faith Set-Up" in Insurance

February 26, 2020

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The Fundamental Basis For A Reverse Bad Faith Claim

- The duty of good faith & fair dealing is the foundational concept that parties to a contract are under a duty to act fairly and not interfere with the other's performance or reasonable expectations.
- The duty of good faith & fair dealing is implied in contracts for insurance.
  - See *Comunale v. Traders & Gen. Ins. Co.*, 50 Cal. 2d 654, 328 P.2d 198 (1958): Insurer, in deciding whether a claim should be compromised, must take into account interest of insured and give it at least as much consideration as it does to its own interest. *See also Brassil v. Maryland Cas. Co.,* 210 N.Y. 235, 104 N.E. 622 (1914).

The Fundamental Basis For A Reverse Bad Faith Claim (cont.)

- It is well established that insureds are permitted to pursue claims against insurers for the alleged breach of the implied covenant of good faith and fair dealing.
  - *Welfl v. Northland Ins. Co.,* 192 F.3d 1169 (8th Cir. 1999)
  - *Nat'l R.R. Passenger Corp. (Amtrak) v. TIG Ins. Co.,* 178 F. App'x 695 (9th Cir. 2006)
- In numerous ways, courts have relied upon this principle to hold insurers liable for breaching the implied covenant of good faith and fair dealing with their insured.

The Fundamental Basis For A Reverse Bad Faith Claim (cont.)

- The basis of a claim of reverse bad faith is that insurers should be able to bring claims against insureds for their breach of the implied covenant of good faith and fair dealing, because the covenant applies to both the insurer and the insured.
- In other words, if an insured breaches the implied covenant of good faith and fair dealing, it seems equitable and reasonable for the insurer to be able to assert a claim against it.

Example of Reverse Bad Faith

- Plaintiff files a claim for UM coverage with her auto insurer alleging that her vehicle was struck by a hit-and-run driver.
- The insurer's investigation reveals that the plaintiff lied about the hit-and-run so insurer denies plaintiff's claim.
- Plaintiff sues the insurer for coverage and the insurer counter-sues alleging that the plaintiff acted in bad faith when she lied about the hit-and-run driver.
- *See Fon v. Amica Mut. Ins. Co.*, No. CIV.A. 06-0607, 2008 WL 1932074 (Mass. Super. Apr. 30, 2008)

No Statutory Basis For Reverse Bad Faith Claims

- Aside from the state of Tennessee, it appears that there are no state statutes expressly authorizing a reverse bad faith claim.
- Tenn. Code Ann. § 56-7-106 allows an insurer to recover up to 25% of the amount claimed by an insured if the insured did not bring a suit against the insurer in good faith and caused the insurer to suffer damages and unnecessary expense.
- *Adams v. Tennessee Farmers Mut. Ins. Co.,* 898 S.W.2d 216 (Tenn. Ct. App. 1994) (holding that statute allowed defendant insurer to collect from plaintiff insured the expenses it incurred in defending the insured's bad faith claim).

Status of a Claim of Reverse Bad Faith

- Every court that has ruled on reverse bad faith has rejected it, either at the trial or appellate level. Those trial courts that have accepted it have been reversed.
- "A common law tort claim for reverse bad faith has not been recognized in any jurisdiction, although it is true that only a handful of jurisdictions have addressed the issue." *State Auto Prop. & Cas. Ins. Co. v. Hargis*, 785 F.3d 189, 192 (6th Cir. 2015)

Status of a Claim of Reverse Bad Faith

- An insurance policy is an adhesion contract.
- Policyholder performs at onset of contract; insurance company much later (if at all)
- Often no longer any corresponding benefit to insurance company performance
- Countervailing legal mechanisms include
  - ambiguities are construed narrowly against the insurance company
  - terms in an insurance policy are given their ordinary, commonly used meaning
  - policies are interpreted pursuant to the objectively reasonable expectations of the insured.
- It is in this context that the policyholder's bad faith cause of action developed.

Status of a Claim of Reverse Bad Faith

- These circumstances give rise to a higher duty on the part of the insurance company to the policyholder.
- Duty to settle within limits
- Duty to resolve claims promptly
- Similar basis for the recognition of a bad faith cause of action on the part of the policyholder against the insurance company.

Status of a Claim of Reverse Bad Faith

- None of the equities that led to a bad faith cause of action on the part of policyholders exist for the insurance company. No public policy exists to create a reverse bad faith cause of action.
- Reverse bad faith is essentially a way to intimidate the insured
- Every contract has a covenant of good faith and fair dealing. No case law where insurance company has relied on that covenant to assert reverse bad faith.

Status of a Claim of Reverse Bad Faith

- "As the holder of the purse strings, the insurer has a certain built-in protection from such evils. On the other hand, the insured, who often finds himself in dire financial straits after the loss, must have the equal footing which is provided by the ability to sue the insurer for bad faith. There are other avenues for the insurer to pursue in the event that an insured submits a fraudulent claim. An insurer drafts the policy, can refuse the insured's claim, and could assert a cause of action against the insured for fraud." *State Auto Prop. & Cas. Ins. Co. v. Hargis*, 785 F.3d 189, 192 (6th Cir. 2015)

Reverse Bad Faith By Another Name: Comparative Bad Faith

- An insurer may defend a bad faith claim by asserting that an insured simultaneously acted in bad faith, thus excusing the insurer's actions, waiving its right to coverage, or justifying a reduction in recovery for any alleged bad faith of the insurer.
- It is "an affirmative defense, premised upon principles of comparative fault, which allocates fault and apportions damages according to harm inflicted by both the insurer's and insured's bad-faith conduct." *First Bank of Turley v. Fid. & Deposit Ins. Co. of Maryland*, 928 P.2d 298, 307 (Okla. 1996)
- Most common examples:
  - Insured's breach of cooperation clause
  - Insured's failure to be deposed or produce documents
  - Insured's impairment of insurer's subrogation rights
  - Insured's failure to comply with notice provisions and resulting prejudice to insurer
  - Insured's submission of fraudulent claim or collusion with third-party plaintiff

Cases In Which Reverse Bad Faith Claims Have Been Rejected

- *Kransco v. Am. Empire Surplus Lines Ins. Co.,* 23 Cal. 4th 390, 2 P.3d 1 (2000) held that an insurer could not raise comparative bad faith as a defense.
  - The California Supreme Court held that an insurer's and insured's duties of good faith were not equivalent due to the inherent unequal footing of the parties.
  - The insured's duty of good faith was held to be purely based on the insurance contract, while the insurer had an additional duty sounded in tort.
  - While the insurer can still bring breach of contract claims against its insured, and an insured's fraud is still grounds for tort damages, the court eliminated the claim of reverse bad faith.
  - Subsequent cases have likewise held an insurer cannot assert a reverse bad faith claim against its insured.
    - *Endurance Am. Specialty Ins. Co. v. Lance-Kashian & Co.*, CV F 10–1284 LJO DLB, 2010 WL 3619476 (E.D. Cal. Sept. 13, 2010).
    - *Hale v. Provident Life & Acc. Ins. Co*., 2003 WL 1510463 (Cal. Ct. App. Mar. 25, 2003).
    - *Hangarter v. Paul Revere Life Ins. Co.,* 236 F. Supp. 2d 1069 (N.D. Cal. 2002), *aff'd in part, rev'd in part sub nom., Hangarter v. Provident Life & Acc. Ins. Co.,* 373 F.3d 998 (9th Cir. 2004).

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Cases In Which Reverse Bad Faith Claims Have Been Rejected (cont.)

- In *Houchin v. Allstate Indem. Ins. Co.*, 4:07-CV-00071-M, 2012 WL 2430474 (W.D. Ky. June 26, 2012), the court dismissed the insurer's counterclaim for reverse bad faith because "[t]he Court is not aware of any jurisdiction that has recognized a cause of action for reverse bad faith." *Id.* at *4.
- Courts are naturally reluctant to create new causes of action or expand the law where other jurisdictions have declined to do so.

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Cases In Which Reverse Bad Faith Claims Have Been Rejected (cont.)

- Courts often rely upon the power dynamic inherent in the insurer-insured relationship in order to characterize the obligations owed and remedies available to each party.
- *Stephens v. Safeco Ins. Co. of Am.*, 258 Mont. 142, 852 P.2d 565 (1993)
  - Supreme Court of Montana declined to compare insurer and insured's bad faith.
  - The court held that the parties' different positions and concerns limited the analysis of bad faith to the insurer's conduct.
  - The Court held that an insurer's bad faith can rise to the level of a tort, while an insured's can only be a breach of contract.

Cases In Which Reverse Bad Faith Claims Have Been Rejected (cont.)

- *Hartford Roman Catholic Diocesan, Corp. v. Interstate Fire and Cas. Co.*, 199 F.Supp.3d 559, 600 (D. Conn. 2016)
  - Insurer asserted an affirmative defense that the "Archdiocese's claim is barred by its own inequitable conduct and bad faith". *Id.* at 598.
  - A prior Connecticut Superior Court case had refused to strike an insurer's affirmative defense of bad faith.
  - The Federal District Court considered Kransco and other cases from outside jurisdictions.
  - The court held that while the Connecticut Supreme Court had never confronted the issue, it would likely not recognize reverse bad faith as an affirmative defense given prior Connecticut decisions on the insurer's duty of good faith due to unequal bargaining power, along with persuasive decisions from other jurisdictions.
  - The District Court's decision is currently on appeal.

Cases In Which Reverse Bad Faith Claims Have Been Rejected (cont.)

- *Bowlers' Alley, Inc. v. Cincinnati Ins. Co.*, 108 F. Supp. 3d 543, 568-69 (E.D. Mich. 2015)
  - Insurer sought to recover attorney's fees and expenses of investigating a claim for which it was not liable based on the policyholder's breach of a policy condition.
  - An earlier Michigan state court case had held that costs of investigation of a claim are not recoverable as consequential damages for a policyholder's failure to cooperate.
  - The Federal Court also noted the Sixth Circuit *Hargis* case.
  - The court ruled that although the failure to cooperate in the adjustment process may support an insurance company's affirmative defenses, it does not provide a basis for affirmative relief and dismissed the counterclaim.

States that have specifically denied a reverse bad faith cause of action

- Oklahoma – *First Bank of Turley v. Fidelity and Deposit Ins. Co.*, 928 P.2d 298 (Okla. 1996)
- "[Reverse bad faith] creates an independent tort that allows an insurer to seek affirmative relief for an insured's breach of the duty of good faith and fair dealing."
- "We hence hold that an insured's misperformance of its contractual duty is neither a "free-standing" ex contractu breach nor a civil harm actionable in tort as an incident of the insurer/insured status."

States that have specifically denied a reverse bad faith cause of action

- Iowa – *Johnson v. Farm Bureau Mut. Ins. Co.*, 533 N.W.2d 203 (Supreme Court Iowa 1995).
- "[The insurer] argues that we should recognize a cause of action for 'reverse bad faith' when an insured brings a frivolous bad faith claim against the insurer."
- "However, we are aware of no jurisdiction that has adopted the tort of reverse bad faith." "…sanctions under Iowa Rule of Civil Procedure 80(a)provide an adequate remedy to insurance companies when an insured files a frivolous bad faith claim."

States that have specifically denied a reverse bad faith cause of action

- Ohio – *Tokles & Son v. Midwestern Indem. Co.*, 605 N.E.2d 936 (Ohio 1992)
- "Midwestern argues that even if we do not recognize the new tort of reverse bad faith, its counterclaim alleges fraud."

Cases In Which Courts Have Potentially Recognized A Reverse Bad Faith Claim

- Our research has not disclosed any decisions that have held an insurer has established a valid and viable claim for reverse bad faith.
- The issue of a reverse bad faith claim appears to be open in the jurisdictions except for those that have rejected such claims, which include California, Connecticut, Hawaii, Iowa, Kentucky, Michigan, Montana, New Jersey, Ohio, Oklahoma, Oregon, and Rhode Island.

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Cases In Which Courts Have Seemingly Acknowledged In Dicta Reverse Bad Faith

- *Flick v. Union Security Life Ins. Co.*, 1996 WL 251873 (E.D. Pa. 1996)
  - Life Insurance case in which the decedent insured misrepresented his treatment for heart problems
  - Evidence showed that on a disability form, decedent insured noted his abnormal angina
  - On insurance application, insured falsely indicated he had never received medical care for angina.
  - Court found insured acted in bad faith and insurer relied on his material misrepresentation.
  - Court granted summary judgment on behalf of insurer and declared policy void.

Cases Where Courts Have Seemingly Acknowledged In Dicta A Reverse Bad Faith Claim (cont.)

- In *Callahan v. Norfolk & Dedham Grp.,* NOCV2007-0265, 2009 WL 3282941, at *8 (Mass. Super. Aug. 6, 2009), the court noted that the insurer's defense of reverse bad faith "need not be reached in deciding the merits of the [insured]'s case" because the insured's claims for unfair claims settlement practices were dismissed.
- The court did not rule on the insurer's reverse bad faith defense but did deny the insured's motion to strike the insurer's defense, and noted that "the insurer's action in raising this issue, in the circumstances presented here, was not inappropriate." *Id*. at *9.

Cases In Which Courts Have Seemingly Acknowledged In Dicta Reverse Bad Faith (cont.)

- In *Shannon v. New York Cent. Mut. Ins. Co.*, 3:13-CV-1432, 2013 WL 6119204 (M.D. Pa. Nov. 21, 2013), a third party claimant asserted bad faith claims against an insurer (assigned from the insured).
- The insurer's answer included allegations that the plaintiff's attorney "orchestrated" a "bad faith set-up" to obtain punitive damages. *Id.* at *1.
- The court allowed the insurer's affirmative defense to stand, holding that it was relevant to an analysis of the insurer's actions.

Cases In Which Courts Have Seemingly Acknowledged In Dicta Reverse Bad Faith (cont.)

- In *AMEC Constr. Mgmt. v. Fireman's Fund Ins. Co.,* 13-718-JJB, 2015 WL 12862920 (M.D. La. February 27, 2015), the court denied a motion to dismiss the insurer's claim for breach of the duty of good faith and fair dealing against the successor in interest to its insured.
- The court found that, "considering the context of the alleged insured/insurer relationships," the claim was "highly unlikely to ultimately succeed," but held that the claim could withstand the motion to dismiss. 2015 WL 12862920 at *1.

Cases In Which Courts Have Seemingly Acknowledged In Dicta Reverse Bad Faith (cont.)

- *Granite State Ins. Co. v. Integrity Structures, LLC,* 2015 WL 136006 (W.D. Wash. Jan. 9, 2015), was characterized by the court as a "reverse bad faith case."
  - After the insurer commenced a DJ action, the insured and its assign asserted counterclaims including bad faith against the insurer.
  - The insurer demonstrated that its insured and its assign executed a consent judgment, failed to inform the insurer, hindered the insurer's investigation, and misled the insurer as to whether the insured was seeking coverage.
  - The court granted partial summary judgment for the insurer, dismissing the insured's claims for bad faith, based in part on the evidence of a bad faith "set up."
  - Issues of fact remained as to the competing breach of contract claims and the insurer's claims against the insured.

Cases In Which Courts Have Seemingly Acknowledged In Dicta Reverse Bad Faith (cont.)

- In *Utica Mut. Ins. Co. v. Century Indem. Co.,* No. 6:13-CV-995, 2015 WL 3429116 (N.D.N.Y. May 11, 2015), a reinsurer sought leave to amend its answer and add a counterclaim for reverse bad faith, based on its reinsured's alleged manipulation of records.
- The reinsured argued that reverse bad faith claims were contrary to New York law, but it could not provide controlling authority expressly rejecting such a claim.
- The reinsurer argued that, because a reinsured owed a duty of utmost good faith under New York law, there had to be some remedy for the breach of such a duty.
- The court held that the claim was sufficiently plausible under New York law in the context of reinsurance such that allowing the amended pleading was proper. In doing so, the court was careful to specify that it was not opining on the likelihood of success of the claim.

Cases In Which Courts Have Seemingly Acknowledged In Dicta Reverse Bad Faith (cont.)

- *XTO Energy, Inc. v. ATD, LLC*, No. CIV 14-1021 JB/SCY, 2016 WL 1730171 (D.N.M. Apr. 1, 2016)
  - Noted that New Mexico has not adopted a comparative bad faith defense.
  - Also observed that "commentators have suggested that a comparative bad-faith defense may be applicable where an insured breaches the cooperation clause in an insurance policy and thereby prejudices the insurer." 2016 WL 1730171 at *30.
  - Ultimately held that the insurer could argue its defense to bad faith claims without requested discovery.

Possible Benefits Of Asserting A Reverse Bad Faith Claim

- The insurer can combat the insured's bad faith claim by attacking the insured's actions and motivation for bringing the claim.
- The insurer can attempt to recover costs spent in defending the underlying complaint from the insured.
- The action may discourage insureds from asserting frivolous bad faith claims against the insurer or trying to "set up" bad faith claims with claimants through a consent judgment.

Possible Disadvantages Of Asserting A Reverse Bad Faith Claim

- There is a potentially large expense of prosecuting a reverse bad faith claim involving significant discovery.
- If the underlying action is still active, the insured will not be inclined to cooperate and assist the insurer's defense of the claim.
- It may be easier for the insurer to assert coverage defenses, (e.g. failure to cooperate / provide notice), or bring a common law fraud claim against its insured – the end result can be similar, i.e. avoidance of the policy and damages/costs.
- If the insurer brings a reverse bad faith counterclaim to its insured's bad faith action or raises reverse bad faith as an affirmative defense, the attack on the insured could sour a judge or jury and harm the insurer's case.

Alternatives to Reverse Bad Faith

- An insurer can assert a claim for fraud against the offending insured.
- *See Neidenbach v. Amica Mut. Ins. Co.*, 842 F.3d 560 (8th Cir. 2016)(Sixth Circuit refused to permit an insurer to claim reverse bad faith because the insurer could assert a claim for fraud against the insured.
- "[t]here are other avenues for the insurer to pursue in the event that an insured submits a fraudulent claim. An insurer drafts the policy, can refuse the insured's claim, and could assert a cause of action against the insured for fraud."

Conclusions With Respect To Claims For Reverse Bad Faith

- Reverse bad faith claims turn on the applicable law, so insurers must research the controlling precedent.
  - In some jurisdictions, courts have rejected reverse bad faith as a matter of law.
  - In other jurisdictions, courts have addressed the concept in dicta.
  - Some jurisdictions have not yet addressed reverse bad faith claims.
  - Insurers should think creatively in asserting a claim for reverse bad faith.
- Insurers should document their files on a contemporaneous basis to document wrongful conduct by the insured
- Insurers should communicate to the insured where the insured is not acting appropriately
- Consider using outside resources to investigate and further document the insured's actions

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Bad Faith Set Up

What Is "Bad Faith Set Up"?

- A defense available to an insurer facing a bad faith claim is that the claim was improperly "set up."
- In a "set up," a demand is made on an insurer within or up to policy limits with the express purpose of using the insurer's refusal against it in a bad faith claim. 3 Law and Prac. of Ins. Coverage Litig. § 29:6
- A bad faith claim can be asserted by:
  - The insured, demanding coverage of a settlement with a third party or payment of a first party claim. *Coventry Associates v. Am. States Ins. Co.,* 136 Wash. 2d 269, 961 P.2d 933 (1998)
  - A third party claimant, demanding the insurer consent to a settlement with its insured. *Pavia v. State Farm Mut. Auto. Ins. Co*., 82 N.Y.2d 445, 605 N.Y.S.2d 208 (1993).
  - An excess insurer, demanding that a primary insurer settle a claim below the excess insurer's limits. *California Union Ins. Co. v. Excess Ins. Co.*, 780 F. Supp. 1010 (S.D.N.Y. 1991) ("In the context of settlements this duty [to the excess insurer] obligates an insurer to attempt to settle a claim where liability is clear and the potential for recovery far exceeds the primary coverage limit") (internal quotations and citations omitted).

Third Party "Bad Faith Set Up"

- "Bad Faith Set Ups" most frequently occur in a Third Party context, where claims for bad faith first occurred. Stephen S. Ashley, *§ 10:3 The Ethics of Setting Up Insurance Companies* in Bad Faith Actions: Liability & Damages (2d ed.).
  - The tort claimant will often manipulate negotiations of settlement forcing the insurer to reject any settlement demands for the policy limit. Paul Dwight, et. al., *Bad Faith Update: Trends Tips and (Sand) Traps*.

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First Party "Bad Faith Set Up"

- First Party "set ups" occur with claims that involve property, no-fault automobile insurance or underinsured motorist insurance. James A. Dodrill, et. al., *Bad Faith Set-Ups of Insurance Companies* (March 4-7, 2015); Douglas R. Richmond, *An Overview of Ins. Bad Faith Law & Litig*., 25 Seton Hall L. Rev. 74, 104,140 (1994).
- First Party "set ups" are less common than Third Party "set ups" because there are "fewer opportunities for creative set-up strategies," but they still occur. Stephen S. Ashley, *§ 10:3 The Ethics of Setting Up Insurance Companies* in Bad Faith Actions: Liability & Damages (2d ed.).
  - Parties engage in "Bad Faith Set Ups" in the First Party context by making large demands and short deadlines for approval. Paul Dwight, et. al., *Bad Faith Update: Trends Tips and (Sand) Traps*.

Judicial Treatment Of "Bad Faith Set Up"

- Courts have rejected claims of bad faith asserted against insurers when evidence shows that the claim was merely the result of a "set up."
- In *DeLaune v. Liberty Mut. Ins. Co.,* 314 So. 2d 601 (Fla. Dist. Ct. App. 1975), an injured claimant offered to settle with the insurer for $10,000, but gave the insurer only ten days to accept.
  - The court held that the deadline, and the claimant's rejection of the insurer's acceptance days after the deadline showed "that this whole charade might have been a 'set up'" for the bad faith claim.

Judicial Treatment Of "Bad Faith Set Up" (cont.)

- *Roberts v. Printup*, 595 F.3d 1181 (10th Cir. 2010).
  - The court held that it was concerning that there was an "incentive to manufacture bad faith claims by shortening the length of the settlement offer, while starving the insurer of the information needed to make a fair appraisal of the case." 595 F.3d 1181, 1189.
- *AAA Nevada Ins. Co. v. Vinh Chau*, 808 F. Supp. 2d 1282 (D. Nev. 2010), *aff'd*, 463 F. App'x 627 (9th Cir. 2011)
  - The court held that a party's demand letter to an insurer that included an "arbitrary" two week deadline to settle was unreasonable, "and appears to be nothing more than an attempt to set up a potential bad faith claim."
  - The court held that the insurer did not lack a reasonable basis to not settle the claim within the time period of the demand letter, because it was doing all it could to investigate the claim.

Judicial Treatment Of "Bad Faith Set Up" (cont.)

- *Striegel v. Am. Fam. Mut. Ins. Co.*, 2:13-cv-01338-GMN-VCF, 2015 WL 4113178 (D. Nev. July 7, 2015).
  - The court held that a "two-week per person policy limit settlement demand" was unreasonable in light of the fact that the plaintiff "was still in the process of gathering the medical records and bills" and the fact that there where seven bodily injury claims made against the policy. 2015 WL 4113178, at *11-14.
- *Gonzalez v. GEICO Gen. Ins. Co.*, 8:15-cv-240-T-30TBM, 2017 WL 39113 (M.D. Fla. Jan. 4, 2017)
  - The court held that witnesses testifying as to the motive and conduct of the underlying plaintiff in order to demonstrate that the bad faith claim was a 'set up' was admissible and not "unfairly prejudicial." 2017 WL 39113, at *2.

Judicial Treatment Of "Bad Faith Set Up" (cont.)

- *Lopez v. Allstate Fire & Cas. Ins. Co.*, 14-20654-Civ-COOKE/TORRES, 2015 WL 5320916 (S.D. Fla. Sept. 14, 2015).
  - Third Party brought bad faith suit against insurer for failure to settle claims made against the insured resulting in excess judgments. 2015 WL 5320916, at *1.
  - Insurer's affirmative defense was "Bad Faith Set Up". *Id.* at *8-10.
  - The Court ruled in the insurer's favor on a motion for Summary Judgment. *Id.* at 10.

Not All Courts Recognize a "Bad Faith Set Up" Defense

- Miller v. Byrne, 916 P.2d 566 (1995).
  - Plaintiff made a settlement demand with a 12 day deadline and when insured tried to seek clarification as to the demand, plaintiff's attorney did not return phone calls. 916 P.2d 566, 569. Insurer was willing to settle for $5,000 less than the full policy limits which was rejected by plaintiff's attorney without informing plaintiff.
  - The court held that "the motivation or intent of Sweeny to 'set up' Southern or the Attorneys for a bad faith claim does not, on this record, appear to meet the tests of legal materiality or logical relevance." *Id.* at 576.
- Rynd v. Nationwide Mut. Fire Ins. Co., 8:09-cv-1556-T-27TGW, 2011 WL 4754520 (M.D. Fla. Oct. 4, 2011).
  - The Court held that witness testimony was properly excluded "because it related solely to the claimed 'set-up' defense. A defense Florida law does not recognize." 2011 WL 4754520, at *14.

“Bad Faith Set Up” Red Flags

- Making a settlement offer knowing that the insurer likely cannot comply with it.
- Making an unrealistic and arbitrary settlement offer. *Berges v. Infinity Ins. Co*., 896 So. 2d 665, 685-93 (Fla. 2005) (Wells, J. & Cantero, J. dissenting); “ [this] strategy which consists of setting artificial deadlines for claims and the withdrawal of settlement offers when the artificial deadline is not met,” seeks to “convert a policy purchased by the insured which has low limits of insurance into unlimited coverage.”

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“Bad Faith Set Up” Red Flags Cont.

- Making a settlement offer right after an accident occurred. Stephen S. Ashley, *§ 10:3 The Ethics of Setting Up Insurance Companies* in Bad Faith Actions: Liability & Damages (2d ed.);
- Making a settlement offer that provides a short period of time for acceptance and no opportunity to extend the time to accept. *DeLaune v. Liberty Mut. Ins. Co.,* 314 So. 2d 601 (Fla. Dist. Ct. App. 1975); Plaintiff’s refusal to accept the offer of settlement on Monday, just after the deadline passed on Friday, was a key indicator that the plaintiff never had any intention of settling.
- Requiring that acceptance of a settlement offer be done by means other than affirmatively stating “we accept”. Stephen S. Ashley, *§ 10:3 The Ethics of Setting Up Insurance Companies* in Bad Faith Actions: Liability & Damages (2d ed.);

Tips For Preventing and Defending "Bad Faith Set Up" Claims

As a general rule:

- Insurers should be responsive and reasonable when dealing with claimants.
- Insurers should undertake a timely and comprehensive evaluation of liability and damages.
- Insurers should also take a timely and comprehensive evaluation of underlying facts and coverage issues.
- Insurers should timely communicate in writing their positions to insureds.
- Insurers should thoroughly and timely document their claims file.
- Insurers should seek assistance from third-party professionals when needed.

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Policyholder (Reverse) Bad Faith Strategies

- Best Practices Are Universal
  - Put Everything In Writing
  - 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

Cooperation

- **Be Creative with Compliance**
- **Emphasize Cooperation**
- **Avoid Saying No**
- **Invite Insurance Company to View Documents On Site**
- **Privilege**

Settlement

- Policy language
- Is There Independent Counsel?
- Permission Before Forgiveness
- Give Insurance Company Reasonable Time For Response
- Use Sharp Deadlines When Necessary
  - eve of trial
  - imposed by claimant
  - effect on business finances

Settlement

- Provide notice to all excess insurance companies that might be reached by judgment excess of the limits of the primary policy.
- Encourage the excess companies to communicate with the primary insurance company.
- Ask excess company to fund settlement and consider offering your rights against primary comp[any.

Thank You

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