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Counterpoint - Reverse Bad Faith Is A Necessary Weapon

In a very well written piece appearing in the online version of *Law360,* Attorney Steve Knott makes a double frontal assault on insurance reverse bad faith: it does not exist, Mr. Knott claims, and it is not necessary. "Only a Victor Frankenstein jurist could stitch together such a beast," says Mr. Knott. The question of the existence of reverse bad faith is far, far less clear than the portrait painted by Mr. Knott, and reverse bad faith is both a highly necessary and desirable weapon for insurers besieged with opportunistic, marginal, and in some cases frivolous claims of insurer bad faith.

One author, referring to Ninth Circuit precedent, frames the problem in this way:

> Plaintiffs' attorneys today strive to manipulate insurers into extracontractual and punitive exposure. Increasingly, plaintiffs groundlessly allege insurance companies' bad faith in attempts to win the judicial lottery. As explained by Judge Kozinski of the Ninth Circuit. . . "This tortification of contract law – the tendency of contract disputes to metastasize into torts – gives rise to a new form of entrepreneurship: investment in tort causes of action." **There now exists a nightmarish extracontractual insurance culture.**[1]

Mr. Knott makes a fairly strong case that an insurance policy should not be transmuted into a tort recovery lottery ticket, arguing that the policy language adequately provides insurers with redress for the misconduct of insureds. The trouble with attempting to close this side of the barn door is that the courts have already propped the other side fully open: insureds, by virtue of the development of bad faith law, now have a powerful tort weapon arising from a contract. Why is an insurer not entitled to the same redress, however, **where the conduct of the insured warrants it**?

The Bad Faith Setup

The examples of the conduct of policyholders used to illustrate the danger of reverse bad faith in Mr. Knott's piece — insurer dismay with the insured's poor performance at a deposition, and an insured's failure to partially fund a settlement at mediation — are highly unusual ones, neither of which I have encountered in a quarter century in litigating bad faith cases. I agree that these examples should not be considered reverse bad faith.

Consider a far more commonly encountered example, however. A policyholder seeking insurance benefits for personal injury, e.g., UM/UIM automobile insurance benefits, makes a 30-day time limit demand for policy limits within weeks of the accident, but then fails to provide requested medical and wage information for 18 months. She refuses to submit to an examination under oath for 12 months and misrepresents her pre-accident health when she is finally presented by her lawyer to give a statement. This conduct impairs the insurer's ability to meaningfully respond to the early time-limit demand, which has long since expired, despite the insurer's repeated requests to keep the demand open so that an investigation can take place.

The purpose of the time limits settlement demand in this example is arguably not at all to settle the case; rather, it is a predicate act aimed at turning the possibility of subsequent award in excess of the policy limits into a *de facto* bad faith claim. In common parlance, the limits demand constitutes a bad faith setup.

Does Reverse Bad Faith Really Exist?

I do not here argue that reverse bad faith is a universally recognized independent tort, or even a formal defense to a bad faith claim. To be sure, few opinions recognizing it agree on what it is, or how it should be used. I do, however, suggest that the doctrine does exist in some form in a number of jurisdictions, and that the judges who have passed on the subject in these jurisdictions are hardly Frankenstonian in their approach: they are leveling a playing field which in current times is very much in need of leveling.

The Pennsylvania Supreme Court has discussed that the duties of good faith and fair dealing in an insurance policy are bilateral, and not unilateral.[2] And the idea that an insured should be held to the same standard of conduct as an insurer specifically *in bad faith litigation* has been around for at least two decades:

> The absence of a statutory right of an insurer to punitive damages does not preclude an insurer's claim against an insured for breach of a contractual obligation of good faith with the right to recover whatever common law damages, if any, it might have suffered. This court concludes that Pennsylvania would apply the duty to act in good faith to "each party" to an insurance contract, including the insured. Such a holding is in conformity with the language of Section 205 of the Restatement (2d) of Contracts and not inconsistent with Pennsylvania precedents.[3]

The misconduct of insureds in Pennsylvania is, therefore, subject to considerable scrutiny and actionable far beyond the insuring agreement. Attorneys' fees statutes have been used to punish policyholder misconduct,[4] and the state's insurance fraud and motor vehicle insurance statutes provide a civil remedy to insurers victimized by the fraud of their insureds.[5]

The formal assertion of the insured's reverse bad faith as an affirmative defense has been permitted in several Pennsylvania federal bad faith cases, specifically overcoming Rule 12(b)(6) challenges of the insured's lawyers who claimed the defense did not exist.[6]

Recognition of the doctrine in various forms goes well beyond Pennsylvania. An insured's knowing and intentional misrepresentations about her injury and post-accident medical treatment have been held relevant to analysis of bad faith claims and sufficient to negate plaintiff's bad faith claim in Washington.[7] An insured's interference with a claims investigation has been held to constitute reverse bad faith in Tennessee.[8]

Even those courts which do not formally recognize a defense of comparative or reverse bad faith have not precluded the introduction of evidence of an insured's misconduct, one federal court in Hawaii noting, "the rejection of comparative bad faith does not mean that an insurer will be held liable for delays which it did not cause [and] . . . it may give rise [to] a contractual or equitable defense."[9]

What Does The Future Hold For Reverse Bad Faith?

The current reverse bad faith picture is, admittedly, far from a clear one. But to dismiss the doctrine as dead in its adolescence is premature, and to dismiss it as unnecessary fails to recognize insureds' attempts to tortify insurance policies into extracontractual dollars. It is highly likely that reverse bad faith will continue to exist in several forms and will apply in those circumstances when the misconduct of the insured calls for it.

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[1] Richmond, Douglas. *An Overview of Insurance Bad Faith Law and Litigation,* 25 Seton Hall L. Rev. 74, 76 (1994) (emphasis added).

[2] *Toy v. Metropolitan Life Ins. Co.,* ___ A.2d ___, 2007 WL 2048931 at p. 6 (Pa. July 17, 2007) (Cappy, J).

[3] *Greater New York Mutual Insurance Co. v. North River Ins. Co.,* 872 F. Supp. 1403, 1407-1408, *as cited in, Garvey*

v. National Grange Mutual Insurance Company, 1995 WL 461228 (E.D. Pa. 1995 at p. 2).

[4] See *Scalia v. Erie Insurance,* 2005 Pa. Super. 223, 878 A.2d 114.

[5] See also, 40 P.S. § 474 (fraud in procuring insurance or in collecting claims; penalty); see also, 18 P.S. 4117(g) (civil action for compensatory damages, attorneys' fees, treble damages); 75 Pa. C.S.A. § 1798(d) (where claim for automobile insurance benefits are made without reasonable foundation, opposing party entitled to award of fees and costs, either independently, or as set off to original claim).

[6] See, *Javorski v. Nationwide,* U.S. Dist. Ct., M.D. Pa., 3:06-CV-01071-RPC (slip op. November 30, 2006) (Doc. No. 48); *Shannon v. NYCM Insurance Co.,* U.S. Dist. Ct., M.D. Pa., 3:13-CV-04132-RPC (slip op. November 21, 2013) (Doc. No. 35).

[7] *Ki Sin Kim v. Allstate Ins. Co., Inc.,* 153 Wash. App. 339, 223 P.3d 1180, Wash. App. Div. 2, 2009, November 24, 2009.

[8] *Daniel v. Atlantic Casualty Company,* No: 02A01-9508-CV-00167 (Tennessee Appeals, December 31, 1996).

[9] *Wailua Associates v. Aetna Casualty and Surety Company,* 183 FRD 550 at 11(D. Hawaii 1998).

The opinions in this article are strictly those of the author and do not necessarily reflect the opinions of Dickie, McCamey & Chilcote, P.C., nor any of the firm's clients.

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