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CHALLENGING POLICYHOLDER CLAIMS FOR BAD FAITH AND PUNITIVE DAMAGES

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NORTH CAROLINA

Typically, the reason a claim for common law bad faith is asserted by an insured against an insurer in North Carolina is to attempt to provide some basis for an award of punitive damages. Under North Carolina law, to prevail on its claim of bad faith, a plaintiff policyholder must prove: "1) a refusal to pay after recognition of a valid claim; 2) 'bad faith'; and 3) aggravating or outrageous conduct."¹ "Bad faith" means conduct "not based on a legitimate, 'honest disagreement' as to the validity of the claim."² An insurer's interpretation of a policy, to the extent it varies from the interpretation of the insured, and even if incorrect, does not constitute bad faith.³ "Aggravated conduct is defined to include fraud, malice, gross negligence, insult ... willfully, or under circumstances of rudeness or oppression, or in a manner which evinces reckless and wanton disregard of the plaintiff's rights."⁴ A plaintiff's allegations of bad faith must be supported by specific examples of the "aggravating conduct" in order to survive dismissal of the bad faith claim.⁵

In *Blis Day Spa v. The Hartford Insurance Group*, the plaintiff insured brought claims for, among other things, breach of contract and common law bad faith. The federal district court granted a summary judgment in favor of the carrier with respect to the various bad faith claims. The plaintiff's spa facility was destroyed by fire. In adjusting the claim, Hartford made payments to Blis that totaled in excess of \$785,000. However, based upon testimony from plaintiff's accountant, the plaintiff contended that Hartford

COMBATING POLICYHOLDER BAD FAITH AND BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING CLAIMS

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SOUTH CAROLINA

In South Carolina, an insurer has potential liability for extra-contractual and punitive damages pursuant to a separate and independent tort claim by the insured for the insurer's alleged first-party bad faith refusal to provide insurance coverage benefits in the first instance. This is a distinct claim for bad faith. An "insurer [doing business in this State] owes the insured a duty of good faith and fair dealing."¹ Under *Nichols v. State Farm Mutual Automobile Insurance Co.*² "if [and when] an insured [is able to] demonstrate bad faith or unreasonable action by the insurer in processing a claim under their mutually binding insurance contract, he can recover consequential damages."³ Moreover, when and if the insured can demonstrate the insurer's actions were willful [and/]or in reckless disregard of the insured's rights, [the insured] can recover punitive damages.⁴ The question of whether a particular insurer has acted in bad faith or whether the company's actions were reasonable will virtually always be a question of fact for the jury to answer.⁵ Subsequent cases have "extended [South Carolina's] longstanding policy that insurers must deal in good faith."⁶ The term "bad faith" had been defined as "a knowing failure on the part of the insurer to exercise an honest and informed judgment in processing a claim."⁷

Under South Carolina law, an insurer acts in bad faith where there is no reasonable basis to support the insurer's decision to either contest or deny a claim.⁸ Conversely, "if there is a reasonable ground for [an insurer

still owed an additional \$162,504 in business interruption losses, advertising expenses and additional expenses. Hartford denied the claim and sought to invoke the appraisal provision of the business policy. Plaintiff refused to participate in the appraisal and filed suit. After finding genuine issues of material fact and denying the insurer's motion for summary judgment as to insured's breach of contract claims, the court nonetheless came to the insurer's side on the bad faith claim. The court held that the insured failed to present evidence of bad faith: (a) there was no evidence that Hartford ever recognized as valid the disputed portions of the insured's claims; (b) the insured failed to demonstrate that Hartford's refusal to pay the claim was not because of a legitimate honest disagreement as to the validity of the claim or an innocent mistake; (c) any alleged misrepresentations by the insurer's accountant consultant had nothing to do with the disputes over the business income losses; and (d) Hartford's failure to pay the disputed amounts when it allegedly was aware that the insured was financially bereft is insufficient to establish aggravating conduct.⁶

No Bad Faith for Breach of Contract

No Bad Faith of Breach of contract does not rise to the level of conduct constituting bad faith under North Carolina law. The North Carolina Court of Appeals construing barebones bad faith allegations found that those allegations were insufficient to make out a claim for bad faith.⁷ The plaintiff in *Beasley v. Nat. Sav. Life Ins. Co.* alleged

13. That by virtue of the contract of insurance referred to above, the defendant owed to the plaintiff the duty to act in good faith and to deal fairly with the plaintiff.

14. That by reason of the defendant's failure to pay a valid claim under its insurance policy, the defendant violated its covenant of good faith and fair dealing to the plaintiff.

15. That the defendant unreasonably and in bad faith withheld from the plaintiff payment of his claim.⁸

to contest or deny and insurance] claim, there is no bad faith."⁹ In this vein, the United States Court of Appeals for the Fourth Circuit has recognized that in South Carolina "an insurer cannot be liable for bad faith refusal to pay proceeds due under an insurance agreement if there exists an objectively reasonable basis for denying the insured's claim."¹⁰

Bad Faith Exists Separately

South Carolina has "consistently emphasized that a bad faith action exists separately from an action in contract."¹¹ Furthermore, under *Tadlock Painting Co. v. Maryland Casualty Co.*, our courts have determined that "the benefits due an insured are not limited solely by those expressly set out in the [insurance] contract [and the] fact that . . . claims [may be] ultimately settled for an amount less than [the amount in issue] (through the insured's efforts) is irrelevant to whether the insurer performed its duties in good faith."¹²

Additionally, an insured who succeeds in a "bad faith" suit may recover attorneys' fees from the insurer in an amount not to exceed one-third of the jury's verdict and this is effective in both appellate and trial South Carolina state courts and Federal courts sitting in this State.¹³ As noted in *Dorman v. Allstate Insurance Company*, the "[d]etermination of an insurer's liability for attorneys' fees pursuant to *S.C. Code Ann.* [§] 38-59-40 is a matter for decision by the trial judge[and in] making this determination, the trial judge must ascertain whether or not an insurer's refusal to pay a claim was without reasonable cause or in bad faith" and, in turn, provide written reasoning for such decision in his or her order.¹⁴

Combating "Breach of the Covenant of Good Faith and Fair Dealing" Claims

Not only has South Carolina recognized a separate and distinct cause of action for "bad faith", but our appellate courts have also recognized another distinct and

The Court of Appeals found these allegations did not makeout the requisite tortious act with the accompanying degree of aggravation necessary for a bad faith claim.⁹

Punitive Damages

Even though a common law bad faith claim is often alleged in order to support a claim or request for punitive damages, any claim or request for punitive damages must also satisfy the statutory requirements of N.C. Gen. Stat. § 1D-1 et seq. There is no independently cognizable “claim” under North Carolina law for punitive damages.¹⁰ North Carolina law prohibits a punitive damages award based on breach of contract.¹¹

North Carolina’s punitive damages statute adopts much of the previously decided case law established by the State’s appellate courts, but further limits the circumstances in which punitive damages are recoverable. This statute “applies to every claim for punitive damages” and its provisions “prevail over any other law to the contrary.”¹² The statute makes it clear that punitive damages may only be awarded “to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts.”¹³ Accordingly, under North Carolina’s punitive damages statute:

Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded:

- (1) Fraud.
- (2) Malice.
- (3) Willful or wanton conduct.¹⁴

Burden for Aggravating Factors

The burden of proving these aggravating factors is the “clear and convincing evidence” standard.¹⁵ “Fraud”

equally significant claim for the breach of the “implied duty of good faith and fair dealing.”¹⁵ This separate cause of action is somewhat more problematic for insurance carriers than simple “bad faith”, as the cause of action it can exist regardless of the court’s ultimate insurance coverage determination (*i.e.* even if the insurance company is correct in its coverage position, its other action may subject it to liability).

The South Carolina Supreme Court, in *Tadlock Painting Co. v. Maryland Casualty Co.*,¹⁶ stated there is “a cause of action for breach of the implied covenant of good faith and fair dealing by an insured against his or her insurer for consequential damages allegedly suffered because of the insurer’s bad faith handling of third party claims.”¹⁷ Most importantly, the Supreme Court “decline[d] to make [the] breach of an express contractual provision [in the insurance contract] a prerequisite to bringing the action.”¹⁸ Consequently, even if the insurance company prevails on the disputed coverage issue with its insured, the insured could still make a recovery against the insurer based upon the insurer’s allegedly “bad treatment” of the insured.

Quoting from the Arizona Supreme Court’s *Deese v. State Farm Mutual Automobile Insurance Company* decision, our South Carolina Supreme Court noted that “an insured is not only bargaining for security from financial loss, the primary goal motivating the purchase of insurance, when it enters into an insurance contract.”¹⁹ Moreover, the Supreme Court noted that in these types of situations ‘the insured also is entitled to receive the additional security of knowing that she will be dealt with fairly and in good faith.’²⁰ That security comes not from the express contractual terms, but from the implied covenant of good faith and fair dealing. The Supreme Court stated: “The elements of an action for breach of the covenants of good faith and fair dealing in an insurance contract are (a) the existence of a mutually binding insurance contract between the plaintiff and the defendant; (b) the insurer’s refusal to pay benefits due under the contract; (c) which results from the insurer’s

is defined under the punitive damages statute to exclude constructive fraud, “unless an element of intent is present.”¹⁶ “‘Malice’ means a sense of personal ill will toward the claimant that activated or incited the defendant to perform the act or undertake the conduct that resulted in harm to the claimant.”¹⁷ “‘Willful or wanton conduct’ means the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm [and] means more than gross negligence.”¹⁸ Thus, pursuant to the plain language of North Carolina’s punitive damages statute, the circumstances in which punitive damages can be recovered for a common law bad faith claim (assuming the elements of the tort are alleged and proved) have been further limited – the available aggravating factors being limited to fraud, malice, and willful or wanton conduct, and factors such as gross negligence, insult, rudeness, etc., are no longer sufficiently aggravating under North Carolina law to support a punitive damages claim.

A plaintiff must allege specific examples of the conduct allegedly constituting bad faith (or other tortious conduct accompanied by some element of aggravation) to avoid a ruling that the claim for punitive damages be dismissed.¹⁹ The North Carolina Supreme Court confirmed that its decision in *Newton v. Standard Fire Ins. Co.* stands for the proposition that, because punitive damages cannot be awarded in North Carolina for breach of contract, it is “imperative . . . that the pleading set forth with specificity the allegations and facts of the tortious conduct which would justify the awarding of punitive damages.”²⁰

In closing, these arguments can be strong grounds to challenge a policyholder’s claims of bad faith and punitive damages.

bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing in the contract; and (d) which damages the insured.”²¹

Defeating policyholder claims for bad faith and breach of the covenant of good faith and fair dealing is no small task.

¹Charleston Dry Cleaners & Laundry, Inc. v. Zurich American Insurance Company, 355 S.C. 614, 617-618, 586 S.E.2d 586, 588 (2003).

²Nichols v. State Farm Mutual Automobile Insurance Company, 279 S.C. 336, 306 S.E.2d 616 (1983). See also *Mid-South Insurance Company v. Doe*, 274 F.Supp.2d 757, 764-765 (D.S.C. 2003).

³Nichols v. State Farm Mutual Automobile Insurance Company, 279 S.C. 336, 340, 306 S.E.2d 616, 619. See also *Jessco, Inc. v. Builders Mutual Insurance Company*, ___ F.Supp.2d ___, ___ (D.S.C. 2010) (2010 WL 419920 *5, filed 29 January 2010).

⁴Nichols v. State Farm Mutual Automobile Insurance Company, 279 S.C. 336, 340, 306 S.E.2d 616, 619. See *Ocean Winds Council of Co-Owners, Inc. v. Auto-Owners Insurance Company*, 241 F.Supp.2d 572, 576 (D.S.C. 2002).

⁵Dorman v. Allstate Insurance Company, 332 S.C. 176, 181, 504 S.E.2d 127, 130 (Ct.App. 1998) (citing *Hook v. Rothstein*, 275 S.C. 187, 268 S.E.2d 288 (1980)).

⁶American Fire and Casualty Company v. Johnson, 332 S.C. 307, 310-311, 540 S.E.2d 356, 358 (Ct.App. 1998) (citing *Carolina Bank and Trust Company v. St. Paul Fire and Marine Co.*, 279 S.C. 576, 310 S.E.2d 163 (Ct.App. 1983); *Brown v. South Carolina Insurance Co.*, 284 S.C. 47, 324 S.E.2d 641 (Ct.App.1984), overruled on other grounds, *Charleston County School District v. State Budget and Control Board*, 313 S.C. 1, 437 S.E.2d 6 (1996); *Tadlock Painting Co. v. Maryland Casualty Co.*, 322 S.C. 498, 473 S.E.2d 52 (1996)).

⁷See 16A John Appleman and Jean Appleman, *Insurance Law and Practice, Compensatory and Punitive Damages*, § 8878.25 (West 1981).

⁸American Fire and Casualty Company v. Johnson, 332 S.C. 307, 310-311, 540 S.E.2d 356, 358 (citing *Cock-N-Bull Steak House, Inc. v. Generali Insurance Company*, 321 S.C. 1, 466 S.E.2d 727 (1996); *Dowling v. Home Buyers Warranty Corporation II*, 303 S.C. 295, 400 S.E.2d 143 (1991)) (Emphasis added). See also *Helena Chemical Company v. Allianz Underwriters Insurance Company*, 357 S.C. 631, 645, 594 S.E.2d 455, 462 (2004). See also *Jessco, Inc. v. Builders Mutual Insurance Company*, ___ F.Supp.2d ___, ___ (2010 WL 419920 *5) (quoting *Varnadore v. Nationwide Mutual Insurance Company*, 289 S.C. 155, 159, 345 S.E.2d 711, 713-714 (1986)) (The insured “must prove that there was no reasonable basis to support the decision of the insurance company to deny certain insurance benefits [to the insured].”). See generally *Mitchell v. Fortis Insurance Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009) (Supreme Court upheld bad faith verdict, but “reduced” the award from \$15 million to \$10 million); *James v. Horace Mann Insurance Co.*, 371 S.C. 187, 638

¹*Blis Day Spa v. The Hartford Ins. Group*, 427 F. Supp. 2d 621, 631 (W.D.N.C. 2006) (quoting *Topsail Reef Homeowners Ass’n v. Zurich Specialties London, Ltd.*, 11 Fed.App’x. 225, 237 (4th Cir. 2001) (citing *Lovell v. Nationwide Mut. Ins. Co.*, 108 N.C. App. 416,

420, 424 S.E.2d 181, 184 (1993))).

²Blis Day Spa, 427 F. Supp. 2d at 631 (quoting *Topsail*, 11 Fed. App'x. at 237 (quoting *Dailey v. Integon Gen. Ins. Corp.*, 75 N.C. App. 387, 394, 331 S.E.2d 148, 155 (1985))).

³See *Olive v. Great American Ins. Co.*, 76 N.C.App. 180, 189, 333 S.E.2d 41, 46 (1985) (rejecting Plaintiff's claims where "the evidence of bad faith appears to be premised almost entirely on their contention that the [insurer] has not interpreted the policy correctly"; court held that the insurer's interpretation of policy was "neither strained nor fanciful, regardless of whether it is correct").

⁴Blis Day Spa, 427 F. Supp. 2d at 631.

⁵See *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 112, 229 S.E.2d 297, 301 (1976).

⁶427 F. Supp. 2d at 631.

⁷See *Beasley v. Nat. Sav. Life Ins. Co.*, 75 N.C.App. 104, 108, 330 S.E.2d 207, 209 (1985).

⁸Id. at 107, 330 S.E.2d at 208.

⁹Id. at 108, 330 S.E.2d at 209.

¹⁰ Id. at § 1D-15(a) (punitive damages may only be awarded if defendant is liable for compensatory damages and fraud, malice, or willful or wanton conduct is also present); *Shore v. Farmer*, 351 N.C. 166, 171, 522 S.E.2d 73, 77 (1999) (holding that separate, identifiable tort claim is required to support a demand for punitive damages); *Newton*, 291 N.C. at 114, 229 S.E.2d at 302 (same); *Mason v. Universal Underwriters Life Ins. Co.*, 2006 WL 2847288, *5 (W.D.N.C. October 4, 2006) ("[A]s a matter of state law, 'punitive damages' is not a cause of action, but is instead a remedy available in very limited circumstances.").

¹¹See N.C. Gen. Stat. § 1D-15(d) ("Punitive damages shall not be awarded against a person solely for breach of contract."); see also *Shore*, 351 N.C. at 171, 522 S.E.2d at 77 (identifiable tort accompanied by some element of aggravation necessary before punitive damages will be allowed in a breach of contract action); *Newton*, 291 N.C. at 111, 229 S.E.2d at 301 ("[P]unitive damages are not allowed [for breach of contract] even though the breach be willful, malicious or oppressive.").

¹²N.C. Gen. Stat. § 1D-10.

¹³Id. at § 1D-1.

¹⁴Id. at § 1D-15(a).

¹⁵Id. at § 1D-15(b).

¹⁶Id. at § 1D-5(4).

¹⁷Id. at § 1D-5(5).

¹⁸Id. at § 1D-5(7).

S.E.2d 667 (2006) (\$1 million bad faith award upheld).

⁹*Helena Chemical Company v. Allianz Underwriters Insurance Company*, 357 S.C. 631, 645, 594 S.E.2d 455, 462 (2004) (citing *Crossley v. State Farm Mutual Automobile Insurance Co.*, 307 S.C. 354, 360, 415 S.E.2d 393, 397 (1992)).

¹⁰*State Farm Fire and Casualty Company v. Barton*, 897 F.2d 729, 731 (citing *Varnadore v. Nationwide Mutual Insurance Co.*, 289 S.C. 155, 345 S.E.2d 711, 713-714). See also *Helena Chemical Company v. Allianz Underwriters Insurance Company*, 357 S.C. 631, 645, 594 S.E.2d 455, 462. South Carolina's state appellate courts have effectively approved this same type of analysis when addressing the viability of an insured's bad faith claim. See *Hansel v. National States Insurance Company*, 313 S.C. 266, 270, 437 S.E.2d 159, 161 (Ct.App. 1993) (citing *Varnadore v. Nationwide Mutual Insurance Co.*, 289 S.C. 155, 345 S.E.2d 711, 713-714)).

¹¹In *Brown v. South Carolina Insurance Co.*, the Court of Appeals suggested that, from a policy standpoint, it would make more sense to treat a bad faith action as one in contract instead of tort." See *Tadlock Painting Co. v. Maryland Casualty Co.*, 322 S.C. 489, 502-503, 473 S.E.2d 52, 54-55. The Supreme Court however, "explicitly overruled both *Brown v. South Carolina Insurance Co.* and *Bartlett v. Nationwide Mutual Fire Insurance Co.* to the extent that they [may have] suggested a bad faith action is one in contract rather than tort." *Tadlock Painting Co. v. Maryland Casualty Co.*, 322 S.C. 489, 503, 473 S.E.2d 52, 55 (citing *Charleston County School District v. State Budget and Control Board*, 313 S.C. 1, 7-8, 437 S.E.2d 6, 9; *Nichols v. State Farm Mutual Automobile Insurance Company*, 279 S.C. 336, 342, 306 S.E.2d 616, 620; *Carolina Bank and Trust Co. v. St. Paul Fire and Marine Co.*, 279 S.C. 576, 310 S.E.2d 163).

¹²*Tadlock Painting Co. v. Maryland Casualty Co.*, 322 S.C. 489, 501-503, 473 S.E.2d 52, 54-55 (citing *Deese v. State Farm Mutual Automobile Insurance Company*, 172 Ariz. 504, 838 P.2d 1265 (1992) (en banc); *Howard v. State Farm Mutual Automobile Insurance Company*, 316 S.C. 445, 450 S.E.2d 582 (1994) (whether an insurer is liable for bad faith must be determined by the evidence before it at the time it denied the claim; evidence arising after denial irrelevant to propriety of insurer's conduct at the time of refusal)).

¹³S.C. Code Ann. § 38-59-40 (West Group 2002 rev.). See *Shadow Creek Apartments, LLC v. Hartford Fire Insurance Company*, 44 Fed.Appx. 640 (4th Cir. 2002) (2002 WL 1932358).

¹⁴*Dorman v. Allstate Insurance Company*, 332 S.C. 176, 181, 504 S.E.2d 127, 130 (citing *Coker v. Pilot Life Insurance Company*, 265 S.C. 260, 217 S.E.2d 784 (1975); *Gurley v. United Services Automobile Association*, 279 S.C. 449, 309 S.E.2d 11 (Ct.App.1983)). See *Ocean Winds Council of Co-Owners, Inc. v. Auto-Owners Insurance Company*, 241 F.Supp.2d 572, 576 (D.S.C. 2002).

¹⁵One Federal District Court has concluded to the contrary noting there is no separate tort or cause of action for "breach of the covenant of good faith and fair dealing" as opposed to general "bad faith". See *Ocean Winds Council of Co-Owners, Inc. v. Auto-Owners Insurance Company*, 241 F.Supp.2d 572, 576 (D.S.C. 2002). No state court case has yet adopted this position.

¹⁶*Tadlock Painting Co. v. Maryland Casualty Co.*, 322 S.C. 489, 473 S.E.2d 52.

¹⁷*Tadlock Painting Co. v. Maryland Casualty Co.*, 322 S.C. 489, 504, 473 S.E.2d 52, 55. See *Ocean Winds Council of*

¹⁹See Newton, 291 N.C. at 114, 229 S.E.2d at 302; see also Fed. R. Civ. P. 9(g) (“When items of special damage are claimed, they shall be specifically stated.”).

²⁰Shugar v. Guill, 304 N.C. 332, 337, 283 S.E.2d 507, 510 (1981).

Co-Owners, Inc. v. Auto-Owners Insurance Company, 241 F.Supp.2d 572, 576 (D.S.C. 2002).

¹⁸Tadlock Painting Co. v. Maryland Casualty Co., 322 S.C. 489, 504, 473 S.E.2d 52, 55.

¹⁹Tadlock Painting Co. v. Maryland Casualty Co., 322 S.C. 489, 502, 473 S.E.2d 52, 55 (citing Deese v. State Farm Mutual Automobile Insurance Company, 72 Ariz. 504, 838 P.2d 1265).

²⁰Tadlock Painting Co. v. Maryland Casualty Co., 322 S.C. 489, 502, 473 S.E.2d 52, 55 (quoting Deese v. State Farm Mutual Automobile Insurance Company, 72 Ariz. 504, 838 P.2d 1265, quoting Rawlings v. Apodaca 151 Ariz. 149, 726 P.2d 565 (1986)) (Emphasis in original).

²¹Gaskins v. Southern Farm Bureau Mutual Insurance Company, 343 S.C. 666, 670, 541 S.E.2d 269, 272 (Ct.App. 2000) (quoting Cock-N-Bull Steak House, Inc. v. Generali Insurance Company, 321 S.C. 1, 6, 466 S.E.2d 727, 730) (Emphasis in original).

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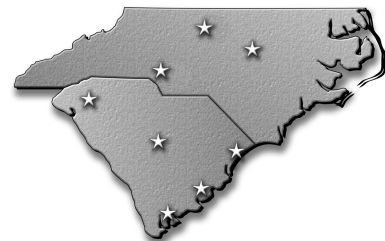
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