

Washington Bad Faith Law

By Matthew King

Every insurer has a legal duty to act in good faith. This duty is one of fair dealing and a responsibility to give equal consideration to the insured's interests.¹ To avoid bad faith claims an insurer must comply with both the legislative and judicial standards.² In addition, the Insurance Commissioner created regulations defining unfair claims practices.³ Under RCW 19.86.920, there is an implied reasonableness requirement in defining unfair methods of competition or unfair or deceptive acts or practices.⁴

An insured cannot prove bad faith solely on the ground that the insurer's decision was incorrect.⁵ "Mistakes and clumsiness alone do not amount to bad faith."⁶ An insurer acts in bad faith only when the position it takes is unreasonable, frivolous, or untenable.⁷

Bad faith claims are brought under the Consumer Protection Act.⁸ However an insurer may be negligent, even where no bad faith exists.⁹ A CPA claim has five elements: (1) an unfair or deceptive act or practice; (2) that occurs in trade or practice; (3) impacts the public interest; (4) injury plaintiff's business or property; and (5) a causal link between the unfair or deceptive acts and the injury.¹⁰ An insurer's breach of its duty of good faith constitutes a *per se* violation of the CPA.¹¹

Typical Bad Faith Acts

What follows are short descriptions of typical bad faith situations and how the courts have dealt with them.

Denial of Defense/Coverage

An insurer may not deny defense of a claim unless those claims are clearly not covered.¹² However, where the duty to defend is denied and sufficient ambiguity exists regarding the policy, a bad faith claim will not be successful and the insured's unfair or deceptive act or practice claim also fails.¹³

Wrongful Refusal to Pay a Claim

An insurer may be liable for a wrongful refusal to pay a claim.¹⁴ Simply making an offer to settle for lower than the amount the insured actually recovers is not bad faith.¹⁵ The test of bad faith is whether the insurer has a reasonable justification for the low offer.¹⁶

Prompt Investigation of Claims

An insurer also must promptly

investigate claims.¹⁷ However, where no evidence exists that an insurer committed the violation with such frequency as to indicate a general business practice the CPA claim fails.¹⁸ However, an insurer did violate the CPA when it failed to respond to a claim for five months, despite insured's repeatedly request for permission to begin mitigation.¹⁹

Failure to Settle Within Policy Limits

An insurer agrees to "pay on behalf of the insured all sums which the insured shall become obligated to pay as damages,"²⁰ subject to the policy limits.²¹ An insurer must also indemnify its insured judgments that impose damages for a covered event.

An insurer's general obligation of good faith and fair dealing requires it to settle even though policy may not specifically impose that duty.²² This duty to settle arises out of an insurer's right to control the defense.

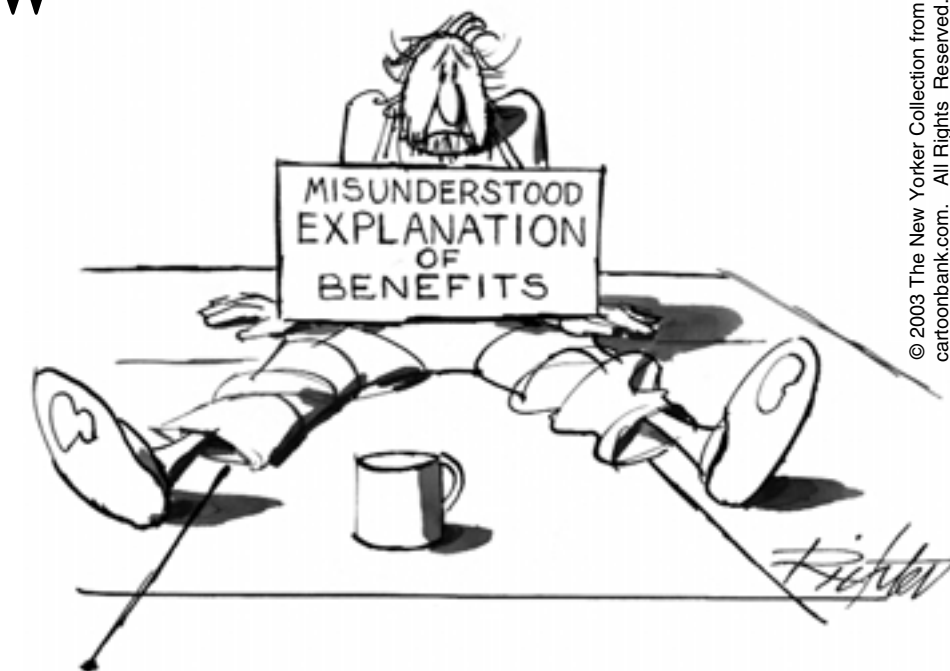
Negligence Claims

An insurer also has a duty to exercise reasonable care with respect to the interests of its insured.²³ Even if an insurer acts in good faith, it may be liable to its insured for any proximal negligence.²⁴ In order to prove a negligence claim against an insurer, an insured must establish that the insurer was at "fault" as that term is defined in RCW 4.22.015.

In that respect, a negligence claim against an insurer is no different than any other negligence claim. In proving a negligence claim, an insured may show noncompliance with WAC § 284-30-300 (1992). However, a violation of those standards no longer constitutes negligence *per se*. Further, the court makes a threshold determination, regarding whether a duty exists, before submitting an insured's negligence theory to the trier of fact.²⁵

Remedies

Policyholders who win on a bad-faith or negligence claim against their insurers are entitled to tort remedies.²⁶ However, no Washington court has specifically addressed the general measure of damages in this context. An insurer's breach of its duty of good faith constitutes a *per se* violation of this act; the remedy includes costs, attorney fees and treble damages.²⁷ In the negligence context, the plaintiff is limited to damages



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proximately caused by the negligent acts.

Third Party Claims

WAC 284-30-300 has several standards that appear to apply to third-party claimants against a tortfeasor's insurer. However, an injured party has no right to assert a bad faith claim against the tortfeasor's insurer.²⁸ The Washington Supreme Court has held that a third party claimant may not sue a tortfeasor's insurance company directly for any alleged breach of the duty of good faith under a liability policy.²⁹

One exception to this rule is when the third-party claimant is assigned the insured's rights under the policy. To do this, the third-party claimant and the insured covenant to not execute against the insured. Then the insured-tortfeasor assigns his coverage and bad-faith claims against his insurer to the third-party claimant. Finally, the third-party claimant and the insured consent to a judgment.³⁰ Note that no-assignment clauses in the policy do not prohibit assignments "made after the events giving rise to liability have already occurred."³¹

Bad faith claims are designed to reign-in insurers when they step out of line. However, they should not be used to force an insurer to settle claims where genuine issues exist regarding the negligence of the insured and contributory fault of the plaintiff. ■

1 *Tank v. State Farm Ins. Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986).
2 *Id.* at 386, RCWA 48.02.030.
3 WAC 284-30-330
4 *American Mfrs. Mut. Ins. Co. v. Osborn*, 104 Wn. App. 686, 17 P.3d 1229, review denied, 144 Wn.2d 1005, 29 P.3d 717 (2001).
5 *Transcontinental Ins. Co. v. Washington PUD Util. Sys.*, 111 Wn.2d 452, 470, 760 P.2d 337 (1988).

6 *Ins. Co. of Pennsylvania v. Highlands Ins. Co.*, 59 Wn. App. 782, 786, 801 P.2d 284 (1990).
7 *Liberty Mut. Ins. Co. v. Tripp*, 144 Wn.2d 1, 25 P.3d 997 (2001).
8 RCW 19.86.
9 *First State Ins. Co. v. Kemper Nat'l Ins. Co.*, 94 Wn. App. 601, 612, 971 P.2d 953 (1999) (Where the court allowed instructions on both negligence and bad faith because they are two separate causes of action).
10 *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986).
11 *Gingrich v. Unigard Sec. Ins. Co.*, 57 Wn. App. 424, 788 P.2d 1096 (1990).
12 *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 951 P.2d 1124 (1998).
13 *DeWitt Constr. Inc. v. Charter Oak Fire Ins. Co.*, 307 F.3d 1127 (9th Cir. 2002).
14 *WAC 284-30-330(7); Gould v. Mutual Life Ins. Co.*, 37 Wn. App. 756, 683 P.2d 207 (1984).
15 *Keller v. Allstate*, 81 Wn. App. 624, 915 P.2d 1140 (1996).
16 *Ellwein v. Hartford Accident & Indem. Co.*, 142 Wn.2d 766; 15 P.3d 640 (2000).
17 WAC 284-30-330(3).
18 *Underwriters at Lloyds v. Denali Seafoods, Inc.*, 729 F. Supp. 721 (W.D. Wash. 1989), *aff'd*, 927 F.2d 459 (9th Cir. 1991).
19 *Wolf Bros. Oil Co. v. International Surplus Lines Ins. Co.*, 718 F. Supp. 839 (W.D. Wash. 1989).
20 *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 874, 784 P.2d 507 (1990).
21 *Hamilton v. State Farm Ins. Co.*, 83 Wn.2d 787, 788, 523 P.2d 193 (1974).
22 *Tyler v. Grange Ins. Ass'n*, 3 Wn. App. 167, 173 n.6, 473 P.2d 193 (1970).
23 *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 394, 823 P.2d 499 (1992).
24 *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 394, 823 P.2d 499 (1992).
25 *Stouffer & Knight v. Continental Cas. Co.*, 96 Wn. App. 741, 753, 982 P.2d 105 (1999).
26 *Gain v. Carroll Mill Co.*, 114 Wn.2d 254, 257, 787 P.2d 553 (1990).
27 *Gingrich v. Unigard Sec. Ins. Co.*, 57 Wn. App. 424, 788 P.2d 1096 (1990).
28 *Planet Ins. Co. v. Wong*, 74 Wn. App. 905, 909, 877 P.2d 198 (1994); *Smith v. Safeco*, 112 Wn. App. 645, 50 P.3d 277 (2002).
29 *Tank v. State Farm Ins. Co.*, 105 Wn.2d 381, 394, 715 P.2d 1133 (1986).
30 *Chaussee v. Maryland Cas. Co.*, 60 Wn. App. 504, 803 P.2d 1339 (1991).
31 *Public Util. Dist. No. 1 v. International Ins. Co.*, 124 Wn.2d 789, 800, 881 P.2d 1020 (1994).

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