INSURANCE BAD FAITH
Washington vs British Columbia

By Greg Samuels and Wyatt Pickett

The Washington legislature vests the (elected) Washington State Insurance Commissioner with the authority to issue regulations identifying acts an insurer may commit which violate the duties of good faith and fair dealing. The following acts have been specifically identified as such in the Washington Administrative Code with respect to the settlement of claims; other provisions address the handling of coverage disputes, resolution of first-party property damage claims, and other situations:

WAC 284-30-330 Specific unfair claims settlement practices defined. The following are hereby defined as unfair methods of competition and unfair or deceptive acts or practices in the business of insurance, specifically applicable to the settlement of claims:

(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.

(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.

The Administrative Code regulations provide the starting point for determining the strength of a plaintiff's claim – because the legislatively proscribed activities can be used to support any of the three theories of recovery a plaintiff may choose.

The WAC regulations are intended to set the *minimum* standards for an insurer's good faith conduct. *See WAC 284-30-300*. The courts presume that if the plaintiff can establish a violation of a WAC provision, they have established grounds for pursuing a bad faith claim. Conduct which is not specifically addressed by the WAC's can still amount to "bad faith" under judicially-generated definitions of the doctrine…but violation of a WAC provision is the cleanest way to prevail on a bad faith claim.

Violation of a WAC provision, while not negligence *per se*, is treated as evidence of negligence by the Washington courts. *See RCW 5.40.050*. Thus, violation of a WAC provision would also provide the predicate for any common-law tort claims asserted…to the extent that such claims offered broader remedies than those offered in "bad faith".

Finally, violation of a WAC provision is deemed to be an "unfair or deceptive act in trade or commerce" permitting the plaintiff to bring a claim under the state's Consumer Protection Act (CPA). A single WAC violation has been held to be sufficient to support a plaintiff's CPA claim, regardless of the fact that the Insurance Commissioner could only take administrative action on such conduct if it was violated with such frequency as to constitute a general business practice. *See Industrial Indemnity Co. of Northwest, Inc. v. Kallveig*, 114 Wn.2d 907, 923-25, 792 P.2d 520 (1990). Provided that the plaintiff can establish the other requirements of a CPA claim have been met by the circumstances (usually true), the plaintiff is entitled to (1) an award of attorney's fees and costs, which are ***not*** generally available to Washington plaintiffs in negligence cases, as well as punitive damages (again, ***not*** generally available to Washington plaintiffs) up to US $10,000 for ***each*** act constituting a CPA violation.

WASHINGTON BAD FAITH LAW: FOUR SENSIBLE QUESTIONS

Question #1:

Is it possible to bring a bad faith claim for acts which are *not* specifically proscribed by the Washington Administrative Code?

ANSWER: Absolutely. The WAC's only set minimum standards for insurer conduct, and compliance with the WAC's alone does not guarantee an insurer has avoided a bad faith claim. The duty to act in good faith is "fairly broad and may be breached by [a variety of] conduct short of intentional bad faith or fraud." *See Truck Insurance Exchange v. Vanport Homes, Inc.*, 147 Wn.2d 751, 764, 58 P.3d 276 (2002). The trier of fact – typically a jury – will be charged with determining if the questioned conduct rises to the level of bad faith. *See Kallveig,* supra.

Question #2:

These standards seem pretty amorphous and plaintiff-friendly. Is there any good news for insurers in the case law?

ANSWER: Yes. While bad faith has been loosely defined and thus leaves plenty of room for creative argument by plaintiff's counsel, the Washington courts have stressed repeatedly that when an insurer's management and handling of a claim are at issue, "mistakes and clumsiness alone do not amount to bad faith." *See Insurance Co. of Pennsylvania v. Highlands Ins. Co.*, 59 Wn. App. 782, 786, 801 P.2d 284 (1990).

The Washington Supreme Court has described the bad faith plaintiff's "heavy burden" in proving their case thusly:

> *Applying the bad faith standard in the summary judgment context, an insurer is ordinarily entitled to summary judgment dismissal of a bad faith claim unless the insured shows there was no reasonable basis for the insurer's actions…This "fairly debatable" standard for determining bad faith, as it is commonly called, is followed in the vast majority of [American] jurisdictions. The logic of putting an insured to task in bad faith cases has been described as follows: "An insurer is entitled to dispute claims so long as it has a reasonable basis. If reasonable minds could not differ [on the facts]….a verdict should be directed or summary judgment rendered….If that cannot be done, it ordinarily must follow that the insurer had reasonable grounds to dispute the facts, precluding any possibility of bad faith."*
>
> *Ellwein v. Hartford Accident & Indemnity Co.*, 142 Wn.2d 766, 775-777, 15 P.3d 640 (2001).

If you can clear this hurdle as a claimant, there is a rebuttable presumption that you have suffered harm. *See Besel v. Viking Insurance Co.,* 146 Wn.2d 730, 737, 49 P.3d 887 (2002). But in the absence of a WAC violation, meeting the "no reasonable basis"/"fairly debatable" standards can be challenging. The vast majority of reported cases arise out of conduct that clearly violates the administrative regulations.

Question #3:

How does bad faith differ from a negligence-based claim? Can you have one without the other, and does a negligence claim get you anything that a bad faith theory does not?

ANSWER: The two claims almost always arise in tandem. Circumstances have sometimes arisen in reported cases which hint at the possibility that an insurer could act in good faith, but still perform negligently in the handling and evaluation of the claim. The lower court opinion which led to *Besel*, supra, suggests one way this could occur…the insurer could act with a reasonable basis in refusing to settle within the policy limits when the merits of the claim were viewed *prospectively*, but might have neglected the claim while in progress

(losing the claims file in midstream and trying to rebuild it from scratch in the midst of negotiations).

It's harder to imagine a scenario where an insurer would be guilty of bad faith but escape liability under the negligence standard. However, the negligence claim might offer the potential for third-party actions which the bad faith claim clearly does not. In contrast with some other U.S. jurisdictions, Washington law has held that only the insured can sue his insurer for bad faith….a third-party harmed by the insurer's conduct lacks standing to sue. *See Planet Insurance v. Wong*, 74 Wn. App. 905, 877 P.2d 198 (1994). However, a negligence claim is governed by the statutory definition of "fault", which encompasses "acts or omissions…that are in any measure negligent or reckless towards the person or property of the actor **or others**" *See* RCW 4.22.015. The potential for third-party actions involving the fault of multiple jointly/severally liable defendants has yet to be explored.

Question #4:

Is there anything left from the old "breach of contract" theory of recovery under Washington law?

ANSWER: Maybe, in a backhanded way. As in Canada, the notion of the duty of good faith and fair dealing arose out of similar principles in the contract field, including notions of fiduciary duties. Again, as in Canada, the Washington courts have noted that the duty owed to insureds is not a true fiduciary duty, since the adversarial nature of claims evaluation precludes any expectation that an insurer will act for the insured with a duty of "undivided loyalty". Still, the quasi-fiduciary relationship presumed to exist in all contracts of insurance, and especially first-party "peace of mind" contracts, has led the Washington courts to define insurer's fiduciary responsibilities very broadly. *See generally Jones v. Allstate*, 146 Wn.2d 291, 45 P.3d 1068 (2002), where a claimant was permitted to sue the third-party tortfeasor's insurance adjuster for damages arising from statements/advice given regarding settlement. In a 5-4 decision, the Court held that the adjuster had committed unauthorized practice of law in giving her advice, and that the adjuster owed a duty to third parties not to give such advice – finding the existence of a duty in part on the fiduciary relationship implicit in the contract of insurance (!). The 4 member dissent (correctly?) pointed out that the relationship isn't truly a fiduciary one even between the insurer and insured, and clearly could not be considered as such between the insurer and third parties harmed by the insured's conduct with which the insurer comes into contact.

COMPARATIVE BAD FAITH LAW: BAD FAITH REFUSAL TO SETTLE; COMPARING *Shea* (BC) with *Besel* (WA)

Both British Columbia and Washington have recognized a cause of action for bad faith in the context of an insurer's failure/refusal to settle a claim within policy limits once liability and damage in excess of limits has become reasonably clear. Likewise, both jurisdictions recognize the right of an assignee (usually the tort plaintiff) to pursue a bad faith claim held by the tortfeasor against his insurer. The typical approach involves an assignment of the defendant's bad faith rights in exchange for an agreement by the plaintiff not to

seek judgment amounts against the defendant's personal assets in excess of the applicable insurance limits. The difference in the approaches from the two jurisdictions, as you will see, lies in the fact that Washington's more robust bad faith law provides claimants with a mechanism for obtaining an assignment of these rights through a consent judgment in lieu of trial, whereas the British Columbia approach offers no avenue for obtaining these rights until an excess tort judgment has been obtained at trial.

Shea v. M.P.I.C., 55 B.C.L.R. (2d) 15 (1991)

British Columbia "duty to settle" law acknowledges the following:

1. The relationship between the insurer and the insured is a commercial one, in which the parties have their own rights and obligations;
2. Within the commercial relationship, special duties may arise over and above the universal duty of honesty, which do not reach the fiduciary standard of selflessness and loyalty;
3. The exclusive discretionary power to settle liability claims given by statute to the insurer in this case, places the insured at the mercy of the insurer;
4. The insured's position of vulnerability imposes on the insurer the duties:
    a. of good faith and fair dealing;
    b. to give at least as much consideration to the insured's interests as it does to its own interests; and
    c. to disclose with reasonable promptitude to the insured all material information touching upon the insured's position in the litigation, and in settlement negotiations.
5. The fact that the insured is at the mercy of the insurer for the purposes of settlement negotiations gives rise to a justified expectation in the insured that the insurer will not act contrary to the interests of the insured, or will, at least, fully advise the insured of its intention to do so;
6. While the commercial nature of the relationship permits an insurer to assert or defend interests which are opposed to, or are inconsistent with, the interests of its insured, the duty to deal fairly and in good faith requires the insurer to advise the insured that conflicting interests exist, and of the nature and extent of the conflict;
7. The insurer's statutory obligations to defend the insured imposes on the insurer, where conflicting interests arise, a duty to instruct counsel to treat the interests of the insured equally with its own; and where one counsel cannot adequately represent both conflicting interests, an obligation to instruct separate counsel to act solely for the insureds, at the insurer's own cost;
8. The insurer's duty to defend includes the obligation to defend on the issue of damages, and to attempt to minimize by all lawful means the amount of any judgment awarded against the insured; and

9. Defence preparations and settlement negotiations must take place in a timely way, and, where last minute negotiations are required, advance planning must be made to ensure that the insured's interests are given equal protection with those of the insurer.

Id. at 69-70

NOTE that in *Shea*, the insurer attempted to argue that the defendant had no bad faith claim to assign, since the post-judgment covenant not to execute prevented any risk of loss to the insured's personal assets by way of the excess judgment. The Court rejected this view, but based its rejection in an analysis of precedent regarding assignee/assignor law and the impact of a covenant not to execute against the assignor as to rights/claims against a third party.

COMPARE *Besel v. Viking Insurance*, 146 Wn.2d 730 (2002)

Basic facts:

D, insured by Viking, crashes his pickup truck and injures his passenger, Besel. Viking did not respond to Besel's phone calls and letters regarding settlement, and in fact lost the claims file at some point during negotiations, causing delay to the evaluation of the claim. Besel provided clear evidence that his damages exceeded $200,000; D's policy limit with Viking was for only $25,000. Viking failed to respond to numerous offers from Besel to settle his claims for $25,000, and ultimately indicates its intent to defend the claim on issues of damages and comparative fault (despite the fact that no WA court has ever assigned more than 50% fault to the passenger in a vehicle driven by an intoxicated driver).

Frustrated, Besel approached D's counsel directly, and proposed the parties enter into a consent judgment establishing Besel's damages at $175,000 and his share of comparative fault at zero. In exchange, Besel agreed not to execute upon the judgment above the $25,000 policy limit against the defendant driver. Besel then took an assignment of defendant's bad faith rights against Viking, and sued for the $150,000 difference.

Prior to entry of the consent judgment, Besel appeared before the court to conduct a statutory "reasonableness hearing" to establish the amount of the presumptive settlement was fair and that the terms of the agreement had been negotiated in good faith. The court found the quantum of damages reasonable under the factors governing such a proceeding. *See RCW 4.22.060*.

The Washington Supreme Court held as follows:

- The insurer would not be heard to argue that the defendant cured any bad faith by way of the covenant not to execute. Rather than grounding this decision in assignor/assignee distinctions, however, the Court expressly held that it would be manifestly unjust for the insurer who committed bad faith in its refusal to settle and forced its insured to negotiate independent settlement

to protect his interests to then benefit from the insured's self-help activities….

- While the insured had a contractual duty to cooperate with his insurer and to permit his insurer to control the settlement of the case, such a right was not absolute. In the event that an insurer breaches its good faith duty to settle cases in which liability and damages are reasonably clear, the insured may enter into a consent judgment to protect himself from the risk of an excess judgment. If bad faith conduct is later established, the insurer may not challenge the validity of such an obligation under the cooperation clause of the insurance contract.
- The insured may take such self-help action **prospectively**, i.e., before a determination in the subsequent litigation as to whether the insurer's conduct in failing to settle amounted to bad faith, negligence, and/or a CPA violation. (Leaves unanswered questions as to what happens if nervous insured cuts such a deal in the absence of bad faith conduct….)
- If the consent judgment has been submitted for judicial review through the reasonableness hearing process, the value of the insured's damages will be presumed to be the difference between the policy limits and the amount of the consent judgment, and the insurer will generally be estopped from challenging the evidence supporting such a judgment (assuming bare notice requirements for the reasonableness hearing have been satisfied)

RESULT: *Besel* provides a plaintiff with substantial settlement leverage over a defendant's insurer in a Washington tort action that is absent from the B.C. approach expressed in *Shea*. If faced with an insurer who asserts unreasonable defences, unrealistically undervalues the potential damage award for the plaintiff, etc., the plaintiff always has the "nuclear option" of writing a "*Besel* letter" to defence counsel proposing a consent judgment coupled with a covenant not to execute and an assignment of bad faith rights. Of course, plaintiff must be sure the bad faith claim will pass muster in Round Two of the litigation.

** Greg Samuels and Wyatt Pickett are lawyers with the Vancouver, BC law firm, Cross Border Law. They can be reached at 604.742.4242 or by visiting www.crossborderlaw.com*

GREG SAMUELS
CROSS BORDER LAW CORPORATION

Copyright © Greg Samuels Cross Border Law Corporation

All rights reserved. No part of this document may be reproduced or transmitted in any form by any means without permission in writing from Greg Samuels Cross Border Law Corporation. Brief quotes may be used with a direct reference to Greg Samuels Cross Border Law Corporation.

Greg Samuels
Cross Border Law Corporation

Suite 204-1730 West 2nd Avenue
Vancouver, B.C. Canada, V6J 1H6

T. 604-742-4242
TF. 1-800-222-6332

www.crossborderlaw.com