

# Bad Faith Hard to Define

But You Know It If You See It

**Mississippi Defense Lawyers Association  
Mississippi Claims Association  
Joint Seminar**

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# **BAD FAITH DOES NOT APPEAL TO THE “PURIENT INTEREST” of anybody**

**Unless you can slightly change the definition from:**

**Marked by or arousing an immoderate or unwholesome interest or desire especially: marked by, arousing, or appealing to sexual desire.**

**To:**

**Marked by or arousing an immoderate or unwholesome interest or desire especially: marked by, arousing, or appealing to HUGE SUMS OF MONEY by some unscrupulous plaintiff attorneys involved with Bad Faith Setups!**

# State of Mississippi definitions:

Mississippi recognizes an independent common law cause of action for bad faith against a first party insurer. See, e.g. Vaughn v. Monticello Ins. Co., 838 So. 2d 983 (Miss. Ct. App. 2001); Hartford Underwriters Ins. Co. v. Williams, 936 So. 2d 888, 895 (Miss. 2006).

For liability policies, an insured must show that the insurer: (1) Lacked an arguable or legitimate basis for denying the claim; (2) That the insurer committed a willful or malicious wrong; or (3) Acted with gross and reckless disregard for the insured's rights.



# State of Mississippi definitions:

- Bad faith does not exist if an insurance company can give the insured a legitimate or arguable reason for denying a claim. See *Pioneer Life Ins. Co. of Illinois v. Moss*, 513 So.2d 927, 929 (Miss. 1987).
- An insurer need only show a reasonable justification in fact or law to deny payment. *Broussard v. State Farm Fire & Cas. Co.*, 523 F.3d 618, 628 (5th Cir. 2008).
- A claim for bad faith cannot be based on a clerical error or honest mistake. *Andrew Jackson Life Ins. Co. v. Williams*, 566 So.2d 1172, 1187 (Miss.1990); *Weems v. American Sec. Ins. Co.*, 486 So.2d 1222, 1227 (Miss.1986); *Consolidated American Life Ins. Co. v. Toche*, 410 So.2d 1303, 1306 (Miss. 1982).

# State of Mississippi definitions:

- The mere fact that [an insurer's] denial of coverage proves to be incorrect is insufficient to prove bad faith. *McKneely*, 862 So.2d at 533. However, [the insurer] has a duty to re-evaluate [the insured's] claim, even after the lawsuit was filed. *Broussard*, 523 F.3d at 629; see also *Spanse v. State Farm Fire and Cas. Co.*, 683 F.Supp.2d 444 (2010).
- Bad faith is an intentional tort, requiring a showing of more than mere negligence. *Universal Life Ins. C. v. Veasley*, 610 So. 2d 290, 295 (Miss. 1992).



# State of Mississippi definitions:

- Mississippi courts will consider a variety of factors in determining an insurer's liability for failure to settle. See *Hartford Accident and Indem. Co. v. Foster*, 528 So. 2d 255 (Miss. 1988)
- Miss Code. Ann. §85-5-35 identifies certain acts and practices of insurers that are considered to be acts of unfair competition and thus prohibited, yet there is no statutorily authorized private cause of action. *Burley v. Homeowner's Warranty Corp.*, 773 F. Supp 844 (S.D. Miss. 1990), *aff'd* 936 F.2d 569 (5th Cir. 1991).

# INSURANCE INDUSTRY (generally excepted) definition:

**A term describing blatantly unfair conduct that exceeds mere negligence by an insurance company.**

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## DAVID STEGALL'S DEFINITION OF BAD FAITH:

**Breaching the usual and customary practices of, and/or failing to maintain the standards of care required by, the insurance (and Risk Management) industry based on the concept of “Utmost Good-Faith”.**

# Doctrine of Utmost Good Faith

From IRMI's Fundamentals of Insurance Law:

Insurance pertains to a transaction in which one party (the insured) is in particular possession of facts unknown to the other party at the time the contract is negotiated. For this reason, the insured is required to complete the application in a truthful manner. Insurance also involves one party (the insurer) making a promise to cover an insured event that may or may not happen in the future. As a result, a higher standard of honesty is imposed on both parties to an insurance transaction than is imposed on regular commercial contracts.



# Doctrine of Utmost Good Faith

Although the above IRMI definition is correct, it seems to limit the concept to the process of purchasing an insurance policy, when in today's modern insurance industry, the process is broader and more complex, and must be expanded to the entire process of risk management (of which insurance is, albeit a big part, is not the only part). I would also expand the concept to all practitioners within the industry, regardless of their role – be it as an agent, a broker, an underwriter, a claims adjuster, including their supervisors and management and, of course, the policyholder or purchaser of services within the industry. They all must operate within the concept of “Utmost Good-Faith”.

# CONDUCT THAT MAY CONSTITUTE BAD FAITH

- Unreasonable delay in handling claims.
- Inadequate investigation or legal research.
- Failure to obtain necessary expert assistance.
- Unreasonable interpretation or application of policy provisions.
- Failure to make a reasonable offer or settlement.
- Misrepresentation of facts or policy provisions.



# CONDUCT THAT MAY CONSTITUTE BAD FAITH

- Failure to honor duty of loyalty and to protect to policyholder's interests.
- Threats and other improper conduct by insurance company.
- Conduct by insurance company or counsel after the institution of suit.
- Refusal to defend suit.
- Advancing interests of insurance company over policyholder's.

# The CPCU Professional Commitment

**AS A CHARTERED PROPERTY CASUALTY UNDERWRITER: ...  
I SHALL STRIVE TO ASCERTAIN AND UNDERSTAND  
THE NEEDS OF OTHERS  
AND PLACE THEIR INTERESTS ABOVE MY OWN;**



# Claim Representatives

- “Claim representatives....are the people responsible for fulfilling the insurance company’s promise,...”
- “Therefore, the claim representative’s chief task is to seek and find coverage, not to seek and find coverage controversies or to deny or dispute

James J. Markham, et al., The Claims Environment  
(1st ed. 1993 Insurance Institute of America)

# Markham on Bad Faith

**“When an insurance company fails to pay claims it owes or engages in other wrongful practices, contractual damages are inadequate. It is hardly a penalty to require an insurer to pay the insured what it owed all along.”**

# How to Avoid Allegations of Bad Faith for a Claims Adjuster

- Operate within the Unfair Trade and Claim Settlement Practice Acts
- Manuals.
  - a. Claims
  - b. Underwriting.
  - c. Loss Control.
  - d. Document Retention.
- (i) Policyholder's Insurance Policy.
- (ii) Insurance Company's Reinsurance Treaties and Underwriting and Claims Guidelines.



# How to Avoid Allegations of Bad Faith for a Claims Adjuster

- Advertisements
- Insurance Company Briefs
- Communications with Reinsurers.
- Compare to Representations to policyholder and Court
- Claims File

# How to Avoid Allegations of Bad Faith for a Claims Adjuster

- Checked Internal Insurance Company Material Before Denying Claim.
- a. Internal Computer Information.
- b. Generic Files.
- c. Reinsurance Communications.
- d. Other Claim Information.
  - (i) That Policyholder.
  - (ii) Other Policyholders
- Attorney's Claims Handling File.

# How to Avoid Allegations of Bad Faith for a Claims Adjuster

- **Claims Representative's should Check:**
  - **a. With Underwriters**
  - **b. With Loss Control Representatives**
  - **c. With Insurance Company's SIU**
  - **d. With Marketing**
  - **e. Own Computer Information**
  - **f. Generic Files**
  - **g. With Agent**



# Recent Trends in Bad Faith

From Travelers White Paper on  
Bad Faith Trends 2017

- Some states can be described as being “safe” bad faith states (e.g. New York) whereby the plaintiff would need to prove that the insurance company acted with gross disregard of the insured’s interests.
- Most states treat bad faith claims in the same way they would treat negligence claims (what would a reasonable insurance company have done?).
- If the court finds that a reasonable insurance company would have settled and the company in question didn’t, that would amount to bad faith.

Litigation between these carriers typically arise when the primary carrier has the opportunity to resolve a case within its coverage limit



# Multiple claimants, multiple insureds and inadequate limits

*A difficult situation for the insurance company as it could lead to an unhappy customer, but if the plaintiff's demand is not accepted, the insurance company, most likely will be accused of acting in bad faith.*



# Bad Faith Set Up

- Typical Set up Scenario:
- Auto with low limits of liability
- Involved in an accident causing serious injury
- Plaintiffs' attorney makes impossible demands to settle
- Trial occurs and jury awards damages of \$10 million is awarded in the plaintiff's favor, along with an assignment to the plaintiff from the insured party of their rights to sue the insurance company for the bad faith failure to settle. The plaintiff then claims the \$10,000,000 from the insurance company.
- Most common in Florida, Mississippi, California and Nevada

# Institutional Bad Faith

There are four areas that plaintiffs focus on to prove institutional bad faith:

- Improper tracking of indemnity costs (e.g. the tracking of claims costs and the setting of average claims cost goals);
- Improper goals to reduce claims severity (e.g. the insurance company has a goal to reduce indemnity pay-outs by 15 percent);
- Improper goals of placing an average amount paid on claims under specific types of coverage;
- Improper performance measurements that are used to determine salary increases, bonuses and benefits of claim handlers (e.g. overpayment of claims by insurance companies means that the claims handler does not receive an increase in salary thereby incentivizing claim handlers to underpay claims).

# Class Actions & More

- Plaintiff attorneys attempt to claim institutional bad faith by grouping the claimants together by way of all of them being taken advantage of in one way or another.
- Duty to defend, breach and consequences
- Consent/rollover Judgments
- Bad faith in the absence of coverage
- Liability for adjusters, TPA's and lawyers
- Duty to initiate settlement discussions
- Punitive damages – insurability
- Bad faith & eroding limits liability policies
- Duty to settle when coverage is in question



# Problem Areas

- Reservation or Rights Letters
- Duty to Defend
- Claims Investigations (and Transparency)
- Tunnel Vision
- Misguided Assumptions
- Misplaced Loyalties

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