

Table of Contents

CHAPTER 1. INTRODUCTION

- § 1:1 Subject of treatise
- § 1:2 The cause of action for bad faith
- § 1:3 Bad faith in the insurance setting
- § 1:4 The structure of the insurance industry
- § 1:5 The structure of an insurance company
- § 1:6 Types of policies
- § 1:7 Other categories
- § 1:8 Layers of coverage
- § 1:9 The structure of an insurance policy
- § 1:10 The marketing of insurance
- § 1:11 An illustration

CHAPTER 2. HISTORICAL DEVELOPMENT OF THE CAUSE OF ACTION

- § 2:1 Scope of chapter

I. THIRD-PARTY CASES

- § 2:2 The breach of contract remedy and its inadequacies
- § 2:3 Traditional tort remedies
- § 2:4 Liability based on negligence
- § 2:5 Liability based on bad faith
- § 2:6 Coalescence of negligence and bad faith standards
- § 2:7 The implied covenant of good faith and fair dealing
- § 2:8 *Comunale v. Traders & General Insurance Co.*
- § 2:9 *Comunale's* precursors

II. FIRST-PARTY CASES

- § 2:10 Extension of the cause of action for bad faith to first-party cases
- § 2:11 The break with tradition
- § 2:12 *Gruenberg v. Aetna Insurance Co.*
- § 2:13 *Anderson v. Continental Insurance Co.*
- § 2:14 Rationales for extending the cause of action for bad faith
- § 2:15 Bad faith at large among the states

III. THE WORLD BEYOND

- § 2:16 The implied covenant as a tool of contract interpretation

§ 2:17 The Uniform Commercial Code and Restatement
(Second) of Contracts

CHAPTER 3. ELEMENTS OF THE CAUSE OF ACTION: THIRD-PARTY CASES

- § 3:1 Scope of chapter
- § 3:2 Factors indicating the existence of bad faith
- § 3:3 —Demands upon the insured to contribute to a
settlement
- § 3:4 — —Insured's duty to contribute policy deductible to
the settlement
- § 3:5 — —Insurer's duty when settlement demand exceeds
the policy limits or the fair settlement value of the
claim
- § 3:6 —Incompetent or dishonest evaluation of third party's
case
- § 3:7 — —Insurer's rejection of its representative's advice to
settle
- § 3:8 — —Rejection of postjudgment settlement offers
- § 3:9 —Failure to inform insured
- § 3:10 — —Exceptions to the duty to notify
- § 3:11 — —Settlement offers that exceed policy limits
- § 3:12 —Improper delegation of insurer's duties
- § 3:13 —Retaliatory cancellation
- § 3:14 Standards governing the insurer's duty to settle
- § 3:15 —Balancing the parties' interests
- § 3:16 — —The insurer's paramount interest
- § 3:17 — —The insured's paramount interest
- § 3:18 — —Equal consideration of the parties' interests
- § 3:19 —The Disregard the Limits Rule
- § 3:20 — —Applying the Disregard the Limits Rule
- § 3:21 —Standards based on the probability of success in
defending the insured
- § 3:22 —Strict liability
- § 3:23 —Subjective versus objective standards
- § 3:24 —The scope of evidence in third-party cases
- § 3:25 Prerequisites of a settlement offer
- § 3:26 —Timing and duration
- § 3:27 —Necessary parties
- § 3:28 —Certainty of the settlement offer
- § 3:29 —Determining the limits of the policy
- § 3:30 Insurer's duty to negotiate
- § 3:31 —Burden of proof
- § 3:32 —When insurer relinquishes control of insured's
defense
- § 3:33 Insurer's duty when settlement value exceeds policy
limits

TABLE OF CONTENTS

- § 3:34 Effect of insured's conduct
- § 3:35 Insured's demands regarding settlement
- § 3:36 Requirement of an excess judgment
- § 3:37 Payment of excess judgment as a prerequisite to a cause of action
- § 3:38 Outcome of third-party's action as evidence of reasonableness of third-party's settlement offer
- § 3:39 Causation
- § 3:40 Settlement of the underlying action
- § 3:41 Other aspects of liability insurer's duty of good faith and fair dealing
- § 3:42 Contractual solutions to the problem of settlement

CHAPTER 4. SPECIAL PROBLEMS IN THIRD-PARTY CASES

- § 4:1 Scope of chapter

I. DISPUTED COVERAGE

- § 4:2 Scope of Part I
- § 4:3 Insurer's duty to defend
 - § 4:4 —When the duty arises
 - § 4:5 —Conflicts of interest and defense provided to the insured
 - § 4:6 —Consequences of insurer's failure to defend
 - § 4:7 —Liability for breach of contract
 - § 4:8 —Loss of contractual rights
 - § 4:9 —Consequences of undertaking defense
- § 4:10 Bad faith refusal to defend
- § 4:11 Defense in bad faith
- § 4:12 Disputed coverage and insurer's duty to settle
 - § 4:13 —When the insurer refuses to defend
 - § 4:14 —When the insurer considers coverage issues in responding to settlement offers
 - § 4:15 —Insurer's options when disputing coverage
 - § 4:16 —Partial coverage and insurer's duty to settle

II. MULTIPLE PARTIES

- § 4:17 Scope of Part II
- § 4:18 Joint tortfeasors and the insurer's evaluation of the case
- § 4:19 Duties of coinsurers
- § 4:20 Insurer's duty in case of multiple claimants and multiple insureds
- § 4:21 Effects of reinsurance

III. OTHER ISSUES IN THIRD-PARTY CASES

- § 4:22 Scope of Part III

- § 4:23 Settlement against the insured's wishes
- § 4:24 Duties of defense attorneys and policy limits
settlement offers
- § 4:25 The problem of attorney-witnesses in bad faith cases

CHAPTER 5. ELEMENTS OF THE CAUSE OF ACTION: FIRST-PARTY CASES

- § 5:1 Scope of chapter
- § 5:2 Meaning of bad faith in first-party cases
- § 5:3 —Rejection of strict liability standard
- § 5:4 —The directed verdict rule
- § 5:5 —The strange development of bad faith law in Texas
- § 5:6 When the duty of good faith arises and terminates
- § 5:7 Varieties of unreasonable claims settlement practices
- § 5:8 —Claim denial with no reasonable basis
- § 5:9 —Inadequate investigation
- § 5:10 —Delay
- § 5:11 —Deception
- § 5:12 —Misinterpretation to avoid coverage
- § 5:13 —Threats
- § 5:14 —False accusations
- § 5:15 —Exploitation of insured's vulnerable position
- § 5:16 —Oppressive demands
- § 5:17 —Conditioning payment of undisputed portion of the
claim on settlement of disputed portion
- § 5:18 —Insurer's failure to communicate
- § 5:19 —Withholding consent to assignment to avoid paying
on intervening loss
- § 5:20 —Abuse of the arbitration process
- § 5:21 —Wrongful cancellation and nonrenewal
- § 5:22 —Abuse of subrogation rights
- § 5:23 —Unfair imposition of increase in premiums for filing
claim
- § 5:24 —Destruction of evidence
- § 5:25 —Insurer Responsibility for Contractor Misconduct

CHAPTER 5A. SPECIAL PROBLEMS IN FIRST-PARTY CASES

- § 5A:1 Scope of chapter
- § 5A:2 Bad faith in the absence of coverage
- § 5A:3 Reliance on inadmissible evidence
- § 5A:4 Multiple claimants
- § 5A:5 The duty to investigate and belatedly asserted
defenses
- § 5A:6 Insurer's duty after litigation begins
- § 5A:7 Interpretation of insurance policies

TABLE OF CONTENTS

- § 5A:8 —A reinterpretation of policy interpretation
- § 5A:9 Concurrent causation
- § 5A:10 Concurrent Causation—Changes in the California Rule of Concurrent Causation
- § 5A:11 Misrepresentation in policy applications
- § 5A:12 —The role of agents
- § 5A:13 Retroactive premium adjustments

CHAPTER 6. PARTIES

- § 6:1 Scope of chapter

I. PLAINTIFFS

- § 6:2 Co-insureds
- § 6:3 Unnamed insureds
- § 6:4 Beneficiaries
- § 6:5 Assignees
- § 6:6 —Assignability
- § 6:7 —Assignable portion of claim for bad faith
- § 6:8 —Timing of assignment
- § 6:9 Third-party claimants and judgment creditors
- § 6:10 Relatives of the insured
- § 6:11 Strangers
- § 6:12 Excess liability carriers
- § 6:13 Uninsured motorists
- § 6:14 Bankruptcy trustees

II. DEFENDANTS

- § 6:15 Representatives
- § 6:16 —Judicial and legislative regulation of insurance marketing practices
- § 6:17 Management groups
- § 6:18 Insureds
- § 6:19 Reinsurers
- § 6:20 Insurance Guarantee Associations
- § 6:21 Excess liability carriers
- § 6:22 Sureties
- § 6:23 Co-insurers
- § 6:24 Self-insured entities
- § 6:25 Public insurers
- § 6:26 Health Maintenance Organizations
- § 6:27 Affiliated entities
- § 6:28 Insurers issuing indemnity policies
- § 6:29 Home protection companies

CHAPTER 7. DEFENSES TO ACTIONS FOR BAD FAITH

- § 7:1 Scope of chapter

- § 7:2 Statute of limitations
- § 7:3 —The status of the cause of action
- § 7:4 —Applicable contract limitations period
- § 7:5 —Applicable tort limitations period
- § 7:6 —Commencement of the limitations period
- § 7:7 —Effect of insurer's nondisclosure of limitations period
- § 7:8 Contractual limitations on suit
- § 7:9 The plaintiff's breach of contract
- § 7:10 The plaintiff's bad faith
- § 7:11 Collateral estoppel, res judicata, and related defenses
- § 7:12 The employee's exclusive worker's compensation
remedy
- § 7:13 Advice of counsel
- § 7:14 Tender of the policy limits
- § 7:15 Conformity to industry standards
- § 7:16 The plaintiff's negligence
- § 7:17 Election of remedies
- § 7:18 Release
- § 7:19 Mitigation
- § 7:20 Waiver and estoppel
- § 7:21 Attorney-client defense
- § 7:22 Death of the insured
- § 7:23 Failure to exhaust administrative remedies
- § 7:24 Preemption
- § 7:25 Admiralty jurisdiction preemption
- § 7:26 Third-party set up of the insurer
- § 7:27 Sovereign immunity
- § 7:28 Arbitration

CHAPTER 8. DAMAGES FOR BAD FAITH

- § 8:1 Scope of chapter
- § 8:2 Insurance policy proceeds
- § 8:3 Excess judgments and other economic harm
- § 8:4 Emotional distress
- § 8:5 Excessive awards
- § 8:6 Punitive damages
- § 8:7 Corporate responsibility
- § 8:8 Factors in determining amount of award
- § 8:9 Constitutional limitations on punitive damages
- § 8:10 Prejudgment interest
- § 8:11 Attorneys' fees
- § 8:12 Apportionment of fees

CHAPTER 9. STATUTES RELEVANT TO INSURANCE CASES

- § 9:1 Scope of Chapter

TABLE OF CONTENTS

§ 9:2	The model legislation of the National Association of Insurance Commissioners
§ 9:3	Private causes of action under unfair claims settlement practices statutes
§ 9:4	Elements of a cause of action
§ 9:5	A general business practice
§ 9:6	Violation of relevant provision of statute
§ 9:7	Conclusion of underlying action and determination of insured's liability
§ 9:8	Failure to settle once liability is clear
§ 9:9	Parties
§ 9:10	Plaintiffs
§ 9:11	Defendants
§ 9:12	Remedies
§ 9:13	Defenses
§ 9:14	The 1990 amendments to the Model Act
§ 9:15	Statutes authorizing recovery of penalties, interest, or attorneys' fees
§ 9:16	Consumer protection statutes
§ 9:17	The application of ERISA to group insurance claims
§ 9:18	Litigating insurance claim disputes under ERISA
§ 9:19	UNUM Life Insurance Co. of America v. Ward

CHAPTER 10. STRATEGY, TACTICS, AND PROCEDURE

I. FIRST-PARTY CASES

§ 10:1 Scope

A. THE PLAINTIFF'S PERSPECTIVE

§ 10:2	Initial strategic considerations
§ 10:3	The ethics of setting up insurance companies
§ 10:4	Setting up the claim
§ 10:5	Common mistakes in prosecuting bad faith claims
§ 10:6	Communications with the insurer
§ 10:7	The decision to sue
§ 10:8	Planning the litigation
§ 10:9	—The choice of forum
§ 10:10	—The choice of defendants
§ 10:11	— —Adjusters and claims agents
§ 10:12	— —Agents and brokers
§ 10:13	— —Lawyers and law firms
§ 10:14	—Choosing causes of action
§ 10:15	— —Breach of contract
§ 10:16	— —Fraud

BAD FAITH ACTIONS

- § 10:17 — —Intentional infliction of emotional distress
- § 10:18 — —Bad faith
- § 10:19 — —Wrongful interference with business relationships
- § 10:20 — —Conspiracy
- § 10:21 — —Breach of statutory duties
- § 10:22 — —Declaratory relief
- § 10:23 — —Negligence
- § 10:24 — —Breach of fiduciary duty
- § 10:25 — —Spoliation of evidence
- § 10:26 Abuse of process
- § 10:27 Malicious Defense
- § 10:28 Planning the litigation—Other considerations in drafting the complaint
- § 10:29 Discovery
- § 10:30 —Requests for production of documents
- § 10:31 — —Attorney-client privilege
- § 10:32 — —Work product
- § 10:33 — —The discovery and admission of reserves in bad faith cases
- § 10:34 —Depositions
- § 10:35 —Interrogatories
- § 10:36 Trial
- § 10:37 Settlement

B. THE DEFENDANT'S PERSPECTIVE

- § 10:38 Identifying potential litigation
- § 10:39 Avoiding bad faith liability
- § 10:40 Responding to a complaint
- § 10:41 —Removal to Federal Court
- § 10:42 —Change of venue
- § 10:43 —Bifurcation, severance, and abatement
- § 10:44 —First steps in ascertaining the facts
- § 10:45 —Drafting a response
- § 10:46 Discovery
- § 10:47 Trial
- § 10:48 Post-trial motions

II. THIRD-PARTY CASES

- § 10:49 Scope of Part II

A. THE PERSPECTIVE OF THE INSURED AND THE THIRD PARTY

- § 10:50 Common interests
- § 10:51 Setting up the claim

TABLE OF CONTENTS

- § 10:52 The demand letter
- § 10:53 Assignment of the insured's cause of action
- § 10:54 Planning the litigation
- § 10:55 Lawyers and law firms as defendants
- § 10:56 The choice of causes of action
- § 10:57 Discovery
- § 10:58 Trial
- § 10:59 —Expert witnesses
- § 10:60 The insured's options

B. THE INSURER'S PERSPECTIVE

- § 10:61 General strategic considerations
- § 10:62 Setting up the defense
- § 10:63 The role of the defense attorney

CHAPTER 11. BAD FAITH IN NONINSURANCE CASES

- § 11:1 Scope of chapter
- § 11:2 Propriety of extending the cause of action
- § 11:3 Bad faith in commercial cases
- § 11:4 The rise and fall of the tort of "Stonewalling"
- § 11:5 Cases extending the cause of action for bad faith to commercial cases
- § 11:6 The search for the special relationship
- § 11:7 —Bad faith in wrongful discharge cases

CHAPTER 12. PRACTICE AIDS AND FORMS

- § 12:1 Scope of chapter

I. FIRST-PARTY CASES

- § 12:2 Matters leading to litigation
- § 12:3 Demand letter
- § 12:4 Complaint
- § 12:5 Answer
- § 12:6 Plaintiff's request for production of documents
- § 12:7 Plaintiff's interrogatories and requests for admissions
- § 12:8 Defendant's request for production of documents
- § 12:9 Defendant's requests for admissions and interrogatories

II. THIRD-PARTY CASES

- § 12:10 Third Party's Interrogatories in the underlying case
- § 12:11 Third-party's policy limits settlement offer
- § 12:12 Assignment of cause of action

- § 12:13 Complaint
§ 12:14 Other pleadings in third-party cases

APPENDICES

- Appendix I. AN ACT RELATING TO UNFAIR METHODS
OF COMPETITION AND UNFAIR AND
DECEPTIVE ACTS AND PRACTICES IN
THE BUSINESS OF INSURANCE
- Appendix II. UNFAIR CLAIMS SETTLEMENT PRACTICES
MODEL REGULATION
- Appendix III. UNFAIR CLAIMS SETTLEMENT PRACTICES
ACT
- Appendix IV. UNFAIR TRADE PRACTICES ACT
- Appendix V. UNFAIR PROPERTY/CASUALTY CLAIMS
SETTLEMENT PRACTICES MODEL
REGULATION
- Appendix VI. UNFAIR LIFE, ACCIDENT AND HEALTH
CLAIMS SETTLEMENT PRACTICES
MODEL REGULATION

Table of Laws and Rules

Table of Cases

Index