

BAD FAITH IN WASHINGTON

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An insurer's bad faith can give rise to two related causes of action under Washington law: 1) a cause of action for bad faith sounding in tort, and 2) a cause of action for unfair trade practices pursuant to the Washington Consumer Protection Act ("WCPA"). See Overton v. Consolidated Ins. Co., 145 Wn.2d 417, 433 – 434, 38 P.3d 322 (2002). The WCPA cause of action is derivative of the tort cause of action. See Griffin v. Allstate Ins. Co., 108 Wn. App. 133, 148 n. 52, 29 P.3d 777 (2001). Although the two causes of action are interrelated, they do have distinct elements of proof and damages as discussed below.

A. Elements Of Bad Faith Causes Of Action

1. Tort of insurance bad faith

An insurer's duty of good faith is established by both statute and common law. See American Manufacturers Mutual Ins. Co. v. Osborn, 104 Wn. App. 686, 697, 17 P.3d 1229 (2001) citing Tank v. State Farm Fire & Casualty Co., 105 Wn.2d 381, 385, 715 P.2d 1133 (1986). The statutory requirement of insurance good faith is found in RCW § 48.01.030, which states:

The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.

See RCW § 48.01.030.

An insurer's breach of its statutory and common law duties of good faith gives rise to the tort of bad faith. See Griffin, 108 Wn.App. at 143. In order to recover for the tort of bad faith the insured must prove that: 1) its insurer breached the duty of good faith, and 2) the insured was harmed by its insurer's breach of the duty of good faith. See Coventry Associates v. American States Ins. Co., 136 Wn.2d 269, 276, 961 P.2d 933 (1998).

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2. Washington Consumer Protection Act bad faith

The WCPA created a statutory cause of action to protect against “unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” See RCW § 19.86.020; RCW § 19.86.090. An insurer’s breach of its duty of good faith constitutes an unfair business act and gives rise to a cause of action for violation of the WCPA. See Leingang v. Pierce County Medical Bureau, Inc., 131 Wn.2d 133, 149, 930 P.2d 288 (1997).

The elements of a WCPA cause of action are: 1) defendant engaged in an unfair or deceptive act or practice, 2) in trade or commerce, 3) that impacts the public interest, 4) an economic injury to plaintiff, and 5) a causal link between the unfair or deceptive act and plaintiff’s injury. See Leingang, 131 Wn.2d at 149. As Washington courts have established that insurance claims handling constitutes commerce that impacts the public interest, in the insurance context the insured must simply prove that it was injured by an unfair practice of its insurer in order to establish a WCPA claim. See Osborn, 104 Wn.App. at 697.

B. Acts Or Omissions That Constitute Bad Faith Under Washington Law

1. Acts or omissions defined by statute

Pursuant to RCW § 48.30.010, the Washington Insurance Commissioner has defined specific “unfair” and “deceptive” insurance trade practices. If the insured can prove that its insurer engaged in any of the following practices, it has met its burden of demonstrating that: 1) the insurer breached its duty of good faith for the purposes of a tort claim, and 2) the insurer engaged in an unfair or deceptive act or practice for purposes of a WCPA claim. See Osborn, 104 Wn.App. at 697. The prohibited practices are:

- (1) Misrepresenting pertinent facts or insurance policy provisions;
- (2) Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;
- (3) Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;
- (4) Refusing to pay claims without conducting a reasonable investigation;
- (5) Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;

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- (6) Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear. In particular, this includes an obligation to effectuate prompt payment of property damage claims to innocent third parties in clear liability situations. If two or more insurers are involved, they should arrange to make such payment, leaving to themselves the burden of apportioning it;
- (7) Compelling insureds to institute or submit to litigation, arbitration, or appraisal to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in such actions or proceedings;
- (8) Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application;
- (9) Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which the payments are being made;
- (10) Asserting to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;
- (11) Delaying the investigation or payment of claims by requiring an insured, claimant, or the physician of either to submit a preliminary claim report and then requiring subsequent submissions which contain substantially the same information;
- (12) Failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage;

- (13) Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement;
- (14) Unfairly discriminating against claimants because they are represented by a public adjuster;
- (15) Failure to expeditiously honor drafts given in settlement of claims. A failure to honor a draft within three working days of notice of receipt by the payor bank will constitute a violation of this provision. Dishonor of any such draft for valid reasons related to the settlement of the claim will not constitute a violation of this provision;
- (16) Failure to adopt and implement reasonable standards for the processing and payment of claims once the obligation to pay has been established. Except as to those instances where the time for payment is governed by statute or rule or is set forth in an applicable contract, procedures which are not designed to deliver a check or draft to the payee in payment of a settled claim within fifteen business days after receipt by the insurer or its attorney of properly executed releases or other settlement documents are not acceptable. Where the insurer is obligated to furnish an appropriate release or settlement document to an insured or claimant, it shall do so within twenty working days after a settlement has been reached;
- (17) Delaying appraisals or adding to their cost under insurance policy appraisal provisions through the use of appraisers from outside of the loss area. The use of appraisers from outside the loss area is appropriate only where the unique nature of the loss or a lack of competent local appraisers make the use of out-of-area appraisers necessary;
- (18) Failing to make a good faith effort to settle a claim before exercising a contract right to an appraisal;
- (19) Negotiating or settling a claim directly with any claimant known to be represented by an attorney without the attorney's knowledge and consent.

This does not prohibit routine inquiries to an insured claimant to identify the claimant or to obtain details concerning the claim;

See WAC § 284-30-330.

2. Acts or omissions defined by common law

In addition to the statutorily-specified instances of bad faith discussed above, Washington courts have found other acts by insurers to constitute bad faith as a matter of law. If the insured can prove that its insurer engaged in any of the following acts or omissions, it has met its burden of demonstrating that: 1) the insurer breached its duty of good faith for the purposes of a tort claim, and 2) the insurer engaged in an unfair or deceptive act or practice for purposes of a WCPA claim. See Industrial Indemnity Co. of the Northwest, Inc. v. Kallevig, 114 Wn.2d 907, 923, 792 P.2d 520 (1990). The following acts or omissions have been held to constitute bad faith by Washington courts:

- (1) Failure to conduct a reasonable claims investigation. See Griffin, 108 Wn. App. at 146 – 147;
- (2) Failure to negotiate in good faith. See Tyler v. Grange Ins. Association, 3 Wn. App. 167, 179, 473 P.2d 193 (1970);
- (3) Failure to settle within policy limits. See Chaussee v. Maryland Cas. Co., 60 Wn. App. 504, 509, 803 P.2d 1339 (1991);
- (4) Failure to defend. See Truck Ins. Exchange v. Vanport Homes, Inc., 147 Wn.2d 751, 764 – 5, 58 P.3d 276 (2002);
- (5) Wrongful denial of coverage. Id.

3. Additional duties when an insurer provides a defense subject to a reservation of rights

When an insurer accepts the defense of its insured pursuant to a reservation of rights, the insurer assumes the following additional duties:

- (1) Thoroughly investigate the cause of the insured's accident and the nature and severity of plaintiff's injuries;
- (2) Retain competent defense counsel for the insured;

- (3) Fully inform the insured of the reservation of rights defense and all developments relevant to policy coverage and the progress of the lawsuit;
- (4) Refrain from engaging in any action that would demonstrate a greater concern for the insurer's financial interest than for the insured's financial risk.

See Safeco Ins. Co. of America v. Butler, 118 Wn.2d 383, 388, 823 P.2d 499 (1992).

C. Damages For Bad Faith Under Washington Law

1. Tort damages

Damages for the tort of insurance bad faith may include consequential damages, coverage by estoppel, and costs and attorney's fees.

a. Consequential damages

Consequential damages arising from insurance bad faith potentially include personal injuries and emotional distress. See Osborn, 104 Wn. App. at 698.

b. Coverage by estoppel

If Underwriters are found to have acted in bad faith, Underwriters may be estopped from denying coverage. "Once the insurer breaches an important benefit of the insurance contract, harm is assumed, the insurer is estopped from denying coverage, and the insurer is liable for the judgment." Kirk v. Mt. Airy Ins. Co., 134 Wash.2d 558, 564, 51 P.2d 1124 (1998). That is, Underwriters will be prohibited from raising any coverage defenses – even if otherwise valid – and will be held liable for an insured's entire claim.

c. Costs and attorney's fees

Under Washington law an insurer is liable for its insured's attorney's fees if it compels the insured to result to litigation to receive the benefits of the insurance contract. See Olympic Steamship Co., Inc. v. Centennial Ins. Co., 117 Wn.2d 37, 52, 811 P.2d 673 (1991). If an insured brings a bad faith claim against Underwriters it will likely do so in conjunction with a declaratory action seeking coverage, which, if successful, would result in an award of attorney's fees. If Underwriters were to admit coverage and an insured were simply to bring a freestanding bad faith claim, attorney's fees would not be recoverable. See Anderson v. State Farm Mutual Ins. Co., 101 Wn.App. 323, 337 – 338, 2 P.3d 1029 (2000). However, even if coverage was not

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at issue, an insured would still be entitled to its attorney's fees if its WCPA bad faith claim was successful, as discussed below.

2. Washington Consumer Protection Act damages

Available damages for a successful WCPA insurance bad faith claim include actual economic damages of up to \$10,000, attorney's fees, fines and penalties, cease and desist orders, and the denial, suspension or revocation of the insurer's license. See Hayden v. Mutual of Enumclaw Ins. Co., 141 Wn.2d 55, 63, 1 P.3d 1167; WAC 284-30-400; RCW 19.86.090; RCW 19.86.140; RCW 48.05.140; RCW 48.30.010. In practice, we are unaware of a WCPA claim resulting in damages other than actual damages of up to \$10,000 and attorney's fees. Non-economic damages and coverage by estoppel are not available as WCPA damages.