

Individual Liability in Bad Faith Actions: Theories of Recovery, Defenses, Current Case Law

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Individual Liability in Bad Faith Actions: Theories of Recovery, Defenses, Current Case Law

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I. Elements of Insurance Bad Faith

Bad Faith Primer

- **Varies By Jurisdiction**
- **Statutory**
- **Common Law**
- **(Interplay of Insurance/CPA Statutes)**

Bad Faith Primer

History of Bad Faith

Evolution from the Contractual Duty of Good Faith & Fair Dealing

Bad Faith Primer

Sample Bad Faith Statute - PA

§ 8371. Actions on insurance policies.

In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:

- (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.**
- (2) Award punitive damages against the insurer.**
- (3) Assess court costs and attorney fees against the insurer.**

Bad Faith Primer

Common Law Bad Faith Egs.

- NJ - "Fairly Debatable" standard. *Pickett v. Lloyd's*, 131 N.J. 457 (N.J. 1993).
- WA - Insurer's breach of contract was unreasonable, frivolous, or unfounded. *Smith v. Safeco Ins. Co.*, 78 P.3d 1274, 1276 (Wash. 2003).

Bad Faith Primer

No Independent Cause of Action Jurisdictions – NY

- **No Independent Tort for Bad Faith Denial of Insurance Coverage**
- **Available consequential damages resulting from a breach of the covenant of good faith and fair dealing in very limited circumstances. *See Panasia Estates, Inc. v. Hudson Ins. Co.*, 886 N.E.2d 135, 137 (N.Y.2008).**

Corporate v. Individual Liability

- **Traditional Bad Faith Actions are Against the Carrier**
- **Trend– sue the claims professional too.**

(There is a growing trend towards alleging personal liability against an in-house insurance claims adjusters in bad faith litigation.)

Corporate v. Individual Liability

Early Reported Cases

- **Courts rejected imposition of bad-faith liability for employee claim adjusters.**
- **Liability of Independent Claim Adjustors?**

Corporate v. Individual Liability

Early Reported Cases

- **The Pennsylvania Supreme Court found independent adjusters could not be liable for bad faith because a contractual relationship is required. *Hudock v. Donegal Mutual Insurance Co.* 264 A.2d 668 (Pa. 1970).**

Corporate v. Individual Liability

The Evolution of the “Doctrinal Rule”

- ***Iversen v. Superior Court of Los Angeles*,
127 Cal. Rptr. 49 (Cal. Ct. App. 1976)**
- ***Egan v. Mutual of Omaha Ins. Co.*,
620 P.2d 141 (Cal. 1979)**

Corporate v. Individual Liability

The Evolution of the “Doctrinal Rule”

- **California Courts Shielded Claims Adjusters From Bad Faith Liability.**
- **The insurer’s employees were not liable for bad faith. The employees were agents of the insurer, not parties to the contract. *Egan v. Mutual of Omaha Insurance Co.* 620 P.2d 141 (Cal. 1979).**

Corporate v. Individual Liability

Erosion of the “Doctrinal Rule”

- The Montana Supreme Court found that an individual could bring a third-party claim against a claims adjuster for bad faith. *O’Fallon v. Farmers Insurance Exchange*, 859 P.2d 1008 (Mont. 1993).
- Montana's Unfair Trade Practices Act states that “[a] person may not, with such frequency as to indicate a general business practice” engage in the prohibited unfair claim settlement practices. Mont. Code Ann. § 33-18-201.

Corporate v. Individual Liability

Erosion of the “Doctrinal Rule”

- ***Liberty Mutual Ins. Co. v. Garrison Contractors,***
966 S.W 2.d 482 (Tex. 1998)
- ***Taylor v. Nationwide Mutual Ins. Co.,***
589 S.E2d 55 (W.Va. 2003)

Corporate v. Individual Liability

More Recent Developments

- **Unfair Trade Practice claims allowed against individual claims adjusters. *See Ellis v. Liberty Mut. Ins. Co.*, No. 18-1032, 2018 U.S. Dist. LEXIS 125409 (E.D. Pa. July 26, 2018).**
- **Note: Pennsylvania’s Bad Faith Statute only provides for a claim against an “insurer.” 42 Pa.C.S. § 8371.**

Corporate v. Individual Liability

More Recent Developments

- A policyholder can directly sue a claims adjuster for bad faith and violations of the Washington Consumer Protection Act. *Moun Keodalah, et al. v. Allstate Ins. Co., et al.*, No. 75731-8-1, 2018 WL 1465526 (Wash. Ct. App. Mar. 26, 2018).
- Note: Washington's bad faith statute imposes a duty of good faith on “all persons” engaged in the business of insurance. The code defines “person” as “any individual, company, insurer, association, organization, reciprocal or interinsurance exchange, partnership, business trust, or corporation.” RCW 48.01.030.

II. *Moun Keodalah, et al. v. Allstate Ins. Co.*, (Wash. Ct. App. Mar. 26, 2018)

Summary of findings

Impact on other jurisdictions

Case law from other jurisdictions

Summary of Findings

- Insureds may sue insurance adjusters in their individual capacity for common law bad faith and violations of Washington's Consumer Protection Act.

Factual Background

- Keodalah made a UIM claim under his Allstate auto policy after being injured when a motorcyclist struck his truck as Keodalah proceeded through an intersection.
- Investigation established the motorcyclist was solely at fault for the collision.
- Allstate's adjuster, Smith, nevertheless insisted Keodalah was 70 percent at fault.
- The parties tried the UIM claim and the jury determined the motorcyclist was 100 percent at fault, awarding Keodalah \$108,868.20. Smith's highest offer had been \$15,000.00.

Key Adjuster Conduct

- Adjuster personally involved in bad faith denial of claim.
- Allstate's internal investigation, the report of Allstate's accident reconstructionist, and the police report confirmed the other party was speeding, that Keodalah stopped at the stop sign, and Keodalah was not using his cell phone at the time of the collision.
- Smith asserted Keodalah had run the stop sign and had been on his cell phone.
- Smith subsequently admitted these claims were false.

Procedural Background

- Keodalah sues Allstate as well as Smith individually.
 - Claims: common law bad faith, Consumer Protection Act (“CPA”), and Insurance Fair Conduct Act (“CPA”).
- Trial court dismisses all claims against Smith and certifies for discretionary appellate review by Court of Appeals.

Appellate Ruling

- Court of Appeals rules insureds may bring bad faith claims against individual insurance adjusters.
- Court of Appeals reverses dismissal of common law bad faith and CPA claims against Smith.
- Court of Appeals affirms dismissal of IFCA claim on unrelated grounds.

What is the basis for individual adjuster liability?

- Statutory
- Existing Washington caselaw
 - Existing Federal caselaw
 - Nature of CPA claim

Statutory Basis for Individual Adjuster Liability

- RCW 48.01.030: “The business of insurance is one affected by the public interest, requiring that **all persons** be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, **and their representatives** rests the duty of preserving inviolate the integrity of insurance.” (emphasis added).
- *Keodalah*: RCW 48.01.030 means what it says.
- Because Smith, as an insurance adjuster, “was engaged in the business of insurance and was acting as an Allstate representative,” Smith owed Keodalah a duty of good faith and could be sued for breaching that duty.

Prior Washington Caselaw On Individual Adjuster Liability

- *Merriman v. Am. Guarantee & Liability Ins. Co.*, 198 Wn. App. 594, 396 P.2d 351 (2017).
- Similarly held statutory duty of good faith applies to all persons engaged in the business of insurance.
- Smith relies on factual distinction: third-party corporate adjuster, not individual adjuster.
- *Keodalah*: Duty of good faith does not distinguish individuals from corporations.

Prior Federal Caselaw On Individual Adjuster Liability

- Conflicting authority.
- *Lease Crutcher Lewis WA, LLC v. Nat'l. Union Fire Ins. Co.*, 2009 WL 3444762 (2009): also ruled corporate adjusters can be liable for bad faith.
- *Garoutte v. Am. Family Mutual Ins. Co.*, 2013 WL 231104 (2013): concluded no claims against individual adjusters.
- *Keodalah*: *Garoutte* incorrectly reads the “representatives” language out of RCW 48.01.030.

Nature of CPA claim permits individual adjuster liability

- Smith claims CPA claim barred because policyholder lacks contractual relationship with adjuster.
- Washington Supreme Court: “a private CPA action may be brought by one who is not in a consumer or other business relationship with the actor against whom the suit is brought.” *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 43-44 204 P.3d 885, 892 (2009).
- Conflicting Ninth Circuit authority based on California law and inapposite.

IFCA claims against individual adjusters?

- IFCA claims dismissed on other grounds so open question.
- IFCA cause of action does not explicitly limit claims to insurers: cause of action exists if “unreasonably denied a claim for coverage or payment of benefits by an insurer.” RCW 48.30.015(1).
- Treble damages explicitly limited to cases where “insurer” acted unreasonably.
- But overall statute appears targeted to insureds specifically.

Keodalah's Impact on Other Jurisdictions

- No other jurisdictions applied *Keodalah* in published ruling yet.
- Depends on statutory versus contractual basis for duty of good faith and fair dealing.
- Key to *Keodalah* is RCW 48.01.030: duty of good faith imposed on “all persons” engaged in the business of insurance including “representatives.”
 - Contractual privity typically absent from adjuster relationship.

Exemplar Caselaw From Other Jurisdictions

- Source of duty critical to adjuster liability.
- Extra-contractual duties, *e.g.*, Washington CPA or RCW 48.01.030, are key.
- General contractual duties often insufficient.

Alaska - Continental Insurance Company v. Bayless and Roberts, Inc., 608 P.2d 281 (Alas. 1980).

- Continental refused a settlement demand recommended by independent counsel defending the insured.
- Adjuster allegedly failed to adequately investigate the claim.
- No contractual claims against adjuster, but permitted negligence claim premised on general duty of ordinary care.
- “The duty to settle and the duty to protect the interest of the insured are generally considered to be duties which sound in tort rather than contract.”

Oklahoma - *Trinity Baptist Church v. Bhd. Mut. Ins. Servs., LLC*, 341 P.3d 75 (Okla. 2014)

- Claims against independent adjuster: breach of contract, bad faith, and gross negligence.
- Adjuster owes insured no duty of good faith because good faith is implied duty arising from insurance contract.
- Adjuster only has duty of good faith where it acts “sufficiently like an insurer”, e.g., acting as an administrator making benefit payment decisions.
- No negligence claim because insurer’s duty of care to insured is non-delegable.

III. Considerations for Insurers

Considerations for Insurers

- **Advent of Social Duty**

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person ... is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Restatement (Second) of Torts § 324A

Considerations for Insurers

- **“Bad Faith Setup”**
- **Adjuster Training**
- **“Best Practices”**
 - **Be Responsive and Reasonable... Even When Wrong.**
- **Reliance on Professionals**

Considerations for Insurers

- **Cost of Defense – WHO PAYS?!**
- **Do claims adjusters have to indemnify themselves in bad faith suits?**

Why Sue the Adjuster?

- **Federal Removal & Fraudulent Joinder**

IV. Policyholder Considerations For Adjuster Bad Faith

Source of Duty Is Critical

- Read the statute!
- Carefully parse each potential cause of action (e.g., contractual, common law bad faith, negligence, statutory) to identify source of duty.
- Claims premised on duties arising from the insurance contract difficult to pursue against adjuster.
 - Some claims may be limited on the merits (e.g., CPA versus IFCA).

Facts Matter

- *Keodalah*: Adjuster personally involved in bad faith claims handling by ignoring evidence she knew was correct.
- *Continental Insurance*: adjuster is branch manager of third party firm; personally failed to communicate settlement authority and key defenses to insured.
- *Trinity Baptist Church*: distinguished typical claims adjuster from “highly skilled professionals who could reasonably expect third parties to rely on their work;” adjuster’s misconduct more attenuated.

Strategic Questions

- Naming adjuster may destroy federal court diversity jurisdiction.
 - May incentive insurer declaratory judgment actions.
- *Tidwell v. Gov't Employees Ins. Co.*, 2018 WL 2441774, at *1 (W.D. Wash. May 31, 2018): bad faith claims remanded upon amendment to add adjuster, destroying diversity.
 - Facilitates obtaining discovery directly from adjuster.
- Multiple defendants change settlement and litigation dynamic.
 - Separate counsel for adjuster?

Other Implications for Policyholders

- *Keodalah*: duty of good faith applies to “all persons” including “representatives.”
 - Policyholders are “persons.”
- Practical differences from existing duty to cooperate?
 - Attorneys (policyholder and insurer) are “representatives.”
- If counsel are named, does this facilitate discovery of attorney-client communications?