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Insurance Bad Faith

Navigating The Southern Bad-Faith Buffet: Extra-Contractual Liability In The Absence Of Breach Of Contract

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Commentary

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I. Introduction

In the Southeast, catastrophic natural disasters have become all too common, and the physical and financial consequences are borne by the entire region. Five of the top ten costliest hurricanes to hit the United States have impacted North Carolina, and with approximately $159.6 billion in insured coastal assets, North Carolina continues to have significant loss exposure.[1] The exposure pervades the entire Southeast. The top four costliest hurricanes have impacted Georgia, while the top three have impacted States as far south as Alabama and north as Virginia.[2] Of the eleven most hurricane-prone counties in the U.S., five are in Louisiana, three are in Florida, and two are in North Carolina.[3] The damage wrought by Hurricanes Katrina, Charley, Frances, Ivan, Jeanne, Wilma, Irene, and "Superstorm" Sandy, as well as the spate of tornadoes across Alabama and others, are well chronicled. To the unwary out-of-state practitioner, variations in state law across the Southeast, particularly the availability of extra-contractual actions, can amplify the impact of a major loss event.

According to a 2011 article published by Zurich North America, civil litigation has increased, on average, by more than five percent annually since 2008, with contract litigation being the most common type.[4] Given that extra-contractual claims, both statutory and common law, in first-party property coverage disputes are on the rise, the stakes for insurance litigation consistently loom over the most attentive claims professional. In many States today, the stakes are even higher, as an insurer may be liable for extra-contractual damages *even without breaching the insurance contract*. One such State is Florida.[5]

In a recent Florida decision, an insured was permitted to "back-door" a bad faith claim through the contract's appraisal provision despite, as a matter of law, failing to prove that the insurer breached its policy. The "Troubles of *Trafalgar*" have recently been discussed, in detail, in this space.[6] This Article attempts to build on "The Troubles of *Trafalgar*" by identifying which other Southeastern states may permit an insured to recover extra-contractual damages in the absence of contractual liability. Accordingly, by first understanding its venue and legal environment, an insurer may then undertake the necessary precautions to best protect its interests.

II. The Southeast—The Good, The Bad, And The Ugly

A. The Ugly—Where Bad Faith Exists In The Absence Of Contractual Liability

Unlike much of the Southeast, North Carolina, South Carolina, and Tennessee expressly permit an insured

to recover statutory bad faith, common law bad faith, or in some cases both, even when an insurer has *correctly* interpreted the insurance contract. The following sections highlight key issues that plague insurers in these jurisdictions.

1. The Tar Heel State

In North Carolina, unlike most other States in this survey, an insurer may be found liable for common law and statutory bad faith, without actually breaching the insurance contract. Specifically, a court may allow an insured to prosecute a common law claim for bad faith and a statutory bad faith claim under N.C. Gen. Statute § 58-63-15, *i.e.*, the Unfair Trade Practices Act, even after it has dismissed the insured's breach of contract claim. The recent (ongoing) federal district court case of *Kielbania*, *et al. v. Indian Harbor Insurance Company*, applying North Carolina law, exemplifies such a holding.[7]

In *Kielbania*, plaintiffs-insured owned a building in Beech Mountain, North Carolina. Following an accidental fire, the insureds submitted their claim and its insurer did not dispute that the policy covered the loss. Rather, it disputed only the amount of loss, and the application of the policy's "coinsurance provision" and "inflation rider."[8]

To arrive at the amount of loss, the insurer reported that the replacement cost value ("RCV") was just over $1 million, and actual cash value ("ACV") of the damaged property was slightly lower. Although the insurer's construction consultant stated that additional, unaccounted water damage was present in the building and that the current estimates would need to be amended, they never were.[9] The insurer disclosed these values to the insured, who disagreed, contending that the RCV was approaching $2.5 million, or more. Although numerous errors in the insurer's estimate purportedly existed, the insurer's adjuster reported, internally, that it was "time to pay the undisputed [ACV] loss" and "let the chips fall where they may." This payment though, like the amendments to the prior estimate, was never made.[10]

After proceeding through appraisal, where predictably a figure between the two sides' positions was reached, and the appraisal award was paid, net of deductibles and coinsurance, the insureds filed suit for breach of contract, common law bad faith, and statutory bad faith under North Carolina's Unfair Trade Practices Act.[11] Both parties filed cross-motions for summary judgment. The court granted the insurer's motion on coverage, sustaining its interpretation of the policy's coinsurance provision and inflation guard endorsement, but denied it on bad faith.[12]

Specifically, the court held, a North Carolina insured may establish a violation of the State's Trade Practices Act, *i.e.*, statutory bad faith, by identifying: (1) a particular unfair or deceptive act; (2) that affected commerce; and (3) that proximately caused the insured injury.[13] North Carolina General Statute 58-63-15 specifies the particular prohibited conduct, which as a matter of law, constitutes an unfair or deceptive act within commerce.[14] In addition, an insurer may be held liable for common law bad faith. Under this latter claim, an insured may recover punitive damages if it refuses in bad faith to settle a valid claim and aggravating or outrageous conduct is present.[15] Prevailing on such claims may entitle the insured to not only resulting damages, but also, punitive damages and attorneys' fees.

The insureds in *Kielbania* complained that the insurer failed to promptly effectuate settlement in good faith; offered substantially less than the insureds ultimately recovered; settled the claim for a less than a reasonable amount; and failed to promptly provide a reasonable explanation for its compromise of the claim.[16] The insureds contended the insurer had omitted several rooms and thousands of square feet from its estimates, failed to consider potential water damage in its estimate, or include in its later estimates, items and issues it had acknowledged were deficient. Further, during the appraisal process, the insurer's adjuster allegedly recommended an umpire whom he viewed would "lean toward" him, and attempted to engage in *ex parte* communications with the umpire. The court therefore held that although the foregoing may not evidence a breach of "good faith", a reasonable jury may find otherwise. Thus, the court permitted the insureds to continue prosecuting both of their bad faith claims, despite finding for the insurer on coverage.[17]

While of course, the *Kielbania* opinion is just one federal district court's opinion as to the handling of one insurance claim, the fact that an appraisal award, properly paid as a matter of law, does not insulate an insurer from the potentially oppressive and costly "bad

faith" litigation, cannot be overemphasized. Appraisal in North Carolina, as in Florida, is not an automatic "exit ramp" from the claim.

2. South Carolina

In South Carolina, like North Carolina, an insurer may be liable for bad faith without breaching the policy. The primary difference with North Carolina is that South Carolina permits the insured to recover only common law bad faith damages, as statutory damages are recoverable only by the State's Insurance Commissioner. A leading case interpreting this issue under South Carolina law is the federal district court decision of *Ocean Winds Council of Co-Owners, Inc. v. Auto-Owners Insurance Company*.[18]

In *Ocean Winds*, the insured, a condominium complex, alleged breach of contract, common law bad faith, and improper claims practices under South Carolina Codes §§ 38-59-20 and 38-59-40. The insured based its claims on the insurer's refusal to indemnify a "collapse". The insurer disputed these claims, contending that, according to South Carolina law, the collapse was not covered because no threat of "imminent collapse"—*i.e.*, "likely to happen without delay"—was established.[19]

The District Court agreed. Although the insured produced affidavits attesting that the "buildings were under *a threat* of collapse with a significant weather or seismic event," the court found such testimony insufficient, as "[m]any buildings are subject to collapse in the event of a significant weather or seismic event." Accordingly, the court granted the insurer's motion for summary judgment.[20]

The insurer's summary judgment motion on the "bad faith" counts was not so fortunate. "[I]f an insured can demonstrate bad faith or unreasonable action by the insurer *in processing a claim* under their mutually binding insurance contract, he can recover consequential damages in a tort action," as well as attorneys' fees. Succinctly put, the court held that a "breach of an express contractual provision is not a prerequisite to bringing a bad faith cause of action." Sufficient evidence existed to create a genuine issue of material fact as to the insurer's good faith claims handling under the common law action, and summary judgment was denied.[21]

Notably, the South Carolina District Court did not permit the insured to prosecute its *statutory* bad faith claim. South Carolina statutes §§ 38-59-20 and 38-59-40, which are part of its Improper Claim Practices Act, forbid an insurer from unreasonably processing or settling an insured's claim. This Act, according to the South Carolina Supreme Court, permits only the Chief Insurance Commissioner—not a private party—to prosecute such an action. Because the text of § 38-59-20 does not draw any distinction between first- and third-party claims and the South Carolina Supreme Court has already precluded private causes of action on third party claims, the Court in *Ocean Winds* held that first-party private causes of action are also prohibited.[22]

3. Tennessee

In Tennessee, unlike South Carolina, statutory bad faith actions *are* permitted, while common law bad faith actions are *prohibited.*[23] Namely, an insured may prosecute, via the "bad faith statute" and State Consumer Protection Act, claims for bad faith in the absence of contractual liability. One of the most significant decisions on this issue is the Supreme Court of Tennessee's holding in *Myint v. Allstate Insurance Company*.[24]

In *Myint*, the insureds owned two rental apartments in the Nashville area. After discovering multiple water leaks in the second floor unit, which damaged the first floor unit, the insureds commenced repairs and filed a claim with Allstate.[25] Allstate denied the claim and subsequently informed the insureds that it was terminating coverage because of the insured property's overall poor condition. After two fires later engulfed the property, the insureds filed further claims with Allstate, which Allstate denied. Ultimately, the insureds filed suit against Allstate, seeking indemnification for all losses and alleging claims for breach of contract, violation of Tennessee Statute 56-7-105, commonly known as the "bad faith statute," and violation of Tennessee Statute 47-18-101, *et seq.*, also known as Tennessee's Consumer Protection Act.

Prior to trial, the district court dismissed the Consumer Protection Act claim, holding that the bad faith statute was the insured's sole remedy. At trial, the jury found in favor of the insureds on the breach of contract claim and for Allstate on the bad faith statute claim. The Appellate Court affirmed in all respects, except for reversing the award of prejudgment interest. The insureds then appealed to Tennessee's Supreme Court.[26]

The Supreme Court reversed in part and affirmed in part. Relative to the issue of bad faith, the Court stated, "the Consumer Protection Act is remedial, rather than regulatory in nature, and it specifically provides a private right of action for *any* 'unfair or deceptive acts or practices affecting the conduct of any trade or commerce.' "[27] "[T]o exempt insurance companies from the purview of the Consumer Protection Act would frustrate the purposes of the Act."[28] Further, the insurance regulations in Title 56, Chapters 7 and 8 "do not foreclose the application of the Consumer Protection Act", as the "mere existence of comprehensive insurance regulations does not prevent the Consumer Protection Act from also applying to the acts or practices of an insurance company.[29] In this context, the legislature has enacted a trilogy of statutes which, on their face, apply to unfair and deceptive insurance trade acts and practices."[30] Simply, the Court continued, the Consumer Protection Act is "*complementary* legislation that accomplishes different purposes" and as such, "the acts and practices of insurance companies are generally subject to the application of all three."[31] The Supreme Court, though, affirmed the lower courts' dismissal of the Consumer Protection Act claim, because the Record did not reveal any "attempt by Allstate to violate the terms of the policy, deceive the Myints . . ., or otherwise act unfairly."

Thus, under *Myint*, an insured may prosecute bad faith claims under Tennessee's Bad Faith Statute and its Consumer Protection Act—but not for common law bad faith.[32]

B. The Bad—Where Good Faith Isn't Always Good Enough

In Kentucky and Texas, unlike North Carolina, South Carolina, and Tennessee, an insured is usually prohibited from asserting a bad faith claim in the absence of contractual liability. Nevertheless, Kentucky and Texas do have their idiosyncrasies. For instance, in Kentucky, once an insured has established a breach of the policy, he may prosecute multiple statutory and common law bad faith claims; while in Texas, "the possibility" exists that an insurer may be liable for bad faith, even after *correctly* denying a claim. Accordingly, while the law in these jurisdictions may be more favorable than North Carolina, South Carolina and Tennessee, the difference may be in the eye of the beholder.

1. The Bluegrass State

In Kentucky, as noted above, once an insured establishes a breach of contract claim, he may also assert multiple statutory and common law bad faith claims.[33] The Kentucky Supreme Court decision of *Davidson v. American Freightways, Inc.* is instructive. In *Davidson*, victims of a two-truck accident brought a personal injury claim against the self-insured motor carrier of the other truck. After recovering damages, the victims alleged that the motor carrier was also liable for its bad faith failure to promptly settle the claim.[34] After the Circuit and Appellate Courts of Kentucky sustained summary judgment rulings in favor of the carrier, the victims appealed. On appeal, the Supreme Court affirmed.

For years, the Court began, we have "recognized a cause of action premised upon an insurer's bad faith refusal to settle a third-party liability claim which resulted in a verdict in excess of the insured's policy limits."[35] Although we recognized but later precluded common law first-party bad faith claims premised upon an insurer's failure to settle, we have since "overruled" this holding.[36] Since then, we have "recognized two statutory bad faith causes of action, the first, a first-party action premised upon an insurer's violation of Kentucky Statute 367.170, *i.e.* the Consumer Protection Act, and the second, a third-party action premised upon a violation of the Unfair Claims Settlement Practices Act ("UCSPA").[37] Accordingly, the Court concluded that while both, statutory and common law remedies remain viable in Kentucky, neither may exist "[a]bsent a contractual obligation."[38] Simply, without a contractual obligation to pay, in Kentucky, "there exists no statutory or common law basis for a bad faith claim. . . ."[39]

2. The Lone Star State—Which Never Says Never

In Texas, as in most states, the historical axiom was that a claim of bad faith was not viable absent a breach of the insurance policy. A recent decision by the Texas Supreme Court in *Arnold v. National County Mutual Fire Insurance Company* indicates that this may not always be the case. In this decision, the Court noted that Texas, like other jurisdictions, requires an insurer has a duty to deal fairly and in good faith with its insured when processing and paying claims.[40] A breach of that duty is established when: (1) there is an absence of a reasonable basis for denying or delaying payment of benefits under the policy and (2) the carrier knew or should have known that there was not a reasonable basis for denying the claim or delaying payment of the claim.[41] Further, this is an objective test.[42]

To establish bad faith, an insured must identify "malicious, intentional, fraudulent, or grossly negligent conduct."[43] "The insurer [must have been] actually aware that its action would probably result in extraordinary harm not ordinarily associated with breach of contract or bad faith denial of a claim—such as death, grievous physical injury, or financial ruin."[44] Despite this, though, the Texas Supreme Court then concluded its analysis by holding that it has not excluded "the possibility that in denying the claim, the insurer may commit some act, so extreme, that would cause injury independent of the policy claim."[45] Apparently taking this to heart, a recent district court decision, in *Intermodal Equipment Logistics, LLC and Seatrain Logistics, LLC v. Hartford Accident Indemnity Company*, echoed this analysis, as the court, there, held that although the insurer had not breached its policy with its insured, a question of material fact existed as to whether the insurer processed the insured's claim in bad faith.[46]

Accordingly, in the Lone Star State, statutory bad faith claims are prosecuted by the Commissioner of Insurance, while insureds may prosecute only common law claims.[47] However, in either case, a breach of contract may not need to be present. Insurers can expect concerted efforts from policyholder representatives to pry open the sliver of daylight afforded by *Arnold* and maintain "bad faith" actions longer than previously anticipated.

C. The 'Good' Bad Faith Law—If Such A Thing Exists

Southern Hospitality: The remaining Southeastern States in our survey (Mississippi, Arkansas, Alabama, Georgia, Virginia and Louisiana) appear to have it (for now). They typically permit either common law or statutory bad faith and only with a breach of contract. The following discussion highlights the particular standards within each jurisdiction which an insured must meet in order to prosecute a claim of bad faith.

1. Mississippi, Arkansas, Alabama and Georgia—Statutory or Common Law Bad Faith, and Only When the Contract is Breached

In Mississippi, an insured may allege only common law bad faith; and to establish such a claim, he "must prove by a preponderance of [the] evidence that the insurer acted with (1) malice, or (2) gross negligence or reckless disregard for the rights of others."[48] The general rule is that if, as a matter of law, there is an "arguable reason" for the insurance company to deny liability, punitive damages are improper—regardless of whether the insurance company prevails on the issue of liability.[49] Simply, according to the Mississippi Supreme Court, the "issue of punitive damages should not reach the jury [when] reasonable minds could differ as to the . . . legitima[cy of the policy] claim."[50]

Bad faith in Arkansas is much like Mississippi: an insured may prosecute only a claim for common law bad faith and only when a breach of contract has occurred.[51] According to the Arkansas Supreme Court, the tort of bad faith is an extension of the well-established rule that an insurance company may be held liable for its failure to settle a claim within policy limits.[52] Affirmative conduct must be present; and such conduct must be "dishonest, malicious, or oppressive . . . ."[53] Further, neither the mere failure to investigate a claim nor simply denying a claim is the sort of affirmative misconduct that gives rise to bad faith.[54] Rather, a breach of contract must exist, and so too must impermissible conduct "at the time the action is commenced."[55]

The foregoing is echoed in Alabama. Like its Sister States to the west, Alabama permits only a common law bad faith claim and only when a breach of contract occurs.[56] "Every contract contains an implied in law covenant of good faith and fair dealing; this covenant provides that neither party will interfere with the rights of the other to receive the benefits of the agreement. Breach of the covenant provides the injured party with a tort action for 'bad faith' notwithstanding that the acts complained of may also constitute a breach of contract."[57] The Alabama Supreme Court has held that this premise means that a bad faith claim will lie only upon a breach of contract and only when such a breach has occurred with knowledge or reckless disregard of a lack of a reasonable basis.[58]

Finally, in Georgia, unlike Arkansas, Alabama and Mississippi, bad faith is governed by statutory law; in particular, O.C.G.A. § 33-4-6, *et seq.*[59] "To support a cause of action under OCGA § 33-4-6, the insured bears the burden of proving that the refusal to pay the claim was made in bad faith. An insurer may defeat this claim by identifying that reasonable and probable existed for the refusal."[60] Simply, when there is any doubt as to the legal issue at hand, an insurer shall not be liable.[61] Accordingly, in Georgia,

an insured may establish bad faith only by demonstrating a "frivolous and unfounded denial of liability" or such analogous conduct during the claim's adjustment.[62] In either case, however, a breach of contract must also occur.[63]

2. Virginia—For Lovers (and Insurers)

Unlike every other State discussed in this Survey, in Virginia, the tort of bad faith does not exist. According to the Supreme Court of Virginia, the operative statute is Virginia Code § 38.2-209. This Statute is the exclusive remedy for bad faith conduct, as it precludes a separate cause of action but does permit an insured to recover his reasonable attorneys' fees and costs.[64] To obtain this relief, an insured must show that "reasonable minds" could not have differed on such things as "the interpretation of policy provisions defining coverage and exclusions [or] whether the insurer had made a reasonable investigation of the facts and circumstances underlying the insured's claim . . . ."[65] Further, such relief is typically available only after judgment has been entered.

For instance, in *Cradle v. Monumental Life Insurance Co.*, the Eastern District of Virginia held that a "claim under § 38.2–209 may only be brought once a judgment is entered against the [insurer]."[66] Likewise, in *Tiger Fibers, LLC v. Aspen Specialty Insurance Co.*, the Eastern District of Virginia again held that "[a] claim under § 38.2-209 may . . . be brought . . . only as a source of recovery of costs and attorney's fees once judgment is entered against the insurer."[67] Although the Supreme Court of Virginia has not ruled whether a claim for bad faith may only be asserted after a judgment has been entered against an insurer, it has stated that § 38.2–209 "allows an insured to recover costs and reasonable attorneys' fees in a declaratory judgment action brought by the insured against the insurer, if the trial court determines that the insurer was not acting in good faith when it denied coverage or refused payment under the policy."[68] Implicit in this explanation is the requirement that judgment must be entered against an insurer on the policy before costs and fees under § 38.2–209 are recovered.[69] Accordingly, while there is no controlling precedent regarding whether judgment is a prerequisite to recover § 38.2-209 damages, the general rule is that such a ruling must first occur.

3. Louisiana

Finally, in Louisiana, like most Southeastern States, an insured may not prosecute a statutory bad faith claim under the State's Unfair Trade Practices Act.[70] However, Louisiana statutes do govern the damages recoverable for bad faith. For instance, Louisiana Revised Statute § 22:1892 provides that failure to timely pay or attempt to settle a claim in certain circumstances shall subject the insurer to liability "when such failure is found to be arbitrary, capricious, or without probable cause."[71] Similarly, Louisiana Revised Statute § 22:1973 states that an insurer that breaches its "duty of good faith and fair dealing" shall be subject to statutory penalties.[72] To evidence such breaches, however, an insured must show on a case-by-case basis that an insurer acted "arbitrarily, capriciously, or without probable cause".[73] "Bad faith," as that term is contemplated in the jurisprudence, means "more than just bad judgment or negligence; it implies a dishonest purpose or evil intent."[74] An insurer that has a reasonable basis for denying coverage or reasonable doubts as to whether coverage applies does not act in bad faith. Indeed, such an insurer "has the right to litigate . . . questionable claims without being subjected to damages and penalties."[75] Accordingly, under Louisiana law, an insurer does not act in bad faith simply because it was wrong, and when bad faith is established, the damages are prescribed by statutory law.[76]

III. The Recourse

In the Southeast, southern hospitality, by and large, remains. Of the eleven States discussed herein, six unambiguously require a breach of contract; and all require conduct above and beyond simple mistake. However, the increasingly litigious first-party arena has given us hints, at least in North and South Carolina, that the seemingly unconscionable result in *Trafalgar* in Florida may repeat itself elsewhere, and soon. The claim professional must not oversimplify the analysis, and attempt to rely upon a victory in the underlying contract litigation to safeguard itself from "bad faith" exposure and risk. While seemingly obvious, the trend in the law appears to be leading towards factual dissection of the claim adjustment process, to locate "bad faith" conduct that will survive even the most appropriate of claim payments.

First, an insurer should be aware of the particular law that will govern the policy at issue and the time constraints *that* adjudicating jurisdiction prescribes. Where the policy was negotiated, issued and delivered, as well as the location of the risk involved, among other factors, will impact which state or federal law governs. Further,

most States fix the amount of time an insurer has to respond to claim communications, issue proofs of loss, investigate a claim and/or render a claim decision. Ignoring such local procedural land mines can have significant repercussions.

Second, when an insurer needs information from its insured, relative to the claim, the insurer should readily request this information, utilizing the array of tools afforded within its insurance contract, such as the Sworn Statement in Proof of Loss, Examination Under Oath, ability to request documents and records, and ability to inspect the property. The purpose of every request must be known, and be defensible as reasonable and appropriate, and the results must be properly analyzed and evaluated, by the claim professional, its experts and attorneys.

Third, when an insurer believes that the policy may not cover the insured's claim, but its investigation is not yet complete, the insurer should readily reserve its rights as permitted under the given state's law, and keep the insured reasonably apprised of the progress of the investigation. Many bad faith claims are solely the result of poor communication, either internally or externally, and thus, can many times be avoided through open lines of communication.

Finally, an insurer should readily seek legal advice when the situation merits it. Too often, insurers may not be fully aware of the particulars of their jurisdiction which may silently set up a reasonable claims investigation for more exposure, litigation and expense. In the right circumstances, counsel can assist the claim professional to evaluate the applicable law, the coverage position of the insured, the law affecting the parties' coverage positions, and/or the significance of the loss. Unfortunately, for some, these issues are often unresolved until *after* the insured has filed suit. By this time, the facts are written and the litigation—especially when bad faith claims loom—is more expensive, litigious, and protracted than otherwise necessary. Early detection of adjustment issues in the loss state can often help the insurer avert the pitfalls discussed in our survey, and protect itself moving forward.

Endnotes

1. Contract Litigation Insurance: A Weapon That Can Help Prepare Your Company For Battle. Zurich North America, August 2011, Zurich American Insurance Company.
2. *Id.*
3. *Id.*
4. *Id.*
5. Trafalgar at Greenacres, Ltd. v. Zurich American Ins. Co., 100 So. 3d 1155 (Fla. 4th DCA 2012).
6. John J. Pappas, Thomas A. Keller, and Timothy R. Engelbrecht, "*The Troubles of Trafalgar: Bad Faith in the Absence of Breach of Contract*," Mealey's Litigation Report: Insurance Bad Faith, Vol. 26, #10 (Sept. 27, 2012).
7. Kielbania, et al. v. Indian Harbor Ins. Co., No. 1:11CV663, 2012 WL 3957926 (M.D.N.C. Sept. 10, 2012).
8. *Id.*
9. *Id.* at 2.
10. *Id.* at 3-4.
11. *Id.* at 7-10.
12. *Id.* at 10.
13. *Id.* (citing N.C. Gen. Stat. § 75-1.1).
14. *Id.* (citing N.C. Gen. Stat. § 58-63-15(11)).
15. Kielbania, 2012 WL 3957926, at 12.
16. *Id.* at 10.
17. *Id.* at 11-12; *see also* Robinson v. N.C. Farm Bureau Ins. Co., 356 S.E.2d 392, 395 (N.C. App. 1987) (stating that there is "nothing in the case law which requires that the tortuous conduct be accompanied by a breach of the contract, even though most, if not all, of the cases have as a factual background the insurance company's refusal pay. We do not believe an action for punitive damages from tortuous conduct is precluded when the company eventually pays, if bad faith delay and aggravating conduct is present.").

18. Ocean Winds Council of Co-Owners, Inc. v. Auto-Owners Insurance Company, 241 F. Supp. 2d 572 (D.S.C. 2002).

19. *Id.* at 573-74.

20. *Id.* at 574-76.

21. *Id.* at 576-77 (emphasis in original); *see also* Tadlock v. Painting Co. v. Maryland Cas. Co., 473 S.E.2d 52, 53-55 (S.C. 1996) (holding that an insured may prosecute and recover damage in a bad faith claim despite the absence of any breach by the insurer of the insurance contract).

22. *Id.* at 577.

23. *See* T.C.A. § 56-7-105; Fred Simmons Trucking, Inc. v. U.S. Fidelity and Guar. Co., 2004 WL 2709262 at *5 (Tenn. Ct. App. 2004); Persian Galleries, Inc. v. Transcontinental Ins. Co., 38 F.3d 253, 260 (6th Cir.1994); Rice v. Van Wagoner Cos., Inc., 738 F. Supp. 252, 253 (M.D. Tenn. 1990); Chandler v. Prudential Ins. Co., 715 S.W.2d 615 (Tenn. Ct. App. 1986).

24. Myint v. Allstate Ins. Co., 970 S.W.2d 920 (Tenn. 1998).

25. *Id.* at 923.

26. *Id.* at 923-24.

27. *Id.* at 925 (citing Tenn. Code. Ann. §§ 47-18-104(a) and -109(a)(1) (1995 and Supp. 1997)).

28. *Id.*

29. *Id.* at 925.

30. *Id.* at 926.

31. *Id.* (emphasis in original).

32. *See* T.C.A.§ 56-7-105; Fred Simmons Trucking, Inc. v. U.S. Fidelity and Guar. Co., 2004 WL 2709262 at *5 (Tenn. Ct. App. 2004); Persian Galleries, Inc. v. Transcontinental Ins. Co., 38 F.3d 253, 260 (6th Cir.1994); Rice v. Van Wagoner Cos., Inc., 738 F. Supp. 252, 253 (M.D. Tenn. 1990); Chandler v. Prudential Ins. Co., 715 S.W.2d 615 (Tenn. Ct. App. 1986); *see also* Barrett v. Vann, 2007 WL 2438025 (Tenn. Ct. App. Aug. 29, 2007) (some internal citations omitted) (also citing Hamer v. Harris, 2002 WL 31469213, at *1 (Tenn. Ct. App. Nov. 6, 2002), (perm. app. denied Feb. 18, 2003) (discussing election of remedies doctrine).

33. Davidson v. Amer. Freightways, Inc., 25 S.W.3d 94, 100 (Ky. 2000) (declaring "[a]bsent a contractual obligation, there simply is no bad faith cause of action, either at common law or by statute.").

34. *Id.* at 94.

35. *Id.* at 99 (citing Manchester Ins. & Indem. Co. v. Grundy, Ky., 531 S.W.2d 493 (Ky. 1975), *cert. denied*, 429 U.S. 821 (1976)).

36. Davidson, 25 S.W.3d at 99 (citing Feathers v. State Farm Fire & Cas. Co., 667 S.W. 693 (Ky. Ct. App. 1983) and Federal Kemper Ins. Co. v. Hornback, 711 S.W.2d 844 (Ky. 1986), respectively); *see also* Curry v. Fireman's Fund Ins. Co., 784 S.W.2d 176 (Ky. 1989) (which overruled Federal Kemper).

37. Davidson, 25 S.W.3d at 99.

38. *Id.* at 100.

39. *Id.*; *see also* Farmland Mut. Ins. Co. v. Johnson, 36 S.W.3d 368 (Ky. 2001) (holding that while "an insurer . . . is entitled to challenge a claim and litigate it if the claim is fairly debatable on the law or the facts, the existence of jury issues on the contract claim does not preclude the bad faith claim").

40. Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165, 167 (Tex. 1987); *see, e.g.*, O'Malley v. United States Fidelity & Guar. Co., 776 F.2d 494, 500 (5th Cir.1985) (noting that no Mississippi case has ever allowed bad faith recovery for the insured without first establishing liability under the policy); Gilbert v. Congress Life Ins. Co., 646 So. 2d 592, 593 (Ala. 1994) (plaintiff bears the burden of proving a breach of contract by the defendant); Reuter v. State Farm Mut. Auto. Ins. Co., Inc., 469 N.W.2d 250, 253 (Iowa 1991) ("a bad faith failure to pay the insured when the insured event occurs . . . may subject the insurer to tort liability"); Wittmer v. Jones, 864

S.W.2d 885, 890 (Ky. 1993) (noting that in order to establish a tort action for bad faith the insured must first prove that the insurer was obligated to pay under the policy); Pemberton v. Farmers Ins. Exchange, 109 Nev. 789, 858 P.2d 380, 382 (1993) ("An insurer fails to act in good faith when it refuses 'without proper cause' to compensate the insured for a loss covered by the policy."); Bartlett v. John Hancock Mut. Life Ins. Co., 538 A.2d 997, 1000 (R.I. 1988) ("there can be no cause of action for an insurer's bad faith refusal to pay a claim until the insured first establishes that the insurer breached its duty under the contract of insurance"); *see also* Ostrager & Newman, Insurance Coverage Disputes § 12.01 at 503 (7th ed. 1994) ("The determination of whether an insurer acted in bad faith generally requires as a predicate a determination that coverage exists for the loss in question."); 15A Rhodes, Couch on Insurance Law 2d § 58:1 at 249 (Rev. ed. 1983) ("As a general rule, there may be no extra-contractual recovery where the insured is not entitled to benefits under the contract of insurance which establishes the duties sought to be sued upon.").

41. Aranda v. Insurance Co. of N. Am., 748 S.W.2d 210, 213 (Tex. 1988).

42. *Id.*

43. *Id.*

44. Universe Life Ins. Co. v. Giles, 950 S.W.2d 48, 54 (Tex. 1997).

45. *Id.*; *see also supra* note 41, Aranda, 748 S.W.2d at 214; *see also* Intermodal Equipment Logistics, LLC and Seatrain Logistics, LLC v. Hartford Accident Indemnity Company, Civil Action 10-0458, S.D. Tx., Galveston Division, Order on Summ. Judg., May 24, 2012 (holding that insurer did not breach policy, but permitted insured to maintain its bad faith claim).

46. *Id.*

47. *See* Tex. Ins. Code Ann. § 542.003 and Tex. Bus. & Com. Code § 17.46 (Westlaw 2013).

48. Universal Life Ins. Co. v. Veasley, 610 So. 2d 290, 293 (Miss. 1992); Miss. Code. Ann. §§ 83-5-37, -45, *et seq*.

49. *See* Henderson v. United States Fidelity & Guaranty Co., 620 F.2d 530, 536 (5th Cir.1980); Reserve Life Insurance Co. v. McGee, 444 So. 2d 803, 809 (Miss. 1983); Standard Life Insurance Co. of Indiana v. Veal, 354 So. 2d 239, 248 (Miss. 1978).

50. Pioneer Life Ins. Co. of Ill. v. Moss, 513 So. 2d 927, 930 (Miss. 1987).

51. Ark. Stat. 23-66-202.

52. Members Mut. Ins. Co. v. Blissett, 254 Ark. 211, 492 S.W.2d 429 (1973).

53. Findley v. Time Ins. Co., 264 Ark. 647, 573 S.W.2d 908 (1978).

54. Reynolds v. Shelter Mut. Ins. Co., 313 Ark. 145, 148, 852 S.W.2d 799, 801 (1993); Parker v. Farm Bureau Cas. Ins. Co., 935 S.W.2d 556 (Ark. 1996).

55. *Id.*

56. *See* Al. Stat. 27-25-9 (Westlaw 2013).

57. Chavers v. National Sec. Fire & Cas. Co., 405 So. 2d 1, 5 (Ala. 1981).

58. Vincent v. Blue Cross–Blue Shield of Alabama, 373 So. 2d 1054, 1062 (Ala. 1979); Safeco Insurance Co. of America v. Sims, 435 So. 2d 1219, 1222 (Ala. 1983); State Farm Fire & Cas. Co. v. Slade, 747 So. 2d 293, 317-18 (Ala. 1999).

59. Howell v. Southern Heritage Ins. Co., 214 Ga. App. 536, 537, 448 S.E.2d 275 (1994). *See* McCall v. Allstate Ins. Co., 251 Ga. 869, 871-872, 310 S.E.2d 513 (1984) ("[W]here the General Assembly has provided a specific procedure and a limited penalty for noncompliance with a specific enactment . . ., the specific procedure and limited penalty were intended by the General Assembly to be the exclusive procedure and penalty, and recovery under general penalty provisions will not be allowed."); United Svcs. Automobile Ass'n v. Carroll, 226 Ga. App. 144, 149, 486 S.E.2d 613 (1997) (damages for bad faith denial of insurance proceeds cannot be recovered under general contract or tort law); *accord* Great Sw. Exp. Co., Inc. v. Great Am. Ins. Co. of New York, 292 Ga. App. 757, 760-61, 665 S.E.2d 878, 881 (2008).

60. Fed. Ins. Co. v. Nat'l Distrib. Co., Inc., 203 Ga. App. 763, 768, 417 S.E.2d 671, 676 (1992) (internal citations omitted); *see also* Central Nat'l Ins. Co. of Omaha v. Dixon, 188 Ga. App. 680, 683, 373 S.E.2d 849 (1988).

61. Allstate Ins. Co. v. Ammons, 163 Ga. App. 385, 386-387, 294 S.E.2d 610 (1982).

62. Russell v. Dairyland Ins. Co., 580 F. Supp. 726, 730-731 (N.D. Ga. 1984) (quoting State Farm Mut. Auto. Ins. Co. v. Harper, 125 Ga. App. 696, 188 S.E.2d 813 (1972)); *see also* Georgia Farm Bureau Mut. Ins. Co. v. Jackson, 240 Ga. App. 127, 130, 522 S.E.2d 716, 719-20 (1999).

63. *Id.*

64. Cuna Mut. Ins. Soc'y v. Norman, 237 Va. 33, 38, 375 S.E.2d 724, 727 (1989) (the court was interpreting the former Virginia Code § 38.1-32.1-now § 38.2-209).

65. *Id.*

66. Cradle v. Monumental Life Insurance Co.*, 354 F. Supp. 2d 632 (2002).*

67. Tiger Fibers, LLC v. Aspen Specialty Insurance Co., 594 F. Supp. 2d 630 (2009); *see also* U.S. Airways, Inc. v. Commonwealth Ins. Co., 2004 WL 1894684, at *23-26 (Va. Cir. Ct. May 14, 2004) (holding that "a judgment against an insurer acts as a condition precedent to any claim of bad faith in Virginia" and dismissing U.S. Airway's § 38.2-209 claim).

68. Wilson v. State Farm Fire & Cas. Co., 79 Va. Cir. 591 (2009) (citing Nationwide Mut. Ins. Co. v. St. John, 259 Va. 71, 75, 525 S.E.2d 649, 651 (2000)).

69. *See* Haghnazarian v. State Farm Mutual Insurance Co., 21 Va. Cir. 140 (Fairfax County 1990) (where the Fairfax County Circuit Court did not consider the insured's claim for bad faith under § 38.2–209 until after the jury had determined that the insurer breached its contract with the insured by failing to fully compensate him for a covered loss.); Wells v. Travelers Insurance Co., 26 Va. Cir. 296 (Richmond 1992) (where the Richmond City Circuit Court did not reach the insured's claim for bad faith under § 38.2–209 until after finding for him on summary judgment.).

70. Klein v. American Life & Cas. Co., App. 1 Cir. 2003, 858 So. 2d 527, 2001-2336 (La. App. 1 Cir. 6/27/03), writ denied 857 So. 2d 497, 2003-2073 (La. 11/7/03), writ denied 857 So. 2d 499, 2003-2101 (La. 11/7/03).

71. La. Rev. Stat. Ann. § 22:1892(B)(1) (previously cited as La. Rev. Stat. Ann. § 22:658).

72. La. Rev. Stat. Ann. § 22:1973 (previously cited as La. Rev. Stat. Ann. § 12:1220).

73. *See* Roberie v. S. Farm Bureau Cas. Ins. Co., 250 La. 105, 194 So. 2d 713, 716 (1967) (holding that "[a] determination as to what constitutes bad faith or lack of good faith depends on the facts and circumstances of each case."); *Combetta v. Ordoyne*, 04-2347, pp. 8-11 (La. App. 1 Cir. 5/5/06); 934 So. 2d 836, 842-43 ("In order to determine whether or not an insurer acted reasonably and in good faith in negotiating and settling a claim, one must look to the facts of the individual case."); Holt v. Aetna Cas. & Sur. Co., 28450-CA, p. 18 (La. App. 2 Cir. 9/3/96); 680 So. 2d 117, 130 (in order to show that the insurer acted arbitrarily, capriciously, or without probable cause, the insured must demonstrate that the "insurer knowingly committed actions which were completely unjustified, without reasonable or probable cause or excuse.").

74. Rainbow USA, Inc. v. Nutmeg Ins. Co., 612 F. Supp. 2d 716, 731-32 (E.D. La. 2009).

75. Clark v. McNabb, 04-0005, p. 10 (La. App. 3 Cir. 5/19/04), 878 So. 2d 677, 684.

76. Matthews v. Allstate Ins. Co., 731 F. Supp. 2d 552 (E.D. La. 2010). ■

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